

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

THE ROLE OF THE REGISTRY AND LEGAL DIVISION OF THE AFRICAN COURT OF HUMAN AND PEOPLE’S RIGHTS IN DISPUTE SETTLEMENT

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This Essay explores whether the African Court of Human and People’s Rights’ (African Court) Registry and Legal Division have a similar expansive role in the dispute settlement mechanism as the World Trade Organization’s (WTO) Secretariat. The African Court is the African Union’s regional body for enforcing human rights. This Essay contributes to the scholarship on African international courts by testing the central arguments in Pauwelyn and Pelc’s “Who Guards the ‘Guardians of the System’? The Role of the Secretariat in WTO Dispute Settlement”¹ through a comparative analysis of the role of the Secretariat within the African Court.² Despite the growing jurisprudence and influence of Africa’s international courts, they continue to be neglected by mainstream scholarship of international courts and tribunals. This is evident in Pauwelyn and Pelc’s article, which does not refer to any of Africa’s seven international courts and tribunals. For that matter, the article makes no reference to any international tribunal outside Europe or the United States.³ Our analysis illustrates the fact that the influence of the African Court’s Registry and Legal Division (Registry) in the process for dispute settlement is not as significant and concerning as that of the WTO Secretariat. As such, the influence of the Registry on the outcome of a case is significantly limited and does not raise any legitimacy crisis like the WTO. We attribute this disparity to the operational and structural disparities between the African Court and the WTO. In the following paragraphs, we examine each of the factors that Pauwelyn and Pelc raise concerning the influence of the WTO staff in WTO panel and Appellate Body proceedings⁴ in the context of the functions of the African Court Registry.

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¹ Joost Pauwelyn & Krzysztof Pelc, *Who Guards the ‘Guardians of the System’? The Role of the Secretariat in WTO Dispute Settlement*, 116 AJIL 534 (2022).

² Our analyses draw on useful feedback based on: Interview with the Legal Division Senior Officer A (Aug. 16, 2022); Survey Report of the Legal Division Senior Officer B (Aug. 16, 2022); Survey Report of HR Department (Aug. 16, 2022), and Survey Reports of General Registry Senior Officers A & B (Aug. 16, 2022). For the full questionnaire, see O.D. Akinkugbe & Morris K. Odeh, *Research Questionnaire – Registry and Legal Division of the African Court*, AFRONOMICSLAW BLOG (Oct. 12, 2022).

³ For a discussion on the Inter-American Court of Human Rights (IACHR), see the contribution by Pablo González Domínguez to this symposium.

⁴ *Pauwelyn & Pelc*, *supra* note 1, at 550.

The Tasks Performed by the African Court's Registry

The first factor relates to the tasks that African Court Registry and Legal Division staff perform. According to Pauwelyn and Pelc, WTO staff perform eight major tasks that cumulatively account for their expansive role in the adjudication process: the appointment of panelists; financial control of panelists and appellate body members; setting the timetable and working procedures; drafting the panel and Appellate Body questions to the parties; providing expert advice on non-legal issues; participating in hearings and internal deliberations of the panelists and Appellate Body members; and drafting of the panel and Appellate Body report.⁵

Our analysis reveals that the Registry of the African Court also play a substantive role in five of these eight major functions. The African Court's Registry reviews the parties' claims and identifies the procedural and substantive issues to be decided in each case.⁶ The Registry staff participate in judges' internal deliberations on cases, except where the matter concerns their national state.⁷ They also draft questions to the parties if there is a need for further clarification and write the first drafts of judgments or rulings of the African Court.⁸ While these functions appear similar to those undertaken by the WTO Secretariat, the African Court Registry performs these tasks under the supervision and direction of the judges of the African Court.⁹

However, the Registry does not have an influence on the appointment of the African Court's judges.¹⁰ The judges are nominated individually by the Assembly of Heads of State and Government of the African Union, for a period of six years and may be re-elected only once.¹¹ Hence, unlike the appointment process of WTO ad hoc panelists and Appellate Body members,¹² the staff lawyers play no role in the appointment of judges of the African Court.¹³ Therefore, while Pauwelyn and Pelc argue that "panelists or [Appellate Body] members that are seen as having 'overreached' can be blacklisted or see their re-appointment blocked" by the WTO staff,¹⁴ there is no such comparable power at the African Court.

