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ORIGINAL ARTICLE

Breaking the Impasse of Appointing Members of the WTO Appellate Body: A Perspective from International Institutional Law

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Abstract

At the 13th Ministerial Conference, WTO members reaffirmed their commitment to restoring a fully functioning dispute settlement system by 2024. By the end of the year, some progress had been made, but an agreement remains elusive. The re-election of Donald Trump as US President adds further uncertainty to these efforts. Against this background, this article re-examines the proposal for the General Council to appoint Appellate Body members through majority voting. It argues that customary rules of interpretation applicable to the constituent instruments of international organizations justify the legality of a vote in the General Council to support the effective functioning of the WTO. To address WTO members' concerns about the negative impact on consensus-based decision-making and the loss of leverage for reforms, this article suggests a General Council decision to appoint fewer than seven Appellate Body members. While not addressing all challenges facing the dispute settlement system, the proposal would bring more certainty to the early recovery of the system.

Keywords: Appellate Body; General Council; majority vote; treaty interpretation; international institutional law

1. Introduction

The WTO's Appellate Body (AB) has not functioned since late 2019 due to the US's ongoing blockade of the process to fill AB vacancies within the Dispute Settlement Body (DSB).[1] The 12th Ministerial Conference (MC) in 2022 set the aim to have 'a fully and well-functioning dispute settlement system accessible to all Members by 2024'.[2] And at the 13th MC in 2024, the commitment to 'achieve the objective by 2024' was maintained,[3] in spite of an earlier draft suggesting softer wording to 'achieve convergence by 2024'.[4] This indicates a strong interest among WTO members in fully and promptly restoring the functionality of the dispute settlement system.

A formal negotiation process on dispute settlement reform commenced in April 2024, yielding some progress.[5] However, the core challenge to reform the appeal/review mechanism

[1]Article 2.4 of the Dispute Settlement Understanding (DSU) provides that, '[w]here the rules and procedures of this Understanding provides for the DSB to take a decision, it shall do so by consensus', 'Understanding on Rules and Procedures Governing the Settlement of Disputes', 15 April 1994, 1869 UNTS 401, 33 ILM 1226, Art. 2.4.

[2]MC12 Outcome Document, WT/MIN(22)/24, WT/L/1135, 22 June 2022.

[3]Ministerial Decision on Dispute Settlement Reform, WT/MIN(24)/37, WT/L/1192, 4 March 2024.

[4]Draft Ministerial Decision on Dispute Settlement Reform, WT/MIN(24)/11, 16 February 2024.

[5]For the most recent news on dispute settlement reform, see 'Facilitator Urges Members to be Practical, Flexible as Dispute Reform Talks Intensify', 21 November 2024, www.wto.org/english/news_e/news24_e/refrm_22nov24_e.htm (assessed 9 December 2024).

remains.[6] While many members seek to retain the AB with more moderate reforms, the US advocates for removing the second tier of the dispute settlement system.[7] Although a major breakthrough by the end of 2024 or shortly thereafter seemed unlikely, the ongoing serious negotiations offer a glimmer of hope.

Donald Trump's election in November 2024 as the next US President, with a wider margin than in 2016, however, introduces significant uncertainty to these efforts. It was during his previous administration that the disruptive policy of blocking AB members' selection was implemented. And before taking office, he had already begun threatening States with new tariffs.[8] The negotiation process, revived under the Biden Administration, is at risk of being abandoned by the newly re-elected president. Even if it continues, it is likely to face substantial challenges and progress more slowly than anticipated.

Against this backdrop, this article re-examines a proposal made early in the crisis: allowing the General Council (GC) to appoint AB members through majority voting. This article does not claim that this proposal represents the best way forward, as many reforms to the AB are long overdue. Additionally, the proposal carries the risk of further alienating the US, which may attempt to block the budget for the AB and refuse to participate in its proceedings.[9] However, a serious discussion of this proposal as a backup plan could bring more certainty to the negotiation process. Even if not adopted, it could strengthen the negotiating power of members advocating for the early restoration of the dispute settlement system.

This proposal has been discussed by a number of scholars. Since 2017, Pieter Jan Kuijper,[10] Jennifer Hillman,[11] and Ernst-Ulrich Petersmann,[12] among others,[13] have engaged in debates

[6]This was evident from the conclusion of the informal negotiation process prior to MC13, see Special Meeting of the General Council, JOB/GC/385, 16 February 2024, 29. Annex 1 of the document contains the 'Consolidated Text Referred to in Mr. Molina's Report', where a draft ministerial decision was presented. The only section that remained unaddressed is 'Title III Appeal/Review Mechanism'. For a detailed examination of the draft ministerial decision, see P. Van den Bossche, 'The Uncertain Future of WTO Dispute Settlement: An Appraisal of the February 2024 Consolidated Text Resulting from the Molina Process on Dispute Settlement Reform', WTI Working Paper No. 2/2024, 2 September 2024.

[7]See e.g. Minutes of the Heads of Delegation Meeting, WT/GC/DSR/1, 4 June 2024, 22. The US representative stated that 'we would like to explore further with delegations whether appeal/review is a necessary feature of a system that supports parties in resolving their disputes … We do not view a standing Appellate Body as the only way of achieving those objectives'.

[8]A. Williams (2024) 'Donald Trump Says He Will Hit China, Canada and Mexico with New Tariffs', *Financial Times*, 26 November 2024, www.ft.com/content/8b986532-df96-41d0-a13b-72fa7987c9d4?shareType=enterprise&shareId=f1abc3fb-4120-425f-866e-7d47f598bac3 (assessed 9 December 2024).

[9]Thanks to one reviewer for pointing this out. Although Article VII:3 of the AEWTO provides that '[t]he General Council shall adopt [] the annual budget estimate by a two-thirds majority comprising more than half of the Members of the WTO', the decision has been adopted by consensus, see M.E. Footer (2006) *An Institutional and Normative Analysis of the World Trade Organization*, 302. The US has been the single largest contributor to budget, with the EU not subject to contributions, www.wto.org/english/thewto_e/secre_e/budget_e.htm (assessed 9 December 2024).

[10]See P.J. Kuijper (2018) 'From the Board: The US Attack on the WTO Appellate Body', *Legal Issues of Economic Integration* 45(1), 1. For an earlier exposition of his idea, see P.J. Kuijper., 'What to do about the US Attack on the Appellate Body?', *International Economic Law and Policy Blog*, 15 November 2017, https://ielp.worldtradelaw.net/2017/11/guest-post-from-pieter-jan-kuiper-professor-of-the-law-of-international-economic-organizations-at-the-faculty-of-law-of-th.html (assessed 9 December 2024).

[11]See J. Hillman (2018) 'Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly?', *Institute of International Economic Law*, at 11–14, www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf (assessed 9 December 2024).

[12]See E. Petersmann (2019) 'How Should WTO Members React to Their WTO Crises?', *World Trade Review* 18(3), 503. For earlier expositions of his idea, see Proposals by Panel Member Prof. E. Petersmann, Conférence sur la Réforme de l'OMC, 15 November 2018, www.tresor.economie.gouv.fr/Articles/4c69c305-4f37-45f5-aa28-09a6aab19768/files/398e28fd-73d7-42bc-85fd-9267bb0289c5 (assessed 9 December 2024); E. Petersmann, 'How Should WTO Members Respond to the WTO Appellate Body Crisis?', *International Economic Law and Policy Blog*, 13 December 2018, https://worldtradelaw.typepad.com/ielpblog/2018/12/ulli-petersmann-on-how-should-wto-members-respond-to-the-wto-appellate-body-crisis.html (assessed 9 December 2024).

[13]For example, Peter Van den Bossche also discussed this option briefly, see P. Van den Bossche, 'The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?', WTI Working Paper No.02/2021, 28 October 2021,

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about this solution. In 2021, Geraldo Vidigal[14] and Henry Gao[15] further enriched the discourse by contributing various perspectives. As will be reviewed below, the main problems linked to this solution are its unclear legality under the Agreement Establishing the World Trade Organization (AEWTO), the risk of establishing a dangerous precedent by departing from the customary practice of consensus in decision-making, and the potential loss of leverage in pushing for institutional reforms. These concerns make the proposal less well-received by members of the WTO.

