Can Judicial Norms Protect Against Political Pressure?
Evidence from 25 years of WTO Rulings

Abstract

International tribunals are pulled between a commitment to judicial autonomy and the need to manage their member-states' political expectations. When the formal design of a tribunal offers governments too much oversight, judicial actors have an incentive to converge on informal norms that protect them from political control. We examine this phenomenon in the context of the WTO's Appellate Body. We argue that the early insistence on collegiality and consensus opinions among WTO AB members had the effect of (i) deflecting political blame and (ii) providing cover for adjudicators who did not dissent when governments might have wished them to. As the informal norm of consensus opinion was weakened, political control by Member-states grew stronger. An empirical analysis of 25 years of Appellate Body activity offers consistent evidence. Exploiting the random allocation of AB adjudicators to divisions, we find no evidence of systematic national bias in the direction of rulings. The one exception relates to the nationality of AB chairs, suggesting that when adjudicators are singled out, they become more prone to political pressure. A similar effect pertains to individual dissenting opinions: the presence of a co-national on a division is associated with significantly increased odds of dissent. These results hold considerable implications for reforms going forward.

1. Introduction

The World Trade Organization's Appellate Body was an experiment in multilateral governance that may have run its course. A quarter century after its inception, it appears likely that if the AB ever comes back into service, its design will be markedly different. In retrospect, the fact that the "World Trade Court" endured as long as it did is as remarkable as its eventual demise.[1] In this article, we take stock of the AB's record, and draw out the lessons that its history offers for institutional design, with a focus on the principal challenge facing all adjudicators in international tribunals: how to manage political pressures while maintaining judicial autonomy?

We leverage the full empirical record now at our disposal, spanning 25 years of legal opinions, to open the black box of internal procedures and decision-making at the WTO's highest tribunal at a turning point in its history. We examine the process through which AB members are selected to serve on a given case, the direction of the resulting rulings, and the occurrence of dissenting opinions. While it is rarely possible to ascertain what pressures, emanating from either member governments or individual policy preferences, are at work in a given instance, looking over a large number of cases in aggregate makes it possible to assess the net effect of these competing forces. Our analysis thus seeks to provide a fuller picture of the forces AB members are exposed to, the means they used to protect their judicial autonomy, and how successful they were in doing so.

Much of the attention paid to the WTO's AB has been focused on formal rules: the term limits of its members, their appointment and re-appointment procedures, the scope of their mandate and appellate review powers, as set out in the WTO treaties. By contrast, our survey of the AB leads us to focus on a set of *informal* judicial norms; that is, norms of behavior adopted by the adjudicators themselves, in distinction to formal treaty norms. Our premise is that such norms emerge in a predictable fashion, in response to the primary formal rules agreed to by states, and that they can have as much of an impact on outcomes as the legal texts themselves.

[1] See Claus-Dieter Ehlermann. 2002. Six Years on the Bench of the "World Trade Court". Some Personal Experiences as Member of the Appellate Body of the World Trade Organization. *Journal of World Trade* 36(4): 605–639, 2002.

From the start of the WTO, the founding members of the AB adopted a set of working procedures which went on to regulate the AB's behavior for the next quarter century.[2] At the center of these was the notion of collegiality, according to which the three-person division would consult with the other four members on the bench; and a related norm of consensus, which informally proscribed separate opinions. The WTO texts themselves are explicit in allowing dissenting opinions.[3] Yet as the first chair of the AB put it, "from the very beginning, I felt strongly that we should avoid minority opinions at all costs."[4] This notion was embraced and openly praised by other members of the AB, and it proved strikingly effective: as a succession of AB members point out as evidence of the exceptional collegiality and cooperative spirit of the bench, no dissenting opinion was issued by any adjudicator for the first decade of the tribunal's existence.[5]

We argue that the emergence of such an informal norm of consensus was no coincidence. Rather than a testament to the particular character of the founding members, as some of those adjudicators themselves have suggested, the insistence on consensus opinions is best thought of as a reaction to a set of formal rules that failed to offer individual adjudicators sufficient protection from the political control exerted by WTO Members. From the standpoint of adjudicators, a strong norm of consensus achieved two objectives: first, it harnessed the "safety in numbers" that came from a united three-person division—which had committed, moreover, to consulting with the other four AB members. As the political science literature on blame attribution attests to, institutional arrangements that increase the perceived number of decision-makers render political repercussions less likely by diffusing responsibility. In much the same way, consensus opinions made it more difficult to single out one adjudicator for blame. Secondly, and just as importantly, by tying the hands of AB members who might have wished to dissent, the much-publicized norm of consensus provided a means of fending off government pressure to dissent in politically salient cases: adjudicators could imply that they had been outnumbered in the division, yet gesture to a strong

[2] As we set out in greater detail below, Article 17.9 of the DSU allows the AB members themselves to draw up their own working procedures.
[3] Article 17.11 of the DSU.
[4] Julio Lacarte-Muró. *Launching the Appellate Body*.
[5] See Lacarte-Muró, Ehlermann, Bacchus. Matsushita also referred to the strength of the norm, though with more ambivalence. In this case we take the definition of "true dissents" from Mavroidis and Kim. An early separate opinion, in *EC—Asbestos*, merely emphasized one aspect of the majority opinion, and is not usually regarded as a dissent.

norm as a reason not to dissent. As long as this norm endured, it provided political cover to individual adjudicators.

Yet as we outline, an insistence on consensus comes at a cost. Deliberations are drawn out by the need to talk through disagreements; the resulting legal opinions are longer and more convoluted; they must include various *dicta* to satisfy every member's views. Most importantly, emphasizing consensus promotes any available focal point. Convergence on existing reasoning is incentivized, while breaking with past rulings is discouraged. At the WTO, this had two important effects. First, it supported a *de facto* rule of precedent, increasing conformance with past rulings while limiting the possibility for learning or course correction over time. Secondly, it magnified the influence of the Secretariat, which provides AB members with a detailed memo laying out the possible courses of action (a so-called "issues paper") before they ever meet to discuss the case. The elevation of consensus meant that this initial focal point loomed larger than it otherwise would have. Some scholars argue that the result was a greater tendency towards "groupthink" in the WTO's AB than in any other international tribunal.[6]

Accordingly, there is anecdotal evidence of increasing dissatisfaction among AB members over the perceived need to bend to the majority. While in the early years, collegiality, and the resulting record of consensus opinions, were seen as an unalloyed good, doubts began to arise through the AB's history, especially as cases grew more complex. Gradually, the strict norm against separate opinions was weakened. In the second and third decades of the AB, dissenting opinions started appearing in response to divisive legal issues. Though such dissents never grew frequent, our claim is that breaking away from a strict norm of consensus was enough to change governments' expectations. AB members could no longer "plead collegiality"; they no longer benefited from the protection provided them by an unbroken record of consensus opinions. The collective aspect of the three-member division no longer offered cover from political pressure.

The collapse of this informal judicial norm, starting in 2005 with the issuance of the first AB dissent, had the unexpected effect of strengthening political control: now that individual AB

[6] Günther, P., 2020. "Groupthink Bias in International Adjudication". *Journal of International Dispute Settlement* 11(1): 91-126.

members *could* dissent from the majority opinion, they faced increased expectations from governments that they would. Indeed, while most attention understandably gets paid to the dissents that *are* issued, it is likely those dissents that were expected by states, but were not issued, that eventually led to mounting political pushback against members of the tribunal. The US, in particular, began throwing the reappointments of its own AB members into doubt once the option of dissenting was on the table, but had not been exercised as forcefully or as frequently as the US might have wished.

Conversely, AB members also had good reason to be wary of using dissenting opinions to castigate any particular WTO Member, be it their own or another powerful member government. Although dissenting opinions are unsigned, the identity of a given dissent's author is a matter of active speculation within Geneva circles. Even from the institution's very beginning, the original AB members were concerned that if dissents occurred too often, it would become easier for governments to tell who they were coming from.[7]

We offer support for our account of the WTO's AB, and the conflicting pressures it grappled with, through three sets of empirical tests. Leveraging the full record of the AB's existence, we begin by assessing whether the selection of three amongst seven AB members to sit on a division to decide particular disputes is truly random, as the AB working procedures set out. Indeed, as opposed to the selection of panelists, which bars nationals from the litigant countries from serving on a panel, no such restriction exists at the level of the AB. This might conceivably lead to an incentive by individual AB members to seek appointment on some cases over others. Anecdotal evidence suggests that there may be ways for adjudicators seeking to get around the random selection process (e.g. by declaring a conflict or unavailability in a given case), in ways that could favor some countries over others. Be that as it may, we find no evidence of any bias in the selection of AB adjudicators to decide specific cases. On every parameter we examine, the selection appears as-if random. This is normatively desirable from the institution's standpoint, attesting to the legitimacy of the division selection process. And it also provides us with a considerable analytical

[7] See Ehlermann 2002, infra. Some WTO observers have gone so far as to conclude that "everyone involved" knows who the author of an AB dissent is (Terris et al, 2007, 124. Terris, D., Romano, C.P. and Swigart, L., 2008. Toward a Community of International Judges. *Loy. LA Int'l & Comp. L. Rev.*, *30*, p.419.)

benefit, approximating the setting for a natural experiment.[8] This is what allows us to ask whether a given division is more likely to rule in favor of a litigant country if it is "treated" with an adjudicator from that country.

