Old and New Issues in EC-US Trade Disputes

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1. Introduction

In June 1986, a group of American and European scholars met in Brussels to review and analyze the major trade issues on which officials from the European Community (EC)\(^1\) and the United States (US) often disagreed. The conference was held three months before the Punta del Este Ministerial Meeting of the General Agreement on Tariffs and Trade (GATT) that successfully launched the Uruguay Round. The aim of the seminar, whose proceedings appear in Baldwin, Hamilton and Sapir (1988), was to provide a better understanding of the economic causes of the disagreements between the EC and the US and to consider various policy options that might assist in resolving these differences in the course of the Uruguay Round.

In some ways, the circumstances today, in April 2002, look very similar to those prevailing 16 years ago. American and European scholars are again meeting, on this occasion at Harvard University, at a time of conflict between the world’s two largest trading actors. The conference also comes a few months after the Doha Ministerial Meeting of the World Trade Organization (WTO), which has seen the successful launch of a new round of multilateral trade negotiations.

The European Community and the United States are the twin pillars of the world trading system. They are, by far, the world’s leading exporters and importers. More strikingly, the EC and the US, together, account for a staggering 70 percent of world merchandise trade. In other words, seven-tenth of the value of world trade either originates from or is shipped to the EC or the US. Conversely, only three-tenth of the value of world trade takes place between countries outside the European Community and the United States. In comparison, the size of bilateral EC-US trade looks relatively modest. It accounts for less than 10 percent of world trade and is no bigger than bilateral US-Canada trade.

Hence, the real significance of the trade relationship between the EC and the US lies not so much in their bilateral trade as much as in their central role in the world trade matrix.

Despite the contextual similarities – the bilateral EC-US disputes, the central role of the two partners in the world trading system and the launch of a new round of multilateral trade negotiations – today’s trade relations between the EC and US are substantially different from what they were 15 years ago. This is due to several developments in the multilateral trading system.

First, the number and diversity of countries with membership in the WTO is vastly greater than in the old GATT regime of the mid-1980s. Then, the GATT had less than 80 members. As of January 2002, the WTO had 144 members (including China) and 27 applicants (including Russia). Second, the dispute settlement system has become more effective. Under the old GATT regime, consensus of all members was required to proceed with every stage of the dispute settlement process. The result was often inertia as the losing party could block the process at any stage. The Dispute Settlement Understanding (DSU) reached in the Uruguay Round significantly

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\(^1\) I use the term ‘European Community’ (EC), rather than ‘European Union’ (EU), throughout the text because the EC is the relevant legal entity as far as trade relations is concerned.
changed the process by introducing the principle of ‘automaticity’. Under the WTO regime, unless there is consensus among all members, no stage of the dispute settlement process can be blocked. Third, during the past 15 years the number of regional trade agreements (RTAs) has hugely increased, with the EC and the US being parties to many of them. Today, trade with RTA partners accounts for nearly one-third of total (extra-) EC and US trade.

The paper analyzes the current trade disputes between the EC and the US in the light of these changes in the trade regime. It is divided into two substantive parts. Section 2 recalls the bilateral EC-US trade conflicts that took place in the early 1980s, while Section 3 looks at the bilateral EC-US trade conflicts that have happened since the inception of the WTO in January 1995. Section 4 concludes.


Quantitative Sketch

The early 1980s witnessed a sharp increase in trade friction between the European Community and the United States. One symptom of this friction was the growing volume of GATT litigation between the two parties.

According to Hudec (1988), more than half the number of bilateral EC-US GATT “lawsuits” filed from 1960 (the year when the EC became a full participant in GATT legal affairs) to the end of 1985 were initiated between 1980 and 1985.

The top panel of Table 1 reproduces the findings of Hudec (1988) on the number of and parties to GATT lawsuits from 1980 to 1985. These findings showed that:

1. Exactly one-third of all GATT lawsuits during this period (14 of 42) were between the EC and the US.
2. Ninety percent of all GATT lawsuits (38 of 42) involved either the EC or the US as one of the parties. Only 4 of the 42 cases involved neither.
3. Nearly 40 percent of all GATT lawsuits involving either the EC or the US were bilateral EC-US cases.
4. The EC and the US generally litigated as much with each other as with all other countries combined. Half the cases against the EC (8 of 16) were brought by the US, and half those against the US (6 of 12) were brought by the EC. Similarly, half the lawsuits filed by the EC (6 of 12) were against the US. By contrast, the US targeted more often the EC than all other countries: two-thirds of the cases filed by the US (8 of 12) were against the EC.
5. The EC and the US were each responsible for initiating roughly 30 percent of all GATT cases (12 of 42). The US was also the target of about 30 percent of the GATT lawsuits (12 of 42), but the EC was the target of nearly 40 percent of the cases (16 of 42).

