1994
REPORT ON US BARRIERS TO TRADE AND INVESTMENT

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CONTENTS

CHAPTER 1: INTRODUCTION

CHAPTER 2: HORIZONTAL ISSUES

CHAPTER 3: SECTORIAL BARRIERS AND IMPEDIMENTS

CHAPTER 1: INTRODUCTION

A Objectives of the Report

The present 1994 Report on United States Barriers to Trade and Investment is the tenth annual report in a series in which the services of the European Commission aim at presenting as comprehensive an inventory as possible of impediments for European industry and investors gaining access to US markets and carrying out economic operations within them. The report discusses the measures deemed to be a barrier or impediment to trade and investment, assesses where appropriate and feasible their economic impact, points out the EU's legal and political position, and refers to action which has been undertaken in the past or which is envisaged for the future. Some care has been taken to outline the effects of the Uruguay Round conclusion for the different sectors discussed in this year's report, although much will depend on how the Uruguay Round Agreements are translated into US national legislation.

Uruguay Round

As a means of identifying problems of access to and of operating within US markets, the European Commission services' reports have become a useful tool for focusing dialogue and negotiations, both multilateral and bilateral, on the elimination of the obstacles inhibiting the free flow of trade and investment. The 1994 report will in addition serve as a means of monitoring US measures to implement the Uruguay Round Agreements. In this connection it is hoped that the report can play a useful part in the formation of the US Administration's future policy on the issues highlighted.

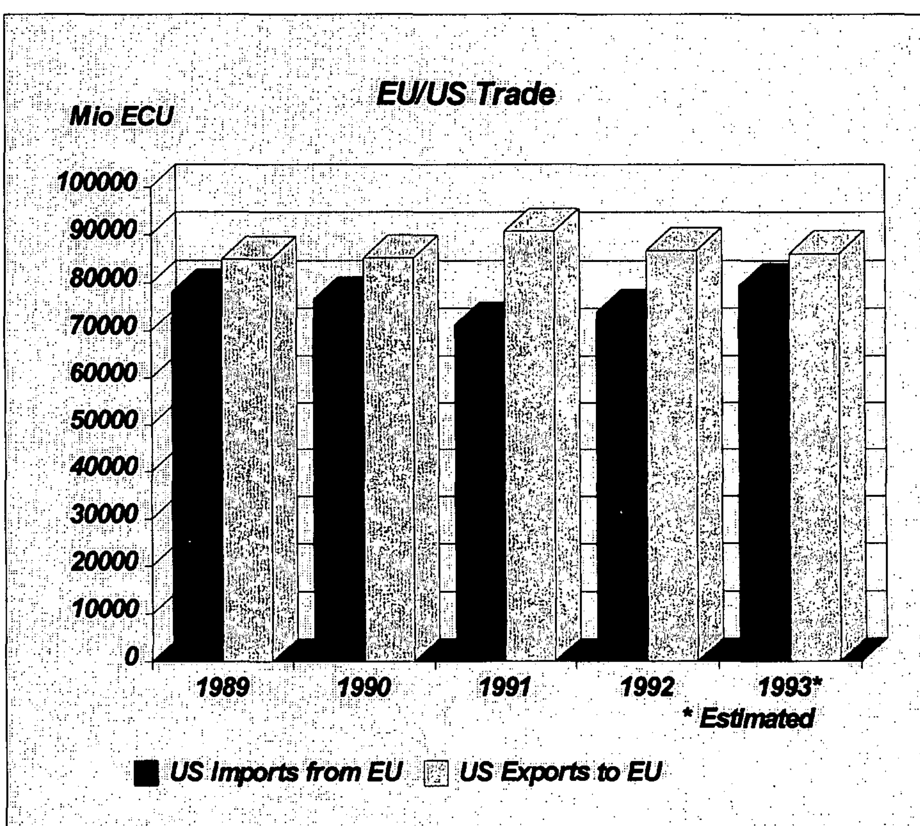
The report has taken into account developments until the end of March 1994.

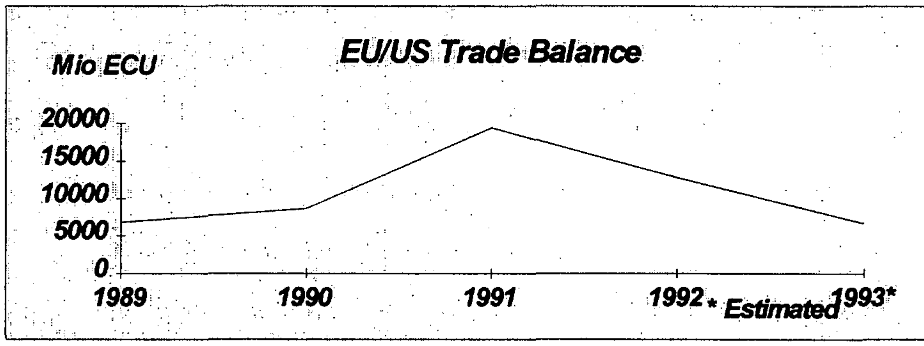
B The Economic Relationship

The report's stocktaking of US trade and investment barriers should be seen against an overall EU-US economic relationship which continues to improve. Bilateral EU-US agreements paved the way for a successful conclusion of the Uruguay Round in 1993. Both these and the Uruguay Round package, provided they are fully and faithfully implemented, will contribute considerably towards further reducing transatlantic trade barriers and impediments to trade.

Trade flows

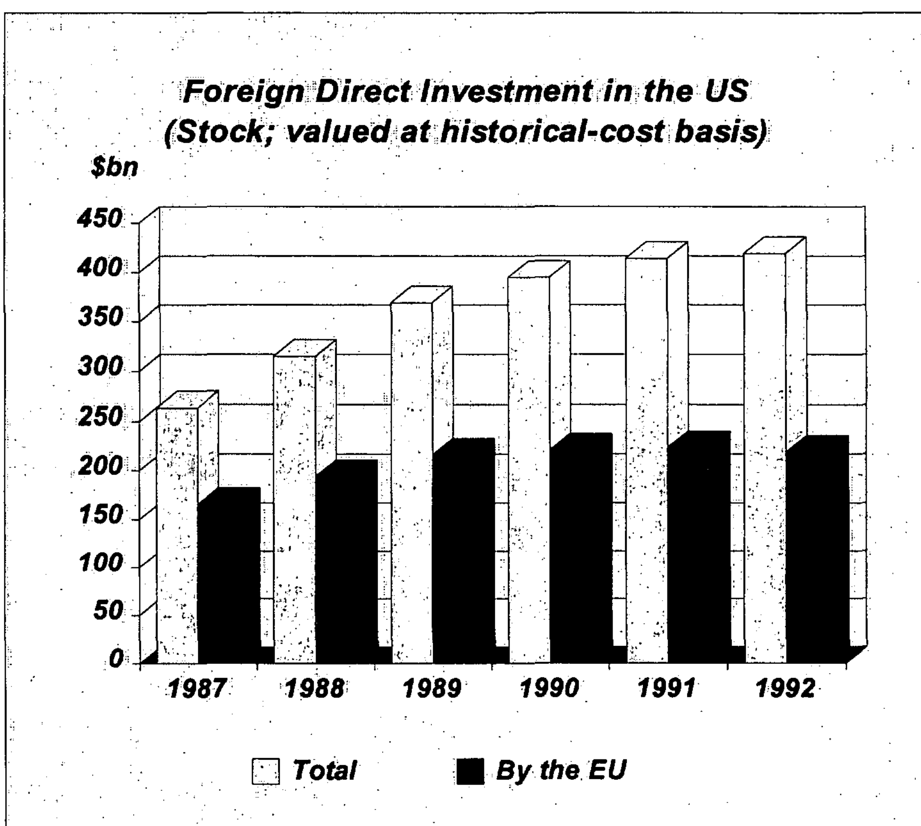
Together, the European Union and the United States are the world's largest trading partners, accounting for more than one third of world trade. Bilaterally, the EU and the US continued to be each others largest trade partner. In 1993, trade flows between them will have reached an estimated ECU 165 billion, constituting some 7% of world trade. Total exports from the EU to the US will have increased to a new peak of almost ECU 80 billion compared to ECU 73.9 billion in 1992. Imports from the US into the EU have remained almost the same at around ECU 86 billion. The increase in European exports to the US in 1993 will reinforce the tendency towards more bilateral balanced trade accounts as indicated in last year's report. However, there still remains a US trade surplus of ECU 6.5 billion.

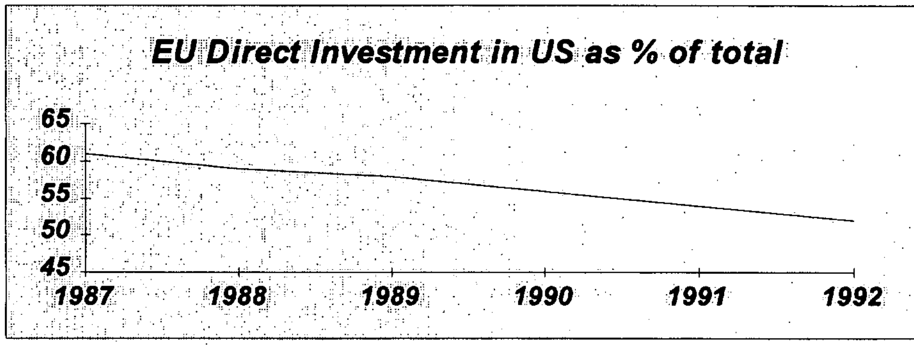


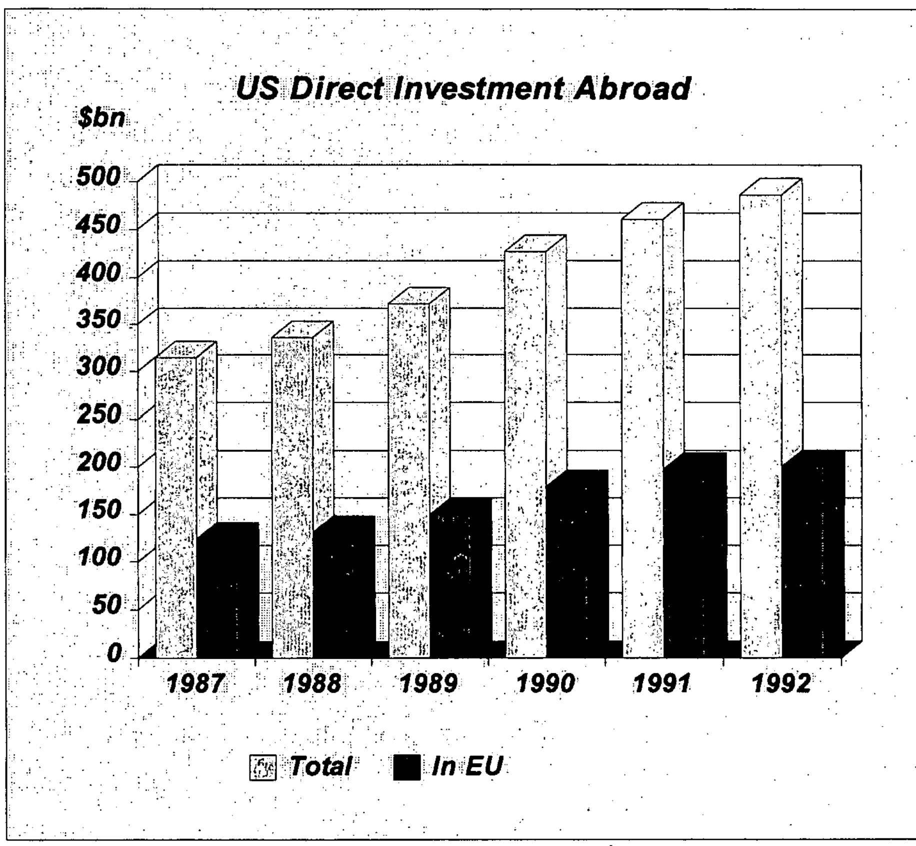


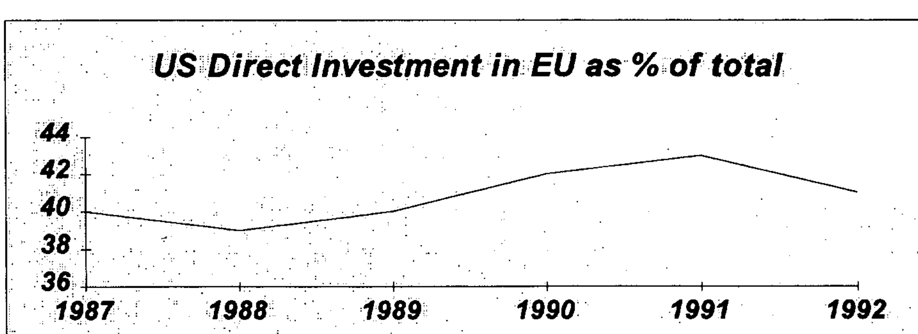
Foreign Direct Investment

The substantial foreign direct investment (FDI) flows between the EU and the US have in the past greatly increased their economic linkages. Although foreign direct investment in the US generally has slowed down, investors from the EU maintained in 1992 more than half of the FDI stocks in the US, equalling almost $220 billion. By contrast, US investors held in the same year $200 billion worth of FDI stocks within the EU, which constituted 41% of all US direct investment abroad.









European foreign direct investment in the US has considerable positive effects on the US economy. With regard to the US labour market, US affiliates of European companies employed 3.2% of the total workforce in the US in 1991, which in absolute figures amounted to almost

Economic benefits

3 million people. Also, according to the US Council of Economic Advisers' 1991 "Report to the President", European-owned firms in the US spend significant amounts on US R&D than US manufacturing firms.

New protectionism?

Economic interdependence between the US and the EU continues to grow. This in itself, however, does not prevent the two partners from taking up different views on economic issues and becoming engaged in conflictual situations. In this context, the EU follows with growing concern the proliferation of discussions in the US on the role that foreign-controlled companies should play in the US economy, and on the benefits for the US of opening up its markets for freer trade in goods and services. The potential positive economic impact of the successful conclusion of the Uruguay Round should not be endangered by a new protectionist philosophy in the disguise of ensuring industrial competitivity. Only recently, studies of the US International Trade Commission and the Washington Institute for International Economics independently came to the significant conclusion that US tariffs and quantitative restrictions would cost the American consumer more than 1% of gross domestic product. This illustrates that liberalised trade and investment are not zero sum games, but are principally beneficial to the nations involved. The present report nevertheless shows that continued efforts are necessary to further eliminate existing barriers and impediments to trade and investment in the US in order to open up US markets and to widen the scope of benefits both to the economy in the US and in the EU.

Market opening necessary

The EU is concerned about some recent policy developments in the US concerning the apparent gradual installation of an industrial policy, leveraged by switching funds from the US's large military and research expenditures. This report analyses in detail a significant number of barriers and impediments to international trade that the EU wants the US to remove. These barriers, some of which have been in existence for decades, reduce the benefits which can be gained from free trade, they cause distortions to the efficient flow of capital and investment and in many cases cause significant market distortions and losses of business to European firms in the US.

C Summary of Findings

Unilateralism endangers world trade system

As in previous reports, the persisting **unilateral elements in US trade legislation** have continued to be of major concern to the EU. A multilateral trade system which is to function to the benefit of its participants, could increasingly be endangered by continued unilateral US dispute settlement. No other major trading partner of the EU has similar trade legislation. The comprehensive multilateral dispute settlement mechanism which has been agreed upon in the framework of the new World Trade Organisation (WTO) will restrain the Contracting Parties from further having to resort to unilateral determinations in trade disputes, and will oblige them to bring their domestic legislation in conformity with all of the Uruguay Round Agreements. Contrary to this, the US have only recently undertaken to renew the so-called Super 301 legislation by way of a Presidential Executive Order. Such moves are not only indicative of an impetus in the US towards increased use of unilateral or bilateral measures, but are also an expression of a continuing debate on the scope for operating such measures alongside the present GATT and the future WTO dispute settlement system. The EU is extremely concerned about these adverse developments which eventually may bring European companies into the firing line, as is presently the case with the US retaliating against the application of the EU Utilities Directive in the telecommunications sector.

Extraterritoriality

The extraterritorial enforcement of US legislation impacting on trade is closely linked to the aspect of unilateralism. The extraterritorial reach of national legislation may not only provoke clashes with the sovereignty of trading partners, but may also lead to unsolvable legal conflicts for economic operators. In these circumstances, trade as well as investment may be negatively affected. Examples of the US legislation in point are the **Cuban Democracy Act**, **re-export controls** and the **Marine Mammal Protection Act**. There is no room in a multilateral trading system for one country imposing its own standards and its own policies on others, nor to claim 'consent rights' as in the case of a **Nuclear Co-operation Agreement** between the EU and the US.

National security also economic security?

The US continues to put forward **national security considerations** to justify trade and investment restrictions which rather pursue protectionist objectives. Measures range from limits on market share to procurement restrictions, such as those contained in **Berry Amendment** legislation, and from unilateral export controls to the screening of and possible prohibition of foreign direct investment as provided for by the so-called **Exon-Florio Amendment**. There is no question about the right of every sovereign country to take the necessary measures in defence of its national security. However, the EU is increasingly concerned that the rather vague and undefined US concept of national security is beginning to embrace aspects of **domestic economic security** as well. Also in this area, multilateral criteria should be developed. The EU will pursue the issue with the US as a matter of priority.

Full implementation a prerequisite

The **public procurement sector** has for years now been of particular sensitivity for European companies seeking access to US markets. The extensive discrimination or even total exclusion of non-US controlled companies in and from public procurement at Federal as well as State level by so-called "**Buy America**" legislation has led to considerable potential for conflict. A recent joint study by the EU and the US pointed out the extent of these measures. Excluding for the time being the telecommunications sector as well as state, municipal and other sub federal entities, the May 1993 **Memorandum of Understanding** between the US and the EU on government procurement has resulted in progress on this issue. The US have agreed to waive the application of the Buy America Act for goods, works and other services above certain thresholds at federal level and for electrical utilities. The EU is continuing negotiations with the US with a view to reaching a more comprehensive agreement on procurement dovetailed with a self-contained agreement on telecommunications procurement, the results of which could be incorporated into an expanded GATT Government Procurement Code. A prerequisite for this would, however, be full implementation by the US of the EU-US Memorandum of Understanding on public procurement, the revocation of presently applied retaliatory measures in this sector and on agreement that is balanced.

Tariff peaks only partially removed

As a result of the Uruguay Round negotiations, the overall US tariff burden on EU exporters will be reduced, and thus the issue of **high tariffs** has lost some of its importance. However, notably for products such as textiles, clothing, footwear, tableware, and glassware, some of which are burdened with tariffs of up to 40%, the EU has only partially succeeded in obtaining reductions. This also holds true for the question of classification of two-door multi-purpose vehicles, presently considered by the US as trucks with a 25% tariff applied when imported into the US. Although the US Court of International Trade in May 1993 ruled that two-door multi-purpose vehicle are passenger cars to which only a 2.5% tariff is applied, the US Government has appealed this decision.

Discriminatory US car taxes

US **tax legislation** may adversely affect trade and investment. Examples range from reporting requirements and corporate income taxation provisions to the issue of luxury and gas guzzler tax, as well as the CAFE payments on cars imported from Europe. The latter has been made subject to a GATT panel procedure the outcome of which is expected later this year.

Regulatory cooperation

The growing economic interdependence between the US and the EU increasingly makes apparent that the **multiplicity of standards** and standard-making procedures in the US, their sometimes lack of conformity with international norms, and the resulting fragmentation of the US market take on the character of impediments and even barriers to trade. The EU has engaged in consultations with the US with a view to advancing regulatory co-operation between each other through agreements on mutual recognition of conformity assessment and good laboratory practices, as well as beginning consultations in specified priority sectors. A successful conclusion of these endeavours would undoubtedly have considerable positive effects on European trade with the US.

US GATT compliance

The protection of **intellectual property rights** has been at the origin of several trade conflicts between the EU and the US. Notably the continuing discrimination of non-US products as provided for by Section 337 of the Tariff Act of 1930, despite a GATT Panel ruling to the contrary, is unacceptable to the EU. The Uruguay Round Agreement on Trade Related Intellectual Property Rights (TRIPS) resolve some of the issues in point where its provisions are fully and faithfully transposed into national legislation. Particularly, recourse by the US to Special 301 legislation with a view to unilaterally defending its industries' interests, has been rendered unnecessary. The EU will therefore closely monitor all US implementation legislation to this aspect.

Investment less attractive

There is a growing concern in the EU about the discussion in the US about **'condition' national treatment** of foreign-controlled economic operators. Thus, companies with non-US parents are treated differently to those with US parents as regards i.e. antitrust exposure of production joint ventures or the participation in federally funded R&D activities. This discrimination is brought about mainly by sectoral and cross-sectoral **reciprocity conditions** as well as economic **performance requirements**. If the trend notably in the US Congress towards more conditional national treatment were to prevail, it would seriously make European investment in the US less attractive and impact on the overall EU-US trade relations. In a multilateral context, proliferation of provisions conditioning national treatment would profoundly distort a major element of the global trade system, and eventually even lead to blurring the principle of Most Favoured Nation (MFN) treatment.

In the same spirit the EU is concerned about impediments to foreign service providers to obtain effective access to the service market in the US as well as the tendancy in the US to discriminate against foreign banks.

It is the legitimate objective of countervailing duties to offset competition distorting effects of subsidies bestowed in a foreign country on products entering the domestic market. However, the recent **application of US**

countervailing duties legislation to a significant part of the EU's steel exports to the US has assumed the character of a barrier to trade. This is because the US has not respected reasonable CVD/AD procedures and methodology. As a result, the EU had to request a GATT panel on the issue.

GATT panel under way

Also the application of **anti-dumping measures** against exports from the Community constitutes a serious barrier to trade for the companies concerned. While the principle of trade defence is enshrined in the GATT, its trade restrictive effect should be contained as much as possible. In this respect, the European Commission is particularly concerned as regards the measures taken by the US Department of Commerce concerning imports of certain steel products from the Community.

In sectors such as **agriculture and fisheries**, **services**, **telecommunications** and **broadcasting,** the successful conclusion of the Uruguay Round has brought some relief to conflictual situations, although to a differing degree. There remain in the US notably in the telecommunications, broadcasting and services sectors considerable obstacles which will have to be overcome to provide European industry with meaningful market access opportunities.

Other areas of concern are the direct and indirect support measures provided for the US shipbuilding and aircraft industries. In both sectors the EU urges the US to work on the basis of what has been achieved in the UR negotiations for a multilaterally agreed framework to reduce barriers and distortions, also in these important sectors.

Further US market opening necessary

To sum up, the impression has been reinforced that the US will have to continue efforts to open up home markets to live up to their own perception of representing "still the most open major trading nation in the world" (1993 Annual Report of the President of the United States on the Trade Agreements Program). In 1994, the EU in its turn will not cease to pursue the objective of securing a wider scope of market access for European industry to US markets.

CHAPTER 2: HORIZONTAL ISSUES

A Unilateralism in US Trade Legislation

1 General Remarks

Unilateralism ignores multilateral agreements...

Unilateralism in US trade legislation takes the form of either unilateral sanctions or retaliatory measures against "offending" countries, or natural or legal persons. These measures are unilateral in the sense that they are based on an exclusively US appreciation of the trade related behaviour of a foreign country or its legislation and administrative practice, without reference to, and often in open defiance of, agreed multilateral rules.

...and damages the world trading system !

