1995
Report on US Barriers to Trade and Investment

Published by the

Services of the European Commission

Brussels, May 1995

Contents

1. INTRODUCTION **1**

1.1. Objectives of the Report 1

1.2. The Economic Relationship 2
1.2.1. Trade flows *2*
1.2.2. Investment flows and stocks *3*

1.3 WTO inaugurated 5

1.4 Summary of Report's findings 7

2. HORIZONTAL ISSUES **11**

2.1. Unilateralism in US trade legislation 11
2.1.1. Introduction *11*
2.1.2. The relevant legislation *11*
2.1.3. Hormones and bananas *12*
2.1.4. Procurement sanctions *13*

2.2. Extraterritoriality 14
2.2.1. Introduction *14*
2.2.2. Illustrative Cases *14*

2.3. Impediments through National Security Considerations 18
2.3.1. Introduction *18*
2.3.2. Import restrictions *18*
2.3.3. Export restrictions *19*
2.3.4. Procurement restrictions *19*
2.3.5. Investment restrictions *20*

2.4. Public Procurement 23
2.4.1. Introduction *23*
2.4.2. Federal "Buy America" legislation *23*
2.4.3. Telecommunications sector *24*
2.4.4. Federal "Buy American" funding programmes *25*
2.4.5. State Buy America legislation and restrictions *26*
2.4.6. Set Aside for Small Businesses *26*

2.5. Tariff Barriers and Equivalent Measures 27
2.5.1. The results of the Uruguay Round negotiations on Market Access *27*

2.5.2. Tariff Reclassifications *27*
2.5.3. Customs User Fees *28*
2.5.4. Excessive Invoicing Requirements *29*

2.6. Technical barriers to trade: standardisation, testing, labelling and certification 31
2.6.1. Introduction *31*
2.6.2. Non-use of international standards *31*
2.6.3. Regulatory differences at State level *32*
2.6.4. Labelling requirements *33*
2.6.5. A Heavy Regulatory Approach *34*
2.6.6. US approval procedures for drugs and drug ingredients *35*

2.7. The Protection of Intellectual Property 36
2.7.1. Introduction *36*
2.7.2. Patents and Related Areas *36*
2.7.3. Government use *37*
2.7.4. Copyright and Related Areas *37*

2.8. Tax policy 38
2.8.1. Introduction *38*
2.8.2. Cumbersome and discriminatory reporting *38*
2.8.3. "Earnings stripping" provisions *38*
2.8.4. State unitary income taxation *39*
2.8.5. US taxes discriminating against imported cars *40*

2.9. Conditional National Treatment (CNT) 41
2.9.1. Introduction *41*
2.9.2. What is CNT? *41*
2.9.3. A different approach by the new Congress? *42*

3. SECTORAL ISSUES **43**

3.1. The Information Society 43
3.1.1. Introduction *43*
3.1.2. Investment restrictions *43*
3.1.3. Services *44*
3.1.4 Data protection *46*

3.2. Agriculture and fish 47
3.2.1. Introduction *47*
3.2.2. Export and other subsidies *47*
3.2.3. Import Arrangements *48*
3.2.4. Sanitary and Phytosanitary Requirements *48*
3.2.5. Domestic Content Requirement for Tobacco *52*
3.2.6. Inadequate Protection of Geographical Indications of European Wines and Designations of Spirits *52*
3.2.7. Drift net fishing *53*
3.2.8. Allocations to foreign fishing fleets *53*

3.3. Financial services 54
3.3.1. Introduction *54*
3.3.2. The new interstate banking framework *54*
3.3.3. Non-national treatment for interstate banking *55*
3.3.4. Sectoral segmentation *55*

3.3.5. Other discriminatory practices *56*
3.3.6. GATS financial services negotiations *56*

3.4. Professional services 57

3.5. Air transport and the aeronautics industry 58
3.5.1. Introduction *58*
3.5.2. Air transport services *58*
3.5.3. Aeronautics Industry *59*

3.6. Shipbuilding and Maritime Services 60
3.6.1. Introduction *60*
3.6.2. Shipbuilding: subsidies and tax policies *60*
3.6.3. Maritime transport services *61*

4. BILATERAL AND MULTILATERAL INITIATIVES 64

4.1. Mutual Recognition Agreement (MRA) 64
4.1.1. What is an MRA? *64*
4.1.2. State of negotiations with the US *64*

4.2. Regulatory Cooperation 65

4.3. New Trade Issues 66
4.3.1. Introduction *66*
4.3.2. Trade and the environment *66*
4.3.3. Trade aspects of other policies *67*

4.4. Other initiatives to reduce trade barriers 68
4.4.1 Introduction *68*
4.4.2. A flavour of the bilateral dialogues *68*

TABLE OF REGULARLY USED ABBREVIATIONS 70

1. INTRODUCTION

1.1. Objectives of the Report

The 1995 Report on United States Barriers to Trade and Investment is the eleventh annual report drawn up by the services of the European Commission.

Its aim is to provide an inventory of impediments for European industry and investors gaining access to US markets and carrying out economic operations within them. The report discusses measures deemed to be a barrier or impediment to trade and investment and indicates the EU's legal and political position. Care has been taken to consider the impact of the US legislation implementing the GATT Uruguay Round agreements.

The 1995 Report contains an additional chapter by comparison to its predecessors. Chapter 4, entitled Bilateral and Multilateral Initiatives, gives a flavour of the many actions on which the EU and the US are cooperating to address outstanding barriers to trade and investment.

As a means of identifying problems of access to and of operating within US markets, the European Commission services' reports have become a useful tool for focusing dialogue and negotiations, both multilateral and bilateral, on the elimination of the obstacles inhibiting the free flow of trade and investment. The 1995 report will in addition serve as a means of monitoring US implementation of the Uruguay Round Agreements. In this connection it is hoped that the report can play a useful part in the formation of the US Administration's future policy on the issues highlighted.

The report has taken into account developments until the end of March 1995.

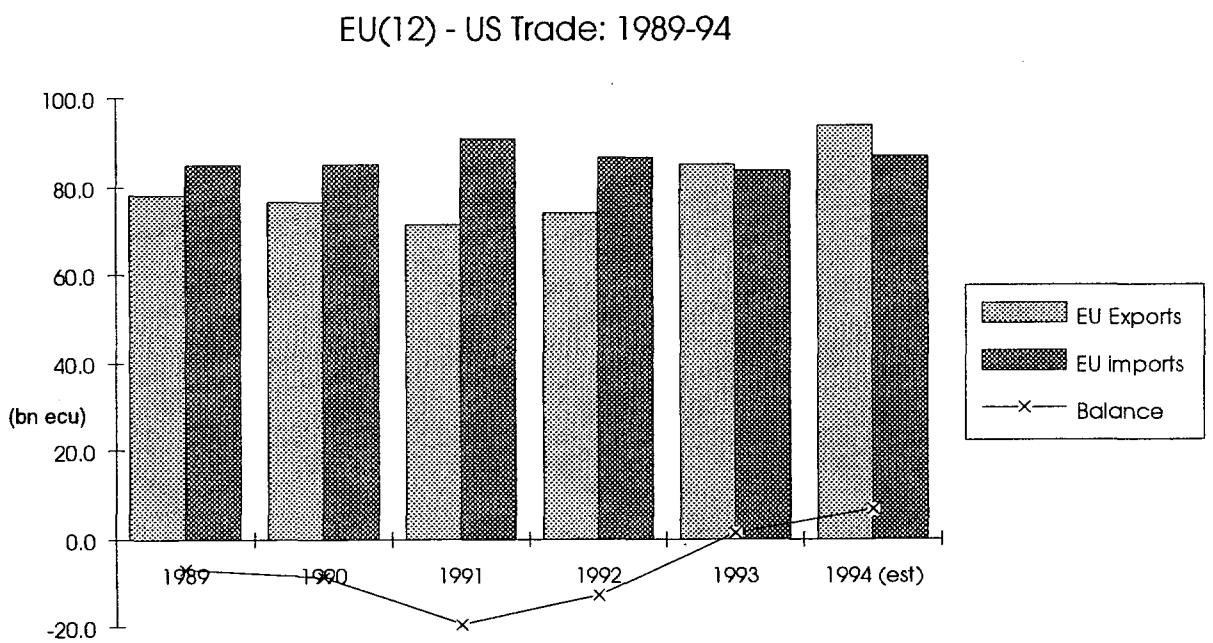
1.2. The Economic Relationship

Transatlantic economic relations are underpinned by the most important trade and investment links in the world. Bilateral trade has grown particularly strongly over the last few years, to the benefit of both economies. Meanwhile, the two sides remain each other's most important source and destination for foreign direct investment. This section briefly reviews the data on EU-US trade and investment and places it in a global context.

1.2.1. Trade flows

Trade between the European Union (excluding the three new Member States) and the US reached nearly 170 billion ecu in 1993, an increase of 5% over the previous year. Flows in either direction were largely balanced, with the EU registering a small surplus of just 1 billion ecu (compared to a deficit of nearly 20 billion ecu in 1991).

Full EU data for 1994 is not yet available, but US data suggests that there was growth of trade flows in both directions, with EU exports to the US particularly buoyant. As a result, the EU's surplus is expected to have grown by comparison to 1993.

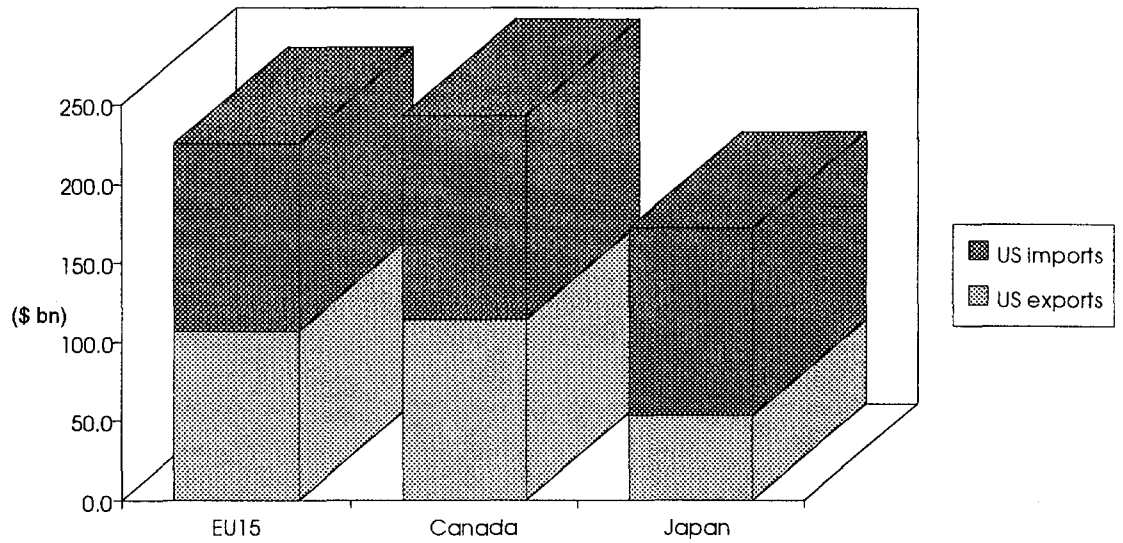


Source: Eurostat (1989-93), Department of Commerce (1994)

The US is the EU's single largest trading partner, accounting for 17% of total EU imports and 18% of total exports in 1993. Likewise, the EU is one of the two top markets for the US, accounting for 20% of US exports and 17% of US imports in 1994.

EU-US trade accounts for 7% of total world trade. This is only marginally less than US-Canada trade, which represents the largest bilateral flow in the world. Trade between the US and Japan is very much smaller. Of the three, trade with the EU is most balanced.

US Trade with EU(15), Canada and Japan (1994)



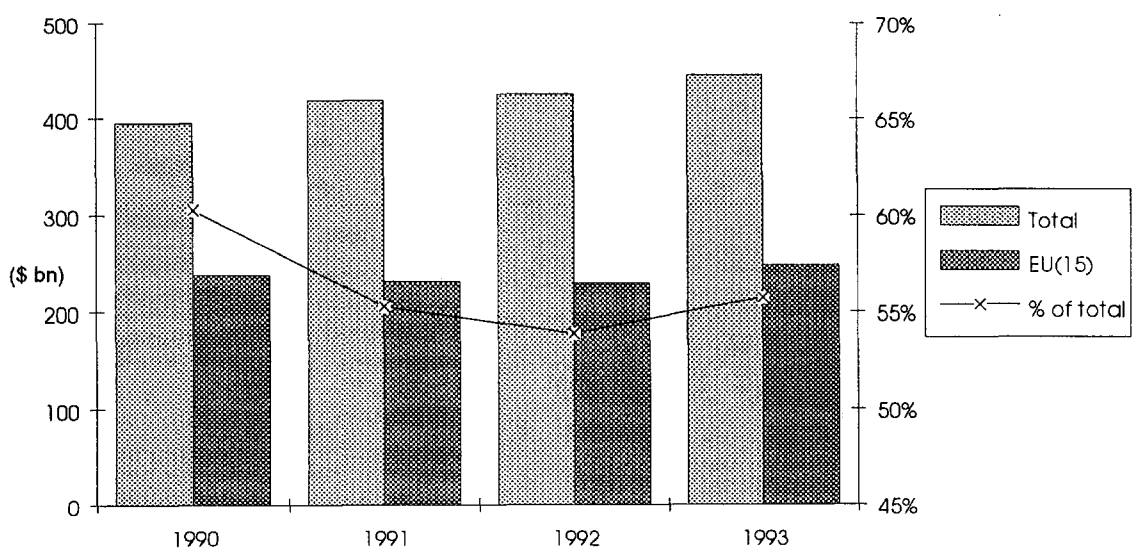
Source: Department of Commerce

1.2.2. Investment flows and stocks

The EU and US have by far the world's most important bilateral investment relationship, and each is the other's largest investment partner. Foreign direct investment (FDI) is a major source of employment and wealth creation, and it has been estimated that up to 3 million generally highly paid jobs in the US are due to EU investment.

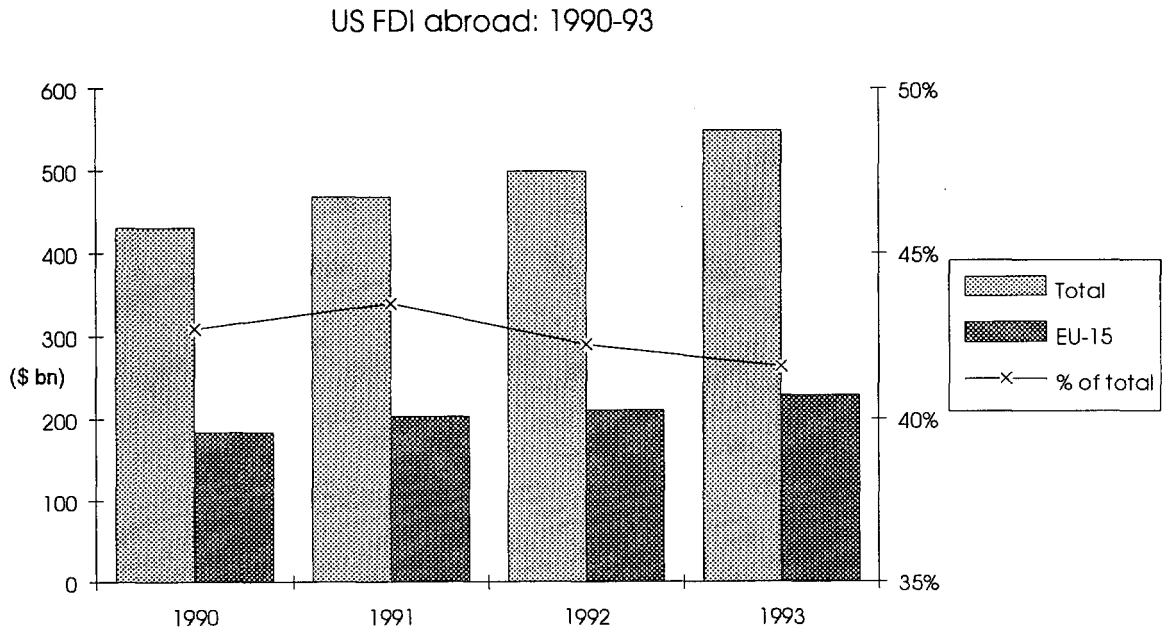
Turning first to the position in the US, the EU(15) is the source of over 50% of total foreign investment in the US, and this share was rising in the most recent year for which data is available. By contrast Japan accounts for less than a third of total *stocks* and this figure has been falling recently as the Japanese economic climate worsened and as firms increasingly look towards new opportunities in south-east Asia.

