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# Loophole or Fire Alarm? The Consensus Requirement for the Appointment of Appellate Body Members and the Institutional Design of the WTO

Geraldo VIDIGAL<sup>\*</sup>

*The past four years have shown that, in contrast to previous assessments that saw the WTO dispute settlement organs as exercising irresistible authority over the WTO Agreements, a WTO Member can single-handedly derail the functioning of the WTO by obstructing appointments to the Appellate Body. This article investigates the origins and character of this feature of the WTO Agreements and examines possible means to overcome it, arguing that merely appointing seven new Appellate Body members will not be sufficient to the future operation of the dispute settlement system. If Members wish to avoid obstruction of appointments becoming a regularly employed negotiation tactic, they must explicitly establish that this possibility is not an integral feature of the institutional design of the WTO – a fire alarm that Members can resort to in case they are dissatisfied with developments within the organization – but an unwarranted loophole in the WTO institutional structure. Among the possible courses of action available to address it, one that is both politically feasible in the short term and unlikely to have its legal effects disputed is a decision, made by consensus by the Membership, to clarify the relationship between the decision-making authority of the Ministerial Conference and the provisions governing appointment of Appellate Body members.*

**Keywords:** World Trade Organization, Appellate Body, International Dispute Settlement, Institutional Design, Dispute Settlement Body, International Courts

## 1 INTRODUCTION

The past four years have been characterized by the United States' (US) disengagement from the multilateral institutions set up after World War II – under the leadership of the US itself – to manage conflict and foster cooperation among world governments. Contrary to what took place in other fields, in which this disengagement largely hindered progress on new initiatives, within the multilateral

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trading system overseen by the World Trade Organization (WTO) the US's obstruction was able to paralyze the existing institutional machinery. US obstruction of appointments to the WTO Appellate Body eventually led it to fall below the minimum of three members it needs to hear appeals, de-activating the Appellate Body and, with it, the system of compulsory and binding dispute settlement that was negotiated as part of the Uruguay Round Agreements (WTO Agreements).<sup>1</sup>

The dispute settlement system has been hailed as the 'jewel in the crown' of the WTO.<sup>2</sup> Given the centrality it acquired in the interpretation of WTO law over the years,<sup>3</sup> the Appellate Body has been called 'a Court in all but name',<sup>4</sup> a 'world trade court'<sup>5</sup> and 'a true court of world trade'.<sup>6</sup> Joseph Weiler's conclusion, in 2001, that 'the final interpretation of the [WTO] Agreements ... has shifted to the Appellate Body' (from the Membership),<sup>7</sup> was widely accepted as the inexorable result of the institutional design of the WTO. A mere three years of obstruction of appointments, however, was sufficient to leave the Appellate Body unable to hear new appeals; a fourth year left it with zero Appellate Body members.<sup>8</sup>

Without a functioning Appellate Body, any Member that has its measures challenged before the WTO dispute settlement system may, by appealing the panel report 'into the void', prevent the issuing of a final ruling on its policies.<sup>9</sup> The paralysis of the Appellate Body thus de facto reverses Members' acceptance of a

<sup>1</sup> See Pieter Jan Kuijper, *The U.S. Attack on the WTO Appellate Body*, 45(1) *Legal Issues Econ. Integration* (2018); Robert McDougall, *The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance*, 52 *J. World Trade* 867 (2018); Geraldo Vidigal, *Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis*, 20 *J. World Investment & Trade* 862–890 (2019); Steve Charnovitz, *How WTO Dispute Settlement Succumbed to the Trump Administration (17 December 2019)*, GWU Law School Public Law Research Paper No. 2019–73, SSRN, <https://ssrn.com/abstract=3505266> (accessed 25 Jan. 2021); Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Extensive (But Fragile) Authority of the WTO Appellate Body*, 79 *L. & Contemp. Probs.* 237–273 (2016); Debra Steger, *The Founding of 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* 447–465 (Gabrielle Marceau ed., Cambridge University Press 2015).

<sup>2</sup> Pascal Lamy, *WTO Disputes Reach 400 Mark*, WTO Press Release 57 (6 Nov. 2009).

<sup>3</sup> Peter Van den Bossche, *From Afterthought to Centerpiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System*, in *The WTO at Ten: The Contribution of the Dispute Settlement System* 289–365 (Giorgio Sacerdoti, Alan Yanovitch & Jan Bohanes eds, CUP 2006).

<sup>4</sup> J. H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 *J. World Trade* 191 (2001).

<sup>5</sup> Claus-Dieter Ehlermann, *Six Years on the 'World Trade Court': Some Personal Experiences as a Member of the Appellate Body of the World Trade Organization*, 36(4) *J. World Trade* 605 (2002).

<sup>6</sup> Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 *Eur. J. Int'l L.* 9, 77 (2016).

<sup>7</sup> Weiler, *supra* n. 4, at 201.

<sup>8</sup> The Appellate Body was fully composed on 23 Nov. 2016 (Minutes of DSB Meeting of 23 Nov. 2016 (WT/DSB/M/389), para. 13.3). Donald Trump took office in the United States on 20 Jan. 2017. The Appellate Body was left with a single member, and as a result became non-operational, on 11 Dec. 2019. It has zero members since 23 Nov. 2020.

<sup>9</sup> DSU Art. 16.4 provides: 'If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal'.

compulsory and binding dispute settlement system as an integral part of their adherence to the WTO Agreements.<sup>10</sup> WTO Members are back in the situation they were in during the era of the General Agreement on Tariffs and Trade 1947 (GATT 1947): a complainant can only obtain a final dispute settlement decision on another Members' policies with the consent of that Member.

The end of the Trump administration presents WTO Members with the opportunity to recompose the Appellate Body. Merely appointing seven new Appellate Body members, however, will be insufficient to rebuild the system as it operated between 1995 and 2016. The expectation that a Member *might* obstruct all appointments in case it is sufficiently dissatisfied with Appellate Body decisions, and single-handedly derail the whole WTO dispute settlement system, means that the system is no longer credibly compulsory except in the very short term.

This situation raises two related questions. The first question is whether, under the WTO Agreements, a Member's ability to block appointments to the Appellate Body is a legal right – the mirror image of an absolute requirement that appointments be made by consensus – or whether it merely exists as a function of the WTO's tradition of decision-making by consensus, which means other Members may ultimately override a Member's obstruction by resorting to majority voting to appoint Appellate Body members. The related question is whether the ability to block appointments to the Appellate Body performs a discernible function within the WTO institutional structure, or whether the only explanation for a consensus requirement in this context is an oversight by WTO negotiators. The answers to these two questions will determine whether and how WTO organs other than the Dispute Settlement Body (DSB), which is explicitly required to make decisions by consensus, may overcome a future block, not only preventing obstructions from deactivating the Appellate Body once more but also precluding the threat of obstruction from being used as a tactic in unrelated WTO negotiations.

This article argues that the consensus requirement for appointments to the Appellate Body is an integral part of the current institutional framework of the WTO. Although it is impossible to know whether this requirement was established due to a conscious choice or to an oversight by WTO negotiators, the requirement can credibly be claimed to perform two functions in the institutional design of the WTO. First, it ensures that no Appellate Body member is appointed who is unacceptable to any WTO Member. Second, it might serve as a 'fire alarm' a Member can resort to as a last resort in order to enforce the Member-driven character of the WTO against an overtake by adjudicators of the law-making function that is reserved for the Membership. As a result, this requirement cannot be interpreted

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<sup>10</sup> Andrew L. Stoler, *The WTO Dispute Settlement Process: Did the Negotiators Get What they Wanted?*, 3 *World Trade Rev.* 99 (2004).

away implicitly. To reject the fire alarm hypothesis and affirm the authority of the Ministerial Conference to appoint Appellate Body members by majority, Members must either amend the WTO Agreements – the Dispute Settlement Understanding (DSU) or the Agreement Establishing the World Trade Organization (AEWTO) – or they must make an explicit decision on the interpretation of these agreements. To avoid a systemic crisis, however, this interpretation should be based on an agreement by the Membership as whole.

Following this introduction, the paper proceeds in four parts. Part 2 examines the consensus requirement that applies to appointments to the Appellate Body, arguing that, while the Ministerial Conference and the General Council may be able to appoint Appellate Body members, these appointments are subject to the same consensus requirement that applies to the DSB. Part 3 proposes that this consensus requirement may be viewed either as a fire alarm or as a loophole in the WTO institutional structure, finding that the Uruguay Round negotiating history is not determinative of which interpretation was the desired one when the WTO Agreements were negotiated. Part 4 examines, in light of this finding, the alternatives available to the Membership to overcome the consensus requirement. Besides the obvious way to address this issue – amending the DSU or the AEWTO – Members could, acting jointly, establish authoritatively the proper interpretation of the powers of the Ministerial Conference under AEWTO Article IV:1. Given the systemic effects of this interpretation, the support of the entire WTO Membership would avoid the charge that the Ministerial Conference is using its interpretative authority to undermine the WTO rules on amendment. Part 5 concludes.

