UNITED STATES
BARRIERS TO TRADE AND INVESTMENT

REPORT FOR 2006

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For market access information, economic and regulatory information, applied tariff levels and analyses of trade issues, please consult the European Commission's Market Access Database website:

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For an overview of all the U.S.-related fiches in the Market Access Database, please click here.

Additional information and updates on EU-U.S. trade relations, as well as this report can be found in the "Bilateral Trade Relations" section of the website of the European Commission's Directorate General for Trade:

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Information from the Directorate General for Enterprise and Industry on notifications of technical regulations and conformity assessment procedures is available at:

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This report has been compiled by the European Commission's Directorate General for Trade in co-operation with the European Commission's Delegation in Washington, D.C. and other services of the Commission on the basis of material available to them at the end of December 2006.

This year's Report on U.S. Trade and Investment Barriers is both more concise, while at the same time, its scope has been expanded. Through hyperlinks in the report, the reader can access specific details of around one hundred U.S. barriers on the European Commission's Market Access Database (MADB). This database will be regularly updated.

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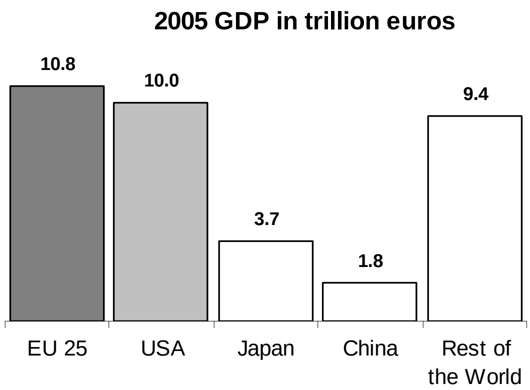

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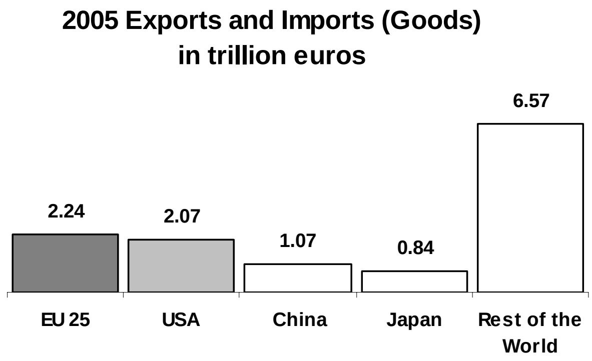

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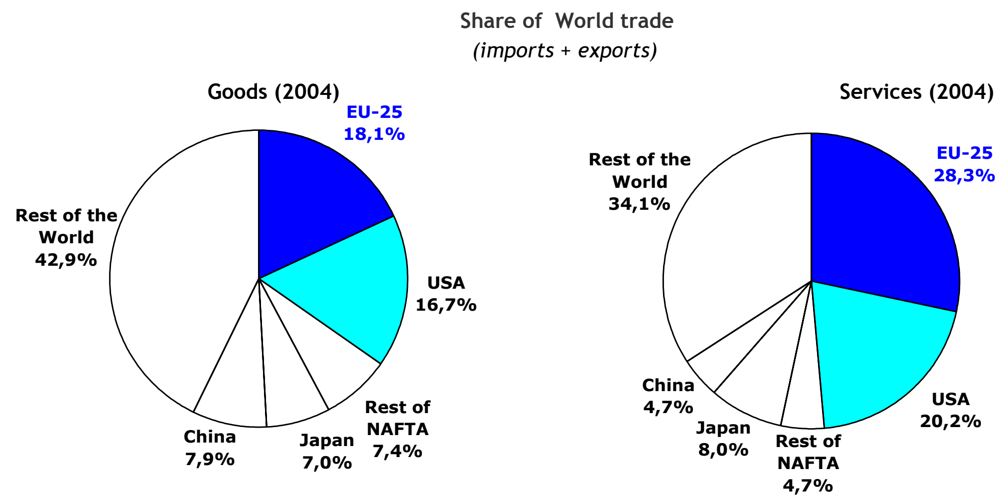

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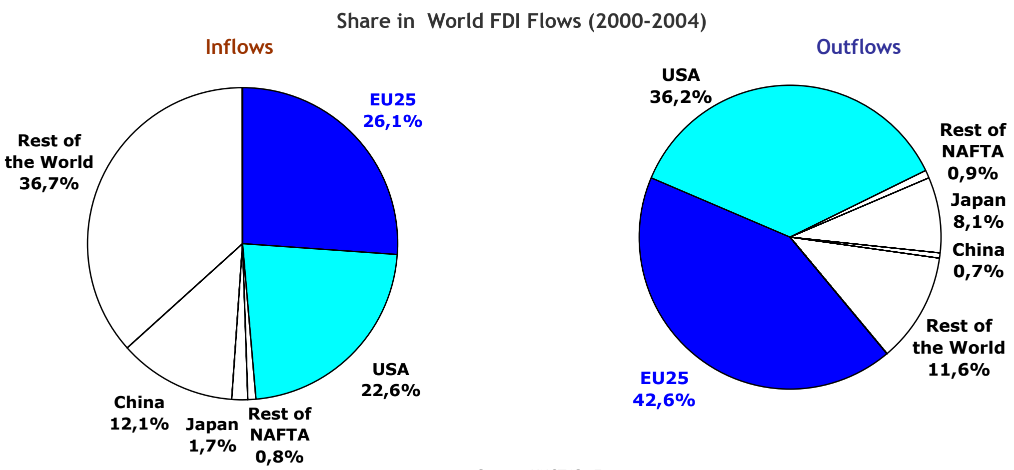

Source: UNCTAD, Eurostat
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1 EU-US TRADE RELATIONS – A BRIEF OVERVIEW

This report identifies the key trade and investment barriers in the United States that need to be addressed to increase the flow of goods, services and investment across the Atlantic. Such barriers are not just damaging to EU companies, but have a substantial negative impact on the U.S. economy and consumers as well. There is a need to draw some long-standing disputes to an end and to solve others without having to resort to litigation, thereby tackling barriers that impede economic growth. This is a big challenge but worthwhile as the potential rewards are great for all.

