

The Changing Nature of EU-US Economic Relations

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I. Introduction

This paper examines how evolving transatlantic economic interactions are shaping the global trade regime since the conclusion of the Uruguay Round and the creation of the WTO. The size of the relationship, between the two largest economic powers in the global system, ensures that the manner in which the transatlantic relationship is conducted will impact not only upon the operations of the present multilateral institutions but the manner in which they will evolve in the future. While institutions shape behaviour, behaviour also shapes institutions. The paper concentrates on this interplay in the case of transatlantic trade issues and the WTO. As it indicates, the transatlantic relationship, with its trade disputes, is "pushing the envelope" in influencing how multilateral organisations such as the WTO determine the global trade rules by which all nations play.

The paper contains seven sections. Section II provides a brief overview of key data on the transatlantic economic relationship. Changes in institutional relationships are detailed in Section III which examines governmental efforts such as the New Transatlantic Agenda, the growing importance of transatlantic civil society dialogues, the growing web of preferential trading links which each side of the Atlantic maintains with the rest of the world and the skepticism among some analysts concerning the need for any new transatlantic structures. Section IV outlines examples of a new assertiveness on the part of the EU in its transatlantic economic policy, both at the level of individual members of the Commission and as an institution. Section V examines the role of the WTO in modifying the relationship and discusses some of the recent U.S.-EU trade disputes which have exercised the new WTO dispute settlement mechanism. Section VI points to some "new age" trade issues which have not yet made use of WTO dispute machinery but are important precursors of disputes first emerging in a transatlantic context which have the ability to proliferate system wide. Section VII contains some conclusions on the systemic implications.

II. Some Data

It is instructive to place the dimensions of the transatlantic relationship within the context of systemic global dimensions. Together, the U.S. and the EU account for close to 40% of world merchandise exports, 45% of world exports of services and 55% of world GDP. While they hold only 30% of world reserves of gold and foreign exchange, almost 85% of world reserves are denominated in their currencies and over 80% of world trade is invoiced in their currencies.

The size of transatlantic bilateral trade in goods and services approached \$450 billion in 1998, close to 20% of the total trade of the two areas. Agriculture, which figures so prominently in U.S.-EU trade disputes amounted to only \$15 billion of that total. The pattern of trade shares across the Atlantic has shown some slight change over the years. The US market has grown in importance for the EU. As Chart I indicates, 13% of extra-EU12 exports went to the United States in 1958,(EU Commission, 1998). By 1994, it had risen to 18%. However, the US share in extra-EU12 imports has remained constant at 17%

In third markets, as Chart II indicates, the U.S. has gained slight market share as measured by its share of world exports, rising from 14 to 17% of world exports. The EU15 share has hovered around 19-20%. These changes in global market shares have many explanations. Chart III, which tracks hourly labour compensation costs in manufacturing, highlights how expensive EU labour has become relative to U.S. labour. Labour costs must be combined with productivity data to measure unit labour costs. The trend in unit labour costs is displayed in Chart IV while Chart V indicates how the U.S. merchandise trade balance with both the EU and the world have tended to move together.

Chart I. U.S. Share in Extra-EU12 Trade 1958-1994 (%)

