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E.C RELEASES 1989 REPORT ON U.S. TRADE BARRIERS

The European Community today issued its 1989 report on U.S. trade practices that impede E.C. exports. The attached report was prepared by the E.C. Commission in collaboration with the member states and updates earlier lists which were first published in December 1985.

This publication, while not exhaustive, pin-points almost 40 measures that confirm the persistence of a variety of tariff and non-tariff barriers to trade, including quantitative restrictions, export subsidies, customs barriers, public procurement policies, countervailing and antidumping procedures and tax barriers.

Frans Andriessen, Vice President of the E.C. Commission responsible for External Relations and Trade Policy, underlined that the Commission continues to be concerned not just by the trade barriers themselves, but also by the U.S. failure to live up to its international trade obligations in a number of areas, for instance in implementing the results of dispute settlement proceedings achieved by the General Agreement on Tariffs and Trade (GATT).

He further indicated that the Community, for its part, will seek the elimination of all unjustified trade barriers by means which fully respect the international rules governing trade.

In response to the 1989 National Trade Estimates report published end April by the U.S. Trade Representative, the Commission stated: "This report is under careful consideration. However, at this stage, the Commission must reiterate its profound concern about the use which could be made of this report under the terms of the U.S. Trade Act. The Commission wishes to emphasize again the risk for the international system of the use of unilateral retaliatory measures incompatible with international trading rules."

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SUMMARY OF EUROPEAN COMMUNITY REPORT ON U.S. TRADE BARRIERS

The report is intended to illustrate the type of barrier encountered by Community exporters in the United States.

U.S. barriers to E.C. exports are of several different types. In the first instance there are measures, the legality of which is, at best, in severe doubt in terms of international trading rules and which have a negative effect on the E.C. and, indeed, other countries' exports to the U.S. In this category fall barriers such as various "Buy America" restrictions. A second category of barriers concerns U.S. measures which have been found to be inconsistent with international trading rules and in respect to which the U.S., in contradiction with its international obligations, has failed either to modify or to offer compensation to its trade partners for the trade damage caused. Two examples here are the U.S. failure to implement the findings of the GATT on the illegality of the Superfund oil import levy and the non-conformity of the U.S. system for levying customs user fees.

A third category of measures consists of provisions of U.S. trade laws which could be used in a harmful way against the Community's trading interests. In this context the Community points to the Omnibus Trade and Competitiveness Act of 1988, under which far-reaching changes were made to the already extensive system of U.S. trade laws and which increase the likelihood of unilateral trade action in contradiction with the rules of international trade.

In the months to come, the Community intends to pursue, particularly in the appropriate international fora, and in accordance with the rules set out therein, actions aimed at ensuring that U.S. short-comings in the application of international trade law are corrected, that barriers are removed and that potentially harmful provisions of trade law are amended.

The individual trade barriers are listed under fifteen sub-headings. They range from the very general, such as the so-called "Super 301" procedure mandated by the 1988 Trade Act, to detailed provisions restricting Community exports of products as various as dredgers, small pieces of jewelry, olive oil, machine tools, etc.

In most cases a factual description of the obstacle is followed by and assessment of its trade impact and by a summary of action already taken or envisaged. Apart from the use of diplomatic demarches intended to remind the U.S. of its international obligations, this action usually emphasizes existing GATT rules and procedures or the ongoing Uruguay Round trade talks as avenues through which the Community is seeking removal of the barriers.

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EUROPEAN COMMUNITY

REPORT ON US TRADE BARRIERS

INTRODUCTION

The purpose of the European Community's report is first of all to make clear that EC exporters face trade practices which impede exports when trading with the US. A second, related aim is to illustrate the range of barriers which confront EC exporters.

US barriers to EC exports are of several different types. In the first instance there are measures whose legality in terms of international trading rules is, at best, severely in doubt and which have a negative effect on EC and, indeed, other countries' exports to the US. In this category fall barriers such as various Buy America restrictions. A second category of barriers concerns US measures which have been found to be inconsistent with international trading rules and in respect to which the US, in contradiction with its international obligations, has failed either to modify or to offer compensation to its trade partners for the trade damage caused. Two examples here are the US failure to implement the findings of the GATT on the illegality of the Superfund oil import levy and the non-conformity of the US system for levying customs user fees.

A third category of measures consists of provisions of US trade laws which could be used in a harmful way against the Community's trading interests. In this context the Community points to the Omnibus Trade and Competitiveness Act of 1988, under which far-reaching changes were made to the US' already extensive system of trade laws and which increase the likelihood of unilateral trade action in contradiction with the rules of international trade.

In the months to come, the Community intends to pursue, particularly in the appropriate international fora, and in accordance with the rules set out therein, actions aimed at ensuring that US shortcomings in the application of international trade law are corrected, that barriers are removed and that potentially harmful provisions of trade law are amended.

Unlike the US, however, which accords itself the right to take unilateral action, the Community does not intend to take the law into its own hands and rectify its grievances through resort to illegal unilateral measures to restore the balance of advantages due to it under international trading rules. Instead, the Community will pursue its complaints through existing mechanisms in conformity with international trading rules.

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I. A. SECTION 301 OF THE TRADE ACT OF 1988

1. Description

Section 301 is the statute under US law dealing with unfair foreign trade practices and measures to be taken to combat them. Major changes were made to Section 301 under the Trade Act of 1988. By substantially reducing the discretion available to the US authorities in administering the Act, the changes make it much more likely that unilateral action will be taken to redress allegedly unfair trade practices. In fact, mandatory action, subject only to a few narrowly drawn waivers, is required in certain cases. In others some discretion, albeit reduced, remains. Furthermore, the scope of the statute has been enlarged to include new categories of practices.

The Trade Act also introduced a new procedure - the so-called "Super 301" - whereby USTR is required to identify priority unfair trade practices and priority foreign countries and self-initiate Section 301 investigations with a view to negotiating an agreement to eliminate or compensate for the alleged foreign practice. If no agreement is reached with the foreign country concerned, then unilateral retaliatory action can be taken.

2. Comment

Unilateral action under Section 301 on the basis of a unilateral determination without authorisation from the GATT contracting parties is GATT illegal. Such unilateral action runs counter to basic GATT principles and is in clear violation of specific provisions of the General Agreement. Except in the specific fields of dumping and subsidisation, where autonomous action is possible, measures taken against other parties must be sanctioned by the GATT Contracting Parties.

The changes to Section 301 in the Trade Act make the likelihood of unilateral action greater and hence are strongly opposed by the Community. A recent example of the use of Section 301 action by the US was the retaliation against the EC in the hormones dispute when the US raised tariffs to 100% in January 1989 on selected EC foodstuffs. The EC has requested a GATT dispute settlement panel on this unilateral US action. The US has so far refused to agree to this. During a special debate in the framework of GATT on 8 February 1989, it was noted that under no GATT provision was the imposition of discriminatory import tariffs of this kind justified.

The US has repeatedly used the threat of Section 301 action in the past, often in flagrant violation of GATT rules, when seeking to obtain Community agreement to the imposition of restrictions against EC exports. The disputes concerning pasta, canned fruit, citrus and the effects of the enlargement of the Community to include Spain and Portugal are cases in point. The Community will continue to defend its GATT rights whenever Section 301 is used to the detriment of its trading rights.

Of course, the EC has its own regulation (2641/84) giving it authority to challenge unfair trade practices of other trading partners. However, unlike the US legislation, it does not provide for unilateral action or any measure which is not in strict conformity with the EC's international obligations.

The question of the GATT legality of the US trade legislation is not the only issue at stake. We are currently engaged in a multilateral effort, in the context of the Uruguay Round trade talks, to open up the world trading system. Aggressive use of Section 301 and Super 301 by the US, with the attendant threat of unilateral action if US conditions are not met, can only serve to undermine this process.

B. Telecommunications - Trade Act

1. Description

The "Telecommunications Trade Act of 1988" is based on the concepts of sectoral reciprocity and mandatory action. The stated objectives are to "provide mutually advantageous market opportunities", to correct imbalances in market opportunities created by reductions in barriers to access to the US market, and to increase US exports of telecommunications products and services. The specific objectives range from national treatment to non-discriminatory access to network, procurement, standard setting procedures, and mutual recognition.

The Act required USTR to establish a list of priority foreign countries at the latest five months after the enactment of the Trade and Competitiveness Act, and to enter into negotiations with such countries with a view to concluding a bilateral or multilateral trade agreement.

If no agreement is reached, the President is authorised to take a series of actions, e.g. termination of trade agreements, Section 301 and prohibition of government procurement.