This article seeks to advance the debate by examining the issue from the perspective of international institutional law. The existing literature clearly reveals that the core of the debate centers on the functioning of an international organization rather than trade issues, and the legality of the GC's intervention by majority vote depends primarily on the interpretation of the AEWTO,[16] a constituent instrument. However, what has been less emphasized is that, in this context, while the interpretative rules outlined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) remain applicable, other interpretative elements, such as imperatives associated with an international organization's effective operation, also deserve special attention. These considerations further enhance the legality of the GC's intervention by majority vote.

The emphasis on practice in interpreting constituent instruments, however, also justifies the concern of many WTO members that the intervention of the GC by majority voting may undermine the consensus-based decision-making of the WTO. Simply stating the non-precedent nature of the action may not suffice to alleviate their concerns. A clearer signal about the remedial nature of the action is necessary. This article argues that this can be achieved through a nuanced design of the draft GC decision. Notably, by appointing less than seven AB members, a clear message will be conveyed about the decision's focus on reactivating the AB, rather than its full restoration.

This article proceeds as follows. Section 2 briefly describes the on-going AB crisis and explains why the option of allowing the intervention of the GC by majority vote should be considered as a backup, and then reviews the existing discussions on this option. Section 3 argues that as a constituent instrument, relevant provisions of the AEWTO should be interpreted using special interpretative rules. The resulting interpretation supports a vote in the GC to break the current impasse of appointing AB members. Section 4 discusses WTO members' practical concerns about the solution's potential negative effects on the customary practice of consensus and the loss of leverage in pushing for institutional reforms. To mitigate these concerns, it is necessary to limit the number of AB members to fewer than seven in the draft GC decision.

2. GC Intervention by Majority Vote as a Possible Solution to the AB Crisis

2.1 Case for Allowing GC Intervention by Majority Vote

The current crisis facing the AB stems from the US's continued obstruction of the appointment of AB members. This has led to a halt of operation of the AB since December 2019 due to the lack of

12. But he seemed to view this option as unrealistic and did not mention it later when discussing potential solutions for reviving the dispute settlement system, see P. Van den Bossche, 'Can the WTO Dispute Settlement System be Revived?: Options for Addressing a Major Governance Failure of the World Trade Organization', WTI Working Paper No.03/2023, 4 October 2023.

[14]See G. Vidigal (2021) 'Loophole or Fire Alarm? The Consensus Requirement for the Appointment of Appellate Body Members and the Institutional Design of the WTO', *Legal Issues of Economic Integration* 48(1), 1. For earlier exposition of this idea, see G. Vidigal (2019) 'Living without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis', *Journal of World Investment & Trade* 20, 862, 873; G. Vidigal, 'Appointing Appellate Body Members by Majority Would Undermine, Not Preserve the Rule of Law', *International Economic Law and Policy Blog* [hereinafter Vidigal's Blog], 31 July 2020, https://ielp.worldtradelaw.net/2020/07/guest-post-appointing-appellate-body-members-by-majority-would-undermine-not-preserve-the-rule-of-la.html (assessed 9 December 2024).

[15]See H. Gao (2021) 'Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement', *Journal of International Economic Law* 24, 534.

[16]Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154, 33 ILM 1144.

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the requisite quorum of three members to hear appeals.[17] And the term of the last sitting member expired in November 2020, signaling the de facto demise of the AB. Under Article 16.4 of the Dispute Settlement Understanding, winning appellants at the panel stage are unable to benefit from their victory while an appeal is pending.[18] As a result, any defendant can appeal a panel ruling 'into the void', and currently 31 cases are pending.[19]

The United States alleges that the AB had strayed from agreed-upon rules, criticizing both its overreach of mandate and its substantive jurisprudence.[20] Many others hold differing perspectives and efforts to salvage the situation have been made – for example, during the GC meeting in December 2018, the EU, China and other States proposed amendments to certain provisions of the DSU.[21] However, the United States showed no interest and the proposals were not adopted.[22] In January 2019, the GC appointed Ambassador David Walker as the facilitator of the Informal Process on Matters Related to the Functioning of the Appellate Body. On the final day before the AB ceased functioning, Walker presented a draft GC Decision for adoption, which also was rejected by the US.[23]

Following the AB's suspension of operations, a subset of WTO members established the Multi-Party Interim Appeal Arrangement (MPIA) in April 2020 as a stopgap solution. While this solution offers some relief and appears to align with Article 25 of the DSU, its limitations are also evident. The number of WTO members that have agreed to join the MPIA are still limited.[24] Although arbitration awards under the MPIA can be subject to the surveillance of the DSB under Article 25.4 of the DSU, the enforceability of unadopted panel reports or arbitration appeals remains unclear.[25] And Gao also underscored that this arrangement denies WTO members their rights to appeal.[26]

Despite past negotiation failures and the establishment of the MPIA, an informal negotiation process on dispute settlement reform, with the support of the US, began in 2023, following the MC12' call for 'a fully and well-functioning dispute settlement system accessible to all Members by 2024'.[27] This process was formalized after MC13 reaffirmed this commitment in early 2024.[28] While progress has been made on many fronts, negotiations on appeal/review issues remain challenging. As Joel

[17]The terms of two of the remaining three members, Ujal Singh Bhatia (India) and Thomas R. Graham (United States) expired on 10 December 2019.

[18]Article 16.4 of the DSU provides that '[i]f 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'.

[19]For a list of cases in which notifications of appeal have been made, www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm#fnt-1 (assessed 9 December 2024).

[20]See Office of the United States Trade Representative, Ambassador R.E. Lighthizer, Report on the Appellate Body of the World Trade Organization, February 2020, https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (assessed 9 December 2024).

[21]See Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, and Mexico to the General Council, WT/GC/W/752, 26 November 2018; Communication from the European Union, China, and India to the General Council, WT/GC/W/753, 26 November 2018.

[22]See Statements by the United States at the Meeting of the WTO Dispute Settlement Body, 18 December 2018, https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf (assessed 9 December 2024).

[23]Report by the Facilitator, H.E. Dr. David Walker (New Zealand) and Draft Decision on the Functioning of the Appellate Body (WT/GC/W/791), JOB/GC/225, 9 December 2019. For the opposition of the US, see Ambassador D. Shea, 'Matters Related to the Functioning of the Appellate Body', 9 December 2019, https://geneva.usmission.gov/2019/12/09/ambassador-shea-statement-at-the-wto-general-council-meeting/.

[24]Currently 54 (including 27 EU members) WTO members are parties to the MPIA, https://wtoplurilaterals.info/plural_initiative/the-mpia/ (accessed 9 December 2024).

[25]See Hillman, supra n. 11, at 9.

[26]Gao, supra n. 15, at 543. See also O. Starshinova (2021) 'MPIA a Solution to the WTO Appellate Body Crisis?', *Journal of World Trade* 55, 787, 801–802. He identified six drawbacks of the MPIA.

[27]See Special Meeting of the General Council, supra n. 6, paras. 1.13–1.14.

[28]See Members Welcome Appointment of Facilitator for WTO Dispute Settlement Reform, 26 April 2024, www.wto.org/english/news_e/news24_e/dsb_26apr24_e.htm (assessed 9 December 2024).

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Richards, one of the co-convenors on these issues, acknowledged recently, 'members remain far apart on the sub-topics of access to the appeal/review mechanism, form of mechanism, and standard of review'.[29] To complicate matters further, the Biden administration, which at least showed a willingness to engage in negotiations, will soon be replaced by the Trump administration, which 'plunged the WTO dispute settlement system into [this] existential crisis'.[30]

Given the significant uncertainty surrounding the negotiation process, it is essential to explore an alternative solution to the crisis confronting the AB, namely, the appointment of AB members by either the MC or the GC through majority vote, at least as a backup plan. In fact, to date, the proposal to launch the selection processes for filling AB vacancies has been raised at each meeting of the DSB since November 2017. Initially supported by 23 members, its support grew steadily as the crisis worsened.[31] By September 2023, 130 members – more than three-fourth of the entire membership – had endorsed the proposal,[32] which persisted through November 2024, according to the latest meeting records available.[33] This demonstrates the strong momentum for the early reactivation of the AB.

