

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

THE APPLICATION OF “THE JUDICIAL TRILEMMA” TO THE WTO DISPUTE SETTLEMENT SYSTEM

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Dunoff and Pollack’s timely article on [The Judicial Trilemma](#) offers a constructive paradigm through which to examine and assess the design and the behavior of international courts and tribunals and, in particular, their members at a time when, despite the increasing judicialization of international law and relations, the legitimacy and function of such courts and tribunals are being questioned in political and public discourse.<sup>1</sup> The focus of this response is on the application of the paradigm to the World Trade Organization (WTO) dispute settlement system, which is one of the international courts and tribunals examined by the authors.

*The WTO Dispute Settlement System*

The relationship between the WTO dispute settlement system and the WTO members is characterized by a degree of proximity that is not typical for other forms of (institutionalized) international and regional dispute settlement systems and the users of those systems. The origins of that relationship lie in the historical development of the WTO dispute settlement system. Unlike many other international courts and tribunals, the WTO dispute settlement system was created against the background of another form of dispute resolution that very much fell within the control of the (then) Contracting Parties to the General Agreement on Tariffs and Trade 1947 (GATT 1947). The procedure and design of the WTO dispute settlement system continue to be marked by that origin. Notable signs include the various stages in which the WTO Dispute Settlement Body (DSB) intervenes and the reliance on consultations with the dispute settlement parties at particular stages in the procedure.

At the same time, the creation of the WTO dispute settlement system and the manner in which the Appellate Body members have performed the functions attributed to them by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) have been viewed quite distinctly by different parts of the WTO membership. An increasingly large number of WTO members consider the WTO dispute settlement bodies, in particular the Appellate Body, to perform a judicial function in the same manner as, for example, the International Court of Justice or the Court of Justice of the European Union. Those WTO members express a deep interest in maintaining the authority of the WTO dispute settlement system and strengthening its function and effectiveness. Nevertheless, a more limited number of WTO members deems the WTO Appellate Body to be an agent of the WTO membership and as not having all of the powers that are inherent to international courts and tribunals. Their interests are not necessarily aligned with those of the majority of the WTO membership. This lack of concordance

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

of views on the functions of the Appellate Body has resulted in a degree of disconnect in the political discussions on the powers of that body and the procedures that apply to it.

### *Controversy over Reappointment*

The 2016 events surrounding the (lack of) reappointment of one of the Appellate Body members, which are discussed in some detail by the authors, exemplify that tension. In essence, one WTO member expressed serious concerns about what it perceived to be systemic failures of the functioning of the WTO Appellate Body, in particular the manner in which it interprets the WTO covered agreements and exercises its jurisdiction. [That WTO member](#) found that “[a]ny failure to follow scrupulously the role we Members have assigned through these agreements undermines the integrity of, and support for, the WTO dispute settlement system.”<sup>2</sup> It was explicit in its admission that “the concerns raised are important, systemic issues that go to the adjudicative approach and proper role of the Appellate Body and the dispute settlement system.”<sup>3</sup> That WTO member’s systemic concerns related to the Appellate Body’s interpretation of provisions of the covered agreements in circumstances where that is unnecessary in order to resolve the appeal before it; the Appellate Body’s decision to reverse a panel report on grounds that are not connected to the appeal; and its interpretation of domestic law. Focusing on conduct directly attributable to the Appellate Body member whose second term was opposed, that WTO member also invoked the manner in which that Appellate Body member participated in hearings. In particular, it expressed its concerns “about the manner in which this member has served at oral hearings, including that the questions posed spent a considerable amount of time considering issues not on appeal or not focused on the resolution of the matter between the parties.”<sup>4</sup>

In the light of the vast body of case-law and practice of the WTO dispute settlement system, the expression of a degree of criticism on the judicial reasoning of the Appellate Body is not necessarily surprising, especially taking into account the rigidity of the procedure applicable to treaty amendment in the WTO, the (related) lack of progress in the reform of the applicable procedural rules laid down in the DSU and a certain delay in revisiting the Working Procedures for Appellate Review (and of panels).

However, while disputants might disagree with reports issued by the dispute settlement bodies, it is important that disagreement does not result in a refusal to accept the legal authority and binding force of the decision of the third party on whom they have conferred jurisdiction regarding disputes about the interpretation and application of the WTO covered agreements. In that regard, the 2016 events surrounding the reappointment of a WTO Appellate Body member have resulted in genuine concerns about whether there continues to exist uniform support for the benefits of multilateral resolution of those disputes and a collective interest in working towards enhancing the effectiveness of that method of dispute resolution.

