REPORT ON UNITED STATES

BARRIERS TO TRADE AND INVESTMENT

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1. INTRODUCTION

The 2001 Report on United States Barriers to Trade and Investment is the seventeenth such annual report. It has been compiled by the Market Access Unit of the Directorate General for Trade in co-operation with the Delegation of the European Commission in Washington, D.C., on the basis of material available to the services of the European Commission. Its aim is to provide an inventory of obstacles that EU exporters and investors encounter in the US.

This Report needs to be placed in the context of a transatlantic economic relationship which has grown particularly strongly over the years, to the benefit of both economies, and which is underpinned by the most extensive trade and investment links in the world.

The EU and the US are each others main trading partners (taking goods and services together) and account for the largest bilateral trade relationship in the world. The total amount of 2-way investment amounts to over €1.1 trillion, with each partner employing about 3 million people in the other. In the year 1999, exports of EU goods to the US amounted to €182 billion (24.1% of total EU exports), while imports from the US amounted to €158 billion (20.5% of total EU imports).

This Report must therefore be seen against the background of the joint commitment of the EU and the US, in the New Transatlantic Agenda (NTA) and in the Transatlantic Economic Partnership (TEP), to strengthen and consolidate the multilateral trading system, and to progressively reduce or eliminate barriers that hinder the flow of goods, services and capital between the EU and the US.

The fact remains that a considerable number of impediments, ranging from more traditional tariff and non-tariff barriers, to differences in the legal and regulatory systems, or due to the absence or limitation of internationally agreed rules and disciplines, still need to be tackled. The Commission remains firmly committed to addressing these through the appropriate channels (bilateral, plurilateral and multilateral) particularly as the reinforcement of efforts to resolve bilateral trade issues and disputes is essential to the confidence-building process which is an integral part of the TEP.

The report should also be seen in the context of the broader policy initiative to improve access to foreign markets for European exports. As part of this, the Commission has set up an extensive electronic Market Access Database available to the public on the Internet (http://mkaccdb.eu.int) (additional material on EU-US relations, as well as the Trade Barriers Report itself is available at http://europa.eu.int/comm/external_relations/us/intro/index.htm). The Database provides market access information in the broadest sense, including economic and regulatory information, tariff levels as well as analyses of trade issues. This facilitates access throughout the year to online updates of the material contained in the published report as well as to the additional background information that is included in the database.

It is to be hoped that, as a means of identifying problems of access to and of operating in US markets, the Commission services' Report will continue to play a useful role in focusing dialogue and negotiations (both multilateral and bilateral) on the elimination of obstacles to the free flow of trade and investment. The Report has taken into account developments until the beginning of August 2001. Any comments should be addressed to the Market Access Unit of the Directorate General for Trade, European Commission, 200 rue de la Loi, 1049 Brussels (fax: +32.2.296.73.93).

2. US TRADE POLICY: SUMMARY OF PROBLEM AREAS

The US Administration has stressed that its trade policy is based on the values of openness, transparency and respect for the rule of law. These are principles to which the EU also firmly subscribes. Both regard the WTO as a fundamental element in achieving a world of open markets. Bilaterally, this shared commitment has contributed to the adoption of the NTA and has fostered the development of a healthy economic relationship. But despite this reinforced cooperation, there remain aspects of US trade policy which are sources of concern to the EU:-

Extraterritoriality
The EU strongly opposes the extraterritorial provisions of certain US legislation that hampers international trade and investment by seeking to regulate EU trade with third countries conducted by companies outside the US. Of particular concern are the Helms-Burton Act and the Iran Libya Sanctions Act. Progress towards a lasting solution to this dispute was made at the 18 May 1998 EU/US Summit. Implementation of the Understanding reached at that occasion however, continues to depend on US Congress legislative action.

Unilateralism
Unilateralism in US trade legislation also remains a matter of concern. Whilst the US has in practice made extensive use of the WTO dispute settlement system, it retains the opportunity to take unilateral trade measures. In 2000 the EU won two dispute settlement cases before the WTO, one against the suspension of customs liquidation in the banana dispute, and one against Sections 301 to 310 of the US 1974 Trade Act. The EU has also initiated dispute settlement proceedings against the "carousel" legislation signed into law on 18 May 2000 (section 407 of the Trade and Development Act of 2000) and the Byrd Amendment.

Tariff barriers
Tariffs have been substantially reduced in successive GATT rounds. As a result, the EU's concern is now focused on a relatively limited number of US "peaks" and other significant tariffs where less progress has been made.

Other customs barriers
EU exports face a number of additional customs impediments, such as the customs user fees and the excessive invoicing requirements on importers, which add to costs in a similar way to tariffs. The EU is also very concerned about the discriminatory nature of the US Harbour Maintenance Tax, and that a replacement scheme must not duplicate the WTO-incompatible problems inherent in the current system.

Technical barriers to trade
EU exporters continue to face a number of behind-the-border impediments. The proliferation of regulation at State level presents particular problems for companies without offices in the US. In addition, some federal standards differ from international norms meaning that manufacturers cannot directly export to the US products made to EU standards (normally based on international standards). Other related difficulties concern labelling requirements and excessive reliance on third-party certification. The FDA drug approval procedures continue to give non-US based firms difficulties. In the agricultural area, a number of sanitary and phytosanitary issues remain a significant source of difficulty for the EU. It was expected that some of these issues might be solved by the Veterinary Equivalence Agreement, signed on 20 July 1999, however no real progress has materialised so far.

Government procurement

Even before the Uruguay Round was ratified, the EU and US had concluded negotiations on a further bilateral procurement agreement that improves on the provisions of the WTO Government Procurement Agreement (GPA). These two agreements increased substantially the bidding opportunities for the two sides. However, the EU remains concerned about the wide variety of Buy America provisions that persist, and to which are being added others for federally funded infrastructure programmes. Small business set-aside schemes also limit bidding opportunities for EU contractors in a substantial manner. The EU also opposes sub-federal selective purchasing legislation, restricting the ability of EU and other companies doing business with specific countries to bid for contracts in various States and cities. Apart from other actions, the EU considers that an increase in the coverage of the US GPA offer (and in particular the elimination of the existing exceptions) would contribute to an improvement of this situation. The review of the Government Procurement Agreement could, thus, represent an opportunity to address the abovementioned problems.

National security restrictions

The principle of national security has a long tradition in trade policy but the lack of a clear definition of "national security" has led to an overly wide interpretation of the term by the US and the EU has repeatedly expressed concern about its excessive use by the US as a disguised form of protectionism. This can be seen in relation to import, procurement and investment restrictions, as well as the extraterritorial application of export restrictions. In particular, the 1988 Exon-Florio amendment and following legislation to restrain foreign investment in, or ownership of, businesses relating to national security have proved to be problematic.

Trade defence instruments

In January 1999, after an investigation under the EC's Trade Barrier Regulation procedure, a WTO Panel ruled that the 1916 US Antidumping Act is in contradiction with the WTO Anti-dumping Agreement and GATT 1994. The WTO Appellate Body confirmed the Panel report and the US was given until 26 July to implement the WTO decision. On 24 July, the US asked the Dispute Settlement Body (DSB) for an extension to this deadline. The EU has now agreed that the draft bill, revoking the 1916 Act will be adopted (and any pending cases terminated) by 31 December 2001 or the end of the current session of Congress (whichever is sooner). On 10 May 2000, the WTO Appellate Body also condemned the countervailing duties maintained after the arm's length privatisation of British Steel, thereby rejecting the methodology followed by the US Department of Commerce (DoC). The US refused to implement the WTO ruling in 12 other privatisation cases and introduced a new methodology which was no better than the one condemned by the Panel. Requests for a further WTO Panel, together with WTO Panels on a DoC measure concerning de-minimus rates in sunset reviews and US safeguard measures on steel wire rod and line pipe were made on 23 August 2001 but were blocked by the US. Second requests will be made on 10 September 2001.

Aeronautics industry

Despite the existence of the 1992 EC-US Large Civil Aircraft Agreement the EU remains concerned about the level of indirect support to US aircraft manufacturers. This is also an area for multilateral action, and progress needs to be made on the 1979 GATT Civil Aircraft Agreement that remains stalled in the WTO because of the US' refusal to rectify it.

Shipbuilding

The 1994 OECD Shipbuilding Agreement which aims at regulating unfair practices, measures of support and injurious pricing still cannot enter into force due to the absence of the US ratification of the Agreement. The maintenance of a number of US subsidies, protective legislation, and tax policies remain a matter of concern.

Conditional national treatment

The provision of conditional national treatment in various US laws, and notably in the area of science and technology research remains troublesome.

Tax measures

Concerns about federal tax measures focus on the nature of reporting requirements and the specific manner for calculating what is due. The EU deems State "world-wide" unitary taxes as inconsistent with US obligations under its tax treaties with third countries. Foreign Sales Corporations (FSC) legislation remains a matter of major concern, and the WTO Appellate Body affirmed in a report of 24 February 2000 that the FSC is an illegal export subsidy and incompatible with the WTO Subsidies Agreement and the Agreement on Agriculture. A WTO Panel also struck down its replacement, the "FSC Repeal and Extraterritorial Income Exclusion Act", in its Report of 20 August 2001. The EU is continuing to monitor the situation closely.

Intellectual property

Despite a number of positive changes in US legislation following Uruguay Round commitments, problems remain due to discrepancies between US legislation and other international commitments. Issues such as informing right-holders of government use of patents as well as various others related to appellations of origin, geographical indications, copyright, trademarks and patent protection have not been resolved. The EC and its Member States recently won a WTO dispute settlement case regarding obstacles to the licensing of music works in the US (section 110(5) of the US Copyright Act), in which a deadline of 27 July was set for the US to implement the panel's recommendations. In July 2001, the DSB allowed the US to extend this deadline until the end of the Congressional session and the EU and US began to discuss ways in which performers and composers could be compensated for the losses generated by the practice. The protection of trademarks in the US, notably those stemming from Cuban origin, also raises concerns in respect of the compatibility with the TRIPs Agreement. On 6 August 2001, a WTO Panel Report confirmed that Section 211 violated WTO rules. Moreover, the co-existence of fundamentally different patent systems (US first-to-invent system versus first-to-file system followed in the rest of the world) continues to create considerable interface problems for EU companies, not to speak of the financial effects of high administrative and litigation costs in patent matters.

Professional services

The implementation of the GATS schedules for professional services has resulted in some improvement in market access. However, a number of problems, especially owing to regulation at the State level, remain to be tackled in order to secure more transparent and open access to the US market.

Communication services

The GATS Basic Telecommunications Agreement in force since February 1998 has led to significant commitments on market access. Nonetheless, the EU remains concerned about the considerable barriers that EU and foreign-owned firms wishing to get access to the US market still face (e.g. investment restrictions, lengthy proceedings, conditionality of market access, and reciprocity-based procedures). A good example is the current restrictions on access to the satellite communications market in the US, though problems also exist in a number of other areas. This situation is not in line with the open market access policy advocated by the US and provides a competitive advantage to the significant number of US companies which have already access to the European market in this field.

Air transport services

A number of issues continue to create problems including foreign ownership restrictions and other protectionist regulations.

Maritime services

Foreign-built vessels are prohibited from engaging in (direct or indirect) coastwise trade (Jones Act), and cannot be documented and registered for dredging, towing or salvaging. In addition, there has been no progress on the elimination of requirements that cargoes generated by US Federal programmes are shipped on US-flagged ships.

3. EXTRATERRITORIALITY AND UNILATERALISM

3.1 Extraterritoriality

This is a long-standing feature of the US legal system manifesting itself in fields such as environment, banking, taxes and export control. While the EU may share some of the objectives underlying such laws, it is opposed, as a matter of law and principle, to the extraterritorial application of such domestic legislation insofar as it purports to force persons present in – and companies incorporated in - the EU to follow US laws or policies outside the US and to the extent that it serves only to protect US trade or political interests. In particular, the EU opposes the extraterritorial provisions of certain US legislation that hampers international trade and investment by seeking to regulate EU trade with and investment in third countries.

Helms-Burton Act
On 12 March 1996, President Clinton signed into law the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (referred to as the "Helms-Burton Act"). This is the latest in a series of legislative initiatives since the US proclaimed a trade embargo against Cuba in 1962 (Section 620 (a) of the Foreign Assistance Act of 1961; further reinforced by the Food Security Act of 1985 and the Cuban Democracy Act of 1992). The Helms-Burton Act *inter alia* allows US citizens to file lawsuits for damages against foreign companies investing in confiscated US (including Cuban-American) property in Cuba (Title III) and requires the US Administration to refuse entry to the US to the key executives and shareholders of such companies (Title IV). The EU is of the view that these measures are contrary to US obligations under the WTO Agreements, in particular the GATT (General Agreement on Tariffs and Trade) and GATS (General Agreement on Trade in Services).

Iran and Libya Sanctions Act
On 5 August 1996, the Iran and Libya Sanctions Act (referred to as "ILSA") was signed into law. The legislation provides for mandatory sanctions against foreign companies that make an investment above US$20 million contributing directly and significantly to the development of petroleum or natural gas in Iran and Libya.

The EU has forcefully expressed, through a number of representations and démarches, its opposition to this kind of legislation - or any secondary boycott and sanction legislation having extraterritorial effects. In particular, with regard to the Helms-Burton Act, the EC and its Member States had initiated a WTO dispute settlement procedure on 3 May 1996.

Furthermore, on 22 November 1996, the EU adopted Council Regulation 2271/96 (the so-called "Blocking Statute") with a view to protecting the EU and its economic operators, against the effects of extra-territorial legislation of this sort adopted by third countries. Other trading partners of the US, such as Canada and Mexico, have strengthened or adopted similar blocking legislation.

On 11 April 1997 an Understanding was reached with the US concerning the Helms-Burton Act, and the ILSA as well as the EC's WTO case regarding the former. The Understanding charted a path towards a longer-term solution through the negotiation of international disciplines and principles for greater protection of foreign investment, combined with the amendment of the Helms-Burton Act. As regards ILSA the Understanding stipulated that "the US will continue to work with the EU towards the objectives of meeting the terms" under

the legislation which would permit the US President to waive the application of sanctions for EU Member States and EU companies. The EU agreed to suspend its WTO case, but reserved the right to restart or to re-launch the WTO dispute settlement procedure, if action is taken against EU companies or individuals under the Helms-Burton Act or ILSA, or waivers as described in the Understanding were not granted, or were withdrawn.

At the 18 May 1998 EU-US Summit in London, building upon the April 1997 Understanding, the EU and the US reached an Understanding on a package of measures to resolve the dispute regarding the Helms-Burton Act and ILSA. The Understanding offers the real prospect for a permanent solution – but still depends on acceptance by the US Congress before full implementation may take place. The Understanding contains three main elements.

The first element is the Understanding on investment disciplines. It contains a clear commitment on the part of the US Administration to seek from Congress the authority to grant a waiver from Title IV of the Helms-Burton Act (visa restrictions) without delay. With respect to Title III (submission of law suits against "trafficking in expropriated property") of the Helms-Burton Act, the Understanding provides for a US commitment to continue to waive the right to file law-suits, so far done on a six-monthly basis and to obtain such a waiver on a permanent basis. It also addresses the issue of whether or not EU and US investment assistance agencies should give assistance to investment projects in illegally expropriated property. However, the EU will not apply the disciplines until the waiver authority is applied.

The second element is the Transatlantic Partnership on Political Co-operation (TPPC) which should be seen in conjunction with the EU's efforts vis-à-vis US Administration to restrain its use of unilateral sanctions with extraterritorial effects, so-called "secondary boycotts". The TPPC states that the US Administration will "not seek or propose, and will resist, the passage of" such sanctions legislation.

The last element of the Understanding relates to the ILSA. At the London Summit, the US Administration did not grant the EU a multilateral regime waiver as foreseen by the Understanding of 11 April 1997. However, the US determined, under Section 9(c) of ILSA, to waive the imposition of sanctions against a major EU investment project in gas exploration in the South Pars field in Iran and committed that similar cases could be expected to be granted similar waivers. As regards Libya, prospects for waivers were linked to further bilateral dialogue. ILSA was due to expire on 5 August 2001, but legislation was introduced and passed in the US Congress and signed into law by President Bush on 3 August 2001 (PL 107-24) extending ILSA for another period of 5 years. The EU stated its objections to Congress and the US Administration.

The Understanding reached at the Summit in no way softens the EU's position that the Helms-Burton and ILSA Acts are contrary to international law. The EU never acknowledged the legitimacy of these Acts and fully reserved its right to resume the WTO case against the Helms-Burton Act in the event of action being taken against EU persons or companies under either this Act or ILSA or the waivers not materialising. The Understanding is of a political nature and does not in any way lend any sort of validity to the illegal provisions of the US laws in question.

Full implementation depends on Congressional support, which despite the US Administration's attempts to deliver appears not to be forthcoming. The EU and its Member States can only fulfil the European commitments once the Presidential waiver authority under

Title IV of the Helms-Burton Act has been adopted and exercised. In the meantime, the US Administration continues to investigate certain EU company's investments in Cuba.

Iran Non-Proliferation Act

On 14 March 2000, the Iran Non-Proliferation Act (INPA) was signed into law. It provides for discretionary sanctions against foreign companies transferring to Iran goods, services and technology listed under the international export control regimes, as well as any other item prohibited for export to Iran under US export control regulations, as potentially contributing to the development of weapons of mass destruction.

INPA constitutes new extraterritorial legislation, for on the one hand, it allows the US Administration to apply its own sanctions to exports which are subject to EU Member State and EC export control regimes, while on the other hand, it unilaterally expands the scope of export controls on EU exports beyond those multilaterally agreed upon. Its adoption is incompatible with the US commitment under the TPPC to resist the passage of extraterritorial sanction legislation.

EU concerns were repeatedly expressed in the run-up to the adoption of this Act. Taking these into account, then President Clinton issued a statement when signing the Bill into law, undertaking to work with Congress in order to seek to rationalise the reporting requirements on transfers deemed legal under the applicable foreign laws and consistent with the multilateral export control regimes. The EU expects that the new US Administration will take the appropriate steps to repeal the threat of sanctions against EU entities.

Several other instances and variations of US extra-territoriality can be found in, *inter alia*, various environmentally-driven embargoes (see section on import prohibitions), export control legislation (see section on export restrictions) as well as, at the sub-federal level, selective purchasing laws (see section on government procurement).

3.2 Unilateralism

This takes the form of either unilateral sanctions or retaliatory measures against "offending" countries, or companies. These measures are based on an exclusive US appreciation of the trade-related behaviour of a foreign country or its legislation and administrative practice, without reference to, and sometimes in defiance of, multilaterally agreed rules. This approach casts doubt on US support for a multilateral rules-based system of addressing trade problems and can lead also to bilateral agreements with elements of discrimination.

The "Section 301" family of legislation provides a striking example of unilateral trade legislation that has been used on numerous occasions against the EU. Section 301 of the 1974 Trade Act as amended by the Omnibus Trade and Competitiveness Act of 1988 authorises the US Government to take action to enforce US rights under any trade agreement and to combat those practices by foreign governments which the US Government deems to be discriminatory or unjustifiable and restricts US commerce.

The Omnibus Trade and Competitiveness Act of 1988 also introduced the so-called "Super 301" provision, a special initiation procedure for unfair foreign trade practice investigations following the Section 301 procedure. Originally limited to 1989 and 1990, President Clinton issued an Executive Order on Identification of Trade Expansion Priorities on 3 March 1994. Referring to the lapsed Super 301 provision, the Executive Order requires the USTR, on the basis of the information contained in the annual National Trade Estimates Report to identify "priority" unfair trade practices from "priority" countries and self-initiate Section 301 cases against them. On 27 September 1995, the President amended this Executive Order to extend it to calendar years 1996 and 1997. After a lapse of more than one year, President Clinton renewed Super 301 by Executive Order in March 1999, extending it until the end of 2001. In addition, Title VII of the 1988 Omnibus Trade and Competitiveness Act relating to the removal

of government procurement barriers was renewed. Rather than identify any countries under Title VII for formal identification, USTR intends to monitor countries and cases with the potential for future identification. On 1 May 2001, USTR announced significant progress in resolving Germany's so-called "sect-filter" purchasing restrictions.

