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U.S. - European Union Disputes in the World Trade Organization

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Summary

U.S.-EU relations have been affected by a number of trade disputes in recent years. While the majority of trade disputes do get resolved, attempts to settle some of the disputes have been met with refusal or inability by one or another of the parties to comply in a timely manner with the World Trade Organization (WTO) panel rulings. The 108th Congress inherits several of these disputes where the WTO has ruled that U.S. laws violate trade obligations. Absent U.S. compliance through legislative action, the EU could in some cases decide to retaliate against U.S. exports this year or next. In the meantime, the EU remains in non-compliance with its WTO obligations to allow imports of beef treated with hormones. Beyond raising U.S.-EU trade tensions, non-compliance by a key WTO member arguably weakens the credibility and authority of the WTO and its dispute settlement process.

The initiation and resolution of disputes under WTO agreements is carried out under the Uruguay Round Dispute Settlement Understanding (DSU), considered a cornerstone of the WTO system. The WTO dispute settlement process has a more quasi-judicial orientation than the quasi-diplomatic orientation of the prior GATT system, in which negotiation and conciliation generally prevailed over multilateral enforcement of rules. The DSU provides for virtually automatic establishment of panels, adoption of panel and appellate reports and, where requested, authorization to impose retaliatory measures; deadlines are set out for various stages of the process. These features ensure that complaints are heard and promote implementation of WTO rulings, thus making available to all WTO Members the means to clarify trade rules and redress trade injury. At the same time, the process continues to retain certain diplomatic elements in that its primary aim is to "secure a positive solution to a dispute," with the preferred outcome being a "solution mutually acceptable to the parties to the dispute and consistent with the covered agreements." Opportunities for settlement are provided at a number of points in a procedure.

U.S. and EU instances of longstanding non-compliance have for the most part not involved routine commercial disputes over trade or customs regulations, but rather tax policy and internal national regulation, particularly of social and health matters. While ambiguity in WTO agreements may give rise to disputes in these difficult areas, the automatic features of the DSU also allow parties to pursue such cases through the full dispute process, even though it may be evident from the outset that implementation of an adverse WTO ruling may be subject to overwhelming domestic opposition in the defending country. To deal with the problem of non-compliance in difficult cases, both Washington and Brussels may need to give greater attention to a number of concerns and policy considerations, including choice of cases initiated, limitations on panel decisions, role of mediation and conciliation, and adoption of remedies that are trade liberalizing. Assuming that some disputes are not well-suited for the DSU process, greater efforts may be needed to settle differences through bilateral negotiations and political compromises, through mediation, or by agreeing to arbitration from an outside (*i.e.*, non-WTO) party. This report will be updated periodically. For more on the WTO dispute settlement process and U.S.-EU Trade Relations, see CRS Report RS20088 and CRS Issue Brief IB10087.

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U.S. - European Union Disputes in the World Trade Organization

Introduction

This report discusses disputes in the World Trade Organization (WTO) between the United States and the European Union (EU). The report begins with an overview of the issues to be addressed, and continues with a brief description of the WTO dispute settlement process, a summary of U.S.-EU dispute settlement history, and a review of issues arising from cases of longstanding non-compliance. The report concludes with a discussion of continuing concerns and policy considerations.

The 108th Congress inherits several U.S.-EU disputes where the WTO has ruled that U.S. laws violate world trade obligations. In some cases, barring abolition or significant modification of the statutes in question, the EU could decide to retaliate against U.S. exports this year or next. The largest threat involves a WTO ruling that a U.S. export tax benefit is an illegal subsidy. Other cases in which original WTO compliance deadlines passed without needed action by the United States include a dispute over the Antidumping Act of 1916, which provides a private right of action and criminal penalties against dumping; a copyright dispute where the U.S. was found to have violated royalty rights of EU musicians; and a trademark dispute with implications for a Cuban rum trademark. At the same time, the EU has not yet complied in a case finding its beef hormone directive to violate WTO obligations, choosing instead to accept retaliatory tariffs originally imposed by the United States in 1999.

Bills were introduced in the 107th Congress to comply with some of these WTO decisions, but, with the exception of the establishment of a Treasury Department fund for WTO settlements in the Trade Act of 2002, legislation was not acted upon. In the 108th Congress, discussions are continuing on compliance legislation in the export subsidy dispute, with bills introduced in April and May 2003. House and Senate legislation to repeal the 1916 Antidumping Act and the challenged trademark provision has also been introduced. In addition, funds were recently appropriated for the settlement of the music licensing dispute, and the Executive Branch has taken initial compliance action in a recent case faulting a Commerce Department countervailing duty methodology.

As an international organization intended to ensure that trade between countries flows more easily, predictably and freely, the World Trade Organization (WTO) serves as a forum for international trade negotiations and the settlement of disputes. The United States and the European Union (EU), accounting for over 40% of world trade, are arguably the two most important members of the WTO. Cooperation and joint leadership between the two partners have historically been the key to all previous efforts to liberalize world trade on a multilateral basis, including the

creation of the General Agreement on Tariffs and Trade (GATT) in 1948 and the WTO in 1995.

