

SYMPOSIUM ON JEFFREY L. DUNOFF AND MARK A. POLLACK, “THE JUDICIAL TRILEMMA”

INDEPENDENCE AT THE TOP OF THE TRIANGLE: BEST RESOLUTION OF THE JUDICIAL TRILEMMA?

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World Trade Organization (WTO) members have, once again, been unable to agree on the appointment of new members to the Appellate Body (AB) in a timely fashion, as one member’s term expired on June 30, 2017, another member resigned in August 2017, and a third member’s term will expire in December 2017, with no consensus on a process to fill those posts. The 2017 standoff follows on the heels of a fractious debate during the summer of 2016 over the United States’ decision to block the reappointment of AB member Sueng Wha Chang of Korea to a second term. Given that the AB has just seven members, the inability to quickly appoint new members to replace those whose terms have expired only adds to the difficulty of rendering decisions within the tight time frames called for in the WTO rules.

[Jeffrey Dunoff and Mark Pollack](#) have suggested that the WTO’s problems are part and parcel of the dilemma facing all international courts as those courts seek to balance three virtues (judicial *independence*, judicial *accountability*, and judicial *transparency*) that cannot all be maximized at the same time.<sup>1</sup> This impossibility of achieving all three objectives requires that states make tradeoffs in the design and structure of international tribunals and in the process by which they appoint (and potentially reappoint) their judges. Dunoff and Pollack conclude that the WTO’s problems, at least in part, are a function of the desire of the United States for greater judicial *accountability*, which comes at the expense of judicial *independence* that is sought by others.

In this essay, I contend that the situation at the WTO and of the Trilemma analysis indicates that Dunoff and Pollack’s analysis may be too simplified to pick up on additional factors affecting the tradeoffs in international courts. At the same time, I conclude that their primary claim—that judicial *independence* should be favored over the other two virtues, generally in a normative pairing with *transparency*—is both correct and achievable.

*Accountable to?*

For Dunoff and Pollack, accountability focuses on the individual judge, not the court as a whole, and they use reappointment as the defining dimension of judicial accountability. If judges are subject to short terms requiring a reappointment process, then they are deemed to be highly accountable. Judges serving for a single fixed term (in practice, nine-year terms) are deemed to have a low degree of accountability.<sup>2</sup> But Dunoff and Pollack’s analysis

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<sup>1</sup> Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AJIL 225 (2017).

<sup>2</sup> *Id.* at 234, noting that WTO AB members serve a four-year term that may be renewed once; judges at the Court of Justice of the European Union serve a six-year, renewable term; International Court of Justice and International Tribunal for the Law of the Sea judges

begs the question of just who the judges are supposed to be accountable to and whether the mere existence of a reappointment process is the proper defining characteristic of accountability. Importantly, the article recognizes the differences across courts in terms of a judge's accountability to a home state versus accountability to all the states that established the court, but still produces a single score for accountability based largely on the existence of a reappointment process, notwithstanding this more complex picture. In taking this more simplified approach, the authors are embracing the fear expressed by a number of judges over at least the appearance of a threat to independence raised by reappointment.<sup>3</sup>

It is not clear that the reappointment process tells us quite this much about accountability because: (1) the presumed link between reappointment and decisions favorable to a judge's home state rests on an unproven assumption that judges both can and might skew decisions to favor their home state, and (2) it effectively assumes that judges are accountable to a single state (most often their home state) despite the recognition that many states may influence a given judge's reappointment.

At the WTO AB, for example, any member of the WTO can block a reappointment. Moreover, renomination by the home state is not required for reappointment.<sup>4</sup> As such, it is not clear whether an AB member is primarily concerned with accountability to his or her home state or to other powerful members of the WTO, including those countries that are frequent participants in the dispute settlement process. Similarly, at the Court of Justice of the European Union (CJEU), Dunoff and Pollack note the introduction of the Article 255 panel process, under which a number of candidates have received negative opinions with respect to their suitability for reappointment after completing a term. If the practical reality is that it is the Article 255 panel that CJEU judges need to be most concerned about, then accountability to their home states may be less important. The more that a judge is accountable to many states in equal or near equal measure, the less that accountability threatens a judge's independence.

#### *Transparency of Views or Transparency of Who Holds Those Views?*

With respect to transparency, the authors are focused on the narrow issue of whether a judge's position or vote on a particular issue before the court can be readily discerned as the test for whether a court is transparent. Their measure focuses on the existence (or not) of dissenting or separate opinions. While recognizing the normative debate surrounding judicial transparency, Dunoff and Pollack do not take on the issue of why it matters who authored a given dissent or separate opinion. In theory, so long as a court permits judges to issue separate or dissenting views, those views ought to stand for themselves, regardless of who drafted them. In my view, a court that regularly issues dissenting views on an anonymous basis ought to be viewed as a transparent court, but the Trilemma analysis would reach the opposite conclusion. Moreover, as the authors note, the degree of anonymity varies depending on the number of judges involved in any given opinion.<sup>5</sup>

serve a nine-year, renewable term; and European Court of Human Rights and International Criminal Court judges serve a nine-year, non-renewable term.

