REPORT ON UNITED STATES

BARRIERS TO TRADE AND INVESTMENT

1998

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Foreword

The 1998 Report on United States Barriers to Trade and Investment is the fourteenth such annual report. It has been compiled by the Unit for Relations with the United States of America in cooperation with the Market Access Unit (both part of the Directorate General for External Relations: Commercial Policy and Relations with North America, the Far East, Australia and New Zealand) and the Delegation of the European Commission in Washington, on the basis of material available to the services of the European Commission. Its aim is to provide an inventory of obstacles that EU exporters and investors encounter in the US.

This Report needs to be placed in the context of a Transatlantic economic relationship which has grown particularly strongly over the years, to the benefit of both economies, and which is underpinned by the most extensive trade and investment links in the world. Moreover, EU-US relations entered an important new phase with the adoption at the EU-US Summit of December 1995 of the New Transatlantic Agenda (NTA) and accompanying EU-US Joint Action Plan. Efforts to intensify and extend multilateral and bilateral co-operation in the field of trade and investment were given a further boost by the adoption, at the EU/US Summit in London in May 1998, of a joint statement on the Transatlantic Economic Partnership (TEP). This Report must therefore be seen against the background of the joint commitment, in the NTA and in the TEP, not only to strengthen and consolidate the multilateral trading system, but also to progressively reduce or eliminate barriers that hinder the flow of goods, services and capital between the EU and the US.

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

The Commission is currently working with Member States and with the US Administration with a view to finalising an Action Plan that will identify concrete actions to implement the TEP statement. This will include specific initiatives in the fields of technical barriers to trade; services; government procurement; intellectual property; consumer and plant health and biotechnology; environment; labour and electronic commerce.

The report should also be seen in the context of the broader policy initiative to improve access to foreign markets for European exports. As part of this, the Commission has set up an extensive electronic Market Access Database available to the public on the Internet (http://mkaccdb.eu.int) (additional material on EU-US relations is available at http://europa.eu.int/en/comm/dg01/eu-us.htm). The Database provides market access information in the broadest sense, including economic and regulatory information, tariff levels as well as analyses of trade issues. For readers, this facilitates access throughout the year to on-line updates of the material contained in the published report as well as to the additional background information that is included in the database.

It is to be hoped that, as a means of identifying problems of access to and of operating in US markets, the Commission services' Report will continue to play a useful role in focusing dialogue and negotiations -- both multilateral and bilateral -- on the elimination of obstacles to the free flow of trade and investment. The Report has taken into account developments until the beginning of October 1998. Any comments should be addressed to the Unit for Relations with the United States of America, DG I, European Commission, 200 rue de la Loi, 1049 Brussels (fax: +32.2.299.02.08).

Summary

Extraterritoriality — The EU strongly opposes the extraterritorial provisions of certain US legislation, which hamper international trade and investment by seeking to regulate EU trade with third countries conducted by companies outside the US. Of particular concern at the present time are the Helms-Burton Act and the Iran Libya Sanctions Act. Important headway towards a lasting solution to this dispute was made at the 18 May 1998 EU/US Summit in London.

Unilateralism — Unilateralism in US trade legislation also remains a matter of concern. While the US has in practice made extensive use of the new WTO dispute settlement system, it retains the possibility to take its unilateral trade measures.

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

Other customs barriers — EU exports also face a number of additional customs impediments, such as the customs user fees and the excessive invoicing requirements on importers, which add to costs in a similar way to tariffs. The US also recently changed its origin rules giving rise to specific problems for various EU textile and clothing products that are no longer able to claim their national origin.

Trade defense instruments — WTO consultations have been under way after a Commission investigation which was completed in April 1998 showed that the 1916 US Antidumping Act was in contradiction with GATT and WTO commitments. Regulations restricting exports, perceived as hindering trade for third parties, are also a matter of concern.

Technical barriers to trade — EU exporters continue to face a number of behind-the-border impediments. The proliferation of regulation at State level presents particular problems for companies without offices in the US. In addition, some federal standards differ from international norms meaning that manufacturers cannot directly export to the US products made to EU standards (normally based on international standards). Other related difficulties concern labelling requirements and excessive reliance on third-party certification. The FDA drug approval procedures continue to give non-US based firms' difficulties. In the agricultural area, a number of sanitary and phytosanitary issues remain a significant source of difficulty for the EU, although some of these may be solved by the recent negotiations for a Veterinary Equivalence Agreement.

Government procurement — Even before the Uruguay Round was ratified, the EU and US had concluded negotiations on a further bilateral procurement agreement that improves on the provisions of the WTO Government Procurement Agreement. These two agreements increase substantially the bidding opportunities for the two sides. However, the EU remains concerned about the wide variety of Buy America provisions that persist, and to which are being added others for federally funded infrastructure programmes. An unwelcome new development is the introduction of several sub-federal selective purchasing laws restricting the ability of EU and other companies doing business with specific countries to bid for contracts in various States and cities.

Aeronautics industry — Despite the existence of the 1992 EC-US Large Civil Aircraft agreement the EU remains concerned about the level of indirect support to US aircraft manufacturers. This is also an area for multilateral action, and progress needs to be made on the Civil Aircraft Agreement that remains stalled in the WTO.

Shipbuilding	The 1994 OECD Shipbuilding Agreement would go a long way towards regulating unfair practices in this industry. The US failure to ratify the Agreement so far, as well as a number of US subsidies and tax policies, remains a matter of concern.
National security restrictions	Although the principle of national security has a long tradition in trade policy, the EU has repeatedly expressed concern about its excessive use by the US as a disguised form of protectionism, particularly in relation to the application of import, procurement and investment restrictions, as well as the extraterritorial application of export restrictions.
Direct Foreign Investment Limitations	The 1988 Exon-Florio amendment and following legislation restrain foreign investment in or ownership of businesses relating to national security. However, the absence of a clear definition of "national security" has led to an overly wide interpretation of the term.
Conditional national treatment	Furthermore, the provision of conditional national treatment in various US legislation, and notably in the area of science and technology research remains troublesome.
Tax measures	Concerns about federal tax measures focus on the nature of reporting requirements and the specific manner for calculating what is due. The EU deems state "world-wide" unitary taxes as inconsistent with US obligations under its tax treaties with third countries. Foreign Sales Corporations legislation remains a matter of concern.
Intellectual property	Despite a number of positive changes in US legislation following Uruguay Round commitments, problems remain due to discrepancies between US legislation and other international committments. In addition, the issues of informing right-holders of government use of patents as well as appellations of origin and geographical indications have not been resolved.
Professional services	The implementation of the GATS schedules for professional services has resulted in some improvement in market access. However, a number of problems, especially due to regulation at the State level, remain to be tackled in order to secure more transparent and open access to the US market.
Telecommunication services	The recently concluded GATS Basic Telecommunications Agreement has led to significant commitments on market access. Nonetheless, the EU remains concerned about the considerable hurdles that US law presents for non-US and foreign-owned firms wishing to invest in radio telecommunications infrastructure and to provide mobile and satellite services. In addition, the Federal Communications Commission exercises a high degree of autonomy and discretion in regulating this sector, including reciprocity-based licensing procedures for foreign-owned firms.
Air transport services	A number of issues continue to create problems including foreign ownership restrictions, air security and foreign repair stations.
Maritime services	The EU was disappointed that the extended WTO GATS negotiations on maritime transport, during which the US never tabled an offer, could not be brought to a successful conclusion. In addition, there has been no progress on the elimination of requirements that cargoes generated by US Federal programmes is shipped on US-flagged ships; on the contrary, this requirement has been extended to cover Alaskan oil exports.

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1. INTRODUCTION

1.1 The New Transatlantic Agenda

The New Transatlantic Agenda (NTA) and the accompanying Joint EU-US Action Plan, adopted at the EU-US Summit in Madrid on 3 December 1995, provide a new basis for transatlantic relations by moving the relationship from one of consultation to one of joint action. The NTA contains a range of commitments in areas such as foreign and security policy, international crime, drug trafficking, migration, environment and health, as well as with regard to increasing transatlantic contacts at the level of the citizen ("Building bridges across the Atlantic"). There is also a substantial chapter on economic and trade issues ("Contributing to the expansion of world trade and closer economic relations"). In agreeing the very substantive provisions of this chapter, the EU and US were able to draw on the recommendations of the business communities on both sides of the Atlantic, through the auspices of the Transatlantic Business Dialogue (TABD), which has also provided guidance and support in the subsequent implementation of the NTA. The economic chapter is divided into two sections, dealing with multilateral and bilateral issues respectively.

The economic relationship between the EU and the US is of vital importance to both. The EU and the US are each other's single largest trading partner: in 1997 two way trade in goods amounted to 277 billion ECU - or around 20% of total EU/US trade in goods. It is estimated that high technology products account for 20% of the two-way trade flow. In 1996 EU-US trade in services of 124 billion ECU accounted for over 35% of total bilateral trade.

The EU and US have by far the world's most important bilateral investment relationship, and they are each other's most important source and destination for foreign direct investment (FDI). The EU is the overwhelmingly largest investor in the US accounting for 59% of total FDI stocks by 1996. At the same time 51% of FDI stocks in the EU originate in the US.

Despite this healthy economic relationship, transatlantic trade and investment remain hampered by a significant number of impediments, mainly of a non-tariff kind. The New Transatlantic Agenda of December 1995 gave renewed impetus to address some of these issues. In particular, the NTA commits the EU and the US, without detracting from the existing co-operation in multilateral fora, to progressively reduce or eliminate barriers that hinder the transatlantic flow of goods, services and capital.

Significant progress has been made since then:

Customs co-operation

The signature at the EU-US Summit of May 1997 in the Hague of the Agreement on Customs Cooperation and Mutual Assistance in Customs Matters covering, *inter alia*, simplification of customs procedures, data and personnel exchanges and increased investigative co-operation;

Mutual Recognition Agreement	The signature at the EU-US Summit of May 1998 of a Mutual Recognition Agreement covering specific areas (telecom equipment, pharmaceuticals, medical devices, electromagnetic compatibility, electric safety and recreational craft). This will allow EU bodies to carry out conformity assessments to US requirements, and vice versa, thus eliminating some of the considerable costs involved for manufacturers on either side of the Atlantic; it is expected to enter into force this autumn;
Veterinary Equivalence Agreement	The EU-US Veterinary Equivalence Agreement aimed at facilitating trade in live animals and animal products was approved by the Council in March 1998. Signature of the agreement is dependent on the US meeting their commitment to publish a proposed rule accurately reflecting the EU's animal health status;
Positive Comity	The signature on 4 June 1998 of the EU-US Agreement on the application of positive comity principles in the enforcement of their competition laws. The Agreement is intended to improve co-operation by complementing the 1991 Agreement between the US and the EC regarding the application of their competition laws, without replacing it;
Regulatory Co-operation	Regulatory co-operation seeking to make regulators more aware of the trade and investment consequences of their decisions and to discourage the development of divergent regulations, so that issues which might otherwise become the source of a future trade dispute may be addressed at an early stage. Several pilot projects are already ongoing, including in the field of agri-food biotechnology. At the EU/US Summit on 5 December 1997, the parties agreed on a Joint Statement on how to strengthen Regulatory Co-operation;
TASBI	The Transatlantic Small Business Initiative (TASBI), which aims at assisting small and medium-sized enterprises from both sides of the Atlantic to form business alliances and partnerships;
GNSS	Joint efforts to establish a Global Navigation Satellite System, aimed at ensuring reliable, efficient and highly accurate navigation and position-fixing services for transatlantic users;
Electronic Commerce	The examination of key issues raised by the rapid growth of electronic commerce. At the EU/US Summit on 5 December 1997, the parties agreed on a Joint Statement on how to co-operate on the various aspects of electronic commerce which now emerge;
S & T Agreement	A Science and Technology Agreement was signed on 5 December 1997. The Agreement will extend and strengthen the conduct of co-operative activities between EU scientific institutions and a range of US government research agencies. Yearly reviews should ensure that the cooperation will take place on a reciprocal and balanced basis.
The Transatlantic Economic Partnership	At the London EU-US Summit of 18 May 1998, Summit Leaders gave additional impetus to the NTA process of eliminating or reducing barriers that hinder the flow of goods, services and capital between the EU and the US. In a joint statement on the Transatlantic Economic Partnership ("TEP") they identified a series of multilateral and bilateral actions to strengthen further the economic partnership, to reduce frictions and to promote prosperity on both sides of the Atlantic. Summit Leaders agreed to establish a Plan, with a timetable for achieving specific results, and to take all necessary steps to allow its early implementation, including any necessary authority to start negotiations.

The European Commission has put forward in September 1998 a draft for this Plan and proposed the launching of negotiations with the US to address technical barriers to trade in the fields of goods, services, government procurement and intellectual property.

The Commission's aim in implementing the TEP statement is twofold: firstly, to cover those trade issues – mainly non-tariff barriers - which really matter for transatlantic business and which, if properly tackled, promise substantial new economic opportunities for our firms and consumers, and, secondly, to stimulate further multilateral liberalisation through deeper liberalisation at the bilateral level and closer EU-US co-operation in multilateral trade fora, in particular the WTO.

The US and EU markets have now reached a stage where there are few significant duties and no quantitative restrictions left in the field of industrial goods. We have also opened our markets for goods and services, more than most other countries in the world. The degree of integration of our economies is considerable.