The centrality of the European Community and of the United States to the GATT litigation process was, in fact, no bigger during the period 1980-1985 than it had been
in the period 1960-1979. Besides the sharp increase in the number of GATT actions, the main distinguishing feature of the early 1980s was the change in the respective roles of the EC and the US. Between 1960 and 1979, the US initiated 50 percent of all GATT lawsuits (19 of 38), whereas the EC initiated less than 10 percent of the cases (3 of 38). By contrast, the EC was on the receiving end of nearly half of the lawsuits (17 of 38), while the US was the defendant in less than one-tenth of the cases (3 of 38). Since the early 1980s, the EC and the US have achieved parity.

Why was there such a significant rise in trade frictions between the two partners at the time?

The early 1980s was an eventful period for the trade agenda. It was an era of implementation of the Tokyo Round agreements, concluded in 1979, and of preparation of the next GATT round of multilateral trade negotiations, eventually launched in Uruguay in 1986. At the same time, the United States witnessed its deepest recession in post-WWII history, a strong appreciation of its currency, and a sharp deterioration in its foreign trade balance. The European Community also suffered an economic downturn, but with a sharp depreciation of its real exchange rate and a trade balance close to equilibrium.

The EC-US trade conflicts during the first half of the 1980s reflected both the achievement and the failures of the Tokyo Round.

One of the major accomplishments of the Tokyo Round was the negotiation of six specific agreements on non-tariff barriers (NTBs). These GATT codes related to dumping, subsidies, standards, government procurement, customs valuation, and import licensing procedures. In their review of GATT codes, Stern and Hoekman (1987) noted that the “subsidies code has received the most negative publicity of all the Tokyo Round codes, and many consider it not to have been very successful. Perhaps the major explanation for this perceived lack of success is that, in drafting the code it was not possible to obtain consensus on such important issues as the appropriate use of agricultural subsidies [or] the definition of subsidies” (p. 62).

There were major differences between the European Community and the United States over what constitutes a subsidy and over how to determine the magnitude of subsidies. In fact, problems with the subsidies code mainly reflected bilateral differences between the EC and the US over matters of agricultural policy. This situation led to numerous EC-US GATT disputes in agriculture.

The fact that there was another round of multilateral trade negotiations in the offing was also, probably, an important factor contributing to the strong rise of GATT

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2 Thirty percent of all GATT lawsuits during the period 1960-1979 were between the EC and the US, and all but one of all 38 lawsuits involved either the EC or the US.

3 Real GDP fell by nearly 2 percentage points and the unemployment rate reached nearly 10 percent in 1982.

4 The dollar’s real effective exchange rate gradually appreciated by nearly 30 percent between 1980 and the peak year of 1984.


6 Real GDP growth was barely 0.1 percent in 1981 and the unemployment rate reached a record 8.7 percent in 1982.
litigation in the early 1980s. Moreover, as noted by Hudec (1988), the general climate within GATT had also become more conducive to litigation at the time. Following the Tokyo Round negotiations, there were efforts to improve the GATT’s dispute settlement system, which led to new and more rigorous procedures for most of the GATT codes, including the subsidies code.

Agricultural Disputes

Most of the disputes between the EC and the US in the early 1980s were about trade in agricultural products. Nearly 90 percent of all US actions against the EC (7 of 8) involved agriculture. However, the focus on agriculture in GATT lawsuits against the EC was not due solely to the US. In fact, three-fourths of all lawsuits against the EC involved agricultural products (12 of 16). By contrast, only roughly 40 percent of all lawsuits against the US covered agriculture (5 of 12), and mostly due to actions brought by the EC (3 of 5).

By the early 1980s, the EC’s Common Agricultural Policy (CAP) was already a long-established subject of US GATT lawsuits against the EC. During the 1960s, the US had tried to persuade the EC to limit the level of its variable levy, to keep price support down and to manage supply through production limits. This was the subject of all the three bilateral EC-US GATT litigation cases that took place at the time, and of the failed Kennedy Round negotiations in agriculture. During the 1970s, the US tried to preserve GATT bindings and other GATT disciplines on EC agricultural products not covered by the variable levy regimes. It also insisted that the effects of the CAP be limited to the EC market, so as to keep third-country markets open to US exports. These two objectives were the subject of four out of the six GATT lawsuits brought by the US against the EC during that time – the other two lawsuits concerned the income tax systems of EC member countries, and were filed as counterclaims against the EC’s own GATT lawsuit against the US Domestic International Sales Corporation (DISC) legislation.

