Crisis at the Appellate Body: Towards More or Less Consent in WTO Adjudication?

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Abstract

The WTO is facing difficult times as the renewal of the members of its Appellate Body seems to be in a deadlock. The opposition of some Members of the Organization to the process means the number of adjudicators is slowly dwindling. In this paper, we put this problem in context, by linking it to the greater concerns about consent in international adjudication. Consent amounts to the effective transfer of adjudicative power to a given tribunal. It is therefore argued that the non-renewal of AB members amounts to a withdrawal of consent by the parties concerned, be it legal or not. Should the problem persist, the WTO's dispute settlement system could be profoundly impacted, transforming it into a mere conciliatory body.

Reference

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Crisis at the Appellate Body: Towards more or less consent in WTO adjudication?

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Introduction

At the end of the year 2016, in an already difficult context1, Ambassador Carim invited the Membership of the WTO to launch the process of appointment for two Appellate Body ("AB") members. Ricardo Ramírez Hernández and Peter Van den Bossche’second term expiring in 2017, the Chairman of the Dispute Settlement Body ("DSB") suggested that the selection process should be over by June of that year.2 In the following meetings, it became clear that the process would not go as smoothly as had been the case in previous situations, with delays stemming from the lack of consensus on the exact selection process(es) to be followed.3 By now, the Members seem to have reached a deadlock, and no clear solution is in sight. With the looming threat of an AB unable to function, the issue becomes more and more pressing as time passes. Indeed, on the 10th of December 2019, absent a renewal or new nomination, the AB will drop to one single member. This is below the three-members threshold necessary for it to function4, practically neutralizing it. Moreover, the eventuality of a

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1 The nomination of Appellate Body member Zhao Hong had taken six months following the vacancy of the seat, WTO Dispute Settlement Body, Minutes of Meeting held on 23 November 2016, WT/DSB/M/389, 23 January 2017, para 13.6 ["WT/DSB/M/389"], while the Appellate Body was facing an ever-increasing workload, WT/DSB/M/389, para 12.1.
2 WTO Dispute Settlement Body, Minutes of Meeting held on 16 December 2016, WT/DSB/M/390, 7 February 2017, para 10.1. This approach was further developed in the first DSB meeting of 2017, WTO Dispute Settlement Body, Minutes of Meeting held on 25 January 2017, WT/DSB/M/391, 27 February 2017, para 8.1 ["WT/DSB/M/391"].
3 WT/DSB/M/391, supra note 2, para 11.1; WTO Dispute Settlement Body, Minutes of Meeting held on 20 February 2017, WT/DSB/M/392, 5 April 2017, para 9.1; WTO Dispute Settlement Body, Minutes of Meeting held on 21 March 2017, WT/DSB/M/394, 17 May 2017, para 9.1; WTO Dispute Settlement Body, Minutes of Meeting held on 19 April 2017, WT/DSB/M/396, 20 June 2017, para 6.1 ["WT/DSB/M/396"]. The fact that the nomination was already being delayed was brought up by some Members early on, WT/DSB/M/391, supra note 2, paras 11.3-11.5.
4 As stated by Article 17.1 of the DSU, "It shall be composed of seven persons, three of whom shall serve on any one case".

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conflict of interest for the remaining AB members could already block the organ from examining some of the appealed cases, even before December 2019.\textsuperscript{5}

The purpose of this paper in neither to point fingers and find culprits of the current predicament, nor to suggest solutions to the issue. Others have already done so in excellent papers.\textsuperscript{6} Rather, the object of this text is to provide a different understanding of the process currently taking place at the WTO, reframing it in the broader context of international jurisdictions. The paper underlines the stakes and consequences of the situation. In essence, we will discuss the role of consent to jurisdiction in the WTO, in light of the current issues the AB faces. To this end, we will start by providing a more detailed factual context, before turning to the core of the paper. The first question to be addressed is whether an obligation to nominate AB members exists, and in the affirmative, whether it does for the Membership as a whole or for WTO Members individually. As a second point, we will show that the current deadlock amounts to a withdrawal of consent to jurisdiction by the Members involved. Finally, we will discuss the implications of this withdrawal for the WTO as an international organization. We will show that this might lead to a fundamental change in the nature of the WTO’s dispute settlement system.

1. A brief history of the issue

As a preliminary section, which will help understand the rest of our approach, we must first turn to the context and nature of the problem, the canvas on which the legal issues will be painted. Our starting point is the follow-up of Ambassador Carim’s invitation mentioned above.