## 2 THE CONSENSUS REQUIREMENT FOR APPOINTMENTS TO THE APPELLATE BODY

### 2.1 THE CONSENSUS REQUIREMENT IN THE ORDINARY OPERATION OF THE WTO

Uniquely in the structure of the WTO, the DSB's decision-making process is subject to a strict requirement that all of its decisions be made by consensus. DSU Article 2.4 provides that, '[w]here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus<sup>[1]</sup>'. Footnote 1 specifies that '[t]he DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision'. As a result, as long as a WTO Member is present at a meeting of the DSB, it may prevent it from reaching a proposed decision by formally objecting to the decision being made.

This strict requirement contrasts with the rules that govern decision-making by the two organs of the WTO endowed with general competence to decide on all

matters under the WTO Agreements: the WTO Ministerial Conference and, between meetings of the Ministerial Conference, the WTO General Council.<sup>11</sup> AEWTO Article IX:1 requires these organs to follow a ‘practice’ of decision-making by consensus; however, it also provides that, ‘where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting’. A footnote clarifies that, when convened as the DSB, the General Council operates not under its own preferred-consensus rule but under the strict consensus requirement of Article 2.4 of the DSU.<sup>12</sup>

The strict consensus requirement applicable to the DSB ordinarily operates to produce the WTO’s ‘quasi-automatic’ dispute settlement system. The DSB will establish a panel, adopt a panel or an Appellate Body report, and provide an authorization for a complainant to retaliate in case of non-compliance with a report, *unless* there is consensus among all Members to reject these decisions.<sup>13</sup> Although Members may still propose the non-establishment of a panel or the non-adoption of a report, any Member that is ‘present’ at a meeting of the DSB may ‘formally object[]’ to this proposal, blocking consensus and ensuring the operation of the dispute settlement system. The establishment of quasi-automatic dispute settlement was one of the key outcomes of the Uruguay Round of negotiations that established the WTO.<sup>14</sup>

The WTO Agreements also entrust the DSB with appointing persons to compose the Appellate Body. DSU Article 17.1 requires the DSB to establish an Appellate Body and provides that the Appellate Body ‘shall be composed of seven persons, three of whom shall serve on any one case’. Although establishing the Appellate Body only needed to be done once,<sup>15</sup> vacancies continuously arise and must be filled accordingly. Article 17.2 provides that ‘[t]he DSB shall appoint persons to serve on the Appellate Body’ and clarifies that ‘[v]acancies shall be filled as they arise’, but does not provide for voting as a back-up alternative in case consensus cannot be reached.

The DSU thus entrusts the continuous task of filling vacancies on the Appellate Body to an organ whose decisions can be blocked by a single WTO Member. As a result, the continued operation of the Appellate Body depends on the continued ability of the WTO’s 164 Members to reach affirmative consensus on names of

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<sup>11</sup> AEWTO, Articles IV:1, IV:2.

<sup>12</sup> Footnote 3 to AEWTO (‘Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding’). The ‘General Council convened as the Dispute Settlement Body’ is how the AEWTO refers to the DSB (AEWTO, Article IV:3).

<sup>13</sup> See also DSU Arts 6.1, 16.4, 17.14, 22.6, 22.7.

<sup>14</sup> Stoler, *supra* n. 10.

<sup>15</sup> The Appellate Body was established at the first meeting of the DSB. DSB, Minutes of Meeting of 10 Feb. 1995 (WT/DSB/M/1), 28 Feb. 1995, at 3.

persons to integrate the Appellate Body. And, although obstruction may have seemed like an unlikely strategy prior to 2016, experience now shows that the consensus requirement that governs DSB decisions, de facto at least, allows a single Member that persistently refuses to support appointments to de-activate the Appellate Body in less than three years.

## 2.2 OVERCOMING THE CONSENSUS REQUIREMENT: AUTHORITY AND MODE OF DECISION-MAKING

Given the consensus requirement at the DSB, a common consideration is that, in the absence of consensus for appointments to the Appellate Body, the Ministerial Conference or the General Council should be able to proceed to make appointments by majority. Pieter Jan Kuijper, Jennifer Hillman, Ernst-Ulrich Petersmann and Henry Gao have all argued that, in light of the obstruction of appointments by the United States, the organs of general competence would be able to take it upon themselves to appoint Appellate Body members – and, in doing so, could make decisions by majority rather than consensus.<sup>16</sup> While an analysis of the relevant agreements shows that the Ministerial Conference (and, acting in its stead, the General Council) have the power to make appointments to the Appellate Body, in doing so they would be subject to the same requirements for decision-making as the DSB.

### 2.2[a] *Competence for Appointment of Appellate Body Members*

In order to take upon itself the task of appointing persons to the Appellate Body, the Ministerial Conference would be required to invoke its broad mandate, under AEWTO Article IV:1, to ‘carry out the functions of the WTO and take actions necessary to this effect’. The same provision specifies that, in performing its functions, the Ministerial Conference has ‘the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement’.

<sup>16</sup> See Kuijper, *supra* n. 1, at 9–10; Jennifer Hillman, *Three Approaches to Fixing the World Trade Organization’s Appellate Body: The Good, the Bad and the Ugly?*, Institute of International Economic Law, Georgetown University Law Centre 11, 48 (Dec. 2018), <https://georgetown.app.box.com/s/966hfv0smran4m31biblgszj42za40b> (accessed 25 Jan. 2021); Ernst-Ulrich Petersmann, *How Should the EU and Other WTO Members React to Their WTO Governance and WTO Appellate Body Crisis?*, EUI Working Papers, RSCAS2018/71, 8 (2018); Henry Gao, *A Rule-based Solution to the Appellate Body Crisis, and Why the MPLA Would Not Work* (1 Sept. 2020), SSRN, <https://ssrn.com/abstract=3767926> (accessed 25 Jan. 2021).

In administering the rules and procedures of the DSU, the DSB is in fact performing one of the core functions entrusted to the WTO by the Membership, that is, to ‘administer the Understanding on Rules and Procedures Governing the Settlement of Disputes’.<sup>17</sup> DSU Article 2.1 clarifies that the DSB is ‘established to administer the[] rules and procedures’ of the DSU and the dispute settlement provisions of other WTO Agreements. For this purpose, the Membership has provided the DSB with ‘the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the [WTO] agreements’.<sup>18</sup>

When administering the rules and procedures of the DSU, therefore, the DSB is carrying out one of the core functions of the WTO. Appointing Appellate Body members, an obligation (‘shall’) of the DSB, is an action necessary for this function to be carried out. Setting aside the question of the requirements for decision-making (discussed in section 2(B)(ii) below), the authority of the Ministerial Conference to make ‘decisions on all matters’ under the Multilateral Trade Agreements logically includes the authority to make decisions provided for in the DSU,<sup>19</sup> and in particular the authority to appoint Appellate Body members.

If this is the case, such a decision can also be made by the General Council. Besides being entrusted with ‘carry[ing] out the functions assigned to it by th[e AEWTO]’,<sup>20</sup> the General Council is also empowered to ‘conduct[]’ the functions of the Ministerial Conference ‘[i]n the intervals between meetings of the Ministerial Conference’.<sup>21</sup> While the function of ‘conven[ing] as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding’<sup>22</sup> is one entrusted to the General Council itself,<sup>23</sup> the ‘authority to take decisions on all matters under any of the Multilateral Trade Agreements’, in principle vested on the Ministerial Conference, accrues to the General Council in the intervals between Ministerial Conference meetings.

A possible objection to this authority relies on the fact, discussed above, that the appointment of persons to the Appellate Body is a competence strictly assigned to the DSB. The Ministerial Conference’s authority is not unlimited. In *US – Clove*

<sup>17</sup> AEWTO, Article III:3. AEWTO Art. III is entitled ‘Functions of the WTO’.

<sup>18</sup> DSU, Art. 2.1.

<sup>19</sup> Article II:2 specifies that the ‘Multilateral Trade Agreements’ include ‘[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3’ to the AEWTO. The DSU is Annex 2 to the AEWTO.

<sup>20</sup> AEWTO, Article IV:2.

<sup>21</sup> AEWTO, Article IV:2.

<sup>22</sup> AEWTO, Article IV:3.

<sup>23</sup> Other provisions of the AEWTO assigning specific functions to the General Council include Articles IV:7, V:1, V:2, VII:3.



