

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

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[Jeffrey Dunoff and Mark Pollack](#) open their analysis of three interrelated design features of international courts and tribunals by reflecting on the controversy generated by the U.S. decision in 2016 to veto the reappointment of a member of the World Trade Organization’s (WTO’s) Appellate Body.¹ The decision to block Sueng Wha Chang’s reappointment is presented by the authors as one that secured the accountability of an individual tribunal member, while at the same time compromising his independence.

Building on this apparent tension between judicial independence and individual judicial accountability, Dunoff and Pollack develop the concept of the Judicial Trilemma, which they present as a dilemma facing those who design international tribunals or participate therein as decision-makers. The dilemma is that in pursuit of what the authors present as the three major values or design features of international tribunals—*independence, accountability, and transparency*—the designers and participants necessarily must prioritize any two at the expense of the third. Dunoff and Pollack illustrate their claim by examining the operation of four tribunals: the WTO Appellate Body, the Court of Justice of the European Union (ECJ), the European Court of Human Rights, and the International Court of Justice (ICJ), each of which is described as prioritizing or maximizing two of these “dynamically interacting” values at the expense of the third.

This symposium contains five responses by leading authors to this thought-provoking article, each focusing on a different aspect or institutional application of the apparent Judicial Trilemma.

[Helen Keller and Severin Maier](#) begin by challenging the conception of independence elaborated in the article as being too wide in some respects and too narrow in others.² They suggest that judicial independence should mean simply that judges are free to decide disputes without improper outside influence, and not that they must be free from all outside influence, or that they must decide without reference to their own ideological preferences. They also suggest that the notion of judicial independence should be appraised not only by reference to whether judicial terms are nonrenewable, which is the approach adopted by Dunoff and Pollack, but also by reference to the existence and scope of judicial immunity.

[Gleider Hernández](#) questions the American-centric, decontextualized, and selective nature of the Trilemma.³ He suggests that the Trilemma should in fact be a quadrangle, with collective institutional authority, and the

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

² Helen Keller & Severin Maier, *Independence and Impartiality in the Judicial Trilemma*, 111 AJIL UNBOUND 344 (2017).

³ Gleider Hernández, *Systemic Judicial Authority: The “Fourth Corner” of “The Judicial Trilemma”?*, 111 AJIL UNBOUND 349 (2017).

commitment to confidentiality that generally accompanies that, making up the fourth corner. He is skeptical of the U.S.-centric focus on judicial accountability that he takes to be inspired by the particular practice of American judicial appointments, and he draws attention to the crucial importance of local and cultural context in understanding the functioning of institutions. Hernández also criticizes the authors' conflation of the intentions and actions of the drafters (usually the representatives of states) who design judicial institutions, with those of the judges who operate within the institutions and oversee the evolution of their practices. Finally, and in common with several other respondents, Hernández points to the unacknowledged selectivity of the three values that comprise Dunoff and Pollack's Trilemma, and suggests that their abstract nature draws attention away from a range of more salient political issues that preoccupy and influence the operation of the various international courts they study: integration for the ECJ, trade liberalization for the WTO, and the tension between consent and universality for the ICJ.

[Mauricio Guim's](#) response provides a practical illustration of Hernández's point about the importance of context, by testing the plausibility and applicability of the Judicial Trilemma in the domestic judicial arena, and specifically in the context of Latin American judicial politics.⁴ Drawing on examples such as the dissolution of the Supreme Court in Ecuador, court purges in Peru and Argentina, the leaking of the identities of anonymous or "faceless" criminal court judges in Colombia, the use of dissents and the dismissal of judges in Venezuela, and the "hyperactive" *sala constitucional* of Costa Rica, he challenges a number of Dunoff and Pollack's premises. He uses the examples of Colombia and Venezuela to suggest that institutional design features intended to promote independence might fail to do so in practice when governments or criminals are nevertheless determined to pressurize them, and he uses the cases of Costa Rica and Argentina to show the converse, i.e., that even courts with strong accountability features can carve out a degree of independence for themselves. The range of interesting examples he provides suggests that the trade-off between the three values of independence, accountability, and transparency might be rather different, at least in the Latin American judicial context, if not elsewhere, from that predicted by Dunoff and Pollack's Trilemma.