In April 2017, as new vacancies in the AB bench were approaching, some Members wishing to move forward started presenting joint statements. In those, they underlined the responsibility of the DSB in the proper functioning of the dispute settlement system.\textsuperscript{7} In May, the EU put forward a formal proposal\textsuperscript{8} in order to start the selection. More generally, the push forward came from two groups, a South

\textsuperscript{5} Sections II and III:1 or the Rules of conduct, WTO Dispute Settlement Body, Rules of conduct for the understanding on rules and procedures governing the settlement of disputes, WT/DSB/RC/1, 11 December 1996.
\textsuperscript{7} WT/DSB/M/396, supra note 3, para 6.2.
\textsuperscript{8} WTO Dispute Settlement Body, Appointment of Appellate Body Members: Proposal by the European Union, WT/DSB/W/597, 12 May 2017 ["WT/DSB/W/597"].
American one and a European one, as those were considered the seats to be filled. At this point, the US representative stated that due to the “ongoing transition in the United States' political leadership and the very recent confirmation of a new US Trade Representative”, it would be unable to support the proposal to move forward regarding one of the two vacancies. The issue did not progress, as the EU wished to launch the selection process for both seats jointly, refusing to accept two distinct nomination processes, and the US preferred to move forward on the “Latin American” one only. In that first phase, the refusal to proceed on nominations came from both the EU and the US, due to their opposing views on the matter. Concern was growing among the Membership, with twenty-four representative commenting on the issue in the July 2017 DSB meeting.

The issue aggravated in August 2017, with the resignation of the Korean AB member, Hyun Chong Kim, due to his appointment as Trade Minister in Korea. There were now two vacancies in the AB, with a third to come into effect in December 2017. At this point, the US discourse shifted before the DSB. Leaving the issue of the joint nomination process, the problem moved to the service of AB members on cases after the end of their terms. Although pressed to do so, the US did not provide a suggestion as to how the question should be addressed. During the September DSB

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10 WT/DSB/M/396, supra note 3, para 6.5.

11 WTO Dispute Settlement Body, Minutes of Meeting held on 22 May 2017, WT/DSB/M/397, 18 August 2017, para 10.3.


13 WTO Dispute Settlement Body, Minutes of Meeting held on 19 June 2017, WT/DSB/M/398, 13 September 2017, paras 8.3-8.4, 9.3.

14 WTO Dispute Settlement Body, Minutes of Meeting held on 20 July 2017, WT/DSB/M/399, 29 September 2017, paras 5.1-5.22.

15 WTO Dispute Settlement Body, Minutes of Meeting held on 31 August 2017, WT/DSB/M/400, 31 October 2017, para 5.1 [“WT/DSB/M/400”].

16 WT/DSB/M/400, supra note 15, paras 5.3-5.5.

17 WTO Dispute Settlement Body, Minutes of Meeting held on 29 September 2017, WT/DSB/M/402, 24 January 2018, para 6.1 [“WT/DSB/M/402”].
meeting, Members started pointing at the US as the cause for the inability to start the selection process. As underlined by the Canadian representative:

Members had heard that the selection processes could not be initiated unless and until the DSB had addressed the concerns of the United States regarding the continued service of Appellate Body members after their terms had expired. Canada called on the United States to inform the DSB precisely what their concerns were and to propose a solution.18

The US expressly acknowledged this in the same meeting, affirming:

In the U.S. view, we cannot be considering launching a selection process to fill a vacancy if the person to be replaced continues to serve and decide appeals. We first would need appropriate action on the part of the DSB.19

The US grievances later also focused on the fact that some AB members were allocated to an appealed case right before the end of their terms, even though said appeal was not to be heard in a near future.20

The October 2017 DSB meeting saw a last attempt by the South American group and the EU to push their own revised proposals.21 Faced with the recurring opposition from the US on the same grounds22, the two groups then changed their approach. The November meeting was the occasion for a new single proposal supported by fifty Members.23 Unable to have it adopted by the DSB, the coalition revised it three times, while growing to sixty-four Members24, to no avail. As noted by the US, the proposals

18 WT/DSB/M/402, supra note 17, para 6.3, see also the remarks by Norway and China, paras 6.7-6.8.
21 WT/DSB/W/596/Rev.5, supra note 9; WT/DSB/W/597/Rev.5, supra note 9; WTO Dispute Settlement Body, Minutes of Meeting held on 23 October 2017, WT/DSB/M/403, 20 February 2018, paras 8.1-8.38 ["WT/DSB/M/403"].
23 WTO Dispute Settlement Body, Appellate Body Appointments: Proposal by Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, The European Union, Guatemala, Honduras, Hong Kong, China; Mexico, Nicaragua, Norway, Pakistan, Peru, The Russian Federation, Singapore, Switzerland, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey, Uruguay and Viet Nam, WT/DSB/W/609, 10 November 2017.
24 WTO Dispute Settlement Body, Appellate Body Appointments: Proposal by Argentina; Australia; Brazil; Chile; China; Colombia; Costa Rica; Ecuador; El Salvador; The European Union; Guatemala; Honduras; Hong Kong, China; Kazakhstan; Korea; Mexico; New Zealand; Nicaragua; Norway; Pakistan; Panama; Paraguay; Peru; The Russian Federation; Singapore; Switzerland; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; Ukraine; Uruguay and Viet Nam, WT/DSB/W/609/Rev.1, 12 January 2018; WTO Dispute Settlement Body, Appellate Body Appointments: Proposal by Argentina; Australia; Plurinational State of Bolivia; Brazil; Canada; Chile; China; Colombia; Costa Rica; Dominican Republic; Ecuador; El Salvador; The European Union; Guatemala; Honduras; Hong Kong, China; India; Israel; Kazakhstan; Korea; Mexico; New Zealand; Nicaragua; Norway; Pakistan; Panama; Paraguay; Peru; The Russian Federation; Singapore; Switzerland; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; Ukraine; Uruguay and Viet Nam, WT/DSB/W/609/Rev.2, 16 February 2018; WTO Dispute Settlement Body, Appellate Body Appointments: Proposal by Argentina; Australia; Plurinational State
do not include the issue regarding AB members serving after the end of their term. It should be noted that, when discussing the issue before the General Council, the US Ambassador only raised the issue as an apparently subsidiary one. The emphasis was placed on a broader issue, the so-called “judicial activism” of the AB. Further discussions on the issue have not led to any solution. With no clear perspective of resolution in the current talks, the future of the AB is in jeopardy due to this deadlock.