The EU and the U.S. are each other's main trading partners, accounting for the largest bilateral trade relationship in the world. Their economies combined are 58% of global GDP. They account for 37% of world trade. EU-U.S. trade in goods and services is worth around EUR 420 billion a year or approx. EUR 1.15 billion a day. The total EU and U.S. Foreign Direct Investment in each other's economy is valued at approximately EUR 1.5 trillion. This has created close to 14 million jobs on both sides of the Atlantic combined.

The size of the bilateral trade relationship means that the EU and U.S. are key players in the Doha Development Agenda (DDA). This aims to deepen "rules-based" trade liberalisation and ensure the further integration of developing countries into the multilateral trading system. The EU is keen to work closely together with the U.S. and other partners in the World Trade Organisation (WTO) to bring the Round to a successful close in the narrow window of opportunity that exists until mid-2007.

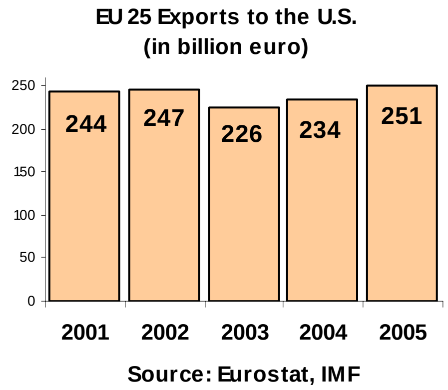
The 2005 EU-U.S. Summit took the decision to launch the Transatlantic Economic Initiative which aims to target some of the key remaining barriers in the transatlantic market: promoting regulatory and standards cooperation; stimulating open and competitive capital markets; anti-money laundering and terrorist financing cooperation; spurring innovation and the development of technology; enhancing trade, travel and security; promoting energy efficiency; supporting effective protection and enforcement of intellectual property rights; competition policy; procurement and services. Although progress is being made in some areas, this report highlights how much more needs to be done in reality – particularly on investment and procurement – for the full potential to be realised.

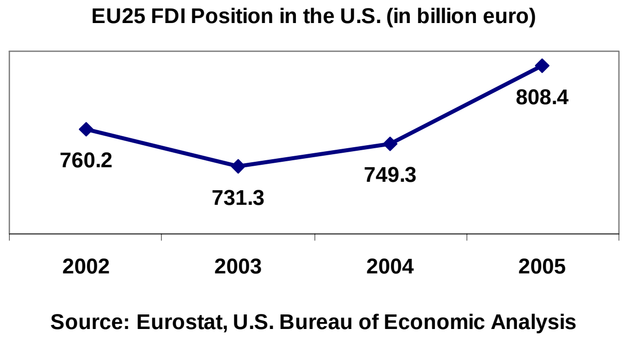
Despite this effort, a considerable number of impediments in the transatlantic trade and investment relationship still need tackling. They range from traditional tariff and non-tariff barriers to differences in both sides' respective legal and regulatory systems. Lack of U.S. compliance with a number of World Trade Organisation dispute settlement findings is still a major EU concern. However, 2006 saw the successful resolution of or, at least substantial progress in three long-running trade disputes:

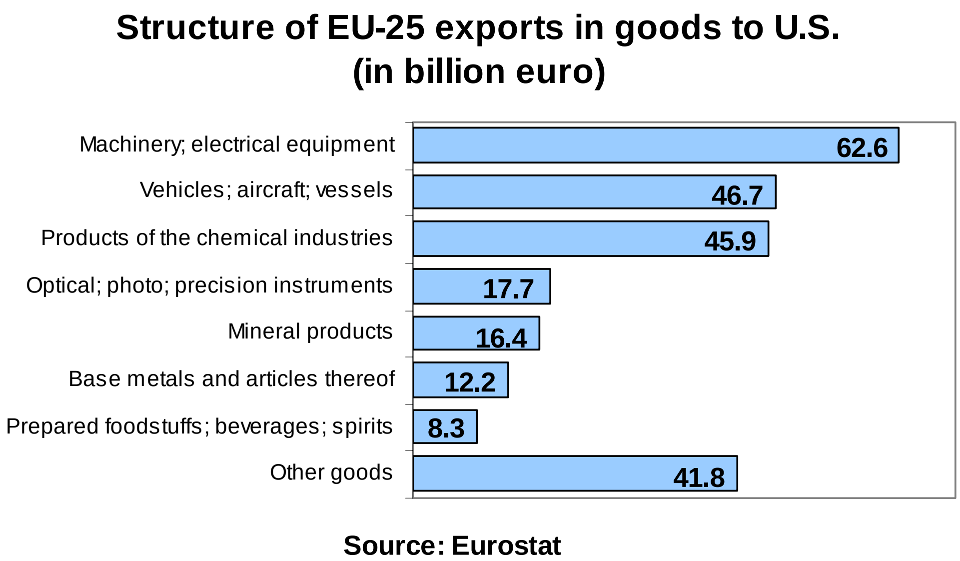
- In February, the US Congress repealed the *Byrd Amendment*, but stopped short of full compliance by introducing a long transition period. To reflect this situation, EU sanctions are now being reduced in tandem with remaining Byrd payments.
- In March, the EU and the U.S. lifted telecoms procurement sanctions against each other, bringing to an end more than a decade-long dispute.
- In May, the U.S. repealed the *Foreign Sales Corporations/ETI* export-contingent subsidy tax scheme, including all grandfathering provisions, which had been repeatedly ruled WTO-incompatible. The WTO had given the EU the right to impose sanctions of up to USD 4 billion dollars if the U.S. did not comply with its ruling. This threat of sanctions has been withdrawn.