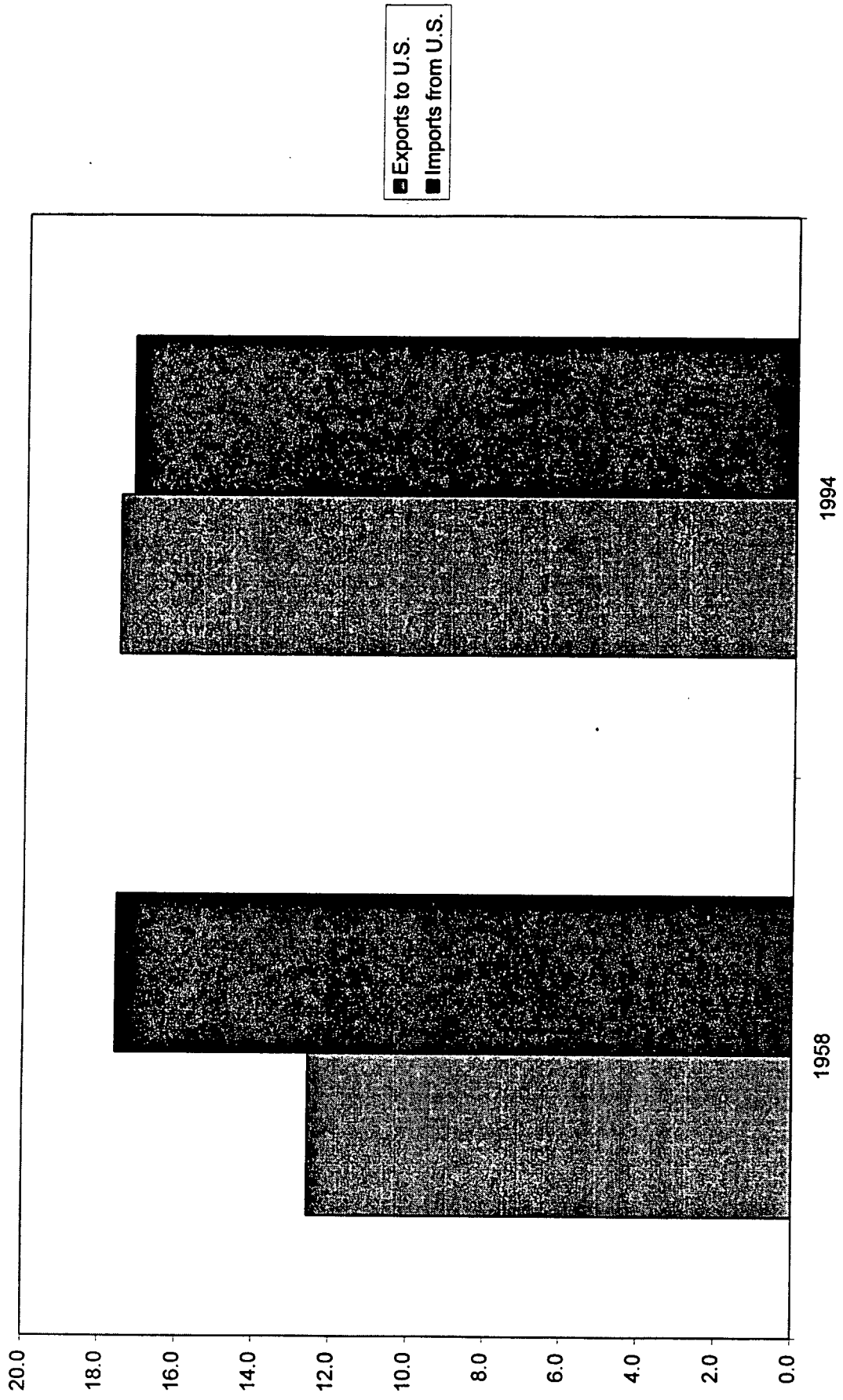


Chart II. US and EU15 Shares of World Merchandise Exports

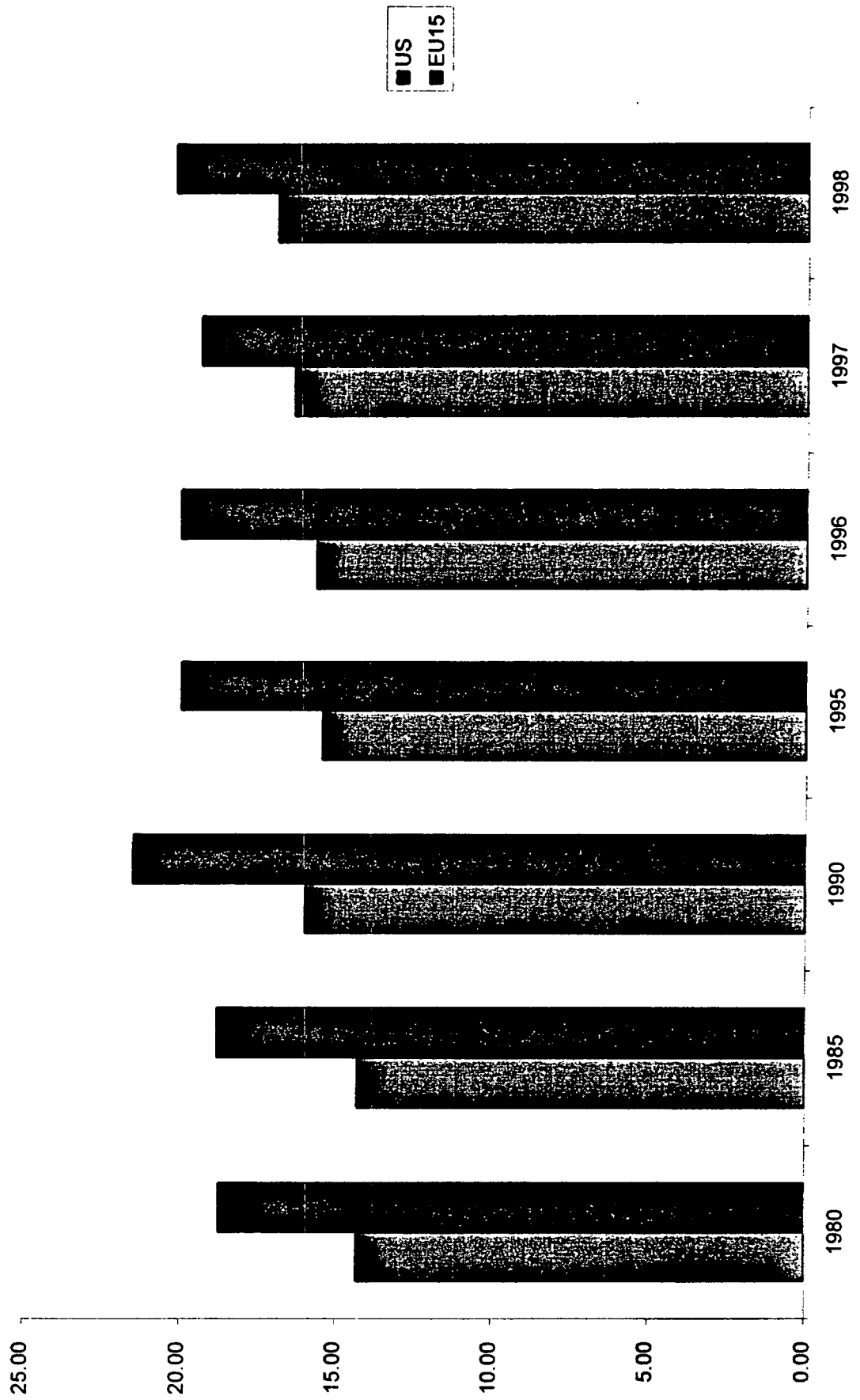


Chart IV. Unit Labor Costs in Manufacturing, US \$ Basis (1992=100)

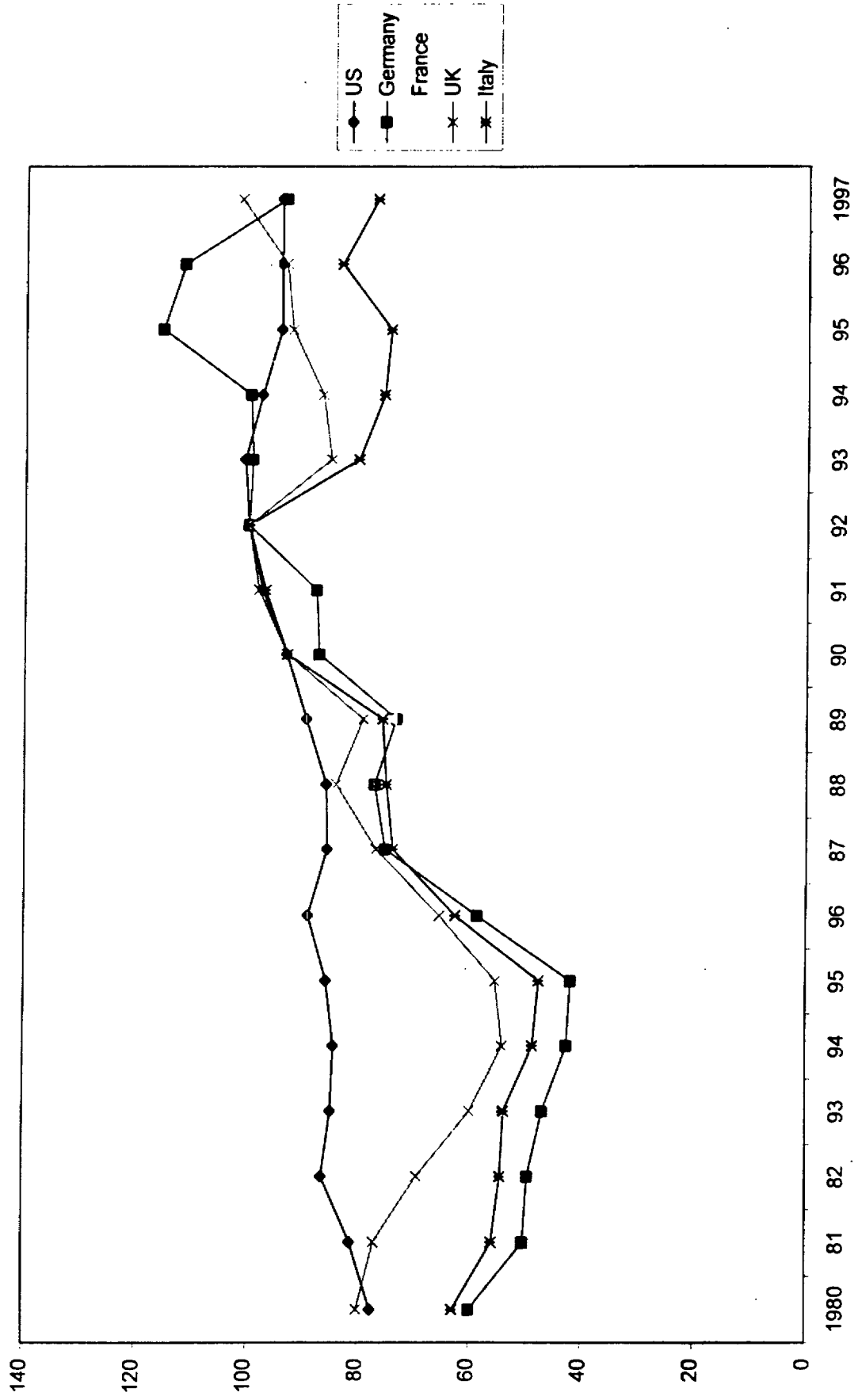
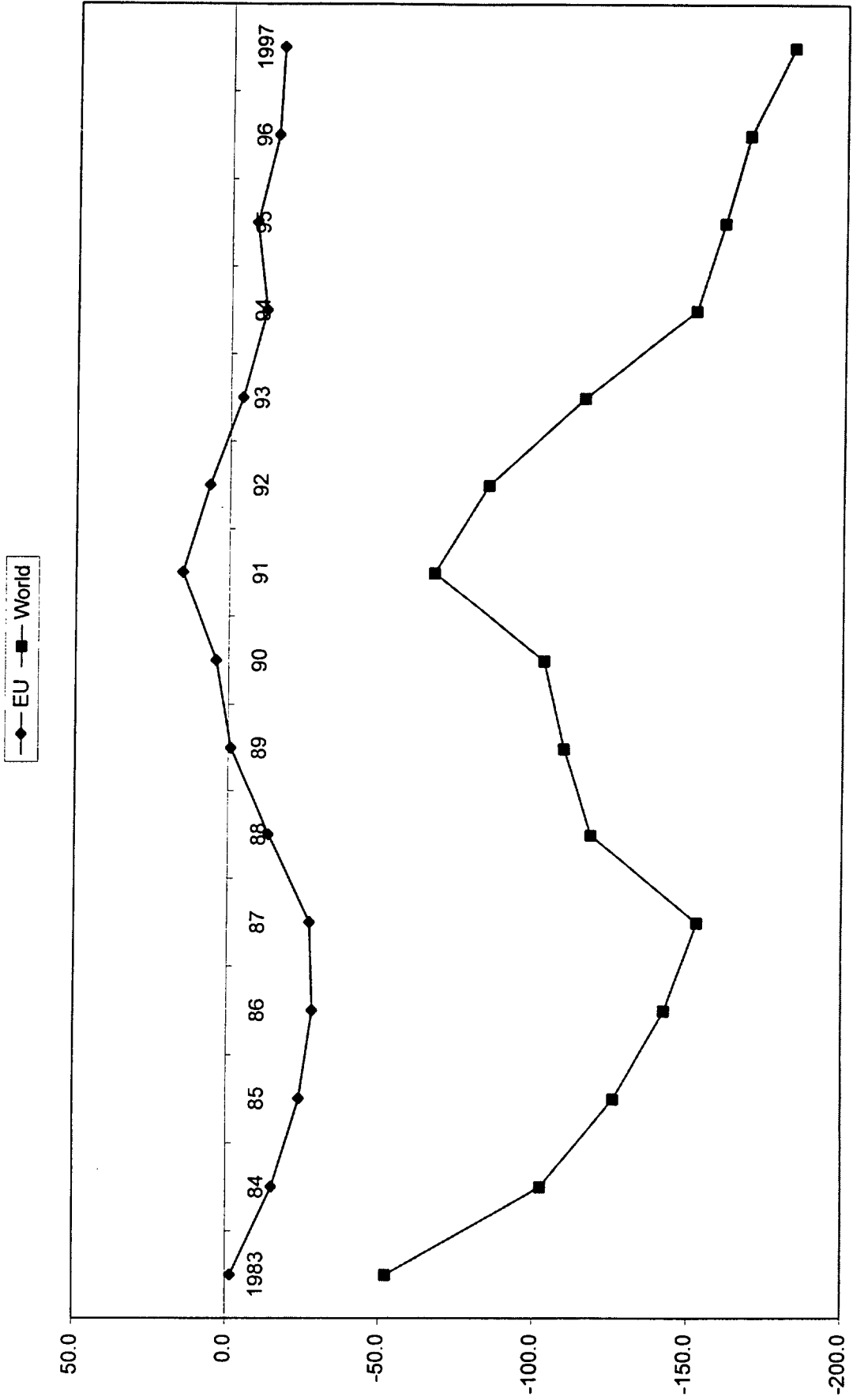