But we witness a process similar to the one we have seen within the EU. As we dismantle the walls constituted by tariffs and quotas, we find that behind these walls there are other walls that can and do hamper trade. Such obstacles were not so relevant or visible as long as other forms of protection applied. But now that tariffs and quotas have disappeared, we find that trade and investment flows continue to be hampered by barriers of another kind, essentially of a regulatory nature. The persistence of such obstacles is in contrast with the development of our economies.

This explains the eagerness of our industries to see these remaining barriers addressed. If they now openly ask for their elimination with such insistence, it is not for some reasons of principle, but because they perceive that such remaining barriers are an obstacle to the further expansion of their business.

Any effort in this direction must of course respect our parallel objective of ensuring in the Transatlantic marketplace a high level of protection of health and safety, the consumer and the environment, while reducing regulatory barriers to trade and investment. The Commission is thus firmly committed to ensure that the concerns of the labour, business, environmental and consumer constituencies are integrated into the process.

More specifically, in the multilateral field the Commission foresees the reinforcement of co-operation in the run-up to the launching of a new Round of multilateral trade negotiations through the establishment of a multi-faceted regular bilateral dialogue. Specific common actions are envisaged in pursuit of the shared objectives set out in the TEP (i.e. in the areas of the implementation of WTO agreements, dispute settlement, services, agriculture, trade facilitation, industrial tariffs, IPR, investment, competition, government procurement, environment, WTO accessions, developing countries, electronic commerce and labour standards).

In the bilateral field the Commission envisages specific common actions in the fields of: technical barriers to trade; services; government procurement; intellectual property; consumer and plant health and biotechnology; environment; labour and electronic commerce. In the first four of these areas the Commission considers that this should be achieved by formal bilateral negotiations.

The Commission's proposals reflect preliminary informal contacts with Member States as well as exploratory contacts with the US Administration. Discussions are currently continuing with the US Administration and with Member States, with a view to finalising this Joint Action Plan, and to reaching agreement within the EU Council on the necessary negotiating directives.

1.2 The Economic Relationship

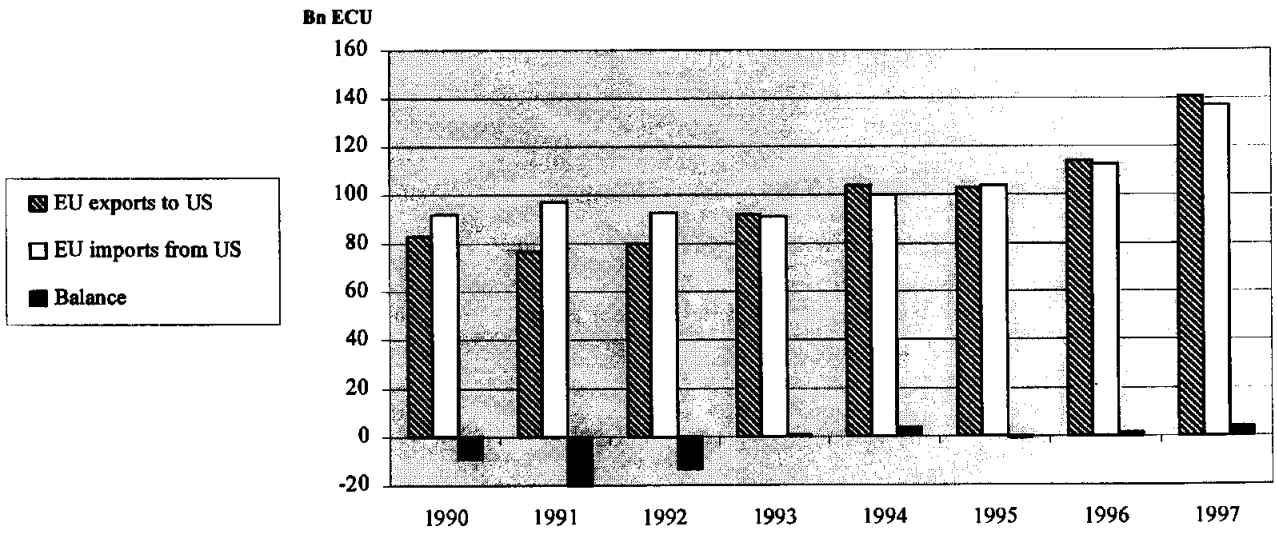
Transatlantic economic relations are underpinned by the most important trade and investment links in the world. Such links have grown particularly strongly over the last few years, to the benefit of both economies. Taking goods and services together, the EU and the US are each other's largest single trading partner, with a two-way flow of more than 400 billion ECU in 1997. Similarly, the two sides remain each other's most important source and destination for foreign direct investment with a combined stock of over US$ 720 billion. This section briefly reviews the data on EU-US trade and investment and places it in a global context (all EU data include the three new Member States unless otherwise indicated).

Trade in goods

Trade in goods (exports plus imports) between the 15 Member States of the EU and the US reached 277 billion ECU in 1997, with a very strong increase of 23% for exports and 21% for imports over the previous year. After the EU registered a substantial trade deficit with the US for three consecutive years from 1990 to 1992, between 1993 and 1997 bilateral trade was almost in equilibrium. The EU recorded a surplus of 0.8 billion ECU in 1993 and 3.7 billion ECU in 1994, a small deficit of 0.4 billion ECU in 1995 and again a small surplus of 1.6 billion ECU in 1996. EU trade data for 1997 show a wider EU surplus of about 3.5 billion ECU.

The US is the EU's single largest trading partner, accounting for 20.5% in total EU-imports and 19.6% in total EU-exports in 1997. Likewise, the EU is one of the two top markets for the US, accounting for 20.5% of US exports and 18.1% of US imports in 1997.

EU - US TRADE IN GOODS: 1990-1997



Source: Eurostat-Comext database.

The EU and the US are the world's most important traders. The EU's share in total world trade (excluding intra-EU trade) amounted to 18.2% in 1997 (19.4% for exports and 17.3% for imports); while, the share of the US amounted to 18.4% (16.3% for exports and 20.5% for imports). Taking only bilateral EU-US trade, it represents more than 7.3% of total world trade. This is just marginally more compared to US-Canada trade which was 7.2% of world trade in 1997. Trade between the US and Japan represented 4.5% of total world trade.

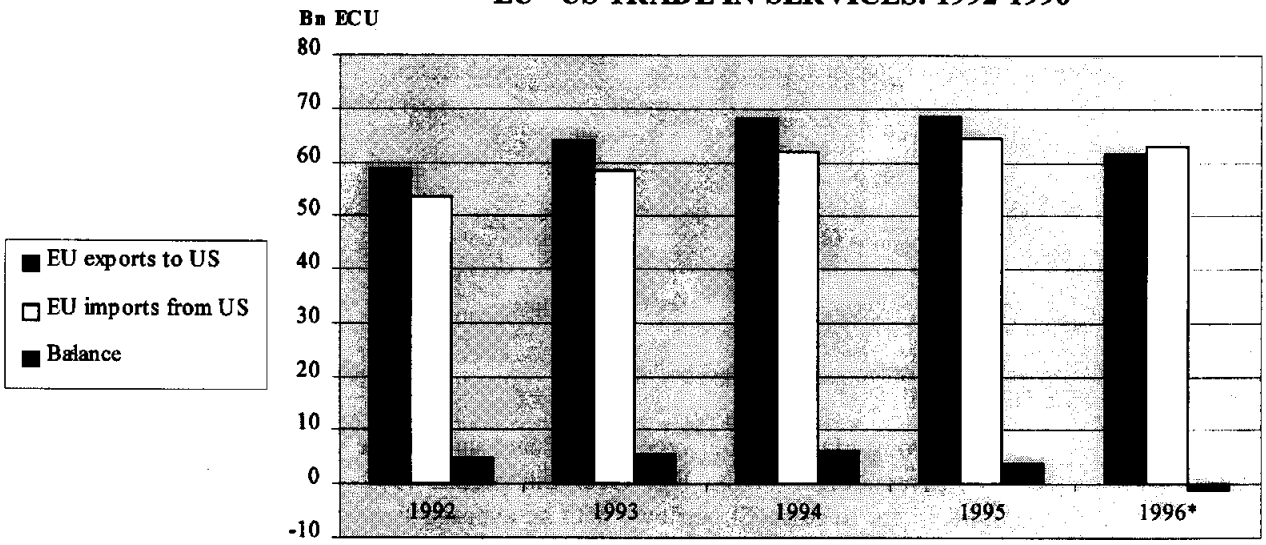
Transatlantic trade is increasingly characterised by high intra-industry trade intensities, especially for manufactured goods, and high levels of intra-firm trade. WTO estimates show that US-EU intra-industry trade intensities grew from a value of 39% in 1980, to 57% in 1995, an indication of an increasing specialisation within product categories to capture economies of scale. Intra-firm trade accounted for more than 45% of US merchandise imports from the EU and 37% of EU imports from the US in 1993, demonstrating the important "pull" effect on trade from foreign direct investment by US and EU affiliates in each other's markets.

Transatlantic trade is also heavily concentrated in sophisticated high technology products and, increasingly, in services. It is estimated that trade in high-technology products accounts for 20% of total EU/US merchandise trade. For both partners, Transatlantic trade accounts for a large share of their total trade in high tech goods (34% for the EU and 25% for the US).

Trade in services

Trade in services between the EU and the US is gaining importance both in absolute terms and relative to merchandise trade. In 1995 EU-US total turnover in services reached 133 billion ECU (68.4 billion ECU for EU's exports and 64.4 billion ECU for its imports) equal to 62 % of total turnover in merchandise trade with the US. The rapid change taking place can be appreciated using historical figures for the EU excluding Austria, Finland and Sweden (EU (12)) for which longer statistical time series are available. In 1985, EU (12)-US bilateral trade in

EU - US TRADE IN SERVICES: 1992-1996



Source: Eurostat, *International Trade in Services, EU, 1985-1995*, (ed. 1996).
* 1996 data are provisional.

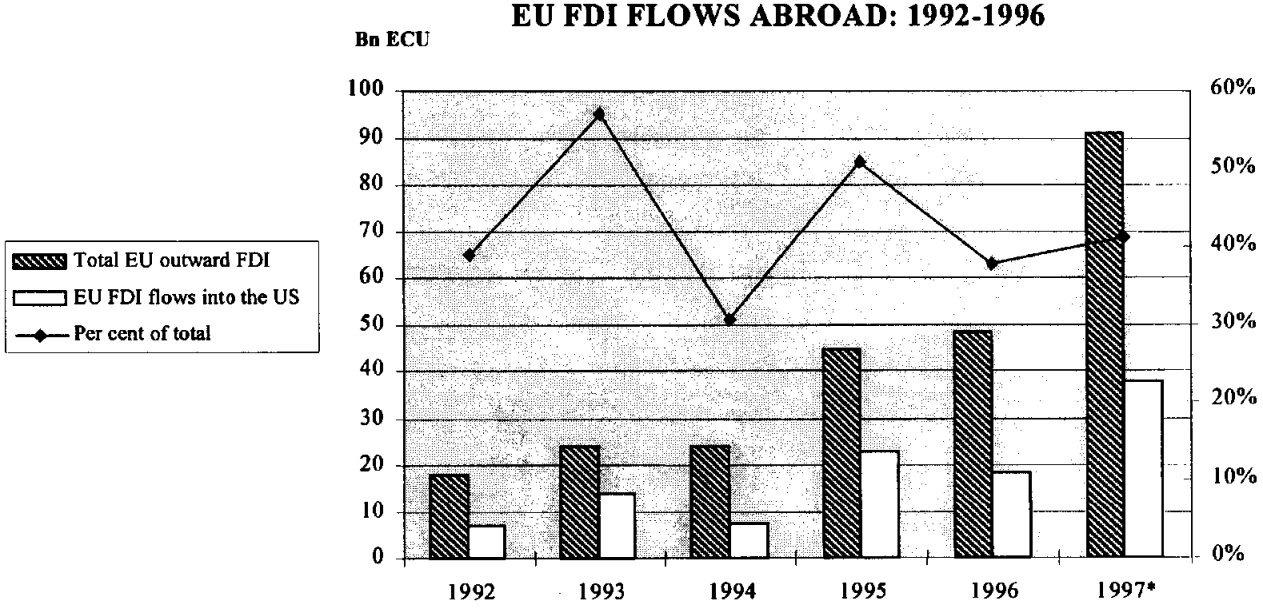
services accounted for 82 billion ECU, or 54% of bilateral trade in goods. By 1994, this figure had risen to more than 125 billion ECU, or 64% of bilateral merchandise trade. Estimates for 1996 seem to indicate a break in the past trends, with a reduction of EU-US bilateral trade in services to 125 billion ECU (63.3 billion ECU for EU's exports and 62.1 billion ECU for its imports) and, for the first time, a small EU deficit of 1.1 billion ECU. This contraction of the bilateral services flow and the above mentioned strong growth of bilateral trade in goods are mirrored in the ratio of EU-US services trade to EU-US total turnover in merchandise trade, which dropped to 54% in 1996.

Notwithstanding the latter developments, in 1996, while the EU accounted for 19% of US merchandise trade, more than 33% of US trade in services was with the EU. Similarly, in 1996 the US accounted for 18.5% of the extra-EU trade in goods, but for 39% of extra-EU trade in services. These trends compare with much lower values for trade in services with other major trade partners.