Furthermore, the 1988 Omnibus Trade and Competitiveness Act introduced a "Special 301" procedure targeting intellectual property rights protection outside the US. Under Special 301 the USTR has created a "priority watch list" and "watch list" to identify "priority" foreign countries that are deemed to deny adequate and effective protection of intellectual property rights. Countries placed on the "priority watch list" are the focus of increased bilateral attention and USTR officially initiates investigation procedures that may eventually result in unilateral trade measures. The "watch list" is reserved for those countries that do not protect US intellectual property or that deny market access to IPR-related industries. On 1 May 2001, the EU was placed on the 2001 "priority watch list" concerning EU Regulation 2081/92 governing the protection of geographical indications for agriculture products and foodstuffs. Furthermore, Greece, and Italy were placed on the "watch list".

Admittedly, the US has used its unilateral trade policy arsenal more sparingly since the WTO Agreement entered into force on 1 January 1995. This Agreement provides for multilateral disciplines on a much-expanded range of economic activities (eg. services, textile and clothing, agriculture and intellectual property – TRIPS). It also establishes a much more effective dispute settlement system, which, in particular, makes it impossible for the losing party to block adoption of the panel report or authorisation of suspension of concessions. The counter-part to this is that the Dispute Settlement Understanding (DSU) explicitly obliges parties to follow the multilateral dispute settlement procedures and to refrain from unilateral determinations of non-conformity and unilateral sanctions.

Nevertheless, on issues covered by the WTO, the US has, on several occasions resorted to unilateral action. In the bananas and beef-hormones cases, in order to comply with the time limits imposed by the Section 301 legislation, the US did not use the obligatory procedure provided by the DSU to solve its disagreement with the EU over whether the EU was in conformity with WTO rules. Instead, the US directly requested the WTO to authorise it to suspend concessions against the EC, in violation of normal WTO procedures.

The EU, in full compliance with WTO rules, initiated two dispute settlement actions before the WTO, one against the US suspension of tariff concessions and one against Sections 301 to 310 of the 1974 Trade Act. The reason for challenging the legislation itself is that this legislation mandates USTR to take this kind of unilateral action within time frames that in certain cases cannot possibly comply with WTO rules. This is particularly relevant in cases where the US should follow the procedure of Article 21.5 DSU to resolve disagreements over the WTO compatibility of measures taken by other Members to implement panel rulings.

A WTO Panel ruled on 8 November 1999 that the statutory language of Sections 301 to 310 of the 1974 Trade Act was as such inconsistent with the rules of the WTO DSU. However, because the US administration through a Statement of administrative Action had undertaken to always act in a manner consistent with the US obligations under the WTO, the panel concluded that as long as the undertaking was respected, no violation was taking place. The practical result of this ruling has been to make Sections 301-310 ineffective against WTO members.

Furthermore, the "carousel" legislation, enacted on 18 May 2000 (Section 407 of the Trade and Development Act of 2000), provides for a mandatory and unilateral revision of the list of products subject to suspension of GATT concessions 120 days after the application of the first suspension and then every 180 days thereafter, in order to affect imports from Members which have been determined by the US not to have implemented recommendations made pursuant to a WTO dispute settlement proceeding. The EU believes that such legislation is fundamentally at odds with the basic principles of the DSU and has issued dispute settlement proceedings.

In addition, in cases where bilateral (as opposed to WTO) agreements are alleged to have been violated, Section 301 is still regularly used as a unilateral trade policy instrument. Under the various elements of Section 301 legislation, trading partners are given no choice but to negotiate on the basis of an agenda set by the US, on the basis of judgements, perceptions, timetables, and indeed, US legislation.

4. TARIFF BARRIERS

4.1 Applied Tariff Barriers

Tariff peaks
Despite the substantial tariff reduction and elimination agreed in the Uruguay Round, the US retains a number of significant duties and tariff peaks in various sectors including food products, textiles, footwear, leather goods, jewellery and costume jewellery, ceramics, glass, trucks and railway cars.

The Information Technology Agreement
With regard to information technology (IT) products, the Information Technology Agreement (ITA) providing for the complete elimination of tariffs by the year 2000 on a large number of products was implemented as of July 1997. The main elements of the new US tariff structure eliminate tariffs on all semiconductors, computers, computer peripherals and computer parts, electronic calculators, telecommunication equipment, electronic components (capacitors, resistors, printed circuits), semiconductor testing and manufacturing equipment and certain consumer electronic items. Although tariffs on optical fibre cables were eliminated under the ITA, the US refused to do the same for optical fibres on which they maintain a rather substantial protection. Tubes for computer monitors are excluded also. Attempts to broaden the scope and coverage of products of the ITA in the form of the ITA II have so far failed.

Banana dispute
A WTO ruling on 6 April 1999, found that various elements of the EU's revised banana import regime, which came into force on 1 January 1999, were inconsistent with WTO rules.

The EU upholds the importance of abiding by WTO rules, and so, on 29 January 2001 the Council adopted a new regulation (216/2001) amending Regulation 404/93, which puts the EU in conformity with WTO rules. In parallel and following these intense consultations, the EU and the US brokered an Understanding by which we mutually agreed on a solution that would definitely put an end to this long-standing dispute.

With the entry into force of the new EU legislation, as of 1 July 2001, the US lifted the retaliatory duties on US$191.4 million worth of EU products.

Beef Hormones dispute

The decision by a WTO panel of August 1997 that EC measures against hormones in beef were not in compliance with WTO rules was submitted to the Appellate Body in September 1997. The body overruled the earlier panel but recommended that the EC bring its measures into conformity with obligations under the Agreement on Sanitary and Phytosanitary Measures (SPS).

Following the deadline of 13 May 1999 imposed by the Arbitrator for the EU to implement those recommendations and request by the US to the WTO DSB to allow the suspension of tariff concessions to the EC and its Member States, the WTO Arbitrator determined that the level of impairment suffered by the US was $116.8 million. In reaction to this, the US suspended the application of tariff concessions by imposing a 100% ad valorem rate of duty on a list of mainly agricultural products from 29 July 1999 onward.

While these sanctions remain, the EU and US are engaged in consultations to find a solution in the form of compensation for imports into the EU of US non hormone-treated beef.

Ceramics and Glass

At the end of the Uruguay Round, customs duties on ceramics and glass products remain relatively higher in the US than in Europe. During the Uruguay Round the US rejected the Community's offer to abolish tariffs in this sector, even though Mexico, one of Europe's leading competitors in the US market, should, after a transitional period, enjoy a zero rate by virtue of the NAFTA. There are products of importance for EU trade which will continue to be confronted by high tariffs even when the Uruguay Round reductions have been fully implemented. These include hotel and restaurant ware, on which the duty rates currently are 30% if made of porcelain or china and 31.5% for others, and certain drinking glasses and other glassware on which the duty rates currently are 33.2% and 38% respectively.

Textiles and Leather

The average trade weighted reduction made by the US in the Uruguay Round was only 12% for textiles and clothing (to be implemented over ten years) and 5.2% for footwear. This means that many significant tariffs and tariff peaks will remain on products of export interest to the EU even when the Uruguay Round reductions have been implemented fully. These include certain woollen fabrics and articles of apparel for which the current duty rates are 31.5% plus a specific rate and 33.3% respectively.

Jewellery

The US jewellery sector is protected by an average tariff of 6% with the highest post Uruguay Round tariff being 13.5%. The corresponding EU rates stand between 2.5% and 3%. Furthermore, the US maintains very significant import duties on certain semi-finished products made of precious metals. The very high raw material cost in this sector means that even modest tariff barriers reduce significantly the access of EU jewellery to the US market.

Automotive

Recently, a customs duty of 25% has been placed on vehicles for the transport of goods with a weight greater than 5 tonnes but less than 20 tonnes.

4.2 Tariff Quotas

Agriculture and Fisheries

The import of certain agricultural products into the US takes place mainly under WTO bound tariff quotas. The EU is monitoring closely the management of such quotas.

The EU remains concerned about certain in-built rigidities in the import licensing system for dairy products. This is in part based on historical trading and sometimes even results in

licences being awarded to companies who no longer trade in milk products. The division of quotas for certain cheeses into Tokyo Round quantities and Uruguay Round quantities, which has no other purpose other than to fragment access to and complicate license applications by traders, should be eliminated. This amalgamation is particularly needed for Swiss or Emmenthal type cheeses and for the NSPF (not specifically provided for) group. A single quota for each cheese group would be more transparent, comprehensible and accessible. Furthermore, a recent study by the US Department of Agriculture's (USDA's) Economic Research Service (April 2001) has actually identified inefficiencies in this type of quota administration.

5. NON-TARIFF BARRIERS

5.1 Registration, Documentation, Customs Procedures

Excessive invoice requirements

Invoice requirements for exporting certain products to the US can be excessive. The information requirements far exceed normal customs declaration and tariff procedures. They are unnecessary because US Customs are entitled to ask for all necessary supplementary documents and information during clearance (as provided for by the Kyoto Convention). There should be no systematic demand for this kind of information. These formalities are also burdensome and costly, thus constituting a barrier against new entrants and small companies. As a result, large established suppliers are privileged and small and new competitors disadvantaged. These effects are particularly disruptive in diversified high-value and small-quantity markets that are of special relevance for the EU.

EU Origin

US Customs does not recognise the EC as a country of origin and refuses to accept EC certificates of origin. This means that in order to justify EC country of origin status, EU firms are required to furnish supplementary documentation and follow further procedures, which can be a source of additional costs. The Transatlantic Business Dialogue (TABD) has urged the US to recognise a simple EU origin. US Customs noted this issue extends the scope of customs policy and that inter-agency consensus did not yet exist (due in part to resistance from USTR). Some US industries and organised labour opposed the change while other business had cost concerns (ie. marketing). For example, tyres imported into the US are required by law to be labelled with their country of origin. If tyres marked "made in the EC" were accepted, market access would be improved and trade less onerous.

Textiles and Leather

Customs formalities for imports of textiles, clothing and footwear to the US require the provision of particularly detailed and voluminous information. These requirements lead to

additional costs and in some cases include confidential processing methods (type of finishing, of dyeing, etc.). Much of this information would appear to be irrelevant for customs or statistical purposes. For example, for garments with an outer shell of more than one construction or material, it is necessary to give the relative weight, percentage values and surface area of each component; for outer shell components which are blends of different materials, it is also necessary to include the relative weights of each component material.

The extension of the liquidation period up to 210 days also functions as an important trade barrier. Apparel articles often have a short life span (e.g. fashion items must be sold within 2 to 3 months) and therefore have to be marketed immediately. Consequently, the retailer or the importer is often not in a position to re-deliver the goods upon Customs request, in which case Customs apply a high penalty (100% of the value of the goods). According to importers, Customs may extend the liquidation period beyond 210 days without giving a detailed motivation. In some cases a minor problem or error in invoice is sufficient. In addition, during the liquidation period, Customs may still request any additional information necessary to establish the classification and the country of origin.

Fisheries

The US has introduced a compulsory system of certificates of origin for yellowfin tuna caught in the Eastern Tropical Pacific since July 1992. Certification rules are also applied for countries using large-scale trawl nets.

The US Code, Title 46, Shipping, Section 12108, blocks the potentially interesting possibility for EU fishermen to fish in US waters under a US flag since foreign-built US flag vessels cannot be documented with a fishery endorsement, thereby also preventing the possibility of joint ventures and joint enterprises. The American Fisheries Act of 1998 included a provision that increased the percentage of shares in a vessel that must be held by US citizens in order for the vessel to be considered a US vessel from 50% to 75%.

5.2 State Level Impediments to Trade

Wines and Spirits

The US operates a series of protectionist and monopolistic systems at State level for the distribution and marketing of wines and spirits. While some legislation has its origins in prohibition era restrictions, it has not been repealed and impedes the free circulation of alcoholic beverages. Rules still persist in some States that do the following: prevent cross-state retail sales of wines and spirits, prohibit EU exporters from distributing, rebottling, or retailing their own wine and require duplicate label approvals, and other procedures. The Bureau of Alcohol, Tobacco and Firearms (ATF) charges a fee for approval of wine labels without which wine cannot be imported. While it is argued that cost recovery justifies the ATF fee, there is no excuse for subsequent levies by various states. Furthermore, US wine sold in its state of origin is not subject to the ATF procedure or fee.

User Fees

There is a series of user fees by which the user of a particular (formerly free) service pays an amount presumed to cover the cost of the service provided.

As a result of laws enacted in 1985 and 1986, the US imposes user fees on the arrival of merchandise, vessels, trucks, trains, private boats and planes, as well as passengers. The Customs and Trade Act of 1990 and the Omnibus Budget Reconciliation Act of 1990 modified these provisions by, among other things, considerably increasing the level of the fees. Excessive fees levied for customs, harbour and other arrival facilities (facilities mainly used by importers) place foreign products at a disadvantage vis-à-vis US competition.

The most significant of the customs user fees is the Merchandise Processing Fee (MPF). The MPF is levied on all imported merchandise except for products from the least developed countries, from eligible countries under the Caribbean Basin Recovery Act and the Andean Trade Preference Act, and from US offshore possessions. It is levied also on merchandise entered under Schedule 8, Special Classifications, of the Tariff Schedules of the US. Fixed previously at 0.17% of the value of the imported goods, the MPF rose to 0.19% in 1992 and amounts to 0.21% ad valorem on formal entries with a maximum of US$485 as from 1 January 1995. Whilst the MPF was to last until 30 September 1990 when established, it is now set to run until 30 September 2003.

At the request of Canada and the EU, the GATT Council instituted a Panel in November 1987 that stated that the US Customs user fees for merchandise processing were not in conformity with the General Agreement. The Panel ruled that customs user fees should reflect the approximate cost of customs processing for the individual entry in question. This principle was not met by an ad valorem system such as that used by the US. The GATT Council adopted the Panel report in February 1988.

The present customs user fee structure is somewhat more equitable, since the fixing of a ceiling makes it less onerous for high-value consignments. However, the fee is still likely to exceed the cost of the service since it is still based on the value of the imported goods.

Harbour Maintenance Tax and Harbour Services Fee

US Customs also participates in the collection of the Harbour Maintenance Tax (HMT). The HMT is levied in all US ports on waterborne imports, at an ad valorem rate of 0.125%. Collected monies are transferred to the Harbour Maintenance Trust Fund to provide for the operation and maintenance of channels and harbours. However, the ad valorem basis for the HMT collection makes it difficult to justify as a fee approximating the cost of the service provided. Moreover, there is a significant accumulation of unused funds, which reached US$1.609 billion in FY1999 and is projected to rise even further. This points to the excessive nature of the HMT.

The US Court of International Trade in October 1995 ruled that under US law the HMT is a tax and not a user fee. The US Constitution prohibits taxes on exports. The US Court of Appeals confirmed this ruling in June 1997 as did the US Supreme Court in March 1998. As a result, the US authorities have stopped collecting HMT on exports. However, the HMT is still being collected on imports.

In March 1998, the EU requested WTO dispute settlement consultations to challenge the imposition of HMT on imports. Two rounds of consultations were held in Geneva on 25 March and 10 June 1998. On 30 April 1999, the Clinton Administration introduced a bill to replace the HMT with a new Harbour Services Fee (HSF), H.R.1947. This new fee would not only finance port operation and maintenance, as the HMT did, but also new port construction, for a total amount of US$1 billion per year. The full costs of those activities, which benefit the entire US economy, would have to be borne by a small group of economic operators, namely shipping lines. In legal terms, the proposed legislation would duplicate many of the WTO problems inherent in the HMT. Most importantly, the so-called “fee” would still be a tax rather than a true user fee, since the charges would not be directly and proportionately related to any true service provided in each individual instance to a vessel and the goods it carries. This is clear, for instance, from the fact that:

- fixed rates are charged for all port visits in the US, whether or not the port in question needs port maintenance or new port construction;

- container ships are significantly overcharged compared to, for instance bulk ships, noting that imports use a proportionately higher share of container ships than US domestic shipments and exports;

- many exemptions exist for different kinds of US vessels and for shipments between the US mainland and Alaska, Hawaii and US possessions.

The EU therefore did not support adoption by Congress of H.R.1947 and urges the new Administration to seek a solution that heeds the concerns expressed above.

Shipbuilding

The US applies a 50% ad valorem tax on non-emergency repairs of US owned ships outside the US and on imported equipment for boats, including fishnets on the basis of Section 466 of the Tariff Act of 1930, as amended in 1971 and 1990. Under the latter amendment the tax would not apply, under certain conditions, to foreign repairs of "LASH" (Lighter Aboard Ship) barges and spare vessel repair parts or materials. The implementing legislation of the OECD Shipbuilding Agreement should make appropriate provision for abolition of this tax as applicable to the contracting parties of the Shipbuilding Agreement (not yet entered into force).

Automotive

The US levies the following three taxes/charges on the sales of cars in the US that raise concern to European automakers: the Luxury Tax, the Corporate Average Fuel Economy (CAFE) payment and the so-called Gas Guzzler Tax.

The Luxury Tax is an excise tax imposed since 1990 on cars valued above an arbitrary threshold, currently around US$36,000. The tax has a higher incidence on imported cars than on US produced cars. Originally it also applied to leisure boats and jewellery but these items were later exempted due to pressure from US producers. The luxury tax is scheduled to be eliminated in 2003, with the tax levied falling from 4% in 2001 to 3% in 2002.

The CAFE payment is a civil penalty payment levied on a manufacturer or importer whose range of models has an average fuel efficiency below a certain level, currently 27.5 miles per gallon (mpg). CAFE favours large integrated automakers or producers of small cars rather than those who concentrate on the top end of the car market, such as importers of European cars.

The so-called Gas Guzzler Tax is an excise tax of US$1,000 - 7,700 per car, levied on all cars not meeting fuel economy standards set by the US Environmental Protection Agency (EPA), currently 22.5 mpg. This fuel economy cut-off point is not founded on any reasonable or objective criterion and leads to discrimination against imported cars.

European automakers, with a total market share in the US of only 6%, bear nearly 70% of the revenue generated by the luxury tax, 85% of that by the Gas Guzzler tax and almost 100% of the CAFE penalties.

5.3 Import Prohibitions

The right of sovereign nations to take measures to protect their essential national security interests has been widely recognised by multilateral and bilateral trade agreements. However, it is in the interest of all trade partners that such measures are prudently and sparingly applied. Restrictions to trade and investment cannot be justified on national security grounds if they are, in reality, essentially protectionist in nature and serve other purposes.

National Security based restrictions

Under Section 232 of the Trade Expansion Act of 1962, US industry can petition for the restriction of imports from third countries on the grounds of national security. Protective measures can be used for an unlimited period of time. The Department of Commerce (DoC) investigates the effects of imports that threaten to impair national security either by quantity or by circumstances. Section 232 is supposed to safeguard US national security, not the economic welfare of any company, except when that company's future may affect US

national security. The application of Section 232 is not dependent on proof of injury to US industry.

In the past, the EU has voiced its concern that Section 232 gives US manufacturers an opportunity to seek protection on grounds of national security, when in reality the aim is simply to curb foreign competition. On 1 February 2001, the DoC initiated an investigation to determine the effects on national security of imports of iron ore and semi-finished steel.

Agriculture and Fisheries

The Marine Mammal Protection Act of 1972 (MMPA) aims at protecting marine mammals, particularly dolphins, by progressively reducing the acceptable level of dolphin mortality in US tuna-fishing operations in the Eastern Tropical Pacific (ETP) Ocean and providing for sanctions to be taken against other countries which fail to apply similar standards.