2. Comments

The Community has been designated as a priority country under the Act, despite the fact that a major liberalisation of the EC market is taking place in the context of the 1992 programme and that negotiations on a multilateral services agreement are under way in the GATT-Uruguay Round negotiations.

The Community cannot accept a unilateral determination by the US of what constitutes a barrier or of when "mutually advantageous market opportunities" in telecommunications have been obtained. US efforts to carry out bilateral negotiations under the threat of unilateral retaliation can only hinder the multilateral talks.

3. Actions taken or to be taken

A first meeting took place on 18 February 1989 between Vice President Andriessen and USTR Carla Hills in Washington where telecommunications issues, amongst others, were discussed. Vice President Andriessen confirmed the readiness of the Community to continue bilateral discussions as in the past, but emphasised that negotiations should take place at multilateral level, within the Uruguay Round.

II. TARIFF AND OTHER IMPORT CHARGES

A. Tariff Barriers

1. Description

Numerous products of EC export interest are subject to high US tariffs. Certain textile articles, ceramics, tableware, glassware, and footwear are all subject to tariffs of 20% or more. In addition, the US is using the introduction of the Harmonised System to increase certain duties in a manner inconsistent with the relevant GATT rules, especially on textiles. Examples of high US tariffs include (with the corresponding EC rate in brackets):

Certain clothing	20-30% (13-14%)
MMF/ woollen blended fabrics	38% (11%)
Ceramic tiles etc.	20% (9%)
Certain tableware	26-35% (10%)
Certain glassware	20-38% (12%)
Certain footwear	37.5-48% (8-20%)
Certain titanium	15% (5-7%)
Garlic and dried or dehydrated onions	35.% (16%)

Such high tariffs reduce EC access possibilities for these products.

2. Estimated impact

Although it is difficult to measure the impact of these restrictions, tariff reductions on these products would significantly increase the competitiveness of EC firms on the US market.

3. Actions taken or to be taken

Tariff reductions will be negotiated within the framework of the Uruguay Round. However, unjustified increases in duties, resulting from the introduction of the Harmonised System, that exceed bound rates will not be taken into account by the EC in assessing offers of tariff reduction by the US in these negotiations. Moreover, within the framework of the Standstill Commitment of Punta del Este the EC continues to oppose unilateral increases in import duties and will actively seek the lowering of these US barriers.

B. Customs User Fees

1. Description

As a result of laws enacted in 1985 and 1986, the United States imposes customs user fees with respect to the arrival of merchandise, vessels, trucks, trains, private boats and planes, as well as passengers. The most significant of these fees is that applied by processing formal entries of all imported merchandise, the only exceptions being products from the least developed countries, from eligible countries under the Caribbean Basin Economic Recovery Act, or from United States insular possessions as

well as merchandise entered under Schedule 8, Special Classifications, of the Tariff Schedules of the United States. The merchandise processing fee for December 1, 1986, through September 30, 1987 was 0.22 percent ad valorem and is now 0.17 percent ad valorem.

These customs user fees, which are calculated on an ad valorem basis, are incompatible with the international obligations of the United States under Articles II and VIII of GATT.

2. Estimated Impact

Based on the EC's 1988 exports to the United States, the merchandise processing fee cost the EC approximately $146 million.

3. Actions Taken or to be Taken

At the request of the EC, the GATT Council instituted a Panel in March 1987, which concluded in November 1987 that the fees were not in conformity with the General Agreement.

The GATT Council adopted the panel report in February 1988. The US has not yet complied with this report, despite repeated requests from the EC and other Contracting Parties for the US to do so. Legislation has not yet been introduced in Congress, nor has the US offered any compensation. The US has been at the forefront in the effort to strengthen the GATT dispute settlement process which culminated in the package of improvements adopted in the GATT Council in April as part of the Uruguay Round Mid-Term Review. At the same time the US has failed to live up to its obligation to comply with the Panel's findings. This contradiction affects US credibility in the GATT, in this area.

C. Other User Fees

1. Description

In July 1986 US customs regulations were amended to impose customs user fees for the arrival of passengers ($5 per arrival) and commercial vessels ($397 per arrival, with a maximum of $5,900 per year for the same vessel).

The United States enacted a law in October 1986 requiring the collection of a $5 immigration user fee for the inspection of passengers arriving in the United States aboard a commercial aircraft or vessel, effective December 1, 1986. The United States proposes to use the fee to fund the United States Immigration and Naturalization Service.

The United States also enacted a harbour maintenance fee in October 1986. The fee, which is to finance the cost of harbour dredging and channel maintenance, amounts to 0.04 percent of the value of commercial cargo travelling through United States ports.

2. Estimated Impact

In 1988, the estimated annual cost of these fees to the EC was $89.5 million for the passenger fee, $19.4 million for the vessel fee, and $147 million for the harbour maintenance tax.

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3. Actions taken or to be taken

Despite official representations to the US authorities in December 1986, the US has failed to respond.

D. Superfund Taxes

1. Description

The United States enacted a law in 1986 to establish a "Superfund", to pay for the clean-up of toxic waste sites, financed by the imposition of two discriminatory taxes on imports. Since 1 January 1987, the US has applied the following taxes: (1) a tax of 11.7 cents per barrel on imported petroleum products (compared with 8.2 cents per barrel on domestic products), and (2) as from 1989, a tax on imported chemical derivatives of feedstocks subject to the Superfund tax equal to the tax that would have applied to the feedstocks if the derivatives had been produced in the United States (or 5 percent ad valorem if the importer does not provide sufficient information to determine the taxable feedstock components in a derivative).

The discriminatory tax differential on petroleum is inconsistent with Art. III of GATT. Regarding the 5% penalty rate, the effective imposition of a tax on imported products in excess of the rate applied to taxable feedstocks used in the production of derivatives in the US, would be contrary to the national treatment requirements of Art III(2) of GATT.

2. Estimated Impact

The cost to the EC of the tax on imported petroleum products was about $7 million in 1987. The cost of the tax on imported chemical derivatives may be as high as $18.6 million.

3. Actions taken or to be taken

The EC requested consultations under GATT Article XXII(1), which were unsuccessful. A Panel instituted at the request of the EC and other Contracting Parties concluded in June 1987 that the discriminatory tax differential on petroleum is inconsistent with GATT Art. III. It recommended that the US should comply with their GATT obligations.

The panel findings and the recommendation were adopted by the GATT Council in June 1987. So far the United States has not taken any action that would eliminate the discriminatory tax provisions for imported petroleum and chemical derivatives.

On 8 March 1988, the EC requested from the GATT Council, in accordance with Art. XX procedures, authorisation to withdraw equivalent concessions granted to the US. In December 1988, the US Government acknowledged the principle of paying compensation for the levied tax. So far the United States has taken no action to eliminate the discriminatory tax provisions for imported petroleum and chemical derivatives nor has it paid compensation.

Once again, the failure of the US to live up to its obligations in implementing the panel's findings does not facilitate the ongoing efforts to reinforce the GATT dispute settlement procedures.

E. Tariff Reclassifications

1. Description

As a result of decisions by US Customs services, as well as following the introduction of the Harmonised System, the United States has periodically and unilaterally changed the tariff classification of a number of imported products. This has in most cases resulted in an increase in the duties payable.

In particular, the US has increased its duties on certain textiles. Duties on wool woven fabrics and wool/silk blends increased from 33% to 36% and from 8% to 33% respectively as a result of a change in classification by chief value to classification by chief weight of fabric. In addition, US tariffs for certain wool-blended tapestry and upholstery fabrics have increased from 7% to 33% and 38% as a result of the merging of several tariff lines. The Community's position is that the duty increases under the new tariff are not justified and contravene the agreed GATT guidelines for transposition to the HS.

Other examples of unilateral reclassifications of products which have led to a significant increase in duties and for which the Community has received no compensation are: orange juice concentrate-based products, prefinished hardboard siding, unfinished ducktype footwear, leaded naptha, Unimog vehicles, polypropylene rope and twine and continuous cast iron bars. The list is not exhaustive.

Moreover, while some increases resulting from the introduction of the HS have been subject to joint negotiations, there have been other instances in which duty increases arose from reclassification decisions by US authorities which were not directly connected with the introduction of the HS (e.g. jam).

Similarly, the Community has cause to complain about other reclassifications which effectively constitute a unilateral extension of a quantitive restriction. For instance, US Customs reclassified wire ropes with fittings so that the former now requires an export certificate for entry into the US.