Further, the structure of remuneration of the African Court judges differs from that at the WTO. In comparison to the WTO, there is no requirement in the African Court for staff members to approve the number of days that judges have worked, payment requests, and accompanying expense reimbursements. As such, the leverage that staff members of the WTO Secretariat have on the financial remuneration of adjudicators is non-existent in the context of the African Court. The African Court's judges receive a fixed monthly compensation package, which comprises their salaries, judicature, intersession, and administrative allowances, as well as an honorarium during ordinary court sessions.¹⁵ In relation to expert evidence on non-legal matters, the African Court does not accept

⁵ *Id.* at 538–39.

⁶ Interview with the Legal Division Senior Officer A (Aug. 16, 2022); Survey Report of the Legal Division Senior Officer B (Aug. 16, 2022).

⁷ *Id.*; see also [Rules of the African Court on Human and Peoples' Rights, 2020](#), Rule 67.

⁸ *Id.*

⁹ [Rules of the African Court on Human and Peoples' Rights, 2020](#), *supra* note 7, Rule 16(4).

¹⁰ [Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights](#), entered into force Jan. 25, 2004, Art. 14.

¹¹ *Id.* Art. 12.

¹² See [Pauwelyn & Pelc](#), *supra* note 1, at 540.

¹³ Survey Report of Human Resources Senior Officer A (Aug. 16, 2022); Interview with the Legal Division Senior Officer A (Aug. 16, 2022); Survey Report of the Legal Division Senior Officer B (Aug. 16, 2022).

¹⁴ [Pauwelyn & Pelc](#), *supra* note 1, at 557.

¹⁵ Survey Report of HR Department (Aug. 16, 2022).

expert evidence from staff.¹⁶ Such evidence may only be adduced by the parties to the dispute. The litigants are expected to provide credible evidence to support their claims and explain technical terms relating to non-legal matters to judges.¹⁷ This procedural approach contrasts with the WTO, where adjudicators can “receive technical help from non-legal WTO staff on substantive questions in dispute.”¹⁸ Similarly, the limited influence of the Registry is evident in the Africa Court’s timetable and working procedure. The Rules of the Court provide that the Court shall meet four times a year in regular sessions lasting four weeks each, totalling about four months in a year, and in special sessions as necessary.¹⁹ Although the legal officers set the agenda and timetable for each year, they are subject to judicial approval.²⁰

In essence, among the eight combined major tasks enumerated by Pauwelyn and Pelc that are performed by the WTO Secretariat, the Registry of the African Court undertakes five of them. The WTO Secretariat thus plays a more expansive role compared to the Registry of the African Court. The critical difference lies in the appointment and remuneration processes. To the extent that the African Court Registry is not involved in the appointment and remuneration of the judges, its influence in the dispute settlement process is consequently limited.

Asymmetries Between African Court Staff and Judges

Three elements are critical in determining the asymmetries between the legal expertise of the staff and the judges of the African Court: the size of the Legal Division, the legal expertise of the judges, and the level of scrutiny of the drafts. First, the African Court, like the WTO, has a Legal Division that is responsible for the management of cases and the preparation of relevant documentation. However, the size of the Legal Division of the African Court is relatively small in comparison with the size of the legal affairs division of the WTO’s Secretariat. The African Court’s team currently consists of twelve permanent lawyers representing about 14 percent of the African Court’s staff vis-à-vis the ninety-lawyer staff strength of the WTO.²¹ The small size of the African Court’s Legal Division is likely to affect the amount of time and effort a legal officer can dedicate to a case and exert influence on its outcome.

