

# WTO Rulings and the Veil of Anonymity

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## Abstract

*Despite a general push for greater transparency, opacity continues to play an important function in international tribunals. The World Trade Organization (WTO) is a case in point. While it has done much to increase its openness, the very design of its dispute settlement body is premised on anonymity in some essential respects. We examine two such instances, each dealing with the authorship of dispute rulings. First, we use text analysis tools to demonstrate that the WTO's panel reports appear to be largely drafted by WTO Secretariat staff rather than the panellists themselves. This appears especially true for the WTO's most systemically important disputes. Second, we show that the formal anonymity of dissenting opinions, which is required by the WTO's rules, is a thin veil. Using the most recent Appellate Body's dissent for demonstration, we use text analysis to pinpoint its likely author. In both these instances, we argue that anonymity exists by design: it serves to strike a balance between judicial autonomy and political control. Yet, in both settings, due to increased scrutiny and widespread access to text analysis tools, the equilibrium relying on anonymity is likely to be upset, with implications for the institution's future design. We argue that the ultimate result may be a beneficial one and offer a menu of reform options.*

## A note for PEIO participants:

This article is now forthcoming in EJIL, but we plan on a follow-up survey to get at public perceptions of judicial authorship, (non)transparency, and their effects on outcomes. As such, any additional feedback will be of great use.

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## 1 Introduction

Despite a widespread push for greater transparency across international judicial institutions, these continue to rely on opacity in a number of key respects. The World Trade Organization (WTO) is a case in point. Since its start as a club of countries negotiating diplomatic solutions behind closed doors in the days of the General Agreement on Tariffs and Trade (GATT), the WTO has done much to increase both its external and internal transparency.<sup>1</sup> Yet it also maintains a degree of opacity in a number of settings. This is not happenstance but, rather, an intrinsic part of its institutional design. In this article, we examine two such instances of opacity by design, each dealing with the authorship of legal rulings. We then show how recent text analysis tools are growingly subverting this opacity, with significant implications for both member states and adjudicators.

The first setting that we examine concerns WTO panel rulings. While it would be reasonable to assume that WTO panellists are the ones writing panel reports, here we provide the first hard evidence suggesting that the institution's bureaucrats, rather than its adjudicators, exert the greater influence by far over the actual drafting of the final rulings. As we demonstrate using two distinct text analysis approaches, the permanent staff of the WTO's Legal Affairs Division and Rules Division play an under-appreciated role in drafting panel rulings. Although adjudicators may guide and control final outcomes, it is the staff who 'hold the pen' – that is, they are the ones who actually sit down and write most of the text of panel reports. The institution does not publicize this role, which, in isolation, is not necessarily unique or problematic, but it is tacitly acknowledged by WTO insiders,<sup>2</sup> amounting to what Tommaso

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<sup>1</sup> General Agreement on Tariffs and Trade 1994 (GATT), 55 UNTS 194. Among other initiatives, the World Trade Organization (WTO) has made dispute settlement rulings rapidly available to the public in the three working languages of the Dispute Settlement Body, and it began encouraging non-litigant WTO members to observe and participate in legal proceedings as third parties. For a survey of transparency practices at the WTO, see Marceau and Hurley, 'Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms', 4 *Trade Law and Development* (2012) 19; Marceau and Pedersen, 'Is the WTO Open and Transparent?', 33 *Journal of World Trade (JWT)* (1999) 5.

<sup>2</sup> See Debra, 'The Founding of the Appellate Body', in G. Marceau (ed.), *A History of Law and Lawyers in the GATT/ WTO* (2015) 447; Blustein, *China Inc. in the WTO Dock: Tales from a System under Fire*, Center for International Governance and Innovation Papers no. 157 (2017), at 13, available at [www.cigionline.org/static/documents/documents/Paper%20no.157%20final%20PDF.pdf](http://www.cigionline.org/static/documents/documents/Paper%20no.157%20final%20PDF.pdf); Hughes, 'The Role of the Legal Adviser in the World Trade Organization', in A. Zidar and J. Gauci (eds), *The Role of Legal Advisers in International Law* (2017) 237.

Soave calls an instance of ‘collective denial’.<sup>3</sup> In fact, this is one of the few instances in international tribunals where opacity has increased over time: the WTO is now less open about the role of Secretariat staff in panel rulings than it was during its first decade. It no longer publishes the names of staff serving on each case as it once did. We argue that such opacity exists by design. Looking back over the founding history of the Secretariat, we show how member states depend on the institution’s permanent staff to strike a balance between a semblance of judicial autonomy and the ability to oversee the work of its adjudicators. An equilibrium has been achieved by relying on a body of ad hoc, non-professional adjudicators who are made dependent on permanent, expert staff. The result, we argue, has empowered a rapidly growing bureaucracy beyond what the member states originally anticipated. We also show that it is the most complex disputes, with membership-wide implications, that invite most control by the Secretariat staff and least input from the panellists themselves. Accordingly, we also demonstrate that those disputes where the Secretariat has more input go on to shape WTO jurisprudence to the greatest degree.

Our second setting for opacity by design concerns dissenting opinions. The WTO is the only major international tribunal to allow dissenting opinions but require that they be anonymous.<sup>4</sup> The ostensible purpose of anonymity is to provide cover from political retribution to individual adjudicators wishing to express a minority opinion. Yet here, too, the cover of anonymity has long been described by some as a mere façade. As James Flett put it over a decade ago, ‘[adjudicators] expressing individual opinions should be aware that, in fact, their opinion may not be entirely anonymous, and that is something they need to factor into [their decision]’.<sup>5</sup> In other words, Soave’s description of ‘collective denial’ may also apply to the setting of dissenting opinions: anonymity is provided for in the rules, but, in practice, all the

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<sup>3</sup> See Soave, ‘The Politics of Invisibility: Why Are International Judicial Bureaucrats Obscured from View?’, in F. Baetens (ed.), *Legitimacy of Unseen Actors in International Adjudication* (2019) 323 at 327.

<sup>4</sup> As Dunoff and Pollack put it, ‘[t]o our knowledge, no other instrument creating an international court imposes an anonymity requirement on separate opinions’. Dunoff and Pollack, ‘The Judicial Trilemma’, 111 *American Journal of International Law (AJIL)* (2017) 225. North American Free Trade Agreement 1992, 32 ILM 289, 309 (1993), panels may issue anonymous dissents, and exceptions also exist in domestic systems: Denmark had a system of anonymous dissents in its Supreme Court from the 1930s to 1958. And the Greek Constitution holds that dissenting opinions at all levels of adjudication be published but that they remain anonymous. See R. Raffaelli, *Dissenting Opinions in the Supreme Courts of the Member States* (2012), available at [www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf](http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf).

<sup>5</sup> Flett, ‘Collective Intelligence and the Possibility of Dissent: Anonymous Individual Opinions in WTO Jurisprudence’, 13 *Journal of International Economic Law (JIEL)* (2010) 287.

relevant actors may have a good sense of who wrote what dissent. We use text analysis to confirm just how thin this veil of anonymity currently is. To demonstrate the point empirically, we analyse the most recent Appellate Body dissenting opinion, issued in a politically sensitive case brought by China against the USA, *United States – Countervailing Measures*.<sup>6</sup> Using external texts by all the candidate authors, we build a stylometric profile for each one and compare it to the text of the opinion, which allows us to identify the likely author of the dissent – the Appellate Body member from the USA – with a great level of certainty. Our intent in doing so is merely to demonstrate that, given the current design of three-member divisions, the veil of *de jure* anonymity is insufficient to protect the identity of individual opinions from the scrutiny of member states. If we can pinpoint the authors of dissenting opinions, well-resourced governments can do the same, which, in turn, has implications for the incentives of adjudicators choosing to issue dissenting opinions.

In both these settings, anonymity plays a similar function: it aims to preserve an equilibrium between judicial autonomy and political control. In the case of panel rulings and the role of the Secretariat, the concern of member states has been to prevent blatant legal errors and inconsistencies, while continuing to rely on non-expert *ad hoc* adjudicators picked from among their own ranks (largely current or former trade diplomats). They have thus consistently avoided delegating adjudication to a permanent body of professionalized judges, who might be insufficiently deferential to government interests. The creation and empowerment of the Secretariat has functioned as a compromise solution. Looking over the history of the WTO and its predecessor – the GATT – we argue that the creation of the WTO Legal Affairs Division has been a means of dealing with the increasing complexity of cases presented before panellists, while staying true to the organization’s original diplomatic character. Under this compromise, *ad hoc* adjudicators often pulled from the ranks of trade diplomats could remain the nominal authors of legal rulings, while a large bureaucracy ensured that rulings remained predictable, consistent, and in line with the WTO’s institutional objectives. Empowering the Secretariat has thus been a means of striking a fragile balance between the predictability of legal outcomes and deference to state interests.

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<sup>6</sup> WTO, *United States – Countervailing Duty Measures on Certain Products from China, Recourse to Article 21.5 of the DSU by China*, 16 July 2019, WT/DS437/AB/RW.

In the case of dissenting opinions, the role of anonymity is better understood. Rulings are delivered *per curiam* by a set of three panellists or by three Appellate Body members in the case of appeals. Since dissenting opinions are written by individual members, it becomes important to conceal the identity of dissenters as a way of preserving their independence. Otherwise, adjudicators may not feel free to voice their views separate from the majority, or they may instead feel pressured to do so if the majority opinion is unfavourable to the government that nominated them.<sup>7</sup> In other words, the current level of transparency, combined with governments' ability to sanction adjudicators (in particular, by blocking the consensus required to reappoint Appellate Body members for a second term) may come at the cost of judicial autonomy.<sup>8</sup> Though they are designed to strike a balance between these competing objectives, our findings suggest that unsigned opinions provide insufficient cover for individual Appellate Body members to allow them to act free of government influence, as intended by the original drafters of the agreement.

In both these settings, we argue that the equilibrium resting on anonymity is in peril. Growing outside scrutiny of the 'unseen actors' at work in international tribunals, combined with the widespread availability of the kind of text analysis tools we rely on in this article, means that the cover of anonymity is unlikely to last, with significant implications in each case. Going forward, the full role of the Secretariat will become more widely known. The same will happen in other international tribunals. Similarly, the pretence of anonymity for dissenting opinions will be increasingly dispelled, and adjudicators can be expected to react accordingly. These can be positive developments, especially if they precipitate corresponding institutional reforms to preserve the required balance between political control and judicial autonomy that the drafters of the WTO treaties sought at the outset. In contrast, the damage that may flow from 'open secrets' of the kind we highlight here comes from how the *de jure* assurance of secrecy may block the reforms that the *de facto* lack of that secrecy would require.

Recent advances in text analysis allow observers a previously unfeasible glimpse into the inner workings of tribunals. Most unexpectedly, our contention is that these novel tools not only can contribute to scholarship but that they can also affect the very workings of these tribunals.

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<sup>7</sup> Appellate Body members are nominated by one member state but then appointed by a consensus of all WTO members; WTO panelists are appointed by agreements of both parties or the WTO director-general.

<sup>8</sup> See Dunoff and Pollack, *supra* note 4 (whose theoretical framework we draw on in the argument section).

Just as the use of statistical analysis can leverage a large caseload of rulings to detect and push for the correction of biases due to factors from the timing of lunch breaks to the national origins of the judges,<sup>9</sup> text-as-data tools can lift the veil of anonymity in a way that exerts pressure on institutional design. Once the pretence of anonymity is shown to be just that – a pretence – reform may be increasingly called for. We conclude with a brief discussion of some of the possible reforms that might be taken in response.

## 2 Transparency and the Design of the WTO

The question of transparency has long been at the centre of the public discussion over international institutions, in general, and the WTO, in particular. Domestic audiences and non-governmental organizations have pushed for greater openness from the organization since the 1990s.<sup>10</sup> Developing countries have often been on the side of demanding greater internal transparency, seeing closed working procedures as allowing larger countries to exert disproportional influence.<sup>11</sup> In response, some scholars have argued that a measure of opacity can be beneficial. In particular, non-transparency can help member states reach agreement, either during trade round negotiations or in the consultations period in the initial stage of disputes. In such cases, excessive transparency may lead to posturing on the part of litigants for the sake of outside observers, be they domestic interest groups or other trading partners.<sup>12</sup> Others have highlighted how ensuring some measure of opacity may increase information sharing in cases where concerns over confidentiality would have made it less likely otherwise.<sup>13</sup> Most relevant to

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<sup>9</sup> See Danziger, Levav and Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions', 108 *Proceedings of the National Academy of Sciences* (2011) 6889; Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights', 102 *American Political Science Review (APSR)* (2008) 417.

