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U.S.-European Union Trade Relations: Issues and Policy Challenges

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U.S.-European Union Trade Relations: Issues and Policy Challenges

SUMMARY

The United States and European Union (EU) share a huge and mutually beneficial economic partnership. Not only is the U.S.-EU trade and investment relationship the largest in the world, it is arguably the most important. Agreement between the two economic superpowers has been critical to making the world trading system more open and efficient.

Given a huge level of commercial interactions, trade tensions and disputes are not unexpected. In the past, U.S.-EU trade relations have witnessed periodic episodes of rising trade tensions and even threats of a trade war, only to be followed by successful efforts at dispute settlement. This ebb and flow of trade tensions has occurred again last year and this year with high-profile disputes involving tax benefits for U.S. exporters, GMO-products, the Byrd Amendment, and aircraft production subsidies.

Resolution of U.S.-EU trade disputes has become increasingly difficult in recent years. Part of the problem may be due to the fact that the U.S. and the EU are of roughly equal economic strength and neither side has the ability to impose concessions on the other. Another factor may be that many bilateral disputes now involve clashes in domestic values, priorities, and regulatory systems where the international rules of the road are inadequate to provide a sound basis for effective and timely dispute resolution.

Both former European Trade Commissioner Pascal Lamy and U.S. Trade Representative Robert Zoellick have worked hard to get the Doha Round of multilateral trade negotiations re-started after the failed Cancun WTO meeting in September 2003. On August 1, 2004, due in no small part to their

efforts, members of the WTO concluded a framework for future Doha round talks, thereby lessening some of the agricultural trade tensions between the U.S. and EU.

On January 21, 2005, the EU lifted sanctions it imposed beginning last year on \$4 billion of U.S. exports. The sanctions were in response to the U.S. failure to comply with a WTO ruling that certain tax provisions for U.S. exports were illegal. However, an EU decision to challenge in the WTO some provisions of the new U.S. tax legislation that were designed to bring the United States into conformity with its WTO obligations has created another bilateral dispute. Furthermore, a number of Members of Congress are considering Pascal Lamy's role in the EU ongoing challenge in the context of his candidacy to be the next head of the WTO. At the same time, the U.S. and EU are now working to avoid a major trade confrontation over government subsidies for the commercial aircraft sector - namely the Boeing Company and Airbus. On January 11, 2005, the two sides agreed to begin bilateral negotiations that are aimed at establishing better understandings on permissible forms of government support for this key sector. Few observers expect an agreement by the April 11, 2005 deadline.

Major U.S.-EU trade challenges can be grouped into five categories: (1) complying with WTO rulings; (2) resolving longstanding trade disputes involving aerospace production subsidies and beef hormones; (3) dealing with different public concerns over new technologies and new industries (4) fostering cooperative competition policies; and (5) strengthening the multilateral trading system.

MOST RECENT DEVELOPMENTS

Deputy Secretary of State Robert Zoellick on April 1, 2005, expressed severe doubts that the U.S. and EU could meet the April 11, 2005 deadline for an agreement eliminating subsidies for large civil aircraft manufacturers.

The EU and Canada announced on March 31, 2005, the specific steps they will take against U.S. exports in retaliation for the Bush Administration's failure to repeal the Byrd Amendment.

On March 4, 2005, U.S. and EU officials announced they had reached a deal to settle a long-standing dispute over tariff imposed on U.S. exports of brown rice.

EU member states on January 21, 2005, adopted a regulation that will automatically re-impose punitive tariffs on U.S. goods should a WTO dispute settlement panel rule against a U.S. law repealing a tax provision long ruled a violation of world export subsidy rules.

On January 11, 2005, the U.S. and EU agreed to begin bilateral negotiations aimed at curbing government support for the commercial aircraft sector.

On December 22, 2004, the European Court of First Instance ordered Microsoft to immediately implement sanctions that were announced by the European Commission last March.

On November 18, 2004, a majority of the House of Representatives (240 Members) urged U.S. Trade Representative Robert Zoellick to pursue a WTO dispute settlement case on European subsidies to Airbus.

The EU on November 8, 2004, took the first steps under the WTO to challenge the sanctions the United States and Canada have imposed on EU exports due to the EU ban on imports of beef raised with artificial beef hormones.

The EU on November 5, 2004, initiated proceedings in the WTO to challenge provisions in recently adopted U.S. export tax legislation (P.L. 108-357).

A WTO panel established to settle a dispute on the EU's alleged moratorium on genetically modified organisms (GMO) announced on November 2, 2004, that its final report will be delayed until the end of June 2005.

Congress on October 11, 2004, completed action on legislation (H.R. 4520) that will repeal a U.S. export tax provision that had been ruled illegal by the WTO.

BACKGROUND AND ANALYSIS

Overview

The United States and the European Union (EU) share a huge and mutually beneficial economic partnership. Not only is the U.S.-EU trade and investment relationship the largest in the world, but it is also arguably the most important. Agreement between the two partners in the past has been critical to making the world trading system more open and efficient.

Given the high level of U.S.-EU commercial interactions, trade tensions and disputes are not unexpected. In the past, U.S.-EU trade relations have witnessed periodic episodes of rising trade tensions and conflicts, only to be followed by successful efforts at dispute settlement. This ebb and flow of trade tensions occurred again last year with high-profile disputes involving tax breaks for U.S. exporters and production subsidies for the commercial aircraft sector.