The principal motivation behind this kind of unilateralism appears to be the opening up of foreign markets for US industry. For the US, this is seen as vital in order to cut the trade deficit and to prevent the economic distortions that foreign trade barriers allegedly cause. But unilateralism in US trade legislation has also always mirrored the US's limited confidence in, and discontent with, GATT rules and the multilateral dispute settlement process. In addition, Congress had the chance to respond to public demands for an active support of US business concerns by enacting unilateral trade provisions. However, the very nature of US unilateral trade legislation implies a real risk that the affected countries will adopt *quid pro quo* measures. Inevitably, such developments would considerably damage the multilateral trading system.

2 Provisions in Trade Legislation

Section 301 of the 1974 Trade Act as amended by the **Omnibus Trade and Competitiveness Act of 1986** authorises the US Administration to take action to enforce US rights under any trade agreement and to combat those practices by foreign governments which the US government deems to be discriminatory or unjustifiable and to burden or restrict US commerce. Even in those areas covered by GATT and its dispute settlement mechanism, the provision still requires the US to take unilateral action against its trading partners, without any prior authorisation of the GATT Contracting Parties. Retaliation is thus rather mandatory than discretionary.

The Omnibus Trade and Competitiveness Act of 1988 also introduced the so-called **"Super 301"**. "Super 301" is the term of art given to a special initiation procedure for unfair foreign trade practice investigations following the Section 301 procedure. On the basis of the information contained in an annual National Trade Estimates Report which identifies foreign trade restrictions and estimates their impact on US commerce, the USTR is required to identify US trade liberalisation priorities and priority foreign countries against which investigations and eventually trade action are officially to be initiated. These Super 301 procedures could only have been introduced in 1989 and 1990. In 1993 and 1994, proposals to reinstate a Super 301 provision were introduced into the Senate (eg. **Trade Enforcement Act**, S. 90; **Trade Compliance Act**, S. 268; **Super 301**, S. 301, **Bancus/Danforth Bill**, S. 1898). Since none of them had been approved by Congress so far, on 3 March 1994 President Clinton issued an **Executive Order on Identification of Trade Expansion Priorities.** Referring to the lapsed Super 301 provision, the Executive Order requires the US Trade Representative to identify "priority" unfair trade practices from "priority" countries and self-initiate Section 301 cases against them.

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

Section 301 contradicts GATT

The unique feature of the family of "301" legislation is that it permits unilateral determinations and action, or threats thereof, inconsistent with, and in clear contradiction to, the multilateral trading system. The GATT does not allow for any unilateral interpretation of the rights and obligations of contracting parties, nor for unilateral action by any one contracting party aimed at inducing another contracting party to bring its trade policies into conformity with the General Agreement. Under the GATT dispute settlement procedures, any trade retaliatory measure has to be authorised by the Council.

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

- Subsidies to wheat flour in 1975;
- Preferential tariffs for citrus fruits in 1976;
- Export subsidies for pasta products and production subsidies for canned fruit in 1981;

- Accession of Spain and Portugal to the EU leading to reduced import quotas for US agricultural products in 1986;
- Oilseed subsidies in 1987;
- Ban of hormones in meat in 1987.

The continuing retaliation measures in the case of the ban of hormones in meat is plainly contrary to GATT rules (see for more details Chapter 3A5).

Telecom products and services

The objectives of the **Telecommunications Trade Act** of 1988 are to "provide mutually advantageous market opportunities", to correct imbalances in market opportunities, and to increase US exports of telecommunications products and services in so far as the Act allows for the identification of "priority countries" for negotiation and the threat of unilateral action (e.g. termination of trade agreements, use of Section 301 and bans on government procurement) if US objectives are not met. To meet these objectives the Act furnishes provisions analogous to "Super 301". The EU continues to be designated a priority country under the Act. However, in February 1992 the US Trade Representative said that sanctions were not felt appropriate for the time being as negotiations in the telecommunications sector were ongoing.

No negotiations under threat of retaliation

Pursuant to the 1987 **Green Paper on Telecommunications**, EU legislation which liberalises procurement by telecom utilities, introducing a high level of transparency and leading to improved market access, the sale of terminal equipment, and the provision of value-added and data services, is now in force. Liberalisation in the satellite and mobile telecommunications sectors is also under way, and a review is currently being conducted of the entire service sector by the European Commission. In view of this the EU cannot accept that the US unilaterally determine what constitutes a barrier or when "mutually advantageous market opportunities" in telecommunications had been obtained. Nor can the EU accept US attempts to conduct negotiations under the threat of unilateral retaliation.

Title VII of the **Omnibus Trade and Competitiveness Act of 1988** stipulates that US procurement of goods from signatories to the GATT Government Procurement Code which are "not in good standing" with the Code shall be prohibited. A procurement prohibition is also mandated against any country which discriminates against US suppliers in its procurement of goods or services, whether or not covered by the Code, and where such discrimination constitutes a "significant and persistent pattern or practice" and results in identifiable injury to US business. To this effect, the US President is required to publish an annual report on those foreign countries which discriminate against US products or services in their procurement.

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

Since the public procurement sector will be covered by the new World Trade Organisation (WTO), its reinforced Dispute Settlement Procedure will also apply to those areas of government procurement which are not yet covered by the GATT Government Procurement Code. The US will therefore have to resort to the WTO dispute settlement procedure regardless of exclusions or exceptions in its schedule of concessions.

Continuing trade retaliation

By a **determination of the US President of 27 April 1992**, the EU and certain Member States were identified as countries alleged to discriminate in public procurement against US products and services. Reference was made notably to Article 29 of the Utilities Directive (EEC/90/531). The President's determination also set 1 January 1993 as the date on which sanctions would be effective against the EU if the discriminatory provision of the Utilities Directive was applied. On 31 January 1993, the US Trade Representative announced that a prohibition of award of contracts by Federal agencies for products and services not covered by the GATT Government Procurement Code from some or all of the Member States of the European Union would enter into force as of 22 March 1993. In addition, the US Trade Representative immediately solicited public comments concerning the impact of other possible actions restricting imports of telecommunications and power generating equipment from the European Union, and held out a prospect of a study on the desirability and feasibility of the US withdrawing from the GATT Government Procurement Code.

On 25 May 1993, the EU and the US concluded a bilateral agreement which waives Article 29 of the Utilities Directive for a number of procurement utilities sectors, but which failed to include the telecommunications sector. On 21 April 1993 the EU and the US reached an interim agreement which waives Article 29 of the Utilities Directive for a number of procurement utilities sectors, but it failed to include the telecommunications sector. Because of this unresolved issue, the US Government decided on 28 May 1993 to impose limited sanctions against the EU relating to US federal procurement below minimum thresholds ($ 176,000 for goods and services and $ 6.5 million for public works), which are still in place. This leaves a number of European companies unable to bid for public procurement contracts, such as the supply of a laser interferometer to the National Institute of Science and Technology. In reaction, on 8 June 1993 the EU adopted measures to similarly restrict access for US tenderers in respect of certain contracts awarded by Member States' public authorities.

3 Comments

Since last year's report, the landscape of unilateral US trade provisions has remained substantially unchanged: Unilateralism has continued to be a characteristic element of US trade laws. The EU therefore considered it to be an absolute necessity in the UR to overcome unilateralism and the defiance of GATT panel rulings by Contracting Parties, and to strengthen the multilateral system by setting up the new World Trade Organisation (WTO).

The obligation of Contracting Parties to ensure conformity of their domestic legislation, regulations and administrative procedures with all of the Uruguay Round Agreements (Art. XVI.4 of the **Agreement establishing the World Trade Organisation**) is an essential element of the WTO's legal structure, combined with the new integrated dispute settlement procedure (DSP).

Binding dispute settlement procedures

The DSP is the core element of the WTO. The improvements of the DSP in the form of stringent decision making procedures will provide an effective mechanism to any infringements of any part of the Uruguay Round Agreement. Paragraph 23 of the **Understanding on Rules and Procedures Governing the Settlement of Disputes** contains a binding commitment by the Contracting Parties that they will have *"recourse to, and abide by, the rules and procedures"* of the DSP. Thus, the DSP renders the use of any unilateral trade measures on matters covered by the WTO illegal. Accordingly, the Contracting Parties will also have to revise their trade policy instruments to the extent that they contain elements of unilateralism. For the US, this means that Section 301 and its hybrids will have to undergo revision in order to ensure compliance with the new WTO dispute settlement structure. In view of this, it is a matter for regret that the US Administration has felt it necessary to re-enact the Super 301 provision which is objectionable in principle. The EU looks to the US to conduct its trade policy in all respects according to the requirements of the multilateral trade system, including the principle of non-discrimination, and avoiding unilateral trade sanctions.

This also holds true for sectors which become more and more interfaced with trade.

No proliferation of Section 301

Indeed, the US Trade Representative has already made public his intention to consider whether non-WTO covered issues could be subjected to new initiatives for Section 301 provisions, such as a "blue 301" for labour rights and human rights and a "green 301" for environmental protection. The EU is concerned about such initiatives, since they will inevitably lead to the same problems as experienced in the past with the old family of "301" legislation.

B Enforcement of US Legislation outside US Territory

1 *The Principle*

For reasons of domestic and foreign policy, the US has adopted a number of laws which are to some extent applicable outside US territory. In some cases the EU does understand the underlying reasons for, and might agree with, the objectives of these laws. However, it does not agree with the measures by which these objectives are being achieved. The enforcement of US legislation outside US territory can expose EU enterprises to unjustified hardships and conflicting requirements. The extra-territorial scope of US legislation affects *inter alia* importers and exporters based outside the US, who have to comply with US export and re-export control requirements and prohibitions; US owned or controlled businesses in Europe which have to comply with US foreign policy trade legislation, for example the Cuban Democracy Act; as well as manufacturers, who have to keep track of end-users or potential misusers of sensitive items. It is generally recognised that the extra-territorial application of US laws and regulations may have a serious effect on international trade and investment if and when they expose foreign-incorporated companies to conflicting legal requirements. Moreover, in many instances the extra-territorial application of certain laws implies an intention to override the laws or fundamental policy of a supranational entity, or other country, such as the EU and its Member States, within its own territory by the policy or laws of the US. This is clearly contrary to generally accepted principles of international law. Accordingly, many close trading partners of the US, such as Canada and certain Member States of the EU have "blocking statutes" in order to preclude the extra-territorial application of foreign legislation within their territory.

Conflicting requirements

2 *Illustrative Cases*

Export controls

One of the most blatant and problematic examples of extra-territorial application are the US **Export Administration Regulations** (EAR), whose legislative authority was the **Export Administration Act of 1979** (EAA), as amended. The authority granted under the EAA expired on 30 September 1990 after which the President invoked his authority, including his authority under the **International Emergency Economic Powers Act of 1977** (IEEPA), to continue the system of controls that had been in place under the EAA. The EAR, among other things, require companies incorporated and operating in EU Member States to comply with US re-export controls. This includes compliance with US prohibitions on re-exports for reasons of US national security and foreign policy subject to US jurisdiction. While the extra-territorial nature of these controls has repeatedly been criticised by the EU and its Member States, notably during the Siberian pipeline dispute of 1982, they continue to be applied.

Sanctions against foreign companies

Furthermore, serious concerns have also been raised by the **1988 US Trade Act's** amendment to Section II of the EAA providing for sanctions against foreign companies which have violated their own countries' national export controls, if such violations are determined by the President to have had a detrimental effect on US national security. The possible sanctions consist of a prohibition of contracting or procurement by US entities and the banning of imports of all products manufactured by the foreign violator. These sanctions are of such a nature that they must be deemed contrary to the GATT and its Public Procurement Code.

Embargoing Cuba

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

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

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

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

The Cuban Democracy Act and the Cuban Assets Control Regulations are enforced by the Office of Foreign Assets Control (OFAC). A list of individuals and companies which do business with Cuba (the SDN list) is maintained. The OFAC can deny authorisation to any financial transaction that the OFAC suspects to be linked indirectly or through various means to a Cuban business. Furthermore, European companies are reporting lengthy OFAC procedures, which tend to harm the operation of normal business between non-US companies.

The CDA aims at closing a loophole which allowed foreign subsidiaries of US companies to make $583 million in Cuban operations, in 1991. US subsidiaries abroad have requested Treasury licences for $718 million of trade with Cuba. The impact of the CDA upon EU trade and investment with Cuba will probably affect a fraction of that amount.

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

EU opposition to Cuban Democracy Act

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

Furthermore several European airlines operating flights to Cuba have their **reservation databases** in the US; however, due to the rules of the Cuban Democracy Act, these flights are not displayed. Apart from the commercial implications, these airlines also face the danger of incurring a fine, since the EU rules for Computer Reservation Systems (CRS) require the information displayed to be complete. Both the Treasury and DoT are aware of the problem, and it was also brought to the attention of the State Department at the EU-US Sub-cabinet meeting in February 1994. As a consequence, with regard to one CRS, Gallileo, the problem appears to be solved.

The EU recognises that the extra-territorial application of US laws and regulations also has the effect of prohibiting non-US owned or controlled subsidiary companies incorporated and domiciled outside the

US from doing business with Cuba. Thus, the US Treasury Department blocked a payment made through the Bank of New York from a European company to another non-US owned company based on the Trading with the Enemy Act. Such extensive application of CDA rules could affect many European companies which engage in legitimate transactions with Cuba.

The tuna - dolphin dispute

The US **Marine Mammal Protection Act of 1972** (MMPA), as amended, aims at protecting marine mammals, particularly dolphins. The Act progressively reduces the acceptable level of dolphin mortality in US tuna-fishing operations in the Eastern Tropical Pacific Ocean and provides for sanctions to be taken against other countries which fail to apply similar standards for dolphin protection. "Primary" embargoes are currently being applied to imports of certain yellowfin tuna products from Mexico and Venezuela. "Secondary" embargoes on yellowfin tuna products are imposed on imports from "intermediary nations" - namely, countries which are exporting to the USA and have failed to certify that they have not imported from the primary embargoed countries during the preceding six months.

Italy is the only EU Member State currently subject to a secondary embargo. At the time of the imposition of the embargo, the value of frozen yellowfin tuna exports affected by the embargoes was estimated at some ECU 5.5 million. These embargoes have had a negative impact on the image of EU products and have contributed to the disturbance of the EU tuna market.

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

GATT panel rules against US

At the request of Mexico, as a primary-embargoed country, a GATT Panel has reported on the terms of the MMPA. The Panel considered that the US practices were not in conformity with GATT Articles III and XI and that the GATT-illegal and unilateral trade elements of the MMPA should be repealed. The EU fully agrees with this analysis along with most GATT Contracting Parties. However, the Panel's report has not yet been adopted. Consultations with the US have taken place, but they have failed to produce any agreement. Because of this lack of progress, the EU requested the establishment of a further GATT Panel. This Panel's proceedings are currently under way and the Panel's report should be available shortly.

Consent rights

A new problem caused by the extra-territorial application of US law has arisen with regard to the EU-US negotiations for the conclusion of a new **Nuclear Cooperation Agreement**. The US side has underlined that, in these negotiations, it is bound to observe the requirements of the 1978 US **Nuclear Non-Proliferation Act** (NNPA). These requirements include an obligation for the US to obtain certain "consent rights" over reprocessing, enrichment and over certain storage and alterations in form and content of nuclear material supplied in accordance with a nuclear agreement. Other requirements relate to such matters as a right to seek the return of nuclear items (in the event of a basic infringement of the agreement), extension of the agreement to non-American items in certain cases ("contamination"), a right to decide on the safeguardability of new types of installations and the maintenance of intrusive rights in perpetuity. This means that the future bilateral EU/US agreement should, in the view of the US side, be subordinate to US domestic law.

3 Comments

The continued extra-territorial application of US laws contributes to serious jurisdictional conflicts between the US and the EU and its Member States. Quite obviously, it has a negative influence on the overall bilateral trade and investment climate.

Legal uncertainty

Individual enterprises whose operations are subject to the extra-territorial scope of certain US legislation suffer severe and unwarranted economic discrimination. In addition, they have to cope with a considerable amount of legal uncertainty as they are often subject to contradictory requirements of US and their respective national laws.

Blocking statutes

Despite frequent international criticism, the US has so far shown no willingness to bring this aspect of its legislation in line with generally accepted principles of international law. The EU will continue to reiterate its opposition to the extra-territorial provisions of US law. It will continue to raise the issue in the appropriate fora, in particular the OECD Committee on International Investment and Multinational Enterprises. The EU and its Member States are closely monitoring the effects of the US extra-territorial legislation. Some Member States are considering adopting blocking statutes similar to those of the United Kingdom and Canada which would protect their businesses from US requirements and would give them a legal basis to plead "foreign government compulsion" in US courts.

C Impediments Through National Security Considerations

1 Some General Remarks

Sovereign nations have a right to take any measure to protect their essential national security interests. This has also been widely recognized by multilateral and bilateral trade agreements. However, it is in the interest of all trade actors, as for example manifested by the National Treatment Instrument of OECD as well as by its Codes of Liberalization, that such measures are prudently and sparingly applied.

Disguised protectionism?

There is an inherent danger that restrictions to trade and investment that are justified on national security grounds are, in reality, merely expressions of protectionist policies.

The US has always been at the forefront of developing national trade laws and regulations to implement and enforce national security policy objectives. Thus, US trade legislation includes various provisions which refer to national security considerations to justify restrictions on foreign imports, procurement, exports and investment. In his 1993 Trade Policy Report to Congress, the US Trade Representative reinforced this position, indicating that the US will regard its national security as interwoven with domestic economic strength.

2 Restrictions Applied in Various Fields

a) *Import restrictions*

On the grounds of national security, the US can restrict imports from third countries. Such restrictions are triggered by US industry petitions under Section 232 of the **Trade Expansion Act of 1962**. Protective measures can be used for an unlimited period of time. The Department of Commerce investigates the effects of imports which threaten to impair national security either by quantity or by circumstances. Section 232 is

Economic welfare of a company

supposed to safeguard the US national security, not the economic welfare of any company, except when that company's future may affect US national security. The application of Section 232 is not dependent on proof of injury to US industry.

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. An example of this is the (US-Japan-Taiwan) Voluntary Restraint Agreement on machine tools which has been extended to the end of 1993 for "high tech" machine tools. It was announced that if during the phase-vout period imports from major machine tool supplier countries were capturing an increasing US market share thus undermining the integrity of the US machine tool revitalization program, the US Government would consider taking appropriate remedial action. The EU will continue to closely monitor the impact of these restrictions on its exports of machine tools to the US.

b) *Export restrictions*

Repeated conflicts

A comprehensive system of export controls was established, under the **Export Administration Act of 1979** (EAA), and continued under the **International Economic Emergency Powers Act of 1977** to prevent trade to unauthorized destinations. This system is also used to enforce US foreign policy decisions and international agreements on non-proliferation of certain types of goods or know-how. It has repeatedly created a conflict of jurisdictions and requirements for European companies whenever their products or exports have had a component or an element controlled under US export control regimes.

Export licenses

The Member States of the EU have their own export control systems and cooperate with the US in the COCOM which is presently being re-negotiated. This makes the extra-territorial characteristics of the EEA mentioned in Chapter 2B1 and the **Arms Export Control Act** all the more inappropriate. Furthermore, the EU has in the past expressed its concern with regard to the unilateral determination made by the US concerning export licences for products made in the EU. The EU has in particular protested because the US considers the subsidiary of a US company incorporated in one of the Member States of the EU as a US company and as such subject to US jurisdiction for actions within the EU.

It is therefore welcomed that the US have shown some interest in a working-level exchange of information with the EU, because it has launched a common export control regime. Likewise, the US and the Member States of the EU are taking part in "non-proliferation" treaties, such as on nuclear, chemical and biological warfare, and missile technology non-proliferation. Appropriate early consultations should allow both legitimate trade to take place and an efficient prohibition of exports to unauthorized destinations.

c) *Procurement restrictions*

National security encompassing economic security?

Procurement by the Department of Defense (DoD) is regarded as one way of addressing the issue of the maintenance of an industrial base capable of meeting national security requirements. According to the 1991 DoD Report to Congress on the Defense Industrial Base, *"national security includes economic security and requires that DoD have an assured and reliable source of supply of defense material in peace time,* *crisis, and war, in an era of declining budgets and increasing of defense markets".*

Although the concept of national security can be invoked under Article VIII of the GATT Government Procurement Code to prohibit national treatment in the defense sector to foreign suppliers, the use of national security considerations by the US has led in practice to an unjustified further substantial reduction in the scope of DoD supplies covered by the GATT Government Procurement Code.

The 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. It is now known as the **Berry Amendment** and its scope has been extended to secure protection for a wide range of products only tangentially related to national security concerns - for example, the GAO 1992 ruling that the purchase of fuel cells for helicopters is subject to the Berry Amendment fibre content provisions, and the withdrawal of a contract to supply oil containment booms to the US Navy because of the same textile restrictions.

Nevertheless, the **Berry Amendment** allows for some exceptions when:

- the purchase does not exceed $25,000;
- satisfactory quality and sufficient quantity cannot be supplied when needed at US market prices;
- procurements outside the US are in support of combat operations, or are by vessels in foreign waters, or are emergency procurements, or procurements of perishables by establishments outside the US;
- speciality metals or chemical warfare protective clothing are procured outside the US to comply with agreements with foreign governments either requiring the US to make purchases to offset sales, or in which both governments agree to remove barriers to purchases of supplies from each other.

It is, however, not clear whether the DoD actually makes use of these possibilities for waivers. Further DoD procurement restrictions are based on the **National Security Act of 1947** and the **Defense Production Act of 1950** which grant authority to the President and the Secretary of Defense to impose restrictions on foreign supplies to preserve the industrial mobilization base and the overall preparedness of the US. This does not apply to Canada because it is considered to be part of the North American Mobilization sphere.

Finally, Congress can adopt Buy America restrictions allegedly based on national security considerations. Congress makes use of this facility by providing the DoD Authorization and Appropriation Acts with additional Buy America requirements for the Department of Defense each year.

Bilateral arrangements

US Allies including certain EU countries have concluded with the US various **Cooperative Industrial Defense Agreements** or **Reciprocal Procurement Agreements** (MOUs) (UK/1975, France/1978, Germany/1978, Italy/1978, Netherlands/1978, Portugal/1978, Belgium/1979, Denmark/1980, Luxembourg/1982, Spain/1982, Greece/1986). These agreements provide for a blanket waiver of the Buy America Act by the Secretary of Defense with respect to products produced by the Allies. They aim to promote more efficient cooperation in research, development and production of defence equipment and achieve greater rationalization, standardization, and compatability. However, the US Administration (DoD and USTR) can determine the standing of an Ally with respect to its discrimination against US products under the bilateral agreements and rescind the blanket waiver of the Buy America Act. In addition, Congress is unilaterally modifying the coverage of MOUs by imposing ad hoc Buy America requirements during the annual budget process as legal norms overriding the MOU itself. According to EU industrial sources, there are indications that US procurement officers disregard the exemption of Buy America restrictions for MOU countries, eg. in the case of fuel-cells and steel forging items.

Protection of domestic industries

A DoD report to Congress in 1989 said that many of the procurement restrictions *"provide protection and guaranteed business to US industries without any requirement or incentives for the industry to modernize and become competitive"*, and therefore do not even fulfil the domestic objective of maintaining an essential US industrial base. The Department of Defense therefore concluded that in many cases, restrictions should be terminated and Congress should instead support a Domestic Action Plan or National Stockpiling Programs. The main arguments against procurement restrictions are that they:

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

Elimination of 'Buy America' necessary

During the Uruguay Round negotiations, in the Market Access Group - Tariff and Non-Tariff measures - and in the Procurement Informal Negotiating Group, the EU requested that the US eliminate Buy America restrictions applicable to broad categories of products regardless of their relation to defence issues. The US denied that there was any abuse of the security exemption in the General Agreement and the Government Procurement Code. The US indicated that they were ready, in the context of the implementation of the Government Procurement Code, to disseminate more guidance to US procurement officials for identifying

Code-covered procurements and national-security-restricted procurements in "Commerce Business Daily" notices, to ensure clear and consistent identification of national security procurements, and to develop concordances between national clarification systems, including the US Federal Supply Classification System and the Harmonized System.

d) Investment restrictions

Screening of acquisitions

Section 5021 of the 1988 Trade Act, the so-called **Exon-Florio amendment**, authorises the President or his nominee to investigate the effects of any merger, acquisition or takeover which could result in foreign control of legal persons engaged in interstate commerce in the US on US national security. This screening is carried out by the Treasury-chaired **Committee on Foreign Investment in the US** (CFIUS). Should the President decide that any such transactions threaten national security, he can take action to suspend or prohibit these transactions. This could include the forced divestment of assets. There are no provisions for judicial review or for compensation in the case of divestment.

