2005

The Role of the WTO Director-General and Secretariat

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Chapter IX of the *Report of the Consultative Board on The Future of the WTO* concerns “The role of the WTO Director-General and Secretariat.” The report generally expresses concern that the WTO secretariat, although “highly skilled” and “well-regarded” has become “more timid” and passive than in the past, and that the “mutual confidence” between delegations and WTO staff has declined. The report finds that the Director-General has become more of a “spokesperson and marketing executive” for the organization than a leader who represents a driving, proactive force in the shaping and brokering of trade negotiations, as compared to the past where Directors-General “were sometimes regarded virtually as spiritual leaders of the system.” It warns that the costs of such a trend will be “lost efficiency” and a loss of intellectual leadership.

Although this concern may be overstated, the secretariat is under direct and indirect pressure to maintain a non-assertive profile. This trend is reflected in the ever-used mantra, repeated (and lamented) in the report that that the WTO is a “member-driven organization” (although some may find a better term to be “member-riven”). Before examining what could be done, it is important that we examine the current role of, and constraints on, the secretariat.

The Role of the Secretariat. The secretariat’s role can be broken down into five major components. First, the secretariat services ongoing WTO trade negotiations, currently conducted under the Doha negotiating mandate. The Director-General chairs the Trade Negotiations Committee which was set up pursuant to the Doha Ministerial Declaration and operates under the supervision of the General Council. Second, the secretariat oversees the implementation of WTO member commitments by staffing the numerous WTO councils, committees and working groups. It has been estimated that there are over seventy different WTO councils, committees, working parties, and other groupings, involving over 2,800 meetings each year. Third, the WTO secretariat services

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all dispute settlement panels. The Consultative Board reports that the first “81 cases for which reports are adopted, and reports whose adoption is pending, amount to more than 27,000 pages of jurisprudence.” Fourth, the WTO includes informational divisions responsible for research and statistics and for communication with the media, civil society, parliamentarians and other organizations. Fifth, the WTO secretariat increasingly provides technical assistance, organized out of the Institute for Training and Technical Cooperation. It assumes all of these tasks with only around 630 persons, a larger proportion of which are translators and support staff.

Overall, the secretariat’s role is likely under-appreciated. Generally speaking, the secretariat constitutes the institutional memory of the WTO and exercises authority in this capacity. The chairs of WTO councils and committees come and go, as do dispute settlement panelists. The secretariat remains. Although the Consultative Board suggests that the Director-General should chair the General Council, it is the Director-General who sits beside and advises the chair at General Council meetings. The relative lack of visibility of the secretariat’s role does not mean that it lacks importance.

The growth in WTO membership, combined with the expansion of the WTO agreements’ coverage, has led to some organizational tension. In particular, there may be tension between the secretariat’s role as service provider for negotiations, compliance monitoring and judicial enforcement, on the one hand, and developing country assistance provider, on the other. Developed country members, for example, may be wary of a conflict between the secretariat as “honest broker” and write of panel reports, on the one hand, and as provider of assistance to certain parties, on the other. Developing countries, in contrast, may be wary of a conflict between the secretariat as provider of technical assistance and as “the guardian of the Treaty”—a concept promoted by the Consultative Board that reflects the role of the European Commission in the EC legal order. WTO technical assistance, and in particular regarding “implementation,” could merely become

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4 See Consultative Board report, pars. 341, 363.
a soft form of enforcement aimed solely at developing countries, obviating the need for formal legal complaints, including, most controversially, in intellectual property matters.\textsuperscript{7}

**Constraints on the Secretariat’s Role in a Member-Riven Organization.** Why might the secretariat be pressed by members and other factors to assume a more “passive” and less outspoken role? Simply stated, the WTO is a different organization than the former GATT. The spotlight on the WTO has risen considerably as the WTO’s membership, scope of substantive coverage, and legalization have increased. There are now 148 members compared to the GATT’s initial twenty-three. The agreements’ scope now touches delicate public policy issues such as the regulation of pharmaceutical and agricultural patents and basic telecommunications, financial and other services. Dispute settlement decisions now commonly make the front page of newspapers around the world. Developing countries, in particular, have become more active, advocating that the WTO must be more responsive to their development needs and demanding “internal transparency” of deal-making. The WTO’s increased profile has raised public legitimacy challenges, as reflected in the demonstrations that routinely accompany its ministerial meetings, starting in Seattle in 1999. The major reason that we now hear the mantra “the WTO is a member-driven organization” is to shield the organization from legitimacy challenges as an autonomous decision-making entity not subject to national political control.

