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Updated July 17, 2024

Dispute Settlement in the WTO and U.S. Trade Agreements

Since the 1980s, Congress has declared that a principal trade negotiating objective of the United States is the establishment and use of dispute settlement (DS) mechanisms to enforce commitments in U.S. trade agreements. Since 1975, Congress has set principal negotiating objectives for dispute settlement and the enforcement of trade agreements within Trade Promotion Authority (TPA) legislation. In the most recent TPA (Title I, P.L. 114-26, expired in 2021), Congress directed the U.S. Trade Representative (USTR) "to seek provisions in trade agreements providing for resolution of disputes between governments under those trade agreements in an effective, timely, transparent, equitable, and reasoned manner." USTR monitors compliance with U.S. trade agreements, and pursues enforcement through bilateral engagement, DS procedures, and other trade policy tools.

The most recent U.S. free trade agreement (FTA), the 2020 U.S.-Mexico-Canada Agreement (USMCA), made various changes to past FTA DS procedures and created new mechanisms. The Biden Administration is not pursuing new comprehensive FTAs, and instead is negotiating targeted initiatives that cover some trade issues. It is unclear what potential obligations may be subject to enforcement, however, which some Members of Congress have raised as a concern. While DS has been a longstanding U.S. trade negotiating objective, the DS system of the World Trade Organization (WTO) has also become controversial for U.S. policymakers, in large part due to adverse dispute panel decisions against the United States, particularly over the use of trade remedies. Some Members have urged the Administration to work with WTO members toward reforms "that improve the speed and predictability of dispute settlement" (see e.g., H.Res. 382, 117th Congress).

Dispute Settlement at the WTO

The WTO was established in 1995 after the Uruguay Round of negotiations among members of the 1947 General Agreement on Tariffs and Trade (GATT). The WTO administers a system of agreements, covering goods and services trade, intellectual property rights, subsidies, and other issues. The WTO Dispute Settlement Understanding (DSU) provides a forum to settle disputes regarding the various WTO agreements.

The establishment of the WTO's DSU was in response to concerns expressed by the United States and other GATT member concerns that the GATT DS was ineffective largely because there were no fixed timetables and a disputing party could block decisions, which often led to unresolved disputes. Congress, in defining U.S. aims for the Uruguay Round, wanted "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" (P.L. 100-418). Observers credited the DSU for strengthening the DS system by imposing stricter deadlines, and making it easier to establish panels, adopt panel reports, and authorize retaliation for noncompliance.

The DSU commits members to take disputes to adjudication under its rules and procedures rather than make unilateral determinations of violations and impose penalties. As a first step, the DSU encourages settlement of disputes through consultations. If a dispute is unresolved within 60 days of a request for consultations, or if a party denies a request, the complaining party may request the establishment of a panel. A panel is composed of three "well-qualified government and/or non-governmental individuals" from members not party to the dispute.

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

Dispute panels hear cases and are to issue their reports to the disputing parties, and then to all WTO members, within nine months from the establishment of the panel. Third parties may join the proceedings if they have a "substantial interest." Until 2019, decisions could be appealed to the Appellate Body (AB), a standing body of seven jurists serving four-year terms, who had expertise in international trade law. Since 2016, the United States has blocked the process to appoint new AB panelists, which led to the body ceasing to function in 2019. The U.S. action was motivated by various concerns about WTO DS, including over perceived "judicial overreach" in panel decisions. U.S. action was also an attempt to prompt WTO members to consider reforms. Panels can continue to hear cases, but those that are appealed may remain unresolved and retaliation cannot be authorized. The European Union and some other WTO members established an appeal arbitration arrangement under Art. 25 DSU to hear their own cases. See CRS Report R46852, *The WTO's Appellate Body: Key Disputes and Controversies*.

Once DSU proceedings are completed, the final reports are presented for adoption by the Dispute Settlement Body (DSB), a plenary committee of the WTO. If a violation is found, the member must bring the offending measure into conformity with WTO obligations. It may voluntarily change its practice and the parties may negotiate a "reasonable timeframe" for implementation. If the respondent does not bring its measure into conformity, or its action is not acceptable to the complainant, the parties may negotiate compensation. The complainant may also request that the DSB authorize retaliation, e.g., withdrawal of tariff concessions. While specific timetables apply,

delays often occur. To date, more than 600 WTO disputes have been filed, with the United States a direct party to 283 cases (**Table 1**). Historically, the United States has been one of the most active participants in WTO DS.

