

The International Law Gaze: America's Fist and the WTO Appellate Body

Dr. Alberto Alvarez-Jimenez, University of Waikato, on how the United States is undermining the WTO Dispute Settlement System

Saturn Devouring His Son is a famous and disturbing painting by Francisco Goya that you can see at the Prado Museum in Madrid. (<http://www.franciscogoya.com/saturn-devouring-his-son.jsp>). It depicts the Greek myth of the Titan Cronus (Saturn), who, fearing to be overthrown by his sons, devoured each of them at birth, save one. Like Saturn, the United States seems to be attempting to devour the Appellate Body of the World Trade Organization (WTO), the jewel of the dispute settlement system of an organization that the United States much helped to give birth to. What is the United States doing? It is blocking the consensus within the WTO for the appointment or reappointment of Appellate Body members to the point that the Appellate Body has been forced to operate with a reduced number of members. You should not dismiss this policy as just a new expression of the tragicomedy that is taking place in Washington since January: the attack on the Appellate Body is one and the very same that the Obama administration put in place in 2016 when it blocked the reappointment of Seung Wha Chang, a South Korean Appellate Body member whom the United States thought of as having views that expanded the authority of the Appellate Body. (Alex Lawson, "US Playing with Fire in WTO Appellate Body Spat" QLAW360. May 24, 2016. <https://www.law360.com/articles/799678/us-playing-with-fire-in-wto-appellate-body-spat>). The action forced WTO members to elect another candidate, Hyun Chong Kim, at the end of

2016. However, he resigned to become South Korea's Trade Minister in 2017, thus creating a vacancy again. Two other Appellate Body members, Ricardo Ramirez and Peter Van den Bossche, ended their second terms in 2017. The three vacancies have not been filled, due to the United States' behaviour. For an institution of seven members, this situation is already severely affecting its operation.

The timing of the attack cannot be worse for the Appellate Body, which has seen a significant increase in its case load in 2016 and 2017, in the number of complainants and third parties and in the complexity of litigation. It is obvious that the Appellate Body requires its full bench to effectively deal with this challenge. As well, three key or massive cases are looming for appeal in the coming months: *EC and certain Member States – Large Civil Aircraft (Article 21.5 – US)*, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, and *Australia – Tobacco Plain Packaging*. (Claus-Dieter Ehlermann "The Workload of the WTO Appellate Body: Problems and Remedies" (2017) 20 *Journal of International Economic Law* 705 at 706). (Ehlermann "The Workload of the WTO Appellate Body").

How far is the US planning to go with its attack? The coming months will be key. The European Union will nominate candidates to replace Van den Bossche. It will be important to see if the Trump administration blocks the appointment of any of the candidates most favoured by the European Union and, if so, for how long, and how the latter will react.

Before proceeding, a few words on the Appellate Body. On paper, it is not like other international courts: Appellate Body members work “part time” for the WTO and have other responsibilities, which certainly cannot conflict with their duties. (Article 17.3. WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)). You may find it odd that, legally, Appellate Body reports are not binding on their own or even on the parties to the case. The reports need to be adopted by the WTO dispute settlement body (DSB), a political organ made up of the entire WTO membership. (Article IV.3 of the WTO Agreement & Article 17.14 DSU). Although all reports have been adopted, and will likely be adopted because the lack of adoption would require the consensus of the DSB, even the support of the winning party to the case, a very unlikely event. The fact is that it is a WTO political institution that formally gives the Appellate Body reports their legal authority. The Appellate Body has a clear institutional constraint: it cannot add to or diminish the WTO members’ rights and obligations under the WTO covered agreements. (Art. 19.2 DSU). You may believe that it is just the repetition of the old *mantra* that courts only apply but never create law, and you might be right to certain extent. But although the limitation does not prevent the Appellate Body from being creative, it sets a limit on how far the Appellate Body can go in its law-making endeavours. To be sure, the Appellate Body follows due process, and it is an independent and impartial institution. (Articles 11 and 17.3 DSU). As was said, it has only seven members, elected for four years, who can be re-elected for an additional term (Article 17.1 DSU) and must be representative of the WTO membership. (Art 17.3 DSU). Major trading partners—the United States, the European Union, and, recently, China—always have a national as an Appellate Body member. The other members come from Africa, Asia, Oceania,

and Latin America. In sum, the negotiators that drafted the DSU and designed the Appellate Body had in mind an institution that would operate only exceptionally. (Mireille Cossy "From Theory to Practice. Drafting and Applying the Dispute Settlement Understanding" in Gabrielle Marceau (ed) *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press, Geneva, 2015) 300 at 303.