In many ways, this chapter of the Consultative Board’s report reflects nostalgia for an (idealized) GATT of the tenures of Arthur Dunkel and Peter Sutherland, a GATT that has forever gone. In fact, one can reasonably speculate that Peter Sutherland had the largest hand in the drafting of the chapter. Today the WTO operates less as a closed “club,”\textsuperscript{8} and is rather constantly subjected to scrutiny by the media, non-governmental organizations, and an enlarged membership that must respond to these media and civil society challenges. Although the WTO is often criticized for a lack of “transparency,” it is much more transparent than the former GATT and, indeed, than most international


organizations. In short, the WTO has become more politicized.\(^9\) Thus, to understand the prospects of the secretariat asserting a greater role, we need to examine what WTO members demand (an interest-based analysis) and what the system can accomplish in light of legitimacy challenges (a sociological organizational analysis).

**Developed Country Concerns.** The WTO’s largest members, and the United States (US) in particular, will likely remain skeptical of the value of an enlarged and more independent WTO secretariat. The fact that the report speaks of the “micro-management” of the WTO budget by members reflects this concern. To the extent that the secretariat is under-resourced, it is because those who pay into its budget do not want to see an increase in the secretariat’s size.\(^{10}\)

Larger and wealthier WTO members may feel that an enlarged secretariat will not serve their interests because it will be harder to oversee and control. Moreover, they may be concerned that the organization could become less efficient, operating more like that bugbear of many members of the US Congress—the United Nations—becoming another sinecure for international civil servants that wastes taxpayer money. The European Community (EC) will more favorably view a larger independent secretariat in light of the EC’s internal experience and its stronger political support for multilateral organizations. The recent check on the creation of a constitution for the European Union, however, shows the limits to European support of international organizations as well.

There are nonetheless reasons that larger members could support a stronger secretariat and Director-General. First, there is frustration at current decision-making within the WTO, which was reflected in the labeling by (then EC Trade Commissioner) Pascal Lamy of the WTO as a “medieval organization.” The larger WTO members may have been able to dominate the organization in the past when the GATT was smaller, but they have more difficulty in shaping the agenda today, resulting in negotiating stalemate. They have an interest in a more efficiently run organization to advance their concerns.

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\(^{10}\) The WTO secretariat’s total size has grown by about 20% in the last five years (from 525 in 2001 to 630 in 2005), and its budget has increased by about 26% during this period (from SF 134,083,610 in 2001 to SF 168,703,400 in 2005). Cf. WTO Annual Report 2001, available at [http://www.wto.org/english/news_e/pres01_e/pr226_e.htm](http://www.wto.org/english/news_e/pres01_e/pr226_e.htm), at 136-148, with the figures listed for 2005 on the WTO web site, available at [http://www.wto.org/english/thewto_e/secree_e/intro_e.htm](http://www.wto.org/english/thewto_e/secree_e/intro_e.htm). Those who support greater growth of the organization maintain that demands on the organization, including on account of its membership, scope and public profile, have risen to a much greater extent.
In addition, there is less of a risk of the WTO becoming a UN-type organization because of the technical nature of its work reflected in on-going negotiations involving the formulae for tariff and agricultural subsidy concessions, the details of commitments for services trade, the monitoring of member notifications and obligations in WTO committees, and the complex jurisprudence generated by the WTO’s multi-stage dispute settlement system. The secretariat will, in any case, remain attentive to the interests of the larger trading nations precisely because of the importance of their support for the functioning of the overall system. If the US or EC were to pull back, the system would founder, which is not the case regarding other members.11

As for smaller developed countries, they should look more favorably on a stronger secretariat to defend their interests in an open trading system, just as smaller trading nations have traditionally done within the EC. The WTO can facilitate access for their products in the world’s largest markets, and help ensure that they are not discriminated against in other markets where large countries exercise political influence, a concern aggravated by the increasing number of US and EC bilateral trade agreements.

**Developing Country Concerns.** As for developing countries, their positions will also vary in light of their particular situations, but we can again note some general considerations. First, there are reasons that developing countries should favor a larger and more independent secretariat. Many of these countries lack internal trade law expertise and, since most of them are small and poor, there are greater opportunity costs for them to develop internal expertise in WTO matters in light of other demands.