*Cigarettes*, the Appellate Body reversed the panel's finding that the Ministerial Conference could issue an authoritative interpretation under Article IX:2 of the DSU without a prior recommendation by the Council overseeing the functioning of the Agreement being interpreted.<sup>24</sup> This limitation, however, concerns the requirements for decision-making rather than the authority to make decisions. As a matter of competence rather than decision-making procedure, Article IV:1 appears to empower the Ministerial Conference (and the General Council between meetings of the Ministerial Conference) to 'take decisions on all matters' under any multilateral WTO Agreements, as long as this is requested by a Member.

2.2[b] *Decision-making Requirements for the Ministerial Conference and General Council in Appointing Appellate Body Members*

Although the Ministerial Conference is empowered to make decisions on all matters under any WTO Agreements, it is not free with regard to the requirements that apply to decision-making. AEWTO Article IV:1 provides that its authority to take decisions must be exercised 'in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement'. In *US – Clove Cigarettes*, the Appellate Body refused to characterize an interpretation contained in the Doha Ministerial Decision as an authoritative Article IX:2 interpretation.<sup>25</sup> The Appellate Body found that panel's reasoning – that the decision had been 'agreed by all WTO Members meeting in the form of Ministerial Conference, the highest ranking body of the WTO'<sup>26</sup> – was insufficient to endow the decision with binding character. Despite recognizing that the decision was worded as a binding interpretation and referred to AEWTO Article IX in its preamble, the Appellate Body concluded that it did not qualify as a binding interpretation under Article IX:2. The Appellate Body stated:

<sup>24</sup> Appellate Body Report, *US – Clove Cigarettes*, Art. 254 (this limitation applies to the WTO's substantive agreements in Annex 1; the DSU is Annex 2).

<sup>25</sup> Doha Ministerial Decision on Implementation-Related Issues and Concerns of 14 Nov. 2001, WT/MIN(01)/17, para. 5.2. The relevant paragraph provided: 'Subject to the conditions specified in para. 12 of Art. 2 of the Agreement on Technical Barriers to Trade, the phrase "reasonable interval" shall be understood to mean normally a period of not less than six months, except when this would be ineffective in fulfilling the legitimate objectives pursued'. AEWTO Article IX:2 endows the Ministerial Conference and the General Council with 'exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements', specifying, when interpreting the substantive WTO Agreements in Annex 1, that these bodies 'shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement'.

<sup>26</sup> Panel Report, *US – Clove Cigarettes*, para. 7.576 [sic]. The panel was not clear that this made the Decision an authoritative interpretation under AEWTO Article IX:2, merely stating that it 'must be guided by [the Decision] in its interpretation' of the provisions of WTO law.

While Article IX:2 of the WTO Agreement confers upon the Ministerial Conference and the General Council the exclusive authority to adopt multilateral interpretations of the WTO Agreement, this authority must be exercised within the defined parameters of Article IX:2 ... to characterize the requirement to act on the basis of a recommendation by the Council overseeing the functioning of the relevant Agreement as a 'formal requirement' neither permits a panel to read that requirement out of a treaty provision, nor to dilute its effectiveness. ... the recommendation from the relevant Council is an essential element of Article IX:2, which constitutes the legal basis upon which the Ministerial Conference or the General Council exercise their authority to adopt interpretations of the WTO Agreement.<sup>27</sup>

This interpretation is consistent with the fact that the Ministerial Conference's authority to issue binding interpretations, and to make all other decisions, does not stem from the Ministerial Conference itself but from the consent of the WTO Membership. This consent is granted under specific conditions and subject to specific requirements for decision-making. The question, then, is not only whether the Ministerial Conference (or the General Council, acting in its stead) has the authority to appoint Appellate Body members, but also whether, when doing so, these bodies are required to act by consensus as the DSB would be.

It would seem that the requirement of consensus does apply. AEWTO Article IV:1 provides that decisions by the Ministerial Conference are to be made 'in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement'. Under AEWTO Article IX:1, the permission for the Ministerial Conference and General Council to resort to voting is preceded by the condition '[e]xcept as otherwise provided'. This condition is reinforced in the last sentence of Article IX:1, which provides that, when voting, the Ministerial Conference and the General Council decide by simple majority of votes cast, 'unless otherwise provided in th[e AEWTO] or in the relevant Multilateral Trade Agreement'.<sup>28</sup>

The simultaneous application of the AEWTO and the DSU, implied by the conjunction 'and' in Article IV:1, means that the specific requirements that govern decision-making by the DSB, and which apply to appointments to the Appellate Body, prevail over those that generally govern decision-making by the political bodies of general competence. The Ministerial Conference, as well as the General Council when performing the functions of the Ministerial Conference, would thus be bound by the consensus requirement of Article 2.4 of the DSU if they were to take it upon themselves to make appointments to the Appellate Body.

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<sup>27</sup> Appellate Body Report, *US – Clove Cigarettes*, paras 253–254.

<sup>28</sup> AEWTO Article IX:2.

2.2[c] *A Matter of Interpretation? Overcoming the Consensus Requirement within the Text of the WTO Agreements*

There are arguments against this interpretation of the institutional arrangement set up by the WTO Agreement. One possibility is to invoke AEWTO Article XVI:3, which provides that the provisions of the AEWTO ‘prevail to the extent of the conflict’ in case of ‘a conflict between a provision of th[e AEWTO] and a provision of any of the Multilateral Trade Agreements’. However, what prevents appointment by voting is not a conflict between strict decision-making provisions in the DSU and less strict ones in the AEWTO; instead, it is the reference in the AEWTO itself to the specific requirements for decision-making in the Multilateral Trade Agreements that prevents resort to majority voting in this case.

Another possibility is to invoke footnote 3 to the AEWTO, which specifies that the decision-making procedure in DSU Article 2.4 applies to ‘the General Council when convened as the Dispute Settlement Body’, inferring from this specific reference to the General Council that the Ministerial Conference is exempted from this restriction. However, this argument does not explain how the footnote would affect the requirement in Article IV:1 that the Ministerial Conference, in taking action, must respect the requirements for decision-making in both the AEWTO and the DSU. The better interpretation of this footnote is that replicates Article 2.4 of the DSU, confirming that, when acting as the DSB, the General Council is bound to act by consensus by footnote 3 to the AEWTO as well as by Article 2.4 of the DSU.<sup>29</sup> When acting on the basis of Article IV, both the Ministerial Conference and the General Council are bound by Article 2.4 not directly but by means of the reference in Article IV:1 to the specific requirements for decision-making in the Multilateral Trade Agreements.

One could also refer to the differences in terminology and aim for a strict interpretation of ‘decision’ in both the AEWTO and the DSU. This interpretation would claim that the ‘decision[s]’ to which DSU Article 2.4 refers include solely the actions for which the DSU employs the term ‘decide’, excluding the action of ‘appoint[ing]’ persons to the Appellate Body described by Article 17.2.<sup>30</sup> The Ministerial Conference’s subsidiary appointments could similarly be labelled not ‘decisions’ under Article IV:1, third sentence, but instead ‘actions necessary’ to carry out the functions of the WTO. This would allow the interpreter to circumvent the requirements for decision-making in Article IV:1, third sentence, which apply solely to ‘decisions’.

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<sup>29</sup> A single organ is referred to in the AEWTO as ‘the General Council when convened as the Dispute Settlement Body’ and in the DSU more concisely as ‘the Dispute Settlement Body’.

<sup>30</sup> Hillman, *supra* n. 16.

The issue with this interpretative maneuver is that the DSU does not provide a decision-making process for DSB actions other than decisions. If the appointment of Appellate Body members is not a ‘decision’ under Article 2.4, what (non-)decision-making process applies to it? The majority decision-making rule in AEWTO Article IX also applies to ‘Decisions’. If it does not apply to the Ministerial Conference’s ‘actions’ under Article IV, what decision-making rules do apply?

The hidden assumption here appears to be that, in the absence of the consensus requirement of DSU Article 2.4, a fall-back majority voting rule would emerge. But there is no such thing as a fall-back majority voting rule, or any voting rule, under general international law. If anything, the fall-back rule under general international law is that a treaty’s rules can only be modified for a state with its consent.<sup>31</sup> It is a state’s consent *ex ante* to a specific decision-making procedure that legitimizes the subsequent adoption, by political or adjudicatory bodies, of decisions that bind the state against its stated preferences.