<sup>10</sup> Ehring, 'Public Access to Dispute Settlement Hearings in the World Trade Organization', 11 *JIEL* (2008) 1021.

<sup>11</sup> The push has been especially pronounced among international tribunals. In the case of investor-state arbitration, in particular, see Burton, Puig and Victor, 'Against Secrecy: The Social Cost of International Dispute Settlement', 42 *Yale Journal of International Law* (2017) 279; Pedersen, 'The WTO Decision-making Process and Internal Transparency', 5 *World Trade Review (WTR)* (2006) 103; Wolfe, 'Regulatory Transparency, Developing Countries and the WTO', 2 *WTR* (2003) 157.

<sup>12</sup> See Stasavage, 'Open-Door or Closed-Door? Transparency in Domestic and International Bargaining', 58 *International Organization (IO)* (2004) 667; Busch and Reinhardt, 'Three's a Crowd: Third Parties and WTO Dispute Settlement', 58 *World Politics* (2006) 446; Kucik and Pelc, 'Measuring the Cost of Privacy: A Look at the Distributional Effects of Private Bargaining', 46 *British Journal of Political Science* (2016) 861; Lamp, 'The Receding Horizon of Informality in WTO Meetings', 23 *Journal of the Royal Anthropological Institute* (2017) 63.

<sup>13</sup> A. Carnegie and A. Carson, *Trading Secrets: Disclosure Dilemmas in International Trade* (2018), available at <http://dx.doi.org/10.2139/ssrn.3206689>.

us, some scholars have argued that excessive transparency can grant too much power to political actors in a way that may threaten judicial independence.<sup>14</sup>

Keeping with these competing considerations, while the WTO has been a leader among international organizations in terms of increasing both internal and external transparency, this march towards transparency has not been uniform. Important pockets of opacity remain, and the debate over their desirability continues. We highlight two instances where opacity has been purposefully retained. In both cases, we suggest that change is afoot. In the first instance, the WTO has actually become less transparent over time with regard to the role of its Secretariat staff in the handling and writing of disputes between member states. Whereas the functions of the Secretariat have never been widely publicized, the WTO used to make known the identity of the Secretariat staff assigned to each dispute. This practice then ceased sometime in 2004, with Case DS302, over the Dominican Republic's cigarettes import regime, being the last case where the WTO listed the Secretariat staff appointed to assist the panel.<sup>15</sup> From that moment on, there has been no indication in the panel reports or related Dispute Settlement Body (DSB) documents that the Secretariat is in any way involved in the writing of rulings delivered by the WTO.

Similarly, the WTO has done much to render the delivery of its rulings more transparent, such as by inviting third parties into the room during proceedings and opening up certain hearings to the public. Yet the identity of writers of dissenting opinions is kept explicitly secret. The WTO stands out among all other international tribunals in having adopted this particular design of allowing dissents while requiring their anonymity. The goal in doing so was plain. As Jeffrey Dunoff and Mark Pollack note, 'individually signed public opinions may substantially threaten the reappointment prospects of judges who lack life tenure'.<sup>16</sup> Domestic courts provide multiple instances where judges were not reappointed after issuing controversial (signed) dissents.<sup>17</sup> The thinking is that by protecting the anonymity of authors, governments will be unable to single out individual adjudicators for political backlash, which may make them more willing to issue dissents.

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<sup>14</sup> Dunoff and Pollack, 'International Judicial Practices: Opening the "Black Box" of International Courts', 40 *Michigan Journal of International Law* (2018) 47.

<sup>15</sup> WTO, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, 26 November 2004, WT/DS302/R.

<sup>16</sup> *Ibid.*

<sup>17</sup> A. Tarr, *Without Fear or Favor: Judicial Independence and Judicial Accountability in the States* (2012).

We consider these two settings side by side since our contention is that anonymity plays a similar role in each. The intent behind an influential but unseen Secretariat is to tilt the equilibrium towards greater political and institutional control by appointing an additional agent to serve as a check on adjudicators. Conversely, the intent behind allowing dissents but requiring their anonymity is to tilt the equilibrium towards greater judicial autonomy, given what is known to be a high degree of political and institutional control over the appointment of panellists (agreement of both parties or appointment by the director-general) and the reappointment of Appellate Body members (by consensus only).<sup>18</sup> It follows that, as the veil of anonymity is lifted in both settings, the particular intended equilibrium of the current institutional design will be disrupted. Next, we examine these two settings in turn.

### ***A The WTO Secretariat: The Function of an ‘Unseen Actor’***

Who drafts 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 too does the judge write the ruling. And, yet, the authorship of legal opinions is a matter of growing controversy. The amount of work and knowledge required of adjudicators in international tribunals, especially when they are not appointed full time (as is the case in the WTO), is so great as to necessarily require outside assistance. An emerging literature examining the ‘unseen actors’ in international tribunals has been calling attention to the overlooked role played by the large number of ‘international civil servants’ working as permanent staff in international tribunals.<sup>19</sup> The WTO features prominently

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<sup>18</sup> Panellists are appointed ad hoc for each dispute by agreement of both parties and, in the absence of such agreement, by the WTO director-general; Appellate Body members are appointed by consensus of all WTO members, for relatively short periods of four years and can be reappointed once, subject once again to consensus support of all WTO members. On the level of political accountability in the WTO, relative to other international tribunals, see Dunoff and Pollack, *supra* note 4; Günther, ‘Groupthink Bias in International Adjudication’, 11(1) *Journal of International Dispute Settlement* (2020) 91.

<sup>19</sup> An excellent reference is the recent edited volume by F. Baetens (ed.), *Unseen Actors in International Courts and Tribunals Challenging the Legitimacy of International Adjudication* (2019); see also Wauters, ‘The Role of the WTO Secretariat in WTO Disputes—Silent Witness or Ghost Expert?’, 12 *Global Policy* (2021) 83; Hughes, *supra* note 2; Douglas, ‘The Secretary to the Arbitral Tribunal’, in B. Berger and M. Schneider (eds), *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions* (2014) 87; Cartier and Hoss, ‘The Role of Registries and Legal Secretariats in International Judicial Institutions’, in C. Romano, K. Alter and Y. Shany (eds), *Oxford Handbook of International Adjudication* (2013) 711; Elsig, ‘Principal-agent Theory and the World Trade Organization: Complex Agency and “Missing Delegation”’, 17 *European Journal of International Relations (EJIR)* (2011) 495; Chong and Weller, ‘To Be, but Not Be Seen’: Exploring the Impact of International Civil Servants’, 86 *Public Administration* (2008) 35; Caron, ‘Towards a Political Theory of International Courts and Tribunals’, 24 *Berkeley Journal of International Law* (2007) 401.



in these studies. While the evidence offered has been mostly anecdotal, scholars have made strong claims about the extent of the WTO Secretariat's involvement in dispute settlement.<sup>20</sup> Yet the pervasive role of the Secretariat remains something of an open secret, and the WTO has endeavoured to keep it that way. It is an acknowledged fact among Geneva insiders, but largely unknown even to well-informed outside observers, let alone member states' domestic audiences.<sup>21</sup> As Soave puts it, 'commentators and scholars remain almost entirely oblivious to the expert communities in which adjudicators are embedded'.<sup>22</sup>

This reluctance to acknowledge the role played by international judicial bureaucrats is unique to international tribunals. Domestic courts, like the US Supreme Court, tend to be far more open about the role of judicial clerks. Some have argued that this difference is due to the greater need faced by international courts to maintain their perceived legitimacy. Maintaining the fiction of the unitary judge delivering authoritative rulings from on high serves this purpose.<sup>23</sup> Others ascribe this difference to the particular legal culture and habits of the class of international lawyers.<sup>24</sup> By contrast, we provide an alternative account of the institutional opacity surrounding the influence of permanent staff. We argue that the role of the WTO Secretariat is quite different from the traditional secretarial role played by judicial clerks in courts like the US Supreme Court. Whereas the latter are unambiguously agents of the Supreme Court justices, the WTO Secretariat staff are better seen as agents of member states, designed to attain a particular political compromise: to allow for the continued reliance on ad hoc panellists pulled from the ranks of current or former diplomats, rather than full-time adjudicators with legal backgrounds who might also be less likely to defer to states' political interests.

The WTO Secretariat's role is defined in broad terms in the treaty texts. Article 27.1 of the Dispute Settlement Understanding reads: '[T]he 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.'<sup>25</sup> As opposed to some international

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<sup>20</sup> See F. Baetens (ed.), *Unseen Actors in International Courts and Tribunals Challenging the Legitimacy of International Adjudication* (2019); Soave, *supra* note 3; Hughes, *supra* note 2.

<sup>21</sup> See Blustein, *supra* note 2; Soave, *supra* note 3.

<sup>22</sup> See Soave, *supra* note 3, at 326.

<sup>23</sup> 'Legitimacy concerns may arise when a legal assistant or tribunal secretary fully or partially drafts a judgement'. See Baetens, 'Unseen Actors in International Courts and Tribunals: Challenging the Legitimacy of International Adjudication', in Baetens, *supra* note 20, 1, at 10–11.

<sup>24</sup> This is Soave's preferred explanation. See Soave, *supra* note 3.

<sup>25</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1994, 1869 UNTS 401.

tribunals, the WTO texts do not circumscribe the Secretariat's responsibilities by specifying what tasks are beyond its purview.<sup>26</sup> What is growingly apparent from testimonials from former staff is that the Secretariat is present at every stage of the WTO's dispute settlement. In the initial stages of a case, the staff help appoint the panellists and set timetables and working procedures for the panel. They are also present during all hearings with the litigants, and they draft questions for the panellists to ask of the parties. Most relevant to our argument, staff from the Legal Affairs Division and the Rules Division prepare a so-called 'issues paper' for the adjudicators (at the Appellate Body stage, the 'issues paper' is written by the Appellate Body Secretariat, which is independent from the rest of the WTO Secretariat and reports directly to the WTO director-general).<sup>27</sup> The issues paper lays out the facts of the case and the arguments of the parties and identifies the legal issues to be decided. It then offers what WTO staff have identified as the applicable WTO treaty rules and the past rulings that are most relevant to the dispute at hand. Nothing in the issues paper is binding on the adjudicators, yet by identifying the relevant legal issues and past precedents, it exercises a strong agenda-setting function. It also offers adjudicators ready text to draw on, which may be especially valuable for adjudicators whose first language is not English or who hold full-time jobs elsewhere. Importantly, adjudicators receive this issues paper from the Secretariat staff before they ever meet to discuss the case. No one outside of the adjudicators and the Secretariat ever sees the issues paper, and its very existence is not widely acknowledged.

As Soave, who draws on interviews with other Secretariat staff (and a former Secretariat staff member himself), puts it, '[a]t least some participants in the community, irrespective of

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<sup>26</sup> Contrast this to, for example, Rule 13 of the Rules of Procedure for Dispute Settlement, Annex XXIV to Chapter 14, EU–Ukraine Association Agreement, 29 May 2014, Official Journal of the EU, L 161/1933-7, which provides: 'The drafting of any ruling shall remain the exclusive responsibility of the arbitration panel and shall not be delegated', or Article 9 of the Rules of Procedure for Dispute Settlement under Chapter 31 of the US–Mexico–Canada Agreement, 30 November 2018, available at [https://can-mex-usa-sec.org/secretariat/agreement-acuerdo-usmca-aceum-tmec/rules-regles-reglas/chapter-chapitre-capitulo\\_31.aspx?lang=eng](https://can-mex-usa-sec.org/secretariat/agreement-acuerdo-usmca-aceum-tmec/rules-regles-reglas/chapter-chapitre-capitulo_31.aspx?lang=eng): 'Only panelists may take part in the deliberations of the panel. Assistants, Secretariat personnel, interpreters, or translators may be present if the panel determines they are necessary'. Consider also the rules of the International Chamber of Commerce, which prohibit undue influence from the secretariat staff over the legal opinion: '[T]he duties of the administrative secretary must be strictly limited to administrative tasks. ... 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.' International Chamber of Commerce, *Note Concerning the Appointment of Administrative Secretaries by Arbitral Tribunals* (1995).