2. Estimated Impact

The overall impact of tariff reclassification is difficult to quantify. However, the textile tariff increases outlined above will have serious repercussions for EC textile exports to the US. Estimated extra duty payments will amount to some $5 million for the Community as a whole.

3. Actions taken or to be taken

The EC is entitled to compensation under Article II.5 of the GATT because such unilateral tariff reclassifications have occurred for bound concessions. Moreover, the Commission has been pursuing these matters bilaterally with the US since the failure of the negotiations under GATT Article XXVIII in 1987, but without success. The Commission requested GATT arbitration, which the US formally rejected on 8 February 1989. The Community, therefore, has now reserved its rights under Article XXVIII.

III. QUANTITATIVE RESTRICTIONS AND IMPORT SURVEILLANCE

A. Agricultural Import Quotas

1. Description

The United States regulates imports of a variety of agricultural products through the establishment of quotas. These cover certain dairy products (including cheese), icecream, sugar and syrups, certain articles containing sugar (including chocolate crumb), cotton of certain staple lengths, cotton waste and strip, and peanuts. While these restrictions are covered by a GATT waiver, and by the headnote to the Customs Tariff in the case of sugar, they restrict certain EC exports to the US and have a considerable negative effect on world markets.

Section 22 of the US Agricultural Adjustment Act of 1933 requires import restrictions to be imposed when products are imported in such quantities and under such conditions as to render ineffective, or materially interfere with, any United States agricultural programme. Such restrictions are a breach of GATT Article II and XI. Therefore, the United States sought and was granted in March 1955 a waiver, subject to certain conditions, for its GATT obligations under the above articles with respect to Section 22 quotas. More than 30 years have since elapsed and in the Community's view the continuation of the waiver cannot be justified. In GATT practice a waiver is usually of limited and fixed duration. Last year the Community called for consultations with the US under the GATT. It also challenged the US on the headnote to the Customs Tariff which restricts sugar imports. Owing to the failure of the ensuing talks, the Community requested the formation of a GATT Panel on certain products subject to the US waiver. The US is opposing the establishment of the panel.

A unilateral decision of the US administration on the application of the cheese import quota in 1988 resulted in a globalisation of certain EC allocations in favour of other third countries. Such a decision was incompatible with the provisions of the 1979 cheese arrangement between the EC and US.

2. Estimated Impact

EC exports are most heavily affected by United States quotas on dairy products, cheese and sugar-containing articles. In 1988 Community exports to the US of dairy products and cheese were $409.1 million, while exports of sugar and related products were $47 million.

3. Actions taken or to be taken

During the Tokyo Round, United States Section 22 quotas on EC dairy products and cheese were the subject of negotiations. At the time, the EC reserved its GATT rights with respect to these quotas. As already indicated, the Community has launched the dispute settlement process in the GATT on the Section 22 waiver for certain products. For its part, the United States has accepted

that, in principle, its GATT waiver for Section 22 restrictions can be the subject of negotiations in the framework of the Uruguay Round.

The Community is challenging the US on the way the quotas were applied in 1988.

B. Import licensing for quota measures

1. Description

When the United States imposes unilateral quota restrictions on imports, the merchandise to be customs cleared must be accompanied by a special invoice authorising importation. However, such a clearance cannot be obtained until the goods are physically in the US customs territory. Thus importers and exporters have no assurance at the time of the shipment that the goods will be allowed to enter the US. If the quota has been filled, the goods must be re-exported or stocked in a warehouse until a quota is available. The fact that the import authorisation cannot be obtained prior to the shipment creates a barrier to trade and is a violation of the GATT Agreement on Import Licensing Procedures (Art. 2 d of the Code).

2. Estimated Impact

It is difficult to quantify the total economic impact of the above but considerable warehouse and transportation costs are incurred if goods fail to obtain a licence on arrival in the US. Furthermore, the uncertainty created is an additional obstacle to trade.

3. Actions taken or to be taken

The EC has raised this issue with the United States with respect to speciality steel quotas and has questioned the conformity of the procedure with the GATT Licensing Code. The GATT Licensing Committee has agreed to address this issue within its work programme. The EC has also raised the issue in the negotiating group on MTN Codes.

C. Machine tools

1. Description

Following the application by the US machine tools industry for import relief under the national security provisions (Sect. 232 of the Trade Expansion Act of 1962) and under mounting Congressional pressure for action, the Administration, in December 1986, concluded Voluntary Restraint Arrangements with Japan and Taiwan covering their exports to the US in the period 1987 - 1991. The US also sought a similar arrangement with Germany but its request was rejected by the Federal Republic. Subsequently the US established, in December 1986, maximum market share levels for certain types of machine tools imported from Germany. These levels are being monitored and the US has threatened unilateral action if they are exceeded. Other Member States are also under the threat

of "remedial action" if they increase their market share in the US. The publication of specific import levels and the open threat of restrictive measures has a negative impact on Community exports. They are not in conformity either with US national legislation or with US obligations under Article XI of the GATT.

2. Estimated Impact

Cannot be assessed.

3. Actions Taken or to be Taken

The Community has, by Note Verbale of 22 December 1986, reserved its GATT rights and indicated that the Commission will propose remedial action to the Council, should restrictive measures be taken by the United States.

D. Beverages and Confectionery

1. Description

In May 1986 the US introduced quotas on imports from the Community of certain wines, beers, apple and pear juice, candy and chocolate in the context of the dispute over the enlargement of the Community. These quotas have since been slightly relaxed.

2. Estimated Impact

The quotas were set at levels which have not proved restrictive, but importers have experienced delays in customs clearance. Uncertainty regarding access has proved to be an obstacle to trade and has, in some cases, led importers to look for alternative sources of supply.

3. Actions taken or to be taken

In response to these non-restrictive quotas, the EC introduced retrospective surveillance of certain imports from the US. If the quotas should become restrictive the EC will take appropriate action against imports from the US.

E. Firearms and munitions

1. Description

The United States prohibits imports of firearms and munitions, unless the importer can demonstrate that the imports are for specific uses, (e.g. competitions, training, museum collections) and obtain a licence from the US Treasury. Sales by United States producers are not subject to similar requirements. United States practice, therefore, discriminates against imports and is inconsistent with GATT Article III.

In addition, the Director of the Drug Policy Control Board has recently announced the immediate temporary suspension of imports of semi-automatic assault rifles. Following this the US Treasury

has refused to issue the necessary licences to importers of these weapons. Again, the importer has to show that the designated weapons (including three weapons originating from the EC) are primarily used for scientific, research, competition, training or hunting purposes. This measure follows a substantial increase in requests for licences received by the Bureau of Alcohol, Tobacco and Fireearms, and reflects growing public concern about the use of these weapons. The EC understands this serious public disquiet and recognises the need for adequate controls. It, nevertheless, considers that this provision should be applied in a non-discriminatory manner.

2. Estimated Impact

The outright import ban eliminates at a stroke foreign participation in the US market.

3. Actions Taken or to be Taken

The EC has noted the United States prohibition on imported firearms and munitions as a prima facie breach of Article III in the GATT catalogue of non tariff barriers. This will be examined in the framework of the Uruguay Round.

F. Foreign built dredges and other vessels

1. Description

The Merchant Marine Act of 1920 requires that only United States-registered vessels may be used in United States territorial waters for activities other than transporting passengers or merchandise (e.g. dredging, towing and salvaging). However, only vessels constructed in the United States are eligible for US registration for these purposes. There is, therefore, a "de facto" prohibition against using imported work vessels.

United States law also requires that vessels registered in the United States for use in coast-wise commerce (e.g. between United States ports), be constructed in the United States. Among other vessels, this requirement applies to air-cushioned vehicles travelling over water (e.g. hovercraft). Similarly, US flag vessels engaged in fisheries in US waters must be built in the US, and owned and manned by US citizens.

2. Estimated Impact

The value of the US market in this area is estimated at about $1.3 billion (1986).

3. Actions taken or to be taken

The EC and other contracting parties have noted United States treatment of these vessels as a prima facie breach of Article III in the GATT catalogue of non-tariff barriers. The EC has raised this issue in the framework of the review of this catalogue in the Uruguay Round.

IV. CUSTOMS BARRIERS

A. Untimely product sampling

1. Description

US Customs follow a sampling and inspection procedure which does not distinguish between perishable and non-perishable products. Thus perishable products stand in line (behind long queues of non-perishable goods such as steel commodities) waiting to be tested and are often spoiled in the process. In this manner whole shipments, for example, of citrus fruit from Spain, have had to be dumped with no compensation to the producers and/or importers.