The MMPA requires that countries that wish to import from the ETP must receive an "affirmative finding" from the National Marine Fisheries Service (NMFS). The criteria for receiving an "affirmative finding" relate to the membership (or launching and completing the accession within six months) to the Inter-American Tropical Tuna Commission (IATTC) and the need to have a "tuna tracking and verification system" that conforms to the Tuna Tracking and Verification System adopted under the Agreement for International Dolphin Conservation Programme (AIDCP).

The EU is provisionally applying AIDCP and is in the course of introducing the legislation regarding a tuna tracking and verification system. The EU has requested to become party to the IATTC but this is pending the signature and ratification by all parties to the Agreement of a protocol to the agreement that would allow the Commission to join the IATTC. However, this has taken longer than the six months foreseen in the US legislation due to reasons beyond the control of the EU. Therefore, as the EU has not met the requirement of membership to the IATTC, nor has in force a tuna tracking and verification system, it cannot receive an "affirmative finding" to enable it to import tuna products from the ETP into the US.

Pursuant to section 609 of Public Law 101-162 exports of shrimp to the US will be embargoed unless nations can provide evidence that their shrimp trawlers match US efforts to protect sea turtles (artisanal fishing, having a sea turtle excluder program or fishing for cold-water shrimp only). The US authorities have now certified forty-two nations, but five Member States (France, Spain, Portugal, Italy and Greece) have not been certified. Thailand, Malaysia, Pakistan and India requested the establishment of a WTO Panel (January-February 1997). The EU participated as a third party.

The Appellate Body of the WTO to some degree reversed the findings of the Panel by agreeing that the US measure served an environmental objective recognised as legitimate under GATT Art. XX(g), the measure had been applied by the US in a manner that constitutes an arbitrary and unjustifiable discrimination between members of the WTO where the same conditions prevail. The Appellate Body further stressed that the US should have consulted and negotiated with the other countries involved and tried to reach a multilateral agreement on turtle protection. Finally, the Appellate Body concluded that the US authorities should bring its measure into conformity with the obligations of the US under the GATT Agreement.

In July 1999, the US department of State issued revised guidelines for the implementation of Section 609. These guidelines set forth the measures the US would take to implement the recommendations and the previous rulings of the DSB.

On 12 October 2000 Malaysia requested a Panel to consider whether the US had correctly implemented the earlier ruling in the "shrimp-turtle" dispute. The panel issued its report on 15 June 2001. The Panel found that the measure adopted by the US in order to comply with the recommendations and rulings of the DSB violates Article XI.1 of the GATT 1994 but that *"in light of the recommendations and rulings of the DSB, Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the US*

authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied." The Panel noted also that *"should any one of the conditions referred to in sub-paragraph 6.1(b) above cease to be met in the future, the recommendations of the DSB may no longer be complied with."*.

The import of dairy products made from unpasteurised milk such as soft cheese, for which there is a ready market in the US is generally prohibited, even though a number of US States permit the production and marketing of such products. The import of fresh dairy products, such as yoghurts, is effectively prohibited through the application of the Import Milk Act.

The import of milk protein into the US is generally permitted. The EU has a substantial export to the US of milk protein used by especially the meat and bread industries in their processing. The most obvious customer, the yoghurt industry is, however, not allowed to use imported proteins, unless they originate in industries, that are Grade A approved by the US authorities. No EU dairy is Grade A approved, and it seems impossible to become Grade A approved. Numerous meetings with the FDA have not solved the problem.

5.4 Import Quotas

Fisheries

Each year, the US fixes the total allowable level of foreign fishing (TALFF) and accordingly makes allocations to foreign fishing fleets. Squid fishing opportunities for EU vessels off the East coast of the US have been gradually phased out under the terms of both the Magnuson-Stevens Fishery Conservation and Management Act (MFCMA) and the former Governing International Fisheries Agreement (GIFA) in favour of the development of the US domestic fishing industry. Though mackerel migrating off the East coast is the only stock currently identified as being in surplus in the US Exclusive Economic Zone, the US authorities have set a zero TALFF since 1990 for this stock, following pressure from its domestic industry. The EU believes that this line neither corresponds to the provisions and intentions of the MFCMA or to the provisions of Article 62 of the UN Convention on the Law of the Sea.

5.5 Standards and Other Technical Requirements

Complex Regulatory System

In the US, products are increasingly being required to conform to multiple technical regulations regarding consumer protection (including health and safety) and environmental protection. Though in general, not intentionally discriminatory, the complexity of US regulatory systems can represent an important structural impediment to market access. For example, it is not uncommon that equipment for use in the workplace is subject to US Department of Labor certification, a county authority's electrical equipment standards, specific regulations imposed by large municipalities, and other product safety requirements as determined by insurance companies.

This situation is aggravated by the lack of a clear distinction between essential safety regulations and optional requirements for quality, which is due in part to the role of some private organisations as providers of assessment and certification in both areas. Moreover, for products where public standards do not exist, product safety requirements can change overnight as the product liability insurance market makes a new assessment of what will be required for insurance purposes.

The WTO Agreement on Technical Barriers to Trade (TBT) covers the rules for standards, technical regulations and conformity assessment procedures. The TBT is applicable to all

WTO Members, and provides, *inter alia*, that its Members must use international standards as the basis for their technical regulations, standards and conformity assessment procedures. However, it provides for certain exceptions for specific, legitimate objectives, such as protection of human health and safety, plant and animal health, and protection of the environment, where the international standards are inadequate for the purpose. The TBT Agreement is intended to ensure that technical regulations and conformity assessment procedures are not more trade restrictive than required for the legitimate purpose of the regulations concerned and the risks they are designed to cover.

The EU believes that the TBT provides an excellent base on which to tackle technical barriers to trade at the multilateral level. It specifies stricter disciplines in many of the areas of concern discussed below, such as the use of international standards, labelling requirements and sub-federal standards. It provides also for further bilateral follow-up actions. In this context, the EU and US recently concluded a Mutual Recognition Agreement and are working towards regulatory co-operation to augment the impact of the existing sectoral dialogues.

Non-use of international standards

A particular problem in the US is the relatively low level of use, or even awareness, of standards set by international standardising bodies. All parties to the TBT are committed to the wider use of these standards; but although a significant number of US standards are claimed to be "technically equivalent" to international ones, and some are indeed widely used internationally, very few international standards are adopted directly and some US standards are in direct contradiction to them. The EU has attempted to clarify some of these issues in discussions in the TBT Committee in Geneva, and in particular, to establish the position of international standards bodies in the context of the TBT, but agreement with the US has been difficult to reach. Discussions in the WTO on conformity assessment issues are progressing but are at an early stage.

Some illustrative cases are:

Excessive reliance on mandatory certification

Against the background of an international trend towards deregulation or the minimising of third party intervention in the regulatory process, one problem experienced in the US is the continued reliance on third party conformity assessment procedures for many industrial products.

In several sectors, such as that of electrical equipment and domestic appliances, technological development and consumer awareness have permitted public regulators around the world to reduce the extent of pre-marketing third party testing and certification in favour of self-certification by manufacturers backed up by post-market surveillance and control. In the US however, third party certification in these sectors is still mandatory (de jure and/or de facto), and as such may pose disproportionately high costs on suppliers to the US market.

As far as IT products are concerned, since they are subject to continuous testing and assessment in their development and production process, it should be unnecessary to repeat such tests by a third party. Industry stresses the advantages of an appropriate "supplier declaration of conformity". US regulatory agencies have begun a review of this approach, and are moving in certain instances towards manufacturer's declarations of conformity (PCs, VCRs, for example).

Regulatory differences at State level

There are more than 2700 State and municipal authorities in the US which require particular safety certifications for products sold or installed within their jurisdictions. These requirements are not always uniform or consistent with each other, or even transparent. In particular, individual States sometimes set environmental standards going far beyond what is provided for at Federal level. Agricultural and food imports (particularly wines) are also often confronted with additional state-level requirements.

Acquiring the necessary information and satisfying the necessary procedures is a major undertaking for a foreign enterprise, especially a small or medium sized one, as at present there is no central source of information on standards and conformity assessment. One company has estimated the volume of lost sales in the US due to the multiplicity of standards and certification problems to be about 15% of their total sales. The expense of certification alone was put at 5% of total sales, as was the amount spent on product liability insurance (a far less significant factor in Europe).

The hidden costs could be much greater because the time and cost involved can be greatly reduced simply by using US components that have already been individually tested and certified. This is particularly the case for electrical products.

In addition, the private organisations providing quality assurance may impose the use of certain specific product components under their own programmes that are not in conformity with international quality assurance standards (such as the International Organisation for Standardisation (ISO) 9000 series). In some cases (e.g. that of telecommunications network equipment) an expensive evaluation procedure is required which does not lead to certification and does not take account of any additional requirements by individual buyers.

For electrical appliances Underwriter's Laboratories (UL) have complete discretion on the standards concerning safety certification and occasionally can make seemingly arbitrary changes to them. UL list the products that comply with the applicable standards, but do not approve them. This is done by a variety of competing testing and certification agencies, some offering testing facilities in the EU.

For example, in early 1993 UL revised standard 1028 on hair clipping and shaving appliances, amending the specifications for the on/off switch. The new UL requirement adds nothing to the safety of these appliances, but adds considerable costs to European manufacturers. It has also required the subsequent modification of the related International Electrotechnical Commission (IEC) standards (endorsed by the Comité Européen de Normalisation Electrotechnique (CENELEC) [European Electrotechnical Standards Committee]).

Non-destructive testing (NDT)

In the field of pressure equipment and indeed in an even wider area, non-destructive testing (NDT) is an important element in ensuring product safety. A main requirement is the certification of the personnel which is to perform the NDT.

While the ISO Standard ISO 9712 on this matter has been supported by the American International Standards Institute (ANSI), the standard is not recognised in the context of the American Society of Mechanical Engineers (ASME) code on pressure vessels. As the ASME code plays an important role outside the US, this fact is of very significant relevance not only with regards to European manufacturers producing for the US market but also European manufacturers active in other parts of the world, even for sale of ASME compliant pressure vessels within Europe.

In practice this means, that NDT personnel in Europe need to be double-certified: once for ISO 9712/EN 473 and once again for ASME-NDT. This is inefficient, as the technical requirements of the NDT certification itself are in essence rather similar. The only substantial difference is that whereas in the ISO/EN case the test is performed by a competent third party, ASME requires the test to be performed in an ASME proprietary fashion.

Apart from asking ANSI to ensure that the ISO 9712 is properly implemented in the US Pressure vessels code, the European Federation of non-destructive testing (EFNDT) has submitted to ASME in October 1999 a code case (ie. detailed wording

of the proposal) to amend the corresponding section of the ASME code. Regretfully, no progress has been made since.

Electrical and Electronic Equipment

Trade in electrical and electronic equipment is a significant ingredient in EU-US commercial relations. This product category amounts to 6% of total EU export to the US. European exporters of electrical and electronic equipment and appliances face steep barriers to market their products on the US market.

First, there is not a single US market for electrical and electronic products -- partially divergent federal, regional, state, sectoral and even county and city technical regulations, procurement specifications and product standards split up the market. It is not sufficient to comply with federal regulations and obtain clearance from US Customs to market electrical and electronic equipment in the US. The information on import conditions received by European equipment exporters from US embassies, chambers of commerce abroad and Customs often proves insufficient and inadequate. The *de facto* fragmentation of the US market forces exporters to make expensive adaptations of their product models and type approvals to local and sectoral requirements, undermining the economies of scale that sales on a unified marketplace of the size of the US market would otherwise make possible.

Second, besides being divergent among themselves, the standards on electrical and electronic products used in the US diverge most often from international IEC standards. These international standards are applied not only in Europe but in a great majority of third countries too. As a consequence European exporters cannot export to the US the electrical and electronic models that they sell to the rest of the world. Moreover, the US actively seeks to deviate countries, with which it has particularly intense trade in electrical and electronic equipment, from the path of international standardisation. The EU would like to see a more unambiguous commitment on the part of the US for IEC standards.

Third, the conditions and procedures applied by many States, cities and utilities to procure electrical and electronic equipment favour local suppliers and local content. Admittedly suppliers and equipment from other parts of the US are also discriminated against, although to a lesser extent than foreign suppliers and equipment. At the federal level the Department of Defence and to a lesser degree other departments also handle procurement rules that discriminate against foreign supplies. All in all public procurement of electrical and electronic equipment in the US does not abide by the principle of most favoured nation in respect to countries to which the US has granted that treatment.

Finally the Annex on Electrical Safety to the EU-US Mutual Recognition Agreement (MRA) is not yet implemented correctly on the US side. The product scope of this Annex is electrical and electronic equipment. Under the MRA European designated laboratories should certify equipment according to US regulations. The Occupational Safety and Health Administration (OSHA) continues to deny European authorities the right to designate European laboratories to operate under the Annex on Electrical Safety. The behaviour of this Agency renders void the signature of the MRA by the US Government. The Commission is firmly committed to step up confidence building until the MRA is applied fully in the US.

Telecommunication equipment

The Federal Ccommunications Commission (FCC) has regulated its requirements for terminal equipment attachment (much in line with the regulatory approach used in the EU). However, the FCC continues to require third party certification of radio transmitters that have also been deregulated in the EU in terms of technical product requirements and approval procedures. The FCC should therefore be encouraged to move toward a "suppliers declaration of conformity" for radio transmitters, otherwise an unbalanced market access situation between the EU and the US will persist.

Automotive

The American Automobile Labelling Act provides that passenger cars and other vehicles must be labelled with, *inter alia*, the proportion of US and Canadian-made parts and the final point of assembly. These requirements are intended to influence consumers to buy cars of US-Canadian origin. There is also an obligation to indicate the origin of engines and gearboxes that could discourage US manufacturers from importing parts from Europe. Moreover conforming to the labelling requirement may involve the disclosure of confidential data from non-US manufacturers.

Methyl Tertiary Butyl Ether (MTBE)

MTBE is used mainly as a fuel additive in petrol. There are recognised environmental risks concerning the contamination of potable water, but these are eliminated by correct storage in appropriate tanks. Following a contamination incidence, California introduced a ban on MTBE. Given the size of the market for MTBE in California, this measure, which is arguably not the correct solution to the problem, is likely to have a significant impact on international trade. The ban is currently subject to a dispute settlement case under NAFTA by Canada.

Recreational Marine

The EU has proposed to introduce exhaust emission requirements in Directive 94/25/EC on recreational craft. 'This has been welcomed both by EU and US industry. At the same time the US Environmental Protection Agency (EPA) seems to consider introducing other exhaust emission values and technical requirements that are far more stringent than industry can meet.

Pharmaceuticals and cosmetics

In the US, as in Europe, a competent authority (the Food and Drug Administration (FDA) must approve a new medicinal product before it can be commercialised. However, the delays for non-US new medicinal products appear to be longer than for US developed medicinal products. This may be in part due to the Investigational New Drug (IND) system that allows the FDA advanced knowledge of medicinal products tested in clinical trials in the US.

By means of an "over-the-counter" (OTC) procedure, approved active substances for many medicinal products are put on a list (OTC-Monograph) by the FDA, so that different final products derived from these active substances can be marketed without any application or delay. However, the OTC monograph procedure requires that the active substance has a US market history. This restricts market access for OTC products with lengthy marketing experience in countries with equally sophisticated medicines regulatory systems and particularly hampers access for plant-based (herbal) medicinal products with a long tradition in Europe. A proposed amendment to the OTC monograph procedure was published on 17 March 1999 but does not yet allow for the acceptance of foreign clinical data for ingredients commonly used in Europe but not in the US.

In addition, the problem of admission of European suntan lotions to the US market was first raised with the FDA in 1991. The FDA also received a petition by European cosmetic firms to open the simplified monograph procedure to UV-filters that had already been accepted in the EU. The FDA did approve sunscreen products containing avobenzone in concentrations of up to 3%; however, the final monograph covering this and other sunscreen products was published on 21 May 1999. Should the FDA follow the monograph's conclusions, all of the characteristics of the label on a sunscreen product such as the size of the type, the size of the lines, the words used, would have to be followed.

A multilateral framework for cooperation on cosmetics has been established between the EU, US, Canada, and Japan. A work programme on regulatory cooperation has been established with a view to align review and approval procedures and examine equivalence of technical requirements. However, no progress has been made on the work programme for regulatory cooperation. FDA has been reluctant to consider in a serious way even simple harmonisation proposals put forward by the industry, eg. they have not acted on a petition submitted by the

industry several years ago to allow the use of Color Index numbers for ingredient labeling to identify colors contained in a product despite these numbers being used in the EU and in most of the countries around the world. The EU harmonised the majority of its labeling system with the US nomenclature system, the major difference being the color identifications used. The FDA should act on the petition and develop a proposal for public comment.

Textiles and Leather

Extensive product description requirements complicate exports to the US. Particular rules for marking and labelling of retail packages to clarify the country of origin, indicate the ultimate purchaser in the US and state the name of the country in which the article was manufactured or produced are burdensome. Articles that are otherwise specifically exempted from individual marking are an exception to this rule. All textile fibres imported to the US have to be marked with the generic names and percentages by weight of the constituent fibres present in the textile fibre product in amounts of more than 5%. Any wool products containing woollen fibre, with the exception of carpets, rugs, mats, upholsteries and articles made more than 20 years prior to importation, have to be clearly marked so as to satisfy the requirements of the Wool Products Labelling Act of 1939 (with regard to information on weight and importer). The Fur Products Labelling Act imposes similar obligations on fur products.

Agriculture and Fisheries

With respect to **wine labelling**, there exist procedures, both at Federal and in some cases at State level, for the approval of labels. Despite the thoroughness of the process, names and descriptive material that may pass off US wine as possessing characteristics or qualities of EU wine are approved. This risks undermining the reputation of the EU product and may displace potential sales. In addition, European exporters are geographically disadvantaged in the sense that they have to send the original label to the competent US authorities, while the US producers can do that with the different offices located in the main producer regions and it can take three to four months for EU exporters to obtain authorisation.

Differences in US and EU **sanitary and phytosanitary requirements** can have restrictive effects on trade. For new non-manufactured agricultural products, there are requirements for import permits to the US. The procedures between application and the inclusion in the list of approved products can take several years. This has been experienced also with other products from the same area of production with the same phytosanitary risks were permitted. A variety of EU exports to the US have encountered problems due to delays in US Customs sampling and inspection procedures, resulting in damage to the goods and subsequent commercial losses for the exporters. The EU does not dispute the right of the US authorities to inspect imported goods but considers that adequate steps should be taken to deal expeditiously with perishable goods.

The FDA's time-consuming controls on the detection of pit fragments in imports of **canned peaches** from the EU led to detention and subsequent destruction or obligatory re-export of this product, hampering the flow of trade and negatively affecting the volume of exports.

Regulations governing the entry of **apples** and **pears** from certain Member States (Code of Federal Regulations of 1996, Title 7, Subtitle B, Ch.III, §319-56-2r) provide for a pre-clearance inspection programme, with the aim of guaranteeing, prior to shipment, that consignments are free from certain specified insect pests such as the pear leaf blister moth, and from "other insect pests that do not exist in the US or that are not widespread in the US."

Operating in this way on the basis of an open list of unspecified pests is not a scientific approach and is contrary to the spirit of transparency as provided for in the International Plant Protection Convention and to the requirement of pest risk analysis and transparency laid down in the WTO SPS Agreement. The stringent inspections and the increased costs arising from the pre-clearance inspection programme have clearly had a negative effect on EU exports of

apples and pears to the US. Consultations with the aim of implementing the "inspection at port of arrival" option resumed in 1996. A draft protocol for a "Schedule of Conditions" concerning participation in an "experiment" for the export of apples and pears from the EU to the US without phytosanitary pre-clearance by the US in the Member State of production, has been submitted to the US. However, the consultations have not yet been conclusive.