Chart V. US Merchandise Trade Balance (\$ billions)



Even as they grapple with their relations with each other, both the EU and the U.S. have continued to expand their preferential trading relationships with other parts of the global trading system as part of the general erosion of the MFN principle of the WTO. In the case of the EU15, Grether and Olarreaga (1998, p. 16) report a slight increase in the already high share of preferential trade of EU member states (including intra-EU trade) from an average of 72% in 1988-1992 to 73% in 1993-1997. The three shares of preferential in total trade for the NAFTA members rose from 19% to 28% over the same period.

Under the Articles of Agreement of the 182 member International Monetary Fund one member, the U.S., has sufficient votes (about 18% of the total) to veto constitutional changes to the Articles of the Fund. Countries of the EU, if they voted as a bloc, would also have a veto. Between them, the fifteen member states also control eight of the twenty four seats on the Executive Board of the Fund. In the World Trade Organisation, where decisions are taken by consensus rather than votes, the U.S. and the EU have the ability to shape much of the agenda and US-EU bargaining has largely shaped the outcome of past GATT trade multilateral rounds.

III. Changes in Institutional Relationships

Even as major changes have occurred within the EU with completion of the internal market, enlargement, Agenda 2000 and the arrival of EMU, the institutional relationships, both global and transatlantic, within which the U.S.-EU economic relationship occurs have drastically changed in recent years. Changes at the global level have occurred in both the trade and financial institutional machinery. On the global trade side, the Uruguay Round and the Marrakesh conference have replaced the GATT with the WTO, have tariffied trade barriers to agriculture, given us a stronger and a binding dispute settlement system; introduced an Agreement on Sanitary and Phytosanitary

Measures (SPS) which introduced a science-based test of trade barriers in the field of food safety and, with the general agreement on trade in services (GATS), expanded the coverage of trade liberalisation into new sectors including financial services and telecoms. On the global financial and macroeconomic front, there has been no major changes in architecture but the G-7 has become the G-8 while the Asian crisis has highlighted the need for some changes in the IMF's credit facilities and brought proposals for new international bank prudential supervision.

Side by side with these global changes, recent years have seen a procession of successively less ambitious proposals for new transatlantic trade structures ranging from a proposed Transatlantic Free Trade Area (TAFTA) to a New Transatlantic Market Place (TPM) to a Transatlantic Economic Partnership (TEP) introduced at the 1998 U.S.-EU London Summit. This series of proposals for arrangements began with the 1990 Transatlantic Declaration and the 1995 U.S.-EU Madrid Summit's New Transatlantic Agenda (NTA) and a Joint EU-U.S. Action Plan to implement the Agenda. A sub-cabinet Senior Level Group (SLG) staffs the summits and develops the work program for the Agenda. Economics was but one of the four areas covered by the Agenda. The May 1998 U.S.-EU summit saw the signature of a Mutual recognition Agreement (MRA) to develop mutual recognition standards in six specific sectors responsible for some \$50 billion in two-way trade: telecom equipment, pharmaceuticals, medical devices, electromagnetic compatibility, electric safety and recreational craft. Following the London Summit, an Action Plan to create the partnership envisaged in the TEP was agreed upon in November 1998 and the Commission was given a negotiating mandate. The TEP Action Plan consists of a rolling agenda to reduce transatlantic trade barriers and to cooperate on further multilateral trade liberalisation.

Even though the most ambitious of the proposed institutional arrangements have been still born, the institutional framework within which the transatlantic economic relationship is conducted

has clearly changed. In particular, the TEP action plan and its implementation are having an impact not only on bilateral relations but on multilateral relations also. Moreover, the TEP has produced an ancillary set of relationships involving civil society input into the governmental TEP process, in the form of dialogues, which are thickening the EU-U.S. relationship and also having an impact in more global fora. These dialogues include the Transatlantic Business Dialogue (TABD) and the newer and lesser well known Transatlantic Consumer Dialogue (TACD) and the Transatlantic Labour Dialogue (TALD). In an earlier stage of development are the Transatlantic Development Dialogue (TADD) and Transatlantic Environmental Dialogue (TAED).

Transatlantic Dialogues

The TABD, established in 1995, is the oldest and best established of the dialogues. In addition to acting as a pressure group on administrations on both sides of the Atlantic, the TABD has a self-perceived role as an "early warning system" for potential trade frictions. The structure of the group mirrors that of the governmental process found in the TEP where the TEP steering group, the Senior Level Group (SLG) supervises working groups in such areas as technical barriers to trade, government procurement, trade and the environment, electronic commerce etc. The TABD has five working groups devoted to standards and regulatory policy, business facilitation, WTO/global issues, SMEs, and electronic commerce. Periodic TABD "score cards" keep track of the progress made by the U.S. and the EU in implementing the recommendations which the TABD feeds into the TEP.

In its most recent Mid Year Report (TABD, May 10, 1999) the TABD calls for Congressional passage of legislation to implement the May 1998 US-EU Understanding of Economic Sanctions, having "consistently urged the withdrawal of objectionable and counterproductive secondary boycotts and of other sanctions with extraterritorial effects" (TABD, Mid Year Report May 10, 1999

p. 49). However, one year after the US-EU Understanding, neither the TABD nor the allied USA*Engage, a coalition of some 700 U.S. businesses opposed to the proliferating use of sanctions as an instrument of U.S. foreign policy, had managed to persuade either house of Congress to pass implementing legislation. Looking forward to the next WTO multilateral negotiations, the TABD is supporting the present USTR position of comprehensive but decoupled sectoral negotiations rather than a comprehensive package in which "nothing is agreed until everything is agreed". The EU, on the other hand has been leaning toward a broad-based Round rather than a sectoral approach.

