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THE JUDICIAL TRILEMMA

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INTRODUCTION

Bespectacled, mild-mannered Sueng Wha Chang seems an unlikely figure to trigger a fractious diplomatic standoff. A former District Court judge in South Korea, practicing attorney in Washington, D.C., and law professor at Seoul National University, Chang joined the World Trade Organization's Appellate Body on June 1, 2012. He brought impressive credentials to the position: Chang had published widely on international trade; taught trade law at Harvard, Yale and other leading universities; and capably served on several high-profile WTO panels.

The United States thus stunned the international trade community when it declared, in May 2016, that it would block the consensus necessary for Chang's reappointment to the Appellate Body. The shocking announcement, revealed just weeks before Chang's four-year term was up, exacerbated an acute workload crunch, as the Appellate Body already had one vacancy and faced a growing backlog of complex disputes. More importantly, it sparked vociferous and widespread criticism, including claims that the unexpected U.S. decision posed an existential threat to the WTO's dispute system and the global trading system writ large.[1]

The impassioned debate over Chang's failed reappointment has attracted substantial diplomatic attention. However, the understandable focus on the immediate consequences of this episode for the Appellate Body elides deeper structural dynamics that not only drive this controversy, but also influence many dimensions of international judicial politics. The purpose of this article is to identify and analyze those underlying dynamics. Drawing on interviews with current and former judges at various international courts, we argue that international judges – virtually all of whom hold office for limited terms and are subject to reappointment – face what we call the Judicial Trilemma.

Specifically, the states that design, and the judges that serve on, international courts confront an interlocking series of potential trade-offs among pursuit of three core values: (i) *judicial independence*, the freedom of judges to decide disputes upon the facts and the law, free of outside influences such as the preferences of powerful states; (ii) *judicial accountability,* structural checks on the exercise of judicial authority manifested most prominently in international courts via reappointment and reelection processes; and (iii) *judicial transparency*, specifically mechanisms that permit the identification of individual judicial positions,

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[1] *See, e.g.*, Shawn Donnan, *US Accused of undermining WTO*, FINANCIAL TIMES, May 30, 2016; Bruce Baschuk, *U.S. Rejects Reappointment of Korean to WTO Panel*, BNA INTERNATIONAL TRADE DAILY, May 12, 2016; TWN Info Service on WTO and Trade Issues, *US body blow to DSU, creating systemic crisis*, THIRD WORLD NETWORK, May 20, 2016, http://www.twn.my/title2/wto.info/2016/ti160514.htm.

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primarily through the publication of separate votes or opinions.[2] Many international judges believe that, as among judicial independence, judicial accountability, and judicial transparency, it is possible to maximize, at most, any two, but not all three, of these values. Our goals in this article are to make explicit the logic of the Judicial Trilemma, and to trace the varied ways in which this logic manifests itself in the design and operation of prominent international tribunals.

As we shall see, the Trilemma plays out in a series of iterative interactions that states and judges engage in: states are the initial and primary movers when they draft a court's statute; judges thereafter face a series of constrained choices in light of states' design decisions; states can then respond to judicial behavior, including through reelection processes; judges respond to state actions, and so forth. As a result of these iterative choices, many international courts can and do come to approximate one of three ideal types. First, a tribunal can have high levels of judicial independence and of judicial accountability (i.e., through short, renewable terms), but at the "cost" of suppressing judicial transparency and identifiability – a pattern found at the Court of Justice of the European Union, where judgments are always issued *per curiam* (by "the Court") and never include separate concurring or dissenting opinions. Alternatively, an international court can exhibit high levels of judicial independence and of judicial transparency (i.e., through open voting and/or individual opinions), but only if individual judicial accountability is low (such as by making judicial terms non-renewable) – a pattern found at the International Criminal Court and at the European Court of Human Rights since reforms in 2010. Finally, a court can combine high levels of judicial transparency (allowing individual judges' positions to be ascertained) with high levels of judicial accountability (allowing for reappointment or non-reappointment) – a pattern found at the International Court of Justice and International Tribunal for the Law of the Sea – but the Trilemma's logic suggests that doing so creates substantial risks of compromising judicial independence.[3]

Viewing Chang's reappointment controversy and other aspects of judicial behavior through the prism of the Judicial Trilemma introduces a new set of perspectives and an alternative conceptualization that better

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[2] In practice, these two aspects of judicial transparency or identifiability – open voting and the possibility of issuing separate opinions – although in principle separable, tend to co-vary among the courts we studied, such that high-transparency courts (such as the International Court of Justice) feature both open voting and the possibility of writing separately, while low-transparency courts neither publicize judicial votes nor issue separate opinions with their judgments. We focus in this paper primarily on the issue of separate opinions, which reveals the legal reasoning as well as the votes of judges who disagree with a majority opinion.

[3] To be crystal clear, our claim is *not* that the independence of judges on courts with renewable terms and frequent dissents is necessarily compromised; our more limited claim is that this combination of structural factors introduces a systemic threat to judicial independence, and that international judges recognize this threat and have taken steps to address it. Whether these steps are adequate is an issue addressed in some detail below.

describes how international judges approach their work, including particularly judicial opinion writing. As we shall see, the WTO Appellate Body is a particularly high-accountability court, whose members are appointed for short, renewable four-year terms. In terms of judicial transparency, however, it occupies an intermediate position: on the one hand, the votes of Appellate Body members are not made public, yet the possibility of issuing anonymous dissents provides the member states a window into judicial decision-making which they can use – and have used – to discipline Appellate Body members whose decisions they object to. The members of the Appellate Body, for their part, understanding their vulnerability under this system, formulated early on an informal rule of consensus decision-making, avoiding dissents in nearly all cases and limiting the identifiability of individual judges. Nevertheless, as Chang's case reveals, member states have also proven resourceful at using another indicator, judicial questioning during oral hearings, as a means of identifying judges' positions and punishing those with unwelcome views. In short, the framework of the judicial trilemma helps us conceptualize and identify both the constraints on Appellate Body members and the limits of their judicial independence.

As an analytic and methodological matter, our analysis draws upon several research traditions. For example, we are influenced by a "rational design" framework that has been productively applied in other international contexts, but has been less frequently applied to international courts.[4] This approach, which draws on game theory and contract theory, starts from the premise that institutional design is a function of the underlying cooperation problems that states or other actors seek to solve. To date, this framework has been used to analyze many aspects of *treaty* design, including variation in the depth and precision of legal obligations, monitoring provisions, and dispute resolution mechanisms.[5] We extend the functionalist logic associated with rational design analysis and apply a similar approach to a new institutional setting – international tribunals – and to the interactive behavior of two sets of actors – the states that create international tribunals, and the judges that serve on these tribunals.

As a result, our analysis offers a new way of theorizing important aspects of international court design and judicial behavior, specifically judicial independence, judicial appointment practices, and judicial decision-making. While each of these features has been studied in

[4] Notable exceptions that employ approaches similar to those used here include LESLIE JOHNS, STRENGTHENING INTERNATIONAL COURTS: THE HIDDEN COSTS OF LEGALIZATION (2015); Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171 (2008).

[5] The seminal works in this area are BARBARA KOREMENOS, THE CONTINENT OF INTERNATIONAL LAW (2016); Barbara Koremenos, et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001). Important legal scholarship in this vein includes Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005); Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579 (2005).

substantial detail,[6] most research to date has focused on *one* of these elements in isolation, and as a result has not addressed the potential for *interaction* among them. Our identification and analysis of the interactive relationships that constitute the Judicial Trilemma thus offers a more robust, theoretically informed, and empirically supported conceptualization of judicial behavior, including particularly opinion-writing, than that found in previous scholarship.

Finally, although our analysis is primarily descriptive and conceptual, focused on state choices and judicial behavior, our findings have important normative implications for the design of international courts and, specifically, for the selection and retention of their judges. In particular, our analysis of the Judicial Trilemma offers a new framework for evaluating ongoing debates over optimal ways to appoint and retain international judges. Analysis in this area has traditionally focused on how best to structure selection processes to ensure that only well-qualified candidates are put forward for election or appointment.[7] We suggest, in contrast, that more attention should be devoted to the length of judicial terms and the structure of judicial *re*appointment and *re*election procedures. If, as many judges believe, the combination of high judicial transparency (through open voting and dissent) and high judicial accountability (through renewable terms) significantly threatens independence, then we would argue that the creators of international courts – and in particular those international courts which practice open voting and dissent – should follow the lead of the European Court of Human Rights and the International Criminal Court and reject renewable judicial terms in favor of longer, non-renewable terms that will better protect judicial independence.

The remainder of this paper proceeds in four parts. Part I provides the theoretical framework for the analysis that follows. To do so, it briefly introduces the rational design literature, describes the three features of

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[6] On judicial independence, *see, e.g.*, Erik Voeten, *International Judicial Independence*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 421 (Jeffrey L. Dunoff & Mark A. Pollack eds. 2013) [hereinafter THE STATE OF THE ART]. On judicial appointment practices, *see, e.g.*, RUTH MACKENZIE, ET AL., SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS (2010). On transparency, *see* Thore Neumann & Bruno Simma, *Transparency in International Adjudication, in* TRANSPARENCY IN INTERNATIONAL LAW 436 (Andrea Bianchi & Anne Peters eds. 2014). For an overview of theories regarding judicial decision-making, *see* Pablo T. Spiller & Rafael Gely, *Strategic Judicial Decision-Making, in* THE OXFORD HANDBOOK OF LAW AND POLITICS (Gregory A. Caldeira, et al. eds., 2008).

[7] *See, e.g.*, Ruth Mackenzie, *The Selection of International Judges, in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 737 (Cesare Romano, et al. eds., 2014). More recently, scholars have highlighted the relatively homogeneous demographics and professional experiences of the individuals who adjudicate international disputes, with particular focus on international arbitration. *See. e.g.*, Susan D. Franck, et al., *The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration*, 53 COL. J. TRANS. L. 429 (2015); Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387 (2014).

international tribunals most relevant to our analysis, and explicates the logic behind the Judicial Trilemma. Part II reviews how different international courts have addressed the Trilemma, with particular focus on the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR), and the International Court of Justice (ICJ). In their diverse responses to the Trilemma, these prominent tribunals closely approximate three "ideal type" strategies for addressing the trade-offs associated with the Trilemma.

Having considered these "ideal type" responses, we turn our attention to extremely complex and controversial manifestations of the Trilemma found in the WTO's widely celebrated dispute settlement system, in particular the Appellate Body (AB). Part III returns to the controversy over Seung Wha Chang's reappointment. The episode is commonly, and understandably, seen as a threat to the WTO dispute settlement system. We agree with this view, but we draw upon the Judicial Trilemma framework to place the WTO system in a broader context, and to better understand the precise tradeoffs made by the Appellate Body's designers and judges, and the resulting dangers that the system poses to the independence of AB members.

In a short conclusion, we summarize our argument and provide a brief normative analysis, arguing in favor of one politically feasible and normatively attractive way to address – although not escape – the Trilemma. Specifically, we detail strategies for revising reappointment and reelection processes at international tribunals in ways intended to promote judicial independence at an acceptable cost in judicial accountability.

I. INTRODUCING THE JUDICIAL TRILEMMA

A. Conceptualizing Institutional Design

In recent years, questions of legal and institutional design have moved to the center of the scholarly agenda. This form of inquiry, often traced to Charles Lipson's influential work on states' choices to adopt formal or informal rules,[8] eventually developed into a full-blown research program that aspires to explain a multitude of design choices with respect to a range of cooperation problems that states seek to address.[9] Much of this work has focused on various types of treaty clauses, including safeguard clauses, exit clauses and reservation clauses. Research has demonstrated that these, and other, design features vary systematically in terms of the conditions under which they are selected.[10]

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[8] Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991).

[9] For a definitive account, *see* KOREMENOS, *supra* note 5.

[10] *E.g.*, Laurence R. Helfer, *Flexibility in International Agreements, in* THE STATE OF THE ART, *supra* note 6, at 177.

This research has less commonly focused on international courts.[11] This oversight is somewhat surprising as international courts have become increasingly important international actors, and as even a cursory glance at the international judicial landscape reveals that courts vary enormously in their design elements. For example, the WTO dispute system has compulsory jurisdiction, can hear only cases involving alleged violations of trade law, has a standing appellate body, and provides for the possibility of sanctions in the event of noncompliance. The ICJ, in contrast, has jurisdiction only by consent of the parties, can hear cases involving any area of international law, has no system of appellate review, and lacks authority to impose sanctions in cases of noncompliance. These and myriad other variations in institutional characteristics immediately raise a series of practical, conceptual, and normative questions: Why would states select one set of tribunal features in one context, and a very different set in another context? How does the selection of one feature (say, compulsory jurisdiction) influence the selection of another (say, providing for sanctions in response to noncompliance)? Most importantly, how does the selection of these features impact other variables we might care about, such as tribunal legitimacy or effectiveness?

A large literature has focused on individual elements of a court's institutional characteristics. Consider, by way of example, the research on judicial independence, commonly understood as meaning that "judges shall exercise their functions free from direct or indirect interference or influence by any person or entity."[12] An impressive body of writings identifies and describes a variety of *ex ante* and *ex post* mechanisms that states might use to influence judicial behavior, ranging from the careful delimitation of a court's jurisdictional reach to threats to ignore a court's judgment.[13] This descriptive work in turn informed a contentious normative debate about the implications and desirability of judicial independence. While many scholars argue that independence is critical to

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[11] In an important and pioneering study, Barbara Koremenos and Tim Betz study the conditions under which states design international treaties with formal or informal dispute settlement provisions, finding that decisions to include dispute settlement provisions respond in systematic ways to enforcement, commitment and uncertainty problems in international politics. Barbara Koremenos & Timm Betz, *The Design of Dispute Settlement Procedures in International Agreements*, *in* THE STATE OF THE ART, *id.* at 371. Koremenos and Betz do not, however, extend their analysis to studying the design features of specific international courts.

[12] INTERNATIONAL LAW ASSOCIATION, THE BURGH HOUSE PRINCIPLES ON THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY, article 1.1 (2004). *See also* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding S.C. Res. 276, Advisory Opinion, 1971 I.C.J. 16, 23 (June 21) (judicial independence is acting "independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute").

[13] Laurence R. Helfer, *Why States Create International Tribunals: A Theory of Constrained Independence, in* INTERNATIONAL CONFLICT RESOLUTION 253 (Stefan Voigt, et al. eds. 2006).

judicial legitimacy and effectiveness, a minority view provocatively suggests that "states will be reluctant to use international tribunals unless they have control over the judges," and therefore that "[i]ndependence prevents international tribunals from being effective."[14]

While a number of individual features of international courts have been well studied, less attention has been devoted to explaining broad patterns of institutional design across tribunals. One influential early effort in this vein classified various international tribunals along three features – access, independence, and embeddedness – and argued that differences along these dimensions influenced how frequently and by whom courts would be used, whether courts would provide for the credible and neutral resolution of disputes, and whether domestic legal mechanisms would be available to implement international court decisions.[15] More recently, important work has analyzed variation in tribunal design and use across different issue areas and geographic regions,[16] and developed innovative typologies of the different functions courts perform.[17]

These writings have taught us much about the design and operation of international tribunals. We seek to build upon and extend this scholarship, in particular by emphasizing that the characteristics of international tribunals do not exist in isolation, but are inter-related. In this regard, two core points deserve emphasis. First, it is not possible to fully understand a particular tribunal feature, such as judicial independence, in isolation, as *de facto* judicial independence is a function of the interplay of different features. Second, it is not possible to fully understand the connections among different features unless we appreciate that these connections are often a function of the interplay of decisions made by states *and* of decisions made by judges. For these reasons, future research should pay more attention to the complexity and totality of a court's features, study the diverse practices of international judges,[18] and analyze tribunal design in a holistic manner.

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[14] Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 7 (2005). For a useful summary of critiques of the view that judges are simply agents of the litigants, see José E. Alvarez, *What are International Judges For? The Main Functions of International Adjudication, in* OXFORD HANDBOOK, *supra* note 7, at 158, 163-66.

[15] Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457 (2000).

[16] *E.g.*, Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order, in* CAMBRIDGE COMPANION TO INTERNATIONAL LAW 203 (James Crawford & Martti Koskenniemi eds., 2012).

[17] KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014).

[18] For an innovative application of "practice theory" to judicial practices, *see* Jeffrey L. Dunoff & Mark A. Pollack, *Comparative International Judicial Practices: A Manifesto* (unpublished manuscript, on file with authors).

B. Tribunal Characteristics relevant to the Judicial Trilemma

The Judicial Trilemma results from the interplay among three specific values that states might seek to embed in any international tribunal, and three specific associated characteristics any court might possess. The first is *judicial independence*. As noted above, a large literature explores the variation in and normative desirability of judicial independence at different tribunals. In principle, we assume that when states create international courts, they seek to populate them with independent judges to conduct unbiased third-party dispute settlement.[19] They do so because states recognize that in an anarchic international setting lacking centralized oversight and enforcement mechanisms, independent courts permit states to enhance the credibility of the commitments they make to other states.[20] Since independent courts can detect, identify, and publicize violations, they are thought to increase the cost of violations and therefore increase the probability that states will comply with their obligations. And, by incentivizing compliance with obligations, independent courts can increase the value of international cooperation.[21]

Of course, to say that states value judicial independence is emphatically not to say that international judges should be above the law. For example, it is not acceptable for judges to act in partisan or self-interested ways. Thus, while judicial independence is central to virtually all plausible theories of well-functioning courts, it is equally fundamental that robust checks on the exercise of power, including judicial power, are necessary.[22] For this reason, the second feature of interest is *judicial accountability*. In this context, accountability is typically understood as meaning that "some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of those standards, and to impose sanctions if they determine that these responsibilities have not been met."[23]

The literature identifies numerous ways that *courts* can be held accountable to the states that create and use them. Tribunal accountability

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[19] We recognize that judicial independence is not a binary variable. Rather, it exists along a continuum from entirely independent "trustees" to perfectly responsive "agents" who are entirely dependent upon their political principals. For important discussions, see, e.*g.*, Karen J. Alter, *Agents or Trustees: International Courts in their Political Context* 14 EUR. J. INT'L L. 33 (2008); Alec Stone Sweet & Thomas Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization*, 1 J. L. & CT. 61 (2013).

[20] Helfer, *supra* note 13, at 253.

[21] *Id.* *See also* Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals*, 93 CAL. L. REV. 1 (2005).

[22] *E.g.*, Paul Mahoney, *The International Judiciary – Independence and Accountability*, 7 L. PRAC. INT'L CTS. 313 (2008).