In February 2001, the US introduced an **organic standard "final rule"** which will be implemented over a two year period. While provision exists for imported products to be recognised as organic, the EU is concerned to avoid that impediments to trade are introduced by this new legislation.

One undue obstacle is the restriction, in the case of approved **citrus** consignments, of the ports of landing to those on the North Atlantic shores. This requirement leads to unnecessary costs of land transport into the southern and western parts of the US. If the products were pre-cleared in the Member State of production, and moreover subject to cold-treatment during transport, there is no phytosanitary justification for the port restriction.

The provisions on standards and certification of plants established in growing media (CFR 1996, Title 7, Subtitle B, Ch.III, §319-37-8) were last revised and effective on 3 November 1999 to permit the import into the US of certain plant genera in sterile growing media. This has reduced the obstacles encountered by EU exports of **potted plants** to the US. However, the new rule contains some requirements that are difficult for exporters to fulfil; eg. it is impossible to satisfy certain obligations because some of the species or genera have a growth cycle that is shorter than the waiting period required by USDA before export can take place.

Almost all sorts of plants and growing media (except soil) are permitted for import. However, when the permitted plants are in permitted growth media the import is not permitted, unless a special Pest Risk Assessment (PRA) has been performed by USDA's Animal Plant and Health Inspection Service (APHIS). Twenty years ago EU producers asked APHIS to make the PRA for 60 sorts. So far they have made only five assessments, in all cases resulting in approval. This extremely long delay is not acceptable. APHIS agrees, but regrets not to have the staff to speed it up. The same office has thousands of applications for approval from all over the world for flowers and fruits and vegetables for import and export. Export approvals have priority.

Some progress has been made on the assessment by APHIS of plants from the EU list for **Schlumbergera** (Xmas cactus). However, since cacti are considered endangered species, the Fish and Wildlife Service must give final approval, although Schlumbergera is among the approved sorts of plants and already imported in big quantities from the EU as seedlings not in a growing media. It can take years to get this final approval.

Resumed intensified discussions are on-going between APHIS and the Commission to assess the plant heath risks associated with the importations of several taxa of plants in approved APHIS growing media from the EU.

The mandatory requirement for a two-year post-entry quarantine on an importer's premises for **hardy nursery stock** is considered by the EU to be excessive. Its main purpose is believed to be the detection of latent infections by organisms of quarantine concern. Although this measure may be justifiable in the case of new or developing trade in specific commodities, the EU considers this not to be the case, if the measure is required for long-term trade on a permanent basis. This requirement should be examined in consultations with the US.

The US introduced rules in 1997 on the import of ruminant animals and products thereof from all European countries based on concerns about **Bovine Spongiform Encephalopathy** (BSE). These requirements are not scientifically based, do not follow the Organisation Internationale

Epizootique (OIE) Code, and discriminate in targeting European countries. The US make no distinction between countries where the incidence of BSE is high or low (the latter being countries with occasional cases).

The EU has raised its concerns at this excessive action bilaterally. During the Committee on Sanitary and Phytosanitary Measures in Geneva of 10-11 July 2001, the EC announced to intensify its efforts through bilateral discussions in the first instance with other WTO Members. If this would not help to solve the issue, further steps might be undertaken.

Quite apart from the BSE restrictions, the US also imposes animal health restrictions on the import of **goats** on the grounds of the risk of scrapie in sheep. These restrictions are not justified because of the widespread presence of scrapie in the US sheep population.

The EU has a comprehensive set of veterinary legislation completed under the **Single Market programme**, and apart from certain specific restrictions based on the relevant disease status, there is free movement of animals within the Community. Nevertheless, the US continues to treat the Community on an individual Member State basis for the majority of issues, thus excluding several products of many Member States from access to the US market. It was hoped that the entry into force on 1 August 1999 of the EU-US Veterinary Agreement would improve the situation but this has not occurred.

The EU operates a policy of **regionalisation**, where restrictions are applied in zones affected by certain animal diseases, with free movement of animals and products outside the affected zones. An animal or product fit for movement is then considered fit for export. The principle of regionalisation as an effective means of controlling animal disease has now been incorporated into the US Tariff Act 1930 by the NAFTA and is part of the WTO SPS Agreement. However, US import administrative rules concerning Foot and Mouth Disease (FMD), Rinderpest and other relevant diseases have still not been amended to reflect this change in legislation, despite a clear commitment in the EU-US Agreement on Application of the Third Country Meat Directive, reached in 1992. The US published a proposed rule on "Importation of Animals and Animal Products" covering only ruminants and swine on 18 April 1996. The EU made substantive critical comments, and has continued to press for the US to recognise the EU's application of regionalisation in the context of the EU-US Veterinary Agreement.

The US, in a letter dated 24 February 1998, has committed itself to accept the EU's regionalisation decisions upon implementation of the EU-US Veterinary Agreement and a provision on regionalisation was included in the EC-US Veterinary Agreement, which entered into force in August 1999. However, the US has failed repeatedly to apply the Agreement provision on regionalisation, most recently in the case of FMD where restrictions were imposed on the whole of the Community, although the disease had occurred in four Member States only. Subsequently and though US restrictions were finally lifted for EU countries with no FMD cases, restrictions remained in place in France and Ireland, although these countries have been free of FMD for a period longer than the 90 day period established in the framework of OIE.

Other restrictions on live animals relate to the **non-recognition by the US of the EU's freedom from certain diseases**. The US published a proposed rule on the recognition of the disease status of certain member States for certain diseases on 14 November 1997 and confirmed it as a final rule in 1998. The US further committed itself in March 1998 to publish a further proposed rule covering the outstanding recognition of Member States and diseases, notably as regards classical swine fever. The Proposed Rule - published in the Federal Register on 25 June 1999 - together with the additional written assurances allowed the EU-US Veterinary Equivalency Agreement to be signed on 20 July 1999. The acceptance of regionalisation for classical swine fever (Finalisation of Proposed Rule), which was for the EU a precondition for signing the Veterinary Agreement with the US, has never materialised.

Non-commingling means that establishments exporting meat or meat products to the US may not handle meat or meat products from countries that are not recognised as being free from certain diseases of concern to the US, and that there is no mixing of meat or meat products destined for the US with meat or meat products from such countries. The EU-US Agreement on Application of the Third Country Meat Directive provides for an establishment to handle both categories of meat or meat products provided that there is a separation in time between handling them. So far, however, the US has not been willing to apply this provision of the agreement. The EU-US Veterinary Agreement includes specific provisions for the application of non-commingling.

Imports into the US of **uncooked meat products** (sausage, ham and bacon) have been subject to a long-standing prohibition. Following repeated approaches by the EU, US import regulations were modified to permit the import of Parma ham, Serrano hams, Iberian hams, Iberian pork shoulders and Iberian pork loins. However, the US still applies a prohibition on other types of uncooked meat products (eg. San Daniele ham, German sausage, Ardennes ham) despite the fact that meat products may come from disease free regions and that the processing involved should render any risk negligible.

The import of **egg products** is allowed only under strict conditions, eg. the requirement for continuous inspection of the production process. A system of periodic inspection would be acceptable from a human health point of view, but continuous inspection is superfluous and expensive, and has a negative effect on prices and competitiveness.

The import of **"Low Acid Canned Food"** such as fisheries products or dairy products is subject to a detailed prior approval system and makes no provision for accepting such products produced under "equivalent" hygiene conditions.

5.6 Government Procurement

Federal Buy America legislation

The Buy America Act (BAA), initially enacted in 1933, is the core domestic preference statute governing US procurement. It covers a number of discriminatory measures, generally termed Buy America restrictions, which apply to government-funded purchases. These take several forms: some prohibit public sector bodies from purchasing goods and services from foreign sources; some establish local content requirements, while others still extend preferential price terms to domestic suppliers. Buy America restrictions therefore not only directly reduce the opportunities for EU exports, but also discourage US bidders from using European products or services. The US industry, through the court system and legislative lobbying, ensures that Buy American preferences are enforced vigorously and maintained.

The restrictions apply to government supply and construction contracts, and require Federal agencies to procure only US mined or produced unprocessed goods, and only manufactured goods with at least a 50% local content. Executive Order 10582 of 1954, as amended, expands the scope of the Buy America Act in order to allow procuring entities to set aside procurement for small businesses and firms in labour surplus areas, and to reject foreign bids either for national interest or national security reasons. As a result of the GATT (subsequently WTO) Government Procurement Agreement (GPA), waivers from many Buy America provisions have been foreseen for GPA Parties (*inter alia*, through the 1979 Trade Agreements Act), including for the EU. However, the actual implementation of these waivers may in some cases produce legal uncertainty and this may act as a barrier. In addition, some Buy America provisions continue to significantly limit access to the US procurement market.

One of the most obvious areas of Buy America is federal aid administered by the Department of Transportation (DoT) under several different acts, including the Highway Administration Act, the Urban Mass Transit Act, and the Airports Improvements Act. In accordance with these acts, the DoT provides aid to the State and local governments for various transportation-related procurements. The Federal government may fund 40% to 80% of the project (depending on the nature of the grant), while the State or local government must fund the remaining share. All purchases of goods and services related to these projects must meet various Buy American provisions, usually domestic content requirements of 60% and, failing that, a price penalty of up to 25%. The European Commission estimates Buy America to affect about US$25 billion of contracts in FY2001, particularly mass transport and airport improvement. These are precisely the sectors where EU business is very competitive. This figure is expected to increase to about US$35 billion by 2005, taking account of budget growth forecasts. These restrictions will negatively impact EU suppliers of products including iron and steel and transport equipment.

National security issues

The Department of Defence (DoD) also has significant procurement expenditures that exclude foreign suppliers of goods or services. The DoD is the largest public procurement agency within the US government spending many tens of billions of dollars annually on supplies and other requirements. Except as required by the Defence Supplement to the Federal Acquisitions Regulation (DFARS), contracting officers must apply BAA requirements to supply contracts exceeding the US$2,500 micro-purchase ceiling and to service contracts that involve finishing of supplies when the supply portion exceeds the micro-purchase ceiling. In March 1999, the Director of Defence Procurement reminded US defence agencies and military departments to ensure that their contracting officers comply with requirements of the BAA, as an audit report had revealed that some contracts had been awarded to foreign firms in contravention of the relevant provisions.

Many procurements fall under "national security" exceptions to open procurement obligations. Although the concept of national security can be invoked under Article XXIII of the GPA to limit national treatment in the defence sector for foreign suppliers, the use of national security considerations by the US has led to a disproportionate reduction in the scope of DoD supplies covered by the GPA. While the US denies abusing the WTO national security exemption, it has indicated a readiness, in the context of the implementation of the GPA, to disseminate more guidance to US procurement officials for identifying which procurements are covered by the Agreement and which by national security exemptions. It has also expressed its intention to ensure clear and consistent identification of national security procurements, and improve the coherence of the US Federal Supply Classification System with the international Harmonised System. These intentions mark a first small step towards more acceptable practices.

There has been a trend towards making DoD's other domestic preferences, apart from the BAA preferences, less restrictive – by expanding the preference to qualifying countries. These are countries that maintain reciprocal memoranda of understanding (MoU) with the US. Currently, eleven EU Member States are qualifying countries. Still, an amendment to the FY1998 Defence Appropriations bill, which would have given the Secretary of Defence blanket authority to waive the domestic preference for American speciality metals, stainless steel, flatware, clothing, or naval components, was substantially diluted by Congress. The compromise language only permits the Secretary of Defence to waive the restriction on a case by case basis under certain circumstances on a limited number of products, rendering the application of a waiver much more difficult. In addition, a bill introduced in the Senate (S.384) in February 1999 by Commerce Committee Chairman McCain to authorise the Secretary of Defence to waive certain domestic source or content requirements in the procurement of items procured for the DoD failed to make any progress.

Management and operation of R&D facilities under the Department of Energy, NASA, the National Science Foundation, or the DoD are often entrusted to private companies and

universities under "management and operating (M&O) contracts". These contracts do not follow the open competition procedures required under the Federal Acquisitions Regulations. Very few M&O contracts have been subject to competitive procedures and often the procurements done by these companies themselves follow Buy America requirements. The US has excluded M&O contracts from its offer in the GPA. More widely, the government has instituted a number of R&D programmes in recent years in which there is a strong preference for US participants. Examples are the Renewable Energy Export Technology Transfer Program and the High Speed Ground Transportation Development Program. Most of these programmes also require BAA compliance with respect to all materials furnished pursuant to the project.

There are numerous other marginal expenditures. While not exhaustive, the following examples of Buy America statutory programmes should be mentioned: the Balance of Payments Program; the Merchant Marine Act of 1936; the Hazardous Materials Transportation Authorisation Act of 1994; the Amtrak Authorisation Act; Grants for Construction of Water Treatment Works; National and Community Service Act; National Science Foundation Act of 1988 (as amended); and the President's National Space Policy Directive of 1990 and 1994. The latter precluded US Government agencies from using foreign launch services (except, in the case of NASA, in collaborative projects not involving an exchange of funds). This policy was subject to undefined exceptions – a possibility that was never, or almost never, used.

The Commercial Space Act of 1998 on the one hand, calls on Federal agencies to buy **space launch services** – rather than launch vehicles; on the other hand, it requires these services to be procured from "US commercial providers", subject to certain exceptions, for instance for international collaborative efforts related to science and technology. It thus legislates the Buy America policy contained until then in the President's National Space Policy but opens the door for NASA to enter into collaborative projects with foreign space agencies even if they involve the disbursement of funds. It remains to be seen how the US Administration will interpret the notion of "US commercial provider". The US justified these restrictions, which initially applied to the launching of military satellites, on national security grounds, but is now also imposed on satellites for civilian use. These measures are part of a set of co-ordinated actions to strengthen the US launch industry and are clearly detrimental to European launch service providers. European launch operators remain in any case effectively barred from competing for most US government launch contracts, which account for approximately 50% of the US satellite market.

Other indirect barriers

Apart from direct legal barriers, the complexity of procurement rules can act as an effective indirect barrier. Suppliers based in countries that are parties of the WTO/GPA are generally not directly excluded from the scope of the BAA and other restrictive regulations. Instead, legislation generally foresees the granting of waivers as regards these suppliers. However, implementation of these waivers can produce a considerable degree of legal uncertainty.

Sub-federal selective purchasing laws

At a sub-federal level, selective purchasing laws (whereby the access of companies to contracts is severely or completely curtailed as a result of the companies' business links with particular third countries) continue to cause great concern. Such laws have been adopted by the Commonwealth of Massachusetts (in the case of Burma) and more than 20 cities and local authorities, and are under consideration by a number of other sub-federal authorities. The Supreme Court found the Massachusetts legislation unconstitutional on the grounds of division of powers between States and the federal authorities. Whilst this removes this particular obstacle, the wider issue of principle vis-à-vis the EU, is left unaddressed.

The EU strongly objects to these attempts to regulate the behaviour of EU companies that are acting in full compliance with EU and Member States' Laws.

The Commission will continue to monitor the situation in other sub-federal jurisdictions.

State Buy America legislation and restrictions

Buy America or "buy local" legislation is also rife at State level. More than half of all US States and a large number of localities do apply some "buy local" restrictions in one form or another. In some cases, the procurement of particular products is subject to such restrictions, such as steel, coal, printing and cars. Affirmative action schemes favouring small business or particular types of business (e.g. minority-owned) are also applied extensively in a large number of States. Although 39 of the 50 States are covered by the bilateral agreement of 1994 (and 90% of total procurement by value at State level), there are still gaps in its scope and, in some cases, concerns about its actual degree of implementation. Among the 11 states that have not been bound in the US GPA offer, some maintain very substantial local preferences, which have a negative impact on EU and other foreign suppliers. This is the case of Alaska, New Mexico, South Carolina and, to a lesser extent, Ohio and Virginia. In the case of New Jersey, State legislation also provides that for the construction of public works projects financed by State funds, the materials used (e.g. cement) must be of domestic origin. Even in the GPA-bound states various exemptions (i.e. for purchases of cars, coal, printing and steel and for set aside) seriously limit the procurement opportunities open to foreigners. Besides, all procurements by States and localities that benefit from particular types of federal funding (e.g. in mass transit and highway projects) are subject to BAA.

Set-aside for small businesses

The Federal government actively seeks to promote the growth of small businesses in numerous ways. It provides loans and grants, develops programmes to encourage bids from small business, and sets aside certain procurement contracts for small business. The "set-asides" are specifically exempted from application of the GPA. Small business set-asides account for tens of billions in expenditures or around 30% of all federal procurement dollars.

The relevant legislation is the Small Business Act of 1953, as amended, which requires executive agencies to place a fair proportion of their purchases with small businesses. This is achieved through two different types of set-aside schemes: one where US Federal government contracts are set-aside, regardless of the size of the contractor, in the event that there is a reasonable expectation of bids from two or more eligible US small or minority businesses; the other where all contracts below a certain threshold (currently US$2,500 to US$100,000) are set aside for US small or minority businesses -- contracts are only released for competitive bidding in the event that two or more eligible bidders cannot be identified. In this context, small businesses are defined as businesses located in the US that make a significant contribution to the domestic economy (through payment of taxes and/or use of US products, materials, and/or labour) and are not dominant. The standard size criteria for eligibility as a small business for goods producing industries is 500 employees or fewer. However, for some industries (i.e. pulp, paper boxes, packaging; glass containers; transformers, switchgear and apparatus; relays and industrial controls; miscellaneous communications equipment; search, detection, navigation guidance systems and instruments) the employee limit is 750 and for some others (i.e. chemicals and allied products; tyres and inner tubes; flat glass; gypsum products; steel and steel products; computers, computer storage devices, terminals; motors and generators; telephone and telegraph apparatus) it is 1000. For services industries, depending on the sector, firms with total annual revenues of less than US$2.5 million to 17 million are considered to be small businesses.

In 1999, the Small Business Administration launched another programme - HUBZone - that provides contracting benefits to small businesses located in "historically under-utilised business zones". The first goal of the programme is to channel at least 1% of overall federal procurement to HUBZone small businesses, which at current federal spending levels equates to about $2 billion. By the year 2003 that goal rises to 3%, or about $6 billion.

The notion of fair proportion means that the government-wide goal for participation by small businesses shall be established at no less than 20% of the total value of all prime contract awards for each fiscal year. Under normal bid procedures, there is a 12% preference for small

businesses in bid evaluation for civilian agencies (instead of the standard 6%). In the case of the DoD, the standard 50% preference applies to all US businesses offering a US product.

An important number of States also operate particularly proactive small businesseses and minority set-aside policies. It is estimated that in States like Texas such policies effectively exclude foreign firms from around 20% of procurement opportunities. In Kentucky as much as 70% is set aside for small businesses. The active promotion of small businesses is a common concern for the EU and the US. The EU is, however, concerned that the US "set-aside" measures and their exemption from the GPA are favouring US industry and restricting the ability of foreign (EU and other) companies doing business in the US.

Berry Amendment

The concept of "national security" was originally used in the 1941 Defence Appropriation Act to restrict procurement by the DoD to US sourcing. Now known as the "Berry Amendment", its scope has been extended to secure protection for a wide range of products only tangentially related to national security concerns -- for example, the 1992 General Accounting Office ruling that the purchase of fuel cells for helicopters is subject to the Berry Amendment fabric provisions, and the withdrawal of a contract to supply oil containment booms to the US Navy because of the same textile restrictions. A recent audit report by the Defence Department's Office of Inspector General concluded that for certain DoD procurements during fiscal years 1996 and 1997, about half of the solicitations and contracts examined had not incorporated or enforced the relevant domestic sourcing requirements. In response, DoD's procurement director has taken steps to ensure that contracts at or above the simplified acquisition threshold (presently US$100,000) are domestically sourced. To comply with the Buy America provisions, contracting officers must generally add 50% to the price when evaluating offers with non-qualifying country end products against offers with domestic end products. In September 1996 Congress adopted an amendment that extended the initial scope of the Berry Amendment to cover also all textile fibres and yarns used in the production of fabrics. The result of this extension is that EU fibres and yarns can no longer be used by US manufacturers for producing fabrics that they sell to the DoD.