The two sides still face difficult challenges in the months ahead in keeping the relationship on an even keel. The two biggest challenges relate to continuing EU sanctions being imposed on U.S. exports as part of the FSC-ETI dispute and escalating tensions over government subsidies the two sides allegedly provide their civil aircraft producers, Boeing and Airbus. In addition, the EU is pushing ahead with possible retaliatory actions in conjunction with another WTO compliance case — the Byrd Amendment which distributes anti-dumping duties imposed by the U.S. to U.S. petitioners and which was found to contravene WTO rules. For its part, the United States is pressing the EU to end its de facto moratorium on genetically modified organisms (GMOs) by requesting the selection of panelists to rule on this WTO complaint. The Congressional response to EU demands to bring U.S. laws in compliance with WTO obligations and Bush Administration initiatives will play a key role in managing the U.S.-EU economic relationship.

Closer Economic Ties

The United States and the European Union share the largest bilateral trade and investment relationship in the world. Annual two-way flows of goods, services, and foreign investment transactions exceeded \$1.3 trillion in 2004. Viewed in terms of goods and services, the United States and EU are each other's largest trading partners. Each purchases about one-fifth of the other's exports of goods in high-technology and sophisticated product areas where incomes and tastes are the primary determinants of market success.

Based on a population of some 455 million citizens and a gross domestic product of about \$10.3 trillion (compared to a U.S. population of 289 million and a GDP of \$10.6 trillion) in 2003, the twenty-five members of the EU provide the single largest market in the world. Given the reforms entailed in the introduction of the European single market in the early 1990s, along with the introduction of a single currency, the euro, for twelve members, the EU market is also increasingly open and standardized.

The fact that each side has a huge investment position in the other's market may be the most significant aspect of the relationship. By year-end 2002, the total stock of two-way direct investment reached \$1.67 trillion (composed of \$964 billion in EU investment in the

United States and \$708 billion in U.S. investment in the EU), making U.S. and European companies the largest investors in each other's market. This massive amount of ownership of companies in each other's market translates into an estimated 4.4 million Americans who are employed by European companies and almost an equal number of EU citizens who work for American companies in Europe.

Growing Strains

Given the huge volume of commercial interactions, it is commonly pointed out that trade disputes are quite natural and perhaps inevitable. While the vast majority of two-way trade and investment is unaffected by disputes, a small fraction (often estimated at 1%-2%) of the total often gives rise to controversy and litigation. Historically, with the possible exception of agriculture, the disputes have been handled without excessive political rancor.

Over the past several years, however, trade relations are being strained by the nature and significance of the disputes. Former EU Commissioner for Trade, Pascal Lamy, stated on November 20, 2000 that the "problems seem to get worse, not better." Richard Morningstar, then U.S. Ambassador to the EU, said in a January 23, 2001 speech that the inability of our two sides "to resolve our list of disputes, which are growing in both number and severity, is beginning to overshadow the rest of the relationship." Moreover, some of the efforts at dispute resolution have led to escalation and "tit-for-tat" retaliation with the potential to harm the multilateral trading system.

In 1999 the United States imposed punitive tariffs on \$308 million of EU exports of mostly higher value-added agricultural products such as Danish ham and Roquefort cheese. This action was a response to a refusal by the EU to change its import regimes for bananas and hormone-treated beef which the World Trade Organization (WTO) determined to be in violation of world trade rules. (The U.S. retaliation for bananas was lifted in 2001 but \$116 million in punitive duties remains in effect due to the beef dispute.) EU pique over U.S. pressures on bananas and beef, in turn, led the EU to threaten retaliation against \$4 billion dollars in U.S. exports that the WTO found in violation of an export subsidy agreement. In addition, the EU has filed numerous WTO dispute resolution petitions alleging that a variety of U.S. trade laws violate international obligations in some technical fashion, contributing to an impression that these challenges are part of a concerted EU strategy to weaken or gut U.S. trade laws.

The underlying causes of the trade disputes are varied. Some conflicts stem primarily from traditional demands from producer or vested interests for protection or state aids. Other conflicts arise when the United States or the EU initiate actions or measures to protect or promote their political and economic interests, often in the absence of significant private sector pressures. Still other conflicts are rooted in an array of regulations that deal mostly with issues that are considered domestic policy.

Resolution of these disputes has proven difficult in recent years. Part of the problem may rest in the fact that the EU and United States are of roughly equal economic strength and neither side has the ability to impose concessions on the other. Another factor may be that numerous new disputes involve clashes in domestic values and priorities where the international rules of the road are inadequate to provide a basis for effective and timely

dispute resolution. (For further discussion, see CRS Report RL30732, *Trade Conflict and the U.S.-European Union Economic Relationship*.)

The United States and European Union currently have a full plate of high profile bilateral disputes this year. Several of the disputes may need to be resolved and new potential disputes avoided if the bilateral trade strains are to be contained and a smoother trade relationship is to develop. Resolution of disputes involving alleged government subsidies for Boeing and Airbus, the Byrd Amendment, and the EU ban on imports of genetically modified organisms (GMOs) are at the top of the list of bilateral challenges.