FDI position in the US: 1990-93



Source: Survey of Current Business (Aug 1994), Commerce Department

Likewise, US investors turn to Europe first when they think of investing abroad: over 40% of total US investment stocks held abroad are located in the EU. It is true, however, that although US investment in the EU has been increasing steadily during the 1990s, total US investment abroad has increased somewhat faster.



Source: Survey of Current Business (Aug 1994), Commerce Department

A similar picture emerges from the EU data on investment *flows*. The US is the largest destination of EU FDI abroad, accounting for over a half of all outward investment between 1988 and 1991. Over the same period, the US was the source of a quarter of all FDI inflows, second only to capital inflows from the then EFTA countries.

1.3 WTO inaugurated

On 1.1.1995, the new World Trade Organisation started its work. Rather unexpectedly, as many as 81 former Uruguay Round participants had managed to ratify and implement the agreements by this date.

Last minute ratification

Doubts as to the likelihood of entry into force on schedule dominated until the last second. In the US, the ratification and implementation of the Uruguay Round became an issue of high political controversy in the Congress, and a vote was postponed until after the November elections. But ultimately, the US implementing legislation passed comfortably in both House and Senate. As for the EU, the whole legislation package was approved by the European Parliament on 14 December and adopted by the Council on 22 December. Together with the Ambassadors of the then twelve Member States, the representative of the Community deposited with the GATT Secretariat the instruments of acceptance on 30 December 1994.

As a consequence, the agreements negotiated during the Uruguay Round Trade Negotiations are now legally in force and trade relations between the US and the EU thus stand on more solid ground.

Lower tariffs

Satisfactory, mutually beneficial results have been achieved on most of the 15 subjects under negotiation. The Round will, over a 10 year period, lead to a major liberalisation in market access for industrialised goods. All industrialised countries and many developing nations agreed to reduce tariff duties by at least 33% over 5 years, and in many cases substantially more. Duties will be entirely eliminated in some particularly important sectors, for instance pharmaceuticals. Thus, the EU's final offer amounts to an average reduction of 37-38% for all partners, and more than 50% for the US. American duty reduction towards the EU is comparable.

Agriculture

Importantly, the Round's results will reduce transatlantic tensions concerning agriculture, as the Uruguay Round extends the system of bound import tariffs to replace variable levies and quantitative restrictions, and then applies a 36% reduction in all tariffs over the six year implementation period, with a minimum of 15% for each tariff line. As for the main bone of contention, subsidised exports of farm products, it has been agreed to cut expenditure on subsidies by 36% over six years and to reduce the volume of subsidised exports by 21% during the same period. Finally, with respect to EU-US relations, the inclusion of a "peace clause" in the Agreement on Agriculture is of special importance. According to Art. 13 of the Agreement, for the duration of 9 years, domestic measures are, under certain conditions, exempted from countervailing measures and actions under GATT Articles XVI and XXIII. In practice, this means that the scope for bilateral conflict with the US has been reduced markedly as the EU's domestic support measures for the Common Agricultural Policy are now much less vulnerable than in the past.

Multi-Fibre Arrangement

Besides agriculture, the highly protected sector of textiles and clothing is gradually opening up. The Multi-Fibre Arrangement will be dismantled over 10 years. The transition from present protectionism to normal trade rules

will be made in four incremental stages: at the start of the process 16% of goods will come under GATT rules, after three years a further 17%, after seven years another 18%. As for trade still restricted during these three stages, import quotas will be increased by 16%, 25% and 27% respectively. At the insistence of the EU, the agreement also contains an explicit link between the liberalisation of the textile and clothing sector and the reinforcement of GATT rules and disciplines, especially concerning improved market access, dumping, subsidies and the protection against counterfeiting.

Services

Opening up of markets is also the main feature of the General Agreement on Trade in Services (GATS) . This agreement rests on three pillars. The first is a framework agreement containing obligations which apply to all members. The second concerns national schedules whereby members commit themselves to concrete liberalisation measures in agreed service activities. The third is a number of annexes which address the specific provisions in several individual service sectors. The framework agreement sets out the basic rules for trade liberalisation. The core provision is the most-favoured-nation (MFN) rule, which led to the unprecedented opening up of merchandise markets under the aegis of the GATT. A large number of countries submitted a schedule of concrete liberalisation commitments. Where results fell short of expectations, as in financial services, maritime transport and movement of persons, work was extended beyond the conclusion of the Uruguay Round itself. However, the ongoing negotiations on basic telecommunications started during the Uruguay Round, were intended to continue after the Round. Results in financial services and movement of persons are expected by June 1995. In the areas of basic telecoms and maritime transports, the deadlines are next year: 30 April and 30 June 1996, respectively.

Stronger trade rules

Beyond its short and medium term liberalisation effect, the Uruguay Round achieved a significant improvement in trade rules. The conditions for the imposition of safeguard measures and of anti-dumping and countervailing duties have been clarified. The GATT dispute settlement procedure has been thoroughly improved relative to the situation under the GATT 1947 where consensus was needed *for* the adoption of panel reports. Not only do the new rules provide for greater automaticity for the establishment and terms of reference of panels, but, more importantly, panel reports and those of the new appeals body will be adopted within strict deadlines unless there is consensus *against* their adoption. It is thus highly unlikely that rulings will be blocked.

Intellectual property

Last but not least, the Agreement on Trade-Related Intellectual Property Rights (TRIPs) extended the multilateral GATT rules, i.e. MFN and national treatment, to all commercially relevant rights - such as trademarks, patents, etc - as well as to the right-holders.

As a result of all its work on rules and disciplines in particular, the Uruguay Round represents an important step towards creating a fair world trade system managed by the rule of law.

1.4 Summary of Report's findings

Unilateralism

Unilateralism in US trade legislation is a major concern although the EU trusts that the US will abide by its WTO obligations, the new rules of which leave no room for unilateral measures in the fields of trade in goods and services and on intellectual property issues. The EU continues to consider the US retaliation in the so-called hormones case as in violation of the US' international obligations and is dismayed by the US extending sanctions further. The EU is now monitoring US actions regarding bananas to ensure that WTO obligations and procedures are respected.

Extraterritoriality

The EU opposes the extraterritorial reach of some US legislation which impedes international trade and investment to the extent that it exposes foreign-incorporated companies to conflicting legal requirements. Particular problems are raised with regard to the US Cuban embargo policy which now runs the risk of being tightened even further.

National security

Although the principle of national security has a long tradition in trade policy, the EU has repeatedly expressed concern about its excessive use in the US as a disguised form of protectionism. This is true, on occasion, for the application of the import, procurement and investment restrictions introduced in the name of national security.

In addition, US export restrictions have a clear extraterritorial application which runs the risk of creating conflicts of jurisdiction for EU enterprises. The EU has, however, been encouraged by recent signs that the US is willing to engage in a more comprehensive dialogue on these issues.

Public procurement

Even before the Uruguay Round had been ratified, the EU and US had concluded the negotiations on a further bilateral procurement agreement that improves on the provisions of the Government Procurement Agreement. This agreement nearly doubles the bidding opportunities for the two sides. However, the EU remains concerned about the wide variety of "Buy America" provisions which persist, and to which are being added others for federally funded infrastructure programmes.

Tariff barriers

Tariffs have been substantially reduced in successive GATT rounds. As a result, the EU's concern is focused on a relatively limited number of US 'peak' tariffs, where less progress has been made. Beyond this, a number of arbitrary tariff reclassifications by the US have been the source of dispute over time, though some were resolved last year. EU exports also face a number of additional customs impediments, which add to costs in a similar way to tariffs such as the Merchandise Processing Fee and the excessive invoicing requirements on importers. The EU is working with the US to try to alleviate some of these difficulties.

Technical barriers to trade

EU exporters continue to face a number of behind-the-border impediments. The proliferation of State regulation 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 products made to EU standards (normally based on international ones) to the US. Other related difficulties concern labelling requirements and excessive reliance on third-party certification. Finally, the FDA 'over-the-counter' drug approval procedures continue to give non-US based firms difficulties.

Intellectual property

As with other sectors, the implementation of Uruguay Round commitments are changing the legislative landscape for intellectual property rights. Patent law is being amended to ensure national treatment for exporters to the US; the EU will be carefully monitoring the implementation of these changes. Unfortunately, the US appears to have no plans to introduce requirements, in line with its TRIPs commitments , to inform right holders of government use of patents.

Tax measures

Like all countries, the US is keen to ensure the collection of all owed taxes. Concerns about federal tax measures therefore focus on the nature of reporting requirements and the specific manner for calculating what is due. More significantly, however, State "world-wide" unitary taxes are inconsistent with international tax treaties, irrespective of the fact that the Supreme Court has ruled them constitutional under US law.

Conditional national treatment (CNT)

Only two of the many legislative items containing CNT language under discussion in the previous Congress reached the statute book before the November dissolution, and the new Congress does not appear to be threatening the same kind of widespread restrictions on national treatment. Nonetheless, the EU is eager to work with the US to establish solid ground rules for the national treatment of investors, and has been disappointed by the US' reluctance hitherto. Investment is becoming a major issue in a variety of fora, and the EU will be looking to these, as well as in its bilateral contacts, to provide a framework which gives businesses real confidence when they invest abroad.

Information society

The G-7 Information Society Conference in February 1995 focused global attention on the telecommunications sector. The EU is moving rapidly towards a largely deregulated market without ownership restrictions, and is looking to the on-going GATS Basic Telecommunications negotiations to engage all the leading industrialised parties in a firm set of commitments on market access respecting the MFN principle and national treatment. However, Vice-President Gore choose the G-7 Conference to signal the US' intention to introduce greater US market access on a reciprocal basis. US policy towards its investment restrictions will therefore be the subject of close EU scrutiny this year.

Elsewhere in the sector, the EU remains concerned about the over-regulation of telecommunications services in general, and the particularly burdensome rules applying to enterprises not incorporated in the US. Finally, the Commission has addressed concerns to the US Administration regarding the premature licensing of Satellite-Personal Communications Systems - this is an inherently global technology and licensing would therefore benefit from greater coordination.

Agriculture and fisheries

The conclusion of the Uruguay Round is hopefully giving rise to a period of relative peace in this sector. Certainly, US export subsidies should become less of a concern over the course of the six year transition period. Sanitary

and phytosanitary issues have therefore become the main source of difficulty for the EU, with products often subject to arbitrary restrictions. The EU has worked intensively with the US to address these concerns, and has sometimes been disappointed by the US response. There is also a growing concern about the abuse of geographic designations for wines.

Little progress in the fisheries sector can be reported since last year. EU concerns focus on US unilateral determinations concerning other countries' fishing practices and the subsequent denial of fishing rights.

Financial services

The US financial services industry is in the throes of major reform, which will sweep away many of the inter-state banking restrictions to the benefit of US and non-US banks as well as their customers.

However, US sectoral segmentation rules remain in place and effectively block the establishment of global integrated financial services organisations. Yet, while EU firms are making strategic business decisions for the single European market, link ups between, for example, banks and insurance firms face difficulties if both parties have US subsidiaries. Multilateral negotiations are due to conclude in June, and the EU will press the US to introduce a more flexible regulatory structure.

Professional services

The implementation of the GATS schedules for professional services should result in a marked improvement in market access. Further negotiations are underway, and the EU is looking to securing more transparent and open access to the US, especially at the State level of regulation.

Air transport and the aeronautics industry

There were signs of progress on the EU's two main concerns in this sector: computer reservation systems and foreign ownership restrictions. EU-US negotiations have lifted some of the discriminatory practices linked to US CRS; others will require further dialogue. Proposals to amend the foreign ownership restrictions were recently introduced in Congress.

The EU remains concerned, however, about the level of implicit subsidies feeding their way into US aircraft manufacturers. This is clearly an area for multilateral action, and where progress needs to be made on the stalled GATT Aircraft Agreement.

Shipbuilding maritime services

The conclusion in the OECD last year of a Shipbuilding Agreement is expected to go a long way towards regulating unfair practices in this industry. As for maritime services, the entry into force of the WTO GATS disciplines to this sector for the first time, although there are no specific commitments as yet to reduce trade barriers. The EU will therefore monitor carefully the implementation of these two accords by the US.

However, there has been no progress on the elimination of requirements that cargoes generated by US Federal programmes be shipped on US-flagged ships, and they may soon also cover Alaskan oil exports - a move which the EU is concerned about.

Bilateral and multilateral initiatives

The EU and US have an extensive and growing dialogue on trade related issues which is playing its part in reducing tensions between the two sides, as well as trade barriers themselves. These are now being augmented by two horizontal initiatives: a Mutual Recognition Agreement of conformity

assessment and Regulatory Cooperation.

An MRA should be ready for signature this year and will provide exporters in a number of sectors to seek certification against US standards from EU bodies, thus eliminating some of the considerable costs in carrying out this action on the other side of the Atlantic and vice versa.

Regulatory Cooperation seeks to improve the trade awareness of the transatlantic expert-level discussions and to discourage the development of divergent regulations. In this way, the existing dialogues between regulators should play a more substantial role in addressing issues which might otherwise become the source of some future trade dispute.

In addition to the numerous dialogues which the Commission is now engaged in with the US, the regular high-level contacts in the 'Sub-Cabinet' play a particularly important role in addressing trade-related problems. These dicussions include 'early warning' sessions which give each side the opportunity to raise concerns before they become more major grievances.

2. HORIZONTAL ISSUES

2.1. Unilateralism in US trade legislation

2.1.1. Introduction

Unilateralism in US trade legislation takes the form of either unilateral sanctions or retaliatory measures against "offending" countries, or natural or legal persons. These measures are unilateral in the sense that they are based on an exclusively 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, agreed multilateral rules.

US unilateralism endangers the global trading rules in that it demonstrates a limited confidence in, and discontent with, GATT rules and the multilateral dispute settlement process, and runs a risk that the affected countries will adopt *quid pro quo* measures.

Reduced scope

While the European Commission clearly remains concerned about unilateral provisions in US legislation, it considers that with the entry into force of the WTO the scope for their practical application has been significantly reduced. The EU will therefore be looking for a radical change in approach by the US on the measures listed in the sections below.

Reinforced dispute settlement

The US - like other WTO members - is now bound under international law "to ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the [Uruguay Round] Agreements" (Art. XVI of the Agreement establishing the WTO). Among those obligations, Art. 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes is of special importance. WTO members are from now on precluded from making any determination on their own that a violation of the agreements covered (i.a. the GATT, GATS, TRIPs) has occurred, that benefits have been nullified or impaired or that the attainment of any objective of these agreements has been impeded. Rather, WTO members have recourse to the reinforced dispute settlement system and any determination of the above kind needs to be made in accordance with the rules and procedures of the Understanding and the findings of the panel or Appellate Body. WTO members are also bound as regards the time allowed to abide by a panel ruling and the level of possible retaliation. In summary, it is clear that the new provisions leave no room for unilateral measures in the fields of trade in goods, services and on intellectual property issues.

2.1.2. The relevant legislation

Section 301 family

The "section 301" family of legislation provides the most striking example of unilateral trade legislation and their future application will therefore be watched particularly closely by the EU. **Section 301 of the 1974 Trade Act** as amended by the Omnibus Trade and Competitiveness Act of 1986 authorises the US Administration to take action to enforce US rights under *any* trade agreement and to combat those practices by foreign governments

(3)

which the US government deems to be discriminatory or unjustifiable and to burden or restrict US commerce.

Super 301

The **Omnibus Trade and Competitiveness Act of 1988** also introduced the so-called "Super 301". "Super 301" is the term of art given to 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 US Trade Representative, 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.

Special 301

The 1988 Omnibus Trade and Competitiveness Act furthermore introduced a Special 301 procedure targeting intellectual property rights protection outside the US. Under Special 301 the USTR identifies "priority" foreign countries that are deemed to deny adequate and effective protection of intellectual property rights and officially initiates investigation procedures which may eventually result in unilateral trade measures.

