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DISPUTE SETTLEMENT

REGIONAL APPROACHES

6.1 NAFTA



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NOTE

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WHAT YOU WILL LEARN

The North American Free Trade Agreement (NAFTA) concluded between Canada, the United States of America and Mexico entered into force in January 1994. The Agreement, which is in accordance with Article XXIV of GATT 1994, aims to establish a free trade area between the three countries, setting rules on the exchange of capital, goods and services between them. Among its objectives are the elimination of barriers to trade, the promotion of fair competition, the protection of intellectual property rights, the encouragement of investment, and, for the purpose of the implementation of the Agreement, the creation of effective procedures for the application and administration of the Agreement and for the settlement of disputes.

This module presents a general analysis of the dispute settlement mechanism of the NAFTA. It provides an overview of the three dispute settlement mechanisms established by the Agreement:

- (i) The *general mechanism* for the settlement of disputes relating to the application, interpretation and implementation of the provisions of the Agreement (Chapter 20 of the NAFTA, described in section 1 of this module); and

Two special mechanisms:

- (ii) For the settlement of investment disputes (Chapter 11 of the NAFTA described in section 2 of this module), and
- (iii) For the review of final determinations and statutory amendments relating to countervailing duty and anti-dumping laws (Chapter 19 of the NAFTA, described in section 3 of this module).

Each dispute settlement mechanism responds to the objectives of the Agreement and to the concerns of the three countries, as follows:

- The general dispute settlement mechanism aims to settle disputes between the three Member States of the NAFTA arising out of the interpretation, implementation and application of the obligations assumed by them under the Agreement. Such disputes cover practically all the areas contemplated by the Agreement, including market access, non-tariff barriers, rules of origin, standards-related measures, government procurement, investment, cross-border services, telecommunications, financial services and intellectual property. This general mechanism fulfils one of the objectives of the NAFTA, which is the creation of effective procedures for the application and implementation of the Agreement.
- A special mechanism is applicable to *investment disputes* arising between an investor of a Member State of the NAFTA and the

host country of the investment, in respect of damages that may be caused by the failure of the host country to implement the protections granted under the Agreement. Given that this mechanism provides investors with the assurance that they have available a specific mechanism that can be put into action by them, it also meets one of the objectives of the NAFTA, which is to increase investment opportunities in the territories of its Members.

- Another special mechanism exists for review of *statutory amendments* and final determinations made by the authorities of a Member State in relation to *anti-dumping and countervailing duty laws*. In the case of statutory amendments, the mechanism applies between the States. In the case of reviews of determinations made by the authorities of a Member State, since the mechanism replaces judicial review in each country, any person that has the right to take part under national legislation may do so under the procedures established by the Agreement. This mechanism also fulfils one of the objectives of the NAFTA, which is to eliminate unnecessary barriers to trade, such as may arise from inadequate application of the Member States' laws on unfair practices.

The nature of the three procedures is similar to that of commercial arbitration, in that there is no standing supranational body; instead there are arbitral tribunals or panels created in each case in accordance with special rules.

OBJECTIVES

After reading this module, the reader should be able to:

- Identify the three dispute settlement mechanisms contained in the NAFTA;
- Recognize the substantive and procedural regulations that are applicable to each of these three mechanisms;
- Identify the various cases that have been submitted to these mechanisms; and
- Apply and analyse the general provisions of each of these mechanisms with reference to specific cases.

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