That is what we do in the second part of the analysis. Given the considerable attention paid to the nationality of WTO adjudicators and states' political interests, we examine whether the presence of an adjudicator from the defendant or complainant Member has any impact on the legal findings in the resulting opinion. On the basis of 25 years of rulings on appeals, we find no consistent evidence of bias in the AB's opinions on the basis of nationality. Looking specifically to US adjudicators, given how the US has been at the center of the clash between political control and judicial independence at the WTO, we again fail to find any consistent evidence of bias by US AB members in favor of the US. An analogous examination of divisions featuring EU AB members yields some weak signs of national preference, but these findings, once we take into account dispute characteristics, time trends, and adjudicator-specific attributes, are insufficiently robust to conclusively point to the presence of bias. In view of the empirical literature on national bias in other courts and implicit bias among adjudicators, these null findings are a testament to the self-professed independence of the WTO's highest tribunal.

The one exception we observe in this respect has to do with the nationality of the *chair* of the sitting three-member division. When the chair of the AB division happens to be from the defendant country, the proportion of findings favorable to the complainant drops by 29%. This effect, which is even more pronounced when we look specifically at the US, is consistent with our broader argument. Whenever adjudicators are singled out—as when they are named chair of a division—they lose the protection offered by the collective aspect of the three-member division: the magnitude of political control they are exposed to increases, and judicial autonomy is threatened. Bias results.

For this same reason, the force of political control is likely to be most keenly felt in the case of dissenting opinions, when adjudicators are explicitly singled out. Dissenting opinions are thus the

[8] The analytical benefit of the random assignment of AB adjudicators has been pointed out in Arias, Eric. 2018. "Impartiality in International Courts: Evidence From A Natural Experiment At The WTO". Presentation at the 2018 International Political Economy Society.

third outcome we examine. We ask, does a dissent become more likely when one of the AB members is from the respondent country in a given case? The answer is yes: the odds of a dissent increase more than fivefold when one of the AB members is from the defendant country, even once we account for dispute characteristics. If we focus only on so-called "true dissents,"[9] the effect is starker still: the odds of a dissenting opinion go up tenfold when one of the division's members is from the same Member as the respondent.

Taken together, these findings present a coherent picture of the AB on the basis of the full universe of its legal rulings. The absence of bias across rulings, in contrast to evidence of nationalist leanings by AB division chairs and authors of dissenting opinions, speaks to how a unified group of even three adjudicators can remain largely immune to pressures from WTO Members. By contrast, any setting where adjudicators are singled out increases the force of political pressure. The norm of consensus opinions was a means of harnessing this "safety in numbers" effect; once this norm was weakened, political control was reasserted.

It follows from our argument and findings that absent a strong norm of consensus decisions, the current design surrounding authorship of judicial opinions at the AB is unstable. We end by asking what changes an eventual successor to the AB is likely to undergo. Instead of offering specific prescriptions, we present a set of most likely options, and the trade-offs that come from choosing one over another. We consider potential limitations based on the nationality of AB members as chair; a formal rule against dissents that would put back in place the protection for individual adjudicators that the original AB members had sought; longer, potentially non-renewable AB appointment terms; and the possibility of an oversight committee that would periodically review rulings and incentivize authoritative interpretations or corrections by WTO Members themselves. No one design choice is optimal from all standpoints. Any reform of formal rules, moreover, will affect the informal judicial norms and practices that arise in response. In this article, we seek a better understanding of the link between these two.

[9] According to the definition set out in: Kim, Evan Y. and Mavroidis, Petros C., Dissenting Opinions in the WTO Appellate Body: Drivers of Their Issuance & Implications for the Institutional Jurisprudence. 2018. Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2018/51. http://dx.doi.org/10.2139/ssrn.3293777

2.1 Judicial Autonomy and Political Control at the WTO Appellate Body

The forced interruption of the AB's activities has brought to a halt the most active branch of the global trade regime. By holding trade enforcement in abeyance, it has injected uncertainty into international trade cooperation. Yet this inflection point also provides a natural opportunity for observers to look over the AB's quarter-century history and see what its record can tell us about the functioning of international tribunals. In particular, the decision by a superpower to block the enforcement arm of an organization it was instrumental in creating underscores the fundamental tension between judicial autonomy and political control that all tribunals must contend with. It is this tension, and its empirical manifestations, which we explore in this article.

In creating international tribunals, drafters attempt to walk a fine line. They must imbue a tribunal with sufficient power to bolster the credibility of the concessions governments have made to one another.[10] An enforcement body that would be overly deferential to powerful political actors, bending to their preferences, would fail at its primary function of reducing uncertainty; governments would be the first to lose out.[11] Yet the same governments are wary of delegating too much power to courts, lest adjudicators show insufficient regard for political exigency, or worse, run away with their mandate and start modifying the meaning of the concessions states have made to one another. If they lack a means of curbing such perceived excesses, governments are wary of delegating power to an enforcement body in the first place. A symmetrically opposite dilemma exists from the standpoint of adjudicators: their judicial authority rests on being perceived as impartial and not prone to political pressures; yet they must remain sufficiently attuned to the sensitivities of Member-states, lest that authority be openly disregarded or forcibly taken away by disgruntled governments.[12] In sum, given insufficient autonomy, international tribunals lack

[10] See among others: Koremenos, B., 2007. If only half of international agreements have dispute resolution provisions, which half needs explaining?. *The Journal of Legal Studies*, *36*(1), pp.189-212. Simmons, Beth and Allison Danner. 2010. "Credible Commitments and the International Criminal Court". *International Organization,* 64(2): 225-256

[11] Guzman, A.T., 2005. The Design of International Agreements. *European Journal of International Law*, *16*(4), pp.579-612.

[12] Garrett, G., Kelemen, R.D. and Schulz, H., 1998. The European Court of Justice, national governments, and legal integration in the European Union. *International organization*, *52*(1), pp.149-176. Staton, Jeffrey and Will Moore. 2011. "Judicial Power in Domestic and International Politics." *International Organization*. John Ferejohn. 2002. "Judicializing Politics, Politicizing Law. *Law and Contemporary Problems*" 65(3): 41-68. Alter, K.J., 1998. Who Are

legitimacy, and their authority suffers. Given insufficient political control, they never come into existence in the first place, or they see their powers clawed back by states.

How this delicate balance between judicial autonomy and political control is achieved, and how it can be upset, is a the core question at the center of the literature on institutional legal design. This cross-disciplinary body of work examines how rules shape the incentives of the actors involved, and thus affect legal outcomes.[13] Most recently, and closest to our case of interest, Dunoff and Pollack (2018) have posited the existence of a "judicial trilemma," according to which the designers of international tribunals choose between three competing objectives: judicial independence ("the ability of judges to decide disputes upon the facts and the law free of state influence"); judicial accountability ("the ability of states to call back perceived overreach"); and judicial transparency (the extent to which individual judicial positions are made known). By this logic, any effort to attain any two of these objectives necessarily comes at a cost to the third.

Though we go on to qualify the judicial trilemma framework, we take from it the useful notion of an unavoidable trade-off in the design of tribunals as concerns two fundamental competing objectives: judicial autonomy and political control. Judicial transparency, we later argue, can indeed function as an effective means of striking a balance between these two objectives, though a formal provision for anonymity does not always assure anonymity in practice. Alternative means, moreover, can also help balance judicial autonomy and political control. When governments have relatively high powers of oversight, say because adjudicators have short or renewable terms, judicial autonomy suffers. This, in turn, has observable empirical implications. When faced with politically sensitive issues or precedent-setting questions, adjudicators will have greater reason to defer to powerful political actors, since they will have internalized the possible consequences of ruling against the national interests of member-states.[14] In other words, if there is an imbalance in

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the "Masters of the Treaty"? European Governments and the European Court of Justice. *International Organization*, pp.121-147.

[13] Dunoff, J.L. and Pollack, M.A., 2017. The judicial trilemma. *The American Journal of International Law*, *111*(2), pp.225-276. Koremenos, B., Lipson, C. and Snidal, D., 2001. The rational design of international institutions. *International Organization*, *55*(4), pp.761-799. Guzman, A.T., 2008. International tribunals: a rational choice analysis. *u. Pa. l. Rev.*, *157*, p.171. Voeten, E., 2008. The politics of international judicial appointments. *Chi. J. Int'l L.*, *9*, p.387.

[14] Garrett, Kelemen and Schulz, supra.

design that favors political control, judicial rulings become more likely to start reflecting national interests. The result is observable bias.

Such bias is rarely ascertainable in a given case, owing to the difficulty of assessing the counterfactual, namely, what would the legal opinion have looked like had the case concerned other litigants, or had it been ruled by another set of adjudicators? Rendering things less tractable still, behavioral science has shown how adjudicators themselves are often blind to their own biases.[15] Outside observers often fare no better, sometimes disagreeing over whether a given case exemplifies bias, or independence.[16] Yet taken in aggregate, using a large enough set of rulings and data about the competing forces present in each, it becomes possible to examine a caseload for evidence of bias on average. To draw on a notorious finding, it is impossible to say whether a judge showed less leniency because she ruled on a case before having lunch, but given a large enough number of rulings and lunches, it becomes possible to estimate an average lunch effect.[17] We propose to conduct the equivalent exercise in the case of the WTO's AB, as informed by existing theories of institutional design.

As many have noted, the AB's design offers states an especially high degree of political control over adjudicators. In their comparison with other international tribunals, Dunoff and Pollack single out the AB as exhibiting the highest degree of political control of any international court, owing to adjudicators' once-renewable short terms (4 years), and the way in which these renewals fall under the WTO consensus rule, so that any country effectively exerts a veto over every judicial (re)appointment. As Elsig and Pollack (2014) demonstrated, moreover, the level of scrutiny given to the appointment and reappointment process of AB members has only increased over time.[18] Most recently, Günther (2020) also places the WTO's AB as ranking highest on "pressure from member states" as compared with other international tribunals.

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[15] See: Tversky, A. and Kahneman, D., 1974. Judgment under uncertainty: Heuristics and Biases. *Science*, 185(4157), pp.1124-1131, and the large experimental literature it inspired.