The basic idea of the solution is that the current impasse in the selection process within the DSB makes it plausible for the MC, as the highest authority of the WTO, to intervene and resolve the crisis.[34] Similarly, the GC, acting as the interim authority between MC meetings, could also step in to tackle the crisis.[35] Given WTO members' objective of restoring the functionality of the dispute settlement system at an early time, the intervention of the GC appears to be a more feasible option. Moreover, the GC is well-suited for this role, having previously been involved in dispute settlement matters[36] and already engaged in efforts to salvage the AB.[37] Even if members opt against this solution for practical reasons which will be addressed in Section 4, the mere existence of such an option could prompt the negotiations, especially by pressuring the holdout members to agree to concessions.[38]

However, the absence of substantial discussions on this option suggests that, among others, WTO members may have concern about its legality. The main concern revolves around whether, in appointing AB members, the GC is exempt from the requirement of consensus. While Article IX:1 of the AEWTO provides that '[d]ecisions of the Ministerial Conference and the General Council shall be taken by a majority of the vote cast', it has the caveat that this applies 'unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement'. Meanwhile, Article IV provides that decisions of the MC need to be made 'in accordance with the specific requirements for decision making in this Agreement and in the relevant Multilateral Trade Agreement'. Footnote 3 of the AEWTO further provides that '[d]ecisions by

[29]Facilitator Urges Members to be Practical, supra n. 5.

[30]Van den Bossche, The Demise of the WTO Appellate Body, supra n. 13, 3.

[31]For the earliest proposal on this matter, see Proposal on Appellate Body Appointments by Argentina et al., WT/DSB/W/609, 10 November 2017. Until now, 26 revised versions of the proposal have been issued with the number of co-sponsors increasing in each version, except for the versions in April and June 2019. See WT/DSB/W/609/Rev.11, 14 June 2019, and WT/DSB/W/609/Rev.10, 16 April 2019.

[32]See Proposal on Appellate Body Appointments by Argentina et al., WT/DSB/W/609/Rev.26, 6 September 2023.

[33]See Proposed Agenda of Dispute Settlement Body, WT/DSB/W/738, 21 November 2024.

[34]See AEWTO, Art. IV:1. This provision endows the MC with 'the authority to take decisions on all matters under any of the Multilateral Trade Agreements'.

[35]See ibid., Art. IV:2. This provision provides that '[i]n the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Assembly'.

[36]For example, a special meeting of the General Council was convened in November 2000 to discuss the AB's handling of amicus curiae briefs, see WT/GC/M/60, 23 January 2001.

[37]See also Meeting of the Dispute Settlement Body, JOB/DSB/9, 19 March 2024, at para. 5. Chairman of the DSB reported that '[d]uring the consultations, most Members stated that they consider the General Council as the appropriate forum to oversee the DS process'.

[38]See Kuijper, supra n. 10, at 10.

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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', i.e., consensus.

2.2 Legal Controversies on GC Intervention by Majority Vote

A closer examination of existing scholarly discussions will shed light on why some scholars believe this solution is viable, as well as the challenges associated with it. Before the AB ceased functioning, Kuijper foresaw that making concession to the US might not salvage the AB and advocated for precautionary measures.[39] He mentioned that '[t]imes of emergency justify emergency measures, also in the law of international organizations. They allow states to invoke the *clausula rebus sic stantibus* in treaty law. They allow states and organs of international organizations to take decisions that are arguably legal, but that they would not take under normal circumstances'.[40] But he did not further explain the implications of the law of international organizations, as he believed that '[t]he WTO itself offers the opportunity of a simple solution [which] is the recourse to majority voting'.[41]

Kuijper contended that the GC is permitted to 'escape from consensus' in appointing AB members based on Article XVI:3 of the AEWTO. He emphasized that Article XVI:3, the conflict-of-laws rule, mandates that the provisions the AEWTO take precedence over those of the Multilateral Trade Agreements in case of a conflict.[42] According to Kuijper, '[p]roviding for an additional method of decision-making in the WTO [under Article IX:1 of the AEWTO], which is not available in the DSU, would constitute such a conflict'.[43]

Hillman and Petersmann also supported the legality of GC's appointing of AB members by majority vote. In addition to endorsing an argument based on Article XVI:3,[44] Hillman suggested that such action 'would be an *appointment* rather than a decision under Article 2' of the DSU and would fulfill members' obligation to fill AB vacancies as outlined in Article 17.2.[45] Petersmann further delineated the US's obstruction of AB member appointments as a breach of the obligation to act in good faith and its obligation under Article 17.2,[46] and posited that a majority vote in the GC or the MC 'is justified by the illegality of the US disregard for the collective WTO duties to maintain the AB'.[47] He also highlighted the illegality of the DSB's de facto amendment of the DSU and emphasized the legal responsibilities of WTO members to comply with WTO amendment procedures and Article 17 of the DSU.[48]

Seemingly aware of the controversies surrounding these interpretations, Hillman and Petersmann suggested an authoritative interpretation to be made by the MC or the GC under Article IX:2 of the ATWTO. Hillman proposed an interpretation affirming the existence of a collective duty of members under Article 17.2 to fill AB vacancies,[49] and, in addition to this, Petersmann suggested that 'in view of Article XVI.3 WTO Agreement' could be added to confirm existing WTO powers to act through majority decisions.[50] Vidigal also recommended an

[39]Ibid., at 8.
[40]Ibid., at 9.
[41]Ibid., at 9.
[42]Ibid., at 10
[43]Ibid., at footnote 38.
[44]Hillman, supra n. 11, at 13. Different from Kuijper, Hillman observed that 'the conflict stems from the United States' use of the consensus rule in the DSU to terminate the existence of the Appellate body' and the WTO's mandate to administer the rules of the DSU.
[45]Ibid., at 11.
[46]Petersmann, supra n. 12, at 507.
[47]Ibid., at 514.
[48]Ibid., at 514–515.
[49]Hillman, supra n. 11, at 13.
[50]Petersmann, supra n. 12, at 514.

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interpretation by the MC or the GC as the 'politically most feasible in the short term'.[51] However, he first highlighted the problems with the legality of the intervention by the GC through majority vote.

Vidigal contended that, based on the qualifications within Articles IV:1 and IX:1 of the AEWTO, the specific decision-making requirements governing the DSB extend to the GC's appointment of an AB member and prevail over the latter's general decision-making rule.[52] He argued that Article XVI:3 is irrelevant in this context, as this is not a situation of conflict between decision-making rules but rather falls under lex specialis.[53] He clarified that AEWTO footnote 3's reference to the GC confirms this obligation without affecting the MC's obligation under Article IV:1.[54]

Vidigal also challenged the notion that restriction on the MC only applies to 'decisions' which exclude the action of 'appointing', as 'the DSU does not provide a decision-making process for DSB actions other than decisions'.[55] Moreover, he highlighted the untenability of arguing that the consensus requirement applicable to all decisions of the DSB per Article 2 of the DSU is not covered by '*specific requirements* for decision-making … in the relevant Multilateral Trade Agreement' in Article IV:1.[56] On this point, he suggested an authoritative interpretation to be made by the MC or the GC could make a difference.[57]

Beyond textual analysis, Vidigal examined the element of object and purpose, suggesting that 'it is not far-fetched to conclude that the object and purpose of the consensus requirement is to ensure that not one person is appointed to the Appellate Body who would be unacceptable to a WTO Member',[58] thereby disputing the claims of the US's 'abus de droit'. He also drew parallels with the *Peace Treaties (Second Phase)* advisory opinion of the International Court of Justice (ICJ) to underscore that even if the US violated its procedural obligations under the DSU, this does not permit 'other Members, or WTO institutions, to compose the adjudicator against the institutional rules Members agreed to'.[59] Furthermore, Vidigal scrutinized the negotiating history, revealing that this problem may not have been noticed by WTO members at that time.[60]