In addition, more powerful members are better able to exercise pressure on smaller members both to adhere to WTO rules and to forebear from challenging violations because of the carrots and sticks that larger members hold. They may not always use these carrots and sticks, but the carrots and sticks are in the background. Small members, in contrast, are less able to exercise extra-legal political and normative pressure. An independent secretariat can be helpful to them.

In the dispute settlement context, in particular, developing countries could benefit from greater assistance from the secretariat. The process of preparing disputes is much more complicated than mere litigation. In the domestic socio-legal literature, the stages

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11 The US and EC would not need to withdraw formally from the system, but merely pay it less attention, as they may already be doing with their focus on bilateral and regional trade agreements.
of dispute resolution are referred to as “naming, blaming and claiming.” Although developing countries currently benefit from the Advisory Centre on WTO Law, the centre focuses only on the ‘downstream’ dimension of enforcement, not on the ‘upstream’ collection of information.” A division of the secretariat, or a semi-independent agency for technical assistance, could provide greater assistance in this respect.

As regards actual litigation, developing countries’ trading sectors are small so that these countries tend not to bring cases of comparable importance for their economies. They also face political issues in bringing a case against a big country, such as a potential loss of foreign aid. In the internal EC context, member states almost never bring cases against each other, but rather rely on the Commission to bring cases and to bargain for settlements in the shadow of a potential case. The Commission does not appear to hesitate before bringing a case against a larger member more than a smaller one. Such a far-reaching change is not feasible under the current WTO system, both because many members would block it and because independent action by a prosecutorial division of the secretariat would subject the system to even greater legitimacy challenges. This prospect nonetheless demonstrates why many developing countries could favor a stronger secretariat.

Yet developing countries will also be wary of a larger more proactive secretariat because of their concern about systemic (and perhaps unconscious) pressure on the secretariat to accommodate the interests of the WTO’s most important trading members. In trade negotiations, for example, Braithwaite and Drahos found evidence that the

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13 Bernard Hoeckman & Michel Kostecki, The Political Economy of the World Trading System: the WTO and Beyond, 2nd edition, (2001) pp. 94-95 (also noting that “One option to deal with the information problem is for the private sector to cooperate and to create mechanisms through which data on trade... barriers are collected and analyzed”). See also Gregory Shaffer, “The Challenges of WTO Law: Developing Country Strategies for Adaptation,” World Trade Review (forthcoming).
15 The largest numbers of cases before the European Court of Justice, however, are references from national courts, concerning questions of EC law, of cases brought by private parties.
16 A proposal that would face similar challenges would be for a division within the secretariat to play a role analogous to that of the Advocate General before the European Court of Justice.
Directors-General under the GATT favored larger members because of structural incentives to account for (and appease) their demands in order to reach a deal that would enhance the Director-General’s own profile.\footnote{See John Braithwaite & Peter Drahos, \textit{Global Business Regulation} (2000), at 196. See also Richard Richard Steinberg, \textit{In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO}, 56 \textit{International Organizations} 339 (Spring 2002).} The larger members also have more negotiating resources so that they may be more likely to succeed in getting their issues in the Director-General’s “neutral” negotiating text through persistent, pro-active engagement. As Braithwaite and Drahos note regarding the modeling of negotiating texts, quoting a US diplomat, “the fact that the model is in a Director-General’s text gives it an air of neutrality.”\footnote{Braithwaite & Drahos, at 216.}

Similarly, developing countries sometimes distrust the secretariat’s provision of technical assistance. As an African representative to the WTO states, “The problem [with the WTO secretariat’s capacity building program] is that it is ideological. They come to tell us what to think, what our positions should be.”\footnote{See Shaffer, Can WTO Technical Assistance, supra note…} The representative maintained that WTO technical assistance is often about “the use of ideas to transform developing country negotiating positions.”\footnote{Id.} Technical assistance regarding implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), in particular, can be controversial. The concept of capacity building is to help people think for themselves, not to tell them what to do or what they can do in light of “negotiating realities.” Yet developing country officials sometimes fear that the latter dynamic prevails, especially where they lack capacity to monitor the technical assistance provided.