Major Issues and Policy Challenges

Major EU -U.S. trade and investment issues and policy challenges can be grouped into six different categories: (1) complying with WTO rulings; (2) resolving two longstanding trade disputes; (3) dealing with disputes involving new technologies or industries; (4) fostering cooperative competition policies; and (5) strengthening the multilateral trading system. A summary and status update of each challenge follows.

Complying With WTO Rulings

Some of the more serious trade disputes that currently cloud the bilateral relationship deal with WTO dispute compliance. While the United States has complied with adverse rulings in most WTO disputes, there are a number of outstanding disputes where this has not been the case. The same can be said of the EU compliance record (see treatment of the beef hormone dispute below). U.S. tax benefits for exporting and the Byrd amendment are two key compliance disputes that involve retaliation or threats of retaliation.

U.S. Tax Benefits for Exports. The EU on March 1, 2004 began imposing retaliatory duties of 5% on selected U.S. exports in the dispute over U.S. compliance with a WTO ruling involving the Foreign Sales Corporation (FSC) and its successor Extraterritorial Income Exclusion (ETI) export tax regime. Although Congress passed legislation (H.R. 4520) on October 11, 2004 that repeals the export tax regime, the EU did not lift the trade sanctions it was imposing on U.S. exports until January 21, 2005. On that date, a regulation adopted by the member lifted retaliatory duties retroactively to January 1, 2005. The regulation, however, also calls for a possible re-imposition of punitive tariffs on \$2.4 billion of U.S. goods if a WTO dispute panel rules against several provisions of the law (the American Jobs Creation Act -P.L. 108-357) passed by Congress to bring the United States into compliance with the WTO ruling on the FSC-ETI case. The Commission had proposed automatic imposition of sanctions if the WTO finds in Brussels' favor, but member states agreed only to give the Commission discretion — in close consultation with the member states — to retaliate on U.S. exports again if the WTO rules against the U.S. tax law.

The two provisions of the American Jobs Creation Act being objected to by the EU are a two-year transition period lasting until 2006 and the grandfathering of the FSC benefits for certain contracts that were in place on September 17, 2003. The EU claims the latter provisions will benefit companies such as Boeing, Microsoft, and Caterpillar.

U.S. reaction to the EU's challenge of the new tax law and threat to re-impose sanctions if it wins its new WTO case has been almost uniformly negative. An official for the Office of the U.S. Trade Representative stated the "it is harmful for the EU to needlessly prolong this matter in the face of Congress' good faith action." Senate Finance Committee Chairman Charles Grassley stated that he remains frustrated and troubled by the actions of the EU. (For further discussion, see CRS Report RS20746, *Export Tax Benefits and the WTO*.)

Byrd Amendment. The Continued Dumping and Subsidy Offset Act (CDSO), or Byrd Amendment, enacted in October 2000, requires the annual disbursement of antidumping and countervailing duties to qualified petitioners in the underlying trade remedy proceedings. Soon after enactment, the EU and seven other parties successfully challenged the statute in the WTO on the grounds that the Byrd Amendment constitutes a "non-permissible specific action against dumping or a subsidy" contrary to various WTO agreements. Because the United States did not comply with the ruling by the arbitrated deadline of December 27, 2003, the eight complaining members requested authorization from the WTO in January 2004 to impose retaliatory measures. A decision by a WTO arbitrator on the amount of retaliation U.S. trading partners can impose was handed down on August 31, 2004. The arbitrator determined that each of the eight complainants could impose countermeasures on an annual basis in an amount equal to 72% of the CDSO disbursements for the most recent year in which U.S. data are available. To date, however, no sanctions have been imposed by any of the eight complainants. At a January 17, 2005 meeting in Geneva, senior officials from the eight complaining countries decided to wait and see what signals emerge from the 109th Congress regarding possible repeal of the Byrd Amendment.

The Bush Administration proposed repeal of the CDSOA in its FY2004 and FY2005 budget requests. At the same time, the Administration has indicated its intent to reverse the WTO ruling against the Byrd amendment by securing the right of governments to distribute monies collected on antidumping and countervailing duties to affected firms as part of the ongoing Doha round of trade negotiations. In addition, considerable congressional opposition has been expressed to elimination of the measure, as evidenced by a letter signed by more than two-thirds of the Senate expressing opposition.

Resolving Longstanding Disputes

The United States and EU are engaged in long-running disputes involving aerospace production subsidies and trade in beef that has been treated with hormones. President Bush in an August 13, 2004 speech raised the stakes of the Airbus-Boeing dispute by stating that Airbus production subsidies are unfair. In October 2004, this long simmering dispute reignited when both sides took their complaints to the WTO. Tensions were somewhat diffused by a January 11, 2005 agreement to try to reconcile differences through a three-month period of bilateral negotiations. But an April 11 deadline looms without much prospect of an agreement being reached. The beef hormone dispute also heated up when the EU in November 2004 took the first steps to challenge in the WTO the sanctions the United States and Canada are imposing on EU exports.