The Transatlantic Consumer Dialogue (TACD) was established in September 1998 and in its December 1998 and April 1999 meetings has produced proposals on a range of issues dealing with consumer safety and data protection standards. Calling for governments to provide as much attention to a dialogue with the TACD as it presently does with the TABD, the TACD has adopted a range of recommendations at variance with those produced by the TABD. In cases such as the beef hormones case, it has urged that the TEP work plan include ways to resolve SPS disputes in a way which preserves the rights of WTO members to exercise a precautionary approach to food safety. The precautionary principle is not explicitly recognised in WTO agreements although precautionary action is permitted. In the case of biotechnology disputes, the TACD calls for mandatory labeling of all Genetically Modified Organism (GMO) altered food. On E commerce it calls for tougher privacy protections of the type found in the EU Data Protection Directive(95/46/EC).

As these examples illustrate, both dialogues, and the SLG and summit processes into which they feed, are helping to form transatlantic governmental negotiating positions in global fora such as the WTO. The TEP process does not involve anything so formal or all encompassing as a PTA, which would clearly be seen by the rest of the trading system as a threat to the nondiscrimination principles of that system. It does however, involve the development of common positions in a

WTO-compatible fashion without much room for input from others. As we shall see below, the TEP related civil society dialogues may prove to be particularly important as the global trading system copes with 'new age' trade disputes on standards for food safety, environmental protection, privacy. These disputes are likely to have their leading edge in U.S.-EU disputes.

Other Ties That Bind

While the transatlantic relationship exists within the WTO commitments of each side, it also exists within the web of other preferential trade agreements (PTAs) which each side has negotiated with others. These have shown that they have an ability to complicate the transatlantic relationship, most noticeable recently in the bananas dispute. The PTAs of both sides have not always been with "natural trading partners" where there was geographical proximity or a large initial volume of trade (Wonnacott and Lutz 1989).

The EU has watched the US negotiate PTAs such as the Israel-United States Free Trade Area Agreement, the Caribbean Basin Initiative and the North American Free Trade Agreement while advocating its extension to Chile and, in the 1994 Miami Declaration, eventually to a Free Trade Area of the Americas (FTAA). The US, on the other hand has watched the growth in the number of signatories to Lomé, the enlargement of the EU to 15 members, the planned enlargement to the East, the planned EuroMed PTA. It has also watched the development of closer EU ties with the Americas.

To the north of the U.S., the EU has developed the 1996 EU-Canada Joint Action Plan and the 1998 EU-Canada Trade Initiative which encompasses many of the same regulatory issues, such as mutual recognition, found in the TEP discussions. To the south of the U.S., the EU has signed a 1997 trade and cooperation agreement with Mexico and is presently negotiating a free trade

agreement. Further south, it signed a 1995 interregional framework cooperation agreement with Mercosur and a 1996 framework cooperation agreement with Chile. A 1998 Commission proposal to negotiate two Interregional Association Agreements with Mercosur and Chile, as envisaged in the 1995 and 1996 agreements, and which originally were envisaged to include a PTA, faced opposition from France, Italy and Ireland concerned about the implications of a PTA for agriculture. The launch of the negotiations was scheduled for the end-June 1999 EU-Latin America and Caribbean summit meeting in Rio de Janeiro shortly after expected Council approval of a negotiating mandate for the Commission at the Cologne Summit. Exclusion of agriculture would not only greatly reduce the attractiveness of any agreement to the Mercosur participants, it would also ensure that any agreement was not a free trade agreement since it would be impossible to meet the WTO standard for a PTA that it encompass substantially all of the bilateral trade between the signatories.

Even as it seeks to deepen economic and political ties with Latin America, the EU's market share in the region's total imports is falling while the US share rises. And, of course, a number of non-Mercosur Latin American countries have participated with the United States in the WTO dispute over EU banana policy. Elsewhere, while the US participates in the development of the Asia Pacific Economic Cooperation Forum (APEC), the EU has launched the Asia-Europe Meeting (ASEM) in 1996, and has encouraged the Asia-Europe Vision Group which in its 1999 report called for both Asia and the EU to set a goal of free trade in goods and services by 2025.

Skeptical Multilateralists

A number of analysts has examined the importance, or lack thereof, of the changing institutional structures which have emerged. Pelkmans (1998) sees the new transatlantic relationships as examples of what he terms "the new plurilateralism" consisting of informal non-

treaty based structures with ambitions to drive the international agenda on WTO issues such as market access. For Pelkmans, this plurilateralism is likely to fall short of lofty objectives because of the strong political opposition to ambitious trade liberalisation in an era in which tariff reduction has been replaced by international negotiations on domestic regulatory regimes whether of competition policy or health and safety standards. Hindley is unpersuaded by the arguments emanating from the Commission that there is a need for new transatlantic institutions when the forum of the WTO is readily available. Evaluating the three arguments in support of new structures cited by the draft NTM proposal (Hindley 1999, p.59), he sees no reason why any non-Atlantic WTO members who are willing to keep up should be excluded from arrangements constructed in the name of forcing the pace of WTO liberalisation; neither is Hindley convinced that economics provides a rationale for new institutions since the gains from further bilateral liberalisation among parties doing only 20% of their total trade with each other are likely to be small; finally, Hindley in evaluating the political rationale for new structures, Hindley hews to his position that new institutions would be detrimental to the existing multilateral WTO.

IV. EU Assertiveness

Even as the EU concentrates on its own widening and deepening, the transatlantic relationship is characterised by a growing assertiveness on the part of the EU. This is apparent both at the Commissioner level, the college of the Commission and the Council. In some instances, Commission assertiveness is reined in. An earlier effort at EU trade assertiveness was the March 1998 proposal of Sir Leon Brittan and colleagues for a New Transatlantic Marketplace (NTM). The NTM was a proposal for a joint EU-US initiative on industrial tariffs in the WTO, as well as the creation of a transatlantic free trade area in services. The proposal was killed by France in the

Council, saving it from the likely later rejection which would have followed closer scrutiny of the likely systemic effects on excluded WTO members. The September 1998 Commission proposal for a Draft Action Plan for Transatlantic Economic Partnership (TEP), which replaced the NTM proposal and was adopted by the Council, commits the participants only to dialogue and not to any far reaching action of the type which had been envisaged in the NTM.

Sir Leon has not been the only Commissioner whose attempted assertiveness in transatlantic relations has been reined in by member states. Transport Commissioner Neil Kinnock has been elbowed to the sidelines by national transport ministers as he has attempted to develop a common external air transport policy. Instead, member state transport ministers have adopted three-pronged strategies of negotiating bilateral "open skies" skies agreements with the United States, encouraging participation of national carriers in "alliance" code sharing and marketing agreements with US and other airlines, while using nationality ownership clauses to shelter the industry from the wave of cross border mergers and acquisitions found elsewhere in industry in the wake of the 1992 and EMU programs. Of course, national ownership clauses are not unique to the EU. Foreign ownership of US airlines is presently limited to 25% of the voting shares. However, the EU member state penchant for continuation of national champions, in the form of national flag carriers, even in an environment of liberalisation of the domestic EU air transport market, has prevented the emergence of a common external air transport policy and, in particular, a common EU transatlantic policy.

For our purposes, behaviour in the WTO presents several recent instances of EU assertiveness in the U.S.-EU relationship. While U.S. officials point to the alacrity with which the U.S. abided by the first four WTO decisions which it lost, they complain about the EU's delay in implementing WTO panel findings which ruled against it and claim to see this as a reason to worry about EU commitment to rule based system. The EU's response to WTO panel findings in both the

bananas and beef hormones disputes has been to exercise ALL of its legal rights in a manner usually associated with the more litigious United States. EU officials argue that their recourse to the full WTO dispute processes, including appellate findings and arbitration, is prompted by U.S. unilateralism in taking action before receiving WTO approval.