<sup>27</sup> For a more detailed description of the Secretariat's tasks, see J. Pauwelyn and K. Pelc, 'Who Guards the "Guardians of the System"?' 'The Role of the Secretariat in WTO Dispute Settlement', *American Journal of International Law* (forthcoming 2022).

their roles and functions, are aware of the existence and tasks of judicial bureaucrats and acquiesce to silence'.<sup>28</sup> Anecdotal evidence further suggests that these tasks include drafting the entire panel report, yet these accounts are difficult to verify.<sup>29</sup> This is what we try to do in the empirical analysis. The stakes of this question are high. Adjudicators retain final say over the direction of a ruling, but it would be misguided to view the writing and the deciding of judicial questions as wholly separable. Legal scholars themselves often insist on how legal reasoning and drafting of opinions are inextricably linked. As Zachary Douglas puts it, 'the act of writing is the ultimate safeguard of intellectual control over the decision-making process'.<sup>30</sup> More recently, Christine Sim, writing in the context of investment arbitration, argues that controlling the drafting of legal opinions would amount to 'usurping the arbitrator's method of reasoning'.<sup>31</sup> Indeed, the authorship of legal opinions has been used as an argument in seeking the annulment of recent decisions.<sup>32</sup>

In the specific context of international trade, the phrasing of opinions has added importance, given how much precedent is known to matter to subsequent decisions. Indeed, while public international law does not recognize past decisions as binding, a degree of '*de facto stare decisis*' has emerged in the trade regime.<sup>33</sup> Others have shown how a chief means by which powerful countries exercise their power at the WTO is by inserting their preferred language into rulings, thus shaping jurisprudence.<sup>34</sup> In this way, the text of rulings is often the field on which the tension between law and politics plays itself out. We know courts strategically vary the vagueness of their rulings, or the level of affect therein, in an attempt to modulate the political pressure of rulings on governments.<sup>35</sup> WTO tribunals have also been shown to use the practice of judicial economy to manage political expectations and avoid ruffling the feathers of powerful

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<sup>28</sup> See Soave, *supra* note 3, at 341.

<sup>29</sup> Baker and Marceau, 'The World Trade Organization', in Baetens, *supra* note 20, 70.

<sup>30</sup> See Douglas, *supra* note 19, at 89.

<sup>31</sup> Sim, 'The Essence of Adjudication: Legitimacy of Case Managers in International Arbitration' in Baetens, *supra* note 20, 217.

<sup>32</sup> See the controversy over the decision in *Yukos Universal Limited v. The Russian Federation*, UNCITRAL, PCA Case No. 2005/AA227, Final Award, 18 July 2014, available at <https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf>, which we briefly discuss below.

<sup>33</sup> Bhala, 'The Myth About *Stare Decisis* and International Trade Law (Part One of a Trilogy)', 14 *American University International Law Review* (1998) 845.

<sup>34</sup> Daku and Pelc, 'Who Holds Influence over WTO Jurisprudence?', 20 *JIEL* (2017) 233.

<sup>35</sup> See Staton and Romero, 'Rational Remedies: The Role of Opinion Clarity in the Inter-American Human Rights System', 63 *International Studies Quarterly* (2019) 477; Busch and Pelc, 'Words Matter: How International Courts Handle Political Controversy', 63 *International Studies Quarterly* (2019) 464.

member states.<sup>36</sup> For all these reasons, the process of drafting rulings may be as important as the final decision over who wins or loses a given claim or case. Even if the adjudicators themselves retain final say and merely direct staff to draft the ruling under their guidance, the fact that the Secretariat staff ‘hold the pen’ – that they not only write the ‘issues paper’ but also actually sit down and write most of the text of the panel reports – grants them considerable influence.

Why would governments condone the existence of an international bureaucracy with such extensive influence? After all, domestic audiences are usually wary of delegating sovereign interests to ‘faceless’ foreign bureaucrats.<sup>37</sup> Indeed, the perceived authority of the figure of the judge, whose legitimacy is tied to a perception of judicial impartiality, is seen precisely as a remedy to the potential legitimacy deficit of international institutions.<sup>38</sup> Why would governments nonetheless empower these permanent staff members who lack direct accountability?<sup>39</sup> A closer look at the moment of creation of the Secretariat’s legal function offers useful insight into this question.

### ***B The WTO Secretariat: Agent of Adjudicators or Agent of Governments?***

The GATT-WTO did not always have Secretariat staff advising adjudicators. Up to the 1980s, no permanent staff from the institution played any direct role in dispute settlement. To an even greater degree than is true today, panellists during the GATT era tended to be current or former diplomats or technocrats pulled from various diplomatic missions in Geneva or governmental trade ministries in capitals rather than professional lawyers (whether in private practice, the judiciary or academia). This was in keeping with the fundamentally diplomatic character of the institution, which was entirely based on consensus. Accordingly, all parties to a dispute,

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<sup>36</sup> See Busch and Pelc, ‘The Politics of Judicial Economy at the World Trade Organization’, 64 *IO* (2010) 257; Brutger and Morse, ‘Balancing Law and Politics: Judicial Incentives in WTO Dispute Settlement’, 10 *Review of International Organizations* (2015) 179.

<sup>37</sup> Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’, 35 *JWT* (2001) 191.

<sup>38</sup> Voeten, ‘Public Opinion and the Legitimacy of International Courts’, 14 *Theoretical Inquiries in Law* (2013) 411.

<sup>39</sup> As Wauters, points out, when panellists call on expert witnesses to assist them with some technical aspect of the dispute, they ‘are subject to the standards of independence and impartiality that apply to the panelists’. Yet, as he goes on, ‘[t]hese due process related quality and safety checks do not apply when the panel consults an internal “expert” from the Secretariat’. Wauters, *supra* note 19, at 88.

including the defendant, had to acquiesce for the dispute to proceed.<sup>40</sup> It was thought that diplomats would be more sensitive to the needs of governments than professional lawyers.

Yet, as the disputes arising in the GATT grew more complex, these ad hoc adjudicators proved not to be entirely up to the task. A series of questionable rulings arose in the late 1970s and early 1980s. Robert Hudec describes these as ‘embarrassingly poor decisions’.<sup>41</sup> It became clear that, while trade diplomats could be sensitive to government interests, they were not always capable of delivering the type of legal reasoning that was being asked of an increasingly legalized institution. The members themselves balked. As Amelia Porges explains, ‘[g]overnments that did not want to have a group of lawyers in the Geneva headquarters telling them what they could do ... had run up against the limits of what was possible without lawyers’.<sup>42</sup> The trouble began with the four DISC cases over tax subsidies decided in 1976 (but only settled five years later)<sup>43</sup>. As Hudec put it in his examination of the case, this was the dispute settlement system’s ‘first significant failure’.<sup>44</sup> The same working party found the US law to be in violation but then reached a similar conclusion with regard to the tax systems of France, the Netherlands, and Belgium, a decision that led to considerable pushback. Hudec describes this as a failed attempt at diplomatic balancing of wrongs. As he concludes, ‘it was clear the panel has misjudged the room it had for diplomatic manoeuvre’. The turning point then came in 1981, when another working party issued a ruling on Spain’s discriminatory treatment of imported soybean oil.<sup>45</sup> The ruling contained plain mistakes of law. Even Spain itself, which was favoured by the mistaken interpretation of the rules that led to no finding of violation, expressed concern about the implications for jurisprudence. The membership decided to reject the ruling: it

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<sup>40</sup> J. Barton *et al.*, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO* (2008).

<sup>41</sup> Hudec, ‘The New WTO Dispute Settlement Procedure: An Overview of the First Three Years’, 8 *Minnesota Journal of International Law (MJIL)* (1999) 1.

<sup>42</sup> Porges, ‘The Legal Affairs Division and Law in the GATT and the Uruguay Round’, in Marceau, *supra* note 2, 223.

<sup>43</sup> GATT, *Income Practices Maintained by Belgium, France and The Netherlands*, 2 November 1976, L/4423, 4 and 5, BISD 23S/114, 127 and 137; GATT, *United States Tax Legislation (DISC)*, 2 November 1976, L/4422, BISD 23S/98.

<sup>44</sup> R. Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure* (1998), at 101–120, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.596.232&rep=rep1&type=pdf>.

<sup>45</sup> WTO, *Spain – Measures Concerning Domestic Sale of Soyabean Oil – Recourse to Article XXIII:2 by the United States*, 17 June 1981, GATT Panel Report L/5142.

was ‘the first and last time’ that governments decided by consensus to reject a ruling on the basis of perceived mistakes in the legal reasoning.<sup>46</sup>

The most straightforward solution to such mistakes by the adjudicators would have been to replace the adjudicators by trained/professional lawyers. That is not what happened. Instead, shortly after the ruling in *Spain – Soyabean Oil*, the GATT members created a body of experienced lawyers – the Legal Affairs Division – to oversee the work of the panellists. Its task was set out in a 1982 GATT ministerial declaration: ‘The secretariat of GATT has the responsibility of assisting the panel, especially on the legal, historical and procedural aspects of the matter dealt with.’<sup>47</sup> While a series of problematic rulings from the *DISC* case to the *Soyabean* case may have been the final determining factor, the Secretariat’s greater involvement in dispute settlement was likely overdetermined. Faced with the greater legal complexity of disputes, and what Hudec described as the ‘all out legal warfare’ waged by US and European Commission lawyers, especially, a more assertive centralized oversight role became necessary. At first, the Secretariat’s Legal Affairs staff had only partial influence over the panellists. As the first director of the Legal Affairs Division, Frieder Roessler, later put it with palpable regret, ‘[t]he new office was not always able to sway the views of the “managers” who were sometimes appointed as panellists’. But the Secretariat’s influence over the panellists then grew in subsequent years: ‘The presence of lawyers was gradually accepted, first as unavoidable, then as useful, and, finally, as indispensable.’<sup>48</sup>

While members had been resistant to the idea of a Legal Affairs Division, they eventually embraced it as a means of preserving the status quo of ad hoc diplomats serving as adjudicators. The new body of legal bureaucrats was created to prevent flagrant mistakes of law and to keep institutional oversight. But it was above all a compromise that allowed the perception of credible delegation to independent adjudicators, with the knowledge that these adjudicators would be sensitive to governments’ political interests. In this sense, though the Secretariat’s formal role as an assistant of panellists might at first paint it as an agent of the adjudicators, it is in fact better seen as an agent of the member states. The creation of the Legal Affairs Division was thus a

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<sup>46</sup> See Porges, *supra* note 42.

<sup>47</sup> Cited in Roessler, ‘The Role of Law in International Trade Relations and the Establishment of the Legal Affairs Division of the GATT’, in Marceau, *supra* note 2, 161. The Legal Affairs Division was initially called the Office of Legal Affairs.

<sup>48</sup> See *ibid.*

lynchpin in the DSB's design, a means of preserving the institution's diplomatic character in all other respects and, thus, of assuring continued deference to state interests. As per classic principal-agent theory, one means of tightening the principal-agent relationship in favour of the principal is by delegating to more than one agent with overlapping mandates.<sup>49</sup> In this light, the function of the Secretariat staff appears very different from that of US Supreme Court clerks, for instance. This is, instead, a case of one agent – Secretariat staff – checking another agent – WTO adjudicators.<sup>50</sup>

One further clue to the intent behind the creation of the Legal Affairs Division can be gleaned from what happened next. In spite of opposition from the Secretariat staff themselves, the USA exerted pressure to create a separate secretarial body to deal uniquely with trade remedies cases, the Rules Division. Challenges of trade remedies (that is, anti-dumping duties or countervailing duties offsetting foreign subsidies) were then, as they are now, the most politically sensitive of all disputes, dealing with the ability of governments to offer important relief in times of need to politically powerful domestic interest groups. And the USA was then, as it is now, a frequent user of these remedies. Anecdotal evidence suggests that the creation of the Rules Division was actually a condition for passing the Uruguay Round that ushered in the WTO and its more legalized dispute settlement system.<sup>51</sup> Given what we know about the USA's interests when it comes to trade remedies, this separation of the Secretariat's oversight role is best seen as a further attempt at increasing the amount of deference to state interests by separating the treatment of trade remedies from all other trade issues.<sup>52</sup> Once more, adding another agent tightened the principal-agent relationship in favour of the principals, the GATT

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<sup>49</sup> For an elaboration of principal-agency theory in the context of international tribunals, see Alter, 'Agents or Trustees? International Courts in Their Political Context', 14 *EJIR* (2008) 33; D. Hawkins *et al.* (eds), *Delegation and Agency in International Organizations* (2006), at 30.