Steel Disputes

The early 1980s also witnessed important bilateral EC-US disputes partly outside the GATT framework. The most acrimonious one was in the steel sector. In March 1980, the US Steel Corporation filed broad-ranging antidumping petitions against European producers. The EC threatened retaliation if antidumping charges were imposed. The outcome of bilateral EC-US negotiations was the revision of the notorious “trigger price mechanism” instituted by the US government in 1978 in order to establish a minimum price for imports. However, US steel imports continued to rise and in early 1982 US producers filed more than one hundred antidumping and countervailing duty complaints against suppliers from seven EC and four other countries. At the end of the year, the cases against EC producers were settled by a voluntary restraint agreement.

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8 The DISC case, brought in 1973, was the first-ever GATT lawsuit filed by the EC. It related to a scheme providing tax deferral for the export earnings of US corporations. The EC argued that the DISC was a tax exemption. The United States eventually repealed the DISC in 1984, and replaced it by the Foreign Sales Corporations (FSC). The FSC allowed partial exemption for the income of a foreign corporate subsidiary obtaining from handling US export sales. The repeal of the DISC and its replacement by the FSC were based on the Tokyo Round subsidies code. See Hufbauer (2002).
(VRA), whereby the EC agreed to limit its exports of carbon steel and of steel pipe and tube. In 1984, however, the Community took two legal actions against the US clamp down on its steel exports. It filed a GATT lawsuit against the US ban on steel and pipe imports, and adopted retaliatory action exercising compensation rights under GATT Article XIX in response to a US safeguard action on carbon steel.\(^9\)

The EC-US steel disputes at the beginning of the 1980s were partly attributable to the failure of the Tokyo Round to resolve a long-standing thorn in the GATT system. Under the original GATT, Article XIX permitted countries to escape from their obligations and raise trade barriers to safeguard their domestic producers in the event of a ‘serious injury’ associated with a surge of imports. The article also specified that foreign suppliers could retaliate or be compensated for losses from the restricted market access.

In general, the European Community and the United States made little use of Article XIX. Both resorted, instead, to voluntary restraint agreements and other GATT-illegal measures. According to Sampson (1987), there were 53 VRAs protecting the EC market in 1986, and 32 protecting the US market. This contrasts with only 13 Article XIX actions by the EC and 14 by the US during the entire period 1970-1986.

The reasons why the EC and the US preferred GATT-illegal VRAs over GATT-sanctioned safeguard measures are well known. First, the use of Article XIX measures generally required adherence to the principle of non-discrimination, whereas VRAs could be targeted towards specific trading partners. Second, the language of Article XIX was considered by international trade lawyers to be “extraordinary oblique” and often only “explainable by reference to the historical development of the language and practice under it” (Jackson 1969 as quoted by Sampson 1987).

During the Tokyo Round, there were attempts to revise the modalities of application of Article XIX with the view to bring safeguards back under the GATT. The negotiations focused largely on the issue of ‘selectivity’. Advocates of selectivity - mainly the EC – argued that countries should be allowed to apply safeguard measures only against imports from countries ‘apparently’ causing the injury. This proposal was strongly objected by smaller trading countries, who considered the non-discriminatory application of Article XIX as the best rampart against protectionist measures by large countries. In the end, the Tokyo Round was unable to resolve the issue and left Article XIX untouched.

Both before and after the Tokyo Round, steel was the product category most affected by VRAs, especially in the US market. The United States maintained VRAs with the EC from 1969 to 1974, and from 1982 to 1992. According to Sampson (1987), 25 of the 32 VRAs protecting the US market in 1986 covered steel and steel products.

The EC-US steel dispute of the early 1980s was the result of both cyclical and structural factors. On the cyclical side, the year 1982 was especially disastrous for world demand, affecting both EC and US steel producers. The latter were, however, also affected by the sharp appreciation of the US dollar, which resulted in the deterioration of their relative competitiveness. On the structural side, the situation in

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the early 1980s was the continuation of three long-term trends that had started a
decade earlier: stagnant world steel consumption; the relative decline of the EC and
the US in the world steel market due to the entry of new suppliers; and improvements
in productivity. The combination of these three trends meant enormous restructuring
for the EC and US steel industry. In the absence of well-functioning GATT safeguard
rules, such restructuring, especially if combined with difficult cyclical conditions, was
bound to result in bitter trade disputes between the two economic giants

3. EC-US Trade Conflicts Since 1995

Quantitative Sketch

Recent years have once again witnessed a sharp intensification of trade disputes
between the European Community and the United States. Bilateral EC-US conflicts -
on bananas, beef hormones or steel – have become regular headlines in the
international media.

