

Outlook 2015

International Dispute Resolution

While prospects for WTO consensus on further trade agreements remains unclear, members increasingly rely on its dispute resolution system to resolve trade disagreements and lay the ground rules for future behavior, observers say. But its ability to resolve future disputes could be hampered without updated agreements, says one analyst.

Outlook 2015: WTO

WTO Dispute Resolutions Lay Path for Members' Trade Rules, Behavior

Many trade industries, ambassadors and observers believe the World Trade Organization will continue to grow as a key forum for resolving major trade disputes and thereby set guidelines for future behavior among its members—regardless of its ability to forge more wide-reaching, multilateral trade agreements.

“As a global rules-setting body, that’s the game in town,” said Deborah James, director of international programs for the Center for Economic and Policy Research.

She recognized questions have been raised about the WTO’s relevancy due to its inability to conclude a major trade agreement other than the Trade Facilitation Agreement in November 2014.

However, she added: “The fact that the Doha round is stalled doesn’t mean there’s not a WTO. They are still the place where binding rules are set. It’s fine if the G-20 gets press, but their agreements aren’t binding.”

“When a [dispute resolution] panel makes a ruling, it’s a powerful signal to countries about how to behave,” said Bill Reinsch, president of the National Foreign Trade Council. “Countries alter their behavior and their plans.”

Gary Hufbauer, a senior fellow with the Peterson Institute for International Economics, suggested the WTO can operate as a dispute resolution forum regardless of

its success in forging new trade agreements. “It does good quality work, good publications, covers countries’ policies. Its dispute settlement is the best going,” even though it has limited staff compared to such institutions as the Organization for Economic Cooperation and Development, he said. However, he warned that cases would become more numerous and more difficult to resolve without updated multilateral trade rules.

More than 480 disputes have been filed with the WTO since it was organized in 1995, and the U.S. has filed more than 100 such cases against other countries, according to WTO records.

The U.S. also has been the target of more than 120 cases and participated as a third party in more than 115, according to WTO records.

In its first 16 years, the Dispute Settlement Body—comprising the full WTO membership—handled disputes estimated to cover at least \$1 trillion of trade flows, Director-General Roberto Azevedo said in September. And the number of active cases before the WTO has doubled since 2012, he said, forcing him to take actions to reassign and boost staff positions, as well as seek ways to ease the dispute resolution process, to handle the workload.

“There is no question that the WTO’s dispute settlement system has been a success,” he said, adding that the trend indicates a continued increase in caseload

should be expected in coming years, with disputes becoming more complex and involving more member countries.

Setting a Precedent. John Murphy, senior vice president of international policy for the U.S. Chamber of Commerce, said he believes dispute resolutions can set a precedent for other countries' behavior.

"We followed with interest the rare earths case the U.S. brought against China," he said. China in September 2014 lost its appeal in a WTO case the U.S. filed—with the support of the EU, Japan and other nations—in which it charged Beijing had illegally restricted exports of rare earth elements used in energy-efficient products like hybrid car batteries.

Murphy said he believes the ruling is relevant to the U.S. ban on export of petroleum outside North America—a ban that EU trade negotiators have sought to have lifted. "By our reading, the U.S. has the same obligation with regards to export restrictions as China does. We think it's extremely relevant."

Reinsch cited as another example pending challenges to Australia's plain packaging requirements for tobacco companies—a case U.S. tobacco companies and other businesses are closely watching. Australia's packaging rules—which ban tobacco companies from selling cigarettes unless their brand names are placed prominently on the lower part of the packaging—are the subject of five WTO disputes in several WTO committees.

With a ruling not likely before 2016, New Zealand, Ireland, Finland, the United Kingdom and France have said they are awaiting a WTO ruling in the case as they mull their own packaging rules.

"I think you're going to see more of that," Reinsch said, "where countries think, 'We might do X, but we might be in violation of our obligations.'"

But the holdout by countries on tobacco packaging rules has at least Australia contending the tobacco industry is unfairly manipulating the WTO dispute resolution system to its advantage by filing parallel disputes at the WTO.

The goal of the disputes is to "instill a form of regulatory chill, which is a well-known tactic of the tobacco industry to avoid countries implementing tobacco control measures," Australia said Nov. 18.

Meanwhile, a recent ruling on a Brazil-U.S. cotton case has many observers and analysts unsettled. Brazil prevailed in its 2002 WTO challenge to the U.S. cotton program and an export credit guarantee program. And the WTO recently backed Brazil's claim the U.S. failed to comply with the adverse decision and it allowed Brazil to impose \$829.1 million in trade retaliation annually. Under a final settlement announced Oct. 1, Brazil pledged to drop its threat of sanctions while the U.S. would make a one-time payment of \$300 million to the Brazil Cotton Institute and would institute new rules for its export guarantee program.

Reinsch said he fears the case has encouraged some WTO members, including Brazil, to consider filing more cases they believe they could win in a similar manner. "It also has raised eyebrows for how the U.S. government chose to resolve it—by paying." He added, "That's not necessarily a trade liberalizing route."

But Hufbauer rejects suggestions that dispute resolution settlements are precedent-setting. He said unless

the WTO rules are routinely updated, increasingly cases will be submitted that the rules do not address. "It is increasingly being called on to fill gaps on issues that it had not considered earlier."

Such gaps, he said, include appropriate environmental exceptions to rules of the trading system. Rules governing such exceptions date to the 1947 General Agreement on Tariffs and Trade, with the exception of Article XX that was adopted in 1995 as a result of the Uruguay Round and at the launch of the WTO.

Hufbauer also cited a WTO dispute settlement ruling that favored the U.S. against China regarding Beijing's restrictions on the importation and distribution of foreign books, music and movies. While China argued it was protecting public morals, the dispute resolution body said the government instead was protecting counterfeiting. "That was a gap. What is public morals?"

He suggested the same issue arose with a challenge by Antigua and Barbuda of U.S. laws barring cross-border online gambling. After the WTO ruled against the U.S. and later said the U.S. failed to meet a deadline to come into compliance, Antigua proceeded with plans to impose \$21 million in annual sanctions against the U.S. in the form of suspended IP rights.

More to the Game? Timothy A. Wise, director of the research and policy program at Tufts University's Global Development and Environment Institute, said the WTO rules-based system can be valuable. However, he added, "The dispute resolution process is deeply flawed because the most powerful members can avoid discipline."

He cited the U.S. payment to Brazil to resolve the cotton export dispute as an example. He said cotton producing countries in Africa also suffered from U.S. cotton subsidy programs. "They have seen basically nothing."

A report by the Transnational Institute called the dispute resolution mechanism the "crown jewel" of the WTO and said, "The reality is that almost no government goes into the DSM without the pressure of their corporations."

But Hufbauer said it can be difficult for companies to encourage governments to press their complaints at the WTO level.

"My recommendation has been that the dispute settlement system open its doors to adjudicating disputes within regional agreements," he said, and thereby lift such responsibility from governments.

"Each government is thinking about how much resources it has, and whether it will upset its trading partners," he said. "There's too much politics involved."

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Azevedo's September 26 speech is available at http://www.wto.org/english/news_e/spra_e/spra32_e.htm. The Transnational Institute report is available at http://www.tni.org/sites/www.tni.org/files/download/wto-big_business_bali_0.