A further sign of increased assertiveness may be detected in the manner in which the EU chooses among the three options available to a WTO member which has lost a WTO case. Briefly, these options are: modify the offending practices so that they are in conformity with WTO obligations, maintain the WTO-incompatible practices but provide compensation to trading partners injured by the practices, or accept retaliation from others.

In both the bananas and beef hormones disputes, the EU has, to date, embarked upon a path of not altering its behaviour but maintaining WTO-incompatible practices while accepting retaliation.¹ This choice has also caused U.S. officials to characterise EU actions as undermining the multilateral trading system. The EU's unwillingness to bring its policies into conformity with the WTO suggests that the domestic political costs of doing so are considered too large. With the weaker GATT dispute settlement procedures, this need to choose among unsavory options could be avoided. The EU (and the U.S.) had occasionally blocked GATT Council adoption of panel findings which had gone against it. This option is not available under the WTO dispute regime.

Viewed from the perspective of impact on the global system, compensation is to be preferred to retaliation. The former is based on consultation between the parties; the latter is unilateral in nature. Retaliation is only an option for large WTO members such as the United States or the EU. It is not a realistic option for their less powerful trading partners.

¹ All three of the Commission's May 1999 proposed options for modification of the banana regime appear WTO compatible but none has been authorised by the Council.

V. The WTO and the Transatlantic Relationship

The dispute settlement procedures of the WTO is the most familiar feature of the WTO to many observers. However, dispute settlement is but one dimension of the work of the WTO and there are other ways in which the WTO influences the US-EU relationship and is, in turn, influenced by it. WTO decision making is largely by consensus rather than by vote, a modus operandi supported by the United States in a deviation from its otherwise strong advocacy of greater transparency in international organisations. This decision making process is disputed by some developing countries who see it as a mechanism for allowing a small group of developed countries to escape the consequences which might flow from the introduction of majority voting to an organisation whose membership largely consists of developing countries, even if, combined, they account for only about 30% of world merchandise exports.

A prime example of underlying tension between developing and developed country WTO members, and one which has not had major transatlantic repercussions has been the succession struggle to fill the vacancy left by Renato Ruggiero as Director General of the WTO. The search for a new WTO DG is a nontransparent, non-voting succession process involving soundings to discover a consensus candidate rather than a formal election. The EU had been unable to form a common position on who to support to succeed Mr. Ruggiero. While the US and France were reported to support the candidacy of New Zealand's Michael Moore, a number of other EU members were reported to be supporting Thailand's Supachai Panitchpakdi. As of early June 1999 there was not a common transatlantic position to resolve the succession stalemate which had developed.

Transatlantic Use of WTO Dispute Settlement

While the percentage of transatlantic trade involved in trade disputes is relatively tiny, recourse to WTO dispute settlement procedures has an influence on the transatlantic relationship as well as an influence on the WTO, especially in these early years when precedent is established with every WTO decision. In the past, under the GATT, redress using multilateral dispute settlement mechanisms required a bilateral decision. Either party could block GATT adoption of the findings of a panel which had ruled against it. Recourse to WTO procedures is less consensual and a party initiating action knows, that with time, there will be an effective ruling.

The WTO dispute settlement mechanism, known formally as the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), is governed by a Dispute Settlement Body (DSB). The DSB is the all member WTO General Council wearing its dispute resolution hat. The DSB establishes panels, appoints arbitrators and adopts reports. Briefly, the stages of the dispute resolution process consist of: consultation with the other country, establishment of a neutral panel which issues a report, possible appeal to the Appellate Body which also issues a report, DSB adoption of the panel and/or appellate report, implementation of the adopted report or, in the event of non-implementation, bilateral negotiations on compensation pending full implementation, DSB authorisation of retaliation if there is no agreement on compensation, and further appeal to an Arbitrator appointed by the DSB in the event of a further dispute about the manner of retaliation.

The WTO process, which contains a rigid timetable governing each stage of the process, replaced the GATT arrangement which provided both parties to a dispute with an effective veto on any finding. Both sides of the Atlantic have made extensive use of the new machinery, not only for transatlantic disputes but for disputes with other WTO members. In some of these latter cases, they have joined in complaints against others. The EU has participated, either as complainant or

defendant, in over 60% of cases brought under the DSU. U.S. participation has also been very large. For both sides of the transatlantic relationship, this represents a major change from their recourse to the GATT where, in the words of Wyndham-White, a Director-General of the GATT, "no trade dispute worth over \$10 million was ever settled inside the GATT". The early use by both the U.S. and the EU of the DSU represents in part, an attempt to fashion, through early precedent in case law, the future direction of that organisation.

The uses to which the new dispute settlement mechanism had been put as of April 1, 1999, are summarised in Table 1. Appendix A contains further details of the individual cases. Of the 30 cases involving both parties, the EU has had a slightly heavier disposition to make use of WTO dispute procedures than the U.S. The U.S. and the EU have been heavy early users of WTO dispute procedures in its first years. Cases involving transatlantic trade issues account for roughly one quarter of the cases which have proceeded to the panel formation or report adoption stage with a noticeable drop off in transatlantic representation further back in the pipeline at the "consultations pending" stage. Both the beef hormones and bananas cases have been among the early cases (seven to date) with the distinction of provoking further disputes on report implementation and hence requiring an Arbitrator's report. Both cases are discussed in greater detail below.

In addition to the cases included in Table 1 and listed in Appendix A, there are four other interesting cases. In these, both the U.S. and the EU complained specifically against what they saw as the favoritism by another WTO member in favour of the exports from the other. Both the U.S. and the EU separately filed cases against Brazil, claiming that Brazil's automotive policy favoured firms from the other country. In addition, the EU filed two complaints against Japan for alleged favoritism in favour of the U.S. In the first case, in 1995, the EU complained about its treatment after the 1994 U.S.-Japan Telecommunications Agreement. In the second, case, in 1997, the EU

complained that tender specifications for a government procurement contract for an air-traffic control satellite were not neutral.

Table I. Transatlantic Use of WTO Dispute Settlement Procedures as of April 1999

	Report Adopted	Panel Active	Consultations Pending	Settled or Inactive	Total
EU complaint against U.S.		4	7	3	14
U.S. complaint against EU	3		5	3	11
Joint complaints against others	3	1		1	5
Transatlantic Total	6	5	12	7	30
All WTO cases	21	22	169	30	242

Note: complaints made specifically against EU member states have been classified as "EU".

Source: WTO, Overview of the State-of Play of WTO Disputes April 19, 1999.

The Banana Dispute

The banana dispute dates back to 1993, when the EU faced three obligations. One of these was to have a GATT consistent trade policy. The other two were to establish an internal market in bananas as part of the 1992 program to complete the internal market, and to maintain the preferential treatment provided to ACP banana producing countries under Lomé (O'Cleireacain, 1990). The Commission failed to reconcile all three objectives and a dispute which began under the GATT as a dispute about trade in goods, i.e. bananas, morphed into a GATS dispute about trade in services, to wit the internal EU marketing and licensing arrangements used to maintain the Lomé preferences. The banana dispute became the first test of the application of the WTO dispute settlement procedures to the GATS. The dispute also differed from normal trade disputes which usually have their origin in the protection of the rent accruing to private domestic producers. While domestic private interests were unquestionably heavily involved, particularly in rent seeking in fruit distribution, the dispute was also a dispute about the manner in which one party, the EU, managed its state to state relations with a group of developing countries.

In the banana dispute, after three adverse panel reports since the dispute began, an April 6, 1999 WTO Arbitrators' decision set the size of the damages to which the U.S. was entitled at \$191 million, and the U.S. sought authorization to withdraw concessions on a range of products from EU member states for that amount. The retaliation was approved by the DSB on April 19, 1999. The product list on which 100% duties were imposed included products exported from all but two member states, Denmark and the Netherlands.