Compared with the bilateral EC-US GATT litigation in the early 1980s, the annual
volume of bilateral EC-US WTO litigation for the period 1995-2001 has increased
substantially. However, as shown in Table 1, the threefold increase in the number of
annual bilateral EC-US litigation must be seen against a fivefold rise in the annual
number of total disputes brought to the GATT/WTO settlement system. Table 1
shows several interesting facts regarding the 251 cases brought to the WTO from its
inception till March 31, 2002:

1. Since 1995, disputes between the EC and the US account for about 20
   percent (48 of 251) of all WTO disputes. This proportion is substantially
   lower than during the early 1980s, when it was one-third.
2. Three-fourths of all WTO disputes (184 of 251) involve either the EC or
   the US as one of the parties. While still very high, this proportion is
   significantly less than the 90 percent recorded in the early 1980s. Put
differently, the proportion of cases involving neither the EC nor the US (67
   of 251) has risen substantially since the early 1980s: from 10 to 25 percent.
3. One-fourth of all WTO disputes involving either the EC or the US are
   bilateral EC-US cases (48 of 184). This proportion is substantially lower
   than in the early 1980s, when it stood at nearly 40 percent.
4. In contrast with the early 1980s, the EC and the US have litigated less with
   each other than with the rest of the WTO membership since 1995. While
   half of the cases against the EC (25 of 47) are still brought by the US, only
   one-third of those against the US are initiated by the EC (23 of 63). Forty
   percent of the disputes filed by the EC (23 of 56) are against the US
   (compared to fifty percent in the early 1980s), and forty percent of the
   disputes launched by the US (25 of 66) are against the EC (compared to
two-thirds at the beginning of the 1980s).
5. Since 1995, the US has initiated somewhat more WTO disputes than the
   EC (66 vs. 56 complaints). The US has also been a more frequent target of
   WTO disputes than the EC (63 vs. 47).
Hence, it appears that, while still central, the role of the European Community and of the United States in the GATT/WTO dispute settlement mechanism has somewhat diminished compared to the early 1980s. More generally, it would seem that the pattern of WTO litigation better reflects the pattern of international trade than was the case in the early 1980s. Nonetheless, bilateral EC-US disputes still occupy a disproportionate place in the multilateral dispute settlement system. The following data illustrate these points:  

1. Together, the EC and the US account for 70 percent of world trade and 75 percent of WTO disputes.
2. Bilateral EC-US trade accounts for less than 10 percent of world trade, but 20 percent of WTO disputes.
3. Bilateral EC-US trade accounts for around 22 percent of EC trade, but around 47 percent of the WTO disputes involving the EC.
4. Bilateral EC-US trade accounts for about 20 percent of US trade, but 37 percent of the WTO disputes involving the US.
5. Trade between the EC and its preferential partners in Europe and Africa accounts for about 32 percent of EC trade, but there is not a single WTO dispute between them.
6. Trade between the US and its NAFTA partners accounts for about 33 percent of US trade, but 10 percent of WTO disputes involving the US.
7. Trade between the EC and its non-preferential WTO partners (excluding China, Russia, the Middle East - all non-members of the WTO prior to 2002 - and the United States) accounts for about 31 percent of EC trade, but 53 percent of WTO disputes involving the EC.
8. Trade between the US and its non-preferential WTO partners (excluding China, Russia, the Middle East and the European Community) accounts for about 38 percent of US trade, but 53 percent of WTO disputes involving the US.

These data clearly indicate that the disproportionate share of bilateral EC-US WTO disputes is partly the result of the tendency of the EC and of the US to resolve their disputes with preferential partners outside the WTO system. In fact, if one computes the ratio of disputes to trade between relevant partners, one observes that the coefficient of EC-US WTO disputes (47% divided by 22%) is barely 25 percent higher than the coefficient of EC disputes with other non-preferential partners (53% divided by 31%). The difference is slightly more pronounced for the United States, with a coefficient of EC-US disputes (37% divided by 20%) which is 33 percent higher than the coefficient of US disputes with other non-preferential partners (53% divided by 38%).

Despite these observations, the fact of the matter is that bilateral EC-US trade disputes retain their full potential to disrupt the world trading system simply because of the sheer size of the two partners within the world trade matrix.