Second, the lawyers in the Legal Division of the African Court accumulate knowledge over time in a manner comparable to the experience and expertise of WTO staff lawyers. This experience—which includes a better grasp of the Court’s case law and procedures—puts the lawyers in a more advantageous position compared to the judges who perform their functions part-time (except for the president of the Court) and for a limited term.²² Although the Court is not legally bound to follow its past decisions, it usually relies on its precedent in making decisions as a matter of convention to enhance the Court’s credibility and predictability. In this regard, the legal officers are responsible for conducting legal research and recommending the appropriate precedent. This reference to precedent increases the influence of the African Court’s staff as they are likely to refer to past decisions where they were involved in the internal deliberations and drafting of the rulings and judgments.

However, unlike the WTO adjudicators, who are pulled from the ranks of trade officials and diplomats and employed only for a particular case, the judges of the African Court are legal experts with experience in judicial matters. In order to be eligible for appointment to the Court, they must “possess the qualifications required in their

¹⁶ Interview with the Legal Division Senior Officer A (Aug. 16, 2022); Survey Report of Registry Senior Officers A & B (Aug. 16, 2022).

¹⁷ *Id.*

¹⁸ Pauwelyn & Pelc, *supra* note 1, at 542.

¹⁹ Rules of the African Court on Human and Peoples’ Rights, 2020, *supra* note 7, Rule 22.

²⁰ Interview with the Legal Division Senior Officer A (Aug. 16, 2022).

²¹ Survey Report of Human Resources Senior Officer A (Aug. 16, 2022).

²² Protocol, *supra* note 10, Art. 15.

respective countries for appointment to the highest judicial offices, or are jurists of recognized competence in international law.”²³ In addition to their legal expertise, the judges can remain in office for as long as twelve years.²⁴ For new judges, “an orientation exercise is usually organized for them, and there are handover documents for them to consult to bring them up to speed.”²⁵ In our view, these features mirror the accumulated experience of the staff lawyers and limit the latter’s influence on the outcome of a case, as judges can exercise independent legal discretion based on their own legal training and experience. This experience, combined with the fact that the Registry is not involved in the judges’ appointment and remuneration, means that judges can analyze the relevance of each judicial precedent without fear or favor, and even reject them.

Third, the level of scrutiny involved in the preparation and delivery of the Court’s decisions may compensate for whatever asymmetry may exist in the relationship between staff lawyers and judges. Before a decision is delivered, at least three judges must have reviewed and approved it following a two-stage preparation process.²⁶ At the first stage, the Legal Division compiles the list of cases due for decisions based on certain established criteria. If the judges approve the list, the legal officers overseeing the matter produce the first draft of the decisions together with their supervisors from the Legal Division. Thereafter, all the lawyers in the division review the draft decision based on an existing administrative “peer review system.”²⁷ At the second stage, the draft decision (technically considered a recommendation) is forwarded to the judge rapporteur who has been working with the legal officer on the matter.²⁸ After the judge rapporteur examines and approves the draft decision, it is forwarded to the Bureau of the Court (consisting of the president and vice president of the Court) or the plenary of the Court (consisting of all the judges) for their examination and delivery.²⁹ The Court’s final decisions are either delivered by the Bureau or the plenary. In all these instances, individual judges reserve the right to dissent or collectively reject the draft decisions if they are not satisfied with them.³⁰ For matters that are non-contentious, administrative, or procedural, the decision is delivered by the Bureau, while for cases that are complex, contentious, or novel, the decision is made by the plenary.³¹

This layered review process ensures that any final decision of the African Court sufficiently reflects the considered views of the judges. This explains why there have been separate and dissenting opinions by the judges of the African Court in 106 out of 331 decisions.³² This is a high dissent rate, which contrasts with the WTO setting where dissents by individual adjudicators are avoided and consensus decisions are preferred.³³ Pauwelyn and Pelc attribute the unusually low dissent rate in the WTO to the significant influence of WTO staff for coherence.³⁴ This is lacking in the African Court. This difference further establishes that, like traditional law clerks, the impact of legal officers in the Court’s proceedings is limited to their research and administrative skills and experience.

²³ *Id.* Art. 4.

²⁴ *Id.* Art. 8.

²⁵ Interview with the Legal Division Senior Officer A (Aug. 16, 2022).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *The African Court Cases* (2022).