Further DoD procurement restrictions are based on the National Security Act of 1947 and the Defence Production Act of 1950, which grant authority to impose restrictions on foreign supplies in order to preserve the domestic mobilisation base and the overall preparedness posture of the US. At the same time, defence procurement from foreign companies is sometimes also impeded by Buy America restrictions on federally funded programmes.

MoU undermined

In practice, all NATO countries (except Iceland), all major non-NATO allies of the US (e.g. Australia, New Zealand) as well as Sweden, Finland and Austria have signed Memorandums of Understanding (MoUs) with the US allowing for a waiver of the corresponding restrictions. However, these MoUs are subject to US laws and regulations, and consequently, other restrictions can be imposed annually by Congress through the appropriations process. For example, US legislation allows the Administration (DoD and USTR) to rescind a waiver if it determines that a particular ally discriminates against US products. In addition, Congress is unilaterally overriding the MoU by imposing ad hoc Buy America requirements during the annual budget process (e.g. in the case of anchor and mooring chains). There are also indications that US procurement officers disregard the exemption of Buy America restrictions for MoU countries (e.g. fuel-cells, ball and roller bearings and steel forging items).

In fact, the barriers to defence trade with the US result from a complex set of rules and practices aiming at imposing "domestic sources restrictions" in US defence acquisition. A partial identification of all these barriers is provided in a July 1998 report of the US General Accounting Office that was established to justify these "domestic sources restrictions". The following examples illustrate the large variety of obstacles facing EU exporters to the US:

- Specific requirements to produce goods on US soil. This can take many forms, for example as part of the DoD programme approval procedure, a requirement exists that any major defence item must be produced on US soil, so that EU companies can only do business by selling the licences to manufacture (e.g. Harrier Vertical Take-Off and Landing Jet). In relation to large calibre cannons, there is legislation in Congress requiring that they be produced in a particular US plant. Such requirements can also be buried in the annual Defence Appropriations bill – for example, in relation to small arms, DoD is required to justify the need to buy offshore.
- There is no grant-back given for changes made to products by the licensee (a common element of licensing systems in the area of non-defence goods, as the original owner then benefits from changes made).
- Foreign Comparative Tests (FCT) are carried out to assess the best product for goods not produced in the US. Funds to carry out such tests were reduced in 1999, although the defence budget itself was increased. Also, experience shows that, where an FCT pinpoints a successful product, DoD seeks a licence to produce that product in the US rather than entering into a direct supply contract with the offshore producer. The effect of this practice is that EU suppliers look for a US production partner early in the process.
- Barriers arising from the use of the Foreign Military Sales Regulation (FMSR). The FMSR introduces maximum foreign content threshold requirements for products exported with FMS support. This means that US prime contractors willing to seek FMS support are reluctant to design foreign content into their products. Instead, they prefer replacing any foreign content by US production under licence (e.g. armoured vehicles were obtained under licence from Austria and then sold on to Kuwait through the FMS system – this took sales to third countries away from European companies).
- Technical data / Technology export control requirements. Non-nationals cannot take their own foreign companies' technical data out of the US (even if only showing around for sales purposes) unless the US company is granted a licence to export that data – and consequently rights over the data.
- US subsidiaries One way of circumventing the US-soil production requirements is to set up a subsidiary in the US. However, such subsidiaries need to obtain both security clearance and authorisation to operate. A precondition for obtaining this is that the overseas parent company must relinquish management control of the subsidiary (US Security Manual). These "Chinese walls" are quite systematically established, examples are within Allison (part of Rolls-Royce) and Tracor (part of BAE Systems).
- Lack of access to bidders conferences / security clearance considerations. Foreign nationals rarely have access to bidder conferences and other pre-contract award procedures, because they are not granted the required security clearances at that stage of the procurement process.
- Congressional approval of the defence budget The defence budget is approved line-by-line and Congress regularly strikes out lines, including procurement programmes. The effect is that defence contractors lobby Members for support for individual programmes, offering inducements in return – sometimes ensuring that production capability will be located in Members' districts. This represents a kind of "regional juste retour" built into the budget approval process. As an example, the company developing a particular missile programme ensured that 49 States benefited from that particular programme, thereby ensuring that programme's survival in the budget.

Bearings

Congress has imposed a Buy America requirement on the procurement of ball and roller bearings since 1988, most recently to the end of 2005. In May 1996, the Federation of European Bearings Manufacturers' Association (FEBMA) made a submission to DoD, in

opposition to the restriction. The 1997 DoD Authorisation Act contains the "McCain Amendment" authorising DoD to waive Buy America requirements that would impede the reciprocal procurement of defence items under the MOU. The EU and 21 NATO countries asked for the effective implementation of the McCain Amendment and the termination of discrimination vis-à-vis imports from countries with which DoD has signed defence cooperation agreements, thus supporting FEBMA's position. The DoD's implementing interim rule was published on 24 June 1997 and included bearings. However, the interim rule notes that acquisition of non-commercial ball and roller bearings is restricted to domestic sources by DoD Appropriations Acts. Each annual DoD Appropriations Act since 1997 has contained a similar restriction. Therefore, Buy America restrictions remain and the McCain Agreement waiver cannot be utilised fully for non-commercial ball and roller bearings.

Iron, Steel and Non-Ferrous Metals

The main problem for the steel sector is the imposition of local content requirements or the preference given in works and other government procurement contracts for bids that include locally produced steel. This practice is notably common at the sub-federal level. Many States (such as Connecticut, Louisiana, Maine, Michigan, Illinois, Maryland, New York, Pennsylvania, Rhode Island and West Virginia) have such requirements that also apply to private contractors and subcontractors.

As already mentioned above, West Virginia and Ohio have recently adopted legislation that introduces procurement restrictions on steel imports.

Telecom equipment

As a result of the failure to liberalise purchases of telecom equipment, the US decided in 1993 to impose sanctions against the EU and certain Member States under Title VII of the Omnibus Trade and Competitiveness Act of 1988. The sanctions bar EU suppliers from bidding, *inter alia*, for US Federal government contracts that are below the threshold values of the WTO Agreement on Government Procurement. The EU responded with counter-sanctions (Regulation 1461/93) that also bar US bidders from applying for contracts awarded by central government agencies below the threshold values. Following the bilateral Marrakech procurement agreement of April 1994, which liberalised around US$ 100 billion of procurement opportunities on both sides, the EU considers that the sanctions are an unnecessary impediment to the bilateral relationship.

Following the liberalisation of the EU telecoms sector, the US Administration has started to investigate the possibility to mutually lift the sanctions and counter-sanctions and so there seems to be a willingness from both the US and the EU to remove the existing sanctions. However, no concrete decision regarding the lifting of the sanctions has been taken yet.

Central procuring agencies and e-procurement

Central purchasing agencies open to the US Federal entities have been increasingly used by public authorities. Procuring entities are given a choice: either they follow the "traditional system", which requires publication of a notice in the Commerce Business Daily (CBD)-Net, or use the "new" electronic schedule system.

The EU is currently examining this system in order to verify its consistency with the GPA.

EU actions in the context of the GPA

Many of the problems experienced by EU suppliers in acceding procurement opportunities in the US could be solved by an increase of the coverage of the GPA and by the elimination of the exceptions introduced in the US GPA offer. Apart from other initiatives, the EU considers that the current review of the GPA offers a good opportunity to improve the situation.

5.7 Trade Defence Instruments

1916 Antidumping Act

The 1916 Antidumping Act prohibits the import and sale of products "at a price substantially less than the actual market value in the principal markets of the country of their production." A Trade Barriers Regulation procedure on the US Anti-Dumping Act of 1916 was initiated on 25 February 1997 further to a complaint by Eurofer (European Steel Industry). The investigations conducted by the Commission confirmed that the US authorities' failure to repeal the 1916 Act is in several respects not in conformity with the obligations of the US under the WTO Agreement, the GATT 1994 and the WTO Anti-Dumping Agreement. Infringements relate notably to the type of remedies available, the lack of procedural rules and of standing requirements, the definition and qualification of the injury concept, the criteria for the calculation of the normal value, and the absence of the requirement to introduce products into the commerce of another country as a prerequisite for dumping to take place.

Despite numerous offers made by the Commission services, the US authorities did not appear willing to reach an amicable settlement. Under these circumstances, a Commission decision to request formal WTO consultations was published in the Official Journal on 28 April 1998. At the occasion of the consultations of 29 July 1998, the Commission reiterated its concern to resolve the case on an amicable basis. In November 1998, a new Court action under the 1916 Act, involving steel imports from Russia and Japan by subsidiaries of EU companies, was initiated before the Ohio District Court (in which part of the defendants made an out-of-court settlement with the plaintiffs in early 1999). On 7 March 2000 a US printing press manufacturer filed a complaint under the 1916 Act against German (and Japanese) producers of large newspaper printing presses in US District Court for the Northern District of Iowa.

A Panel was established on 1 February 1999 and the report was circulated on 31 March 2000. The Panel's conclusions were that the 1916 Act violates Articles VI:1 and VI:2 of GATT 1994, several provisions of the Anti-Dumping Agreement and Article XVI:4 of the Agreement Establishing the WTO and recommended that the DSB request the US to bring the 1916 Act into conformity with its obligations under the WTO Agreement. The US appealed this ruling, together with a ruling on a similar case brought by Japan. The Appellate Body confirmed the Panel's ruling and gave the US until 26 July 2001 in which to implement the decision. The US requested an extension to this deadline on 24 July and the EU has now agreed that the draft bill, revoking the 1916 Act, will be adopted by 31 December 2001 or the end of the current session of Congress, whichever is sooner.

Safeguard measure on steel wire rod

On 1 March 2000 the US introduced a tariff quota of 1.58 million net tons on imports of steel wire rod. The quota will remain in place for three years. Imports exceeding this quota will be subject to an additional import duty of 10% in the first year, 7.5% in the second year and 5 % in the third year. The quota level will increase by 2% annually. Having failed on numerous occasions to solve the issue bilaterally, a WTO Panel was requested on 23 August 2001 but was blocked by the US, forcing a second request on 10 September 2001.

Safeguard measure on welded line pipe

On the same day, the US introduced a safeguard measure on imports of welded line pipe. The measure consists of an additional 19% import duty, which will remain in place for three years, but which will not apply to the first 9,000 net tons of line pipe originating in each exporting country. The duty will be reduced to 15% in the second year and 11% in the third year. This measure has also entered into force on 1 March 2000.

The Commission reacted to the US measures in both the steel wire rod and the welded line pipe cases by reserving its right to suspend equivalent concessions under Article 8 of the WTO Safeguard Agreement (SA). This Article affords exporting countries the right to obtain

trade compensation. Since the US failed to offer any trade compensation, the EU is entitled to suspend equivalent concession. Such a suspension does not have any immediate effect in practice, given that Article 8(3) SA stipulates that the right of suspension shall not be exercised for the first three years that a WTO compatible safeguard measure is in effect (that is why the US measures have been limited to such duration). However, it sends a clear signal to the US that the EU is ready to fully use its rights under the SA and that the suspension would immediately take effect should the US decide to extend the measures and/or should the DSB find that the US measures do not conform to the SA.

A WTO Panel was requested on 23 August 2001 (Korea has already had a Panel, the report being expected in mid October) but was blocked by the US, forcing second request on 10 September 2001.

Byrd Amendment

As of October 2000, US Customs authorities are obliged to give the anti-dumping duty collected on imports directly to the complaining domestic industry. This is an illegal remedy against dumping because industry benefits twice; once from the above measure and once from the price increase resulting from the duty.

The EC, along with other major export countries (including Japan, Korea and Brazil) requested a WTO Panel on 23 August 2001.

Sunset reviews on countervailing duties

In May 2000, the Commission raised with DoC and USTR the issue of sunset reviews of countervailing duty measures against EU Member States. The Commission cited several cases where DoC had found subsidisation to have fallen below the "de-minimis" level of 1% set out in the Agreement on Subsidies and Countervailing Measures (ASCM), but had nevertheless determined that subsidisation would continue at the rate found in the original investigation, and had thus recommended the extension of the countervailing duties.

On 23 August 2001 the EC requested a WTO Panel having failed to solve the problem bilaterally. However, this was blocked by the US, forcing a second request on 10 September.

Countervailing duties on pasta from Italy

On 24 July 1996, the DoC imposed antidumping and countervailing duties on pasta from Italy. The latter contain a component designed to countervail EU export refunds granted on cereals used in the manufacturing of pasta. This measure which could have been considered to be in breach of item 8 of the US-EC Pasta Settlement of 1987, is subject to regular administrative reviews, which have led to reductions in duty levels. In June 2001, the US initiated a "sunset" review to determine whether the measure should continue or be repealed.

Agriculture and Fisheries

On 1 June 1998 the US imposed safeguard measures in the form of a quota on imports of wheat gluten from *inter alia* the EU. The safeguard reduced EU exports by over 40% and was managed in a manner designed to further disrupt trade. The protectionist nature of the US safeguard measure was compounded by modifications to the management rules of the quotas.

The EU successfully challenged this measure before a WTO panel, which was upheld on appeal. On 19 January 2001 the WTO Dispute Settlement Body adopted the Appellate Body and Panel reports in the case finding the US measure to be “without legal basis”. The EU urged the US to comply with the ruling by withdrawing the measure. While the US made no move, the EU withdrew equivalent measures in the form of a €5 tariff on imports from the US on corn gluten feed up to 2,730,000t.

On 1 June 2001, the US complied with its obligations and withdrew the wheat gluten quota. As a result, the rebalancing tariff on corn gluten feed was lifted also on 1 June 2001.

Iron, Steel and Non-Ferrous Metals

In June 1998, the EU initiated a WTO dispute settlement procedure against the DoC countervailing methodology with respect to privatisation of the EU company British Steel. The Commission holds that the US practice of countervailing pre-privatisation subsidies without showing whether the privatised company has obtained a benefit constitutes a violation of the ASCM. Consultations under the DSU on this issue were held with the US in Geneva on 29 July 1998. A panel to examine the issue was established at the DSB meeting of 17 February 1999. On 23 December 1999 the panel found in favour of the EC and condemned the US methodology. These findings have been confirmed by the WTO Appellate Body on 10 May 2000. The Commission expected the US to take into account the findings of the WTO panel in several other CVD investigations involving EU companies concerning similar issues however, this did not occur and so the EC requested a WTO Panel on 23 August 2001. This request was blocked by the US and so a second request was made on 10 September.

5.8 Export Restrictions

Export controls

A comprehensive system of export controls for dual-use items was established under the Export Administration Act (EAA) of 1979 and the US Export Administration Regulations (EAR) to prevent trade to unauthorised destinations. This system, among other things, requires companies incorporated and operating in the EU to comply with US re-export controls, including compliance with US prohibitions on re-exports for reasons of national security and foreign policy. The extraterritorial nature of these controls has repeatedly been criticised by the EU, given the fact it consists of actives member of all international export control regimes: the Nuclear Suppliers Group, the Australia Group, the Missile Technology Control Regime and the Wassenaar Arrangement (see Iran Non-Proliferation Act, chapter 3).

Serious concerns have also been raised by the 1988 US Trade Act's amendment to Section II of the EAA providing for sanctions against foreign companies which have violated their own countries' national export controls, if such violations are determined by the President to have had a detrimental effect on US national security. The possible sanctions, which would consist of a prohibition of contracting or procurement by US entities and the banning of imports of all products manufactured by the foreign violator, would appear to be contrary to the GPA.

Satellites

Since 1999, the jurisdiction for export controls on commercial communications satellites as well as parts and components and related technical data has been transferred by Congress (National Defence Authorisation Act) from the Commerce Department to the State Department. Goods or technologies previously listed as dual-use goods have been added to the US munitions list, thus subjecting them to tighter controls. Exceptions were provided by Congress calling for an expeditious treatment of export licence requests for NATO and major non-NATO allies. However in practice this exception had no effect, with the US Administration retaining wide latitude for imposing additional export control requirements, also on NATO countries, as it sees fit for reasons of national security. These additional controls, including monitoring of technical exchanges with EU firms, have lead to delays and uncertainties in the licensing process, causing concerns about possible delays in satellite launches and impairment of EU launch providers' ability to serve the US commercial market (US Government launches are reserved for American providers according to the Commercial Space Act adopted in 1998). They also impact negatively on manufacturers of satellites and components which rely on US parts, impair the ability of EU firms to reply to US bids for tender, and affect European insurers of launches of US satellites whose access to the technical data required to assess the insurance risks has been hampered.

A provision in the FY2000 Consolidated Appropriations bill signed into law in November 1999 attempted to clarify the so-called "NATO/non-NATO major allies exception." Pursuant to this provision, a new regulatory regime for export licenses to US allies was established in May 2000, primarily for satellite components, parts, accessories and technical data, and entered into effect in July 2000. A separate regime was set up for commercial communication satellites involving US allies, including those exported to French Guinea for launch. Then-Secretary of State Albright gave assurances in a May 2000 letter to Members of Congress that the licensing process would be expedited. However, industry continues to express concerns that this regime does not adequately address the difficulties caused by the transfer of jurisdiction. Two bills are pending before Congress, one which will reform the regime controlling exports of dual-use items and technologies, including space-related ones, and military items, and a second which will return the licensing process for satellites to the DoC.

Encryption

With the digital age, the need has evolved for improved protection against unauthorised use in a number of areas, including personal data, trade secrets and databases. An example where this need is obvious is electronic commerce. In March 1997, the OECD Council adopted a Recommendation on Guidelines for Cryptography Policy setting out principles to guide countries in formulating policies and legislation relating to the use of cryptography.

At present, both the EU and the US operate export control regimes to limit the cross-border movement of the strongest encryption products. On 30 December 1996, new US export control regulations were published that transferred the licensing of commercial encryption products from the Department of State to the Department of Commerce and mandating key recovery until 31 December 1998. A new interim final rule was published on 14 January 2000. The rule amends the Export Administration Regulations (EAR) to allow the export and re-export of any encryption commodity or software to individuals, commercial firms and other non-governmental end users in all destinations. It also allows exports and re-exports of retail encryption commodities to all end users in all destinations; post export reporting requirements are streamlined and the changes of the Wassenaar Arrangements are incorporated (Cryptography Note). The restrictions on terrorist supporting states (Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria), their nationals and other sanctioned entities are not affected by this rule. This new rule could pose potential problems such as a different treatment for use by government bodies, Internet and telecommunications service providers for which existing or new restrictions apply. The notion of "US subsidiaries" in Section 740.17 could create a competitive disadvantage for European firms based in the US (especially for the development of new products) as they will have their products "technically reviewed". Furthermore, a "supplementary information" provision is required for foreign companies to apply for Encryption Licensing Arrangements (ELAs) in order to obtain treatment equivalent to that extended to foreign subsidiaries of US parent companies. The nearly generalised introduction of the technical review of encryption products above a certain key length in advance of sale, creates a difficulty for the European industry for cases of re-export. The newly created rules applicable to retail encryption commodities and software, in particular the eligibility criteria (functionality, sales volume, distribution methods, ability to modify products and the level of support by the supplier), will probably be subject to divergent interpretations. The effect of the Cryptography Note, as introduced in the Wassenaar Arrangement, is reduced by the US authorities through the introduction of two new requirements: "crypto functionality should not be modified or customised" and "the items cannot be network infrastructure products such as high end routers or switches designed for large volume communications". The latter items still need to be licensed.

The practical effects of this remain to be seen. A combination of the continuing constraints on the export of strong encryption products and on the interoperability of systems employing such technology inhibits not only trade in encryption products but, more importantly, the effective growth of e-commerce. Moreover, many modern encryption techniques are patented

and licenses may be required to allow sales of European products in the US. Thus, significant barriers to international trade in encryption products without key recovery continue to exist.