Airbus-Boeing Subsidy Tensions.¹ On December 19, 2000, Airbus announced that it had formally launched a program to construct the world's largest commercial passenger aircraft, the newly numbered Airbus A380. In the spring of 2001, Boeing dropped its support of a competing new large aircraft, opting instead to focus on the development of a new class of higher speed commercial aircraft, the so-called sonic cruiser, which has since been cancelled. The Airbus action potentially reopens a long-standing trade dispute between the United States and Europe about subsidization of aircraft projects that compete directly with allegedly non-subsidized U.S. products, in this case the Boeing 747 series aircraft.

The large commercial aircraft (jet aircraft with 100 or more seats) production industry is essentially a duopoly consisting of an American manufacturer, Boeing, and a European manufacturer, Airbus. Until recently Airbus was a consortium of national aviation firms, some with close government ties, who cooperated to produce commercial aircraft. As a result of recent European aerospace industry consolidation, Airbus is now owned by just two firms, EADS and BAE systems. Airbus itself is reforming as a public firm under the name Airbus Industrie.

The dispute between the United States and the European governments participating in the Airbus consortium is of long standing. The basic premise of the dispute is whether, as U.S. trade policymakers contend, Airbus is a successful participant in the market for large commercial jet aircraft not because it makes competitive products, which by all standards it does, but because it has received significant amounts of governmental subsidy and other assistance, without which it probably would not have been able to enter and participate in the market.

At issue in the A380 development is at least \$2.5 billion in already identified direct loans to be provided to Airbus member firms by the governments of France, Germany, Spain, and the United Kingdom. Additional funds are likely to be provided to subcontractors by other European nations such as Belgium and Italy. In December 2000, then-President Clinton expressed concerns that the loans to be supplied for the A380 would not be at commercial rates and that they might be forgiven if the A380 is a commercial failure. So far, the Bush Administration has expressed similar concerns, but has taken no additional actions. The EU provided information in April 2001 that it claimed showed that all state-aids to be provided would fully comply with the 1992 U.S.-EU Agreement on Government Support for Civil Aircraft.

Shortly after the A380 project was announced, Boeing dropped its support of a competing new large aircraft. At the time, it decided instead to focus on the development of a new class of higher speed commercial aircraft, the so-called sonic cruiser, which has since been cancelled. Boeing, which apparently believes the market for A380 size aircraft is limited, is now offering airlines a new technology 250-seat aircraft, the 7E7, which is viewed as a replacement for the 767. As of this writing, no specific order for this aircraft have been received and a decision to actually produce the aircraft is still pending.

¹ Prepared by John W. Fischer, Specialist in Transportation, Resources, Science, and Industry Division.

Airbus does not accept the U.S. view of the reasons for its success. (Airbus now leads Boeing in both new annual aircraft deliveries and orders). Although admitting to, but not publically disclosing, the level of direct subsidies from supporting governments, Airbus contends that it is in the market for long-term profit. Airbus points to the loan repayments it has provided over the last several years as proof of its long-term intent to operate in a market environment. Airbus counters the U.S. argument that subsidies are the principal reason for Airbus' success with claims that U.S. manufacturers have benefitted from huge indirect governmental subsidies in the form of military and space contracts and government-sponsored aerospace research and development.

Europeans are also likely to contend that the 7E7, if it is built, will receive a level of subsidy that they believe might proportionately exceed the subsidy levels received by the A380. To support this claim, they point to over \$3 billion in publically announced subsidies from Washington State for 7E7 manufacturing facilities and large announced Japanese government subsidies for Japanese manufacturing firms who may serve as major subcontractors on the aircraft.

Defense industry connections that both Boeing and Airbus have may complicate the dispute. For Boeing, the decision by the Air Force to lease 20 military tanker versions of the B767 aircraft and purchase 80 more has been controversial. Critics of this deal contend that the Air Force could have found comparable aircraft at cheaper price and that the real intent of the deal is to keep Boeing's 767 production line open during the ongoing industry downturn. Supporters of the sale believe that the 767 is a good platform for a military tanker and that its ready availability will efficiently fill an important national defense need.

Airbus, for its part, has its own military subsidy issue. Several European nations have decided to develop and acquire 180 model A400M military transport aircraft at a cost of approximately 20 billion euros. This aircraft is viewed by many as comparable in many respects to the existing, but smaller and potentially cheaper, U.S. built Lockheed Martin C-130. Airbus also has announced that the engines for this aircraft would be produced by a European firm whose product would cost fully \$1 billion more than that offered by Pratt&Whitney, Canada, which believed it had the inside track for the contract. North American critics may regard this move as blatant subsidy.

President Bush on August 13, 2004, stated that his administration would pursue "all options" to force the Europeans to end their subsidies, including a WTO challenge. In response, the European Commission said that it would consider renegotiating the 1992 civil aircraft agreement. The EU has utilized a provision of the agreement to support up to one-third the cost of developing new planes. But bilateral talks failed to make progress, and on October 6, 2004, both sides brought their complaints to the WTO. However, on January 11, 2005, the two sides agreed again to try to settle the dispute bilaterally, that is to say outside the WTO. Many observers had expressed concern that the WTO was not necessarily the most appropriate forum for the settlement of this dispute. The objective of the bilateral negotiations will be to conclude a comprehensive agreement that establishes "fair market competition for all development and production of large civil aircraft in the European Union and the United States." Both sides have agreed to a three month negotiation period. Should negotiations fail to reach an agreement by April 11, which appears to be a strong possibility, it could trigger the formation of a WTO dispute resolution panel which might take a year or more to reach a finding as to which parties might be at fault.