A number of bills intended to extend the scope of Exon-Florio provisions, or to widen the concept of national security to purely economic matters, have been tabled in Congress. The **Fiscal Year 1993 Defense Authorization Act** has strengthened Exon-Florio procedures by requiring a report by the President to Congress on the results of each CFIUS investigation and by including, among other factors to be considered, *"the potential effect of the proposed or pending transaction on US's international technological leadership in areas affecting US national security"*. This economic criterion is new.

Involvement of foreign governments

Since 1992, there is a statutory requirement that an Exon-Florio investigation be made if a foreign government 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. At the beginning of 1994, the Office of International Investment proposed implementing rules to the amendments to Section 721 of Title VII of the Defense Production Act of 1950. The proposed rules will expand the scope of facts the President will have to take into consideration when making a Section 721 determination. Thus additional requests for information will be presented to entities controlled by foreign governments.

While the EU understands the wishes 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 the

Going beyond essential security interests

wide scope of the statute, the lack of a definition of national security and the uncertainty as to which transactions are notifiable to the attention of the US Administration. Although the US Treasury's implementing regulations, which were published in November 1991, do provide some additional guidance on certain issues, these uncertainties remain. Coupled with the fear of potential forced divestiture, this has in practice meant that 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 will be subject to pre-screening.

OECD efforts in question

The Exon-Florio provisions could 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 Liberalization of Capital Movements. Such an approach would also harm common EU-US efforts to establish and implement multilateral disciplines on trade-related investment agreements (TRIMs) and to enhance liberalization measures and instruments in the OECD.

Investment restrictions

With regard to **foreign ownership**, the US has told the OECD of a number of additional restrictions, which it justifies "partly or wholly" on the grounds of national security. Foreign investment is restricted in coastal and domestic shipping under the **Jones Act** 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 (see also Chapter 3D3). Foreign investors must form a US subsidiary for exploitation of deep water ports and for fishing in the Exclusive Economic Zone (**Commercial Fishing Industry Vessel Anti-reflagging Act of 1987**). Licences for cable landings are only granted to applicants in partnership with US entities (**Submarine Cable Landing Licence Act of 1921**).

Under the **Federal Power Act**, any construction, operation or maintenance of facilities for the development, transmission and utilization 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 organized under the laws of the United States. The same applies under the **Geothermal Steam Act** to leases for the development of geothermal steam and associated resources on lands administered by the Secretary of the Interior or the Department of Agriculture. As regards the operation, transfer, receipt, manufacture, production, acquisition and import or export of facilities which produce or use nuclear materials, the **Nuclear Energy Act** requires that a licence be issued but the licence cannot be granted to a foreign individual or a foreign-controlled corporation, even if there is incorporation under US law.

The conveyance of public lands to foreign investors or the use of public lands by foreign investors for the exploitation of energy resources such as oil and gas, coal, and certain other minerals, is limited to corporations organized under US federal or state laws, provided that the country of the foreign investor provides like or similar privilege to US citizens or corporations (Reciprocal Investment Privileges Requirement: **Mineral Leasing Act of 1920**, **Mineral Leasing Act for Acquired Lands of 1947**, **Geothermal Steam Act of 1970**). This applies also to the acquisition of rights-of-way for oil or gas pipelines across onshore federal lands. However, the Reciprocal Investment Privileges Requirement appears to be interpreted by the Department of the Interior and the US courts in a flexible way so that at present no country is considered to deny reciprocal investment privileges.

According to the **Naval Petroleum Reserves Act** the leasing of mineral rights may be denied to foreign nationals, or corporations in which such citizens are stockholders, if the foreign country does not allow US citizens or corporations to lease public lands. Leases for minerals in the Outer Continental Shelf may be held by aliens lawfully admitted for permanent residence in the US or by associations of such resident aliens (**Outer Continental Shelf Lands Act**).

D Public Procurement

1 An Introduction

International obligations overridden

Discriminatory government procurement provisions known as "Buy America" are implemented in the US at Federal, State and even lower levels. Under the US doctrine of international trade law, domestic law such as the **Buy America Act of 1933** overrides the US's international obligations. The practical application of this principle means that Buy America provisions apply unless waived in response to specific international obligations of the US, such as the GATT Government Procurement Code. The outcome of the continuing amendments to the Buy America Act is a lack of transparency and predictability in the implementation of US obligations under the GATT.

Buy America restrictions may take several forms. Some straightforwardly prohibit public sector bodies from purchasing goods from foreign suppliers. Others establish local content requirements ranging from 50% to 65%, while others still extend preferential terms to domestic suppliers, the price preference ranging anywhere from 6% to 50%.

As in earlier years, the US Congress enacted in fiscal year 1993 a number of **ad hoc Buy America provisions** when adopting the budget of the different Federal departments and agencies. These provisions extend the scope of the Buy America Act of 1933 as amended and affect primarily products/sectors not covered by the GATT Government Procurement Code, in particular in the defense field. In the latter, they represent unilateral changes to the Memoranda of Understanding (MOU) signed in the defense cooperation field between foreign governments and the US Administration (see Chapter 2C2c). In 1993, the EU presented two demarches to the US Department of State and the Department of Defense on Buy America provisions raising the point of procurement restrictions for steel plate and oil containment booms by the Department of Defense.

Liberalisation of public procurement markets

The EU and the US have liberalized their procurement markets, bilaterally through the conclusion of a Memorandum of Understanding in May 1993. Under the bilateral agreement, barriers to EU companies to bid to supply contracts for goods, works and services with US central government agencies ("A" agencies) were removed as well as those for goods and works for six federally financed electrical utilities. The US also made a commitment to start an internal process to get a maximum coverage of sub-federal entities and the elimination of Buy America provisions in a subsequent agreement. It was agreed to aim for additional coverage of the sub-federal (Category "B") and public utilities (Category "C") level in the negotiations for a new GATT Procurement Agreement (GPA).

Telecommunications remain bone of contention

However, public procurement in the telecommunications sector remains a bone of contention between the EU and the US. Sanctions imposed by the US in May 1993 under Title VII of the **1988 Trade Act** are still in force against EU bidders for certain federal contracts. The US sanctions prevent European bidders from 9 Member States from participating in federal agency below $176,000 for supplies and services contracts and below $6.5 million for construction. The US estimates the effect of sanctions on EU business to be of the order of $19 million. The counter-sanctions implemented by the EU on 8 June 1993 are also still in force against US bidders for supplies, works and services; they mirror the US sanctions in that they apply to below-threshold procurements.

US public procurement figures

US procurement at Federal level totals approximately $210 billion annually. The value of US procurement covered by the GATT Government Procurement Code as reported by the US has declined from $18.8 billion in 1985 to $13.1 billion in 1990, whereas contracts not within the scope of the Code have increased over the same period. This potential US market for EU exports is significantly affected by Buy America restrictions.

Ongoing negotiations

Within the framework of the GATT, a new Agreement on Government Procurement (GPA) is being negotiated. In this context, agreement has already been reached to expand GPA coverage to new entities at federal level, e.g. the Department of Transportation and the Department of Energy, and to include procurement in services, whereas negotiations on the inclusion of sub-federal entities (Category B) and on utilities (Category C) are continuing. It is rather doubtful whether the new GPA will eventually dissolve existing uncertainties as to the actual scope of the exemptions authorized for reasons of public interest and national security. Similarly, differences of interpretation between the EU and the US may remain regarding the case of the sonar mapping system procurement. The US continues to block the adoption of the respective GATT panel report of 1992, which establishes that the exclusion of a EU bidder from the procurement of a mapping system for the US National Science Foundation infringed upon US GATT obligations on national treatment. In the GPA negotiations, the US have now filed a reservation with a view to excluding such procurement from the scope of a new GATT Agreement on Government Procurement.

2 The relevant Legislation in Point

a) Federal Buy America Legislation

The **Buy America Act of 1933**, as amended, contains the basic principles of a general buy national policy. It applies to government supply and construction contracts and requires that Federal agencies procure only unmanufactured supplies for public use which have been mined or produced in the US, and only manufactured goods with a substantial local content of a minimum of 50% as defined by the Executive Order 10582 of 1954. The **Executive Order 10582 of 1954**, as amended, expands the scope of the Buy America Act in order to allow procuring entities to set aside procurement for small businesses and firms in labour surplus areas, and to reject foreign bids either for national interest reasons or national security reasons. In the construction, alteration, and repair of public buildings and public works only domestic materials shall be used.

Exemptions

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

Similar restrictions as in the Buy America Act are contained in:

- the **National Security Act of 1947** and the **Defense Production Act of 1950**, which grant authority to the President and the Secretary of Defense to impose restrictions on foreign supplies in order to preserve the domestic mobilization base and the overall preparedness posture of the US. These restrictions are "justified" on the grounds of national security, although in most cases the issue is not the achievement of defense objectives but the protection of US industry (see Chapter 2C2c);
- the **Department of Defense Balance of Payments Program**, which provides for a 50% price correction on foreign offers, when compared with US offers;
- the **Competition in Contracting Act of 1984**, which allows the procuring agencies to restrict procurement, on a case by case basis, in order to achieve industrial mobilization objectives.

The US Congress annually adopts some ad hoc Buy America provisions as part of the **Budget Authorizations and/or Appropriations legislation**, raising price preferences from a standard 6% up to 10-25%, notably in the water, transport (mass transit, airport and highway construction), energy, and telecommunications sectors.

Waivers

The application of the Buy America legislation may be waived in order to give preferential treatment to certain countries. On the basis of the **Trade Agreements Act of 1979**, this was the case for Free Trade Agreements between the United States and Canada, Israel and Mexico. Until recently, it was generally assumed that a Memorandum of

Understanding (MOU) signed between the US DoD and the Defense Authorities of a third country regarding defense cooperation constituted a waiver from the application of the Buy America legislation. However, the US Administration responded to recent EU demarches against specific Buy America DoD restrictions by saying that MOU provisions allowing for a waiver of the Buy America Act of 1933 could be implemented only where they are consistent with US national laws. Therefore, ad hoc legislation adopted by Congress under the Department of Defense Appropriation Act is obviously seen as superseding the respective waiver provisions of MOUs (see also Chapter 2C2c).

The **Defense Appropriation and Authorization Acts for Fiscal Year 1994** contain the following Buy America provisions:

- supercomputers;
- shipboard welded anchors, mooring chains 4 inches or less in diameter;
- multibeam sonar mapping systems and supporting software (subject to waivers);
- carbon, alloy or armour steel plate (subject to waivers);
- coal and coke for use at US defence facilities in Europe;
- for **National Defense Sealift Fund programs**, procurement of shipboard components and propulsion system components; since FY 1994 shipboard cranes and spreaders for shipboard cranes are also covered;
- aircraft fuel cells (subject to waivers if a US product is not available in adequate quantities on a timely basis and is purchased for national security purposes);
- enclosed lifeboat survival systems (local content rule);
- prohibition of contract in case of fraudulent "Made in USA" labels;
- Buy America Act waiver restrictions where countries violate their MOUs with the US by discriminating against US products covered by the MOU;
- the **Traficant amendment** which requires reciprocity in procurement unless this violates US international agreements or US GATT obligations.

Although they are not formally included in the FY 1994 DoD Appropriation and Authorization Acts, some Buy America restrictions are still implemented for:

- food, clothing, natural fibre products, synthetic fabrics, specialty metals, handtools and measuring tools (Berry Amendment which has been made permanent since FY 1993);
- ball bearings and roller bearings (through FY 1995 as part of FY 1993 DoD Authorization Act);
- machine tools (through FY 1996).

The **Airport and Airway Safety, Capacity, Noise Improvement and Intermodal Transportation Act of 1993** extends for the fiscal year 1994 the authorizations for the Federal Aviation Administration (FAA) and the associated Buy America provisions, notably a 25% price preference for US steel and manufactured products with respect to funds for FAA operations, FAA equipments and facilities, and with respect to grants to airports. Federal grants awarded to airport authorities by the FAA are subject to Buy America restrictions. In particular, only domestic steel and manufactured products can be used in capital projects. For procurement of equipment and construction of facilities, there exists a 60% content requirement. If these criteria are not met, the bid price of the contract is to be raised by 25%. Considering that the **Airport Improvement Program** grants awarded in fiscal year 1992 totalled almost $1.7 billion, the Buy America restrictions constitute a significant barrier to European companies trying to supply i.e. the fire fighting equipment market at US airports.

Steel products

Under the **Waste Water Treatment Construction Program**, the Environment Protecting Agency (EPA) provides funds to local units of government for up to 75% of the cost of the projects. The **Federal Water Pollution Control Act**, as amended by Section 39 of the **Clean Water Act**, provides for a 6% price preference for US suppliers. Although funds are still being allocated to contractors, the Construction Grants Program is being phased out. However, the Buy America restrictions attached to it remain in force. In fiscal year 1992, the federal funding waste water grants totalled almost $2 billion to the benefit of the states.

Mass transit equipment

According to the **Surface Transportation Assistance Act of 1978** (STAA) US States must meet several requirements to receive federal funds from the Urban Mass Transport Administration. Among these are that standard specifications in work contracts must favor US supplies, and that any steel used in a project must have been manufactured in the US. The STAA as applied to mass transit equipment (rolling stock and other) requires local transit authorities to provide for a 25% preference to bidders supplying US manufactured equipment. For contracts entered into, on or after 1 October 1991, the equipment procured must have a domestic content of 60%. In addition, final assembly of any transportation vehicles must have been carried out in the US. As with all Buy America restrictions, any non-federal dollars matched with federal dollars are subject to the same rules. The domestic content requirement was also extended, in 1987, to subcomponents. Waivers for products or subcomponents may be granted by the Urban Mass Transportation Administration, when the use of domestic suppliers provesuneconomical and will result in unreasonable costs. These Buy America provisions also apply to Federally assisted programmes and contracts awarded by the **Federal Aviation Administration** and the **Federal Highway Administration**. Strong preference is given to domestic bids in all these programmes, therefore constituting an effective exclusion of foreign contractors from winning bids for mass transit projects. The federal mass transit grants awarded to cities in fiscal year 1992 were about $2.6 billion.

Highway construction

The **Intermodal Surface Transportation Efficiency Act of 1991** (ISTEA) defines the US national policy for intermodal transport, which includes a national highway system and arterial roads essential for international, interstate and regional commerce, travel, national defence, intermodal transfer facilities, etc. The ISTEA extends the existing Buy America restriction on steel to iron products. It reserves at least 10% of the total appropriations for US small and disadvantaged businesses. Under Section 1048, it also provides for trade sanctions against a foreign country which is considered to have discriminated against US suppliers or which has violated, as determined by the Secretary for Transport (in consultation with the USTR), either an agreement in respect of transport activities or one in respect of products covered by ISTEA. The federal aid highway funds awarded to the states in fiscal year 1992 totalled almost $18 billion.

Train equipment

The **Amtrak Improvement Act of 1978** and successive legislation provides that steel products, rolling stock and power train equipment be purchased from US suppliers, unless US-made items cannot be purchased and delivered in the United States within a reasonable time.

Telephone and electric authorities

The **Rural Electrification Administration** (REA) awards loans and loan guarantees to telephone and electric authorities. These loans are subject to Buy America restrictions. Specifically, all the materials and equipment must be domestic, although exceptions are made for certain items which are not made in a high enough quantity or quality in the US. For those non-domestic components, 6% is added to the bid price. The REA awarded almost $1.2 billion in loans and loan guarantees to telephone and electric authorities in fiscal year 1992.

The **Clean Coal Technology Program**, which is part of the **Energy Policy Act**, includes Buy America restrictions. Those company projects selected by the Agency of International Development for this programme have to respect a local content rule which means that at least 50% of the equipment supplied has to have been manufactured in the US.

b) State Buy America legislation

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

c) Set Aside for Small Business

Support for small business

The **Small Business Act of 1953**, as amended, requires executive agencies to place a fair proportion of their purchases with small business concerns. These are defined as businesses located in the United States which make a significant contribution to the US economy and are not dominant. Currently, the concept of fair proportion means that the Government-wide goal for participation by small businesses shall be established at no less than 20% of the total value of all prime contract awards for each fiscal year. Moreover, each executive agency shall have an annual goal, which is currently 10% for the Department of Defense, and 5% for other agencies. Under the normal bid procedures, there is a 12% preference for small businesses in bid evaluation for civilian agencies (instead of the standard 6%). In the case of the Department of Defense, 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 California and Texas such policies effectively close off around 20% of procurement opportunities to foreign firms. In Kentucky, in practice, as much as 70% is set aside for small businesses. The present and the new GATT Government Procurement Code contain a US reservation indicating that their provisions do not apply to small and minority businesses set aside.

3 Comments

Sub-federal procurement still not covered

Throughout 1993, the EU and the US were engaged in talks to ensure a successful conclusion to negotiations on an expanded GATT Government Procurement Agreement (GPA). However, whilst the EU was able to reach an agreement with the US and every other party to the Code as regards Category A procurement, it was not able to conclude an agreement with the US regarding sub-federal procurement (Category "B") and procurement in the utilities sectors (Category "C") as the US offer in those areas was insufficient. Negotiations will therefore continue in 1994 in order to try to reach an agreement with the US on a balanced package that will lead to a major reduction in Buy America provisions at all levels.

The EU's objective in negotiations with the US has been to reduce the negative economic impact of protectionist legislation at federal and sub-federal level. By agreeing to open public markets on a reciprocal basis

Submission to GATT disciplines required

under the GATT Government Procurement Code, US entities are obliged to submit to GATT disciplines, under which Buy America stipulations should disappear. A common study by the European Commission and the US government on the bidding potential that companies from both sides have in each others' markets indicates that Buy America restrictions and other exemptions (such as those for small businesses) in the US cover large areas of procurement opportunities at state and at other sub-federal levels. The conclusion of a balanced agreement, covering a broad range of sub-federal and publicly-owned utility procurements would therefore dramatically increase procurement opportunities for EU bidders in the US.

E Tariff Barriers and Equivalent Measures

1 *Tariffs as Trade Impediments*

Difficulties for EU exporters

Tariffs are a classic means of protecting a market against foreign imports. The US maintains **high tariffs** called **tariff peaks** (defined as tariffs of 15% and higher) on numerous products imported from the EU. As ceramics, tableware, glassware, vegetables and footwear are all subject to tariffs of 20% or more, the respective EU exporters face considerable difficulties. The following examples illustrate some of the high US tariffs which reduce market access possibilities for EU products (the corresponding EU tariff rates are in brackets):

Ceramic tiles, etc.	20% (8-9%)
Certain tableware	26-35% (5.1-13.5%)
including hotel porcelain dinnerware	35% (5.1-13.5%)
Certain glassware	20-38% (12%)
Certain footwear	37.5-48% (4.6, 5, 8, 20%)
Garlic and dried or dehydrated onions	35% (16%)
Zinc alloys	19% + 48.5 cents/kg (3.5%)
Certain synthetic organic colouring matter	20% (10 %)

However, much of this protective effect will be reduced when the US tariff concessions obtained within the framework of the Uruguay Round negotiations are fully implemented (see also below under Section 4).

The EU has also been faced with a series of tariff measures as a result of US Customs services **reclassifications** following the introduction of the Harmonised System (HS).

Duties on some **marbles**, in particular on "ivory cream marbles" have increased from 2.8% to 6%. The type of Spanish marble known as "Crema marfil" marble, was formerly classified under the TSUSA tariff classification as "marble; slabs; rubbed; or polished in whole or in part" (item 514.65), and was subject to an ad valorem tariff of 2.8%. In the new harmonised classification (HTSUS, Harmonised Tariff Schedule of the United States), the US customs authorities have classified this marble under item 68.02.92.00, "other calcareous stones", with a tariff of 6%.

The new classification of **red dye** has led to an increase in duty rates from 3.1% to 15%, without having been subject to joint HS negotiations. In the same way, a reclassification of **sugar confectionery** (including white chocolate) has meant that the duty rate has increased from 7% to 17.5%.

According to a Treasury Department ruling of 1989, **multi-purpose vehicles** remain classified under heading 87.03 of the Harmonised System, that is "motor vehicles, designed for the transport of persons", provided that they contain four doors. Thus, effectively two-door multi-purpose vehicles are classified as trucks under HTS heading 87.04, which are subject to a tariff of 25%, while four-door vehicles are treated as cars, and are subject to a tariff of 2.5%.

US Court of International Trade supports EU view

The number of side-doors criterion is inadequate for classifying multi-purpose vehicles. With the exception of the US, this inadequacy is recognised by all members of the Customs Cooperation Council (CCC), whose Harmonised System Committee has on several occasions said that the classification cannot be made by counting the number of doors. In 1993, at least two bills in Congress were introduced which aimed at laying down the reclassification by law. On 14 May 1993 the US Court of International Trade (CIT) issued a ruling overturning the Treasury's classification of the two-door Nissan Pathfinder as a truck. Despite the fact that the Pathfinder had some "truck-like attributes", it was regarded as a passenger car which should have been subject to a 2.5% tariff instead of the 25% tariff collected on trucks shipped into the US. The US Administration has appealed against this ruling. The EU supports the view that duty increases by way of reclassification, as in the case of multi-purpose vehicles, are not justified and contravene the agreed GATT guidelines for transposition to the HS.

Duty suspensions lapsed

On 31 December 1992 most of the **duty suspensions** contained in **Chapter 99, Subchapter II of the US Harmonised Tariff Schedule** expired, thereby reverting the duty rates for a substantial number of agricultural and industrial products to the applicable most favoured nation rates. The estimated total volume of imports from the EU of products covered by Chapter 99, Subchapter II, amounted to $1.27 billion in 1991. With some of the currently applicable duties being as high as 38%, the economic impact of the expiry is considerable. The EU has requested a renewal. While recognising that the US is under no obligation to provide one, such a move would assist companies both in the EU and the US in offering a permanent system which would remove uncertainty of trade.

2 Customs User Fees

Fees as revenue sources

As a result of laws enacted in 1985 and 1986, the United States 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** extend and modify these provisions by, among other things, considerably increasing the level of the fees. This legislation demonstrates a tendency to seek to use fees, rather than taxes, as a source of revenue. Excessive fees levied for customs, harbour and other arrival facilities, that is for facilities mainly used by importers, place foreign products at an unfair competitive disadvantage vis-à-vis US competition.

The most significant of the Customs User Fees (CUF) is the **Merchandise Processing Fee** (MPF) which was fixed at 0.17% of the value of the imported goods for 1988 and 1989. The Customs and Trade Act of 1990, effective 1 October 1990, provided a number of modifications to the previous law for one year. The Omnibus Budget Reconciliation Act of October 1990 extended it for five more years, to 30 September 1995. It also provided for the discretionary adjustment of fees. As of 1 October 1992, the Merchandise Processing Fee is 0.19% ad valorem.