In response, Gao staunchly defended the legality of appointing AB members by majority vote in the GC. He argued that the consensus rule applies solely when the GC functions as the DSB. Moving the appointment of AB members to the GC would not warrant the application of the consensus rule, as doing so would stretch Article 2.4 of the DSU[61] and contradict the explicit treaty language of Article IV:3 of the AEWTO stating that the GC only acts as the DSB when it convenes as such.[62] Gao further contended that confining the decision-making process to the special rule under the DSU would render the stipulation in Article IV:1, 'in accordance with the specific requirements for decision-making *in this Agreement*', meaningless.[63] This presents a potential conflict and justifies the application of Article XVI:3 of the AEWTO.[64]

[51]Vidigal, supra n. 14, at 18.
[52]Ibid., at 9.
[53]Ibid., at 10.
[54]Ibid., at 10.
[55]Ibid., at 10–11.
[56]Ibid., at 11.
[57]Ibid., at 21.
[58]Ibid., at 12–13.
[59]Ibid., at 13.
[60]Ibid., at 14–17.
[61]Gao, supra n. 15, at 545.
[62]Ibid., at 545–546. Article IV:3 of the AEWTO provides that, 'The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding.' On this point, Van den Bossche expressed different views. He noted that, according to this provision, 'whenever the General Council discusses dispute settlement matters it convenes as the DSB (and not as the General Council) and decisions can only be taken by consensus'. However, he observed that the MC could legally decide on this matter, although such an outcome is unlikely in practice, see Van den Bossche, The Demise of the WTO Appellate Body, supra n. 13, 12.
[63]Ibid., at 546.
[64]Ibid., at 546.

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Gao underscored the object and purpose of the DSU set out in Article 3.2, emphasizing that the dispute settlement system is 'a central element in providing security and predictability to the multilateral trading system' and the prompt settlement of disputes is 'essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members'.[65] He condemned the US's action as an abuse of power, representing an attempt to 'force a major amendment to the DSU on all other WTO Members'.[66] Gao asserted that members are 'responsible for this termination of the Appellate Body' if they 'refuse to invoke the majority voting process'.[67]

However, Gao's call appears to have been met with skepticism, at least not convincing enough to sway WTO members into believing it as a credible interpretation. In fact, similar arguments by Gao, Vidigal, and other scholars had circulated earlier in the *International Economic Law and Policy Blog*, yet both camps remain at odds, unable to reach a consensus.[68] And an anonymous commentator noted that 'people who are well-versed in principles of treaty interpretation and the interpretive style of the WTO can reach opposite conclusions on whether majority voting for ABMs is or is not permitted'.[69]

3. Legality of GC Intervention by Majority Vote under International Institutional Law

The discussion above indicates that allowing the GC to intervene by majority vote, even without considering members' concern about its practical effects, is not entirely convincing from a legal perspective. This section, however, argues that the existing literature does not exhaust all the arguments related to the legality of the intervention of the GC by majority vote. The nature of the GC's appointment of AB members as an institutional issue, coupled with the fact that the AEWTO is a constituent instrument of an international organization, entails the application of additional interpretative elements. These elements can render the legality of the GC's intervention by majority vote less controversial.

3.1 Institutional Interpretative Rules as the 'Customary Rules of Interpretation of Public International Law'

As demonstrated earlier, the question of whether the GC can appoint AB members by majority vote primarily involves the interpretation of Articles IV, IX, XVI, and footnote 3 of the AEWTO. The interpretative rules applied by the learned scholars in Section 2 are obviously those outlined in Articles 31 and 32 of the VCLT. While some scholars find a clear answer through textual analysis alone, others also scrutinize the element of object and purpose. Vidigal, contending that these elements are not enough to determine whether the consensus requirement in appointing AB members acts as a loophole or a fire alarm, further examined the negotiating history of the AEWTO, permissible under Article 32 of the VCLT. These interpretative rules do not seem to be disputed by participants in the debate, as they are commonly applied by the AB and considered to represent 'customary rules of interpretation of public international law' as outlined in Article 3.2 of the DSU.[70]

[65]Ibid., at 546.
[66]Ibid., at 546.
[67]Ibid., at 546.
[68]For Vidigal's post and comments by other scholars, see Vidigal's Blog, supra n. 14.
[69]Ibid., at Reply 6 August 2020 at 10:53 am.
[70]See e.g. WTO, *United States – Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body*, 20 May 1996, WT/DS2/AB/R, at 16–17; WTO, *Japan – Taxes on Alcoholic Beverages – Report of the Appellate Body,* 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 104, n. 17; WTO, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Report of the Appellate Body*, 17 February 2004, WT/DS257/AB/R, para. 59. For further discussion on the interpretative practice of the Appellate Body, see H.R. Fabri and J. Trachtman, 'Final Report on the Jurisprudence of the WTO DSB', ILA Study Group on the Content and Evolution of the Rules of Interpretation, 29 November–13 December 2020.

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However, these conventional rules of treaty interpretation may not entirely suffice for the current issue. The question of whether the GC can appoint AB members by majority vote is an institutional issue and concerns the interpretation of provisions of a constituent instrument rather than a trade dispute typically brought before panels and the AB. In such a context, 'customary rules of interpretation of public international law' require the application of a slightly modified set of interpretative rules, which we may term 'institutional interpretative rules' for the purpose of this article.

The existence of such institutional interpretative rules with regard to constituent instruments in public international law is clearly elucidated by the ICJ in its advisory opinion on the *Legality of the Use of Nuclear Weapons*. While 'the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply',[71] the Court stated that

> the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia,* to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.[72]

It is clear from this quoted statement of the Court that, in addition to the elements that have already been examined, elements such as 'the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice' also require careful scrutiny to determine whether the GC can intervene by majority vote. And these elements often facilitate a more dynamic interpretation.[73]

Before examining these elements, however, it is necessary to ascertain whether such institutional interpretative rules have been excluded from applying to the AEWTO or its rules of decision-making. While the application of such rules aligns with customary rules of interpretation of public international law and is not expressly prohibited by the AEWTO, there is a possibility that these rules could be implicitly set aside based on pertinent provisions of the AEWTO. Article 5 of the VCLT allows special rules of an international organization to prevail.[74] Even if one regards these institutional interpretative rules as outside the VCLT framework[75] and as general rules of international law, their application still allows for exceptions, provided States so intend.

The WTO, as its name suggests, is an international organization, evidenced also by its composition of various organizations,[76] legal personality established, and privileges and immunities accorded by member States,[77] and competence to conclude a headquarters agreement.[78]

[71] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, ICJ Reports (1996), 74, para. 19.

[72] Ibid., at 75, para. 19.

[73] See C. Brolmann (2012) 'Specialized Rules of Treaty Interpretation: International Organization', in D.B. Hollis (ed.), *The Oxford Guide to Treaties*, 507.

[74] Article 5 of the VCLT provides that '[t]he present Convention applies to any treaty which is the constituent instrument of an international organization … without prejudice to any relevant rules of the organization'.

[75] See Brolmann, supra n. 73, at 508.

[76] See AEWTO, Arts. IV and VI.

[77] See ibid., Art. VIII:1-4.

[78] See ibid., Art. VIII:5.

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However, it differs from many other international organizations. Notably, it predominantly comprises plenary organs composed of all members. While it does operate a secretariat of over 600 employees, its scale remains relatively modest compared to organizations such as the UN, World Bank, or IMF.[79] Moreover, it prides itself on being a 'member-driven' organization and a platform for negotiation among members.[80] As such, it has been aptly characterized by Kuijper as an 'IO lite'.[81]

It could be contended that the WTO lacks significant autonomy in substance, thus rendering institutional interpretative rules inapplicable. This argument, however, is not entirely convincing. It is not clear whether low autonomy necessarily precludes the application of institutional interpretative rules. The breadth of the definition of international organization suggests that the WTO may already possess higher autonomy compared to many other international organizations.[82] Even if one were to regard the WTO more as a conference of States than a typical international organization, the institutional interpretive rules may still be applicable. Robin Churchill and Geir Ulfstein have suggested that these interpretative rules should extend to conferences of States to justify 'outcomes that would not be accepted under the law of treaties'.[83]

Moreover, the GATT's numerous institutional innovations 'put in place without explicit treaty text authority',[84] challenge the notion that formalizing the WTO as an international organization has stripped the regime of its institutional flexibility, confining it to a more textual interpretation. The WTO's own practices, such as postponing the MC for two years due to the pandemic, despite the explicit requirement to hold 'at least every two years',[85] further substantiate the applicability of institutional interpretative rules. Dismissing the relevance of these rules to the WTO's institutional framework, as noted by John Jackson, could inhibit the WTO 'from being able to adapt to changing conditions in the world'.[86]

It could also be argued that institutional interpretative rules should not apply to decision-making rules of the AEWTO, as members appear to attach special importance to these rules. Article X:2 explicitly states that amendments to Article IX of the AEWTO 'shall take effect only upon the acceptance by all Members', while amendment to many other rules have a lower threshold.[87] However, in reality, the decision-rules have been de facto altered by WTO

[79]Compared with the latter organs which employ at least several thousand staff members, the number of staff at the WTO Secretariat is approximately 620, www.wto.org/english/thewto_e/secre_e/intro_e.htm (assessed 9 December 2024).