[23] Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005).

can come in many forms, including "financial accountability (to the budgetary authority), case-management accountability (for the efficient processing of cases), . . . process accountability (for procedures), and 'content' accountability (for individual judgments)," and many mechanisms can be used to promote these various forms of accountability.[24]

Judicial accountability, in contrast, focuses on the individual judge, not the court as an institution. It is thus a narrower category and primarily involves judicial terms of office and the possibility of reappointment and reelection. We foreground judicial reappointment processes for several reasons. First, unlike U.S federal judges who enjoy lifetime appointments, judges at virtually every international court serve for limited time periods, most with the possibility of renewal at the end of a term. Moreover, judges at most international courts cannot be removed *during* their terms of office, except by the unanimous vote of their fellow judges, and only when they are "unable to fulfill the required conditions," such as being unable to perform the duties of the office. Thus, reappointment is the primary mechanism whereby member states can hold individual judges accountable for their behavior.[25] Second, judicial appointment provisions, including both length and renewability of terms, vary considerably across tribunals. For example, WTO AB members serve for four-year terms, and may be reappointed once, while CJEU judges serve six-year terms, and are eligible for reappointment. ICJ and ITLOS judges serve for nine-year terms, and may be reappointed, while ECtHR and ICC judges also serve for nine-year terms, but are not eligible for reappointment.

For purposes of explicating the Judicial Trilemma, we focus on whether judicial terms are renewable as a threshold and defining dimension of judicial accountability.[26] This conceptualization is not, however, intended to suggest that judicial accountability can or should only be thought of as a binary variable. To the contrary, variation in institutional design features at different courts can determine how often, and to whom, judges are accountable. By way of example, we highlight two such features, the length of judicial terms and the rules governing renomination and reelection to the bench.

First, and most obviously, different term lengths will thus create different degrees of judicial accountability. Among international courts that permit reelection, states have provided for substantially different lengths of term. As noted, judges at the AB face reelection after completing a four-year term, judges at the CJEU after completing a six-

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[24] Mahoney, *supra* note 22, at 339.

[25] In domestic settings, additional mechanisms, such as the judicial council, are available and frequently employed. See, e.g., Nuno Garoupa and Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103 (2009).

[26] As a result, our focus is on a form of *ex post* judicial accountability. There are also various forms of *ex ante* judicial accountability, which largely occurs in the vetting process for prospective judges. This process varies widely among international courts.

year term, and judges at the ICJ after completing a nine-year term. Assuming that the desire to remain in office might influence judicial behavior, particularly as the end of a term approaches, institutional variation in term lengths creates different incentives for judicial behavior on different courts, and correspondingly different levels of judicial accountability to member states.

Second, the court-specific provisions for judicial appointment and reappointment determine *to whom* judges are accountable. As a general rule, appointments to international courts are a two-stage process, in which one set of actors (typically individual member governments) first nominate judges, and then a broader electorate or selectorate (typically a plenary assembly of the member states) makes the final selection.[27] Within this general framework, however, the statutes of different international courts vary substantially, which in turn determines which actors have the ability to approve, or veto, the reappointment of individual judges.

At the CJEU, for example, there are as many judges as EU member states, and the bench consists of one judge from each member state. A potential candidate for the CJEU must obtain the support of his or her home government to be nominated (or renominated). Once the government forwards an individual as a candidate for the bench, however, the long-established practice is for other states to acquiesce in this choice. Thus, the nominee (and potential renominee) is *de facto* accountable to only one state, which as a matter of practice is solely responsible for deciding whether the individual will be nominated or renominated. In this case, we might say that there is strong and direct accountability to the home state, but only very limited accountability to other states.

At the ICJ, in contrast, only a fraction of states will have a judge of their own nationality on the bench, and the election and reelection process has a different dynamic. As a practical matter an individual must obtain the support of her home government to be nominated or renominated.[28] Typically, more individuals are nominated than can serve, and to be elected or reelected, a candidate must receive a majority of the votes of the United Nations General Assembly and the Security Council. Hence, a

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[27] For a discussion of this two-stage "nomination game," *see* Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUR. J. INT'L REL. 391, 395 (2014).

[28] ICJ nominations do not come directly from governments, but rather from national groups at the Permanent Court of Arbitration. These groups can nominate up to four names, no more than two of whom can be of the same nationality as the national group. Thus, as a formal matter, candidates need not be nominated by their home state, and from time to time candidates nominated by a foreign national group have been elected to the court, including Judge Ruda, an Argentinian nominated first by Belgium and elected in 1972, and Judge Weeramantry, a Sri Lankan nominated first by New Zealand, and elected in 1990. However, these cases are exceptional: "In the increasingly demanding lobbying and vote-trading process, candidates without the active support of their government will be extremely unlikely to win, except in extraordinary circumstances." Mackenzie, *supra* note 7, at 96.

judge with an eye to renomination would consider the preferences of his or her own state, but would in addition be cognizant of broad preferences that would run across the UN's membership. In this case, we might say there is *strong and direct accountability* to the judge's nominating state, and *diffuse accountability* to the electorate as a whole.

At the WTO, an AB member needs the support of his/her own state at the nomination stage; once nominated, however, the WTO's consensus rule means that a single WTO member state can block a judge's appointment. Much the same process is followed for reappointments, including the ability of any state to block a reappointment under the WTO's consensus rule. In this context, therefore, there is *strong and direct accountability* to the home state, and *strong accountability* to *each and every one* of the voting states.

Hence, even within the category of high accountability courts, different structural features, prominently including length of term and voting rules for election to the bench, can interact to generate a continuum of judicial accountability. In graphic form, this variation can be presented as follows:

Table 1: Variation in Judicial Accountability at Selected International Courts

Stage of reappointment	**ECtHR (post-2010)**	**CJEU**	**ICJ**	**WTO**
Renomination (accountability to home state)	None – non-renewable terms	High	High	High
Reelection (accountability to treaty parties)	None – non-renewable terms	Low – de facto deference to home state	Medium – majority vote of GA and SC required	High – consensus required

The third feature of interest is *judicial transparency*. The term "transparency" has many meanings in international legal discourse,[29] and even in the context of international adjudication, transparency can refer to who can submit written pleadings, whether oral proceedings are broadcast or otherwise accessible to the public, the nature of the judges' deliberative processes, and the means used to disseminate the court's judgments, among other topics. In highlighting *judicial* transparency, we focus on a more limited and precise aspect of transparency, namely the ability to identify a particular judge's position or vote on a particular issue before

[29] *E.g.*, TRANSPARENCY IN INTERNATIONAL LAW, *supra* note 6.

the court, or what we might call judicial *identifiability*. The most visible and common mechanisms related to identifiability are found in the format and content of a court's judgments, in particular the public reporting of judicial voting and the use of separate concurring or dissenting opinions.

In this feature, as well, international courts display enormous variation. At some courts, such as the International Court of Justice and the International Tribunal for the Law of the Sea, judgments explicitly state the number and the names of the judges constituting the majority and those constituting the minority on each operative provision of the judgment. Moreover, at both of these courts, separate concurring and dissenting opinions are explicitly allowed, and indeed virtually every judgment is accompanied by one or more separate opinions. In these instances, every judge's position on virtually every important issue in a case is publicized, and judicial identifiability is extremely high. In stark contrast, at other courts, such as the CJEU, judgments are always issued in the name of the court, no indication of the judges' votes on any issue appears, and separate concurring or dissenting opinions are never issued. In these courts, judicial identifiability is extremely low. Still other courts occupy intermediate positions. For example, ECtHR rules require that a judgment state "the number of judges constituting the majority," but not their names, and both the court's statute and the judge-made Rules of Court explicitly allow for separate concurring or dissenting opinions, which are commonplace. At the WTO's AB, identifiability is lower, as separate opinions are issued in less than 10% of the reports issued by the Appellate Body and, when issued, are anonymous.

As a normative matter, a large and ongoing debate surrounds the normative desirability of judicial identifiability, and in particular the desirability of separate concurring or dissenting opinions.[30] Advocates of dissent claim that they improve the quality of a court's reasoning, as well-reasoned dissents force the majority to grapple with the strongest arguments posed by the losing side.[31] In this sense, dissents serve as "the second blade of the shears, against which the cutting edge must work, serving to make a finer and truer line."[32] In a similar vein, dissents can limit the scope of a majority decision, and serve as a type of "damage control" mechanism. Moreover, dissents can provide practical guidance to litigants and other courts, identifying potential lines of argument to pursue in future cases. Finally, dissents can influence the development of legal doctrine. The most enduring dissents serve as "appeal[s] to the brooding spirit of the law, to the intelligence of a future day," when the arguments

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[30] Following common usage, we use the shorthand "dissent" to refer both to separate opinions that dissent from the majority decision, and concurring opinions that concur in the outcome but differ in their legal reasoning. *See e.g.*, Richard Mosk & Tom Ginsburg, *Dissenting Opinions in International Arbitration*, 15 MEALEY'S INT'L ARB. REP. 6, note 1 (1999).

[31] William J. Brennan, *In Defense of Dissents*, 37 HAST. L. J. 427 (1986).

[32] PAUL A. FREUND, ON LAW AND JUSTICE 55 (1968).

presented in a dissent may one day persuade a future majority, and become the law.[33]

Against this catalogue of asserted advantages, other judges and scholars offer a list of objections to dissent, or conversely of the advantages of judicial unity. In this view, the practice of dissent, as opposed to issuing a single, unanimous judgment of the court *en banc*, brings with it an impressive list of disadvantages. First, a fractured court can damage a court's legitimacy, particularly early in a court's history, before it has created a legacy; "dissent cancels the impact of monolithic solidarity on which the authority of a bench of judges largely depends."[34] Moreover, dissents can sow confusion among bench and bar, as a splintered set of opinions can leave the precise state of the law unclear. Dissents can also undermine judicial collegiality, as judges rarely appreciate having their errors pointed out in a highly public fashion, and frequent dissents can contribute to divisiveness and ill feelings on a court.

More importantly for current purposes, dissenting opinions also provide a pathway into understanding the logic that drives the Judicial Trilemma. For judges who enjoy life tenure, issuing individually signed, public and potentially unpopular opinions – whether majority, concurring, or dissenting – are unlikely to pose any significant threat to judicial independence, since the judge is insulated from retaliation or reward by the political branches or citizenry. By contrast, individually signed public opinions may substantially threaten the reelection prospects of judges who lack life tenure. Given this tension, many judicial systems have struggled to find the appropriate relationship between permitting the issuance of separate, often unpopular opinions, on the one hand, and the nature and structure of judicial terms and appointment procedures, on the other.

For example, state courts in the U.S. provide many examples of judges who were not reelected following the issuance of unpopular opinions.[35] Similar issues have arisen in other countries. For example, for many years, judges at the German Constitutional Court were statutorily prohibited from issuing separate opinions. In 1970, the German legislature enacted a reform that allowed the Court to publish concurring and dissenting opinions. At the same time, "[r]esponding to the concern that reappointment considerations might influence a judge's votes,"[36] the political branches altered the appointment process for those judges, moving from a system of short, renewable terms to a new system of non-

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[33] CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS, AND ACHIEVEMENTS: AN INTERPRETATION 58 (1936).

[34] LEARNED HAND, THE BILL OF RIGHTS 72 (1958).

[35] For an excellent exploration of the issues posed by judicial elections in the various U.S. states, *see* G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES (2012).

[36] Ruth Bader Ginsburg, *Remarks on Writing Separately,* 65 Wash L. Rev. 133, 146 (1990)

renewable, 12-year terms.[37] The same dynamic is, of course, seen at international courts, where states may retaliate against decisions they do not like by opposing a judge's reappointment – as the case of Seung Wha Chang explosively illustrates.

Extrapolating from these cases, and drawing on interviews with current and former international court judges and court officials, we may theorize more generally about the interrelationship between judicial appointment, judicial independence, and judicial transparency. More specifically, we hypothesize that with respect to these three characteristics, judicial systems face potential trade-offs, such that any given court can maximize two, but not all three, of these features (see Figure 1).

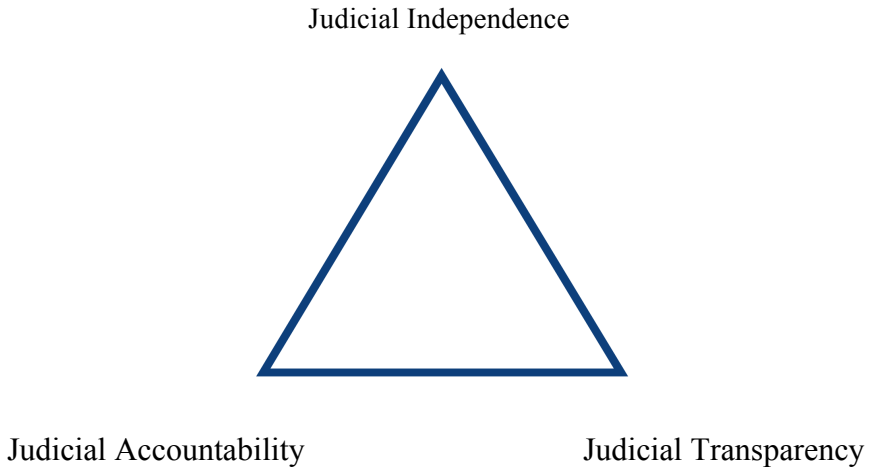

Figure 1: The Judicial Trilemma: "Pick two, any two"

In principle, we can imagine that states designing international courts might wish to create courts that exhibited high levels of judicial accountability, judicial transparency, and judicial independence. But the logic of the Trilemma suggests that states cannot maximize all three of these values at once. By way of example, imagine that states design a court with high judicial accountability, by making the judges subject to periodic assessment and reappointment by the members after a fixed term of office, and with high judicial transparency, by requiring publication of the judges individual votes and by compelling or allowing the publication of individual dissenting or concurring opinions. By maximizing these two features, however, the member states render the judges vulnerable to individual assessment by member states, which may opt to block the renomination or reappointment of individual judges in response to unwelcome rulings. Put simply, assuming that judges are at least partially

[37] As we shall see, one international court, the European Court of Human Rights, took a parallel decision to move from short, renewable terms to longer, non-renewable terms, in part out of concern for the independence of judges who regularly engage in public judicial dissents, and similar proposals have been advanced at the WTO.

motivated by a desire to retain their positions,[38] efforts to maximize *both* judicial accountability and judicial transparency inherently place pressures on judicial independence.[39] If this logic is correct – as many of the judges we have interviewed believe – then states that design international courts, and the judges that serve on those courts, can choose to maximize two important values, but only at the cost of some sacrifice to a third important value. And if this characterization of the strategic environment in which states and judges find themselves is accurate, then most international courts (and indeed domestic courts) can approximate one of three ideal types:

First, if states most highly value independence and accountability, they can design a court whose judges have limited, renewable terms of office (hence maximizing accountability), and protect those judges' independence by minimizing judicial transparency or identifiability. In these cases, states can design court statutes that either compel, or at least allow, judges to issue judicial decisions *per curiam*, such that neither the vote nor the opinions of individual judges can be identified. For their part, judges with limited, renewable terms of office can choose to reduce their vulnerability to non-reappointment by reducing (insofar as they are able) the transparency of their court's decision-making, by issuing *per curiam* rulings and suppressing any sign of individual votes or positions, even where their statutes explicitly allow for open voting and/or separate opinions. This is the choice made by the designers, or the judges, of traditional, Continental European civil law courts (including the pre-1970 German Constitutional Court), all of which opted deliberately to suppress dissent to limit the identifiability, and maximize the independence, of the judges. Among international courts, as we shall see, the CJEU exemplifies this ideal type, suppressing for over seven decades the individual votes and views of the judges and issuing *per curiam* rulings in an effort to protect the independence of judges with renewable six-year terms.

Second, if states most highly value independence and transparency, they may design courts whose statutes compel or allow judges to vote openly and to issue individual concurring or dissenting opinions, thereby allowing the judges to be individually identified. In these cases, states that value an independent judiciary will be forced to sacrifice judicial accountability, for the simple reason that individually identifiable judges with renewable terms will face incentives to issue votes and rulings that conform to the interests of the member-states responsible for renomination

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[38] For a general discussion, *see* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thins Everybody Else Does)*, 3 S. CT L. REV. 1 (1993).

[39] As noted above, the pressures on judicial independence would vary as a function of the reappointment or reelection system used. A system that makes a judge's state of nationality responsible for renomination would pose a greater threat to judicial independence than a system that permitted any state to propose reappointment. Similarly, a system that requires consensus for reappointment would pose a greater threat to judicial independence than one that relies upon majority vote.

and reelection. In these cases, we should expect judges to have non-renewable terms, which may be either for life or for a fixed term of office. Among domestic courts, the United States Supreme Court, whose judges enjoy life tenure (except for impeachable offenses) and the post-1970 German Constitutional Court, whose judges have non-renewable 12-year terms, both fit this model, voting and dissenting openly and without fear of retribution due to their non-renewable terms. Among international courts, both the post-2010 European Court of Human Rights, which we will examine in detail below, and the International Criminal Court fit this pattern. In each instance, judges serve for non-renewable nine-year terms, and frequently issue judgments that are accompanied by one or more dissenting or concurring opinions.

Third and finally, states may choose to maximize both judicial accountability and judicial transparency, by designing courts whose judges have both renewable terms of office and a statute featuring the requirement of possibility or open voting and separate opinions. If the logic of the Trilemma is correct, however, this choice to maximize accountability and transparency comes at a cost, leaving judges vulnerable to member-state retaliation for unwelcome, and identifiable, individual votes or opinions. In domestic jurisdictions, one approximation of this ideal type is found in the courts of those individual U.S. states where judges vote openly and write separately (hence, high transparency) and serve fixed, renewable terms of office before facing reelection or reappointment by executives, legislatures, or electorates (hence, high accountability). While this design choice has its defenders, critics point out that this combination of design features imperils the independence of state court judges, by placing them under pressure to offer judicial rulings that will be acceptable to whichever electorate or selectorate is entrusted with their reappointment.[40] Importantly for our analysis here, this ideal type also comes close to identifying an important and large group of international courts, whose judges are required or allowed to vote and write individually and openly, but who are subject to renomination (typically by their home governments) and reappointment (typically by a general assembly of the members). To be clear, we do not mean to suggest that judges on these courts, which include the ICJ and ITLOS among others, should be understood as obedient servants of their political masters, but rather that the design of their courts to maximize judicial accountability and identifiability creates a structural context that posses certain risks to judicial independence by exposing individual judges to retaliation for unwelcome rulings.