\textbf{Legitimacy Concerns.} Legitimacy challenges also constrain secretariat action. The WTO is under broader public scrutiny and challenge today. A stronger more activist secretariat could stir anti-WTO sentiment, not only among anti-WTO social movements, but within governments themselves. Developing countries could revolt against a Director-General exercising a strong hand, complaining of the lack of transparency, consultation, and recognition of their positions. To the extent that many members believe that WTO treaties are unfair toward developing countries, and in particular the TRIPS
agreement, then they will not want the secretariat to promote such “unfairness.” Within the internal US context, references by some US senators to the Appellate Body as a “kangaroo court” also do not bode well for a strong independent secretariat. Decisions by an independent secretariat become an easy target for politicians in developed and developing countries alike.

Proposed Changes in Secretariat. Some incremental changes nonetheless may be possible to achieve. For example, the Consultative Board’s suggestion of placing WTO-related technical assistance and capacity building programs in a semi-independent agency should be considered. Officials could be seconded to this agency from organizations such as the World Bank and UNCTAD. Secretariat members from WTO operational divisions could be included where needed since they will hold the most up-to-date knowledge and experience on WTO developments. This institutional development would provide greater autonomy to those who engage in capacity building and it would reduce internal tensions with the secretariat’s “brokering” and “guardianship” roles.

The secretariat could play a greater role in presenting structured information and assessments before relevant WTO committees concerning member’s meeting their various commitments, whether regarding proposed regional and bilateral trade agreements in relation to the requirements of GATT article XXIV, notification obligations before the SPS, TBT and other committees, and assessments under the Trade Policy Review Mechanism. Although there is no prospect of the secretariat becoming more active in a prosecutorial role, the secretariat could provide information to help structure analysis of members’ meeting of their obligations, a task that could particularly benefit members having fewer internal resources.

Changes could also be made to address the delicate situation that the secretariat faces in providing “support” for panel decisions, an issue which is implicitly touched upon in another chapter of the Sutherland report. As is well known, the secretariat can

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21 This point was made by a representative to the WTO from a developed country in a discussion in February 2005.
22 Congressional Record, S4308-26 (online ed., May 14, 2002) (remarks of Senator Baucus, former Chair of the Senate Finance Committee). Senator Baucus has also maintained that “WTO dispute settlement panels are legislating.... They are making up rules that the United States never negotiated.” Speech on Senate floor, Sept. 26, 2002.
23 The Consultative Board notes, in paragraph 257 of Chapter VI on “The WTO Dispute Settlement System,” that “a combination of roster and ad hoc appointments might serve the institution very well and ease somewhat the particular problems that have been witnessed in a few of the panel selection.
wield considerable authority in determining legal outcomes.\textsuperscript{24} It is able to do so, in particular, because of the ad hoc panel selection process. Some practitioners in Geneva find that the problem is most acute where developing countries are the only parties to a dispute and the secretariat appoints less experienced panelists to these cases.\textsuperscript{25} To alleviate these concerns, the WTO dispute settlement system would need to provide for professional panelists—in short, to become more like a court. Alternatives include appointing professional panelists designated for a fixed term (along the lines of the Appellate Body), adopting a compromise involving a mix of permanent and ad hoc panelists, and maintaining a smaller roster of experienced candidates from which to choose. Without such change, ad hoc panelists will remain more dependent on the secretariat’s legal analysis as to the “right” outcome.

Weiler maintains that if the secretariat is to play an independent role in the dispute settlement system, it should do so more transparently by publishing its legal opinions, much as the European Commission does before the European Court of Justice, so that the parties may respond to them.\textsuperscript{26} This development, however, would depend on panels being able to operate competently on their own with traditional legal clerks. This would require a more permanent set of panelists, as done for the Appellate Body. Although the secretariat may not wish to assume such a public profile in WTO disputes for reasons noted earlier, it may be preferable to the less transparent, but authoritative role that the secretariat often plays in current panel decision-making.

As regards the Director-General, the report recommends that the General Council spell out “powers and duties,” and that these duties should (“arguably”) include the chairing of the General Council. In practice, however, a definition of powers and duties would be constrained and likely have little effect on what the Director-General does. Change will more likely depend on the personality of the Director-General and the

\textsuperscript{24} See e.g. Joseph Weiler, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement,” 25:2 Journal of World Trade 191 (April 2001), also available as Jean Monnet Working Paper 9/00, \url{http://jeanmonnetprogram.org/papers/00/000901.html}. (“The views of the Secretariat as to the proper outcome of a dispute will, thus, come out and more invidiously will be consciously and subconsciously pushed upon the Panel. The ability of Panels to be aware of this and to resist it varies considerably”).