Investment links

The EU and the US have by far the world's most important bilateral investment relationship and are each other's largest investment partner. The US market remained the main destination of EU foreign direct investment (FDI) with an average share of 43% between 1992 and 1997. Outflows from the EU to the US accounted for 37.5 billion ECU in 1997 or 41% of total EU outward flows, thus doubling in value on the previous year. The US attracted 38% (18.2 billion ECU) of EU outward FDI flows in 1996, 51% (22.7 billion ECU) in 1995, 31% (7.4 billion ECU) in 1994, 57% (13.8 billion ECU) in 1993 and 39% (6.9 billion ECU) in 1992.

EU FDI FLOWS ABROAD: 1992-1996

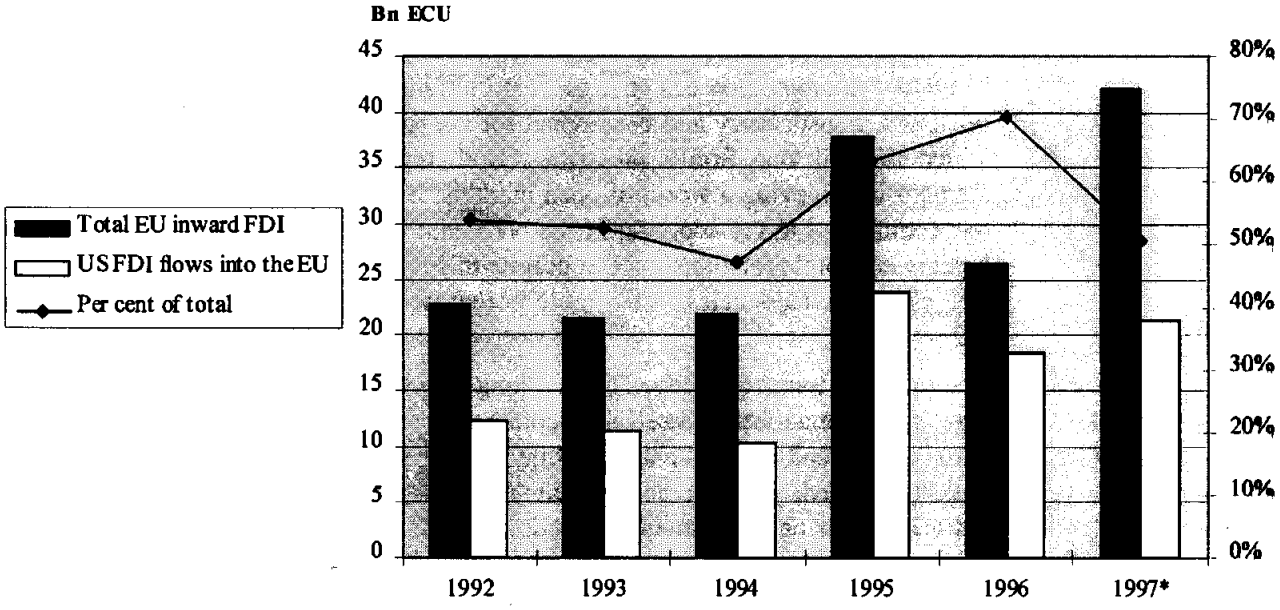


Source: Eurostat, *European Direct Investment* (ed. 1997).
* 1997 data are provisional.

The strong FDI links between the EU and the US are confirmed by the amount of US investment into the EU. Over the period 1992-1997, the US was the first contributor to extra-EU inflows with an average share of 57%. In 1997, 51% (21.4 billion ECU) of extra-EU inflows came from the US, a 16% increase on the previous year. In 1996, 70% (18.4 billion ECU) of extra-EU inflows were originated in the US, against 63% (23.9 billion ECU) in 1995, 47% (10.3 billion ECU) in 1994, 53% (11.3 billion ECU) in 1993 and 54% (12.3 billion ECU) in 1992.

Looking at FDI stocks in the EU and the US, the importance of the Transatlantic investment relationship is also evident. By 1996, cross investment stocks between the EU and the US on a historical-cost basis reached US$ 720 billion, by far the world's largest investment relationship. EU investment in the US was valued at US$ 372 billion, while the US investment in the EU was estimated at US$ 348 billion. As with the bilateral trade relationship, investment stocks are both balanced and substantial. They have also been growing very quickly over the past few years, doubling between 1989 and 1996.

FDI FLOWS INTO THE EU: 1992-1996



Source: Eurostat, *European Direct Investment* (ed. 1997).
* 1997 data are provisional.

Once again, the EU and the US are each other's largest partner. The EU is by far the biggest investor in the US accounting for 59% of total FDI stock in that country by 1996. The EU share has also been steadily increasing over the past decade. Likewise, the most important FDI market for the US is the EU. In 1996, 44% of US FDI stock was located in the EU.

The investment relationship is impressive also when analysed from an EU perspective. At the end of 1996, 43% of EU FDI assets outside the Union were invested in the US, and 50% of the EU FDI liabilities were owned by US investors.

Foreign Direct Investment (stocks, billion US$, 1996)

	US in the EU	EU in the US
FDI Stocks		
Bn US$	348	372
	as % of total US FDI abroad	as % of FDI in the EU from abroad
US stock in the EU	44%	50%
	as % of FDI in the US from abroad	as % of total EU FDI abroad
EU stock in the US	59%	43%

Sources: European Commission, Eurostat, and US DoC BEA

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2. GENERAL FEATURES OF US TRADE POLICY

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

Problem areas: Extraterritoriality

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

On 12 March 1996 President Clinton signed into law the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (formerly the "Helms Bill", S 381 and its companion HR 927, the "Burton Bill") (referred to as the "Helms-Burton Act"). This is the latest in a series of legislative initiatives since the US proclaimed a trade embargo against Cuba in 1962 (Section 620 (a) of the Foreign Assistance Act of 1961; further reinforced by the Food Security Act of 1985 and the Cuban Democracy Act of 1992).

The Commission is of the view that these measures are in part, actually or potentially, contrary to US obligations under the WTO Agreements, in particular the GATT (General Agreements on Tariffs and Trade) and GATS (General Agreements on Trade in Services).

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

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

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

On 11 April 1997 an Understanding was reached with the US concerning the Helms-Burton Act, the ILSA and the EU's WTO case regarding the former. The Understanding charted a path towards a longer-term solution through the negotiation of international disciplines and principles for greater protection of foreign investment, combined with the amendment of the Helms-Burton Act. As regards ILSA the Understanding stipulated that "the US will continue to work with the EU toward the objectives of meeting the terms" under the legislation which would permit the US President to waive the application of sanctions for EU Member States and companies. The EU agreed to suspend its WTO case, but reserved the right to restart or to re-establish the panel if action is taken against EU companies or individuals under Helms-Burton or ILSA, or waivers as described in the Understanding were not granted, or were withdrawn.

At the 18 May 1998 EU/US Summit in London, the EU and the US reached an agreement on a package of measures to resolve a dispute regarding the Helms-Burton Act and ILSA. The Summit deal offers the real prospect for a permanent solution – but still depends on acceptance by the US Congressional before full implementation may take place. The three main elements of the Summit deal are:

- first, an agreement on disciplines for investments into illegally expropriated property;
- second, a US commitment to self-restraint on future extraterritorial legislation expressed in an agreement on Transatlantic Partnership on Political Co-operation.
- third, an assurance for waivers for the EU and for EU companies under both Acts.

The agreement on investment disciplines addresses the issue of whether or not investment assistance agencies of the parties should give assistance to investment projects in illegally expropriated property. This agreement is a valuable step forward in investment protection policy, which goes far beyond addressing the issue of possible illegal expropriations in Cuba.

The Understanding on Disciplines contains a clear commitment on the part of the US Administration that it will seek from Congress the authority to grant a waiver from Title IV of the Helms-Burton Act (visa restrictions) without delay. It is important to note that the EU will not apply the agreed disciplines until this waiver authority is exercised. In addition, with respect to Title III (submission of law suits against "trafficking in expropriated property") of the Helms-Burton Act, not only does the Understanding provide for a US commitment to continue to waive the right to file law-suits until the end of this President's term; the Understanding also contains a clear reference to the possibility of obtaining such a waiver on a permanent basis in the light of the EU's developing efforts to promote democracy and human rights in Cuba.

The deal on Transatlantic Partnership on Political Co-operation should be seen in conjunction with the EU's efforts to make the US Administration restrain its use of unilateral sanctions with extraterritorial effects, so-called "secondary boycotts". The Summit agreement on this issue states that the US Administration will "not seek or propose, and will resist, the passage of" such sanctions legislation.

Another element of the deal reached at the Summit relates to the ILSA. At the EU-US Summit, the US Administration did not grant the EU a multilateral regime waiver as foreseen by the 11 April Understanding. However, the US determined

under section 9(c) of ILSA to waive the imposition of sanctions against TOTAL for its investment in gas exploration in the South Pars field in Iran and the US expressed its expectation that similar cases would result in like decisions for EU companies.

As regards Libya, the Summit provided for a strengthening of the US commitment to "engage with the EU in a sustained process for consideration of waivers under section 9(c) of ILSA to companies from the EU".

The agreement reached at the Summit in no way softens the EU's position that the Helms-Burton and ILSA Acts are contrary to international law. At no point in time did the EU acknowledge the legitimacy of these Acts. We have fully reserved our right to resume the WTO case against the Helms-Burton Act in the event of action being taken against EU persons or companies under either this Act or ILSA or the waivers would not materialise. The agreements are of a political nature and do not in any way lend any sort of validity to the illegal provisions of the US laws in question.

Full implementation depends on Congressional support, which the Administration has undertaken to do all it can to deliver. But the EU and its Member States can only fulfil the European side of the deal once the presidential waiver authority under Title IV of the Helms-Burton Act has been adopted and exercised.

Sir Leon Brittan has stated that "I welcome the agreements and the constructive, intensive efforts of the United States Administration to reach them. The European Union stands ready to implement these agreements, including the disciplines on future investment in property which has been illegally expropriated, when Congress authorises the President to grant a waiver to the European Union under Title IV of the Helms-Burton Act, and when that waiver is granted.

Yet I am sad that so much of the effort of those of us whose responsibility and ambition is to promote EU/US relations, has been diverted in the last two years into solving this totally unnecessary problem. Legislation of this sort is clearly counter-productive. What on earth is the point, when you are trying to deal with a country like Iran or Libya or Burma, of passing a law which creates a confrontation with precisely those partners who are your closest allies in dealing with countries of that sort, even if they do not always agree 100 per cent with your policy prescription?"

In the unilateral EU Declaration, the EU's Council of Ministers also welcomed the deal, despite the EU's continued and principled opposition against these extraterritorial laws, as the basis for a lasting peace.

While these two legislative initiatives have been very prominent in recent times, several other instances and variations of the same problem can be found in, inter alia, various environmentally-driven embargoes (see section on import prohibitions), export control legislation (see section on export restrictions) as well as, at the sub-federal level, selective purchasing laws (see section on government procurement).

Unilateralism

There is a second element in US trade policy-making about which the EU has regularly complained: unilateralism. This tendency takes the form of either unilateral sanctions or retaliatory measures against "offending" countries, or companies. These measures are unilateral in the sense that they are based on an exclusive US appreciation of the trade-related behaviour of a foreign country or its legislation and administrative practice, without reference to, and sometimes in defiance of, multilaterally agreed rules. This approach casts doubt on US support for a multilateral rules-based system of addressing trade problems and can also lead

to bilateral agreements with elements of discrimination. Admittedly, the US has used its unilateral trade policy arsenal more sparingly in the recent past and has made a greater use of the WTO dispute settlement system. However, the potential still exists to take unilateral measures which risk undermining the global trading system that both partners have greatly contributed to building and promoting.

The "Section 301" family of legislation provides a striking example of unilateral trade legislation which has been used on numerous occasions against the EU. Section 301 of the 1974 Trade Act as amended by the Omnibus Trade and Competitiveness Act of 1988 authorises the US Administration to take action to enforce US rights under any trade agreement and to combat those practices by foreign governments which the US government deems to be discriminatory or unjustifiable and to burden or restrict US commerce. In 1997, the USTR (United States Trade Representative) initiated six new investigations, two of which were directed against the EU (market access for modified starch and export subsidies on processed cheese).

The Omnibus Trade and Competitiveness Act of 1988 also introduced the so-called "Super 301" provision. "Super 301" is the name 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. On 27 September 1995, the President amended this Executive Order to extend it to calendar years 1996 and 1997, after which it lapsed. Despite a call to reinstate it by a bipartisan group of Members of Congress, the President has not yet done so by executive order.

Furthermore, the 1988 Omnibus Trade and Competitiveness Act introduced a "Special 301" procedure targeting intellectual property rights protection outside the US. Under Special 301 the USTR has created a "priority watch list" and "watch list" to identify "priority" foreign countries that are deemed to deny adequate and effective protection of intellectual property rights. Countries placed on the "priority watch list" are the focus of increased bilateral attention and USTR officially initiates investigation procedures that may eventually result in unilateral trade measures. The "watch list" is reserved for those countries that do not protect US intellectual property or that deny market access to IPR-related industries. On 1 May 1998, as a result of its annual Special 301 review, the EU, Italy, and Greece were placed on the 1998 "priority watch list." Italy had been elevated from the "watch list", where it was previously listed. Furthermore, Denmark, Ireland, and Sweden were placed on the "watch list."