A final possible interpretation is that the consensus requirement is not a specific requirement for appointment of Appellate Body members under DSU Article 17.2 but rather a general requirement that attaches to all decisions of the DSB. As a result, it does not apply to decisions of the Ministerial Conference under AEWTO Article IV:1, which are only limited by ‘specific requirements for decision-making’. The context provided by the DSU, which specifically requires some decisions to be made by consensus,<sup>32</sup> supports this interpretation. As discussed below, interpreting the relationship between these provisions in this manner would be the preferable means of affirming, through an authoritative interpretation, the authority of the Ministerial Conference to appoint persons to the Appellate Body by majority.

However, this interpretation is by no means self-evident. AEWTO Article IV:1 refers to ‘specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade *Agreement*’, not the relevant *provision*. It is a specific requirement for decision-making *under the DSU* that decisions entrusted to the DSB – including the appointment of persons to the Appellate Body – must be made by consensus. The AEWTO goes to great lengths to prevent the fall-back mechanism of majority decision-making under Article IX:1 from being used to undermine the strict rules governing decision-making under other provisions and agreements.<sup>33</sup> It is therefore unclear that the object and purpose of Article IV:1 would support allowing the Ministerial Conference to overcome the consensus requirement that applies to a decision on the basis that this requirement is set out for the organ entrusted with the decision rather than for the decision itself. Only an

<sup>31</sup> See Arts 30, 40 and 41 of the Vienna Convention on the Law of Treaties.

<sup>32</sup> DSU Arts 6.1, 16.4, 17.14, 21.6, 22.6, 22.7.

<sup>33</sup> Besides the decision-making requirement in AEWTO Article IV:1, *see* the provisos in Article IX:1 (‘Except as otherwise provided’, ‘unless otherwise provided’) and fn. 3.

investigation into the object and purpose of the WTO's decision-making requirement may establish that the consensus requirement for appointments to the Appellate Body is a loophole rather than a fire alarm.

### 3 LOOPHOLE OR FIRE ALARM? THE CONSENSUS REQUIREMENT AND THE WTO'S INSTITUTIONAL FRAMEWORK

#### 3.1 TWO VIEWS ON THE CONSENSUS REQUIREMENT

The ability of WTO Members to single-handedly block appointments to the Appellate Body could be seen as a loophole in the institutional structure of the WTO. If it takes the form of persistent obstruction with the declared aim of forcing a renegotiation of already agreed obligations, blocking appointments could be said to violate the principle of good faith, amounting to what the Appellate Body has termed '*abus de droit*', or 'an abuse or misuse of right'.<sup>34</sup> In *US – Gasoline*, the Appellate Body noted that a provision 'invoked as a matter of legal right should not be so applied as to frustrate or defeat the legal obligations of the holder of the right'.<sup>35</sup> Ernst-Ulrich Petersmann suggests that blocking appointments 'on grounds not related to the personal qualifications of proposed ... candidates violates the WTO legal obligations to comply with DSU rules in good faith'.<sup>36</sup> In the face of this violation, he proposes, Members should be able to 'overcome the illegal "blocking"', resorting to majority decisions in order to 'meet their collective legal duties' to maintain the Appellate Body in operation.<sup>37</sup>

However, another possible view is that the ability to block Appellate Body appointments is a feature of the WTO institutional framework. While WTO Members have agreed to compulsory dispute settlement under the DSU, they have done so while imposing strict limits on panels, the Appellate Body, and the DSB, all of which are explicitly precluded from 'add[ing] to or diminish[ing] the rights and obligations of Members' under the WTO Agreements.<sup>38</sup> Given the compulsory jurisdiction of the Appellate Body, the de facto absence of recourse against its findings, and the decisive role each Appellate Body member may have in a three-member division, it is not far-fetched to conclude that the object and purpose of the

<sup>34</sup> Appellate Body Report, *US – Shrimp* (WT/DS58/AB/R), para. 158.

<sup>35</sup> Appellate Body Report, *US – Gasoline* (WT/DS2/AB/R), at 22.

<sup>36</sup> Petersmann, *supra* n. 16 (emphasis in the original). Petersmann refers to DSU Art. 3.10. For situations other than disputes, Art. 4 of the Vienna Convention on the Law of Treaties would seem more adequate. 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

<sup>37</sup> Petersmann, *supra* n. 16, at 8.

<sup>38</sup> DSU, Arts 3.2, 19.2.

consensus requirement is to ensure that not one person is appointed to the Appellate Body who would be unacceptable to a WTO Member.

It would even be possible to rationalize the ability to obstruct *all* appointments not as an *abus de droit* but as a means for a Member particularly dissatisfied with developments in the jurisprudence of the Appellate Body to ensure that the WTO remains a Member-driven organization, preventing the fundamental transformation by adjudicators of rights and obligations agreed in the WTO Agreements. From this perspective, obstructing appointments could be the last resort available to the dissatisfied Member – a *fire alarm* – as an alternative to withdrawal that could lead to a permanent weakening of the organization. The ability to continue to oppose the appointment of Appellate Body members, which accrues only to WTO Members present at meetings of the DSB, may have been a key reason for the United States to have remained in the WTO for the entirety of the Trump administration, against the wishes expressed by Presidential candidate<sup>39</sup> and then President Trump.<sup>40</sup>

As a matter of international law, there is support in the jurisprudence of the International Court of Justice (ICJ) for the view that withholding consent for appointment of adjudicators is a right, and one that cannot be overcome by institutional machinery other than with the prior consent of the relevant state. In 1950, the ICJ was confronted in *Peace Treaties (Second Phase)* with an instance in which a state that had agreed to an arbitration mechanism refused to cooperate in the constitution of the arbitral tribunal. While the Court highlighted that there was an obligation to cooperate in good faith to ensure the proper functioning of the arbitral clause, it also found that failure to fulfil this obligation did not allow other parties to the treaty, or international institutions, to proceed to the constitution of the adjudicator. As the Court put it, '[t]he failure of machinery for settling disputes ... is one thing; international responsibility is another'.<sup>41</sup> If this reasoning is followed, even assuming the United States has failed to perform in good faith its obligation to cooperate in the composition of the Appellate Body,<sup>42</sup> a violation of procedural obligations under the WTO Agreements would not engender a right for other Members, or WTO institutions, to compose the adjudicator against the institutional rules Members agreed to when they consented to be bound by the WTO Agreements.

<sup>39</sup> Geoff Dyer, *Donald Trump Threatens to Pull US Out of WTO*, Financial Times (24 July 2016).

<sup>40</sup> James Politi, *Donald Trump Threatens to Pull US Out of the WTO* (sic), Financial Times (30 Aug. 2018).

<sup>41</sup> *Interpretation of Peace Treaties (Second Phase)* (Advisory Opinion) [1950] ICJ Rep 221, 229. See Clément Marquet, *Crisis at the Appellate Body: Towards More or Less Consent in WTO Adjudication?*, Society of International Economic Law (SIEL), Sixth Biennial Global Conference (2018), SSRN, <https://ssrn.com/abstract=3217863> (accessed 25 Jan. 2021).

<sup>42</sup> Note that DSU Art. 17.2 imposes the obligation to fill vacancies in the Appellate Body 'as they arise' on the DSB, not on individual Members. Additionally, DSU Art. 23.2(a) arguably precludes Members from acting on their own determination that a violation has occurred.

### 3.2 EXPLAINING THE CONSENSUS REQUIREMENT: THE URUGUAY ROUND NEGOTIATING HISTORY

The two interpretations of the WTO institutional framework sketched out above make obstructing Appellate Body appointments alternatively an abuse of a right (in which case the consensus requirement is a loophole in an otherwise tight institutional structure) or a legitimate procedural right (in which case it offers a fire alarm that any Member is able to resort to in case of extreme dissatisfaction with adjudication-driven developments within the WTO). Given this ambivalence, it is worth verifying whether the negotiating history of the Uruguay Round can offer clarity on the common intention of Members.<sup>43</sup>

The roots of the present arrangement for Appellate Body appointments are to be found in the 1990 and 1991 drafts for a reformed GATT dispute settlement mechanism – the December 1990 ‘Brussels Draft’<sup>44</sup> and the December 1991 ‘Dunkel Draft’, named after GATT Director-General Arthur Dunkel (together, ‘the Drafts’).<sup>45</sup> The Drafts presumed that the rules they established would apply within the institutional framework of the GATT 1947. The sole political body established by the GATT 1947 agreement itself was the ‘CONTRACTING PARTIES’. GATT Article XXV allowed its Contracting Parties to act jointly and, by majority, to make decisions required for the operation of the agreement.<sup>46</sup> In the GATT era, the key political bargains were struck at the periodic high-level meetings of the CONTRACTING PARTIES. In 1960, the CONTRACTING PARTIES established the Council,<sup>47</sup> an organ composed of diplomats that implemented the determinations of the CONTRACTING PARTIES between periodic meetings and ran the day-to-day operation of the GATT, including the administration of its dispute settlement mechanism.