10 The trade figures are for 2000 and are shown in Table 2. Those for WTO disputes are for the period from January 1, 1995 to March 31, 2002.
11 More than half of these disputes (30 of 55) involve just 4 trade partners: Canada (9), India (8), Brazil (7) and Japan (6).
12 Half of these disputes (40 of 81) involve just 4 trade partners: Japan (12), Canada (10), Korea (10) and Brazil (8).
In terms of subject matters, the bilateral EC-US WTO trade disputes recorded since 1995 bear much resemblance, but also several striking differences, with the bilateral EC-US GATT disputes of the early 1980s.

Agricultural Disputes

The EC’s Common Agricultural Policy continues to be a major source of friction between the European Community and the United States. However, the specifics of the WTO lawsuits filed by the United States against the EC’s agricultural policy has greatly changed over the past 20 years. Since the inception of the WTO in 1995, the US has filed no action against EC agricultural subsidies. This is, clearly, the outcome of two important elements in the Uruguay Round negotiations: the reintegration of the agricultural sector under GATT discipline (the Agriculture Agreement), and the Subsidies and Countervailing Measures Agreement which provided a considerable improvement over the Tokyo Round subsidies code. This relative peace between the European Community and the United States was, by no means, a foregone conclusion at the beginning of the 1990s. For instance, Tim Josling, one of the most knowledgeable experts on EC-US agricultural conflicts stated a few months before the conclusion of the Uruguay Round that “few would put the probability of a strong agreement very high. More likely is a continued period of tension, with both the EC and the US trying to interpret the terms of a weak agreement in their favor, at the same time accusing the other of bad faith. The prospects for a peaceful decade in farm trade do not look very bright.” (1993, p. 572).

The decade has certainly not been entirely peaceful. During the 1990s, the United States has brought successful WTO action against relatively two new developments in the EC’s agricultural policy: the prohibition of beef hormones and the banana regime. The two cases are well known.13

In 1989, the EC started to ban the use of six growth hormones used for cattle and to forbid the imports of beef containing such hormones. The ban led to a GATT lawsuit, and later to a WTO dispute settlement case filed in 1996 by the United States and other beef-exporting nations. The Panel, and subsequently the Appellate Body, ruled that the EC ban violated the EC’s WTO obligations. In view of the non-compliance by the EC with the WTO ruling, the Dispute Settlement Body authorized, in 1999, the United States to impose retaliatory tariffs on imports from the EC of $117 million per year.14 The measure is still active.

In 1993, following the implementation of the Single Market, the Community instituted an EC-wide system of import quotas for bananas to replace a long-standing system of national quotas, which had become unmanageable with the removal of national border controls. The new system led to two GATT lawsuits, and later to two WTO dispute settlement cases filed in 1995 and 1996 by the United States and several Latin American countries.15 The Panel, and subsequently the Appellate Body, ruled that the EC system violated the EC’s WTO obligations. In view of the non-compliance by the EC with the WTO ruling, the Dispute Settlement Body authorized,

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13 See, for instance, Messerlin (2001).
14 Canada received a similar authorization at the same time as the United States.
15 The United States were not a party to the original GATT lawsuits.
in 1999, the United States to impose retaliatory tariffs on imports from the EC of $191 million per year.\textsuperscript{16} The measure was deactivated in 2001, following an agreement between the European Community and the United States.\textsuperscript{17}

These two highly-publicized WTO dispute settlement cases - the only two where authorized retaliation has taken place – have an important common feature. \textit{Bananas} and \textit{Beef Hormones} were both largely viewed as simply pitting the United States against the European Community, although the US was neither the only complainant nor the only party authorized to retaliate against the EC. This illustrates the point of Bown (2002) and others that “the retaliation-as-compensation approach requires that affected trading partners have the \textit{capacity} to retaliate” (p. 56; italics in the original). A key determinant of the capacity to retaliate is the size of the retaliating country, i.e. its ability to affect the partner’s terms of trade. With the exception of raw materials, the European Community and the United States are probably the only two truly ‘large countries’ in the world. They alone have the capacity to retaliate by inflicting welfare losses on their partners.

\textbf{Steel Disputes}

Steel disputes are another recurrent theme on the bilateral EC-US trade relations agenda. In 1992, following the termination of a broad network of VRAs that had been in force since 1982 and the collapse of negotiations on a Multilateral Steel Agreement (MSA) that would have imposed certain controls on international trade in steel, US producers filed nearly one hundred antidumping and countervailing duty petitions against imports from 21 countries, including several EC members. In response to these demands, the US Government imposed antidumping and countervailing duties on two categories of steel products. This led to a flurry of GATT complaints, including seven by the EC or by soon-to-be EC members (Finland and Sweden), which did not succeed, however, in removing the US measures.