2. Estimated Impact

US practice amounts to an impediment to trade in perishable products with evident effects on EC businesses.

3. Action taken or to be taken

Testing of perishable goods should be undertaken bearing in mind the possibility of spoilage of the product.

B. Origin marking for jewellery

1. Description

Section 134.11 of the Code of Federal Regulations requires that jewellery be marked with country of origin. It is not at present on the Customs' J list of exemptions. Small items of jewellery do not lend themselves to marking. In many cases even the indication of the gold and silver content, as required by other acts and regulations, such as the import marking provisions for native-American style jewellery of the 1988 Trade Act, can only be embossed with great difficulty. Further marking of the articles in question would very often lead to their impairment.

2. Estimated impact

In 1986 the value of imports into the US of jewellery amounted to $1.9 billion. The inclusion of jewellery on the Customs' J list of exemptions would undoubtedly increase EC exports to the US.

3. Actions taken or to be taken

Jewellery should be exempted from the origin requirements of Section 134.11 of the Code of Federal Regulations.

V. STANDARDS, TESTING, LABELLING AND CERTIFICATION

A. Telecommunications

1. Description

Although the approval procedures of Bellcore (the approval body owned by the Bell Operating Companies) are open, nevertheless EC suppliers of central office switching equipment experience difficulties in selling into the United States market because of the length and cost of the procedures. Moreover, there is no guarantee of sales at the end of the process. The system thus has the effect of favouring established companies in the US.

Furthermore, due to the fact that the technical environment relating to telecommunications in the US differs heavily from most other countries, the costs for adapting European-based switching equipment to US specifications are much higher than the costs for the necessary adaptation work required for practically all other countries.

As regards standards for technical equipment, although the FCC (Federal Communications Commission) requirements are limited to "no harm to the network", manufacturers, in practice, have to comply with a number of voluntary standards set by industrial organisations (such as Underwriters Laboratories) in order to ensure end-to-end compatibility. Understandably this compatibility is considered as necessary by providers of services and users, in the US as in Europe. Therefore, even if the FCC operates a relatively cheap and expeditious scheme, this is by no means the end of the story and further hurdles in terms of private performance standards have to be met.

2. Estimated Impact

It is difficult to quantify the cost to exporters of the necessary testing and adaptation work, but exporters are being discouraged by these costs and the attendant risks.

3. Actions taken or to be taken

The Community and the United States instituted fact-finding discussions on telecommunications in 1986. EC and US officials have met regularly. These discussions are expected to continue.

Areas covered in the discussions ranged from standards and testing to procurement. The Uruguay Round will provide an opportunity for negotiations, where appropriate.

B. Cured Meat

1. Description

Exports of cured meat from the EC are subject to restrictive controls in the US market. For example, imports into the US of Parma Ham have been subject to a long- standing prohibition, ostensibly for health reasons. Following repeated approaches by the Community, US import regulations have been modified to permit importation, but in such a way that imports will not actually take place before September 1989.

The US market for the present thus remains closed to this high quality product.

Furthermore, the US still applies a prohibition on other types of uncooked ham, notably San Daniele, Ardennes ham and German and Spanish ham.

2. Estimated impact

The above, high quality hams are a luxury product and enjoy a considerable international demand. Exports of these hams to the US, with its high per capita income, are expected to be substantial.

3. Actions taken or to be taken

The import restrictions on Parma and other hams were contrary to GATT Articles XI and XIII and not justified by Art XX. The Commission has repeatedly drawn the attention of the US authorities to the illegality of the measure.

C. Phytosanitary barriers

1. Description

Imports of plants (horticultural and agricultural) into the US are subject to US quarantine regulations. The USDA oversees the administration of these regulations in order to protect US agriculture and livestock producers against the importation of diseases and pests that do not exist in the US. These regulations have over the past few years been the subject of discussion and negotiation between the various USDA countries, including the Netherlands, Belgium and Denmark. However, during this period the USG has repeatedly postponed their modification, allegedly because of inadequate manpower to carry out the necessary scientific examination. Meanwhile, the USDA is being subjected to strong pressure from US growers and producers not to amend the regulations, in order to impede imports. Some USDA quarantine regulations are so restrictive as to allow no access from certain countries.

Two examples of European products which have been the subject of negotiation, but which are still subject to an inappropriately restrictive import regime, include: 1) European potatoes, (these are not allowed into the US ostensibly to prevent the introduction of golden nematodes, although nematodes can apparently be found in certain potato growing areas of the US), and 2) the import of a large variety of plants from the Netherlands, Belgium and Denmark, for example, where sterile growing media (such as rockwool) are used.

2. Estimated Impact

The Community has been barred from supplying products with a potentially large market in the US. A considerable amount of trade has been lost.

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3. Actions taken or to be taken

The Community feels that this issue should be settled in the framework of the Uruguay Round discussions. The USDA should be required to justify its quarantine regulations (e.g. by proving that the certain pests/diseases against which the restrictions are supposed to provide protection are indeed absent from the US) and if necessary adjust them so that these regulations do not act as non-tariff trade barriers to Community products.

D. FDA requirement on chlorinated solvent levels in olive oil

1. Description

The Food and Drug Administration issued an import alert on 17 August 1988 which gave an instruction to detain in import status olive oil found to contain over 0.050 parts per million Perchloroethylene (PCE) and Trichlorethylene (TCE). This is effectively a limit of zero since 0.05 ppm represents the lowest detectable level. This limit is overly restrictive according to current scientific thinking. The Community accepts that both compounds should be kept to a level which does not pose a danger to health. At the same time, this level should be a realistic one and should take into account the possibility of background contamination.

2. Estimated Impact

Attaining such low levels of tolerance set by the US limits possible shipments of certain types of olive oil and increases costs of refining.

3. Action taken or to be taken

The EC has written to the FDA on 16 March 1989 requesting that the ruling be reviewed and inviting the US to harmonise with the level set by the Community.

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VI. PUBLIC PROCUREMENT

The United States Government practice of adopting Buy American policies in certain areas of government procurement which are not at present covered by the present GATT or which could fall within derogations provided for in the Code has created permanent discrimination in favour of United States products. In addition, it has encouraged state and local entities to adopt similar policies.

The following is a general discussion of the Buy America provision of the Trade Act followed by examples of Buy American provisions enacted by the United States. Also included is a specific point on procurement in the area of telecommunication.

A. Buy America (Trade Act)

1. Description

The 1988 Trade Act provides for action by the Administration against foreign countries which discriminate against US products or services in government procurement.

In the case of discrimination in procurement covered by the Code, the President initiates the dispute settlement procedures under the Code. If these are not completed after one year, the President is required to declare 'offending' countries as being countries 'not in good standing' and (subject to certain limited waivers) to ban procurement of their goods and services. Similar sanctions are taken in the case of procurement not covered by the Code if the US determines unilaterally that there is discrimination against its own procedures.

2. Comment

Unilateral US determination on whether Code signatories are in compliance with the Code represents a violation of GATT procedures. The latter would require the US to raise the matter in the relevant committee and pass through a process of consultations and dispute settlement. Unilateral action, at any stage, to reinstitute preferences or to ban certain countries from access to US procurement would clearly be contrary to the Code provisions. Such measures could only be authorised by the relevant committee.

Once again, the disregard for the GATT implicit in this provision is detrimental to the Uruguay Round negotiations and to the shared EC-US objective of bringing more countries' products and services under multilateral free trade disciplines.

The Community for its part has proposed a major liberalisation in access to public procurement in the Member States as part of the EC's 1992 programme.

B. Department of Defense

The Department of Defense, both on its own initiative and by Congressional directive, is prohibited from purchasing certain products from foreign sources or, alternatively, must give some kind of preferences to US products. Affected products include:

- speciality metals, forging items, machine tools, coal and coke, carbon fibres, precursor fibres, textile articles, stainless steel flatware, ship propulsion shafts, valves, welded shipboard anchor chains and mooring chains, administrative vehicles, ball and roller bearings

These measures are contrary to the bilateral Memoranda of Understanding between the US and other NATO partners, and in some cases go beyond the limits of the security exception provided for in the GATT Government Procurement Code (Article VIII). Article VIII.1 of the Code allows parties to make exceptions to the general rules of the Code for goods considered indispensable for national security or defence. However, Article IX.5(a) provides that exceptions may be made only in exceptional circumstances and must be negotiated with the other parties.

There has been a net increase in the number of DOD Buy America provisions voted by the Congress in 1988. By way of example, two specific restrictions are examined below: machine tools and bearings.

i) Machine Tools

1. Description

The United States enacted a law in 1986 that requires machine tools used in any government-owned facility or property under the control of the Department of Defence to have been manufactured in the United States or Canada.