It is Boeing's view that Airbus has benefitted greatly from direct assistance from member states. Boeing further argues that several of Airbus's projects, especially the A380, would not have been able to obtain financing in commercial markets because of their large risk. Airbus rejects Boeing's charges of subsidization and counters that Boeing has benefitted from huge indirect governmental subsidies in the form of military and space contracts as well as some potential support from states and foreign governments.

Beef Hormones. The dispute over the EU ban, implemented in 1989, on the production and importation of meat treated with growth-promoting hormones is one of the most bitter disputes between the United States and Europe. It is also a dispute, that on its surface, involves a relatively small amount of trade. The ban affected an estimated \$100-\$200 million in lost U.S. exports — less than one-tenth of one percent of U.S. exports to the EU in 1999.

The EU justified the ban to protect the health and safety of consumers, but several WTO dispute settlement panels subsequently ruled that the ban was inconsistent with the Uruguay Round Sanitary and Phytosanitary (SPS) Agreement. The SPS Agreement provides criteria that have to be met when a country imposes food safety import regulations more stringent than those agreed upon in international standards. These include a scientific assessment that the hormones pose a health risk, along with a risk assessment. Although the WTO panels concluded that the EU ban lacked a scientific justification, the EU refused to remove the ban primarily out of concern that European consumers were opposed to having this kind of meat in the marketplace.

In lieu of lifting the ban, the EU in 1999 offered the United States compensation in the form of an expanded quota for hormone-free beef. The U.S. government, backed by most of the U.S. beef industry, opposed compensation on the grounds that exports of hormone-free meat would not be large enough to compensate for losses of hormone-treated exports. This led the way for the United States to impose 100% retaliatory tariffs on \$116 million of EU agricultural products from mostly France, Germany, Italy, and Denmark, countries deemed the biggest supporters of the ban. Canada imposed \$9.4 million in sanctions.

The U.S. hard line is buttressed by concerns that other countries might adopt similar measures based on health concerns that lack a legitimate scientific basis according to U.S. standards. Other U.S. interest groups are concerned that non-compliance by the EU undermines the future ability of the WTO to resolve disputes involving the use of SPS measures.

Occurrences of "mad cow disease" in several EU countries and the outbreak of foot-and-mouth disease (FMD) in the United Kingdom and three other EU countries have contributed to an environment that is not conducive to resolving the meat hormone dispute. The EU has recently indicated its intention to make the ban on hormone-treated meat permanent, while at the same time expressing some openness to renewing discussions about a compensation arrangement which would increase the EU's market access for non-hormone treated beef from the United States. In discussions held June 11, 2001, a U.S. industry proposal for expanded access to the EU market for hormone-free beef for a period of 12 years was rejected by the EU. In response, the EU countered with a 4-5 year period for compensation. The compensation talks have since languished.

In pursuing compensation talks, the Bush Administration is faced with a divided industry position. The American Meat Institute and the American Farm Bureau prefer carousel retaliation to settle the dispute while the American Cattlemen's Beef Association supports efforts to gain increased access for non-hormone treated beef in exchange for dropping the retaliatory tariff on EU exports.

The Bush Administration has maintained that it would not use so-called "carousel" retaliation (rotating the products subject to retaliation) while the negotiations for compensation are on-going. Some observers speculate that both the EU and the U.S. have made a political decision to handle the dispute by insisting that they are making progress towards a resolution. This arguably could shield USTR from congressional and private sector pressures to apply the carousel provision against the EU.

On August 2, 2002, eleven senators, including Senate Minority Leader Trent Lott and Senate Finance Committee Chairman Max Baucus, called on the Bush Administration to increase the level of retaliation for the EU's ban on beef imports to adjust for the additional trade that will be lost when new countries join the EU. The Senators also suggested that the U.S. should implement the carousel provision of U.S. trade law.

In October 2003, the European Commission notified the WTO that it has changed its hormone ban legislation in a way that it believes complies with international trade rules. The legislation makes provisional a previous permanent ban for five growth hormones used to raise beef and keeps in place a permanent ban on the use of oestradiol 17 on the basis that it is carcinogen. As a result, the EU argued that it should no longer be subject to punitive trade sanctions by the United States (as well as by Canada).

On November 8, 2004, the EU took an initial step in the WTO to challenge the U.S. and Canadian sanctions still in effect. According to the EU, its October 2003 actions making the ban provisional for five growth hormones complies with WTO rules, which means the U.S. and Canada are no longer entitled to retaliate against its exports. The U.S. and meat industry, however, argue that making a ban provisional for the long term does not meet WTO obligations. If a panel is formed, a decision may not be reached until late 2005, thereby keeping this dispute very much alive. For further discussion, see CRS Report RS20142, *The European Union's Ban on Hormone-Treated Meat.*)

Dealing with Different Public Concerns Over New Technologies and New Industries

The emergence of new technologies and new industries is at the heart of a growing number of disputes. Biotechnology as a new technology and e-commerce (and related data privacy concerns) as a new industry are emerging issues that have great potential for generating increases in transatlantic welfare, as well as conflict. These issues tend to be quite politically sensitive because they affect consumer attitudes, as well as regulatory regimes.