[80]See e.g. 'Whose WTO Is It Anyway?', www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (assessed 9 December 2024).

[81]P.J. Kuijper, (2009) 'WTO Institutional Aspects', in D. Bethlehem et al. (eds.), *The Oxford Handbook of International Trade Law*, 81. See also Footer, supra n. 9, 328. She referred to the WTO as a 'sui generis' organization.

[82]For example, International Whaling Commission is also regarded as a global international organization, but its size and power are much smaller compared to the WTO. For a definition of international organizations, see H.G. Schermers and N.M. Bloker (2018) *International Institutional Law: Unity within Diversity*, 40.

[83]R.R. Churchill and G. Ulfstein (2000) 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', *American Journal of International Law* 94(4), 623, 634. See also G.F. Arribas (2020) 'Rethinking International Institutionalisation through Treaty Organs', *International Organizations Law Review* 17, 479–481.

[84]J. Jackson (2006) *Sovereignty, the WTO and Changing Fundamentals of International Law*, at 98. He mentioned examples like the GATT's reimbursement of the ICITO for the costs of the secretariat, the establishment of a Council without any explicit treaty language, and the development of a series of separate instruments to address non-tariff barriers.

[85]AEWTO, Art. IV:1. The MC12, initially scheduled to be held in June 2020, was postponed three times due to the pandemic before finally taking place in June 2022. The interval between MC6 and MC7 also extended beyond two years due to the stalemate in the Doha Round negotiations.

[86]Jackson, supra n. 84, at 185. See also B. Gu (2024) 'Teleological Interpretation by International Economic Organizations', *Journal of World Trade* 58, 956. He warned that 'if teleological interpretation prevails, there is hope that the WTO will survive and prosper; if it does not, as the tradition has been, the WTO will remain in recession, in decline, or even brain dead'.

[87]For many other provisions, amendments shall take effect for either all members or the members that have accepted them upon acceptance by two thirds of the members, see AEWTO, Art. X:3 and 4.

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members with the practice of voting almost abandoned.[88] This confirms the adaptability of the decision-making provisions, although Article IX's favorable stance towards consensus, the long-time practice and consensus of members in deciding by consensus indicates that a very high threshold is required for any change with these rules.

While neither of these two arguments negates the application of institutional interpretative rules, they raise important concerns to be addressed in the process of treaty interpretation. The relatively conservative character of the institutional structure of the WTO evidently needs to be considered in the element of the 'nature of the organization', indicating that while an innovative interpretation of the AEWTO is possible, it should only be done in a very cautious manner. And considering the special importance attached to the decision-making rule by members and the established practice of consensus, it is prudent to focus our examination on whether the GC's intervention by majority vote is justifiable as an exception to address the AB crisis, rather than questioning whether the GC can intervene in the DSB's operation by vote as a norm. These differing targets carry distinct burdens of proof, especially when considering the element of 'the imperatives associated with the effective performance of its functions' to be discussed below.[89]

3.2 Examination of Additional Interpretive Elements

Given the applicability of institutional interpretative rules and the ambiguity in the treaty text, this subsection will explore the application of additional interpretative elements. These include 'the very nature of the organization created', 'the objectives which have been assigned to it by its founders', 'the imperatives associated with the effective performance of its functions', as well as 'its own practice'. Apparently not all of these elements provide clear guidance for interpretation; some even add complexity rather than clarity to the issue. As just noted, the very nature and practices of the WTO suggested both flexibility and caution. The objectives set by the founders, as noted in Section 2, remain contentious. Therefore, arguing for GC intervention by majority vote based on these elements lacks convincing grounds.

One element, 'the imperatives associated with the effective performance of its functions', however, appears particularly relevant here as the core issue at hand is the inability of the AB to function properly. According to Article III:3 of the AEWTO, one of the WTO's main functions is to 'administer the Understanding on Rules and Procedures Governing the Settlement of Disputes'. Additionally, Article 3.3 of the DSU emphasizes that '[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is *essential to the effective functioning of the WTO*'.[90]

The application of this interpretative element should be distinguished from the second sentence of Article IV:1 of the AEWTO, which states that '[t]he Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect'. While the latter can be constrained by the third sentence of Article IV:1, which mandates the application of 'specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement',[91] the element of 'the imperatives associated with the effective performance of its functions', deriving its legal force from general international law, applies to the interpretation of the entire AEWTO, encompassing both the second and third sentences of Article IV:1.

[88]See Kuijper, supra n. 81, at 96. Kuijper described this as 'a clear example of (re)-interpreting or de facto modifying the WTO provisions without having to resort to the constitutional techniques of the authoritative interpretation under Article IX:2 and of amendment under Article X'.

[89]See also Kuijper, supra n. 10, at 9. He distinguished between 'times of emergency' and 'normal circumstances' and observed that '[t]he ambush killing of the AB by the US clearly falls outside "normal circumstances"'.

[90]Emphasis added.

[91]See Vidigal's Blog, supra n. 14, paras. 3–4.

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The question is whether the intervention of the GC by majority vote can be considered 'imperative' in this situation. As discussed in Section 2.1, there are other methods for resolving the current impasse. While a vote in the GC could indeed assist in this regard, it is not the only means available to members.

A brief review of relevant cases of the ICJ can shed light on what constitutes an 'imperative'. In the *Reparation of Injuries* advisory opinion, a question arose about whether the United Nations can bring an international claim to obtain reparation from a State in respect of the damage caused to an agent in the service of the organization.[92] This right was not mentioned by the actual terms of the UN Charter, and there were alternative means for compensating the agent, such as the remedies afforded by local law, diplomatic protection by its national State, and the possibility of the conclusion of a general convention in this regard.[93] Nevertheless, the Court deemed that '[t]o ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is *essential* that in performing his duties he need not have to rely on any other protection than that of the Organization'.[94]

A year later, and right before delivering its *Peace Treaties (Second Phase)* advisory opinion[95] cited by Vidigal above, the Court issued its advisory opinion on *South-West Africa*.[96] Compared to the *Peace Treaties (Second Phase)*, which centered on the compromissory provisions of the Peace Treaties signed by Bulgaria, Hungary, and Romania with the Allied and Associated Powers – where the Court noted that the UN Secretary-General is not authorized to appoint the third member of the Treaty Commission even if one party fails to appoint a representative[97] – *South-West Africa* presents a more relevant precedent. It pertains to the interpretation of a constituent instrument, the UN Charter, and demonstrates a different reasoning process in interpretation.

In the League of Nations era, South-West Africa was placed under a Mandate conferred on South Africa, which was supervised by the League of Nations. Following the dissolution of the League, a vacuum emerged regarding the mandate's supervision, prompting questions about South Africa's remaining obligations, especially the obligation to receive international supervision and to submit reports. Article 80(1) of the UN Charter only provides that 'until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties'. Following the logic of *Peace Treaties*, no mechanism would exist to address the situation until an agreement was concluded between South Africa and the UN.

The ICJ, however, emphasized that Article 80(1) purports to safeguard 'the rights of the peoples of mandated territories until Trusteeship Agreements are concluded', and 'no such rights of the peoples could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ'.[98] It also noted that, according to Article 10 of the Charter, the General Assembly has the power to 'discuss any questions on any matters within the scope of the present Charter and to make recommendations on these questions or matters to Members of the United Nations'. Based on these two provisions and also a rather ambiguous statement in a resolution of the Assembly of the League of Nations, the Court identified the General Assembly as the 'legally qualified' organ to fulfill this supervisory role.[99] This is despite the

[92] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174, 181.