The US has initiated Section 301 procedures against the EU in 28 cases altogether. In at least 7 cases, the US threatened the imposition of punitive duties or counter subsidies, or eventually resorted to such unilateral retaliation against the EU. The two currently outstanding cases are covered in the next section.

2.1.3. Hormones and bananas

The hormones dispute

In 1989 in response to a Community ban on the use of hormones in the production of livestock, the US Section 301 imposed unilateral retaliation measures amounting to 100% ad valorem duties on a range of EU exports to the value of $97.2 million. This amount represents the US's perceived loss of trade to the EU in beef and beef products for human consumption and affects, among others, canned tomatoes and fruit juice.

In an effort to de-escalate the dispute later that year, the EU/US Hormones Task Force agreed "to lift retaliation on EC products to the extent that US meat exports to the EC resumed". In fact, two small reductions amounting to $4.5 million were made in 1989 on this basis.

Since then US exports of beef and beef products to the EU have risen steadily, to $34.3 million in 1994. The EU has therefore repeatedly requested that a further reduction in the retaliation measures be made. The US has maintained, having examined the relevant trade data, that no such adjustment is warranted. Although the issue has been raised on numerous occasions, and in particular during the final phase of the Uruguay Round negotiations, the US Administration is currently not prepared to give a commitment to reduce the retaliation.

Extension of retaliation list

Indeed, for one particular product, boneless veal, the situation became markedly worse in 1994 when Dutch exports of the product, which had been going on unhindered for seven months, were suddenly classified as falling within the scope of the 100% retaliatory duties (despite these referring

specifically to *beef* rather than *veal*). US Customs has subsequently confirmed this decision and is seeking to reclaim $2 million duty retroactively on Dutch veal which had already cleared customs. The EU has objected strongly to this action, which has seriously curtailed Dutch veal exports and created financial problems for the US importers and Dutch companies who had hitherto been trading in good faith.

Bananas

Following the 17 October 1994 opening of an investigation under Section 301 of the 1974 Trade Act to ascertain if the EU's banana regime is adversely affecting US economic interests, USTR Kantor published a preliminary finding against our system in January 1995. However, the EU considers that there is no justification for the US to take unilateral action. The credibility of the WTO would be put at stake were the US to ignore so blatantly their obligations and rights within this new organisation within months of its inception. Either a negotiated solution can be found to the problem or the US should pursue its rights in the WTO. There should be no doubt of the Commission's willingness to continue a constructive dialogue with the US and discussions between officials are proceeding to see if a solution can be found.

2.1.4. Procurement sanctions

The EU and certain Member States also continue to be subject to sanctions under **Title VII of the Omnibus Trade and Competitiveness Act of 1988**. Title VII i.a. provides for a procurement prohibition against any country which discriminates against US suppliers in its procurement of goods or services, whether or not covered by the Code, and where such discrimination constitutes a "significant and persistent pattern or practice" and results in identifiable injury to US business. To this effect, the US President is required to publish an annual report on those foreign countries which discriminate against US products or services in their procurement (see Section 2.4.2).

2.2. Extraterritoriality

2.2.1. Introduction

For reasons of domestic and foreign policy, the US has adopted a number of laws which are to some extent applicable outside US territory. In some cases the EU does understand the underlying reasons for, and might agree with, the objectives of these laws. However, it does not agree with the measures by which these objectives are being achieved.

The enforcement of US legislation outside US territory can expose EU enterprises to unjustified hardships and conflicting requirements. The extra-territorial scope of US legislation affects *inter alia* importers and exporters based outside the US, who have to comply with US export and re-export control requirements and prohibitions; US owned or controlled businesses in Europe which have to comply with US foreign policy trade legislation, as well as manufacturers, who have to keep track of end-users or potential misuses of sensitive items.

The extra-territorial application of US laws and regulations seriously impedes international trade and investment to the extent that it exposes foreign-incorporated companies to conflicting legal requirements. Many close trading partners of the US, such as Canada and certain Member States of the EU have or consider adopting "blocking statutes" in order to preclude the extra-territorial application of foreign legislation within their territory.

2.2.2. Illustrative Cases

Amongst the most problematic examples of extra-territorial application are the US **Export Administration Regulations** (EAR), whose legislative authority was the **Export Administration Act of 1979** (EAA), as amended. Though scheduled to expire in 1990, the system of controls established continues in force based on a Presidential decision under the **International Emergency Economic Powers Act of 1977** (IEEPA). The EAR, among other things, require companies incorporated and operating in EU Member States to comply with US re-export controls. This includes compliance with US prohibitions on re-exports for reasons of US national security and foreign policy subject to US jurisdiction. The extra-territorial nature of these controls has repeatedly been criticised by the EU and its Member States.

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 consist of a prohibition of contracting or procurement by US entities and the banning of imports of all products manufactured by the foreign violator. These sanctions are of such a nature that they must be deemed contrary to the GATT and its Public Procurement Code.

Cuba

Since 1962, the year in which the US first proclaimed a trade embargo against Cuba, the relations between the two countries have mainly been determined by **Section 620 (a) of the Foreign Assistance Act of 1961** (FAA), as amended, the **Trading with the Enemy Act of 1917** (TWEA), as amended, and the **International Emergency Economic Powers Act** (IEEPA).

The FAA and TWEA provide the legal basis for the promulgation of the **Cuban Assets Control Regulations**, which prohibit virtually all commercial and financial transactions with Cuba or Cuban nationals by US companies, US owned or controlled companies and US nationals, unless specifically licensed by the Department of the Treasury. The IEEPA provides the legal authority to control and prohibit US exports to Cuba.

The Cuban Democracy Act of 1992 (CDA) amends the **Cuban Assets Control Regulations** and further restricts licensed trade with Cuba to only humanitarian and food aid operations. Section 1706 of the CDA lays down a number of trade prohibitions. These are:

- a prohibition of all commercial transactions and payments with Cuba by US companies including US owned or controlled foreign firms. This will, however, not affect contracts entered into before the date of enactment of the CDA;
- a 180 days landing ban on commercial vessels departing from Cuba, except if they hold a licence issued by the US Secretary of Treasury;
- a landing ban on vessels carrying goods or passengers to or from Cuba or carrying goods in which Cuba has any interest, except if they hold a licence issued by the US Secretary of the Treasury.
- a prohibition on supplying ships carrying goods or persons to or from Cuba.

That part of the CDA which purports to prohibit foreign firms owned or controlled by US companies from trading with Cuba is clearly extraterritorial. Accordingly, the Governments of Canada and the United Kingdom invoked their blocking legislation on 9 and 14 October 1992 respectively to counter the extra-territorial scope of the CDA and to protect the trading interests of their companies.

The opposition of the EU to the CDA was made clear on many occasions without success, including a final démarche to the Department of State in October 1992, urging the President to veto the CDA. The EU has also noted the threat expressed by the US Government to prohibit, under the **Food Security Act of 1985**, as amended by the **Food, Agriculture, Conservation and Trade Act of 1990**, the allocation of a preferential sugar import tariff quota to any country that is a net importer of sugar from sugar cane of sugar beets unless that country verifies that it did not import sugar from Cuba for re-export to the US. As a matter of fact, the US have denied a preferential sugar quota to a Member State which has refused to give the assurances demanded.

In addition, the extra-territorial application of US laws and regulations also has the effect of impeding legitimate transactions with Cuba carried out by

non-US owned or controlled subsidiary companies incorporated and domiciled outside the US. Thus, the US Treasury Department blocked a payment made through the Bank of New York from a European company to another non-US owned company not located in the US based on the Trading with the Enemy Act.

A Bill (the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995 (Bill S 381 or the Helms Bill and its companion HR 927, the Burton Bill) seeking further to tighten up the embargo against Cuba was introduced in Congress earlier this year. In its current form (March 1995), among other objectionable features, it contains the following extraterritorial provisions :

- a prohibition to US owned or controlled firms from financing other firms that might be involved in certain economic transactions with Cuba;
- a prohibition of the entry into the US of sugars, syrups and molasses originating from any country that imports such products from Cuba, unless this country certifies that it will cease such imports in the future;
- jurisdiction to US federal courts over disputes between US and foreign companies about expropriated property located overseas, including retroactively, over claims by persons that held Cuban citizenship at the moment of expropriation.

The EU has conveyed to the US Administration and Congress its opposition to the above provisions and its determination to defend the EU's legitimate right under the WTO. The US Administration offered its cooperation to the Congress in view of making LIBERTAD more compatible with the US international obligations.

Product liability

The House of Representatives passed the **Common Sense Product Liability and Legal Reform Act of 1995** in March of this year. Although its provisions for simplifying the system of product liability in the US are welcome, the proposed legislation would give US courts direct jurisdiction over manufacturers based outside the US. Moreover, the courts would be empowered to demand information from such manufacturers and, when this is not forthcoming, to assume this is an admission of liability. This approach ignores the fact that there are internationally agreed procedures for handling requests for information contained in the Hague Convention on Taking Evidence Abroad in Civil and Commercial Matters.

At the time of writing, however, the Senate's draft text does not contain these extraterritorial aspects. The Commission would encourage the Senate to avoid such provisions, and to resist their inclusion during the House/Senate Conference.

Tuna-Dolphin

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 Ocean and providing for sanctions to be taken against other countries which fail to apply similar standards for dolphin protection. "Primary" embargoes are currently being applied to imports of certain yellowfin tuna products from Mexico and Venezuela. "Secondary" embargoes on yellowfin tuna products are imposed on imports from

"intermediary nations" - namely, countries which are exporting to the USA and have failed to certify that they have not imported from the primary embargoed countries during the preceding six months. Italy is currently subject to such a secondary embargo.

The EU shares the declared aim of the MMPA, but believes that any measures for the conservation of living resources, including dolphins, should be achieved through international cooperation. Unilateral trade measures which are adopted for environmental reasons should be avoided in favour of multilaterally agreed measures.

At the request of Mexico, as a primary-embargoed country, a GATT Panel has reported on the terms of the MMPA. The Panel considered that the US practices were not in conformity with GATT Articles III and XI and that the GATT-illegal and unilateral trade elements of the MMPA should be repealed. However, despite consultations with the US, the Panel's report has not yet been adopted. Because of this lack of progress, the EU requested the establishment of a further GATT Panel.

The second Panel report was released in May 1994. Like the first one, it finds against unilateral measures imposed for environmental reasons and related to Processes and Production Methods (PPMs). Furthermore it reiterates that it should not be allowed to impose trade measures with a view to forcing other countries to change their environmental and conservation policies within their own jurisdiction. In this respect the second panel confirms the classic interpretation of GATT Articles III:4 and XX (b) and (g).

The EU has formally requested the GATT Council to adopt the Panel report. At the time of writing, the US Government was still examining the Panel report and therefore was not ready to discuss its adoption.

2.3. Impediments through National Security Considerations

2.3.1. Introduction

Inherent danger of overly restricting trade

The right of Sovereign nations to take any measure 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 actors that such measures are prudently and sparingly applied, as for example manifested by the National Treatment Instrument of OECD and its Codes of Liberalisation. There is an inherent danger that restrictions to trade and investment introduced on national security grounds are, in reality, essentially protectionist in nature.

National security ≠ economic strength

This latter concern is particularly appropriate in the case of the US. The US Trade Representative reiterates annually in his Trade Policy Report to Congress that the US regards its national security as interwoven with domestic economic strength. Similar sentiments have been reported by the Department of Defence (DoD) regarding its procurement policies too.

US legislation includes numerous restrictions on foreign imports, exports, procurement and investment which are justified on national security considerations. The EU continues to have major concerns about the overuse of these provisions and the US' apparent undermining of international agreements designed to alleviate some of the restrictions. In this context, it also draws attention to the excessive burden placed on the US economy of propping up an uncompetitive defence industry. The EU will be monitoring carefully US implementation of the new GATT procurement rules, and will be looking to forthcoming negotiations on investment issues to address some of the matters raised in this chapter.

2.3.2. Import 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 investigates the effects of imports which threaten to impair national security either by quantity or by circumstances. Section 232 is supposed to safeguard the 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.

Disguised protectionism

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. The EU will continue to monitor closely the impact of these restrictions

2.3.3. Export restrictions

Unilateral determinations

A comprehensive system of export controls was established, under the **Export Administration Act of 1979** (EAA), and continued under the **International Economic Emergency Powers Act of 1977** to prevent trade to unauthorised destinations. This system is also used to enforce US foreign policy decisions and international agreements on non-proliferation of certain types of goods or know-how. The EU has repeatedly expressed its concern about the unilateral determination by the US concerning export licences for products made in the EU: this creates a conflict of jurisdictions and requirements for European companies whenever their products or exports have had a component or an element controlled under US export control regimes. The EU has in particular protested because the US considers the subsidiary of a US company incorporated in one of the Member States of the EU as a US company and as such subject to US jurisdiction for actions within the EU.

EU-US dialogue

The EU Member States have their own export control systems and do cooperate with the US in various "non-proliferation" agreements, such as on nuclear, chemical and biological warfare, and missile technology. It is, however, welcome that the US have shown some interest in a further working-level exchange of information with the EU, because it will launch a common export control regime. Appropriate early consultations should allow both legitimate trade to take place and an efficient prohibition of exports to unauthorised destinations.

2.3.4. Procurement restrictions

Reduced scope of GPA

Although the concept of national security can be invoked under Article VIII of the GATT Government Procurement Agreement (GPA) to limit national treatment in the defence sector for foreign suppliers, the use of national security considerations by the US has led in practice to a disproportionate reduction in the scope of DoD supplies covered by the GPA.

More clarity on GPA

While the US denies abusing the GATT 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. Together, these mark a first small step towards more acceptable practices.

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 GAO 1992 ruling that the purchase of fuel cells for helicopters is subject to the Berry Amendment fibre content provisions, and the withdrawal of a contract to supply oil containment booms to the US Navy because of the same textile restrictions.

(4)

Although the Berry Amendment does provide for waivers from its strict requirements, it is not clear whether the DoD actually makes use of these possibilities.

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.

Buy America restrictions

At the same time, defence procurement is sometimes also impeded by Buy America restrictions on federally funded programmes (section 2.4.4). US Allies including 11 EU member states have concluded **Cooperative Industrial Defence Agreements** or **Reciprocal Procurement Agreements** (MOUs) with the US. These agreements provide for a blanket waiver of the Buy America Act by the Secretary of Defence with respect to products produced by the Allies. They aim to promote more efficient cooperation in research, development and production of defence equipment and achieve greater rationalisation, standardisation, and compatibility.

MOU's undermined

However, the US Administration (DoD and USTR) can rescind the blanket waiver if it determines that a particular Ally discriminates against US products. In addition, Congress is unilaterally overriding the MOUs by imposing ad hoc Buy America requirements during the annual budget process. According to EU industrial sources, there are also indications that US procurement officers disregard the exemption of Buy America restrictions for MOU countries, e.g. in the case of fuel-cells and steel forging items.

Restrictions are counter-productive

A 1989 DoD Report to Congress casts doubt on whether many of the procurement restrictions contribute towards the aim of maintaining an essential US industrial base. The main arguments against procurement restrictions are that they:

- increase by 30 to 50% the price of DoD requirements;
- are a disincentive for investment and innovation;
- are costly in terms of paperwork and management;
- have produced increased lead-times for supply by domestic industries;
- maintain a climate of protectionism;
- create an atmosphere of animosity with allies, particularly when they violate the spirit of the MOUs.

2.3.5. Investment restrictions

Section 5021 of the 1988 Trade Act, the so-called **Exon-Florio amendment**, authorises the President to investigate the effects of any merger, acquisition or take-over which could result in foreign control of legal persons engaged in interstate commerce on US national security. This screening is carried out by the Treasury-chaired Committee on Foreign Investment in the US (CFIUS). Should the President decide that any such transactions threaten national security, 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:

Reinforcing Exon-Florio

- Since 1992, an Exon-Florio investigation must be made if a foreign government owned entity engages in any merger, acquisition or take-over which 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 **Fiscal Year 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's international technological leadership in areas affecting US national security"* - again blurring the line between industrial and national security policy.

OECD efforts in question

The Exon-Florio provisions 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. Such an approach also harms common EU-US efforts to establish and implement the multilateral disciplines in the WTO Trade-Related Investment Measures (TRIMs) Agreement.