5.9 Subsidies

Transparency in the area of subsidies is an obligation of the WTO Agreement on Subsidies and Countervailing Measures. Up to 1998, the US only notified the WTO of a limited number of Federal programmes, many of which were relatively small, and refused to notify its many State-level subsidies. However, following pressure from the EU, in the form of detailed questions and a counter-notification under Article 25.10 of the Agreement, the US finally began to notify certain state-level subsidies in its new and full notification of 1998.

This notification was reviewed in the WTO Subsidies Committee in May 1999. The EU still remains concerned by the lack of information on US State-level subsidies, particularly large, ad-hoc investment incentives. The reporting of Federal subsidies has improved, although there are still gaps as regards certain sectors, notably aerospace. The US undertook to include non-notified subsidies, including those identified by the EU, in the next update notification. This should have been provided in 1999. However, no update was provided at that time nor at the subsequently promised date of September 2000, nor at the last Committee in June 2001.

Aircraft

The large civil aircraft (LCA) sector is generally subject to the WTO rules on subsidies (1979 GATT Agreement on Trade in Civil Aircraft), but more specific multilateral rules are required to restrict all forms of government support and intervention for aircraft products. The EU regrets that, in 1993, at the end of the Uruguay Round negotiations, the US blocked at the last minute the adoption of a new Civil Aircraft Agreement supported by all other negotiating parties. Since then, no progress has been made.

In 1992, after lengthy negotiations on government subsidies to the LCA sector, the EU and US concluded a bilateral Agreement on Trade in Large Civil Aircraft (Bilateral Agreement) which focuses on the limitation of both direct and indirect government support. The Agreement suffers from a divergence between the ways the US and EU interpret the indirect support discipline and, on the European side, there is the concern that its implementation has created an increasing imbalance of obligations. In fact, despite the very high level of US funding for its civil aircraft industry, which since 1992 has not abated much, US representatives have continued to argue that only a negligible fraction should be considered as a *benefit* for US industry. The EU was surprised that the US did not organise in 1999 and 2000 the consultations that they were supposed to hold pursuant to the Bilateral Agreement; these only resumed on 11 January 2001.

Despite very large public funding for NASA aeronautics R&D budgets, the US has so far denied the existence of *benefits* to the US LCA industry. However, a conservative estimate of NASA's aeronautics budget for 1998 amounts to US$1.13 billion and according to estimates carried out for the EU, about 70% of NASA's aeronautics spending can be classified as support to the US LCA industry. In FY 1998, the DoD spent about US$5 billion on R&D for the development of aircraft and related equipment. This translates into benefits to the civil aircraft manufacturers amounting up to US$1.17 billion. Finally, the Federal Aviation Administration (FAA) has an annual aeronautics budget for research and development that exceeds US$2 billion. One of the FAA's stated objectives is *"to foster US civil aeronautics"*. However, the US declared that only a negligible proportion of this spending has turned out to be an identifiable (indirect) support to the US LCA industry. It should be added that Boeing benefited in 2000 from a prohibited export subsidy (FSC) of $291 million.

According to EU estimates, for the FY 1998, US LCA manufacturers received indirect support in the range of 5.2% to 7.4% of their commercial turnover. This is well above the 3% limit set by the 1992 Bilateral Agreement.

Finally, it must be underlined that the US Administration has taken an active stance in favour of the domestic aircraft industry not only through R&D government financing (subsidies), but also by means of high-level political leverage with third countries' airlines (inducement). In 1999, the EU first raised the issue of inducement in Israel at the GATT Committee on Trade in Civil Aircraft and again at the 2001 bilateral LCA Agreement consultations.

The FAA has also been used to support Boeing. In January 2000, it decided to modify the operating rules for twin-engine aircraft (ETOPS), helping the competitive position of the twin-engine B-777 vis-à-vis the quad-engine A-340. In April 2000, the Secretary of Transportation was granted discretionary authority not to grant landing & take-off rights ("slots") at four US airports for airlines which did not fly Boeing with the passage of the AIR-21 FAA re-authorisation legislation. This constitutes discrimination violating three international agreements (the EC-US 1992 Bilateral, the 1979 GATT Agreement on Civil Aircraft and the 1994 GATT).

Shipbuilding

The signing of the OECD Shipbuilding Agreement in December 1994, which is meant to eliminate aids in the shipbuilding sector, was a major achievement and was expected to have a significant impact on US and all other signatories subsidy programmes and unfair practices in the shipbuilding sector. The Agreement aims to eliminate all direct and indirect support and to combat injurious pricing practices.

Standstill provisions on existing subsidy levels and on new measures of support before the entry into force of the Agreement had been accepted within the Final Act of the Agreement.

In December 1995 the EC, South Korea and Norway deposited their instruments of ratification for the Agreement and Japan in June 1996. The failure of the US to ratify it is a matter of great concern. Opposition in the Congress originating from the naval industry did not allow the US to ratify it and despite several attempts during the past years, no bill concerning the implementing legislation has moved in Congress. The EU continues to monitor the impact of the existing subsidy programmes and to request the ratification of the OECD Agreement by the US. To date, ratification has not taken place but US industry's concerns about unfair competition by Korean yards could relaunch the process in the future.

From 1980 until 1994 US shipbuilders did not succeed in building for export. The domestic market for the US Navy and the protective Jones Act (which reserves the construction of the vessels used for coastwise traffic to US shipbuilders) provides shipyards with orders. Production was less than 100,000 gross tonnes (gt) in 1993 while the available capacity was 250,000 gt. However, during the period 1994-1998, the deliveries grew up to 641,000 gt. The US shipbuilding industry now represents 2% of the world market and the potential capacity, taking into account re-conversion of military installations, is estimated at 1.1 million gt. The Merchant Marine Act of 1936, as amended, provides for various shipbuilding subsidies and tax deferments for projects meeting domestic-built requirements. These are provided via the Operating Differential Subsidy (ODS), the Capital Constructions Fund (CCF) and the Construction Reserve Fund (CRF). These measures will have to be modified by the US Congress before the entry into force of the Shipbuilding Agreement.

In addition the US Administration introduced a new programme, the "Capability Preservation Agreement Scheme" that was signed into law on 18 November 1997 (PL 105-85). This scheme allows qualified shipyards to claim for reimbursement on their US Navy shipbuilding contracts for certain costs attributable to work on their commercial shipbuilding.

The Merchant Marine Act also established under Title XI, the Guaranteed Loan Program (formerly known as the Federal Ship Financing Guarantee Program) to assist in the development of the US merchant marine by guaranteeing construction loans and mortgages on US flag vessels built in the US. In 1993 the guarantee programme was extended to cover vessels for export. During FY2000, the Maritime Administration (MARAD) approved US$886 million worth of Title XI guaranteed loan applications for 15 vessels and barges and 2 cruise ships. As of July 2001, for FY2001 MARAD has approved US$536 million in loan guarantees. Since fiscal year 1994, the Title XI programme has guaranteed loans for at least 426 vessels covering US$5.75 billion in loans. The OECD implementing legislation will have to provide for the amendment of these loan guarantees in order to put them in conformity with the rules of the 1994 Understanding on export credits for ships, which would have entered into force together with the OECD agreement. The US industry would like to retain this scheme that has helped to revitalise the sector.

Agriculture and Fisheries

The US operates a range of programmes designed to subsidise and/or promote exports of US agricultural products. The US has continued to maintain an aggressive export policy for agricultural products.

The Export Enhancement Program (EEP) allows US exporters to apply for a cash subsidy designed to make US products competitive with exports from other countries. EEP has not been used to any great extent in recent years, but potentially applies to products exported to over 70 countries. The Dairy Export Incentive Program (DEIP) is also used for market development purposes. The Market Access Program (formerly the Market Promotion Program) offers a share of costs for promotion campaigns for agricultural products (the majority being high value and value added) in selected export markets. The budget provides US$ 90 million annually for fiscal years 1996-2002.

The Export Credit Guarantee Program offers US government guarantees of short-term GSM-102 (6 months-3 years) and medium-term GSM-103 (3-10 years) private bank loans at commercial interest rates. It is targeted at countries that need guarantees to secure financing but show a reasonable ability to repay. The program includes a specific list of commodities per country allocation. It has recently become the main export policy tool of USDA, with annual allocations exceeding $5 billion and declared annual subsidy levels of over $400 million. The program has a default rate of over 10% historically, and it is characterised by uncertainty (and lack of transparency) with respect to the implicit subsidy component stemming from rescheduling of payments. To date no agreement has been reached on rules governing export credit guarantees in agriculture (under Article 10.2 of the UR Agreement on Agriculture). Negotiations were due to commence in the OECD in 1995, but were held up by US objections for 4 years. The OECD in its 2000 report on export credits found that 88% of trade distortions arising from export credits in the agricultural sector came from the US. The Emerging Markets Program is funded under the Farm Bill for approximately $1 billion during FY1996-2002 with $10 million annually for technical assistance.

The propensity of the US to use food aid to countries not suffering food shortages as a means of surplus disposal of farm products has the effect to disturb local markets, cut out traditional supplies and undermine local producers. The EU continues to complain about this practice that accounts for a substantial proportion of US grain exports and is seeking disciplines on the abuse of food aid in the WTO agricultural negotiations. The EU strongly supports the provision of *genuine* food aid by the US and other countries.

6. INVESTMENT RELATED MEASURES

6.1 Direct Foreign Investment Limitations

National security considerations: Exon-Florio provisions

Section 5021 of the 1988 Trade Act, the so-called Exon-Florio amendment, authorises the President to investigate the effects on US national security of any merger, acquisition or take-over which could result in foreign control of legal persons engaged in interstate commerce. This screening is carried out by the Treasury-chaired Committee on Foreign Investment in the US (CFIUS). The length of time taken by the screening process and the legal costs involved can act as a deterrent to foreign investment. Moreover, should the President decide that any such transactions threaten national security – which is widely interpreted -- he can take action to suspend or prohibit these transactions. This could include the forced divestment of assets. There are no provisions for judicial review or for compensation in the case of divestment. Since being introduced, the scope of Exon-Florio has been further enlarged:

- Since 1992, an Exon-Florio investigation must be made if a foreign government owned entity engages in any merger, acquisition or take-over that gives it control of the company. Further provisions contain a declaration of policy aimed at discouraging acquisitions by and the award of certain contracts to such entities;
- The 1993 Defence Authorisation Act requires a report by the President to Congress on the results of each CFIUS investigation and by including, among other factors to be considered, "the potential effect of the proposed or pending transaction on US international technological leadership in areas affecting US national security" -- again blurring the line between industrial and national security policy.

The Exon-Florio provisions thus inhibit the efforts of OECD members to improve the free flow of foreign investment and could conflict with the principles of the OECD Code of Liberalisation of Capital Movements and the National Treatment Instruments, although the US has notified reservations under the instruments for Exon-Florio.

While the EU understands the wish of the US to take all necessary steps to safeguard its national security, there is continued concern that the scope of application may be carried beyond what is necessary. In this context, the EU has drawn attention to the lack of a definition of national security and the uncertainty as to which transactions are notifiable. Although the US Treasury's implementing regulations, which were published in November 1991, did provide some additional guidance on certain issues, many uncertainties remain. Coupled with the fear of potential forced divestiture, many if not most, foreign investors have felt obliged to give prior notification of their proposed investments. In effect a very significant number of EU firms' acquisitions in the US are subject to pre-screening.

Foreign ownership restrictions

With regard to foreign ownership, the US has informed the OECD of a number of additional restrictions that it justifies "partly or wholly" on the grounds of national security. Foreign investment is restricted in coastal and domestic shipping under the Jones Act and the US Outer Continental Shelf Lands Act, which includes fishing, dredging, salvaging or supply transport from a point in the US to an offshore drilling rig or platform on the Continental Shelf. Foreign investors must form a US subsidiary for exploitation of deep-water ports and for fishing in the US Exclusive Economic Zone (Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987). Under the American Fisheries Act of 1998, fishing vessel-owning entities must be at least 75% owned and controlled by US citizens in order to document a

vessel with a fishery endorsement. Licences for cable landings are only granted to applicants in partnership with US entities (Submarine Cable Landing Licence Act of 1921).

Under the Federal Power Act, any construction, operation or maintenance of facilities for the development, transmission and utilisation of power on land and water over which the Federal government has control are to be licensed by the Federal Energy Regulatory Commission. Such licenses can be granted only to US citizens and to corporations organised under US law. The same applies under the Geothermal Steam Act to leases for the development of geothermal steam and associated resources on lands administered by the Secretary of the Interior or the Department of Agriculture. Regarding the operation, transfer, receipt, manufacture, production, acquisition and import or export of facilities which produce or use nuclear materials, the Nuclear Energy Act requires that a licence be issued but the licence cannot be granted to a foreign individual or a foreign-controlled corporation, even if there is incorporation under US law.

Conditional national treatment

The principle of National Treatment -- that foreign direct investment should not be treated less favourably than domestic enterprises in like circumstances -- is one of the pillars of the liberalisation in the world economy and a well-established legal standard in bilateral treaties and multilateral agreements. In OECD Member States as well as world wide, there has been a trend to remove barriers to the entry of foreign investment and to extend the application of national treatment by gradually removing existing restrictions. However, in the US, as in other countries, some long-established exceptions to this principle still exist thus giving rise to instances of Conditional National Treatment (CNT).

CNT generally relates to the treatment of foreign-owned firms that is less favourable than that of domestic firms. The conditioning of investment may take the form of:

Reciprocity

The investment is allowed only to the extent that "comparable" or "equivalent" opportunities are available to US firms in the home country of the investor. In some cases, such requirements may not even be related to the sector in which the foreign company wants to be economically active in the US ("cross-sectoral reciprocity").

Performance requirements

Relating either to the contribution of the foreign controlled company's activities to the US economy and employment, or to the realisation of specified parameters of production (volume, local content).

Public subsidies

The EU has become increasingly concerned over recent years about US legislation taking the form of tests on whether a foreign owned company legally established in the US meets certain conditions and requirements. CNT language is most notable in the area of science and technology and concerns the granting of Federal subsidies for R&D or other advantages to US-incorporated affiliates of foreign companies.

Examples of conditional national treatment are: the American Technology Pre-eminence Act of 1991 that authorises the Advanced Technology Program, an industry-led, cost-shared R&D programme, designed to develop high risk technologies that the private sector is unlikely to pursue without government support; the Energy Policy Act of 1992 that authorises Federal programmes and joint ventures between industry and government laboratories in energy-related R&D; the National Co-operative Production Act of 1993, which extends the favourable antitrust treatment applying to joint R&D ventures, to joint manufacturing ventures and the Advanced Lithography Program which deals with research on semiconductor materials and processes.

Although US subsidiaries of European firms have been able to participate in US programmes, the fact remains that satisfying the eligibility conditions can be a more cumbersome process for foreign-owned companies.

6.2 Tax Discrimination

Reporting requirements

The information reporting requirements of the US tax code as applied to certain foreign-owned corporations mean that domestic and foreign companies are treated differently. These rules apply to foreign branches and to any corporation that has at least one 25% foreign shareholder. They require the maintenance, or the creation, of books and records relating to transactions with related parties. The documents must be stored at a place specified by the US tax authorities and an annual statement filed containing information about dealings with related parties. There are stiff penalties for non-compliance with the various provisions. These requirements are onerous. Although their purpose, the prevention of tax avoidance and evasion, is reasonable, they are burdensome and add to the complexity for foreign-owned corporations of doing business in the US.

"Earnings stripping" provisions

The so-called "earnings stripping" provisions in Internal Revenue Code 163j limit the tax deductibility of interest payments made to "related parties" which are not subject to US tax, and of interest payments on loans guaranteed by such related parties. In practice, most "related parties" affected will be foreign corporations.

The provisions are designed to prevent foreign companies from avoiding tax by financing a US subsidiary with a disproportionately high amount of debt as compared with equity, with the result that profits are paid out of the US in the form of deductible interest payments rather than as dividends out of taxed income. This objective is reasonable and in line with internationally agreed tax policy. However, the US rules for calculating the ceiling in any year on the amount of admissible interest uses a formula, the results of which can be inconsistent with the internationally accepted arm's-length principle. If, ultimately, this leads to the disallowance of relief for the interest payable, it could have discriminatory consequences because a tax treaty partner would not be obliged to make a corresponding adjustment to taxable profits in the other country. The provisions relating to loans guaranteed by related parties could also disallow the interest on a number of ordinary commercial arrangements with US banks and provide a disincentive from raising loans with them.

State unitary income taxation

Certain US States (Alaska, Arizona, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Rhode Island and West Virginia) and the District of Columbia assess State corporate income tax for foreign-owned corporations on the basis of an arbitrarily calculated proportion of their total world-wide profits. This proportion is calculated in such a way that a company may have to pay tax on income arising outside the State, giving rise to double taxation.

World-wide unitary taxation

This is inconsistent with bilateral tax treaties concluded by the US at the Federal level and a company may face heavy compliance costs in providing details of its world-wide operations. International attention has focused mainly on California, which from 1986 has allowed companies to elect for "water's edge" unitary taxation. Under this method, companies are taxed on the basis of a share of their total US (rather than world-wide) income. The 1994 US Supreme Court ruling that California's former world-wide unitary tax was constitutional was not encouraging. The EU and its Member States remain concerned about unitary regimes and will keep a watch on possible developments.

Foreign Sales Corporations

US legislation authorising so-called Foreign Sales Corporations (FSCs) (26 USC Sections 921-27) provides that, under specific conditions, certain income earned by a foreign subsidiary of a US corporation will not be subject to US tax. The statute's presumption as to income allocation is questionable and gives rise to an objectionable tax benefit accruing to US firms. The purpose of the favourable tax treatment has been to encourage the export of US manufactured goods. The FSC is general legislation, applicable to all industrial and agricultural sectors and was recently expanded to cover the software and military sectors.

Subsidies, which are contingent upon export performance or upon the use of domestic over imported goods are strictly prohibited under the WTO. The FSC scheme applies exclusively to the export of goods and these goods must have more than 50% of their market value of US origin. Therefore, the FSC scheme provides a prohibited subsidy within the meaning of Article 3 of the Agreement on Subsidies and Countervailing Measures (ASCM).

FSC tax exemptions cannot be justified by the aim to avoid double-taxation for US companies established abroad as FSCs are typically established in tax havens where no income tax is paid at all. For instance, in 1996, 91% of all FSCs were incorporated in the US Virgin Islands, Guam and Barbados.

The EU also considers that the FSC scheme is an export subsidy within the meaning of Article 1 of the Agreement on Agriculture. On 24 February 2000, the WTO Appellate Body ruled in favour of the EU, as it considered that FSC exemptions amount to a prohibited export subsidy under the ASCM as well as the Agreement on Agriculture. On 15 November 2000, the "FSC Repeal and Extraterritorial Income Exclusion Act" came into effect. This Act still provides US firms with the subsidies and so does not comply with the Panel's rulings. The EC requested a Panel that, in its report circulated 20 August 2001, struck down the Act. The EU is continuing to monitor the situation closely.

Aircraft

In terms of its economic impact, Boeing declared in its 2000 financial statements that FSC tax benefits amounted to US$291 million. This accounted for about 14% of Boeing's net earnings for the same year (US$2.13 billion). Between 1995 and 2000, FSC benefits for Boeing amounted to US$1 to 2 billion. In terms of market value, it has been estimated that improved earnings due to FSC subsidies translate into advantages of US$1 to 2 billion for Boeing's market capitalisation, allowing it recourse to relatively cheaper capital. The FSC system therefore grants a considerable competitive advantage to US aircraft manufacturers to the detriment of their competitors.