In tabular form, the logic of the Trilemma suggests three ideal-type courts, each of which achieves high values for two of the three features, at the expense of low values for the third (see Table 2).

[40] *See* TARR, *supra* note 35, for an excellent discussion of both critics and defenders.

Table 2: The Judicial Trilemma: Three Ideal-Type Courts, with Examples

Accountability	Transparency	Independence	Examples
High	Low	High	CJEU and other economic integration courts
Low	High	High	ECtHR (post-2010), International Criminal Court
High	High	Low	ICJ, ITLOS, International Criminal Tribunal for the Former Yugoslavia, investment arbitration

In the next section, we turn from a conceptualization of the Judicial Trilemma and brief description of ideal-type responses to it to empirics, identifying and exploring the workings of three courts (the CJEU, the ECtHR, and the ICJ) that we believe illustrate these three ideal types, before turning in Part III to the more complex case of the WTO and the saga of Sueng Wha Chang.

II. HOW DO INTERNATIONAL COURTS ADDRESS THE JUDICIAL TRILEMMA? THREE IDEAL TYPE RESPONSES

Having examined the logic behind the Judicial Trilemma, and argued that its dynamics push courts towards one of three ideal type responses to the Trilemma, we now turn from theory to empirics. In this section, we examine institutional design and judicial practice at three important international tribunals: the Court of Justice of the European Union, the European Court of Human Rights, and the International Court of Justice. We choose these courts, in part, because they are among the most visible and influential international courts, and in part because they illustrate three different ideal-typical approaches to the Trilemma. Put simply, the choices taken by the member states and the judges of the CJEU demonstrate a choice to maximize accountability and independence at the expense of transparency; while the choices at the ECtHR (particularly since 2010) prioritize transparency and independence over

accountability; and the choices at the ICJ prioritize both accountability and transparency, but at the potential expense of independence.

A. The Court of Justice of the European Union

The Court of Justice of the European Union (formerly called the European Court of Justice (ECJ)) is the judicial organ of the European Union.[41] Its primary task is to examine the legality of European Union (EU) measures and to ensure the uniform interpretation and application of EU law. The Court consists of 28 Judges, one from each EU Member State. It is assisted by eleven Advocates General, who present the Court an impartial and independent "opinion" in the cases assigned to them.

The Court was created, and its original statute was drafted, in the early 1950s, as part of the 1951 Treaty of Paris which created the European Coal and Steel Community (ECSC) and its first supranational High Authority. The founders of this first Community envisaged a court whose primary role would be administrative, ruling on the legality of the decisions of the High Authority, rather than inter-state dispute settlement. Accordingly, they designed the first Court's statute on the model of the French *Conseil d'État*, and many of the member states' original design choices – which have for the most part carried forward into the much larger and busier Court of today – bear the imprint of the French civil-law model.[42]

The Court has jurisdiction over several types of proceedings. First, domestic courts in EU Member states may, and sometimes must, refer cases to the CJEU to seek clarification of EU law. In addition, the European Commission or any member state may bring an action to determine whether a Member State is fulfilling its obligations under EU law. Finally, individuals can seek the annulment of a measure adopted by an EU body, or a determination of the lawfulness of the failure of an EU body to act.

The CJEU has been enormously influential. Numerous scholars have detailed the Court's leading role in the gradual "transformation" of Europe, including through the Court's development of the doctrines of direct effect and supremacy.[43] Political scientists have detailed how the Court's decisions helped push European political and economic

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[41] As a formal matter, the CJEU is the judicial institution of the EU and the European Atomic Energy Community, and is made up of three courts: the Court of Justice, the General Court, and the Civil Service Tribunal. For current purposes, our focus is on the Court of Justice.

[42] For detailed and sophisticated accounts, *see* Anne Boerger-De Smedt, *La Cour de Justice dans les Négociations du Traité de Paris Instituant la CECA*, 14 J. EUR. INTEGRATION HIST. 7, 30-33 (2008); Anne Boerger-De Smedt, *Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome*, 21 CONTEMP. EUR. HIST. 339, 355 (2012).

[43] *E.g.*, Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991).

integration in Europe further and faster than Member States had been prepared to go on their own.[44] Others have demonstrated how the Court has influenced national law, detailing how CJEU jurisprudence has impacted domestic legal systems across Europe.[45] In short, a broad scholarly consensus concludes that "the Court's case law has shaped . . . the balance of power among the EU's organs of government, the 'constitutional' boundaries between international, supranational, and national authority, and literally thousands of policy outcomes great and small. Comparatively, the significance of the ECJ's impact on its legal and political environment rivals that of the world's most powerful national supreme, or constitutional, courts."[46]

The CJEU exhibits one of the three "ideal" type responses to the Trilemma, combining high levels of judicial independence and judicial accountability with low levels of judicial transparency. With respect to the question of judicial independence, the drafters of the Paris Treaty, and those of the Court's subsequent statutes which have largely hewn to those original provisions, adopted a text that emphasized and sought institutional protections for judges' individual and collective independence. Thus, article 19 of today's Treaty on the European Union and article 253 of the Treaty on the Functioning of the European Union provide that CJEU judges "shall be chosen from persons whose independence is beyond doubt," and this theme is reinforced in the statute of the Court, which provide that before taking up his duties, a judge shall, in open court, take an oath to perform his duties impartially and conscientiously, and which prohibits a judge from exercising any political or administrative function, or from engaging in any occupation (absent a specific exemption granted by the Council). The judges themselves evidenced their commitment to judicial independence by adopting a Code of Conduct, applicable to both current and former judges, which includes several obligations with a view to guaranteeing independence and impartiality, including the filing of a declaration of financial interest, limitations on the type of activities that can engage in, and other limitations.

Other treaty provisions enhance this commitment to judicial independence. For example, CJEU judges enjoy immunity from legal proceedings while in office, and after leaving office they "continue to enjoy immunity in respect of acts performed by them in their official capacity, including words spoken or written."[47] Moreover, judges enjoy protections from removal from office. A judge may be removed from office "only if, in the unanimous opinion of the Judges and Advocates-

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[44] *E.g.*, ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE (2004).

[45] LISA CONANT, JUSTICE CONTAINED: LAW AND POLITICS OF THE EUROPEAN UNION (2002).

[46] Alec Stone Sweet, *The European Court of Justice and the judicialization of EU governance*, *in* 5 LIVING REVIEWS IN EUROPEAN GOVERNANCE 3 (2010).

[47] Protocol No. 3, On the Statute of the Court of Justice of the European Union, art. 3, 2010 O. J. Eur. Union (C 83/210) [hereinafter Protocol No. 3].

General of the Court of Justice, he no longer fulfills the requisite conditions or meets the obligations arising from his office."[48]

In terms of judicial accountability, the Court's Statute provides that judges serve for relatively short six-year terms, which are renewable.[49] Each government has the de facto ability to appoint a national judge to the court. Although appointments are formally by common accord of all governments, traditionally national candidates are rarely, if ever, second-guessed by other states. The Lisbon Treaty modified this system somewhat by introducing the so-called Article 255 panel procedure. Under this procedure, operational since 2010, a seven-member panel, consisting of former national supreme and constitutional court judges and former ECJ judges, interviews all candidates for appointment or reappointment and delivers a reasoned opinion on the suitability of the candidate. To date, several candidates have received negative opinions, and these individuals were replaced by their national governments.[50] While the panel provides a "quality check" on the process, governments still retain the ability to nominate and renominate national judges, including, in principle the unfettered discretion *not* to reappoint a judge should the government disagree with the judge's rulings in particular cases.

As the Trilemma would suggest, given the Court's high independence/high accountability structure, the CJEU is a "low transparency" court. The Court's statute provides that judgments "shall contain the names of the Judges who took part in the deliberations." Unlike the statutes of some other international courts, however, it does not provide that the judgment shall identify who was in the majority on any particular issue. Just as importantly, the Court's original 1951 statute, and

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[48] *Id.* article 6.

[49] This six-year renewable term, which was part of the statute of the first Court in 1951, was a French proposal, and was contested by the Belgian delegate to the Paris negotiations, Fernand Muûls, who sought, unsuccessfully, to increase the length of their mandate to nine years. Muûls argued, in the words of historian Anne Boerger-de Smedt, that "the nomination procedure proposed by the French would put the judges at the mercy of the good will of the ministers, which seemed incompatible with the principle of independence affirmed in Article 32 of the Treaty. This seemed even more alarming since the judges were not named for life and since the renewal of their mandates was also left to the discretion of the governments." Boerger-De Smedt, *La Cour de Justice*, *supra* note 42, at 20-21 (author's translation). Although the Belgian position was supported by the German delegation, French delegate Paul Reuter argued that the proposed system guaranteed to governments "their rightful role," while permitting the governments to negotiate collectively appointments to both the High Authority and the Court. *Id.* at 21 (author's translation). The French position carried the day, and the provision for a seven-judge Court, appointed by common accord of the member states for six-year renewable terms, was included in the final draft of the Treaty in Article 32. This left the judges of the ECJ more vulnerable to member-state pressure than the judges of either the ICJ or ECtHR, whose mandates, through renewable, were longer at nine years.

[50] FRANKLIN DEHOUSSE, THE REFORM OF THE EU COURTS (II): ABANDONING THE MANAGEMENT APPROACH BY DOUBLING THE GENERAL COURT (Egmont – The Royal Institute for International Relations, 2016).

all of those that have followed, make no reference at all to the possibility of judges issuing separate concurring or dissenting opinions. To some extent, this omission – which is unique among the four courts reviewed in this paper – can be attributed to the nature of the original ECJ as an administrative court modeled on the French *Conseil d'État*: the common-law tradition of separate opinions was alien to the French and other Continental European legal systems of the original six member states in the early 1950s, and in this sense it is unsurprising that the original member states made no mention of separate opinions in the CJEU statute. It is worth noting, however, that the question was discussed in the negotiations. According to Maurice Lagrange, the French negotiator and former *Conseil d'État* judge who drafted the original text of the Court's statute, the possibility allowing explicitly for judicial dissent was raised toward the end of the negotiations by the Dutch delegation, and was rejected. It was at this point, according to Lagrange, that the French proposed the novel position of Advocate-General, modeled on the French *Commissaire du Governement*, who would be charged with undertaking an initial reading of the parties' written submissions and producing a public, non-binding Opinion for the judges' consideration. The proposal was accepted, according to Lagrange, "as a sort of compensation for the ban on the right of judges to publish dissenting opinions."[51]

All CJEU judgments from its inception to the present day have been issued in the name of the Court and never include separate concurring or dissenting opinions. Some CJEU judges we interviewed claimed that the Court's statute precludes the writing of separate opinions, pointing particularly to a provision stating that "[t]he deliberations of the Court of Justice shall be and shall remain secret."[52] These judges argue that publication of separate opinions would necessarily reveal, at least to some extent, elements of the court's deliberations, in particular the identity and arguments of those who depart from the majority of the court on specific issues.[53] While this is surely a plausible reading of the statute, the relevant language hardly compels this conclusion. In fact, the statutes of other international courts contain similar language regarding the secrecy

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[51] Maurice Lagrange, Discours prononcé par M. l'Avocat général Maurice Lagrange, à l'audience solennelle de la Cour (Oct. 8, 1964), http://www.ena.lu?lang=1&doc=8791 (quoted in Boerger-de Smedt, *La Cour de Justice*, *supra* note 42, at 21). *See also* Maurice Lagrange, *La Cour de Justice des Communautés européennes du Plan Schuman à l'Union européenne*, *in* 2 LA CONSTRUCTION EUROPÉENNE (1979). On the role of the Advocate General in the EU legal system, *see e.g.*, NOREEN BURROS & NORA GREEVES, THE ADVOCATE GENERAL AND EU LAW (2007).

[52] Protocol No. 3, *supra* note 47, at art. 35.

[53] Josef Azizi, *Unveiling the EU Courts' Internal Decision-Making Process: A Case for Dissenting Opinions?*, 12 ERA FORUM 49, 52 (2011) ("the full secrecy of deliberations also excludes to reveal the mere number of judges who have adhered to the final judgment and to specify the reasons why they partly or entirely disagree with that judgment").

of deliberations,[54] yet judges on these courts routinely issue separate opinions without triggering claims that doing so violates the secrecy of deliberations.

Our interviews with CJEU judges, reinforced by a large body of scholarly writings,[55] suggest a different motivation. Specifically, the judges recognized the logic of the Trilemma and, given their desire for independence and their relatively short terms of office, decided on their own not to issue separate decisions. Indeed, many former judges have candidly suggested as much in writings that address the interplay of short, renewable terms, the issuing of *per curiam* rulings, and the fragility of judicial independence.[56] Consider, for example, Judge Azizi, who suggests that "the very fact that judges may be reappointed could be seen as putting at risk their independence," and that

> *Seen from this angle, the obligation to keep the secrecy of deliberations is simply an appropriate means to guarantee judicial independence*…. In all these types of proceedings, the possibility of making known the position of a judge . . . could put him or her under pressure to change his or her attitude in order to be in line with his or her Member State or with the public opinion prevailing in his or her Member State. In this respect, the relevant question is not so much as to whether or not a judge would be strong enough to resist such potential pressures which might possibly lead him or her to anticipate the desired attitude; relevant is only that the mere taint of the external appearance or even likelihood to meet such expectations could not be ruled out…. Consequently, reasons justifying the secrecy of

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[54] For example, the ICJ Statute provides that, "The deliberations of the Court shall take place in private and remain secret," International Court of Justice Rules of Court article 21 (entered into force July 1, 1978), and the ECtHR's Rules of Court state that, "The Court shall deliberate in private. Its deliberations shall be and shall remain secret." European Court of Human Rights Rules of Court rule 28 (entered into force July 1, 2014). Nonetheless, judges at both of those courts have interpreted these provisions as consistent with the subsequent publication of the number and identities of the judges in the majority and minority, as well as separate concurring or dissenting opinions.

[55] On short, renewable terms as a threat to EU judicial independence, and on the suppression of public dissent as a strategy to preserve that independence, *see e.g.*, DAMIAN CHALMERS, ET AL., EUROPEAN UNION LAW: CASES AND MATERIALS 145 (2d ed., 2010) J.H.H. Weiler, *Epilogue: The Judicial Après Nice*, *in* THE EUROPEAN COURT OF JUSTICE 225-226 (Gráinne de Búrca & J.H.H. Weiler eds., 2002); and J.H.H. Weiler, *Epilogue: Judging the Judges: Apology and Critique*, *in* JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE 252 (Maurice Adams, Henri de Waele, Johan Meeusen, & Gert Straetmans eds., 2013).

[56] *See, e.g.*, G. Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 MODERN L. REV. 175, 176 (1994) ("[J]udges and advocates general… hold office for six years and may be reappointed (or, of course, not reappointed). … [I]n few countries is the judiciary so bereft of formal guarantees of its independence").

> deliberations and thus excluding dissenting opinions … would prevail for as long as the but limited legal term of office confronts judges with the need for future professional perspectives.[57]

Substantially similar sentiments were expressed, in many cases unsolicited, by nearly all of the CJEU judges we interviewed. Several suggested that, if dissents were allowed, judges might feel pressure to write separately on cases of importance to their home states, particularly as they approach the end of their terms.[58] Avoiding such a conflict was, accordingly, the main, although not the only, reason the judges cited for avoiding public dissent.[59]

This same notion, that the judges' renewable terms represent both the primary threat to their independence and the primary impediment to the introduction of dissents, appears in much of the scholarship on the Court. Writing in 2001, for example, Joseph Weiler argued for the introduction of dissenting opinions in the Court, in order to improve the clarity of the Court's famously brief and sometimes cryptic legal reasoning,[60] but noted immediately thereafter that a "precondition" to any such reform would be the elimination of renewable judicial terms, which he called "a continuous affront to the integrity of the European legal system."[61] Writing more than a decade later, Weiler continued to call for the introduction of separate and dissenting opinions, but here again he concluded that, "So long… as the judges may be reappointed the possibility of dissenting opinions would be inimical."[62]

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[57] Azizi, *supra* note 53,,at 53-57 (emphasis added).

[58] Interview with CJEU Judges L1 and L2.

[59] Judges mentioned other considerations as well. For example, some judges argued that unanimous opinions enhance the court's legitimacy, and judicial collegiality, not in the sense of rapport among judges, but in terms of the energies devoted to the collective effort to deliberate together and reach the broadest possible consensus on the rationale in support of a decision.

[60] Weiler, *Epilogue: The Judicial Après Nice, supra* note 55, at 225 ("I would argue for the introduction of separate and dissenting opinions. One of the virtues of separate and dissenting opinions is that they force the majority opinion to be reasoned in an altogether more profound and communicative fashion. The dissent often produces the paradoxical effect of legitimating the majority because it becomes evident that alternative views were considered even if ultimately rejected").

[61] *Id.* at 225-26 ("As a precondition for these changes in the style of ECJ decisions, the Member States in the next IGC would have finally to eliminate a continuous affront to the integrity of the European legal system, namely the renewability provisions for sitting judges on the Court. The European Parliament has proposed, twice, in its input to two successive IGCs that judges on the ECJ be appointed to one non-renewable term of office, thus removing any appearance of dependence on a Member State…. The refusal of the Member States to accede to that request is simply unacceptable. Once this elementary anomaly is corrected, the conditions for dissents and separate opinions would be open").

[62] J.H.H. Weiler, *Epilogue: Judging the Judges: Apology and Critique*, *in* JUDGING EUROPE'S JUDGES, *supra* note 55, at 252.

Thus, the CJEU – both in its original design, and in the subsequent behavior of the judges – represents one response to the Trilemma, associated with high accountability, high independence and low transparency. The original 1951 statute of the Court, unchanged in its fundamentals today, created a Court with high accountability of judges to their home member states, and an aspiration of high independence, combined with language that allowed for low transparency, given the absence of open voting and the silence on the possibility of separate opinions. In the subsequent decades, moreover, the judges, profoundly aware of the vulnerability attached to six-year renewable terms, decided to pursue a "low transparency" strategy of suppressing all records of judicial votes, and all signs of internal dissent on the bench, issuing all judgments in the name of the Court. Reappointing states, in turn, lack the ability to "retaliate" against a national judge due to his or her positions, and judicial independence is maintained. Graphically, this approach can be represented as follows:

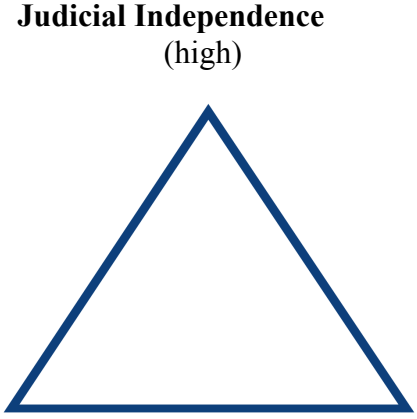

Figure 2: The Judicial Trilemma at the Court of Justice for the European Union

This analysis helps us understand the long-standing debate over the introduction of dissent at the CJEU. Many thoughtful observers argue that the presence of dissents would improve the quality of reasoning found in the Court's judgments, which is famously brief, "magisterial," and on

occasion "cryptic."[63] However, many of the judges have resisted calls to introduce dissents, and the logic of the Trilemma explains why.