Subsequently, in May 1999, the Commission adopted a report to the Council which contained three options to bring its bananas regime into compliance with its WTO obligations. These were: abolition of all quotas and imposition of a high MFN tariff with zero tariffs for ACP countries; a

tariff quota with differential tariff rates of zero for ACP countries and non-zero for others; and maintaining the present Latin American tariff quota but eliminating all limits on ACP bananas. Either of the tariff quota options would also require WTO-compatible import licence distribution systems. All three options appear to represent an EU effort to eventually produce a WTO-compliant trade regime in bananas. The manner in which the impact on Lomé countries, or private producers there, would be mitigated has yet to be made public.

The Beef Hormones Dispute

Although it had simmered since 1981, the hormones dispute began in earnest with a 1989 EU ban on imported beef from animals treated with growth-promoting hormones, implementing a series of three Directives (81/602, 88/146, 88/299) which had banned these hormones in all EU cattle and provided a further year before the ban would be applied to imported beef. In 1996, with the new WTO dispute settlement procedures and the Uruguay Round Agreement on Sanitary and Phytosanitary Measures (SPS) in place, the U.S. requested consultations, arguing, inter alia, that the ban did not comply with the requirement in Article 5.1 of the SPS that such a measure be based on an assessment of the risks to human health and had been introduced without any such assessment. Canada joined the U.S. in the complaint. The case moved through all stages of the dispute procedures, with panel and Appellate Body finding in favour of the complainants and an Arbitrator setting a May 13, 1999 date for the EU to come into compliance. Later, the Arbitrator was asked to arbitrate in a further dispute after the EU had announced that it needed a "reasonable period of time" to come into compliance with its obligations and the two parties had been unable to agree on a period. The EU sought a 39 month period to be composed of two years for risk assessment and 15 months for resulting legislative action. The U.S. offered ten months. The Arbitrator awarded fifteen.

The Parliament, in a May 4, 1999 resolution, called on the Commission to maintain the hormones ban and opposed any resolution based on a labeling solution. In the wake of the expiry of the Arbitrator's "reasonable time" and a Commissioner's statement that the ban would never be lifted, the U.S. moved to retaliate and followed the Canadian lead of announcing that it too would request WTO authorisation to suspend previous concessions, i.e. raise tariffs on other products. On May 14, 1999, the U.S. announced that it intended imposing 100% tariffs on \$202 million of EU exports to the U.S. but delayed releasing the list of products to be affected. As in the case of bananas, the EU is expected to seek arbitration of the amount of damages claimed in a June 3, 1999 meeting.

As with bananas, the Commission developed three options to settle, in this case on a temporary basis, the beef hormones dispute. These were presented to the Council and Parliament in a February 1999 Communication. As mentioned above, the DSB had given the EU a deadline of May 13, 1999 to come into conformity with the SPS, a deadline the EU intended to miss while it awaited the results of further commissioned scientific studies. The chosen options for temporary redress were: provide compensation through other trade concessions; dilute the import ban from a permanent one to a temporary one while completing further scientific research, or remove the import ban and introduce a system of labelling. A fourth option, eventually exercised, lay in the hands of the complaining parties, the U.S. and Canada -- eventual retaliation through suspension of previous concessions. Initially, the U.S. sought either a labelling solution which would identify beef as U.S., but not as hormone-treated, or consultations on a temporary compensation package and, on April 28, 1999, the EU told the DSB that it would consider offering temporary compensation. The proposed U.S. solution of national origin labelling of beef is not one adopted within the U.S. and the Department of Agriculture voiced some concern at the precedent which would be set.

The WTO finding that EU policy on beef hormones had not been based on a risk assessment, and the arrival of GMO disputes has spurred EU efforts to put in place a risk assessment system for food safety in which there is public confidence, confidence which had been damaged by the mad cow disease incident. This is no easy task.

One of the less commented upon dimensions of the case is the precedent which the dispute panel set, upheld by the Appellate Body (WT/DS26/AB/R), in obtaining independent scientific opinion from individual experts acting in their personal capacity rather than through the formation of an Expert Review Group as provided for in DSU Appendix 4. This DSU precedent represents a further opportunity, to open up of WTO governance to civil society. The panel must, however, meet its DSU obligations to have consulted with the parties to the dispute on the manner in which experts would be selected.

Sanctions and Extra-Territoriality

A different set of problems are raised for global rules when countries seek to extend the reach of their national law into other jurisdictions. The Congressional penchant for sanctions has bedeviled the working relationship between Brussels and the Administration for some time. Sanctions disputes have, in most instances, proved too large and too important for the two sides to have great recourse to systemic dispute settlement procedures beyond using WTO consultation procedures, seeking the setting up of a panel and then short-circuiting its establishment. The issue has been kept firmly, to date, on a bilateral track.

An exception is the dispute involving a sub-federal level of government, that involving the EU complaint against U.S. State of Massachusetts government procurement policy for firms doing business with Burma (Myanmar). As indicated in Appendix I, this dispute is the subject of an active

WTO panel. A further set of sub-federal actions revolve around efforts to settle claims growing out of court actions in the U.S. for settlement of claims relating to Nazi gold and other banking and insurance policy claims. These have not involved formal U.S.-EU relations but have produced instances in states and local authorities in the U.S. have effectively delayed European bank and insurance company by, inter alia, withholding regulatory authority for the merged entities to operate in the U.S.

The Libertad Act (Helms-Burton) and the Iran Libya Sanctions Act (ILSA, D'Amato) dispute has, to date, been contained by the Commission and the Administration. ILSA provided the Secretary of State with the authority to grant waivers against sanctions if deemed appropriate. This waiver authority was exercised during the 1998 EU-US London Summit. However, similar waiver authority is not provided to the Administration, except on a temporary basis, from all the sanctions contained in the Helms-Burton Act. Title III of the Act allows U.S. nationals to file suit against foreign companies for damages suffered when these companies traffic in expropriated property in Cuba. Title IV denies U.S. visas to trafficking company executives or shareholders, or their families.

Following a 1996 EU complaint to the WTO regarding the WTO compatibility of Helms-Burton, an April 1997 Understanding between the two sides led to an EU suspension of its WTO action and a US Administration exercise of waiver powers available to it with respect to Title III. However, the Administration's Title III waiver authority is not for permanent waivers and waivers must be renewed every six months. The Administration also agreed to seek waiver authority from Congress through amendment of Title IV.

At the time, the approach to defusing the sanctions issue made use of the work in drafting the proposed, but now dead, OECD Multilateral Agreement on Investment (MAI). While the two parties have kept the issue on a bilateral track, the hopes of including some of its provisions on

prohibitions of supporting foreign investment in expropriated property in the MAI would have been a further example of building a regime outwards from the TEP. The EU use of the WTO dispute procedures never reached the stage of the establishment of a panel to hear the dispute.

The containment may prove temporary. It rests upon implementation of two documents released at the May 1998 EU-U.S. London Summit. These are the Understanding with Respect to Disciplines for the Strengthening of Investment Protection and the Declaration on the Transatlantic Partnership on Political Cooperation. Under the Understanding, the EU agreed not to rejoin the WTO panel issue, to join the U.S. in devising common approaches to the expropriation of property expropriated after May 18, 1998, to establish a registry of claims of expropriated property and to take those claims into account in its dealings with the expropriating state. The U.S. Administration agreed to attempt to persuade Congress to amend Title IV of the Libertad Act to provide a permanent waiver for the EU. However, in a unilateral statement issued at the summit, the EU announced that its commitment not to seek WTO redress would lapse if, among other conditions, a permanent waiver of Title III had not been granted by the end of the Clinton Administration's term of office. Congress has yet to act.

The Growing GMO Dispute

Still on a TEP track, and not yet introduced into the WTO forum, is the growing dispute over the treatment of GMOs. Several member states, including Austria, France and Luxembourg, have imposed marketing bans on GMO products even after they have been approved by the Commission. Others have a moratorium on test-planting of seeds. The U.S. complains about the lengthy, and, in its view, haphazard and excessively political, risk assessment and approval processes which have curtailed U.S. exports of GMO products to the EU. The TABD complains about the slow approval

process. A TEP U.S.-EU Biotechnology Group has been formed to discuss the regulatory issues. Both the TABD and the TACD are actively seeking to influence its outcome.