[Isabelle Van Damme](#)⁵ and [Jennifer Hillman](#)⁶ concentrate in their respective responses on one of the four tribunals examined in the lead article, namely the WTO Appellate Body. Both respondents suggest that there are other and different possible understandings of how, and if so to whom, the members of the Appellate Body may be accountable, and that the perception of the United States when it vetoed Sueng Wha Chang was not shared by the majority of member states. Van Damme also argues that whereas Dunoff and Pollack view the U.S. veto as having focused on the accountability of an individual judge, it was in fact a strategic use of the power of individual nonreappointment in order to influence the Appellate Body as a whole, and to send a signal to the Tribunal collectively about the United States' preference as regards their interpretation and decision-making. Turning to normative questions, she argues that the Appellate Body reappointment process should only be used to reinforce judicial accountability insofar as it relates to the competence of the individual member in carrying out his or her judicial functions, and not to censure or demonstrate disapproval of particular decisions or reports.

Finally, Jennifer Hillman concurs with Dunoff and Pollack as well as with Van Damme in placing primary importance on the value of judicial independence over the other two elements of the Trilemma, but she also agrees with Hernández that the conception of the Trilemma is too simplified and excludes other important aspects of the tradeoffs implicit in the design of international tribunals. Like Keller and Maier, too, she questions the particular understanding of accountability used by Dunoff and Pollack, as well as the link they draw between reappointment and accountability. She also questions whether judicial transparency really requires separate and identifiable

⁴ Mauricio Guim, [The Judicial Trilemma Visits Latin American Judicial Politics](#), 111 AJIL UNBOUND 354 (2017).

⁵ Isabelle Van Damme, [The Application of "The Judicial Trilemma" to the WTO Dispute Settlement System](#), 111 AJIL UNBOUND 359 (2017).

⁶ Jennifer Hillman, [Independence at the Top of the Triangle: Best Resolution of the Judicial Trilemma?](#), 111 AJIL UNBOUND 364 (2017).

dissenting opinions, or whether anonymous dissents would equally provide for judicial transparency. Finally, building on her experience with the WTO Appellate Body, she argues that the Trilemma omits factors other than independence, accountability, and transparency that are important in the overall institutional design and functioning of a tribunal, such as the nature of the parties, decision-making processes, length of judicial terms, and time-frames for decision-making.

In short, Dunoff and Pollack have already generated a lively set of debates in response to their thought-provoking analysis of the trade-offs which may have to be made between various design features of international courts and tribunals. By way of conclusion, and to add my own reaction to their analysis, I would question whether the values that they identify and place in relation to one another in the Trilemma really are the three major values or design features which most or even many architects of an international tribunal would aim to pursue. While I share the view of the authors themselves and of several of the other respondents that judicial independence is a key feature and perhaps the primary value to be pursued when establishing a court or tribunal, including an international tribunal, I find the choice of transparency and accountability as the other two main values to be curious. Judicial accountability would not be high on any list I would draw up of the values to be pursued or the features to build into the design of an international tribunal. Many other candidate values come more readily to mind, such as judicial competence and experience, fairness of decision-making procedures, quality and thoroughness of judicial reasoning, and efficiency and timeliness of judgment. Accountability in the strong sense used by Dunoff and Pollack (i.e., being subject to sanction where performance is considered to be unsatisfactory to governments) would not, with the exception of removal for gross incompetence etc., be on my list of design features for international judicial tribunals. And transparency, while a reasonably relevant feature, would not necessarily be an indispensable one. Hence, while I suspect that few would disagree with Dunoff and Pollack that there is a clear trade-off between independence and accountability in the design of international (and domestic) courts, or that transparency of individual judicial decision-making may make it easier to hold individual judges to account, the choice to present these three together as the primary values to be pursued when designing international tribunals is strongly contestable.

Nevertheless, whatever readers may conclude as to the persuasiveness of the Judicial Trilemma or of the values identified by Dunoff and Pollack, there is no doubt that they have done a significant service in provoking discussion of these issues, and a debate about what the important design features of international tribunals should be. Their article has provided a very rich and stimulating analysis of some of the key challenges confronting a range of international courts and tribunals and the various features that bear on their independence and accountability. To have generated such thoughtful and varied responses as have been brought together in this symposium is already a major achievement and their work is sure to continue to provoke valuable discussion and debate.