[16] As Voeten (2008) points out, the landmark European Court of Justice case, *Cassis*, has been held up as an example of judges bending to politics by Garrett and Weingast (1993), while Alter and Meunier-Aitsahalia (1994) saw in it an instance of judicial independence in the face of politics. See: Voeten, Erik. 2008. "The Impartiality of International Judges: Evidence from the European Court of Human Rights." *American Political Science Review* 102(4): 417–33.

[17] Danziger, S., Levav, J. and Avnaim-Pesso, L., 2011. Extraneous factors in judicial decisions. *Proceedings of the National Academy of Sciences*, *108*(17), pp.6889-6892.

[18] Elsig, M. and Pollack, M.A., 2014. Agents, trustees, and international courts: The politics of judicial appointment at the World Trade Organization. *European Journal of International Relations*, *20*(2), pp.391-415.

Yet at the same time, the WTO's AB purports to high judicial autonomy. The Dispute Settlement Understanding states that the AB's members "shall not be affiliated with any government."[19] At the establishment of the AB, the Dispute Settlement Body expanded on this requirement, linking it explicitly with the notion of judicial independence, under the heading of "Impartiality":

> The DSU provides that members of the Appellate Body "shall not be affiliated with any government." Members of the Appellate Body should not therefore have any attachment to a government that would compromise their independence of judgment.[20]

AB members themselves routinely celebrate their independence and impartiality. As Lacarte-Muró declared at the end of his final term as Chair of the AB: "We are well aware that none of our rulings is likely to be greeted with universal approval; but our function is another: to be independent, impartial and objective at all times. I believe this also to have been the case."[21]

The question that arises from the institutional design literature is, how can a balance between these competing objectives be achieved? How can governments countenance a high level of judicial autonomy, when they possess the means to claw it back if they are dissatisfied with a particular ruling? AB members themselves have also remarked on this tension, and on how the formal rules produced an imbalance that threatened judicial independence by offering too much control to political actors. As Claus-Dieter Ehlermann, one of the founding members of the WTO AB, put it, "The problem concerns the duration of the terms of office of members of the Appellate Body. A four-year term, which may be renewed once, does not seem to guarantee sufficiently the independence of the person appointed."[22] Yet immediately returning to the theme of the AB's unflinching impartiality, Ehlermann then adds, "I do not want to give the impression that the existing regime has affected in any way the independence of the Appellate Body or any of its individual members. On the contrary…"[23]

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[19] DSU Article 17:3, sentence 2.
[20] Establishment of the Appellate Body. Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995.
https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DSB/1.pdf
[21] Lacarte-Muró. Farewell Address to the Dispute Settlement Body. 19 December 2001.
[22] Ehlermann, C.D., 2002. Six years on the bench of the "world trade court" some personal experiences as member of the Appellate Body of the World Trade Organization. *Journal of World Trade*, *36*(4).
[23] Ehlermann 2002, at 608.

Dunoff and Pollack's judicial trilemma framework offers an answer to the question of how an equilibrium might be attained. Tribunals may forfeit what the authors call "judicial transparency", the third point of the trilemma, by obfuscating the identity of individual opinion-writers. In this way, anonymity can temper an imbalance between a claim to high judicial autonomy, and an institutional design which offers governments effective means of reprisal. The authors focus on the identifiability of separate opinions, and point out that the WTO is unique among international tribunals in requiring that dissenting opinions "shall be anonymous."[24]

Yet as Dunoff and Pollack themselves hint at, this anonymity requirement may be little more than a fig leaf. Given the small number of possible authors (only the three members on the division can issue a dissent), speculation about the likely author is rampant. Some assume that the identity of dissent writers is known by insiders. As Terris et al. put it, "since decisions are taken by a chamber of three members, usually everyone involved knows who has authored the opinion".[25] This may be not far off the mark. Recent empirical work shows how existing computational text analysis tools allow outsiders to pinpoint the likely author of a given dissent with a high level of certainty.[26] The implications are significant: few adjudicators would risk issuing an individual separate opinion which they suspect could irk a powerful country. And indeed, all "true dissents" in the meaning of Kim and Mavroidis have favored one of the trade regime's superpowers. Yet even this may constitute only the tip of the iceberg. Indeed, most of the attention is understandably paid to the dissents that can be observed. Yet it is likely that those dissents that were never issued, but were expected by litigants, ended up being more significant drivers of the political backlash against the tribunal than those dissents that did actually materialize.

If the formal design feature of anonymity, meant to strike a balance between political control and judicial autonomy, falls short of the mark, then it follows that the level of political control at the WTO could overwhelm any claim to independence of the AB. If this is so, how did the WTO manage to strike some balance between its competing objectives for a quarter century?

[24] WTO DSU Art. 17(11).
[25] Terris, Daniel, Cesare P. R. Romano, and Leigh Swigart. 2008. "Toward a Community of International Judges". *Loy. LA Int'l & Comp. L. Rev.* 30: 419-472.
[26] Pauwelyn, Joost and Krzysztof Pelc 2021. *WTO Rulings and the Veil of Anonymity*. Working Paper.

One of the central claims we put forward is that when the formal rules fail to sufficiently promote one of the primary objectives of an institution, informal norms can emerge to correct the imbalance. Moreover, it is those actors most directly affected by this imbalance that should seek to develop informal norms to try and correct it. This is in part because of how member-states, once the initial moment of institution creation has passed, shift back to the short-term horizon most typical of elected officials. In her work on the European Court of Justice, Alter has articulated how such short political time horizons affected the court's development; in this case, it explains why states are not likely to remedy an imbalance in the formal rules unless that imbalance threatens their immediate national interests.[27] The unique long-sighted perspective taken by negotiators during an institution's initial moment of creation proves politically difficult to replicate in subsequent reforms. Sovereign governments are not naturally given to imposing constraints on their behavior. Elected officials, especially, are more inclined to maximize their power in order to further their short-term interests. As a result, an excess of political control over an international tribunal—which favors political actors in the short run but harms them in the long run by weakening the authority of an enforcement body they rely on—is unlikely to draw urgent calls for reform on the part of governments.

In fact, the main concern on the part of Member-states in the first years of the AB was not an excess of political oversight, but rather the risk that they would prove *too* independent.[28] This early concern clashes with more recent assessments by legal observers who agree that compared with other international tribunals, the rules governing appointment and reappointment of WTO adjudicators render it a high political accountability body.[29] These two views can be reconciled: while Member-states exert considerable control *ex ante* over the selection of individual adjudicators, the AB's interpretations are effectively the last word on legal questions, leaving little room for *ex post* control by Member-states. While there do exist options for legislative oversight by Member-states, as through the adoption of "authoritative interpretations," these have never been

[27] Alter 1998, supra.
[28] Barfield, C.E., 2001. Free Trade, Sovereignty, Democracy: Future of the World Trade Organization. *Chi. J. Int'l L.*, *2*, p.403. Wolff, A.W., 2001. Problems with WTO dispute settlement. *Chi. J. Int'l L.*, *2*, p.417.
[29] Dunoff and Pollack 2018, Günther 2020, supra.

used—a fact that legal scholars have actively sought to explain.[30] While puzzling at first, the inability of governments to coordinate over legal interpretations mirrors their failure to achieve other bargaining outcomes under current voting rules. As a result, and lacking a means of reining in politically problematic interpretations after the fact, Members have focused their oversight efforts on the appointment and reappointment process. This, in turn, accounts for how individual adjudicators have been more likely to feel the pressures of government interests on their own skin.

It follows that in these circumstances, Member-states are unlikely to be the ones to initiate a change in institutional design to voluntarily limit their own powers of oversight over individual adjudicators. It has thus fallen on adjudicators themselves to develop norms of behavior in response to such political pressures. Next, we take a closer look at how these informal norms arose.

2.2 How Informal Norms Emerge in Response to Formal Rules

Looking back over his term as AB member, Claus-Dieter Ehlermann listed "collegiality" first among the "most important" aspects of his time at the WTO.[31] The innocuous-sounding term stood for a commitment by the three-member division to consult with the other four on the bench, and for consensus in the rulings that resulted. Under the same heading of "collegiality," Ehlermann went on to note that while the WTO treaties allow for dissenting opinions, the AB's self-imposed Working Procedures gestured in the opposite direction. Rule 3.2 of the Working Procedures states:

> "The 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."

With evident pride, Ehlermann observed that the Working Procedures had, up to that point, "clearly prevailed over the possibility" of dissent offered by the formal rules. Over time, the exceptional level of consensus opinions by the AB has often been offered as a reflection of the

[30] Cosette D. Creamer and Zuzanna Godzimirska, 2016. 'Deliberative Engagement within the World Trade Organization: A Functional Substitute for Authoritative Interpretations', 48 *New York University Journal of International Law and Politics* 413. See also: Lamp, Nicolas. 2021. *Arrested Norm Development: The Failure of Legislative-Judicial Dialogue in the WTO*. Working Paper, Queen's University. Lamp argues that the current impasse at the AB is "as much as story of WTO Members' underreach as it is a story of panels' and the Appellate Body's overreach."

[31] Claus-Dieter Ehlermann. Reflections On The Appellate Body Of The World Trade Organization (WTO).

exceptional level of collegiality among AB members. As Alvarez (2009) put it, "the functioning of the Appellate Body (AB) is virtually perfect in terms of collegial decision-making," and the means of assessing this degree of perfection is to consider the degree of unanimity.[32] A quarter century later, another AB member would complain of "an over-emphasis on 'collegiality' that shaded into peer pressure to conform."[33] We are interested in how the norm of consensus, and its subsequent erosion, affected legal outcomes in the intervening years.