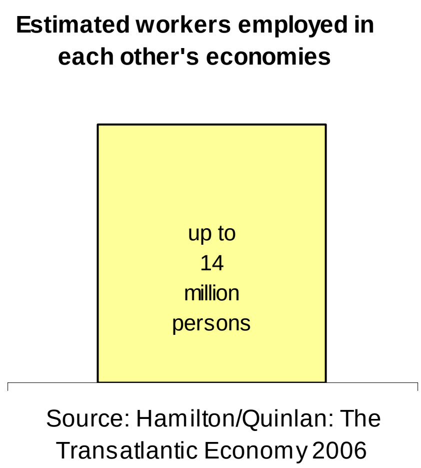
Even if the economic impact of these trade disputes constitutes only a small proportion of the overall EU-U.S. trade volume, they need to be managed adequately. The European Commission remains firmly committed to address existing and future obstacles to trade and investment in the U.S. market in a constructive way, through agreed bilateral, plurilateral and multilateral channels.

EU-U.S. Economic Interdependence









2 EXTRATERRITORIALITY AND UNILATERALISM

2.1 Extraterritoriality

The extraterritorial provisions of certain U.S. legislation which hamper international trade and investment continue to cause problems for EU companies. Although these issues have been relatively quiet in recent years, a number of provisions remain on the U.S. statute book, especially the 1996 Cuban Liberty and Democratic Solidarity (*Helms-Burton*) Act and the *Iran-Libya Sanctions Act* (ILSA). Although the application of ILSA with respect to Libya was terminated by President Bush in April 2004, Congress passed the *Iran Freedom Support Act* in 2006 which extended the provisions of ILSA in the case of Iran only for another five years to 2011.

The EU has expressed its opposition to this kind of legislation, or any secondary boycott or sanction legislation having extraterritorial effects, through a number of representations and *démarches*, such as the *Council Regulation 2271/96* (the so-called "Blocking Statute") of 22 November 1996. Other trading partners of the U.S., such as Canada and Mexico, have strengthened or adopted similar blocking legislation.

On 14 March 2000, the *Iran Non-Proliferation Act* (INPA), another example of extraterritorial legislation, was signed into law. It allows the U.S. Administration to apply its own sanctions to exports which are subject to EU Member State and EU export control regimes, while also unilaterally expanding the scope of export controls on EU exports beyond those agreed multilaterally.

Section 319 of the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*, known as the *PATRIOT Act*, deals with allegations of money laundering and the forfeiture of funds in the U.S. interbank accounts. It applies extraterritorial provisions to financial services. The European Commission is concerned about such allegations and their impact on the legal certainty and ability of European banks to conduct business in the U.S. The Commission is working with U.S. Treasury authorities to assess the nature of this problem and, if necessary, how to remedy the situation in such a way as to give European banks sufficient legal clarity to conduct their business.

2.2 Unilateralism

In this context, "Unilateralism" may take the form of either unilateral sanctions or unilateral retaliatory measures against "offending" countries or companies. Both types of measures are based on an exclusively U.S. assessment of the actions of a foreign country or its legislation and administrative practice irrespective of multilaterally-agreed rules. This approach has in the past cast doubt on U.S. support for a multilateral rules-based system addressing trade problems. Whilst the U.S. has in practice made extensive use of WTO fora, including its dispute settlement system, it has not renounced the possibility of taking unilateral trade measures. As a result, the EU has won two WTO dispute settlement cases, one against the U.S. suspension of customs liquidation in the banana dispute, and one against *Sections 301-310 of the Trade Act of 1974*. The latter authorises the U.S. Government to take action to enforce U.S. rights under any trade agreement and to combat practices by foreign governments which the U.S. Government deems to be discriminatory, unjustifiable or restrictive to U.S. commerce.

The EU also initiated dispute settlement proceedings against *"carousel" legislation* (*Section 407 of the Trade and Development Act of 2000*), which the U.S. has so far not applied. The most recent example of unilateral action here is the U.S. continued suspension of obligations in the EC Hormones Dispute and persisting import duties despite the EU's removal of inconsistent measures.

3 TARIFF BARRIERS

Despite the substantial tariff reduction and elimination agreed in the Uruguay Round, the U.S. 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.

Negotiations in the current Doha Development Round have not yet been concluded. The EU's concern is now focused on a relatively limited number of U.S. "peaks" and other significant tariffs where less progress has been made. The EU hopes that there will be a substantial reduction of remaining U.S. tariffs as an outcome of the current Doha Round.

Concerning multilayer parquet, changing classification by the U.S. Bureau of Customs and Border Protection has led to higher tariffs. Although tariffs on optical fibre cables were eliminated under the *Information Technology Agreement* (ITA), the U.S. does not wish to do the same for optical fibres where rather substantial protection remains. Tubes for computer monitors are also excluded. Attempts to broaden the scope and coverage of products in the form of an ITA II have so far failed.

4 NON-TARIFF BARRIERS

Traditionally, the focus of trade negotiations has been on reducing tariff barriers. As they have come down, attention has switched increasingly towards non-tariff barriers. These barriers range from regulatory inconsistencies across the Atlantic to complex issues such as sanitary and phytosanitary measures, state-level impediments and import prohibitions amongst others. Reduction of existing regulatory barriers to trade and investment - and preventing new ones emerging - would have a positive impact on the competitiveness of EU and U.S. companies and economies.

4.1 Regulatory Divergences and Barriers

Regulatory barriers are increasingly recognised as significant impediments to trade and investment between the EU and the U.S. A particular problem in the U.S. is the relatively low level of use, or even awareness, of standards set by international standardising bodies.