2. The obligation to nominate AB Members

Having placed the factual canvas, we can now turn to the legal substance. The first argument of this paper relates to the existence (or lack thereof) of a responsibility to nominate AB members. This question can be further subdivided into two distinct ones. Is there a responsibility of the Membership of the WTO as a whole to do so? In the affirmative, can this responsibility trickle down onto individual Members?

As an entry door into the first question, one should turn to the text of the Dispute Settlement Understanding (“DSU”). Article 17.1 explicitly states “A standing Appellate Body shall be established by the DSB.” Similarly, Article 17.2 further develops: “The DSB shall appoint persons to serve on the Appellate Body for a four-year term.” The word “shall” has usually been understood as a synonym for “must”, thereby reflecting an obligation. This approach is also shared by a large part of the Membership. For instance, in the September 2017 meeting, no less than forty-three Members underlined that the DSB had a collective obligation to ensure the proper functioning of the AB, including the nomination of its members. There seems to be

of Bolivia; Brazil; Canada; Chile; China; Colombia; Costa Rica; Dominican Republic; Ecuador; El Salvador; The European Union; Guatemala; Honduras; Hong Kong, China; India; Indonesia; Israel; Kazakhstan; Korea; Mexico; New Zealand; Nicaragua; Norway; Pakistan; Panama; Paraguay; Peru; The Russian Federation; Singapore; Switzerland; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; Ukraine; Uruguay and Viet Nam, WT/DSB/W/609/Rev.3, 27 April 2018.


28 Emphasis ours.

29 Emphasis ours.


31 WT/DSB/M/402, supra note 17, paras 6.3, 6.4, 6.10, 8.2, 8.4, 8.20, 8.21.
little doubt as to the fact that legally speaking, there is indeed an obligation for the DSB to select AB members.

The question of individual obligation of Members in this process is, however, more murky. Some Members seem to believe such duty exists. For instance, China underlined the “duty and responsibility of each Member”\(^{32}\), and Singapore, on behalf of the ASEAN Members, as well as Chile, on behalf of the GRULAC referred to “Members”\(^{33}\) having this obligation, rather than the Membership as a whole. However, the text of the DSU on this point is less clear than regarding the collective obligation. We therefore briefly turn to the law of state responsibility for an attempt at an answer.

The 2001 Draft articles on Responsibility of States for Internationally Wrongful Acts (the “ILC Draft Articles”) touch upon the question of shared responsibility. Some of them, it could be argued, enjoy a customary status\(^{34}\), and in any case bear persuasive weight.\(^{35}\) Here, the international responsibility of a State is the result of an internationally wrongful act.\(^{36}\) Two conditions need to be met: “(a) [the action or omission] is attributable to the State under international law; and (b) [it] constitutes a breach of an international obligation of the State”\(^{37}\). Both these points need to be addressed in order to determine whether it is possible to single out the responsibility of a Member for the non-renewable of AB members, as well as the question of the causal link.

Before answering these questions, we note that another way to focus the responsibility on individual Members rather than the DSB exists. Indeed, we are mindful of the existence of Article 47 §1 of the ILC Draft Articles, which states: “Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act”. However, this is not the type of attributability discussed here. Article 47 §1 deals with joint responsibility, rather than attribution of responsibility to a single Member. Under article 47 §1, the whole group is still responsible, as much as every single member of it is, individually. Conversely, the analysis of Article II aims at determining whether a single Member can be exclusively liable, bypassing the responsibility of the whole group.

The first point that needs to be addressed here is the attribution of an act to a Member under international law.\(^{38}\) Attribution is the least controversial of the issues.

\(^{32}\) WT/DSB/M/402, supra note 17, para 6.10.
\(^{33}\) WT/DSB/M/402, supra note 17, paras 6.4, 8.21.
\(^{36}\) Article 1, ILC Draft Articles, supra note 34.
\(^{37}\) Article 2, ILC Draft Articles, supra note 34.
\(^{38}\) Article 2(a), ILC Draft Articles, supra note 34.
The representative of a Member at the DSB is usually under the authority of the Ministry of Trade or Foreign Affairs. It can be assumed – barring exceptional circumstances – that this person is “empowered by the law of that State to exercise elements of the governmental authority”\textsuperscript{39}. Therefore, the conduct of a diplomat in the DSB can be attributed to the Member it represents.