Uncertainties about implementation

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 to protect essential security interests. 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 which it justifies "partly or wholly" on the grounds of national security. Foreign investment is restricted in coastal and domestic shipping under the **Jones Act** (see section 3.6.3) 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 Exclusive Economic Zone (**Commercial Fishing Industry Vessel Anti-reflagging Act of 1987**). Licences for cable landings are only granted to applicants in partnership with US entities (**Submarine Cable Landing Licence Act of 1921**, section 3.1.2).

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 only be granted to US citizens and to corporations organised under the laws of the United States. 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. As regards 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.

2.4. Public Procurement

2.4.1. Introduction

New bilateral agreement

In April 1994, the EU and US finalised a further round of bilateral procurement negotiations. The new agreement, which is in the process of final approval by the European Parliament and Council, builds on the 1993 Understanding on the liberalisation of procurement markets, as well as the Government Procurement Agreement agreed as part of the Uruguay Round. In particular, it expands coverage to include some sub-central government entities and those operating electrical utilities. However, US sub-federal coverage remains incomplete (37 out of 50 states), and the EU was obliged to scale back its offer in this respect to match.

Although this agreement marks a further reduction in the prevalence of "Buy America" restrictions, EU firms are still subject to a substantial array of difficulties when tendering in the US. Beyond the formal legislative restrictions, a number of federally funded programmes include restrictions on third country tendering as do State regulations in many instances. The EU also continues to monitor closely the impact of US small business set-aside provisions.

The EU is now looking to the new bilateral and multilateral agreements to improve greatly on the currently available opportunities. These agreements are expected to counter some of the major discrimination present in the Buy America legislation, and the EU will be monitoring very carefully US implementation of them.

2.4.2. Federal "Buy America" legislation

Many types of measures

The **Buy America Act of 1933**, as amended, contains the basic principles of a general buy national policy. 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. Others 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 European exports, but also discourage US bidders from using European products or services.

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. The **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 (see 2.4.5) and firms in labour surplus areas, and to reject foreign bids either for national interest reasons or national security reasons. In the construction, alteration, and repair of public buildings and public works only domestic materials shall be used.

Some limited waivers

On the other hand, the Buy America Act can be abrogated for public interest reasons. Furthermore, the Buy America obligations do not apply to the procurement of supplies to be used outside the US territory, to products which are unavailable in the US in sufficient quantities or satisfactory quality and to domestic materials which would entail unreasonable costs to acquire. Whereas the Executive Order of 1954 defines "unreasonable" as a cost differential greater than 6% of the bid price including duty and all costs after the arrival in the US, the DoD applies a 50% price differential.

Tendering restrictions

Sanctions imposed by the US in May 1993 under **Title VII of the Omnibus Trade and Competitiveness Act of 1988** following a lack of agreement on procurement rules in the telecom sector are still in force against EU bidders for certain federal contracts below the GATT Government Procurement Agreement (GPA) thresholds. The US sanctions prevent European bidders from participating in certain federal tenders. The counter-sanctions implemented by the EU on 8 June 1993 are also still in force against US bidders for supplies, works and services. A study jointly financed by the EU and the US put the value of above-threshold US central government procurement and that part of sub-central government procurement covered by the GPA at $50-55 billion and $24 billion respectively.

Similar restrictions to those in the Buy America Act are contained in:

- the **National Security Act of 1947** and the **Defence Production Act of 1950** (see section 2.3.4);
- the **Department of Defence Balance of Payments Program**, which provides for a 50% price correction on foreign offers, when compared with US offers;
- the **Competition in Contracting Act of 1984**, which allows the procuring agencies to restrict procurement, on a case by case basis, in order to achieve industrial mobilisation objectives.
- the **National Space Policy Directive of 1990** establishes that US Government satellites will be launched solely on US manufactured launch vehicles, unless a specific exemption has been granted by the President. The measure is part of a set of coordinated actions to strengthen the US launch industry and is clearly detrimental to European launch service providers. European launch operators are effectively barred from competing for US government launch contracts, which account for approximately 80% of the US satellite market. The restriction, which initially applied to the launching of military satellites, was justified by the US on national security grounds, but is now also imposed on satellites for civilian use.

2.4.3. Telecommunications sector

Special difficulties

Procurement in the telecommunications sector remains a bone of contention between the EU and the US. As mentioned above, the US imposed Title VII 1988 Trade Act procurement prohibitions against EU bidders in May 1993 (see above). US telecommunications companies have historically bought equipment from local suppliers, and AT&T buys network equipment almost exclusively from itself. Furthermore, **Buy America** rules apply to DoD procurement, and to Rural Telephone Cooperatives financed

by the Rural Electric Administration (see below).

Not covered by WTO

Although the EU has sought negotiated solutions to these problems, the 1993 MOU and the new GPA did not cover this sector. One of the principal difficulties is the criteria for establishing which particular utilities should be included. Following the breakdown of the multilateral talks, the EU and the US attempted, so far unsuccessfully, to negotiate a bilateral self-contained agreement on telecommunications procurement. Again the issue of coverage is at the forefront.

Inclusion of private sector

The EU believes that coverage should not specifically distinguish between public and private companies, but should focus on the underlying conditions which lead telecommunications companies to pursue procurement policies that tend to favour particular national suppliers. These conditions include, first, insulation from market forces through the possession of a monopoly or a dominant position over a network, or through the possession of special rights relating to the management of the network; and, second, the means which government may use to influence the operations of an entity, such as regulation of tariffs and financing, or authorisation to operate. Thus, the EU argues that both publicly owned and private status utilities operating under monopoly or dominant conditions should be covered - this would introduce a higher level of transparency and would lead to improved market access.

2.4.4. Federal "Buy American" funding programmes

Additional Congressional restrictions

In addition to legislative restrictions, the US Congress regularly adopts some ad hoc Buy America provisions as part of the Budget Authorisations and/or Appropriations legislation and apply to federally funded programmes. These typically raise price preferences from a standard 6% up to 10-25%, notably in the water, transport (mass transit, airport and highway construction), energy, and telecommunications sectors. By way of examples:

- The **Airport and Airway Safety, Capacity, Noise Improvement and Inter-modal Transportation Act of 1993** includes a price preference and local content provisions for US steel and manufactured products procured by the Federal Aviation Authority.
- The **Federal Water Pollution Control Act**, as amended by Section 39 of the **Clean Water Act**, provides for a 6% price preference for US suppliers for projects for water treatment.
- The **Surface Transportation Assistance Act of 1978** provides federal assistance for State transport projects, as long as States impose US standards, include a 25% price preference for US equipment and require the use of US manufactured steel.
- The **Inter-modal Surface Transportation Efficiency Act of 1991** extends the existing Buy America restrictions on steel to iron products and reserves at least 10% of the total appropriations for US small and disadvantaged businesses. It also provides for trade sanctions against a foreign country which is considered to discriminate against US suppliers.
- The **Amtrak Improvement Act of 1978** and successive legislation

provides that steel products, rolling stock and power train equipment be purchased from US suppliers, unless US-made items cannot be purchased and delivered in the United States within a reasonable time.

- The **Rural Electrification Administration** provides loans and loan guarantees to telephone and electric authorities, subject to all the materials and equipment being domestically produced. Following ratification of the bilateral Marrakech agreement, "Buy American" restrictions will only apply to loans made to telephone utilities.
- The **Clean Coal Technology Program**, which is part of the **Energy Policy Act** requires that projects selected by the Agency of International Development for this programme must ensure that at least 50% of the equipment supplied has to have been manufactured in the US.
- **Defence Appropriation and Authorisation Acts** (section 2.3.4).

2.4.5. State Buy America legislation and restrictions

Purchases of steel

Supplies and works contracts

Legislation in at least 40 States provides for Buy America restrictions on procurement. Many States (Connecticut, Louisiana, Maine, Michigan, Illinois, Maryland, New York, Pennsylvania, Rhode Island and West Virginia) have requirements for purchases of steel used for construction and infrastructure work - they apply not only to the public purchaser, but also to private contractors and subcontractors. In addition, general preferences for supplies and works contracts, which can be as high as 10%, are found in Alabama, Alaska, Arizona, Arkansas, Massachusetts, Maine, Montana and Wyoming. In public work projects, New Jersey legislation specifies that only domestic materials, such as US cement, may be used.

2.4.6. Set Aside for Small Businesses

Federal set-aside

The **Small Business Act of 1953**, as amended, requires executive agencies to place a fair proportion of their purchases with small businesses. These are defined as businesses located in the United States which make a significant contribution to the US economy and are not dominant. Currently, the concept 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. Moreover, each executive agency shall have an annual goal, which is currently 10% for the Department of Defence, and 5% for other agencies. Under the 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 Department of Defence, the standard 50% preference applies to all US businesses offering a US product.

State set-aside

An important number of States also operate particularly proactive small businesses and minority set-aside policies. It is estimated that in States like California and Texas such policies effectively close off around 20% of procurement opportunities to foreign firms. In Kentucky as much as 70% is set aside for small businesses. The present and the new GATT Government Procurement Code contain a US reserve for small and minority businesses set aside.

2.5. Tariff Barriers and Equivalent Measures

2.5.1. The results of the Uruguay Round negotiations on Market Access

The US committed itself in the Uruguay Round to an average tariff reduction on industrial products of 37%; vis-à-vis the EU it went even further and will reduce its tariffs by 46%. The US commitment covers both the elimination and harmonisation of duties in certain sectors and the reduction of certain tariff peaks (defined as tariffs of 15% and higher). Tariff reductions will be implemented over a period of 5-10 years, beginning on 1 July 1995.

Zero tariffs

Beyond this, total tariff elimination was negotiated on a plurilateral basis, among industrial countries, in the following sectors:

- beer and distilled spirits
- pharmaceuticals and intermediate chemicals (remaining chemicals were aligned to either the 5.5% or the 6.5% harmonised rates)
- paper, pulp and printed matter
- steel
- construction and agriculture equipment
- medical equipment
- toys
- furniture
- scientific instruments products
- semiconductor manufacturing and testing equipment

Tariff peaks

A number of US tariff peaks remain in the textiles, footwear, ceramics, glass and trucks sectors. Reductions in the field of textiles, where most peaks are maintained, will only average 12%. The 25% duty on imports of trucks will remain in place.

Customs Cooperation Agreement

Nonetheless, a number of tariff related subjects remain unsolved, in particular customs users fees and the invoicing requirements for certain products. The EU and US are currently working on a Customs Cooperation Agreement which should, once agreed, facilitate the pursuit of these issues.

2.5.2. Tariff Reclassifications

In the last few years, several EU products have been hit by unilaterally increased tariffs as a result of their reclassification under a new heading.

Eventually, most of these cases were solved, either bilaterally or after the issue of an authoritative opinion of the Harmonised System Committee of the Customs Co-operation Council. However, problems with regard to sugar confectionery, red dye and ivory cream marbles (Spanish 'crema

(5)

marfil') remain, although the new, higher, duty rates for the latter will be reduced as a result of the Uruguay Round.

2.5.3. Customs User Fees

The need to tackle the budget deficit without increasing taxes has led to the establishment of a series of User Fees by which only the user of a particular (formerly free) service pays an amount presumed to cover the cost of the service provided.

Fees becoming excessive

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** extended and modified these provisions by, among other things, considerably increasing the level of the fees. Excessive fees levied for customs, harbour and other arrival facilities, that is for facilities mainly used by importers, place foreign products at an unfair competitive disadvantage vis-à-vis US competition.

Merchandise Processing Fee

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 insular possessions. It is also levied 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 $485 as from 1 January 1995. Meant, when established, to last until 30 September 1990, it has been extended on various occasions. It now runs until 30 September 2003.

GATT ruling

At the request of Canada and the EU, the GATT Council instituted a Panel in March 1987, which in November 1987 concluded that the US Customs User Fees for merchandise processing were not in conformity with the General Agreement. The Panel ruled that a Customs User Fee was not in itself illegal but that it should be limited in amount to the approximate cost of services rendered. The GATT Council adopted the panel report in February 1988.

The present Customs User Fees 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, in many cases, to exceed the cost of the service rendered since, irrespective of the level, it is still based on the value of the imported goods. Moreover, if the most recent increase was essentially designed to balance the shortfall of customs revenues as a consequence of the Uruguay Round duty rates reduction, the EU would be particularly concerned.

Harbour Maintenance Fee

US Customs also participates in the collection of the Harbour Maintenance Fee (HMF). The HMF is levied in all US ports on waterborne imports, exports and domestic cargoes at an ad valorem rate of 0.125%. It serves to fund dredging and other harbour maintenance activities. However, the ad valorem basis for its collection makes it difficult to justify as a fee approximating the cost of the service provided. Moreover, while

enforcement through Customs ensures that imported merchandise bears the fee, the same is not true for domestic cargo. 1992 data show that imports bear 65% of the levy, exports 27% and domestic cargo 3%.

Moreover, there is a notable accumulation of unused funds which could reach almost $1 billion by 1998. According to US Authorities this is due to the absence of proper budgeting of dredging works or to the blockage of projects by environmental lobbying groups. However, the European Commission is closely monitoring the accumulation of unused funds as this may confirm the excessive nature of the fee.

2.5.4. Excessive Invoicing Requirements

Textiles and clothing

Invoice requirements for exporting certain products to the US can be excessive. This is particularly the case for textiles/clothing where customs formalities include the provision of particularly detailed and voluminous information. 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.

Other products affected

EU exporters of footwear and machinery are faced with the same type of complex/irrelevant questions (e.g. a requirement to provide the names of the manufacturers of wood-working machines, and of the numerous spare parts). Furthermore, the US Customs and customs house brokers can also request proprietary business information (e.g. listing of ingredients in perfumes or composition of chemicals).

Reforms pending

In September 1992 the US Customs Service proposed amendments to the Customs Regulations. The proposed amendments, implementation of which is still pending, are intended to ensure that Customs has sufficient information to determine the tariff classification and admissibility of the merchandise with reference to the numerical scheme and product description contained in the Harmonised Tariff Schedule of the United States.

The legislation limits the specific and very detailed invoice description requirements in the **Customs Regulations (19 CFR 141.89 (a))** to three groups of merchandise:

- Textile and apparel products which are subject to quotas and visa requirements under the US textile import program;
- Steel and steel products which until 31 March 1992 were subject to voluntary restraint arrangements; and
- Machine tools which until 31 December 1991 were subject to voluntary restraint arrangements.

The information requirements in their amended form far exceed normal customs declaration and tariff procedures. They are unnecessary because customs are entitled to ask for all necessary supplementary documents and information during clearance (standard 15 of Annex B1 of 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 new competitors disadvantaged. These effects are particularly disruptive in diversified high-value and small-quantity markets which are of special relevance for the EU.

2.6. Technical barriers to trade: standardisation, testing, labelling and certification

2.6.1. Introduction

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. Even if, 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 be subject to US Labour Department 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 national 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.

WTO TBT Agreement

In the Uruguay Round the US has agreed on an expanded Agreement on Technical Barriers to Trade (TBT) which will improve the rules for enforcing standards, technical regulations and conformity assessment procedures. The TBT Agreement is applicable to all WTO members, but provides for the right to adopt and maintain appropriate technical rules for specific, legitimate objectives, such as protection of human health and safety, plant and animal health, and protection of the environment. The level of protection is discretionary as long as measures respect the basic provisions of the TBT Agreement. A feature of the new TBT Agreement is the *proportionality criterion* which 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. In particular, it specifies tougher restrictions on the US in many of the areas of concern discussed below - use of international standards, labelling requirements and sub-federal standards. The Agreement also provides for further bilateral follow-up actions. In this context, the EU and US are negotiating a Mutual Recognition Agreement (section 4.1) and launching an initiative called Regulatory Cooperation (section 4.2) to augment the impact of the existing numerous sectoral dialogues (section 4.4).

2.6.2. 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 WTO Agreement on Technical Barriers to Trade 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, very few indeed are directly adopted. Some are in direct contradiction.