The main provisions of the current law as opposed to the pre 1990 situation are:

Current law	**Previous law**
0.19 % ad valorem rate on formal entries	0.17 ad valorem rate on formal entries
$21 minimum and $400 maximum on formal entries	no floor or ceiling
$3 surcharge for manual formal entries	no surcharge
discretionary adjustment of fees for formally entered merchandise within a range of 0.15 to 0.19% so as to offset Customs salaries and expenses	no adjustment
Informal entries $2 for automated informal entries, $5 for manual not Customs prepared, $8 for manual Customs prepared informal entries	no charge on informal entries

It is estimated that if the value of US imports from the EU in 1992 was about $96 billion the Merchandise Processing Fee cost the EU approximately $160 million (fees for informal entries not included).

At the request of Canada and the EU, the GATT Council instituted a Panel in March 1987, which in November 1987 concluded that the US

GATT panel report for limiting amount of fees

Customs User Fees for merchandise processing were not in conformity with the General Agreement. The Panel ruled that a Customs User Fee was not in itself illegal but that it should be limited in amount to the approximate cost of services rendered. The GATT Council adopted the panel report in February 1988.

The new legislation of 1990 provides a somewhat more equitable Customs User Fees structure, since the fixing of a ceiling makes the CUF less onerous for high-value consignments. However, the fee is still likely, in many cases, to exceed the cost of the service rendered since the fee, irrespective of the level, is still based on the value of the imported goods. This is admitted in a GAO study, which concludes that it is unclear whether even modified ad valorem fees would approximate the costs of processing an importer's individual shipment.

Elimination of customs user fees

The Merchandise Processing Fee 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**, or from US insular possessions. It is also levied on merchandise entered under Schedule 8, Special Classifications, of the Tariff Schedules of the United States. In Article 310 of the **North American Free Trade Agreement** (NAFTA) the US has committed itself to eliminating existing customs user fees in accordance with a timetable and not to impose new customs user fees. There is some concern that the loss of revenue incurred through the US' NAFTA commitment will be compensated for by increasing the fees on imports of non-NAFTA origin products. The Secretary of the Treasury has some room for manoeuvre with the fees applied, while having to respect certain legal minimum and maximum percentages in order to ensure sufficient collection of revenue. Indeed, though purportedly to offset increased costs of US Customs commercial operations, US Customs has now proposed an increase in the MPF to become efffective in FY 1995, which would change the current rate of 0.19% to 0.24% *ad valorem*. Minimum and maximum MPF would increase from $21 and $400 to $25 and $485 respectively.

3 *Excessive Invoicing Requirements*

Irrelevant information requested

Invoice requirements for exporting certain products to the US can be excessive. This is particularly the case for textiles/clothing where customs formalities include the provision of particularly detailed and voluminous information. Much of this information would appear to be irrelevant for customs or statistical purposes. For example, for garments with an outer shell of more than one construction or material, it is necessary to give the relative weight, percentage values and surface area of each component; for outer shell components which are blends of different materials, it is also necessary to include the relative weights of each component material.

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

Amendments to Customs Regulations

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

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

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

The information requirements in their amended form are unnecessary and constitute a considerable additional burden on the trade community. They are unnecessary because customs are entitled to ask for all necessary supplementary documents and information during clearance (**standard 15 of Annex B1** of the **Kyoto Convention**). There should be no systematic demand for this kind of information.

The information required by the US Customs Service on trade invoices goes far beyond the information which is necessary for a customs declaration and for tariff procedures. These formalities are burdensome and costly; they thus also constitute a barrier against new entrants and small companies. As a result, large established suppliers are privileged and small new competitors disadvantaged. These effects are particularly disruptive in diversified high-value and small-quantity markets which are of special relevance for the EU.

4 Comments

As a result of the Uruguay Round negotiations substantial improvements were brought about in the area of tariffs. The US have offered in the Uruguay Round an **average tariff reduction** on industrial tariffs which meets the Montreal market access target of a 33% depth of reduction. According to the USTR, the average depth of cut is 34%. On EU exports, industrial tariffs will be reduced by a larger amount, ie 46%.

US tariff offer

The US tariff reduction is based on the reciprocity given by US trading partners on each tariff item, on the participation of these countries in covering whole categories and it is obviously conditioned by domestic product sensitivity. The US Uruguay Round tariff offer covered both the elimination and harmonisation of duties in certain sectors and the reduction of certain tariff peaks.

As to the former, total **tariff elimination** has been negotiated on a plurilateral basis in the following sectors:

- beer (HS 2203)
- whisky and brandy (HS 2207 ex, 2208 ex)
- pharmaceuticals and intermediate chemicals
  a) all pharmaceuticals in Chapter 30; all products under headings HS 2936, 2937, 2939 and 2941
  b) specified pharmaceutical active ingredients which bear an international non-proprietary name (INN) and salts, esters and hydrates of these INNs
  c) specified products used for the production and manufacture of finished pharmaceuticals;
- paper, pulp and printed matter (HS 47, 48 and 49)
- most steel headings
- construction equipment products
- agricultural equipment products
- medical equipment products
- scientific instruments products
- certain furniture products (HS 9401 ex, 9402 ex, 9403 ex)
- certain toys (ex HS 9501-9505)
- semi-conductor manufacturing and testing equipment.

With regard to other chemicals (HS 28-39) a plurilateral proposal foresees the **harmonisation** of duties mainly at 5.5 and 6.5%.

Reduction of tariff peaks

US **tariff peaks** are concentrated in the chemicals, textiles, footwear, ceramics, glass and trucks sectors. As a result of the market access negotiations, peaks in the chemicals and ceramics sectors will be effectively reduced by more than 50%. Reductions in the other sectors are more modest and tariff cuts in the field of textiles, where most peaks are maintained, will only average 12%. The 25% duty on imports of trucks will remain in place. Thus many US tariff peaks will be upheld even after implementation of the Uruguay Round results.

As regards **reclassifications**, two issues of concern to the EU listed in last year's Barriers Report were solved in the course of 1993. The classification problems regarding **gaskets** have been resolved by a decision of the Harmonised System Committee (administered by the Customs Cooperation Council) taken at its meeting of 18-19 October 1993. The Committee decided in favour of the EU point of view and as of 1 January 1994 the rates applicable to gaskets and gasket materials were reconverted from 18% and 15% to 3.5% and 3.7% respectively. Also, the dispute between the EU and the US over the correct **classification of empty perfume bottles** was resolved on a bilateral basis.

Classification problems solved

The conclusion of an EU-US customs cooperation agreement for which first negotiations are now underway will certainly facilitate the pursuit of the kind of problems discussed in this chapter. In particular, the excessive invoicing requirements could well be tackled within such a framework.

Some positive development can finally be noted with regard to **invoicing requirements**. The **Customs Modernisation Act** has entered into force. As it provides for the acceptance of electronic equivalents of invoices, it might become easier for exporters to provide the necessary information. Implementing regulations are currently under discussion.

F Tax Legislation Affecting Trade and Investment

1 Some Introductory Remarks

The US have taken radical steps to reduce their budget deficit with the **Omnibus Budget Reconciliation Act of 1993**. Considerable budget cuts have been applied across the board. Additionally, federal tax revenue has been increased, and a number of budgetary burdens have been shifted to the States. However, this last measure in particular has given rise to some anxiety amongst foreign investors in the US. It is not yet clear to what extent an already existing discriminatory tax burden will remain in place and/or new revenue mechanisms which target non-US economic operators will be instigated.

Discriminatory tax burdens

The discussion on a levy on imports of high-energy products and the US Administration's support for California in the unitary tax case pending before the US Supreme Court provide a worrying precedence. Striking the right balance in taxation matters at sub-federal level will be of considerable importance. Notwithstanding the EU's general sympathy for and support of any measure leading to budget consolidation, it will nevertheless closely monitor further developments in the tax field and their effects on European investors in the US.

2 Cumbersome and Discriminatory Reporting

The existing information reporting requirements of the **US Tax Code** may lead to discrimination of foreign-controlled companies:

- The foreign ownership threshold for reporting includes corporations with at least 25% foreign shareholders;
- The offshore record keeping requirements oblige foreign corporations to transfer records, in certain circumstances, to their US subsidiary;
- Foreign corporations are required to nominate US subsidiaries as their agents to receive Internal Revenue Service summonses;
- Penalties for failure to comply with reporting requirements are up to $10,000.

According to the **Omnibus Budget Reconciliation Act of 1990** reporting requirements and related provisions not only apply to subsidiaries of non-US controlled companies, but also to all other "foreign" entities such as branches. This will primarily affect foreign banks.

These requirements are onerous and in several cases of extra-territorial effect. They also run counter to the principle of national treatment. The objective of the legislation to ensure that the Internal Revenue Service can obtain relevant information on transactions between a US operation and a foreign affiliate where foreign ownership might be used to avoid taxes. Fulfilling the requirements is, however, burdensome and adds to the complexity of doing business in the US for foreign owned corporations. Accordingly, these provisions have the potential to discourage foreign investment in the US.

3 "Earnings stripping" Provisions

Limited deductions from taxable income

The **Budget Reconciliation Act of 1989** which contained the so-called "earnings stripping" provisions (Internal Revenue Code 163j), places a limitation on the extent to which interest payments can be deducted from taxable income. The limitation applies when interest is paid, by a corporation which is subject to tax in the US, to a "related party" which is not liable to US tax, and in instances where the payer has a high debt to equity ratio. The majority of "related parties" affected will in practice be foreign corporations.

The legislation is designed to prevent foreign companies from artificially loading a US subsidiary with debt, and so arranging for profits to be paid out of the US in the form of deductible interest payments, rather than as dividends paid out of taxed income. These provisions were further extended in the **1993 Budget Reconciliation Act** to include interest payments on loans guaranteed by a related party not liable to US taxation.

Arms length principle

The objective of limiting excess interest payments is reasonable and consistent with internationally agreed tax policy. However, in the calculation of excess interest, US law uses an arbitrary formula rather than the internationally accepted arms length principle. This could have discriminatory consequences in its application because a tax treaty partner would not be obliged to make a corresponding adjustment of such an arbitrary nature. In practice this discriminates against foreign companies investing in the US, as US companies suffer no such restriction on the amount of interest they can deduct for tax purposes.

The latest changes, designed to prevent evasion of the rules by using "back to back" loans and guarantees, are particularly controversial. Many lenders routinely ask for parent company guarantees for loans made to US subsidiaries of foreign companies. Moreover, with the backing of a parental guarantee, US subsidiaries are able to borrow at a lower rate. Borrowing without a guarantee will discriminate against foreign companies. In addition, since the rules apply to existing loans this may lead to considerable (disruptive) restructuring of borrowing requirements.

4 State Unitary Income Taxation

Some 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 companies operating within their state borders on the basis of an arbitrarily calculated proportion of the total world-wide profits of the company. This proportion of total world-wide earnings is assessed in such a way that a company may have to pay tax on income arising outside the State, which may give rise to double taxation. A particularly discriminatory manifestation of the taxation of world-wide income has been its application by certain States (most notably California) to so-called "unitary" groups - whereby States attempt to tax the world-wide profits of companies having no presence within their borders.

Risk of double taxation

Quite apart from the added fiscal burden, a state which applies unitary taxation is reaching beyond the borders of its own jurisdiction and taxing income earned outside that jurisdiction. "World-wide" unitary taxation conflicts with bilateral tax treaties concluded at the Federal level by the US with foreign countries. A company may also face heavy compliance costs in furnishing details of its world-wide operations and with the operation of the internationally agreed arm's length principle.

Conflicts with tax treaties

In response to the protests of multinational corporations, the demarches of foreign governments and pressure from the US Federal Administration, the State of California amended its law in 1986 to allow corporations to opt for taxation on the basis of "water's edge" (rather than "world-wide") unitary taxation. Under this method, companies are taxed on the basis of a share of their total US income. However, companies had to pay a substantial non-returnable fee to make this option and remained subject to a "throw back" provision under which world-wide unitary tax could still be imposed without reason and regardless of their choice. Following additional pressure, California further amended its law in 1993 by abolishing the fee for electing "water's edge" taxation and making other administrative changes. Whilst these changes have removed concerns about current treatment, they do not resolve the issue of the legality of past practice. Consequently, a case is still being pursued and is now before the US Supreme Court.

Water's edge taxation

US Supreme Court ruling pending

Contrary to the policy of past US Administrations, the Clinton Administration has filed a brief in support of the Californian position without, however, defining a US position on the issue of world-wide unitary taxation. The brief is based on the argument that the law was not unconstitutional at the time the tax was imposed. The outcome of the case will have important ramifications for foreign investors, both those already established and those considering setting up in the US. For the time being, businesses are concerned about the possibility that world-wide unitary taxation will continue to apply and will be reintroduced by a number of States. EU companies consider their planning to be adversely affected under these circumstances. The EU and its Member States will continue to closely monitor any development.

Discussions continue within the OECD Committee on Fiscal Affairs.

5 US Car Taxes Discriminate Against European Imports

Disproportinate effects on EU imports

Since 1990, sales of European automobiles in the United States have been severely harmed by the cumulative impact of new **luxury excise** and higher **"gas guzzler" taxes**. In addition, the **Corporate Average Fuel Economy** (CAFE) regulations continue adversely to affect European car makers. These three provisions of US law have almost exclusively affected non-US automobiles. Domestic manufacturers and their customers have had to pay virtually no CAFE penalties and only minimal gas guzzler and luxury taxes for comparable vehicles. Together, these measures have resulted in disproportionate and discriminatory tax burdens on imported European passenger cars sold in the United States.

Evidence for discrimination

A **luxury excise tax** was introduced as of 1 January 1991 by the **Omnibus Budget Reconciliation Act of 1990**. The tax, as applied to cars, was set at 10% of the retail price exceeding $30,000 of any new passenger vehicle. This threshold was evidently set at a level which would not affect the vast majority of American cars. Sales figures continue to bear this out. Virtually all US-produced cars, including US luxury vehicles, sell for less than $30,000. By contrast, in the US market, many European producers have concentrated on the high-end market segment covering autos that incorporate advanced styling, features, and technology and therefore generally sell for more than $30,000. As a result, in 1992, the luxury tax was levied on 41.2% of European autos sold in the US, but only on 2% of the US-produced vehicles. Consequently, nearly 70% of the revenue generated by the luxury tax was paid by European auto producers ($209 million), while only slightly more than 10% of the luxury tax was paid by American producers ($32 million), even though US cars constituted 73% of the US market. Thus, the tax falls disproportionately on imports from Europe. This disparate impact will be exacerbated further by the **Omnibus Budget Reconciliation Act of 1993** which subjects the luxury tax threshold to a cost-of-living adjustment. This has raised the threshold to $32,000 as of 1 January 1994 and will reduce the already limited impact of the luxury tax on US autos, without similtaneously benefiting imported European cars.

In 1978, Congress amended **Section 4064 of the US Internal Revenue Code** (IRC) to impose a federal excise tax on any individual passenger automobile "of a model type" sold in the US whose fuel economy falls below 22.5 miles per gallon as determined by the US Environmental

Protection Agency. This tax, known as the **"gas guzzler" tax**, took effect in the 1980 model year. After a phase-in period, the gas guzzler tax originally started at $500 for autos with fuel economy ratings of less than 22.5 mpg and rose to $3,850 for autos with ratings of less than 12.5 mpg. The **1990 Omnibus Budget Act**, which added the luxury tax, also doubled the gas guzzler tax. Consequently, any model type with a fuel economy of less than 22.5 mpg, as determined by EPA, is now subject to a gas guzzler tax of at least $1,000. The tax rises sharply to $7,700 for automobile models with a fuel economy of less than 12.5 mpg.

Tax targeted at imports

The tax has been targeted almost exclusively at imports. In 1990, when Congress doubled the gas guzzler tax, over 70% of the 118,544 cars subject to the tax were imported, and 60% of that total (71,449) were European. European makes accounted for 73% of the revenue generated by the tax, whereas US cars only sourced 20%. In 1990, 47 model types were subject to the gas guzzler excise tax. Of these, 44 were European, and only two were American. In terms of total tax burden, the European share of total gas guzzler taxes was nearly 85% ($84.65 million) in 1992, although European models constituted just 3.3% of the US market. Thus European-origin models were 21 times more likely to be subject to the gas guzzler tax than US vehicles.

While the original and laudable intent of the gas guzzler tax was to encourage **energy conservation**, it has long since become simply a device for **raising revenue**. A key advantage of the tax as a revenue raiser is that almost all of the revenues are generated by foreign auto producers. The recognition of this disparate impact is clearly apparent in the 1988 statement of Senator D'Amato when he proposed to double the gas guzzler tax as a way to fund additional mass transit subsidies. In introducing the bill, Senator D'Amato stated: *"The Joint Committee on Taxation has estimated that this proposal would cost the Treasury some $400 million over 5 years. How do we pay this?* ***I do not think we should go to the American taxpayer and say "You are going to have another burden."*** *We intend to offset this by doubling the gas guzzler tax which is paid on the purchase of certain new low-mileage cars...* ***According to the Environmental Protection Agency, in model year 1988 only the most expensive imported cars triggered this tax. There are absolutely no domestic-made cars that are impacted by this tax."*** At the time when Senator D'Amato introduced his bill in 1987, gas guzzler collections totalled $80 million, almost all of which was levied on cars from Germany, Italy, Sweden, and the UK.

Under IRC section 4064(c)(1), the US Treasury Department applies the gas guzzler tax to "model types" that fall below 22.5 mpg in EPA fuel economy ratings. Model type fuel economy is determined by EPA which relies on the same methodologies used to determine Corporate Average Fuel Economy (CAFE) penalties. American manufacturers produce multiple vehicle configurations in a single model type. The EPA regulations permit these manufacturers to take advantage of the "averaging" concept which allows a car with poor mileage to be offset by a more fuel-efficient configuration. Congress was fully aware of these circumstances during the debate on the 1990 Omnibus Revenue Act, but chose to reject an approach that would have eliminated the averaging concept.

Exemptions of US cars

According to 1992 EPA data, more than 20 American-manufactured vehicle configurations did not meet the gas guzzler tax threshold, but were nevertheless exempted from the tax because their poor mileage ratings were averaged in with other models using the same engine and transmission combination. These vehicle types include some of America's best known car lines such as Corvette, Mustang, Camaro, and Lincoln Town Car. Because EPA's rules permit a manufacturer to select which vehicle sub configuration in a model type will actually be tested, there are undoubtedly even more US-made vehicle configurations that fail to meet the 22.5 mpg threshold but pay no gas guzzler tax. In contrast, because European manufacturers do not have large numbers of vehicle configurations in each model type, they must test a much higher percentage of their different vehicle sub configurations. As a result, unlike US-produced automobiles, nearly every European model that fell below the 22.5 mpg threshold paid the tax. The comparatively low fuel economy of European origin models is a function of the weight and performance characteristics of high performance vehicles, not the inefficiency of the engine.

In 1975, the **Energy Policy and Conservation Act** (Energy Act), the United States established the **Corporate Average Fuel Economy** (CAFE) Program. The Energy Act required each manufacturer and importer of passenger automobiles to attain an average fuel economy for its entire US sales volume of 18 miles per gallon (mpg) of gasoline by 1978. It also contained a schedule for increasing each manufacturer's or importer's overall average fuel economy rating to 27.5 mpg by the 1985 model year. The 27.5 mpg standard remains in effect today despite several legislative proposals over the years to raise the standard.

Discriminatory methodology

The methodology for calculating CAFE fuel economy ratings has led to discrimination against European manufacturers, which have incurred 99.99% of all CAFE fines ($263 million). In addition, the fuel economy measurement for various vehicle "model types" determined as part of the CAFE calculation is also the basis for the imposition of gas guzzler taxes on individual European automobiles. Thus, factors that are biased against European manufacturers under the CAFE program carry over into the gas guzzler tax program, as described above. Accordingly, it is important to understand how the method of calculating CAFE leads to different treatment of similar automobiles.

The key to understanding CAFE is to recognise that it regulates the "average" fuel economy of a manufacturer's or importer's total "fleet" of passenger automobiles sold in the US. For purposes of CAFE, each manufacturer's fleet must attain an average fuel economy of 27.5 mpg. Accordingly, the statute and regulations seek to raise the fuel economy of a manufacturer's aggregate output, as opposed to regulating the fuel economy of individual vehicles. Thus, under CAFE, manufacturers may produce vehicles with fuel economy below the level of the standard if they produce sufficient numbers of vehicles with fuel economy above the level of the standard. In other words, larger vehicles with poor mpg ratings can be averaged with smaller, less fuel-consuming vehicles to reach the 27.5 mpg standard for CAFE compliance. This system provides obvious advantages to large full-line manufacturers - such as the "Big Three" in the US which market numerous vehicles and have the flexibility to adjust their product mix to achieve a 27.5 mpg average. At the time CAFE was enacted, Congress specifically recognised that fleet-wide averaging would be more beneficial to US manufacturers than a product-specific tax, which might encourage increased imports of fuel-efficient automobiles.

Advantages for full-line manufacturers

The national treatment obligation of GATT Article III is a cornerstone of the General Agreement on Tariffs and Trade (GATT). Article III obliges each contracting party to provide non-discriminatory treatment to imported goods. It guarantees imported products **equality of competitive opportunity** by prohibiting discriminatory internal taxes, laws, and regulations. Such discrimination can take two forms. The most straightforward type of discrimination involves laws and regulations that single out imports for less favourable tax or regulatory treatment on the basis of origin. In addition, GATT has long recognised that laws and regulations which appear to apply to both imported and domestic products can violate Article III if they have the **effect of imposing disproportionate burdens on imported merchandise or serve to protect domestic industries**. There is a clear GATT precedent prohibiting a contracting party from using artificial and contrived tax categories and criteria to target imports for higher tax burdens than similar domestic products.

GATT principles at stake

The effect, however, of the luxury and gas guzzler taxes, as well as of the CAFE penalties, is to shift to foreign auto makers a disproportionate share of the burden of reducing the US federal budget deficit. As a result, European automobiles have been uniquely saddled with steep US excise taxes, as well as bearing the stigma of being labelled as overpriced and environmentally unsound "luxury" products for American consumers. Therefore, the European Union requested the establishment of a GATT panel. Two hearings took place at the end of 1993. A final decision is expected by the end of May 1994.

GATT panel under way

6 Beer and Wine Excise Taxes

Discriminatory tax exemptions

The **Omnibus Budget Reconciliation Act of 1990** created a new tax credit for domestic wine producers of 90 cents/wine gallon and augmented the credit provided to domestic beer producers by between $9 and $11 per barrel. In the case of wineries, a producer is afforded the credit if no more than 250,000 gallons (roughly 10,000 hectolitres) of wine are produced annually, applicable to the first 100,000 gallons of production, and for breweries, if no more than 2,000,000 barrels are produced annually, applicable to the first 60,000 barrels production. Many of the individual states also maintain such discriminatory tax exemptions or credits.

These tax credits are solely available to qualifying "small" domestic producers and not for third country producers. In practice, this measure would provide a maximum total benefit of $660,000 per eligible brewery (of which, it has been estimated there are more than 200 in the US) and of $90,000 per winery (of which, there are 1,400 estimated beneficiaries).

GATT panel report supports EU view

In September 1991, the EU made a submission to the GATT panel which had been requested by Canada on, inter alia, this issue. In March 1992, the panel reported that the Federal and State tax exemptions and credits were inconsistent with Article III.2, first sentence. The panel report was adopted at the GATT Council meeting on 19 June 1992. Implementation is not yet complete; apparently hindered by constraints imposed by US constitutional law on Federal Government involvement in State regulation of alcohol. The EU noted its dissatisfaction that implementation was incomplete at the GATT Council on 9-10 February 1993.

G Standards, Testing, Labelling and Certification

1 *A Closer Look at the Issue*

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 in this domain can represent a very important **structural impediment** to market access. 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 organizations as providers of assessment and certification in both areas.