2. Estimated Impact

The estimated impact is as yet unquantified for all Member States of the EC. A substantial part of the machine tools in question are procured under bilateral Memoranda of Understanding. There is a considerable difference between EC estimates of the trade involved ($50 million) and those of the US ($8 million).

3. Actions taken or to be taken

Department of Defense purchases of machine tools are covered by the GATT Government Procurement Code. Exemptions may only be taken after notification and compensation procedures according to the Code. The EC has requested consultations under the Code. Three inconclusive consultations have taken place. The Commission is considering its next step.

ii) Bearings

1. Description

The Department of Defense issued in August 1988 an interim regulation (amendment to Federal Acquisition Regulations), essentially prohibiting the purchase of imported bearings and products containing imported bearings by the DOD except those sourced from Canada. The final rule, issued in April 1989, further reduces the scope of the exemptions.

2. Estimated Impact

The Defense demand for bearings is estimated around $770 million. It is difficult to assess the impact of the above regulation at this time.

3. Actions Taken or to be Taken

The European Community has expressed its concern to the USG on several occasions. US restrictions would remove the exemptions enjoyed by EC government under Memoranda of Understanding with DOD and would violate the standstill agreed to by GATT contracting parties at Punta del Este in 1986. US action is also inconsistent with findings by the Department of Commerce in a Section 232 case that imported bearings are not a threat to national security.

C. State and Local Policy

At state and local levels, Buy American provisions are often used by transport and road construction authorities to limit foreign participation, sometimes in a more restrictive manner than called for by Federal requirements. For example, the standard Buy American preference is 6%. In the the mass transit sector, it is 25%. Some State and local authorities go even further. Although the provision of Article I.2 of the Code requires parties to inform regional and local government of the objectives, principles and rules of the Code, this has not prevented discrimination against foreign sources by US state and local governments.

In the context of the renegotiation of the GATT Government Procurement Code the EC is seeking an extension of the Code coverage to the USA. The parties have agreed to negotiate extension of Code coverage with a view to broadening the Agreement and to explore the possibilities of expanding the coverage to include service contracts.

As examples of Buy America provisions applied at a local level, it is worth mentioning high voltage power equipment and mass transit and road construction.

i) High voltage power equipment

1. Description

The United States enacted a law in 1986 giving US firms a 30 percent preference with respect to the procurement of high voltage power equipment by the Power Marketing Administration, the Tennessee Valley Authority and the Bonneville Power Administration.

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2. Estimated Impact

The EC is examining the impact of this provision.

3. Actions Taken or to be Taken

Such procurement is not covered by the GATT Government Procurement Code. Negotiations on the extension of the Code coverage are currently taking place within the framework of Article XI(6) of the Code.

ii) Mass Transit and Road Construction

1. Description

The Surface Transportation Assistance Act of 1982 established a "Buy America" preference of 25% for the procurement of steel and manufactured products, and 10% for rolling stock. This preference was increased to 25% for rolling stock in 1987.

1987 also provided for an increase in the domestic content requirement (for the purpose of determining the applicability of "Buy America") from 50% to 55% on October 1, 1989 and 60% on October 1 1991. This 50% rule for components also applies to subcomponents.

A similar 25% "Buy America" preference also applies to the Federal Highway Constitution programme.

2. Estimated Impact

The EC is examining the impact of this provision.

3. Actions Taken or to be Taken

Such procurement is not covered by the GATT Government Procurement Code. Negotiations on the extension of the Code coverage are currently taking place within the framework of Article XI (6) of the Code.

D. Other Types of Buy America Restrictions

Buy America provisions have been enacted in other sectors - for example, restrictions exist on:

- paper for currency and securities
- paper for passports
- hand and measuring tools
- National Science Foundation
- Voice of America Program
- Small Business Administration

E. TELECOMMUNICATIONS

1. Description

Telecommunications are at present excluded from the GATT Government Procurement Code but examination of a possible extension to this sector is currently taking place.

Public procurement in the US is dominated by American companies. Network specifications are based on the requirements of the network established by AT&T. Since AT&T is still a manufacturer of equipment, as well as a provider of long distance services, it is better placed than outside companies to supply its own network.

Although the Bell Operating Companies (BOCs) are privately owned, they are heavily regulated by the FCC (1) and the State PUCs (2). The BOCs operate effective regional monopolies. Thus, although they are private companies, and are prohibited from manufacturing equipment and so should be free to procure competitively, there are many reasons why they may not do so.

That the are of procurement is an extremely complex one is further indicated by the fact that the Federal Government's recent network upgrade (FTS 2000) was open for procurement contracts only to US companies. This multi-billion dollar contract has been awarded to AT&T (60%) and US Sprint Communications (40%), thereby considerably strengthening these two companies' position both now and in the future.

2. Estimated Impact

The economic impact cannot be assessed until the scope and coverage of the possible extension of the GATT procurement agreement is agreed.

3. Action taken or to be taken

The Community's objective is to obtain guarantees of access to markets on a mutual basis at all levels, including access to entities operating at state and other sub-federal levels. The ownership of a company (public or private) is not a specific criteria by which to judge whether a company is liable to be politically influenced in its procurement. In the GATT the Community continues to maintain the position that if the EC telecommunications entities are to be covered by the Code, so should the US companies operating under corresponding conditions.

4. A further area of difficulty is related to the various Buy American provisions, both at Federal and State level, referred to elsewhere in this report.

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(1) Federal Communications Commission
(2) Public Utility Commissions

VII. EXPORT SUBSIDIES

A. Export Enhancement Programme (EEP)

1. Description

The Food Security Act of 1985 (the Farm Bill) requires the United States Department of Agriculture (USDA) to use Commodity Credit Corporation stocks worth $1 billion over a three-year period to subsidise exports of US farm products, with the option of going up to $1.5 billion. Both ceilings were reached a long time ago, and the programme is still in operation. This programme was intended to support wheat exports to a limited number of countries, most of which are traditional EC markets. It is now used for a wide range of commodities (mainly wheat, wheat flour, barley, feed grains, poultry, eggs and dairy cattle) and for exports to all food importing countries except Japan and South Korea. In particular, in 1987, the United States added China and the USSR to the list of countries to which EEP can apply.

The Trade Act prolongs the programme to 1990 and increases it from $1.5 billion to $2.5 billion, thus extending further its depressive effect on world markets. Additionally, $2 billion could be made available for export enhancement for the period 1990-92 if there has not been significant progress towards achieving an agreement with respect to agricultural trade in the Uruguay Round.

2. Estimated Impact

As of 10 March 1989, about 57.6 million tons of wheat, 2.7 million tons of wheat flour, 6.3 million tons of barley, 0.15 million tons of chicken, 34.3 million dozen eggs (and substantial quantities of dairy cattle, malt, vegetable oil, and feed grains) had been subsidised for export within the programme. In financial terms, subsidies already granted are valued at approximately $2.469 million.

3. Actions taken or to be taken

The Community has already reacted to US EEP subsidies, where necessary, by increasing its export refunds. The Mid-Term Review of the Uruguay Round of trade negotations commits participants, "to ensure that current domestic and export support and protection levels in the agricultural sector are not exceeded". The Community remains vigilant over the US compliance to this undertaking. The Uruguay Round provides an opportunity to address this and other forms of US agricultural subsidies.

B. Marketing Loans

1. Description

Marketing loans have been provided for in the Farm Act of 1985 but on an optional basis. So far they have only been used for cotton and rice. The most significant commodities have not yet benefitted.

The Trade Act of 1988 requires the President to implement in 1990 a marketing loan for wheat, feed grains and soya beans if progress has not been made on agriculture by 1 January 1990 in the Uruguay Round, unless such implementation is certified as harming further negotiations.

2. Estimated Impact

Extended subsidies for agriculture such as Marketing loans have the effect of continuing to exert downward pressure on world prices at a time when everybody should be working towards improving conditions on the world market.

3. Actions taken or to be taken

Automatic triggering of marketing loans and export enhancement is contrary to the spirit of Punta del Este, the Standstill Commitment, and because it demands action by 1 January 1990, it goes against the "globality" approach adopted by the Community and is totally contrary to the US's GATT proposal to eliminate agricultural subsidies. The Mid-Term Review of the Uruguay Round of trade negotiations commits participants, "to ensure that domestic and export support and protection levels in the agricultural sector are not exceeded". The Community remains vigilant over US compliance with this undertaking.