While the US has been recently using Section 301 legislation in support of the WTO Dispute Settlement system, it still uses Section 301 as a unilateral trade policy instrument in cases where bilateral agreements are alleged to have been violated. Under the various elements of Section 301 legislation, trading partners are given no choice but to negotiate on the basis of an agenda set by the US, on the basis of judgements, perceptions, timetables, and indeed, US legislation. World trade problems should not be solved through forced settlements based on a unilateral determination of unfairness, unilateral timetables, and the threat of unilateral trade action if no agreement is reached.

3. TARIFF BARRIERS

3.1 Applied Tariff Levels

Tariff peaks

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

The Information Technology Agreement

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

In addition regarding other product types, the US will accelerate to the year 2000 the elimination of duties on brown spirits and will also eliminate by that year all duties on other spirits.

Ceramics and Glass

At the end of the Uruguay Round, customs duties on ceramics and glass products remain relatively important and higher in the US than in Europe. The US has rejected the Community's offer to abolish tariffs in this sector, even though Mexico, one of Europe's leading competitors in the US market, should, after a transitional period, enjoy a zero rate by virtue of the NAFTA (North Atlantic Free Trade Area). There are products of importance for EU trade which will continue to be confronted by high tariffs even when the Uruguay Round reductions have been fully implemented. These include hotel and restaurant ware, certain drinking glasses and other glassware on which the duty rates currently are 31% if made of porcelain or china and 32.2% for others, 34.2% and 38% respectively.

Textiles and Leather

The average trade weighted reduction made by the US in the Uruguay Round was only 12% for textiles and clothing and 5.2% for footwear. For textiles and clothing the reductions which were made will be implemented over 10 years. However, these averages disguise the fact that many significant tariffs and tariff peaks will remain on products of export interest to the EU even when the Uruguay Round reductions have been fully implemented. These include woollen fabrics and certain articles of apparel for which the current duty rates are 25% and 33.6% respectively.

Jewelry

The US jewellery sector is protected by an average tariff of 6% with the highest post Uruguay Round tariff being 13.5%. The corresponding EU rates stand between 2.5% and 3%. Furthermore, the US maintains very significant import duties (up to 14%) on certain semi-finished products made of precious metals. Because of the very high incidence of raw material cost in this sector even modest tariff barriers significantly reduce the access of European jewellery products to the US market.

3.2 Tariff Quotas

Agriculture and Fisheries

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

The EU remains concerned about certain in-built rigidities in the licensing arrangement for dairy products. In 1997 the number of firms to which import licences were issued further decreased. About 280 firms were granted import licences in 1997 compared to about 400 firms in 1996. Despite a decrease of more than 25% in the number of firms, the licence fee that is supposed to cover administrative cost went down by less than 10%. As regards the management of tariff quotas for tobacco, the EU is concerned that the methods applied seem more restrictive than necessary and have the potential to create obstacles to EU exports.

4. NON-TARIFF BARRIERS

4.1 Registration, Documentation, Customs Procedures

Excessive invoice requirements

Invoice requirements for exporting certain products to the US can be excessive. The information requirements far exceed normal customs declaration and tariff procedures. They are unnecessary because US Customs are entitled to ask for all necessary supplementary documents and information during clearance (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 and new competitors disadvantaged. These effects are particularly disruptive in diversified high-value and small-quantity markets that are of special relevance for the EU.

US Customs does not recognise the EC as a country of origin and refuse to accept EC certificates of origin. This means that in order to justify EC country of origin status, EU firms are required to furnish supplementary documentation and follow further procedures, which can be a source of additional costs.

Textiles and Leather

Customs formalities

Customs formalities for imports of textiles, clothing and footwear to the US require 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.

Origin rules

On 1 July 1996, the US introduced a wholesale revision of its origin rules for textiles and clothing products. While for many textile and clothing products the new US origin rules parallel those of the EU, printing and dyeing of fabric no longer confer origin as it did under the former US rules.

This new measure hampers EU exports to the US: grey cloth made of cotton, silk or synthetic imported into the EU to be dyed and printed, when re-exported to the US no longer qualifies as of EC origin (even if manufactured into scarves, table cloth or bed linen). For fabrics and scarves made of 100% silk, the problem is mainly one of brand image, i.e. such products will have to be labelled as "Made in China" despite the fact that the grey fabric imported from China represents less than half of the value of the finished product. Furthermore, the possibility for the EU to continue exporting such products into the US will be dependent on future commercial relations between China and the US. For cotton and synthetic fabrics the situation is more serious since Community goods will be subjected to the import quotas that the US applies at present to imports from China, India, Pakistan, Egypt, etc. Embroidered goods and even certain hats will be subject to similar problems. The total volume of EU exports adversely affected by the new rules is estimated to be US$ 450 million per year.

A Trade Barriers Regulation procedure was initiated on 22 November 1996 further to a complaint lodged by the Italian textile industry and led to the adoption of a Commission Decision to request WTO consultations. The investigation carried out by the Commission services demonstrated that the US legislation was notably in breach of the WTO Agreement on Textiles and Clothing and the WTO Agreement on Rules of Origin.

Only after receiving a request for WTO consultations from the EU, the US Administration eventually agreed in July 1997 to the modification of the contested rules, at the latest at the end of 1998. The US agreed to modify its rules of origin either by adopting the solution resulting from the international harmonisation process or, if such negotiations fail to reach an agreement by the July 1998 deadline, by reverting to its previous rules of origin. The present US Congress should adopt the changes before the end of 1998. The US also agreed to a number of transitional measures aiming at ensuring that, in the meantime, the EU products' access to the US market would not be disturbed or diminished. The Commission is at present carefully monitoring the implementation of the US commitments.

In addition, the US Customs classifies weaver's beams as yarns. In the framework of the textile agreements between the US and certain third countries, a visa (export licence) is required if the yarn category is subject to a quantitative limit. Therefore, the European weaver's beam exporter has to provide the US importer with a visa from the exporting yarn country valid during the quota management year. However, in the EU, weaver's beams are classified as an article of yarn HS code 5609. If the US would apply the same HS-classification as the EU, no visas were required.

Agriculture and Fisheries

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

The US Code, Title 46, Shipping, Section 12108 blocks the potentially interesting possibility for EU fishermen to fish in US waters under a US flag since foreign-built US flag vessels cannot be documented with a fishery endorsement, thereby also preventing the possibility of joint ventures and joint enterprises.

4.2 Levies and Charges (Other than Import Duties)

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 the user of a particular (formerly free) service pays an amount presumed to cover the cost of the service provided.

As a result of laws enacted in 1985 and 1986, the US imposes user fees on the arrival of merchandise, vessels, trucks, trains, private boats and planes, as well as passengers. The Customs and Trade Act of 1990 and the Omnibus Budget Reconciliation Act of 1990 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 disadvantage vis-à-vis US competition.

(4)

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 US$ 485 as from 1 January 1995. Whilst the MPF was to last until 30 September 1990 when established, it is now set to run until 30 September 2003.

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

The present customs user fee structure is somewhat more equitable, since the fixing of a ceiling makes it less onerous for high-value consignments. However, the fee is still likely, 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.

Harbour Maintenance Tax

US Customs also participates in the collection of the Harbour Maintenance Tax (HMT). The HMT is levied in all US ports on waterborne imports, exports and domestic cargoes at an ad valorem rate of 0.125%. Collected moneys are transferred to the Harbour Maintenance Trust Fund to provide for the operation and maintenance of channels and harbours. However, the ad valorem basis for the HMT collection makes it difficult to justify as a fee approximating the cost of the service provided. FY 1997 transfers into the Fund were US$ 736 million, of which US$ 434 million from imports and US$ 49 million from foreign trade zones. Exports and domestic shipments contributed only US$ 214 million and US$ 35 million respectively. The inadequate collection by US Customs of the HMT on exports and domestic shipments suggests that imports contribute in a disproportionate manner. It should also be noted that many exemptions exist from the HMT, notably for domestic shipments.

Moreover, there is a significant accumulation of unused funds, which reached US$ 1.4 billion in FY 1998 and is projected to rise to US$ 2.2 billion by FY 2000. This points to the excessive nature of the HMT.

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

In March 1998, the EU requested WTO dispute settlement consultations to challenge the imposition of HMT on imports. Two rounds of consultations were held in Geneva on 25 March and 10 June 1998. The US Administration has indicated its intention to introduce legislation to Congress that would reform the HMT by replacing it with a harbour services user fee. Once introduced, the Commission will make an in-depth analysis of the proposed legislation and evaluate the consequences for the WTO case.

Automotive

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

The Luxury Tax is an excise tax imposed since 1990 on cars valued above an arbitrary threshold, currently around US$ 36,000. The tax has a higher incidence on imported cars than on US produced cars. Originally it also applied to leisure boats and jewellery but these items were later exempted due to pressure from US producers.

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

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

European automakers, with a total market share in the US of only 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. 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. 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 dismissed these as technicalities, and announced that it would not change the provisions

Shipbuilding

The US applies a 50% ad valorem tax on non-emergency repairs of US owned ships outside the US and on imported equipment for boats, including fishnets on the basis of Section 466 of the Tariff Act of 1930, as amended in 1971 and 1990. Under the latter amendment the tax would not apply, under certain conditions, to foreign repairs of "LASH" (Lighter Aboard Ship) barges and spare vessel repair parts or materials. The draft legislation (S-629) for implementation of the OECD Shipbuilding Agreement should make appropriate provision for abolition of this tax as applicable to the contracting parties of the Shipbuilding Agreement.

4.3 Import Prohibitions

The right of sovereign nations to take measures to protect their essential national security interests has been widely recognised by multilateral and bilateral trade agreements. However, it is in the interest of all trade partners that such measures are prudently and sparingly applied. Restrictions to trade and investment cannot be

justified on national security grounds if they are, in reality, essentially protectionist in nature and serve other purposes than the protection of security interests.

National security based restrictions

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

In the past, the EU has voiced its concern that Section 232 gives US manufacturers an opportunity to seek protection on grounds of national security, when in reality the aim is simply to curb foreign competition. The EU will continue to monitor closely the impact of these restrictions.

Agriculture and Fisheries

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, Panama, Colombia, Vanuatu and Venezuela. "Secondary" embargoes on yellowfin tuna products are imposed on imports from "intermediary nations" – namely, countries which are exporting to the US and have failed to certify that they have not imported from the primary embargoed countries during the preceding six months. Costa Rica, Japan and Italy are currently subject to such a secondary embargo.

Mexico, as a primary-embargoed country, requested a GATT Panel in November 1990. The Panel concluded that the US primary and secondary embargoes were not in conformity with GATT Article XI (Elimination of Quantitative Restrictions) but the Panel's report was never adopted. Subsequently the EU requested the establishment of a further GATT Panel in February 1993 which found against the US' unilateral measures imposed for environmental reasons and it reiterated that trade measures cannot be imposed with a view to forcing other countries to change their environmental and conservation policies within their own jurisdiction. Again, this Panel's report was not adopted.

In the framework of IATTC (Inter-American Tropical Tuna Commission) the members (including the US, the Central American and Latin American countries) have negotiated and agreed upon an Agreement on the International Dolphin Conservation Program and adopted it in February 1998. The Agreement was opened for signature from 21 May 1998. The entry into force of this Agreement will allow the US to lift its import embargo.

The EU (not being a member of IATTC, but intending to adhere in the future) has followed the negotiations of this agreement very closely and will carefully monitor any developments in the US import policy.

Drift net fishing

Furthermore, amendments to the Magnuson Fishery Conservation and Management Act of 1983 (MFCMA) require the DoC 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.

Shrimp

Pursuant to section 609 of Public Law 101-162n exports of shrimp to the US will be embargoed unless nations can provide evidence that their shrimp trawlers match the US efforts to protect sea turtles. The US authorities (artisanal fishing, having a sea turtle excluder program or fishing for coldwater shrimp only) have now certified forty-two nations, but five Member States (France, Spain, Portugal, Italy and Greece) have not been certified. Portugal presented a démarche to the Department of State in May 1996 underlining, inter alia, its concerns regarding the potential extraterritorial effect of this legislation. Following WTO consultations in December 1996, Thailand, Malaysia, Pakistan and India requested the establishment of a Panel (January-February 1997). The EU participated as a third party.

The Panel report of 15 May 1998 concluded that the US import ban on shrimps and shrimp products is not consistent with Article XI:1 of GATT 1994, and cannot be justified under Article XX of GATT 1994. The report was very critical on the unilateral measures carried out by the US as well as the lack of commitment to reach a negotiated, multilateral solution. In July, the US filed an appeal of the Panel findings.

Dairy products

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

4.4 Import Quotas

Agriculture and Fisheries

Allocations to foreign fishing fleets

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

4.5 Standards and Other Technical Requirements

Complex regulatory system

In the US, products are increasingly being required to conform to multiple technical regulations regarding consumer protection (including health and safety) and environmental protection. 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 is subject to US Labor 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 public standards do not exist, product safety requirements can change overnight as the product liability insurance market makes a new assessment of what will be required for insurance purposes.

