

WTO Faces Hurdles In Bid To Fix Dispute Overload

By **Alex Lawson**

Law360, New York (October 14, 2014, 3:57 PM ET) -- World Trade Organization leaders have begun taking steps to address a persistent escalation of dispute settlement activity, but a meaningful response to the problem will fall to WTO member countries, which experts say will likely opt for modest reforms given the difficulty of pursuing ambitious change.

WTO Director-General Roberto Azevedo made a rare appearance at last month's Dispute Settlement Body meeting to inform members that he had begun funneling staff away from the organization's less active wings and into its legal arm. Still, he acknowledged that this was only a stopgap measure, and he pressed members to come forward with their own proposals to smooth the bumpy flow of litigation.

Many regular WTO litigators, including Perkins Coie LLP senior counsel David Christy, said that any substantive changes, such as the creation of a standing body of regular panelists or an expansion of the Appellate Body membership, will demand a renegotiation of the WTO's Dispute Settlement Understanding — an event that would require the cooperation of members that have a history of tough negotiations.

“It's going to need to be a member-driven, member-funded solution,” Christy said. “The problem is that apart from hiring more lawyers, many options would require institutional changes. You would be hard-pressed to put a substantial dent in this problem that didn't require some renegotiation. You might only be able to make some changes around the edges.”

While a simple negotiation to arm the WTO for the steady uptick in litigation over the past several years may appear noncontroversial, the organization has struggled to deliver even modest outcomes on a multilateral basis, most recently failing to implement a deal to improve trade facilitation measures among its membership.

Sidley Austin LLP partner Andrew Shoyer, who previously served as a WTO legal adviser for the U.S. trade representative's office, said that the reopening of any WTO text raises the possibility an arduous negotiation among members.

“Everything can be a negotiation ... and you can have parties that don't have substantive disagreements but might block consensus on something as a lever to achieve something else,” Shoyer said.

Azevedo appears to have stretched as far as he can to address the problem, securing enough funding to create 15 new attorney positions in the WTO's legal arm, for which the organization has already begun

fielding applications. Christy said Azevedo made the right move in crafting new full-time positions as opposed to hiring litigators on a contract basis as past WTO leadership regimes have done.

Christy added that sweeping changes to increase the WTO's efficiency would also move the organization more toward a legal body and away from its diplomatic roots, which would be unpopular among certain factions of the membership.

"Some members believe the dispute settlement process already is too legalistic and inflexible," Christy said. "They would prefer to preserve what remains of the diplomatic aspects of the process."

The easiest and quickest fix for Azevedo would be to simply bolster the WTO's legal staff. But that can only happen with a substantial increase in funding from the members, which can be politically difficult, according to Shoyer.

A more practical strategy would be for the WTO to encourage its members to use certain alternative methods of dispute settlement that are automatically built into the existing texts.

One such method is the use of the WTO's so-called good offices provision, which essentially provides feuding countries with an independent referee from the WTO staff, usually from the director-general's office, to allow the two sides to discuss the dispute bilaterally in a "productive atmosphere."

The WTO also provides for conciliation and arbitration as methods of dispute resolution that are less resource-intensive, and Shoyer said that it would be in Azevedo's interest to promote those tools to members. Still, he noted that it will be tough to get countries to depart from using the formal process, which has become ingrained in the WTO culture.

"The reason why the mainstream form of dispute settlement in the WTO has become so popular is because it leads to a judicial decision that is enforceable in the sense that it can lead to the use of retaliation," Shoyer said. "For countries who are facing a problem, it's hard to sell them on using an option that seems short of that."

Akin Gump Strauss Hauer & Feld LLP senior counsel Alan Yanovich said that the WTO might also begin considering minor tweaks to the interaction between the parties and the actual panels, such as placing page limits on submissions, holding only one panel hearing instead of two and requiring submissions to be transmitted to panels further in advance of hearings.

More broadly, Yanovich said that the dispute settlement overload is more taxing on the WTO secretariat than it is on individual members, adding that Azevedo was looking to make the case to members that the organization is stretched thin.

"The secretariat is concerned because they are getting the brunt of it," Yanovich said. "They are the ones being asked to put the bodies in place and get these cases done. I think Azevedo's point was to raise awareness among delegations that are not big users of dispute settlement."

With the WTO's inability to craft new global trade rules through multilateral negotiations, many observers have pointed to the dispute settlement system as the crowning achievement of the organization's 20-year history.

It is therefore rather ironic that one of the organization's most prominent success stories now appears

to be the source of its latest existential crisis, according to Shoyer, who warned that a failure to address the dispute overload in a meaningful way could badly damage the WTO's reputation.

“In order to ensure the credibility of the system, Azevedo knows that he needs to provide those resources,” Shoyer said. “As a courthouse, the WTO has been very successful. So, if because of the resource needs, the WTO shows itself unable to make good on the dispute settlement side, that's a real problem.”

--Editing by Jeremy Barker and Christine Chun.

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