As usually happens, to understand international bodies or institutions, one has to also look at their operation. In this realm, the Appellate Body is cast in a different way. It is the most active international adjudicator of the world in terms of the number of decisions it renders annually; it used to meet its very tight deadlines to adjudicate trade disputes, and it did so with an exceptionally low number of anonymous separate or dissenting opinions, contrary to, for instance, the ICJ, which is famous for the opposite. (Alberto Alvarez-Jimenez "A Perfect Model for International Adjudication? Collegial Decision-Making in the WTO Appellate Body" (2009) 12 *Journal of International Economic Law* 289).

Needless to say, the United States is a very active litigant and is involved in multiple disputes brought before the WTO dispute settlement system, either as complainant, respondent, or third party. In fact, the United States has a higher winning rate in litigation in the WTO than any other major user of its system (Gregory Shaffer, Manfred Elsig & Mark Pollack "Trump is fighting an open war on trade. His stealth war on trade may be even more important" *Washington Post*, Sept. 27, 2017). As if this were not sufficient, you will also find that such

active involvement appears to have important influence not on the results of litigation, but on the content of the interpretation of applicable law by the Appellate Body and WTO panels. (Mark Daku and Krzysztof J. Pelc “Who Holds Influence over WTO Jurisprudence?” (2017) 20 Journal of International Economic Law 233 at 245.

If these are the Appellate Body’s (impressive) record over the last 20 years and the United States’ results as a major user of the WTO dispute settlement system, you may ask why the United States is so keen to play Saturn. For the answer, it is important to come back to the first days of the WTO.

Déjà Vu

The reality is that some sectors in the United States have always viewed the WTO dispute settlement system with suspicion, even before it started to operate. During the implementation of the Uruguay Round Agreements in the United States, there were serious attempts to undermine WTO panel or Appellate Body reports by creating an internal trade institution, the WTO Dispute Settlement Review Commission, that would determine whether or not the given report adverse to the United States was in conformity with WTO law. (John H. Jackson, *The Jurisprudence of GATT & the WTO* (Cambridge University Press, Cambridge, 2000) at 394). In other words, the draft legislation purported to create an American institution even higher than the Appellate Body on WTO law. The bill was not approved, because among

other reasons, other trade partners announced a similar move. (Jackson at 394). In any case, the seed of dissatisfaction with the WTO was then planted.

You may also find of interest the fact that the tactic was deployed by the United States in 1995, when it threatened to block the appointment of the first Appellate Body members if the WTO did not adopt Rules of Conduct for them. The WTO did so. (Gabrielle Marceau, "From the GATT to the WTO. The Expanding Duties of the Legal Affairs Division in Non-panel Matters" in Gabrielle Marceau (ed) *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press, Geneva, 2015) 244 at 261.

But there are more oddities behind the American behaviour: the United States' trade establishment has often been unhappy with how its own appointed appellate body members have performed. In its view, some of these members have been unable to protect American interests. Only two American members have been reappointed: James Bacchus one of the original members, and Thomas Graham, a current member. The other two have received different treatment. Merit Janow, a Columbia University law professor, had a single term, and so did Jennifer Hillman, who, prior to joining the Appellate Body, was a member of the United States International Trade Commission. She expressed her willingness to serve a second term, but the United States made known to her its objection to her reappointment. (Appellate Body Annual Report for 2011. June 2012 at 4 and Claus-Dieter Ehlermann "The Workload of the WTO Appellate" Body at 713).

It is hard to understand how a country that has the immense advantage of having a national sitting in the Appellate Body all the time still complains about its own choices and continues to blame a collegial institution for failing to take into account American interests enough. You will find it surprising that the competence with which Ms Janow and Hillman carried out their duties has not been questioned by anybody outside the United States. Further, Jennifer Hillman and James Bacchus have already openly condemned their own country's policy. (Alex Lawson "[US Playing with Fire in WTO Appellate Body Spat](https://www.law360.com/articles/799678/us-playing-with-fire-in-wto-appellate-body-spat)" QLaw360. May 24, 2016. <https://www.law360.com/articles/799678/us-playing-with-fire-in-wto-appellate-body-spat>).