The second question is more delicate. Is it possible to argue that the responsibility of the DSB to nominate AB members extends to individual Members of the WTO? In that regard, we submit that the nomination itself cannot be an individual obligation. A single Member does not have the possibility to respect this obligation by itself, due to the consensus requirement.\textsuperscript{40} It would therefore be meaningless to impose an obligation to act when the act depends on external circumstances – i.e. the agreement of all other Members. This is the essence of the problem of causality in the law of State responsibility.\textsuperscript{41} Where a State can, causally, not provide a given result alone, it should not be held responsible for its failure to act, in particular when it did all in its power to do so. Since a single Member cannot nominate an AB member by itself, it cannot be responsible for it alone.

This is why the failure of the DSB to comply with its duty should be the responsibility of those who are actually the cause of it. In that context, we submit that there is an individual obligation stemming from the DSB’s own duty. WTO Members have an obligation to negotiate the nomination in good faith. Considering that they cannot reach a decision alone in the WTO, an interpretation of Article 17.1 and 17.2 following the VCLT would entail an obligation to negotiate such decision. It would be the only way to give an \textit{effet utile} to these paragraphs.\textsuperscript{42} Article 17.1 and 17.2 entail at the very least a \textit{pactum de negotiando}, and possibly even a \textit{pactum de contrahendo}.\textsuperscript{43} The obligation of result – the nomination of AB members – can only be reached through negotiations, be they acrimonious or not. As Owada puts it: “A subsequent refusal to make an agreement or an unreasonable delay in its conclusion could violate the \textit{pactum} and constitute a breach of international law”\textsuperscript{44}.

In the existence of an obligation to negotiate, negotiations should be held in good faith. In general, international jurisdictions have argued that negotiations are more than a simple formal exercise. As it was aptly put in the \textit{Graeco-German Arbitration}:

\textsuperscript{39} Article 5, ILC Draft Articles, \textit{supra} note 34.
\textsuperscript{40} Article 2.4 of the DSU.
\textsuperscript{42} On that point, see Hersch Lauterpacht, “Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties” (1949) 26 British Yearbook of International Law, 48-85.
In this case, an agreement to negotiate implies much more than mere willingness to accept the other side’s complete capitulation. For such a result, negotiations are neither necessary nor desirable. We construe the pertinent provisions of the Agreement to mean that, notwithstanding earlier refusals, rejections or denials, the parties undertook to re-examine their positions and to bargain with one another for the purpose of attempting to reach a settlement.45

More generally, it is usually held that where an obligation to negotiate exists, negotiations must be held in good faith.46

It stems from the above that while an obligation might exist for the DSB itself to nominate AB members, some of the WTO Members could be individually liable due to their lack of good faith in the negotiations to that effect. Remains to determine what would amount to good faith negotiations. Depending on which side of the issue one is defending, it could be argued that the other is not negotiating in good faith, refusing to engage in the one’s approach. As announced early in this paper, we do not intend to take a particular stance with regards to the specific issue at hand, but rather suggest a legal framework that could be applied to the problem.

3. The withdrawal of consent to jurisdiction

Having reached the conclusion that Members could be individually liable for the non-renewal of AB members, we now turn to the second – and main – argument of this paper. We submit that the current inability of Members to renew the AB vacancies amounts to a withdrawal of consent to jurisdiction. To demonstrate this, we will first look at the principle of consent as the general cornerstone of international jurisdiction. Following that, we will clarify the exact meaning of consent. When one State or Member consents to jurisdiction, what is the specific action that embodies it? Finally, we will apply this reasoning to the specific situation of the WTO, showing that indeed, the non-renewal of AB members amounts to withdrawal of consent.

This reasoning first requires a brief overview of the concept of consent to jurisdiction. International jurisdictions, in general, all insist upon the primacy of consent. As stated by the PCIJ as early as 1923:

It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.\textsuperscript{47}

The principle has then been upheld throughout the case law of the ICJ, as well as other jurisdictions. Be it ITLOS, ICSID, or \textit{ad hoc} arbitration, the same reasoning applies.\textsuperscript{48} This reflects the basic fact that in international law, jurisdiction is attributed in an ascending dynamic, unlike in national systems.\textsuperscript{49} Ultimately, consent is at the core of the jurisdiction of international courts and tribunals, having been recognized across the board.

In the WTO, the concept of consent to jurisdiction is much less discussed. Indeed, the most it is approached by the AB is when it mentions that the WTO panels and AB enjoy “compulsory jurisdiction”.\textsuperscript{50} Even though consent might not be directly addressed by the WTO jurisdictions, it does not drastically change the underlying assumption with regards to the attribution of jurisdiction. No one argues that the WTO is a derogation to the fundamental nature of international law. This is also the shared understanding of most of the doctrine on the topic; consent to jurisdiction is embedded in the WTO Agreements.\textsuperscript{51} The panels and AB do not draw their power from nature, God or anything of the sort. Rather, the Members composing the organization would need to give this power, in one way or another. The implication is that the DSU includes built-in consent. Provisions such as Article 2, 3, 19 or 23 can be construed as the expression of the Members’ consent upon accessing the organization. While this consent to jurisdiction is part of a more general package, it is nevertheless given. The exact way in which it is done, is, however, debatable. Additionally, it might be taken for more granted than it actually is.