Illustrative cases:

- The **1990 Fastener Quality Act** (FQA), which aims to deter the introduction of sub-standard industrial fasteners into the US, includes onerous compliance costs. The FQA will have the effect of requiring European manufacturers to revert to final sampling and testing methods at a time when they have invested heavily in internationally agreed quality assurance systems such as ISO 9000, designed to improve quality and reduce the need for multiple assessments.
- The **Nutrition Labelling and Education Act 1990** requires certain products to be labelled as to their content and origin. The EU is concerned that the rules differ from international standards on labelling established by the **Codex Alimentarius** (upon which the corresponding EU legislation is based) and, furthermore, that this legislative action would have serious negative consequences on EU/US trade in foodstuffs. As it stands, the proposed implementing legislation would result in significant commercial obstacles to EU food products marketed in the US and vice-versa.

2.6.3. Regulatory differences at State level

There are more than 2,700 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.

No central source of information

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).

Other hidden costs

The hidden costs could be much greater because the time and cost involved can be greatly reduced simply by using US components which 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 programs which are not in conformity with international quality assurance standards (ISO 9000). 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.

Illustrative Cases:

Ceramic ware

- EU exporters of ceramic ware must comply both with Federal regulations setting tolerance levels on the amount of lead in ceramic ware, and with those enacted by State legislatures such as California (which are more stringent than both the internationally recommended level and the current federal limit).

- **California's Safe Drinking Water and Toxic Enforcement Act** (Proposition 65) requires a special warning label on all products containing substances known to the State of California to cause birth defects or reproductive harm, including lead.

Recycled glass bottles

- The **Public Resources Code of California**, requires that glass containers which are used for food and beverages have a minimum percentage of recovered glass in their composition. This legislation applies to all glass containers produced or sold in California, and thus also affects EU exports to California. It is worth noting, however, that any environmental damage caused in California by the import of glass containers is in no way related to the amount of recycled glass used when the product was manufactured in a third country. Therefore the application of such a domestic environmental requirement to imported products is not in conformity with GATT rules.

Electrical appliances

- In order to sell electrical appliances in certain States it is a legal necessity (and, in others, a commercial one) to obtain approval by Underwriters' Laboratories (UL) against its standards. UL has complete discretion on its standards and, on occasion, can make seemingly arbitrary changes to them.

  Shaving equipment

  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 will cause considerable costs to European manufacturers. It has also required the subsequent modification of the related IEC international standards (endorsed by CENELEC).

2.6.4. Labelling requirements

Providing consumers with accurate, useful information is certainly in everyone's best interest. However, sometimes the information required to be put on a label seems to be specifically designed to influence consumer behaviour. For other products, labelling requirements seem to be another way of slowing down the process of getting a new good to the market.

Illustrative cases:

- The **American Automobile Labelling Act** provides that, from October 1994, passenger cars and other light vehicles must be labelled with, *inter alia*, the proportion of US/Canadian made parts and the final point of assembly. These requirements seem to be intended to influence consumers to buy cars of US/Canadian origin. They constitute an

unjustifiable discrimination, contrary to Article 2.1 of the TBT Agreement, as the obligation to indicate engine and gearbox origin could discourage US constructors from importing parts from European component manufacturers. Moreover, since EU rules are quite flexible, due to the internal market, parts for any single model of motor vehicle may originate from one of several countries. The US proposal will therefore have greater administrative costs for European importers than for other importers. In addition, the fulfilment of the labelling requirement may involve the disclosure of confidential data from non-US manufacturers.

The EU is seriously concerned that the implementation of the labelling requirement will create unnecessary trade barriers, and put an excessive financial burden on importers to the US market. It therefore asked the US, within the TBT framework, to adapt its car labelling requirements accordingly but, as no action was taken, the issues were taken up at the last TBT Committee. The US indicated that it would be reviewing the issue and would inform on any progress that would be made. Unfortunately, up to now no further information has been provided by the US administration and the issue may have to be pursued further.

Wine labelling

- With respect to wine labelling, there exist procedures, both at Federal and State level, for the approval of labels on the front and rear sides of wine bottles. In general, an average of three months is required to obtain label approval at the Federal level and, at the State level, the approval period varies from State to State but may be as long as six weeks. This renders the approval procedure time-consuming, confusing to exporters (who have to comply with different regimes from State to State) and costly.

2.6.5. A Heavy Regulatory Approach

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 USA 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, and as such may pose disproportionately high costs on suppliers to the US market.

Elsewhere, the continued concentration of certification authority in the hands of US regulatory agencies, rather than more devolved procedures for conformity assessment, again appears to buck the international trend towards more trade friendly and market responsive approaches to regulation.

2.6.6. US approval procedures for drugs and drug ingredients

Discriminatory requirements

By means of an "*over-the-counter*" (OTC) procedure, approved *ingredients* of a drug are put on a list (OTC-Monograph) by the Food and Drug Administration (FDA), so that different final products derived from these ingredients can be marketed simultaneously. However, the OTC drug approval procedure requires a drug ingredient to have a US market history. This restricts market access for OTC products with long-standing marketing experience in countries with equally sophisticated drug regulatory systems.

This problem is encountered by all OTC drugs in the US and, specifically, by EU phytomedicines. A petition regarding this matter has been filed by the European-American Phytomedicines Coalition (EAPC), aimed at the use of foreign marketing data to support the simplified OTC Drug Review for European phytomedicines.

Suntan lotions

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 drug approval procedure to UV-filters that had already been accepted in the EU. The FDA indicated in 1992 that it would examine its current approval scheme with particular regard to this matter. A decision is still pending.

2.7. The Protection of Intellectual Property

2.7.1. Introduction

With the entry into force of the WTO, the area of intellectual property is now subject to additional international disciplines. In implementing the Uruguay Round agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs), the US has made a number of modifications to the legislation listed in last year's Barriers Report.

These changes are welcome, but to what extent they will remedy existing shortcomings is not yet clear. For example, the EU is already concerned that amendments to patent legislation will be insufficient to resolve the discriminatory practices identified by the 1989 GATT panel, and that no action at all appears to be being taken on government use of patented items. US implementation of the TRIPs agreement will therefore be one of the most closely watched areas over the next year.

Note that protection of geographical indications is covered in section 3.2.7.

2.7.2. Patents and Related Areas

Measures affecting imported goods

Section 337 of the Tariff Act of 1930 provides remedies for holders of US patents: imports of goods infringing US patents can be blocked ("exclusion order"), and goods can be removed from the US market once in 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 remedies for infringing US process patents.

GATT illegal

In July 1987, the EU requested the establishment of a GATT panel to consider the compatibility of Section 337 of the Tariff Act with the US' obligations under GATT, notably with the national treatment requirement. The Panel Report, which was adopted in November 1989, concluded that Section 337 was inconsistent with GATT Article III.4. The provision in question accords imported products, alleged to infringe US patent rules, treatment less favourable than that accorded under Federal District Court procedures to like products of US origin.

Monitoring UR amendments

In the framework of its Uruguay Round implementation legislation the US has adopted modifications to Section 337 expressly to bring its legislation into conformity with the GATT Panel findings. A first analysis of these modifications, however, raises doubts as to whether the stated objective has been reached, and the Commission will closely monitor the application of the modified provisions in practice.

Patent law systems

US patent law is based on the *first-to-invent* system, whereas the rest of the world follows the *first-to-file* system. Section 104 of the US Patent Law earlier ruled out the possibility of establishing a date of invention by reference to any activity performed in a foreign country. This clearly discriminatory treatment has been cleared away by the implementation of

the TRIPs Agreement. Consequently a date of invention can be established by reference to activity in North American Free Trade Agreement or WTO countries. However, since the amendment only enters into force on 1 January 1996, non-US inventors will continue to suffer from discrimination until this date.

2.7.3. Government use

Government immunities

Section 1498 of US Code section 28 stipulates that a patent owner may not enjoin or recover damages on the basis of his patent for infringements due to the manufacture of goods by or for the Unites States, or for its use. The use of patented goods is extremely widespread in practically all government departments. It is of particular importance in the Department of Defence and its associated agencies.

The government or its contractors are under no obligation to carry out patent searches and generally do not do so. But even in cases where the existence of a patent is well known to the government or its contractor, there exists no legal obligation to inform the patent owner of the infringing acts. The only remedy available to the patent owner in such a situation consists of an action against the US in the US Claims Court, for the recovery of reasonable and entire compensation for such infringement.

Impact on EU firms

While this practice disadvantages domestic US right holders too, it is highly detrimental to foreign right-holders because they will generally not be able to detect such government use in the first place, and will thus miss the opportunity to initiate an administrative claims procedure.

Article 31 TRIPs introduces a requirement to inform promptly a right holder about government use of his patent, but the US has so far not taken any legislative action to bring its practice into line with this provision.

2.7.4. Copyright and Related Areas

Moral rights

Despite the unequivocal obligation contained in Article 6 bis 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. By contrast, US authors fully benefit from moral rights in the EU, which leads to an imbalance of benefits from Berne Convention Membership for the European side.

2.8. Tax policy

2.8.1. Introduction

Balancing the budget

After several year's of improvement, the US fiscal deficit is expected to reverse course and deteriorate over the long run in the absence of further policy action. Since the November 1994 Congressional election, fiscal policy has become the focal point of partisan skirmishes between the two political parties and the Executive and Legislative branches of government. So far, the debate has been dominated by disagreements over spending priorities and over the proper balance between fiscal deficit reduction and tax cuts for middle income earners. However, as the debate turns more squarely to tax policy, there is a possibility that the search for new sources of revenue will lead to greater pressure on foreign taxpayers. There continues to be considerable disquiet over whether foreign-owned corporations are paying their fair share of the US tax burden. This gives rise to some anxiety among foreign investors in the US. It is not clear whether the already discriminatory tax rules will remain in place or whether new mechanisms targeting non-US economic operators will be instigated.

California's victory in the recent Supreme Court ruling on its unitary tax, and the extent of the reservation for sub-federal tax measures which the US is currently seeking from the GATS, also give cause for concern. Striking the right balance in taxation measures on a sub-federal level will be of considerable importance.

Developments in the tax field, and their effects on European investors in particular, will therefore need careful monitoring. Note that the banking branch profit tax is covered in section 3.3.5.

2.8.2. Cumbersome and discriminatory reporting

Information 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, and in some cases the creation, of books and records relating to transactions with related parties. These documents must be stored at a place specified by the US tax authorities. An annual statement must be filed containing information about dealings with related parties, and there are stiff penalties for non-compliance with the various provisions.

These requirements are onerous and run counter to the principle of national treatment. 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.

2.8.3. "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. In practice, most "related parties" affected will be foreign corporations. These provisions were extended in the **1993 Budget Reconciliation Act** to include interest payment on loans guaranteed by such related parties.

Internationally agreed approach overlooked

The provisions are designed to prevent foreign companies from avoiding tax by artificially loading a US subsidiary with debt, and arranging for profits to be 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 amount of disallowable excess interest use a formula the results of which can be inconsistent with the internationally accepted arm's length principle. This 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 extension of the provisions to loans guaranteed by related parties could also catch, and disallow the interest on, a number of ordinary commercial arrangements with US banks, and provide a disincentive from raising loans with them.

2.8.4. State unitary income taxation

Arbitrary calculations

Certain US States 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, so giving rise to double taxation.

"World-wide" unitary taxation is inconsistent with bilateral tax treaties concluded by the US at the Federal level. A company may also face heavy compliance costs in providing details of its world-wide operations.

Among the 16 State applying a unitary tax (Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Kansas, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Rhode Island and West Virginia), international attention has mainly focused on California. Under pressure from foreign governments and multi-national corporations, California has, since 1986, allowed companies to elect for "water's edge" taxation instead. Here, companies are taxed instead on the basis of a share of their total US (rather than world-wide) income. In 1993 California abolished the fee and administrative charges for making such an election, so removing concerns about its current practice.

Supreme Court ruling

Nonetheless, the EU remains concerned about the unitary tax regimes in other States. In this respect, last June's Supreme Court ruling that California's world-wide unitary tax was not unconstitutional is not encouraging, despite violating bilateral tax agreements, is not encouraging. The EU will keep a watch on developments.

2.8.5. US taxes discriminating against imported cars

The US levies the following three taxes/charges on the sales of cars in the US that raise concern to European auto-makers:

Luxury Tax

- The Luxury Tax is an excise tax imposed since 1990 on cars valued above an arbitrary threshold, currently around $33,000. 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.

CAFE payment

- 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 car makers or producers of small cars rather than those who concentrate on the top of the car market, such as importers of European cars.

Gas Guzzler Tax

- The so-called Gas Guzzler Tax is an excise tax of $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 auto-makers, with a total market share in the US of only 4%, 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.

GATT panel

After holding two rounds of consultations with the US in 1992, the EC requested a GATT Panel to examine the measures with respect to GATT Article XXIII:1. The panel's report was issued on 30 September 1994. Its results were mixed.

Luxury and Gas-Guzzler taxes accepted

On the Luxury and Gas-Guzzler taxes, the Panel accepted that the setting of thresholds, which affected only a small proportion of the cars sold in the US, was consistent with the law's policy objectives. Although the Panel did level some criticisms at the CAFE provisions, the USTR rather unconstructively dismissed these as technicalities, and announced that it would not change the provisions.

Weakening GATT Article III

The Commission considers that, in reasoning as it did, the Panel weakened considerably the GATT Article III, by shifting it away from the protection of tariff concessions and the equality of treatment for goods which have cleared customs to the non-protection of domestic production. Moreover, it implied that complainants should prove both protectionist intent and protectionist effect, thus imposing an impossible burden of proof. At the same time, it ignored evidence in the form of clear statements by US legislators that the tax would not harm US car-makers.

This Report constitutes a backward step in the interpretation of GATT Article III that risks opening the door for inventive tax and regulatory authorities to discriminate against imported products. For these reasons, the EU has not agreed to the adoption of the Panel Report so far and is not inclined to do so in the future.

2.9. Conditional National Treatment (CNT)

2.9.1. Introduction

National Treatment

The principle of National Treatment - that Foreign Direct Investment should not be treated less favourably than domestic enterprises in like situations - 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, there still exist in the US, as in other countries, some long-established exceptions to this principle.

The EU have made this a key issue in its contacts with the US Administration, raising the subject at political and senior official level. To date, the US has failed to provide any indications of how to handle the EU's concerns.

Talks have recently begun for an agreement in the area of science and technology. This seeks to establish greater cooperation on these matters, and the European Commission is insisting that they also address means to resolve the CNT issue through the establishment of common eligibility requirements for project funding.

2.9.2. What is CNT?

The EU has become increasingly concerned over recent years about US legislation taking the form of tests on whether a company, legally established in the US but whose ownership is foreign, meets certain conditions. Indeed, the proliferation of such legislative proposals in the 103rd Congress was alarming.

There are two basic forms of conditional national treatment to be encountered:

Reciprocity clauses

- Reciprocity clauses: in some cases, they are not even related to the sector in which the foreign company wants to be economically active in the US (cross-sectoral reciprocity).

Performance requirements

- Performance requirements: these relate either to the impact of the foreign controlled company's activities on the US economy and labour market, or to parameters of production (volume, local content).

CNT language is most notable in the area of science and technology and concerned the granting of federal subsidies for research and development, or other advantages, to US-incorporated affiliates of foreign companies.

Examples

Examples of conditional national treatment can be found in the **American Technology Pre-eminence Act of 1991** that authorises the Advanced Technology Programme, the **Energy Policy Act of 1992** that authorises federal programmes and joint ventures between industry and government laboratories in energy related R&D and in the **1993 Defence Appropriations Act** that authorises the Technology Reinvestment Project,

a programme designed to ease conversion from defence to civilian manufacturing by funding technology development and deployment as well as education and training.

Cumbersome administrative work

Although US subsidiaries of European firms have been able to participate in some programmes, the fact remains that satisfying the eligibility conditions can be a more cumbersome process for foreign owned companies. By contrast, EU science and technology programmes do not discriminate against locally-incorporated affiliates of foreign businesses.

2.9.3. A different approach by the new Congress?

In the end, only two of the several proposals tabled in the previous Congress became law, the National Cooperative Production Act, which extends the favourable antitrust treatment applying to joint R&D ventures to joint manufacturing ventures, and the aforementioned 1993 Defence Appropriations Act.

Smaller technology programmes

In the new Congress, there are discussions about lifting foreign ownership restrictions in the telecommunications and broadcasting sectors, on a reciprocal basis (see Section 3.1.2). However, fewer proposals containing conditional national treatment provisions are expected due to the intention of the new Congress to scale down federal support for technology programmes.

