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Dispute Settlement in the WTO and 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 long-standing U.S. trade negotiating objective, its use has become controversial following some adverse decisions, particularly with regard to U.S. trade remedy law.

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 disputing 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 for non-compliance. It also reversed the GATT 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 to take disputes to adjudication under DSU rules and procedures rather than make unilateral determinations of violations and impose penalties. 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, as recommended to the parties by the WTO Secretariat. If members cannot agree on panelists, they are chosen by the WTO 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 (AB), a standing body of seven persons serving four-year terms, who are unaffiliated with any government, and have expertise in international trade law. An appeal is limited to issues of law and legal interpretation and must be completed within 90 days. However, this timetable is rarely adhered to.

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 may negotiate 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 retaliation through the withdrawal of tariff concessions or other suspension of WTO benefits equivalent to the effect of the offending practice. Procedures set specific timetables, although delays often occur. To date, 592 cases have been filed at the DSB, excluding cases that were subsequently consolidated. As of December 2019, the United States was a direct party to 279 cases **(Table 1). (**For more information, see, CRS Report R45417, *World Trade Organization: Overview and Future Direction*, coordinated by Cathleen D. Cimino-Isaacs).

Table 1. U.S. Dispute Settlement Status at WTO
As of December 2019

	As Complainant	As Respondent
Settled, terminated, or case lapsed	32	20
In consultations	29	37
In panel stage	14	21
In appellate stage	1	4
Report(s) adopted, no further action required	7	19
Report(s) adopted, with recommendation to bring measure(s) into conformity	41	54
Total	124	155

Source: World Trade Organization.

Dispute Settlement in FTAs

U.S. free trade agreements (FTAs) provide options to resolve disputes arising under an agreement in both state-to-state and investor-state fora. Like the WTO DS, U.S. FTAs first aim to resolve disputes through consultation with the other party. Since the U.S.-Chile FTA (2004), 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 are possible remedies. If a dispute is common to both the WTO and FTA rules, a party can choose the dispute forum, but cannot bring the dispute to multiple fora.

State-to State Dispute Settlement

State-to-state DS is infrequent under U.S. FTAs and disputes are usually resolved via consultation. Three cases have been decided under North American Free Trade Agreement (NAFTA) DS, with other disputes adjudicated under WTO DS. Other than in NAFTA, the United States has brought one FTA dispute—with Guatemala over labor practices—to formal DS. Notably, the revised NAFTA – the proposed U.S.-Mexico-Canada Agreement (USMCA) did not change the roster selection process, which potentially allows a party to prevent the creation of a panel over lack of consensus regarding panel appointments. However, additional congressional negotiations over USMCA reportedly have led to new language that would require a panel to be formed.

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 alleged breaches of a party's investment obligations. ISDS proceedings are conducted under the auspices of the World Bank-affiliated International Centre for Settlement of 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, and a tribunal cannot compel a country to change its laws over an adverse decision. In a break from previous U.S. FTAs, USMCA ended recourse to ISDS between the United States and Canada, and limited its use with Mexico. (See CRS In Focus IF11167, *USMCA: Investment Provisions*, by Christopher A. Casey and M. Angeles Villarreal.)

Binational Review of Trade Remedy Actions

Unique among U.S. FTAs, NAFTA contains a binational dispute settlement mechanism to review anti-dumping (AD) and countervailing duty (CVD) decisions of a domestic administrative body. While some groups in the United States support its elimination, it is retained in the proposed USMCA.

Current Issues for Congress

Congress may seek to address two upcoming issues related to dispute settlement in FTAs: the proposed changes under USMCA and the possible demise and potential reform of the AB at the WTO.

USMCA. As noted above, the proposed USMCA restricts the use of ISDS, yet it retains the binational dispute mechanism to review administrative actions concerning trade remedies. It initially left intact the roster panel selection of NAFTA regarding state-to-state DS, although that issue reportedly has been resolved. In considering the USMCA, Congress may examine the sufficiency of the amended DS process to enforce the new and enhanced provisions of the agreement. With regard to ISDS, Congress may debate whether the USMCA adheres to Trade Promotion Authority negotiating objectives or whether USMCA ISDS provisions strike the right balance between the protection of U.S. investment abroad and maintaining a government's right to regulate.

WTO. Since 2016, the United States has vetoed the appointment of AB panelists, as their terms expired. This has left the AB with three jurists, the minimum number to hear an appeal. On December 10, 2019, the terms of two remaining jurists expire, leaving the AB unable to hear new cases, and possibly unable to finish existing cases. Dispute panels can continue to hear cases, but appealed cases would remain in limbo, and panel decisions could not be enforced. Central U.S. concerns include whether AB panelists have interpreted agreements too expansively, whether proceedings are completed in a timely manner, and whether AB jurists should be able to finish cases after their terms have expired. Some WTO members share U.S. concerns and have made proposals to address them. However, to date the U.S. has rejected them, maintaining that the DSB must address the fundamental issue of why the AB acts as if it can allegedly disregard the language of the DSU. Given the potential demise of the WTO DS system, Congress may consider the relative importance of U.S. complaints with the AB with the value of having a functioning DS system for the multilateral trading system.

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