U.S.-EU efforts to provide leadership to the world economy in recent years, however, have been affected by a number of trade disputes. These disputes have absorbed a large amount of time and energy of key policymakers, making efforts to pursue common interests and objectives, such as the successful completion of the current WTO Doha Development Round, more difficult. Moreover, in cases involving beef hormones, bananas, export tax benefits, and other trade laws, attempts to settle disputes have met with refusal or inability by one side or the other to comply in a timely manner with the WTO panel rulings.

The WTO dispute settlement system is viewed by WTO Members as "a central element in providing security and predictability to the multilateral trading system."[1] Non-compliance with WTO panel and Appellate Body rulings by a key Member arguably weakens the credibility and authority of the WTO and serves as a poor model for the rest of the world. Why should we comply with WTO panel decisions if the United States or EU do not have to, other countries may ask. Non-compliance may also diminish the perceived value of negotiating new trade agreements, as well as increase the attractiveness of retaliation as an enforcement mechanism. At the same time, focusing on the underlying causes of non-compliance may reveal the limitations of the WTO dispute process and the ultimate outcomes that can realistically be expected in certain types of cases.

WTO Dispute Settlement Process

Settlement of trade disputes from 1948-1995 in the GATT, the predecessor organization to the WTO, was based on a blend of two different philosophies. The first was a "diplomatic" view that favored conciliation and problem-solving over legal precision in determining which country was right or wrong. The second was a more judicial and "rules-oriented" approach that attempted to provide a more binding process with sanctions as an enforcement mechanism.[2]

Today's WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU), one of the agreements that emerged from the GATT Uruguay Round (1986-1994), tilts more towards a judicial model. U.S. negotiators had advocated this approach during the Round, supported by a statutory trade negotiating mandate in the Omnibus Trade and Competitiveness Act of 1988 to strengthen GATT dispute settlement procedures.

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[1] WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Art. 3.2.

[2] Jackson, John H. *The World Trading System; Law and Policy of International Economic Relations.* The MIT Press, Cambridge, Mass. 1989. pp. 85- 88. Barfield, Claude E. *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization,* The AEI Press, Washington, D.C. 2001. 245p.

The DSU, which went into effect January 1, 1995, continues past GATT dispute practice, but also contains several features aimed at making the system more rigorous and automatic. In contrast to the old GATT system, in which a member could block decisions at any step of the process, the DSU provides that panels will be established and reports by WTO panels and the Appellate Body will be adopted unless there is a consensus among WTO members against taking such action. In addition, where the losing party does not comply with its WTO obligations within a reasonable time period, and the complaining party requests authorization to impose a retaliatory measure, the request will be granted absent the same negative consensus. Deadlines have also been established for each stage of the four-step dispute process: consultations; panel deliberations; appellate review; and implementation of compliance measures.[3] The DSU is administered by the WTO Dispute Settlement Body (DSB), which is composed of all WTO Members.

Members are required under the DSU to first determine if invoking DSU procedures "would be fruitful" in a given case.[4] The aim of the process is "to secure a positive solution to a dispute," the preferred outcome being "a solution mutually acceptable to the parties to the dispute and consistent with the covered agreements"; absent such a solution, the primary objective of the process is withdrawal of an offending measure, with compensation and retaliation being avenues of last resort.[5] Where retaliation is requested by the prevailing party, the defending party has a right to have the amount arbitrated to determine if the level proposed is substantially equivalent to the level of trade damage. However, compensation and retaliation are considered temporary measures under the DSU, pending full compliance. Where the defending party does take action to comply and the prevailing party questions whether the action is sufficient, a compliance panel may be established to determine whether the measure fulfills WTO obligations. The DSU also discourages unilateral actions in WTO-related trade disputes, requiring WTO Members to resolve such disputes using DSU procedures, and to observe DSU provisions when determining whether a WTO violation has occurred or trade injury exists, determining what is a reasonable time to comply, and taking any retaliatory measures.

The steps in the WTO dispute process are as follows:

Consultations (Art. 4). If a WTO Member requests consultations with another Member under a WTO agreement, the latter must generally respond within 10 days and enter into consultations within 30 days. If the dispute is not resolved within 60 days after receipt of the request to consult, the complaining party may request a panel. The complainant may request a panel earlier if the defending Member has failed to enter into consultations or if the disputants agree that consultations have been unsuccessful.

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[3] For an overview, see CRS Report RS20088, *Dispute Settlement in the World Trade Organization: An Overview*, by (name redacted).

[4] DSU, Art. 3.7.