The founding AB members were of a mind about the importance of collegiality, and the value of consensus opinions. Julio Lacarte-Muró, the first Chair of the AB, has stated that he sought to avoid dissents "at all costs." He went on to say that this view was "shared by my colleagues," and then again pointed to the record of quasi-perfect unanimity: "during our initial four-year term at the Appellate Body, there was only one dissenting opinion, and it was so mild that it could not really be considered as a strong disagreement."[34] Such satisfaction at the high degree of unanimity can be seen from all the early AB members. Comparing the AB to a musical band, the American member James Bacchus proudly remarked: "Our band sings in harmony. In nearly sixty appeals, there has never once been a dissent by any Member of the Appellate Body to the conclusions and recommendations in any Appellate Body report."[35] In fact, the norm of consensus opinions was so firmly ingrained that by 2000, no less of an authority than John Jackson could claim that there was no allowance made for dissenting opinions in the AB: "There is no indication of particular authorship of any part of an Appellate Body report and *no provision for dissenting opinions*."[36]

The textual origin of this strong norm is found in the Working Procedures established by the AB members themselves at the WTO's inception. Described by one AB member as a "masterpiece of

[32] As Alvarez notes, "the collegial decision-making process of the AB has managed to decide all cases so far with two separate opinions." Alberto Alvarez-Jimenez. The WTO Appellate Body's Decision-Making Process: A Perfect Model for International Adjudication? *Journal of International Economic Law* 12(2), 289–331.
[33] Graham, Thomas. 2020. Farewell speech of Appellate Body member Thomas R. Graham. WTO. https://www.wto.org/english/tratop_e/dispu_e/farwellspeechtgaham_e.htm
[34] Lacarte-Muró, Julio. 2015. "Launching the Appellate Body*."* In *A History of Law And Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, ed. Gabrielle Marceau. Cambridge, 476-481.
[35] Bacchus. *"Woulda, Coulda, Shoulda": The Consolations of WTO Dispute Settlement.* Address to the International Bar Association Geneva, Switzerland March 20, 2003.
[36] Emphasis added. Jackson, John. 2000. "Dispute Settlement and the WTO: Emerging Problems". In: McWhinney, E. and Secretariat, W.T.O., 2000. *From GATT to the WTO: The Multilateral Trading System*. Kluwer Law International BV. 71.

a document," these rules were rapidly conceived by the seven original members and the Secretariat staff supporting them during the first three months of their mandate.[37] The Working Procedures count thirty-two articles covering all aspects of the appeal process. The precision and scope of the self-imposed Working Procedures stands in contrast with the vague instructions that AB members were given by the DSU that Members negotiated. In this sense, the "gap filling" much-discussed by some Members may have begun before a case was ever ruled on, and it concerned the ground rules the AB members would work under.

It was thus the original AB members, rather than WTO Members, who decided to hold oral hearings with disputing parties, espousing a court-like process that some members later objected to. They were also the ones to come up with a lottery-based system to appoint, in advance, and on a rotating basis, adjudicators to the three-member divisions—it is this aspect of random selection that we leverage in our empirical analysis. It was in the AB's Working Procedures that the concept of "collegiality" first appeared, whereas it is absent from the DSU text. And it was the AB members themselves who decided to hold themselves to a strong norm of consensus opinions, despite the explicit provision for dissenting opinions in Article 17 of the DSU.

This question of how best to handle dissenting opinions has been described as an especially vexing one for AB members. As A.V. Ganesan, whose term lasted from 2000 to 2008, put it:

> There was, however, one issue about which there was some concern in the Appellate Body and which used to be discussed in the general exchange of views of the Appellate Body. This was the issue of dissenting opinions. […] Note that the Working Procedures exhort the divisions to 'make every effort to take their decisions by consensus', whereas the DSU contains no such exhortation or requirement.

Why would a group of adjudicators, all with self-described "strong personalities and views,"[38] voluntarily commit to avoiding separate opinions "at all costs," when the WTO texts explicitly allowed them? After all, adjudicators presumably believe in the merit of their own opinions. In much of their work outside of the AB, they are in the business of expressing their individual views

[37] Ganesan (528). The first seven members of the Appellate Body were appointed in November 1995, and the AB Working Procedures came into effect February 1996.
[38] Lacarte-Muró 2015, supra.

on legal matters. Why would adjudicators pre-emptively constrain their ability to voice their individual opinions?

The norms of consensus opinion and collegiality-amongst-seven provided a means of protecting judicial independence from political control in the face of a formal institutional design that did not sufficiently do so. Specifically, the norms of collegiality and consensus are means of attaining "safety in numbers," by diffusing responsibility for legal opinions in politically sensitive cases. Decisions that were signed by all three members of the division, and that moreover were said to be the product of consultations with the remaining four members, made it hard for countries to single out a single adjudicator for blame.

This idea of diffuse responsibility is in keeping with a large literature in political science that examines blame attribution. These findings are typically interested in explaining the size of the economic vote, or the extent to which elected political leaders are blamed by their electorate for economic downturns, or credited for economic growth. The main takeaway from this set of empirical findings is that voters are less likely to blame political leaders for poor economic outcomes when the clarity of responsibility is low. That clarity of responsibility turns on factors like the voting cohesion of the major governing party, or the number of parties included in the cabinet. The more diffuse governments responsibility appears, the more political leaders avoid blame for unfavorable outcomes.[39] By this logic, the small size of a given AB division makes them vulnerable to political opprobrium. The option of separate individual opinions, especially if their author can be identified, would magnify the odds of political pushback considerably. As per the literature on blame attribution, the easier it is to single out an individual for a given ruling, the more room there is for political actors to exercise their power. The norms of collegiality and consensus, conversely, made decision-making as diffuse as the formal rules allowed it to be.

[39] See Powell Jr, G.B. and Whitten, G.D., 1993. A cross-national analysis of economic voting: taking account of the political context. *American Journal of Political Science*, pp.391-414. For an overview of the economic voting literature, see Duch, R.M. and Stevenson, R.T., 2008. *The economic vote: How political and economic institutions condition election results*. Cambridge University Press, and Anderson, C.J., 2007. The end of economic voting? Contingency dilemmas and the limits of democratic accountability. *Annu. Rev. Polit. Sci.*, *10*, pp.271-296.

The norm of consensus had a second key benefit. By taking the option of separate opinions off the table, it usefully tied the hands of AB members. While this stifled individuals wishing to express their separate opinions, it provided a credible means of fending off government pressure to dissent in politically salient cases: adjudicators could imply that they had been outnumbered in the division, yet gesture to a strong norm as a reason not to dissent. The key aspect of such attempts at self-constraint is precisely this pooling equilibrium: if AB members who secretly wish to dissent cannot be distinguished from AB members who secretly prefer to stand up to political pressure, then there is no way for those political actors to distinguish between the two. The ability to express individual views in some cases is traded against the freedom *not* to express politically favorable views in others.

For informal norms to provide cover to individual adjudicators in this way, they have to be *known*. Their ultimate purpose is not so much to shape judicial behavior, as state expectations. In this sense, the benefit of norms goes beyond their effects on judicial outcomes in those cases where they are invoked. It is not merely about the case at hand, but also the cases to come. To fully achieve this effect, norms not only had to be followed by the AB members, but they had to be acknowledged by the Member governments. Only then would AB members be able to "plead consensus and collegiality," and resist political pressure to dissent from an unfavorable majority opinion. The striking extent to which AB members went out of their way to publicize their self-imposed norms is consistent with this incentive. Not only did the founding AB members explicitly include references to consensus and collegiality in their Working Procedures, but as individuals they frequently referred to them in their speeches and writings; they underscored their efforts to adhere to the norm they had created; and they celebrated their consistent record in doing so.

Of course, in their own accounts, AB members did not explain their emphasis on collegiality and consensus by the need to protect themselves from political control. Rather, they spoke of the need to bolster the perceived legitimacy and authority of a fledgling institution in its first years. And while this was undoubtedly part of their calculations, it also leaves open the question of why other international tribunals, like the International Court of Justice, the International Tribunal for the Law of the Sea, or the European Court of Human Rights, all of which allow and countenanced dissenting opinions in their first years, did not witness the emergence of analogous norms. The

personal accounts of AB members also frequently ascribe the successful record of consensus to the characters and legal experience of the individual founding members of the AB.[40] Yet some explanations offered by AB members do tacitly bring up the prospect of political control. In the words of Lacarte-Muró, who in his capacity as the original AB Chair may have had more influence over the emergence of these norms than anyone:

> "while such opinions were to remain anonymous, it was conceivable that if they became 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 conclusion they wished."[41]

Legal scholars have drawn a similar link between dissents and political control. As Terris, Romano, and Swigart (2007) plainly put it, "Dissenting opinions… expose judges to the scrutiny of their governments". The same concern is present in other courts. The same authors go on to cite a judge from the ECJ, where dissents are not allowed, who explained that "the advantage of not having dissenting opinions is that there is no opportunity for a judge to signal… 'Look what a good boy am I.'"[42] In other words, the inability to curry favor with a government means that the government cannot expect such favors, or punish adjudicators for not proffering them. There are thus multiple instances of governments not reappointing adjudicators to international courts when they have not availed themselves of the option to dissent against an unfavorable ruling. Voeten lists a number of cases of Eastern European countries lashing out against national judges at the ECtHR who ruled with the majority against their country of origin, and were not reappointed to second terms as a result.[43] If adjudicators are able to credibly commit not to issue dissents, this allows them to better resist political pressures. The self-constraint proves enabling.