When, at the final stages of the Uruguay Round, negotiators agreed to establish a WTO, the broad policy-setting and decision-making functions of the GATT CONTRACTING PARTIES were entrusted to the WTO Ministerial Conference, which should meet at least every two years.<sup>48</sup> The functions formerly

<sup>43</sup> Article 32 of the VCLT establishes, as supplementary means of interpretation, ‘the preparatory work of the treaty and the circumstances of its conclusion’. These supplementary means are to be used only ‘in order to confirm the meaning’ resulting from the application of the general rule of interpretation, or in order to determine the meaning when the general rule of interpretation ‘(a) leaves the meaning ambiguous or obscure’ or ‘(b) leads to a result which is manifestly absurd or unreasonable’. Arguably, those that claim that the consensus requirement is a loophole are assuming either (a) or (b).

<sup>44</sup> Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Revision), MTN.TNC/W/35/Rev.1 (3 Dec. 1990) (Brussels Draft).

<sup>45</sup> Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (20 Dec. 1991), at s. 13 (Dunkel Draft).

<sup>46</sup> GATT, Art. XXV.

<sup>47</sup> GATT CONTRACTING PARTIES, Summary Record of the Eleventh Meeting, SR.16/11 (23 June 1960), 161 (establishing the ‘Council of Representatives’).

<sup>48</sup> AEWTO Art. IV:1.

performed by the GATT Council – taking care of the day-to-day business of the institution between high-level political gatherings – were to be performed by the WTO General Council. However, while the WTO General Council is similar in character to the GATT Council, there is a key difference: the General Council's activities in the field of dispute settlement are carried out by a legally distinct organ: the 'General Council ... convened as the Dispute Settlement Body'<sup>49</sup> or simply 'the Dispute Settlement Body'.<sup>50</sup>

This partition of the Council into a General Council and a Dispute Settlement Body<sup>51</sup> was crucial to the institutional framework in which appointments to the Appellate Body take place. While the Drafts entrusted the administration of dispute settlement to the Council,<sup>52</sup> the DSU entrusts it to the DSB, 'established to administer the[] rules and procedures' of the DSU and the dispute settlement provisions in other WTO Agreements.<sup>53</sup>

It is not clear, however, whether the implications of entrusting the DSB with appointments to the Appellate Body were noticed by WTO Members at the time. The issue of appointments first appeared in the first complete draft text on dispute settlement of the Uruguay Round, prepared by the GATT Secretariat for use at the December 1990 meeting of negotiators in Brussels. This draft provides that Appellate Body members 'shall be chosen *by the Council* to serve for a three-year term'.<sup>54</sup> By mid-October, this had changed. The Chairman's Text on Dispute Settlement, drafted by Julio Lacarte-Muró after two weeks of meetings of which there are no records,<sup>55</sup> provides that Appellate Body 'Members shall be appointed by the CONTRACTING PARTIES to serve for a four-year term'.<sup>56</sup> Since the CONTRACTING PARTIES could decide by majority, this would have excluded the appointment of Appellate Body members from the decision-making rules governing decisions on dispute settlement.<sup>57</sup>

<sup>49</sup> Agreement Establishing the World Trade Organization, fn. 3.

<sup>50</sup> Article IV:3 of the Agreement Establishing the WTO specifies that the 'General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding'. The DSU provides that it establishes '[t]he Dispute Settlement Body ... to administer [its] rules and procedures' (DSU Art. 2.1).

<sup>51</sup> Similar to the DSB for the dispute settlement system, the trade policy review mechanism is administered by the Trade Policy Review Body, another specialized body i.e., de facto, a meeting of the General Council, but has, as a matter of law, its own institutional structure and a specific set of competences (AEWTO, Art. IV:4; AEWTO, Annex 3 (Trade Policy Review Mechanism)).

<sup>52</sup> Brussels Draft, at 290; Dunkel Draft, at s. 14.

<sup>53</sup> DSU, Art. 2.1.

<sup>54</sup> GATT Secretariat, *Draft Text on Dispute Settlement*, MTN.GNG/NG13/W/45 (21 Sept. 1990) (emphasis added).

<sup>55</sup> Note by the Secretariat, 'Meeting of 24 Sept. to 11 Oct. 1990', MTN.GNG/NG13/23 (24 Oct. 1990).

<sup>56</sup> Chairman's Text on Dispute Settlement, CGT/607-14 (NG/13) of 19 Oct. 1990, reprinted in MTN.GNG/NG5/WGSP/W/26/Rev.1/Corr.1 (30 Oct. 1990).

<sup>57</sup> At this stage, it was unclear whether negative consensus would be adopted.



This same wording appears in the 1990 Brussels Draft and in the 1991 Dunkel Draft. While the GATT Council was required to act by consensus with respect to dispute settlement matters,<sup>58</sup> the CONTRACTING PARTIES were allowed to make decisions by simple majority.<sup>59</sup> This meant that, under the rules of the Drafts, the appointment of Appellate Body members could take place by majority rather than by consensus.<sup>60</sup> This crucial shift may have been single-handedly operated by Julio Lacarte-Muró.

Between the issuing of the Dunkel Draft and the signature of the WTO Agreements, however, the appointing authority for Appellate Body members changed again, this time to the DSB. Assigning appointments to the DSB rather than the Ministerial Conference meant that any Member became able to single-handedly prevent the appointment of persons to the Appellate Body – and ultimately to paralyze the entire dispute settlement system – by consistently obstructing consensus for appointments at the DSB.

It is unclear why the decision was made to entrust the DSB rather than the Ministerial Conference with the appointment of Appellate Body members. There are no official records of negotiations that took place between the December 1991 Dunkel Draft and the April 1994 signing of the WTO Agreements in Marrakech. The key subjects of disagreement did not involve dispute settlement.<sup>61</sup> More energy was spent on the WTO's institutional structure and the question of whether and when voting could be used at WTO political bodies.<sup>62</sup>

Queries posed to persons who were key in the drafting process did not result in them recalling making a substantive decision to modify the decision-making rule for appointments to the Appellate Body. It is likely that, once a specialized body was created that met regularly to administer dispute settlement, it simply seemed more logical for appointments to be made by this organ rather than by one that meets every two years. Assigning appointments to the DSB rather than the ordinary General Council may have seemed consistent with the partition of competences among these two configurations of the same set of actors: the Geneva-based representatives of the entire WTO Membership.

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<sup>58</sup> Brussels Draft, at 290 (the Council was required to make decisions 'by the traditional practice of consensus'; the Brussels Draft specifies that parties retain the possibility of resorting to GATT Art. XXV); Dunkel Draft, at s. 3.

<sup>59</sup> GATT Art. XXV:4.

<sup>60</sup> The Brussels Draft specifically noted that the Council was required to make decisions 'by the traditional practice of consensus', while clarifying that the possibility remained of resort to GATT Art. XXV, the provision governing joint action by all GATT 'CONTRACTING PARTIES' (Brussels Draft, at 290).

<sup>61</sup> John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* 133 (Springer 1999) ('As far as the texts on dispute settlement were concerned, there was not much more to do [after the Dunkel Draft]').

<sup>62</sup> *Ibid.*, at 334–335.

Thus, what to the drafters of DSU may have seemed like a cosmetic change, which essentially adjusted the GATT-oriented Dunkel Draft to adapt it to the WTO's institutional structure, resulted in a substantive (and, for the Appellate Body, existential) shift in the institutional balance of the WTO. While the Ministerial Conference or the General Council could have overcome obstruction by resorting to vote, no such procedure was available to the DSB. Because the organs of general competence are bound by the specific requirements for decision-making established in the Multilateral Trade Agreements, they, too, become subject to obstruction by a single Member.

Does this negotiating history answer the question of whether the consensus requirement is a loophole or provides Members with a fire alarm against WTO adjudicators? Not entirely. It does not seem to make the fire alarm hypothesis absurd or unreasonable, which could possibly justify considering this requirement a loophole. Instead, the plain words of Article IV:1 and IX:1 seem to indicate that decision-making requirements in the Multilateral Trade Agreements – in this case, the consensus requirement that governs all decisions of the DSB, including appointments to the Appellate Body – also apply in case the Ministerial Conference or the General Council take it upon themselves to make the relevant decisions.