In this context, both judges and scholars have argued for a change to the judges' six-year renewable terms in favor of longer, non-renewable terms of nine or (preferably) twelve years that would reduce their accountability to their home states.[64] In its report to the 1996 Intergovernmental Conference that culminated in the Treaty of Amsterdam, for example, the Court expressed an interest in moving toward longer, non-renewable judicial terms of office, a reform that it justified explicitly in terms of judicial independence.[65] The European Parliament, the Spanish government, and a number of non-state actors offered similar proposals,[66] but the member states made no changes in this regard – a failure for which they have been excoriated by Weiler.[67]

However we normatively interpret member states' refusal to move toward non-renewable terms of office (and we shall see below that we are

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[63] For criticisms of the Court's abbreviated style of legal reasoning, and suggestions that the introduction of separate opinions might improve that style, *see e.g.*, MITCHEL LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY 22-23 (2009) (depicting the Court "magisterially handing down sweeping decisions composed in highly deductive argumentative shorthand"); Vlad Perju, *Reason and Authority in the European Court of Justice*, 49 VIRG. J. INT. L. 307 (2009) (arguing for the introduction of dissents in the CJEU, coupled with the extension of judges' terms of office).

[64] Interviews with CJEU, Judges L2, L3, L5. There is ample precedent for such a change, including both the 1970 reform of the German Constitutional Court, which coupled the introduction of dissent to the introduction of non-renewable 12-year terms, as well as the 2010 reform of the European Court of Human Rights, which responded to concerns about judicial independence among the freely dissenting Strasbourg judges by introducing non-renewable nine-year terms. *See* next section.

[65] Report of the Court of Justice on certain aspects of the application of the treaty on European Union, 1995 EUR. CT. JUS., 6-7 ("The Court does not intend to express any opinion with regard to the procedure for the appointment of its members or the term of their appointment, beyond those aspects which concern the preservation of its independence and its functional efficiency…. The Court would not, however, object to a reform which would involve an extension of the term of office with a concomitant condition that the appointment be non-renewable. Such a reform would provide an even firmer basis for the independence of its members and would strengthen the continuity of its case-law.").

[66] *See* Task Force on the Intergovernmental Conference, No. 1: Briefing on the European Court of Justice, EUR. PARL. DOC., July 25, 1995, at 5 (noting European Parliament support for a move to nine-year, non-renewable terms, and support for twelve-year, non-renewable terms from the Spanish government, the European Movement, and the Bertelsmann Foundation).

[67] Weiler, *Epilogue: Judging the Judges*, *supra* note 55, at 151-152 ("The possibility of reappointing judges and advocates general at the end of their term of office is an ongoing scandal unknown in all respectable jurisdictions. It compromises the appearance of independence of the judges (since their reappointment would depend on their own government), and it has been argued over the years that in some instances it was not only the appearance of independence that has been compromised. What is worrying is that in several IGCs, proposals were brought forward which would have limited the term of ECJ judges to one term of, say, 9 or 12 years. They were always rejected by the Member States. I cannot find a benign explanation for such rejection").

indeed in broad agreement with Weiler on this point), it is clear that in the absence of such a change, the *de facto* ban on dissents represents a robust equilibrium, broadly supported by judges and scholars alike. As we shall see, however, other international courts have adopted different approaches.

B. The European Court of Human Rights

The European Court of Human Rights (ECtHR) hears cases alleging violations of the European Convention on Human Rights (ECHR), a treaty whereby the (now) 47 member states of the Council of Europe are obliged to uphold fundamental civil and political rights of individuals under their jurisdiction. Since the Court began operations in 1959, the Convention has been amended several times, and its supervisory and enforcement mechanisms have likewise undergone a considerable evolution. Below, we discuss some of the key moments in this evolution, and explore their implications for the Trilemma.

During negotiations over the original Convention in 1949-1950, the initial members of the Council of Europe were deeply divided, with certain "maximalist" members seeking the creation of a strong human rights court with compulsory jurisdiction and a right of individual initiative, while other states opposed the creation of any court at all. In the compromise that followed, a Court was created, but both compulsory jurisdiction and individual access to the Court were made the subject of optional protocols. Furthermore, access to the Court would be mediated by a quasi-judicial European Commission on Human Rights, which would screen cases and, if its members considered the case to be well-founded, would forward that case to the Court on the individual's behalf. From the 1950s to the early 1970s, few governments accepted the ECtHR's jurisdiction, the Commission dealt with most cases on its own, and the Court was a relatively sleepy, part-time institution.

Over the next decade the pace of activity increased, and by the late 1970s the Court had found violations of the Convention in a number of high-profile cases. Moreover, as more states accepted the ECtHR's jurisdiction, and the number of cases increased, the system began to clog, and the cumbersome two-tier process was increasingly seen as both overburdened and unacceptably slow. Substantial debate led a majority of European states to accept Protocol 11 to the European Convention, which was intended to simplify the institutional structure and shorten the length of time it took to process cases. To do so, the Protocol, which came into force in 1998, eliminated the Commission, required all member states to accept the ECtHR's compulsory jurisdiction, authorized individuals to file

cases directly with the Court, and transformed the ECtHR into a full-time body.[68]

Russia and a number of Central and European states ratified the Convention in the 1990s, extending the Court's reach far beyond Western Europe. The combination of an expanded number of member states and the right of individual petition, however, generated an enormous backlog of cases, and by 2000, there was general agreement that the Court confronted "a major crisis." As a result, in May 2004 the Council of Europe Committee of Ministers adopted Protocol 14 to the European Convention.[69] Its aim was to improve the Court's efficiency, in part by strengthening the Court's ability to quickly dispose of applications that are clearly inadmissible.

Over nearly six decades, the ECtHR has been widely acclaimed, and often characterized as "the world's most effective international human rights tribunal"[70] and as a quasi-constitutional court for Europe. During that period, the Court has taken an expansive (some would say activist) approach to the treaty, which it has famously described as a "living instrument," gradually expanding the meaning of the core rights contained in the Convention's list of fundamental human rights.[71]

For our purposes in this paper, the ECtHR represents a second approach to the Judicial Trilemma, combining high levels of judicial independence and high levels of judicial transparency with levels of judicial accountability that have varied over time (see below), but are today far lower than those at the CJEU. Let us consider each, briefly, in turn.

With respect to judicial independence, the European Convention does not explicitly mention judicial independence, providing only that judges "shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence."[72] Upon taking office in 1959, the judges adopted their own Rules of Court, which require each judge, before taking his duties, to take an oath or solemn declaration to "exercise [her] duties as a judge honourably, independently and impartially,"

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[68] ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS (OUP, 2011);

[69] For an overview, *see* Lucius Calflisch, *The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond*, 6 HUM. RTS. L. REV. 403 (2006).

[70] *E.g.* Laurence Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 126 (2008); Kanstantsin Dzehtsiarou & Donal K. Coffey, *Legitimacy and Independence of International Tribunals: An Analysis of the European Court of Human Rights*, 37 HASTINGS INT'L & COMP. L. REV. 271 (2014).

[71] On the development of the Court over time, *see e.g.* BATES, *supra* note 68; and THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS (Jonas Christoffersen & Mikael Rask Madsen eds,, 2011).

[72] ECHR art. 39(3).

language that remains essentially unchanged today.[73] Later rules provided that judges shall serve in their individual capacity and that they should not "engage in any political or administrative activity or any professional activity which is incompatible with their independence or impartiality…."[74] Protocol 11, moreover, strengthened the commitment to judicial independence with the addition of language providing that judges shall sit in their individual capacity, and "shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a fulltime office."[75]

A number of other structural features are intended to buttress judicial independence. First, ECtHR judges enjoy privileges and immunities in the exercise of the official functions. They enjoy immunity from legal process for official statements, exempt from taxation, and from immigration restrictions. Even after they leave office, they continue to enjoy immunity for "in respect to words spoken or written and all acts done by them in discharging their duties." Second, they enjoy protections from removal from office. The Convention provides that no judge may be dismissed from office unless a super-majority of two-thirds of the other judges decide that the judge has ceased to fulfill the required conditions. To date, no judge has been dismissed under this provision.

In fact, from the Court's earliest days, there was little doubt that judges were acting independently. A bold series of early decisions against member states firmly established that judges were willing to rule against members and by the 1970s, commentators were already declaring that the Court had established "a reputation for quality and independence."[76]

The ECtHR is also a high transparency court. The original Convention said little about the form of judgments. Specifically, it did not direct that judgments list the judges who participated, or how they voted. However, the Court's statute, modeled explicitly on the Statute of the International Court of Justice[77], did provide that "[i]f the judgment does

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[73] Rules of Court of the European Court of Human Rights, Rule 3, at 4 (1959). The original rules can be found at http://www.echr.coe.int/Documents/Archives_1959_Rules_Court_BIL.pdf.

[74] *Id.* Rule 4.

[75] ECHR art. 21.

[76] H. Schermers, *The Convention on Human Rights: an evolving instrument*, 1 FORUM 18, 19 (1978).

[77] The first draft European Convention, including a statute for a future Court, was drawn up by the International Juridical Section of European Movement in May of 1949 under the chairmanship of Pierre-Henri Teitgen. This draft was then introduced in July 1949 into the Consultative Assembly of the newly created Council of Europe, where it became the basis for negotiations among the Council's member states, culminating in the signing of the Convention in November 1950. The European Movement's draft Convention and Statute acknowledges in Article 1 its debt to the ICJ Statute (reproduced in 1 COLLECTED EDITION OF THE `TRAVAUX PREPARATOIRES' OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Martinus Nijhoff ed., 1975):

Art. I. The European Court of Human Rights established under the European Convention on Human Rights shall be constituted and shall function in accordance with

not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion."[78]

The initial Rules of Court, adopted in 1959 by the Court's first set of judges, tilted further in the direction of transparency by providing that judgments should include the names of the judges constituting the Chamber and the number of judges constituting the majority, thus revealing whether a decision had been unanimous, although not the names of the judges in the majority or the minority. The rules also allowed for judges to issue separate concurring or dissenting opinions or a "bare statement of dissent." This language, which remains essentially unchanged in Article 74 of the current rules of Court, did not explicitly *require* judges in the minority to publicly declare themselves as dissenters (although some current judges interpret the rule in precisely that way), but neither did it discourage dissent.

From the earliest days, ECtHR decisions were commonly accompanied by separate dissenting and concurring opinions. Between 1959 and April 2001, the Court issued just over 2,000 judgments, of which 602, or roughly one third, had one or more separate, dissenting, partly dissenting or concurring opinions.[79] Interestingly, these patterns did not significantly change in the aftermath of Protocol 11. Of the cases decided between November 1, 1998 and October 31 2001, 70% were unanimous, and 30% had dissenting or concurring opinions.[80] Interviews with judges on the contemporary Court similarly reveal a highly permissive attitude toward dissent, with many judges indicating to us that they feel no reticence about issuing dissenting or concurring opinions alongside the

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the provisions of this Statute *which is based on the Statute of the International Court of Justice* and which forms an integral part of the said Convention [emphasis added].

See also the speech of David Maxwell-Fyfe, a participant in both the European Movement and the Consultative Assembly of the Council of Europe ("The Court will function under a statute which is annexed to our Convention, and is modeled, with the minimum of adaptation, on the International Court of Justice, and the method of election is also very similar"). *Id.* at 121. This deliberate copying of much of the ICJ Statute, in turn, explains the Statute's initial rules on both judicial accountability (nine-year renewable terms) and judicial transparency (separate opinions), as we shall see presently.

[78] ECHR art. 51. This provision, it should be noted, appeared almost verbatim in the "maximalist" May 1949 draft of the European Movement, and seems to have been accepted without discussion in subsequent negotiations. *Id.* at 317.

[79] NINA-LOUISA AROLD, LEGAL CULTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS 91, n. 249 (2006).

[80] Arold, at 92. These figures vary somewhat if we disaggregate cases with respect to the violations alleged. For example, 87% of the cases alleging a violation of article 9 were decided unanimously, but only 51% of the cases alleging a violation of article 10 were decided unanimously. *Id*. at 93. Dissent rates in Grand Chamber decisions are substantially higher than in the Court's regular seven-judge chambers. The higher figures likely result from two factors. First, the Grand Chamber hears only "exceptional" cases, often involving difficult questions of law, substantial political issues, or important issues of policy, and these difficult cases are more likely to spark dissenting opinions. Second, the Grand Chamber consists of 17 judges; this relatively large number of jurists is less likely to reach consensus, and more like to produce a separate opinion or opinions, than cases heard by seven-judge chambers.

decision of the Chamber, subject only to informal norms about the length and respectful tenor of such opinions, or indeed that they feel obligated, if they vote against the majority, to issue at least a brief separate opinion explaining why.[81]

Given both high judicial independence and high judicial transparency, the logic of the Judicial Trilemma might predict low judicial accountability. However, the states that negotiated the ECHR in 1950 created a high-accountability court. The original Convention, once again modeled explicitly on the ICJ Statute, provided that ECtHR judges would serve for renewable nine-year terms.[82] In Protocol 11, moreover, the member states opted to *increase* the accountability of the judges, by changing the term of office to a six-year renewable term.[83] It is understandable that at the very time that states were substantially strengthening the Court, they would seek a corresponding increase in judicial accountability, yet the change was criticized at the time, both by the Parliamentary Assembly of the Council of Europe[84] and by students of the Court, who argued that it represented a potential loss of independence of judges vis-à-vis their home states.[85]

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[81] Anonymous interviews with seven judges of the ECtHR, Strasbourg, December 2014 and July 2016. For good discussions of the norms and frequency of dissent in the earlier Court, *see e.g.* F.J. Bruinsma, *The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)*, 32 ANCILLA IURIS 32 (2008); Michael O'Boyle, *The Opinions, Separate and Otherwise, of Judge Nicholas Bratza*, *in* FREEDOM OF EXPRESSION: ESSAYS IN HONOR OF NICOLAS BRATZA 13-39 (Josep Casadevall et al. eds., 2012); FLORENCE RIVÈRE, LES OPINIONS SÉPARÉES DES JUGES À LA COUR EUROPÉENNE DES DROITS DE L'HOMME (2004). Pieter Van Dijk, *Separate Opinions in the Practice of the European Court of Human Rights During the Martens Era*, *in* MARTENS DISSENTING: THE SEPARATE OPINIONS OF A EUROPEAN HUMAN RIGHTS JUDGE (W.E. Haak, G.J.M. Corstens & M.I. Veldt eds., 2000); and R.C.A. White & I. Boussiakou, *Separate Opinions in the European Court of Human Rights*, 9 Hum. Rights L. Rev. 37 (2009).

[82] ECHR art. 40 ("The members of the-Court shall be elected for a period of nine years. They may be re-elected"). Here again, this provision, which appeared in nearly identical form in Article 12(a) of the European Movement's Draft Statute ("The members of the Court shall be elected for nine years and may be re-elected"), was taken verbatim from 1945 ICJ Statute, Article 13(1), and we find no evidence in the *Travaux* of any significant discussion on this provision. COLLECTED EDITION OF THE `TRAVAUX PREPARATOIRES', *supra* note 77, at 305.

[83] Protocol 11, Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, art. 23, Eur. Treaty Series 155 (1994) http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cda9.

[84] ALASTAIR MOWBRAY, CASES AND MATERIALS ON THE EUROPEAN CONVENTION OF HUMAN RIGHTS 13 (3rd ed., 2012).

[85] *See e.g.*, Rudolf Bernhardt, *Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11*, 89 AM. J. INT'L L. 145, 153 (1995) ("The term of office will be reduced from nine to six years, though reelection will not be restricted…. In the author's personal experience, six years is a very short time for a position of this kind; at least one renewal should therefore become the rule. But this again will depend on governments, which submit the nominations, and they may be influenced by judicial pronouncements they do not like or by other political considerations").

Thus, the early experience of the ECtHR seems to confound the Trilemma, as the Court exhibited apparently high levels of independence, accountability, and transparency. But this constellation of features was not sustainable. Specifically, by the late 1990s and early 2000s, Court-watchers began to voice concerns that ECHR member states were using the reappointment power to retaliate against national judges whose opinions they found objectionable. As Erik Voeten reported:

> There are some examples of judges who were not renewed and where this decision was publicly linked to the judge's decisions. According to some observers, the Bulgarian authorities "settled scores" with judge Dimitar Gotchev after his vote in the *Loukanov* case. The Moldovan judge Tudor Pantiru was ousted by the newly elected Communist government, which vowed to only "send real patriots" to Moldova's diplomatic missions after Pantiru's failure to dissent in *Metropolitan Church of Bessarabia and Others*. The Slovakian judge Viera Stráznická, who had voted against her country on several occasions, was not selected as a candidate for reelection in 2004, a decision she appealed.[86]

Faced with this evidence of national governments seemingly punishing judges for unwelcome decisions, the Court's allies grew alarmed, and in 2001 the three-member Evaluation Group, appointed by the Council of Europe to study the Court's workings and recommend amendments to the Convention, proposed a change to the terms of the judges from a renewable six-year term to a non-renewable nine-year term, justifying the change explicitly in the interest of ensuring the independence of the judges:

> In its own case-law, the Court requires of national courts a high standard of objective independence and impartiality, extending also to appearances…. The Evaluation Group considers that the Convention should be amended so as to lay down that judges of the Court are elected for a single, fixed term, without possibility of re-election. This term should not be less than nine years. The effect of these

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[86] Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 421 (2008) (references removed). *See also* Jean-François Flaus, *Brèves Observations sur le Second Renouvellement Triennal de Ia Cour Européenne des Droits de l'Homme*, 61 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 5, 29 (2005) (noting that failure to renominate a national judge, while rare, constitutes a potential sanction in response to unwelcome rulings). Gotchev, the judge appointed – but not reappointed – in respect of Bulgaria, had joined a unanimous decision finding a Bulgarian violation in *Lukanov*, which was the first decision in a case from any of the new member states of central and eastern Europe, in 1997, Joel Blocker, *Bulgaria: Court Rules Lukanov's Human Rights Were Violated*, RADIO FREE EUROPE, Mar. 9 1997, http://www.rferl.org/content/article/1083937.html, only to be denied renomination in 1998.

