

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 SECRETARIAT IN THE INTER-AMERICAN COURT OF HUMAN
RIGHTS: A COMPARATIVE ANALYSIS

*Pablo González Domínguez**

In “Who Guards the ‘Guardians of the System’? The Role of the Secretariat in WTO Dispute Settlement,”¹ Joost Pauwelyn and Krzysztof Pelc argue that the Secretariat of the World Trade Organization (WTO Secretariat) has more influence over dispute resolution than the staff of any comparable tribunal. This influence is the result of the institutional design of the WTO, but also of unexpected factors that extended the mandate of the WTO Secretariat beyond what was originally conceived. The authors claim that this influence has brought benefits but has also raised questions of legitimacy and accountability. It has also had unintended—and not necessarily positive—legal effects. In this Essay, I offer a comparative view of the Secretariat of the Inter-American Court of Human Rights (the IACtHR Secretariat). I first wish to complement Pauwelyn and Pelc’s analysis and provide another point of reference to understand the degree of influence that the WTO Secretariat has over dispute resolution. Second, I wish to provide some comparative insights as to the benefits and challenges that come with the existence of a permanent Secretariat playing a pivotal role within international judicial or quasi-judicial systems.

The Inter-American Court of Human Rights and Its Secretariat

The IACtHR was established in 1979. The Court’s bench consists of seven judges who are elected for a term of six years that can be renewed one time.² Judges do not always exercise their functions at the seat of the Court in Costa Rica. Instead, they meet in person for “regular” and “special” sessions.³ The sessions are usually held in San José, and some are held in the state parties to the American Convention on Human Rights (the Convention). During these sessions, judges work together for periods of two to three weeks to address any institutional, jurisdictional, or diplomatic activity that is required in the exercise of their mandate. Beyond these in-person sessions,

** Staff Attorney at the Inter-American Court of Human Rights and Lecturer on International Human Rights Law in Universidad Panamericana, Mexico City, Mexico. This Essay reflects the personal opinion of the author and does not represent the official position or opinions of the Inter-American Court or any of its members.*

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 [American Convention on Human Rights](#), Nov. 22, 1969, Arts. 53–55.

³ As a result of the COVID-19 pandemic, most sessions have been held virtually since 2020. See [2021 Annual Report of the Inter-American Court of Human Rights](#), at 24. Sessions are usually referred to, in Spanish, as *Periodos Ordinarios de Sesiones (POS)* and *Periodos Extraordinarios de Sesiones (PE.S)*. These terms are officially translated as “regular” and “special” sessions.

they continue to carry out their work remotely while also carrying out other professional activities. The reason for this work scheme is solely practical: since judges are not employed full time due to a limited budget, they do not dedicate themselves exclusively to the Court's work and are not required to reside at the Court's headquarters.

However, this does not mean that the Court only performs its functions during the regular and special sessions. Judges work with the Secretariat, which consists of around seventy-three permanent officials who work and live in Costa Rica. These officials are under the authority of the secretary of the Court, who coordinates the work of the Court and carries out the orders of the judges. The different departments of the Secretariat can be classified as follows: (1) the secretaries (the secretary and the deputy secretary); (2) the legal department (the legal director, the staff attorneys and their legal assistants); (3) the administrative department; and (4) other departments (the library, international cooperation, the communications department, etc.).⁴ The Secretariat is autonomous in relationship to the Organization of American States, so the secretary is subject only to the authority of the Court. Therefore, it is the Court that has the power to appoint and remove the secretary from his functions or re-elect him to the position. At the same time, the secretary is the authority in charge of appointing and directing the Secretariat's staff.⁵

The secretary has a series of functions defined by the Statute and the Rules of Procedure of the Court, which include the following: processing the correspondence of the Court; directing the administration of the Court, pursuant to the instructions of the presidency of the Court; preparing drafts of the work schedules and regulations, and budgets of the Court; planning, directing, and coordinating the work of the staff of the Court; and carrying out the tasks assigned to him by the Court or the presidency.⁶ This wide spectrum of functions makes the secretary a key institutional actor in conducting the day-to-day affairs of the Court. It is true that the secretary acts in constant coordination with, and under the direct orders of, the judges and the presidency of the Court.⁷ But he has a significant degree of autonomy to perform the legal and administrative functions necessary for the fulfillment of the Court's mandate. Even more, the secretary may be re-elected every five years, with no term limit. This means that he can outlast judges in their positions, even those who are re-elected.

The secretary is also responsible for supervising the legal department of the Secretariat. This department consists of staff attorneys of different nationalities (mostly from Latin American countries) and their legal assistants, who are in charge of carrying out the tasks related to all matters falling within the Court's jurisdictional mandate under the direction and coordination of a legal director.⁸ These include procedural tasks for contentious cases, provisional measures, and advisory opinions (e.g., notifying the parties of the case, receiving and transmitting the memorials of the parties and the evidence, etc.); preparing legal memoranda for the resolution of cases; preparing summaries and other documents for public hearings; and preparing draft judgments and resolutions for the

⁴ Pablo Saavedra Alessandri & Elizabeth Jiménez Mora, *Una radiografía a la Secretaría de la Corte*, in [CORTE INTERAMERICANA DE DERECHOS HUMANOS. ORGANIZACIÓN, FUNCIONAMIENTO Y TRASCENDENCIA](#) 282 (César Astudillo & Sergio García Ramírez eds., 2022).