C. Targeted Export Assistance

1. Description

The Food Security Act of 1985 establishes a new programme, entitled Targeted Export Assistance. Under this programme, the Secretary of Agriculture had to provide $110 million (or an equal value of Commodity Credit Corporation commodities) each fiscal year until FY 1988, specifically to offset the adverse effect of subsidies, import quotas, or other unfair trade practices abroad. For the two following fiscal years, 1989 and 1990, up to $325 million will be spent annually.

For these purposes, the term "subsidy" includes an export subsidy, tax rebate on exports, financial assistance on preferential terms, financing for operating losses, assumption of costs of expenses of production, processing, or distribution, a differential export tax or duty exemption, a domestic consumption quota, or any other method of furnishing or ensuring the availability of raw materials at artificially low prices. The 1985 Act authorises priority assistance to producers of those agricultural commodities that have been found under Section 301 of the Trade Act of 1974 to suffer from unfair trade practices or that have suffered retaliatory actions related to such a finding.

2. Estimated Impact

For fiscal year 1988 about $100 million has been used to provide subsidies for this programme for promoting exports of high value products (e.g. wine, fruits, vegetables, dried fruits and citrus), mostly to Europe and the Far East.

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3. Actions taken or to be taken

The Community has not taken any particular policy initiative in relation to this programme. Agricultural subsidies which are trade distorting are to be addressed within the Uruguay Round.

D. Corn gluten feed and other cereals substitutes

1. Description

Corn gluten feed and other cereal substitutes are largely by-products from the processing of corn into starch, corn sweeteners and ethanol. The latter two in particular benefit, both directly and indirectly, from various subsidies and tax incentives. For example, corn sweetener producers benefit from numerous internal agricultural support programmes (not least from a low loan rate for corn and from the very high internal US sugar price) and from extremely restrictive (and declining) sugar import quotas - see II, A 1. Similarly, the production of ethanol, a high grade alcohol used as an additive in gasoline, has greatly increased in recent years, largely as a result of federal and state tax incentives and an extraordinary tariff surcharge on imported ethanol.

2. Estimated Impact

Virtually all United States production of corn gluten feed is exported - nearly all of it to the EC. United States corn gluten feed exports have in the past displaced the use of EC produce as animal feedstuff, leaving a costly surplus.

The EC imported 5.8 million tons of corn gluten feeds worth $765.3 million from the US in fiscal year 1988. These imports have contributed to livestock product surpluses and have displaced an amount of EC feed grains of roughly 4,000,000 tons.

3. Actions taken or to be taken

EC corn producers have been concerned for a number of years about the effects of these subsidies on their sales within the Community. The Uruguay Round will provide an opportunity to address these and other forms of US agricultural subsidies.

E. Foreign Sales Corporation

1. Description

The Domestic International Sales Corporation (DISC) legislation has been a cause of EC/United States contention since its adoption by the United States in 1972. Under this legislation, US firms were allowed to defer payment of corporate taxation on export earnings. This amounted to a de facto export subsidy which the EC challenged as illegal under GATT, obtaining a panel ruling in 1976 which condemned the United States law.

It was not until the end of 1981 that the United States agreed to adopt the panel report and it took a further three years for the United States to enact legislation to replace the DISC system with the Foreign Sales Corporation (FSC). However, in doing so, the United States converted the tax deferment provided under DISC into a definitive tax remission.

2. Estimated Impact

US exports have benefited over the life of the DISC legislation by an overall illegal subsidy of between $10-12 billion during a period when about 20% of all US exports went to the EC. Indirectly this tax remission has also affected EC exports on third country markets. It will continue to bestow economic advantages on US exports for some time to come. An illustrative example is the tax remission benefit of $397 million which Boeing realised under the DISC according to its annual report 1985, and the $422 million of additional benefits to General Electric during the second quarter of 1984, according to press reports. Mc Donell Douglas has benefitted from $300 mio of tax remission under the DISC.

3. Actions taken or to be taken

The EC together, with other contracting parties have engaged GATT Article XXII.1 consultations in March 1985 and reserved their rights, in particular concerning the tax remission.

F. Public R&D Funds

1. Description

a) The United States Government heavily funds research and development ("R&D") activities, particularly for defence purposes. Total federal funds for R&D in FY 1987 were estimated to be $60 billion, of which $41 billion were defence-related. The FY 1987 commitment represented a 10 percent increase over FY 1986. The increase was mainly due to R&D activities related to advances in tactical aircraft systems as well as increased emphasis on the Strategic Defence Initiative.

b) Access by US-based, but foreign-owned, firms to research consortia funded by the USG is becoming an issue. For example, participation in SEMATECH has been limited to US companies. This consortium, which benefits from DOD funds, is dedicated to the development of manufacturing technologies for semi-conductors. EC-based, but foreign-owned, firms doing research in the EC are not excluded from EC research programmes.

2. Estimated Impact

US Federal Government R&D expenditures are about one-half of total R&D efforts expenditures in the United States, both public and private. Although it is difficult to quantify the full benefit to the United States economy, it amounts to approximately 1 percent of United States GNP.

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One of the main beneficiaries of R&D funds for defence is the US aircraft industry. The Boeing 707 (of which 763 units have been sold) is the civil version of the KC 135 (820 units delivered) developed and constructed under military contract. Boeing has also received contracts worth $2.9 billion to develop and produce avionics equipment for the B/1B bomber. Another example is the avionics equipment for the Boeing 757/767 which was developed with funds from NASA - 423 aircraft of these types have been sold so far. The Boeing 747 benefited from the experience gained by Boeing's C-5A design competition team, whose efforts were funded directly by the US Air Force. The result of this team's extensive windtunnel testing and structural analysis of large jet transport design concepts was the development of the 16-wheel high flotation main landing gear used today on the 747.

Many other industries are recipients of substantial US Federal funds for R&D. In a number of cases (e.g. aerospace, electrical machinery and communications, and rubber products) federal funds account for 20% or more of total R&D funds.

VIII INTELLECTUAL PROPERTY

A. Section 337 of the Tariff Act of 1930

International Trade Commission procedures. The rapid and onerous character of procedures under Section 337 of the Tariff Act of 1930 puts a powerful weapon in the hands of US industry. This weapon is, in the view of European firms, abused for protectionist ends. Under the Section, as amended by the Omnibus Trade Act of 1988, complainants may choose to petition the International Trade Commission (ITC) for the issuance of an order excluding entry of products which allegedly violate US patents. ITC procedures entail a number of elements which accord imported products challenged as infringing US patents treatment less favourable than that accorded to products of US origin similarly challenged. The choice of the ITC procedure rather than normal domestic procedures for complainants in respect of imported products is itself an inconsistency. In addition, the ITC has to take a decision with regard to such a petition within 90 days after the publication of a notice in the Federal Register. Although in complicated cases this period may be extended by 60 days, even this extended period is much shorter than the time it takes for a domestic procedure to be concluded in cases where the infringer is a US company. There are also several other features of the Section 337 procedure which constitute discriminatory treatment of imported products, in particular, the limitations on the ability of defendants to counterclaim, the possibility of general exclusion orders and the possibility of double proceedings before the ITC and in federal district courts. As a result, European exporters may be led to withdraw from the US market rather than incur the heavy costs of a contestation, particularly if the quantity of exports in question is limited or if new ventures and smaller firms are involved.

Furthermore, Section 337 applies "in addition to any other provisions of law". Suspensions of a Section 337 investigation is not automatic when a parallel case is pending before a United States District Court.

A complaint has been filed by a European company under the EC's legislation for combatting unfair trade practices, the commercial policy instrument (Regulation 2441/84). This alleges that the procedures of Section 337 are inconsistent with the national treatment clause of GATT. The Commission has found that the application of these procedures to the import of certain aramid fibres from the Community contained sufficient evidence of an illicit commercial practice on the part of the United States. The resultant threat of injury as defined by Regulation 2641/84 warranted further action. In March 1987 the Commission decided to initiate the procedures for consultation and dispute settlement provided for in Article XXIII of GATT. Bilateral consultations have failed and, at the request of the Commission, the GATT Council agreed in July 1987 to the establishment of a panel. The panel report was sent to the GATT Council at the end of 1988.

The report concluded that Section 337 of the United States Tariff Act of 1930 is inconsistent with Article III:4, since imported products challenged as infringing United States patents treatment are less favourably treated than products of United States origin which are similarly challenged. This discrimination cannot, according to the Panel's findings, be justified under Article XX(d).