#### 4 OVERCOMING THE CONSENSUS REQUIREMENT: METHODS AND DESIRABILITY

##### 4.1 MEANS TO ALLOW MAJORITY APPOINTMENTS: AMENDMENTS AND INTERPRETATIONS

While the design of dispute settlement was settled reasonably early in the final stage of Uruguay Round negotiations, institutional issues were contentious until the very end of negotiations. The United States, in particular, was concerned that the establishment of a fully feathered international organization would open the door for attempts, by numerical majorities, to use voting procedures to renegotiate the basic terms of the negotiated agreements. John Croome writes that, beyond the 'tough requirement' of a three-fourths majority for the adoption of interpretations and waivers, the United States only agreed to the establishment of the WTO once it was sure that AEWTO provisions 'offered an impregnable defence against a possible tyrannous majority, since unanimity would be needed to amend such key rules as those on voting and the MFN [Most-Favoured-Nation] requirements'.<sup>63</sup>

If the existing WTO rules do not allow appointment of Appellate Body members by majority, two avenues are available to modify this situation: amending

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<sup>63</sup> Croome, *supra* n. 61, at 360.

the relevant agreements or, taking advantage of the uncertainty regarding their meaning, interpreting into them an arrangement different from that which emerges from the interpretation expounded above. While the former option would result in the most secure means of ruling out the use of obstruction as a fire alarm, the latter may be the one that is politically most feasible in the short term.

4.1[a] *Amending the Agreements: The DSU and Article IV:1*

The most obvious path for modifying the arrangements for appointments is to amend Article 17 of the DSU. For example, an amended DSU Article 17.2 might state that if the DSB cannot reach consensus on a person to be appointed within a year of a position on the Appellate Body becoming vacant, the Ministerial Conference may proceed to the appointment by a three-quarters majority.

Amending the DSU is straightforward as a matter of procedure, given that amendments enter into force immediately upon approval by the Ministerial Conference. This approval, however, must take place under a strict consensus requirement,<sup>64</sup> meaning that a single Member would be able to block it. WTO Members have been unable to agree on far less contentious amendments to the DSU. The DSU review process, started in 1997, has not led to any amendments at all in over twenty years, not even to eliminate obvious inconsistencies such as the ‘sequencing’ issue or to codify into the DSU procedures regularly used by panels.<sup>65</sup> It is unlikely that such a consequential amendment as one permitting Appellate Body appointments by majority would be proposed and approved without a number of other issues being raised, ultimately preventing adoption of the package.

In principle, modifying the decision-making provisions of the AEWTO also requires support from the entire Membership. AEWTO Article X:2 specifies that amendments to the AEWTO Articles governing amendments (Article X) and collective decision-making (Article IX) can be proposed by a two-thirds majority, but only take effect upon acceptance by all Members. As a result, a single Member may thwart efforts to modify these provisions as well.

The one potential workaround, available to a significant majority of the Membership, would be to amend AEWTO Article IV:1. This could be done by adding a simple sentence, or even a footnote, at the end of Article IV:1, stating that, in the absence of consensus at the DSB for the appointment of Appellate Body members, the Ministerial Conference may appoint persons to the Appellate Body following the decision-making procedure established in

<sup>64</sup> AEWTO Art. X:8.

<sup>65</sup> See on this David Evans & Celso de Tarso Pereira, *DSU Review: a View from the Inside*, in *Key Issues in WTO Dispute Settlement: The First Ten Years* 251–268 (Rufus Yerxa & Bruce Wilson eds, CUP 2005).

Article IX:1. This amendment would leave intact Article IX as well as DSU Article 17.2. Its effect would be to add an autonomous authorization for decision-making by the Ministerial Conference. While the DSB would remain under the obligation to fill vacancies as they arise, the Ministerial Conference would be permitted to exercise its authority not by making a decision entrusted to the DSB (which would trigger the consensus requirement) but directly, under the consensus-preferred rule set out in Article IX:1.<sup>66</sup>

Pursuing this avenue would not be simple. While a proposal to amend Article IV:1 could be approved by the Ministerial Conference by a two-thirds majority of the Members,<sup>67</sup> the requirements for as well as the consequences of its taking effect are complex. AEWTO Article X:3 provides that the Ministerial Conference must, in its decisions on amendment, determine whether the approved amendment is of such a character that it alters the rights and obligations of Members. If it determines that this amendment merely facilitates the performance by WTO bodies of their obligations under the Agreements and thus does not alter Members' individual rights and obligations, the amendment would take effect for all Members upon acceptance by two thirds of the Members. If it determines that the amendment does affect the rights and obligations of Members (implying that blocking consensus is a procedural right),<sup>68</sup> the amendment will take effect after acceptance by a three-fourths majority of Members; but it will only take effect for those Members that have accepted it.

The latter option would give rise to important systemic issues: it makes little sense for this amendment, and the consequent appointment of Appellate Body members, to be effective for some WTO Members only. With this in mind, Article X:3 also allows the Ministerial Conference to determine that the amendment is of what can be called an *integral nature*.<sup>69</sup> In this case, the amendment must be accepted by every Member within a set period of time, after which the Member has two choices: to 'withdraw from the WTO' or to 'remain a Member with the consent of the Ministerial Conference'.<sup>70</sup> The regulation of integral amendments does not establish that the integral character of the amendment modifies the conditions for its taking effect. What might happen, then, is that the Ministerial Conference, in

<sup>66</sup> This is possible because Art. IV:1 is not included in the Art. X:2 list of provisions whose amendment requires acceptance by all Members. Although this provision also concerns decision-making, Art. IX:2 does not refer to 'provisions on decision-making' but specifically refers to AEWTO Arts IX and X.

<sup>67</sup> AEWTO, Art. X:1.

<sup>68</sup> The existence of a right does not need to be stated explicitly. In *Peru – Agricultural Products*, the Appellate Body stated that WTO Members have a 'right to have recourse to WTO dispute settlement' (Appellate Body Report, *Peru – Agricultural Products*, WT/DS457/AB/R, paras 5.19–5.28).

<sup>69</sup> The exact wording of Art. X:3 is that the amendment may be designated as being 'of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference'. Such a decision must be made by a three-quarters majority.

<sup>70</sup> AEWTO, Art. X:3.

establishing the conditions for holdout Members to remain in the WTO, determines that any Members that decide not to withdraw is deemed to have accepted as valid the appointment of Appellate Body members under the amended Article IV:1.

Despite being a legal possibility, amending AEWTO Article IV:1 in the absence of consensus is likely to be a burdensome task. The Protocol Amending the TRIPS Agreement, agreed to by consensus in December 2005, only came into effect in January 2017, after ratification by two-thirds of the Membership.<sup>71</sup> The relatively uncontroversial Trade Facilitation Agreement, agreed to by consensus in July 2013, came into effect in February 2017.<sup>72</sup> The best-case scenario for an amendment approved in mid-2021 is therefore that it will take effect in 2025. Vocal opposition by a Member, even if it could be overcome at the meeting of the Ministerial Conference, would likely delay such taking effect significantly, perhaps indefinitely.

#### 4.1[b] *Interpreting the Agreements: The Limits of Article IX:2*

Given the difficulties with adopting amendments, Members seeking to overcome the consensus requirement for the appointment of Appellate Body members would be drawn to interpretation as the clearest path for ensuring that a majority of Members can keep the Appellate Body in operation against persistent obstruction. AEWTO Article IX:2 provides the Ministerial Conference and the General Council with ‘exclusive authority’ to issue interpretations of the WTO Agreements. For interpretations of the AEWTO and the DSU, the Ministerial Conference may issue such interpretations without previous recommendation by another organ, merely by adopting an interpretation by a three-fourths majority of the Members.<sup>73</sup>

Interpretations by the Ministerial Conference or the General Council must remain within the bounds of the current text of the WTO Agreements. Article IX:2 provides that authoritative interpretation by political bodies cannot ‘be used in a manner that would undermine the amendment provisions in Article X’. As the Appellate Body put it in *EC – Bananas III*, these ‘multilateral interpretations are meant to clarify the meaning of existing obligations, not to modify their content’.<sup>74</sup> On the other hand, the power of authoritative interpretations is extensive; the

<sup>71</sup> Protocol Amending the TRIPS Agreement, approved 6 Dec. 2005, 23 Jan. 2017 (WTO Treaty Series No. 34, WT/Let/508, WT/L/641).

<sup>72</sup> WTO General Council, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, 28 Nov. 2014 (WT/L/940). The Agreement entered into force only for the Members that accepted it.

<sup>73</sup> AEWTO, Art. IX:2.

<sup>74</sup> Appellate Body Reports, *EC – Bananas III (Art. 21.5 – Ecuador II)/EC – Bananas III (Art. 21.5 – US)*, para. 383.