While the fact that consent is the root of all international adjudication is not disputed,\textsuperscript{52} its exact definition is scarcely discussed. Consent is usually related to the voluntarism of international law.\textsuperscript{53} However, its precise meaning is foggier. For the purpose of this paper, we submit a definition of consent to jurisdiction based on the effective transfer of a power to a jurisdiction. Consent to jurisdiction should not be

\textsuperscript{47} \textit{Status of Eastern Carelia}, PCIJ Series B, No. 5, 27.

\textsuperscript{48} For ICSID, see for instance \textit{Daimler Financial Services AG v. Argentine Republic}, ICSID Case No. ARB/05/1, Award, 22 August 2012, para 175. For ITLOS, see for instance \textit{M/V “Norstar” (Panama v. Italy)}, Preliminary Objections, Order of 15 March 2016, ITLOS Reports 2016, 31, para 172.

\textsuperscript{49} With regards to the “ascending” and “descending” concepts, see Martti Koskenniemi, \textit{From Apology to Utopia: The Structure of International Legal Argument}, 2\textsuperscript{nd} Edition (Cambridge: CUP, 2006), 59.

\textsuperscript{50} \textit{US – Continued Suspension}, supra note 30, para 341.


defined by the form in which it is expressed, but rather by its actual effects.\textsuperscript{54} In this approach, the act of consenting to jurisdiction is the actual transfer of power to adjudicate, rather than the creation of an obligation to appear in a given dispute. This approach is consistent with the one taken by the ICJ in the \textit{Interpretation of Peace Treaties} Advisory Opinions. At the time, the Court was to rule on the obligation for Bulgaria, Hungary and Romania to nominate arbitrators.\textsuperscript{55} Confronted with their unwillingness to do so, the Court could only reiterate that the countries had an obligation in that sense.\textsuperscript{56} It could, however, not nominate the arbitrators in the countries’ stead, nor create the arbitral commission by itself.\textsuperscript{57} This example shows the clear distinction between an obligation to give consent and consent itself. One might be obliged to give its consent to a jurisdiction, yet it is not sufficient for it to be construed as actual consent. Corollary to this, consent is only given once no further action from the State is required for the jurisdiction to be able to operate effectively. If an additional step is needed – as was the case in the \textit{Interpretation of Peace Treaties} – there is no proper consent given. The ability for a jurisdiction to provide a binding decision is non-existent, as would be the case if the first agreement had not been signed in the first place.

Any other approach would bring a never-ending quest for the source of consent. If the last step is not the one constitutive of consent, what is to say that the Peace treaties would be the ones containing consent? If the nomination of an arbitrator cannot be construed as consent because it simply flows from an overarching treaty, what objective reason justifies that the treaty embodying the obligation to arbitrate can? This treaty is not a self-standing instrument either. Treaties are dependent upon the \textit{pacta sunt servanda} rule.\textsuperscript{58} Therefore, \textit{pacta sunt servanda} would be a necessary precondition to the validity of the treaty embodying consent. No one would seriously argue that \textit{pacta sunt servanda} in itself embodies consent.\textsuperscript{59} If the ultimate step is not the one reflecting actual consent, one would be on a never-ending quest to find the source of it.

The ICJ indirectly confirmed this reasoning in the \textit{Fisheries Jurisdiction (Spain v. Canada)}. On that occasion, the Court was invited to rule on the interpretation of an acceptation of its jurisdiction. It refuted Spain’s argument, in which the application of the “conform interpretation” principle had been suggested. Instead, the Court said:

\begin{quote}
\textit{Spain’s position is not in conformity with the principle of interpretation whereby a reservation to a declaration of acceptance of the compulsory}
\end{quote}

\textsuperscript{54} See \textit{Rights of Minorities in Upper Silesia (Minority Schools)}, PCIJ Series A No. 15, 24.
\textsuperscript{55} \textit{Interpretation of Peace Treaties}, Advisory Opinion, ICJ Reports 1950, 65, 77.
\textsuperscript{56} \textit{Interpretation of Peace Treaties (Second Phase)}, Advisory Opinion, ICJ Reports 1950, 221, 228-229.
\textsuperscript{57} \textit{Ibid.}
\textsuperscript{58} Article 26 of the Vienna Convention on the Law of Treaties.
\textsuperscript{59} If that approach was upheld, international jurisdiction would not be built upon consent, seeing as \textit{pacta sunt servanda} is a customary rule of international law. Any State would automatically give consent through its adherence to this principle. Anthony Aust, \textit{Modern Treaty Law and Practice}, 3\textsuperscript{rd} Edition (Cambridge: CUP, 2013), 160.
jurisdiction of the Court is to be interpreted in a natural and reasonable way, with appropriate regard for the intentions of the reserving State and the purpose of the reservation. In point of fact, reservations from the Court’s jurisdiction may be made by States for a variety of reasons; sometimes precisely because they feel vulnerable about the legality of their position or policy. Nowhere in the Court’s case-law has it been suggested that interpretation in accordance with the legality under international law of the matters exempted from the jurisdiction of the Court is a rule that governs the interpretation of such reservations.60