<sup>50</sup> Tellingly, what little formal criticism there has been among member states of the Secretariat's role in dispute settlement has come solely from developing and least-developed country members. Two such instances, both addressing transparency, are WTO, *Negotiations on the DSU, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe*, WTO Doc. TN/DS/W/18, 7 October 2002; WTO, *Jordan's Contributions Towards the Improvement and Clarification of the WTO DSU*, WTO Doc. TN/DS/W/43, 28 January 2003.

<sup>51</sup> As Roessler, recalls, 'understood that this [the creation of the Rules Division] was, at least in part, a response to certain political pressures from various trade remedy-using contracting parties, and that, according to Director-General Dunkel, this would help gain US Congressional support in concluding the Uruguay Round negotiations'. Roessler, *supra* note 47, at 168.

<sup>52</sup> As Roessler later admitted, he had first chafed at what he considered a split of the oversight of the Secretariat which would diminish the consistency of GATT rulings and the resulting jurisprudence, but he then went on to consider it a 'blessing in disguise' since it was a means of accommodating a powerful political actor. *Ibid.*, at 169,

members. Thanks to the creation of the Legal Affairs Division and the Rules Division, disputes could continue to be ruled on by ad hoc panellists largely pulled from the ranks of trade diplomats, and blatant errors of law could be avoided through the oversight of a permanent Secretariat, which would nonetheless remain deferential to state interests.

The intent behind the creation of a dedicated body (now composed of three separate entities: the Legal Affairs Division, the Rules Division and the Appellate Body Secretariat) to oversee rulings explains why member states have not moved to restrain the Secretariat's influence, despite mounting concerns among member states about the dispute settlement function of the WTO drifting from its original mandate. Instead, the size and resources of the Legal Affairs Division has continued to grow. In the 1980s, it counted a total of three staff. At the end of 1999, the Legal Affairs Division, the Rules Division and the Appellate Body Secretariat divisions held a total of 37 staff. By 2018, the number of permanent staff has risen to 90, not counting a number of non-permanent staff. These numbers also represent a growing portion of the institution as a whole, from 7 per cent of the WTO's total staff in 1999 to 14 per cent in 2018.

Our argument clashes with existing accounts that tend to focus on the ad hoc nature of panellists as the phenomenon that requires explaining and as the natural target of reform. In this way, Hudec explains that '[i]f panels were composed of members with such legal expertise, one would no longer need to worry about the undue decision-making power of the panel's legal staff'.<sup>53</sup> More recently, Jasper Wauters picks up Hudec's point, arguing that '[t]he problem is not so much the Secretariat but the *ad hoc* nature of the panel system and ... panelists whose professional qualifications and part-time participation are simply ill-suited for writing the kind of legal reports that WTO dispute settlement panels are expected to issue'.<sup>54</sup> What these arguments miss is that the ad hoc nature of the panel system is not an aberration; it is the point. It is not that the idea of changing this arrangement has never occurred to governments. Rather, member states have consistently resisted the idea of a permanent body of panellists with professional legal training and backgrounds, and they continue to appoint panellists most often drawn from the ranks of trade diplomats. The objective has been to find a means of maintaining the diplomatic character of the institution, while avoiding the egregious mistakes of law of the kind that

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<sup>53</sup> See Hudec, *supra* note 41 at 35.

<sup>54</sup> See Wauters, *supra* note 19.



occurred in the 1970s. The empowerment of the Secretariat has been the means to this end for the past 30 years.

Indeed, this particular compromise has persisted to the current-day WTO. Today, panellists are still chosen on an ad hoc basis, though there is growing discussion of whether this design remains optimal.<sup>55</sup> With the rising complexity of WTO disputes, the Secretariat's role has only increased within its vaguely defined mandate. And while this may suit government interests in the way that is described above, the DSB also has reason to conceal the full extent of the Secretariat's role. An effectively technocratic arrangement is presented to outside observers as a strictly judicial process, which enjoys all the authority attributed to a tribunal. Meanwhile, the amount of scholarly attention to the 'unseen actors' in international tribunals has also been growing in recent years, and this work has produced considerable anecdotal evidence suggesting that the WTO Secretariat, in particular, exerts far greater influence over the dispute settlement process, and the text of the final rulings, than is commonly acknowledged. Yet these claims remain largely anecdotal, and no hard evidence has been brought to bear on the question. This is what we attempt in our empirical analysis. Before doing so, we turn to our second setting of opacity by design, looking at dissenting opinions.

### ***C The Function of Anonymous Dissents***

By contrast to the under-publicized functions of the Secretariat, where scholarship has only recently begun to catch up with insiders' practical knowledge, the issue of dissenting opinions is well-trodden ground. A large body of scholarship in the legal literature has weighed in on the costs and benefits of allowing separate opinions in international courts. Yet here, too, the discussion has been mostly normative and has relied on little actual empirical evidence, which is where our main contribution lies. The principal argument in favour of giving adjudicators the option to dissent highlights how doing so compels discussion among adjudicators, leading to higher quality reasoning in the rulings and allows tribunals to convey the presence of an internal debate over the legal issues at hand. Suppressing dissents, in this view, risks generating a form of

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<sup>55</sup> See Busch and Pelc, 'Does the WTO Need a Permanent Body of Panelists?', 12 *JIEL* (2009) 579; Hoekman, 'Proposals for WTO Reform: A Synthesis and Assessment', 20 *MJIL* (2011) 324; L. Johannesson, *Efficiency Gains and Time-savings of Permanent Panels in the WTO Dispute Settlement*, IFN Working Paper no. 1219 (2018), available at [www.ifn.se/wfiles/wp/wp1219.pdf](http://www.ifn.se/wfiles/wp/wp1219.pdf).

‘groupthink’.<sup>56</sup> Those arguing against minority opinions tend to invoke more pragmatic concerns, looking to the political effects of split rulings. Some argue that dissents take away from a tribunal’s perceived authority, especially in its first years, and may thus decrease the rate of compliance. The other major concern is that dissents may expose the dissenting members to political backlash by singling out individual adjudicators.<sup>57</sup>

The major existing international tribunals are about evenly split on the question of separate opinions. The International Court of Justice (ICJ) features signed dissenting opinions, but as Dunoff and Pollack point out, it also has a lower claim to judicial independence than the WTO, with judges all but expected to dissent in favour of the country that appointed them. In addition, where a state party does not have a national on the ICJ bench, it can appoint an ad hoc judge, thereby balancing the situation.<sup>58</sup> Even courts with overlapping memberships often differ in their design choices. The European Court of Human Rights features frequent separate opinions, especially in its more significant rulings,<sup>59</sup> whereas the Court of Justice of the European Union (CJEU) does not allow them. Even so, the design of the WTO deals with the question of separate opinions in an unusual way. Dissents are allowed at both the panel and the Appellate Body level, yet the rules require that they be anonymous. Article 14(3) of the Dispute Settlement Understanding reads: ‘Opinions expressed in the panel report by individual panellists shall be anonymous.’ Article 17(11) imposes the equivalent requirement on Appellate Body opinions.<sup>60</sup> It is the only major tribunal to have landed on this particular design.

The WTO’s solution thus amounts to a compromise. The intent, ostensibly, is to capture some of the benefits of more rigorous debate resulting from the possibility of minority opinions, while offering the dissenting member cover from political retribution. Yet, from the very start of the institution, doubts have cropped up over how reliable this cover from political backlash really is. Such concerns were one reason why the founding chair of the Appellate Body, Julio Lacarte Muró, warned that, ‘while such opinions were to remain anonymous, it was conceivable that if they became frequent they might eventually provide clues as to their authors. If that were to

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<sup>56</sup> See Günther, *supra* note 18.

<sup>57</sup> See Dunoff and Pollack, *supra* note 14.

<sup>58</sup> Statute of the International Court of Justice (ICJ Statute) 1945, 33 UNTS 993, Art. 31, paras 2, 3.

<sup>59</sup> Voeten, *supra* note 9 (who reports that level-one (highest importance) judgments featured at least one minority opinion at a rate of 53 per cent, against only 6 per cent in level three (lowest importance)).

<sup>60</sup> ‘Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.’ DSU, *supra* note 25.

happen, governments could begin to try and identify them and reach whatever conclusion they wished'.<sup>61</sup> As it happens, Lacarte Muró's intuition was correct: given enough writing samples from individual adjudicators, it becomes possible to guess who the likely author of a given dissent is. Yet, as we go on to show, the writing need not come from dissenting opinions themselves; other texts penned by the adjudicators can serve the same purpose.

Even Dunoff and Pollack, who look to judicial anonymity as the condition for maintaining full judicial independence in the face of the high level of political control featured in the WTO (Appellate Body members are (re)appointed by consensus of all WTO members; in contrast, ICJ judges, for example, are (re)appointed by majority vote<sup>62</sup>), recognize that the anonymity of dissents is by no means assured. Citing a range of anecdotal evidence, they conclude that 'at least some states believe that they can identify the authors of separate opinions and are willing to act on those beliefs'. Our aim is to empirically demonstrate that, even without the resources of well-funded governments, outside observers are now able to pinpoint the likely authors of dissenting opinions using public documents and widely accessible text analysis tools.

Just as in the case of the Secretariat's role in drafting rulings, lifting the veil of anonymity in the case of dissents holds implications for the behaviour of the relevant actors. We can distinguish two distinct effects. The first is the one that is most often remarked on: if a dissenting opinion would be displeasing to a powerful state, and if it can be traced to an individual adjudicator, this adjudicator may prefer not to issue the opinion for fear of political repercussions (in particular, blockage in her reappointment process). The result is to reinsert power considerations into the equation, as adjudicators must weigh what they consider as the correct interpretation against the possible political backlash that may result if they are branded as the author. Second, and just as importantly, the option of issuing a dissent, and the awareness of being personally linked to it, can have the paradoxical effect of increasing the pressure to dissent in favour of a powerful litigant.<sup>63</sup> As one judge from the CJEU, which does not allow for separate opinions, put it, 'the advantage of not having dissenting opinions is that there is no

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<sup>61</sup> Lacarte Muró, 'Launching the Appellate Body', in Marceau, *supra* note 2, 476.

<sup>62</sup> ICJ Statute, *supra* note 58, Art. 10.

<sup>63</sup> In related work, we find that the presence of a co-national on a division is associated with significantly increased odds of dissent. See J. Pauwelyn and K. Pelc, 'Can Judicial Norms Protect against Political Pressure? Evidence from 25 Years of WTO Rulings', manuscript on file with the authors (2022).

opportunity for a judge to signal ... “Look what a good boy am I””.<sup>64</sup> Conversely, when adjudicators do have the option of dissents, and when moreover their identities can be traced, they may feel pressured to do so. This is especially likely to be the case when an adjudicator’s home country is among the litigants, as can happen at the Appellate Body level (at the panel stage, in contrast, nationals of parties or third parties cannot be appointed, unless both parties agree), since governments may have greater means of exerting pressure over their nationals.<sup>65</sup>

More generally, insofar as the system was designed on the premise of anonymity, the equilibrium will be affected if that anonymity is lifted. This has arguably already taken place in the case of WTO dissents: in blocking the reappointment of Appellate Body adjudicators – first of its own nationals and then of a foreign national – the USA let it be known that it was attributing particular legal positions to individuals and that it was taking issue with those positions. In the process, it became clear that adjudicators could be punished not only for the individual positions they took but also for those they failed to take. Yet the nominal assurance of anonymity remains since the rules provide for it. As a result, the current *status quo* may amount to the worst of all worlds: adjudicators are not provided with any actual political cover, but the necessary reforms do not take place, so long as the pretence of anonymity remains in the formal rules. By doing away with the ‘open secrets’ that remain in the case of the Secretariat’s role and that of anonymous dissents, one may thus highlight the need for reform. Next, we describe the text analysis tools that are contributing to the erosion of such open secrets, and we apply them to our two cases in turn.

### **3 Analysing the Authorship of Panel Rulings**

The Secretariat plays an important 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 ultimately exercise over WTO rulings? We now take up this empirical question, focusing on who drafts panel rulings. To do so, we begin by collecting data on the identity of the individual panellists and WTO Secretariat members assigned to each dispute. This

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<sup>64</sup> Terris, Romano and Swigart, ‘Toward a Community of International Judges’, 30 *Loyola of Los Angeles International and Comparative Law Review* (2008) 419.