The Panel also recommended that the CONTRACTING PARTIES request the United States to bring the procedures applied to imported products in patent infringement cases into conformity with its obligations under the General Agreement.

The US has not yet agreed to the adoption of the panel report. The EC looks to the US to adopt the Panel report without further delay in the interests of the credibility of the GATT dispute settlement procedures.

B. Other Intellectual Property Issues

1. Description

a) Patent Cooperation Treaty - US reserve on Article 11(3)

Under Article 11(5) of the Patent Cooperation Treaty, a foreign patent application is considered to define the state of the art as of the date of the application. The US has entered a reservation to this principle under Article 64(4) and it is only when the international application has been published that it is treated as forming part of the state of the art. Thus, a US inventor may on the basis of inventive activity carried out after the date of application prevent the granting of a US patent to a foreign inventor. This is a clear contravention of the Treaty's provisions.

b) Discriminatory features of patent interference procedures.

In objecting to the granting of a US patent, evidence of prior inventive activity on US territory may be used to defeat an application. Evidence of even earlier inventive activity abroad by a foreign inventor is not taken into consideration.

c) Inadequate protection of appellations of origin and indications of source

The US accords less strict protection to geographical denominations than do Community countries. This causes problems for a broad range of European products particularly wines (Burgundy, Champagne, Chablis) and food (cheese such as cheddar, gouda, cooked meats etc.)

d) Trade Marks

The US does not support existing international arrangements, that would be of benefit to European interests in the US, particularly in the trade mark field. At the same time it criticises the

progress made by the Community in the intellectual property field and calls upon it to accelerate enactment of Community legislation which would benefit US commercial interests in Europe.

e) Berne Convention

Until the United States acceded, in March 1989, to the Berne Convention, copyright relations with (certain) Member States were based on the Universal Copyright Convention with the result that, in general, neither party protected works first published in the other country before 1957. As required by Article 18 of the Berne Convention, EC Member States party to the Berne Convention have now extended protection to pre-1957 US works. The US, however, has chosen to interpret Article 18 in a way which is, in the EC view, incorrect and has not extended protection to pre-1957 works.

2. Estimated impact

It is difficult to assess the accuracy of data on the economic impact of these barriers but there is no doubt that it is substantial.

3. Actions taken or to be taken

Trade related aspects of Intellectual Property rights are included in the Uruguay Round negotiations.

IX. UNITED STATES LEGISLATION AND PRACTICE ON COUNTERVAILING AND ANTI-DUMPING DUTIES

The 1988 Trade Act made a number of technical amendments to US anti-dumping and countervailing duty laws, the general thrust of which is to reinforce the previously existing laws. Of particular concern to the Community are the expansion of the injury criteria, the calculation of subsidies on certain processed agricultural products, the definition of an industry producing processed agricultural products, treatment of international consortia, and provisions on treating leases equivalent to sales ("Airbus" provisions). The US already had, prior to the introduction of these amendments, the most extensive and far-reaching anti-dumping and countervailing duty laws. The changes made by the Trade Act accentuate the differences between US laws and those of the EC even further.

Aside from recent changes in US AD and CVD laws, the EC, on a number of occasions, has raised aspects of United States countervailing duty ("CVD") legislation and practice which it considers incompatible with United States obligations under the GATT Code on Subsidies and Countervailing Duties. Thus, the EC has expressed its strong reservations with regard to United States legislation on "upstream subsidies" contained in Section 771A of the Trade Act of 1930, as amended in 1984, which, in effect, preempted discussions in the relevant experts group in the GATT. The EC also opposes the United States practice of deviating from the Code's provisions with respect to the definition and calculation of a subsidy. The United States considers that a subsidy exists wherever an economic benefit is conferred on an industry, regardless of whether there has been state intervention and a financial contribution by a government.

In the area of dumping, the EC objects to the statutory minimum profit of at least 8 percent to be added in constructed value calculation under Section 773(e) of the Tariff Act of 1930. This requirement runs contrary to Article 2.4 of the GATT Anti-dumping Code which states that "as a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin".

The EC has repeatedly criticized the United States for imposing AD and CVD duties corresponding to the full dumping margin or amount of subsidisation established. Article 8.1 of the GATT AD Code and Article 4.1 of the GATT subsidies Code declare it desirable to impose a lesser duty, if such duty would be sufficient to remove injury to the domestic industry. The EC has followed this approach in Article 13(3) of Regulation No. 2176/84. The failure of the US to follow GATT provisions leads to unfair, penal duties being levied on exporters which bear no relation to removing the injury caused to domestic producers.

The EC further objects to the low United States standard of verifying the standing of a petitioner for AD and CVD measures. Article 5.1 of the GATT AD Code and Article 2.1 of the GATT Subsidies Code require a written request by or on behalf of an industry affected. The United States authorities, however, will only check whether any application does in fact fulfill this condition if other domestic producers raise the issue.

With regard to the procedures used by the US in applying anti-dumping and countervailing duty laws, the Commission has recently informed US Department of Commerce officials of its concern over certain administrative practices, notably in relation to the anti-dumping case on anti-friction bearings. EC concerns centre on the manner in which these cases have been managed, the costs involved in defending European producers' interests, and the unfair and unreasonable methods used to verify respondents' data.

At an earlier stage in the bearings case, the Commission also voiced its concern over the large volume of data required by the DOC within a deadline shorter than that laid down by GATT Anti-dumping Code recommendations. In addition, it pointed out that some of the information required was company-secret and irrelevant to an anti-dumping investigation and that excessive detail was required on other matters. The Commission also noted that there appeared to be discrimination in favour of one country's exporters with regard to deadlines for responses to questionnaires .

Overall, the EC is concerned that respondents may not have had the full opportunity for the defence of their interests to which they are entitled under Article 6.7 of the GATT Anti-Dumping Code. The US, which is the major user of anti-dumping remedies, must ensure that its laws are applied fairly and impartially and that procedural fairness and objective evaluation of the facts of each case is achieved.

X. Section 232 of the Trade Expansion Act

1. Description

In recent years within the United States domestic industry has had increasing recourse to Section 232 of the Trade Expansion Act (the so-called national security clause). Under this section, the Department of Commerce investigates whether articles are being imported into the US in such quantities or under such circumstances as to threaten to impair US national security. Petition requirements are much looser under Section 232 than under other trade statutes. Recent cases affecting Community exporters have been machine tools (see separate entry), ball and roller bearings, crude oil and petroleum products, and plastic moulding injection machinery. In the latter three cases, after an exhaustive investigation, no action was taken to restrict imports.

Under the Trade Act of 1988 the USG has reduced the time limit for the Commerce Department to make an investigation from one year to nine months. In addition the President must now decide on what action to take within 90 days of the Department's report. Previously, there was no deadline for Presidential action.

The changes to Section 232 under the Trade Act add to the Community's concerns regarding Section 232. It seems that certain US industries are attempting to obtain protection under this statute instead of, or in addition to, the relevant trade-related provisions (e.g. AD regulations). In the bearings case, the Section 232 case was one of three trade-related actions (Section 232, DOD Buy America rule (see separate entry) and anti-dumping cases).

2. Estimated Impact

There was no direct impact in the cases of bearings, oil and moulding machinery as no action was taken. Exporters were, nevertheless, subjected to uncertainty during the investigation and incurred heavy expenses in defending the case.

3. Actions to be taken

The Community will seek compensation for any loss of trade resulting from US action under Section 232.

XI. EXPORT CONTROLS/RESTRICTIONS ON TECHNOLOGY TRANSFER

1. Description

Extraterritorial application of US law obstructs not only imports into and exports from the US but it can, under certain conditions, affect trade elsewhere in the world, including within the Community itself. This is particularly true for export controls and restrictions on technology transfer.

The Export Administration Act of 1979 ("EAA"), as amended most recently by the Omnibus Trade Act of 1988, provides the legal basis for the United States Government to exercise export controls, inter alia, for national security and foreign policy reasons. While the notion of national security is defined in the EAA, foreign policy is not. Export controls based on foreign policy are therefore decided upon in a purely discretionary way by the United States Government.

Export controls for national security reasons are applied by the United States not only on direct exports from the US but also on reexports within and from the jurisdiction of the Community on goods containing US components or know-how. Although the extent of such controls has been reduced as a result of the passage of the 1988 Trade Act, and of the adoption of a number of regulations, a foreign consignee of US technology must still comply with US export control regulations to avoid fines and sanctions by the US government. Moreover, COCOM has established three lists of products, including industrial products, the export of most of which to proscribed countries is conditional upon agreement by all COCOM participants. All EC Member States, except Ireland, participate in COCOM and apply its export control rules. (Ireland has a special arrangement with the US and applies similar export control rules). The application by the US of additional and unilateral rules for products of US origin within the Community is therefore not only legally inadmissible but also unnecessary.