EU exporters to the U.S. market face steep regulatory barriers. In the U.S., products are increasingly being required to conform to multiple technical regulations regarding consumer protection (including health and safety) and environmental protection. Although in general not *de jure* discriminatory, the complexity of U.S. regulatory systems can represent an important structural impediment to market access as in the case of pharmaceutical approval. Other obstacles for European exporters, such as the *American Automobile Labelling Act*, documentary and labelling requirements for textiles as well as restrictions regarding the distribution and marketing of wines and spirits refer to regulatory barriers in the form of labelling requirements. Concerning pressure equipment, it is not uncommon that equipment for use in the workplace is subject to U.S. 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. Furthermore, conformity assessment procedures and testing requirements have proven to be very burdensome for European 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. For instance, this is the case for product-safety requirements and other standards for electrical and electronic equipment as well as construction products. Moreover, for products where public standards do not exist, product safety requirements can change overnight when the product liability insurance market makes a new assessment of what will be required for insurance purposes. Furthermore, U.S. Coast Guard Regulations and technical requirements of the Environmental Protection Agency (EPA) for recreational marine pose considerable technical barriers to the European shipbuilding industry. Differences in standards and food safety requirements between the U.S. and the EU are moreover exemplified by the export conditions for Grade A milk products as well as provisions for organic products under the National Organic Program of 2001.

A more integrated and streamlined transatlantic regulatory environment would have a positive impact on the competitive potential of EU and U.S. companies, given the fact that the latter are also highly integrated. Reinforced regulatory cooperation is therefore important to help dismantling existing regulatory barriers and preventing new ones from arising. Recent efforts include the development of the 2002 voluntary *EU-U.S. Guidelines for Regulatory Cooperation and Transparency* and the recent *2005 Roadmap for EU-U.S. Regulatory Cooperation* (also see the latest report). Moreover, the *High Level Regulatory Cooperation Forum* to facilitate regulatory dialogues established by the Transatlantic Economic Initiative at the June 2005 EU-U.S. Summit met on two occasions in 2006. Although progress is being made by EU-U.S. regulatory cooperation, EU exporters continue to face a number of post-import impediments. The proliferation of regulations at State level presents particular problems for companies without offices in the U.S. Moreover, the *EU-U.S. Agreement on Mutual Recognition*, in force since 1 December 1998, has not been fully implemented.

4.2 Registration, Documentation, Customs Procedures

There is a lack of recognition of the EU as a customs union; the direct consequence is non-acceptance of EU certificates of origin by U.S. Customs. Serious questions are also raised by the reluctance of the U.S. Bureau of Customs and Border Protection's of the Department of Homeland Security (CBP) about foreign participation in the Customs-Trade Partnership Against Terrorism (C-TPAT) scheme. The cost burdens and discriminatory effect on European exporters that arise as a consequence shows this is an issue that needs to be addressed within the framework of the Transatlantic Economic Initiative. Similarly, the Container Security Initiative (CSI), launched to counter potential terrorist threats to the international maritime container trade system, is causing additional costs and delays in shipments from the EU to the U.S. Further similar burdens are to be expected from the implementation of the 2006 *Security and Accountability For Every (SAFE) Port Act*, and in particular the Secure Freight Initiative. The implementation of the food-related provisions of the *Public Health Security and Bioterrorism Preparedness and Response Act of 2002* (*Bioterrorism Act*) puts severe burdens on trade in food and feed products to the U.S.

The *U.S. Code, Title 46, Section 12108* and the *American Fisheries Act of 1998* represent considerable shipping restrictions for fishermen as foreign-built vessels are not eligible to receive a fishing licence. U.S. rules of origin for textiles continue to affect European exports of fabrics, scarves, bed linen, table linen, bedspreads as well as quilts containing cotton and wool.

4.3 State Level Impediments

There are more than 2,700 State and municipal authorities in the U.S. that require particular safety certifications for products sold or installed within their jurisdictions. These requirements are neither transparent, nor uniform or consistent with each other. Individual States also sometimes set sub-federal procurement rules going far beyond what is provided for at federal level. Agricultural and food imports, such as restrictions regarding the distribution and marketing of wines and spirits, product-safety requirements and other standards for electrical and electronic equipment, are also often confronted with additional state-level requirements.

4.4 Levies, Charges and Import Duties

EU exports face a number of additional customs impediments, such as import user fees and excessive invoicing requirements on importers, which add to costs in a similar way to tariffs. The most significant user fee is the Merchandise Processing Fee, which is levied on all imported merchandise except for products from the least developed countries, from eligible countries under the *Caribbean Basin Recovery Act*, the *Andean Trade Preference Act*, U.S. FTA partners, or from U.S. Offshore possessions. Another significant user fee has been created under the *Medical Device User Fee and Modernization Act of 2002*. Contrary to their U.S. counterparts, Small and Medium-sized Enterprises (SMEs) from the EU are unable to apply for reductions and reimbursement of the fees charged.

In a similar way, the Harbour Maintenance Tax is levied in all U.S. ports on waterborne imports at an *ad valorem* rate of 0.125%. In the area of textiles, a specific "cotton fee" is charged to provide money to raw cotton producers (for advertisement purposes). In the area of shipbuilding, the U.S. applies a 50% *ad valorem* tax on non-emergency repairs of U.S.-owned ships outside the U.S. (*Section 466 of the Tariff Act of 1930*). The U.S. levies two taxes/charges in particular on the sale of cars in the U.S. Both the Corporate Average Fuel Economy (CAFE) payment and the so-called Gas Guzzler Tax – which place the tax primarily on imported cars – are of concern to European automakers.