<sup>65</sup> Panellists cannot serve on disputes that concern their home country, while no such restriction exists at the level of the Appellate Body, where adjudicators are randomly assigned to disputes.

is a straightforward exercise for panellists, who are readily identified at the start of every panel report. It is a more difficult task when it comes to Secretariat staff. Up to 2005, the WTO communicated the staff assigned to each dispute,<sup>66</sup> 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.<sup>67</sup> We thus rely on Chad Brown, Henrik Horn and Petros Mavroidis' WTO Dispute Settlement System dataset,<sup>68</sup> which compiles over 3,000 WTO documents to gather data on, among other dispute features, the Secretariat staff assigned to panels from DS2 to DS302. This dataset captures the first 10 years of the WTO's operation (1995–2005). Judging by trends in the volume and complexity of cases, as well as the number of staff and the budget of the Legal Affairs Division and Rules Division, it is likely that the role of Secretariat members has only increased since this time.

We then go through each panel report and manually extract 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 and that are most crucial to legal outcomes. Our empirical approach reflects the assumption that rulings are likely the result of multiple authors offering input over a given text. Panellists may decide overall outcomes, but they divvy up the task of actually writing various parts of the ruling among themselves as well as delegate drafting to Secretariat staff. The level of input from the Secretariat staff is likely to vary in inverse proportion to the skill and available time of the panellists. 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.

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<sup>66</sup> The last dispute to have publicized the Legal Affairs Division officers assigned to the dispute was WTO, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, 26 November 2004, WT/DS302/R. Up to that point, the information was provided either upfront in a Secretariat note on panel composition, announcing both panellists and legal staff for the case, or *ex post* in an annex to the final panel report listing the emails of relevant staff working on the case.

<sup>67</sup> As Johannesson and Mavroidis put it, '[o]riginally, 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'. Johannesson and Mavroidis, 'The WTO Dispute Settlement System 1995–2016: A Data Set and Its Descriptive Statistics', 51 *JWT* (2017) 57.

<sup>68</sup> The dataset is hosted at [globalgovernanceprogramme.eui.eu/wto-case-law-project](http://globalgovernanceprogramme.eui.eu/wto-case-law-project).

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. While the applications of stylometry to legal questions remains rare, they are growing in number.<sup>69</sup> There are many different methods for attributing authorship through stylometry. For instance, in an early application to the question of US Supreme Court clerks, Rosenthal and Yoon rely 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.<sup>70</sup> 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. Jeffrey Rosenthal and Albert Yoon were thus able to show that Supreme Court justices have become more likely to rely on clerks over time. We use two different approaches to address our question: textual similarity and authorship detection.

### ***A Textual Similarity Approach***

To assess the relative influence of the Secretariat over the drafting of rulings, we used two wholly distinct methods. In the first, we compared 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 omitted the diagonal entries that compare a panel report to itself (with similarity = 1).

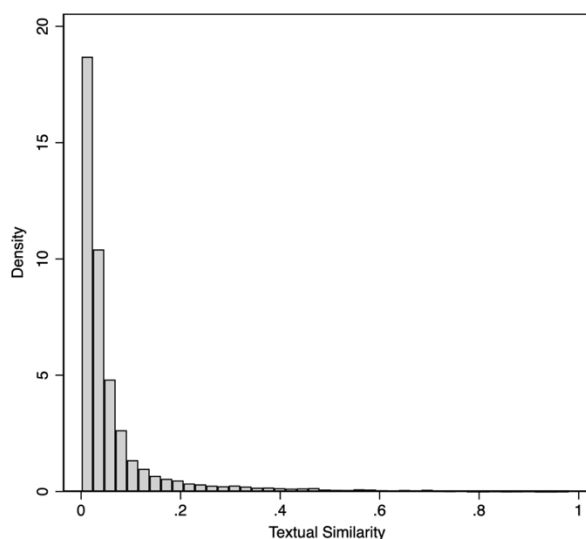
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<sup>69</sup> See, e.g., Langford, Behn and Lie, ‘Computational Stylometry: Predicting the Authorship of Investment Arbitration Awards’ in R. Whalen (ed.), *Computational Legal Studies* (2020) 53; Dickinson, ‘A Computational Analysis of Oral Argument in the Supreme Court’, 28 *Cornell Journal of Law and Public Policy* (2019) 449; J. Yuen, *Arbitral Award Written by the Tribunal Assistant* (2017), available at [www.lexology.com/library/detail.aspx?g=bea9a0fe-6d1b-4f71-9bbe-7548a6e3875a](http://www.lexology.com/library/detail.aspx?g=bea9a0fe-6d1b-4f71-9bbe-7548a6e3875a).

<sup>70</sup> Rosenthal and Yoon, ‘Judicial Ghostwriting: Authorship on the Supreme Court’, 96 *Cornell Law Review* (2011) 1307.

We also left aside pairs of technically distinct reports that nonetheless relate to the same dispute, and are thus almost identical in content.<sup>71</sup> This left us with 5,146 unique dispute pairs. Most panel reports have very little textual similarity between them, but some appear written in a more similar style. A histogram illustrating the distribution of this similarity is shown in Figure 1.

Figure 1: Distribution of Textual Similarity between Panel Reports



This similarity index became our dependent variable of interest. To estimate it, we relied on a series of generalized linear models (GLM) with a logistic link function, which were ideally suited to estimating a dependent variable that varies continuously from 0 to 1, as ours does.<sup>72</sup> Our unit of analysis was the dispute pair. We have two main explanatory variables: the number of panellists in common in each pair of panel reports and the number of Secretariat members in common. We then added a number of control variables meant to confound effects. In particular, we wanted to ensure that common panellists or common staff members are not proxying for

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<sup>71</sup> For instance, Disputes DS50 (WTO, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 5 September 1997, WT/DS50/R) and DS79 (WTO, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 24 August 1998, WT/DS79/R) were both filed against India by the European Union (EU) and the USA, respectively. The two disputes produced two separate panel reports, delivered nearly a year apart, and the USA 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.

<sup>72</sup> Papke and Wooldridge, 'Econometric Methods for Fractional Response Variables with an Application to 401(k) Plan Participation Rates', 11 *Journal of Applied Econometrics* (1996) 619.

other similarities between disputes. For instance, if a given panellist or staff member has known expertise in handling anti-dumping cases, they may be more likely of being appointed to such cases, and any textual similarity could be more reflective of the nature of the case than of the common writing style of the individuals. We checked for how much of a concern this is by looking at the correlation between individuals and specific legal issues, and we saw no consistent pattern that would suggest that panellists and staff are more likely to be assigned to some cases over others (see Table A1 in the Appendix). Nonetheless, we wanted to ensure that our estimates were robust to these controls. In sum, we asked: how much does having a common panellist versus 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 expected the coefficient on the number of common Secretariat members to be higher.

The results are shown in Table 1. The first two columns suggest that having either panellists or Secretariat members in common does appear to increase the similarity of reports. But what is interesting is what happens when these two indicators are included together. We do so in Model 3, which reveals that, though both common panellists and common staff appear to have a significant effect, the magnitude of that effect for common staff is about three times greater. In other words, having a common Secretariat staff member accounts for three times more similarity between two panel rulings than having a common panellist. When we include various confounding variables in Models 4–6, however, the effect of common panellists disappears altogether, while that of common Secretariat staff remains strong and significant. In sum, Secretariat members seem to have a much greater relative influence on the text of panel rulings than the panellists themselves.

Table 1: Effect of Common Panellists versus Secretariat Members on Similarity between Rulings

	(1)	(2)	(3)	(4)	(5)	(6)
Common panellists	0.507*** (0.093)		0.182* (0.103)	0.027 (0.103)	0.086 (0.104)	0.062 (0.105)
Common Secretariat staff		0.520*** (0.065)	0.513*** (0.064)	0.379*** (0.065)	0.392*** (0.061)	0.402*** (0.064)
Common AD dispute				1.009***	0.936***	0.914***



				(0.081)	(0.079)	(0.081)
Common SPS Dispute				1.079***	1.033***	1.159***
				(0.175)	(0.165)	(0.178)
Common SCM dispute				0.476***	0.377***	0.398***
				(0.082)	(0.079)	(0.081)
Common TBT dispute				0.112	-0.148	-0.013
				(0.172)	(0.182)	(0.176)
Common GATT dispute				0.179***	0.159***	0.157***
				(0.047)	(0.046)	(0.048)
Common complainant					0.458***	
					(0.061)	
Common respondent					0.797***	
					(0.052)	
Common US respondent						0.651***
						(0.061)
Common EU respondent						0.433***
						(0.075)
Constant	-2.702***	-2.787***	-2.794***	-3.007***	-3.252***	-3.122***
	(0.018)	(0.024)	(0.025)	(0.038)	(0.039)	(0.039)
Observations	20572	10492	10492	10492	10492	10492

*Notes:*

AD = anti-dumping; SPS = sanitary and phytosanitary measures; SCM = subsidies and countervailing measures; TBT = technical barriers to trade.

GLM estimates. Dependent variable is the textual similarity between pairs of panel rulings. Robust standard errors clustered on common dispute in parentheses \* p < 0.10; \*\* p < 0.05; \*\*\* p < 0.01.

As an additional check, we also accounted for time in two different ways. First, it might be that rulings issued around the same time could share textual traits, if only because of a shared (un)availability of past jurisprudence. Second, it could be that we see a convergence in the drafting style of rulings over time, as the drafters of rulings, whoever they may be, converge on a common legal rhetoric, reflecting an emerging common practice. To get at the first notion, we

simply controlled for pairs of rulings issued in the same year. The variable is significant on its own but ceases to be as soon as our main explanatory variables are included. Second, to capture a possible convergence in rhetoric across time, we aimed to capture the sequence of panel reports rather than the passage of time. That is, convergence occurs not because of time passing but, rather, because of the accumulation of rulings. We resorted to a simple means of proxying for this trend, by summing the dispute settlement number of the dispute in each dispute pair. High (low) numbers indicate dispute pairs where both disputes occur late (early) in dispute settlement history. Time does seem to matter to some extent, and both our indicators are statistically significant. Yet neither has any effect on our main finding: the influence of Secretariat members on the text of panel rulings appears relatively stronger than that of panellists.

We are also aware that staff play an important role in the appointment of panellists to a case. Where parties mutually agree to the panellists, it is most commonly based on lists of names originally proposed by the Secretariat. Where, in the absence of party agreement, the director-general appoints panellists (as happens in 69 per cent of panels), the Secretariat has an even greater role (even though the director-general makes the final call, names are provided by staffers in the Legal Affairs or Rules Divisions). That is, indeed, another aspect of the Secretariat's unusual influence over WTO proceedings. One concern this raises is that the staff may strategically appoint panellists to specific cases on the basis of prior views or rulings. Our controlling for legal issue type gets at this concern in part, but to further ensure that the appointment process was not interfering with our findings, we included a count of the number of panellists appointed by the director-general in each dispute pair.<sup>73</sup> The variable is not significant and in no way affects our results. Next, we took a different approach to the question of authorship.

### *1 General Imposters Approach*

Our similarity-between-rulings approach allowed us to use all relevant dispute ruling pairs. But it remains imperfect. Both panellists and Secretariat members may be assigned on disputes with common topics (say, cases under the WTO's Agreement on Sanitary and Phytosanitary

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<sup>73</sup> We thank an anonymous reviewer for this suggestion.

Measures), and this could skew our measures of similarity.<sup>74</sup> 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 tested the same proposition using an entirely different stylometric approach. Instead of comparing panel reports to one another, we compared panel reports to external texts that we can be certain were written by the potential candidates. And rather than relying simply on similarity scores, we used our external texts to build stylometric profiles for our candidate authors. A typical toy application for this technique, called the General Imposters method,<sup>75</sup> which we implemented using the imposters function in the R package Stylo,<sup>76</sup> 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 that we can confidently attribute to one author and for which we can thus rule out the other author.

We were able to apply this method to our setting since a number of panellists and Secretariat members have also written and published such external texts, especially as academic articles. We thus collected such external texts for as many panellist 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, for example, 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);<sup>77</sup> (vi) finally, we steered clear of external texts that pertained directly

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<sup>74</sup> Agreement on Sanitary and Phytosanitary Measures 1994, 1867 UNTS 493.

<sup>75</sup> See Kestemont *et al.*, ‘Authenticating the writings of Julius Caesar’, *Expert Systems with Applications* 63 (2016) 86.

<sup>76</sup> See Eder, Rybicki and Kestemont, ‘Stylometry with R: A Package for Computational Text Analysis’, 8 *The R Journal* (2016) 107.