Our point is that this informal norm, or one with equivalent effect, would have likely arisen with a different set of founding AB members, each with different characters and legal experiences. The

[40] For instance, James Bacchus, an early AB member from the US, chalked the degree of consensus across the caseload up to the character and experience of the individual AB members: "Nor do I think that I betray any of our 'confidentiality' by saying that our ability to achieve consensus around our table in our first seven years is testimony to the considerable care taken by the Members of the WTO in the elaborate and global selection process they have employed in appointing all the Members of the Appellate Body." A.V. Ganesan similarly described how the norm succeeded because AB members were "willing to eschew their individual egos and predilections and engage in a constructive exploration to try to reach possible consensus."
[41] Lacarte Muró. "Launching the Appellate Body", supra.
[42] Terris et al, 2007.
[43] Voeten (2008) singles out cases in Bulgaria, Moldova, and Slovakia.

norm arose not so much because of the harmonious relations between the founding seven members, their particularly collaborative characters or their past professional experience, but as a result of a particular set of incentives. It was an attempt to protect the authority of a nascent court, but also a means of protecting its adjudicators from an imbalance in the formal rules. It preserved judicial autonomy in the face of the significant powers of oversight wielded by governments over individual adjudicators.

2.3 The Rising Cost of Norm Adherence

Collegiality and consensus sound inherently desirable. The founding AB members certainly portray them as such. Yet even in those earliest accounts, there are signs of the costs that come from insisting on consensus, which would only grow as the WTO evolved and cases became more complex. Thus, Lacarte-Muró admitted:

> "Of course, a process such as this takes time. For example, on one occasion, I was a member of a division that was clearly split. We were two sharing one opinion, and the third disagreed diametrically. […] it took us a whole week of going in and out of each other's offices and chatting in corridors to suddenly find the magic formula that was acceptable to all three."[44]

James Bacchus also pointed to the difficulties involved: "the 'consensus' we have achieved in the many appeals that have been made, thus far, to the Appellate Body has not always been achieved easily." Elsewhere, Bacchus spoke of the "exhaustive mutual effort" required to make "seven minds into one."[45] It follows that the ability to go back and forth over an acceptable formulation would grow less practicable as the caseload, and with it, each adjudicator's workload, both grew. Others have noted how an insistence on consensus may be inherently undesirable if it masks disagreement. A later AB member, Mitsuo Matsushita, opined that "if a dissenting opinion is not published, this would mean that the dissenting opinion was simply ignored or that a compromise was reached between the majority and the dissenting member. This could make the reasoning of

[44] Elsewhere, Lacarte-Muró pointed to the costs of the consensus norm in these terms: "we came down to this formula of consensus and the explanation, the secret for that, is unending toil, unending patience, unending tolerance, and unending inventiveness to work out the right formula…" Julio Lacarte-Muró. 2005. 'WTO Appellate Body Roundtable', in Laurence R. Helfer and Rae Lindsay (eds), *New World Order or A New World Disorder?* Washington: American Society of International Law. p.183.

[45] J Bacchus, 'Table Talk: Around the Table of the Appellate Body of the World Trade Organization' (2002) 35 Vanderbilt Journal of Transnational Law 1021, 1038.

the judgment somewhat unclear and ambiguous."[46] Trying to assuage would-be dissenters in order to achieve consensus also generates ambiguity in another way. Among various "techniques to achieve consensus by suppressing Division Members' disagreements," Alvarez (2009) lists the use of *obiter dicta*, which "allows the collegial judicial body not to leave [would-be] dissenters with empty hands by permitting them to put their imprint on the decisions."[47] And while it may quell internal disagreements, the inclusion of *dicta* or "odd findings" to satisfy recalcitrant AB members affects the odds of subsequent compliance, and has been criticized as judicial activism. Ambiguous rulings make it more difficult for even well-disposed respondents to implement recommendations, and easier for recalcitrant respondents to find a way around strict compliance. The rise in Article 21.5 compliance proceedings is often attributed to foot-dragging on the part of respondents; the lack of clarity of adjudicators' recommendations may be another factor.

In a recent analysis, Günther (2020) singles out the WTO's AB as the international tribunal that is most prone to "groupthink," which he defines as an excessive seeking of unanimity over other relevant considerations. In a comparison with five international courts across different issue-areas, the WTO's AB scored highest in its propensity towards groupthink. Günther's account puts the blame squarely on the AB's "collegial culture," as well as formal aspects of the rules like the limited timeframe for deliberation and the size of the caseload. In this telling, groupthink forfeits the epistemic advantage that comes from a diversity of opinions. If AB rulings are presented as a unanimous opinion when they are actually the result of divided opinion, this offers a false impression of the ruling's level of certainty, and falsely undermines the merit of competing views.

In this search for consensus, tribunals also become more likely to fall back on existing reasoning. Thomas Schelling was the first to demonstrate that whenever coordination is required, focal points grow in importance, and individuals become more likely to coalesce around them.[48] In the case of the AB, this had two notable effects. First, it strengthened the importance of precedent. Once the AB had decided on a given matter in one case, the norm of consensus increased the resistance to

[46] Matsushita, M., 2005. Some thoughts on the Appellate Body. In *The World Trade Organization: Legal, Economic and Political Analysis* (pp. 1389-1403). Springer, Boston, MA.
[47] Alvarez-Jimenez, A., 2009. The WTO Appellate Body's Decision-Making Process: A Perfect Model for International Adjudication?. *Journal of International Economic Law*, *12*(2), pp.289-331.
[48] Schelling, T.C., 1980. *The Strategy of Conflict*. Harvard.

adopting a different reasoning the next time a similar issue came up. Past rulings provided the focal point needed for coordination, with the added advantage of allowing AB members to "wash their hands" of a contentious legal matter by pointing to past rulings.[49] Yet this practice came at the cost of learning and course correction. The irony is that an informal norm, consensus-based decision making, which arose in response to excessive political oversight may thus have had the unexpected effect of reinforcing precedent conformance—the very practice that the US later inveighed against when it reined in the tribunal. Imbalances in institutional design can come back to haunt the states that created the institution in the first place.

Secondly, and for similar reasons, the search for consensus had the unexpected effect of further empowering the WTO Secretariat. In what remains a little-known practice, the permanent staff of the AB Secretariat provide the adjudicators with a detailed memo of the merits and possible courses of action for every dispute they rule on, called an "issues paper." Adjudicators receive this issues paper before they even meet to discuss the case. As Günter puts it, "[AB] members will be inclined to agree with the Secretariat's opinion [in the issues paper] because the relevant arguments are already laid out for them, and the associated social costs of dissenting may be considerable."[50] Given how AB members come and go, while the Secretariat is a permanent actor, it acts as the guardian of the system. The stronger the norm of consensus, the greater the incentive to coalesce around the focal point provided in the Secretariat's initial take on the case under appeal.

The drawbacks of the norm of consensus were vividly expressed in a now infamous speech by Thomas Graham, the last US standing AB member, in which he vented his frustration over some of the practices of the AB. Graham complained of "an *orthodoxy* of viewpoint" within the AB. Giving credence to the central claim in Günther (2020)—published shortly before his speech—Graham spoke of "a kind of *group-think* that de-legitimized serious systemic criticisms". In elaborating on the sources of these shortcomings, Graham explicitly singled out "an over-emphasis on *'collegiality'* that shaded into *peer pressure to conform*," and complained of "the degree of control by the Appellate Body staff".[51] In his telling, it was these practices, "more than any other

[49] See Garrett, Kelemen and Schulz, *supra*, who argue that the clearer the legal precedent, the less ECJ judges needed to tailor their rulings to the political sensitivities of EU member-states.
[50] Günther, *supra*.
[51] Emphasis added. Graham, *supra*.

cause, [that led] to the downfall of the Appellate Body." The main qualification to this account that our own argument offers is that insofar as judicial beliefs and practices precipitated pushback by Members, those practices were originally a strategic response to a particular design of the rules that offered those same Members excessive oversight.

2.4 The Erosion of a Norm

For all its shortcomings, the norm of consensus served its purpose so long as it was strictly adhered to. It provided adjudicators with political cover. It made it harder for governments to single out any individual adjudicator for blame, and it made it impossible for states to expect a favorable dissent, or blame individuals for not delivering them. This changed over the institution's history. As cases grew more complex, the back-and-forth required to reach consensus decisions became more difficult to muster; as they grew more politically charged, the opportunities for disagreement multiplied. Accounts like that of the AB member Matsushita suggest that for all the socialization of new members that took place within the AB, frustration with the practice of consensus opinions was growing among adjudicators.[52] Increasingly, AB members admitted to not being personally wedded to the norm.[53]

It took just over a decade for the first true dissenting opinion to be issued by the AB (in *US—Upland Cotton*), but only another year to see the second (in *US—Zeroing (EC)*).[54] Then, in *EC—Large Civil Aircraft*, two separate dissents were issued in the same case by different AB members. All told, by our count, the rate of separate opinions is 7.3% across the entire caseload. The change in frequency is revealing: the rate went from 3.7% of rulings in the first decade to 8.3% of rulings

[52] As Matsushita put it, "The publication of a dissenting opinion would promote the transparency of the appellate process [when there is disagreement among the adjudicators]." Ultimately, after weighing the arguments commonly proposed on both sides, Matushita sides with the view that the shortcomings of a norm of consensus outweighed its benefits (Matsushita 2005, 1401). That same year, the AB issued its first dissent.

[53] Merit Janow, for instance, stated how "Coming from the U.S. legal culture where dissents are common and courts have often seen dissents in one era become majority views in another, I am less uncomfortable than some may be with the notion of airing separate views on particular issues." But she then immediately went on to say that dissents would be undesirable if they led to the attribution of specific view to specific individuals, since this would politicize of the process: "If the WTO membership were to politicize its interpretation of rulings—e.g., associating certain views on particular issues with certain individuals on the Appellate Body from particular jurisdictions—this could prove corrosive." Janow, Merit. 2008. *Reflections on Serving on the Appellate Body*. 6 Loy. U. Chi. Int'l L. Rev. 249.