In fact, the reaction of other WTO members and [current](#) and [past](#) Appellate Body members<sup>5</sup> against that sole WTO member’s opposition to reappointment of an Appellate Body member showed a [deep concern](#) about using the (re)appointment process as an instrument to voice criticism of individual reports of the Appellate Body.<sup>6</sup> The discussions among WTO members focused on the conditions under which reappointment may occur and

<sup>2</sup> [Statement by the United States at the Meeting of the WTO Dispute Settlement Body](#) (May 23, 2016).

<sup>3</sup> [Id.](#)

<sup>4</sup> [Id.](#)

<sup>5</sup> See [Letter of All Living, Former WTO Appellate Body Members](#) (31 May 2017); the letter of all current Appellate Body members, dated 18 May 2016, is included in Appellate Body, [Annual Report for 2016](#), Annex 3, WTO Doc. WT/AB/27 (Mar. 2017).

<sup>6</sup> See, e.g., [Appointment of New Appellate Body Member and Reappointment of Appellate Body Member](#), WORLD TRADE ORGANIZATION (2016).

whether, assuming an Appellate Body member wishes to complete a second term and is supported by the nominating WTO member, reappointment may occur automatically.

### *Systemic Considerations*

The authors of *The Judicial Trilemma* describe the 2016 objection to the reappointment of a WTO Appellate Body member in the context of their analysis of judicial accountability, viewed as the accountability of an individual judge. This is indeed one relevant context in which this incident may be examined. Nevertheless, it seems to me that the 2016 objection shows uniquely how the judicial accountability and independence of an individual judge cannot be divorced from the accountability and independence of the judicial college of which that judge is a member. In fact, the concerns raised by that sole WTO member, in support of its objection, relate to systemic matters as regards judicial reasoning, the exercise of judicial economy, the risk of judicial overreach, and the lack of remand authority. All of those concerns relate to the design and operation of the WTO Appellate Body as a judicial body. Irrespective of whether the Appellate Body member whose reappointment that WTO member sought to prevent had any responsibility for the Appellate Body's apparent failure to meet the standards deemed relevant by the opposing WTO member as regards judicial decision-making, the reappointment process appears to have been instrumentalized in order to signal to the Appellate Body and the WTO membership as a whole that at least one WTO member considers that the Appellate Body is functioning suboptimally. At the same time, the process as it took effect in 2016 should also be seen as cautioning against further politicizing the (re)nomination process. In fact, it should be seen as a sign that that process needs to be depoliticized by either reforming it or reconsidering the interpretation of the applicable rules laid down in the DSU.

I would submit that, where the applicable procedural rules provide for reappointment of judges at the end of their term, there must be circumstances in which reappointment may be opposed by either the nominating state or other states. That is the case in WTO dispute settlement because Article 17.2 of the DSU provides that "[t]he DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once." In such circumstances, there cannot be an absolute presumption that reappointment will occur. However, those circumstances must be specifically concerned with the adequacy of the person concerned to perform the functions which the position of judge entails. Therefore, the reappointment process should not be used to voice criticisms of individual decisions of the judicial body or to undermine the legitimacy of the judicial college of which that person is a member. That is particularly so in the context of the WTO dispute settlement system. The content of reports of the Appellate Body cannot be used as a main standard of measurement for the purposes of assessing the suitability of individuals to be a member of the Appellate Body. Appellate Body reports are adopted by the division of three Appellate Body members hearing the dispute, following an exchange of views with the four other Appellate Body members, without votes of individual members of the division becoming public. Therefore, by any measure, an Appellate Body report is always the result of a process that exceeds the collective effort of the division to find a compromise on how to decide a particular question of law.

Furthermore, individual opinions of WTO Appellate Body members are rare and anonymous. For Dunoff and Pollack, that feature speaks to the value of judicial transparency as regards the individual exercise of the judicial function. But it would also appear that the lack of transparency as regards the decisions of individual WTO Appellate Body members can be explained by a concern to strengthen the legitimacy of the WTO Appellate Body, as the authors remark. By speaking with one voice, Appellate Body members enhance the judicial transparency of the Appellate Body as an institution.<sup>7</sup> In any event, while there might occasionally be speculation about the authorship of such individual opinions, as is well-documented by Dunoff and Pollack, such guesses cannot be used

<sup>7</sup> Dunoff & Pollack, *supra* note 1, at 260–71.

as an objective basis for assessing the adequacy of individual WTO Appellate Body members. Nor should such opinions be used for any other purpose than that of expressing a fully independent and objective assessment of a point of law that has been put to the Appellate Body in the context of a specific appeal. Finally, due to the confidentiality of internal decision-making processes of the division hearing the case, it is not possible to make assumptions about the authorship of questions put to the parties at a hearing. In any event, the questions asked by a WTO Appellate Body member, or by any member of a judicial college for that matter, during a hearing cannot necessarily be used as an indicator of the final position that he or she will adopt as regards the questions of law that are put to them in a specific case.