The ICJ is suggesting that it cannot bend the consent of States beyond what is the normal understanding of it. It is not its role to modify the consent as is given by the State. If the Court itself cannot act as a substitute to provide consent, the State itself is the only able to do it. It will do it the moment it actually transfers the power to adjudicate to a given jurisdiction, and it is not up to the jurisdiction to fix an illicitly framed consent.

Getting closer to the WTO, this point was also addressed in an ICSID case. In Menzies v. Senegal, the tribunal was called upon to decide whether the MFN clause of the GATS could allow an investor to import consent from BITs with other countries. In that respect the tribunal argued:

Le Tribunal arbitral estime que, même dans l’hypothèse où l’article II de l’AGCS s’appliquerait à l’arbitrage d’investissement (ce qui n’a pas été démontré), il serait seulement de nature à créer une obligation pour les Etats signataires d’offrir l’arbitrage dans le futur et ne représente pas un consentement à l’arbitrage ou à l’extension d’une offre d’arbitrage.61

In other words, obligation to consent is one thing, actual consent is another.

One should note that the ultimate step of consent can take many forms. In the cases identified above it could be the nomination of the arbitrators, or the mere declaration under Article 36 §2 of the Statute of the ICJ. When giving consent to a permanent jurisdiction, consent is properly given once one of the parties can seize the institution by itself, without depending on a further action of the other. Ad hoc dispute settlement, however, can often depend on the nomination of the adjudicators. This last action is often the one enabling the jurisdiction to proceed.

Under those circumstances, the possible violation of an obligation to nominate an Appellate Body member is irrelevant when assessing the actual effects of the non-renewal of the AB bench. Indeed, as suggested above, one could construe an obligation to negotiate in good faith in this context. This is, indirectly, an obligation to

60 Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, ICJ Reports 1998, 432, para 54.
61 Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. République du Sénégal, ICSID Case No. ARB/15/21, Sentence, 5 August 2016, para 141.
consent, due to it being result-oriented, rather than means-oriented. However, whether the obligation exists or not does not bear upon the fact that consent is being withdrawn. Through the non-renewal of its members, the Appellate Body is being made concretely ineffective. It is not the case yet, but the situation could arise by the end of 2019, when the AB drops under three members. At that point, be it legal or not, through collective inaction or individual stalling, the AB will not be able to function. As suggested above, consenting is defined by an effective transfer of the power to adjudicate. A contrario the effective removal of this power to adjudicate amounts to a withdrawal of consent. A jurisdiction not able to act anymore is, in practical terms, in the same situation as a jurisdiction who was never granted such power. Therefore, we argue that a process of withdrawal of consent is currently underway, and could be finished by the end of 2019.

The question of obligation to nominate identified above is irrelevant to determine that there is a withdrawal of consent currently underway. It is, however, useful in determining whose withdrawal it is. Indeed, establishing which Member(s) are bound by this obligation and responsible for its violation also indicates from whom the process stems.

The first possibility identified above is that of a shared obligation of the Membership of the WTO to nominate AB members. Under those circumstances, one might argue that the whole of the Membership is effectively withdrawing its consent to jurisdiction. Akin to the effects of an amendment of the DSU, the Members are rendering the AB ineffective. Should the obligation fall upon individual Members, the non-renewal of the AB members would entail different circumstances. Firstly, it would signify that the Member responsible for the violation of that obligation would individually be withdrawing its consent. By rendering the AB ineffective, the Member is ensuring that this jurisdiction is unable to adjudicate on cases in which it might be involved. However, and this is where the specificities of the WTO come into play, the Member would also effectively be withdrawing the consent of the rest of the Membership. Due to the consensus rule in force in the WTO\textsuperscript{62}, the opposition of a single Member is sufficient to block the whole process. Incidentally, the Member is rendering the AB unable to function beyond procedures involving it. It is also removing the appeal option for the other Members in the process. This might not be as much of an issue when the whole of the Membership fails to respect its obligation, because there is an identity between the responsible group and that suffering the consequences. However, when a single Member is responsible for the non-renewal, its individual failure to uphold its obligation still entails consequences for all the other Members. Not only are they not able to bring a claim against the Member withdrawing its consent, they are

\textsuperscript{62} Article 2.4 of the DSU.
also prevented from bringing complaints against other Members wishing to maintain their consent. A single Member violating its obligation to nominate an AB member is effectively not only withdrawing its own consent to jurisdiction, but also withdrawing it for the whole of the Membership.