3. SECTORAL ISSUES

3.1. The Information Society

3.1.1. Introduction

G7 Conference

The G-7 Governments agreed in February 1995 that the Information Society is rapidly emerging as one of the key business sectors for the future. The development of global markets for telecommunications networks, services and applications are central requirements for the achievement of the Global Information Society (GIS). In the US, Europe and elsewhere steps must be taken to open up markets, in particular those for equipment (telecoms public procurement issues are covered in section 2.4.3), services and infrastructure. This should lead to the concerted removal of all obstacles to trade and investment.

US legislation in this area presents considerable hurdles for non-US firms and foreign-owned firms wishing to invest in radio telecommunications infrastructure and to provide mobile and satellite services. In addition, the Federal Communications Commission (FCC) has traditionally exercised a high degree of autonomy and discretion in regulating this sector. However, the existing regulatory framework is also hampering the development of the sector more generally, and there are currently a number of moves afoot to reform the telecommunications regulatory environment. A common theme in most of the proposed reforms is the introduction of reciprocity-based market access restrictions.

WTO negotiations

Basic telecommunications services is one of the sectors where the negotiations are extended beyond the Uruguay Round. Talks are continuing in a specially constituted WTO negotiating group on basic telecommunications, and are scheduled to conclude in April 1996. The EU attaches great importance to these negotiations, and is concerned to see that the current debate about telecommunications reform will not prevent the US from making comprehensive MFN commitments on market access and national treatment, and agreeing to the establishment of firm regulatory disciplines for the future.

3.1.2. Investment restrictions

There are a number of restrictions on investment in the US telecommunications market. These impede competition in a number of sectors and slow down the development of new telecommunications infrastructure - together this raises costs for US service providers and service users.

Radio communications

Section 310 of the Communications Act of 1934 imposes limitations on foreign investment in radio communications: "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, corporations in which any officer or director is an alien or of which more than 20% of the capital stock is owned or voted by an alien (25% if the

ownership is indirect).

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

Particular difficulties for mobile operators

The problem is clearly particularly acute in the mobile communications sector. This is the fastest growing part of the market and Section 310 effectively restricts foreign carriers to a minority share holding or a subcontracting role in this sector. As wireless services continue to grow in importance and customers demand integrated local and long-distance solutions from a single carrier, the ability to participate in and hold radio licences will become more critical to the long term success of all carriers.

LEOs affected too

The same is true for satellite personal communications systems (S-PCS or "LEOS"). Section 310(b) will apply to space station licensees providing services directly to end users (although there are no limitations for investing in the consortia building and deploying the satellite systems); it will thereby restrict non-US owned investments from providing mobile satellite services in the US market.

Limited access to INTELSAT

Beyond its direct application, the conditions in Section 310 are also utilised by the **Act establishing the Communications Satellite Corporation (COMSAT)**. As a result, non-US incorporated firms face difficulties in providing INTELSAT space segment services to US users and international service carriers, and in INMARSAT international maritime and aeronautical satellite telecommunications services for US domestic use.

Congress reviewing legislation

Changes in the legislation are currently being debated, and may be adopted later this year. Section 310 looks set to be amended, but perhaps only with the addition of a reciprocity clause. Such a clause would, if introduced, remain inconsistent with the objectives of the GATS basic telecommunications negotiations at which MFN offers are being sought. At the same time, the FCC is also considering amendments to procedures used for implementing the existing provisions - again some measure of reciprocity is being considered.

Finally, the **Cable Landing Act** provides that the FCC may withhold or revoke submarine cable landing licences in order to achieve reciprocal treatment of US interests. This impedes foreign investment in this particular aspect of telecommunications infrastructure. The legislation permits, among other things, the revocation of an existing authorisation if a country fails to grant US nationals reciprocal rights.

3.1.3. Services

The limitations on services due to restrictions on owning radio licences was treated in the previous section, but there are a number of other restrictions on service providers:

- Although the FCC has discontinued its policy of treating foreign-owned US carriers as "dominant" under **Section 214 of the Communications**

Dominant carriers

Act of 1934 for the provision of international services, it has yet to act on a number of applications by such carriers with a "non-dominant" status. Designated dominant carriers face greater oversight of their subsequent activities by the FCC.

Equivalency tests

Under Section 214, carriers must make applications to the FCC to provide services. The licensing conditions provide for "public convenience and necessity" criteria. In the case of foreign-owned US carriers, this includes a "market equivalency test" with respect to the provision of international simple resale, and the FCC are considering applying the same test with respect to the provision of international facilities-based services. The test requires a subjective assessment of whether the country of origin of a US affiliate provides equivalent opportunities to US carriers for the services which the affiliate is seeking to offer.

Considerable FCC discretion

Together, the FCC has broad powers to withhold or revoke licences to foreign entities. Moreover, the market equivalency tests lead to the development of bilateral market access arrangements which cause fragmentation of the global markets rather the desired integration needed for the achievement of the GIS. In practice, a number of EU firms have been designated as "dominant", despite the fact that they are often far smaller than many unregulated US companies.

Radio station licences

- Similarly, **Section 308(c)** of the **Communications Act of 1934** permits the FCC to "impose any terms, conditions or restrictions" on the granting of a radio station licence for commercial communications between the US and a foreign country. In practice licences have only been granted when foreign partners could not exercise effective control on the system's business and policy decisions.

- **Section 309** of the **Communications Act** requires the FCC to determine whether the granting of radio licences would be in the public interest and permits the FCC to impose conditions.

Mobile satellite services

- The FCC decision to give **American Mobile Satellite Corporation** (AMSC) the monopoly rights to serve the domestic US mobile satellite services (MSS) market means that any foreign competition is excluded. As one particular example of this, Inmarsat-based aeronautical satellite services are very largely excluded from domestic segments of international flights.

  US justifications for the domestic monopoly of AMSC - scarcity of spectrum and a limited market - no longer hold. The FCC continues to license additional mobile satellite service providers in the US. Moreover, in the case of S-PCS systems, the premature licensing of providers (coupled to the implicit ownership filter, see previous section) seem to indicate that the US is trying to seek effective control of global MSS ventures, while closing the domestic market from foreign competitors. The seriousness with which the Commission considers these matters was conveyed to the US authorities in a démarche submitted on 1 June 1994.

Market structure

- The *de jure* or *de facto* monopoly market structure for local intra-state services is also a significant impediment for European service providers. In this context, effective safeguards for competition need to be ensured, in order to establish a level playing field for the existing and emerging global providers of equipment, services and applications.

3.1.4 Data protection

Individuals who are the subject of data processing operations are protected in almost all EU states by 'data protection' laws. A directive harmonising these laws at EU level is close to adoption.

European firms wishing to transfer data to the US to make use of data processing facilities there, or indeed wishing to sell personal information to US based firms, encounter difficulties owing to the lack of legal protection for the data once it arrives in the US.

3.2. Agriculture and fish

3.2.1. Introduction

Tensions reduced

The settlement of the Uruguay Round negotiations and the establishment of the WTO will have far reaching consequences for international agricultural trade, and has already brought about a distinct relaxation in agricultural trade tensions between the European Union and the United States, which has traditionally been one of the more contentious areas of trade relations. This relative peace should have spillover effects in terms of the expansion of global agricultural trade and important economic benefits for both agricultural producers and those involved in agribusiness throughout the world.

However, notwithstanding the fact that much of the heat has been taken out of EU/US agricultural disputes, a variety of issues remain unresolved. The most acute difficulties are now in the sanitary and phytosanitary fields in spite of some progress within the framework of the European Commission - US Department of Agriculture (USDA) dialogue (section 4.4) and the Agreement on Sanitary and Phytosanitary measures (SPS) in the Uruguay Round. The latter should ensure that there is more transparency in future on SPS measures and that these measures will be carefully monitored under the auspices of the World Trade Organisation.

Need for international fisheries cooperation

In the fisheries sector (sections 3.2.7 & 3.2.8), the EU acknowledges the entitlement of the US to condition access to living resources in its Exclusive Economic Zone (EEZ). There seems to be a tendency, however, to use unilateral measures (such as the definition of "large" drift nets) as benchmarks of other countries' policies, with the possibility of sanctioning accordingly. The EU stresses the need for international cooperation in this sector, as unilateral measures may be out of proportion with the objective of conservation and destabilising for international trade.

3.2.2. Export and other subsidies

The US operates a range of programmes designed to subsidise and/or promote exports of US agricultural products.

- **Export Enhancement Program** (EEP), where US exporters may apply for a cash subsidy designed to make US products competitive with subsidised exports from other nations. EEP is currently used for exports of wheat, wheat flour, barley, barley malt, rice, feed grains, eggs, frozen poultry, frozen pork and vegetable oil to over 70 food importing countries.

- Operating in the same manner as EEP are the **Sunflower and Cottonseed Oil Assistance Programs** (SOAP and COAP) and the **Dairy Export Incentive Program** (DEIP).

- **Market Promotion Program** (MPP), which offers a share of costs for promotion campaigns for agricultural products (the majority being high

value and value added) in selected export markets.

- **Export Credit Guarantee Program**, offering 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. There is no eligible list of commodities, though bulk products are the main beneficiaries. It is targeted at countries which need guarantees to secure financing but show a reasonable ability to repay.

- **Public law 480** food aid programs have amongst their other (generally altruistic) aims the expansion of foreign markets for US agricultural products.

Under the terms of the Uruguay Round agreement all countries, including the US, have agreed progressively to reduce their expenditure on agricultural export subsidies, set against a 1986-90 base period, by a total of 36% over six years, and during the same period to reduce the quantity of subsidised exports for each product category by 21%.

3.2.3. Import Arrangements

Tariff rate quotas

Under the terms of the Uruguay Round agreement, the former Section 22 import quotas are to be replaced by Tariff Rate Quotas (TRQs), where a prescribed quantity of a product may be imported at a lower rate of duty, with any quantities in excess being subjected to higher tariffs. Out-of-quota rates of duty are to be progressively reduced during the first 6 years of application of the Uruguay Round agreement.

Cheese quotas

However, for cheese quotas dating from the Tokyo Round, the US may unilaterally determine at a certain stage in the year that a particular cheese is not available from the EU and may then "globalise" part of the EU's cheese quota, opening it up to other countries and thus depriving the EU of the opportunity to fill the quota. Discussions are currently proceeding with the US for adequate consultations to take place before there is any globalisation of EU quotas.

3.2.4. Sanitary and Phytosanitary Requirements

Delays at customs controls

Differences in US and EU sanitary and phytosanitary requirements can have restrictive effects on trade. 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.

Canned peaches

In particular, the Food and Drug Administration's time-consuming controls on the detection of pit fragments in imports of canned peaches from the EU has lead to detention and subsequent destruction or obligatory re-export of this product, hampering the flow of trade and negatively affecting the volume of exports.

Phytosanitary issues:

In the phytosanitary field, the following main difficulties persist:

Apples and pears

- Regulations governing the entry of apples and pears from certain member states (Federal Register of 1987, Title VII, Ch.3, §319-56-2r) provide for a pre-clearance programme, with the aim of guaranteeing, prior to shipment, that consignments are free from an insect pest known as the pear leaf blister moth and from "other 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 is not a scientific approach and is contrary to the spirit of transparency as provided for in the International Plant Protection Convention. Furthermore, despite the continued operation of the pre-clearance programme, the rate of rejection of consignments has increased substantially. These extended and more stringent inspections and the increased costs arising from them have clearly had a negative effect on EU exports of apples and pears to the US. Negotiations have not yet been able to resolve this issue, but are still continuing.

Pathogen free regions

- The prohibition of the import of fruit and vegetables from pathogen-free regions of an EU Member States adjacent to regions in which a given pathogen is known to occur (Federal Register of 1987, Title VII, Ch.3, §319-56-2r) creates undue obstacles to exports from pathogen-free regions within the EU. An example is the prohibition of imports of tomatoes from Brittany because of the presence of the Mediterranean Fruit Fly in the Mediterranean regions of France. Although Brittany is ecologically isolated from the infested regions of France, and the French authorities carry out the necessary surveillance to avoid dissemination of the pest, imports into the US of ripe tomatoes from Brittany are not allowed by the US authorities. The EU considers these measures to be excessive and not justifiable on phytosanitary grounds.

Potted plants

- The revised provisions on standards and certification of plants established in growing media (Federal Register 7, §319-37-8) have reduced the obstacles encountered by EU exports of potted plants to the US. However, the certification of plant genera involves a very long procedure which may considerably delay the approval of EU plant genera.

  USDA published a Final Rule in the Federal Register of 13 January 1995, effective from 13 February 1995, which will permit the import into the US of four plant genera in sterile growing media. USDA is however deferring final action on Rhododendron pending further study by the Fish and Wildlife Service, due to endangered species concerns. The new rule comes after over a decade of lobbying activities by European plant growers, supported by the Commission and Member States.

  Unfortunately, the new rule contains some requirements which are difficult for exporters to fulfil, for example it is impossible to satisfy certain obligations because some of the species or genera involved have a growth cycle which is shorter than the waiting period required by USDA before export can take place.

- In July 1992 the California Court of Appeals ruled that the Environmental Protection Agency (EPA) must strictly apply the terms of the **Delaney Clause**, which requires the establishment of zero tolerance levels for any substance (including pesticides) which have been shown to induce cancer at some concentration in laboratory test animals, regardless of how low the risk is in reality. Prior to this ruling EPA applied a negligible risk interpretation of the Clause, but this was rejected by the Court despite the validity of the scientific arguments advanced.

  Following this ruling, EPA has identified 36 pesticides which have shown carcinogenic effects in test animals and it will be reviewing at least 49 others over the next five years. Legislative proposals for the first batch of pesticides have already been made and further proposals are expected in due course. It is quite conceivable that important EU products, such as wine, may be involved.

- The mandatory requirement for two years' post-entry quarantine on an importer's premises for hardy nursery stock is not justifiable on plant health terms. Its main purpose is believed to be the detection of latent infections or possible organisms not previously identified as a possible quarantine concern. Although it may be appropriate for new or developing trade in specific commodities, the EU does not consider it to be justified as a permanent feature of long-term trade.

Hardy nursery stock

Procymidone issue resolved

On a positive note, on 18 August 1994 EPA published a Final Rule in the Federal Register establishing an import tolerance for the fungicide Procymidone of 5 parts per million on wine grapes, thus ending trade problems in wine exports to the US dating back to February 1990, when the Food and Drug Administration found residues of Procymidone in EC wines.

Sanitary issues:

In the sanitary field the following difficulties persist :

- Like the EU, the US has introduced rules on the import of animal products and by-products from countries where Bovine Spongiform Encephalopathy (BSE) exists (docket number 90-252, Federal Register 56: 19794, April 30, 1991, amending 9 CFR parts 94 and 95). These contain specific requirements for the export of meat from ruminant animals.

BSE

  However, while the EU has subjected its requirements for approval to the authoritative international institution in this area, the International Office for Epizooties (IOE), the US has introduced measures which exceed those of the EU. In particular, the US does not make any distinction between countries where the incidence of BSE is high or low (the latter being countries with occasional cases traceable to live animals imported from high incidence countries), while the EU applies restrictive measures only in countries with a high incidence of BSE. As a result, French, Irish and Portuguese exports have been subject to requirements not deemed necessary under EU and IOE rules.

  The EU considers that there is no justification for going beyond the recommendations of the IOE, especially when the US has not taken all necessary measures to protect its own cattle population from the internal threat of spongiform encephalopathies in the US. The US

measures constitute an unwarranted restriction on trade.

Regionalisation

- The EU operates a policy of regionalisation, where restrictions are applied in zones affected by certain animal diseases, with free movement of animals outside the affected zones. An animal 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 North American Free Trade Agreement (NAFTA). However, US import administrative rules concerning Foot and Mouth Disease, Rinderpest and other relevant diseases have still not been amended to reflect this change in legislation.

Swine vesicular disease in Spain

- The consequences of this can be demonstrated by the example of African Swine Fever (ASF) and Swine Vesicular Disease (SVD) in Spain. On 7 February 1995 USDA published a Proposed Rule to declare Spain free of SVD, since there have been no outbreaks since April 1993. However, the US intends to continue restricting exports of pork and pork products from Spain, on the grounds that Spain imports pork from countries where SVD is considered (by the US) to exist, because Spain has a common land border with a country designated as having SVD and because of the presence of ASF in a small region of Spain.