Bio-technology.² Differences between the United States and the EU over genetically modified organisms (GMOs) and food products that contain them pose a potential threat to, and in some cases have already disrupted, U.S. agricultural trade. Underlying the conflicts are pronounced differences between the United States and EU about GMO products and their potential health and environmental effects.

Widespread farmer adoption of bio-engineered crops in the United States makes consumer acceptance of GMO crops and foods at home and abroad critical to producers, processors, and exporters. U.S. farmers use GMO crops because they can reduce input costs or make field work more flexible. Supporters of GMO crops maintain that the technology also holds promise for enhancing agricultural productivity and improving nutrition in developing countries. U.S. consumers, with some exceptions, have been generally accepting of the health and safety of GMO foods and willing to put their trust in a credible regulatory process.

In contrast, EU consumers, environmentalists, and some scientists maintain that the long-term effects of GMO foods on health and the environment are unknown and not scientifically established. By and large, Europeans are more risk averse to the human health and safety issues associated with bio-engineered food products than U.S. citizens.

With minor exceptions, the EU has approved no GMO products since 1998, even though it has an elaborate approval process in place. As of January 2004, 22 GMO products or crops were awaiting approval. (On May 19, 2004, the EU approved the import of canned Bt sweet corn, an action that the U.S. argues did not end the general moratorium.)

In October 2002, the EU implemented revisions to that process aimed at reassuring its member states and the public about the safety of its regulatory system. Nonetheless, a block of EU countries continued to halt the release of any new GMO crops into the environment. These countries said they would not implement the EU-wide legislation for approvals until new, stricter, regulations for labeling and tracing GMO containing products are implemented. The EU Council of Ministers adopted these regulations on July 22, 2003. They came into force on November 7, 2003.

Due to the continuing de facto moratorium, the United States, Canada, and Argentina, in August 2003, initiated a case before the WTO. U.S. agricultural interests contend that not only have these policies blocked their exports to the EU, but also fueled unwarranted concerns about the safety of biotechnology throughout the world. U.S. interests contend that there is no scientific evidence that GMO foods and crops are substantially different from, or any less safe than, conventional varieties. EU officials say they have been moving as quickly as possible to reinstate biotechnology approval while trying to reassure their consumers regarding safety issues. On February 23, 2004, the three co-complainants asked the WTO to appoint the panelists after they were unable to agree on a mutually acceptable slate. In an April 8, 2004 ruling, the WTO rejected EU claims that the petition for a panel was not justified. In May 2004, the panel began receiving and reviewing submissions from both

² Prepared by Charles E. Hanrahan, Senior Specialist in Agricultural Policy, Resources, Science, and Industry Division.

sides to the dispute. On November 2, 2004, the panel announced that its final report will be delayed until the end of June 2005.

The U.S.-led WTO case does not involve the new labeling and traceability regulations that will require most food, feed and processed products from GMOs to be labeled (meat and livestock are exempt). The American Soybean Association has argued that even if the GMO approval moratorium is lifted, the new labeling and traceability rules are themselves unworkable and unnecessary, and can mislead consumers by wrongly inferring that GMO products are inherently different than non-GMO foods or pose safety concerns. More formally, the group also argues that the regulations violate the WTO's Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).

In the most recent action, EU member states on November 29, 2004, failed to approve European Commission proposals to force some member states to lift their bans on five genetically modified varieties of corn and rapeseeds meant for cultivation, import, and processing. A number of member states, including Austria, Luxembourg, Germany, France, and Greece, argue that they should have the right to impose such bans if they choose to do so.

E-Commerce and Data Privacy. On July 1, 2003, the EU began requiring U.S. and other non-EU firms to pay value added tax (VAT) on the sale of goods and services digitally delivered to individual consumers in the EU. The new tax rules apply to the supply over electronic networks (digital delivery) of software and computer services generally, plus a wide array of information services. U.S. and other non-EU firms are required to register in one country but pay the VAT at the rate applicable to each customer's country. In contrast, EU firms pay tax at the single rate of the country in which they are located.

EU taxation of digital transactions raises several policy issues for the United States. These include the taxation of digital commerce, unequal taxation of EU versus non-EU firms, high tax compliance costs, EU competition with the Organization for Economic Cooperation and Development's (OECD's) multilateral discussions of the taxation of e-commerce, and the possibility of a complaint to the WTO. The issue of requiring a foreign firm to collect tax on sales at multiple rates depending on the customer's country of residence is similar to the domestic issue, raised in connection with the Internet tax moratorium, of possibly requiring U.S. sellers to collect tax on interstate sales based on the tax in the customer's state of residence. (For further discussion, see CRS Report RS21596, *EU Tax on Digitally Delivered E-Commerce*).