One might wonder how it is that one Member may withdraw consent for the others. This possibility is based on the primary assumption of this paper, that consent is the effective transfer of adjudicatory power. In this perspective, giving consent can be the result of a delicate construction, with actual consent being the ultimate step. Consent to the ICJ, for example, depends upon the ICJ’s prior existence and functioning to be effective. The WTO is in a similar situation, in that consent to the AB’s jurisdictions is made of different parts. Among them, the WTO’s existence and functioning are also necessary. Additionally, the presence of nominated AB members is also needed. Akin to a house of cards, when one piece is removed, the whole construction crumbles to the ground. Precisely because consent is not simply the adhesion of a country to a given treaty, it can have broader effects. As mentioned above, the accumulation of different elements is the process of building consent, with the final one actually giving the consent. However, all those elements can be necessary ones. This is why the actual order in which different elements of consent are given does no matter, what matters is the moment all of them are present. The consequence of this is that withdrawal of consent happens as soon as one of these necessary elements vanishes. Therefore, depending on the way the jurisdiction is built, it can entail consensus-based decisions to remain effective. In the absence of those decisions, consent can vanish for all.

4. The consequences

The last questions stemming from the issues identified above is that of the consequences of those changes. Beyond the simple fact that the non-renewal of the AB members is a withdrawal of consent, what does it mean for the broader organization itself?

The first point that can be underlined is that such change essentially means a return to the GATT situation. Under the GATT, Members had to consent to the jurisdiction of panels on an ad hoc basis, at various stages of the proceedings. For instance, the respondent could object to the establishment of the panel by refusing to join a consensus on the matter. Similarly, the composition of a panel could be objected to. Finally, and maybe more importantly, the parties to the dispute could each refuse the adoption a panel report after its issuance. All these possibilities are as many

63 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT Document L/4907 (28 November 1979), BISD 26S/210, para 10 [“GATT Understanding”]
64 GATT Understanding, supra note 63, para 11
65 GATT Understanding, supra note 63, para 21; Article XXIII:2 of the GATT.
situations in which consent is built. It is only through a positive decision in all these situations that consent is given, they are all necessary steps for the issuance of a binding decision.

Should consent be effectively withdrawn following the process outlined above, the situation would not be substantially different. According to Article 16.4 of the DSU, an appealed panel report can only become binding after the completion of the appeal.\textsuperscript{66} The implication is that any party to the dispute (in particular the losing one) has a blocking power. For that reason, consent to the jurisdiction would not be given until after the issuance of the report. The absence of appeal would be the final step rendering effective the consent of the Members to the dispute. Obviously, nothing would prevent Members from agreeing beforehand not to appeal a report. However, it is difficult to see what would, in practice, stop the losing party from doing it anyway, after the report has been issued. While an agreement might stand, the current case law of the WTO does not lend much weight to agreements taking place outside the organization’s framework, in particular regarding the limitation of dispute settlement possibilities.\textsuperscript{67} For those reasons, the situation would be very similar to that of the GATT. Consent would not be given before the beginning of the procedure anymore. Rather, it would once again be done on an \textit{ad hoc} basis after the issuance of the judgement.

In this situation, one might even wonder to what extent the WTO adjudicating bodies could still be considered \textit{jurisdictions}. Indeed, one of the main principles applied by all international (and national) jurisdictions is that of \textit{perpetuatio fori}\.\textsuperscript{68} That concept requires a court or a tribunal to assess its own jurisdiction at the time it was seized. In the words of the ICJ:

\begin{quote}
If at the date of filing of an application all the conditions necessary for the Court to have jurisdiction were fulfilled, it would be unacceptable for that jurisdiction to cease to exist as the result of a subsequent event. [...] the removal, after an application has been filed, of an element on which the Court’s jurisdiction is dependent does not and cannot have any retroactive effect. What is at stake is legal certainty, respect for the principle of equality and the right of a State which has properly seised the Court to see its claims
\end{quote}

\textsuperscript{66} Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. 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.

\textsuperscript{67} WTO Appellate Body Report, \textit{Peru – Additional Duty on Imports of Certain Agricultural Products}, WT/DS457/AB/R, adopted 31 July 2015, para 5.26, fn 106. It should be noted that recourse to Article 25 of the DSU could be another way around it, with a formal agreement in advance to submit the panel report to arbitration. Here, if the process is laid out in advance (in particular the nomination of the arbitrators), consent could be given in advance, see Andersen et al., \textit{Article 25, supra} note 6.

\textsuperscript{68} Examples in various jurisdictions can be found in the following cases: \textit{Nottebohm (Liechtenstein v. Guatemala)}, Preliminary Objections, Judgement, ICJ Reports 1953, 111, 122; \textit{Plama Consortium Limited v. Republic of Bulgaria}, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para 140; \textit{M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)}, Judgment, ITLOS Reports 2013, 4, para 151.
decided, when it has taken all the necessary precautions to submit the act instituting proceedings in time.\textsuperscript{69}

By going back to a system in which a single Member, party to the dispute, could block the adoption of a report after its issuance, the WTO would essentially void one crucial point of its jurisdictions.