It is nonetheless the case that, as the practice stands in WTO law, one WTO member may block reappointment for reasons relating to its discontent with the outcome of, and the judicial reasoning found in, Appellate Body reports. That is often deemed to be the case because, in accordance with Article 2.4 of the DSU, decisions by the DSB for which the DSU provides are to be taken by consensus. Furthermore, due to the geographical representation of WTO members reflected in the composition of the WTO Appellate Body, those WTO members who enjoy a quasi monopoly in nominating candidates can block reappointment also by refusing to nominate “their” Appellate Body member for a second term. It would be mere conjecture to assume that the blocking of the reappointment of Appellate Body members might affect the content of future reports, the occurrence of anonymous opinions, or the type of question to be asked during hearings. Dunoff and Pollack nonetheless show, based on recorded statements especially of former members of a judicial college, that such risks might exist. That raises the question of how recurrence of this type of opposition may be avoided.

#### *Possible Reform*

As long as the consensus rule continues to apply and reappointment is only an option, the incidence of objections such as those made in 2016 (or any other type of objection for that matter) is inevitable. Thus, a single WTO member can unilaterally block a multilateral process of (re)appointment of WTO Appellate Body members.

Dunoff and Pollack suggest an amendment of the DSU so as to give WTO Appellate Body members a longer but nonrenewable term, taking into account also that the length of the term of Appellate Body members is comparatively shorter than that of members of other international or regional courts or tribunals. I would be inclined to endorse that type of reform, if amendment of the DSU were to occur (in the short or long term). Changing Article 17.2 of the DSU in that manner would render, to some extent, objections based on discontent with individual decisions or types of reasoning obsolete. Such reform would therefore diminish the value of judicial accountability of an individual Appellate Body member, as defined by the authors, but strengthen the value of judicial independence of individual Appellate Body members and of the Appellate Body as a judicial college. It might also infuse more stability in the operation of the WTO Appellate Body because it would avoid disruptions caused as a result of processes of (re)appointment, which recur too often.<sup>8</sup> This would be the case should WTO members agree—formally or informally—no longer to propose reappointment of any member of the Appellate Body.

That type of structural reform of the WTO dispute settlement system requires amendment of the DSU and therefore appears to be difficult to achieve. Putting aside that fact, the challenge for the WTO dispute settlement and all other international courts and tribunals lies in the need to find channels through which judicial bodies and the users of the system may engage in continuing (formal and/or informal) dialogues and make collective efforts in

<sup>8</sup> At the time of drafting this essay, there are two vacancies as a result of the expiry of the second term of office of one Appellate Body member and the unexpected resignation of a recently appointed Appellate Body member. There will be a third vacancy at the end of 2017 when another Appellate Body member's second term expires. WTO members have been divided as to whether procedures for replacing the two Appellate Body members whose second term expires in 2017 should be linked.

improving the applicable procedural framework. That is particularly important taking into account that many forms of international dispute settlement (and especially the WTO dispute settlement system) function within the context of incomplete procedural rules. [In the WTO, that may be done](#), for example, through consultations aimed at informing the process through which the Appellate Body revises its Working Procedures, the adoption of ad hoc decisions of the DSB on select aspects of dispute resolution, and other formal procedures for which the WTO Agreement provides.<sup>9</sup> Whether the Appellate Body itself will respond by changing some of its internal practices by, for example, avoiding anonymous individual opinions or changing the practice of allowing an Appellate Body member having the nationality of one of the disputants to be part of the division hearing an appeal, is not yet apparent. In any event, any such efforts presuppose that all WTO members continue to accept the authority of the WTO dispute settlement bodies.

### *Conclusion*

The commentary on and the reaction to the incident relating to the reappointment of one of the Appellate Body members showed a common tendency to focus on the separateness of the WTO dispute settlement system, or to view that system in isolation from other forms of dispute resolution in international law. Here lies one of the merits of the article by Dunoff and Pollack. By analyzing judicial independence, transparency, and accountability in various dispute settlement systems, the authors show that that incident is by no means unique to the WTO dispute settlement system and that it should not necessarily be seen as undermining the integrity of the system in the long term. It is nonetheless the case that the WTO dispute settlement system is unique in that, so far, all great global powers have actively and recurrently participated in that type of dispute resolution. In that sense, the manner in which all users of that type of dispute settlement perceive the judicial authority of bodies on which jurisdiction to apply and interpret treaties has been conferred is of interest to the functioning of all other types of dispute settlement, and particularly institutionalized dispute settlement.

<sup>9</sup> See, e.g., [Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes](#), WTO Doc. JOB/DSB/1 and Addenda (July 11, 2016 and July 11, 2017) and discussions at the most recent DSB meeting of 20 July 2017, documented in the [Report of the DSB meeting of July 20, 2017](#), WORLD TRADE ORGANIZATION.