Europe has been behind the U.S. in biotech innovation with the result that the private commercial interests seeking to narrow the interpretation of the precautionary principle have tended to be U.S. in origin although there is considerable unease in European industry.

Several broad issues are raised by the present differences in the transatlantic treatment of GMOs. The first issue concerns the approval process for GMOs and the commercial planting of GM-modified crops. Subsequent issues concern what happens when approved products enter the food chain: should there be voluntary or compulsory segregation of food products and at what level of "GMO contamination". Finally, how should products be labeled?

In dealing with a future growth industry in which it presently lags, the EU needs transparent risk assessment and approval systems that enjoy public confidence. These are not yet in place, as the current public debate over GMO testing and the beef hormones case show. The present EU system is one in which national authorities continue to exercise considerable influence over product approvals. Meanwhile, the Commission and member governments are struggling to develop a new regulatory framework for biotechnology in the face of considerable consumer unease. These consumer fears ensure that national authorities not only have not left the issue entirely to the EU but have even been prepared to flout EU legislation. As a result, EU trading partners do not yet see a coherent scientific review process and the uncertainty is having a trade impact.

The current EU product approval process (90/220) relating to the release into the environment of new GMOs is a process first requiring approval in a member state followed by review by an EU scientific committee, followed, in turn, by Council approval. The 90/220 process has fallen into disuse in some member states which have stopped testing. Commission proposals

for its amendment have yet to be adopted.

The separate issue of labelling of GMO food was addressed by the Commission's Novel Foods Regulation, introduced in 1997, which requires labeling of all food products including GMO-modified products. It was followed by a 1998 law on specific labeling of foods produced from genetically modified corn and soybeans but did not specify the modification threshold levels which would make the labeling necessary. This drew further U.S. complaints (USTR 1999) and is currently under review.

Biotech firms trumpet the increases in agricultural yields made possible by their products. As purchasers of inputs, European agricultural interests might be expected to welcome biotech innovations even if consumers do not. They are, thus, a potential natural ally inside the EU for U.S. (and EU) biotech firms. To date, the main GM innovations have been in predominantly U.S. crops such as soya, cotton and maize and have not been of great interest to the bulk of EU farmers. Moreover, the Uruguay Round and Agenda 2000 trends to decouple domestic agricultural support from production reduces the yield-promoting incentive for EU farmers to use biotech. However, as GM techniques spread into products such as wheat and sugar which feature prominently in the CAP, and to the extent that these techniques can reduce costs, EU farmers may still be counted as natural allies by biotech firms. Of course, the BSE, Belgian egg, and other scares have not lessened public concern about the safety of the food chain or the environmental damage wrought by intensive agriculture.

Proposals to settle the GMO dispute through a package labelling solution have yet to bear fruit. U.S. producers may be expected to complain about any labelling which casts their products in a negative light or involves extra costs. Consumer groups on both sides of the Atlantic insist on the consumer's right to know if food products contain GMOs. Informational labelling as a solution

to international differences in public disquiet, even after a risk assessment that a product is "safe", is likely to be a contested solution. The U.S. administration opposes labelling systems which would imply that a GMO product is somehow dangerous or of lesser quality. Producers of GMO products may be expected to see such implications even in the informational labelling proposed by consumer and environmental groups. Currently, U.S. meat processing companies are resisting the calls of consumer groups that the U.S. Agriculture Department include a labelling requirement in a proposed new set of rules permitting companies to begin treating raw ground beef with irradiation. Companies fear that any reference to irradiation or use of the universal radura symbol for irradiation will be viewed by consumers as a warning rather than informative notice. The beef industry proposes to follow the dairy industry's milk labelling and use the phrase "cold pasturised".

The TEP drive toward MRAs as a device to not only reduce the cost of superfluous testing, but to head off trade disputes in a bilateral forum, is unlikely to solve disputes arising from differences in predisposition to assume risk or differences in public confidence in regulators charged with keeping our food safe and our environment clean. The fundamental issue with labeling, as opposed to the issue of how risk assessment and product approval is conducted, is the extent to which public policy provides consumers with information to exercise choices which are not "science-based" or are based on an individual's own application of the precautionary principle. In this debate, whether conducted in transatlantic fora or in global fora, EU policy makers also face pressure from parliament and NGOs on both sides of the Atlantic. The TACD calls for a total ban on nonmedical use of antibiotics, including growth promoters, in animal and food production. It also calls for mandatory labeling of all genetically engineered foods. Both in Brussels, the TEP, and in wider fora such as the UN Codex Alimentarius and the WTO, consumer groups active in the TACD seek wider recognition for the precautionary principle. In this effort they seek to emulate the success of

environmental NGOs who had been successful in having the principle enshrined in the Maastricht Treaty's art. 174 for environmental legislation.

VI. New Age Transatlantic Trade Disputes: Is the WTO Ready?

New Age disputes on consumer safety (including food safety), environmental protection, privacy protection are the future of trade disputes. Transatlantic trade disputes on them, as exemplified by the data privacy, beef hormones and GMO cases, are likely to be but the leading edge of such disputes elsewhere in the trading system. These trade disputes are occurring on a transatlantic basis first for two reasons -- the large size of the domestic markets involved and the (relatively) sophisticated nature of the respective regulatory and standard-setting procedures used by each side. Outcomes and standards determined in this cockpit are likely to "trickle down" to the rest of the trading system. It is not clear that the existing institutional machinery is up to the task.

These "new age" disputes are ones in which the primary motivating force of the domestic lobby is not rent but safety and/or environmental protection. These are not disputes to defend industries. Rather, they are disputes in which public opinion, not a private rent-seeking producer, is responsible for exerting pressure on governments to control imports. These new disputes rarely pit producer against producer. They are, instead, frequently producer-consumer disputes over who will control the debate on rule setting. They involve issues of market access, i.e. whether products should be available at all, and, if so, the conditions e.g. labelling requirements, on which they should be available.

The U.S.-EU trade disputes over risk assessment in the cases of beef hormones and GMOs is but the tip of a wider systemic issue. These issues are likely to become multilateralised quickly as consumers in other countries exert similar pressure on their own governments. A complicating

factor in these disputes is that neither dispute pits the interests of a domestic producer against those of a foreign producer. Instead, both disputes involve governmental response to general public opinion with public unease, not easily quieted by review of the latest scientific evidence, driving the dispute. Disputes based on the lack of public confidence require public education. However, it is in the interests of the private producers to attempt to control this information in ways which do not impact on sales. This is an area in which governments may be expected to be reluctant to surrender sovereignty to any international body.

The Data Privacy Dispute

In common with GMOs, much of the U.S.-EU tensions on data privacy and E commerce has been kept to the TEP and out of the WTO to date. However it will also probably have an eventual impact on WTO treatment of E commerce in the next WTO Round. The EU's Data Directive (95/46) represents a regulatory approach to E commerce privacy issues, in contrast to the private sector U.S. approach. The Data Directive provides consumers with such privacy protection as requiring firms to tell consumers how data gathered will be used, giving them access to it to correct errors, and giving them the option to refuse permission to use it. This is considerably more stringent than current U.S. practice which relies on industry self-regulation, some Federal Trade Commission regulation and state fair trade laws.

If national data protection registrars in member states were to decide that U.S. firms do not meet equivalent standards to those contained in the Data Directive, the Directive gives them the right to block the flow of personal information from the EU to third countries. The risk to all transatlantic data flows and the operations of major international companies would be considerable. U.S. companies and trade groups, which have resisted congressional efforts to legislate tougher privacy

protection in the U.S., have sought Administration support in dealing with the Data Directive. The U.S. Department of Commerce's "safe harbour" proposals on transatlantic transmission of personally identifiable data seek to exempt U.S. firms from being subject to the data directive by proposing that U.S. corporations be self-regulatory and make general public statements on their data protection policies. Commerce would maintain a directory of firms which had signed up to a set of principles.

While the TABD has supported the U.S. "Safe harbour" approach, the TACD has urged their rejection on the grounds that the proposals lack effective enforcement means and redress for privacy violations.