The Present American "Reason"

More recently, one of the main public reasons for the United States' dissatisfaction with the operation of the Appellate Body is related to anti-dumping. If you have not heard of the term, it is, in essence, an unfair trade practice that takes place whenever goods are exported at a price that is lower than that in their own market. (Article 2.1 of the WTO Anti-Dumping Agreement). Oversimplifying, exporters recovered their costs with the sales in the domestic market and could, thus, export to other countries at a much lower price and easily gain market share there. WTO law condemns this practice and allows importing States to impose duties up to the difference between domestic price and the export prices, also called the margin of dumping. By imposing these duties on the import of the goods, national authorities make the imported product less competitive. This is so since the duty will probably be transferred to consumers in the form of higher prices for the product in question, thereby protecting the

domestic industries of the like products. Returning to the point, what has upset the United States is that the Appellate Body has consistently declared that zeroing, a methodology used mainly by American international trade institutions, which allows them to find higher margins of dumping and therefore permits the authorities to impose higher anti-dumping duties for the benefit of American industries, is contrary to the WTO Anti-Dumping Agreement. (Appellate Body Report, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, 18 April 2006, at [263(b)]).

It is worth mentioning that the decision has an upside for the United States: other WTO members cannot rely on the said methodology to impose higher anti-dumping duties against American exports, either. Differently put, the United States is upset about decisions that may also favour its own export industries.

In addition, the attack on the Appellate Body comes from one of the very few members that have the power to be very flexible in the handling of trade disputes and adverse rulings. This is a luxury that other members do not usually have: if they lose a case, they comply or will face the economic cost of non-compliance in the form of authorized trade retaliation, in addition to other costs of a political character. (Article 22 DSU). Not the United States. First, it can persuade others with whom it has significant and protracted WTO disputes to take them outside the WTO dispute settlement system to be resolved in a different forum with which the parties are more comfortable. This was the case of the Softwood Lumber dispute between the United States and Canada, which was finally settled by a tribunal operating under the

rules of the London Court of Arbitration. (Alberto Alvarez-Jimenez “Mutually Agreed Solutions under the WTO Dispute Settlement Understanding: An Analytical Framework After the Softwood Lumber Arbitration” (2011) 10 WORLD TRADE REVIEW 543).

Second, although you might know that monetary compensation is not a legal remedy under WTO law (Article 19.1 DSU), the United States has been able to keep measures that the Appellate Body has declared to be inconsistent with WTO law in exchange for compensation in settlements with complainants that, although significant for them, are but low figures for the United States and its domestic industries. The United States can sometimes “buy non-compliance.” This was the case, for instance, with a subsidies dispute on cotton with Brazil. In this case, the American subsidies persisted after being declared to be contrary to WTO law by the Appellate Body, due to Brazil’s acceptance of US 300 million in exchange. (Appellate Body Report, *United States — Subsidies on Upland Cotton*. (WT/DS267/AB/R), March 3, 2005, at [763] – [764] and *Memorandum of Understanding Related to the Cotton Dispute* (WT/DS267), Section I.1. October 1, 2014). An American think tank, the Institute for Agriculture & Trade Policy, called the settlement an unconditional surrender by Brazil. (“Unconditional surrender: The U.S.-Brazil deal to end WTO-authorized retaliation” October 9, 2014. <https://www.iatp.org/blog/201410/unconditional-surrender-the-us-brazil-deal-to-end-wto-authorized-retaliation>). In *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, the Appellate Body sided with Indonesia and its claim that the American ban on the import of clove cigarettes was contrary to WTO law. (Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R. April 4 2012. At [298] – [299]). Indonesia and the United States reached an

agreement that allowed the latter to keep its ban. (BRIDGES “Indonesia Announces Deal with US on Clove Cigarettes Trade Dispute” October 9, 2014. <https://www.ictsd.org/bridges-news/bridges/news/indonesia-announces-deal-with-us-on-clove-cigarettes-trade-dispute>).

The Impact of the American Saturn

It is clear that the United States and any other members have a veto power and can block consensus as a matter of right. (Article IX.1 of the WTO Agreement). But the current situation is not merely that of blocking consensus, it is an unquestionable abuse of this right, with the clear goal of undermining the Appellate Body and the WTO members’ right to appeal panel reports.

The persistent attack on the Appellate Body affects its operation regarding two fundamental phases of the dispute settlement system: the appeal stage and the appeal of compliance panel reports, namely, decisions on whether or not a respondent Member has complied with the adopted panel report that found its measure inconsistent with WTO law. (Article 21.5 DSU). The operation of the Appellate Body is adversely affected at these stages in two ways: quality and timing.