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

Non-use of international standards

A particular problem in the US is the relatively low level of use, or even awareness, of standards set by international standardising bodies. All parties to the TBT Agreement are committed to the wider use of these standards; but although a significant number of US standards are claimed to be "technically equivalent" to international ones, and some are indeed widely used internationally, very few international standards are directly adopted. Some US standards are in direct contradiction to them.

Illustrative cases:

Fastener Quality Act

The 1990 Fastener Quality Act (FQA), which aims to deter the introduction of sub-standard industrial fasteners into the US, includes onerous compliance costs. It was amended in 1996 (Public Law 104-113). The amended law tightens the original FQA, withdrawing the possibility to grant waivers to imported fasteners. The entry into force of the implementing regulations was delayed several times, most recently by legislation until 1 June 1999. These regulations contain burdensome accreditation and certification requirements – even though they were modified in April 1998 to provide for recognition of manufacturers' Quality Assurance Systems (QAS). They also contain burdensome and discriminatory record-keeping requirements. FQA regulations discriminate against non-NAFTA suppliers in the following manner: they demand from them an original laboratory testing report or certified copy thereof to be attached to each lot; fastener parts' logos must be registered with the US Patent & Trademark Office; and the testing laboratory must be accredited by the US National Institute of Standards and Technology (NIST). The US Customs Service will enforce compliance of exports from non-NAFTA countries with the FQA but no organisation has been set up to ensure compliance by other NAFTA and US manufacturers.

At present the list of official bodies recognised by NIST, to which EU testing laboratories can apply for accreditation under the provisions of the FQA, includes three US institutions (A2LA, NADCAP and NIST's NVLAP), three from the EU (COFRAC-France, DAP-Germany, UKAS-UK), one from Taiwan, one from Japan and another one from Canada. As of March 24, 1998 NIST has a total of 147 laboratories listed and any of these laboratories can perform required tests with their accredited scope of competence under the requirements of the FQA. The EU and the US have commenced mutual recognition negotiations (MRA) with respect to fasteners which, if successful, could help alleviate some of the problems related to the FQA requirements.

Nutrition labelling

The Nutrition Labelling and Education Act 1990 requires certain products to be labelled regarding their content. 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 and result in significant commercial obstacles to EU food products marketed in the US and vice-versa.

Excessive reliance on mandatory certification

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

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

As far as IT products are concerned, since they are subject to continuous testing and assessment in their development and production process, it should be unnecessary

to repeat such tests by a third party. Industry stresses the advantages of an appropriate "supplier declaration of conformity". US regulatory agencies have begun a review of this approach, and are moving in certain instances towards manufacturer's declarations of conformity (PCs, VCRs, for example).

Regulatory differences at State level

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

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

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

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

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

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

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 product to the market.

Automotive

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

Pharmaceuticals

Approval procedures for drugs and drug ingredients

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

By means of an "over-the-counter" (OTC) procedure, approved active substances for a medicinal product are put on a list (OTC-Monograph) by the FDA, so that different final products derived from these active substances can be marketed without any application or delay. However, the OTC drug approval procedure requires that the active substance has a US market history. This restricts market access for OTC products with lengthy marketing experience in countries with equally sophisticated drug regulatory systems and particularly hampers access for plant-based (herbal) medicinal product with a long tradition in Europe.

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. While the FDA did approve sunscreen products containing avobenzone in concentrations of up to 3%, final monographs covering this and other sunscreen products are still pending.

Textiles and Leather

Marking requirements

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

Agriculture and Fisheries

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 of wine bottles. In general, an average of three months is required to obtain label approval at Federal level and, at State level, the approval period varies according to the 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 State regimes) and costly.

Sanitary and phytosanitary issues: 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 FDA'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.

Apples and pears

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

Operating in this way on the basis of an open list of unspecified pests is not a scientific approach and is contrary to the spirit of transparency as provided for in the International Plant Protection Convention and to the requirement of pest risk analysis and transparency laid down in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. The stringent inspections and the increased costs arising from the pre-clearance inspection programme have clearly had a negative effect on EU exports of apples and pears to the US. Consultations with the aim of implementing the "inspection at port of arrival" option have resumed in 1996, but have not yet been conclusive. However, a draft protocol for a "Schedule of Conditions" concerning participation in an "experiment" for the export of apples and pears from the EU to the US 1998/99 season without phytosanitary pre-clearance by the US in the Member State of production, has recently been submitted to the US for comment.

Pathogen free regions

Under US Regulations (Code of Federal Regulations of 1996, Title 7, Subtitle B, Ch. III, §319-56-2) the import of fruit and vegetables from an EU Member State, in which the relevant pathogen is known to occur, is not only prohibited from the infested area of that Member State, but also from the pathogen-free areas thereof. This 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; they discriminate

Brittany against other pathogen-free areas in the Community, which is not justifiable on phytosanitary grounds, having regard to the conditions of the internal market within the Community.

Potted plants

The provisions on standards and certification of plants established in growing media (Code of Federal Regulations of 1996, Title 7, Subtitle B, Ch. III, §319-37-8) were revised and effective on 13 January 1995 to permit the import into the US of four plant genera in sterile growing media. This has reduced the obstacles encountered by EU exports of potted plants to the US.

The new rule contains some requirements that 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 that is shorter than the waiting period required by USDA before export can take place.

It is noted that APHIS (Animal and Plant Health Inspection Services) has recently re-opened and extended the comment period on a proposal to allow the importation of Rhododendron (Azalea) established in growing media from Europe, originally published in the Federal Register of 7 September 1993. This was the result of the completion of consultations on Rhododendron in conformity with section 7 of the Endangered Species Act, which revealed that import from Europe is not likely to adversely affect endangered or threatened species or their habitants.

Hardy nursery stocks

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

BSE

The US introduced rules on the import of ruminant animals and products thereof from all European countries based on concerns about Bovine Spongiform Encephalopathy (BSE).

However, while the EU requirements are based on the recommendations of the authoritative international institution in this area, the International Office for Epizooties (OIE), those of the US are not scientifically based, and discriminate in targeting European countries. 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). The US action blocked all EU ruminant exports, pending examination by the US of data submitted. The EU has raised its concerns at this excessive action both bilaterally and in the Committee on Sanitary and Phytosanitary Measures in Geneva.

Goats

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

Recognition of the Community

The EU has a comprehensive set of veterinary legislation completed under the Single Market programme, and apart from certain specific restrictions based on the relevant disease status, there is free movement of animals within the Community. Nevertheless, the US continues to treat the Community on an individual Member State basis for the majority of issues, thus excluding several products of many Member States from access to the US market.

Regionalisation

The EU operates a policy of regionalisation, where restrictions are applied in zones affected by certain animal diseases, with free movement of animals and products outside the affected zones. An animal or product fit for movement is then considered fit for export. The principle of regionalisation as an effective means of controlling animal disease has now been incorporated into the US Tariff Act 1930 by the NAFTA and is part of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. 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, despite a clear commitment in the EC/US agreement on application of the Third Country Meat Directive, reached in 1992. The US published a proposed rule on "Importation of Animals and Animal Products" covering only ruminants and swine on 18 April 1996. The EU made substantive critical comments, and has continued to press for the US to recognise the EU's application of regionalisation in the context of an EU-US Veterinary Agreement. An agreement was negotiated on a technical level on 30 April 1997. The US, in a letter dated 24 February 1998, has committed itself to accept the EU's regionalisation decisions upon implementation of the EU-US Veterinary Agreement.

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. The US published a proposed rule on the recognition of the disease status of certain member States for certain diseases on 14 November 1997. The US further committed itself in March 1998 to publish a further proposed rule covering the outstanding recognitions of Member States and diseases, notably as regards classical swine fever.

Non-commingling

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

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, Serrano hams, Iberian hams, Iberian pork shoulders and Iberian pork loins. However, the US still applies a prohibition on other types of uncooked meat products (e.g. San Daniele ham, German sausage, Ardennes ham) despite the fact that meat products may come from disease free regions and that the processing involved should render any risk negligible.

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.

Canned food

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

4.6 Government Procurement

Federal Buy America legislation

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

The restrictions apply to government supply and construction contracts, and require Federal agencies to procure only US mined or produced unprocessed goods, and only manufactured goods with at least a 50% local content. Executive Order 10582 of 1954, as amended, expands the scope of the Buy America Act in order to allow procuring entities to set aside procurement for small businesses and firms in labour surplus areas, and to reject foreign bids either for national interest or national security reasons. As a result of the GATT (subsequently WTO) Government Procurement Agreement (GPA), many Buy America provisions have been waived for Contracting Parties (inter alia, through the 1979 Trade Agreements Act), including for the European Union. But some persistent Buy America provisions continue to limit access to the US procurement market in a significant way.

One of the most obvious areas of Buy America is federal aid administered by the Department of Transportation (DOT) under several different acts, including the Highway Administration Act, the Urban Mass Transit Act, and the Airports Improvements Act. In accordance with these acts, the DOT provides aid to the State and local governments for various transportation-related procurements. The State or local government at some level must match that money. Specifically, the Federal government may fund 40% to 80% of the project (depending on the nature of the grant), while the State or local government must fund the remaining share. All purchases of goods and services related to these projects must meet various Buy American provisions, usually domestic content requirements of 60% and, failing that, a price penalty of up to 25%. It has been estimated that expenditures pursuant to grants funded by the DOT in fiscal year 1996 totalled approximately US$ 9 billion, a significant share of which went towards procurement of goods, services and construction. As a consequence, European transport equipment manufacturers are denied access to a large and lucrative market.

National security issues

The Department of Defense also has significant procurement expenditures that exclude foreign suppliers of goods or services. Some products are subject to specific exclusions, while others fall within "national security" exceptions to open procurement obligations. Although the concept of national security can be invoked under Article XXIII of the GPA to limit national treatment in the defence sector for foreign suppliers, the use of national security considerations by the US has led in practice to a disproportionate reduction in the scope of DoD supplies covered by the GPA. While the US denies abusing the WTO national security exemption, it has indicated a readiness, in the context of the implementation of the GPA, to disseminate more guidance to US procurement officials for identifying which

procurements are covered by the Agreement and which by national security exemptions. It has also expressed its intention to ensure clear and consistent identification of national security procurements, and improve the coherence of the US Federal Supply Classification System with the international Harmonised System. Together, these intentions mark a first small step towards more acceptable practices. There has been a trend towards making DoD's other domestic preferences, apart from the Buy America Act preferences, less restrictive – by expanding the preference to qualifying countries. These are countries that maintain reciprocal memoranda of understanding (MoU) with the US. Currently, eleven EU Member States are qualifying countries. Still, a recent amendment to the fiscal year 1998 Defense Appropriations Bill, which would have given the Secretary of Defense blanket authority to waive the domestic preference for American specialty metals, stainless steel flatware clothing, or naval components, was substantially diluted in Congress. The compromise language only permits the Secretary of Defense to waive the restriction on a case by case basis under certain circumstances on a limited number of products, rendering the application of a waiver much more difficult.

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

There are numerous other marginal expenditures. While not exhaustive, the following examples of Buy America statutory programmes should be mentioned: the Balance of Payments Program; the Merchant Marine Act of 1936; the Hazardous Materials Transportation Authorization Act of 1994; the Amtrak Authorization Act; Grants for Construction of Water Treatment Works; National and Community Service Act; National Science Foundation Act of 1988 (as amended); and the National Space Policy Directive of 1990. The latter establishes that US Government satellites will be launched solely on US manufactured launch vehicles unless the President has granted a specific exemption. The measure is part of a set of co-ordinated 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 some 60% of the US satellite market. The US justified the restriction, which initially applied to the launching of military satellites, on national security grounds, but is now also imposed on satellites for civilian use.

Sub-federal selective purchasing laws

At a sub-federal level, selective purchasing laws (whereby the access of companies to contracts is severely or completely curtailed as a result of the companies' business links with particular third countries) continue to cause great concern. Such laws have been adopted by the Commonwealth of Massachusetts (in the case of Burma) and more than 20 cities and local authorities, and are under consideration by a number of other sub-federal authorities.

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

The Massachusetts Law has raised additional concerns because it is subject to the requirements of the GPA. This is not the case with the other laws and resolutions which have already been adopted. The EU believes that the law contravenes a number of basic principles of the GPA and – after seeking to resolve the issue bilaterally – sought WTO consultations in June 1997. Subsequently an amendment to the Law was proposed in April 1998, but has not been acted on by the Massachusetts Legislature. In the absence of a satisfactory change to the Massachusetts law in the near future, the EU has requested the establishment of a WTO Panel on this issue. In the meantime, US industry – under the auspices of the National Foreign Trade Council (NFTC) has filed a suit against the Massachusetts Act challenging its constitutionality. The EU has filed an amicus curiae brief in support of the plaintiff.

State Buy America legislation and restrictions

Buy America or "buy local" legislation is also rife at State level. Although 39 of the 50 States are covered by the bilateral agreement of 1994 (and 90% of total procurement by value at State level), there are still gaps in its scope, including various exemptions for purchases of cars, coal and steel. In the case of New Jersey, State legislation also provides that for the construction of public works projects financed by State funds, the materials used (e.g. cement) must be of domestic origin.