> changes would be to ensure continuity within the Court and, moreover, to offer a further guarantee of the Court's independence.[87]

This proposal was championed in turn by the Council of Europe's Parliamentary Assembly[88], and finally endorsed by the ECHR member states, who included the reform as part of Protocol 14 in 2004. In place of six-year, renewable terms, Article 2 of the Protocol amends ECHR Article 23 to provide for a single non-renewable term of nine years. The explicit rationale for this change – the first such reform in the history of the international judiciary – was a concern about judicial independence.[89] As one set of commentators diplomatically put it, the change from renewable to non-renewable terms "had its origins in concerns at the Court, the Parliamentary Assembly and the Committee of Ministers about a few instances where there seemed to be abuse of the current provisions in that sitting judges of recognized competence and effectiveness had not been included on the list of candidates for judge for their country on expiry of their term, apparently for political reasons."[90] Others have more straightforwardly noted that the change was intended "to offer more guarantees for the Court's independence,"[91] and "to reinforce the

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[87] REPORT OF THE EVALUATION GROUP TO THE COMMITTEE OF MINISTERS ON THE ECHR, para 89 (2001) (*reproduced in* STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH), REFORMING THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A WORK IN PROGRESS (Council of Europe Publishing, 2009)).

[88] Recommendation 1649 (2004): Candidates for the European Court of Human Rights, EUR. PARL.DOC. (2204), which reads in part as follows:

1. An independent judiciary is indispensable for the protection of human rights and fundamental freedoms.

2. In order for the European Court of Human Rights to continue to inspire confidence, it is vital that the process by which judges are selected and appointed also inspire confidence.

9. The ability of the Court to act without fear or favour will be strengthened by ensuring for its judges the appropriate status and remuneration, terms and conditions and security of tenure until the mandatory retirement age or expiry of the fixed term of office.

13. The Assembly considers that a nine-year term of office would contribute to the greater efficiency and continuity of the Court and would consolidate its independence.

21. It invites the Committee of Ministers, on the occasion of the forthcoming revision of the Convention, to introduce the following amendments…. "Article 23 – Term of office. Judges shall be elected for a term of nine years, including those elected to fill casual vacancies. They may not be re-elected." [otherwise unchanged]

See also the positive reply from the Council of Europe's Committee of Ministers. Recommendation 1649 (2004) Reply from the Committee of Ministers adopted at the 924th meeting of the Ministers' Deputies, EUR. PARL. DOC., Doc 10506 (Apr. 20 2005).

[89] Martin Eaton & Jeroen Schokkenbroek, *Reforming the Human Rights Protection System Established by the European Convention on Human Rights*, 6 HUM. RTS. L. REV. 1, 10-11 (2005).

[90] *Id.*, at 10.

[91] Jan Lathouwers, *Protocol No. 14: Object, Purpose and Preparatory Work*, *in* PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS 1, 9 (Paul Lemmens & Wouter Vandenhole eds., 2005). *See also* Marie-Aude Beernaert, *Protocol 14 and New Strasbourg Procedures: Towards Greater Efficiency? And at What Price?*, 5 EUR. HUM. RTS. L. REV. 545, 548 (on "changing the judges' term of office

independence and impartiality of the judges [as] the situation in which judges had to resubmit their candidatures to the government was perceived as awkward and undignified."[92]

Thus, the post-Protocol 14 ECtHR represents a second "ideal" type response to the Trilemma. Initial design choices in the 1950s, which combined high levels of accountability and judicial transparency, eventually produced an unintended but significant threat to a third value, judicial independence. Judges, parliamentarians, and a large majority of member governments, pushed back against this pressure. In response, states agreed to change judicial terms of office, making them longer and non-renewable. These changes, in turn, have alleviated, although not entirely eliminated, political pressures on judicial independence.[93] Graphically, we can represent the ECtHR's contemporary (post-2010) response to the Trilemma as follows:

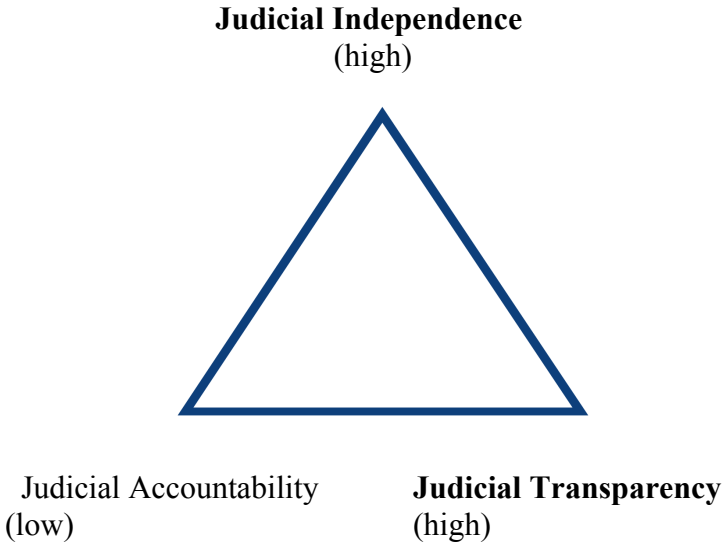

Figure 3: The Judicial Trilemma at the European Court of Human Rights

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from the present six-year renewable term to a single, nine-year term, in order to strengthen both the appearance and the reality of their independence").

[92] Nathalie Van Leuven, *The Judges of the European Court and the Commissioner for Human Rights, in* PROTOCOL NO. 14, *supra* note 91.

[93] All seven of the current ECtHR judges we interviewed for this study indicated that they supported the move to non-renewable terms, and are grateful not to have to worry about "campaigning" for reappointment to the Court. Several judges, however, noted frankly that the move to non-renewable terms does not entirely remove extra-legal pressures on judges, many of whom are relatively young and likely to seek judicial, governmental or academic positions in their home states following their terms in Strasbourg. Interviews with ECtHR judges, December 2014, July 2016, Strasbourg.

Comparing the ECJ and ECtHR cases, we see in both instances that both member states and judges of each Court came to recognize, more or less explicitly, the stark trade-offs of the judicial trilemma, the two courts responded to this trilemma in strikingly different ways. At the Luxembourg Court, judges appointed for short, renewable terms have taken a conscious decision to remain (as they have always been) a low-transparency court, interpreting the secrecy of deliberations as prohibiting any public sign of dissent or disagreement within the court, and in the process protecting individual judges from retaliation for unwelcome rulings. In Strasbourg, by contrast, the spate of non-renewals after 1998 forced the member states as well as the judges to confront the nature of the trilemma, to which they responded with an unprecedented decision to shift to non-renewable judicial terms of office, effectively accepting less judicial accountability in return for high judicial transparency and independence. We now examine a court that represents a third response to the Trilemma.

C. The International Court of Justice

The International Court of Justice is the principal judicial organ of the United Nations.[94] The Court's Statute draws heavily upon the Statute of the Permanent Court of International Justice (PJIC),[95] a tribunal that was associated with the League of Nations and served as the first standing international court with general jurisdiction. The PCIJ was a relatively busy and successful court between 1922 and 1939, an era that ended with the outbreak of World War II.[96] However, as it became increasingly clear that the war would soon end, a number of states expressed support for the establishment of an international court after the conclusion of hostilities.[97]

The ICJ Statute was adopted at the San Francisco Conference that established the United Nations. The Statute "forms an integral part of the [UN] Charter,"[98] and all UN members are ipso facto parties to the Statute.[99] The Statute authorizes the ICJ to exercise two primary forms of jurisdiction: it hears legal disputes submitted to it by States (contentious cases) and issues advisory opinions (advisory proceedings) on legal questions referred to it by duly authorized UN organs and specialized agencies. Like the PCIJ, the Court does not exercise compulsory jurisdiction over contentious cases. Rather, the Court is competent to entertain a dispute only if the states concerned have accepted its

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[94] UN Charter, art. 92.

[95] *Id*.

[96] *See, e.g.*, LEGACIES OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE (Christian J. Tams & Malgosia Fitzmaurice eds., 2013).

[97] *E.g.*, SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005 (2006).

[98] UN Charter, art. 92.

[99] UN Charter, art. 93.

jurisdiction.[100] The Court's decisions in contentious cases are final and binding, and the Charter provides that every UN Member "undertakes to comply" with ICJ decisions "in any case to which it is a party."[101]

The Court consists of 15 judges, and normally hears cases en banc. However, a state party to a case which does not have a judge of its own nationality on the bench may choose a person to sit as a judge *ad hoc* in that specific case,[102] meaning that in any particular dispute the court can consist of up to 17 judges. The bench may not include more than one national of the same state, and the Court as a whole should represent the main forms of civilization and the principal legal systems of the world.[103] In practice this principle has found expression in the distribution of membership of the Court among the principal regions of the globe. In recent years, this distribution has consisted of three individuals from Africa, two from Latin America and the Caribbean, three from Asia, five from Western Europe and other States, and two from Eastern Europe, a distribution which corresponds to that of membership of the Security Council. Moreover, as a matter of practice, the Court has always included judges of the nationality of the permanent members of the Security Council.[104]

How has the ICJ addressed the Judicial Trilemma? As with our analysis of the two European courts, we will begin with discussions of the two features that the Court's designers and judges have attempted to maximize, and then turn to the third element associated with the Trilemma.

The ICJ, like the CJEU, and unlike the ECtHR, has always been a *high accountability* court. Candidates for the bench are not directly nominated by states but rather through a group consisting of the members of the Permanent Court of Arbitration (PCA) designated by that state.[105] Having nominations flow through the PCA, rather than directly from states, was intended to add an independent, professional dimension to the process, and to reduce the political element. This effort, however, has met with only partial success. As one former ICJ judge remarked, "The process is heavily political. Nomination by national groups has not worked; it is meant to be insulated from governments. But governments

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[100] ICJ Statute, art. 36.

[101] UN Charter, art. 94.

[102] ICJ Statute, art. 31. The position of the judge ad hoc raises difficult questions regarding judicial independence. As a large literature addresses this issue, we do not further pursue it, and focus instead on the other members of the Court's bench. For an excellent overview of the issues, *see* Iain Scobbie, *"Une Heresie en Matiere Judiciaire"? The Role of the Judge Ad Hoc in the International Court*, 4 L. & PRAC. INT'L CTS. & TRIBS. 421 (2005).

[103] ICJ Statute, art. 9.

[104] The sole exception to this unwritten rule being the lack of a Chinese judge during the time period 1967 to 1985.

[105] For more on the nomination process, *see* MACKENZIE, ET AL., *supra* note 6, at *63-99*.

do make nominations. The national group system is largely ineffective."[106]

The names that emerge from this process are submitted to both the UN General Assembly and the Security Council. To obtain a seat on the Court, candidates must receive an absolute majority of the votes in both bodies, which cast their votes simultaneously but separately.[107] Successful candidates are elected to nine-year terms of office, and are eligible for reappointment.[108] To ensure that all judges are not rotated at once, judicial terms are staggered such that one-third of the Court's seats are up for election every three years.

The reappointment process is similar to the appointment process; potential candidates must receive the support of their home state, and the candidate is then considered by both the General Assembly and the Security Council. There is no limit on the number of times that incumbent judges can be reelected.[109] Thus, like judges at other international courts, ICJ judges are de facto dependent upon their home state for renomination. Their path to reelection, however, is more difficult than that of CJEU judges (as other EU members typically approve of other state's judicial nominees) but easier than that of WTO AB members (who, as discussed below, must be approved by consensus).

The ICJ has been a *high transparency* court, although the issue has given rise to controversy from time to time. The ICJ Statue provides that the judgment "shall contain the names of the judges who have taken part in the decision," echoing language found in the PCIJ statute. A 1926 revision of the PCIJ's rules of court elaborated on this language by providing that the judgment specify the number (but not the names) of the judges in the majority. During debates over rule reforms in 1926 and 1936, the judges considered requiring that the judgment list the names of the judges in the majority. The debate pitted concerns over maintaining the confidentiality of deliberations against the interest in greater

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[106] *Id.* at 85-86. *See also* Davis R. Robinson, *Politics and Law in International Adjudication*, 97 AM. SOC. INT'L L. PROC. 277 (2003) ("the national groups are generally not independent of government control and necessarily follow the directions of their political masters"). These claims may be overstated. For example, there is evidence that the U.S. group has from time to time forwarded nominees other than those supported by the U.S. administration. *See, e.g.*, Kenneth Keith, *International Court of Justice: Reflections on the Electoral Process*, 9 CHINESE J. INT'L L. 49, 53 (2010).

[107] ICJ Statute, art. 8. Like much else in the UN system, this process of double elections is a compromise between the principle of equality of states and the desire to ensure the representation of judges from great powers. PACTICIA GEORGET, ET AL, *Article 4*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 234 (Andreas Zimmermann et al. eds., 2nd ed., 2012).

[108] ICJ Statute, art. 13.

[109] The longest tenure was that of Judge Lachs, who served for almost 26 years. The average length of tenure, however, is approximately 10 years.

transparency. In both instances, a majority of judges rejected the call for greater transparency.[110]

The initial ICJ rules of court followed the PCIJ rules. In practice, the absence of a rule requiring disclosure of how each judge voted, coupled with a rule permitting but not requiring dissents (discussed below), meant that in some cases it was not possible to determine how particular judges voted.[111] In 1978, however, the judges adopted a significant change to the Rules of Court, providing the judgment contain not only "the names of the judges participating," but also "the number and names of the judges constituting the majority."[112] By implication, of course, this rule identifies the number and names of the judges who are not in the majority. Moreover, in 1980, the Court adopted the practice of voting paragraph by paragraph on the dispositif and listing the names of the judges who voted for and against each paragraph, producing even greater transparency.

The PCIJ and ICJ have also witnessed longstanding debates over the desirability of permitting separate opinions, including dissents.[113] The issue had been highly controversial during the drafting of the PCIJ statute. States were badly split on the issue and, in a compromise proposal, an Advisory Committee of Jurists recommended allowing the publication of dissenting votes, but not of dissenting opinions. Thereafter, the League's Council amended the draft PCIJ statute to permit judges to append a statement of their individual opinions to the Court's judgment. As finally adopted, Article 57 of the PCIJ Statute provided that "[i]f the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion."

The Court's rules went even further, authorizing judges to issue dissenting opinions in advisory proceedings, even though this was not expressly provided for in the court's Statute. Moreover, although the Statute did not provide for concurring opinions, these were introduced as a matter of judicial practice in 1923.

In 1926, during deliberations over revisions to the rules of court, Judges Loder and Weiss proposed to eliminate the rule permitting dissents

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[110] Elaboration of the Rules of Court of 11 March 1936, PCIJ, Series D, No. 2, 3rd Add. Pp. 319-26.

[111] For example, the Maritime Safety Committee Advisory Opinion was adopted by a vote of 9 to 5, but only two of the dissenters chose to identify themselves. Lori F. Damrosch, *Article 56*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 107, at 1366.

[112] ICJ, Rules of Court, art. 95, http://www.icj-cij.org/documents/index.php?p1=4&p2=3&.

[113] The paragraphs that follow draw heavily upon earlier accounts of this history, particularly R. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 INT'L & COMP. L. Q. 792 (1965); Edward Dumbauld, *Dissenting Opinions in International Adjudication*, U. PA. L. REV. 929 (1942). For a more recent treatment, *see* GLEIDER HERNANDEZ, THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION 109 – 111 (2014).

in advisory proceedings, but the proposal was not accepted.[114] Another proposal, endorsed by Judges Anzilotti, Finlay and Moore, pushed in the other direction. It would have provided that the names of all judges who dissented, as well as any opinions they might write, be published. The proposal was addressed, in part, to a judicial practice that had developed whereby "certain judges did not dissent publicly, but filed secret dissenting opinions without attaching them to the judgment or the opinion."[115] While the court did not make the mention of the dissenting judges' names mandatory, the judges did decide to end the practice of attaching secret dissents to the minutes of the Court.[116]

In 1929, another process for revising PCIJ rules was undertaken, and Judge Fromageot proposed to eliminate the ability to dissent in advisory jurisdiction cases. This proposal triggered strong opposition. Judge Hurst replied that the proposal would "destroy the Court;" Judge Root argued that "the suppression of dissentient opinions would … be disastrous;" and Judge Politis noted that, although he originally opposed the idea of dissenting opinions, he had come to see them as being of "immense advantage to international law."[117] Judge Fromageot then withdrew his proposal, and the issue was not formally considered again at the PCIJ.

In the run-up to the San Francisco conference, an informal Inter-Allied Committee proposed that "it should be obligatory on any judge who dissents from the majority to state his reasons for so doing."[118] However, the proposal was not adopted, and the ICJ statute echoes the PCIJ Statute in providing that judges may, but are not required to, dissent. The Court's Rules provide that "any judge may … attach his individual opinion to the judgment, whether he dissents from the majority vote or not, or a bare statement of his dissent."

In practice, from the start, PCIJ and ICJ judges have frequently exercised their right to write separately, and it is extremely rare for the Court to release a judgment without separate opinions. For example, in its first 243 decisions (90 judgments, 25 advisory opinions, 128 orders), the Court also released 1017 individual opinions, including 349 dissenting opinions, 406 separate opinions, and 262 declarations.[119] The practice of frequent dissent continues. By way of example, the Court's last five

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[114] P.C.I.J. Series D, No. 2 Add., 195-198, 283 (1926).

[115] Anand, *supra* note 113, at 797.

[116] *Id*. at 798.

[117] *Id.* at 798 (quoting Minutes of the Committee, League of Nations Doc. No. C. 166.M.66.1929.V. at 50).

[118] Report of the Informal Inter-Allied Committee on the Future of the P.C.I.J., Miscellaneous No. 2 (1944), Cmd. 6531, para 81.

[119] Rainer Hoffman & Tilmann Laubner, *Article 57, in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 107, at 1209.

judgments in contentious cases have been accompanied by eight,[120] three,[121] ten,[122] four,[123] and twelve[124] separate opinions, respectively.

What implications does high accountability and high transparency have for judicial independence at the ICJ? The Court's statute and rules include provisions on judicial independence that are substantially similar to those found at other courts. The Statute provides that "[t]he Court shall be composed of a body of independent judges, . . . who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law." Significantly, the Statute also provides that "[j]udges of the nationality of each of the parties shall retain their right of to sit in the case before the Court." This clause suggests that judges serve in their individual capacity, and it is not unknown for a national judge to vote against his or her own state's legal position.[125]

These provisions are reinforced by several structural features designed to enhance independence. For example, ICJ judges enjoy "diplomatic privileges and immunities" when engaged on the business of the Court.[126] And, once they assume their positions on the bench, they are protected from removal. No member of the Court can be dismissed unless, in the unanimous opinion of the other Members, she or he no longer fulfills the required conditions.[127] In fact, a removal under these circumstances has never occurred.