VII. Conclusion: Systemic Implications

As the beef hormones case demonstrates, the new WTO dispute settlement mechanism, though stronger than the GATT system it replaced, is not a behavior modification mechanism. Settlement of disputes need not entail such drastic changes. Both the beef hormones and bananas disputes became disputes about implementation and redress when WTO dispute panels had largely found against the EU. EU officials have strenuously pointed out that their actions in the hormones ban are fully compatible with its obligations under the WTO while US officials maintain the need for a rules based international system. The EU is not likely to allow itself to be tarred as a flagrant rule-breaker, not least by the U.S.

EU officials have been at pains to show that, as mentioned earlier, there are two ways in which a WTO member may maintain WTO-inconsistent policies and be in compliance with its obligations under the WTO: provide compensation to trading partners injured by the practices, or accept retaliation. In the hormones dispute, the EU offered, and the U.S. initially accepted, to discuss temporary compensation while the EU conducted its risk assessment. However, in the U.S.

view, compensation is only acceptable as a temporary measure and once it became apparent that the beef hormones ban might become a permanent ban, the U.S. opted for retaliation. The U.S. stress on a rules based system is particularly evident in discussions on GMOs, biotechnology and risk assessment. Meanwhile, the EU seeks wider international acceptance of what U.S. officials deem to be an overly broad application of the "precautionary principle" in risk assessment.

The differential transatlantic responses to losing cases at the WTO, with the U.S. accepting negative judgements while the EU has not, has caused some in the U.S. to argue for further changes in the DSU as part of the next Round. They would seek to make judgements even more legally binding and reduce the wiggle room of governments as to how they respond to negative judgements. A WTO review of the working of the DSB is due to be completed this July. However, as trade disputes increasingly move into areas of great public concern such as biotechnology, GMOs etc., governments would be wise to leave themselves some latitude in how they respond to negative WTO findings.

At the international level, NGOs have sought a wider role in WTO dispute procedures which are unnecessarily secretive and have not, to date, allowed panels to hear amicus curiae briefs. Many of them are the U.S. and EU NGOs participating in the consumer and environmental Dialogues of the TEP. Environmental NGOs have been among the most vigorous pushing for an opening up of WTO procedures and have achieved some limited success to date but this access has been to the debate on the agenda going forward rather than access to the dispute settlement procedures. In this, they have been sometimes assisted by the U.S. as part of a foreign policy effort of the Clinton Administration to bring greater transparency and accountability to all international organisations. Brussels has rarely been the home of the transparency principle although the Commission favours permitting interested parties to air their views to WTO panels and making some panel and Appellate

Body sessions open to the public (Commission, 1999, p. 10). Sir Leon Brittan has been among those drawing a lesson from the role of NGOs in scuppering the MAI and has called for the wider involvement of civil society in WTO discussions if there is to be public support for agreements reached by governments on such issues of concern to the general public as trade and the environment, sustainable development and food safety. In particular, he has spoken of the need for the WTO to address public concern on these issues. This requires tackling the issue of the incorporation of the "precautionary principle" more explicitly into WTO agreements in a manner which precludes acceptance of an open-ended application of the principle to the point of considering any non zero risk as excessive. Rather, there is a need to agree on methodologies which apply the principle.

The beef hormones case and the need to PSP may be expected to have major effects on internal food safety regimes in the EU. The need to conduct risk assessments has been recognised. This does not, of course, mean that trade measures will be relaxed. As pointed out earlier, there are always the other two options of WTO compliance of providing compensation or accepting retaliation. However, they point to the cost attached to these policies. Moreover, similar costs will be borne by other countries as they too feel the need to come into conformity. The implications of the PSP were obvious when it was being negotiated. US complaints against the beef ban began when the directive was first introduced. This is an area in which the EU has moved slowly.

What are the implications for the global trading system if the EU (and the U.S.) continue on the path of accepting the need to compensate trading partners for nullification and impairment, rather than accept the recommendations of WTO panels? The "global" system becomes one of myriad standards with a complicated set of side payments as the price paid for not accepting the standards that are negotiated internationally. However, when side payments are made in the form of other

trade concessions, or when retaliation takes the form of suspension of concessions previously granted, the internal distribution of the burden of making the side payments may have no relationship to the distribution of the perceived benefits from not coming into compliance. Moreover, the distribution of the burden is, to some extent, in the hands of the other injured trade partners. The decision to not accept compensation, and, subject to the provisions of art. 22.3 of the DSU, the decision on the product coverage (but not the value of trade) for suspension of previous concessions is in the hands of the complaining party. However, the requirement that the retaliation must be authorised by the DSB keeps a multilateral umbrella over the action..

The longer term consequences for the present global trading system of an expansion of the present EU approach of accepting retaliation rather than change would be dangerous. There is a systemic need to prevent proliferation of this approach to other countries and other products and, in both the TEP and a new WTO Round, contain the potential for damage posed by new age trade issues. In this context, the transatlantic institutional arrangements of TEP and its civil society dialogues have an extremely useful role to play both in striking transatlantic modus vivendi and then exporting them to global fora. It is only by limiting this proliferation that the legitimacy of the more universal global institutions may be maintained.

Appendix A: WTO Disputes Involving Either the U.S. or EU as of April 1999

Adopted Reports

EU and US (and Canada) in complaint against Japan re alleged discriminatory taxes on some alcoholic beverages
 US and others in complaint against EU on importation, distribution and sale of bananas
 US and Canada in complaint against EU measures on hormones in beef.
 U.S. complaint against EU and Ireland and the U.K. customs classification of multimedia PCs and LAN equipment.
 EU and US (and Japan) complaint against Indonesian automobile measures.
 EU and US complaint against Korean taxes on alcoholic beverages.

Active Panels:

EU complaint against U.S. tax treatment of "Foreign Sales Corporations"
 EU complaint against U.S. State of Massachusetts government procurement policy for firms doing business with Burma (Myanmar).
 EU (and Japan) complaint against U.S. alleged failure to repeal the Anti-Dumping Act of 1916.
 EU complaint against U.S. countervailing duties on U.K. steel products.
 EU complaint against U.S. sections 301-310 of the 1974 Trade Act.

Pending Consultations:

EU complaint against U.S. definitive safeguards on wheat gluten imports.
 EU complaint against U.S.' withholding liquidation and imposing contingent liability duties on a range of products as part of the dispute on EU implementation of recommendations of the DSB in the banana dispute.
 EU complaint against U.S. Copyright Act exempting the paying of royalties on music played in public places.
 EU complaint against U.S. alleged changes in rules of origin for textiles and apparel after NAFTA
 U.S. complaint against EU member states (France, Ireland, Greece, Netherlands, Belgium) of alleged export subsidy and import substitution subsidy effects produced by certain of income tax provisions.
 U.S. complaint against EU (and Greece) for lack of enforcement of intellectual property rights in Greek TV broadcasting.
 EU complaint against U.S. harbour maintenance tax.
 U.S. complaint against EU in respect of alleged failure to reduce export subsidies on processed cheese.
 EU complaint against U.S. Dept. of Agriculture Food Safety Inspection Service ban on poultry imports.
 U.S. complaint against EU and member states (Denmark, Ireland) on alleged failure to grant or enforce intellectual property rights.
 U.S. complaint against Belgium in respect of alleged restrictions on publishing commercial telephone directory services.
 EU complaint against U.S. anti-dumping measures on solid urea from the former GDR.

Settled or Inactive Cases:

U.S. complaint against Sweden re enforcement of Intellectual Property Rights.
 EU complaint against U.S. Cuban Liberty and Democratic Solidarity Act's trade sanctions provisions.
 EU complaint against U.S. changes in rules of origin for textiles and apparel after NAFTA.

EU and U.S. complaint against Japan re copyright protection for sound recordings.

U.S. complaint against Portugal re patent protection legislation.

EU complaint against U.S. tariff increases on imports in retaliation against the "hormones" directive.

U.S. (and Canada, Thailand and Uruguay) complaint against EU import duties on grains introduced to implement Uruguay Round concessions on agriculture.

Source: WTO, Overview of the State-of Play of WTO Disputes April 19, 1999.

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