[54] Kim and Mavroidis (2018).

thereafter.[55] These remain rare events in comparison with tribunals like the ECtHR or the ICJ, which feature a higher rate of dissent. Our point, however, is that the breaking of the norm starting in 2005 sufficed to change state expectations. As soon as the first dissents were issued, AB members could no longer "plead consensus"; they no longer benefited from the protection provided them by an unbroken record of consensus opinions. Once dissents became acceptable, states came to expect them from their co-national adjudicators, in particular. Tellingly, the US began blocking reappointments of its own AB members after the strict norm against dissents was abandoned—starting with Janow, who served from 2003 to 2007, and then Hillman, who served from 2007 to 2011.

One can only observe those dissents that are issued. Yet our argument suggests that it is precisely those dissenting opinions that were never issued, but became expected by states, that drove most of the backlash by Member-states like the US. Once individual AB members *could* dissent from the majority opinion, they faced increased expectations from governments that they would. In this way, the abandonment of an informal judicial norm had the effect of reasserting political control over adjudicators.

3.1 Empirical Analysis

What can the twenty-five-year record of the AB tell us about the competing forces that AB members are exposed to? Specifically, how has the judicial autonomy that adjudicators have consistently laid claim to fared under varying levels of political pressure? The premise of our argument is that whenever individual adjudicators are singled out, they become more vulnerable to political control, and their autonomy suffers as a result. The most common—though not the only—form of such political control is pressure by Members on their co-nationals. The US taking steps against the reappointment of its own AB members is a case in point. Accordingly, looking

[55] The cases featuring separate opinions are *EC—Asbestos*, *US—Upland Cotton*, *US—Zeroing (EC)*, *EC—Large Civil Aircraft* (which included two separate opinions)*, US—Continued Zeroing, India—Solar Cells, US—Washing Machines, and US—Countervailing Measures (China).* The denominator is made up of the 123 unique AB opinions covering 177 disputes (or 96 unique opinions covering 135 disputes after the issuance of the first separate opinion). Many disputes feature common rulings for challenges brought by multiple complainants against the same respondent.

for national bias offers a means of gauging the power of political pressure. Settings with heightened political control should be settings where we observe greater odds of national bias.

Again, pressure on co-nationals is not the only means that political pressure can take at the WTO, or in other international tribunals. After all, the WTO's consensus rule allowed the US to eventually block the reappointment of Seung Wha Chang, a Korean AB member. Yet insofar as governments find it easier to exert pressure on their co-nationals—because of shared networks or employment prospects following their tenure at the WTO—this offers us an opportunity to compare different settings for signs of such pressures.

The particular design of the AB allows us unique insight into this question, since the process of appointing three of the seven adjudicators to given disputes is based on random assignment.[56] As Article 6(2) of the Working Procedures sets out, "The Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin." This random appointment process is another design feature we owe to the AB itself, rather than WTO Members, who did not specify how AB members would be appointed to particular cases, having given the AB *carte blanche* to set its working procedures. The exact lottery system used is not known, but its purpose is widely publicized. As the former AB member A.V. Ganesan described it, "The ingenious random selection mechanism devised by the Appellate Body ensured that for every seven appeals serially numbered, each member was on three divisions."[57] The result is what amounts to a quasi-natural experiment, where each dispute is either randomly "treated" with the co-national adjudicator treatment, or gets the non-national "control." It is then possible to ask whether this co-national "treatment" has an observable effect on outcomes, without fearing that the estimation is contaminated by, for instance, countries' influence over appointments to particular cases.

[56] To our knowledge, Arias (2018) is the first to point out this analytical benefit in a working paper. One challenge in assessing political pressure in any tribunal comes precisely from how states have every reason to act strategically. Since states have some insight into adjudicators' priors, they have an incentive to sway the process of appointment of adjudicators to particular cases, as happens in the appointment process of WTO panelists. In such circumstances, it becomes impossible to distinguish potential judicial bias at the individual level from selection bias resulting from influence over appointments.

[57] Ganesan, *supra*, fn 12.

By contrast, the same exercise could not be performed on WTO panelists, who are picked by mutual agreement of the litigants themselves from a list of *ad hoc* adjudicators proposed by the Secretariat. This process has grown increasingly politically fraught; so much so that in 64% of all disputes[58], countries' conflicting incentives have made agreement over a set of panelists impossible, and the Director-General, in cooperation with WTO Secretariat staff, has had to assign one or more panelists. That decision, in turn, reflects various strategic interests of the institution, and thus cannot be considered random. Perhaps for this reason, a strict rule explicitly prohibits co-nationals of either litigant party (as well as third parties) from serving on panels (unless both parties agree), in an effort to limit the influence of powerful litigants over the appointment process. This formal provision eliminates a source of bias, but it means that the most frequent litigants have few co-nationals shaping jurisprudence. That is also the main reason why the Appellate Body does not have an analogous constraint.

Our empirical analysis has three main parts. We begin by assessing the purported randomness of the appointment process; we then look for signs of co-national bias among all AB members, and AB division chairs in particular; and we end by looking at how the presence of co-national adjudicators affects the odds of dissenting opinions. As per our discussion above, we expect greater bias whenever adjudicators are singled out—either as divisions chairs, or as the writers of dissents.

Our three sets of tests rely on a common dataset, which builds on Horn and Mavroidis (2020) and Kucik and Pelc (2018), and which we complete for our purposes. We update the data to cover the entire existing AB caseload, and add information about dissenting opinions and the tenures of individual AB members. Our main dependent variable of interest is the direction of the ruling, which we code at the claim-level, and aggregate as a proportion up to the dispute level.[59] Our main unit of analysis is thus the dispute, since all our explanatory variables, such as the identities of the adjudicators, are observed at the dispute level as well.[60]

[58] Joost Pauwelyn and Weiwei Zhang. 2018. Busier Than Ever? A Data-Driven Assessment and Forecast of WTO Caseload, *JIEL*. p.18.
[59] See the online appendix for a more detailed discussion of the coding process.
[60] In the robustness checks, we rerun the analysis at the claim level, and our findings remain entirely unchanged. If anything, our standard errors become smaller, as might be expected from an "artificial" increase in the sample size.

3.1 Assessing Randomness

As noted above, the AB's Working Procedures explicitly set out that the appointment of individual adjudicators to cases be random. Yet anecdotal evidence nonetheless suggests that there are means of manipulating the process. Because the DSB rules include provisions against conflicts of interest, adjudicators may cite such a conflict, or simply claim not to be available for a particular appeal, as a way of increasing their odds of being appointed to the next case down the line. States may also time their own appeals strategically, knowing which AB members have already assigned to appeals, so as to increase their odds of having a particular adjudicator appointed to their case. Given these considerations, does the empirical record offer any evidence of such manipulation?

To test this question, we create an original dataset of all AB members who could have been selected for any given case. Every dispute counts seven possibilities, except for a handful of exceptions in the recent past, when the number of AB members began to dwindle, and the number of possible picks grew smaller. All told, our dataset counts 835 dispute-adjudicators. For each dispute, we observe which of the available AB members were selected to a given division. Nationality offers us the most straightforward test of possible signs of manipulation. We estimate how a correspondence between an adjudicator's nationality and that of either litigant affects the odds of that adjudicator being selected to the case. In other words, if a case concerns country A, is an adjudicator from country A any more (or less) likely of being appointed to the dispute?

Table 1 presents the results. The quick takeaway is that none of our estimations yield any statistically significant effects: we find no sign of manipulation. Neither the Co-national of Respondent variable nor the Co-national of Complainant variable shows any effect. We then focus on the US and the EU, given that they are the DSB's central players, its most active litigants, and have, by tacit agreement, co-national representatives sitting on the AB at all times. We code a US and EU indicator variable for all US or EU AB members, and interact this variable with a dummy indicating a US or EU defendant or complainant. None of these interactions prove statistically significant. We then check whether any individual adjudicators are more likely to be chosen for specific legal issues raised in the dispute at hand. Finally, we check whether any national origin seems more likely to be selected, on average, paying special attention to the US and EU. We observe no effect here, either (these last results can be found in the online appendix). In sum, on

all relevant observables, AB members seem to be assigned to divisions in an as-if random fashion. This speaks to the procedural legitimacy of the AB's assignment method, but it also allows for a cleaner test of our next question of interest.

Table 1: Is the Assignment of ABMs to Divisions Random?

	(1)	(2)	(3)	(4)
ABM Co-national of Respondent	-0.066			
	(0.162)			
ABM Co-national of Complainant	-0.183			
	(0.160)			
US Co-national		-0.007	-0.007	0.024
		(0.167)	(0.157)	(0.136)
US Respondent		-0.013	-0.013	
		(0.052)	(0.102)	
US AB member X US Respondent		-0.069	-0.069	
		(0.275)	(0.252)	
EU Co-national		0.065	0.065	0.134
		(0.148)	(0.137)	(0.146)
EU Respondent		-0.082	-0.082	
		(0.065)	(0.140)	
EU AB member X EU Respondent		0.278	0.278	
		(0.388)	(0.349)	
US Complainant				-0.030
				(0.126)
US AB member X US Complainant				-0.341
				(0.328)
EU Complainant				-0.026
				(0.112)
EU AB member X EU Complainant				-0.104
				(0.284)
Constant	-0.105**	-0.121**	-0.121+	-0.126+
	(0.026)	(0.042)	(0.071)	(0.065)
Observations	835	835	835	835

Dependent variable is an indicator of whether an eligible AB member is selected to a given AB division. Robust standard errors clustered on common dispute in parentheses + p<0.10 * p<0.05 ** p<0.01.