4.5 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 and, of course, particularly since the events of 9/11. 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. Under *Section 232 of the Trade Expansion Act of 1962*, U.S. industry can petition for the restriction of imports from third countries on the grounds of national security. The application of Section 232 is however not dependent on proof from industry. Consequently, the law provides U.S. manufacturers with the opportunity to seek protection on the grounds of national security, when in reality the aim can be simply to curb foreign competition. In addition, the chemicals sector is affected by import restrictions for certain drug precursor chemicals. Similarly, the *Jones Act* uses national security reasons to prohibit the use of foreign vessels.

In the area of fisheries, the *Marine Mammal Protection Act of 1972* establishes significant import prohibitions. While the EU wholeheartedly supports the protection of marine mammals, particularly dolphins; it rejects certain provisions – not directly related to animal protection –which may impede trade.

4.6 Sanitary and Phytosanitary Measures

In the agricultural area, a number of sanitary and phytosanitary (SPS) issues remain a significant source of difficulty for the EU. Most notable amongst these are the problems encountered in trading animal products. For example, U.S. measures are prohibiting imports from the EU of bovine animals (based on BSE concerns) and beef. The *Veterinary Equivalence Agreement*, signed on 20 July 1999, made progress in particular regarding the recognition of the animal health status of EU Member States. There are promising signs to expedite this recognition process in a near future (Classical Swine Fever, Exotic Newcastle Disease, Swine Vesicular Disease) although the full implementation of Article 6 of the *Veterinary Equivalence Agreement* has not been assured yet.

Some of these trade barriers are adversely affecting exports of beef, certain matured pork meat products and meat preparations from EU Member States. Also Grade A milk products (milk, cream, fermented dairy products, etc) are largely forbidden entry into U.S. territory. The *Veterinary Equivalence Agreement* provides a framework to work towards the recognition of mutual equivalence of EU and US sanitary standards in these areas, but the pace of these discussions is very slow. Other SPS-related exist for plant health cover imports of fresh fruits, perennials and nursery stock as well as standards and certification of ornamental plants established in growing media and propagation material (including vitis-wine plants).

U.S. import permits are required for new non-manufactured agricultural products. The time between applying and inclusion on the list of approved products can take several years, even when other products from the same area of production with the same phytosanitary risks are permitted (this concern also applies to the conclusion of Pest Risk Analyses (PRA) by the U.S. authorities). Difficulties have been noted for fruits as well as for plants, although they are even more explicit for plants. In addition, provisions of the *Bioterrorism Act* represent a barrier for European imported perishable products with a limited shelf life.

4.7 Public Procurement

In the field of public procurement, the main U.S. trade barriers are contained in a wide array of clauses in federal, state and local legislation and regulation giving preference to domestic suppliers or products, or excluding foreign bidders or products altogether. In addition, there are federal restrictions on the use of federal grant money by State and local government. These restrictions are called "Buy America" (*Buy America Act* or BAA). Taken together, these restrictions, such as the "Buy America" provisions of the Department of Transportation (DoT), cover a significant proportion of public purchasing in the U.S. However, as the U.S. International Trade Commission noted in its 2004 report: *The Economic Effects of Significant U.S. Import Restraints,* the complexity and partially overlapping nature of existing restrictions make it nearly impossible to determine the total value of government-purchased imports subject to these restrictions. Regarding development aid, restrictive provisions for U.S. Food Aid purchases and transportation require that at least 75% of tonnage is transported on vessels carrying the U.S. flag. Moreover, on a significant number of sectoral issues, "Buy American" restrictions are imposed for ball and roller bearings, on electrical and electronic equipment and are the legal basis of local content requirements for steel in public procurement cases.

Another practical limitation lies in the lack of transparency related to sub-federal procurement opportunities. Unlike the EU - where all tender notices for central and sub-central procurements are published on a single electronic site free of charge (the TED data base) - only U.S. federal notices are published on a single electronic site (fedbizopps.gov). This situation effectively hinders foreign suppliers' access to sub-federal procurement markets. Potential bidders do not know where to look for relevant procurement opportunities and/or information relating to sub-federal purchases.

Despite the fact that the WTO *Government Procurement Agreement (GPA)* substantially increased tendering opportunities for both sides, the EU remains concerned about the wide variety of discriminatory "Buy America" provisions that persist. Small business set-aside schemes, exemplified by the *Small Business Act of 1953*, also limit bidding opportunities for EU contractors. Extraterritorial sub-federal selective public procurement laws restrict the ability of EU and other companies to do business with specific countries if - at the same time - they wish to bid for contracts in various U.S. States and cities. There have been further efforts within U.S. Congress to add restrictions to foreign procurement in the context of the annual authorisation and appropriations process. Some of the proposed amendments raised concerns as to their compatibility with the WTO *GPA*.

The Department of Defense (DoD) also has significant procurement expenditures that exclude foreign suppliers of goods or services. The DoD is the largest public procurement agency within the U.S. government, spending billions of dollars annually on supplies and other requirements. Many procurements fall under "national security" exceptions to open procurement obligations. The concept of "national security" was originally used in the *1941 Defense Appropriations Act* to restrict DoD procurement to U.S. 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. There has been a trend towards making the DoD's other domestic preferences, apart from the BAA, less restrictive by expanding them to qualifying countries which maintain reciprocal memoranda of understanding (MoU) with the U.S. In practice, all North Atlantic Treaty Organisation (NATO) countries (except Iceland), all major non-NATO allies of the U.S. such as Australia and New Zealand as well as Sweden, Finland and Austria have signed MoUs with the U.S. allowing for a waiver of the corresponding restrictions.

The *Commercial Space Act of 1998* applies national security restrictions to space launching services. These restrictions, which initially applied to the launch of military satellites, are now also applied on national security grounds to satellites for civilian use. The measures are part of a set of co-ordinated actions to strengthen the U.S. launch industry and are clearly detrimental to European launch service providers. European operators remain effectively barred from competing for most U.S. government launch contracts which account for approximately 50% of the U.S. satellite market.