<sup>77</sup> 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 supported by Busch and Pelc, *supra* note 55, who find

to the WTO dispute under consideration. For instance, Gabrielle Marceau, a Secretariat member, is the author of an academic article on *United States – Steel Safeguards*.<sup>78</sup> Since she was also a Secretariat member assigned to that case, we would not use this text to create her profile.<sup>79</sup> 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 panellists or all Secretariat members. However, our search produced texts that met our criteria for 237 candidate authors, across 23 disputes. We pre-processed all external texts in a number of ways to ensure that neither set of external texts exhibited characteristics that were common to their group (Secretariat or panellists) rather than the relevant individual. We thus got rid of all technical terms that appear in the official WTO Glossary and all terms that appear in any WTO dispute title, which may be more indicative of a technical topic than an individual stylometric profile, and we took out all terms that do not appear in at least 40 per cent of external texts. As we describe below, we also ran a placebo test to verify the accuracy of our analysis.

The authorship attribution that we implemented focuses on commonly used strings of words or characters. Following common usage for these methods, we relied on strings of three or four characters and strings of one or two 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.<sup>80</sup> As

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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 appeal.

<sup>78</sup> WTO, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, 10 November 2003, WT/DS248/AB/R.

<sup>79</sup> As it happens, the issue did not arise, since the panel chair for that case, Stefan Johannesson, did not have enough external texts that met our requirements, and so we could not include the *United States – Steel Safeguards* case (WTO, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, 10 November 2003, WT/DS248/AB/R) in our analysis, given our fifth coding rule.

<sup>80</sup> Specifically, the General Imposters method relies on a popular authorship attribution method called Burrow's Delta, which computes a distance metric (Delta) between a test text and each class within a training set (e.g.

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 that would produce a strong signal, while others may prove to be ‘stylometrically blurry’.<sup>81</sup> 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 2–5. 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 panellists. Circled red dots correspond to panel chairs. The higher (lower) the score for a candidate author, the more (less) likely she or he is an author of the ruling. Candidates that score higher appear as being 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 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 2: Detection of Panellists versus Secretariat Authors Using One-Word Strings

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different authors). The class with the minimal Delta is classified as author. Delta is a ‘scaled distance’ that 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’. See Burrows, ‘Delta’: A Measure of Stylistic Difference and a Guide to Likely Authorship’, 17 *Literary and Linguistic Computing* (2002) 267.

<sup>81</sup> M. Eder, *Authorship Verification with the Package ‘Stylo’* (2018), available at [computationalstylistics.github.io/blog/imposters/](https://computationalstylistics.github.io/blog/imposters/)



Figure 3: Detection of Panellists versus Secretariat Authors Using Two-Word Strings



Figure 4: Detection of Panellists versus Secretariat Authors Using Three-Character Strings

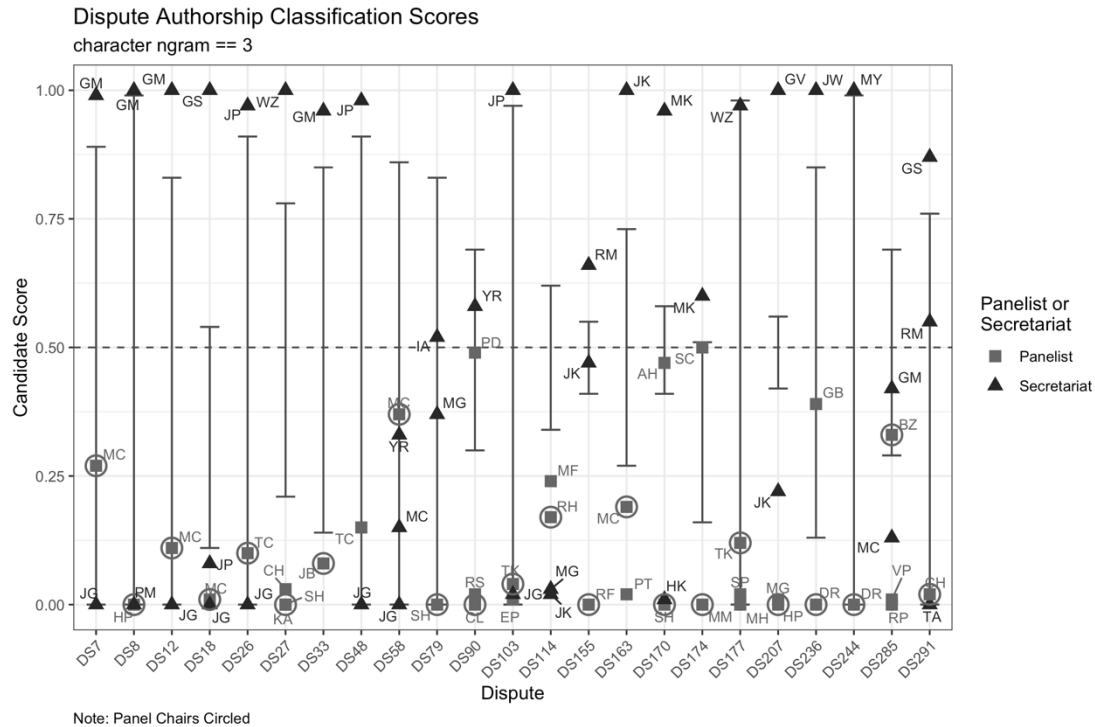
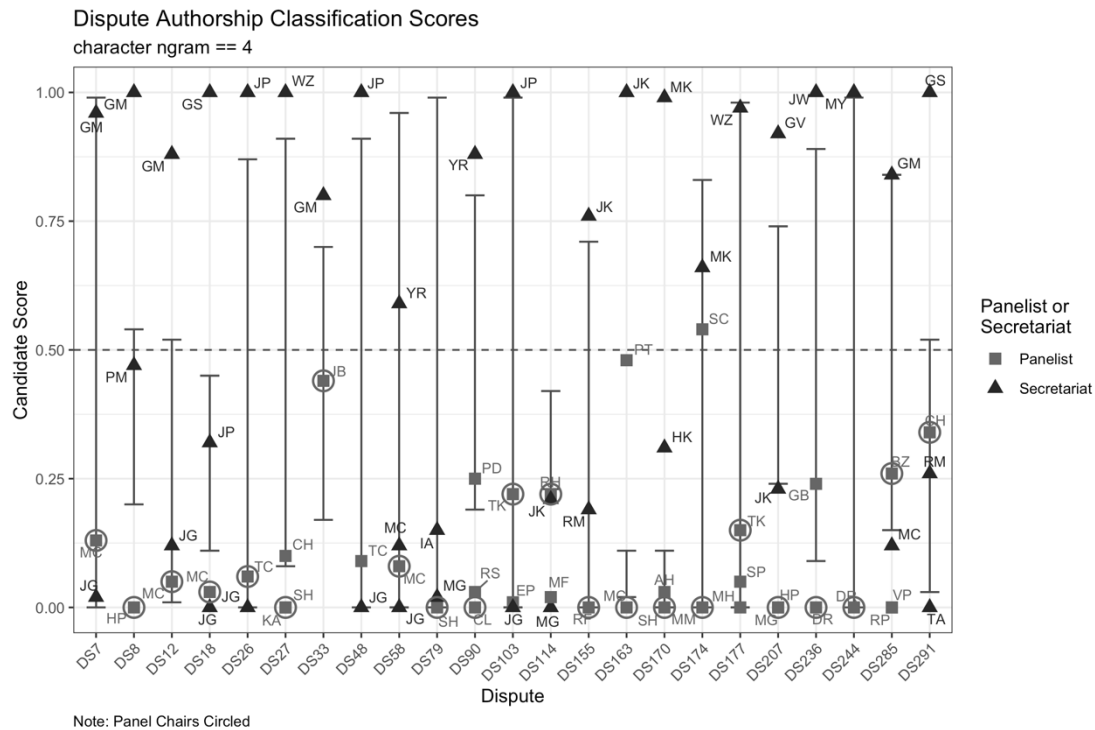


Figure 5: Detection of Panellists versus Secretariat Authors Using Four-Character Strings



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 panel reports (90

per cent) are attributed to Secretariat members, and 7 out of 69 panel reports (10 per cent) are attributed to panellists. 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 three-character strings. Conversely, the tests actually rule out a number of panellists as having any observable influence over the writing of the reports.

We also ran a placebo test to check for false positives by verifying whether our authorship detection tool would wrongly attribute authorship to texts we know a candidate did not author. It follows that we cannot check for false negatives since we never have certainty that a given candidate was among the authors of a ruling – that is, in fact, what we are assessing in our main tests. For our placebo test, we thus ran all candidates against panel reports to which they were not assigned, for a total of 1,248 tests, and we checked in how many cases we get what we know to be an erroneous result. This necessarily relies on the assumption that Secretariat staff who were not formally assigned to a case did not, in fact, contribute to its drafting. Of these, we got a false positive rate of 1.4 per cent, a level that is within the norms of authorship detection<sup>82</sup> and that should further strengthen our confidence in the accuracy of the tool.

Authorship attribution remains a probabilistic exercise, and no test is definitive. Yet the preponderance of the evidence, using two distinct methods, strongly suggests that the Secretariat plays a greater role in the drafting of WTO rulings than the panellists themselves. As noted above, our tests are limited to the first 302 disputes for which the identity of assigned Secretariat staff was disclosed. Yet there is good reason to believe that the pattern we observed continues past that point. If anything, the gap in experience between the Secretariat staff and the average panellist has only grown over time, just as the volume of jurisprudence to master and complexity of cases has increased.

## *2 When Does the Secretariat Exert Most Influence?*

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<sup>82</sup> Looking more closely at these false positives, half of them come from a single Secretariat member, Petros Mavroidis. As it happens, Mavroidis has had a long involvement in the WTO, contributing, for instance, to the writing of the WTO's Analytical Index. Though this is necessarily speculative, it may be that his textual footprints have thus made their way into texts that he himself did not author.



We have shown that, looking across disputes, the Secretariat staff appear to have a greater role, on average, in writing the final text of panel reports than the panellists themselves. Yet Figures 2–5 also reveal how much this influence varies. Are there systematic reasons for this variation? Can our analysis shed light on what accounts for the Secretariat’s greater or lesser influence? And does this variation then affect outcomes, such as a dispute’s subsequent contribution to WTO jurisprudence? In this section, we take a first step in addressing these questions. What we already know about the Secretariat’s role informs our theoretical expectations. We have argued that the Secretariat plays an overlooked oversight function. Accordingly, we might expect that its influence would be felt especially strongly on those cases that raise the most complex legal issues and those most likely to raise concerns from the remainder of the membership. Similarly, given what we know about the Secretariat’s role as ‘guardian’ of the system, we might expect that disputes where the Secretariat is highly involved may become more influential over subsequent jurisprudence.

To test these beliefs, we examined the relationship between authorship scores and dispute characteristics. Specifically, for each dispute, we took the top authorship score for panellists and the top score for Secretariat staff and used these scores as proxies of the degree of influence for each group.<sup>83</sup> These remain imperfect and noisy indicators of influence over the drafting of panel reports. The small size of our sample is another reason to be careful in drawing inferences from the results. For these reasons, we kept our analysis as parsimonious as possible. We thus began with a set of simple bivariate correlations. Table 2 shows the correlation between a number of dispute traits and authorship scores for both the Secretariat staff and the panellists.

Table 2: Bivariate Correlations

	Secretariat authorship score	Panellists authorship score
Systemic interest dispute	0.40	–0.52
Number of legal claims	0.32	–0.18
Number of third parties	0.26	–0.15
Jurisprudential impact	0.15	–0.13

<sup>83</sup> Using the top score in this case reflects what we know of the Secretariat’s drafting process, especially going back to the GATT Legal Office; anecdotal accounts suggest that the task of drafting was assigned to a single Secretariat member: ‘The writer was typically the legal secretary to the panel, himself or herself a member of the Secretariat reporting to his or her supervisor.’ See Weiler, *supra* note 37.

The relationships in Table 2 are telling. First, those disputes in which at least one third party declares a ‘systemic interest’ in a dispute, as opposed to a substantial trade interest,<sup>84</sup> strongly correlate with the Secretariat taking on a greater role in drafting the report. Conversely, the same disputes are highly negatively related to panellists exerting more influence over drafting panel reports. The same is true of disputes with many legal claims brought by the complainant, a common measure of a dispute’s complexity and the number of third parties to a case, which is another indicator of the systemic implications of a dispute. Together, these three indicators suggest a consistently strong relationship between a dispute’s complexity and systemic importance and the role the Secretariat staff come to play in drafting rulings.