Set-aside for small businesses

The Federal Government actively seeks to promote the growth of small businesses in numerous ways. It provides loans and grants, develops programmes to encourage bids from small business, and sets aside certain procurement contracts for small business. The "set-asides" are specifically exempted from application of the GPA. Small business set-asides represent a substantial proportion of federal procurement money – many tens of billions in expenditures or around 30% of all federal procurement dollars. The relevant legislation is the Small Business Act of 1953, as amended, which requires executive agencies to place a fair proportion of their purchases with small businesses. This is achieved through two different types of set-aside schemes: one where US Federal government contracts are set-aside, regardless of the size of the contractor, in the event that there is a reasonable expectation of bids from two or more eligible US small or minority businesses; the other where all contracts below a certain threshold (currently US$ 100,000) are set aside for US small or minority businesses -- contracts are only released for competitive bidding in the event that two or more eligible bidders cannot be identified. In this context, small businesses are defined as businesses located in the US which make a significant contribution to the domestic economy and are not dominant. The standard size criteria for eligibility as a small business for goods producing industries is 500 employees or fewer. However, for some industries (pulp, paper boxes, packaging; glass containers; transformers, switchgear and apparatus; relays and industrial controls; miscellaneous communications equipment; search, detection, navigation guidance systems and instruments) the

employee limit is 750 and for some others (chemicals and allied products; tyres and inner tubes; flat glass; gypsum products; steel and steel products; computers, computer storage devices, terminals; motors and generators; telephone and telegraph apparatus) it is 1000. For services industries, depending on the sector, firms with total annual revenues of less than US$ 2.5 million to 17 million are considered to be small businesses.

Currently, the notion of fair proportion means that the government-wide goal for participation by small businesses shall be established at no less than 20% of the total value of all prime contract awards for each fiscal year. Under 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 DoD, the standard 50% preference applies to all US businesses offering a US product.

An important number of States also operate particularly proactive small businesses and minority set-aside policies. It is estimated that in States like Texas such policies effectively exclude foreign firms from around 20% of procurement opportunities. In Kentucky as much as 70% is set aside for small businesses. The GPA will not, at present, affect the operation of these set-asides.

Berry Amendment

The concept of "national security" was originally used in the 1941 Defense Appropriation Act to restrict procurement by the DoD to US sourcing. Now known as the "Berry Amendment", its scope has been extended to secure protection for a wide range of products only tangentially related to national security concerns -- for example, the 1992 General Accounting Office ruling that the purchase of fuel cells for helicopters is subject to the Berry Amendment fabric provisions, and the withdrawal of a contract to supply oil containment booms to the US Navy because of the same textile restrictions. Although the Berry Amendment does provide for waivers from its strict requirements, it is not clear whether the DoD actually utilises these possibilities. In addition, in September 1996 the Congress adopted an amendment that extended the initial scope of the Barry Amendment to cover also all textile fibres and yarns used in the production of fabrics. The result of this extension is that Community fibres and yarns can no longer be used by US manufacturers for producing fabrics that they sell to the DoD.

Further DoD procurement restrictions are based on the National Security Act of 1947 and the Defense Production Act of 1950, which grant authority to impose restrictions on foreign supplies in order to preserve the domestic mobilisation base and the overall preparedness posture of the US.

At the same time, defence procurement from foreign companies is sometimes also impeded by Buy America restrictions on federally funded programmes. US Allies including fourteen EU Member States have concluded Co-operative Industrial Defence Agreements or Reciprocal Procurement Agreements (Memoranda of Understanding - MOU) with the US. These agreements provide for a waiver by the Secretary of Defense of the price differentials under Buy America restrictions with respect to goods 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 undermined

However, US legislation allows the Administration (DoD and USTR) to rescind a waiver if it determines that a particular ally discriminates against US products. In addition, Congress is unilaterally overriding the MOU by imposing ad hoc Buy America requirements during the annual budget process (e.g. in the case of anchor and mooring chains). There are also indications that US procurement officers

disregard the exemption of Buy America restrictions for MOU countries (e.g. in the case of fuel-cells, ball and roller bearings and steel forging items).

Bearings

Congress has imposed a Buy America requirement on the procurement of ball and roller bearings since 1988, most recently to the end of the year 2000. In May 1996, the Federation of European Bearings Manufacturers' Association (FEBMA) made a submission to DoD, in opposition to the restriction. The 1997 DoD Authorization Act contains the so-called "McCain Amendment" authorising DoD to waive Buy America requirements that would impede the reciprocal procurement of defence items under the MOU. The EU and 21 NATO countries asked for the effective implementation of the McCain Amendment and the termination of discrimination vis-à-vis imports from countries with which DoD has signed defence cooperation agreements, thus supporting FEBMA's position. The DoD's implementing interim rule was published on 24 June 1997 and included bearings. However, the waiver applicable to bearings may be of limited value since it does not apply to procurements made with funds subject to Buy American requirements under the Appropriations Act. Separately, DoD also published on 24 June 1997 a final rule allowing a waiver on the Buy America provision on ball and roller bearings for procurements below the so-called "simplified acquisition threshold" (currently US$ 100,000). Again, this waiver possibility is of limited use for the reasons indicated above.

Iron, Steel and Non-Ferrous Metals

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

Sanctions: Telecom Equipment

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

4.7 Trade Defense Instruments

1916 Antidumping Act

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

In addition to a still pending Court action in Utah, there are substantiated indications that further Court actions under the 1916 Act could be brought against several steel importers including at the occasion of imports of EU products, thus transforming the 1916 Act into an alternative to the conventional and WTO-compatible anti-dumping rules for use by the US industry.

Despite numerous offers made by the Commission services, the US authorities did not appear willing to reach an amicable settlement. Under these circumstances, a Commission decision to request formal WTO consultations was published in the OJ on 28 April 1998. At the occasion of the consultations of 29 July of this year, the Commission reiterated its concern to resolve the case on an amicable basis. The US promised to examine the matter further, but have not come forward with a new proposal so far

Countervailing duties on pasta from Italy

On 24 July 1996, the DoC imposed antidumping and countervailing duties on pasta from Italy. The latter contain a component designed to countervail EC export refunds granted on cereals used in the manufacturing of pasta. This measure is in breach of item 8 of the US-EC Pasta Settlement of 1987.

4.8 Export Restrictions

Export controls

A comprehensive system of export controls was established, under the Export Administration Act (EAA) of 1979 and the US Export Administration Regulations (EAR) to prevent trade to unauthorised destinations. This system, among other things, requires companies incorporated and operating in 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. The extraterritorial nature of these controls has repeatedly been criticised by the EU and its Member States, given the fact that the latter are active members of all international export control regimes: the Nuclear Supplier Group, the Australia Group, the Missile Technology Control Regime and the Wassenaar Arrangement.

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 would appear to be contrary to the GPA.

Encryption

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

At present, both the EU and the US operate export control regimes to limit the cross-border movement of the strongest encryption products. On 30 December 1996, new US export control regulations were published that transferred the licensing of commercial encryption products from the Department of State to the Department of Commerce and mandating key recovery until 31 December 1998. The practical effects of this remain to be seen. A combination of the continuing constraints on the export of strong encryption products and on the interoperability of systems employing such technology inhibits not only trade in encryption products but, more importantly, the effective growth of electronic commerce. Moreover, many modern encryption techniques are patented and licenses may be required to allow sales of European products in the US. Thus, significant barriers to international trade in encryption products without key recovery continue to exist.

4.9 Subsidies

Transparency in the area of subsidies is an obligation of the WTO Agreement on Subsidies and Countervailing Measures. The US has only notified the WTO of 49 subsidy programmes, many of which are relatively small. Furthermore, the update of the US notification, due on 30 June 1996, is still outstanding. The EU identified 24 Federal programmes of which the WTO had not been notified and there appears to be extensive non-notified subsidies at sub-federal level. The EU has already identified about 400 state subsidies and also provided evidence of 30 enterprise zones within states that confer subsidies. The US refuses to notify such sub-federal aid as a matter of principle. By not fully complying with its transparency obligations, the US has deprived its trading partners of legitimate information in this area. In view of the failure of the US to notify sub-federal schemes, the Community has made a first, illustrative, counter-notification under Article 25.10 of the Agreement, giving details of 10 subsidies granted by US states and inviting the US to notify these to the WTO Subsidies Committee.

Following the counter-notification by the Community, the US formally committed itself to notify sub-federal subsidies at the time of the new and full notification that is due on 30 June 1998.

Aircraft

The large civil aircraft (LCA) sector is generally subject to the WTO rules on subsidies (it is specifically excluded from several provisions of the Subsidies Agreement in anticipation of a broader Agreement on civil aircraft trade), but more

specific multilateral rules are required to restrict all forms of government support and intervention for aircraft products. The EU regrets that, at the end of the Uruguay Round negotiations, the US blocked the adoption of a new Civil Aircraft Agreement supported by all other negotiating parties. Although negotiations have continued since, no progress has been made.

LCA Agreement

Bilaterally, the EU and the US started negotiations for the limitation of government subsidies to the LCA sector in the late 1980s. Such negotiations were concluded in 1992 with the signature of the EC-US Agreement on Trade in Large Civil Aircraft (O.J. L 301 of 17 October 1992) which focuses on the limitation of both direct and indirect government support. The Agreement suffers from an important divergence between the US and the EU in the way to interpret the indirect support discipline and, on the European side, there is the concern that its implementation has created an increasing imbalance of obligations. In fact, despite the very high level of US funding for its civil aircraft industry, which since 1992 has not abated, US representatives have continued to argue that only a negligible fraction should be considered as a benefit for US industry.

Support from the NASA aeronautics budget

In particular, in the face of very large public funding for NASA (National Aeronautics and Space Administration) aeronautics R&D budgets, the US has so far denied the existence of benefits to the US LCA industry. For instance, NASA's aeronautics budget for 1996 and 1997 amounted to US$ 1.11 billion and 1.09 billion, respectively. According to estimates carried out for the EU, about 70% of NASA's aeronautics spending can be classified as support to the US LCA industry. In Fiscal Year 1996, the Department of Defence (DoD) spent about US$ 5 billion on R&D for the development of aircraft and related equipment. This translates into benefits to the civil aircraft manufacturers between US$ 758 million and 1.31 billion. Finally, the Federal Aviation Administration (FAA) has an annual aeronautics budget for research and development that exceeds US$ 2 billion. One of the FAA's stated objectives is "to foster US civil aeronautics". However, the US declared that only a negligible proportion of this spending has turned out to be an identifiable (indirect) support to the US LCA industry. According to EU estimates, for the fiscal year 1996, US LCA manufacturers received indirect support in the range of 7.1% to 12.8% of their commercial turnover. This is well above the 3% limit set by the 1992 bilateral Agreement.

Supersonic aircraft programme

Another area of great concern to the EU industry is the NASA programme for High Speed Civil Transport (HSCT), that is the programme for the development of a new supersonic aircraft to succeed Concorde. The US aircraft and aero-engine industry are closely working with NASA on this project which is being funded at the level of more than US$ 200 million per year. US industry sets the initial research parameters, it defines NASA's research priorities with respect to HSCT, it has been awarded NASA HSCT contracts to perform the needed research and it is protected from sharing valuable data and results with others.

Active support from the Administration

Finally, it must be underlined that the US Administration has taken a very active stance in favour of the domestic aircraft industry not only through R&D government financing (subsidies), but also by means of high-level political leverage with third countries' airlines (inducement).

Shipbuilding

OECD Shipbuilding Agreement

The signing of the OECD Shipbuilding Agreement in December 1994, which is meant to eliminate aids in the shipbuilding sector, is a major achievement and is expected to have a significant impact on US and all other signatories subsidy programmes in the shipbuilding sector. 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.

In December 1995 the EC, South Korea and Norway deposited their instruments of ratification for the Agreement. Japan did so in June 1996. The failure of the US to ratify it is a matter of great concern. The revised bill (S. 1216) sponsored by Senator Roth seems to be the last attempt to approve the Agreement. However, even as the EU continues to monitor the ratification and implementation process and to verify that the legal basis for US ratification is in accordance with the terms of the OECD Agreement and its impact on the existing subsidy programmes, the prospects of a US ratification in 1998 remain gloomy.

Subsidies

From 1980 until 1994 US shipbuilders did not succeed in building for export. The domestic market for the Navy and the protective Jones Act (which reserves the construction of the vessels used for coastwise traffic to US shipbuilders) provides shipyards with orders. Production was less than 100,000 gross tonnes (gt) in 1993 while the available capacity was 250,000 gt. However, the potential capacity by 2000, taking into account the re-conversion of the military activity, is evaluated at 1.1 million gt. The Merchant Marine Act of 1936, as amended, provides for various shipbuilding subsidies and tax deferments for projects meeting domestic built requirements. These are provided via the Operating Differential Subsidy (ODS), the Capital Constructions Fund (CCF) and the Construction Reserve Fund (CRF). These measures will have to be modified by the US Congress before the entry into force of the Shipbuilding Agreement.

On 5 December 1997, Vice President Gore announced that up to US$ 80 million in federal funds, part of a US$ 400 million aid package, would be available to complete the revitalisation of the Philadelphia naval shipyards, to be managed by the Kvaerner group. State and local authorities would finance the remainder of this package. In addition to the federal funds for training, US$320 million of sub-federal subsidies granted to the yard would be inconsistent with the US commitments not to introduce new measures of support or to increase the level of the existing measures.

In addition the US administration introduced a new programme, the so-called "Capability Preservation Agreement Scheme" included in H.R. 1119, signed into law on 18 November 1997. This scheme allows qualified shipyards to claim for reimbursement on their US Navy shipbuilding contracts for certain costs attributable to work on their commercial shipbuilding.