4.8 Trade Defence Instruments

Several U.S. trade defence measures have been brought by the European Union to the WTO Dispute Settlement system. Many aspects of U.S. trade defence legislation and practices have already been ruled as inconsistent with WTO Agreements. Implementation by the U.S. of these WTO findings has, at best, also been slow.

The methodology and application of U.S. trade defence instruments has been challenged frequently and successfully - and not only by the EU - in the WTO Dispute Settlement system, such as the laws, regulations and methodology for calculating dumping margins (*zeroing*). As a result, in December 2006, the Department of Commerce (DoC) published its intention to comply with the WTO ruling against zeroing, by changing the methodology itself. However, the U.S. has subsequently delayed implementation until 22 February 2007. In addition, it has until 9 April 2007 to implement the WTO ruling in 31 specific cases in which the zeroing methodology has been applied. Several other aspects of U.S. trade defence legislation and practices, including those relating to safeguards, have been shown to be inconsistent with WTO Agreements as well. WTO rulings against U.S. trade remedies include the *Continued Dumping and Subsidy Offset Act of 2000 ("Byrd Amendment").* Despite the welcomed news of its repeal in 2006, the Byrd Amendment's WTO-incompatible distribution of collected anti-dumping and countervailing duties to the U.S. complainants will continue for several more years.

The *Antidumping Agreement* and the *Subsidy and Countervailing Measures Agreement* (SCM) contain a so-called "sunset review". While measures should not last longer than five years unless it is deemed that their termination would likely lead to the continuation or recurrence of dumping or subsidisation which are causing injury, the U.S. has kept in place many countervailing duty (CVD) orders on privatised steel firms dating back as far as 1985, although the subsidies involved have usually expired, ceased to exist or are having only minimal impact. In December 2006, the U.S. finally revoked a number of these long standing measures; however many other measures still remain in place.

In March 2002, the DoC imposed an anti-dumping duty of 125.77% on imports of stainless steel bars from the UK made by Firth Rixson Special Steels (FRSS) Ltd. The U.S. had also enacted anti-dumping and countervailing duties on uranium imports from France, Germany, the Netherlands, and the UK in 2002, which were partially revoked in 2006.

4.9 Re-Export Restrictions

A comprehensive system of export controls for dual-use items under the *Export Administration Act of 1979* and the Export Administration Regulations was established to prevent trade to unauthorised destinations. This system, among other things, requires companies incorporated and operating in the EU to comply with U.S. re-export controls, including compliance with U.S. 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 that it has active members 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*). Several aspects of the U.S. encryption control policy also raise concerns. Potential problems are posed by the differential treatment of encryption items depending on whether they are transferred to government and non-government end users.

4.10 Subsidies

The EU continues to be concerned about the significant direct and indirect government support given to U.S. farmers and industry by means of direct subsidies, protective legislation and tax policies. The adoption by the U.S. Congress of the *Farm Security and Rural Investment Act of 2002 ("Farm Bill")* increases significantly the trade-distorting effect of U.S. farm subsidies. This Act is clearly inconsistent with the express commitments of WTO Members, reinforced at Doha in November 2001, that farm policies should be reformed in the direction of less trade distorting forms of support. Closely related to the *Farm Bill*, are the commodity loan programmes with marketing loan provisions for crops like wheat, rice, corn, soybeans and other oilseeds. These programmes are administered by the Farm Service Agency (FSA) through the Commodity Credit Corporation (CCC). Additionally, several agricultural export programmes such as the *Export Enhancement Program*, the *Dairy Export Incentive Program* and *Market Access Program*, the *Export Credit Guarantee Program (GSM-102)* as well as the *Food Aid Programs* provide considerable amounts of subsidies for U.S. farmers

On 12 October 2004, the EU initiated a WTO dispute settlement procedure against a number of U.S. federal and state subsidies to Boeing. This action followed the U.S. unilateral withdrawal from the *EC-U.S. Agreement on Trade in Large Civil Aircraft* and the initiation of WTO dispute settlement procedures against alleged European support for Airbus. U.S. subsidies challenged by the EU in the WTO include a USD 3.4 billion package in the State of Washington (combining tax breaks, tax exemptions or tax credits), infrastructure projects for the exclusive benefit of Boeing, USD 14.5 billion funding from NASA and DoD for aeronautics R&D and a USD 800 million package in the State of Kansas in the form of tax breaks and subsidised bonds. WTO panel proceedings in both cases are ongoing, and are expected to last until the first semester of 2008. The EU also remains concerned about the significant level of subsidies to the U.S. shipbuilding, aircraft engine manufacturers and steel industries.

The EU recognises the severe financial consequences of 9/11 on U.S. airlines and the need to ensure that vital transport services in the U.S. are maintained. Nevertheless, the on-going large scale state aid for airlines represents a significant protection from commercial pressures faced by foreign carriers as well and is an impediment to fair trade on transatlantic air routes. *EU Regulation No 868/2004* allows for specific measures to be taken against third countries' carriers in order to counteract subsidisation and unfair pricing practices resulting from such non-commercial advantages.

Transparency in the area of subsidies is an obligation of the *Subsidy and Countervailing Measures Agreement* (SCM). Up to 1998, the U.S. only notified the WTO of a limited number of federal programmes – many of which were relatively small – and not 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 SCM, the U.S. finally began to notify certain State-level subsidies in its new and full notification of 1998. However, the EU still remains concerned by the lack of information on U.S. State-level subsidies, particularly large, *ad hoc* investment incentives.