³³ *Pauwelyn & Pelc*, *supra* note 1, at 542.

³⁴ *Id.* at 561.

The Registry's Control Over Judges

The structure of the African Court requires staff to follow the judges' instructions and report to them regularly. The African Court's Registry does not have control over judges.³⁵ Instead, their role can be likened to that of agents or traditional legal assistants.³⁶ This agency relationship between the judges and the staff is further reflected in how the Registry staff are recruited and promoted. It is the responsibility of the judges to recruit, appoint, promote, and manage the employment status of the Registry. While the "Appointments, Promotions, Recruitments Oversight Board" and the "Committee of Judges on Administration, Budgetary and Financial Matters" are responsible for the appointment and promotion of professional staff, the Board and the Bureau of the Court are responsible for general services positions.³⁷ Thus, the Registry staff is accountable to the Bureau, the Board, and the Committee, which are all made up of judges. This contrasts with the situation in the WTO, where all staff are appointed (and promoted) by the director general, without any formal role for the panelists or the Appellate Body. Further, unlike the WTO, where the staff is assigned to the panels and the Appellate Body, the legal officers in the African Court are assigned to the individual judges in respect of specific cases. This gives the judges more control, relative independence, and authority over the management of cases. The legal officers (as law clerks and agents) are accountable to the judges and follow their instructions. The judges can even make a case for their replacement.³⁸

Finally, while legal officers prepare the first drafts of rulings and judgments, they are only considered internal recommendations. Although in most cases, the recommendations are adopted as the decisions of the Court, there are instances during the judges' internal deliberations, where the Bureau or plenary has rejected some recommendations for not reflecting their position on the matter.³⁹ To avoid such rejection, the legal officers are likely to follow the opinions expressed by the judges during the preliminary internal deliberations and hearings of the cases. Similarly, the judge Rapporteur or the plenary also reviews and approves the questions prepared by the staff before they are sent to the parties. This is also a significant restraint on the nature of the questions that the legal officers can raise.⁴⁰

Conclusion

This Essay contends that the influence of the African Court's Registry and Legal Division in the Court's process for dispute settlement is not as significant and concerning as that of the WTO Secretariat. Both the WTO Secretariat and the Court's Registry are similarly involved in setting the working procedures of their tribunal and court, drafting questions for the parties, identifying issues to be decided, participating in internal deliberations of the panelists and judges, conducting research based on precedent, and preparing the draft rulings or judgments of their tribunal and court.

Unlike the WTO Secretariat, the African Court Registry does not play a role in appointing judges. Instead, it is the judges that are involved in hiring, promoting, and firing the administrative and legal officers. The Registry does not exercise any form of financial or technical control over the judges and the asymmetries in expertise between

³⁵ Interview with the Legal Division Senior Officer A (Aug. 16, 2022).

³⁶ *Id.*

³⁷ [Rules of the African Court on Human and Peoples' Rights, 2020](#), *supra* note 7, Rules 18, 20; Survey Report of the Legal Division Senior Officer B (Aug. 16, 2022).

³⁸ Interview with the Legal Division Senior Officer A (Aug. 16, 2022).

³⁹ *Id.*

⁴⁰ *Id.*

the judges and the legal officers, if any, are insignificant given the knowledge and experience of judges. Therefore, the influence of the Registry on the outcome of a case is significantly limited and does not raise any legitimacy crisis like the WTO. As we argue, this difference can be attributed to the operational and structural disparities between the African Court and the WTO.

Finally, unlike the WTO Secretariat, whose role is “purposefully kept opaque by the institution,”⁴¹ the African Court Registry’s administrative and legal support tasks are not shrouded in opacity. The Court is transparent as to the tasks being performed by the Registry and Legal Division in the Court’s dispute settlement mechanism. This openness and transparency were evident in our interviews with senior members of the Registry and Legal Division of the African Court. Consequently, in the case of the African Court, there is no basis for recasting the nature of its dispute settlement process as “more akin to a process of administrative or agency review.”⁴²

⁴¹ [Pauwelyn & Pelc](#), *supra* note 1, at 563.

⁴² *Id.* at 564.