The related issue of data privacy rights is also a source of friction. While the EU supports strict legal regulations on gathering consumer's personal data, the United States has advocated a self-regulated approach. Controversy emerged when the EU in 1995 adopted a directive forbidding the commercial exchange of private information with countries that lack adequate privacy protections. The issue appeared resolved by the "Safe Harbor" agreement of 2000, whereby U.S. companies that agree to abide by privacy principles can enter a safe harbor protecting them from the EU directive barring data transfers to countries that do not adequately protect citizens' privacy. But U.S. companies have been slow to participate in the Safe Harbor by self-certifying to the Department of Commerce. Currently, only entities whose activities fall under the regulatory authority of the Federal Trade

Commission or the Department of Transportation are eligible to participate in the Safe Harbor. Whether or how other sectors, particularly financial services, will be considered in relation to Safe Harbor has not yet been determined. On January 7, 2005, the European Commission unveiled alternative model clauses aimed at providing more flexibility for companies seeking to comply with EU data privacy law when transferring personal data from the 25 EU member states. (For further discussion, see CRS Report RS20823, *The EU-US Safe Harbor Agreement on Personal Data Privacy*.)

Fostering Cooperative Competition Policies

In recent years the EU and the United States have sparred over competition policies. Known as anti-trust policy in the United States, these laws provide remedies to deal with a range of anti-competitive practices, including price fixing and other cartel arrangements, abuses of a dominant position or monopolization, mergers that limit competition, and agreements between suppliers that foreclose markets to new competitors.

While regulators on both sides share much information and seek to collaborate in ways that provide for consistent policies, two high-profile cases have raised questions about the need to improve cooperation. These cases are the European Commission's July 2001 decision to block the merger of General Electric and Honeywell and the Commission's March 24, 2004 decision to impose remedies and fines on Microsoft for alleged violation of European competition laws.

GE-Honeywell Case

As M&A activity has accelerated in the 1990s among U.S. and European companies, the U.S. Justice Department and the European Union's competition directorate have worked closely in passing judgment on proposed deals. Pursuant to a 1991 bilateral agreement on antitrust cooperation between the European Commission and the United States, the handling of these cases has been viewed generally as a successful example of transatlantic cooperation. In reviews of several hundred mergers over the past 10 years, there has been substantial agreement between regulators in Brussels and Washington on antitrust decisions. However, the EU's 2001 rejection of General Electric's \$43 billion merger with Honeywell International has highlighted major differences in antitrust standards and processes employed by the EU and the United States. In the process, some observers have argued that the GE-Honeywell case points to a need for closer consultations or convergence in antitrust standards.

The GE-Honeywell merger would have combined producers of complementary aircraft components. GE produces aircraft engines and Honeywell makes advanced avionics such as airborne collision warning devices and navigation equipment. GE and Honeywell do not compete over any large range of products. The combined company arguably would have been able to offer customers (mostly Boeing and Airbus) lower prices for a package that no other engine or avionics company could match. In its review, the U.S. Justice Department concluded that the merger would offer better products and services at more attractive prices than either firm could offer individually, and that competition would be enhanced.

With regard to the European Commission's merger review (which occurs over any merger between firms whose combined global sales are more than \$4.3 billion and that do

at least \$215 million of business in the European Union), the legal standard employed for evaluating mergers is whether the acquisition creates or strengthens a company's dominant position as a result of which effective competition would be significantly impeded. The commission's Task Force on Mergers concluded that, together, GE-Honeywell's "dominance" would be increased because of the strong positions held by GE in jet engines and by Honeywell in avionics products.

EU antitrust regulators relied, in part, on the economic concept of "bundling" to reach its decision. Bundling is the practice of selling complementary products in a single, discounted package. The combined company makes more profits than the pre-merger companies and prices are lower, making consumers better off. But the EU concluded that the lower prices and packages of products that could be offered by the merged entity would make competition a lot more difficult for other producers of airplane equipment such as Rolls Royce, Pratt & Whitney, and United Technologies. In the long run, European regulators had concerns that the merger could force weaker competitors out of the market, thereby leaving GE-Honeywell free over time to raise prices.

GE officials countered that the commission relied on a theory that is not supported by evidence, particularly in the aerospace industry. Boeing and Airbus, for example, tend not to be weak or passive price takers, but are strong and sophisticated customers that negotiate all prices. And even if the new company offered discounted "bundled" packages, the winners would be the airlines and, ultimately, their customers.

In short, the GE-Honeywell case crystallized differences in standards and processes employed by antitrust regulators in Washington and Brussels. In terms of standards, in the United States, a merger could be acceptable if it results in efficiencies that regulators were convinced would lower prices to consumers, even if competition in the marketplace might adversely be affected. In Europe, however, the governing regulation requires the competition commissioner to block a merger if he determines that it will "create or strengthen a dominant position." This is based on a concern that "dominance" increases the likelihood of "consumer abuse." Regarding process, one of the most striking differences is that the European process clearly affords competitors more leeway to oppose mergers by allowing for testimony behind closed doors and places more weight on economic models that predict competition will be reduced and competitors eliminated in the long-run. In contrast, U.S. antitrust regulators tend to presume that any post-merger anti-competitive problems can be taken care of later by corrective antitrust enforcement action.

Microsoft Case

After a five-year investigation of Microsoft Corporation's alleged leveraging of its near monopoly in the market for personal computer operating systems and for media players, the European Commission on March 24, 2004, fined Microsoft \$612 million and ordered the company to disclose to its competitors the interfaces required for their products to "talk" with the Windows operation system. In addition, Microsoft is required to offer a version of its Windows operating system without Windows Media Player to PC manufacturers or when selling directly to end users.