Appellate Body described them in *US – Clove Cigarettes*, as ‘binding on all Members’ and having ‘a pervasive legal effect’.<sup>75</sup>

Is there a possibility to interpret the WTO Agreements so that, within the bounds of the current text, Members could clarify that the consensus requirement for appointments is a loophole and authorize the Ministerial Conference to appoint Appellate Body members by majority? It seems that there is. As explained in section 3.C above, contrary to provisions of the DSU that specify that the decisions they refer to are to be made by consensus,<sup>76</sup> Article 17.2 does not itself establish specific requirements for decision-making. Contrary to AEWTO Article IX:2, it does not provide the DSB with ‘exclusive authority’ to appoint persons to the Appellate Body. In fact, it is worded not as an authorization but as an obligation (‘shall’) for the DSB to appoint persons to the Appellate Body. The sole bar to majority appointments by the Ministerial Conference is the interpretation according to which the consensus requirement that applies to all DSB decisions is part of the ‘specific requirements’ for Appellate Body appointments that the Ministerial Conference is bound by if it seeks to make a decision under a Multilateral Trade Agreement.<sup>77</sup>

If this limitation is the result of an interpretation, it can be overcome by an authoritative interpretation under Article IX:2. It would suffice for the interpreter to clarify, with ‘pervasive legal effect’, as follows:

1. AEWTO Article IV:1 endows the Ministerial Conference with authority to make appointments to organs set up under any of the Multilateral Trade Agreements, unless the relevant provision itself provides that another organ has exclusive authority to make such appointments;
2. DSU Article 17.2 requires the DSB to fill vacancies at the Appellate Body as they arise, but does not prejudice the authority of the Ministerial Conference, or of the General Council between meetings of the Ministerial Conference, to make appointments employing the general decision-making authority they have received from the Membership under AEWTO Article IV:1;
3. DSU Article 2.4 binds the DSB only and does not affect the ability of the Ministerial Conference or the General Council to make, by majority, decisions provided for in the DSU, unless the provision of the DSU that governs the relevant decision establishes a specific requirement of consensus for that decision;

<sup>75</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 250.

<sup>76</sup> DSU Arts 6.1, 16.4, 17.14, 21.6, 22.6, 22.7.

<sup>77</sup> AEWTO Art. IV:1.

4. As a result, AEWTO IV:1 endows the Ministerial Conference, as well as the General Council between meetings of the Ministerial Conference, with the authority to make appointments to the Appellate Body under DSU Article 17.2, governed by the decision-making requirements of AEWTO Article IX:1 and not bound by the general requirements that govern decision-making by the DSB.

The possible issue with issuing such an interpretation is that, to have pervasive legal effects, it is not sufficient that it is adopted pursuant to the procedural requirements for decision-making under Article IX:2. It must also remain within the bounds of what is permissible for an interpretation under Article IX:2.

#### 4.2 MULTILATERAL INTERPRETATION AND SUBSEQUENT AGREEMENT: WHY CONSENSUS IS BEST

Resort to Article IX:2 to interpret the WTO Agreements is subject to two limitations. The first is that Members must follow strictly the decision-making procedures of Article IX:2. The second is that interpretations ‘shall not be used in a manner that would undermine the amendment provisions in Article X’.<sup>78</sup> As the Appellate Body noted in *US – Clove Cigarettes*, while Article IX:2 provides the Ministerial Conference and the General Council with broad authority to interpret the WTO Agreements, ‘the exercise of this authority is situated within defined parameters established by Article IX:2’.<sup>79</sup> These parameters are not only procedural but also substantive, meaning that an interpretation adopted pursuant to the correct procedures may still be unwarranted if it is found to amount to an amendment of the WTO Agreements.

Employing Article IX:2 in the manner above, against views strongly held by some Members, runs the risk of leading to an impasse. If some Members perceive the multilateral interpretation as a modification of what they see as the most credible interpretation of the WTO Agreements, depriving them of a procedural right, is it undermining the amendment provisions of the AEWTO?

The question may be answered by arguing that this substantive limitation is to be taken into account by the Ministerial Conference when issuing interpretations, but that the agreement of Members within the Ministerial Conference establishes the scope of its authority. In other words, the same interpretative authority held by the Ministerial Conference over the WTO Agreements would apply reflexively to the Ministerial Conference’s own authority, so that when it issues an interpretation it implicitly determines that issuing such an interpretation is within the bounds of its authority.

<sup>78</sup> AEWTO Art. IX:2.

<sup>79</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 249.

The problem with this answer is that the Ministerial Conference is not free to determine the scope of its own authority. Although it may issue documents labelled interpretations or worded as interpretations, if these documents are adopted outside the parameters of Article IX:2 they do not produce the pervasive legal effects of an Article IX:2 interpretation. Just as, in *US – Clove Cigarettes*, mere agreement within the Ministerial Conference was found to be insufficient to overcome the procedural requirement of Article IX:2, mere agreement at the Ministerial Conference is insufficient to overcome the substantive limitation on the authority of the Ministerial Conference. The source of the authority of the Ministerial Conference is not the Ministerial Conference itself but the consent of WTO Members, as expressed in the Agreement Establishing the WTO and its Annexes.

On the other hand, as the parties to the WTO Agreements, whose consent gives these agreement their binding force, Members are able to directly influence the interpretation of rights and obligations under the WTO Agreements. Parties to any treaty may establish its proper interpretation by adopting a subsequent agreement on the interpretation of the treaty. The operation of this collective authority of the parties is codified in Article 31.3(a) of the Vienna Convention on the Law of Treaties, which provides that interpreters are required to take into account, in the interpretation of a treaty, ‘any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’.

Under general international law, subsequent agreements have a decisive role in interpretation, and one which has been recognized by the Appellate Body.<sup>80</sup> In *US – Clove Cigarettes*, the Appellate Body quoted approvingly the remarks, originally made by the International Law Commission (ILC), that a subsequent agreement on interpretation is an ‘authentic element of interpretation’ that ‘must be read into the treaty for purposes of its interpretation’.<sup>81</sup> Subsequent agreements are limited by the text of the relevant treaty, meaning that they cannot ‘replace or override the terms contained’ in a legal provision.<sup>82</sup> To the extent that they express an agreement

<sup>80</sup> In its 2020 *Report on the Appellate Body*, the US takes issue with the relevance the Appellate Body has assigned to subsequent agreements. The US argument amounts to arguing that Art. IX:2 establishes *lex specialis* with respect to the ability of Members to collectively interpret the WTO Agreements (United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* 74–80 (Feb. 2020)). This argument deserves proper consideration, in particular due to the Appellate Body’s use of the concept in *US – Tuna II* to give binding authority to decisions agreed at committee level. For present purposes, the arguments developed in the US report would seem to warrant the view that an Art. IX:2 interpretation, adopted by the Ministerial Conference pursuant to the applicable procedure, is able to determine with binding effect for all Members that a *possible* interpretation of the provisions of the WTO Agreements is the *correct* interpretation.

<sup>81</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 265 (quoting Appellate Body Reports, *EC – Bananas III (Art. 21.5 – Ecuador II)/EC – Bananas III (Art. 21.5 – US)*, para. 390, which in turn quotes the ILC, *Yearbook of the International Law Commission*, 1966, Vol. II, 221) and para. 269 (quoting ILC, *Ibid.*).

<sup>82</sup> Appellate Body report, *US – Clove Cigarettes*, para. 269.



among Members on the interpretation or application of a provision of the WTO Agreements, however, subsequent agreements ‘will inform the interpretation and application of a term or provision’ of WTO law.<sup>83</sup>

Although the Appellate Body has established parallels between multilateral interpretations under AEWTO Article IX:2 and subsequent agreements on interpretation,<sup>84</sup> there are differences between these instruments. The authority of WTO organs to issue multilateral interpretations derives from the delegation of this authority consented to by Members. The use and effects of multilateral interpretations are accordingly limited by the terms of such delegation, enshrined in Article IX:2.<sup>85</sup> By contrast, the legal effects of subsequent agreements on interpretation flow directly from the authority of WTO Members, as the parties to the WTO Agreements, over their mutual rights and obligations. By specifically agreeing on the interpretation of a provision or concept in a treaty, its parties express their common intention with respect to interpretation. Since the purpose of treaty interpretation is precisely to clarify the common understanding of the parties as expressed in a treaty text, an instrument expressing the common understanding of WTO Members with regard to the meaning of a treaty decisively impacts the interpretation of that treaty.

To constitute a subsequent agreement and decisively affect the interpretation of the WTO Agreements, a decision must ‘bear[] directly on the interpretation’<sup>86</sup> of a provision and ‘express an agreement between Members on the interpretation or application of a provision of WTO law’.<sup>87</sup> In *US – Clove Cigarettes* and *US – Tuna II*, the Appellate Body found that decisions made by consensus within WTO political bodies amounted to subsequent agreements and interpreted the provisions whose meaning was in dispute according to the clarifications provided by Members.