[93] See ibid., Dissenting Opinion by Judge Hackworth, at 202; Dissenting Opinion by Judge Krylov, at 217.

[94] Ibid., at 183. Emphasis added.

[95] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, Advisory Opinion, 18 July 1950, ICJ Reports (1950) 221.

[96] *International Status of South-West Africa*, Advisory Opinion, 11 July 1950, ICJ Reports (1950) 128.

[97] Peace Treaties (Second Phase), supra n. 95, at 230.

[98] South-West Africa, supra n. 96, at 136–137.

[99] Ibid., at 137.

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fact that South Africa was still supervised by the ICJ based on the power transferred from the PCIJ according to Article 37 of the ICJ Statute.[100]

Later, in the *Awards of Compensation* advisory opinion, the Court also observed that 'to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity [set out in Article 101 of the UN Charter]', it is 'essential' for the General Assembly to have the capacity to establish an administrative tribunal.[101] Furthermore, dismissing the claim that 'an implied power can only be exercised to the extent that the particular measure under consideration can be regarded as absolutely essential'[102] and the concern about potential conflicts with other Charter provisions, the Court held that the administrative tribunal thus established can also impose legal limitation on the General Assembly itself.[103]

The institutional interpretative rules applicable to constituent instruments do not allow them to be interpreted as one may wish.[104] They do, however, support a more dynamic approach to interpreting treaty text. A well-known example is the interpretation of the term 'concurring vote' in Article 27 of the UN Charter, which has been interpreted to include voluntary abstentions.[105] Here, when a measure is essential for the effective functioning of an international organization and is not prohibited by the constituent instrument, it may be taken to ensure such effectiveness. Despite the possibility for States parties to negotiate a solution and the existence of alternative methods to mitigate the negative effects, precedent suggests that the most effective course of action may still be regarded 'essential' or 'imperative'. In this context, the intervention of the GC by majority vote appears to be a less surprising option compared to measures permitted by the Court in the *Reparation of Injuries, South-West Africa* and *Awards of Compensation* advisory opinions.

When the GC's intervention by majority vote is clearly supported by 'the imperatives associated with the effective performance of its functions' and other interpretative elements do not convincingly suggest a different course, it is reasonable to conclude that this option is legally permissible under the AEWTO. Even if concerns remain regarding AEWTO footnote 3, which appears to establish a specific decision-making rule for the GC in its role as the DSB, the MC can certainly intervene through majority vote. Given the GC's function in lieu of the MC and the objective set in the MC12 and MC13, it seems overly formalistic to argue that this power must be exercised by the MC in its next meeting rather than by the GC.

Assuming any doubts persist regarding the legality of the option, they can be dispelled by broad endorsement of WTO members. The 2021 resolution of the Institute of International Law (IDI), concerning the interpretation of constituent instruments of international organizations, states that 'when there is a general agreement among the membership of the international organization as to an interpretation, the interpretation should be presumed to be valid and *intra vires*'.[106] While the definition of 'general agreement' is not entirely clear, as indicated by

[100]See ibid., Separate Opinion by Sir Arnold McNair, 158; Separate Opinion by Judge Read, 169.

[101]See *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Reports (1954), 47, 57.

[102]Ibid., at 58.

[103]Ibid., at 59–62.

[104]For cases where a more dynamic reading of constituent instruments was denied, see e.g. *Admission of a State to the United Nations (Charter, Art.4)*, Advisory Opinion, 28 May 1948, ICJ Reports (1948), 57; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 3 March 1950, ICJ Reports (1950), 8; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, 8 June 1960, ICJ Reports (1960) 150; Legality of Nuclear Weapons, supra n. 71.

[105]See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Report (1971), at 22, para. 22.

[106]Institute of International Law, Resolution on Limits to Evolutive Interpretation of the Constituent Instruments of Organizations within the United Nations System by their Internal Organs, 4 September 2021, para. 7.

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Mahnoush Arsanjani, it is distinct from the entire membership.[107] However, equalizing a simple majority with 'general agreement' would also not appear appropriate,[108] especially considering the more conservative institutional structure of the WTO.

For interpreting the AEWTO, a three-fourths majority is likely sufficient, as it aligns with the threshold under Article IX:2 for issuing a formal interpretation in the MC or the GC. Some may argue that permitting GC intervention constitutes an informal modification of the AEWTO, requiring a standard for 'general agreement' that closely mirrors the formal amendment rules[109] outlined in Article X, particularly its second paragraph, which mandates consensus for altering Article IX's decision-making rules. However, as discussed in Section 2.2, a more favorable interpretation of Articles IV:1 and XVI:3 could also justify GC intervention, or at least the MC's involvement. For amending these provisions, a three-fourths majority of the membership is adequate under the third and fourth paragraphs of Article X.[110]

Support from more than three-fourths of the membership for restarting the appointment of AB members in the GC would not necessarily eliminate the possibility of legal challenges, as it would with a formal interpretation under Article IX:2. However, the presumption of legality generated by the general membership's support should outweigh any alternative interpretations put forward by individual States or scholars. Ironically, the most likely forum for challenging the restored AB would be the AB itself. Given the legal arguments outlined above, it is highly unlikely that the AB would uphold such a challenge.

Conversely, if the proposal garners support from just over half the membership, this would not necessarily affect its legality but could raise significant doubts about the effectiveness of the reactivated AB. Opponents may attempt to block its budget or refuse to participate in its proceedings, potentially exacerbating divisions within the membership rather than preserving the WTO's integrity. Thus, beyond examining the proposal's legality, it is essential to address the practical concerns of members to secure broader support.

4. Crafting a Refined Proposal to Address WTO Members' Institutional Concerns

The legal possibility for the GC to play a more active role in resolving the crisis does not automatically guarantee that members will support such a move, as many members still harbor concerns about its negative effects on the future development of the WTO. Foremost among which are the potential disruption of the customary practice of consensus in decision-making and the possible loss of leverage in advocating for the reform of the AB. This section proposes a refined draft GC decision to address these institutional concerns of WTO members.

4.1 Institutional Concerns Arising from GC Intervention by Majority Vote

Relocating the appointment of AB members from the DSB by consensus to the GC by majority vote, while securing broad membership support, is a complex endeavor. Migrating support for

[107]See M. Arsanjani (2019) Report on Are There Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organization by the Internal Organs of Such Organizations (with Particular Reference to the UN System)?, 234. See also Yearbook of the Institute of International Law, vol. 82 (2021), 187.

[108]R. Etinski (2023) 'Evolutive (Dynamic) Interpretation and Informal Modification of Constituent Instruments of International Organizations', *Chinese Journal of International Law* 22, 213–214.

[109]See ibid., 214.

[110]Article X of the AEWTO provides that: '3. Amendments to provisions of this Agreement … of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is 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.

4. Amendments to provisions of this Agreement … of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members.'

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restarting the selection process for AB vacancies to endorsing the GC's majority vote is not straightforward, and discussing this option without the potential for a simple majority is impractical. And as noted in Section 3.2, even if the proposal manages to pass, a lack of substantial majority could pose challenges. It has been cautioned that this might invite dissent from members, potentially empowering the US to further its blockade, threatening the WTO's integrity.[111] Conversely, if support can be rallied to achieve over a three-fourths majority among members, the AB would face fewer challenges and its legality would also be further bolstered.[112]

The mobilization of WTO members hinges on many factors, such as the leadership within the organization and potential shifts in circumstances. Anticipating the outcome is beyond the scope of this article, which will focus primarily on making the proposal itself more appealing. In this spirit, this section will address two main concerns identified by many scholars that appear to inhibit members' support for this proposed solution – its negative impact on the practice of consensus within the WTO and the diminished incentive to advance institutional reforms once the AB is restored.