First, as mandated by Article 17.1 of the DSU, the Appellate Body hears and decides cases in Divisions of three members, who are randomly selected, so the possibility of an Appellate

Body member national of a party to a dispute is allowed. (Rule 6.2. of the Working Procedures for Appellate Review). But one of the virtues of the design of the decision-making of the Appellate Body is the creation of the notion of exchange of views. (Rule 4 of the Working Procedures for Appellate Review). In this phase of the process, the three deciding members meet with the other four to discuss the case and decision at hand, and this phase has become very important. As an original member of the Appellate Body has expressed, “The system of exchange of views has proved to be of enormous benefit to the work of the Appellate Body. As intended, the exchanges have permitted divisions to draw on the individual and collective expertise of all members. In addition, these exchanges have contributed greatly to consistency and coherence of decision making. The system of exchange of views has thus contributed to providing security and predictability to the multilateral trading system which is, according to Article 3.2 of the DSU, the fundamental aim of the dispute settlement system of the WTO.” Claus-Dieter Ehlermann “Experiences from the WTO Appellate Body” (2005) 38 Texas International Law Journal 469 at 478.

The fact that this exchange of views is taking place by a significantly reduced number of participants due to the United States’ behaviour deprives the Appellate Body of the diversity of input that the participation of the whole bench ensures.

In addition, a reduced number of members prevents the Appellate Body from rendering its reports within a timeframe closer to its tight 60–90 days deadlines (Article 19.5 DSU), since the current members will have to sit in more Divisions, thereby increasing their already

significant workload. The Appellate Body already acknowledged the existence of this effect in March 2017. (Appellate Body. Annual Report for 2016. March 2017. at 6). In this sense, those WTO members that are or will be appellants during the time the situation persists will be already incurring the cost of having their dispute settled much later than under normal conditions. Made no mistake: the United States is already imposing costs on other WTO members, New Zealand included.

The tactic also means that the American Appellate Body member will also sit in more divisions, thereby increasing the chance of his being part of those hearing and adjudicating cases to which the United States is a party. This appears to be what the United States is seeking to ensure or is indirectly achieving. We can presume that he is impartial and independent, but I leave to your own interpretation the fact that a recent Appellate Body report condemning zeroing again and rendered at the time the attack was ongoing and by a Division that included Thomas Graham had an anonymous dissenting opinion on this conclusion. (Appellate Body Report, *United States - Anti-Dumping and Countervailing Measures on Large Residential Washers from South Korea*, September 7, 2016, at [5.191] – [5.203]. In fairness to Graham, this is the second dissenting opinion on the topic in the Appellate Body case law. The first took place before his designation in *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) (Article 21.5 – EC)*, WT/DS294/AB/R, 14 May 2009, at [259] – [70]). In any case, you can guess the chances that he is the author of the recent dissenting opinion in light of the whole background of American behaviour. In principle, there would be nothing wrong with agreeing with your own country on a point of law. But this situation is different today: a country expecting certain results appoints a judge, blocks the

appointment of others, make its own judge more likely to sit in a division adjudicating its disputes, and expects him to achieve those results. Graham's presence in divisions hearing new appeals in which the United States is appellant or appellee could, at some point, put at risk the perception of independence and impartiality of the Appellate Body during the time this state of affairs persists. This is not the right time for dissenting opinions in decisions that depart from what the United States expects from the Appellate Body.

Who Can Resolve the Situation

It is not for the Appellate Body to resolve the situation. It has to continue working under the circumstances. The American attack leads to further delays in the rendering of reports, as was said, but this is a consequence the WTO membership has to face and address. To be sure, the other alternative would be to render reports under or closer to the deadlines, but at the expense of the quality of the adjudication. You would certainly agree with the European Union, that "a high quality Appellate Body report, albeit ... late, contributed more to the rules based trading system than a poor-quality report issued within 90 days." (Dispute Settlement Body, 23 July 2012, Minutes of the Meeting, WT/DSB/M/320, 28 September 2012, at [101]).

To be sure, there are institutional elements that can be valuable for the Appellate Body in its current dire situation. One of them is the fact that the Appellate Body has a very able Secretariat, which has had the same director for more than a decade. (Appellate Body Annual Report for 2016, at 14). This is a factor that gives much needed institutional stability to the

operation of the Appellate Body regardless of its composition. To be sure, the Appellate Body Secretariat supports Appellate Body members; it does not decide cases for them, so this source of stability might have limitations if the assault on the Appellate Body persists and it is forced to operate with an even more reduced number of members.