Non-recognition of disease-free status

- Other restrictions on live animals relate to the non-recognition by the US of the EU's freedom from certain diseases, e.g. contagious equine metritis.

Non-commingling

- Non-commingling means that establishments exporting meat or meat products to the US may not handle meat or meat products from countries which 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 EC/US agreement on application of the Third Country Meat Directive, reached in 1992, provides for an establishment to handle both categories of meat or meat products provided that there is a separation in time between them. So far, however, the US has not been willing to apply this provision of the agreement.

Uncooked meats

- 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. However, US still applies a prohibition on other types of uncooked meat products, e.g. San Daniele ham, German sausage, ham and bacon and cured hams from Spain, despite the fact that meat products may come from disease free regions and that the processing involved should render any risk negligible.

Egg products

- The import of egg products is allowed only under very strict conditions, in particular, the requirement for continuous inspection of the production process. A system of periodic inspection of the production process 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.

3.2.5. Domestic Content Requirement for Tobacco

The **Omnibus Budget Reconciliation Act of 1993** contains provisions which negatively affect EU exports of tobacco to the US, notably a 75 % domestic content requirement for tobacco in cigarettes manufactured in the US.

In July 1994 a GATT panel found that these provisions contravene Article III of GATT. The US then announced its intention to unbind nine tariff lines of tobacco products, replacing them with a Tariff Rate Quota. US negotiations on this with EU and other interested countries are continuing.

3.2.6. Inadequate Protection of Geographical Indications of European Wines and Designations of Spirits

EU legislation protects the geographical indications of wines. US legislation does not afford the same level of protection against misuse of EU denominations. In 1983, an exchange of letters between the EC and the US provided a measure of protection for EC geographical names that designate wine. The US undertook not to appropriate such names, if known by the US consumer and unless this use by US producers was traditional. The exchange of letters expired in 1986 but the US has maintained its commitment to this undertaking.

Incomplete BATF list of non-generic names

In April 1990 the Bureau of Alcohol, Tobacco and Firearms (BATF) published a list of examples of "Foreign Non-generic Names of Geographic Significance Used in the Designation of Wines". However, many EU geographical designations do not figure on this list and the EU indicated to BATF that the list, as published, is not satisfactory, since it does not ensure sufficient protection of EU wine denominations in the US. A petition to BATF to complete the list of EU protected distinctive indications was rejected on the grounds of lack of evidence that the names were known to the US consumer.

Semi-generic names

Moreover, no progress has been achieved to date with respect to wine names defined as semi-generic under US legislation. The US regulations allow some EU geographical denominations of great reputation to be used by American wine producers to designate products of US origin. The most significant examples are Burgundy, Claret, Champagne, Chablis, Chianti, Malaga, Madeira, Moselle, Port, Rhine Wine (Hock), Sauterne, Haut Sauterne and Sherry.

Grape names

American producers also use some of the most prestigious European geographical indications as names of grape varieties. This abuse could often mislead consumers as to the true origin of the wines. Furthermore, the improper use of EU geographical designations for wines and spirits places the respective EU products at a disadvantage on the US market.

Gamay Beaujolais

For example, on 5 April 1994 the BATF published in the Federal Register a Notice of Proposed Rulemaking, which would permit the use of the geographical designation "Gamay Beaujolais" for a US wine which BATF admits is now known to be neither Gamay nor Beaujolais. The EC has

strenuously objected to this, and BATF has so far taken no final decision.

Spirits

With regard to spirits, the US regulations basically provide protection against practices misleading to the consumer. This limited protection does not prohibit the improper use of designations of spirits or even the development of certain names into generic designations. An agreement was approved by the EU in February 1994 for the mutual recognition of two US and six EU designations and provides for future discussions on the possibilities of extending their mutual recognition to further designations.

The Agreement on Trade-Related Aspects of International Property Rights (TRIPs Agreement, section 2.7) will have a bearing on these wine issues. It remains, however, to be seen how the US will implement TRIPs in its own legislation and this, together with the general question of the applicability of TRIPs to wine appellations, is being examined in some detail. At the bilateral level, the EU will be seeking additional protection for EU wine appellations in the context of the ongoing negotiations for a new EU/US wine agreement.

3.2.7. Drift net fishing

Unilateral determinations

Amendments to the **Magnuson Fishery Conservation and Management Act of 1983** (MFCMA) require the Department of Commerce to list nations whose nationals engage in large-scale drift net fishing in a manner unacceptable to the US authorities. Such a nation may be certified for the purposes of the so-called "**Pelly Amendment**" and its marine products may be consequently embargoed.

Compulsory Certificates of Origin

The US 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. These rules may be considered to be a serious obstacle for EU exporters. The provisions of the **High Seas Drift Nets Fisheries Enforcement Act of 1992** allow for the possibility of EU Member States, if engaged in large scale drift nets fishing, being faced with an embargo in the future.

3.2.8. Allocations to foreign fishing fleets

Squid and mackerel

Each year, the US fixes the total allowable level of foreign fishing (TALFF) and accordingly makes allocations to foreign fishing fleets. Squid fishing possibilities for EU vessels off the east coast of the US have been gradually phased out under the terms of both the **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 EEZ, the US authorities have set a zero TALFF since 1990 for this stock, following pressure from the domestic industry to protect its markets. A zero TALFF is proposed for 1995 too. The EU believes that this line neither corresponds to the provisions and intentions of the MFCMA nor to the provisions of Article 62 of the UN Convention on the Law of the Sea.

3.3. Financial services

3.3.1. Introduction

The US financial services sector is characterised by geographical and sectoral segmentation. As a result, EU companies face difficulties in developing national banking structures, and in offering a broad range of services. Since these limitations require not just segmentation of US banking operations, but also of a company's worldwide operations, they are of particular concern to EU companies looking to exploit the new flexibility in the Single Market to develop integrated financial services operations.

Some reforms were introduced last year which will make it easier to conduct inter-state banking, although the full consequences of the changes will not be apparent for several years. However, two areas of non-national treatment have not been eliminated and remain a concern to the EU. More importantly, reforms to the Glass-Steagall Act are now being considered. If substantial and non-discriminatory changes are adopted, these would be a major step forward for the US industry in general, and thus for EU participants too. Although signs of improvement exist, the present US offer in the on-going WTO financial services negotiations is disappointing and still seems to indicate a general unwillingness to address market access issues for non-US incorporated firms.

3.3.2. The new interstate banking framework

Geographical segmentation

The long-standing geographical segmentation of the US financial services industry was addressed last year by the **Interstate Banking and Branching Efficiency Act of 1994** (the Riegle-Neal Act). The new provisions provide a framework for the reduction of barriers to interstate banking. The extent to which an interstate banking network emerges will significantly depend on individual State participation, and the interpretation and implementation of the new provisions by the federal bank regulatory agencies.

Interstate banking will be possible through bank acquisitions, consolidation (or merger) and *de novo* branching on a non discriminatory basis. One year after enactment (September 1995), a foreign bank, like a US bank holding company, will be able to expand interstate through the acquisition of another bank, without regard to State law. The regime for branching by consolidation and merger is different: individual states can "opt out" of the interstate provisions by enacting legislation to that effect before June 1997. A bank's establishment of *de novo* branches will only be permitted if a State "opts in", i.e., by enacting specific legislation permitting out-of-state banks to establish branches.

Although these changes are based on the principles of non-discrimination, in practice the ability to expand by acquisition of or merger with insured branches might be less advantageous to EU than US domestic banks because EU banks are for the most part in the (uninsured) wholesale

market.

3.3.3. Non-national treatment for interstate banking

Despite its many positive features for European banking firms, the Riegle-Neal bill has failed to eliminate almost all of the non-national treatment provisions in this sector. Two particular cases remain:

- The **Community Reinvestment Act** (CRA) requires (retail) banks insured under the Federal Deposit Insurance scheme to lend a certain amount of money to the local community. Wholesale banks have traditionally not been subject to this requirement because they are uninsured. However, with the Riegle-Neal Act, the linkage with deposit insurance has been broken. Even if a foreign bank were to acquire an insured US bank and turn it into an uninsured wholesale branch (which represents the bulk of EU presence in the US market), it remains subject to CRA. This is not the case for US-based, uninsured depository institutions under similar circumstances.

- The discriminatory imposition of bank **examination fees** on foreign banks by the Federal Reserve Board remains of concern. The Riegle-Neal bill merely imposes a three year moratorium on the imposition of fees for foreign banks by the Federal Reserve Board.

3.3.4. Sectoral segmentation

Reform must reinforce national treatment

The **Glass-Steagall Act** provides for the separation of commercial and investment banking in the US. Yet, at a time when technology and other innovations are increasingly blurring distinctions between traditional financial services industries, these provisions are standing in the way of the rational development of the market. Modifications to the Act are being considered by Congress, but it is currently too early to make an assessment of them.

However, even in the early stages, it is important that any proposal recognises the important principles underlying the maintenance of open capital markets: that any reforms should respect national treatment, in which effective competitive opportunity between domestic and foreign banks is guaranteed; that provisions having an extraterritorial reach should be avoided; and that investor choice for operating through a branch or a subsidiary should be upheld.

Links to insurance companies

A second problem is the restrictions on banks affiliating themselves with other types of non-bank financial institutions (notably insurance operations) enshrined in the **Bank Holding Company Act**. These prohibitions not only apply to all firms operating in the US market, but also to all non-US banking institutions which have operating subsidiaries in the US. The practical consequence is that banks, insurance companies or securities firms incorporated in the EU and which are legitimately affiliated among themselves within the EU, may not operate in the US. Moreover, when, for instance, an EU bank and an insurance company with US subsidiaries develop formal links, they may find themselves obliged to divest themselves of one of their US operations in order to avoid 'non permissible' affiliation in

the US.

More and more EU firms are coming up against this problem when they consider their strategy for competing in the EU internal market. Due to the greater flexibility in the EU, many EU banks, insurance companies and securities firms are seeking links with each other, but face potentially damaging consequences for their US operations.

3.3.5. Other discriminatory practices

Branch profit tax

Some non-US banks operating in the US have to calculate their allowable interest expense deduction in a way which disadvantages them. They are subject to a 30% branch profit tax, similar to a withholding tax, regardless of whether those earnings have been repatriated from the US. They are also subject to a tax dependent on the amount of the bank's interest expense deduction (excess interest tax), even if the bank has no taxable income. Furthermore, in the application of this tax, some non-US banks are disadvantaged in the use of certain tax exemptions.

Separate State legislation

EU **insurance firms** face particular difficulties in the US as regulation and supervision of insurance activities is left to the States, and a separate licence is needed to operate in each State. Some States only issue renewable licences limited in time for non-US insurers. Certain States do not allow the operation and establishment of insurers owned or controlled in whole or part by a foreign government or state, while other States impose special capital and deposit requirements, or other requirements, for the authorisation of non-US insurers. However, some of these requirements are also imposed on out-of-state US insurance companies.

The **Internal Revenue Code of 1986** established a special 4% excise tax on casualty insurance or indemnity bonds issued by insurers and a special 1% excise tax on life insurance, sickness and accident policies and annuity contracts issued by foreign insurers; it also established a special 1% excise tax on premiums paid for certain reinsurance contracts.

3.3.6. GATS financial services negotiations

The conclusion of the Uruguay Round left financial services negotiations unfinished. Negotiations are continuing, with a view to an exchange of offers and commitments being agreed this year.

Need for a better offer

The latest US offer confirms the impression that new operations and new establishment will continue to face conditional market access and non-national treatment. Limiting its binding commitments to existing activities, any expansion of existing operations, the establishment of a new commercial presence or the conduct of new activities is potentially subject to regulation which discriminates against foreign operators.

3.4. Professional services

New GATS disciplines

As a result of the conclusion of the GATS negotiations, the access of professional service suppliers in the US should have been improved: a number of nationality conditions and in-state residence requirements should have been removed.

No State rules for access by foreign service suppliers

However, the general problem still remains: licensing of professional service suppliers is regulated at State level and in many instances there are no rules regulating the access of foreign service suppliers (see 1994 Report for details). In a sector such as professional services, which is by definition highly regulated and in which the exercise of the activity depends on specific access conditions and qualifications, this remains a serious barrier.

The state of play in this sector reflects the implementation of the US schedule of commitments in the framework of the Uruguay Round negotiations. Despite the improvements contained in their schedule, access to the US market for professional services is not satisfactory. Furthermore, regulations at State level are either not very transparent or lacking and, in the States which do permit access, the requirements are still very demanding.

Improving outlook?

Nonetheless, the situation should improve steadily under the GATS/WTO:

- The GATS dispute-settlement procedure will apply to the professional services sector regardless of actual commitments in the schedules.
- The Working Party on professional services of the WTO's Council for Trade in Services will start reporting on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the field of professional services do not constitute unnecessary barriers to trade.
- Negotiations on the further liberalisation of professional services is expected in the framework of the GATS.

3.5. Air transport and the aeronautics industry

3.5.1. Introduction

As a result of successful EU-US negotiations, there has been progress over the last year on computer reservation systems issues. Some progress may also be discernible on the EU's long-standing complaint about the restrictions on ownership in this sector.

The EU is also concerned about the level of disguised subsidies to the US aircraft manufacturing industry. In this context, the EU believes there is a clear need for a successful outcome to the on-going multilateral negotiations in this sector and looks to the US to play a constructive part in achieving it.

3.5.2. Air transport services

Computer Reservation Systems (CRS)

Negotiations between representatives of the European Commission and the US Department of Transportation have resulted in the lifting of discriminatory treatment of non-US carriers in the provision of relevant marketing, booking and sales data generated by Computer Reservation Systems in the US.

Unfortunately no positive developments can be reported regarding the preference given to "on-line" services (connections with the same carrier) over "interline" services (connections with other carriers). As noted in previous editions of this Report, 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).

Foreign ownership of air carriers

One way for European carriers to balance the competitive disadvantage created by the on-line preference and to get access to the behind gateway passenger would be to invest in a US carrier. Unfortunately, the **Federal Aviation Act of 1958** prohibits foreign investors from taking more than a 49% stake in an US air carrier and restricts the holding of voting stock to 25%. This latter limitation makes US rules on foreign ownership considerably more restrictive than the relevant EU rules. A proposal introduced in the House of Representatives by Rep. Clinger (HR 951) would provide for some progress in the liberalisation of US foreign ownership restrictions..

Drug tests

The US published a Notice of Proposed Rule Making on 15 February 1994 which requires foreign air carriers to establish anti-drug and alcohol misuse programs in the US for their employees performing safety sensitive functions within the territory of the US by January 1996. Such a requirement interferes in the employment relationship between foreign companies and their foreign employees. Discussion on drug and alcohol abuse is taking place within the framework of the International Civil Aviation Organisation. The EU believes that this issue can best be resolved through

cooperation between States rather than by unilateral extraterritorial action.

3.5.3. Aeronautics Industry

Subsidies to the US industry

The US aircraft and aero-engines manufacturers benefit from massive US government support through various programmes. Together, these programmes have a marked impact on the competitiveness of the US civil aircraft industry.

NASA

- NASA's annual budget for civil aeronautics is around $1 billion, and is used both for the development of a new supersonic aircraft and advanced subsonic technologies. NASA's stated objective is to expand its aeronautical research programmes and "transfer [...] the resulting new technology to the US civil aircraft industry".

DoD

- In 1992, the DoD spent $6.8 billion on aeronautics research and development, of which the US large civil aircraft industry received $1.2 billion in research and development grants and $1 billion was used to fund military aero-engine R&D.

MANTECH

- The US aircraft industry also benefits from the DoD funding of Independent Research and Development (IR&D) projects, and the MANTECH programme. The latter is aimed at developing and encouraging contractors to use new technologies in their manufacturing process. The Administration has also increased DoD commitments to "dual-use" technology programmes and defence conversion research.

Other advantages stem from special tax programmes, like Foreign Sales Corporations. Although these are theoretically available to all qualifying business, the most significant benefits have accrued to the US aircraft industry.

In parallel to this, the Clinton Administration, through the Department of Commerce, has stepped up its export promotion effort, including for aircraft. Together with the subsidisation of aircraft development, the number of potential sales open to EU products on the basis of price and technical merit has been reduced.