Discrepancies with international standards

A particular problem in the US is the relatively low level of use, or even awareness, of standards set by international standardizing bodies. All parties to the GATT Code on Technical Barriers to Trade are committed to the wider use of these standards; but although a significant number of US standards are claimed to be "technically equivalent" to international ones, very few indeed are directly adopted. Some are in direct contradiction. One example of the problems this can cause is the case of food labelling, which is set out in Chapter 3A9.

Diversity of standards setting authorities

There are more than 2,700 State and municipal authorities in the US which require particular safety certifications for products sold or installed within their jurisdictions. These requirements are not always uniform or consistent with each other, or even transparent; in some cases a national standard may not exist. In this case, product safety requirements are not set out by mandatory technical regulations, but are determined in the market place through product liability insurance. Individual States may set environmental standards going far beyond what is provided for at federal level, as has occurred in California (with regard to lead levels and glass recycling). Then again, the US Labour Department may require certification for equipment used in the workplace; the county authorities for electrical equipment; large municipalities for virtually any equipment they choose to regulate; and insurance companies for other product safety aspects depending on the company.

High costs for foreign companies

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 that the volume of lost sales in the US due to these factors is 15% of total sales. The hidden costs could be much greater because the time and cost involved can be greatly reduced simply by using US components which have already been individually tested and certified. In addition, the private organizations providing quality assurance may impose the use of certain specific product components under their own programs which are not in conformity with international quality assurance standards (ISO 9000). In some cases (e.g. that of telecommunications network equipment) an expensive evaluation procedure is required which does not lead to certification and does not take account of any additional requirements by individual buyers.

Negotiations under way

EU/US negotiations began in 1993 for the conclusion of bilateral mutual recognition agreements covering those industrial products for which mandatory conformity assessment procedures apply. The scope of these negotiations extends to sectors such as telecommunications, terminal equipment, EMC requirements, electrical equipment, pressure vessels, lawn mowers, recreational craft, medical devices, pharmaceuticals and airworthiness.

2 *Some Illustrative Cases*

Lead release action levels

EU exporters of **ceramicware** must comply both with Federal regulations setting tolerance levels on the amount of lead in ceramicware, and with those enacted by State legislatures such as California. At the end of 1991, the Food and Drug Administration (FDA) unilaterally set tolerance levels for lead in **wine** and introduced "new" action levels for lead release from ceramicware. These action levels represent a significant tightening of the standards and are used to determine the need for enforcement action against specific lots of shipments. The sampling and testing methods used to assess levels of leachable lead from cups and mugs are not satisfactory. As it stands, the FDA can take action on the basis of a single sample. EU exporters believe that if the FDA insists on new action levels, they ought to be introduced in such a way at least to prevent individual states from imposing more stringent standards and unnecessary labelling requirements. In this context, California approved, in October 1993, a limit of 150 ppb for lead levels in wine after 1 January 1994 which is more stringent than the internationally recommended level (and the current federal limit).

Warning labels

In this respect, California's **Safe Drinking Water and Toxic Enforcement Act** (Proposition 65) is of concern to the EU. The Act requires a warning label on all products containing substances known to the State of California to cause birth defects or reproductive harm, including lead. In addition, enforcement of Proposition 65 by the Attorney General of California has meant that European manufacturers of ceramicware have to finance a $1 million lead safety information campaign for consumers. More recently, a court settlement in California will annul the effect of a paragraph of Proposition 65 pertaining to an interim measure for food, drug, cosmetic and medical device products, and, as from 16 December 1993, imposes stricter Californian standards in place of federal standards.

Glass recycling

The **Public Resources Code of California**, requires that **glass containers** which are used for food and beverages have a minimum percentage of recovered glass in their composition. The minimum percentage is progressive from 15% in 1992 up to 55% in 2002. Glass container manufacturers are requested to give a monthly report on the percentage of postfilled glass used, i.e. the glass containers found in bottle banks which have been previously filled with a beverage or food. In-house cullet (broken scrap glass resulting from the manufacturing process) is not considered to be recycled glass.

This legislation applies to all glass containers produced or sold in California, and thus also affects EU exports to California. The only element of flexibility in the legislation is the possibility of a reduction or a waiver of the percentage requirement if its achievement is technologically infeasible. At the Federal level there have also been proposals to Congress to require a minimum percentage of recycled glass in glass containers. The State legislature of New Jersey is presently even considering a total **ban of green glass beverage containers**.

In 1991, sales of European food and beverage glass containers to the US totalled US $10 million. Although the share being exported to California and New Jersey is not known, it can be assumed that it is a high percentage, as California is the main wine producing state and New Jersey is host to major European breweries. If the Californian legislation were to be introduced at the federal level and extended to food and beverages sold in such receptacles, the economic impact would clearly be enormous. The same would apply to a New Jersey enactment of a ban on green glass beverage containers.

While the Community shares the environmental objective of recycling glass containers in order to save landfill spaces, to reduce energy consumption and to preserve natural resources, it questions the Californian approach to this objective. It is worth noting that any environmental damage caused in California by the import of glass containers is in no way related to the amount of recycled glass used when the product was manufactured in a third country. Therefore the application of such a domestic environmental requirement to imported products is not in conformity with GATT rules. Furthermore, the reporting requirements are unnecessarily burdensome.

National Electrical Code

Federal, State and local jurisdictions require product testing and certification of the safety of numerous **electrical products** and parts thereof. At the State and local level, there are more than 2,700 State, City and Municipal governments in the US which require particular safety certifications on certain products sold or installed within their jurisdictions. These requirements are not always uniform and consistent with one another and in some cases a national standard may not exist. In addition, the electrical code requirements are more closely monitored and more problematic (due to the use of non-US components) for suppliers of imported equipment than for US manufacturers.

For example, in order to be able to sell electrical appliances in the US, in a number of States it is a legal necessity (and for others a commercial one) to obtain "listing" by Underwriters' Laboratories (UL) and to apply the UL mark on the appliances. UL listing can be obtained after submitting product samples to the UL laboratory for safety tests according to UL standards.

In early 1993 the UL issued a revision of its standard 1028 Hairclipping and Shaving Appliances which also covers **electrical shavers**. This revision includes a new requirement (effective from 5 April 1995) that a single pole on/off switch or overcurrent protective device must be mounted in the live conductor of the supply circuit. As switches and overcurrent devices in these appliances are always single pole switches/devices, for European producers of electrical shavers this new requirement has the implication that:

- a new polarized plug has to be used; and
- the worldwide standardized appliance coupler (acc. to IEC publication 320, endorsed by CENELEC as EN 60320) has to be polarized.

As hairclipping and shaving appliances exported by European manufacturers to the US are double insulated, the new UL requirement does not add anything to the safety of these appliances. The necessary constructional changes, will, however, cause considerable costs.

Industrial fasteners

Similarly, the requirements of the **1990 Fastener Quality Act** (FQA), which aims to deter the introduction of sub-standard industrial fasteners into the US, are onerous: compliance will be costly and the definition of "critical application" vague. The FQA will have the effect of requiring European manufacturers to revert to final sampling and testing methods at a time when they have invested heavily in internationally agreed quality assurance systems such as ISO 9000, designed to improve quality and reduce the need for multiple assessments. Under the terms of the FQA, fasteners will have to be tested by an accredited laboratory and certified by the manufacturer; each batch will require an original laboratory testing report certifying that the standards are met.

The testing and certification requirements translate into lost sales and further expense (in terms of time and money) related to hiring a US inspector. Expansive product liability insurance (a far less significant factor in Europe) is an additional expense borne by manufacturers on sales in the US. 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. Federal, state and local jurisdictions should reduce the divergence in safety certifications and adopt national standards for electrical safety certification. Such national standards should be based on the appropriate international standards set in the International Electrotechnical Commission (IEC) or the International Standards Organization (ISO). These are the standards that have been adopted in EU Directives.

Disadvantages for importers

Section 355 of the **Transportation Appropriations Act of 1992** has introduced, as of 1 January 1994, an obligation for automakers and car dealers to place labels on new cars detailing among other things the percentage of US/Canadian parts that went into the car as well as indicating the final assembly point by city, state and country. It has been suggested that transparency is the aim of the proposed language. Providing consumers with accurate, useful information is certainly in everyone's best interest. The obligatory labelling system, as set out by Section 355 of the Transportation Appropriations Act of 1992, will, however, not provide any useful information to consumers about the product as such and its characteristics. The only information contained in the label is whether and to what extent the parts of the product or the product itself are of domestic origin. Such information can only be intended to influence consumers to buy cars of US/Canadian origin. This is clear from the language used, and from the speech made by Senator Mikulski in sponsoring her amendment. References to *"stand up for America"*, *"help provide jobs"* and *"practice pocketbook patriotism"* cannot be interpreted in any other way.

Car labelling with protectionist intent

The EU believes that the labelling requirement constitutes an unjustifiable discrimination, contrary to Article 2.1 of the GATT Code on Technical Barriers to Trade:

- the US proposed obligation to indicate the origin of the engine and gearbox could discourage US constructors from importing them from their European subsidiaries or from European component manufacturers.
- within the EU, the assembly of vehicles is quite flexible as to the origin of car components, due to the internal market. For a single model of motor vehicle, a specific part may originate from one of several countries. The US proposal will therefore have greater administrative costs for European importers than for other importers.

EU request

The EU is seriously concerned that the implementation of the labelling requirement will create unnecessary trade barriers, and would put an excessive financial burden on importers to access the US market. In addition, the fulfillment of the labelling requirement may involve the disclosure of confidential data from manufacturers other than US manufacturers. The EU has therefore requested the US, within the GATT framework, to adapt their car labelling requirements accordingly.

3 Comments

In the Uruguay Round the US have agreed on an expanded Agreement on Technical Barriers to Trade (TBT) which will improve the rules for enforcing standards and technical regulations. The TBT Code will be applicable by all WTO members ensuring for each country the right to adopt and maintain appropriate international standards, with the exception of their chosen level of protection for health and human, plant, animal life and the protection of environment. A proportionality criterion is found in the TBT Code to ensure that standards do not create unnecessary obstacles to trade and that they can be justified on the basis of the best available scientific evidence.

The EU has already forwarded proposals for the implementation of these multilateral guidelines: firstly, the sharing of experience and information in the regulatory process leading to drafting of legislation and standard-making with a view to achieving increased regulatory convergence; and secondly, the launching in 1994 of a bilateral round of plurisectoral negotiations for agreements on Mutual Recognition of Conformity Assessment and Good Laboratory Practice.

H The Protection of Intellectual Property

1 Patents and Related Areas

Discriminating protective measures

Section 337 of the Tariff Act of 1930 provides holders of US patents, who are manufacturing in the US, with remedies which keep imported goods which infringe such patents out of the US (exclusion order), or have them removed from the US market once they have entered 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 **Omnibus Trade and Competitiveness Act of 1988**, several modifications have been introduced to Section 337, such as the availability of remedies in relation to imported goods which infringe a US process patent.

GATT panel report in favour of EU position

In July 1987, the EU requested the establishment of a GATT panel to consider the compatibility of Section 337 of the Tariff Act with the US's obligations under the GATT, notably with the national treatment requirement of its Article III. The Panel Report which was adopted by the Contracting Parties in November 1989 came to the conclusion that Section 337 is inconsistent with GATT Article III:4. The incriminated provision accords to imported products alleged to infringe US patent rules treatment less favorable than that accorded under Federal District Court procedures to like products of US origin as a result of the following factors:

- the choice of forum in which complainants can challenge imported products, whereas no corresponding choice is available to challenge products of US origin;
- the potential disadvantage to producers or importers of challenged products of foreign origin resulting from the tight and fixed time-limits in proceedings under Section 337, when no comparable time-limits apply to producers of challenged products of US origin;
- the non-availability of opportunities in Section 337 proceedings to raise counterclaims, as is possible in the Federal District Court;
- the possibility that general exclusion orders may result from proceedings brought before the USITC under Section 337, given that no comparable remedy is available against infringing products of US origin except where this might be justified under GATT Article XX (d);
- the possibility that producers or importers of challenged products of foreign origin may have to defend their products both before the ISITC and in the Federal District Court, whereas no corresponding obligations exists with respect to products of US origin.

Despite the GATT Panel findings of 1989, the US has to date not taken any measure to bring Section 337 into line with its international obligations under the GATT. The adverse effects of Section 337 on

European companies' activities have meanwhile been highlighted by several cases. Its discriminatory nature became particularly apparent in one case in which the Federal District Court stayed the procedure before it on the ground of an arbitration clause, which did not prevent the International Trade Commission (which was subsequently petitioned) from taking action. In 1992 Senator Rockefeller introduced a bill into the US Senate which was intended to bring Section 337 into line with the GATT panel findings. While the bill indeed addresses some of the issues raised in the panel findings, it clearly falls short of a meaningful solution to the GATT inconsistencies. In February 1993 the bill was reintroduced Senate with minor modifications. With a view to the national treatment requirement contained in Article III of the Uruguay Round Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), including Trade in Counterfeit Goods , as well as its chapter on the enforcement of intellectual property rights, the US is expected to regularize Section 337 within the framework of its Uruguay Round implementing bills.

Lacking implementation of GATT panel report

US patent law is based on the *"first to invent system"*, whereas the rest of the world follows the *"first to file system"*. **Section 104 of the US Patent Law** states that it is not possible to establish a date of invention by reference to any activity in a foreign country. A non-US inventor who typically carries out research and development activities outside the US cannot therefore establish a date earlier than that in which he or she applied for the patent. This treatment clearly discriminates vis-à-vis foreign inventive activities in comparison to US domestic inventive activities and thus has the effect of forcing foreign companies to carry out research and development in the US rather than abroad. The discrimination features under Section 104 appear incompatible with Article 27 of the Agreement on TRIPS. The US will have to undertake the necessary modifications in implementing the Uruguay Round.

Discrimination of foreign inventive activities

US law allows **governmental use of intellectual property rights** without even having to notify the right holder. This practice is particularly frequent in the activities of the Department of Defence. For obvious reasons this practice is particularly detrimental for foreign right holders because they will generally not be able to detect such government use and are thus very likely to miss the opportunity to initiate an administrative claims procedure. The TRIPS Agreement contains some safeguards for the patent holder which should eventually lead to considerable changes in the US law and practices on mandatory licensing.

Disadvantaged foreign right holders

2 *Copyright and Related Areas*

Despite the unequivocal obligation contained in **Article 6 bis of the Berne Convention,** to which the US acceded in 1989, to make **"moral rights"** available for authors, the US has never introduced such rights and has repeatedly announced that it has no intention to do so in the

Imbalance of benefits

future. It is clear that while US authors fully benefit from moral rights in the EU, EU right holders do not enjoy such rights in the US, which leads to an imbalance of benefits from Berne Convention Membership for the European side.

Incomplete copyright protection

Article 18 of the Berne Convention stipulates that works which have not fallen into the public domain by the entry into force of the Convention shall benefit from its protection. According to Article 5, protection under the Berne Convention is not dependent on the fulfilment of formalities. Contrary to these provisions, the US does not grant **copyright protection** to third country works created before 1989 in the absence of the completion of the formalities under US copyright law. Thus, films which at the time have not been appropriately registered in the US are not granted any copyright protection. This situation has apparently led to widespread copying and rental of such films in the US, which is financially detrimental to the legitimate EU right holders.

3 Comments

The EU is confident that a full and faithful implementation of the Uruguay Round Agreement on TRIPS will not only reduce but also prevent trade frictions. Like most developed countries, the EU and the US have an interest in administrating multilateral rules which both protect intellectual property rights and make redundant the use of unilateral trade measures such as Special 301 of the Trade Act of 1988 (see Chapter 2A2). The Agreement on TRIPS is an important step as it includes a national treatment provision and is built upon the dispute settlement procedure of the new World Trade Organization. It will cover a wide range of European industries: consumer goods, textiles and clothing, processed food, wines and spirits, pharmaceuticals, chemicals, computer programming and entertainment.

I Conditioning National Treatment

1 The Principle of National Treatment

The principle of national treatment is one of the pillars of liberalization of the world economy. It is a well established legal standard, used in international treaties and other multilateral instruments. OECD Member countries have declared that "*enterprises operating in their territories and owned and controlled directly or indirectly by nationals of another Member country*" should be accorded "*treatment no less favourable than that accorded in like situations to domestic enterprises*", that is to say they should be accorded "**National Treatment**". This principle was incorporated in the GATT 1947 and continues to be fundamental to the GATT 1994 as applied to goods. It has been included within the framework of the Uruguay Round in the Agreements on Trade-related investment measures (TRIMS) and on Trade-related Aspects of Intellectual Property Rights (TRIPS). Also, the General Agreement on Trade in Services (GATS) promotes the principle of national treatment, provided this qualification is set out in the respective schedules.

2 Proliferation of conditional national treatment in the US

Although within the OECD framework, Member countries have taken steps to extend their application of the national treatment principle by gradually removing existing restrictions, the US has retained a certain legislative stock of provisions conditioning national treatment of foreign economic operators in different economic sectors.

Enhancing conditional national treatment

The European Commission is now concerned about a growing tendency in the 103rd US Congress to proliferate legislation conditioning the principle of national treatment and providing for the possibility of increased **discrimination against European economic operators** in the US. This proposed legislation is not only directed at non-US companies' participation in federally funded Research and Development (R&D) and related activities, but extends to a growing variety of sectors such as:

- Antitrust exposure of production joint ventures;
- Collaboration in environmental research and implementation projects;
- Aeronautical technology research, development, and commercialisation;
- NASA procurement;
- Financial services;
- Research in low-emission power sources;

- High-risk commercial space ventures;
- Application of Section 301 of the Trade Act of 1974 in cases of denial of national treatment for US companies operating in foreign countries;
- Earthquake equipment.

The following legislation is affected:

- National Cooperative Production Amendments Act of 1993, signed into law on 10 June 1993
- National Competitiveness Act (S 4 / HR.820)
- Aeronautical Technology Consortium Act (S 419 / HR 1675)
- National Environmental Technology Act (S 978)
- Hydrogen Future Act (HR 1479)
- National Aeronautics and Space Administration Authorisation Act (HR 2200)
- Omnibus Space Commercialisation Act (HR 2731)
- Fair Trade in Financial Services Act (S 1527)
- Defence Authorization Legislation (HR 2401 / S 1298)
- Amendment to the Trade Act of 1974 (HR 249)
- Authorisations for the Earthquake Hazards Reduction Act of 1977 (HR 3485)
- Fair Trade in Services Act (HR 3565)

Reciprocity

Performance requirements

The discrimination of non-US controlled companies is mainly brought about by two different kinds of conditioning the granting of national treatment. On the one hand, there is the straightforward **conditioning of national treatment** towards private operators by requiring the country of origin of the foreign economic operator to grant reciprocal treatment to US companies which are economically active in that country in order for the foreign company to receive formal national treatment in the US. It is important to note that the **reciprocity condition** is not always related to the sector in which the foreign company is active in the US, but may also be **cross-sectoral**. The proposed US legislation contains **distinctive operative conditions** either in the form of a definition of the notion of "US company", or in the form of additional performance requirements for non-US companies. In general, the performance requirements formally apply to all economic operators whether or not they are domestic or foreign-controlled, and thus do not constitute a de jure deviation from the formal national treatment principle. However, in these cases foreign-controlled enterprises can face **indirect, de facto discrimination,** in that they experience more practical difficulties than US firms in fulfilling the performance requirements.

3 *Undesirable consequences*

Important EU FDI in the US

Valued on a historical-cost basis, direct investment of EU origin in the US amounted to almost $229 billion at the end of 1992. This corresponds to more than 50% of total foreign investment in the US market. It is acknowledged by the US Government that the growth of US affiliates has had a net positive effect on the US economy, contributing to capital formation, value added, and technological development. Exports from foreign investors in the US totalled $91 billion.

EU proposals

If the trend in Congress on conditioning national treatment were to prevail, this would make foreign direct investment in the US considerably less attractive and impact on the overall EU-US trade and investment relations. In a multilateral context, this kind of legislation would seriously distort a major element of the global trade system, and eventually even lead to a blurring of the principle of **Most Favoured Nation (MFN) treatment**. The European Commission has already expressed its concerns on several occasions. It has proposed to continue consultations between the EU and the US with a view to working on the formulation of mutually acceptable criteria regarding the eligibility of companies for participation in R&D and technology programs. The pursuit of such consultations and an eventual understanding would contribute much towards creating a stable and investment climate in the US beneficial to all sides.

J The Application of Countervailing Duty Legislation

CVD as trade barrier

US countervailing duty (CVD) legislation aims to offset the competition-distorting effect of subsidies bestowed in a foreign country on products entering the US market. This legislation is thus designed to protect the US market from unfair competition from foreign products by establishing an equal competitive level. While this is a legitimate objective, and while it is clear that US CVD legislation does not intend to bar or restrict imports in general, its recent application has assumed the character of a barrier to trade.

The Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT (Subsidies Code) sets out on the one hand to ensure that the use of subsidies does not adversely affect or prejudice the interests of any signatory to this Agreement by allowing relief to be made available to producers adversemu affected by subsidies. But on the other hand the Agreement tries to ensure that countervailing measures do not unjustifiably impede international trade. The European Commission firmly believes in the need to respect this balance, and to ensure that the legitimate use of GATT remedies against unfair trade practices remains within the boundaries of GATT rules.

Unwarranted CVD cases

The US imposed in the course of 1993 countervailing duties on a significant part of the EU's steel exports to the US market. The European Commission considers these CVD cases to be unwarranted and/or excessive because of their sheer number and, more importantly, because of the methods used by the US investigating authorities:

- The US has countervailed subsidies which were granted up to 15 years ago to EU steel companies. While not contesting the right to allocate subsidies over time, the European Commission considers this practice to be arbitrary and not in conformity with the GATT 1985 Guidelines on Amortisation and Allocation.
- The US also recalculates the actual amount of a grant given by a government and, by doing so, unjustifiably increases the amount of the subsidy. This leads to a CVD of sometimes two or three times the actual amount of the subsidy granted.
- Countervailing duties were imposed on the products from one EU steel producer because the company produced steel with assets it had bought from a company which allegedly had received subsidies in the past. The steel producer and the European Commission have argued in vain that this producer, by purchasing these assets at full market value, cannot have received any benefits from subsidies which may have been granted in the past to the seller of those assets.

- The US has also countervailed the debt forgiveness that private German banks have granted to a steel producer. The Commission considers that private payments cannot be considered as a subsidy given the absence of any financial contribution from or constraint by the public authorities on these private banks.
- The European Commission finally questions whether the US subsidy findings in the case of capital infusions or the granting of credit facilities to steel companies by public authorities entail subsidies at all. The Commission is of the opinion that in many instances the US could only make its subsidy findings by resorting to artificial and arbitrary methods in order to determine whether the company was "equity" or "credit" worthy.

GATT panel request successful

The above mentioned US methods have led either to findings of subsidies where none existed or to an overstating of the actual amount of subsidies when they did exist. On this basis the US has imposed countervailing duties at an exaggerated level on a large proportion of EU steel exports to the US, thereby seriously impairing or hindering these trade flows. These measures are thus not in conformity with the Subsidies Code. As a consequence, the European Commission has requested a GATT Panel with regard to one product group (lead & bismuth steel). The GATT Committee on Subsidies and Countervailing Measures decided on 4 June 1993 to establish a Panel to review the facts of these anti-subsidy cases. Procedures are ongoing, with a panel report expected during the first half of 1994. For other steel cases (flat-rolled steel products) further consultations and conciliation are underway.