Should we assume that these provisions are sufficient to ensure judicial independence – or does the logic of the Trilemma compel the conclusion that the combination of high accountability and high transparency inevitably imposes structural pressures on judicial independence? The answer to this question turns, in part, on how we

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[120] Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections (Int'l Ct. Justice Mar. 17).

[121] Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Columbia), Preliminary Objections, 2016 I.C.J. (Mar. 17).

[122] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.); Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica) (Int'l Ct. Justice Dec. 2015).

[123] Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objections, 2015 I.C.J (Sept. 24)

[124] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, 2015 I.C.J. (Feb. 3).

[125] *See, e.g.*, The SS Wimbeldon, 1923 P.C.I.J. (ser. A) No. 1, at 15, 34 (June 28) (dissenting opinion of Judge Anzilotti); Case Concerning Avena and Other Mexican Nationals (Mex. V. U.S.), 2004 ICJ 12, 70 (Mar. 31) (dissenting opinion of Judge Burgenthal). Other examples include Judge Basdevant in Minquiers and Ecrehos (Fr./UK), 1953 I.C.J. 47, 74 (Nov 17); Judge McNair in Anglo-Iranian Oil Co. (UK v. Iran), Jurisdiction, 1952 I.C.J. 93, 116 (July 22); Judges McNair, Basdevant and Hackworth Monetary Gold Removed from Rome in 1943 (It. V. Fr., UK & US), Preliminary Question, 1954 I.C.J. 19, 34-35 (June 15).

[126] ICJ Statute, art. 19.

[127] ICJ Statute, art. 18. *See also* Rules of Court, art. 6 (same).

understand the motivations of individual judges. At one pole, we might think that a judge's primary motivation is to keep his or her job (i.e., to be reappointed at the end of a term), whether as an end in itself or as a means to other ends (i.e, to produce changes in legal doctrine, or to obtain influence or power). Under this conceptualization of judicial motivation, the need to stand for reappointment creates pressures, particularly near the end of a judge's term, which can threaten judicial independence. As Paul Stephan argues, "[k]nowing that they can be replaced, the members of the [international] tribunals have an incentive not to do anything that will upset the countries with nominating authority. In those cases where [judges] nonetheless veer off in an unanticipated direction, the nominating state can institute a course correction within a relatively short period of time by choosing 'sounder' candidates for the tribunal."[128]

These concerns are heightened by the fact that successful candidates (and their nominating states) typically undertake lengthy "campaigns," involving visits to UN delegations by candidates and substantial lobbying by diplomats. For example, in his pursuit of a position on the Court, Judge Keith's "campaign … lasted for over two years and involved visits to more than 30 capitals as well as [three trips] to New York…."[129] The trend towards increasingly lengthy and elaborate campaigning had only accelerated in recent years. Mackenzie and Sands note that "[e]lections involving judges standing for reelection can focus on cases decided by the judge."[130] They diplomatically conclude that "[t]his practice raises many eyebrows."[131]

Many Court insiders have been less circumspect in describing the structural pressures that can arise from the ICJ's reelection system. One former President Judge of the Court complained that "the three-yearly elections often involve a good deal of horsetrading at the best of times; henceforth, this has become accentuated, leading to a situation in which candidates had been and would in future be elected more on consideration of how they might vote on certain delicate issues coming before the Court than on whether they would or could render objectively valid judicial opinions in all cases and at all times."[132] A distinguished scholar who appeared before the Court and served as a judge *ad hoc* summarized the critique of reelection as follows: "subjecting the composition of the Court, however partly, to the political control (and possible censure) of the

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[128] Paul B. Stephan, *Courts, Tribunals, and Legal Unification – The Agency Problem*, 3 CHIC. J. INT'L L. 7-8 (2002).

[129] Judge Kenneth Keith, Challenges to the Independence of the International Judiciary, Speech delivered to Chatham House (Nov. 26, 2014), https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20141126ChallengesIndependenceInternationalJudiciary.pdf.

[130] Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of International Judge*, 44 HARV. INT'L L. J. 271, 278-79 (2003).

[131] *Id.*at 279.

[132] T.O. ELIAS, ICJ: PRESENT TRENDS AND FUTURE PROSPECTS IN NEW HORIZONS IN INTERNATIONAL LAW 71, 78-79 (T.O. Elias, ed. 1979).

Security Council and the General Assembly every three years reduces the margin of autonomy of the judges, particularly those seeking re-election; or at least, it may be occasionally interpreted to have had this effect."[133] And Sir Gerald Fitzmaurice, drawing on his two terms of service on the Court, observed that:

> … frequent elections afford occasions on which various political and psychological pressures can be brought to bear on the Court and its members and, what is still worse, may enable it to be constituted – or reconstituted – with a direct view to a particular case then before, or about to be submitted to it, or some phase of which still has to be adjudicated upon. These are very far from being merely theoretical or hypothetical possibilities. They have caused uneasiness for many years – an uneasiness which time and intimate experience has only served to confirm.[134]

We should, however, hesitate before concluding that judicial independence at the Court has in fact been compromised. First, as an empirical matter, notwithstanding the arguments and sobering observations from Court insiders, marshaling empirical evidence that the combination of high judicial transparency and high accountability have, in fact, compromised judicial independence is hard to do. For some observers, the fact that national judges rarely vote against their own states, standing alone, is taken as evidence of bias and a lack of independence.[135] But the proper interpretation of this behavior is far from clear.[136] It is

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[133] Georges Abi-Saab, *Ensuring the Best Bench: Ways of Selecting Judges, in* INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE 168 (Connie Peck & Roy S. Lee eds., 1997).

[134] Sir Gerald Fitzmaurice, *The Future of Public International Law and of the International Legal System in the Circumstances of Today*, *in* LIVRE DU CENTENAIRE 288-89 (Institut de droit international 1973) . It is possible Fitzmaurice had a very specific example in mind. He serve on the Court that decided the South West Africa cases. South West Africa Cases (Ethiopia v. South Africa, Liberia v South Africa), Judgment, 1966 ICJ Rep. 6. In that highly controversial case, Sir Percy Spender, as President, cast the tie-breaking vote. This decision triggered an enormous political backlash against the Court, its composition, and Sir Percy, who declined to stand for reelection. In his place, Australia nominated Sir Kenneth Bailey, a highly accomplished law professor and diplomat who helped to prepare the final draft of the UN Charter. Nonetheless, the backlash over Sir Percy's behavior led states to reject Bailey's candidature. *E.g.*, EDWARD MCWHINNEY, JUDGE MANFRED LACHS AND JUDICIAL LAW-MAKING 15 (1995) ("the anger against Spender … was enough to defeat Bailey"); ROBERT KOLB, THE ELGAR COMPANION TO THE INTERNATIONAL COURT OF JUSTICE 127-32 (2014); JAMES CRAWFORD, THE GENERAL ASSEMBLY, THE INTERNATIONAL COURT AND SELF-DETERMINATION, IN FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 585, 588 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

[135] Eric A. Posner & Miguel F.P. de Figueiredo*, Is the International Court of Justice Biased?*, 34 J. L. STUD. 599, 601 ("Whereas judges vote in favor of a party about 50 percent of the time when they have no relationship with it, that figure rises to 85–90 percent when the party is the judge's home state").

[136] As Judge Schwebel noted, "it is not to be assumed that the national judge who votes in favor of the position of his own country is wrong, still less biased." Stephen M.

extremely rare that a national judge has been the only member of the Court voting for his or her state,[137] suggesting that reasons other than nationality can plausibly explain these votes.

Moreover, as a conceptual matter, there is another way that we can understand judicial behavior and motivation. On the basis of our interviews with international judges, we believe that at least some judges are more interested in discharging their judicial duties and deciding cases as best they can, and in articulating their vision of the law as clearly as they can, than they are in the longevity of their judicial career. Similarly, we believe that a substantial number of international judges derive professional satisfaction from "embodying or serving some shared higher ideals,"[138] and from standing as a defender of these ideals. And many international judges, particularly those near the end of their careers or with other career options, care more about their reputation among their peers and the invisible college of international lawyers than they do about reappointment. As Alvarez notes, "[t]here is considerable evidence that those who serve on these tribunals, including its judges, see themselves as [Hersch] Lauterpacht would have described them as agents of the 'international community' bent on the pursuit of 'justice' broadly understood."[139] In short, an alternative model of judicial behavior and motivation holds that judges "care greatly about maintaining their authority and may even choose a political sanction over an action that would be seen as compromising their identity as a moral, rational-legal, and/or expert decision-maker," [140] and therefore that states have much less power to "retaliate" against unwelcome rulings than is commonly assumed.

For current purposes, it is not necessary to choose among these competing models of judicial behavior, and in fact we think neither is likely to be entirely accurate. International judges constitute a heterogeneous group,[141] and no one model accurately captures the way all judges think and behave. Any particular judge's preferences for career advancement and for fearlessly articulating the law as best she can likely evolves as career paths and circumstances change. So we do *not* interpret the Trilemma to mean that ICJ judges are biased, and will invariably change their votes or even shade their opinions to curry favor with those who control their renomination and reelection. Rather, we take the Trilemma to mean that the particular structural features of the ICJ require judges who are committed to judicial independence to resist pressures and

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Schwebel, *National Judges and Judges Ad Hoc*, *in* MELENGES EN L'HONNEUR DE NICOLAS VALTICOS. DROIT ET JUSTICE 319, 327 (R.J. Dupuy ed., 1999).

[137] Marianne J. Aznor-Gomez, *Article 2*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 107, at 239.

[138] Alter, *supra* note 17, at 39.

[139] Alvarez, *supra* note 14, at 173.

[140] *Id.*

[141] *E.g.*, DANIEL TERRIS, ET AL., THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES (2007).

engage in forms of potential professional self-sacrifice that is not required of judges at some other courts – and that this outcome can be avoided by changing other structural features of the environment in which they operate.

Thus, the ICJ reveals an ambiguous portrait of a third position vis-à-vis the Trilemma. Unlike the CJEU and the ECtHR, the ICJ is a high accountability, high transparency court. Some observers argue that, as the Trilemma would suggest, this combination of structural features produces a Court that is low on judicial independence. This position can be graphically illustrated as follows:

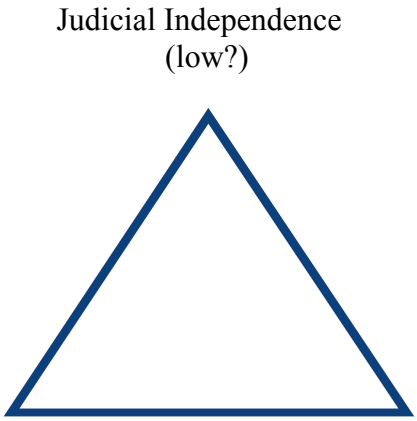

Figure 4: The Judicial Trilemma at the International Court of Justice

Again, we hasten to add that this account of judicial independence at the ICJ is highly contested, with many respected observers concluding that judicial independence at the ICJ is high. But whatever judgment one ultimately makes about the degree of independence of ICJ judges, there should be little doubt that the structural environment in which they find themselves places pressures on judicial independence that judges at the CJEU and ECtHR do not experience

III. BREAKING THE MOLD? THE JUDICIAL TRILEMMA AT THE WTO

The WTO's dispute settlement system has as its foundation the rules and procedures set out in the WTO's Dispute Settlement Understanding (DSU), which is administered by the Dispute Settlement Body (DSB), consisting of representatives of all WTO

members.[142] Disputes between WTO members over alleged breaches of WTO obligations are heard, in the first instance, by a group of three panelists, from countries not party to the dispute, who are specially selected for the particular dispute. Panels have compulsory jurisdiction and issue reports containing factual and legal findings. Issues of law and legal interpretation by panels can be appealed to the WTO's Appellate Body, which consists of seven members, three of whom are randomly selected to sit as a "division" to hear any particular dispute. The findings of panels and the Appellate Body become effective when they are adopted by the DSB, which happens automatically unless WTO members agree unanimously not to adopt the report, the so-called "reverse consensus" procedure.[143] Where violations are found, the offending state is expected to bring its laws into conformity with its WTO obligations. In cases of noncompliance, the DSB can authorize the prevailing party to impose economic countermeasures against the noncomplying party.

The WTO dispute system has been remarkably busy. As of December 31, 2015 over 500 matters were brought to the WTO's dispute system, and 214 panel reports had been adopted,[144] or an average of about 25 disputes and about 10 panel reports per year. Between 1995 and 2015, 144 panel report, or 67% of the total number of panel reports, were appealed.[145] As of the end of 2015, the AB had circulated a total of 138 reports.[146] In contrast, over nearly 50 years, the GATT system processed an average of just over two disputes per year.[147] This substantial increase in activity can be attributed to the expanding reach of trade rules, the significant increase in membership (23 at the GATT's founding, and 164 WTO members today), and the greatly increased judicialization of the system, which lessens the impact of power asymmetries between disputing parties.

The WTO dispute system has also been, by most accounts, remarkably successful.[148] The widespread participation in the system is as impressive as the sheer number of disputes considered. As of November

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[142] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 1869 UNTS 401.

[143] *Id.* at art. 16(4).

[144] Figures derived from WTO, Annual Report 2016, available at https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep16_e.pdf; WTO, Appellate Body Annual Report for 2015, WT/AB/26 (3 June 2016). The dispute settlement process involves a mandatory consultation stage, and roughly one-half of the matters are disposed of during this stage. William J. Davey, *The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges*, 17 J. INT'L ECON. L. 679, 688 (2014).

[145] Appellate Body Annual Report for 2015, *supra* note 144, at Annex 7.

[146] *Id.* at 15.

[147] CRAIG VANGRASSTEK, THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION 229 (2013).

[148] Valerie Hughes, *Working in WTO dispute settlement: pride without prejudice*, *in* A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO 400 (Gabrielle Marceau ed., 2015); Davey, *supra* note 144.

2015, roughly two-thirds of the members had participated in dispute settlement proceedings, either as parties or third parties, including many developing states. Moreover, panels and the AB regularly address issues involving substantial economic stakes and enormous political sensitivity, and for the most part their rulings have been broadly accepted. Notably, compliance rates are high; some 90% of the disputes brought to adjudication were resolved by the removal of measures found to be WTO-inconsistent.[149] As one leading commentator summarizes, "[w]hatever its flaws, the [WTO dispute system] is the envy of international lawyers who are more familiar with less efficient and more compliance resistant legal regimes, including those within the International Labour Organization (ILO), United Nations (UN) human rights bodies, and other adjudicative arrangements such as the World Court or the ad hoc war crimes tribunals."[150] The success of WTO dispute settlement is particularly notable as it occurs in a context "of intense diplomatic and political divisiveness and prevailing perception[s] of impasse and malaise" in the WTO.[151] As the Chang episode illustrates, however, not all of the news from Geneva related to dispute settlement is positive. The Judicial Trilemma helps us understand why. Thus, we turn in the rest of this section to analysis of how the DSU and AB address the complex interdependence among judicial independence, judicial accountability, and judicial transparency; as we shall see, the AB features rules and practices that differ, sometimes markedly, from arrangements at other leading international tribunals.

For example, with respect to *judicial independence*, the DSU does not directly or explicitly state that AB members shall be independent;[152] instead it provides that the AB "shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the

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[149] Giorgio Sacerdoti, *The WTO Dispute Settlement System: Consolidating Success and Confronting New Challenges* (working paper) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809122.

[150] Jose Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1 (2001).

[151] Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9, 12 (2016)

[152] The DSU addresses both AB members and panelists, DSU, article 8(2) (panelists "should be selected with a view to ensuring the independence of the members"); as we are primarily interested in AB members we shall focus on provisions addressing the Appellate Body.

As Charnovitz notes, the absence of an explicit provision on the independence of AB members is all the more striking given that several WTO agreements instruct governments to provide for independent judicial review of administrative proceedings. Steve Charnovitz, *Judicial Independence in the World Trade Organization*, *in* PATH OF WORLD TRADE LAW IN THE 21ST CENTURY 91, 101 (Steve Charnovitz ed., 2015). *See, e.g.*, GATT, art X:3(b) (requiring independent review of administrative actions); Agreement on Implementation of Article VI of the GATT 1994, art. 13 (requiring independent judicial review); Agreement on Rules of Origin, art 3(h), Annex II, para. 3(f) (same); Agreement on Subsidies and Countervailing Measures, art 23 (same).

subject matter of the [WTO] agreements generally."[153] The DSU also provides that AB members "shall be unaffiliated with any government" and they "shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest."[154] Independence is explicitly mentioned in the 1995 DSB Decision on the Establishment of the Appellate Body, which states that AB members "should not … have any attachment to a government that would compromise their independence of judgment."[155]

Notably, the DSU does *not* contain several structural provisions intended to reinforce judicial independence commonly found in the Statutes of other international tribunals. For example, the DSU is silent concerning the circumstances in which an AB member can be removed from the bench. In contrast, the statues creating other tribunals typically provide for removal only upon the unanimous vote of the other judges.[156]

Moreover, unlike their brethren who serve on the ICJ, ECtHR, and CJEU, AB members do not receive salaries set at a level intended to promote independence. Instead, the DSU provides for payment of "the expenses of persons serving on the [AB], including travel and subsistence allowance."[157] This arrangement no doubt reflects early expectations that the number of appeals would be low, and that service as an AB member would be part-time. In fact, the AB's workload has proven to be surprisingly large and highly demanding. Nonetheless, instead of receiving a salary, AB members enter into a contractual arrangement whereby they receive a monthly retainer, travel costs, and a per diem for days served in furtherance of their duties as an AB member.[158]

Finally, in terms of independence, it is worth noting that, at least as a rhetorical matter, the DSU refers to individuals on the AB as "members," not "judges;" that the AB is called a "body," rather than a "court;" that the AB issues "recommendations," not "rulings;" and that the AB produces "reports" not "judgments," that the DSB is then free to accept or reject.

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[153] DSU, art. 17(3).

[154] *Id.*

[155] Dispute Settlement Body, Establishment of the Appellate Body, Decision adopted on 10 February 1995, WT/DSB/1.