<sup>3</sup> For example, the sixteen judges from eleven international courts gathered at the Brandeis Institute for International Judges session in 2007 noted that "although participants believe that most international judges do not alter their conduct in order to stay on the bench, the threat that re-election pressures pose to their judicial independence—or at least its appearance—is too great to be ignored." Brandeis Institute for International Judges, *Independence and Interdependence: The Delicate Balance of International Justice* (2007).

<sup>4</sup> At the AB, the process of reappointment begins with the Chair of the Dispute Settlement Body (which includes all members of the WTO) determining whether a sitting member is willing to serve a second term. If yes, the Chair then begins a process of consultations with the WTO members. While logically those consultations may begin with the home state of the AB member seeking reappointment, a formal renomination is not required. As such, the accountability for AB members flows to and from all WTO members, not just the home state.

<sup>5</sup> As noted, decisions written by a small bench, such as the three members of a division at the AB, allow states to "easily speculate as to the identity of [a formally anonymous dissent's] author." Dunoff & Pollack, *supra* note 1, at 267.

*Independent from?*

While Dunoff and Pollack recognize that judicial *independence* is not a binary variable and that it exists along the continuum between entirely independent “trustees” to perfectly responsive “agents” who are entirely dependent on their political principals, their Trilemma analysis nonetheless reaches a single score of “high” or “low” when evaluating the judicial independence of international courts. In so doing, they appear to place significant stock in the more *pro forma* indicia of independence, such as whether the word “independence” is used in the treaty text establishing the court or in the oath of office taken by the judges. Importantly, however, they also analyze whether the judges on each court are permitted to work outside the court or engage in outside political or professional activities. Like transparency, the independence analysis also begs the question of who international court judges are expected to be independent from—their home governments, the international organization that established their court, or all states that are members of the organization? Here, the answer is easier, as what matters is independence from all of the above. The hallmark of independence ought to be the ability to render a decision based purely on the merits of an individual case and the application of the law at issue to the facts at hand; it requires independence from all sources attempting to influence the outcome of any given decision.

*Other Factors Deserving of Attention?*

While there is significant value in the clear Trilemma analysis and the trade-offs it implies, the authors may have set aside other factors that might also play a significant role in determining the overall balance of a given court. For example:

- (1) Time frames for decisions—Those courts and tribunals that operate under fixed or tight deadlines may perceive the Trilemma factors, particularly independence and transparency, somewhat differently than courts that are given more time to reach their decisions and craft their opinions. The WTO AB, for example, is given a ninety-day maximum period in which to render its decision (including translations into English, French, and Spanish).<sup>6</sup> The short time frame was designed to ensure the quick resolution of disputes but has the clear effect of holding judges more immediately accountable than judges given a much longer time frame. A ninety-day requirement provides less time for the issuance of lengthy dissents, and fewer opportunities for outside interests or political pressure to be brought to bear. The short time frame also makes crafting short, well-reasoned decisions more challenging, as the time needed to pare down drafts to their essential parts is often not available.
- (2) Parties to the disputes—Most of the courts examined in the article are charged with resolving state-to-state disputes, but others, the European Court of Human Rights in particular, hear complaints by individuals. This too may impact the Trilemma analysis, as accountability to a state may be affected by whether the party coming before the court is the state itself or simply a national from a state. Individuals are less likely to be able to hold judges accountable to them than states are. Moreover, it is easier for judges to be entirely independent of individuals than to be totally independent of states.
- (3) Decision-making processes—Courts have a wide array of approaches to decision-making, ranging from highly collegial courts to those in which most judges reach decisions independent from their colleagues on the bench and simply circulate opinions to one another. The style of decision-making

<sup>6</sup> The WTO Rules establish a ninety-day maximum time frame, which until recently had been met for all but the largest and most complex of appeals. Since 2012, however, the number, length, and complexity of appeals began to overwhelm the system such that most appeals exceed the ninety-day time frame.

for each court also matters, as courts in which collegiality is a prized virtue are likely to score lower on the transparency scale notwithstanding whether their rules permit separate and dissenting views. While the WTO AB may be unique in the amount of discourse that regularly occurs and in the value it places on reaching decisions by consensus, the decision-making culture and the collegial approach of courts may implicate the Trilemma analysis.

- (4) Length of judicial terms—In their analysis of accountability, Dunoff and Pollack appear to accept that it is equally true that “every international judge is motivated, at least in part, by a desire to keep his or her position,” no matter what the length of the initial term.<sup>7</sup> It is not clear why that is the case. For some judges, such as those that are appointed to a four-year term at the AB, there may well be a strong desire to obtain a second term if for no other reason than that it takes a considerable amount of time to become good at the job, well versed in the large body of past cases and procedures, and importantly, to foster the deep relationships with the other AB members that are critical to the collegial approach to decision-making practiced at the AB. But for judges appointed to a (relatively long) nine-year term at the International Tribunal for the Law of the Sea or the International Court of Justice, the motivation for a second term is likely to be quite different and potentially less intense.