7. INTELLECTUAL PROPERTY RIGHTS

7.1 Copyright and related areas

Moral rights

Despite the unequivocal obligation contained in Article 6bis of the Berne Convention to which the US acceded in 1989 to make "moral rights" available for authors, the US has never introduced such rights and has repeatedly announced that it has no intention to do so in the future. It is clear that while US authors benefit fully from moral rights in the EU, the converse is not true, which leads to an imbalance of benefits from Berne Convention membership to the detriment of the European side. It is noted that the US has ratified and implemented the World Intellectual Property Organisation (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty. Adherence to these Treaties by the US requires legislation on moral rights at least for performers.

Cross-border licensing of music works

Following a complaint under the Trade Barriers Regulation concerning obstacles to the licensing of music works in the US, an examination procedure was initiated on 11 June 1997. The complaint was lodged by the Irish Music Rights Organisation (IMRO) and unanimously supported by the Groupement Européen des Sociétés d'Auteurs et de Compositeurs (GESAC). It related to Section 110(5) of the 1976 US Copyright Act that provides for an exemption to the author's exclusive rights to authorise the communication of their works to the public ("homestyle exemption"). Concretely, Section 110(5) permits the playing of "homestyle" radios and televisions in public places (such as bars, shops, restaurants etc.) without the payment of a royalty fee.

The investigation report, which was submitted to the TBR Committee on 3 February 1998, confirms that Section 110(5) violates the US's obligations under Article 11bis(1) of the Berne Convention for the Protection of Literary and Artistic Works and consequently those under Article 9(1) of the Agreement on Trade related Aspects of Intellectual Property Rights (TRIPs). The report also shows that this practice has caused a serious deprivation of income to EU right-holders as a large number of commercial establishments do not pay any royalty fees: the report estimated the resulting royalty losses at between US$3 and 6 million a year, representing between 10 and 20% of the annual amount of royalties obtained by EU authors for the public performance of their works in the US. Moreover, the incomplete copyright protection in the US has broader economic effects negatively affecting the overall position of authors on the US market.

On the basis of these conclusions, the Commission invited the US to discuss the matter informally. However, the US did not show a willingness to find an amicable settlement that would be satisfactory for EU right-holders. In addition, on 6 October 1998 an amendment was approved by the Congress ("Fairness in Music Licensing Act") substantially widening the scope of the homestyle exemption. As a result, the effects on Community right-holders worsened. At the request of the EC and its Member States, at the DSB meeting of 25 May 1999, a Panel was established.

On 5 May 2000, the panel issued its final report. The panel's main finding is that the most important of the two subparagraphs of Section 110(5) is in breach of the US' obligations under the TRIPs Agreement and therefore recommended that the DSB request the US to bring Section 110(5)(B) into conformity with its obligations under the TRIPS Agreement. The report of the Panel was published on 15 June and was adopted by the DSB on 27 July. The US did not appeal the report but informed the DSB that to implement the recommendations and rulings of the DSB would require a "reasonable period of time" in which to do so under the terms of Article 21.3 of the rules of the DSB. The matter was put to arbitration for determination of a "reasonable period of time". The arbitrator held on 15 January 2001 that such a period was 12 months after adoption of the Panel report (ie. 27 July 2001).

In July 2001 the EU and the US agreed to look for ways to compensate European performers and composers for the economic losses due to the "business exemption", until such time as the US Copyright Act is amended. The exact amount of the compensation will be determined by independent arbitrators.

The WTO DSB has approved the US request to postpone the deadline for implementing WTO rulings, in order to facilitate discussions with the EU on compensation. The parties now have until the end of the US Congressional session to negotiate a compensation deal.

7.2 Appellations of Origin and Geographical Indications

Inadequate protection

The amendment to the US trademark law (new subsection 2(a) of the Lanham Act) adopted for the purpose of implementing Articles 23.2 and 24.5 of the TRIPs Agreement creates grounds for refusal or cancellation of a trademark that consists of, or comprises, a geographical indication which, when used on - or in connection with – wines or spirits, identifies a place other than the origin of the good. It does not apply to indications that an applicant first used in connection with wines or spirits before the TRIPs Agreement entered into force. However, Art. 24.5 TRIPs allows continued use only of those trademarks used or registered in good faith before 1995 or before the geographical indication is protected in its country of origin. Thus, it will have to be closely followed whether the US complies with its TRIPs obligations, by ensuring that a trademark used or registered in bad faith in the US can no longer be maintained where it is identical with or similar to a geographical indication.

The European Commission and the US Government continue to discuss a broad-ranging wine agreement, which would include improving the protection of geographical indications.

Semi-generic names

US regulations allow some EU geographical denominations of great reputation to be used by American wine producers to designate products of US origin, many being used in word and service marks, even for products other than wines. The most significant examples are Burgundy, Claret, Champagne, Chablis, Chianti, Malaga, Madeira, Moselle, Port, Rhine Wine (Hock), Sauterne, Haut Sauterne and Sherry. Despite the fact that in 1997 the D'Amato amendment codified US regulations on the use of semi-generic wine names in the US into Federal law, some progress was made in the context of the current bilateral negotiations between the US and the EU where the US took a conditional commitment to phase out semi-generic names. This commitment as well as all other areas of the protection of geographical indications is currently under discussion between the EU and the US.

Grape names

American producers also use some of the most prestigious European geographical indications as names of grape varieties. This could mislead consumers as to the true origin of the wines.

Spirits

With regard to spirits, an agreement was approved by the EU in February 1994 for the mutual recognition of two US and six EU geographical indications and provides for future discussions on the possibilities of extending their mutual recognition. For the other EU designations, the US regulations provide a limited protection but does not prohibit their improper use: a geographical indication when qualified by ATF as "non-generic distinctive" may be used for spirits not originating in the place indicated but with a proviso such as "kind", "type", etc. in conjunction with the true origin of the product. This appears to violate Article 23.1 of TRIPs which expressly prevents use of a geographical indication for spirits not originating in the place indicated, even where the product's true origin is indicated or accompanied by an expression such as "kind", "type", "style", "imitation" or the like.

Also, it should be noted that the US protects geographical indications under Article 22 TRIPs only in as much as they may mislead consumers rather than *per se*. The practical approach would appear to be insufficient in the light of the TRIPs requirement that, while granting some leeway as to the means of protection, does not permit inadequate protection. Certain EU agri-food producers have seen their interests affected adversely by the US approach.

7.3 Patents, Trademarks and related areas

Measures affecting imported goods

Section 337 of the Tariff Act of 1930 provides remedies for holders of US intellectual property rights by keeping the imported goods which are infringing such rights out of the US ("exclusion order") or to have them removed from the US market once they have come into the country ("cease and desist order"). These procedures are carried out by the US International Trade Commission (ITC) and are not available against domestic products infringing US patents. Under the 1988 Omnibus Trade and Competitiveness Act, several modifications have been introduced to Section 337, such as the availability of remedies in relation to imported goods that infringe a US process patent. The GATT Panel report which was adopted by the Contracting Parties in November 1989 concluded that Section 337 was inconsistent with Article III:4 GATT. The provision in question accords to imported products alleged to infringe US patent rules treatment less favourable than that accorded to like US products. Some modifications have been made to Section 337 in the context of implementing TRIPs. However, in its present form Section 337 does not eliminate the major GATT inconsistencies raised by the 1989 GATT Panel. As a result, Section 337 appears to continue to be in violation of Article III: 4 GATT and of a number of provisions contained in TRIPs.

In February 2000, the EC and its Member States held WTO consultations with the US on Section 337 during which the US maintained the view that Section 337 was in compliance with the provisions of the GATT and TRIPs. The EC is currently analysing the information submitted during the consultations with a view to requesting, possibly, the establishment of a WTO panel on this issue.

Advertising low price perfumes imitating famous European brands and thus benefiting from the well-known reputation of the European brands is not prohibited. This practice may violate Article 6bis Paris Convention (confusion) and/or Article 10bis Paris Convention (unfair competition), as incorporated into the TRIPs Agreement through its Article 2.1.

Government use

Under US law (28 US Code Section 1498) a patent owner may not enjoin or recover damages on the basis of his patent for infringements due to the manufacture or use of goods by or for the US government authorities. This practice is apparently extremely widespread in all government departments and it appears to be inconsistent with Article 31 of the TRIPs

Agreement that introduces a requirement to inform promptly a right holder about government use of his patent.

First to file

European companies are faced with indirect costs resulting from the 'first-to-invent' system for patent registrations in the US. The US patent system applies the principle of 'first-to-invent' that is only used in the US. The rest of the world follows the principle of 'first-to-file', fixing thereby a clearly defined moment when the priority right to a patent is established. The 'first-to-invent' principle creates several obstacles for EU and US companies trying to obtain a patent right in the US, namely because it has a considerable economic impact on the potential right holder. The issue has figured on top of the TBD agenda and the latter has recommended the adoption of the 'first-to-file' approach in the US.

Section 211 of the US Omnibus Appropriations Act

Congress adopted Section 211 of the Omnibus Appropriations Act in October 1998. It prohibits, under certain conditions, the registration or renewal of a trademark that is identical or similar to a trademark previously owned by a confiscated Cuban entity and sets forth that no US Court shall recognise or enforce any assertion of such rights.

In the view of the Commission and the Member States, Section 211 violates several provisions of the TRIPs Agreement, notably on national treatment and most-favoured-nation treatment, the protection of trademarks and enforcement. Section 211 was already applied in a case involving a European company that was not able to defend its trademark rights before a US court as a consequence.

At the request of the EC and its Member States of July 1999, WTO consultations were held with the US on Section 211 in September and December 1999. These consultations, while clarifying the respective positions, did not lead to a satisfactory resolution. Therefore, in March 2000, the EC and its Member States decided to request the establishment of a WTO panel.

The Panel's report was issued on 6 August 2001 and confirmed that Section 211 was in violation of Article 42 of TRIPs by denying trademark owners access to the courts. Furthermore, it stated expressly that Section 211 should not apply when the trademark has been abandoned. However, there were two points where the Panel did not agree with the EU's interpretation of the compatibility of Section 211 with WTO rules; that trade names are not covered by TRIPs and that TRIPs does not regulate the question of the determination of IPRs.

The EU has therefore decided to appeal the panel ruling.

Patentability of software and business methods

The patentability of software and business methods in the US has been identified by many as a potential barrier to entry in markets.

8. SERVICES

8.1 Business Services

Professional Services
Following the conclusion of the GATS negotiations in 1993, the access of professional service suppliers to the US has been improved since a number of nationality conditions and in-State residence requirements have been removed.

However, despite the improvements contained in the schedule of specific commitments, access to the US market, where licensing of professional service suppliers is generally regulated at State level, remains unsatisfactory. This is mainly due to the lack of transparency in -- and divergence of -- access conditions at State level, as well as the frequent absence of a transparent regulatory regime for the operation of foreign professional service suppliers. In addition, the Buy America provision in Section 136 (1) of the Foreign Relations Authorisation Act for FY1990-91 gives US companies bidding for contracts to provide guard services for US embassies a 5% price preference.

Nonetheless, the situation should improve steadily under the GATS: the Working Party on Professional Services has agreed on disciplines applicable to accountancy services, and the new Working Party on Domestic Regulation will continue working on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade. In addition, negotiations on market access and on the further liberalisation of professional services will take place as part of the next round of trade liberalisation talks.

8.2 Communication Services

In spite of the GATS Basic Telecommunications Agreement concluded in 1997 and in force since February 1998, European and other foreign-owned firms seeking access to the US market still face important barriers, particularly in the mobile services sector (e.g. investment restrictions, lengthy and burdensome proceedings, protectionist attitudes in certain congressional circles and lack of access to frequencies for 3rd generation services) and in the satellite services sector (e.g. lengthy proceedings, conditionality of market access, de facto reciprocity-based procedures). The EC notes that there have been gradual improvements on a number of issues since its last report. However, as exemplified by the protectionist bills introduced in the Congress in 2000 and the lengthy proceedings to allow transfer of licenses,

market access is still not fully ensured and this situation is not in line with the market access policy advocated by the US; indeed it provides a competitive advantage to the significant number of US companies that already have access to the EU market in these fields.

WTO Basic Telecom Agreement

The negotiations on basic telecommunication services, held in the GATS framework under the auspices of the WTO, concluded successfully on 15 February 1997. At that time, 69 governments undertook legally binding commitments on access to their telecommunications services' market, thereby liberalising a global market estimated to be worth approximately US$600 billion; i.e. over 90% of total global revenues for telecommunications services. The WTO Basic Telecom Agreement entered into force in February 1998.

The US undertook commitments on most telecommunications services (voice telephone, data, telex, telegraph, private leased circuit services; local, domestic, long-distance and international; using any kind of technology; etc.), but retained several restrictions. Foreign direct investment in common carrier radio licences is limited to 20% (indirect investment being allowed up to 100%). The US also kept a market access restriction on satellite-based services, namely the monopoly of Comsat to link up with Intelsat and Inmarsat (US legislation, the "ORBIT Act", removed the Comsat monopoly in 2000, see below). Late in the negotiation, the US took an exemption to the MFN principle for one-way satellite transmission of Direct to Home (DTH), Direct Broadcast Satellite (DBS) and digital audio services. The EU reserved its right to challenge this exemption as it applies to services which are part of the audio-visual commitments undertaken by the US in 1994 as a result of the Uruguay Round.

In November 1995, in the run-up to the WTO negotiations on a Basic Telecoms Agreement, the FCC had adopted a rule on entry of foreign-affiliated carriers into the US market, adding a new factor to the Commission's public interest review for the purpose of granting waivers of Section 310 restrictions on foreign indirect investment. Specifically, the FCC introduced an "Effective Competitive Opportunity Test" (ECO-test). The FCC also issued in May 1996 a notice of proposed rulemaking applying the ECO-test to foreign-licensed satellites. The EU submitted objections in both proceedings. On 25 November 1997, the FCC adopted two rulings (a general ruling on foreign participation in the US market, and a specific one on the satellite services market entitled DISCO-II) to implement the commitments of the US in the Basic Telecom Agreement. In these rulings the FCC replaced the ECO-test with a rebuttable presumption that entry by carriers from WTO countries and by satellites licensed by WTO countries is pro-competitive, but the FCC retained the unclear 'public interest' criteria which can still be invoked to deny a licence to a foreign operator for various motives, such as "trade concerns", "foreign policy concerns" and "very high risk to competition". Although the FCC expressed its intention to only deny market access on this basis in exceptional circumstances (which are not well defined) the discretion retained by the FCC remains of concern to the EU and raises questions as to the compatibility of the FCC rules with US WTO commitments.

Radio and mobile communications

Section 310 of the Communications Act of 1934 remains basically unchanged following the adoption of the Communications Act of 1996. It contains restrictions on the holding and transfer of broadcast and common carrier radio communication licences: no broadcast or common carrier (or aeronautical en route or aeronautical fixed radio station) licence shall be granted to, or held by, foreign governments or their representatives, aliens, foreign corporations, or corporations of which more than 20% of the capital stock is owned or voted by a foreign entity (25% if the ownership is indirect subject to public interest waiver). The one change brought about by the new Act was to eliminate the restriction on foreign directors and officers.

This situation has not changed significantly through the Basic Telecom Agreement, as limitations on direct foreign ownership of common carriers radio licences have been explicitly retained in the US offer.

To provide telecommunications services, operators typically need to integrate radio transmission stations, satellite earth stations and in some cases, microwave towers into their networks. Foreign-owned US operators face additional obstacles in obtaining the licensing of these various elements relative to US-owned firms.

Mobile communications: third generation systems

Access of third generation (3G) mobile communication systems to the US market could be restricted due to lack of availability of frequencies in the US. This concern has arisen following the US decision to allocate to second generation systems the frequency bands which had been identified for third generation systems by the International Telecommunications Union (ITU) at its World Assembly Radio-communications Conference in 1992. These frequency bands are generally available for third generation systems in European and in most of the other countries throughout the world, as these countries have followed the 1992 ITU recommendation. The World Assembly Radio-communications Conference in May 2000 (WRC-2000) identified additional spectrum for third generation systems. In October 2000, the US Administration recognised for the first time in a Memorandum by the US President that "Third generation wireless systems need radio frequency spectrum on which to operate. Executive departments and agencies and the Federal Communications Commission (FCC) must cooperate with industry to identify spectrum that can be used by third generation wireless systems, whether by reallocation, sharing, or evolution of existing systems, by July 2001". The USG objective is to allow FCC to auction 3G spectrum by September 2002, though recent developments indicate that this may take longer. The process is primarily focused on the spectrum identified at WRC-2000, which is already being used in the US by commercial telecommunications, television, national defence, law enforcement, air traffic control, and other services. The process has lead already to a number of interim reports and the EU will continue to monitor it. In particular, it is necessary to ensure that the US market is open to European and foreign country operators which are potential new entrants in the market, as well as to provide regulatory certainty to companies interested in investing in these new technologies in the US.

Foreign investment

The US has undertaken commitments in the framework of the Basic Telecom Agreement to suppress restrictions to indirect investment from 1 January 1998. However, the US Administration holds the view that it is not necessary to adopt specific legislation to abolish such investment restrictions, since the FCC may waive these restrictions under the current law by invoking the "public interest." The US Administration and the FCC consider that this waiver provision is sufficient for the FCC not to apply section 310(b)(4) to WTO Members. This situation, however, does not provide certainty to European operators.

The FCC proceeding initiated in September 2000 by the application by Deutsche Telekom (DT), VoiceStream and Powertel for a transfer of control of licenses from VoiceStream and Powertel to DT in the course of DT acquisition of these mobile carriers, and concluded on April 24, 2001 shows that foreign investment in the US still faces uncertainty and lengthy proceedings.

The US Congress also considered during 2000 legislation that would have severely limited the ability of foreign government-owned companies to invest in US telecommunications companies. In particular, legislation introduced by Senator Hollings would have, if adopted, constituted a clear violation of US commitments in the WTO on foreign investment and would have negatively affected the interests of European companies. The EU will remain vigilant and oppose any action, through legislation or otherwise, that would undermine the US WTO commitments.

Satellite Communications

In the past few years, European satellite carriers have encountered serious problems in serving the US market[1]. Notably, the following cases have been brought to the Commission's attention: Inmarsat Ventures plc.[2], New Skies Satellites N.V.[3], and Eutelsat[4].

These cases show that proceedings by the FCC on spectrum allocation and licensing are not always carried out in an objective, transparent, timely and non-discriminatory manner, and raise concerns regarding their compatibility with US WTO commitments. Fortunately, the goodwill of the companies involved has permitted positive outcomes in some cases.

In parallel to these individual cases, Congress considered for nearly two years legislation that sought to promote a pro-competitive privatisation of Intelsat, Inmarsat, and their successor and spin-off entities. Various bills sought to unilaterally impose the specific criteria and timetables for the privatisation of these entities.

The "Open-market Reorganisation for the Betterment of International Telecommunications Act" (ORBIT Act) was finally adopted by Congress and signed on 17 March 2000 by President Clinton. The final text represents an improvement compared to earlier versions (hopefully as a result of the démarches made by the EC and its Member States). It gives more time, for instance, to these entities to conduct IPOs and meet the Act's privatisation criteria, but it still imposes conditions on entry into the US market of Intelsat, Inmarsat Ventures plc and New Skies Satellites NV. It contains guidelines for the US administration to influence

[1] Please note that "a satellite operator applying for market access to the US" means in practice that one or more US earth station operators apply to the FCC for a license to link up with the satellite(s) of that operator. The FCC process entails the allocation of certain frequency bands and/or orbital slots.

[2] Inmarsat Ventures plc has access to the US market for maritime and international aeronautical services but access is not yet assured for land-mobile services, although Inmarsat has been privatised since April 1999 and is now a UK-based company. Inmarsat access to the US market should not be restricted but so far, the FCC has issued only Special Temporary Authorisations for earth station operators to link with Inmarsat satellites. The ORBIT Act sets 'pro-competitive' criteria for US market access by Inmarsat, Intelsat and their successor and separated entities and pursuant to this Act, on 28 June 2001, the FCC extended to the end of the year the deadline for Inmarsat's initial public offering (IPO). While this delay is inconsistent with the general commitments in the WTO by the US, market access for Inmarsat service providers is expected shortly. However, it is likely to contain some conditions relating to the IPO.