While consensus is not strictly required by the AEWTO for decision-making, it has become a custom among members. Except in its first year,[113] WTO members have been avoiding voting, a sentiment referred to by Gao as 'the collective phobia of voting'.[114] Hillman, in her discussion, acknowledged the legality of GC's intervention by majority vote, but viewed it as an 'ugly' fix for the WTO Appellate Body. She expressed concerns that voting could undermine the preferred consensus approach among members and lead to challenges regarding the legitimacy of appointed AB members by the US and others, thereby impeding the AB's operational effectiveness.[115]

This practice of consensus, as alleged by some scholars, has seriously hindered the organization's development, especially given the large but diverse membership since the WTO's establishment,[116] with the current crisis serving as a stark example. The Sutherland Report, an expert review initiated by the WTO itself, also acknowledged this issue and proposed possible changes.[117] However, this is undeniably a highly contentious matter that cannot be easily altered. Indeed, the practice has valid reasons, particularly in safeguarding the rights of small and developing States.[118]

Even if changing the practice would benefit the organization in the long term, members are currently not prepared for such a shift. Without a detailed plan for altering the practice of consensus under serious consideration, transitioning to the fallback option of voting by simple

[111]See Vidigal, supra n. 14, at 22.

[112]It has also been suggested by Vidigal that it is preferable for members to achieve consensus when issuing the authoritative interpretation, as this would allow the interpretation to 'constitute a subsequent agreement and decisively affect the interpretation of the WTO Agreements', see ibid., at 24. But this view seems overly optimistic.

[113]In 1995, the General Council submit the draft decisions regarding Ecuador's accession and certain draft waivers to a vote by postal ballot, see General Council, Minutes of Meeting Held on 31 July 1995, WT/GC/M/6, 20 September 1995.

[114]Gao, supra n. 15, at 546.

[115]Hillman, supra n. 11, at 14.

[116]See e.g. Jackson, supra n. 84, at 50 and 238; C. Ehlermann and L. Ehring (2005) 'Decision-Making in the World Trade Organization', *Journal of International Economic Law* 8(1), 51; M. Elsig and T. Cottier (2011) 'Reforming the WTO: the Decision-Making Triangle Revisited', in T. Cottier and M. Elsig (eds.), *Governing the World Trade Organization: Past, Present and Beyond Doha*, 289.

[117]P. Sutherland et al. (2004) *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*. The report recommends that 'distinctions … could be made for certain types of decisions such as purely procedural issues' and a member blocking a wide-supported measure shall declare in writing 'the matter is one of vital national interest to it' with reasons included.

[118]See ibid., at 63; R.H. Steinberg (2002) 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', *International Organization* 56(2), 339, 362. See also Footer, supra n. 9, 333. She observed that consensus decision-making also 'favours majority interests in a less obtrusive way than weighed voting by giving procedural significance to parity of interest among the individual Members rather than having to take equality of voting power of Members into account'.

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majority would be too abrupt. The WTO would be transformed from an 'IO lite' to not only a 'normal IO', but an 'IO pro', as it could make important decisions with the support of fewer members compared to many other international organizations. This would exacerbate rather than solve the AB crisis.[119]

Therefore, allowing the GC's appointment of the AB members by majority vote to set a precedent for the future could significantly impact the acceptability of the option. However, the conundrum lies in the fact that, even if it may not constitute an authoritative interpretation of relevant decision-making rules, it will inevitably influence future discourse, especially given the emphasis on practice in the interpretation of constituent instruments as noted in Section 3.

Another concern deterring WTO members from supporting the GC's intervention through majority vote is the potential loss of leverage to reform the current dispute settlement system once the GC restores the AB. The aim of reforming the AB has been shared by many members, with calls for improvements and clarifications of the DSU existing for some time.[120] Admittedly, the crisis has accelerated negotiations in this regard. It is reasonable to assert that many members supported the mandate for the full restoration of the dispute settlement system with the expectation that some changes would be implemented. Once the AB is fully restored by the GC, calls for institutional reform are less likely to be heard by members that benefit from the existing arrangement or do not want to risk changing the status quo. This would make the GC's intervention unwelcome to members who sympathize with the US in its efforts to reform the dispute settlement system.

Meanwhile, some members may also be concerned that adopting the proposal could further alienate the US or even lead to its withdrawal from the WTO, given that the US has viewed the blockage of AB member appointment as leverage to push for fundamental reforms in the dispute settlement system.[121] Gao has taken a firm stance on this issue, suggesting that withdrawal from the WTO might not be a wise and straightforward option for the US.[122] He also noted that even if the US were to exit the organization, such a move 'would not be a fatal blow' to the overall functioning of the WTO.[123] However, to attract the support of as many members as possible, a more conciliatory approach is required.

That said, from the perspective of institutional law, allowing the AB to remain hostage while waiting for the negotiations with uncertain outcomes is not an option. Members' lack of action or eventual acquiescence to such practice may evince that 'the ability to block Appellate Body appointments is a feature of the WTO institutional framework'.[124] Therefore, something must be done; otherwise, a very bad precedent may be set for the WTO and even other international organizations,[125] indicating that in the name of reform, institutional predation is permitted.

4.2 Recasting GC Intervention as a Shield rather than Sword

Based on the concerns noted above, the best solution, as noted by Kuijper, is to limit the direct appointment of AB members by the GC applying majority vote as 'an exceptional one-off measure connected to the threat of malfunctioning of the AB, and accompanied by explicit openness

[119]Ibid., at 64. It is mentioned that departing from consensus could give unfair advantage to parties with large blocks of votes and make it harder to negotiate a single undertaking within a broad agenda.

[120]See e.g. Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para. 30.

[121]See e.g. Minutes of Meeting of the Dispute Settlement Body, WT/DSB/M/489, 10 June 2024,19. The US representative stated that 'the United States recognized that … achieving fundamental dispute settlement reform would not be easy' and 'it looked forward to working with [the facilitator] and all Members as they pursued fundamental dispute settlement reform'.

[122]Gao, supra n. 15, at 548. He mentioned factors like the concern about China's role in the WTO and the necessity of congressional approval.

[123]Ibid., at 549.

[124]Vidigal, supra n. 14, at 12.

[125]See Gao, supra n. 15, at 547.

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to further discussions with the US'.[126] However, sending such signals can be difficult, as this practice can always be cited in the future as a precedent for deviating from consensus, and without concrete actions, mere confirmation of 'openness to further discussions' appears less convincing.

Efforts have been made by scholars in this regard. Kuijper suggested a GC decision 'identifying certain categories of decisions [including the nomination of AB members] that in the future could be taken by [] a super-qualified majority'.[127] Nevertheless, as admitted by him, such a decision itself also needs 'the support of a very large majority'.[128] As noted above, to enhance the legality of the GC's majority voting, it has been suggested that an interpretation be issued. Petersmann proposed that the interpretation could also clarify that 'such majority decisions on meeting collective legal obligations of all WTO members do not establish a precedent for WTO decision-making on discretionary trade policy issues'.[129] The credibility and effectiveness of this statement, however, can still be questioned. Regarding the 'openness to further discussion', Hillman suggested that changes to the DSU need to be made before resorting to voting to show the good faith of members.[130] But achieving consensus on specific changes may be even more difficult, potentially putting the cart before the horse.

To indicate that majority voting is reserved for exceptional circumstances, a formal interpretation issued by the GC in a separate document does not appear to be necessary. As observed in Section 3, the GC's intervention by majority vote to solve the crisis is legally permitted under the AEWTO, and there is little need for an interpretation to further confirm its legality. A formal interpretation might complicate the process, as it would require an additional agenda item to be discussed by members before appointing AB members. And such an agenda item is likely be opposed by some members, leading to an additional occasion of deviating from the practice of consensus. Thus, a formal interpretation may present more problems than benefits.[131]

Instead, a well-designed proposal to appoint AB members could help restore the AB, signal that the intervention of the GC by majority vote is limited to specific occasions, and reassure members that they still have leverage to push forward the reform of the AB. In the preamble of the draft GC decision, it is crucial to state that recourse to a vote for the appointment of members of the AB 'shall be understood to be an exceptional departure from the customary practice of decision-making by consensus, and shall not establish any precedent for such recourses in respect of any future decisions in the WTO'.[132] Additionally, the draft decision should highlight that the AB's ongoing dysfunction hinders the effective functioning of the WTO, acknowledge the extensive consensus-seeking efforts by WTO members, and affirm members' intention to pursue further reform of the dispute settlement rules and procedures with which the present resolution is without prejudice to.[133]

These statements are necessary for raising the threshold for invoking the practice in the future and showing the commitment of members to further reforming the AB, but they are not

[126]Kuijper, supra n. 10, at 10.