⁵ [Rules of Procedure of the Inter-American Court of Human Rights](#), Arts. 7, 10; [Statute of the Inter-American Court of Human Rights](#), Art. 4. On the legal basis and justification for the administrative autonomy of the Secretariat and the Court, see [Saavedra Alessandri & Jiménez Mora](#), *supra* note 4, at 282.

⁶ [Rules of Procedure](#), *supra* note 5, Art. 10.

⁷ *Id.* Art. 12. The Court elects its president and vice president to serve for a period of two years. They may be re-elected. The president's functions include directing the work of the Court, acting as the Court representative, regulating the matters presented before the Court, and presiding over its sessions.

⁸ In 2022 there were seventeen attorneys in the Secretariat (ten working on the merits section and seven supervising compliance with judgments) and eight legal assistants.

judges.⁹ In performing these tasks, the legal department works in close collaboration with the secretaries and the judges.

The Secretariat's influence on legal questions can be observed in the various stages for the processing and resolution of cases.¹⁰ As established by the Convention, cases may be submitted to the Court by the Inter-American Commission of Human Rights or the state parties to the American Convention. Once the case is received by the Court, it is assigned to a judge rapporteur (*juez relator*) who works with the Secretariat in all matters related to that case. The judge rapporteur approves the drafts of any decision on the merits before it is presented to the Court, and usually gives instructions on how to decide important questions about the case at every stage of the procedure. Yet, the staff attorney assigned to the case, and who is under the direct authority of the legal director and the secretaries, is the official in charge of the procedural management of the case and the preparation of the different documents and drafts needed for any decision taken by the Court (from a draft resolution calling for a public hearing to the draft judgment of the case). The preparation of these documents is carried out in coordination and supervision of the legal director and the secretaries and, after it is approved, it is delivered to the judge rapporteur and later to the Court for approval.

Consequently, the legal department is the area with the most immediate contact and knowledge of the different issues surrounding the cases, including the evidence and the briefs submitted by the parties. This dynamic gives the Secretariat an important role in the elaboration of legal standards and case analysis, since the staff attorney prepares the first versions of decisions, such as the summons to a hearing as well as the draft judgments, which are later approved by the legal director and the secretaries.¹¹ Furthermore, the professional expertise of the staff attorneys, the legal director, and the secretaries, who are trained in international law and human rights, and in some cases have multiple years of experience at the Court, gives their voice a relatively prominent role in the process for the resolution of cases. Similar to the WTO Secretariat, they become “guardians” of the consistency of the Court's jurisprudence both in relation to the content of norms as well as the institutional and procedural framework relevant to the drafting of judgments.

A Tale of Two Secretariats

The role of the IACtHR Secretariat bears some noteworthy similarities with that of the WTO Secretariat. Like the latter, the IACtHR Secretariat is instrumental in defining the calendar of the cases that are addressed by the Court and the resources (human and material) that will be used to handle those cases. This includes issues such as: (1) determining the order in which the public hearings will take place and the judgments that will be analyzed during the regular and special sessions; (2) preparing the background materials for judges on the main factual and legal aspects in a case, as well as the applicable precedents in the case law of the Court and comparative analysis of the jurisprudence of the other international bodies of supervision (i.e., the European Court of Human Rights or the Human Rights Council) or constitutional courts in Latin America or other regions; and (3) assisting judges in preparing for court hearings, for example by proposing questions that could be formulated to the parties or to the witnesses and experts during the public hearings.

⁹ Alexei Julio Estrada & Cristhian Molina Delgado, *Abogadas y abogados de apoyo de la secretaría: estructura y organización del trabajo*, in [CORTE INTERAMERICANA DE DERECHOS HUMANOS. ORGANIZACIÓN, FUNCIONAMIENTO Y TRASCENDENCIA](#), *supra* note 4, at 302.

¹⁰ For a detailed account of the particularities of the function of the Secretariat of the Court in the substantiation of cases and the preparation of draft judgments, see Jorge Calderon Gamboa, *Dinámicas, procedimientos y elaboración de sentencias*, in [CORTE INTERAMERICANA DE DERECHOS HUMANOS. ORGANIZACIÓN, FUNCIONAMIENTO Y TRASCENDENCIA](#), *supra* note 4, at 701.

¹¹ For an analysis of the different levels of participation of the Secretariat in the preparation of draft judgments, see [Saavedra Alessandri & Jiménez Mora](#), *supra* note 4, at 288.