3.2 Assessing Rulings

Having confirmed that the assignment of adjudicators to cases appears random, we can now ask whether the presence of a co-national AB member has an observable effect on legal outcomes. As per our discussion, we are interested in this test as a window into whether, and when, political pressure is felt most strongly by adjudicators. Our expectation is that whenever adjudicators are singled out, they become more vulnerable to such pressures.

Table 2: Co-national AB Members from Litigant Countries

		AB Member from Complainant Country		
		0	1	Total
AB Member from Defendant Country	0	94	34	128
	1	44	8	52
	Total	138	42	180

How often do AB members sit on cases that concern their own countries of origin? As noted above, this possibility is expressly disallowed at the panel level (unless both parties agree, which rarely happens). But as Table 2 shows, it is a frequent occurrence at the AB. There were 44 disputes that counted AB members from the defendant country, 34 disputes that counted AB members from the complainant country, and 8 cases that featured an ABM from both the complainant and the defendant country. All told, at least one co-national from a litigant country sits among the three ruling ABMs in 48% of cases. While this seems a high number, it is in fact dictated by the random assignment to divisions, combined with the diplomatic practice of always having an adjudicator from the system's two most frequent users on the AB. It also makes plain how many adjudicators would need to be excluded if the AB had chosen, as it could have done, to bar co-nationals from serving on disputes involving their countries of origin.

Table 3: Crosstabulation of Rulings and AB Co-nationals

	AB member from Respondent Country	Number of disputes	Proportion of findings in favor of complainant	Standard Error
All Respondents	0	127	0.720	0.030
	1	50	0.624	0.055
US Respondent	0	41	0.695	0.051
	1	31	0.646	0.068
EU Respondent	0	15	0.716	0.066
	1	13	0.436	0.109

Next, we have a look at the simplest descriptive statistics linking the co-national "treatment" and AB ruling outcomes. Table 3 shows the average direction of the ruling, coded as the proportion of findings favorable to the complainant, according to whether a co-national was among the adjudicators.[61] It then focuses specifically on cases where the US and EU are defendants. These are also the two WTO Members who most frequently have co-nationals among the ruling AB members. The results are mixed. In all cases, the co-national treatment is linked to a more favorable ruling for the defendant country. The relationship is not statistically significant when looking at all defendants, or when focusing on the US. In the EU case, however, the association is suggestive of some pro-national leanings: the average ruling against the EU is 72 percent in favor of the complainant when no European AB member is present; but that falls to 44 percent when an EU AB member is present. This difference, moreover, is statistically significant in a simple t-test at the 0.05 level. Yet given how we are dealing with a relatively small number of rulings, this association could be due to other confounding variables. The issues at stake in these disputes differ, there may be changing trends across time, or some cases may have been more politically sensitive than others, in ways that sway the results. Similarly, since these are appeals, they are in dialogue with a panel ruling at the prior stage. Next, we try and account for these confounding factors.

To do so, we rely on a series of generalized linear models (GLM) with a logistic link function, which are well suited to estimating a dependent variable that takes the form of a proportion bounded from 0 to 1, as ours does.[62] We begin with a parsimonious estimation that looks at the effect of an ABM member from either the defendant or complainant country on the direction of the ruling, controlling only for time trends, using cubic splines with three knots. To try and account for the prior stage in the dispute settlement process, we control for the proportion of claims ruled in favor of the complainant by the panel. Most cases are ruled in favor of the complainant at the panel stage; although the AB frequently amends or reverses panel findings, rulings remain highly favorable to complainants net of appeal. We want to know is, controlling for that first ruling, is an

[61] Where the denominator is made up of all findings delivered by the AB in a given case. More than one finding may be delivered for a given claim brought by a litigant.
[62] Papke, L. E. and J. Wooldridge. 1996. Econometric methods for fractional response variables with an application to 401(k) plan participation rates. *Journal of Applied Econometrics* 11: 619–632.

appeal more likely to be ruled in favor of the complainant if the AB features a co-national from one of the litigant countries?

In subsequent models, we add control variables for the most contentious disputed legal issues, namely antidumping, subsidies and countervailing duties, SPS, TBT, and agriculture disputes. To try and capture the systemic implications of the dispute, we control for the number of third parties. Third parties are other Members that ask to join the proceedings, and who can make oral and written submissions which are included in the final report.[63] Finally, across all estimations, we cluster robust standard errors on the common dispute, to account for how some rulings relate to more than one complaint.

The results are presented in Table 4. The findings are consistent across our various specifications. While the effect of having a co-national among the AB adjudicators ruling on a case has a consistent positive effect for that country, it never reaches statistical significance. That is, the presence of an AB member from the respondent country is associated with fewer findings of violation; conversely, the presence of an AB member from the complainant country is associated with more findings of violation. But neither rises to conventional levels of statistical significance. In columns 5 and 6, we then look specifically at the US and EU, by interacting our indicator for AB member from the respondent country with an indicator of US or EU defendant. Here again, the presence of EU adjudicators shows more of an indication of pro-national bias than US adjudicators, but the effect falls just short of statistical significance. The controls behave as expected. Third parties, in particular, are associated with more pro-complainant findings, in support of existing work.[64]

[63] The presence of third parties has been argued to be one way by which adjudicators grasp the political implications of their recommendations. See: Busch, Marc L. and Eric Reinhardt. 2006. "Three's a crowd: Third parties and WTO dispute settlement." *World Politics* 58(3): 446-477. Busch, M.L. and Pelc, K.J., 2010. The politics of judicial economy at the World Trade Organization. *International Organization*, *64*(2), pp.257-279. Brutger, Ryan and Julia C. Morse. 2015. Balancing law and politics: Judicial incentives in WTO dispute settlement. *The Review of International Organizations* 10(2): 179-205.

[64] Johns and Pelc, *supra*.

Table 4: The Effect of AB Member Co-Nationals on AB Rulings

	(1)	(2)	(3)	(4)	(5)	(6)
Respondent Co-national on AB	-0.510		-0.527		-0.218	-0.730
	(0.379)		(0.388)		(0.464)	(0.641)
Complainant Co-national on AB		0.234		0.249		
		(0.323)		(0.328)		
Panel Ruling Direction	1.949**	1.900**	2.009**	2.054**	2.061**	2.065**
	(0.504)	(0.509)	(0.559)	(0.561)	(0.584)	(0.572)
EU Respondent					0.089	
					(0.597)	
Resp Co-national on AB X EU Resp					-1.088	
					(1.033)	
US Respondent						0.156
						(0.495)
Resp Co-national on AB X US Resp						0.266
						(0.930)
Agriculture			-0.357	-0.205	-0.340	-0.293
			(0.473)	(0.460)	(0.520)	(0.499)
Antidumping			0.252	0.393	0.307	0.234
			(0.439)	(0.426)	(0.462)	(0.487)
Subsidies and Countervailing Measures			0.081	0.100	0.077	0.043
			(0.358)	(0.358)	(0.368)	(0.386)
SPS			-0.068	-0.111	0.076	-0.007
			(0.495)	(0.469)	(0.555)	(0.547)
TBT			-0.124	-0.083	-0.046	-0.158
			(0.405)	(0.423)	(0.429)	(0.415)
Number of Third Parties			0.035	0.030	0.024	0.031
			(0.032)	(0.030)	(0.034)	(0.032)
Cubic Splines Time Trend	X	X	X	X	X	X
Constant	-30.775	-33.861	-36.571	-43.350	-37.175	-39.980
	(34.014)	(33.065)	(34.926)	(34.089)	(34.943)	(34.701)
Observations	177	177	177	177	177	177

GLM estimates. Dependent variable is the proportion of findings ruled in favor of the complainant. Robust standard errors clustered on common dispute in parentheses + p<0.10 * p<0.05 ** p<0.01.

In sum, these results appear to offer support for the Bacchus's contention, that "in nearly eight years, there has *never once* been a suggestion by any Member of the WTO that the Appellate Body

is anything but independent and impartial in reaching and rendering our judgments."[65] In this way, we also concur with Voeten's assessment of another international tribunal, the ECtHR, using an analogous empirical approach, where he concluded that "the overall picture is mostly positive for the possibility of impartial review of government behavior by judges on an international court."[66] Similarly, we find that judicial independence can indeed stand up to political interests in the international realm. Yet as we demonstrate next, this ability relies on institutional design.

Table 5: The Effect of AB Co-National Chairs on AB Rulings

	(1)	(2)	(3)	(4)
Division Chair from Resp Country	-0.935*	-0.981+	-1.190*	13.347**
	(0.467)	(0.528)	(0.533)	(1.097)
US Respondent				0.547
				(0.407)
US Respondent X Division Chair from Resp				-14.946**
				(1.177)
Agriculture		-0.310	-0.806	-0.171
		(0.494)	(0.561)	(0.522)
Antidumping		0.284	0.307	0.142
		(0.426)	(0.505)	(0.415)
Subsidies and Countervailing Measures		0.037	-0.640	-0.035
		(0.368)	(0.452)	(0.380)
SPS		-0.200	0.170	-0.190
		(0.480)	(0.563)	(0.487)
TBT		-0.174	0.108	-0.317
		(0.434)	(0.678)	(0.439)
Number of Third Parties		0.033	0.007	0.039
		(0.031)	(0.037)	(0.032)
Constant	-30.459	-38.431	51.001	-42.554
	(33.526)	(34.420)	(56.863)	(33.528)
Adjudicator Fixed Effects			X	
Cubic Splines Time Trend	X	X	X	X
Observations	177	177	177	177

GLM estimates. Dependent variable is the proportion of findings ruled in favor of the complainant. Robust standard errors clustered on common dispute in parentheses + p<0.10 * p<0.05 ** p<0.01.