[5] *Id.*

Establishing a Dispute Panel (Arts. 6, 8). If a panel is requested, the DSB must establish it at the second DSB meeting at which the request appears as an agenda item, unless it decides by consensus not to do so. The panel is generally composed of 3 persons. The Secretariat proposes the names of panelists to the disputants, who may not oppose them except for "compelling reasons." If there is no agreement on panelists within 20 days from the date the panel is established, the WTO Director, at the request of either disputing party, appoints the panelists.

Panel Procedures (Arts. 12, 15). After considering written and oral arguments, the panel issues the descriptive part of its report (facts and argument) to the disputing parties. After considering any comments, the panel submits this portion along with its findings and conclusions to the disputing parties as an interim report. Absent further party comments, the interim report is considered to be the final report and is circulated promptly to WTO Members.

A panel must generally circulate its report to the disputants within 6 months of the date the panel is composed, but may take longer if needed. The period from panel establishment to circulation of the report to all Members should not exceed 9 months.

Adoption of Panel Reports/Appellate Review (Arts. 16, 17, 20). Within 60 days after a panel report is circulated to WTO Members, the report is to be adopted at a DSB meeting unless a party to the dispute appeals the report or the DSB decides by consensus not to adopt it. Within 60 days of being notified of an appeal (extendable to 90 days), the Appellate Body must issue a report that upholds, reverses, or modifies the panel report. An appellate report is to be adopted by the DSB, and unconditionally accepted by the disputing parties, unless the DSB decides by consensus not to adopt it within 30 days after circulation to Members.

The period of time from the date the panel is established to the date the DSB considers the panel report for adoption is not to exceed 9 months (12 months where the report is appealed) unless otherwise agreed by the disputing parties.

Implementation of Panel and Appellate Body Reports (Art. 21). Thirty days after the panel and any Appellate Body reports are adopted, the Member must inform the DSB how it will implement the WTO ruling. If it is "impracticable" to comply immediately, the Member will have a "reasonable period of time" to do so. The period will be: (1) that proposed by the Member and approved by the DSB; (2) absent approval, the period mutually agreed by the disputing parties within 45 days after the date of adoption of the report or reports; or (3) failing agreement, the period determined by binding arbitration. Arbitration is to be completed within 90 days after the reports are adopted. To aid in determining a compliance period, the DSU gives the arbitrator a non-binding guideline of 15 months from the date of adoption.

The period of time from the date the panel is established to the date the compliance period is determined is not to exceed 15 months unless the disputing parties agree otherwise. If the panel or the Appellate Body has extended its time, the additional period is to be added to these overall deadlines. In such case, the total time is not to exceed 18 months, unless the disputing parties agree that exceptional circumstances warrant an extension.

Compliance Panels (Art. 21.5). Where there is disagreement as to whether a Member has complied in a case, a panel may be convened to resolve the dispute. The compliance panel has 90 days to issue its report, which may then be appealed.

Compensation and Suspension of Concessions (Art. 22). In the event the defending party fails to comply with the WTO recommendations and rulings within the compliance period, the party must, upon request, enter into negotiations with the prevailing party on a compensation agreement within 20 days after the expiration of this period; if negotiations fail, the prevailing party may request authorization from the DSB to retaliate.

If requested, the DSB is to grant the authorization within 30 days after the compliance period expires unless it decides by consensus not to do so.[6] The defending Member may request arbitration on the level of retaliation or whether the prevailing Member has followed DSU rules in formulating a proposal for cross-retaliation; the arbitration is to be completed within 60 days after the compliance period expires. Once a retaliatory measure is imposed, it may remain in effect only until the offending measure is removed or the disputing parties otherwise resolve the dispute.

Overview of U.S. – EU Disputes in the WTO

From 1995 through the end of 2002, the United States and the EU filed 51 complaints against each other under the Dispute Settlement Understanding. The cases are almost equally divided: 26 have been filed by the United States against the EU or one of its Member States, and 25 have been filed by the EU against the United States. For the most part, the United States or the EU, as the case may be, has been the sole complainant in the case. The 51 complaints constitute 18.3% of the total number of complaints filed between January 1, 1995, the date the WTO Agreement entered into force, and December 31, 2002.[7]

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[6] The DSU does not make clear how it is to be determined whether a losing Member has complied with WTO rulings so that compensation and authorization to impose countermeasures may be requested before the end of the stated 30-day period. As noted above, Article 21.5 provides for panels to make this determination if a disagreement arises as to whether a Member has complied, but, other than stating that the panel's work should be completed within 90 days, the DSU does not clearly integrate the compliance process into an overall WTO dispute proceeding. This ambiguity has given rise to the problem of "sequencing," which refers to the timing of compliance panel proceedings and requests to impose countermeasures. The issue, which first arose in the implementation phase of the U.S.-EU banana dispute, has been taken up in WTO discussions and negotiations of revisions to the DSU. Absent clarifications in the DSU, however, sequencing problems have generally been resolved on an *ad hoc* basis through bilateral agreements between disputing parties. Parties ordinarily agree that a compliance panel is to complete its work before the prevailing party will pursue approval of its authorization request. *See generally* Rhodes, "The Article 25.1/22 Problem: Clarification through Bilateral Agreements?" 3 *J. Int'l Econ. L.* 553 (2002).

