Customs Update

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WTO needs a dispute resolution system that won't drive participants bananas

While the current dispute over the preferential treatment accorded bananas imported from certain countries into the European Union highlights its potential impact on global trade, it is far from the only contentious issue between the United States and the EU that has wound up before the World Trade Organization.

That these issues seem to linger unresolved for long periods raises the question of whether a system needs to be implemented to expedite resolution.

For example, in early 1998, the Appellate Body of the WTO affirmed the finding of a dispute settlement panel that the EU import ban on meat, mainly from the United States and other countries, that is produced using growth-promoting hormones, violated an agreement on sanitary measures.

The panel determined the ban was not based on scientific evidence, nor had the EU performed a risk assessment to support the sanitary measure.

To date, this issue remains unresolved.

In mid-1997, the United States raised concerns over the request by the EU to the WTO for a dispute settlement consultation on the Massachusetts law prohibiting buying from companies doing business in Myanmar, formerly Burma.

Charlene Barshefsky, the U.S. trade representative, was concerned the EU's move would hurt both the U.S. and European interest in improving human rights in Myanmar.

Federal court acts after state takes too much power

Recently, however, a federal district court struck down the Massachusetts law as unconstitutional. The law applied a pricing penalty on state procurements from companies transacting business in Myanmar, which the court said was an attempt by the states to conduct a federal function.

The WTO primarily serves as a forum for international trade negotiations and resolving trade disputes. Each member must fully agreed to address trade issues collectively. However, the WTO lacks the power necessary to enforce its decisions.
This inability only serves to frustrate the administration of its directives and force individual nations to resolve matters unilaterally.

Interestingly, the WTO allows such action after a good faith effort to work within the guidelines fails. The ongoing U.S. campaign to force the EU to change its banana regime clearly illustrates this point.

Four years in the making and with no end in sight

In 1994, the U.S. Trade Representative began investigating the banana regime created by the EU under 302(b) of the Trade Act of 1974. The USTR claimed the EU was imposing a restrictive licensing program designed to transfer market share from U.S. firms doing business in Latin America to those of African, Caribbean, Pacific and other EU-related sources.

Pursuant to this inquiry, and as required under 303(a) of the Trade Act, the United States held various consultations with the EU under the procedures of the WTO.

Subsequently, a dispute panel determined that the EU banana regime was inconsistent with the EU’s WTO obligations. These obligations prohibit the EU from implementing discriminatory trade policies.

In September 1997, the WTO Appellate Body confirmed the major panel findings against the European regime. The WTO Dispute Settlement Body thereafter agreed with this decision.

The issue was then sent to an arbitrator to determine the time frame for implementation.

Accordingly, the United States waited more than four years before issuing the Nov. 10 Federal Register notice that proposes imposing prohibitive 100% ad valorem duties on a wide range of products from the EU should the EU fail to modify its restrictions on importing bananas consistent with the findings of the WTO.

To its credit, the USTR clearly presented its objection to the EU’s banana regime in accordance with the WTO’s dispute settlement procedures. It then brought this issue before a WTO dispute settlement panel.

Patiently, the United States waited for this decision to be affirmed by both the WTO Appellate Body and the Dispute Settlement Body. It even acquiesced to a WTO arbitrator who awarded the EU more time in which to implement the appropriate modifications.

Throughout this period, the USTR had the unilateral authority to impose trade sanctions against the EU under Section 301 of the Trade Act. However, in compliance with its obligations under the WTO, the United States deferred such action in order to abide by WTO recommendations.

Unfortunately, though, after more than four years of diplomatic gymnastics, the WTO has still failed to persuade the EU to fulfill its obligations. It is this inability that has propelled the United States and the EU to the brink of a trade war.

The mere threat of sanctions has thrown U.S. importers of potentially vulnerable products from the EU into a frenzy and forced them to spend hundreds of thousands of dollars to protect their interests.

The WTO needs a way to put teeth in decisions

Hopefully, once the micro-problem (i.e., the banana issue) is resolved, the world community will address the lingering macro-issue of how to enhance the enforcement ability of the WTO.

If the WTO were equipped with the tools necessary to enforce its judgments, many of the disputes that currently linger for years without closure could be efficiently and effectively resolved.

The result would be to permit our trade negotiators to return to their mission of breaking down trade barriers and building ties between the United States and its partners, rather than straining multilateral relationships and frustrating the flow of international commerce.

It would also protect free traders from getting squeezed between two economic superpowers engaged in a high stakes game of “chicken” where they are potentially the most substantial losers.

Customs Update is a weekly column examining critical aspects of the relationship between customs agencies and importers. This column was prepared by Steven S. Weiser and Ari L. Kaplan, partner and associate, respectively, in the international law firm of Graham & James LLP, N.Y., and reflects the opinion of the writers. Please address any questions to Customs Update, Trade Desk, The Journal of Commerce, Trade Desk Center, Suite 2750, New York, N.Y. 10048.