CHAPTER 3: SECTORAL BARRIERS AND IMPEDIMENTS

A Agriculture and Fisheries

1 An Introduction

Positive developments

Traditionally, bilateral EU/US agricultural trade has been one of the more contentious areas of trade relations. However, in recent years, several factors have contributed to a distinct relaxation of trade tensions. Firstly, the EU's **internal reform of its agricultural policy** has also had beneficial external effects, notably the reduced level of export refunds on a range of agricultural products as well as the elimination of export subsidies for some others. Secondly, the reaching of a solution on the long-running **oilseeds dispute** removed a serious bone of contention between the two sides. And thirdly, the agreement reached in December 1993 on the **Uruguay Round negotiations** also constitutes a positive development. The overall effect of these developments will be to facilitate international agricultural trade flows and reduce the possibility of potentially trade disrupting disputes in the future. The relative peace between the world's two major agricultural traders should have spillover effects in terms of the expansion of global agricultural trade and important economic benefits for both agricultural producers and those involved in agribusiness throughout the world. However, notwithstanding the fact that a lot of the heat has been taken out of EU/US agricultural disputes, a variety of issues remain unresolved.

2 Export and Other Subsidies

US export enhancement

The **Food Security Act of 1985** required the United States Department of Agriculture (USDA) to use Commodity Credit Corporation stocks, under the Export Enhancement Program (EEP) to subsidise exports of US wheat to a limited number of countries, most of which are traditional EU markets. EEP is now used for a wide range of commodities (mainly wheat and flour, barley, barley malt, sorghum, poultry feed, vegetable oils, frozen poultry, eggs, rice, semolina, dairy cattle and canned peaches) and for exports to over 70 food-importing countries.

The **1988 Trade Act** extended the program to 1990 and increased it from $1.5 billion to $2.5 billion. The **1990 Farm Bill** reinforced the tough US attitude, providing for the continuation of the EEP without specified program limits. It provided for a minimum of $500 million per year, for five years. The expenditure for EEP for FY 1992 was $968 million. The estimated expenditure for FY 1993 is $1.2 billion and, in FY 1994, has amounted to $536 million as of 7 February 1994.

From FY 1985 to February 1994, about 142.8 million tons of wheat, 4.4 million tons of wheat flour, 13.6 million tons of feedgrains, 1.67 million tons of vegetable oil and substantial quantities of eggs, dairy cattle, frozen poultry and canned peaches were targeted for export subsidies within the program. In financial terms, subsidies already granted are valued at approximately $5,306 million. According to the US Department of Agriculture, the 1992 EEP measure of $1 million on exports of 9,000 tons of canned peaches to Japan, Korea and Mexico was taken as a retaliation against the EU because of the EU refusal to apply retroactively a modification of the processing aid for canned fruit which had become necessary under the EU-US agreement on canned fruit. In FY 1993, 2,654 tons of canned peaches were the subject of EEP subsidies.

In addition, in FY 1993, the US Government spent approximately $1.61 million on the **Dairy Export Incentive Program (DEIP),** $25.3 million for the **Sunflower Oil Assistance Program (SOAP)**, and $6.8 million for the **Cottonseed Oil Assistance Program (COAP)**. These programs are mainly targeted against EU agricultural exports to third countries. The US Administration has recently indicated that it is not planning to reduce EEP in anticipation of the implementation of the Uruguay Round agreement, although it will have to do so afterwards, and is also expected to retain export subsidies under the DEIP.

Internal support by loans

Marketing loans were provided for in the **Farm Act of 1985**, on a discretionary basis for feedgrains, wheat and soyabeans, but on a mandatory basis for rice and upland cotton. They permit the repayment of government buying-in loans for certain agricultural commodities at less than the loan rate and thus function as an additional measure of internal support. The **Agricultural Competitiveness and Trade Act of 1988** established a mechanism for automatically triggering marketing loans for wheat and feedgrains if it were judged by the US that there had been insufficient progress in the agricultural negotiations in the Uruguay Round. These triggers remain on the books with respect to wheat and feedgrains. The **1990 Farm Bill** provided for the continuation of mandatory marketing loans for upland cotton and rice and for extension of the scope of same to include soyabeans and other oilseeds.

The **Food Security Act of 1985** established a new program, entitled **Targeted Export Assistance** (TEA). Under this program, for fiscal years 1989 and 1990 figures of $200 million and $220 million were approved. Under the **1990 Farm Bill** the TEA program was renamed the **Market Promotion Program** (MPP) and expanded to "encourage the development, maintenance and expansion of commercial export markets for agricultural commodities". Whereas the TEA program was limited to commodities where the US considered that exports had been adversely affected by unfair foreign trade practices, the MPP, while according such exports priority for assistance, allows consideration also to be given to other commodity groups. The allocation for FY 1992 was $200 million, for FY 1993 is $148 million and for FY 1994 is $100 million.

Export assistance

The US supports its agriculture by **commodity loans** which guarantee the farmer a minimum price (loan rate) if he cannot sell his produce above this price on the open market, and by **deficiency payments** which are calculated as the difference between a government-established target-price and the higher of the market price or the loan rate. Deficiency payments are an internal support measure which, nevertheless, may impact substantially on external trade. Deficiency payments allow the US to have lower internal prices than within the EU and to start with direct export subsidies from lower levels.

Export credits

The **Export Credit Guarantee Program** (GSM-102) is the largest US agricultural export promotion program and has been functioning since 1982. It guarantees repayment of private, short-term credit for up to three years. The **Intermediate Export Credit Guarantee Program** (GSM-103) was established by the **Food Security Act of 1985** and complements GSM-102 by guaranteeing repayment of private credit for 3-10 years. Guarantee coverage of at least $5 billion annually is provided for under GSM-102 and of $500 million under GSM-103. A total of $3.6 billion of guaranteed credit was announced for FY 1993 under GSM-102 and GSM-103.

Public law 480 (P.L.480) has amongst its other (generally altruistic) aims the expansion of foreign markets for US agricultural products. Its Title I makes US agricultural commodities available through long-term dollar credit sales at low interest rates for up to 40 years (as from Spring 1992). In FY 1992, Title I agreements were estimated at $494 million and the Administration is seeking $312 million in budget authority for FY 1994. Donations for emergency food relief are provided under Title II (valued at $470 million in FY 1992). Title III authorises "food for development" projects (valued at $240 million in FY 1992). The program level for P.L.480 for FY 1993 is about $1.7 billion.

3 Trade Hampering Import Quotas

Section 22 of the US **Agricultural Adjustment Act of 1933** requires import restrictions to be imposed when products are imported in such quantities and under such conditions as to render ineffective, or materially to interfere with, any US agricultural program. Such restrictions are contrary to GATT Articles II and XI. Therefore, the US sought and was granted in March 1955 a waiver, subject to certain conditions, for its GATT obligations under the above articles with respect to Section 22 quotas. Nearly 40 years have since elapsed and in the EU's view the continuation of the waiver cannot be justified. In the annual examination of the waiver in the GATT, the EU together with other Contracting Parties has always insisted that the conditions under which the waiver was granted should be fully respected and that the application of the waiver should be brought to an end. The conclusion of the Uruguay Round will have the effect of replacing the Section 22 quotas with new current access quotas which will be "bound" in the GATT.

US quotas effecting EU exports

The US regulates imports of a variety of agricultural products through the establishment of quotas. These cover certain dairy products (including cheese), ice-cream, syrups, certain articles containing sugar (including chocolate crumb), cotton of certain staple lengths, cotton waste and strip, and peanuts. While these restrictions are covered by a GATT waiver, they restrict EU exports to the US and have a considerable negative effect on world markets. The EU exports potentially most heavily affected by US quotas are dairy products, cheese and sugar-containing articles.

Cheese import quotas

In this context, attention has to be drawn to the fact that unilateral decisions of the US administration on the application of the cheese import quota in 1988, 1989, 1991 and 1993 resulted in a globalization of certain EU allocations in favour of other third countries. Such decisions are incompatible with the provisions of the **1979 cheese arrangement** between the EU and US as was indicated to USDA on several occasions.

4 Disproportionate Burden Through Cotton Import Fee

The **Cotton Research and Promotion Act** Amendments of 1990, enacted under the 1990 **Farm Bill** provide, inter alia, for a levy of $1 per bale on imports of cotton and cotton-containing products, in addition to a supplemental assessment of six tenths of one percent of the historical value of the cotton (based on the average price received by US producers of upland cotton). This import fee does not appear to discriminate, in principle, against foreign producers exporting to the US, as a similar fee is imposed on domestic US producers of raw cotton. However, it may prove discriminatory in practice for two reasons, which have been explained to the US Administration.

Disproportionate impact on imports

Firstly, the **assessment of the fee** tends to place the cost of administration disproportionately on imports. These high administrative costs, besides being burdensome in themselves, may also have the effect of a non-tariff barrier in discouraging foreign producers from exporting to the US. The EU is also concerned that the list of imported products upon which this fee is to be levied appears to include a range of products which are classified as containing blends of a high percentage of other textile fibres, for example, many wool garments, sales of which would in no way benefit from measures destined to increase cotton consumption.

Promotion of domestic cotton

Secondly, it is understood that this fee is to be used to fund the **US Cotton Board**. To the extent that the activities of this organisation benefit domestic and foreign cotton equally, there would not appear to be discrimination. However, the EU is concerned that foreign cotton may not, in fact, receive equitable treatment, especially as one of the express purposes of the Cotton Board, as set out in the Federal Register notice, is "to maintain and expand domestic and foreign markets and uses for US cotton".

The final rule became effective on 10 November 1992. This was unchanged except for the reduction of the rate from 0.6% to 0.5% of the value of cotton bales or bale equivalent. The EC's concerns were not met. The US Department of Agriculture proposes to raise the rates again in 1995/96. In summary, the EU is concerned that the two aspects of the proposed legislation referred to above may amount to de facto discrimination against imports into the US and a non-tariff barrier for foreign exporters of cotton-containing products.

5 *Sanitary and phytosanitary requirements*

Customs delays for perishable goods

Differences in US and EU sanitary and phytosanitary requirements can have restrictive effects on trade. In the past, there have been cases where US customs follow a sampling and inspection procedure which fails to define adequately which goods require urgent processing by customs if deterioration is to be avoided. EU exports of fruit (apples, pears, citrus), ornamental plants, cut flowers and smoked salmon to the US have encountered problems due to delays, resulting in damage to the goods and subsequent commercial losses for the exporters. In particular, the Food and Drug Administration's time-consuming scrutinising controls on the detection of pit fragments in imports of canned peaches from the EU has lead to detentions and subsequent destruction or obligatory re-export of this product, hampering the flow of trade and negatively affecting the volume of exports. 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.

In the **phytosanitary field** the following main difficulties persist in spite of some progress within the framework of bilateral discussions between the European Commission and the US Department of Agriculture in 1993.

Insect pests in apples and pears

Prior to the introduction of administrative instructions governing the entry of **apples and pears** from certain countries in Europe (Fed. Reg. of 1987, Title VII, ch.3, par. 319-56-2r), a pre-clearance program was applied in agreement between the French and US authorities with the objective of guaranteeing the absence of an insect pest known as the pear leaf blister moth. The new administrative rules extended the inspections to other Member States and to "other pests that do not exist in the US or that are not widespread in the US", the result being that US inspection operated on the basis of an open list of prohibited pests.

Operating on the basis of an open list is not a scientific approach and is contrary to the spirit of transparency as provided for in the International Plant Protection Convention. Notwithstanding the continued operation of the pre-clearance program, the rate of rejection of consignments increased significantly. The extended and more stringent inspection as well as the ensuing increased costs have had an evident negative impact on EU exports of apples and pears to the US. Negotiations between the EU and the US have so far failed to solve the issue.

Imports from pathogen-free regions

The prohibition of import of **fruit and vegetables** from pathogen-free regions of an EU Member State adjacent to regions in which a given pathogen is known to occur (Fed. Reg. of 1987, title VII, ch.3, par. 319-56-2r) creates undue obstacles to export from pathogen-free regions within the EU. An example is the prohibition of import 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, imports into the US of ripe tomatoes from Brittany are not permitted by the US authorities. The EU considers these measures to be excessive and not justifiable on phytosanitary grounds.

Potted plants

The revised provisions regarding standards and certification of **plants** established in growing media (Fed. Reg. of title VII, par. 319-37-8) have reduced the obstacles encountered so far for EU exports of potted plants to the US. However, the certification of plant genera involves a very long procedure which may considerably delay the approval of EU plant genera. A proposed rule (Fed. Reg. Vol. 58 No. 171) of 7 September 1993 provides for an amendment to CFR. 319-37-8 to allow the importation of five additional genera of plants. While approval of these five genera is expected in 1994, the EU considers the decision to reevaluate the previous risk analyses done on EU plant genera unnecessary and an undue obstacle to trade in this area.

Stringent residue levels

The US insists on zero **pesticide residue** levels for substances which have not been approved for use in the US or for which no import tolerance has been established even where these substances are manufactured in the United States and exported to foreign countries (i.e. Mercabam). In some cases, time-consuming or unduly delayed approval procedures have led to trade disruption.

Disruption of EU wine imports

In February 1990, the Food and Drug Administration (FDA) found residues of a fungicide "procymidone" in imported wines. The fact that the manufacturer had not applied to the Environmental Protection Agency (EPA) to have a tolerance level fixed for this product led to an effective zero tolerance level being imposed and consequent disruption of EU wine exports to the US to the tune of $200 million in 1990. This situation prevailed despite the fact that a Scientific Advisory Panel subsequently found that the health risk to consumers of wine with residues of procymidone is negligible. The interim solution of the trade dispute, in April 1991, has allowed the resumption of the bulk of normal trade flows. The establishment by the EPA of a permanent tolerance has not yet taken place but is anticipated shortly.

Negligible risk policy

In July 1992, the Californian Court of Appeals effectively ruled the EPA's negligible risk policy as illegal. This ruling would have the effect of rejecting food products (fresh or processed) containing residues of more than 35 frequently used pesticides. The Administration is presenting a proposal to Congress on widespread reform in pesticide legislation including the Delaney clause which imposes a zero level for any cancer-inducing residue.

Registration of naturally acidified products

Table olives and **pickled vegetables** from certain EU Member States, despite the fact that they constitute products of natural fermentation, are considered by FDA to be either low acid or acidified, resulting in the obligation on their producers to register with the FDA. As attested by regulations both of the International Council of Olive Oil and FAO's Codex Alimentarius, these are natural products for which the fermentation in brine leads to a slight natural level of acidity, rendering it unnecessary for acids or other chemical preservatives to be added. The obligation on these producers to register with the FDA constitutes an administrative barrier, which seriously hampers imports and often results in unjustified detentions at US ports of entry.

In the **sanitary field** the following difficulties persist :

Bovine Spongiform Encephalopathy

The US rules on importation of **animal products** and by-products from countries where Bovine Spongiform Encephalopathy (BSE) exists (docket number 90-252, Fed. Reg. 56 : 19794, April 30, 1991, amending 9 CFR parts 94 and 95) contain three requirements concerning ruminant animals:

- that the meat does not originate from any animal which has been in a country in which BSE exists during a time when the country was permitting the use of ruminant meat and bone meal for the feeding of ruminants;
- all meat has to be deboned and all visually identifiable lymphatic and nerve tissue have to be removed;
- each animal has to be inspected prior to slaughter by a veterinarian and found free of neurological disorders.

The EU has taken restrictive veterinary measures, which have been approved by the International Office for Epizooties (IOE), in order to protect animal health and public health in the EU. However, the US measures go beyond these measures on important points such as:

- US does not make any distinction between countries with low or high incidence of BSE, while the EU in accordance with IOE requirements takes restrictive measures only in countries with a high incidence of BSE (UK). This position whereby the varying incidents of BSE in countries is not taken into account was restated in the 7 September 1993 rule (9 CFR.94.18) which unjustifiably banned import of animal casings from all countries listed by the US as having BSE (UK, FR, IRL, P). Furthermore, the temporary addition of Denmark and subsequent addition of Portugal to the US list of countries where BSE exists on the basis of one imported infected cow was not justified;
- all meat from all countries with BSE (UK, FR, IRL, P) must be deboned, while EU requirements for deboning only concern UK;
- double requirement of deboning and the ban on meat from animals born prior to the ban on feeding on ruminant meat and bone meal.

The EU considers that the US measures constitute an unjustified restriction on trade. There is no justification for going beyond the recommendations of the authoritative international institution (IOE) especially when the US has not taken measures to protect its cattle population from the internal threat of scrapie in the US. In particular, the application of the severe measures (as applied to the UK) to countries with only a few cases of BSE cannot be justified.

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

The principle of regionalization as an effective means of controlling animal disease has been incorporated in the US Tariff Act 1930 by the North American Free Trade Agreement (NAFTA). However, US import administrative rules concerning Foot and Mouth Disease, Rinderpest and other relevant diseases remain to be amended to reflect this change in legislation.

Non-recognition of EU regional control

Non-comminglement means that establishments exporting animals, meat or meat products to the US do not handle at the same time, animals, meat or meat products from countries which are not recognised as free from relevant diseases and that there is no mixing of meat or meat products destined for the US with meat or meat products from such countries. These requirements are unnecessary in view of the EU policy of regionalized control of animal diseases.

Import of uncooked meats

Imports into the US of **uncooked meat products** (sausage, ham and bacon) have been subject to a long-standing prohibition, only part of which may be justified on health grounds. Following repeated approaches by the EU, US import regulations were modified to permit importation of Parma ham. However, the US still applies a prohibition on other types of uncooked meat products, e.g. San Daniele ham, German sausage, ham and bacon and cured hams from Spain.

Continuous inspections unnecessary

The import of **egg products** is only allowed under very strict conditions. One of these requirements is the continuous inspection of the production process. This is superfluous and expensive and has a negative effect on prices and competitiveness. However, a system of periodic inspection of the production process would be acceptable from a human health point of view.

The Hormones dispute

In 1989 in response to a Community ban on the use of **hormones** in the production of livestock, the US imposed **unilateral retaliation measures** under Section 301 of the Trade Act of 1974 on EU exports to the US to the value of $97.2 million. This amount represents the US's perceived loss of trade to the EU in beef and beef products for human consumption.

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

Earlier this year, the EU requested in writing that a further reduction be made. The US replied that, having examined the relevant trade data, they considered that no adjustment of the retaliation measures is warranted. Although the issue was raised during the final phase of the Uruguay Round negotiations, the US Administration is currently not prepared to give a commitment to reduce the retaliation.

6 *Domestic Content Requirement for Tobacco*

GATT illegal measure

The **Omnibus Budget Reconciliation Act of 1993** contains provisions, notably a 75% domestic content requirement for tobacco in cigarettes manufactured in the US, which will negatively affect EU exports of tobacco to the US. The EU presented a written démarche to the Department of State in July 1993 expressing its concerns regarding the provisions of this legislation. The EU considers that these measures infringe its GATT rights, in particular with respect to GATT Article III, and announced at the GATT Council on 22 September 1993 its intention to request consultations with the US under GATT Article XXIII:1. The EU consultations with the US were held in October 1993 but proved unsatisfactory. Consequently, at the meeting of the GATT Contracting Parties in January 1994, the EU announced its intention to make its views known to the GATT Panel which has been requested by a number of other Contracting Parties. The EU has also commented on the implementing rules published in the Federal Register with respect to the Domestic Content Requirement and to the Tobacco Importer Assessments.

7 *Inadequate Protection of Geographical Indications of European Wines and Spirits*

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

Limited protection granted

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

US use of EU geographical 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 wines of US origin. The most significant examples are Burgundy, Claret, Champagne, Chablis, Chianti, Malaga, Marsala, Madeira, Moselle, Port, Rhine Wine, Sauternes, Haut Sauternes and Sherry. This issue is clearly a major one in the ongoing EU/US discussions on a new and better wine accord.

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

Agreement reached

With regard to spirits, the US regulations basically provide protection against practices misleading to the consumer. Furthermore, they explicitly protect five EU denominations. This limited protection does not prohibit the improper use of geographical designations of spirits or even the development of certain names into generic designations. An agreement was approved by the Council of the European Communities in February 1994 for the reciprocal protection of two US and six EU designations and discussions on the mutual recognition of further designations should take place shortly.

8 Labelling

US legislation requires certain products to be labelled as to their content and origin. The implementation of the **Nutrition Labelling and Education Act 1990** requires the US Food and Drug Administration (FDA) to follow an accelerated timetable in their extensive program of changes to US food labels. In this context, the FDA published a series of proposed rules (amounting to over 600 pages) in the Federal Register of 27 November 1991, with a comment-period deadline of 25 February 1992. The US Department of Agriculture has also been working along the same timetable with regard to the labelling requirements for fresh meat and poultry. Final rules were published in January 1993 with respect to both the FDA and USDA nutrition labelling with effective dates in May 1994.

Divergence from international standards

The EU is concerned that the proposed rules differ from international standards on labelling established by **Codex Alimentarius** (upon which the corresponding EU legislation is based) and, furthermore, that this legislative action would have serious negative consequences on EU/US trade in foodstuffs. As it stands, the proposed implementing legislation would result in significant commercial obstacles to EU food products marketed in the US and vice-versa.

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

9 Phytomedicines

Marketing restrictions

The Food and Drug Administration (FDA) has implemented a statutory requirement for old (but generally recognised as safe and effective) drugs to the effect that marketing experience must have taken place only in the US. Apparently this marketing limitation was placed on Over-the-counter (OTC) products in order to facilitate the FDA's extensive OTC Drug Review which took place in the 1970's and 1980's. Given the fact that international harmonisation efforts for pharmaceuticals are on the increase, this limitation presents a major trade barrier to European companies.

Petition to expand drug review

On 24 July 1992, the European American Phytomedicines Coalition (EAPC) filed a Citizen Petition with the Food and Drug Administration asking the Agency to expand its OTC Drug Review. The Petition is under review in FDA's Office of the General Counsel and its Office of OTC Drug Products to include plant medicines (also known as phytomedicines) which are marketed in Europe.

10 Driftnet Fishing

Unilateral measures

The **Magnuson Fishery Conservation and Management Act of 1983** (MFCMA) was re-authorised in 1990 with a resulting impact on international fisheries matters. The amended Act proposes that the US apply a number of unilateral measures to its partners with which it has **Governing International Fisheries Agreements** (GIFA) on the high seas. The measures include the right for the US authorities to know the whereabouts of driftnet vessels beyond their exclusive economic zone, to board and inspect those vessels and to have on-board observers. However, the GIFA with the EU expired on 1 January 1994.

Amendments also require the Department of Commerce to list nations, the nationals of which engage in large-scale driftnet 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.

Yellowfin tuna

The US introduced a **compulsory system of Certificates of Origin** for yellowfin tuna caught in the Eastern Tropical Pacific from 1 July 1992. Certification rules are also applied for countries using large-scale trawl nets. These rules may be considered to be a serious obstacle for EU exporters. The provisions of the **High Seas Driftnet Fisheries Enforcement Act of 1992** allow for the possibility of EU Member States, if engaged in large scale driftnet fishing, being faced with an embargo in the future.

11 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 possibilities for EU vessels off the east coast of the US have been gradually phased out under the terms of both the Magnuson Fishery Conservation and Management Act (MFCMA) and the former Governing International Fisheries Agreement (GIFA) in favour of the development of the US domestic fishing industry. Though mackerel migrating off the east coast is the only stock currently identified as being in surplus in the US Exclusive Economic Zone (EEZ), the US authorities have proposed a zero TALFF for both 1993 and 1994 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 nor to the provisions of Article 62 of the **UN Convention on the Law of the Sea**.

International cooperation necessary

The EU acknowledges the entitlement of the US to link access to living resources in its EEZ to certain conditions. There seems to be a tendency, however, to use US measures (such as the definition of large driftnets) as benchmarks of other countries' policies with the possibility of sanctioning accordingly. No matter how well-founded are the US objectives, their actions should be based upon international cooperation. Otherwise, unilateral measures may be out of proportion with the objective of conservation and destabilizing for international trade.