[7] These statistics and information regarding the current status of the cases discussed here are (continued...)

In general, the EU has brought a relatively steady number of cases each year, while the number of cases brought annually by the United States reached a peak in 1998 and has fallen to one case in each of 2000, 2001, and 2002. The EU caseload against the United States may be viewed as somewhat heavier than the U.S. caseload against the EU because a number of the cases filed by the United States against the EU or its Member States involve the same or similar subject matter; moreover, the EU has pursued a greater number of cases through the full panel process. The following chart shows the variations in actual complaints filed:

Year	U.S. as Complainant	EU as Complainant
1995	2	0
1996	3	3
1997	6	4
1998	8	5
1999	4	4
2000	1	5
2001	1	2
2002	1	2

Source: WTO dispute settlement statistics [http://www.wto.org]

U.S. Complaints Against the EU. Of the 26 complaints filed by the United States against the European Union or specific EU countries, 13 are currently listed by the WTO Secretariat as remaining in the consultative stage and thus do not appear to have a definitive solution. In all of these cases, the 60-day consultation period in the DSU has passed. These cases allege, in reverse chronological order: Safeguards Agreement and GATT violations stemming from the EU tariff-rate quota on U.S. corn gluten feed briefly imposed while the U.S. maintained its three-year safeguard on wheat gluten; the EU's failure to protect trademarks and geographic indications for agricultural products in violation of the Agreement on Trade-Related Intellectual Property (TRIPS); French and EU subsidies to develop a flight management system related to Airbus; export subsidies resulting from income tax treatment of exports by various EU members; and EU export subsidies on processed cheese. In addition, there are two outstanding complaints related to the now settled dispute over EU's banana import regime.

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[7] (...continued)
derived from the WTO Secretariat's electronically-published *Update of WTO Dispute Settlement Cases* and chronology of disputes, [http://www.wto.org/english/tratop_e/dispute_e/dispu_e.htm]. While the European Communities (EC) is the WTO member body for the 15 European Union member states, the term European Union or EU is used in this discussion when referring to the EU's WTO participation.

Seven complaints filed by the United States were settled either through consultations or before a panel had begun its work. Since settlement of a case must be mutually agreed by the disputing parties, the United States apparently achieved a satisfactory solution in these situations. Two of these cases dealt with customs duties on rice and grain, respectively, and five involved intellectual property issues. In four of these either a panel had been requested or else a panel was established or later suspended.

Five of the cases brought by the United States were taken through the full panel process. Two were won by the United States: beef hormones and bananas. Three of the cases were lost on appeal, each of these dealing with customs classification of computer equipment.

The EU eventually complied in the successful challenge to the EU's banana import regime, though two and one-half years had passed from the end of the original compliance deadline (January 1, 1999) before a settlement was reached. Maintaining that the EU had not complied by this deadline, the United States requested authorization to impose sanctions on EU products under Article 22 of the DSU. In April 1999, the WTO authorized the United States to suspend $191.4 million in trade concessions, an arbitrated amount reflecting the level of trade injury suffered by the United States. The United States imposed 100% *ad valorem* duties on EU products in this amount shortly thereafter and, following a compliance panel proceeding, protracted negotiations between the EU, the United States and Ecuador, and the institution of new EU measures, the EU eventually complied. The United States suspended the increased duties July 1, 2001. The case also focused attention on the DSU itself, with the EU challenging U.S. domestic procedures and countermeasures under Section 301 of the Trade Act of 1974 as violative of DSU requirements.

In contrast, the EU chose to accept retaliation in the beef hormone case, in which the United States had obtained panel and appellate reports finding that the EU's ban on imports of meat from animals to which certain growth hormones were administered violated the WTO Agreement on Sanitary and Phytosanitary Measures. When the EU had not complied by May 13, 1999, the end of the arbitrated compliance period, the United States again sought authorization to impose sanctions on EU products. In July 1999, the United States was authorized to suspend concessions in the arbitrated amount of $116.8 million, and shortly thereafter imposed 100% *ad valorem* duties on certain EU items. Absent compliance by the EU, these duties still remain in place.

Currently pending is a U.S. complaint regarding the EU's provisional steel safeguards instituted after the Bush Administration imposed safeguards on steel imports in March 2002. A panel was established in September 2002, but panelists have not yet been named.

EU Complaints Against the United States. Of the 25 cases brought by the EU against the United States, seven cases are listed by the WTO Secretariat as remaining in consultations; in each of these the 60-day DSU consultation period has ended without a panel being requested. The most recent of these are disputes over sunset reviews of antidumping and countervailing duties on steel products from France and Germany, and a sunset review of antidumping duties on seamless pipe

from Italy. The older disputes involve the Section 301 carousel retaliation provision, which generally requires the United States Trade Representative (USTR) to revise lists of products against which trade sanctions are imposed; Section 337 of the Tariff Act, which authorizes border measures against infringing imports and was amended in 1994 after a successful GATT challenge by the European Communities; the U.S. harbor maintenance tax; an import ban on poultry products; and antidumping measures on solid urea from the former German Democratic Republic.