The consequence of that change is the modification of the very nature of its jurisdictions. Not only the AB, but also the panels would suffer this change. By definition, a body entrusted with solving a dispute, and whose decision is not binding can hardly be called a jurisdiction. Rather, the fact that the parties can decide the fate of the decision after its issuance transforms it into a form of conciliation proceedings.\textsuperscript{70} This argument has already been made regarding GATT panels. Some authors argue that a GATT panel was indeed closer to a conciliation proceeding than a jurisdictional process.\textsuperscript{71} This reasoning could find a new youth should the non-renewal of AB members persist.

A legitimate question would be the exact difference between this situation and the one currently prevailing. Even though they cannot do it alone, WTO Members already have an option to render the decision non-binding. A “negative consensus” of the DSB to that effect allows it to dismiss a panel or AB report.\textsuperscript{72} However, the difference is not simply one of degree, but one of nature. We must recall here the definition of consent provided above. Consent is the ultimate step taken by a State, after which anyone can seize a given jurisdiction against it. Combining this with the notion of \textit{perpetuatio fori}, it follows that consent means no unilateral action from the defending State can void the proceedings. Should the complainant desire so, it can proceed until the conclusion of the case, including its binding solution. The situation is no different under the current functioning of the WTO. Due to the principle of “negative consensus”, the complainant can always bring a case to its proper end. Even if the whole Membership opposes the adoption of the report, the complainant can refuse to join the consensus, leading anyway to the adoption of the report. In other words, even if the theoretical possibility of refusing the adoption of the report exists, its actual use depends on the complainant and the respondent jointly. In that regard, the situation is similar to that of a withdrawal of the case before the ICJ.\textsuperscript{73} The principle of \textit{perpetuatio fori} applies to


\textsuperscript{72} Articles 16.4 and 17.14 of the DSU.

\textsuperscript{73} See Article 89 of the Rules of the Court.
the extent that the respondent wants to withdraw consent alone. The joint withdrawal of the case by a complainant and the respondent does not fall under that principle.\textsuperscript{74}

Interestingly, the balance prevailing at the time of the GATT would be kept. As Mexico explained in the negotiations of the DSU: “The purpose of establishing an appellate body is to compensate for the virtually automatic adoption of panel reports”\textsuperscript{75}. The removal of the AB entails the disappearance of the panel reports’ automatic adoption. In other words, according to Mexico at the time, consent to compulsory jurisdiction was necessarily linked to the existence of the AB. In sum, the current predicament the WTO finds itself in is not a new situation \textit{per se}. The dispute settlement process under the GATT already had similar characteristics.

Conclusion

Through the reasoning above, we attempted to underline the fundamental changes to the WTO’s very nature looming on the horizon. The organization is facing one of the most challenging times of its existence, and the outcome of this situation might durably shape a new global trading system.

In particular, we have tried to demonstrate two points. The first relates to the responsibility of the DSB and, with more granularity, individual Members. The whole WTO Membership has an obligation not only as a group, but also as individual Members to negotiate in good faith the renewal of the members of the Appellate Body. However, in spite of this obligation, the current situation reflects an ongoing withdrawal of consent to the jurisdictions of the WTO. Not only the AB is impacted through its sheer disappearance. The panels also are. The potential loss of binding power of their reports is a side effect of the current problem.

One should note that the issue identified above is a distinct one from that of the Membership of the WTO. The consent being withdrawn is focused on jurisdiction, and not to the whole organization. Nevertheless, coming back to the original question of this paper, one could argue that the role of consent in the WTO would be reinforced. It would become a renewed question in every single case. However, because both jurisdictions would lose their status, and arguably their judicial function, the WTO is facing fundamental changes of nature. One of its pillars, the rule of law, is in jeopardy.\textsuperscript{76}

Bringing together all the elements of this paper, a final note can be made. Should one Member be liable for the non-renewal of the AB bench, remains the question of enforcement. Arguably, this Member could be targeted by a complaint from other

\textsuperscript{74} For examples, see any of the cases withdrawn before the ICJ. If the principle of \textit{perpetuatio fori} also applied here, the Court would simply have not allowed such withdrawal.

\textsuperscript{75} Negotiating Group on Dispute Settlement, \textit{Proposal by Mexico}, MTN.GNG/NG13/W/42, 12 July 1990, para 12.

Members in the WTO’s own dispute settlement system. Since the DSU itself is a covered agreement, obligations stemming from it can be litigated. Moreover, the term “measure” has been interpreted widely, to include “any act or omission attributable to a WTO Member”. Hence, the omission to act and nominate an AB member could fit into a complaint before the WTO jurisdictions. However, the actual process would run into the very hurdle it is trying to overcome. Due to the impending (temporary?) death of the AB, the complaint would most likely find a closed door at the end of the panel stage, limiting its binding power. Ultimately, the issue would boil down to the usual Hartian problem, do international obligations exist without the means to enforce them?

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77 Article 1.1 and Appendix 1 of the DSU.
78 Article 3.3 of the DSU.