HOW LONG DOES IT TAKE TO SOLVE A DISPUTE AT THE WTO?

Concerns have been raised that the border tax adjustment feature of the DBCFT proposal might be challenged by members of the World Trade Organization ("WTO") on the basis that it violates WTO’s trading agreements. WTO’s agreements allow border adjustments for indirect taxes, such as value-added taxes, but not on direct taxes, such as income taxes.
A CASE HISTORY - ETI AND FSC EXPORT TAX BENEFIT CONTROVERSY

The Extraterritorial Income ("ETI") and Foreign Sales Corporation ("FSC") Export Tax-Benefit Controversy, between the U.S. and EU, reveals that WTO's dispute resolution system, in practice, is often protracted. The ETI & FSC Export Tax-Benefit Controversy started in 1971 under the General Agreement on Tariffs and Trade (GATT, the WTO's predecessor) and continued under the WTO until May 16, 2006.
December 10, 1971

ENACTMENT OF THE DOMESTIC INTERNATIONAL SALES CORPORATION ("DISC")

In December 10, 1971, the U.S. Congress voted to subsidize exports of U.S. made goods through the income tax law by legislation called "DISC."
EU BEGINS PROCEEDINGS AGAINST DISC

Three months after Congress enacted the DISC legislation, the European Community ("EC," the precursor of the European Union) began proceedings under GATT by requesting a consultation with the United States. In response, the U.S. requested consultations under GATT with several European countries to challenge their "territorial" tax systems.
FORMAL COMPLAINTS UNDER GATT

Both the EC and the U.S. subsequently filed formal complaints with GATT. The GATT established independent panels to examine and report on the complaints.
NOVEMBER 1, 1976

GATT FIRST REPORT REGARDING DISC

The GATT report ruled against the U.S. DISC. However, the GATT report was not binding on the parties and was subject to approval of the GATT Council.
DECEMBER 1, 1981

GATT REPORT REGARDING DISC ADOPTED BY THE GATT COUNCIL

The GATT report regarding DISC was adopted by the GATT Council, subject to "Understanding."

Due to the "Understanding," a lengthy discussion between the U.S. and the EC regarding the application of the GATT report ensued.
ENACTMENT OF THE FOREIGN SALES CORPORATIONS PROVISIONS ("FSC")

The FSC provisions were designed to achieve GATT legality by incorporating elements of a "territorial" tax system. The FSC was not challenged under GATT, and remained unchallenged under WTO rules until 1998.
THE WTO FOUNDATION

The WTO was officially founded under the Marrakesh Agreement on January 1, 1995. To allow WTO’s members to enforce WTO’s trading agreements, its members agreed to establish procedures for settling trading disputes. These procedures, set in the Uruguay Round agreement, were intended to overcome the prior inability of GATT to efficiently enforce violations of trading agreements signed under the GATT. As described by the WTO:

‘a procedure for settling disputes existed under the old GATT, but it had no fixed timetables, rulings were easier to block, and many cases dragged on for a long time inconclusively. The Uruguay Round agreement introduced a more structured process with more clearly defined stages in the procedure. It introduced greater discipline for the length of time a case should take to be settled, with flexible deadlines set in various stages of the procedure. The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year — 15 months if the case is appealed.”
EU STARTS PROCEEDINGS TO CHALLENGE FSC

The European Union ("EU") formally requested, under the WTO procedures, to start consultations with the U.S. over the FSC provisions.
JULY 1998 – FEBRUARY 22, 2000

DISPUTE SETTLEMENT PANEL ESTABLISHED UNDER WTO

After consultations between the EU and U.S. regarding FSC provisions failed, the EU requested the establishment of a dispute settlement panel, which the WTO formed in September 1998. On October 8, 1998, the WTO panel issued a report, determining that the FSC provisions violate WTO trading agreements. The U.S. immediately appealed the decision to the Appellate Body, which ruled against the U.S. on February 22, 2000.
THE U.S. ACCEPTS THE REPORT REGARDING FSC

In response to the Appellate Body decision, the U.S. informed the WTO that it would comply with the panel decision, but would do so in a way that would ensure that "U.S. exports are not disadvantaged in relation to their foreign counterparties." In November 15, 2000, the FSC was repealed and replaced by the U.S Tax Extraterritorial Income ("ETI") provisions.
THE EU CHALLENGES THE ETI PROVISIONS

EU formally requested consultations with the U.S. over the ETI provisions. Due to the failure of the consultations, on December 7, 2000, the EU asked the WTO to establish a panel to determine ETI’s legality. On December 20, 2000, a panel was set up by the WTO. After ten months of deliberations the panel issued a report ruling against the ETI provisions. On October 10, 2001, the U.S. announced it would appeal the panel’s decision. On January 19, 2002, the appellate body issued a report upholding the panel’s ruling.
CONSEQUENCES OF U.S. FAILURE TO COMPLY WITH THE WTO REPORT REGARDING THE ETI

On August 30, 2002, following failure of the U.S. to take steps to comply with the WTO’s decision, WTO arbitrators ruled that the EU could impose $4.043 billion in sanctions on EU imports from the U.S. EU officials stated that the EU would begin imposing tariffs on imports from the U.S. if the U.S. did not achieve compliance by March 1, 2004. On March 1, 2004, the EU began to phase in the tariffs. On October 22, 2004, Congress finally repealed the ETI provisions while enacting a mix of domestic and international tax incentives.
"GRANDFATHERS" FOR EXISTING CONTRACTS UNDER THE ETI

At the time the ETI provisions were repealed, the U.S. adopted a transition provision that "grandfathered" contracts for U.S. exporters that had sales contracts dated before September 17, 2005. Before the EU could reimpose the sanctions planned for May 16, 2006, Congress, repealed the grandfathered ETI benefits in a tax bill passed on May 11, 2006.
AND SO THE STORY ENDS

After 35 years, the DISC/FSC/ETI controversy between the EU and the U.S. finally came to an end. While the length of this controversy was extraordinary, it is not unusual for WTO cases to take at least four years if they get to the panel stage, and an average of seven years in cases which result in new countermeasures.