In five cases, the dispute was either settled through consultations or an established panel was allowed to lapse. Two of these involved U.S. rules of origin for textiles, and a third involved pre-WTO retaliatory measures taken by the United States against the EC beef hormone directive. When the U.S. removed its tariff increases in July 1996, the EU decided not to pursue its earlier panel request in this third case. The two remaining cases challenged U.S. measures imposed for foreign policy purposes and were controversial for this reason. The challenged statutes were the Cuban Liberty and Democratic Solidarity Act (Helms-Burton Act), which imposed additional sanctions on Cuba and on individuals dealing in property confiscated by Cuba, and the Massachusetts state law that imposed procurement sanctions on firms doing business in Burma. After a panel was established in the Helms-Burton Act case and the United States suggested that it might invoke WTO national security exceptions in its defense, the dispute was resolved by bilateral agreement between the United States and the EU. The Burma panel was allowed to lapse in February 2000 as lower federal courts in the United States ruled the state law unconstitutional. The Supreme Court eventually held that the statute was preempted by a federal statute imposing sanctions on Burma.[8]

Thirteen of the 25 cases have been pursued by the EU through the full panel process or are currently before a panel. Two of these, each involving challenges to Section 301 and instituted in response to U.S. actions in the banana case, had mixed results for the EU; the United States did not need to take action in these cases.[9] The EU prevailed in nine others. To date the United States has complied in two of these cases (wheat gluten safeguards and a countervailing duty order on U.K. steel products), and has taken action aimed at compliance in several others.

Two cases are currently at the panel stage, both dealing with safeguards. In the first case, a challenge to the steel safeguards imposed in March 2002, a final panel report adverse to the United States was issued May 2, 2003; the United States has stated that it will appeal the report, which is expected to be circulated to WTO

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[8] Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000). The Burma case illustrates that in some situations parallel domestic and international legal proceedings may be initiated with respect to a governmental measure and that, if the domestic judicial proceeding is successful, the WTO claim may be abandoned. While federal law prohibits private rights of action against the United States and individual States and their political subdivisions for alleged WTO violations, 19 U.S.C. § 3512(c), a constitutional challenge was still possible with respect to the state Burma law.

[9] *See generally* Jackson and Grane, "The Saga Continues: An Update on the Banana Dispute and Its Procedural Offspring," 4 *J. Int'l Econ. L.* 581 (2001).

Members as a whole in July 2003.[10] In the second, a challenge to U.S. safeguards on line pipe and wire rod, panelists have not been named; the panel may have become moot, however, since the safeguards in question expired in early March 2003.

Of the seven cases in which the United States has not yet fully complied, one involves a tax statute (the Extraterritorial Income Exclusion (ETI) Act); two involve intellectual property issues (music licensing and protection for trademarks belonging to businesses whose property was confiscated by the Cuban government); and four deal with trade remedies. The ETI Act was passed to comply with an earlier WTO ruling finding that the U.S. Foreign Sales Corporation statute was a prohibited export subsidy. The trade remedy challenges involve the Antidumping Act of 1916, which provides a private right of action and criminal penalties for dumping; a countervailing duty (CVD) order on German steel products; a set of 12 CVD orders on EU steel products; and the Continued Dumping Subsidy Offset Act of 2002 (CDSOA) or Byrd Amendment, which provides for the disbursement of antidumping and countervailing duties to producers and interested parties in the underlying antidumping and CVD proceedings.

In three of the seven cases (ETI, music licensing, and the Antidumping Act of 1916), U.S. compliance deadlines have passed; in one (trademark protection), the compliance deadline will expire at the end of June 2003. The Administration, in its FY2004 budget proposal, has called for repeal of the ETI statute and stated an intent to work with Congress for statutory reform of international tax rules. As discussed below, other legislative proposals and options are also being considered, with bills recently introduced in the House and Senate. Legislation has also been introduced in the current Congress to repeal the 1916 Antidumping Act (H.R. 1073 (Sensenbrenner); S. 1080 (Hatch/Leahy); and S. 1155 (Grassley)). Three bills that would repeal the challenged trademark provision in connection with removal of the U.S. trade embargo with Cuba have also been introduced (H.R. 188 (Serrano); S. 403 (Baucus); and H.R. 1698 (Paul)).