Loan guarantees

The Merchant Marine Act also established under Title XI, the Guaranteed Loan Program (formerly known as the Federal Ship Financing Guarantee Program) to assist in the development of the US merchant marine by guaranteeing construction loans and mortgages on US flag vessels built in the US. In 1993 the guarantee programme was extended to cover vessels for export. As of 1 October 1997, approved applications for construction guarantees involved 11 companies and 40 vessels, with 17 applications pending. During FY 1997, Congressional authority for

the Title XI program had a cap of US$ 12 billion, with US$ 11.15 billion allocated to the Maritime Administration (MARAD) and US$ 850 million authorised to guarantee the financing of fishing vessels and fisheries facilities by the National Oceanic and Atmospheric Administration. Title XI guarantees for eligible export vessels are limited to US$ 3.0 billion. As of 1 October 1997 Title XI guarantees in force aggregated approximately US$ 2.6 billion, covering approximately 1933 vessels and 116 individual shipowners. The OECD implementing legislation will have to provide for the elimination of these construction loan guarantees.

Agriculture and Fisheries

Export Enhancement Program

The US operates a range of programmes designed to subsidise and/or promote exports of US agricultural products. The US has continued to maintain an aggressive export policy for agricultural products. The recent Farm Bill adopted by Congress has confirmed this approach.

The Export Enhancement Program (EEP) allows US exporters to apply for a cash subsidy designed to make US products competitive with subsidised exports from other countries. EEP has been capped at US$ 350 million in fiscal year 1996, but applies to products exported to over 70 countries. Currently operating in the same manner as EEP is the Dairy Export Incentive Program (DEIP) which is also used for market development purposes. Although EEP funds have not been utilised in recent years due to high world market prices, the recent decline in commodity prices has increased pressure from Congress for their full use.

The Market Access Program formerly the Market Promotion Program (MPP) offers a share of costs for promotion campaigns for agricultural products (the majority being high value and value added) in selected export markets. The new Farm Bill provides US$ 90 million annually for fiscal year 1996-2002.

The Export Credit Guarantee Program offers US government guarantees of short-term GSM-102 (6 months - 3 years) and medium-term GSM-103 (3-10 years) private bank loans at commercial interest rates. 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.

The Emerging Markets Program is funded under the new Farm Bill to the tune of US$ 1 billion during fiscal year 1996-2002 with US$ 10 million annually for technical assistance.

5. INVESTMENT RELATED MEASURES

5.1 Direct Foreign Investment Limitations

National security considerations: the Exon-Florio provisions

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

- Since 1992, an Exon-Florio investigation must be made if a foreign government owned entity engages in any merger, acquisition or take-over 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 1993 Defense Authorisation Act requires a report by the President to Congress on the results of each CFIUS investigation and by including, among other factors to be considered, "the potential effect of the proposed or pending transaction on US international technological leadership in areas affecting US national security" -- again blurring the line between industrial and national security policy.

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

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 that it justifies "partly or wholly" on the grounds of national security. Foreign investment is restricted in coastal and domestic shipping under the Jones Act and the US Outer Continental Shelf Lands Act, which includes fishing, dredging, salvaging or supply transport from a point in the US to an offshore drilling rig or platform on the Continental Shelf. Foreign investors must form a US subsidiary for exploitation of deep-water ports and for fishing in the US Exclusive Economic Zone (Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987). Licences for cable landings are only granted to applicants in partnership with US entities (on the Submarine Cable Landing Licence Act of 1921).

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

Conditional National Treatment

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

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

Reciprocity

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

Performance requirements

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

Government Procurement

The carve-out proposed by the US in the Multilateral Agreement on Investment (MAI) negotiations allows the administration to apply the numerous provisions of the Buy America Act affecting trade and investment. The Buy America Act favours national suppliers (their tenders are chosen up to 50% above the best tender of foreign companies). However, some OECD countries have signed a bilateral agreement so that the Act does not apply to their investors.

US Federal legislation for the access to grants, subsidies and other advantages lays down discriminatory provisions in the case for example of the Advanced Technology Program, the Energy Policy Act and the Technology Reinvestment Project.

Public Subsidies

The carve-out proposed by the US in the MAI negotiations to cover such aid schemes does not specify the programmes concerned and might be an open door for all future programmes. This carve-out is not acceptable since US companies have access in principle to Community grants and subsidies
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 and requirements. CNT language is most notable in the area of science and technology and concerns the granting of Federal subsidies for research and development, or other advantages, to US-incorporated affiliates of foreign companies.

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

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

The European Commission attaches great importance to addressing the CNT issue and considers that CNT and other similar limitations are not compatible with a key aim of the OECD Multilateral Agreement on Investment to provide high standards for liberalisation of investment regimes.

5.2 Tax Discrimination

Cumbersome and discriminatory reporting requirements

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

"Earnings stripping" provisions

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

Internationally agreed approach overlooked

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

State unitary income taxation: arbitrary calculations

Certain US States (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) assess State corporate income tax for foreign-owned corporations on the basis of an arbitrarily calculated proportion of their total worldwide profits. This proportion is calculated in such a way that a company may have to pay tax on income arising outside the State, giving rise to double taxation.

World-wide unitary taxation

"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 worldwide operations. International attention has mainly focused on California, which from 1986 has allowed companies to elect for "water's edge" unitary taxation instead. Under this method, companies are taxed on the basis of a share of their total US (rather than worldwide) income. The 1994 US Supreme Court ruling that California's former worldwide unitary tax was constitutional was not encouraging. The EU and its Member States remain concerned about unitary regimes and will keep a watch on possible developments.

Foreign Sales Corporations

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

Export subsidies as well as local content requirements that distort trade are strictly prohibited under the WTO. The FSC system establishes an export subsidy, which is conditional upon a local content requirement (more than 50% of the market value of the exported product must be of US origin). It therefore appears to be contrary to both the Agreement on Subsidies and Countervailing Measures (ASCM) and the national treatment provision in Article III of the GATT 1994.

FSC tax exemptions cannot be justified by the aim to avoid double-taxation for US companies established abroad. FSCs are typically established in tax havens where no income tax is paid at all. For instance, in 1992, 66% of all FSCs were incorporated in the US Virgin Islands.

The EU also considers that the FSC scheme is an export subsidy within the meaning of Article 1 of the Agreement on Agriculture. On 18 November 1997, the EU requested WTO consultations with the US, which were held on 17 December 1997, 10 February and 3 April 1998 with no agreement reached. Therefore on 23 July the EU requested a dispute settlement Panel be established to consider these measures

Aircraft

In terms of its economic impact, Boeing declared in its 1995 financial statements that FSC tax benefits amounted to US$ 75 million. This accounts for about 20 percent of Boeing's net earnings for the same year (US$ 393 million). In terms of market value, it has been estimated that improved earnings due to FSC subsidies translate into advantages of US$ 1 to 2 billion for Boeing's market capitalisation, allowing it recourse to relatively cheaper capital. The FSC system therefore grants a considerable competitive advantage to the US aircraft manufacturers to the detriment of their competitors.

6. INTELLECTUAL PROPERTY RIGHTS

6.1 Copyright and related areas

Moral rights

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

Crossborder licensing of music works

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

The investigation report, which was submitted to the TBR Committee on 3 February 1998, confirms that Section 110(5) violates the US's obligations under Article 11bis(1) of the Berne Convention for the Protection of Literary and Artistic Works and consequently those under Article 9(1) of the Agreement on Trade related Aspects of Intellectual Property Rights (TRIPs) Agreement. The report also shows that this practice has caused a serious deprivation of income to Community right-holders, estimated at between 3 and 6 million dollars a year, representing between 10 and 20% of the annual amount of royalties obtained by EU authors for the public performance of their works in the US.

On the basis of these conclusions, it was decided that action should be taken urgently including, if necessary, entering into formal consultations with the US within the WTO. In order to avoid early recourse to the WTO dispute settlement mechanism, the Commission invited the US to first discuss the matter informally. However, the US did not as yet show a willingness to find an amicable settlement that would be satisfactory for the Community right-holders. In addition, on 6 October 1998 an amendment was approved by the U.S. Senate and the House ("Fairness in Music Licensing Act") substantially widening the scope of the homestyle exemption. As a result, the effects on Community right-holders will be worsened.

6.2 Appellations of Origin and Geographical Indications

Inadequate protection of geographical indications of wines and designations of spirits

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

The EU has invited the US to negotiate a broad-ranging wine agreement, which would include improving the protection of geographical indications.

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 appellations of origin and geographical indications 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. In addition, and despite EC opposition, in 1997 the D'Amato Amendment codified the US provisions on the use of semi-generic wine names in the US into Federal law.

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 appellations of origin and geographical indications for wines places the respective EU products at a disadvantage on the US market.

Spirits

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

origin of the product is indicated or accompanied by an expression such as "kind", "type", "style", "imitation" or the like.

6.3 Patents and related areas

Measures affecting imported goods

Section 337 of the Tariff Act of 1930 provides remedies for holders of US intellectual property rights by keeping the imported goods which are infringing such rights out of the US ("exclusion order") or to have them removed from the US market once they have come into the country ("cease and desist order"). These procedures are carried out by the US International Trade Commission (ITC) and are not available against domestic products infringing US patents. Under the 1988 Omnibus Trade and Competitiveness Act, several modifications have been introduced to Section 337, such as the availability of remedies in relation to imported goods that infringe a US process patent. The GATT Panel Report which was adopted by the Contracting Parties in November 1989 came to the conclusion that Section 337 was inconsistent with GATT Article III:4. The provision in question accords to imported products alleged to infringe US patent rules treatment less favourable than that accorded to like products of the US. Some modifications have been made to Section 337 in the context of implementing the TRIPs; however, the US has to date not taken appropriate measures in order to fully do away with the main discriminating features of Section 337.

In the US, advertising low price perfumes imitating famous European brands and thus benefiting from the well-known reputation of the European brands is not prohibited. This practice might violate Article 6bis Paris Convention (confusion) and/or Article 10bis Paris Convention (unfair competition).

Government use

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

First to file system

Moreover, the co-existence of fundamentally different patent systems (US first-to-invent system versus first-to-file system followed in the rest of the world) continues to create interface problems.

7. SERVICES

7.1 Business Services

Professional Services

New GATS disciplines

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

Problems at State level

However, despite the improvements contained in the schedule of specific commitments, access to the US market, where licensing of professional service suppliers is generally regulated at State level, remains unsatisfactory. This is mainly due to the lack of transparency in -- and divergence of -- access conditions at State level, as well as the frequent absence of a transparent regulatory regime for the operation of foreign professional service suppliers. In addition, the Buy America provision in Section 136 (1) of the Foreign Relations Authorization Act for Fiscal Year 1990-91 gives US companies bidding for contracts to provide guard services for US embassies a 5% price preference.

Improving outlook?

Nonetheless, the situation should improve steadily under the GATS: the Working Party on Professional Services is working 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. In addition, negotiations on market access and on the further liberalisation of professional services will take place as part of the next round of trade liberalisation talks.

7.2 Communication Services

Telecommunication Services

US legislation 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) exercises a high degree of autonomy and discretion in regulating this sector, including reciprocity based licensing procedures for foreign-owned firms.

WTO Basic Telecom Agreement

The negotiations on basic telecommunication services, held in the GATS framework under the auspices of the WTO, concluded successfully on 15 February 1997. Thereby 69 Member countries reached agreement on the liberalisation of the global market for telecommunications, estimated to be worth approximately US$ 600 billion. As a result, the 69 governments undertook legally binding commitments on access to their telecommunications services' market. The WTO Basic Telecom Agreement entered into force in February 1998.

The US undertook commitments on most telecommunications services (voice telephone, data, telex, telegraph, private leased circuit services; local, domestic, long-distance and international; using any kind of technology; etc.), but retained several restrictions. Foreign direct investment in common carrier radio licences is limited to 20% (indirect investment being allowed up to 100%). The US kept another market access restriction on satellite-based services, namely the monopoly of the Communications Satellite Corporation (COMSAT) to link up with the International Telecommunications Satellite Organisation (INTELSAT) and the International Maritime Satellite System (INMARSAT).

At the very last moment of the negotiations, the US took an exemption to the MFN principle for one-way satellite transmission of Direct to Home (DTH), Direct Broadcast Satellite (DBS) and digital audio services. The EU reserved its right to challenge this exemption as it applies to services which are part of the audio-visual commitments undertaken by the US in 1994 as a result of the Uruguay Round.

Radio communications

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

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

International Services

In November 1995, the FCC adopted a new rule on entry of foreign-affiliated carriers into the US market, adding a new factor to the Commission's public interest review for the purpose of granting waivers of Section 310 restrictions on foreign indirect investment. Specifically, the FCC introduced an "Effective Competitive Opportunity Test" (ECO-test). FCC also issued in May 1996 a notice of proposed rulemaking (so-called DISCO II) applying the ECO-test to foreign-licensed satellites. The EU disagreed with the FCC contention that the Foreign Carrier Entry Order sets forth a clear and explicit entry standard to replace its previous case-by-case determinations. Both the ECO-test and the DISCO II were reviewed in order to adapt them to the commitments undertaken by the US in the GATS as part of the Basic Telecom Agreement. Thus, on 25 November 1997, the FCC adopted two rulings (a general ruling on foreign participation in the US market, and a specific one on the satellite services market) to implement the commitments of the US in the Basic Telecom Agreement. In these rulings the FCC replaced the ECO-test with a rebuttable presumption that entry by carriers from WTO countries and by satellites licensed by WTO countries is pro-competitive, but FCC retained the unclear 'public interest' criteria which can still be invoked to deny a licence to a foreign operator, such as "trade concerns", "foreign policy" and "very high risk to competition". Although the FCC expressed its intention to only deny market access on this basis in exceptional circumstances -- which are not well defined -- the conditions under which such a denial may be invoked remain a concern that we need to further consider. The EU has indicated consistently that it is concerned about the large discretion that those rulings

confer to the FCC. The EU has indicated that this makes the compatibility of the FCC rules with the US WTO commitments questionable.