\textsuperscript{25} Interviews, Geneva, July 19-21, 2005.

\textsuperscript{26} Weiler, The Rule of Lawyers, supra note…. In such statement, neither Weiler nor I am suggesting that the secretariat is, or should be, anything like the European Commission.
Director-General’s relation with members and secretariat staff in a given political-economic context.

The report hopes that the new Director-General will assume a greater leadership role in the organization so that the WTO operates under a more unified corporate-like structure. For example, the Director-General could be a more hands-on manager of secretariat personnel in respect of their appointment, removal and allocation and assignment. Similarly, the Director-General could play a greater role in defending secretariat staff from member pressure so that their work is not silenced. In terms of organizational culture, however, the WTO is (and will remain) far from a “corporation” and its Director-General far from a “chief executive officer,” however far the Sutherland report pushes this corporate analogy.\footnote{27}{Mr. Sutherland was Chairman of BP p.l.c and Chairman of Goldman Sachs International when he chaired the Consultative Board.}

As for the Director-General’s selection, the Consultative Board makes technocratic-oriented suggestions that would broaden the search for candidates. Most members, however, will remain wary of changes that reduce their political control since the Director-General can exercise influence in negotiations. The latest appointment process was nonetheless highly successful. The candidates placed their proposals on the WTO website. They met with members collectively and individually. The members gave their views to the Chair of the General Council, which led, following three rounds after each of which one candidate withdrew, to a consensus around Mr Lamy. There is promise that Mr Lamy will be a strong leader, one who will master technocratic details and gain the respect of the secretariat staff. Mr Lamy, in this regard, has an advantage over many of his predecessors simply from a cultural perspective, since the vast majority of the secretariat is European.\footnote{28}{In fact, the greatest number is French (165 out of 630), although this number includes support staff. Figures available on the WTO web site at \url{http://www.wto.org/english/tratop_e/wto_eIntro_e.htm}.}

The report next recommends that the secretariat have only two (or at most three) deputies, with one serving as a sort of “chief executive equivalent” in Geneva to the extent that the Director-General travels globally. The report suggests that the deputies reflect political considerations and provide little value added for their cost. The deputies, however, can act as senior WTO interlocutors with their regions and thus facilitate
organizational appreciation of regional developments, consensus-building in negotiations, and member support of the organization. If insiders question if this role has been accomplished, then the problem may lie in the deputies chosen and not in the post. Mr Lamy has boldly advertised for these positions, suggesting that he wishes to play a greater role in their selection. Whether or not key members will permit him to do so is another matter.

Finally, the report turns to changes in the secretariat itself, proposing a larger secretariat operating under a bigger budget. It notes staff dissatisfaction because of low pay and slack management. It maintains that salaries must remain more competitive to attract top people, as in economics and in law. The report is correct, but whether members who pay the largest portion of the budget will provide funds to increase salaries remains in doubt.

As regards the WTO secretariat’s analytic function, the report laments that the WTO’s economic research is not given as much priority as in other organizations such as the World Bank. The problem, however, remains in the contractual nature of the WTO compared to that of other institutions. WTO members fear that research conducted within the WTO can affect bargaining contexts and the judging of disputes by panels and the Appellate Body. For example, although the secretariat could play a useful role in engaging in objective analysis of the impact of negotiating proposals on development—a task that already lies within the mandate of the secretariat’s trade and development division, but apparently has yet to be operationalized—that analysis would be controversial in a politically-charged negotiating context. Such work is more likely to be conducted by the World Bank, UNCTAD or other organizations, preferably in liaison with the trade and development committee.

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30 The United States and Germany contribute the most to the budget, around US $21 million and US $12 million respectively. See http://www.wto.org/english/thewto_e/secree_e/contrib05_e.htm. Although these are small amounts in terms of their overall government budgets, they have opposed budgetary expansion. Most developing countries will likely favor a better-resourced secretariat, while remaining wary of it becoming more independent.

31 I thank Otto Genee for this point. We participated in a panel concerning this chapter of the report at the conference “In Search of Effective Global Governance: The Case of the World Trade Organization,” at Maastricht University, Feb. 4-5, 2005.
**Conclusion.** There are reasons to favor enhancing an independent role for the WTO secretariat, at least incrementally. Yet significant checks on such a development remain on account of the WTO’s more politically sensitive policy coverage, its more prominent public profile, and ongoing challenges to the legitimacy of its decisions.