In the music licensing case, the disputing parties agreed to have the level of trade injury determined in an arbitration under Article 25 of the DSU, which provides for binding arbitration as an alternative means of dispute settlement. This option, which resulted in an arbitral award of $1.1 million annually, was agreed to after the United States had not implemented the earlier WTO ruling by the end of the arbitrated compliance period (July 2001). Congress established a judgment fund for the payment of such WTO awards in the Trade Act of 2002, but has yet to appropriate funds for it. In P.L. 108-11, the emergency wartime supplemental appropriations act, however, Congress appropriated $3.3 million for "a one-time only, lump-sum payment" to the European Communities to cover three years of trade injury in the case.[11]

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[10] "WTO Panel Issues Final Ruling Condemning U.S. Steel Safeguard ," 20 *Int'l Trade Rep.* 812 (BNA 2003); "WTO Issues Final Panel Finding U.S. Steel Safeguard in Violation of Rules," *Inside U.S. Trade*, May 9, 2003, at 11.

[11] *See* H.Rept. 108-76 at 92.

The compliance process is in its early stages in some of the more recent cases. The United States has begun to comply with rulings in the challenge to the multiple CVD orders on EU steel products with the issuance of a Commerce Department notice March 21, 2003, announcing a proposed revision of the privatization methodology at issue in the case.[12] The United States and the EU have negotiated a compliance deadline of November 8, 2003, in the proceeding.[13] The compliance period in the CDSOA dispute is currently being arbitrated.[14]

Non-Compliance in Selected Cases

While the majority of U.S.-EU disputes do get resolved satisfactorily, a number of cases are currently testing the implementation articles of the DSU. Two of the more difficult of these cases – beef hormones and the ETI Act export subsidy – do not involve routine commercial disputes over trade or customs regulations, but rather tax policy and internal national regulation, particularly of social and health matters. These kinds of disputes, involving what are normally considered domestic policy issues, appear to be the most difficult to resolve and may raise broader questions such as whether the WTO is the proper forum for resolving these kinds of disputes.

Beef Hormone Dispute

The beef hormone dispute dates to 1989, when the EU instituted a ban on the sale, distribution and importation of hormone-treated beef.[15] In challenging the ban under the new DSU in 1996, the United States argued that it violated the Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). While the provisions of the SPS Agreement recognize the right of WTO members to adopt measures to protect human, animal, or plant life or health, they also require that these measures be founded on scientific evidence and applied only to the extent to achieve public health goals. The United States argued that the EU ban was instituted without sufficient scientific evidence, and that it constituted a disguised trade barrier.

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[12] Dep't of Commerce, "Notice of Proposed Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act and Request for Public Comment," 68 Fed. Reg. 13897 (2003).

[13] WTO, *Update of WTO Dispute Settlement Cases* (May 1, 2003), at 152.

[14] *Id.* While the Bush Administration has proposed repeal of the CDSOA in its FY2004 budget request (allowing, however, disbursements for FY 2003), 70 Senators have written to the President urging negotiations with U.S. trading partners aimed at recognition of a right to disburse antidumping and countervailing duties in the manner prescribed by the statute "prior to any attempt to change our laws." "U.S. Trading Partners Welcome Bush Proposal to Rescind Byrd Amendment," 20 *Int'l Trade Rep.* 255 (BNA 2003); "Two-Thirds of Senate Defends Byrd Law, Casting Doubt on Repeal," *Inside U.S. Trade*, February 7, 2003, at 21. Other options are also being explored. *See, e.g.*, "Draft Senate Bill Would Repeal Byrd Law, Create TAA Trust Fund," *Inside U.S. Trade*, April 11, 2003, at 1.

[15] For further information, *see* CRS Report 98-861, *U.S. European Agricultural Trade: Food Safety and Biotechnology Issues*, by (name redacted).

WTO panels agreed with the U.S. argument and gave the EU time to bring its hormone measure into compliance with SPS rules. The EU, however, argued that none of the scientific reports established beyond reasonable doubt that the consumption of beef treated with hormones was safe for human health. The EU also claimed that a judgment about the level of protection was a value judgment that only it could make. Occurrences of "mad cow disease" in several EU countries and the outbreak of foot-and-mouth disease in the United Kingdom also contributed to making many Europeans more risk averse on this issue. As noted earlier, the US in 1999 imposed 100% ad valorem tariffs on $116.8 million in EU exports, an amount of retaliation that is still in effect.

Food safety concerns are not limited to the beef hormone case, however, with the United States having recently filed a complaint in the WTO requesting consultations with the EU regarding its restrictions on products containing genetically-modified organisms (GMOs). The EU has imposed a moratorium on approval of GMO products while it implements regulations requiring traceability and labeling. Some EU countries have also adopted a policy of banning such products, though the EU has indicated that it would seek to prohibit individual countries from maintaining their bans once EU regulations are in place. The United States views the moratorium and import bans, which significantly affect exports of U.S. agricultural products to Europe and, it is alleged, to developing countries as well, as not being scientifically-based as is required under the SPS Agreement and has expressed doubts as to the feasibility of the proposed regulatory scheme. Members of Congress have been calling for the initiation of a dispute settlement proceeding, with the EU strongly defending its practices and urging the United States to allow the EU regulatory regime to be fully implemented.[16] The United States filed its WTO complaint May 13, 2003, with Canada and Argentina initiating separate actions. A complaining country may request a panel if its dispute with the EU is not resolved within 60 days of its consultations request.

