Insight

The Enforcement of Law and Dispute Settlement Procedures under U.S. International Agreements

JACQUELINE VARAS | DECEMBER 18, 2017

The United States has 14 trade agreements with 20 different countries around the world. Together with the United States, these countries comprise 34 percent of global Gross Domestic Product (GDP). In addition, the United States has hundreds of international agreements and treaties covering a variety of issues, from arms sales and weapons control to the promotion of deregulated international commerce and investment. These agreements carry significant economic and strategic value. To be effective, however, there must be enforcement mechanisms and legal remedies in place to resolve disputes among signatories.

Every U.S. trade agreement since 1989 has included a dispute settlement procedure. Similarly, the World Trade Organization's dispute settlement system has protected the rights of more than 160 member-nations for over 30 years. These systems enable individuals or countries to address their concerns as well as provide participants with needed security in a rules-based international trade regime. In what follows, we survey the range of enforcement mechanisms.

INVESTOR-STATE DISPUTE SETTLEMENT

Investor-State Dispute Settlement (ISDS) describes an international arbitration procedure in which investors can sue foreign governments for treating them unfairly. ISDS can be triggered when foreign governments favor domestic companies over international competitors, seize the private property of foreign investors without due compensation, or restrict the movement of capital within their borders. Approximately 3,000 agreements worldwide contain some type of ISDS provisions, and the United States is party to 50.

When an ISDS case is brought against a nation's government, it is not resolved through either nation's court system. Instead, the parties enter an arbitration process in which the case is decided by a three-member panel of legal experts. This is to protect investors from potential bias within a country's courts and from weak legal institutions in developing nations.

In the over 20 years in which the it has been party to ISDS agreements, the United States has been sued by foreign investors only 16 times. Of those, 10 were decided in favor of the United States and the remaining cases were either settled or dropped. By contrast, U.S. investors have been awarded damages in over 30 ISDS cases against foreign nations including Canada, Ecuador, and Mexico.

ISDS gives companies at home and abroad the security to invest internationally. Without it, foreign and domestic businesses may not have the confidence to expand, participate in trade, or invest in the United States.

STATE-STATE DISPUTE SETTLEMENT

Similar to Investor-State Dispute Settlement, State-State Dispute Settlement provides countries with a forum to resolve disagreements over the interpretation and implementation of trade agreements. Under this system, nations first have the opportunity to resolve disputes among themselves through private consultations. If the dispute is not resolved within 60 days, either party may request a meeting of cabinet-level officials to consult on the issue. If this meeting is not effective, a three-member arbitration panel is formed to make a final decision. The countries involved in the dispute each choose one panelist to serve and agree on a third to chair the panel.

State-State Dispute Settlement cases are rare for the United States. Only eight cases have been brought in the history of U.S. trade agreements: five under the U.S.-Canada Free Trade Agreement and three under the North American Free Trade Agreement (NAFTA). A particularly notable case involved a Mexican trucking dispute. Mexico filed a state-state arbitration claim in 2000 after the United States would not lift a ban on Mexican trucks crossing the U.S. border. At the time, the United States cited both safety concerns and concerns over losing U.S. jobs to Mexican truckers. Although Mexico won the dispute, no tariffs were imposed at the time. However, Mexico eventually imposed retaliatory tariffs on $2.4 billion of U.S. goods, causing the United States to lift the cross-border trucking ban in 2015.

DISPUTE SETTLEMENT UNDER THE WORLD TRADE ORGANIZATION

The World Trade Organization (WTO) was formed in 1995 to oversee the global trading system and promote the liberalization of trade barriers. It was preceded by the General Agreement on Tariffs and Trade (GATT), the first multilateral trade agreement signed by 23 nations in 1947. Seventy years later, 164 nations are members of the WTO.

The function of the WTO is to facilitate commerce and enforce the global rules of international trade. All WTO members are granted most-favored-nation (MFN) status, giving them access to lower tariffs on exports to other member countries. MFN also ensures that countries cannot discriminate between their trading partners by erecting trade barriers; they must treat every WTO member equally.