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-owned firms.

Limited access to INTELSAT and INMARSAT

Beyond its direct application, Section 310 also has repercussions in the monopoly of the COMSAT, a private corporation created by the Communications Satellite Act of 1962 to enable the US to participate in INTELSAT. COMSAT is the sole US access provider to INTELSAT and INMARSAT with respect to satellite services. As a result, non-US firms face difficulties in providing INTELSAT space segment services to US users and international service carriers, and INMARSAT international maritime and aeronautical satellite telecommunications services. This restriction was maintained after 1 January 1998 as the US has listed COMSAT's monopoly as a market access limitation in its GATS schedule.

The US has undertaken commitments in the framework of the Basic Telecom Agreement to suppress restrictions to indirect investment from 1 January 1998. However, the US Administration holds the view that it will not be necessary to implement specific legislation to abolish such investment restrictions, on the grounds that the FCC can waive these restrictions under the current law by invoking the "public interest." The US Administration and the FCC consider that this waiver provision is sufficient for FCC not to apply section 310(b)(4) to WTO Members.

International Settlement rates

In August 97 the FCC adopted a report and order on International Settlement Rates (the so-called Benchmark Order). This Order asserts the FCC's jurisdiction to prescribe international settlement rates that US carriers shall pay foreign carriers to terminate traffic originating in the US. It establishes benchmarks for five categories of countries based on their level of economic development. The FCC schedule gives US carriers until 1 January 1999 to reach the applicable benchmarks with carriers in upper income countries and until 1 January 2003 in countries with a teledensity of less than 1%. In addition, the Benchmark Order applies as of 1 April 1998 on affiliates' routes. The fact that the benchmarks have been established unilaterally by US authorities has raised almost unanimous criticism by all other WTO countries, especially developing ones. The EU has reserved its position in the WTO to challenge this legislation.

Mobile 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. The FCC has extended this monopoly to the domestic segment of international flights, although for the time being, FCC is granting interim waivers allowing INMARSAT-based services.

US justifications for the domestic monopoly of AMSC - scarcity of spectrum and a limited market - no longer hold. The FCC continues to license additional US mobile satellite service providers. Moreover, in the case of S-PCS (Satellite Personal Communications Services) systems, such licensing of providers (coupled to the implicit ownership filter) seems 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.

7.3 Financial Services

The US financial services sector has been characterised by industry and geographic fragmentation, but this situation is rapidly changing. The application of technology and new flexibility shown by federal regulators has increasingly blurred traditional product distinctions. The pace of affiliations between banks and securities houses and the conduct of insurance activities by banks are picking up and recently the first major merger of a US bank and a US insurance company - - Citicorp and the Travelers Group - - was announced. Greater reliance on electronic data flows is reinforcing the development of an interstate market already well underway as a result of the implementation of the interstate banking legislation passed in 1994. Electronic commerce is also beginning to have an impact on the delivery of all kinds of financial products. As a consequence, it is expected that the US market will look very different in the early 21st century than it does now and that there will be increasing convergence between the US and EU financial sectors. In this dynamic environment, it is important that EU financial firms are given competitive opportunities comparable to those afforded US institutions as new laws are passed, regulations are adopted and the market is restructured.

WTO Financial Services negotiations

In this context, financial services negotiations in the framework of the GATS are particularly important. These negotiations, which extended beyond the Uruguay Round until mid 1995, were concluded through an interim agreement which expired in December 1997. A permanent inclusion of financial services under the GATS was not possible at that time, given the decision by the US to make very limited commitments, guaranteeing basically non-discriminatory operating conditions only for already established foreign suppliers, and to take a broad MFN exemption allowing for the application of reciprocity measures.

GATS negotiations on financial services were relaunched in April 1997, with the aim of reaching a permanent agreement based on improved offers of the participants. Many countries submitted significantly improved commitments in regard to both market access and national treatment granted to foreign financial institutions operating in that country's territory. Negotiations were successfully concluded by the 12 December 1997 deadline with the adoption of a permanent and MFN-based agreement, pending approval by all affected WTO Members by the agreed deadline of 29 January 1999. If approved, the agreement will enter into force on 1 March 1999. All major trading partner of the EU, including the US, are part of this agreement, which will provide a predictable and legally enforceable commitment, improved access of EU (and other countries) financial institutions to the US market, ands non-discriminatory treatment of their operations.

Banking

Sectoral segmentation

Product-related limitations on activities and affiliations are of great interest to EU firms. Despite the absence of federal legislation in this area, there have been very positive developments: the Federal Reserve Board and the Comptroller of the Currency have increased the scope of affiliations and activities permitted to banks, and the courts have generally upheld the agencies' positions. Financial modernisation legislation that has passed the House of Representatives would remove many of the remaining restrictions in the financial sector. These include the restrictions on affiliations in the Glass-Steagall Act of 1933 which provides for the separation of commercial and investment banking in the US and the provisions in

the Bank Holding Company Act of 1956 which prohibit the affiliation of banks with insurance companies. The prospects of this legislation in the immediate future are uncertain. The legislation continues to be subject to several controversial issues and there may not be enough time for the Senate to adopt a bill and then reach a final consensus with the House before the end of this session of Congress. Nevertheless, the progress to date in the House, the steps taken by the Federal Reserve and the Comptroller of the Currency to give more flexibility to the current legal structure and the general reaction to the proposed merger of Citicorp and the Travelers Group suggest that the underlying consensus in the US is beginning to shift in favour of a more modern structure. If the US modernises the legal structure of the US financial services industry this would be a major step forward for US financial institutions in general, as well as for EU financial institutions.

Debanking problems

Extensive US financial sector restructuring could eventually have a positive impact on the "debanking" problem faced by EU financial firms operating in the US. At present, because of structural differences in the types and forms of banking affiliations permitted for companies operating in the US compared to the EU market, an EU firm may be required to give up its banking license in the US as a result of, for example, a merger in Europe with an EU insurance company. These limitations are of particular concern to EU companies looking to exploit the new flexibility in the Single Market to develop integrated financial services operations. Ironically, US authorities permit US firms to conduct a broader range of activities in Europe and elsewhere outside the US than they permit to US and foreign firms operating in the US. Both the EU and US lose as a result of these structural barriers, which also hamper the significant contribution EU companies make to the liquidity of US capital markets and to employment in the US.

Geographical segmentation

The long-standing geographical segmentation of the US financial services industry was addressed by the Interstate Banking and Branching Efficiency Act of 1994 (the Riegle-Neal Act). This legislation established a framework for the reduction of barriers to interstate banking and has been a very positive step. Interstate banking is now possible on a non-discriminatory basis through bank acquisition, consolidation (or merger) and, where state law permits, de novo branching. Initial signs are that the law is having a considerable impact on the national financial sector structure. Although these changes are based on the principles of non-discrimination, in practice the ability to expand by acquisition of - or merger with - insured banks or branches is less advantageous to EU banks than to US domestic banks or the US bank subsidiaries of EU banks because EU banks are for the most part engaged in the wholesale banking market in the US. Since 1991, EU banks have not been permitted to establish or acquire US branches the deposits of which are insured by the Federal Deposit Insurance Corporation other than through a US bank subsidiary. While the Riegle-Neal Act permits a foreign bank to acquire an insured branch and convert it to wholesale, uninsured status, it also requires that such branches continue to comply with the Community Reinvestment Act

Insurance

Links to banks

The US insurance market is the largest in the world, although its relative share of the world market has been constantly diminishing. EU insurance companies cannot operate in the US market if they are affiliated outside the US with a bank having a branch, agency or a commercial lending company or a bank subsidiary in the US, unless the bank decides to withdraw from the US (this problem is described in the banking section above).

A further impediment for EU insurance companies seeking to operate in the US market is the fragmentation of the market into 54 different jurisdictions, with different licensing, solvency and operating requirements.

Securities

Establishment problems

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

Reciprocity requirements

At the Federal level, the Primary Dealers Act (section 3502(b)(1) of the 1988 Omnibus Trade Act) prohibits firms from countries that do not satisfy reciprocity requirements and which were not authorised before 31 July 1987 (with the exception of Canadian and Israeli firms) from becoming or continuing to act as primary dealers in US government bonds. In its only activity under the Act, the Federal Reserve Board has carried out an examination of three government securities markets in the EU (Germany, United Kingdom, France and the Netherlands) and concluded that US firms were generally granted national treatment in dealing in government securities in those Member States. The Primary Dealers Act is often cited as the first step by the US in the direction of conditional national treatment, although it is not a tool that has been utilised to exclude any European firm from the US market.

7.4 Transport Services

Air Transport Services

Computers reservation systems

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

Foreign ownership of air carriers

The Federal Aviation Act of 1958 prohibits foreign investors from taking more than a 49% stake in a US carrier and restricts the holding of voting stock to 25%. This latter limitation makes US rules on foreign ownership considerably more restrictive than relevant EU rules. Cross border investments are an important driving force behind liberalisation. Reducing foreign ownership restrictions would give better access for carriers to international capital, which in turn would contribute to growth, competitive effectiveness, and the promotion of competition and consumer

benefits. In the past the US Administration has advocated liberalisation of foreign investment restrictions, but thus far no progress has been achieved in this area.

Hatch amendment

t, which was signed into law on 24 April 1996, requires the Federal Aviation to apply security measures to foreign carriers, identical to those already applied by s serving the same US airports. Whilst the EU supports efforts to improve aviation n amounts to a breach of international agreements. Efforts to improve international d be handled, as has hitherto been the case, by multilateral negotiations especially ay not be the most effective in a non-US environment.

The Aircraft Repair Station Act of 1997

In 1997, a bill on foreign repair stations was introduced in the US Congress. This bill repeals FAA amendments (from 1988) to the Code of Federal Regulations and thus reverts to the more restrictive legal framework that was in force before 1988. The bill also states that all standards that apply to domestic repair stations will equally apply to foreign repair stations.

There does not seem to be any general reason on the grounds of safety for doing so. Therefore, if this bill is adopted, there might be a conflict with GATS specific commitments undertaken by the US regarding aircraft repair and maintenance services. Indeed, the US is bound not to introduce any market access limitation on the consumption abroad mode of supply of these services.

Maritime Transport Services

WTO negotiations on international maritime transport were suspended on 28 June 1996. Resumption is scheduled at the same time as the new round of negotiations on the liberalisation of services by the year 2000. In the meantime, WTO Members agreed to observe a standstill clause. The EU regretted that, during the negotiations, the US never tabled an offer relating to maritime transport services and firmly hopes that the US will endeavour to achieve a multilateral agreement in order to create a better environment for shippers and ship-operators. The EU maintains that the most effective means to achieve the widest possible liberalisation of the sector is through the WTO.

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

Coastwise trade

In particular, foreign-built (or rebuilt) vessels are prohibited from engaging in coastwise trade either directly between two points of the US or via a foreign port. Trade with US island territories and possessions are included in the definition of coastwise trade (Merchant Marine Act of 1920 - The Jones Act). Moreover, the definition of vessels has been interpreted by the US 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 tonnes (gt) must be carried out within the US if it is to engage in coastwise trade. A smaller vessel (under 500 gt) may lose its existing coastwise rights if the rebuilding abroad or in the US with foreign materials is extensive (46 U.S.C. 83, amendments of 1956 and 1960).

In the context of the negotiations for the OECD Shipbuilding Agreement, it was agreed that the Jones Act would be subject to a special review and monitoring procedures.

In addition, no foreign-built vessels 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 and many US ports are in need of dredging.

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 preferences 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.

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

The relevant legislative provisions are:

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

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

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

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

Alaskan oil cargoes

In November 1995 President Clinton signed into law legislation lifting the ban on the export of Alaskan oil, though reserving such shipments to US-flag vessels. This legislation represents a most unwelcome extension of the US cargo preference measures to commercial cargoes. The EU considers that this legislation is incompatible with the spirit of the Uruguay Round Ministerial Decision on Negotiations on Maritime Transport Services, is contrary to the OECD Common Principles of Shipping, and clearly represents a discriminatory and protectionist measure.

LIST OF FREQUENTLY USED ABBREVIATIONS

DoC	Department of Commerce
DoD	Department of Defense
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
FDA	Food and Drug Administration
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Government Procurement Agreement
MFN	Most-favoured nation
NAFTA	North American Free Trade Agreement
NASA	National Aeronautics and Space Administration
NTA	New Transatlantic Agenda
OECD	Organisation for Economic Co-operation and Development
TBT	Technical Barriers to Trade
TRIPs	Trade Related Aspects of Intellectual Property Rights
USDA	US Department of Agriculture
WTO	World Trade Organization