[156] In addition, the DSU does not provide that AB members are entitled to privileges and immunities. However, the Headquarters Agreement between the WTO and the Swiss Confederation states that AB members are entitled to the same privileges and immunities granted to diplomatic agents under international law. WT/GC/1. Under this agreement, AB members are exempt from Swiss federal, cantonal and communal taxes on their compensation, as well as from value added tax on items purchased for personal use.

[157] DSU, article 17(8).

[158] An April 2001 proposal that AB members receive a salary based on full time work and a pension was not accepted by WTO members. In addition, AB members do not participate in the WTO's pension plan. In 2001, WTO members reviewed this system and considered whether a move to full-time employment was warranted, but no consensus was reached, so the system remains unchanged.

Rules drafted by AB members, on the other hand, strongly and explicitly emphasize independence. The Working Procedures for Appellate Review, drawn up by the AB in consultation with the WTO Director-General and Chair of the DSB, provide that an AB member "shall not accept any employment nor pursue any professional activity that is inconsistent with his/her duties and responsibilities," and shall not accept or seek instructions from any other source.[159] Rules of Conduct, adopted by the AB itself, provide that members shall be "independent and impartial," and shall, in each case, "disclose any information" that "is likely to affect or give rise to justifiable doubt as to their independence or impartiality."

Despite textual provisions and structural elements that might suggest a lower commitment to judicial independence than that found at other tribunals, most qualitative assessments have found that the dispute system is highly independent from the litigants and member states,[160] a conclusion confirmed by qualitative analysis.[161] For example, the unusual provision that AB reports do not become effective until adopted by the DSB does not compromise the independence of AB members, given the negative consensus rule.[162] Moreover, the system of compulsory jurisdiction combined with the high cost of exiting the WTO render it difficult for parties dissatisfied with the dispute process to threaten to "exit" the dispute process.[163] Finally, the practical impossibility of using WTO legislative mechanisms to override AB jurisprudence widens the space of judicial discretion and heightens AB independence.[164] For these reasons, to the extent there is a debate over independence, the question is not whether the AB lacks independence, but rather whether it is too independent of the WTO's membership.[165]

The AB is a *high accountability* court. AB members serve for four-year terms and are eligible for reappointment once.[166] Thus AB

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[159] Working Procedures for Appellate Review, WT/AB/WP/6 (Aug. 16, 2010).

[160] Howse, *supra* note 151.

[161] John Maton & Carolyn Maton, *Independence under Fire: Extra-Legal Pressures and Coalition Building in WTO Dispute Settlement*, 10 J. INT'L ECON L. 317 (2007) (series of regression analyses finding that AB is independent of member state influence);

[162] Philip M. Nichols, *Realism, Liberalism, Values and the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 841, 854-55 (1996) (negative consensus rule "could create a partial de facto independence for the panels and the [AB], which no longer must worry about crafting reports that appeal to all, or even a majority, of the members").

[163] YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 203 (2014).

[164] Howse, *supra* note 151. For a general discussion of whether and how the threat of legislative reversal influences international judges, *see* Olof Larsson & Daniel Naurin, *Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU*, 70 INT'L ORG. 377 (2016).

[165] *E.g.*, Steve Charnovitz, *Judicial Independence in the World Trade Organization*, *in* INTERNATIONAL ORGANIZATINOS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 219, 226 (Laurence Boisson de Chazournes et al. eds, 2002).

[166] The terms of AB members are staggered so that all seats do not turn over at the same time.

members have terms that are substantially shorter than those found at other tribunals (six years at the CJEU, and nine years at the ECtHR, ICJ, ITLOS and ICC). Moreover, they face a nomination and election system that substantially heightens accountability to the nominating state and to the entire membership. First, prospective AB members must secure the support of their home state, which forwards their name and curricula vitae for consideration. Thereafter, prospective members undergo an intensive vetting process. For example, they meet for several hours with a six-member Selection Committee, consisting of the WTO's Director General, and the Chairs of the most important WTO Councils.[167] At this time, candidates are "quizzed on their knowledge of WTO law, their positions on controversial legal questions, and their approach to trade litigation," among other matters.[168] Candidates also call upon national delegations and WTO Ambassadors in Geneva for substantive discussions of trade law and policy; candidates are occasionally even interviewed in important capitals, including Washington, D.C. and Brussels.[169] Mindful of the WTO's consensus rule, after all interviews are complete the Selection Committee engages in numerous "private confessional sessions with WTO members"[170] to gauge levels of support for different prospective nominees. The Selection Committee is expected to bring forward candidates who will be approved by a consensus of the WTO membership.

The consensus decision-making process enables any WTO member to veto the appointment, or reappointment, of any particular candidate. States have not been reluctant to exercise this power. As a result, at times it has not proven possible to achieve consensus around any individual on a slate of candidates. In such cases the Selection Committee will not forward any names, and instead propose that a new selection process be undertaken.[171] Scholarly research demonstrates that the level of scrutiny given to candidates – and the associated politicalization of the nomination and election process – has substantially increased over time.[172]

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[167] In addition to the Director-General, the Selection Committee includes the Chairs of the General Council, Council for Trade in Goods, Council for Trade in Services, Council for Trade-Related Aspects of Intellectual Property Rights, and of the Dispute Settlement Body.

[168] *Indian Nominees Appointed to Appellate Body*, 15 BRIDGES, Nov. 23, 2011.

[169] Sorayut Chasombat, *A Reflection on the Selection of the Appellate Body Membership*, Mar. 3, 2014, http://www.thaiwto.com/article%201.html. Chasombat, the Minister Counselor of Thailand's Permanent Mission to the WTO, continued: "In theory candidates will be competing on their own merit. The word "lobbying" is frowned upon by purists within the WTO circle. However, it is naive to believe that there is no "lobbying" going on by those concerned albeit in a low-key manner. At this level of competition, no candidate will be successful without a certain form of help from their governments." I*d.*

[170] *Id.*

[171] *See, e.g.*, Daniel Pruzin, *WTO Selection Panel to Recommence Search for Appellate Body Judge Following Deadlock*, BNA INT'L TRADE DAILLY, Jan. 22, 2014 (failure to reach consensus on candidate to replace David Unterhalter after his term ended).

[172] Elsig & Pollack, *supra* note 27.

Successful candidates serve for four-year terms, which can be renewed once. Upon renomination for a second term, much the same process is followed: the incumbent judge must first be renominated by his or her member state (which may decline to do so), and the renominated judge must then be approved by consensus of WTO members (granting each WTO member a *de facto* veto over reappointment). Over time, many AB members have sought second terms,[173] and reappointment has, with a few notable exceptions discussed below, been virtually automatic. This apparent automaticity, however, should not distract us from the structural fact that first-term AB members are subject to a reappointment procedure that holds them accountable, after only four years, to both their home state and subsequently to a consensus vote of the entire WTO membership.

The DSU and Working Procedures also differ in certain respects from other instruments with respect to *judicial transparency* or *identifiability,* including provisions that render WTO dispute settlement considerably less transparent in general than most other international courts. At the first level, or panel, stage of proceedings, the DSU provides that "[p]anel deliberations shall be confidential."[174] The Working Procedures go further, providing that panels shall "meet in closed session," and that "[t]he deliberations of the panel and the documents submitted to it shall be kept confidential."[175] The DSU likewise provides that AB proceedings "shall be confidential."[176] Despite this provision, in a few instances, at the request of parties to specific disputes, Appellate Body oral hearings have been opened to the public.

Notably, the DSU has an approach to separate opinions not found at any other international court. It explicitly authorizes the use of separate opinions in either panel or AB reports. However, it attempts to shield the identity of the author of a separate opinion, providing that opinions expressed by individuals in panel or AB reports "shall be anonymous."[177] To our knowledge, no other instrument creating an international court imposes an anonymity requirement on separate opinions.

While the DSU uses language that neither encourages nor discourages the use of separate opinions, the initial AB members drafted Working Procedures that are markedly less neutral regarding separate opinions. Specifically, the Working Procedures for Appellate Review

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[173] But not all. For example, two of the original seven AB members, El-Naggar and Matsushita, did not seek a second term for personal reasons. And, on occasion, a sitting member has passed away while in office.

[174] DSU, art. 14(1).

[175] Working Procedures for Appellate Review, WT/AB/WP/W/11 (July 27, 2010), paras (2), (3). The Rules of Conduct provide that "[e] ach covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential." Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1, art VII(1), WT/AB/WP/6 at p. 19.

[176] DSU, art. 17.

[177] DSU, art. 14 (3) (panel) DSU, art. 17 (11) (AB).

provide that "[t] he Appellate Body and its divisions shall make every effort to take their decisions by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, the matter at issue shall be decided by a majority vote."[178] By directing AB divisions to "make every effort" to reach consensus, the language expresses a strong preference to avoid the issuance of separate opinions.

In practice, the use of separate opinions has been extremely rare. In the first eighteen years of dispute settlement, less than 8% of the panel reports, and less than 5% of AB reports, contained dissents or separate opinions. In contrast, during the GATT era, roughly 2% of panel reports had dissents or separate opinions. Thus, while dissents are still far from the norm, and are filed much less frequently than at tribunals such as the PCIJ, the ICJ, ITLOS, or the ECtHR, they occur at a notably higher rate than was the case during the GATT era.

At first glance, the low dissent rate is puzzling. Nothing in the DSU precludes or discourages dissent. The panels and Appellate Body are asked to interpret a series of highly complex and interrelated legal texts that are frequently unclear, often as a deliberate result of inconclusive negotiations. Moreover, over more than two decades, panelists and AB members have adjudicated hundreds of disputes raising thousands of contentious issues, many of which involve highly disputed issues of trade law and policy. And, particularly during the first years of the system, practically every dispute raised issues of "first impression." Given these realities, how is it that virtually all of the individuals who served on virtually all of the panels and AB divisions were virtually always able to reach agreement on the resolution of virtually all issues raised in virtually all disputes?

Several former AB members have vividly detailed the challenges faced by the nascent body, and the motivations that prompted "the Appellate Body [to come] down to this formula of consensus."[179] Many have emphasized that the decision to "speak with one voice" was motivated by a desire to build the legitimacy and credibility of the new dispute settlement system. For example, former AB Chair A.V. Ganesan notes that the early AB members periodically discussed the possibility of dissenting opinions. He writes that members shared "a sense that, at least until the appellate system was more firmly established, the expression of [ ] dissenting or concurring opinions might diminish the credibility and reliability of the appellate review process."[180]

From this perspective, the first AB members, acutely conscious that they were "present at the creation" of a new system,[181] committed to

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[178] Working Procedures, supra note 159, article 3(2).

[179] Julio Lacarte, *WTO Appellate Body Roundtable*, 99 PROC. AM. SOC'Y INT'L L. 175, 183 (2005).

[180] A.V. Ganesan, *The Appellate Body in its formative years: A personal perspective*, *in* A HISTORY OF LAW AND LAWYERS, *supra* note 148, at 517, 531

[181] James Bacchus, *Table Talk: Around the Table of the Appellate Body of the World Trade Organization*, 35 VAND. J. TRANSNAT'L L. 1021, 1038 (2002).

each other *not* to exercise the right granted them in the DSU to issue separate, anonymous opinions. Notwithstanding treaty text explicitly authorizing dissent, they reached an agreement among themselves "not to render any separate opinion" and instead to speak with one voice only when issuing AB reports.[182]

The logic of the Trilemma suggests an alternative reason why the early AB members decided to suppress dissent: Given a high accountability appointment and reappointment system, high judicial transparency would potentially threaten judicial independence. In extrajudicial writings, former AB members make clear that they recognized the logic behind the Trilemma, and particularly their awareness that separate opinions could potentially threaten judicial independence. As former AB Chair Ehlermann writes:

> … from the very beginning, every one of the seven Appellate Body members was determined to contribute to the building of a new institution. Every one of us wanted to contribute to its strength and authority. We were of course aware that we had to build up the reputation, acceptability and ultimately the legitimacy of the Appellate Body from scratch. We were convinced that ultimate legitimacy could derive only from our behavior both as individuals and as a group, and from the quality of the work that we were charged to accomplish . . . . The determination to gain credibility, acceptability, and legitimacy, *combined with the paramount concern for independence*, explains the Appellate Body's attitude towards consensus, as opposed to voting and individual opinions, be they dissenting or concurring."[183]

To be sure, the DSU provision requiring that dissents be anonymous can be understood as designed to protect judicial independence in light of the tensions associated with the Judicial Trilemma. But the initial AB members recognized that anonymity is hard to maintain. As the first Chair of the AB recalls, early in the AB's operations,

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[182] Alberto Alvarez-Jimenez, *The WTO Appellate Body's Decision-Making Process: A Perfect Model for International Adjudication?*, 12 J.INT'L ECON. L. 289 (2009). *See also* Debra Steger, *The founding of the Appellate Body*, *in* A HISTORY OF LAW AND LAWYERS, *supra* note 148, at 447, 458 (the original AB members "had an understanding that there would be no dissents . . . they all believed that the foundation for a strong Appellate Body would be established best on the basis of consensus, high-quality decisions"). Given the large number, and highly controversial nature, of disputes submitted to the AB, it must have been difficult to uphold the informal norm against dissent, and reports suggest that one member of the first AB threatened to dissent in several cases. Elsig & Pollack, *supra* note 27, at n.25.

[183] Claus-Dieter Ehlermann, *Reflections on the Appellate Body of the WTO*, 97 PROC. AM. SOC'Y INT'L L. 77, 78 (2003) (emphasis added).

> To a greater or lesser degree, all the members of the Appellate Body were accustomed to the notion of separate opinions and could have had recourse to them. Yet, while such opinions were to remain anonymous, it was conceivable that if they become frequent they might eventually provide clues as to their authors. If that were to happen, governments could begin to try and identify them and reach whatever conclusions they wished. For these reasons, from the very beginning, I felt strongly that we should avoid minority opinions at all costs.[184]

In short, for at least some AB members, the strategy of suppressing dissents was at least in large part designed to ensure independence.

Conventional wisdom suggests that the AB members' strategy has been effective, and that, much like the CJEU, the AB is a high independence, high accountability, low transparency court, which can be graphically represented as follows:

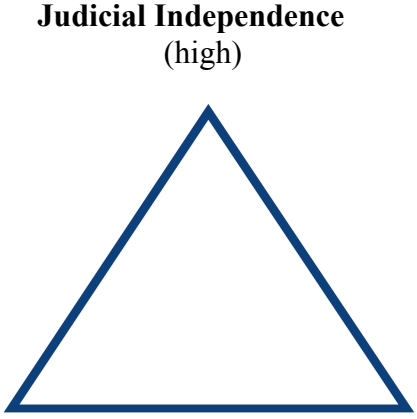

Figure 5: The Judicial Trilemma at the WTO's Appellate Body

Upon closer analysis, however, the AB presents a substantially more complex and potentially far more troubling picture. In fact, we believe that judicial transparency is not as "low" as the above analysis would suggest, as states originally intended, or as AB members expected. Specifically*, in a relatively small tribunal,* such as a three-person division hearing a dispute, *states may believe that they can discern a judge's position on a particular issue, especially where the option to dissent exists*. More specifically, if a given report features a dissent, the member states can easily speculate as to the identity of the dissenter among the

[184] Julio Lacare-Muro, *Launching the Appellate Body*, *in* A HISTORY OF LAW AND LAWYERS, *supra* note 148 at, 476, 478

three individuals hearing that dispute. Just as significantly, if the decision features no dissent, then the member states can reasonably conclude that that all three of the members voted in favor of the decision. Either way, the *de facto* level of judicial transparency or identifiability is higher than might have originally been anticipated. The combination of high transparency with a high accountability appointment system, threatens to create pressures on judicial independence at the AB that could be even more acute than those experienced by their colleagues on the ICJ.

Three examples illustrate the point. In 2003, the second term of James Bacchus (United States), an original AB member, was about to expire. By informal understanding, the replacement would be a U.S. citizen, and the United States submitted two names for consideration as potential replacements. Of the two candidates, Columbia University professor Merit Janow was approved. During Janow's first term, she sat on an AB division that found U.S. subsidy programs for cotton farmers to be WTO-inconsistent.[185] The report in that dispute included a dissent which argued that the programs at issue were not prohibited subsidies.[186] The dissent was anonymous – but trade insiders openly speculated that Janow authored the dissent.[187] Perhaps more importantly, Janow also served on the division that considered a challenge to a controversial and politically contentious U.S practice called "zeroing." The AB upheld the challenge and found against the United States.[188] The report in this dispute was unanimous, without any separate opinions.

Near the end of Janow's first term, the DSB Chair announced that Janow had advised him that she would not seek reappointment. The WTO official "gave no reason why Janow declined to seek what was widely considered an automatic reappointment to the WTO's highest juridical body."[189] Reports indicate that the U.S. failed to support Janow's renomination because she declined to dissent in disputes she sat on involving the United States:

> Some evidence from interviews suggests that USTR was concerned about cases where [Janow] was part of the three persons hearing the appeals in which the AB ruled against the US. In the reports, she did not use the option of sharing an individual (usually dissenting) view. Most importantly, she was involved in an AB recommendation that disagreed with a panel that found US antidumping practices (so-called zeroing methodology) to be permissible. A former USTR put it more generally: 'We were not happy with US

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[185] United States – Subsidies on Upland Cotton, WT/DS267/AB/R (Mar. 3, 2005).

[186] *Id.* at paras. 631-41.

[187] *See, e.g.*, Daniel Pruzin & Gary Yerkey, *WTO Appellate Body Upholds Ruling Against U.S. Subsidy Programs for Cotton*, BNA INT'L TRADE DAILY, March 4, 2005

[188] United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/AB/R (Apr. 18, 2006).

[189] Daniel Pruzin & Merit Janow, *Sole U.S. Member of WTO Appellate Body to Step Down*, BNA INT'L TRADE DAILY, May 23, 2007.

> AB members who bend over backwards to show their independence by ruling against the US'.[190]

With Janow's seat about to become vacant, the United States once again forwarded two names for consideration, and WTO members eventually chose Jennifer Hillman, a former USTR official. As an AB member, Hillman sat on a division involving another challenge to the U.S. practice of zeroing. Once again, the Appellate Body found the U.S. practice to be impermissible, and the United States lost the dispute.[191] The AB report included a lengthy separate opinion, which described and defended the legality of U.S. zeroing practices,[192] in a way that arguably departed from previous AB jurisprudence.[193] While the separate opinion was anonymous, many observers agree that "[i]t seems reasonable to assume that Hillman drafted this [separate opinion]."[194]

Near the end of Hillman's first term, she expressed an interest in pursuing a second term. However, the U.S. government did not support Hillman's bid for renomination, and she withdrew her name from consideration.[195] While the United States never provided a public account of why it did not support Hillman's bid for a second term, "according to observers, USTR perceived [her] as not being sufficiently aggressive in issuing dissenting opinions on trade remedy cases."[196]

These examples suggest that it is difficult if not impossible to maintain the confidentiality of separate opinions; or, at a minimum, that at least some states believe that they can identify the authors of separate opinions and are willing to act on those beliefs. Moreover, they demonstrate that *even the possibility* of issuing a dissent can "out" a judge's position on issues litigated before him or her. Given a treaty-based entitlement to dissent, an AB member's lack of dissent can be interpreted as an agreement with the result and the reasoning of an AB report. Moreover, these examples show that nominating states – or at least the United States in its role as renominating state – are willing to retaliate against AB members who they deem to be insufficiently supportive of their interests in WTO disputes.