The last two indicators are especially revealing. We look at the importance a case takes in jurisprudence by looking at its subsequent citation rate in other disputes and the measure of jurisprudential impact of each dispute, as measured by Krzysztof Pelc, which additionally takes into account the commercial importance of the cited disputes.<sup>85</sup> In both cases, those disputes where the Secretariat played a greater role in drafting are those that subsequently became most influential for all WTO jurisprudence. These remain simple correlations; it is important to check how the same relationships hold up in a regression setting. The main benefit of doing so is that we can control for the passage of time, using cubic splines, which is especially important for citation rates.<sup>86</sup> This is what we do in Tables 3 and 4, where we run univariate regressions with time splines and robust standard errors clustered by common dispute. The same relationships remain: disputes of ‘systemic interest,’ disputes with more legal claims brought and disputes that attract more third parties are all more likely to see greater Secretariat input into the drafting of the rulings. And, as Table 4 further shows, those same disputes where the Secretariat staff have more influence over rulings are also those that end up being most central in WTO jurisprudence.

<sup>84</sup> We code third party interest as a dichotomous variable, based on the formal request countries submit to become a third party before the panel, pursuant to Article 10.2 of the DSU, *supra* note 25. The empirical trade literature uses systemic interest as a proxy for disputes that raise membership-wide concerns. See Busch and Reinhardt, *supra* note 12; Johns and Pelc, ‘Fear of Crowds in WTO Disputes: Why Don’t More Countries Participate?’, 78 *Journal of Politics* (2016) 88.

<sup>85</sup> Pelc, ‘The Politics of Precedent in International Law: A Social Network Application’, 108 *APSR* (2014) 547.

<sup>86</sup> For obvious reasons, older disputes have higher citation rates, all else equal, than more recent disputes. Splines are one way of accounting for this.

Table 3: Systemic Disputes and Authorship Scores

	Secretariat	Panellists	Secretariat	Panellists	Secretariat	Panellists
Number of legal claims	0.012**	−0.007				
	(0.005)	(0.007)				
Third parties count			0.010*	−0.006		
			(0.005)	(0.007)		
Systemic dispute					0.227**	−0.338***
					(0.101)	(0.112)
Cubic time splines	✓	✓	✓	✓	✓	✓
Observations	41	41	41	41	41	41

Notes:

Ordinary Least Square (OLS) estimates. Dependent variable is the authorship score of Secretariat versus panellist for each dispute. Robust standard errors clustered on common dispute in parentheses \*  $p < 0.10$ ; \*\*  $p < 0.05$ ; \*\*\*  $p < 0.01$ . Constant not shown.

Table 4: Authorship Scores and Jurisprudential Impact

	Jurisprudential impact	Jurisprudential impact	Citation rate	Citation rate
Secretariat authorship score	15959.88**		39.41*	
	(6549.83)		(22.76)	
Panellist authorship score		−7514.99		−27.97
		(7540.08)		(26.06)
Cubic time splines	✓	✓	✓	✓
Observations	37	37	37	37

Notes:

OLS estimates. Dependent variables measure jurisprudential impact as per Pelc, ‘The Politics of Precedent in International Law: A Social Network Application’, 108 *American Political Science Review* (2014) 547, and citation rate (in degree). Robust standard errors clustered on common dispute in parentheses \*  $p < 0.10$ ; \*\*  $p < 0.05$ ; \*\*\*  $p < 0.01$ . Constant not shown.

The small sample keeps us from running more sophisticated analysis to pinpoint causality, and, thus, we do not make strong claims about these relations being causal. It is just as likely that we are observing selection effects, whereby the type of case that requires a greater Secretariat role is also the type of case that is then more heavily cited. The sheer strength of the

findings, however, suggests that the authorship scores from our earlier analyses are capturing meaningful variation between disputes. These results thus serve as a good test of the data in Figures 2–5. In sum, more complex disputes that have membership-wide implications appear to invite more control by the Secretariat staff and less input in writing final rulings from the panellists themselves. And the same disputes where the Secretariat has more influence over writing are also those that go on to shape WTO jurisprudence to the greatest degree.

## **B Analysing Dissenting Opinions**

We now turn to our second setting case of opacity by design: the authorship of dissenting opinions. Both WTO panellists and Appellate Body members are formally allowed to issue individual dissenting opinions, though they do so infrequently: dissents in Appellate Body reports appear in less than 10 per cent of Appellate Body reports.<sup>87</sup> Dissents in panel reports are only slightly more frequent. When they do occur, however, dissents often prove highly controversial. As a result, although dissents are required by the rules to remain anonymous, insiders often speculate over who among the three Appellate Body members sitting on the case wrote a given dissent.

As we demonstrate, authorship detection tools can now empirically point to the likely author of dissenting opinions with a high degree of certainty. We focus on a recent and particularly controversial Appellate Body ruling in *United States – Countervailing Measures*, a dispute in which China challenged various aspects of the US trade remedies system.<sup>88</sup> One of the three Appellate Body adjudicators on the case was the US national on the Appellate Body. As the dissent sided with the US position in the dispute, observers have speculated that the US member wrote the dissent. We pick this one dissent for the purpose of demonstration rather than because it is polemic. Our point is that, if we are able to identify the likely author of a dissenting opinion in this case, then well-resourced governments can do the same for this and other cases.

The dissenting opinion in *United States – Countervailing Measures* was worded in exceptionally harsh terms. It disagreed with the majority finding against the USA on highly

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<sup>87</sup> P. Mavroidis and E. Kim, ‘Dissenting Opinions in the WTO Appellate Body: Drivers of Their Issuance and Implications for the Institutional Jurisprudence’, Robert Schuman Centre for Advanced Studies Research Paper no. RSCAS 2018/51 (2018), available at <http://dx.doi.org/10.2139/ssrn.3293777>.

<sup>88</sup> *United States – Countervailing Measures*, *supra* note 6.

consequential issues related to alleged subsidies provided by China. At the DSB meeting following the ruling, the USA drew on the dissenting opinion to forcefully argue against the majority opinion and to stake out what would eventually become its justification for blocking further appointments to the Appellate Body.<sup>89</sup> It referred to the dissenting opinion nearly 30 times during the meeting, citing it almost in its entirety across eight pages. It praised its reasoning and regretted only that it could not cite it in full. As the minutes of the meeting revealed, '[t]he United States said that it appreciated the diligent approach that had been undertaken in the dissent and regretted that the United States could only summarize three main points in this meeting'. The USA further 'urged other Members to read closely the concerns that were expressed in the dissent on this issue'. The Chinese representative could not fail but respond to the USA's argumentation, reminding the DSB that when a separate opinion was included, it was nonetheless the majority that constituted the ruling.<sup>90</sup>

To assess the most likely author of the dissent in question, we proceeded in the same way that we have described above when assessing the likely authors of panel reports. We collected external texts from the three Appellate Body members assigned to this case: Shree Baboo Chekitan Servansing of Mauritius, Ujal Singh Bhatia of India, and Thomas Graham of the USA. We used the same criteria for collecting outside texts as before, and we pre-processed the texts in the same fashion, getting rid of stop words, all terms listed in the WTO Glossary and the title of the dispute. We relied on the same General Imposter method as in the analysis above, where we traced the likely authors of the panel reports.

The results are shown in Figure 6. Since we were dealing with a single dispute, we included all our specifications in the same figure, using one, two, and three-word strings and three- and four-character strings. Across specifications using both character and word strings, the US member, Thomas Graham, can be determined to be the author with near certainty. The only specification that yielded ambiguous results was the one relying on single word strings, yet, here too, Graham was ranked as the most likely author. While we purposefully limited our analysis to

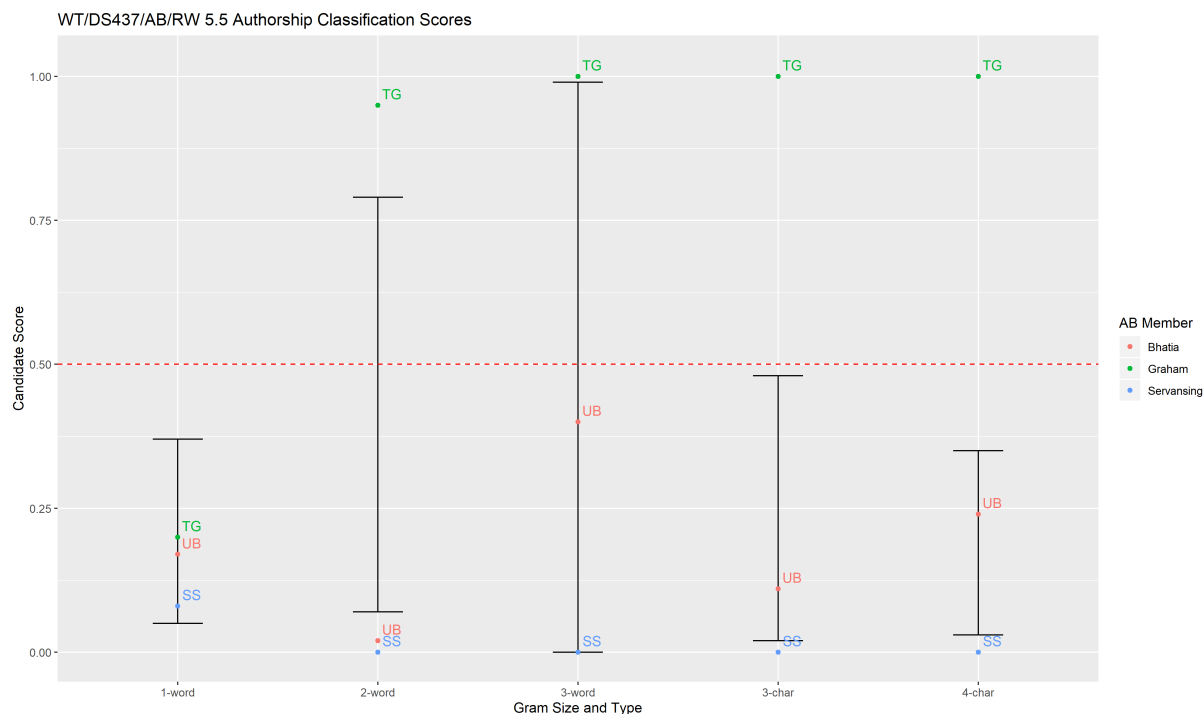
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<sup>89</sup> In particular, the USA repeatedly cited the dissenting opinion's case against treating past Appellate Body decisions as precedent, and its contention that the Appellate Body had drawn conclusions from its own analysis of the record evidence, rather than through an analysis of reasoning provided by the panel, and that, in so doing, it had exceeded its mandate.

<sup>90</sup> 'China noted that the United States had repeatedly mentioned and commended the separate dissenting opinion in this Appellate Body report. ... It was, however, the majority opinion that provided the basis for the DSB's recommendations and rulings.' *United States – Countervailing Measures*, *supra* note 6, at 20–28.

this one controversial dissenting opinion, the implication is a general one: insofar as the WTO rules ever provided real protection for the identity of Appellate Body dissents in a way that guarded judicial independence,<sup>91</sup> this protection is now illusory.

Figure 6: Authorship Detection of an Appellate Body Dissenting Opinion



#### 4 Implications of Lifting the Veil of Anonymity

Text-as-data methods of the kind used in the analysis above have only recently become widely available. Consider that just a few years ago, in 2015, Russia sought to annul an arbitral award ordering it to pay damages of US \$50 billion to investors in the oil and gas company Yukos. As grounds for the annulment, Russia argued that the tribunal had failed to fulfil its mandate since arbitrators had delegated the drafting of large parts of the award to a tribunal assistant. In presenting its case, Russia made headlines by relying on the analysis of a forensic linguistics expert to demonstrate that it was ‘extremely likely’ that tribunal assistant Martin Valasek was the

<sup>91</sup> See Dunoff and Pollack, *supra* note 4, at 236.

author of ‘significant portions’ of the *Yukos* award.<sup>92</sup> At the time, Russia’s move was unprecedented. The ability to determine authorship introduced a new element into investor-state arbitration and led to considerable stock-taking in the investment arbitration regime over the issue of the ‘fourth arbitrator’.<sup>93</sup> Our empirical analysis demonstrates that the kind of exercise that just a few years ago required calling on a forensic linguistics expert can now be done with widely available text analysis tools. This holds considerable implications since, as we have shown, the design of international tribunals, and the WTO in particular, is premised on nominal anonymity in a number of respects. If outside observers – from governments to legal scholars – are able to reliably determine the authorship of rulings, this will change the balance of power within tribunals.