Steve Charnovitz, a well-known American academic and critic of the current situation, has suggested that the Appellate Body amend its Working Procedures in order to stop accepting new appeals. (Steve Charnovitz, “How to Save WTO Dispute Settlement from the Trump Administration” International Economic Law and Policy Blog, November 3 2017. <http://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html>). The legal bases of such a decision are questionable, since nowhere in the DSU does the possibility of denying the right to appeal to any member exist. In addition, such determination would diminish the members’ rights under the DSU and would then be contrary to its Article 19.2. But mainly, the last thing the Appellate Body needs at this time is to fragment the WTO membership. Charnovitz’s recommendation further weakens the Appellate Body regarding its most precious asset: its authority. In addition, it is doubtful that the WTO Director-General and the Chair of the DSB, who must be consulted as part of the amendment of the Working Procedures (Article 19.9 DSU), would agree to this proposal had it come from the Appellate Body itself. It is also possible to envisage that they would also have reservations about this suggestion before all other diplomatic instruments had been tried and exhausted.

Should Members exert restraint when bringing cases and filing appeals to help the Appellate Body operate? Certainly not: starting a WTO trade dispute is often an economic and domestic political decision involving the given complainant and its domestic industry affected by the trade restriction. It is unlikely that the difficulties in the appointment of Appellate Body members could be a relevant factor in this decision. Members will continue bringing those cases in which domestic interests are claiming to be resolved. Perhaps strategic litigation by some major players will be the type of cases that, as you can expect, will not be brought while the current situation persists, for such litigation demands a fully operative Appellate Body to set the right path for the development of WTO law in a given area and in a given direction.

In reality, the solution rests with the WTO membership as a whole. It could please the United States and declare that zeroing is consistent with the Anti-Dumping Agreement through a formal interpretation pursuant to Article IX.2 of the WTO Agreement or through any subsequent agreement that qualifies as such under Article 31.3(a) of the Vienna Convention on the Law of Treaties. In normal circumstances, there would be nothing wrong with an interpretation that modifies what the Appellate Body has determined. However, under the current situation, such a move has its risks, since blocking appointments would become the tool for the United States and potentially others to press WTO members to issue decisions any time there is an Appellate Body interpretation that the former disagree with.

But the WTO membership might also resist and negotiate with the United States on a solution that does not compromise the independence and impartiality of the Appellate Body or the

legal soundness of its conclusions. Or the WTO membership might be reluctant to cede to the undue pressure and wait for the reaction of American export industries that count on the prompt adjudication of disputes by the Appellate Body in order to remove trade restrictions worth millions of dollars in overseas markets. The Appellate Body's paralysis or the significant impairment of its operation adversely affects these American interests, and one expects them to act internally in order to press the government for a change in this realm. Certainly, these interests have not been successful in recent years, but they have a role to play in a solution to the current problem.

There is a bottom line in the event of the apocalyptic prospect of an inoperative Appellate Body. The Dispute Settlement Body could make a decision or the threat of a decision that the selection of WTO Appellate Body members required a modified version of consensus (consensus minus one, for instance) or that the appointment would be made by voting pursuant to Article IX.1 of the WTO Agreement. Voting is taboo in the WTO, and this determination would not be without risks: it could set a precedent for decision-making that might create unexpected problems in the future. However, the risk could be minimized with proper wording, like the one included in the decision to use voting as a last-resort instrument to select the WTO director-general. There, the General Council stated that voting would be understood "to be an exceptional departure from the customary practice of decision-making by consensus, and shall not establish any precedent for such recourse in respect of any future decisions in the WTO." (See *Procedures for the Appointment of Directors-General*, WTO document WT/L/509, 20 January 2003. Para. 20. See also Craig VanGrasstek *The History and Future of the World Trade Organization* (WTO Publications, Geneva, 2013) at 211).

In a Nutshell

“They made the rules, they cannot complain if I am the stricter enforcer,” says the main character in Hillary Mantel’s *Wolf Hall*. This line could be the Appellate Body’s response to the American attack. Severe interference with the operation of the Appellate Body is the purpose of the United States. It is an abuse of the right to block consensus in WTO decision making, and as a result, the WTO membership is already bearing the costs of further delays in the adjudication of its trade disputes.

Saturn was able to devour all of his sons, save one: Jupiter, who stood up to his father and rescued his brothers. You, like me, might be wishing for the rest of the WTO membership to be Jupiter at this critical juncture of the existence of the WTO dispute settlement system in order to preserve it.

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