In Europe, GMOs are an issue of great public sensitivity. Several food safety crises in the late 1990s heightened public fears about biotechnology and reduced public confidence in the ability of government agencies to police such activities. Nor have such technologies found much favor within the European agricultural sector that still places major emphasis on maintaining family farms. Given these sensitivities and preferences, it is uncertain whether the EU would comply with a WTO decision that lifted the moratorium directly or indirectly. The issue has been further complicated by both U.S. and European efforts to persuade other countries to adopt their approaches towards biotechnology in foods and agriculture.[17]

Export Subsidy Dispute

How the United States taxes export earnings has been the focus of a dispute with Europe since the 1970s. The current dispute is a product of multiple factors:

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[16] *See generally* "Consumers in Europe Resist Gene-Altered Foods," *N.Y. Times*, February 11, 2003, at A3.

[17] The Atlantic Council of the United States, *Risk and Reward: U.S.-EU Regulatory Cooperation on Food Safety and the Environment*, Policy Paper, November 2002, pp. 10-16.

technical GATT and WTO rulings, EU efforts to gain diplomatic leverage over the United States on trade issues, and complex distributional issues making it hard for Congress to craft a WTO compatible solution.

The FSC/ETI controversy involves EU charges that these provisions are an export subsidy that contravene various WTO agreements, particularly the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Agreement on Agriculture. WTO panels have agreed with the EU complaint, rejecting the U.S. argument that it had negotiated exemptions to its taxation of exports in the late 1970s and early 1980s. After the FSC replacement statute was ruled non-compliant with world trade obligations, a WTO arbitrator, in an award circulated in August 2002, determined that the EU could impose 100% punitive tariffs on $4.04 billion of U.S. exports to Europe. On May 7, 2003, the EU formally requested and received authorization from the WTO to impose the retaliatory measures.[18] EU Trade Commissioner Lamy stated the same day that he was "encouraged" by U.S. efforts to "ensure repeal" of the statute during the current fiscal year and that the European Commission "will review the situation in the autumn, and if there is no sign that compliance is on the way at that time, it would then start the legislative procedure for the adoption of countermeasures by 1 January 2004."[19]

Although the FSC was enacted in 1984, the EU did not challenge the provision until 1997. Many on the U.S. side maintain the EU challenge was motivated by a desire to create negotiating leverage on trade issues, not by complaints from European companies that they were being disadvantaged by the subsidy. Perhaps the EU thought that winning a case that involved a very large amount of trade could forestall U.S. challenges against a variety of EU practices, as well as help settle other trade disputes.

U.S. policymakers remain divided over how best to comply with the WTO ruling, which has raised complex issues involving the U.S. tax code. Some in the Senate would like to see a negotiated solution, perhaps by amending the SCM Agreement in a way that would permit some exemption of export earnings from corporate tax. Legislation proposed in the House to repeal the ETI and provide other tax benefits was introduced by House Ways and Means Committee Chairman Thomas in the 107th Congress (H.R. 5095), but was opposed by a number of large exporting companies, and was not acted upon. In 2003, the President called for repeal of the ETI statute along with revision to the U.S. international tax rules in his FY 2004 budget proposal and discussions have continued to take place in Congress on replacement legislation. On April 11, 2003, Congressmen Rangel and Crane introduced legislation (H.R. 1769) that would repeal the current statute, provide transition relief, and create a new tax deduction for income attributable to U.S. production activities. A companion Senate bill (S. 970 (Hollings)) was introduced

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[18] WTO News, Dispute Settlement Body, May 7, 2003, [http://www.wto.org/english/news_e/news03_e/dsb_7may03_e.htm].

[19] "Foreign Sales Corporations: Following WTO authorisation to apply countermeasures of up to $4 billion, EU expects US to ensure compliance with WTO rules before the beginning of next year," IP/03/652, May 7, 2003, [http://europa.eu.int/comm/press_room/ index_en.htm].

May 1, 2003. Chairman Thomas is also expected to introduce replacement legislation in the current session.[20]

Concerns and Policy Considerations

The credibility of the WTO depends on a prompt, effective, and fair dispute settlement mechanism. Non-compliance by either the U.S. or EU of a WTO ruling arguably thwarts this objective. To deal with the problem of non-compliance, both Washington and Brussels may have to give greater attention to a number of concerns and policy considerations, including choice of cases initiated, limitations of panel decisions, the role of mediation and conciliation, and the adoption of remedies that are trade liberalizing.

Both the U.S. and EU have brought complaints to the WTO that may have been motivated more by a desire to score points with domestic political interests or to bolster negotiating leverage on other trade disputes than to redress serious trade problems. Some cases have been initiated even when it is probable that the defendant would be unable to implement a losing panel decision due to overwhelming domestic political opposition. Greater sensitivity on the part of policy makers on the selection of cases to initiate in the future could prevent the WTO dispute process from being used and arguably weakened in this manner.