The EC continued to challenge the GATT-conformity of the US measures after the entry into force of the WTO Agreement. In 1998, the EC filed a WTO dispute settlement case against the continued imposition of countervailing duties on imports of certain steel products by the United States. The Panel, and subsequently the Appellate Body, ruled that the measures by the United States were inconsistent with its WTO obligations under the Subsidies and Countervailing Measures (SCM) Agreement. The EC filed two further related WTO dispute settlement cases in 2000. The following year, it also brought a case challenging the continued imposition of antidumping duties on imports of certain steel products by the United States. Around the same time, the US Congress introduced a new piece of legislation (the ‘Continued Dumping and Subsidy Offset Act of 2000’ known as the ‘Byrd Amendment’) which gave the tariff revenue generated by antidumping and countervailing duties to the affected domestic producers, thereby raising their incentive to petition for antidumping and countervailing measures. In 2001, the EC and eight other nations filed a WTO dispute settlement case against the Byrd Amendment, which had been written into law at the instigation of the US steel industry.

\textsuperscript{16} Ecuador received a similar authorization in 2000.

\textsuperscript{17} An agreement between the EC and Ecuador was also reached in 2001.
Faced with growing challenges in the WTO towards its antidumping and countervailing measures, the US Administration decided to add another instrument to its panoply of measures aimed at protecting domestic steel producers against import competition. In 2000, the United States imposed definitive safeguard measures on imports of two relatively narrow categories of steel products against suppliers from the EC and other countries, while deliberately excluding its two NAFTA partners from the measures. In response to these measures, Korea and the EC filed two separate WTO dispute settlement cases. In the case brought by Korea, the Appellate Body ruled at the beginning of 2002 that the measures by the United States were inconsistent with its GATT/WTO obligations under the Subsidies Agreement and Article XIX. However, it rejected Korea’s claim that the United States violated its GATT/WTO obligations by exempting Canada and Mexico, its NAFTA partners, from the measures. No report has yet been issued in the case filed by the EC.

In spite of the outcome in the previous case, the United States decided in March 2002 to impose definitive safeguard measures on imports of a broad range of steel products against suppliers from the EC and other countries, again deliberately excluding Canada and Mexico as well as two other FTA partners (Israel and Jordan) from the measures. In response to these measures, the EC, Japan and Korea immediately filed three separate WTO dispute settlement cases. The EC also immediately adopted its own provisional safeguard measures so as to protect its market against the potential diversion of steel trade due to the shutting of the US market.

These recent episodes suggest the European Community and the United States have made little or no progress in resolving steel trade disputes that have plagued them and the world economy for more than 30 years. Since 1970, the beginning of each decade has witnessed a torrent of trade measures by the US and the EC seeking to protect their domestic producers from each other and from third-country producers. The voluntary restraint agreements of the 1970s and 1980s were replaced in the 1990s by antidumping and countervailing measures that have now been supplemented by safeguard measures. In the United States, there are clear cyclical reasons behind this periodicity of trade protection measures: according to the National Bureau of Economic Research, recession hit the country in 1969-1970 and 1973-75, in 1980 and 1981-1982, in 1990-1991, and resurfaced in 2001. Two of these episodes were either immediately followed by, or in the midst of, a large US trade deficit, situations which tend to exacerbate the pressure for trade protection measures. There are good reasons to fear, therefore, that 2002 could see a repeat of the situation in the early 1980s, when the US, and the EC, instated comprehensive systems of trade distortions affecting the entire world steel market.

The current situation demonstrates that the Uruguay Round Safeguard Agreement, which established rules for the application of Article XIX measures, did not address the “fundamental flaw in the safeguard provisions of GATT” (Baldwin, 1995, p. 166). The Safeguard Agreement succeeded in rooting out ‘grey-area’ measures such as voluntary restraint and orderly marketing agreements. It also had the merit of spelling

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18 There has not been a single WTO dispute settlement case filed either by the United States or by another WTO member against the EC in the area of steel. This does not mean, however, that the EC steel industry has not been protected by a variety of measures. Messerlin (2001) reports that there were 111 antidumping cases lodged by the EC steel industry between 1980 and 1999, most of which resulted in antidumping measures.
out in more details the procedures that must be followed in Article XIX determinations and in defining such key concepts as ‘serious injury’. On the other hand, it failed to address the time-consistency issue inherent in GATT/WTO safeguard provisions. By allowing governments to provide import protection to domestic industries ‘seriously injured’ by increased imports, GATT/WTO-sanctioned safeguard measures do not tend to foster an economically efficient structural adjustment process. This is especially true in politically-powerful industries like steel.