12 Comments

Conclusion of Uruguay Round

The conclusion of the Uruguay Round negotiations in December 1993 represents the integration of agricultural trade into the multilateral trading system. This agreement, once implemented, will ensure that in the future agricultural trade will be subject to rigid multilateral disciplines. In addition, the US, together with other GATT Contracting Parties, has agreed to specific disciplines on internal support measures, on export subsidies and on market access which will substantially affect the measures which have been discussed in the preceding chapter. With regard to internal support, for instance, it has been agreed that deficiency payments may be exempted from the requirement of reduction provided they satisfy certain criteria such as a direct link to set-aside. However, the internal support provided by marketing loans will require reduction. As regards export subsidies, EEP and DEIP will have to be substantially reduced in accordance with UR commitments although it appears that SOAP and COAP may be phased out before the deadline for UR implementation (probably July 1995). It would appear that the MPP will be exempt from reduction in as far as promotion activities do not directly affect production. In 1992, at Blair House, the European Commission and the US agreed to work towards the development of internationally agreed disciplines (for example within the framework of the OECD) to govern the provision of export credits, export credit guarantee or insurance programs. Thus negotiations should take place with regard to such measures as GSM-102, GSM-103 and P.L. 480.

Scientific justification for SPM

In addition, the UR package of 15 December 1993 includes an Agreement on Sanitary and Phytosanitary measures (SPM). This Agreement will allow for the distinction between legitimate SPMs from protectionist SPMs. The Agreement both acknowledges the right of the importing countries to establish the level of protection determined by any of these countries and the right of the exporting countries to certify that certain exports are free of pests or diseases subject to the importing countries concerned. In the footnote under §11 of the Agreement, the Contracting Parties have agreed to the principle that "a scientific justification" is a basis for a SPM which is more stringent than the international standard but which "is not more trade restrictive than required to achieve their appropriate level of protection". Being placed under the World Trade Organisation (WTO) dispute-settlement procedure, it is possible that many instances of abuse of SPM will be brought to the attention of the WTO.

Further negotiations necessary on intellectual property aspects

Finally, in the Uruguay Round negotiations on intellectual property, the EU sought to establish a high level of protection to prevent any use of a geographical indication identifying a wine or spirit on a product which did not originate from the area indicated. The text agreed partially addresses this concern; it represents an important step forward insofar as it obliges member countries to protect geographical names for wines and spirits which originate in that geographical area, and it aims to secure a standstill on the usurping of geographical indications. Nevertheless, the Contracting Parties agree to enter into bilateral negotiations aimed at increasing the protection provided by the agreement, particularly as far as generics and semi-generics are concerned, and the EU's goal remains to eliminate completely all illicit use of its appellations.

B Services

1 An Introduction

The US economy, although still considered to be strongly based on manufacturing, has become increasingly orientated towards the services sector. Whether this will continue at the same pace as in the 1980s is unclear. The Clinton Administration has pledged to stimulate capital growth in small and medium size businesses, and has indicated that it intends to focus its action on promoting industrial growth in certain high-tech or strategic industries.

Growing importance of services sector

Services exports from the US have grown steadily over the past six years - from $77 billion in 1986 to $152 billion in 1991. The services sector in the US economy includes areas such as communications, transport, public utilities, finance, insurance and real estate, wholesale and retail trade, government, as well as business and health care services. Nearly 75% of the US labour force is employed in service industries. In every State more people are employed in service jobs than in manufacturing, agriculture and mining. Widespread impediments for foreign service providers to obtaining effective access to the services market in the US therefore continue to be of concern to the EU.

2 Financial Services

a) Federal Restrictions

Continuing discrimination against foreign banks

The US Government has made unsuccessful attempts to reform the US banking system However, Congress has opposed these attempts and called into question the unconditional national treatment of foreign-controlled financial services operators. An example of this is the **Fair Trade in Financial Services Act**. Submitted to Congress in October 1993, this legislation aims to improve market access in third countries for US banking and securities firms. By introducing requirements for reciprocity, access to the US financial services market can be denied to foreign companies whose home country does not agree to remove its market access barriers for US financial service providers. Despite assurances that the legislation is not targeted at the EU, the European Commission is monitoring further developments carefully to ensure that the interests of EU financial services providers in the US are secured.

The latest US offer for commitments in the financial services sector under GATS confirms the impression that US policy is moving towards conditioning market access and national treatment, at least with regard to new operations and new establishments. As its binding commitments are limited to existing activities, any expansion of existing operations, the establishment of a new commercial presence, or the conduct of new activities are all potentially subject to regulation which discriminates against foreign operators.

It is already the case that EU financial institutions in the US are not always granted national treatment, but are discriminated against and restricted in their business activities.

Tightening of foreign bank supervision

The implementation of current legislation such as the **Federal Deposit Insurance Corporation Improvement Act of 1991** (FDICIA) and the **Foreign Bank Supervision Enhancement Act** (FBSEA) has tightened regulation and supervision requirements, notably for foreign banks. The implementing regulations of the FDICIA have created uncertainties and delays in establishment. Under the FBSEA, the Federal Reserve Board must now approve all foreign bank applications for branches, agencies and representative offices, including those seeking or holding state charters. In doing so, the Federal Reserve Board must determine whether the foreign bank is subject to comprehensive supervision on a consolidated basis by its home country authorities. It also has to check whether the bank's top management and local office managers have been associated with any criminal activity. While it is recognized that the new procedures are based on legitimate concerns, it should be possible to address these concerns without creating barriers for foreign operators.

New fees levied on foreign banks

Only recently, the Federal Reserve Board published for public comment a proposal for charging **annual examination fees** to foreign bank branches, agencies and representative offices on the grounds that under the FBSEA it is obliged to charge fees. Like US banks, US branches and agencies of international banks already pay examination fees to their primary regulator, whether it be a state authority for a state-licensed branch or whether it be the Comptroller of the Currency for a federal branch or agency. The Federal Reserve Board's long standing policy has been not to charge US banking institutions for its examinations. Consistent with the treatment of US banking institutions, the Board has not charged US branches, agencies and other operations of international banks since 1978, when it was first authorized to examine international banks under the International Banking Act. To charge US offices of international banks for Federal Reserve examinations would effectively require international banks to pay two sets of examination fees, while US banks continue to pay only one. This would clearly be inconsistent with the principle of national treatment and with US obligations under international and bilateral treaties.

Bank subsidiaries of a foreign-controlled bank incorporated in the US may not own a securities firm (Section 20 of **Glass Steagall Act**), although in January 1990 some of them were authorized to own subsidiaries which may engage to a limited extent in underwriting and dealing in corporate debt and equity securities on the same basis as US owned bank holding companies. Similarly, non-US banks with a bank subsidiary in the US may not own a securities firm (Section 4(a)(1) of the **Bank Holding Company Act**). US branches of non-US banks are subject to the same restrictions when engaging in securities activities (Section 8(a) of the **International Banking Act**).

Discrimination in the securities market

Under section 7(d) of the **Investment Company Act of 1940**, a foreign investment company may not sell its securities in the US, unless the US Securities and Exchange Commission (SEC) finds that investors in the foreign investment company will enjoy the same protection as investors in domestic investment companies. The SEC recognizes that this standard is hard for foreign companies to meet. Therefore, it has suggested that foreign money managers organize an investment company in the US that invests in the same type of securities as the foreign investment company and register the "mirror" fund to sell its shares in the US. Foreign money managers are reluctant to incur the additional costs necessary to do this.

Burdensome regulations in the futures and options market

With certain exceptions, non-resident firms can only provide investment services, including the provision of investment research to non-institutional investors, to US residents through a registered broker-dealer. However, as regards dealing in futures and options, the **Commodities and Futures Trading Commission (CFTC) Part 30 Exemption Order** permits the exemption of foreign firms from US registration and regulation to provide services to US residents. The CFTC issued an order in October 1992 which had the effect of relaxing previously imposed restrictions on the marketing activities of those foreign firms granted relief in accordance with Part 30 for their US activities. While the granting of the order was appreciated, business done for US residents under non-US contracts on a non-US exchange by non-US firms is nevertheless subject to a number of burdensome regulations. The foreign firm needs to segregate all US customer money and must accept that US customers have the right to resort to arbitration in the US. Furthermore, the foreign firm must provide the CFTC with a list of all its US affiliates carrying on related business and procure a consent from these affiliates that the CFTC may have access to their books. Such a requirement is not imposed on local dealers. Certain of these requirements may even be imposed in cases of unsolicited business carried out at the initiative of the investor.

Extra-territoriality

Access by US residents to non-US markets may also be hampered by the **extraterritorial application of US regulations** determining in certain instances, for business carried out in a non-US exchange or market by a US resident, the terms of contracts, the acceptance by the foreign firm of US jurisdiction, or otherwise imposing US regulation and jurisdiction on non-US exchanges or markets in which US residents participate.

The Securities and Exchange Commission (SEC) has proposed **large trader reporting rules** which appear to require reporting of large trades in US-listed securities even when they take place outside the US and are not carried out through US brokers/dealers. The EU is concerned that, if implemented in the way envisaged by the SEC, this proposal would have extraterritorial effects.

There are a number of other restrictions which further impede the operations of EU financial institutions in the US. Foreign banks still have lower **uncollateralized overdraft** possibilities than US banks. Although the uncollateralized **Fedwire daylight overdraft ceiling** for foreign banks was raised by the Federal Reserve Board in 1991, further improvement is needed.

Impediments to business with S & L's

Federal savings and loan associations are restricted in their ability to make investments in certificates of deposit issued by uninsured offices of foreign banks (Section 5(c) of the **Home Owners' Loan Act of 1933**), or to invest in certificates of deposits and other time deposits offered by foreign banks (Section 5(c)(1)(M) of the Home Owners' Loan Act of 1933 and section A(b)(1) of **Federal Home Loan Bank Act**). Most US branches of non-US banks do not engage in retail deposit activities in the US and are not required to obtain FDIC insurance.

Reciprocity requirements

At Federal level, Section 3502 (b)(1) of the **1988 Omnibus Trade Act (Primary Dealers Act)** prohibits firms from countries which do not satisfy reciprocity requirements becoming or continuing to act as primary dealers of US government bonds, if they were not authorized before 31 July 1987. Exceptions exist for Canadian and Israeli firms.

Tax discrimination

Non-US banks operating in the US have to calculate their allowable interest expense deduction in a form which is disadvantagous to them. They are subject to a 30% **branch profits tax** similar to a withholding tax regardless of whether those earnings have been transmitted outside the US and they may be subject to a tax dependent on the amount of the bank's interest expense deduction (**excess interest tax**), even if the bank has no taxable income. Furthermore, in the application of this tax, non-US banks are disadvantaged in the use of certain tax exemptions.

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

Finally, under Federal law, directors of EU banks' subsidiaries incorporated in the US must be US citizens although, with the approval of the Comptroller of the Currency; up to half of the directors may be foreign.

b) State Restrictions

Importance of state level regulations

Banking regulation at State level is traditionally important because of the existence of the dual banking system in the US, in which responsibilities are shared between Federal and State authorities. State activities have also become particularly significant because deregulation has often appeared first at State level before being adopted at Federal level. In the 1970s, deregulation of interest rates occurred initially at the State level before being adopted by Congress. Similarly, in recent years many States are attempting to avoid federal interstate banking restrictions or limits on lines of business through changes in State law.

Prohibition of interstate banking

Bank holding companies, regardless of their incorporation inside or outside the US, are prohibited from establishing or acquiring control of a bank outside their "home State", unless the host State expressly permits this (Section 5 of the **International Banking Act** and Section 3(d) of the **Bank Holding Company Act of 1956**). However, a majority of States have now enacted laws allowing out-of-state banks to set up subsidiaries in their territory, although there are still some States which do not permit (or impose restrictions on) the establishment of or takeover by bank holding companies which are not of the same State. In addition, according to Section 5(a) of the **International Banking Act**, a foreign bank or its subsidiary not incorporated in the US cannot open branches in more than one State. Foreign banks with branches in several States before 7 July 1978, however, were grandfathered by Section 5(B) of the International Banking Act. Domestic banks are similarly restricted by the **McFadden Act**.

States' reciprocity requirements

Certain States impose **reciprocity requirements** for the establishment of branches or agencies of non-US banks, and most States impose similar reciprocity requirements for the establishment of branches of non-US insurance companies. US banks and insurance companies from other States may also be affected by these provisions. The restrictions and discriminations thus existing at the State level have a smaller adverse impact on the competitive opportunities available to EU financial institutions, but are nevertheless obstacles to effective market access.

Even so, activity at State level has become increasingly important, and there is concern that many States have adopted or are introducing measures which discriminate against EU banks.

- A number of States prohibit foreign banks from establishing branches within their borders, do not allow them to take deposits, or impose on them special deposit requirements;
- Some States have citizenship requirements for bank incorporators or directors;
- Certain States still exclude the issuance of stand-by letters of credit for insurance companies for reinsurance purposes by branches and agencies from foreign banks;
- Certain States exclude the possibility of expanding to other States for "regional compact" banks established in the "regional compact" whose parent bank is a non-US owned bank, or limit the benefits of such expansion only to bank holding companies which hold a large proportion of their total deposits within the region;
- In many States, branches and agencies of non-US banks are required to satisfy burdensome registration requirements to engage in broker-dealer activities, with which US banks need not comply;
- Several States restrict the ability of branches and agencies of non-US banks to serve as depositories for public funds.

Discrimination against insurers

As regards insurance, the fact that the competence to regulate and supervise insurance activities is left to the States (**McCarran-Ferguson Act**) has meant that there is a requirement to obtain a separate licence to operate in each State. Certain States do not allow the operation and establishment of insurers owned or controlled in whole or part by a foreign government or state, whereas other States impose special capital and deposit requirements for non-US insurers or other specific requirements for the authorization of non-US insurers. However, some of these requirements are also imposed on out-of-State US insurance companies. For non-US insurers, some States only issue renewable licences limited in time .

Discrimination by the ICC

At the end of 1991, the **Interstate Commerce Commission** introduced a requirement that **truck operators** involved in interstate commerce should only be allowed to insure with domestic insurers. This in effect bars European insurers from doing business in a sector where they have been active for many years. This is a restraint on trade which is against the interests not only of European insurers, but also of US consumers. It is against the spirit of the OECD Capital Movements and Invisible Transactions Code and also contrary to the desire to improve market access underlying the current agreement in the GATS. The decision is currently being challenged in the US courts.

c) An Assessment

In an increasingly globalized international market, the separation between **banking and securities activities** continues to be at odds with developments elsewhere, and is likely to constitute a significant competitive disadvantage for EU banks which cannot compete in the US for certain businesses, while US banks can engage in securities activities in most Member States of the EU. The US, however, have respected the existing securities operations of some EU banks' securities subsidiaries in the US and have allowed them to continue. Foreign banks now have an opportunity to underwrite and deal, to a limited extent and through a separate subsidiary, in corporate debt and equity on the same basis as that recently granted to US bank holding companies. This ability, however, is subject to certain conditions (so-called "firewalls" between the non-US parent bank and its affiliates and its US securities subsidiary) which in some instances encroach upon the authority of the home country bank supervisor. The restrictions on inter-State activities are also a significant obstacle for the conduct of EU business within the US.

Some exceptions granted...

The application of internal US **specialization requirements** beyond US borders could also have a substantial and undesirable impact on the structure of European financial groups. However, the European Commission acknowledges the flexibility so far shown by the Federal Reserve Board in limiting, to the extent possible under current US law, these extraterritorial effects. It is now necessary to work towards a permanent solution, rather than the temporary exemption from US law used until now. EU banks with a subsidiary in the US may become affiliated within the EU with an insurance company which has an insurance subsidiary in the US, or with an EU securities firm with a US subsidiary. There may also be cases where an EU bank with a branch or subsidiary in a State of the US merges with another EU bank with a branch or subsidiary in another US State. In all of these cases, it may be necessary, unless exempted from the prohibitions of the **Bank Holding Company Act**, either to divest of an existing bank, securities or insurance operations in the US, or in any case to restrict drastically existing US operations in the securities field. It is thought that up to 200 EU banking groups might be affected by this problem. The European Commission therefore stresses the need for reform to end the adverse effects on non-US based banking organizations of the present application beyond US borders of specialization requirements, geographical restrictions or other operating conditions, such as certain "firewalls" between the US securities operations and the non-US affiliates of the same financial group.

...but major concerns remain

3 *Air Transport*

Airline foreign ownership is subject to limitations. Current US legislation allows foreign investors to own up to 49% of the shares in an air carrier, but only 25% of the voting stock. These restrictions place European investment interests at a disadvantage and thus inhibit the free flow of transatlantic investment in this sector. As a first step, the European Commission welcomes the recommendation of the "National Commission to Ensure a Strong Competitive Airline Industry" to liberalize ownership restrictions (up to 49% voting capacity in US airlines).

Drug tests

In November 1988, the Federal Aviation Administration (FAA) adopted regulations concerning an **anti-drug program** for personnel engaged in specified aviation activities. According to these regulations, employees performing sensitive safety and security-related functions - including employees located outside the territory of the US - would have to undergo a drug test. The rule is already applicable within the US, but insofar as it relates to testing outside US territory, the compliance date was extended several times, first until January 1992, then until January 1993, and once again until January 1995. However, drug testing for personnel located outside the US is objectionable because of its extraterritorial reach. The US published a Notice of Proposed Rule making (NPRM) on 15 February 1994 which proposes to withdraw any extra-territorial application of the anti-drug program i.e. the testing of US and foreign nationals working in safety sensitive jobs overseas for US carriers. However, the US propose in the same NPRM to require foreign air carriers to establish anti-drug and alcohol misuse programs in the US for their employees performing safety sensitive functions within the territory of the US by January 1996. Such a requirement interferes in the employment relationship between foreign companies and their foreign employees, and as such goes beyond what is permitted under international law. Discussion on drug and alcohol abuse should take place within an appropriate international civil aviation forum such as the international Civil Aviation Organisation so that the issue could be resolved through cooperation between states rather than by unilateral extra-territorial action.

Disguised restrictions

Revised rules on **Computerized Reservation Systems** (CRS) issued by the US Department of Transportation became effective on 7 December 1992 and will terminate on 31 December 1997. These rules maintain the approach of their predecessors, allowing US Computer Reservation Systems in the principal CRS displays to give preference to "on-line" services (connections with the same carrier) over "interline" services (connections with other carriers). This implicitly disadvantages all the non-US airlines which, unlike the US carriers, have to rely on interline connections for traffic to and from US points other than their own gateway points.

This method of display amounts in effect to a disguised restriction of international trade in services. As a result, airline bookings are distorted. The consumer (the passenger) is only given the selection of US on-line services on the first screens (some 80% of all bookings are made through the first screen), and this despite the fact that the quickest connections may be ensured through interline services. The problem of "on-line" preference in US CRSs remains valid, although the situation of

European carriers has improved somewhat. This is due, first, to an increasing use by US CRSs of an ECAC (European Civil Aviation Conference) -type neutral display as the default display for availability requests including a city outside the US, and second, to the increasing number of code-sharing agreements between European and American air carriers which will give European carriers in principle the same on-line preference in US CRSs as their American partners.

However, the option of code sharing may in practice be open only to a relatively small number of European carriers, thus distorting competition between them. Furthermore, code-sharing is only feasible if the corresponding traffic rights are granted under bilateral agreements. From the CRS point of view, code-sharing may increase the problems of "screen padding" and "starburst" flights by which the flights of non-code shared partners will be shifted to remote screens. As this will happen in addition to the "on-line" effect, European carriers may be seriously disadvantaged in the US market in particular, as there are no provisions in US CRS rules on code-sharing, contrary to the EC Code of Conduct, which restricts the display of code-sharing.

Delayed FAA inspections

As regards the **certification of foreign aircraft repair and maintenance stations**, in 1988 the **Federal Aviation Regulation** (FAR 145) was amended in order to allow routine repair and maintenance of US registered aircraft to be performed anywhere in the world. In order to perform maintenance or repair work on US registered aircraft, a foreign repair station needs to be approved (certified) and annually inspected by the US Federal Aviation Administration (FAA). Until such approval is given, the station cannot be used by US registered aircraft. Due to the length of the process, it is very difficult for an EU firm providing maintenance and/or repair for aircraft to be certified by the FAA, because of lack of FAA resources to carry out the necessary inspections/certifications across the EU. Although there are over 100 EU firms operating with FAA approval, there is a 2-year backlog of requests affecting in particular equipment manufacturers and airlines. It is thus the delayed implementation of the Federal Aviation Regulation which acts as a barrier to trade in services in this particular sector. The commercial impact is very damaging, since an EU manufacturer may not be able to repair or to sell maintenance equipment to US customers.

4 Space launching

The **National Space Policy Directive** of 6 September 1990 establishes that US Government satellites will be launched on US manufactured launch vehicles unless a specific exemption has been granted by the President. The measure can be explained as part of a set of coordinated actions to strengthen the US launch industry.

National security restrictions

The promotion of the US commercial space launch industry, by reserving all US launches of government satellites exclusively for domestic launch service suppliers, is clearly detrimental to European launch service providers. European launch operators are effectively barred from competing for US government launch contracts, which account for approximately 80% of the US satellite market. The restriction, which is justified by the US for national security reasons for the launching of military satellites, is now also imposed on government satellites for civilian use.

5 Professional services

Barriers at State level

As a result of the Uruguay Round negotiations on services, the access of professional service suppliers in the US will be improved: a number of nationality conditions and in-state residence requirements will be removed. However, the general problem will remain: licensing of professional service suppliers is regulated at State level and in many instances there are no rules regulating the access for foreign service suppliers. In a sector such as professional services, which is by definition highly regulated and in which the exercise of the activity depends on specific access conditions and qualifications, this is a serious barrier.

Prohibition of foreign legal consultants

For **legal services,** the situation of foreign legal consultants remains unsatisfactory. Only 15 States permit foreign legal consultants to be licensed to practice in international law. This is subject to additional specific conditions, permitting practice of home country law. The general conditions are very demanding: on average, experience requirement of 5 to 7 years preceding registration, minimum age requirement of 26 years. In the following States it is not possible at all to practice as foreign legal consultant: Alabama, Arizona, Arkansas, Colorado, Delaware, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming.

In-state office requirement

As regards **accounting services**, only North Carolina has maintained a nationality requirement for licensing. In-state residency is required in Arizona, Arkansas, Connecticut, District of Columbia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee and West Virginia. An in-state office is required in Arkansas, Connecticut, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, New Hampshire, New Mexico, Ohio, Vermont and Wyoming. However, the major obstacle in accountancy relates to the treatment of qualifications. Most of the States do not take into account home

Licensing requirements

qualifications and therefore licensing often requires total or partial requalification.

Access for **medical services** (doctors, veterinaries and para-medical service suppliers) is very difficult because of numerical limitations, nationality conditions and lack of procedures for qualifications.

For **architectural, urban planning and landscape services** two-thirds of the officers, partners and/or directors of an architectural firm in Michigan must be licensed in Michigan as architects, professional engineers and/or land surveyors. In-state residence residence is required in Illinois.

Citizenship requirements

For **engineering and integrated engineering services** US citizenship is required in the District of Columbia, in-state residency in Idaho, Iowa, Kansas, Maine, Mississippi, Nevada, Oklahoma, South Carolina, South Dakota, Tennessee, Texas and West Virginia.

6 Comments

The General Agreement on Trade in Services (GATS) is one of the major achievements of the Uruguay Round. It provides a framework of open trade rules relating to transparency, MFN and national treatment, together with a first package of initial market opening concessions, which are included in sectoral annexes. The US schedules of concessions include commitments in specific sectors such as:

- professional services (accounting, architecture, engineering);
- business services (computer services, rental, leasing, advertising, market research, consulting, security services);
- communications (value-added telecoms, couriers, audio-visual services);
- construction;
- distribution (wholesale and retail trade, franchising);
- educational services;
- environmental services;
- financial services (banking, securities, insurance);
- health services;
- tourism services.