From the perspective of judicial independence, the failed reappointment of Sueng Wha Chang is even more troubling. Near the end

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[190] Elsig & Pollack, *supra* note 27, at 406.

[191] United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), Recourse to Article 21.5 of the DSU by the European Communities, WT/DS294/AB/RW, (May 14, 2009).

[192] *Id.* at paras. 259-270.

[193] James Flett, *Collective Intelligence and the possibility of dissent: Anonymous individual opinions in WTO jurisprudence*, 13 J. INT'L ECON. L. 287, 300 (2010).

[194] Elsig & Pollack, *supra* note 27, at 19.

[195] *USTR Blocks Hillman's Bid for Second WTO Appellate Body Term*, INSIDE US TRADE, Apr 29, 2011.

[196] For Appellate Body Candidates, *USTR Priortized Willingness to Dissent*, INSIDE US TRADE, Sept. 9, 2011. *See also* Elsig & Pollack, *supra* note 27, at 409 ("it seems likely that USTR was unhappy with Hillman because she did not more often and forcefully dissent from decisions against the U.S.).

of his first term, Chang expressed an interest in serving for a second term. Thereafter, the Chair of the DSB engaged in consultations with WTO members, and hosted a May 10, 2016 meeting for states to pose questions to Chang. Some 26 delegations participated in the meeting. The following day, the U.S Ambassador to the WTO advised the WTO's Director-General and the Chair of the Dispute Settlement Body that the United States would not support an additional term for Chang.

At a May 23, 2016 DSB meeting, the United States provided a public defense of its position, arguing that Chang's "performance does not reflect the role assigned to the Appellate Body by [WTO] Members in the [WTO Dispute Settlement Understanding]."[197] In support of this claim, the United States referred to four recent AB reports in which Chang had participated, and highlighted what it considered to be inappropriate action by the AB, including (i) devoting two-thirds of a report to analysis of issues that were not necessary to the result because resolution of a preliminary issue rendered the remaining issues moot, (ii) addressing issues that weren't part of the appeal, (iii) deciding disputes on the basis of arguments not made by any party, and (iv) deciding what is lawful under a Member's domestic law.[198] Because reappointment requires a consensus of the WTO membership, the U.S. objection was fatal to Chang's bid for reappointment.

The trade community's reaction was swift and severe. South Korea claimed the U.S. action meant that, "if appellate body members make decisions that do not conform to U.S. perspectives, they are not going to be reappointed."[199] Brazil, China, Egypt, the EU, Honduras, India, Indonesia, Iceland, Oman, Mexico, Switzerland, Taiwan, Thailand and Viet Nam, among other states, likewise expressed concern that the U.S. action could undermine confidence in the system.[200] The EU characterized the U.S. position as "a very serious threat to the independence and impartiality of current and future appellate body members."[201] Egypt, Nigeria, Paraguay, Russia, Taiwan and Thailand similarly emphasized the potentially negative impact on the AB's independence and impartiality.[202] No delegation spoke in support of the US position.

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[197] Statement by the United States at the Meeting of the WTO Dispute Settlement Body, May 23, 2016, https://geneva.usmission.gov/wp-content/uploads/2016/05/Item7.May23.DSB_.pdf.

[198] The full text of the U.S. statement can be found at https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf.

[199] Bruce Baschuk, *U.S. Blocks Korean Judge From WTO Appellate Body*, BNA INT'L TRADE DAILY, May 24, 2016.

[200] *WTO members debate appointment/reappointment of Appellate Body members*, WORLD TRADE ORG. May 23, 2016, https://www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm.

[201] *US accused of undermining WTO*, FIN. TIMES, May 30, 2016.

[202] *WTO members debate*, *supra* note 200.

The negative reaction was not limited to other WTO members. For example, all of the living former AB members cosigned a letter critical of the U.S. position. The letter stated that reappointment decisions "must never be made in such a way that could threaten to politicize WTO dispute settlement and imperil the impartial independence of every Member of the Appellate Body." They warned that

> … if, now, the fact that a Member of the Appellate Body joined in the consensus on the outcome on a particular legal issue or on a particular dispute becomes for the first time a factor in a decision on that Member's reappointment, all of the accomplishments of the past generation in establishing the credibility of the WTO dispute settlement system can be put in jeopardy.… There must be no opening whatsoever to the prospect of political interference in what must remain impartial legal judgments in the WTO's rule-based system of adjudication.
>
> The unquestioned impartiality and independence of the Members of the Appellate Body has been central to the success of the WTO dispute settlement system, which has in turn been central to the overall success of the WTO. Undermining the impartial independence of the Appellate Body now would not only call into question for the first time the integrity of the Appellate Body; it would also put the very future of the entire WTO trading system at risk.[203]

Despite widespread and sustained criticism, the United States did not change its position, and Chang's term as an AB Member expired on May 31, 2016. As of this writing, the position remains vacant.

One other aspect of this incident deserves mention. After the U.S. announced its opposition to Chang, the other AB members – including some who may in the future seek a second term – sent a letter to the DSB Chair sharply criticizing the attribution of certain reports or passages from reports to a single AB member, noting that "no case is the result of a decision by one Appellate Body Member, nor should interpretations or outcomes be attributed to a single Member."[204] In response, the United States asserted that "it is not difficult to ascertain from the questions posed by a member … at an oral hearing that the member is associated with the views expressed in an [AB] report related to those questions."[205]

In adopting this position the United States introduced a new and unexpected element to the concept of judicial identifiability. Traditionally, states and other interested actors identified a judge's

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[203] Letter to Xavier Carim, Chair of the Dispute Settlement Body (May 31, 2016), http://worldtrade law.typepad.com/files/abletter.pdf

[204] Letter to Xavier Carim, Chair of the Dispute Settlement Body, (May 18, 2016).

[205] Statement by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, May 23, 2016.

position on legal issues primarily if not exclusively through published votes and written opinions. Under this traditional approach, the strategy of releasing unanimous opinions provided no basis for states to infer a judge's position on any particular issue, and could be used as a means of limiting judicial identifiability. By demonstrating its willingness to rely on questions and comments made during oral proceedings, however, the United States dramatically expanded the domain of judicial behavior used to discern a judge's position on a particular issue.

The U.S. approach to judicial identifiability raises many interesting and difficult questions, most of which are beyond the scope of this paper. For example, whether questions posed during oral arguments provide a reliable evidentiary basis for reaching a conclusion about a judge's position on legal issues is a question that is even more complex at the WTO than elsewhere, given that oral proceedings are typically closed.[206] For our purposes, the more relevant inquiry is what implications the U.S. position has with respect to the Judicial Trilemma. One immediate implication is that, if other states follow the U.S. lead and infer judicial positions from questions at oral hearings, judicial transparency will be understood as higher at all international courts. If a court is not already a high transparency court, the logic of the Trilemma suggests that an increase in transparency will likely create downward pressure on either judicial independence or judicial accountability. Alternatively, inferring judicial positions from questions at oral hearings could trigger adaptive responses by international judges, who will face incentives to change patterns of judicial questioning during oral proceedings. Specifically, judges might become less willing to pose questions in oral proceedings for fear of having those questions held against them should they one day decide to seek reappointment.

We derive three important lessons from the strange saga of Sueng Wha Chang, two about the WTO and the other about international courts in general. First, this incident is often understood as demonstrating that the WTO's reappointment process threatens the independence of AB members. But the suggestion that the two features of judicial independence and judicial accountability are necessarily locked into an inverse relationship, where "more" of one inevitably comes at the expense of "less" of the other, is incomplete, and therefore misleading. In fact, these two features are not necessarily in opposition, and it is entirely possible to have high levels of judicial independence and high levels of accountability – as the CJEU, a successful and influential international court, amply demonstrates. The Judicial Trilemma teaches us that the Chang incident involves the interaction of three court features – independence, accountability, and transparency – rather than two, and thus

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[206] A former AB member told us that AB members prepare questions prior to the oral proceedings, and then distribute the questions among different members of the division, which suggests that it is not possible to discern a judge's position from the questions posed in oral proceedings.

points towards alternative ways of addressing the problems this episode highlights. Specifically, it is possible to preserve and enhance AB independence by either (a) changing the reappointment system, or by (b) designing structural features which could, in fact, limit or eliminate judicial identifiability. The standard analysis overlooks the third element of the underlying dynamic, thus not only misdiagnoses its cause, but also misleadingly limits the list of potential cures.

Second, the WTO dispute system has been enormously successful and often serves as a "poster child" for the positive role that international adjudication can play in furthering international cooperation. Without denigrating the system's considerable successes, the Trilemma suggests that the WTO system faces unique pressures and may be substantially more fragile than commonly assumed.[207] In particular, AB judges have significantly shorter terms than their counterparts at other courts. Moreover, as they can be appointed or reappointed only by consensus, they face an electoral system that is substantially less forgiving than at other international courts. Indeed, given that they must obtain the support of every WTO member, Appellate Body members are perhaps the most accountable of all international judges. At the same time, they inhabit a system that is considerably more transparent than commonly understood. The DSU's directive that separate opinions be anonymous was likely designed to enhance judicial independence. However, the combination of a small bench and a highly informed community of trade insiders renders anonymity virtually impossible to maintain, and produces a system of de facto high judicial identifiability. Given this structural combination of extremely high judicial accountability and higher judicial transparency than is generally acknowledged, the Trilemma suggests that, contrary to conventional wisdom, judicial independence at the AB is fragile and at risk.

Finally, it is natural to interpret Chang's failed reappointment in terms of its implications for the future of WTO dispute settlement. Once again, however, we think the standard analysis is too narrow. Sueng Wha Chang's failed reappointment surely has implications for the WTO; but its larger significance rests on structural dynamics that are common to all international courts. At each international tribunal, states and judges confront a series of difficult tradeoffs. Judicial independence, judicial accountability, and judicial transparency are all desirable features for international courts to have. The Judicial Trilemma reveals, however, that it is not possible to maximize all of these values at the same time. Understanding the Trilemma's logic can help ensure that these inevitable tradeoffs are made deliberately and intelligently.

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[207] For a very different analysis that reaches a similar conclusion, see Gregory Shaffer, Manfred Elsig and Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 L. & CONTEMP. PROBS. 237 (2016).

CONCLUSION

In his classic 1958 essay, "Two Concepts of Liberty," Isaiah Berlin famously asked whether the fundamental values of human existence, such as liberty and equality, were compatible with one another. On the one hand, Berlin noted a long-standing and commonplace "conviction that all the positive values in which men have believed must, in the end, be compatible, and perhaps even entail one another." It was this view that Berlin referred to as "the total harmony of true values." On the other hand, however, Berlin argued, drawing upon "the ordinary resources of empirical observation and ordinary human knowledge," that it was clear that "not all good things are compatible, still less all the ideals of mankind." One could not, for example, simultaneously maximize both liberty and equality, since liberty of the individual must include the liberty to establish inequalities, while the achievement of equality must necessarily imply some limits on individual liberty. Generalizing from this example, Berlin argued that:

> The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others…. If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict – and of tragedy – can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.[208]

Our core argument accepts and embraces Berlin's fundamental, if tragic, insight that not all desirable values can be maximized at once, and that the need to choose among positive values is an inescapable characteristic of the human condition. More specifically, we argue that it is not possible, either in principle or in practice, to maximize simultaneously the three fundamental values of judicial accountability, judicial transparency, and judicial independence. Empirically, we have demonstrated that the state designers of international courts, and the judges who carry out their mandates within their respective statutes, all confront this fundamental trilemma, but have made strikingly different trade-offs among these three values.

We do not, of course, claim that either member states, when drawing up the statutes of various courts or tribunals, or judges, when drawing up rules of court or making case-by-case decisions, consciously invoke what we have called the Judicial Trilemma. In some cases member states have designed courts without much explicit thought about the

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[208] Isaiah Berlin, *Two Concepts of Liberty*, *reprinted in* FOUR ESSAYS ON LIBERTY 118 (1969).

inevitable tradeoffs between judicial accountability, transparency and independence, falling back instead on off-the-shelf templates from existing domestic or international courts. Nevertheless, the fundamental choices made by states at these foundational moments have embodied different tradeoffs among these three values, and the judges, for their parts, have by and large responded with remarkably clear and self-conscious strategies designed primarily to maximize their own independence within the constraints of their respective statutes. In at least one case, moreover, both the judges and the member states of the European Court of Human Rights have made an explicit and self-conscious choice to *change* their original trade-offs, first increasing judicial accountability in Protocol 11 by shortening their renewable terms from nine to six years, and then decreasing judicial accountability in Protocol 14 by granting the judges nine-year, non-renewable terms, with the explicit aim of increasing the judges' independence. The term "Judicial Trilemma" is our own, as is our effort to lay out its fundamental logic; yet the fundamental, underlying tradeoffs are recognized, and acted upon, by both states and judges, who increasingly recognize the need to choose among competing, and inherently incompatible, values.

As a normative matter, we do not view each of the "ideal type" responses to the Trilemma adopted by different international courts as equally satisfactory. Like the current and former international judges we interviewed, we start with the proposition that is judicial independence is fundamental in itself and is instrumentally indispensible for any rule of law system. Thus, we support structural elements of a legal system that tend to protect, rather than threaten, judicial independence. Yet to say this is not to endorse a particular approach to the Trilemma, for it leaves open the question of whether it is more desirable to pair a commitment to judicial independence with efforts to maximize judicial accountability or judicial transparency.

Judicial transparency, primarily through open voting and the possibility of issuing separate opinions, is highly controversial, yet we are persuaded that separate concurring and dissenting opinions can have significant systemic benefits. Drawing on their experience serving on the bench, numerous domestic and international judges, have stated that separate opinions help to hone and refine majority opinions, resulting in better-reasoned judgments.[209] Relatedly, separate opinions also help litigants and others to understand the scope and limits of a court's judgment, and to identify alternative lines of argument to pursue. Finally, and rarely although perhaps most importantly, dissents can substantially influence the future development of the law. In many legal systems,

[209] For a sampling of the voluminous literature, *see, e.g.*, Brennan, *supra* note 31; Ginsburg, *supra* note 36, at 143 (1990); Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 42 (1994); M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 314

prophetic dissents have, over time, reshaped the law and some have even come to be embraced by the majority of a future court.

We acknowledge the concern that dissents can potentially undermine the authority and legitimacy of a tribunal, particularly in a court's early days, before it has had a chance to establish a legacy. However, we think that in most instances this concern is exaggerated. Courts earn respect and authority by producing well-reasoned opinions, and we are persuaded that dissents substantially assist this process by contributing to the integrity and quality of the opinion-writing process.[210]

Is the interest in enhanced judicial transparency greater than the interest in enhanced judicial accountability? We accept the premise that accountability should attach to any exercise of public authority, yet believe that of the three relevant values, judicial accountability, in the form of granting judges renewable terms, need not and should not be maximized. One need not go as far as Joseph Weiler, who characterized short, renewable judicial terms as a "continuous affront" to the rule of law, to conclude that they create an environment where judges are potentially vulnerable to extra-legal pressure, or at least can reasonably be perceived as being potentially vulnerable to extra-legal pressures. Moreover, we believe that non-renewable terms, although necessarily entailing a lower degree of accountability, are tolerable and not likely to produce judges who act in entirely unrestrained ways. First, states can still carefully screen potential judicial nominees, and experience demonstrates that states are likely to select individuals who have been well socialized into an appreciation of the importance of constraint in the exercise of judicial power. Second, even assuming that a particular judge, feeling unconstrained by concerns related to reappointment, and inclined to act in unacceptable ways, other mechanisms are available. For example, if a judge violates fundamental ethical rules or is unable to fulfill her assigned duties, nearly all international courts provide for the possibility of removal by the other judges. Third, and perhaps most importantly, states have numerous mechanisms other than renewable terms that serve to promote accountability *of courts as a whole*, without insisting on the accountability of *individual judges* for their judicial votes and opinions. Some of these are *ex ante*, such as taking reservations to a tribunal's jurisdiction and promulgating rules to regulate access and procedure; others are *ex post*, such as renegotiating substantive or jurisdictional rules, delaying the implementation of decisions, or creating competing courts.[211] In the aggregate, these mechanisms provide ample means for states and other actors to introduce elements of ensure the accountability of international courts, but they do so without subjecting individual judges to extra-legal pressures in response to their individual votes.

For these reasons, we endorse the approach taken by the ECtHR and the ICC, which combines the high transparency of open dissent and

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[210] Brennan, *supra* note 31.

[211] *E.g.*, HELFER, supra note 13, at 253.

the high independence of secure judges with the acceptable decrease in judicial accountability associated with non-renewable terms. The case of the ECtHR, where member states made an explicit choice to give up renewable terms to promote independence, as well as the case of the ICC, where member states learned the lessons of the Yugoslav and Rwandan tribunals with their four-year renewable terms, show that both states and judges are able to learn from past experience, and make different choices.

That said, we appreciate that our position rests on contestable normative premises. More fundamentally, however, we do not believe that there exists one ideal approach to the Trilemma that is appropriate for all courts in all contexts at all times. As a normative matter, the goal should not be to design a comprehensive, ideal approach to the Trilemma, but rather to carefully design a mix of the various characteristics that is appropriate given the goals of those responsible for the institutional architecture of a particular court or adjudicative system.[212] As we've emphasized, the conceptual framework of the Judicial Trilemma does not in itself tell us what kind of court to choose, nor does it offer the false hope that all values can be maximized simultaneously -- but it does tell us that a choice is necessary, and indeed inescapable. Although no choice is perfect, we believe that the emerging trend towards transparent courts, with independent judges and an acceptable loss of accountability through non-renewable terms, is a salutary one, which offers the best chance, among necessarily imperfect choices, to advance the prospects that a deeply interdependent world will increasingly be governed by the rule of law.

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[212] *See* Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 9 (Stephen B. Burbank & Barry Friedman eds., 2002). For a more generalized version of this type of argument, *see* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1997).