Export controls for foreign policy reasons have in the past also been applied by the US in an extraterritorial manner within the Community, although the US Administration has recently begun to show greater sensitivity to other countries' concerns. Unfortunately, the US Congress has not shown the same sensitivity, as was demonstrated by the inclusion in the Trade Act of 1988 of the so-called Garn Amendment. Under this amendment, mandatory sanctions are applied to certain violations of non-US law which takes places outside US territory even if they are committed by non-US citizens. This application of extraterritorial controls in these areas is unacceptable for the Community.

2. Estimated impact

Although it is difficult to give exact figures on trade losses incurred by Community companies due to US reexport control measures, such losses are likely to be substantial, notably on high-technology products. The US National Academy of Sciences report on export controls estimated that the "direct, short-run

economic cost to the US economy arising from US export controls was of the order of $9.3 billion in 1985" ("a very conservative estimate"). It also estimated that the associated loss of employment was 188,000 jobs in the US alone.

3. Action taken or to be taken

The Community and its Member States have protested to the US authorities in numerous diplomatic démarches against the extraterritorial application of US export controls, which is inconsistent with international law.

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XII REPAIR SERVICING

A. Repair of ships abroad

1. Description

The United States applies a 50 percent tariff on most repairs of US ships abroad, e.g. on equipment purchased and repairs made. The United States justifies this measure on the grounds that it protects an industry essential for defence purposes.

2. Estimated Impact

No exact data is available.

3. Actions taken or to be Taken

The EC has noted the United States practice in the GATT catalogue of non-tariff barriers.

XIII TAX BARRIERS

A. State unitary income taxation

1. Description

Certain individual US states assess state corporate income tax for foreign-owned companies operating within their state borders on the basis of an arbitrarily calculated proportion of the total worldwide turnover of the company. This proportion of total worldwide earnings is assessed in such a way that a company may have to pay tax on income arising outside the state, giving rise to double taxation. Quite apart from the added fiscal burden, a state which applies unitary taxation is reaching beyond the borders of its own jurisdiction and taxing income earned outside that jurisdiction. This is in breach of the internationally accepted principle that foreign-owned companies may be taxed only on the income arising in the jurisdiction of the host state -- "the water's edge" principle. A company may also face heavy compliance costs in furnishing details of its worldwide operations.

The State of California, host to numerous foreign-owned companies, is considered one of the most important examples. In September 1986 it adopted a tax bill which provides for the water's edge alternative to unitary taxation. The water's edge treatment may be elected by a foreign corporation if more than 20% of its property, payroll and sales are in the US. An "election fee" of 0.03% of the foreign corporation's Californian property, payroll and sales has to be paid if the water's edge treatment is elected instead of unitary taxation.

In 1988 the law was modified in several ways which alleviated some of the concerns of foreign-owned companies. Only companies that elect the water's edge approach are now required to file domestic disclosure spread sheets. The other major change was that if it qualifies and elects to do so, a company must bind itself contractually to the water's edge approach for five rather than ten years, as the law originally required.

Although the latest Californian legislation can be considered a step forward, it is still less than satisfactory. Although the length of commitment has been shortened, a company must still bind itselfcontractually for a five-year period in order to "elect" the water's edge treatment. An annual election fee must be paid by a company that takes the water's edge approach. A more basic objection is that extensive discretionary tax powers continue to be granted to state tax authorities.

2. Estimated Impact

No assessment has been made of the effect of unitary tax on EC investment in the United States, but EC-owned companies consider this tax treatment to affect adversely their current or planned operations.

3. Actions taken or to be taken

After the adoption of the California tax bill, the US federal government concentrated its efforts on persuading the states (Alaska, Montana and North Dakota) which still applied unitary taxation to abandon it. Montana and North Dakota have both passed "water's edge" legislation. Legislation to change from a worldwide to a water's edge system is currently moving through the Alaskan legislature, but oil companies, which have the greatest presence there, would be excluded. Unitary taxation is also being challenged in the US legal system, particularly in the California courts, but this process is likely to take years and may not result in a clear resolution of the issues involved. In the US Congress, legislation has been introduced to modify or eliminate the unitary approach taken by states, but most observers do not expect this issue to become important until pending actions in state legislature or courts are resolved.

XIV. BARRIERS RELATING TO FINANCIAL INSTITUTIONS

1. Description

In the financial services sector the most significant obstacles to provision of services by EC financial institutions derive from regulations which, for instance, prohibit banks from entering certain securities businesses (Glass-Steagall Act), or restrict inter-state banking (McFadden Act), and the fact that the regulation of insurance is the exclusive competence of the States, with the ensuing requirement to obtain a licence in each State.

Most of the regulations adversely affecting EC financial institutions are to be found at the State level:

- in certain States, foreign banks cannot receive deposits from the public administration;
- some States do not admit the establishment of branches of foreign banks;
- specific requirements may be imposed for the authorisation of non-US insurers;
- directors of EC banks' subsidiaries incorporated in the US must be US citizens, although under approval of the Comptroller of the Currency up to half the number of directors may be foreign.

2. Estimated Impact

The separation between banking and securities constitutes an important competitive disadvantage for EC banks, which cannot compete in the US for certain businesses while US banks can engage in securities activities in most Member States of the Community; However, a number of EC banks have had securities firms' subsidiaries grandfathered under US legislation.

The restrictions to inter-State activities also make the conduct of business within the US more difficult.

3. Actions taken or to be taken

The Commission has already expressed concerns about the provisions of the Omnibus Trade Act on primary dealers and about the potential obstacles represented for EC financial institutions by US sectoral and geographical segmentation.

The Commission has recently submitted a proposal according to which negotiations with third countries might be foreseen where it appears that a third country is not granting to credit institutions of the Community effective market access and competitive opportunities comparable to those accorded by the Community to credit institutions of that third country (Second Banking Directive).

XV. INVESTMENT BARRIERS

A. Exon-Florio Amendment

1. Description

The Trade Act contains provisions (the Exon-Florio Amendment) which allow the President to investigate the effects on national security (broadly defined) of mergers, acquisitions or takeovers, proposed or pending or with foreigners, which could result in foreign control of "persons engaged in interstate commerce in the United States."

Upon completion of the investigation the President may take "such action for such time" as the President considers appropriate to ensure that foreign control will not impair national security, subject to two conditions:

- there must be "credible evidence" of a threat to national security, and

- it must be determined that other provisions of law "do not provide adequate and appropriate authority for the President to protect national security."

Options open to the President are the suspension of a transaction or the forced divestiture of the investment by the foreign interest. In making his decision, the President may consider factors such as the domestic production needed for projected national defence requirements, the capability and capacity of domestic industries and commercial activity by foreign citizens as it affects US national security requirements.

2. Comment

2. This new legislation in the area of investment could be the forerunner of more far-reaching provisions on the registration and disclosure of foreign investment. The Bryant Bill on foreign investment now before Congress is a renewed effort to introduce the requirements contained in last year's Bryant Amendment to the Trade Bill, which was not adopted.

1. A number of cases of foreign takeovers of US firms, including one involving a Community firm, have already been investigated by the inter-agency Committee on Foreign Investment into the US. Given the recent trend to use national security provisions as a substitute for trade action (e.g. machine tools, ball bearings Section 232 cases), the application of the new provisions needs to be closely watched.

B. Radio Communications

The Communications Act of 1934 imposes limitations on foreign investments in radio communications.

No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station licence may be held b:y

- foreign governments,
- aliens,
- corporations in which any officer or director is an alien or of which more than 20% of the capital stock is owned by an alien,
- corporations which are controlled by corporations in which any officer or more than 25% of the directors are aliens, or of which more than 25% of the capital stock is owned by an alien.

In addition the Federal Communications Commission (FCC) has ruled that certain foreign-owned international carriers (those with 15% stock owned by a telecommunications entity) should be classified as 'dominant' regardless of whether they hold a dominant position in the market. This places additional reporting and licensing requirements on these carriers. Although two US companies both have higher market share than any of the three foreign-owned companies so classified, neither has been classified as 'dominant'.

Amongst other discriminatory requirements, the three foreign-owned 'dominant' companies will have to obtain Section 214 licences from the FCC, provide annual reports on their US domestic long distance revenues and tariffs, file tariff notifications earlier than 'non-dominant' companies and cost justify their tariffs.