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Dispute Settlement in U.S. Trade Agreements

The United States traditionally has championed the use of effective and reciprocal dispute settlement (DS) mechanisms to enforce commitments in the World Trade Organization (WTO) and in U.S. free trade agreements (FTAs). While effective and enforceable DS has been a longstanding U.S. trade negotiating objective, its use has been controversial at times over the outcome of adverse decisions, especially those that may require Congress to change U.S. law to become compliant with the decision.

Dispute Settlement at the WTO

The WTO was established in 1995 after eight years of trade negotiations in the Uruguay Round among members of the General Agreement on Tariffs and Trade (GATT) – the predecessor to the WTO during 1947-1994. The WTO administers a system of agreements on trade liberalization and rules in goods (including tariff and non-tariff barriers), services, and intellectual property rights. Through its Dispute Settlement Understanding (DSU), the WTO provides an enforceable means to settle disputes regarding obligations under these agreements.

Under the GATT, dispute settlement was largely viewed as ineffective because there were no fixed timetables and decisions could be blocked by a party, which frequently led to no resolution of disputes. In defining U.S. aims for the Uruguay Round, Congress sought to achieve major reform in the GATT dispute settlement system in the following U.S. trade negotiating objective:

> ...to ensure that such mechanisms within the GATT and GATT agreements provide for more effective and expeditious resolution of disputes and enable better enforcement of United States rights. - Omnibus Trade and Competitiveness Act of 1988, (P.L. 100-418)

The DSU was credited with strengthening the DS system by imposing stricter deadlines and making it easier to establish panels, adopt panel reports (DS decisions), and to authorize retaliation, if necessary. It also reversed the process for adopting a panel report by providing that a report can be blocked only by consent of all members.

How it Works

The DSU established the process for the settlement of disputes for the WTO system of agreements. It commits members not to make unilateral determinations of violations or impose penalties, but rather to take disputes to adjudication under DSU rules and procedures. As a first step, the DSU encourages the settlement of disputes through consultations and requires a party to enter into consultation with a requesting party within 30 days of receipt of the request.

If a dispute cannot be resolved within 60 days of a request for consultations, or if a party denies a request for consultation, the complaining party may request the establishment of a panel. The DSU sets the procedures for choosing panel members and establishes a panel's terms of reference. A panel typically is composed of three "well-qualified government and/or non-governmental individuals" from third party members not a party to the dispute recommended to the parties by the WTO Secretariat. If members cannot agree on panelists, they are chosen by the Director-General.

Dispute panels hear cases and issue reports to disputing parties and then to all WTO Members within nine months of a panel's establishment. Third parties may join if they have a "substantial interest" in the proceedings. Decisions may be appealed to the Appellate Body, a standing body of seven persons serving four year terms, unaffiliated with any government, and having recognized expertise in international trade law. An appeal is limited to issues of law and legal interpretation and should be completed within one year.

WTO DS Core Objectives

[the DS system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Art. 3.2 DSU

Once DSU proceedings are completed, the reports are presented for adoption by the Dispute Settlement Body (DSB). If a violation is found, the member must bring the offending measure into conformity with WTO obligations. It may choose to change its practice and the parties negotiate to establish a reasonable timeframe for implementation. If the respondent does not bring its measure into conformity in a reasonable period of time, or its responsive action is not acceptable to the complaining Member, the parties may negotiate compensation. Alternatively, the complaining Member may request that the DSB authorize it to suspend obligations, thereby giving permission for the complainant to retaliate through the withdrawal of tariff concessions or otherwise suspend WTO benefits equivalent to the effect of the offending practice. Procedures set specific timetables, although delays often occur. To date, 524 cases have been filed at the DSB, excluding cases that were subsequently consolidated. As of the end of 2015, the United States was a direct party to 232 cases **(Table 1).**

Table 1. U.S. Dispute Settlement Scorecard at WTO
As of end of year 2015

	As Complainant	As Respondent
Resolved w/out litigation	29	23
Won on core issues	46	17
Lost on core issues	4	57
In Appellate stage	0	0
In Panel stage	5	6
In Consultations	2	1
Inactive	22	20
Total	108	124

Source: U.S. Trade Representative.