5 INVESTMENT RELATED MEASURES

5.1 Foreign Direct Investment Limitations

The *Exon-Florio Amendment to the 1950 Defense Production Act (Section 5021 of the 1988 Trade Act)* and subsequent legislation is restraining foreign investment in (or ownership of) businesses relating even peripherally to national security. The Exon-Florio provision is implemented by the Committee on Foreign Investment in the United States ("CFIUS"), an inter-agency committee chaired by the Secretary of Treasury. As the President delegated his authority in this matter to CFIUS in 1988, the committee has the authority to block a foreign acquisition of a U.S. corporation on national security grounds. The lack of a clear definition of "national security" seems to have led to an overly wide interpretation of the term by the U.S. The EU recognises that there are security issues to be resolved relating to trade and investment, particularly in the aftermath of 9/11, but has long expressed concern about excessive use which could be interpreted to be a disguised form of protectionism. Import, procurement and investment restrictions, as well as the extraterritorial application of export restrictions are affected.

U.S. restrictions on foreign investment are particularly evident in the shipping, energy and communications sectors. Various U.S. laws provide for "Conditional National Treatment" for investments of foreign-owned firms, notably in relation to the area of science and technology research. Apart from this matter, the EU would like the U.S. to resolve outstanding foreign ownership issues to allow the EU-U.S. agreement on aviation services to be brought to a rapid conclusion.

Further investment constraints exist in the telecommunication sector (*Section 310 of the 1934 Communications Act*), where U.S. law enforcement agencies have imposed strict corporate governance requirements on companies seeking Federal Communications Commission (FCC) approval of the foreign takeover of a U.S. communications firm in the form of far-reaching Network Security Arrangements.

Foreign investment is also restricted for 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 U.S. to an offshore drilling rig or platform on the Continental Shelf. Non-U.S. investors must form a U.S. subsidiary for exploitation of deep-water ports and for fishing in the U.S. 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 U.S. citizens in order to receive a fishing permit. Licences for cable landings are only granted to applicants in partnership with U.S. 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 U.S. citizens and to corporations organised under U.S. law.

5.2 Tax Discrimination

Several aspects of U.S. taxation practices constitute additional difficulties to foreign investment in the U.S. market. Those are mainly related to the nature of reporting requirements, conditions for deductibility of interest payments and State unitary income taxes. Firstly, concerns about federal tax measures' focus for instance on the nature of reporting requirements and the fact that domestic and foreign companies are treated differently. Secondly, the so-called "earnings stripping" provisions in the *Internal Revenue Code 163j* and its limits on tax deductibility of interest payments applies relatively strict rules that do not necessarily always conform to internationally-accepted principles. Thirdly, the EU deems U.S. state-level "world-wide" unitary taxes as inconsistent with U.S. obligations under its tax treaties with other countries.

6 INTELLECTUAL PROPERTY RIGHTS

6.1 Copyright and Related Areas

Despite a number of positive changes in U.S. legislation following the Uruguay Round, copyright issues are still problematic such as authors' moral rights and music licensing exemptions due to *Section 110(5) of the 1976 U.S. Copyright Act* ("*Irish Music*" *case*). Despite losing a WTO case on the latter issue, the U.S. has not yet brought its Copyright Act into compliance with the WTO *Agreement on Trade Related*

Aspects of Intellectual Property Rights (TRIPs). The EU has safeguarded its rights to suspend trade benefits granted to the U.S. if the *Copyright Act* is not amended.

6.2 Appellations of Origin and Geographical Indications

The continuing misuse of EU geographical indications on foods and drinks produced in the U.S., particularly in the wine sector, as well as other food products, is the source of considerable frustration for EU producers. There is no protection of geographical indications as such in the U.S. labelling regulations and collective trademarks or certification trademark systems are insufficient to give full protection.

6.3 Patents, Trademarks and Related Areas

Article 31 of the TRIPs Agreement introduced a requirement to inform promptly right holders about Government use of their patents. Despite extensive use of patented goods by or for U.S. authorities, it appears that U.S. Government departments frequently fail to comply with this obligation.

Section 337 of the Tariff Act of 1930 provides remedies for holders of U.S. intellectual property rights by keeping the imported goods which are infringing on such rights out of the U.S. ("exclusion order"), or to have them removed from the U.S. market once they have come into the country ("cease and desist order"). In February 2000, the EU and its Member States held WTO consultations with the U.S. with no positive outcome on the issue. Since then, the U.S. International Trade Commission (ITC) has started new investigations against European companies. The European Commission is concerned by these developments and regularly raises Section 337 in its bilateral contacts with the U.S. Administration.
Section 211 of the U.S. Omnibus Appropriations Act of 1998 ("Havana Club") 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. No U.S. Court can recognise or enforce any assertion of such rights. According to the Appellate Body report of 2002, Section 211 is in violation of both the national treatment and the most favoured nation obligations of the TRIPs. In addition, the advertising of low price perfumes which imitate famous European brands and thus benefit from their well-known reputation. This practice, while not prohibited in the U.S., may nevertheless represent a violation of existing intellectual property rights.

The co-existence of fundamentally different patent systems (the U.S. continuing with its "first-to-invent" system whilst the "first-to-file" system is followed by the rest of the world) continues to create considerable problems for EU companies, considering high U.S. litigation costs in patent matters. The existence of different systems is a shared EU-U.S. problem and there is a need to harmonise the systems. However, there have been some initiatives in Congress to reform the patent system by moving toward a "first-to-file" system and this can only be further encouraged. In a similar fashion, transatlantic differences regarding patents are exemplified by the application of the *Hilmer Doctrine* in patent interference cases, which has been clearly detrimental to European companies. American and European law also take different approaches to the question of patentability of software and business methods. Concerning plant variety, U.S. provisions such as the *Plant Patent Act* do seriously impede trade in breeding material for ornamental plants.

7 SERVICES

7.1 Business Services

The implementation schedule of the *General Agreement on Trade in Services* (GATS) for professional services has resulted in some improvement in market access. However, a number of problems, especially because of State level regulation, remain to be tackled in order to secure more transparent and open access to the U.S. market. The *Sarbanes-Oxley Act of 2002*, adopted as a reaction to U.S. corporate scandals, has had a significant impact on U.S.-listed EU companies, as well as on EU auditing firms, which could face conflicting laws on audits and corporate governance.