[127]Ibid

[128]Ibid.

[129]Petersmann, supra n. 12, at 515.

[130]Hillman, supra n. 11, at 12.

[131]Issuing a formal interpretation could also lead to challenges based on Article IX:2, which provides that '[t]his paragraph shall not be used in a manner that would undermine the amend provisions in Article X'. See also WTO, *United States – Measures Affecting the Production and Sales of Clove Cigarettes – Report of the Appellate Body*, 4 April 2012, WT/DS406/AB/R, 84–88 (the legality of the Doha Ministerial Decision was challenged for not complying with relevant procedures despite its adoption by consensus).

[132]General Council, Procedure for the Appointment of Directors-General, WT/L/509, 20 January 2003, para. 20. This paragraph provides that the General Council can resort to vote if it is not possible to take a decision by consensus.

[133]Cf. General Assembly, Standing Mandate for a General Assembly Debate When a Veto is Cast in the Security Council, A/RES/76/262, 28 April 2022. This resolution addressed the highly sensitive issue of the veto and was adopted by consensus. To address member States' concerns, the preamble notes that 'the present resolution and its provisions are without prejudice to the intergovernmental negotiations on Security Council reform'.

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sufficient to mitigate members' concerns. They can be viewed as mere lip service, easily made and lacking substantial impact. In future situations, members might simply replicate these statements. Therefore, further action is necessary to emphasize the remedial nature of the GC's intervention by majority vote, ensuring it serves as a shield rather than a sword, or merely as a safety valve.

This article proposes that the draft decision limit the GC to appointing less than seven AB members. This move would reactivate the AB, but not restore its full operation within the current legal framework.[134] This may not be entirely satisfying for many WTO members. Given the current case load, even if all seven judges were restored, it might still take some time for the AB to return to its normal operation. Neither does it fully meet many members' desire for full restoration of the AB. However, it is a necessary move to demonstrate the remedial nature of the GC's intervention by majority vote. This move also leaves room for maneuver for members, including the United States, which believe that urgent reform of the AB is needed. Although not fully restoring the AB, they can be assured that they still retain some leverage to push for these reforms.[135]

In this regard, appointing six AB members seems to be appropriate, although any number between three and six would serve the aforementioned purpose. Fewer members, in addition to raising concerns about reduced efficiency and the concentration of power, presents the practical challenge of allocating the limited seats among WTO members. This issue is less pronounced with six AB members, as it has been customary for the US to nominate one member of the AB.[136] Given that the US is unlikely to nominate a member in the reactivated AB, other seats can be allocated in a manner consistent with past practices.

In addition, to 'pragmatically accommodate US power politics', as aptly noted by Petersmann, the proposal could acknowledge that 'members will submit disputes to the newly composed AB only among themselves, without initiating AB proceedings against the US', until a solution is found to address its concerns.[137] This 'opt out' provision could also be extended to a limited number of WTO members, if necessary, to garner broader support for the reactivation of the AB.[138]

Voting on such a draft GC decision is not the end, but serves more as a useful testing ground. Essentially, it calls for members to revert to the time before the AB's collapse. If this move is not accepted or is passed by only a narrow margin, it signals that the AB's full restoration will require significant changes either within or outside the WTO. Absent such changes, focus may shift more to the operation of the MPIA, as the lack of support for this modest proposal indicates a lack of interest among members in returning to the pre-crisis era. Even if the AB manages to be restored,

[134]One reviewer mentioned the possibility of appointing more AB members or ad hoc members. Compared to the proposal of appointing more AB members or member ad hoc, the merit of appointing fewer than seven members is that it operates within the current legal framework. For proposals outside this framework, many members may not feel legally obligated to join and might instead prefer the MPIA. Article 17 of the DSU stipulates that the AB 'shall be composed of seven persons' and '[v]acancies shall be filled as they arise'. Appointing more than seven members would constitute a clear violation of this provision. This may also be the case with appointing an AB member ad hoc. However, appointing fewer than seven members does not necessarily breach this provision, as the provision does not impose a specific time limit for filling vacancies. Given the significant challenges currently facing the AB, delaying the appointment of some members can be legally justified.

[135]See also R. Sharma (2020) 'WTO Appellate Body at Cross Roads: Options and Alternatives', in C. Lo, J. Nakagawa and T. Chen (eds.), *The Appellate Body of the WTO and Its Reform*, 244. Before the full paralysis of the AB, Sharma suggested that two members of AB be appointed to demonstrate that 'the US is not totally against having the AB system' and to satisfy 'other WTO Members interests to continue with the AB'.

[136]For further discussion on the appointment of AB members, see P. Lee, 'Appointment and Reappointment of the Appellate Body Members: Judiciary or Politics', in Lo et al., supra n. 135, 255.

[137]E. Petersmann (2020) 'Between "Member-Driven Governance" and "Judicialization": Constitutional and Judicial Dilemmas in the World Trading System', in Lo et al., supra n. 135, 34–35.

[138]See E. Petersmann (2020) 'WTO ADJUDICATION@Me.Too: Are Global Publics Goods like the World Trade Organization Owned by Governments or by Peoples and Citizens?', *Journal of East Asia and International Law* 13, 36.

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it could soon fail again due to members' lack of cooperation. In this scenario, the AB may not deliver the security and predictability expected.

However, if this proposal is adopted with the support of a vast majority of WTO members, the reactivated AB may enjoy high legitimacy among them, and as noted above, its legality is further enhanced. In such a case, members may consider fully restoring the AB in the near future, while also pressing ahead with reforms to the dispute settlement system. Ideally, such unity among the membership could influence the decision of the United States, leading it to voluntarily cease hindering the proper functioning of the AB.

5. Conclusion

Before the AB became non-functional, scholars warned that once it was terminated, it might not be restored.[139] Later, it was cautioned that if it cannot be restored quickly, it was not likely to come back.[140] Predictions also suggested that the more successful the MPIA became, the less likely WTO members would return to the AB.[141] However, the proposal to restart the appointment of AB members at each DSB meeting indicates that momentum to restore the AB remains strong.

The ongoing negotiations to reform the dispute settlement system reflect the intention of most members to implement necessary changes to the AB, enabling it to function more efficiently and resume operations in a timely manner. These efforts may continue even though their objectives were not realized by the end of 2024. However, the deep divide between the US and most other members on reforming the appeal/review mechanism casts doubt on the likelihood of achieving progress in the near term. Furthermore, the re-election of Donald Trump as US president raises questions about whether this could ever be achieved.

It is timely to review the option of allowing the GC to appoint AB members through majority vote. Even if this option is not ultimately adopted, demonstrating it as a viable option can bring greater certainty to the progress of negotiation. Based on the customary interpretative rules applicable to constituent instruments, which have been less noticed in existing discussions, a convincing case can be made that the GC has the power to intervene by majority vote to support the effective functioning of the WTO.

The support of the general membership for this option is necessary for the proper functioning of the AB and would further enhance its legality. To mitigate the concerns of WTO members, this article suggests that, besides statements confirming the non-precedent-setting nature of the decision, the importance of the AB, the efforts made by members, and the need for reform, the draft GC decision should limit the appointment of AB members to fewer than seven. Additionally, as suggested by Petersmann, certain members could temporarily opt out of this arrangement. This would send a clear signal about the remedial character of the decision.

This move leaves open whether WTO members should restore the full operation of the AB immediately or if some changes need to be implemented first. But it clearly signals that institutional predation, such as the blocking of AB members' appointments, will never be encouraged and that an international organization supported by the general membership is resistant to such actions. Without serious discussion of this option, even if members eventually find an acceptable solution to the crisis, the outcome may be built on an unstable foundation.

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[139]See Kuijper, supra n. 10, at 9; Petersmann, supra n. 12, at 505.
[140]See Hillman, supra n. 11, at 3.
[141]See Gao, supra n. 15, at 547.

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