Yet this may ultimately bring about a favourable outcome. Both instances of opacity by design that we focus on in this article have been the topic of quiet speculation among Geneva insiders. Such ‘open secrets’, we suggest, can lead to a suboptimal impasse. The *de jure* assurance of secrecy blocks the reforms that the *de facto* lack of that secrecy would call for. We thus conclude with some suggestions about the possible direction of future reforms in light of our findings.

## 5 Rethinking Institutional Design: The Secretariat

If an influential but unseen Secretariat was originally meant to strike a balance between a perception of judicial autonomy and the ability to oversee the work of adjudicators, increased transparency around the Secretariat’s role has two possible consequences. First, it may undermine judicial legitimacy by raising questions of who actually decides WTO disputes: appointed adjudicators or ‘faceless bureaucrats’ who lack direct accountability? Second, throwing light on the increasing influence of Secretariat staff may lead WTO members themselves to realize that what was originally their agent – initially designed to keep an eye on

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<sup>92</sup> The arbitral award was delivered under the rules of an UNCITRAL tribunal. For an overview of cases dealing with a ‘fourth arbitrator’, including *Yukos Universal*, *supra* note 32, see Carswell and Winnington-Ingram, ‘Awards: Challenges Based on Misuse of Tribunal Secretaries’, in W. Rowley, E. Gaillard and G. Kaiser (eds), *The Guide to Challenging and Enforcing Arbitration Awards* (2019) 60.

<sup>93</sup> Among others, see Newman and Zaslowsky, ‘The Yukos Case: More on the Fourth Arbitrator’, *New York Law Journal*, 28 May 2015, available at <https://www.law.com/newyorklawjournal/almID/1202727596051/TheYukos-Case-More-on-the-Fourth-Arbitrator/>; Maynard, ‘Laying the Fourth Arbitrator to Rest: Re-evaluating the Regulation of Arbitral Secretaries’, 34 *Arbitration International* (2018) 173.

ad hoc, non-professional adjudicators – may have turned into an independent actor largely operating beyond membership control. In this sense, when it comes to the Secretariat, the imbalance comes from too little control by member states.

This is why the reform advocated by some legal scholars – to appoint a permanent body of professional panellists<sup>94</sup> – might prove counterproductive. Following the theory of our argument, while such a reform might indeed reduce reliance on the Secretariat, it could make the very system of dispute settlement politically untenable, as it would further limit membership oversight over the proceedings. Indeed, the reliance on panellists appointed ad hoc from the ranks of trade diplomats sensitive to political interests is the main means by which members exercise political oversight over panels (panel reports require adoption by the DSB on which all WTO members have a seat, but such adoption is automatic unless there is a consensus against it, thereby severely limiting the political oversight by the DSB over specific dispute outcomes). One might imagine instead mid-way solutions that would maintain some control over adjudication without doing away with the largely diplomatic character of WTO panels. One example, supported by findings about the significance of the role of panel chairs,<sup>95</sup> would be to have a roster of professional panel chairs, assisted by two wing panellists who continue to be selected ad hoc from the ranks of trade diplomats.

An alternative path for reform would aim to circumscribe and clarify the role of the Secretariat. Members could limit the type of guidance provided in ‘issues papers’ for adjudicators and impose time limits on how long staff can be in an advisory position to panels or the Appellate Body (for example, an eight-year limit, as currently applies for Appellate Body members themselves). In addition, and with an eye to judicial legitimacy, members could call for greater *de jure* transparency around the role of the Secretariat: (i) greater disclosure of ‘issues papers’ and economic expertise provided by the Secretariat to adjudicators, at least within the WTO membership and (ii) greater disclosure – as used to be the case – of individual staff assisting a given panel or Appellate Body division, thereby facilitating the enforcement of rules of conduct on staff. Whatever the chosen reform is, it must be judged by its ability to meet the same objective – namely, to redress the balance between judicial autonomy and political/institutional oversight.

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<sup>94</sup> Most recently, see Wauters, *supra* note 19; Johannesson, *supra* note 55.

<sup>95</sup> See Busch and Pelc, *supra* note 55.



## 6 Rethinking Institutional Design: Dissenting Opinions

One can reason analogously with regard to dissenting opinions. Insofar as the option of anonymous dissents was originally meant to capture some of the benefits of more rigorous debate resulting from the possibility of minority opinions, while offering the dissenting member cover from political retribution, here too, the lifting of anonymity has two related effects. First, the loss of anonymity may undermine judicial autonomy and independence: if everyone can figure out who wrote a dissent, adjudicators may feel inhibited from dissenting against the interests of the country that nominated them or that could block their reappointment; conversely, when a ruling goes against such country, they may feel hard pressed to issue a dissent. Second and related, it allows WTO members to exercise greater control over adjudicators, by not reappointing adjudicators who dissented or failed to dissent in a way that upset a country's interests. In this sense, when it comes to dissents, the imbalance comes from too much political control.

One response could be for adjudicators to publicly commit to a practice of not dissenting, thereby providing for collective cover against political retribution (a step further would be to exclude dissents from the treaty altogether, as is done for the CJEU). Such a practice was seemingly the solution that Appellate Body members themselves converged on during the first decade of the WTO's existence, under the banner of 'collegiality'.<sup>96</sup> They explicitly set out a rule for themselves, committing to avoid dissenting opinions 'at all costs'.<sup>97</sup> However, as the last years of the Appellate Body's existence have shown, in the face of strong internal disagreements and outside criticism, such informal arrangements grow fragile. In addition, even a voluntary practice of avoiding dissents risks the emergence of 'groupthink'<sup>98</sup> and may stymie healthy and vigorous debate, thereby reducing the quality of rulings and locking in past mistakes. In a notable link between the two settings that we focus on in this article, a norm of consensus (and

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<sup>96</sup> The Working Procedures established by the founding bench of Appellate Body members included a commitment to avoid dissenting opinions. See WTO, *Working Procedures for Appellate Review*, 15 February 1996, WT/AB/WP/1, Rule 3.2: 'The Appellate Body and its divisions shall make every effort to take their decisions by consensus'.

<sup>97</sup> The phrase is from Lacarte-Muró, the first chair of the WTO Appellate Body. See Lacarte-Muró, *supra* note 61.

<sup>98</sup> On the relation between (non-)allowance for dissenting opinions and groupthink, see Günther, *supra* note 18.

against dissents) can actually increase the influence of the Secretariat, to whom adjudicators then turn in search of a focal point that might be acceptable to all adjudicators on the ruling division.

As above, an alternative would consist of mandating that dissents be signed, thus conferring ownership, as well as responsibility, to their authors, as happens in all other tribunals that allow for dissents. Then, to limit the possibility for short-term, case-specific political sanctioning, Appellate Body terms could be lengthened beyond the current four years, thereby expanding the portfolio of cases on which reappointment would be judged (ICJ judges, for example, are appointed for nine-year terms), or Appellate Body members could also be appointed for one non-renewable term only. This would reduce *ex post* political control over Appellate Body members once they are appointed but keep in place *ex ante* control over appointments by membership consensus. More radical reforms would be to (re)appoint Appellate Body members by some form of majority vote (as happens in most international tribunals), to exclude nationals of either disputing party to sit on an Appellate Body division (as is the case for panels, unless both parties agree) or to allow a disputing party to appoint an ad hoc member on an Appellate Body division in case the opposing party has a national on that division (similar to ad hoc judges in the ICJ). These more radical reforms are, however, highly unlikely (too little political oversight) as key WTO members such as the European Union (EU), USA and China want to retain (veto) control over the (re)appointment of Appellate Body members and highly value having a *de facto* Appellate Body seat for one of their nationals, without nationality restrictions (given the frequent involvement of especially the EU and the USA, in 48 per cent of past Appellate Body cases at least one of the three Appellate Body members was a national of one of the disputing parties). Such reforms also risk further politicizing the Appellate Body with Appellate Body members perceived as representing their country of nationality rather than being neutral, thereby also undermining judicial autonomy.

Lifting the veil of anonymity for panel dissents, conversely, may not require reform for reasons that also follow from this argument. Panellists cannot be nationals of any of the litigants or third party members (unless the litigants agree), thereby considerably reducing the risk of political pressure for panellists to dissent in favour of their country of nationality. In addition,

panellists are appointed for one case only, and seeking reappointment is a low priority.<sup>99</sup> A panel dissent, or lack thereof, may still upset one of the disputing parties. However, unlike with Appellate Body members, where reappointment requires consensus of all WTO members, panel appointments only require the agreement of the disputing parties. In a case between, say, Mexico and the USA, a dissent by one panellist may upset Mexico, but that does not prevent the dissenter from being appointed in a future dispute between, say, China and the EU. In sum, the high degree of political control over Appellate Body adjudicators is what renders the lifting of the veil of anonymity problematic. It follows that the kinds of reform required in that setting may not be required in the case of panel dissents.

## 7 Conclusion

This article takes up an unusual goal for a scholarly work. It seeks to throw light on two instances of ‘open secrets’ in an international institution. In both cases, these are beliefs that are supported by anecdotal evidence and that may be common knowledge to some insiders, but to which most outside observers are oblivious. We rely on text analysis methods to offer strong empirical support for two claims. First, we show evidence that WTO panel rulings are drafted by the institution’s permanent staff rather than the actual adjudicators appointed to those cases. It is, moreover, the dispute settlement system’s most important cases that invite the most input from the Secretariat staff, compared to panellists – these are the same disputes that go on to serve most frequently as precedent for subsequent disputes. Second, we show that the veil of anonymity that the WTO’s formal rules put on dissenting opinions is largely illusory: the suspicion that ‘at least some states believe that they can identify the authors’ is likely correct and for good reason.<sup>100</sup> If we can identify authors using widely available tools, so can well-resourced governments.

In each of these two cases, anonymity exists by design. As we show by reference to GATT/WTO history, the Secretariat’s prominent behind-the-scenes advisory function was a corrective introduced in the 1980s in reaction to explicit mistakes of law made by under-

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<sup>99</sup> Panellists are modestly paid for their services (governmental panellists receive 300 Swiss francs per day) and are most often employed full-time elsewhere or comfortably retired. Panellists often view their function as a form of ‘service’ to the trade law community. See Pauwelyn, ‘The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus’, 109 *AJIL* (2015) 761.

<sup>100</sup> See Dunoff and Pollack, *supra* note 4.

qualified adjudicators or experts without sufficient institutional connection to the GATT. The introduction of the Secretariat into dispute settlement thus constitutes a particular compromise: further legal mistakes can be avoided, while continuing to rely on the type of adjudicators, pulled from the ranks of trade diplomats, that will remain sensitive to states' interests. In the case of dissenting opinions, anonymity was seen as a means of fostering debate among adjudicators, while protecting divergent opinions from political backlash. When this anonymity was in doubt, the adjudicators themselves sought to make up for it, by committing to a practice of consensus decisions, but this norm ultimately broke down in the face of increasingly controversial legal issues.

This is not to say that the Secretariat does not play a useful function within dispute settlement. As Thomas Cottier notes in a recent article, it may be precisely because of the 'in-house expertise and experience' of the WTO Secretariat that countries turn to the WTO to resolve disputes arising between parties to regional agreements rather than using the dedicated dispute settlement systems in those agreements (most of which are modelled on the WTO).<sup>101</sup> Yet the agent may have outgrown its initial mandate in a way that member states could not have initially anticipated, and this remains largely unknown to outside observers.

Our intent in bringing these matters to light is premised on the belief that 'open secrets' constitute something of a worst-case outcome: the pretence of anonymity can hold up the reforms that would be seen as necessary if the pretence were dropped. We hope to have contributed to the dropping of that pretence. We have laid out the possible paths for reform that might be taken in each of our two settings. In both, our argument suggests that, conditional on some adjustment in institutional design, greater transparency can be attained in a way that preserves the balance between judicial autonomy and political control. Maintaining that balance remains the tricky challenge faced by all international tribunals. In this article, we have sought to lay out the function that anonymity can play in this respect and to examine what happens when the veil of anonymity is lifted.

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<sup>101</sup> Cottier, 'Recalibrating the WTO Dispute Settlement System: Towards New Standards of Appellate Review', 24 *JIEL* (2021) 515.