Similar to the WTO Secretariat, the staff of the IACtHR Secretariat is present in most of the hearings and deliberations that are carried out by the judges. It also contributes to most of the discussions that take place among the judges, in addition to preparing most of the materials that form the basis for the discussion. Perhaps more importantly, it is the IACtHR Secretariat, through a collaborative process that includes key members of the staff and the judge rapporteur, that prepares the draft resolutions (including judgments), so they can be discussed by the Court during its regular and special sessions. These functions, as well as the fact that judges do not work exclusively for the Court, do not have staff attorneys directly under their supervision, and do not live permanently in Costa Rica,¹² may generate some asymmetries regarding experience and time allocation between the Secretariat and the judges, similar to the ones that Pauwelyn and Pelc emphasize for the WTO.¹³

However, there are fundamental differences in the functioning of the two Secretariats. First, the IACtHR Secretariat plays neither a formal nor an informal role in the election or re-election of judges. Elections are within the exclusive competence of the states acting under the framework of the Organization of American States. The selection process is mainly political and diplomatic, and the secretary has little influence. Second, questions such as the order in which the issues are distributed among the different judges, or when judges act as rapporteurs, are decided by judges themselves and are only executed by the Secretariat. Likewise, the members of the Secretariat do not have a say in determining compensations for judges, at least not in the way that WTO staff do.¹⁴ Similarly, judges (especially the president) have greater formal control over the IACtHR Secretariat than the WTO panelists seem to have, since they have the exclusive power to appoint, re-elect, and remove the secretary from his position. Finally, there is no doubt that judges have the last word in all legal matters falling within the mandate of the Court.

These differences may be partly explained by the nature of both institutions and their mandate. The IACtHR was created as an international tribunal whose main function is to examine the international responsibility of states for human rights violations. As such, the Court has acted as an arbiter and an interpreter of the American Convention and other human rights treaties. So it seems logical that expert judges have a prominent role in the fulfillment of the core mandate that the IACtHR has in accordance with the American Convention,¹⁵ and that the IACtHR Secretariat has the powers of an auxiliary body responsible for supporting the judges in carrying out the Court's mandate.¹⁶ On the other hand, the WTO is a multilateral institution that has a larger purpose than dispute resolution and the WTO Secretariat has a broader mandate compared to that of the IACtHR Secretariat. It therefore stands to reason that the WTO Secretariat performs a wider array institutional functions that allow the organization as a whole to achieve objectives that go beyond those of a jurisdictional or quasi-jurisdictional nature.

Notwithstanding the differences between the WTO and the Court, some of Pauwelyn and Pelc's observations about legitimacy, accountability, and legal outcomes might apply to the IACtHR Secretariat.¹⁷ The external legitimacy of the Court could be strengthened in the long term through measures that reduce any potential asymmetry between judges and the Secretariat. This is yet another reason to have judges who work full time at the Court, who have direct contact with cases on a daily basis, and who have specific expertise in international law and human

¹² The exceptions are judges who are nationals of Costa Rica, and some judges who live in San José for personal reasons.

¹³ [Pauwelyn & Pelc](#), *supra* note 1, at 548.

¹⁴ *Id.* at 540.

¹⁵ Although the Court also promotes human rights in the region (i.e., by organizing and participating in forums, producing publications and courses, and holding public hearings in some state parties), the Inter-American Commission has the main mandate within the Inter-American human rights system to create awareness of human rights and to make recommendations to governments for the adoption of progressive measures for the protection of rights. [American Convention on Human Rights](#), *supra* note 2, Art. 41.

¹⁶ If the IACtHR Secretariat has come to assume a more prominent role in matters falling within the jurisdictional mandate of the Court, this has been due to material circumstances that have not allowed judges to have more direct involvement in and control over cases.

¹⁷ [Pauwelyn & Pelc](#), *supra* note 1, at 552.

rights when they are elected by the Organization of American States. These changes could also affect the content of judgments, by reflecting better the judges' individual positions, their agreements and disagreements.¹⁸ There are benefits of a professionalized and influential Secretariat, which guarantees stability and consistency both in legal and administrative matters. But full-time involvement of judges at the Court could certainly reduce potential challenges to the institution's authority and address concerns about the lack of external legitimacy.¹⁹

Conclusion

Pauwelyn and Pelc argue that the WTO Secretariat wields greater influence over the dispute resolution mechanism than any other comparable international dispute resolution body. This hypothesis is true in respect to the IACtHR Secretariat. Yet, the structure and practices of the IACtHR Secretariat have important similarities to those of the WTO Secretariat, such as the functions assigned to the staff and its relationship with the judges. Similar to the WTO, these features produce a certain asymmetry between the Court judges and the staff and also impact on legal issues. But there are also relevant differences such as control over the appointment of panelists and judges, the remuneration they may receive for their work, and the extent of impact on the final decisions adopted of judges and panelists. Overall, in those aspects, the WTO Secretariat seems to play a much more prominent role than the IACtHR Secretariat.

¹⁸ *Id.* at 557.

¹⁹ Dinah Shelton, *The Rules and Reality of Petitions Procedures in the Inter-American Human Rights System*, 5 N.D. J. INT'L & COMP. L. 26 (2015).