[3] The Netherlands-based New Skies Satellites N.V. (the privatised Intelsat spin-off) was granted market access to the US in August 1999 to provide Fixed Satellite Services (excluding Direct to Home services) for a 3-year duration only (compared to the standard renewable 10-year term). The FCC considered that New Skies was not independent enough from Intelsat and that, therefore, unconditioned access to the US market could have triggered anti-competitive risks due to potential difficulties for US companies to obtain access to foreign markets from national regulatory authorities having a wish to protect New Skies. New Skies made since then an IPO of shares and the results of this IPO satisfied the FCC (i.e., resulted in a "substantial dilution" of Intelsat Signatories' ownership) and entitled US licensees accessing New Skies' satellites to the standard 10-year earth station license, granted by the FCC in April 2001. This case shows that the US regulation (DISCO II and its "competition criteria") is actually carried out in a manner that violates US commitments in the WTO (in practice, the FCC still applies a reciprocity mechanism similar to the "ECO-test" by linking market access in the US to market access for US operators in third countries).

[4] Eutelsat (an Inter-Governmental Organisation based in France and privatised 2 July 2001) faced last year a competing claim by a US company, Loral Skynet, to use a specific orbital location to provide Fixed Satellite Service to and from the US, in spite of the priority rights it had acquired under the ITU process. Eutelsat and Loral finally came to an agreement in December 1999, as it became clear that the FCC would not allow US earth station operators to link up with Eutelsat's satellite at the disputed orbital location in the absence of a settlement with Loral Skynet. In particular, there is a concern that the FCC leveraged its regulatory clout to the advantage of Loral and brought Eutelsat to the negotiating table. Absent this, and given ITU rules of filing priority, Eutelsat would have had no incentive to engage into settlement discussions. Eutelsat's existing customers have now received FCC authorisation to link up with its satellite. FCC also took the decision to allow future customers to automatically link up with its satellite. This case raises questions about the compatibility of US domestic procedures with the GATS provisions on Domestic Regulation.

the privatisation process of these companies[5] and to use that privatisation process to pursue wider objectives[6]. President Clinton, on signing this bill into law, stated that the "provisions of S.376 could interfere with the President's constitutional authority to conduct the Nation's foreign affairs" and that he "will therefore construe these provisions as advisory". The Act also includes statutory privatisation criteria that the FCC must apply in order to determine whether to grant market access to these entities. The President thus also stated that the Administration would continue to advise the FCC (which is an independent agency) on matters concerning interpretation of and compliance with US WTO obligations.

However, there is serious concern in the EU that these criteria apply to no other competitor, foreign or domestic and could lead the FCC to limit these entities' access to the US market and thereby reduce competition in the US market (contrary to the explicit intent of the Act to promote competition). In that respect, the Act violates WTO obligations and if used against EU operators' interests, the EU reserves its rights of arbitration procedures under the WTO.

Finally, the US keeps restrictions on the provision of one-way satellite transmission of Direct to Home (DTH), Direct Broadcast Satellite (DBS) and digital audio services, following the exemption to the MFN principle taken by the US at the very last moment of the GATS negotiations on basic telecoms services.

Universal service

The current universal service and access charge regimes in the US require further clarification, in particular with a view to ensuring that foreign consumers are not subsidising universal service obligations in the US.

Digital terrestrial television

The FCC mandated in 1996 an exclusive transmission standard for digital terrestrial television in the US, known as ATSC. This decision has prevented the technology (DVB-T) developed in Europe and being adopted in several countries around the world, from entering into the US market. Several market players in the US have called for a review of the FCC decision regarding, at least, the modulation system of the ATSC transmission standard so as to allow the market to choose the technology best suited for the innovative services and applications to be offered to consumers. Nevertheless, the FCC confirmed its decision in a January 2001 Order, following a period of comparative tests between ATSC and DVB-T modulation systems held in the US whose procedure and results have been disputed by the DVB-T industry. This is in clear contradiction with USG calls for technological neutrality and market driven approaches in other sectors, such as mobile communications.

Moreover, as another example of regulatory intervention in this market, the EU notes that, in a Further Notice of Proposed Rulemaking issued in January 2001, the FCC considered whether to require some TV sets to have the capability to receive over-the-air DTV signals in addition to displaying the existing analog TV signals. It asked whether a gradual requirement to include DTV reception capability in TV sets could help promote a more rapid development of high DTV set penetration. This proposal was supported by a letter of outgoing FCC Chairman Kennard to Senator Hollings, now Chairman of the Committee on Commerce, Science and Transportation encouraging the US Congress to adopt legislation that would require over time, starting from 1 January 2003, that "an apparatus designed to receive television signals that is shipped in interstate commerce, manufactured in the United States, or

[5] Mainly by calling on the US administration to achieve the bill's objectives in international fora, by requiring that the US administration oppose any application by these entities for additional orbital locations in the ITU and by requiring that the US administration ensure that the US remain the administration responsible for Intelsat notification to the ITU.

[6] Specifically, the bill requires the US administration to pursue a cost-based settlement policy for international telecommunications, and to oppose assignment by competitive bidding of orbital locations or spectrum for the provision of international or global satellite communications services.

imported from any foreign country into the United States, for sale or resale to the public, such apparatus be equipped to receive digital television broadcast signals". Therefore in practice, if this approach was adopted, starting in 2003, all TV sets sold in the US, either manufactured there or imported, would over time be required by the FCC to include the ATSC technology.

The EC will continue to monitor closely developments on this issue.

Internet domain names and cyber squatting

In the context of violations of trade marks and famous marks which have been reported to us, the Commission welcomes the development of alternative dispute resolution (ADR) for the Internet DNS and has, together with the US and other countries, supported the recommendations of WIPO for an administrative dispute resolution procedure and the implementation of the ICANN Uniform Dispute Resolution Policy.

In parallel to the adoption in August 1999 and the implementation in November 1999 by ICANN of the Uniform Dispute Resolution Policy (UDRP), the US enacted the Anticybersquatting Consumer Protection Act in November 1999. This Act which entitles the owner of a mark registered in the Patent and Trademark Office to file an *in rem* civil action against a domain name, in the case of a violation of the right of the owner of a mark by a domain name in the judicial district in which a domain name registrar or registry is located, also allows a plaintiff to elect to recover statutory damages between $1,000 and $100,000.

The Commission supports the view that a world-wide system based on the WIPO's recommendations would be beneficial to the whole Internet community and should be allowed to work through to some results and evaluation rather than being pre-empted by national legislation. Though a thorough analysis of the Anticybersquatting Consumer Protection Act has not been completed so far, the Commission has some reserves about the possible impact that it could have on the use of the URDP as trade mark owners may prefer to act under the US legislation rather than the UDRP.

The Commission is further concerned by the fact that other countries might enact further legislation, similar or divergent, creating a situation of "patchwork" legislation world-wide which could affect the uniform approach proposed under the WIPO and ICANN dispute resolution scheme, in particular at the stage where the WIPO system might be extended to address Famous Names and other categories of names dispute.

Therefore the Commission re-affirms its support to the UDRP that has been put in place by ICANN and WIPO and endorses the outcome of the international workshop on cybersquatting held in Australia on 31st January and 1st February 2000, where it was agreed that WIPO would be requested to initiate a study and develop recommendations on further issues arising from abusive domain names registration in relation to the protection of personal and non-protected names within the domain name system. In this regard, WIPO has launched a co-operation program for the administrators of ccTLDs (*country code top level domains*) to advise them on intellectual property strategy and management for their domains, including dispute prevention and resolution.

As part of this program, the "WIPO Conference on Intellectual Property Questions Relating to the ccTLDs", that took place in Geneva in February 2001, devoted particular attention to future trends for the country domains, the treatment of intellectual property in the ccTLDs from the various regions of the world, and how rightholders are coping with infringements. At the Conference, WIPO presented a comprehensive set of voluntary intellectual property guidelines designed to assist ccTLD administrators. The Commission supports this exercise and re-affirms its support to a uniform world wide system that would be beneficial to the whole of the Internet community.

8.3 Financial Services

The pace of affiliations between banks and securities houses and the conduct of insurance activities by banks began picking up prior to the recent enactment of the Gramm-Leach-Bliley Act of 1999 ("GLBA"). Electronic commerce is also beginning to have an impact on the delivery of all kinds of financial products. There is increasing convergence between the US and EU financial sectors with a number of acquisitions of US brokerages and insurance companies by EU firms. In this dynamic environment, it is important that EU financial firms be given competitive opportunities comparable to those afforded US to institutions as new laws are passed, regulations are adopted and the market evolves.

WTO Financial Services negotiations

In this regard, the European Commission is working to improve access of European financial institutions to US markets in a number of key sectors, including the new financial activities permitted under GLBA and reinsurance and other wholesale insurance markets.

Financial services negotiations in the framework of the GATS are particularly important. A permanent and MFN-based agreement entered into force in March 1999 and GATS negotiations on financial services were relaunched in Geneva in 2000 to increase regulatory transparency in the US and other markets and ensure national treatment for EU institutions.

Banking

In 2000, following intervention by the Commission, the Federal Reserve agreed to waive the "leverage ratio" requirement for EU banks wishing to qualify as financial holding companies (FHCs) under the Gramm-Leach-Bliley Act. However, concerns still remain over the extent to which the Federal Reserve will take into account the views of the home country supervisory authority in assessing FHC applications.

The international banking community has also voiced concern over the requirement of the Office of the Comptroller of the Currency (OCC) and some State banking supervisors to maintain "asset pledges" in addition to the paid up capital the maintain in their home country. The Commission, assisted by the International Banking Advisory Committee, is reviewing these asset pledges requirements to see if they are appropriate.

Insurance

A remaining impediment for EU insurance companies seeking to operate in the US market is the fragmentation of the market into 54 different jurisdictions, with different licensing, solvency and operating requirements. Each state has its own insurance regulatory structure and, by contrast to banking, federal law does not provide for the establishment of federally licensed or regulated insurance companies. However, interest in establishing a federal statutory structure for licensing and regulation of insurance is growing.

The US regulatory/supervisory structure is far behind that of the EU, and this entails heavy compliance costs for EU companies in each of the 54 jurisdictions. The National Association of Insurance Commissioners (NAIC) is making a tentative attempt to harmonise some basic regulatory requirements between the states, but this will be a long process. The NAIC's recommendations are not binding, so even if state insurance commissioners agree to some further harmonisation, implementation at state level cannot be guaranteed. Allied to the costs involved in dealing with this outdated regulatory structure, EU companies also face direct discrimination on a number of fronts. For example:

– not all states have "port of entry legislation". In other words, to underwrite risks in one state, an EU insurance company must first be licensed in another state before seeking a licence in the first state;

– some states require their insurers to buy reinsurance from state-licensed companies, before allowing reinsurance premiums to leave the state;

– those EU companies that specialise in the US$ 9 billion "surplus lines" market (large industrial, transport, or hard-to-place risks), such as Lloyd's and the Paris market have to be "white-listed" by the NAIC to operate on a cross-border basis in the US. In order to receive approval, companies have to, *inter alia*, name a US attorney and lodge a trust fund in a US bank of up to US$ 60 million. No credit is given for the fact that EU companies are effectively regulated in the EU or for situations where the retrocession takes place to US domestic insurers. Partly as a result of these requirements, market share of Lloyd's on the surplus lines market has dropped from 20% to 14% over the last 10 years. Other non-US companies share of the market has dropped from 12% to 9% over the same period.

Securities

EU securities firms may register as broker-dealers or investment advisers, and in principle may establish both in the form of branches or subsidiaries. However, the establishment of a branch in the US by a foreign securities firm to engage in broker-dealer activities, although legally possible, is in fact not practicable, since registration as a broker-dealer means that the foreign firm establishing the branch has to register and become itself subject to Securities and Exchange Commission (SEC) regulation. Foreign mutual funds have not been able to make public offerings in the US because the SEC's conditions make it impracticable for a foreign fund to register under the US Investment Company Act of 1940.

Concerns are arising also over the limited access for the trading screens of EU exchanges to the US. This impedes the free flow of capital across the Atlantic.

The Commission is also encouraging the SEC to take a positive role in the creation of international accounting standards (IAS). It will be important that IAS be acceptable for listings of US exchanges by the 2005 date for their adoption in the EU.

8.4 Transport Services

Air Transport

Until recently, computer reservation systems (CRS) gave preference in the US to "on-line" services (connections with the same carrier) over "interline" services (connections with other carriers). This practice implicitly disadvantages all non-US carriers which, unlike their US competitors, have to rely on interline connections for traffic to and from US points other than their own gateways (behind gateway traffic). A degree of progress has been achieved with the publication of a Final Rule in December 1997 that requires each CRS to offer one display that lists flights without giving all on-line connections a preference over inter-line connections. However, it is not clear that non-stop flights will be shown first in the display.

The Federal Aviation Act of 1958 prohibits foreign investors from taking more than a 49% stake in a US carrier and restricts the holding of voting stock to 25%. This latter limitation makes US rules on foreign ownership considerably more restrictive than relevant EU rules. Cross border investment is an important driving force behind liberalisation. Reducing foreign ownership restrictions would give better access for carriers to international capital, which in turn would contribute to growth, competitive effectiveness, and the promotion of competition and consumer benefits. In the past the US Government has advocated liberalisation of foreign investment restrictions, but thus far no progress has been achieved in this area.

The Hatch Amendment, which was signed into law on 24 April 1996, requires the Federal Aviation Administration (FAA) to apply security measures to foreign carriers, identical to those already applied by the FAA to US airlines serving the same US airports. The FAA final rule, implementing the law, has not been issued. Whilst the EU supports efforts to improve aviation security, such legislation amounts to a breach of international agreements. Efforts to

improve international aviation security should be handled, as has hitherto been the case, by multilateral negotiations.

The FAA reauthorisation bill (AIR-21) of April 2000 directs the Administrator to establish an aircraft repair and maintenance advisory panel. It also directs the Secretary of Transportation to request information from foreign air carriers in order to assess balance of trade issues. The EU remains concerned that a conflict could develop with the GATS-specific commitments undertaken by the US regarding aircraft repair and maintenance services.

Section 1117 of the Federal Aviation Act requires that, in general, transportation funded by the US Government (passengers and cargo; mail is covered by separate legislation) must be performed by US carriers. In the EU any obligation for government officials to use "national flag" is considered to be anti-competitive and contrary to the Treaty.

The US and EU rules on dry leasing are broadly similar in effect. However, Article 8(3) of Council Regulation (EEC) 2407/92 limits leases of foreign registered aircraft by EU carriers to a short term to meet their temporary needs; or otherwise if there are exceptional circumstances. Many EU carriers lease equipment (both with and without flight crew) from US carriers and leasing companies.

The US rules on wet lease prevent any lease of non-US registered aircraft by US carriers. No Community-registered aircraft with Community flight crew can thus be leased to US companies. The US authorities subject applications for wet leases by EU carriers of third country aircraft for use on routes to the US to a "public interest" test.

Maritime Transport

WTO negotiations on international maritime transport were suspended on 28 June 1996 with members agreeing to observe a standstill clause pending further negotiations. Resumption of these negotiations is an integral part of the new round on services launched in 2000. The EU regretted that during the previous negotiations the US never tabled an offer relating to maritime transport services and hopes that the US will endeavour to achieve a multilateral agreement in order to create a better environment for shippers and ship-operators. The EU believes that renewed maritime negotiations would provide an opportunity to cover all aspects of modern door-to-door shipping, including commitments on multimodal activities and that the most effective means to achieve the widest possible liberalisation is through the WTO.

While international maritime transport markets in the US are predominantly open, significant restrictions remain on the use of foreign built vessels in the US coastwise trade and in relation to access to certain international cargoes from which non-US vessels are excluded.

In particular, foreign-built (or rebuilt) vessels are prohibited from engaging in coastwise trade either directly between two points of the US or via a foreign port. Trade with US island territories and possessions are included in the definition of coastwise trade (Merchant Marine Act of 1920 - the Jones Act). Moreover, the definition of vessels has been interpreted by the US Government to cover hovercraft and inflatable rafts. These limitations on rebuilding act as another discrimination against foreign materials: the rebuilding of a vessel of over 500 gross tonnes (gt) must be carried out within the US if it is to engage in coastwise trade. A smaller vessel (under 500 gt) may lose its existing coastwise rights if the rebuilding abroad or in the US with foreign materials is extensive (46 USC 83, amendments of 1956 and 1960). In the context of the negotiations for the OECD Shipbuilding Agreement, it was agreed that the Jones Act would be subject to a special review and monitoring procedures.

In addition, no foreign-built vessel can be documented and registered for dredging, towing or salvaging in the US. Third countries are therefore unable to have access to the US market at a time when part of the US fleet needs renewing and many US ports are in need of dredging.

The US has a number of statutes in place that require certain types of government-owned or financed cargoes to be carried on US-flag commercial vessels. The impact of these measures is significant; they deny EU competitors access to a very sizeable pool of US cargo, while providing US ship owners with guaranteed cargoes at protected, highly remunerative rates.

The application of the measures to US public procurement contracts introduces uncertainty for those businesses whose tenders include shipping goods to the US. Whether they are required to ship the goods on US-flagged vessels, which charge significantly higher freight rates than other vessels, is not known until after the award of the contract.

The relevant legislative provisions are:

- The Cargo Preference Act of 1904 requires that all items procured for or owned by the military departments be carried exclusively on US-flag vessels.

- Public Resolution N°17, enacted in 1934, requires that 100% of any cargoes generated by US Government loans (i.e. commodities financed by Export-Import Bank loans) be shipped on US-flag vessels, although MARAD may grant waivers permitting up to 50% of the cargo to be shipped on vessels of the trading partner.

- The Cargo Preference Act of 1954 requires that at least 50% of all US government-generated cargoes subject to law be carried on privately owned US flag commercial vessels if they are available at fair and reasonable rates.

- The Food Security Act of 1985 increases to 75% the minimum proportion of agricultural cargoes under certain foreign assistance programs to be shipped on US-flag vessels.

- The Alaska Power Administration Sale Act of 1995, while removing the prohibition on the export of Alaska crude oil, retained the pre-existing US flag vessel carriage requirement of such exports.

LIST OF FREQUENTLY USED ABBREVIATIONS

ANSI	American National Standards Institute
APHIS	Animal Plant and Health Inspection System
ASCM	Agreement on Subsidies and Countervailing Measures
ASME	American Society of Mechanical Engineers
ATF	Bureau of Tobacco, Alcohol and Firearms
CNT	Conditional National Treatment
DoC	Department of Commerce
DoD	Department of Defense
DoT	Department of Transport
DSB	WTO Dispute Settlement Body
DSU	WTO Dispute Settlement Understanding
EC	European Community
EPW	Environmental Protection Agency
EU	European Union
FAA	Federal Aviation Administration
FCC	Federal Communications Commission
FDA	Food and Drug Administration
GATS	General Agreement on Trade and Services
GATT	General Agreement on Tariffs and Trade
GPA	Government Procurement Agreement
IEC	International Electrotechnical Commission
ITC	International Trade Commission
MARAD	Maritime Administration
MFN	Most-favoured Nation
NASA	National Aeronautics and Space Administration
NATO	North Atlantic Treaty Organisation
NOAA	National Oceanics and Atmospheric Administration
NTA	New Transatlantic Agenda
OECD	Organisation for Economic Co-operation and Development
OSHA	Occupational Safety and Health Administration
SEC	Securities and Exchange Commission
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TABD	Transatlantic Business Dialogue
TBT	Technical Barriers to Trade Agreement
TEP	Transatlantic Economic Partnership
TRIPs	Trade Related Aspects of Intellectual Property Rights Agt.
USDA	US Department of Agriculture
USTR	US Trade Representative
WTO	World Trade Organisation