In the area of some of the most bitter U.S.-EU disagreements, the WTO may be asked to rule on very complex issues that touch sensitive domestic social and environmental concerns directly. If the applicable WTO agreements are vague or ambiguous, it is legitimate to question whether WTO panels should be in the business of clarifying rules where scant U.S.-EU substantive consensus exists. Moreover, Bush Administration trade officials have expressed concerns that some panel rulings "legislate new obligations" that were not agreed to in multilateral negotiations. Under these circumstances, some type of politically agreed upon compromise may be viewed as preferable to a quasi-judicial WTO ruling pending efforts to clarify the rules in subsequent multilateral negotiations.

Assuming that some disputes with a highly charged political content are not well suited for the panel and appellate body process, greater efforts could be made to get the contending parties to settle their differences through bilateral negotiations, through mediation, or by agreeing to arbitration from an outside (*i.e.*, non-WTO) party.[21] While the DSU does afford opportunities for mediation and conciliation, some observers argue that these provisions can be greatly strengthened and made mandatory in highly divisive cases. Similarly, Washington and Brussels could try to strengthen the role of the "early warning system" that was established in 1999 as

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[20] "Thomas Predicts Work on Bush Tax Plan May Delay ETI Bill; Amendment in Works," 20 *Int'l Trade Rep.* 346 (BNA 2003).

[21] Bilateral negotiations, for example, helped bridge the gap between the sides on how best to protect personal data when transferred across borders. See CRS Report RS20823, *The EU-U.S. "Safe Harbor" Agreement on Personal Data Privacy*, by (name redacted).

means of identifying and preventing future disputes stemming from legislative and regulatory proposals which threaten to create problems for the other side.

The fact that the EU elected to accept retaliation rather than comply with the WTO beef hormone ruling raises other concerns about WTO remedies. While accepting retaliatory measures may be an option for managing a dispute with domestic implementation difficulties, the remedy (trade sanctions) fundamentally conflicts with the goal of trade liberalization. Moreover, trade sanctions raise political tensions and impose economic costs not only on foreign producers, but also on domestic importers, consumers, and firms dependent on those imports subject to punitive tariffs. Retaliation often hardens the resolve of the offending party to maintain its WTO-illegal policy or law than to change it. Thus, when retaliation is accepted for an extended period, the utility of the remedy as a means of exerting pressure on the losing party to comply fully may diminish.[22]

Some critics of retaliation have suggested making compensation the only WTO remedy for non-compliance. Compensation, in turn, could be implemented through a monetary fine on the offending country or the offending country could agree to reduce its own trade barriers by an amount equivalent to its trade barrier.[23]

WTO Members are currently negotiating possible revisions to the WTO Dispute Settlement Understanding in the Doha Development Round, facing a deadline of May 2003. The United States has recently proposed revisions that would give disputing parties greater control over the process, with additional avenues for settlement. It is unclear at this point how successful the dispute settlement negotiations will be and whether any revisions that are adopted will serve to defuse the types of US-EU disputes that have stalled at the compliance phase. Moreover, regardless of revisions to the DSU, rulings that require statutory changes may as a rule prove more difficult to implement than those involving the exercise of authorities already granted. As long as the DSU allows Members to resort to the full

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[22] Congressional concern over the ineffectual nature of retaliation in the US-EU beef hormone case (as well as in the now-settled U.S. challenge to the EU's banana import regime) led to enactment in 2000 of the so-called "carousel" retaliation statute, which directs the United States Trade Representative periodically to revise the lists of imports subject to trade retaliation in a case brought under Section 301 of the Trade Act of 1974 unless the USTR determines that implementation of WTO obligations is imminent or the USTR and the Section 301 petitioner agree that revision is unnecessary. Both the beef hormone and banana cases were initially brought as Section 301 actions and were each in the monitoring phase of the USTR's investigation, as required under § 306 of the Act, when the statute was passed.

The USTR began implementation of the carousel provision shortly after it was enacted but to date has not revised the retaliation list in the beef hormone case. The EU quickly challenged the carousel provision in the WTO, arguing, among other things, that it requires unilateral suspension of (or threats to suspend) WTO concessions or obligations other than those whose suspension has been authorized by the DSB. The case remains in consultations, with the issue having been raised in the ongoing review of the DSU begun under a Uruguay Round mandate. *See generally* CRS Report RS20715, *Trade Retaliation: The "Carousel" Approach*, by (name redacted).

[23] Barfield, Claude, E., p. 130.

WTO dispute process for disputes of their choosing, Members will have the option of following this route when they believe that pursuing a WTO case best fulfills their various policy goals. It remains unclear whether past experience as to the types of WTO cases that may realistically be expected to result in compliance will serve as a significant factor in decisions as to which cases Members will initiate in the future.