In the area of free movement and business contacts, the EU considers the current U.S. visa non-reciprocity regime as a particularly serious barrier to trade and investment which can in some cases cause harm to the competitiveness of EU companies.

7.2 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 substantial barriers that EU and foreign-owned firms still face (e.g. investment restrictions, lengthy proceedings, conditionality of market access, and reciprocity-based procedures). *Section 310 of the 1934 Communications Act* established restrictions to foreign investment in U.S. companies holding a broadcast or common carrier radio licence. There are also limits to foreign indirect investment although subject to a public interest waiver. The U.S. Administration and the Federal Communications Commission (FCC) consider that this waiver provision is sufficient for the FCC not to apply *Section 310(b) (4) of the 1934 Communications Act* to WTO Members. This situation, however, does not provide certainty to European operators. In addition, FCC regulations for digital terrestrial television and digital audio broadcasting also negatively affect European companies, and EU-based satellite communications operators have experienced difficulties accessing the U.S. market.

Furthermore, the reduction in the number of competitors in the wire line sector, notably as a result of mergers, coupled with an extremely litigious environment raises some concerns and will require particular attention to ensure a fair and non-discriminatory access offer, in particular to guarantee last mile access to customers, a reduction of competition in the internet backbone market leading to "de-peering", as well as dominance and packet-discrimination concerns.

7.3 Financial Services

There are continued difficulties in operating conditions for financial institutions on both sides of the Atlantic. Evidence of widespread corporate malfeasance, financial misinformation, and violation of conflicts of interest rules has prompted a significant overhaul of elements of the U.S. regulatory system. While welcomed in principle, the reform of elements of U.S. Congressional law on company accounts and corporate governance (*Sarbanes-Oxley Act*) contains elements which could potentially require EU entities to infringe their domestic obligations, as well as increasing the cost for EU issuers of capital raised in U.S. markets. The international banking community continues to voice concern over the requirement to maintain "asset pledges" (capital equivalency deposits), in addition to the paid up capital they maintain in their home country, of the Office of the Comptroller of the Currency (OCC) and some State banking supervisors. Much of the focus of EU-U.S. discussions in the field of financial regulation over the past three years has been to find pragmatic and mutually satisfactory solutions to ensure that provisions of the U.S. law do not have unintended consequences for activities of EU established entities and vice-versa.

In general, recognition of equivalence of home-country standards for capital and banking markets would significantly reduce the regulatory burden of firms and financial institutions that are active on both sides of the Atlantic. Additionally, the current requirement for non-U.S. reinsurers to post 100% collateral for their U.S. acceptances is both discriminatory and technically unjustifiable in the modern age. The EU welcomes the moves towards re-examining this system but will need to see that such moves are also implemented in practice in all U.S. states.

Concerns relating to access to U.S. financial markets frequently centre on the extent to which compliance with U.S. regulatory provisions is a proportionate or justified condition for providing financial services directly to U.S.-domiciled investors or counterparties. EU financial institutions are already subject to comparable and demanding authorisation and supervision in Europe. Several regulations of the U.S. Securities and Exchange Commission for foreign securities firms represent substantial barriers for the establishment of branches or subsidiaries.

These concerns gain currency as remote trading and investment strategies are already being implemented on a transatlantic basis. EU and U.S. authorities have agreed on the need for informal mechanisms to support enhanced information flow and upstream discussions on new regulatory initiatives. Since 2002, the EU-U.S. Financial Markets Regulatory Dialogue has been tackling existing issues of concern and acting to prevent new ones from emerging). Financial services negotiations in the framework of the GATS are also particularly important. In this context, the EU is working to improve access of European financial institutions to U.S. markets in a number of key sectors. Unfortunately, the U.S. has not so far offered major new commitments in financial services. A permanent and MFN-based agreement entered into force in March 1999 and GATS negotiations on financial services were re-launched in Geneva in 2000.

7.4 Transport Services

With regard to air transport, the EU and U.S. are seeking to conclude a first-stage comprehensive air transport agreement that would significantly reduce barriers concerning market access. The EU also aims, through this agreement, to address foreign ownership limitations and FAA restrictions regarding leasing of foreign aircraft. Measures adopted on aviation security since 9/11 as well as the large scale governmental financial assistance provided to U.S. airlines are issues that also need addressing. *Section 1117 of the Federal Aviation Act* requires that, in general, transportation funded by the U.S. Government (passengers and cargo, mail is covered by separate legislation) must be performed by U.S. carriers. By contrast, in the EU, any obligation for government officials to use "national flag" is considered to be anti-competitive.

The *Merchant Marine Act of 1920 (Jones Act)* prohibits foreign-built vessels from engaging in (direct or indirect) coastal trade and cannot be documented or registered for dredging, towing or salvaging. In addition, there has been no progress on the elimination of requirements that U.S. Government-owned or financed cargoes be shipped on U.S.-flagged ships. U.S. maritime security legislation (such as the Container Security Initiative and the Secure Freight Initiative) is of EU concern, since it could result in discrimination between ports of WTO Members as to the way in which cargo containers are processed. In addition, the U.S. has not included any maritime services-related commitments within even its most recent Doha WTO Round services offer of May 2005.

Whereas the U.S. advocates further liberalisation from other countries on express deliveries, barriers to its market remain significant, in particular those concerning air transport. On 16 April 2003, an amendment to the *Wartime Supplemental Appropriations Act* barred airlines which are not effectively controlled by U.S. citizens or 50% of whose turnover derives from foreign companies from the benefits of certain military budget appropriations, which have in effect deprived them from State Department and Department of Defense contracts.

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