Although this sector will be subject to the WTO rules on subsidies, the EU calls for new specific multilateral rules to restrict all forms of government support and intervention for aircraft products. The EU regretted that, at the end of the Uruguay Round negotiations, the US blocked the adoption of a new Aircraft Agreement supported by all other negotiating parties. Although negotiations have continued since, no progress has been made.

3.6. Shipbuilding and Maritime Services

3.6.1. Introduction

The successful completion last year of the OECD negotiations on the elimination of aids in the shipbuilding sector was a major achievement, and is expected to have a significant impact on US', and all other signatories', subsidies programmes in the shipbuilding sector.

OECD Shipbuilding Agreement

Eliminating all pricing support and subsidies

The OECD Shipbuilding Agreement was signed on 21 December 1994 by the EU, the United States, Norway, Sweden and Finland. It will be signed by Japan and South Korea in 1995. Following ratification the Agreement should come into effect on 1 January 1996. The Agreement aims to eliminate all direct and indirect support and to combat injurious pricing practices. Provision is made for a standstill on existing subsidy levels and on new measures of support during the intervening period, but allows for the continuation of previously committed aid subject to certain conditions. The EU will closely monitor progress in the transposition of the Shipbuilding Agreement into US legislation.

The EU is also hopeful that the introduction of GATS disciplines to the maritime services sector will create a better environment for EU operators. Unfortunately, no progress can be reported regarding the many US measures which give preference to US shippers for cargoes generated by federal programmes.

3.6.2. Shipbuilding: subsidies and tax policies

Subsidies in force

The **Merchant Marine Act of 1936**, as amended, provides for various shipbuilding subsidies and tax deferments for projects meeting domestic build requirements. These are provided via the Construction Differential Subsidy (CDS), the Operating Differential Subsidy (ODS), the Capital Constructions Fund (CCF) and the Construction Reserve Fund (CRF). These measures will have to be repealed or modified by the US Congress before the entry into force of the Shipbuilding Agreement.

Loan guarantees

The Act also established the Federal Ship Financing Fund to assist the development of the US merchant marine by guaranteeing construction loans and mortgages on US flag vessels built in the United States. The Maritime Administration (MARAD) has already this year announced its approval for more than $160 million in Title XI shipbuilding loan guarantees to support construction of seven vessels in US yards. In 1994 $285 million was granted in new guarantees and the balance of the fund amounted to $1.2 billion at the end of February 1995. Applications pending at that date amounted to $2.75 billion.

Subsidies to be repealed

The **Merchant Marine Act of 1936**, as amended, provides for various shipbuilding subsidies and tax deferments for projects meeting domestic build requirements. These are provided via the Construction Differential Subsidy (CDS), the Operating Differential Subsidy (ODS), the Capital Constructions Fund (CCF) and the Construction Reserve Fund (CRF).

These measures will have to be repealed or modified by the US Congress before the entry into force of the Shipbuilding Agreement.

Subsidies budgeted for in 1996

The Maritime Administration (MARAD) has already announced its approval for more than $160 million in Title XI shipbuilding guarantees to support construction of seven vessels in US yards.

Tax on non-emergency repairs

The United States applies a 50% ad valorem tax on non-emergency repairs of US owned ships outside the USA 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. This tax will also have to be abolished to conform with the provisions of the Shipbuilding Agreement.

3.6.3. Maritime transport services

With the entry into force of the WTO, the maritime transport sector is for the first time subject to multilateral GATS disciplines. However, no schedules were agreed during the Uruguay Round and they are now the subject of ongoing negotiations. In the meantime, the use of foreign-built vessels for coastwise trade, fishing and special work is restricted in US waters.

Coastwise trade

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 is 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 administration 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 Tons (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 U.S.C. 883, 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 to monitoring procedures.

Restriction on foreign built fishing trawlers

A foreign-built US flag vessel cannot be documented for fisheries in the US 200 mile EEZ. This prohibition is wide-ranging since the definition of fisheries includes processing, storing, and transporting (**Commercial Fishing Industry Vessel Anti Reflagging Act of 1987**). This US domestic build requirement has not been eliminated by the terms of the OECD Shipbuilding Agreement.

Dredging, towing or salvaging

In addition, no foreign-built vessel can be documented and registered for dredging, towing or salvaging in the US. Third countries are thus not able to have access to the US market at a time when part of the ageing US fleet needs to be renewed.

Ship classification

The Jones Act also provides for an effective monopoly of the US Coast Guard Administration for ship classification and inspection services to the American Bureau of Shipping (ABS). EU classification companies are therefore excluded from this market. However, a Bill is under consideration in the House to enact the Coast Guard Regulatory Reform Act as part of the USCG Authorisation for 1996. One important provision is that ABS's monopoly of US flag business would be removed.

Section 710 of the Federal Maritime Commission Authorisation Act of 1990 dealing with Non-Vessel Operating Common Carriers (NVOCCs), reinforced the provisions of the **1984 Shipping Act**, which requires NVOCCs to file tariffs. This is still considered to be a great administrative burden and a disadvantage in competition, particularly for small EU freight forwarders. The EU considers these financial and administrative obligations an unnecessary and unwarranted burden on the international transportation industry.

Cargo preference measures

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

In particular, the Commission is studying the conformity of such measures with US obligations under its public procurement agreements (section 2.4). 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 Eximbank 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.

Alaskan oil cargoes

- In addition, Congress is currently reviewing the prohibition on the export of Alaskan oil. The draft Bills provide for the reservation of the carriage of the exported oil to US-flagged vessels. The EU is particularly concerned about these measures which appear to breach the US' international commitments and obligations and depart from normal commercial practice. The Cotton Club (of which the EU is a member) submitted a démarche on this issue to the State Department in February.

4. BILATERAL AND MULTILATERAL INITIATIVES

4.1. Mutual Recognition Agreement (MRA)

4.1.1. What is an MRA?

Certification costs

With agreement on a further round of widespread tariff cuts in the Uruguay Round, the trade policy agenda is increasingly focusing on non-tariff barriers. Among these, some of the major costs faced by prospective exporters to the US relate to certification to environmental and safety standards. In part, this is due to divergence in standards, but a major element is simply the costs of repeatedly travelling to the US to submit products for examination or paying the costs of an inspection by a body based on the other side of the Atlantic.

Similar standards

Yet, despite their differences, EU and US standards are broadly similar in their intentions, and involve equally competent testing and certification bodies to implement them. A MRA codifies this equality of expertise, and empowers EU bodies to certify particular products for the US market and to issue the relevant marks of conformity. In return, US bodies would be allowed to license for EU standards and laws. An MRA would therefore be particularly valuable for small and medium-sized enterprises.

The Commission is currently leading negotiations for MRAs with the US, Canada, Japan, Switzerland, Australia and New Zealand.

4.1.2. State of negotiations with the US

Twelve areas

Negotiations began in 1994 and are continuing this year. Twelve areas or sectors are currently subject to debate: telecommunications terminal equipment, electrical products, electromagnetic compatibility, pharmaceuticals, medical devices, machinery, lawn-mowers, personal protective equipment, pressure vessels, recreational craft, road safety equipment and airworthiness.

One of the first tasks of the negotiations was to establish a solid understanding of each other's regulatory systems. The second stage in this process is to establish a degree of confidence in their implementation and enforcement; a number of joint EU-US workshops are being organised to examine in more detail these questions.

Establishing complete coverage

Another problem is in identifying exactly which rules (including at State level) applies for any particular product. Unless local certification for all relevant legislation is possible, real market access gains will not have been achieved. Moreover, in some cases, standards are not mandatory but, without them, products are unlikely to be stocked on retailers' shelves - these *de facto* mandatory standards also need to be identified and included. However, many of these latter are organised by the private sector and present particular problems since the MRA will only be signed by the European Community and US Administration.

4.2. Regulatory Cooperation

Mutual Recognition Agreements implicitly accept that standards and norms differ between the EU and US. These differences usually reflect alternative approaches to regulatory issues, rather than different levels of consumer, health, environmental or other protection, but they can also be the source of trade disputes.

Diverging regulations

The products of technological development are to be welcomed, but they also place demands on regulatory authorities. Since public pressures are typically similar in the EU and US, regulators on either side of the Atlantic face similar challenges. Yet, in the absence of a positive commitment to cooperate, the chances are that regulatory solutions will diverge and, moreover, inadvertently provide the source of a trade dispute for some time in the future.

GATT TBT Agreement

The GATT Technical Barriers to Trade Agreement already contains an obligation to use international standards and to choose regulatory solutions which are the least trade restrictive possible. These provide the basic multilateral framework for developing technical regulations and standards, but this is an area where the EU and US have scope to go further on a bilateral basis.

Sub-Cabinet involvement

The decision to address this issue was taken at the EU-US Sub-Cabinet meeting of February 1994. An early attempt to develop a series of pilot projects to illustrate the concept became stalled, so a joint paper explaining the idea has been drawn up instead. It now remains to implement the paper's calls for greater awareness of trade interests in the regulatory process.

Protecting legitimate interests

There is a fine balance between protecting legitimate regulatory interests, while ensuring that trade interests are not excessively jeopardised. Regulatory Cooperation is therefore a voluntary and non-binding process, and it will not directly change existing regulatory processes. However, it should play a role beyond that simply of an early warning mechanism. The aim is to reach more compatible regulations for the future.

The initiative promises benefits for industry and regulators. Compatible standards in two of the world's largest markets will reduce entry costs into export markets. For regulators, cooperation offers the possibility of learning from each other, and can help cover gaps in expertise where it is too costly to dedicate staff.

4.3. New Trade Issues

4.3.1. Introduction

At the conclusion of the Uruguay Round, contracting parties agreed to look at the relationship between trade and other economic policies. In most cases, there is considerable potential for EU-US cooperation on these subjects, based on a high degree of shared interests and perspectives.

The interconnections between trade and the environment have come increasingly to the centre of attention. This process culminated with the establishment of the Committee on Trade and Environment (CTE) within the WTO. Work is most advanced in this sector, but other areas of potential interest include trade and competition policy, the role of multinationals and the links to social policy.

4.3.2. Trade and the environment

Similar underlying objectives

The US and the EU share similar concerns on trade and environment: both are developed and mature trading economies with a highly environmentally aware public opinion. The fact that there has been confrontation recently within the GATT Dispute Settlement system (Tuna-dolphin case (section 2.2.2) and the more recent Car Taxes case (section 2.8.5)) does not stem from underlying opposed objectives, but from disagreement on the methods to achieve the objective of environment protection and conservation.

Mandate

The CTE's mandate allows it the possibility to "make recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the trading system".

OECD work

The link between trade and environment is also currently being discussed in OECD. The Joint Session of Trade and Environment Experts has been requested to submit to Ministers a report with substantive conclusions by May 1995.

UNEP/UNCTAD

Furthermore, UNEP and UNCTAD are co-operating on this issue. This co-operation has been welcomed worldwide as a complementary forum to WTO.

The EU has a pro-multilateralism stance, underlining the importance of reaching international consensus in order to advance proposals and solutions to render trade and environment policies "mutually supportive". The US on the other hand sees the scope for the adoption of unilateral measures.

Multilateral Environment Agreements

With regard to Multilateral Environment Agreements (MEAs), the EU has proposed a "collective reading" of GATT Art. XX which would ensure that trade measures taken pursuant to MEAs (including those against non-parties to the MEA) will not be challenged under GATT. However, the EU is prepared to examine other options.

4.3.3. Trade aspects of other policies

Competition policy

Likewise, the EU and the US have a common interest in the debate on the link between trade and competition policies, although this discussion is not as far advanced at a multilateral level as that on trade and the environment.

Successive rounds of trade liberalisation have resulted in a situation where the average tariff levels of industrialised countries are around 4% for industrial products, This, coupled with the commitments given by governments in the Uruguay Round on non-tariff measures, such as technical barriers to trade, intellectual property and sanitary and phytosanitary measures, mean that governments have now comparatively little scope for influencing trade.

Globalisation of world economy

On the other hand private companies have little or no international constraints on them, and the globalisation of the world economy has left multinational companies with considerable power to affect trade flows. The problem is, thus, to ensure that the liberalisation of trade which governments have negotiated, sometimes at considerable pain, is not negated by anti-competitive behaviour on the part of private companies.

The EU and the US, both large, open economies with mature competition legislation, rigorously enforced, have every interest in persuading their trading partners to enact, and more importantly, to enforce, comparable legislation in their territories. This would call for negotiation of binding international disciplines with an effective dispute settlement procedure in the competition field.

4.4. Other initiatives to reduce trade barriers

4.4.1 Introduction

Implementing regulatory cooperation

The EU and US have a rich and diverse expert-level dialogue, which is playing an important role in addressing the barriers to trade listed in this report. In addition, these dialogue represent in many cases the implementation of Regulatory Cooperation (see section 4.2).

The following section provides a few details about some of the dialogues, but it is not exhaustive.

4.4.2. A flavour of the bilateral dialogues

Early warning

Twice a year, the European Commission's Directorate-General for External Economic Relations (DG I) and US State Department meet at high official level in the Sub-Cabinet. This is an opportunity to review a whole range of bilateral issues and, on each occasion, time is set aside for 'early warning' points where the two sides can raise matters of concern before they become more major grievances and the source of dispute. The Sub-Cabinet therefore provides valuable diplomatic backing to the resolution of potential trade difficulties.

Food legislation

The European Commission's Directorate-General for Industry (DG III) and the Food and Drugs Administration have held talks concerning legislation on food and human and veterinary medicines for some time, and the process was formalised on an annual basis in 1989. These generally take the form of a plenary session with a series of working group, and provide a forum for the discussion of matters of mutual interest and concern, and to identify practical areas for the harmonisation of legislation.

For example, the discussions at the last plenary meeting covered such topics as mechanisms for information exchange, the use of international standards, updates on the FDA's regulatory agenda and the EU's harmonising legislation, and technical issues relating to the mutual recognition agreement negotiations.

Veterinary agreement

Discussions with the US are continuing, with a view to reaching a conclusion this year, on a global veterinary agreement which would extend the principle of equivalence of veterinary requirements to issues and products not already covered by the 1992 agreement on the application of the Third Country Meat Directive to trade in beef and pork.

Pesticides

Meetings are held between European Commission's Directorate-General for Agriculture (DG VI) and the Environmental Protection Agency on a generally annual basis with a view to cooperating on the pesticides programmes of the EU and US, and to sharing the burden of pesticide regulatory review, thereby reducing pesticide-related trade disputes.

High-technology

Following a few years of inactivity, the EU-US discussion on high technology products was recently restarted, and is currently focused on regulatory and data harmonisation issues pertaining to the emerging

biotechnology industry. The group is also expected to look at ways of supporting the on-going OECD studies into jobs and growth potential from this sector.

Information Society

The latest addition to the transatlantic dialogue covers the area of the Information Society, which held its first meeting in late 1994. In fact, this was the re-launch of a former dialogue which had fallen into abeyance in the 1980s. With so much current focus on these issues at present, the EU and US have both acknowledged the value of ensuring that this market is opened up at the global level. Another meeting is scheduled for this Summer which will take up many of the matters discussed last November, and at the G-7 Conference in February 1995.

Investment issues

The importance accorded to investment issues in debate about international economic policy has grown considerably over the last few years. New provisions were included in the Uruguay Round negotiations on these matters, and the EU is looking to improve further these multilateral measures. The US is equally concerned to establish firm disciplines in this area. Negotiations will begin shortly in the framework of the OECD for a new investment instrument, and the Commission is keen to see this work taken up at the multilateral level by the WTO.

TABLE OF REGULARLY USED ABBREVIATIONS

CNT	Conditional National Treatment
CRS	Computer reservation systems
DoD	Department of Defence
EFTA	European Free Trade Association
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
FDA	Food and Drugs Administration
FDI	Foreign Direct Investment
GAO	US General Accounting Office
GATS	General Agreements on Trade in Services
GIS	Global Information Society
GPA	Government Procurement Agreement
HR	House of Representatives
IEC	International Electrotechnical Commission
ISO	International Standardisation Office
ITC	International Trade Commission
MFN	Most favoured nation
MOU	Memorandum of Understanding
MRA	Mutual Recognition Agreement
TBT	Technical Barriers to Trade
TRIMs	Trade Related Investment Measures
TRIPs	Trade Related aspects of Intellectual Property rights
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environmnt Programme
USDA	US Department of Agriculture
USTR	United States Trade Representative