

WTO Appellate Body Crisis: Implications for Agriculture

Executive Summary

For the first time in its 24-year history, the WTO is facing an existential crisis. For several years the U.S. has voiced its concern with the Appellate Body process at the World Trade Organization (WTO) by blocking the appointment and reappointments of “judges”¹ at the Dispute Settlement Appellate Body due to concerns over “judicial overreach.” If there is no resolution before December 11, 2019, the world’s most prominent trade dispute settlement mechanism will lose quorum and be unable to hear any new cases. The current system has provided the U.S. agriculture sector with key victories in the past and stability in the tariff rates farmers, ranchers, and agriculture exporters face in foreign markets. In a world with no WTO dispute settlement institution, trade disputes in export markets would need to be either resolved through non-binding arbitration or through litigation in the domestic courts.

Background

Since its inception in 1995, the WTO has served as an effective institution for trade disagreements due to its enforceable dispute resolution procedures where the appellate body issues decisions that are final, binding, and generally respected by disputing parties. However, WTO members have failed to update the rulebook of the organization since its founding, which has forced the appellate body to deliver decisions on ambiguous and incomplete rules. Under the Trump administration, the U.S. has been blocking the appointment for Appellate Body members in order to force WTO members to negotiate new rules that address a myriad of U.S. concerns. The primary U.S. concerns include increased transparency, punishments for countries that fail to provide timely notifications, self-identification of developing status, “zeroing”², and limiting the scope of judicial overreach. On December 11, 2019 the terms of two of the three active judges will expire, causing the already overburdened system to become unable to hear new cases.

Despite several proposals by WTO members on approaches to WTO reform, most observers and analysts are pessimistic on the prospects of a resolution, leaving the WTO headed towards uncharted waters. Robert McDougall, a fellow at the Centre for International Governance Innovation, says that the U.S. has given no indications of putting in effort to solve the crisis and the most likely outcome remains the paralysis of the body.³ In August 2018, President Trump even threatened to pull out of the WTO and called the creation of the organization “the single worst trade deal ever made.” Although the WTO only needs a 3/4th majority to create new legislation, WTO members remain deeply divided over the best path forward. China and India, among others, look to see more benefits given to developing countries. The Uruguay Round of negotiations required over a decade of negotiation to establish the WTO, and reform efforts will likely entail a protracted and complex negotiation.

¹ Negotiators were reluctant to use the word judges, suggesting that WTO countries did not envisage vesting members with the same authority as judges of national or international courts.

² Zeroing refers to a controversial methodology used by the United States for calculating antidumping duties against foreign products. The foreign domestic price (FDP) of the product is compared with its U.S. import price (USIP) adjusted for transportation and handling costs. Under zeroing, the United States sets at zero the negative differences (that is whenever FDP minus USIP is less than zero).

³ <https://insidetrade.com/daily-news/race-save-wto%E2%80%99s-appellate-body-may-be-naught-us-%E2%80%98-no-rush%E2%80%99?s=em>

In the meantime, Canada and the European Union (EU), among other countries, may move forward with an interim alternative for the WTO appellate body, which could be used until the arrival of a larger solution. The EU proposes using Article 25 of the Dispute Settlement Understanding, which states that WTO members can agree to use “expeditious arbitration within the WTO as an alternative means of dispute settlement.” According to a Geneva source, the EU’s proposal would require interested WTO members to agree on a template for rules that would guide the arbitration process.⁴ Then, the two disputing members in a case would reach a bilateral agreement to use arbitration in place of the appellate process based on that template. While this could circumvent the U.S. blockade of judges, critics of this approach point out that members would have no incentive to bind themselves to arbitration if they foresee a negative outcome.⁵

Implications

The collapse of the appellate body could have far-reaching implications for the agriculture sector. Presently 164 countries are constrained in what they can do with tariffs rates. Up until two years ago, WTO members rarely saw sudden hikes in tariffs, and the WTO prevents countries from blocking goods over regulations made on a whim. An important example is that barriers to food products are meant to be founded in scientific evidence before restricting international trade. Without a dispute settlement body, countries could opt to use their own court system instead, which could lead to an increasingly volatile trading environment. Keeping tariffs consistent has allowed firms and customers to have market stability and reduce risk. The U.S. does have free trade agreements or pending deals with many of our largest agriculture export markets (e.g. USMCA), but that would not solve all the problems of a collapsed trading system. Supply chains could be damaged, and agricultural-based products are often the target of retaliation.

Most importantly, the dispute settlement mechanism at the WTO has generally served U.S. agriculture well during its lifespan. For example, in October 2005, a WTO dispute panel ruled in favor of the U.S. on all major claims against a 20% tax Mexico levied on beverages made using high-fructose corn syrup (HFCS). The U.S. has also recently won two critical victories at the WTO against Chinese agricultural subsidies, which found that China would have imported up to \$3.5 billion of corn, wheat and rice in 2015 alone if their tariff-rate quotas had been administered properly.⁶ Also, to the benefit of agriculture producers and exporters, the U.S. has had a successful record of winning complaints at the WTO. Since 1995, the U.S. has prevailed on 91 percent of adjudicated issues.⁷ In short, the dispute settlement body ensures U.S. farmers, ranchers, and agribusinesses can export to foreign markets without discriminatory taxes and other trade barriers.

Summary

The food and agriculture sector would benefit from successful conclusion of timely reform efforts of the WTO’s appellate body operations. While the U.S. pursues long sought-after reforms to the nearly 25-year old appeals system, timely solutions are paramount to avoid prolonged uncertainty and access to a modernized binding dispute settlement system that has generated positive outcomes and improved market access for U.S. agriculture exporters and workers.

⁴ <https://insidetrade.com/daily-news/eu-moving-forward-wto-appellate-body-backup-plan?s=em>

⁵ <https://www.csis.org/analysis/article-25-effective-way-avert-wto-crisis>

⁶ <https://www.agweek.com/business/agriculture/4604485-us-wins-second-wto-case-against-china>

⁷ <https://www.forbes.com/sites/danikenson/2017/03/09/u-s-trade-laws-and-the-sovereignty-canard/#6b8515c5203f>