[65] In the same address, Bacchus repeats the message for emphasis: "We are always independent. We are always impartial. We will always be. We will always sing our own songs."
[66] Voeten 2008, *supra*.

Our theory holds that whenever adjudicators are singled out, they lose some of the protection afforded by a collegial ruling body, and thus become more prone to political pressures. This first occurs in the case of the "presiding member" elected by each division, who is commonly called the division chair. The role of chairs has been shown to matter at the panel level. Busch and Pelc (2010) find that whereas the experience of the average panelist does not affect legal outcomes like the rate of appeal, the experience of the panel chair *does* seem to matter.[67] In our case, whether division chairs actually have actual greater influence over the content of the ruling, it is enough for governments to believe that they do. By being singled out, our argument goes, individual adjudicators are more likely to be held responsible by governments. Political interests find a point of pressure, in ways that should observably affect outcomes.

To test this, we rely on a similar set of estimations as above. This time, our explanatory variable is an indicator of whether the AB division chair is from the defendant country. The results are presented in Table 5, and they tell a different story from Table 4. The presence of an AB chair from the defendant country is strongly associated with fewer findings of violation against the defendant. The size of the effect is similar across the estimations in columns 1-3: the average ruling is 29% more favorable to the defendant when the division chair is from the defendant's country, holding all else equal. In the last column, we focus on the US, the one country that has had enough division chairs rule on its cases to allow us to estimate an effect.[68] As before, we interact the Co-national Division Chair with a US Respondent variable. Tellingly, the effect is even more pronounced: a US chair is associated with 39% fewer findings against the US, all else equal. When we then look at cases where the US is a complainant, we find the opposite: a US chair is associated with 41% *more* findings of violation, and the effect is strongly significant.

The difference between the findings in Tables 4 and 5 speaks to the premise of our argument. One might think that whether a co-national is present on the AB division or is the "presiding member"

[67] Busch, Marc L. and Krzysztof Pelc. 2009. "Does the WTO need a Permanent Body of Panelists?". *Journal of International Economic Law* 12(3): 579-594.

[68] A US AB member has chaired division rulings on cases where the US is the respondent in 14 disputes, against 2 for the EU. Given this discrepancy, we verify the odds of an AB member from a given country to be elected as presiding member. The US members do not seem significantly more likely to be elected presiding members, conditional on being appointed to a given division. The high number of US co-nationals serving as division chairs ruling on cases where the US is a respondent is thus a reflection of the number of cases where the US is a respondent, rather than the odds of being elected as presiding member.

should not make much of a difference. Yet by singling out an individual adjudicator, the role of presiding member offers an opening for political pressure to bear down on the AB. The effect is strong enough to be observable across the caseload. Yet the prime instance in which individual adjudicators are singled out is through the option of dissenting opinions. We examine these next.

3.2 Assessing Dissents

We turn our attention to the odds of dissenting opinions being issued. Here, we rely on the Kim and Mavroidis (2018) coding, as well as their characterization of "true dissents" as opposed to all separate opinions. Since the outcome of interest is binary, we run a probit model. Throughout, we control for the direction of the AB's majority opinion, since this is what the dissent is most clearly reacting against. A time trend using cubic splines is included, since time is an especially important aspect of the story, given the erosion of the consensus opinion norm through the AB's history. In columns 1 and 2 of Table 6, we begin by considering the odds of any separate opinion, and we then focus on true dissents in columns 3 and 4.

Throughout the various estimations of Table 6, dissenting opinions of all sorts are strongly and significantly related to the presence of a co-national from the defendant country among the adjudicators. The magnitude of these effects is large. Looking at the first two columns, the odds of a separate opinion of any kind become 6 times greater in the presence of a co-national AB member. Looking at columns 3 and 4, the odds of a "true dissent," in turn, grow 14 times higher when a co-national is present on the division, all else equal. This is what we might expect, since dissenting opinions overwhelmingly favor the defendant. We interpret these findings as an indication of how political pressure is especially high on co-nationals in the case of dissenting opinions. Because the option exists, adjudicators feel forced to exercise it. To paraphrase the above-cited judge from the ECJ, because dissents allow adjudicators to show their home country what a loyal judge they are, they feel pressured to do so.[69]

[69] Terris et al. 2007, supra.

Table 5: Estimating the Odds of AB Dissenting Opinions

	(1)	(2)	(3)	(4)
	Separate Opinions		True Dissents	
Respondent Co-national on AB	0.884*	1.197*	1.359*	2.628*
	(0.345)	(0.481)	(0.567)	(1.126)
Majority AB opinion direction	0.417	0.914+	1.006	2.330**
	(0.567)	(0.518)	(0.647)	(0.900)
Panel Ruling Direction		-0.685		-3.793**
		(0.980)		(1.200)
Agriculture		-0.216		-1.152
		(0.641)		(1.242)
Antidumping		0.467		-0.262
		(0.595)		(0.652)
Subsidies and Countervailing Measures		1.105*		2.665**
		(0.487)		(0.962)
SPS		1.166+		
		(0.647)		
TBT		0.629		
		(0.563)		
Number of Third Parties		0.040		0.173+
		(0.032)		(0.099)
Cubic Splines Time Trend	X	X	X	X
Constant	-11.774	-8.031	16.294	15.745
	(22.990)	(34.778)	(58.939)	(65.593)
Observations	177	177	177	177

Probit estimates. Dependent variable is the probability of separate opinion (columns 1-2) or dissenting opinion (columns 1-2), according to the criteria set out in Kim and Mavroidis (2018). Robust standard errors clustered on common dispute in parentheses + p<0.10 * p<0.05 ** p<0.01.

4. Conclusion

The fine balance between political control and judicial independence in international tribunals is usually thought of as a question of formal institutional design. In this respect, despite the WTO offering states a high level of political control over (re)appointments to its appellate tribunal, we find no overt sign of political influence when AB adjudicators deliver a collective ruling as three-member divisions, which have moreover committed to consulting with the remaining four AB members, following its commitment to "collegiality." However, this changes as soon as

adjudicators are singled out as individuals, either as presiding members of an AB division, or by delivering dissents, which are by their nature individual opinions. In both those instances, and across the full 25-year caseload, we find evidence of national bias.

One of the central arguments of this article is that adjudicators themselves can respond to excessive political oversight by adopting informal judicial norms of behavior. Among such norms at the WTO was a strict adherence to consensus opinions, as well as a commitment to discussing all rulings with the remaining four members on the bench. So long as these practices were followed, they successfully offered protection against political influence. Since AB members were not able to dissent without breaking a strong and well-publicized norm, they could not be faulted for failing to do so. Over time, however, the commitment to these norms became increasingly costly. With the erosion of a strict norm of consensus starting in 2005, political control was effectively strengthened, and judicial autonomy suffered. From that point on, it was a matter of time before a powerful state sought to reassert control over the tribunal.

How else might a balance between these competing objectives be achieved? Our findings point to some possible options. The first draws directly on our finding about AB division chairs, who appear more swayed by nationality. One straightforward response would be to bar co-nationals of the litigant countries from serving as division chairs. They could still be appointed to the division, so that the major powers of the system would not lose representation in key disputes.

Given our findings on dissenting opinions responding to nationality of the AB members, another response would be to explicitly bar dissenting opinions. This would amount to formalizing the norm that AB members initially put in place for themselves. Yet the reasons for which this norm was eventually broken also speak to why it might prove overly costly as a formal rule. The negative impact on substantial discussion among adjudicators, given the increasing complexity of cases; the resulting prolongation of deliberations; and the associated elevation of the AB Secretariat's role as a source of consensus positions all suggest that the option of dissenting is highly valuable.

If the weight of political control cannot be addressed by removing *de facto* identifiable dissenting opinions, the now oft-mentioned possibility of longer, six-year, non-renewable terms for AB

members might provide a better alternative. States would still have the ability to vet adjudicators through existing procedures, but there the spectre of re-appointment would not exert as much pressure on individual adjudicators. Alternatively, terms could remain renewable but be made longer, thereby keeping the control offered by a re-appointment process, while expanding the portfolio of cases on which reappointment would be judged and limiting the possibility for short-term, case-specific political sanctioning.

Such a reduction of political control, in turn, would call for some countervailing mechanism by which governments could exercise additional control over the direction of rulings, and their implications for jurisprudence. Of the range of options now being considered, the possibility of an oversight committee that would periodically review AB decisions—or panel decisions, if WTO Members were to decide to scrap appellate review—presents itself as one that might facilitate political feedback at least cost to judicial autonomy. This might be one means of triggering or supporting the adoption of "authoritative interpretations," a political feedback mechanism which by all accounts has been underused by WTO Members.[70] Drawing on Article X:2, a decision rule by which interpretations were adopted following approval of three-fourths of the membership would help prevent deadlocks in bargaining among Members. As some have recently argued, such an oversight committee could also be combined with the option to "remand" especially contentious points of rulings back to the relevant AB (or panel) division.[71]

As our discussion makes clear, no one reform is optimal; all necessarily imply trade-offs. Any possible solution should be conceived of as a package of countervailing reforms that aim at the preservation of an equilibrium between the competing pressures of political control and judicial autonomy. This is especially so, since as we have shown, adjudicators themselves can respond to perceived shortcomings in the formal rules by adjusting their own informal practices. For this reason alone, as Members return to the bargaining table to reach a new agreement over the design of the "crown jewel" at the center of the world trade system, we ought to remember that no set of rules can remain in perpetual equilibrium, and the reform process is bound to be an iterative one.

[70] Creamer and Godzimirska 2016, *supra*.
[71] See: Lamp 2021, *supra*.