Table 1. U.S. WTO Dispute Status, as of June 2024

	Complainant	Respondent
Settled, terminated, or lapsed	45	34
In consultations	29	36
In panel stage	8	12
In appellate stage	2	11
Report(s) adopted, no further action required	6	13
Report(s) adopted, rec to bring measure(s) into conformity	34	53
Total	**124**	**159**

Source: World Trade Organization.

Dispute Settlement in FTAs

U.S. trade agreements often provide mechanisms to resolve disputes in both state-to-state and investor-state fora. USMCA also has additional enforcement mechanisms.

State-to State Dispute Settlement

Similar to WTO DS, trade agreement provisions first aim to resolve disputes through consultations. 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 or selected from a list of individuals. If a party does not come into compliance with an adverse panel decision, compensation, suspension of concessions, or fines are possible remedies. For disputes over obligations common to both WTO and FTA rules, a party can choose the dispute forum, but can only bring the case to one forum.

USMCA made several changes to DS under the 1994 North American Free Trade Agreement (NAFTA) to update procedures and address perceived shortcomings. Provisions on the panel roster selection, for example, aimed to ensure formation of a panel even if a party refuses to participate in the selection process, closing a loophole that discouraged use of NAFTA DS. USMCA also established a facility-specific "rapid-response" mechanism for labor disputes.

State-to-state DS has been infrequently utilized. Three cases were decided under NAFTA. Several disputes have been initiated and resolved under USMCA, including under the labor mechanism. Under other U.S. FTAs, one dispute with Guatemala over labor practices has undergone full DS.

Investor-State Dispute Settlement (ISDS)

Most U.S. FTAs contain ISDS, a separate mechanism that allows an individual investor to bring a complaint against a host government to resolve disputes over alleged breaches investment obligations. Proceedings are often conducted under the World Bank-affiliated International Centre for Settlement of Investment Disputes (ICSID), or comparable rules. A successful claim results in monetary penalties, but a tribunal cannot compel a country to change its laws. USMCA removed ISDS between the United States and Canada and limited its use with Mexico. The USMCA negotiations heightened debate over ISDS. Some supporters argued ISDS provided investors a neutral and effective venue for resolving disputes. Opponents raised concerns that ISDS discouraged states from implementing health and environmental regulations and conceded a comparative advantage of the United States to countries with less reliable judicial systems. Per UNCTAD, as of 2023 U.S. investors comprised one-fifth of claims worldwide, with more than 230 cases against host states. Foreign investors brought 24 cases against the United States, which prevailed in 10; others are pending, settled, or discontinued.

Binational Review of Trade Remedy Actions

Unique among U.S. FTAs, NAFTA and USMCA contain a binational DS mechanism to review anti-dumping and countervailing duty decisions of a domestic administrative body. To date, DS panels have issued 27 decisions involving the U.S. trade remedy actions.

Issues for Congress

In oversight of the enforcement of U.S. trade deals, key questions confront Congress, for example, to what extent trading partners are complying with obligations, and to what extent USTR is enforcing them. Members might seek to address the effectiveness of new DS mechanisms under USMCA, prospects for new binding trade obligations under executive-led trade initiatives, and potential for WTO DS reforms. Members could seek changes to U.S. negotiating objectives on DS within future TPA or other legislation.

USMCA. Congress may examine new DS processes, dispute outcomes, and whether USMCA may be a template for new U.S. trade deals. Congress may also debate the impact of limited ISDS on safeguarding U.S. investments in Mexico and whether future FTAs should include ISDS.

New Trade Initiatives. In ongoing U.S. trade initiatives like the Indo-Pacific Economic Framework for Prosperity (IPEF), it remains unclear to what extent potential trade commitments may be subject to enforcement. The IPEF Supply Chain Agreement establishes a new facility-specific reporting mechanism on "labor rights inconsistencies" in IPEF partner supply chains. Members might consider the merits of cooperative versus binding commitments, and the effectiveness of IPEF and other prospective agreements.

WTO. The lack of an appeals mechanism has limited the resolution of WTO disputes and effectiveness of WTO DS. Supporters have generally viewed the DS system as a WTO success. Others are concerned about the legitimacy of the system if WTO members do not agree to DS reforms and negotiation of new trade rules, which could prevent key issues from being adjudicated. The United States has not supported DS reform proposals to date. WTO members committed to renew reform efforts, aiming to have "a fully and well-functioning dispute settlement system" by 2024. Congress might consider whether the lack of functioning DS undermines the global trading system and U.S. interests. Some observers have also raised concerns over unilateral U.S. trade enforcement actions outside the WTO, such as via "Section 232" authorities, and trading partner retaliatory tariffs. Most recently, in 2022 DS panels decided in favor of some WTO members that contested U.S. tariffs.

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