Dispute Settlement in FTAs

U.S. FTAs provide options to resolve disputes arising under an agreement in both state-to-state and investor-state fora. Like WTO DS, U.S. FTAs first aim to resolve disputes through consultation with the other party. Since the U.S.-Chile FTA, panels have been composed of three arbiters, each side appoints one and the third is appointed by mutual consent. Failing that, the third is selected from a list of individuals who are not nationals of either side. After a panel makes its decision, the offending party is expected to come into compliance. If not, compensation, suspension of benefits, or fines have been possible remedies. If a dispute is common to both WTO and FTA rules, a party can choose the forum in which to bring the dispute, but cannot bring the dispute to multiple fora. State-State dispute settlement is infrequent under U.S. FTAs and disputes are usually resolved via consultation. Three cases have been decided under NAFTA DS, with other disputes adjudicated under WTO DS. Other than in NAFTA, the United States has brought only one FTA dispute—with Guatemala over labor practices—to formal DS.

Investor-State Dispute Settlement (ISDS)

Most U.S. FTAs since NAFTA contain a separate dispute settlement system for investment. ISDS allows an investor to seek arbitration directly with a host government to resolve disputes over potential breaches of a party's investment obligations. ISDS proceedings are conducted under the auspices of the World Bank-affiliated International Centre for Settlement for Investment Disputes (ICSID), or comparable rules. Panels are typically composed of three arbiters—one appointed by the investor claimant, one by the party, and one by agreement of the disputing sides. A successful claim can only result in monetary penalties; a tribunal cannot compel a country to change its laws over an adverse decision. Of the 16 cases brought against the United States, it has prevailed in 10, settled 3, discontinued one, and has 2 pending. Policymakers and various stakeholders continue to debate the balance between investor protections and government authority (See CRS In Focus IF10052, *U.S. International Investment Agreements (IIAs)*, by Martin A. Weiss and Shayerah Ilias Akhtar).

NAFTA Chapter 19

Unique among U.S. FTAs, NAFTA contains a binational dispute settlement mechanism (Chapter 19) to review anti-dumping (AD) and countervailing duty (CVD) decisions of a domestic administrative body. While this provision was sought by Canada and Mexico in NAFTA negotiations, some in the United States have sought its elimination; it likely will be discussed in any renegotiation of NAFTA. According to the NAFTA Secretariat, 145 cases have been brought under Chapter 19: 23 against Canada; 23 against Mexico; and 99 against the United States.

Issues for Congress

Congress may wish to explore a number of issues with DS in trade agreements. Congress may wish to evaluate the effectiveness of the dispute settlement in upholding reciprocal trade obligations—as opposed to taking unilateral action—and its effectiveness in striking down trade barriers. Second, Congress may wish to examine issues with the current operation of the various fora and potential reforms that could improve its efficiency. These include:

- **Length of deliberations.** As noted above, cases are supposed to be resolved within a year of establishment of a panel or 15 months if appealed. However, delays often occur at various stages, making the average time in practice considerably longer. Some landmark cases like the Boeing/Airbus dispute have lasted over a decade. Given the highly technical nature of some disputes, are lengthy deliberations inevitable? What could be done to shorten the process?
- **Inadequate deference to domestic laws.** This has been especially controversial in U.S. trade remedy (anti-dumping/countervailing duty) cases, where panels have ruled impermissible U.S. practices not expressly prohibited in WTO agreements. Some stakeholders argue that WTO panels are creating new obligations. How should this be best addressed?
- **Noncompliance with decisions.** In some cases, members will decide not to comply, choosing to accept retaliation. While this is rare, it could weaken the system over time.
- **NAFTA renegotiation.** If potential NAFTA renegotiation results in obligations beyond those of the WTO, its dispute system may be used with greater frequency. NAFTA could adopt some reforms adopted by newer U.S. FTAs, such as greater transparency and a more robust panel selection process. Newer U.S. ISDS provisions protect against frivolous claims, affirm a country's right to regulate, and clarify minimum standard of treatment, among other new provisions.

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