The recent steel disputes also illustrate another worrisome trend. The United States seems to be explicitly using safeguard measures to send the message to third countries that they better sign up to free-trade agreements if they want to maintain access to the world’s largest import market. 19

New Disputes: Services and Intellectual Property Rights

One of the major achievements of the Uruguay Round agreements was the decision that all WTO signatories must accept commitments in two other areas besides trade in goods covered by the GATT: trade in services covered by the GATS, and trade-related intellectual property rights covered by the TRIPs Agreement. What has been the impact of this extension of multilateral trade rules on bilateral EC-US WTO dispute settlement cases?

Trade in services is a substantial component of the bilateral EC-US trade relation. In 2000, services trade amounted to more than one-third of the total goods and services trade between the European Community and the United States. At the same time, bilateral EC-US trade in services represented about 40 percent of total (extra-) EC trade in services - compared to about 20 percent for trade in goods. Yet, it seems that there have been only two bilateral EC-US WTO dispute settlement cases concerning the GATS.

In Bananas, the United States and several Latin American countries claimed that the EC regime for the importation, sale and distribution of bananas was inconsistent with several of the EC’s WTO obligations, including those under the GATS. The heart of the case as far as the United States was concerned were issues relating to distribution activities. The presence of the United States among the complainants obviously changed significantly the nature of the Bananas case compared to the situation in the early 1990s, when Latin American banana-growing countries had been alone in their two GATT dispute settlement cases against the EC. The EC actually attempted to invalidate the presence of the United States in the case by arguing that its banana import regime falls solely under the GATT because: (1) the GATT and the GATS may not overlap in application to a measure; and (2) the import regime does not touch the service providers of the complaining parties in their wholesale service activities, but only in their import activities, that is, in their activities in the goods sector. Both arguments were rejected by the Panel and the Appellate Body.

19 In a press briefing held in The White House on March 5, 2002 US Trade Representative Zoellick maintained that Brazil and other Latin American countries were receiving a preferential treatment by being exempted from safeguard measures. He added: “So it’s a Western Hemispheric arrangement that I think will be -- go down rather well.”
In 1997, the United States brought a WTO dispute settlement case against Belgium for measures affecting commercial telephone directory services. The case never went beyond formal consultation.

There have been a number of bilateral EC-US WTO dispute settlement cases relating to intellectual property rights rules, some filed by the EC, others by the US. Only two cases, both brought by the EC, went beyond formal consultation.

In 1999, the EC filed a case regarding Section 110(5) of the United States Copyright Act as amended by the “Fairness in Music Licensing Act” enacted in 1998. The EC alleged that Section 110(5) of the US Copyright Act permitted, under certain circumstances, the playing of radio and television music in public places (such as bars, shops, restaurants etc.) without the payment of a royalty fee, in violation of the US obligations under the TRIPs agreement. The Panel ruled that parts of Section 110(5) did not meet the obligations of the United States under the TRIPs Agreement. Furthermore, the Arbitrators determined that the level of EC benefits which were being nullified or impaired as a result of the operation of Section 110(5) amounted to $1.1 million per year.

The same year, the EC filed a case regarding Section 211 of the United States Omnibus Appropriations Act of 1999. Section 211 was designed to diminish the rights in the US of owners of trademarks and trade names that previously belonged to a Cuban national or company that was expropriated in the course of the Cuban revolution. It was introduced into the Omnibus Appropriations Act of 1999 at the behest of Bacardi, Ltd., a Bermuda-based corporation, in order to bar Havana Club Holdings (HCH) from protecting its trademark Havana Club in the US. Havana Club is a premium rum produced in Cuba and marketed worldwide by HCH, a joint venture between a Cuban company and Pernod Ricard of France. The EC claimed that Section 211 was not in conformity with the US obligations under the TRIPS Agreement. The Panel, and subsequently the Appellate Body, ruled in favor of the EC. The Appellate Body insisted that its ruling was not a judgement on confiscation per se. Instead, it was a matter of ensuring that where confiscation of intellectual property rights takes place between two countries, its effects on other WTO members must comply with the TRIPS Agreement, and in particular with its obligations of national treatment and most-favored-nation treatment.