#### *Systemic or U.S.-Centric Problems at the WTO?*

The Dunoff and Pollack article begins and ends with the WTO AB, outlining at the outset the “vociferous and widespread criticism” of the United States’ decision to block the reappointment of AB member Sueng Wha Chang, and at the end concluding that application of Trilemma analysis suggests that “judicial independence at the AB is fragile and at risk.”<sup>8</sup> Such emphasis may overstate the case, both because the AB is, for various well-documented reasons, an outlier in the scheme of international courts<sup>9</sup> and because only one WTO member—the United States—appears to have acted in ways that potentially threaten the independence of AB members. And those actions have come only after years in which the WTO “always reappointed Appellate Body Members who wished to serve a second term.”<sup>10</sup>

Indeed, as the authors note, since the time of the potential reappointment of American member Merit Janow in 2007, there has been speculation about the United States’ willingness to link reappointment to specific decisions of the AB. When it came time for my potential reappointment in 2011, the record arguably moves beyond speculation, given the United States Trade Representative (USTR)’s apparent expression of hope that a new U.S. AB member “will be more willing to boldly defend U.S. interests in Geneva than Hillman”<sup>11</sup> and observers noting that “USTR perceived outgoing Appellate Body member Jennifer Hillman as not being sufficiently aggressive in issuing dissenting opinions on trade remedy cases.”<sup>12</sup> By the time of the decision in 2016 to block Sueng Wha Chang’s

<sup>7</sup> Dunoff & Pollack, *supra* note 1, at 257.

<sup>8</sup> *Id.* at 271.

<sup>9</sup> See, e.g., J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats—Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191 (2001).

<sup>10</sup> See, e.g., Minutes of the WTO Dispute Settlement Body, [WTO Doc. WT/DSB/M/153](#) para.99 (July 2003) and [WTO Doc. WT/DSB/M/192](#) para. 57 (June 2005).

<sup>11</sup> *WTO Committee Recommends Grabam, Bhatia for Appellate Body Slots*, INSIDE U.S. TRADE (Nov. 11, 2011).

<sup>12</sup> *For Appellate Body Candidates, USTR Prioritized Willingness to Dissent*, INSIDE U.S. TRADE (Sept. 9, 2011). USTR apparently criticized Hillman for not issuing dissents in trade remedy cases notwithstanding the fact that the only case directly challenging U.S. trade remedy practices on which Hillman sat as a member of the division involved the AB *upholding* a U.S. determination to impose safeguards on imports of tires from China.

reappointment, the United States explicitly and publicly linked its moves to four specific cases on which Chang served as one of three members of the AB division crafting the opinion. The rest of the world has been equally explicit and public in its criticism of the United States' action, potentially indicating strong support for the proposition that the independence of the AB is paramount and must be protected. If no other country chooses to follow the United States down the road of linking reappointments to AB decisions and if, instead, there are efforts to strengthen the independence of the AB, then the Dunoff and Pollack Trilemma could play out in manner that leaves the balance between the three competing virtues with a more appropriate emphasis on independence.

However, as the Trilemma analysis makes clear, such an increase in *independence*, most likely through establishing a [longer, single term](#) for AB members,<sup>13</sup> will come at the expense of *accountability*. Whether this is a possible or even desirable outcome for the WTO will depend on whether the United States is provided other avenues to address its concerns over the operation of the dispute settlement system. There are no doubt some WTO members that share at least some of the United States' concerns over AB decisions that are overly long on rhetoric and short on reasoning, opining on matters that are not central or even raised on appeal, and the increasingly ossified view of past decisions, even if such other members do not share the United States' tactical approach of blocking AB member reappointments as the appropriate method to address those concerns.

### *Conclusion*

In my view, and based on the lessons learned at the WTO Appellate Body, Dunoff and Pollack have got it right. Independence must be paramount for international tribunals to have true legitimacy; the prospect of a reappointment process can cast a shadow on the principle of independence and with it, support for a rule-of-law system. At the same time, judges must be held accountable to do their work within the mandates of the institutions they serve. Application of the Trilemma analysis to the AB would suggest that a compromise needs to be struck in which the balance in favor of independence is restored by providing AB members with longer, nonrenewable terms while increasing accountability through enhanced mechanisms to address concerns over decisions that may exceed the AB's mandate. Members of the WTO must be willing either to use existing tools, including to adopt definitive interpretations of WTO provisions, or to create new ones that will foster both more open dialogue and more definitive accountability outside of the context of reappointment. If that can be done, then the application of the Trilemma analysis could assist the WTO to reset the balance between independence, accountability, and transparency for the good of all of its members.

<sup>13</sup> For example, both Hillman and departing AB member Lilia Bautista commented in their respective farewell remarks on the desirability of a longer, nonrenewable term for AB members. Appellate Body, [Annual Report for 2011](#), at 74 (Hillman) and 75 (Bautista), WTO Doc. WT/AB/17 (June 13, 2012).