The order effectively puts Microsoft on notice that future attempts to add features to Windows would be challenged in Europe if the additions put rival products at competitive

disadvantage. The ruling is intended to ensure that “anyone who develops new software has a fair opportunity to compete in the marketplace,” EU competition commissioner Mario Monti said in Brussels. Microsoft called the EU’s decision “unwarranted and ill-considered,” and said it expected to appeal the order in European courts.

The penalties go well beyond the terms of a settlement Microsoft reached with the U.S. Justice Department and several states in 2001. A Justice Department official criticized the EU’s decision to adopt separate mandates, and several members of Congress warned that the ruling could widen trade and diplomatic rifts between the U.S. and Europe.

R. Hewitt Pate, Chief of the Justice Department’s Antitrust Division, criticized the approach taken by the EU in requiring code sharing as part of its remedy for protecting “competitors, not competition.” Pate also expressed concern that the EU decision could “dull lawful innovation ... and hurt consumers.”

The reaction from Congress was mixed. Senator Herb Kohl, ranking minority member of the Senate Judiciary Committee’s Antitrust, Competition Policy and Consumer Rights Subcommittee, stated that “much of the EU’s decision” reflects his subcommittee’s recommendation to the Justice Department when it settled its case against Microsoft. House Judiciary Committee Chairman F. James Sensenbrenner said the decision “raises important questions concerning the extraterritorial application of foreign antitrust law.” And Senate Majority Leader Bill Frist stated that “I now fear that the U.S. and EU are heading toward a new trade war and the Commission’s ruling against Microsoft is the first shot.”

A number of antitrust lawyers argued that the decision highlights fundamental differences between the U.S. and EU in dealing with monopoly abuse. Efforts to harmonize the U.S. approach to antitrust with authorities in the EU are, thus, likely to continue.

On December 22, 2004, a senior European judge upheld the implementation of the March sanctions. The Court of First Instance said that Microsoft had failed to demonstrate that imposing Commission penalties might cause it serious and irreparable damage. Microsoft says it would still prefer a negotiated settlement to a continuing legal challenge to the sanctions. Any decision to restart settlement talks or even to open further investigations against Microsoft now falls to Ms. Neelie Kroes, who took over as EU competition commissioner last month.

Strengthening the Multilateral Trading System

After three years of efforts, including the ill-fated ministerial held in Seattle in 1999, trade ministers from the 142 member countries of the WTO agreed to launch a new round of trade negotiations last November in Doha, Qatar. At Doha the WTO members also agreed to give priority attention to a number of developing country concerns.

By most accounts, U.S.-EU cooperation played a major role in producing agreement at Doha. Then-USTR Zoellick and then-EU Trade Commissioner Lamy reportedly worked closely together, agreeing that making concessions to developing countries on issues of priority concern was necessary to move the trading system forward. Their cooperation began early in 2001 with the settlement of the long-running banana dispute and tacit agreement to

settle other disputes without resort to retaliation. Each also recognized that both trading superpowers would have to make concessions at Doha to achieve their overall objectives.

At Doha, both the U.S. and EU shared the goal of liberalizing markets in which each enjoyed competitive advantages and to preserve as many protected and less advanced sectors as possible. To gain support from other WTO members, the United States agreed to allow negotiations on its trade remedy laws and on patent protection while the EU agreed to greater liberalization of the agricultural sector than some Member States wanted. Both also agreed to support a number of capacity building initiatives designed to help developing countries better take advantage of world trade opportunities.

Subsequent negotiations proceeded at a slow pace and eventually broke down at the Cancun Ministerial Conference held September 10-14, 2003. At this meeting, trade negotiators were unable to reach agreement on the course of the multilateral trade negotiations. The immediate cause of the collapse was disagreement over launching negotiations on investment and competition, but agriculture and industrial market access were also sources of contention.

After the collapse of the Ministerial Conference, Brussels and Washington explored different ways in getting the Doha Round restarted. On December 2, 2003, the European Commission approved a white paper on reviving the Doha talks. Then-USTR Robert B. Zoellick outlined his proposals for moving the round forward in a letter to trade ministers dated January 11, 2004. On April 16, 2004, the EU withdrew its previous demand that member countries of the WTO agree to negotiate new rules on the so-called Singapore issues of investment, government procurement, competition policy, and trade facilitation. And on May 16, 2004, the EU announced that it is prepared to negotiate the elimination of all export subsidies as part of an effort to inject new momentum in talks.

The EU concessions, in turn, helped trade ministers conclude on August 1, 2004, an agreement setting the broad policy framework for the Doha negotiations. The framework agreement also pledges to substantially reduce domestic supports and significantly expand market access for farm products. Members also agreed to hold the next ministerial meeting of the WTO in Hong Kong in December 2005 — although it is very unlikely that the Doha Round will be completed by then.

Peter Mandelson, who replaced Lamy as EU Trade Commissioner in November 2004, is expected to continue to work with Zoellick's replacement in advancing the Doha Round. President Bush has nominated Congressman Rob Portman (R-OH) to replace Zoellick, but a date for his confirmation hearing has not yet been set.

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