4. Conclusion

Several conclusions may be drawn from the analyses in this paper.

First, there has been a sharp rise in the total number of trade lawsuits since the introduction of the new WTO dispute settlement system. The number of cases during the first 7 years of the WTO (1995-2001) far exceeded the number recorded during the early 1980s, or even during the last 15 years of the GATT (1980-1994).20

Second, although their relative importance has somewhat decreased compared to period prior to 1995, the EC and the US still account for the lion’s share in the total

number of WTO dispute settlement cases. Nearly three-quarters of all WTO disputes involve the EC and/or the US. This situation, which is largely attributable to the dominant role of the European Community and of the United States in the world trade matrix, confers a great deal of importance to the bilateral EC-US trade relation.

*Third*, in line with the overall trend, there has been a significant increase in the number of bilateral EC-US dispute settlement cases since the inception of the WTO. Several of these disputes are not simply about bilateral EC-US trade, but also (or even sometimes mainly) about third country markets where EC and US exports compete. The latter situation is well illustrated by the WTO dispute about the US special tax treatment for *Foreign Sales Corporations*.²¹

*Fourth*, the subject matter of EC-US WTO dispute settlement cases is largely the same as the subject of EC-US GATT litigation cases: it is still dominated by agriculture and steel, two sectors that enjoy powerful political clout on each side of the Atlantic despite their relatively limited economic importance.

*Fifth*, disputes about agriculture and steel should not be blown out of proportion. However vexing, these long-standing disputes concern a small fraction of the bilateral EC-US economic relation. In fact, trade is altogether a small proportion of the transatlantic economic relation.²² Foreign direct investment (FDI) is at least as central to bilateral EC-US economic relations as trade.²³

*Finally*, cases such as *Bananas, Beef Hormones* or *Foreign Sales Corporations* plainly illustrate the contention of Weiler (2000) that “[t]he diplomatic ethos which developed in the context of the old GATT dispute settlement tenaciously persists despite the much transformed juridified WTO.” In the old GATT, politics and diplomacy played an overt role in the dispute settlement process, since the consent of the disputants was required at several stages, including for the adoption of the final ruling. A major outcome of the Uruguay Round was the strengthening of the dispute settlement system through the introduction of the principle of ‘automaticity’. Formation of panels, adoption of their reports and, if rulings are not complied with, retaliation have all become automatic. This judicialization of the system is severely tested by trade diplomats and politicians in Brussels and Washington when they engage in high-profile disputes, which they find difficult, or even impossible, to resolve without recourse to retaliation. As several authors have noted, there tends to

²¹ The EC challenged the FSC as a violation of the Uruguay Round SCM Agreement, which considerably reduced the possibility of tax exemption compared to the Tokyo Round subsidies code. The Panel, and subsequently the Appellate Body ruled in favor of the EC. The Arbitrators will determine that the level of EC benefits which were being nullified or impaired as a result of the FSC tax treatment by the end of April. It is generally expected that it will amount to over $1 billion per year, which would make it the largest award ever granted in a WTO dispute settlement case.

²² According to Barba Navaretti, Haaland and Venables (2002), sales of manufacturing products by EC subsidiaries in the US, and by US subsidiaries in the EC, are nearly four times larger than bilateral EC-US trade.

²³ According to Barba Navaretti, Haaland and Venables (2002), the US accounts for about 50 percent of (extra-EC) inward FDI stocks (in goods and services) into the EC, and for about 50 percent of (extra-EC) outward FDI stocks (in goods and services) from the EC. By contrast the US only accounts for 20 percent of extra-EC trade in goods and 40 of extra-EC trade in services. The share of the EC in inward FDI stocks into, and outward stocks from, the US is also about one-half.
be a fundamental contradiction between the escalating judicial activism of the European Community and of the United States, on the one hand, and their refusal to comply with WTO rulings and to engage in retaliation, in the other. The price of this contradiction is the weakening of the WTO’s fledgling legal order and of its legitimacy.\textsuperscript{24} This situation has led some observers, such as Barfield (2001), to argue for the reintroduction of explicit political and diplomatic factors in the WTO dispute settlement system. Others have suggested that the European Community and the United States should resolve more trade problems outside the WTO. Both solutions, however, open up new problems.

\textsuperscript{24} See, for instance, Porter et al. (2001).
References


Table 1
GATT (1980-85) and WTO (1995-2002) Disputes, by Year

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<th>All Cases</th>
<th>All vs. EC</th>
<th>All vs. US</th>
<th>EC vs. All</th>
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