The relevance of a decision on interpretation would be significantly affected by a lack of consensus. In *Whaling in the Antarctic*, the ICJ concluded that resolutions of the International Whaling Commission, which were not binding under the International Convention for the Regulation of Whaling, could affect the interpretation of the Convention if they were adopted by consensus or by a unanimous vote. The Court, however, refused to ascribe interpretative value to a resolution adopted without consensus, highlighting that it had not been supported by the party disputing its interpretative value before the Court (Japan).<sup>88</sup>

<sup>83</sup> Appellate Body Report, *US – Tuna II*, para. 372.

<sup>84</sup> Appellate Body Reports, *EC – Bananas III (Art. 21.5 – Ecuador II)/EC – Bananas III (Art. 21.5 – US)*, para. 383.

<sup>85</sup> See Appellate Body Report, *US – Clove Cigarettes*, para. 250.

<sup>86</sup> Appellate Body Report, *US – Tuna II*, para. 372.

<sup>87</sup> Appellate Body report, *US – Clove Cigarettes*, 262.

<sup>88</sup> ICJ, *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, Judgment, ICJ Reports 2014, 226, 257, para. 83.

The issue of the value of a non-consensual interpretation under Article IX:2 would be compounded, in the case of Appellate Body appointments, by the fact that the validity of a ruling on the effects of the interpretation is likely to itself depend on the authoritativeness of the interpretation. Ordinarily, the DSB, resorting to panels and the Appellate Body, is able to settle disputes among Members regarding the legal effects of Ministerial Conference decisions. This becomes trickier if the question at hand concerns the very legality of the DSB's conduct, including the lawfulness of its referring appeals to, and adopting reports by, an Appellate Body composed according to a decision-making procedure some Members deem unlawful. Although international adjudicators have in the past ruled on the lawfulness of their own creation,<sup>89</sup> it would be difficult to avoid a systemic crisis for the WTO – an organization that relies heavily on consensus – in case a Member were to dispute the lawfulness of the very composition of the organs tasked with pronouncing on interpretative disputes.

## 5 CONCLUSION

The recent stalemate over Appellate Body appointments has shown that, if the intention of Uruguay Round negotiators was to establish permanent institutional machinery for settling disputes immune to blocking by individual WTO Members, they inadvertently left a loophole in this machinery when they entrusted the DSB, an organ that must make all decisions by consensus, with composing the Appellate Body. Although the Ministerial Conference and the General Council would be able to appoint persons to the Appellate Body, the most logical interpretation of the AEWTO and the DSU in light of each other is that appointments must still be agreed by consensus.

Should Members wish to close this loophole, they could either amend the WTO Agreements (the DSU or the AEWTO) or decide to jointly interpret its provisions to clarify that the Agreements allow majority appointments. To do so, the Ministerial Conference could, for example, issue a multilateral interpretation: (1) establishing its own authority to, acting under AEWTO Article IV:1, appoint persons to the Appellate Body; (2) clarifying that the consensus requirement in DSU Article 2.4 applies generally to decisions of the DSB, not constituting a specific requirement of decisions to appoint Appellate Body members under Article 17.2; and (3) clarifying that, as a consequence, a decision by the Ministerial Conference to employ its authority to appoint persons to the Appellate Body would be subject to the regular rules for decision-making of AEWTO Article IX.

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<sup>89</sup> See International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 Oct. 1995), Case No IT-94-1-AR72, OXIO 62, (1996) 35 ILM 32.

If it were supported by three-quarters of the WTO Membership, such an interpretation would be formally adopted. However, an interpretation adopted by majority would remain subject to the claim that it undermines the amendment provisions of Article X. In case of dispute, it could fall upon an Appellate Body composed by majority vote to determine the legal effects of this interpretation. This could lead to a systemic crisis, if the party disputing the legal effects of the interpretation also failed to accept as lawful the appointment of the Appellate Body members tasked with settling this interpretative dispute.

If, by contrast, the decision on interpretation were adopted by consensus, it would constitute not only a multilateral interpretation under Article IX:2 but also a subsequent agreement by the entire Membership on the interpretation of the WTO Agreements. Although subsequent agreements are equally limited to interpretative clarifications, they represent the common understanding of the parties to a treaty regarding its interpretation. A clear expression of Members' agreement on interpretation puts behind such interpretation the original normative authority held by the WTO Membership acting jointly, rather than the delegated authority of the Ministerial Conference. Such an interpretation would not depend for its value on a debate regarding the extent of the delegation of authority under the AEWTO.

It is likely that WTO Members will eventually agree to reconstitute the Appellate Body in 2021, possibly in the context of a broader agreement involving various decisions and clarifications. However, the previously common view that the WTO Agreements set up an unstoppable institutional machinery, endowing the Appellate Body with de facto ultimate authority over WTO obligations, no longer holds. Under the interpretation of the decision-making rules for appointments applied over the past four years, any WTO Member may obstruct appointments to the Appellate Body to seek to compel it, or other WTO Members, to accept a reversal of a legal interpretation or to adopt a decision that the Member is particularly interested in.

As the experience with WTO decision-making over the years shows, WTO Members zealously protect the consensus practice. A single exception has been recorded: the decision on the accession of Ecuador, the first decision on accession, was explicitly adopted by a two-thirds majority of the Membership.<sup>90</sup> Subsequent to that, Members have on all occasions refrained from deciding other than by consensus. In late 2020, after a group of facilitators concluded that a candidate to the post of WTO Director-General was the most likely to gather consensus, the meeting of the General Council at which she was meant to be appointed was postponed after the

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<sup>90</sup> General Council, Decision of 16 Aug. 1995 – Accession of Ecuador, WT/ACC/ECU/5 (22 Aug. 1995), fn. 1. Although reports have stated that it was Peru's objection that prevented the adoption of the decision by consensus, Peru did join other Members in 'welcoming and supporting the accession of Ecuador' (General Council, Minutes of Meeting of 31 July 1995, WT/GC/M/6 3 (20 Sept. 1995)).

United States stated that it favoured a different candidate.<sup>91</sup> In July 2008, disagreement between India, China, and the United States prevented the conclusion of the Doha Round.<sup>92</sup> In 2015, Venezuela, Nicaragua and Bolivia successfully blocked consensus at the Ministerial Conference in Bali until they obtained a paragraph implying that the US embargo on Cuba should end.<sup>93</sup> Members small and large have blocked consensus and prevented the adoption of decisions, relying on the strength of the Membership's respect for the practice.

Respect for a practice, however, is not the same as an absolute rule that prevents consensus from being overcome even by the largest of majorities, putting all the negotiating power in the hands of an obstructing Member. In order to ensure that the WTO institutional machinery operates under the arrangement agreed to in 1994, and prevent a return to the practices of the GATT 1947, it will be insufficient for WTO Members to appoint seven new persons to compose the Appellate Body. Members must affirmatively establish that blocking appointments is not a fire alarm that individual Members may resort to in order to ensure that their views prevail. If a Member believes that the organization is drifting in a different direction from that which it would favour, the appropriate course of action is to negotiate a new path with other WTO Members.

The practice of WTO negotiations is highly deferential to holdout Members, with individual Members big and small having prevented the organization from building up on the existing framework. The obstruction of appointments, however, goes beyond giving Members an instrument to prevent the making of decisions they dislike. It permits individual Members to, by holding the dispute settlement system hostage, seek the renegotiation of agreements in force and the revision or abolition of fundamental rules of the WTO – including those the United States originally wished to defend against a 'tyrannous majority'.<sup>94</sup> The effect of accepting the existence of a right of individual Members to obstruct appointments is not to give Members in the minority a defence against the tyranny of the majority, but to give any minority with no concern for the commonly established WTO institutional framework – including a minority of one – an instrument with which to seek to submit the continued operation of the organization to its own will.

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<sup>91</sup> General Council, *Appointment of the Next Director-General*, JOB/GC/247 (28 Oct. 2020); JOB/GC/248 (6 Nov. 2020). Aime Williams, *US Refuses to Back Ngozi Okonjo-Iweala as Next WTO Head*, Financial Times (29 Oct. 2020). Appointments of Director-Generals, made under AEWTO Art. VI:2, take place under the regular preferred-consensus rule of AEWTO Art. IX.

<sup>92</sup> Heather Stewart, *Tariffs: WTO Talks Collapse After India and China Clash with America Over Farm Products*, The Guardian (30 July 2008).

<sup>93</sup> Surabhi Rastogi, *World Trade Organization Overcomes Last-minute Hitch to Adopt Bali Package*, Financial Express (8 Dec. 2013).

<sup>94</sup> Croome, *supra* n. 61, at 360.