For nations that do not wish to utilize dispute settlement mechanisms within individual trade agreements, or for nations that do not have trade agreements with one another, the WTO offers its own dispute settlement procedure. The WTO dispute settlement process resembles that of an international tribunal: Countries engage in initial consultations, hearings, and the creation of a panel to aid in making rulings and recommendations. The final decision is made by the Dispute Settlement Body, a council consisting of representatives of all member governments. While the primary goal of this process is to settle disputes privately through initial consultations, the WTO has an average of 30 dispute settlement panels active each month. Decisions are usually made in a little over one year.

ANTI-DUMPING AND COUNTERVAILING DUTIES

Anti-dumping and countervailing duties (AD/CVD) are another type of enforcement mechanism intended to discourage foreign nations from selling unfairly priced products to the United States. U.S. businesses can petition the U.S. International Trade Commission (USITC) to perform anti-dumping and countervailing duty investigations if they believe competing foreign products are priced below fair market value, either due to government subsidies in those countries or a global oversupply of the product. If both USITC and the Department of Commerce find that underpriced imports have caused significant harm to domestic industry, duties are applied to bring those import prices up to the U.S. market price. The United States has imposed over 300 different AD/CV duties on products deemed to be unfairly competitive.

Under NAFTA, AD/CVD decisions made by USITC and Commerce (or their counterparts in Canada and Mexico) can be challenged and then reviewed through bi-national panels. This has resulted in NAFTA partners imposing significantly fewer anti-dumping and countervailing duties on each other than on the rest of the world. Most recently, Canada requested the creation of a binational panel to review U.S. duties placed on Canadian softwood lumber.

GLOBAL SAFEGUARD INVESTIGATIONS

Another option for U.S. businesses that are materially harmed from imports is to appeal to USITC under section 201 of the Trade Act of 1974. This law allows for "safeguard investigations." If USITC finds that a recent surge in imports of a particular product has significantly harmed domestic industry, it can recommend to the president that temporary import restrictions be put in place. Unlike anti-dumping and countervailing duties, these restrictions do not affect imports coming from only one country, but rather apply to all imports of a specific product regardless of its origin. Furthermore, for USITC to recommend import restrictions following a safeguard investigation, it does not need to find that exporters were engaging in potentially illegal or uncompetitive activity (i.e. receiving government subsidies). It only needs to confirm that the import surge poses harm (or a serious threat of harm) to domestic industry.

Safeguard investigations are rare, with 75 investigations occurring in the past 40 years (compared to thousands of anti-dumping and countervailing duty investigations). The last time a safeguard investigation resulted in import restrictions was in 2002, when President Bush approved steel tariffs of up to 30 percent. However, these tariffs were withdrawn in 2003 after the WTO ruled that the United States had violated the terms of GATT.

While safeguard investigations are not frequent, President Trump has expressed a commitment to trade enforcement. As such, USITC recently launched two safeguard investigations that resulted in recommendations to restrict imports. One was at the request of a U.S.-based solar panel manufacturer. Suniva Inc. petitioned USITC last April to perform a safeguard investigation into imports of solar cells and modules. The investigation found that increasing solar imports, mostly from China, cause significant injury to U.S. manufacturers. In response, USITC recommended a range of import restrictions including both tariffs and quotas.

Another safeguard investigation was launched this year into imports of residential washing machines. Whirlpool petitioned USITC in May, claiming that Samsung and LG (both based in South Korea) are evading U.S. antidumping duties by shifting manufacturing to China, Vietnam, and Thailand. USITC found in October that these washing machine imports harm American manufacturing and recommended that a 50 percent tariff be placed on certain large residential washing machines.

Safeguard investigations can be a lifeline for U.S. industries facing a sudden flood of international competition, especially when previous efforts to enforce trade rules have been unsuccessful. However, any potential import restrictions should be weighed against the risk of legal action and potential impact on U.S. consumers.

CONCLUSION

Enforcing current trade rules and defining dispute resolution procedures are integral to ensuring confidence and stability in international commerce. Predictability in the global marketplace gives nations the security to engage with one another, and the result of this cooperation is significant: International trade increases productivity, gives greater access to new markets, benefits consumers, and grows the economy. Without enforcement capabilities, nations would be wary of entering these agreements, and opportunities for both international cooperation and economic growth would be lost.