The liberalization of the provision of services aimed at by GATS will be progressive. Further negotiations have been programmed to eliminate MFN exemptions, to adopt substantive disciplines on subsidies, government procurement and safeguards, and to include new areas such as basic telephone services, maritime services and additional professional services.

WTO dispute settlement coverage

In the balance of benefits accruing from GATS and the WTO, it should be noted that the integrated dispute settlement procedure will apply to all sectors regardless of the level of commitment made in the schedules of concessions annexed to GATS. As a result, the EU expects that GATS/WTO will be the forum in which any future disputes will be exclusively addressed, precluding the use of other means, such as unilateral trade provisions contained in general or specific national legislation.

C Telecommunications and Broadcasting

1 An Overview

Both in Europe and in the US the issues of growth, competitiveness and employment are at the core of current economic and industrial policy debate. In this respect, emphasis is put on the development of the information technology and communications industries. In the telecommunications sector, technological change is accelerating; regulatory reforms leading to the strengthening of competition on the US and the EU markets are being introduced in order to foster the competitiveness of industry. New development prospects, in particular concerning telecommunications networks, are sketched out in the December 1993 White Paper for the EU side and the National Information Infrastructure (NII) for the US side. Hence initiating a dialogue with the US on telecommunications and information infrastructure seems appropriate. Yet there remain significant obstacles for EU companies in acceding to the US telecommunications market, including ownership restrictions for the granting of radio licences to foreign owned carriers.

Obstacles to market access remain

In particular, Community companies' access to the US network equipment market is impeded by a variety of factors, such as insufficient transparency in Regional Bell Operating Companies (RBOC) and AT&T procurement procedures, the special rights and/or dominant position enjoyed by these utilities, the existence on this market of strong manufacturers who are also carriers, the ability of the Federal Communications Commission (FCC) and of State Public Utility Commissions (PUCs) to influence the procurement practices of these utilities, and the effect of a US standardisation policy which is not closely linked to international standards.

Network equipment

AT&T (the dominant long-distance carrier) also manufactures equipment. Therefore, as a vertically integrated company, it has little incentive to buy competitively. Thus it is far better placed than outside companies to supply its own network, and in practice buys most of its equipment from itself. AT&T also benefits from a range of advantages. These include the company's large base of equipment already in place, the fact that network specifications are based on the requirements of the original AT&T monopoly telecommunications network, and the influence that the company has on the standardisation process in the US. At the same time, however, its procurement procedures are not transparent, nor is it obliged to go out to tender.

With regard to the RBOCs, the Community is aware that these companies are obliged to ensure that their procurement procedures are non-discriminatory in the sense of not favouring AT&T above other suppliers. However, these procedures fall short of those set out in the EU directive on procurement. Notably, the procurement process followed by the RBOCs is not very transparent - intimate knowledge of their organisation and preferences is necessary. The process inherently favours those suppliers which are most familiar with the RBOCs. In addition, the expense of testing certain network equipment through Bellcore can be very high in some cases. Thus although the system is open to all in theory, in practice it is open only to those suppliers with the ability to make this investment.

Procurement procedures

To a great extent, the RBOCs enjoy monopolies on provision of basic services in their areas of operation, and they are subject to regulation in a number of ways. The FCC must authorise the construction of new lines for all carriers, including RBOCs (S214 of the 1934 Communications Act). It also regulates inter-state tariffs through price caps. Intra-state communications are regulated by the local State Public Utility Commissions (PUCs) whose administration of price-setting involves them in all aspects of the RBOCs' operations - indeed, it is estimated that as much as 70% of BOC revenue is regulated by PUCs rather than by the FCC. This means that irrespective of ownership, public or private, the major telephone companies in the US are subject to a significant degree of federal and local government control. Companies are therefore not free to act on the basis of purely commercial criteria, and there is concern that this could also apply to their procurement.

Monopolistic structures

2 *Investing in Telecommunications and Broadcasting*

Section 310 of the **Communications Act of 1934** imposes limitations on foreign investment in radio communications: *"No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station licence shall be granted to or held by"* foreign governments or their representatives, aliens, corporations in which any officer or director is an alien or of which more than 20% of the capital stock is owned by an alien (25% if the ownership is indirect).

Ownership restriction

Most common carriers need to integrate radio transmission stations, satellite earth stations and in some cases, microwave towers into their networks. Therefore, foreign-owned US common carriers are faced with unnecessary obstacles in competing in much of the long-distance market and, more importantly, through a minority shareholding provision in the mobile market. Foreign news organisations are also hampered in their activities in the US. Section 310 also applies to the Communications Satellite Corporation (COMSAT) which as US signatory to the INTELSAT and INMARSAT agreements is sole supplier of INTELSAT space segment services to US users and international service carriers, and of INMARSAT international maritime and aeronautical satellite telecommunications services. The Act provides for

Wireless services hampered

waivers to be made by the FCC in the specific case of indirect ownership, if it finds that this would be in the public interest. Thus the statute imposes on the FCC the burden of finding that the level of a foreign company's investment or control is contrary to the public interest. However, the FCC has rarely used this possibility.

National security arguments

Foreign operators are denied access to ownership in these sectors in contradiction to the principles of the OECD Code of Liberalisation of Capital Movements, and the US government has had to take a waiver under the Code to cover this point. As foreign companies may not own wireless facilities and networks, and may not take a large stake in US companies providing them, they are effectively prevented from competing in many common carrier services. Effectively, Section 310 obliges foreign carriers either to enter into subcontracting arrangements with US carriers, or to use alternative (non-radio) technology. As wireless services continue to grow in importance and customers demand integrated local and long-distance solutions from a single carrier, the ability to participate in and hold radio licences will become more critical to the long term success of all carriers. The ultimate rationale for these restrictions is the argument that US control of communications is essential at all times, for reasons of national security. However, where there is no national security risk there is no basis for invoking the policy.

3 Public Procurement Restrictions

More transparency necessary

Telecommunications equipment is still not within the GATT Procurement Code - apart from the inclusion of NTT of Japan - but examination of a possible extension to this sector has been taking place for a number of years. Negotiations on telecommunications have been held up due to the difficulty of agreeing on which particular utilities should be included. In the view of the EU, the criteria for inclusion of entities should be based not on the distinction between public and private companies, but on the identification of underlying conditions which lead entities in the telecommunications sector to pursue procurement policies that tend to favour particular national suppliers. These conditions include, first, insulation from market forces through the possession of a monopoly or a dominant position over a network, or through the possession of special rights relating to the management of the network; and, second, the means which government may use to influence the operations of an entity, such as regulation of tariffs and financing, or authorisation to operate. Thus, the EU view is that both publicly owned and private status utilities operating under monopoly or dominant conditions should be covered under GATT Government Procurement Code procedures. This would introduce a high level of transparency and would lead to improved market access.

Currently, highly competitive European manufacturing companies face great difficulties in the US market, because US operating companies have historically bought equipment from local suppliers, and because AT&T buys network equipment almost exclusively from itself. A 6% **Buy America preference** applies to DoD procurement (unless waived under the Memorandum of Understanding with NATO allies), and to procurement of Rural Telephone Cooperatives financed by the Rural Electric Administration (USDA). Draft legislation tabled in Congress in 1990, 1992, 1993 and 1994 would explicitly impose local content requirements on RBOC procurement and is monitored by the EU.

4 Standardisation in the Telecommunications Field

The EU recognises the problems in standardisation arising from the speed of innovation and the difficulty for standards-setting to keep up with it. However, the Union continues to be concerned about certain developments taking place in the United States and the fact that these developments are not transparent.

Differing standards

With regard to **telecommunications services**, for example, the ONA (Open Network Architecture) plans of the RBOCs, which continue to be monitored by the Federal Communications Commission, are not closely related to international standards-setting. The indications are that ONA is being developed independently of national and international standardisation procedures, and that this is true for ISDN and intelligent network equipment and service plans as well. The latter is now partly being redressed through the promotion of uniformity.

Costly adaptations to US specifications

With regard to **network equipment**, the costs of adapting European-based switching equipment to US specifications are much higher than the costs for the necessary adaptation work required for the rest of the world. This is due to the fact that the telecommunications technical environment in the US differs to a large degree from that of most other countries. Thus, entry to the market is effectively limited to large companies with substantial financial resources. This is all the more apparent given that even when the Bellcore evaluation has been completed, at a cost of perhaps several millions of dollars, a company has still no guarantee that its products will be bought.

Standards of Underwriter Laboratories

As regards standards for **terminal equipment**, the FCC requirements are, in principle, limited to "no harm to the network" requirements (according to Part 68 of the FCC rules). In practice, however, manufacturers have to comply with a number of voluntary standards, such as those required by individual Bell Operating Companies, to ensure end-to-end compatibility, or those set by industrial organisations, such as Underwriters Laboratories (UL). The latter produces standards in order to ensure safety concerning connection to the electrical supply system covered by the National Electrical Code and covering risks of fire, electrical shock and personal casualty. As they are in practice universally regarded as a necessary addition to FCC requirements, these rules are "de facto mandatory". Due to changes in the National Electrical Code, manufacturers of terminal equipment who wish to be connected to the network now have to submit their products to a nationally recognised laboratory in order to demonstrate conformity with UL standards. In many states this has been made mandatory.

FCC standards

Moreover, about two-thirds of products which have to comply with the "no harm to the network" requirements (Part 68 of the FCC rules) also have to comply with frequency requirements (Part 15 of those rules). The technical standards developed by the FCC for radio frequency equipment are mandatory. In reality, therefore, the FCC requirements are not the only ones which imported equipment will have to meet, and it is not clear which of the other requirements will apply in a given jurisdiction. Although officially FCC requirements are the only mandatory standards imported terminals have to meet, exporters have no certainty as to which other standards will in practice need to be complied with in order to sell their products.

Cordless telephone standards

Digital European Cordless Telephones (DECT) is an area of mobile communications which, together with the GSM, has been at the centre of EU telecommunications policy efforts to create pan-European services and terminal equipment for the single market. The frequency allocation process under way in the US in the area of unlicensed PCS services has seen the set-up of an unofficial industry grouping called WINFORUM developing an "etiquette" - or set of rules for freqency use - to enable coexistence of different technologies in the allocated band of 1910-1930 MHz. The FCC requires such an etiquette to issue a rule under part 15 of its procedures and has recognised WINFORUM as a designated feeder organisation for this purpose (somewhat as EWOS is to CEN/CENELEC). The technical argument is complex but, on the face of it, and on the recommendation of an industry grouping, the FCC is in the process of creating a technical barrier to trade against European DECT systems.

The multiplicity of "voluntary" standards and the absence of a central point where information on all relevant standards can be obtained represents an effective trade barrier.

5 Services in Telecommunications and Broadcasting

Foreign firms face obstacles in the provision of common carrier services as a result of the FCC licensing process under Section 214 of the **Communications Act of 1934** and/or the implementation by the FCC of the restrictions on foreign investment under section 310 of the same Act. The latter provision also affects broadcasting services. In addition, foreign firms operating in the US face discrimination in their regulatory treatment.

Enhanced services

Furthermore, uncertainties about the extent to which federal regulation of major US common carriers may be reduced ("streamlined") and about possible involvement of sub-federal authorities in regulating "enhanced" or "value-added" services, have led to concerns that foreign enhanced service providers may face new barriers to market entry or predatory behaviour by network operators.

Common Carrier telecommunications services may be provided without restriction by foreign-owned business (for long-distance service only - services at local level being generally regarded as a monopoly) only if no radio communication is involved. However, non-radio businesses also face discrimination in their regulatory treatment.

Dominant carriers

The FCC establishes a distinction between "dominant" and "non-dominant" carriers. In theory, dominant carriers are those which hold market power and bottle-neck facilities. They must comply with stricter regulations than non-dominant carriers. At present the only US carrier so designated is AT&T and COMSAT for certain services. The extent of regulation implied by this designation is under consideration. Formerly the FCC classified as "dominant" all foreign-owned carriers, 15% or more of whose stock is owned by a foreign telecommunications entity, irrespective of their size, and irrespective of the route being operated. In November 1992, the FCC adopted a rule modifying this policy. Now, carriers will be regulated as dominant only on those routes where their foreign affiliates have the ability to discriminate against unaffiliated US international carriers through control of bottle-neck services and facilities in the foreign market. Under the new framework, carriers affiliated with a foreign carrier that is a monopoly in the destination market will presumptively be considered dominant for that route. Carriers affiliated with a foreign carrier that is not a monopoly on the destination route will receive closer scrutiny by the FCC. However, the modified policy deals only with the manner in which US international carriers will be regulated once they obtain authority to operate, but it does not address the standards the FCC will apply in determining whether to authorise entry. The FCC does not have to act on petitions for classification of carriers as "non-dominant" within specified time limits.

Classification is a crucial issue because dominant carriers face heavier regulation with respect to the construction of lines, tariffs and traffic and revenue reports. Section 214 of the **Communications Act** requires common carriers to seek FCC **authorisation** to construct new lines, extend existing lines, acquire or operate new lines. The FCC currently forbears regulation of non-dominant carriers for domestic services. For international services, "dominant" carriers must obtain authorisation of the construction <u>and</u> extension of lines. Authorisation is required for each type of service, and each country. "Non-dominant" carriers must only get authorisation for the construction of new lines.

Filing of tariffs

All carriers must file tariffs at the FCC for international services. However, "dominant" carriers must file most tariffs at the FCC on a 45 days' notice instead of 14 days for "non-dominant" carriers, and they must also submit their costs to justify any tariff changes. Moreover, in 1989 the FCC allowed AT&T to file tariffs on a 14-day notice for certain IMTS (international service) filings. AT&T generally does not need to provide cost support for its IMTS (international filings).

All carriers must file annual **international traffic and revenue reports**; but only foreign-owned "dominant" carriers must file quarterly domestic traffic and revenue reports.

Monopoly providers of communication services

Regarding Section 214 authorisation, common carriers may not construct, extend or acquire a communications line unless the FCC determines it would be in the public interest. Moreover, it provides that the FCC may attach such conditions to the issuing of the certificate as it thinks are in the public interest. The legislative intent behind this section of the Act was to make sure that monopoly providers of communication services did not duplicate facilities, which would lead to the monopoly's "captive" customers paying higher charges than they should for surplus facilities. However, there is no definition of what is in the public interest, nor are there any set criteria used by the FCC in order to judge whether it is in the present or future public convenience that carriers provide services. There is some concern that the FCC, through its application of Section 214, has moved away from the original intent of the section and independently makes decisions affecting international trade policy. Here again, the FCC does not have to act on Section 214 petitions within a specified time limit.

Cable landing licenses

Finally, the **Cable Landing Act** requires a common carrier to seek a (marine) cable landing licence. Section 2 of the Act provides that the FCC, through power delegated by the President, may withhold or revoke a submarine cable landing licence in order to assist in securing or maintaining rights or interests of the US, or may grant landing licences on terms which will assure just and reasonable rates and services. The Act is intended to achieve reciprocal treatment of US interests. It permits, among other things, the revocation of an existing authorisation if a country fails to grant US nationals reciprocal rights.

As for **radio based services**, Section 308(c) of the **Communications Act of 1934** permits the FCC, in certain circumstances, to "impose any terms, conditions or restrictions" on the granting of a **radio station licence**, including for basic telecoms for commercial communications between the US and a foreign country. Such conditions or restrictions, including withholding or revoking a licence, may be imposed to assist in securing or maintaining rights or interests of US providers in foreign countries, or to assure just and reasonable rates and services. Section 309 of the Communications Act covers the granting of radio licences. It requires the FCC to determine if such a licence would be in the public interest and permits the FCC to impose conditions.

Section 310 of the Communications Act of 1934 significantly forecloses the operation of **mobile and satellite facilities** and the provision of **telecom and broadcast services** by imposing limitations on foreign investment. As a result, the FCC does not grant licences to operators owned by foreign governments or their representatives (e.g. state-owned telecom operators and broadcasters), nor to suppliers of broadcast, common carrier or aeronautical services in cases where the foreign ownership exceeds 20% (or 25% indirectly).

Regulatory uncertainty

The provision of "private" services by satellite is subject to great regulatory uncertainty. In principle, foreign companies have unrestricted access to the provision of "non-common carrier" or "private carrier" services. However, the question of whether a proposed satellite service may comprise a licensable common carrier service or a private service is not clear in US regulatory terms. This is due to the US treaty obligations to INTELSAT regarding interconnection with the public network. Each application is subject to a lengthy case-by-case consideration, so a non-US owned licence applicant's commercial viability may remain very uncertain pending the outcome of individual FCC licence proceedings. The use of foreign-owned satellite news gathering terminals in the US by foreign organisations is hampered by Section 310(a) which prevents the FCC from granting a licence to foreign governments or their representatives.

Foreign competition excluded

Regarding **mobile satellite services** (MSS), the FCC decision to give American Mobile Satellite Corporation (AMSC) the monopoly rights to serve the domestic US market means that any foreign competition is excluded. This applies to both the space segment and the service levels. The US Court of Appeals reversed the FCC's decision to require several mobile satellite service applicants to join a consortium under a single licence. However, in January 1992 the FCC launched the process for a final decision granting the US monopoly mobile satellite service licence to AMSC. The FCC has stated that the reason for imposing this consortium is related to the scarcity of MSS spectrum and the limited market for MSS services.

However, a number of companies have in the past been licensed to provide mobile satellite services, albeit in different frequency bands. In addition, COMSAT has been allowed to provide international land-based mobile satellite services outside of North-America. Thus, COMSAT can now compete in Europe for the provision of MSS services if it obtains the necessary European licenses, while domestically the US retains the AMSC monopoly.

As far as **aeronautical mobile satellite services** (AMSS) are concerned, in 1989, the FCC confirmed its 1987 decision on the exclusivity of the AMSC licence and ruled that Inmarsat-based aeronautical satellite services may not be used on the domestic segments of international flights. This effectively prevents market entry by Inmarsat-based systems, since any aircraft in flight between two domestic US points would be obliged to use AMSC space segment.

While the FCC, in a recent Order, has decided to permit certain parties (those already authorised to provide Inmarsat aeronautical MSS services to aircraft in international flight) to provide interim services to aircraft in domestic flight, it deferred consideration of a permanent waiver to allow use of Inmarsat for AMSS to aircraft in flight on domestic legs of scheduled international flights.

Effective barriers

The discriminatory regulatory requirements relating to "dominance" exacerbate the effective barriers to foreign competition in this sector. By regulating European competitors far smaller than many unregulated US companies, the FCC appears to be adopting criteria going beyond competition policy. Similarly, the FCC should not use this authorisation procedure as a tool to address broader policy issues beyond the regulatory concerns regarding the service for which the authorisation is sought.

Domestic monopolies are outdated

The US policy to retain a domestic monopoly for MSS while at the same time launching additional US-based consortia into global MSS ventures via an effective control over spectrum allocations is detrimental to efforts of non-US based organisations to provide both global or US MSS services. First of all, the arguments for the domestic monopoly of AMSC no longer hold. Despite the so-called scarcity of spectrum and the so-called limited market, additional service providers have been and continue to be licensed by the FCC. There exists no justifiable argument to retain the monopoly. Furthermore, early licensing of MSS providers, the early availability of additional spectrum in the US only, and an applied ownership filter to bar non-US competitors seem to indicate that the US is trying to seek effective control of global MSS ventures, while closing the domestic market from foreign competitors.

6 Comments

Access to the US telecommunications market is an important issue for the EU. Although the US has unilaterally imposed Title VII 1988 Trade Act procurement prohibitions against EU bidders, the EU has avoided escalating the conflict and has kept its own counter retaliation to the appropriate level (see Chapter 2D). The 1993 MOU concluded between the EU and the US on procurement does not cover the procurement of telecommunications equipment. The same applies to the new GATT

Government Procurement Agreement to be signed this year. The Community's offer to include network equipment had to be withdrawn after the US refusal to cover their privately owned entities. Therefore, the EU and the US decided to negotiate a bilateral self-contained agreement on telecommunications procurement.

D The Maritime Sector

1 *Some General Remarks*

Support measures for the American shipbuilding and ship repair industry continued throughout 1993 and culminated in the announcement in October 1993 of the Clinton Administration's policy statement on shipbuilding in support of US shipyards and the subsequent approval of the plan by Congress providing for a research and development program and the revitalised Title XI program for loan guarantees. The US Congress considered the Gibbons/Breaux legislation aimed at eliminating foreign shipyard subsidies and the Administration is preparing a plan to support its shipbuilding industry in converting to the commercial market.

Multilateral negotiations

Meanwhile, multilateral shipbuilding negotiations resumed at the OECD in Paris in September 1993 with a view to concluding a shipbuilding trade agreement by the end of November 1993. This proved not to be possible by that date, and the negotiations continued in January and March 1994. Reactivation of US legislation targeting foreign shipbuilding subsidies is seen as an attempt to increase the pressure on the OECD negotiations, as are measures for financial aid to US shipyards.

Support payments

Other legislation is still pending in Congress, such as **The Shipbuilding Trade Reform Act** (Gibbons Bill - HR 1402/S.990) and the **Maritime Security and Competitiveness Act** (HR 2151). The former would call for sanctions - such as denial of access to US ports and imposition of fines - against vessels owned or controlled by citizens of countries which subsidise shipbuilding or repair industries. The latter would authorise the federal government to pay shipping companies operating support payments of $2.1 million to $2.3 million per US-flag vessel annually for ten years. Foreign controlled companies' eligibility under the program would be limited through a priority system in favour of US-controlled companies. The bill would also include shipbuilding provisions creating a program of payments for series-built ship construction to subsidise the transition of US yards from the defence to the commercial market.

2 *Subsidies and Tax Policies*

The **Merchant Marine Act of 1936**, as amended, provides for various subsidies schemes or tax deferment measures in the shipbuilding sector which contain domestic build requirements.

Title V of the Merchant Marine Act, provides for a **Construction differential subsidy** (CDS), a direct Federal grant, for the construction of US-flag merchant ships in US shipyards under Buy America requirements. However, no public source funding seems to have been provided by the Government since 1981.

Section 607 of the Merchant Marine Act, enables US shipowners to defer certain taxable income via the **Capital Constructions Fund** (CCF) and the **Construction Reserve Fund** (CRF) to buy or transform vessels, on condition that they use American material or goods (Buy America) except for fisheries vessels (under the CCF program). Approximately $1.2 billion in funds had accumulated in the CCF as of the end of 1992 and there are 108 fund holders. The CRF was $3.6 million in Fiscal Year 1993. This program has a more limited use as currently there are only 6 fund holders.

Section 601 of the Merchant Marine Act provides for the payment of an **Operating Differential Subsidy** (ODS) to US operators of ships built in the US of US materials, so as to place their operating costs on a parity with those of foreign competitors. No new ODS contract has been given since 1981 but during Fiscal Year 1993, the US authorities distributed in excess of $215.5 million in funds on old ODS contracts. It is understood that the US Administration is preparing a new legislative package proposing a new program to replace ODS contracts with contracts under this new program.

Commercial loans for vessel construction

Title XI of the Merchant Marine Act authorises the US Government to provide direct **Federal Ship Financing Guarantees** to US shipowners to obtain commercial loans for the construction or reconstruction of nearly all categories of vessels (except fishing vessels). Guarantees may be granted for up to 75% of the vessel's actual cost. In order for a new non-fisheries vessel to be eligible for these financial guarantees, it must be built entirely in a US shipyard, all components of the hull and superstructure fabricated in the US and the vessel entirely assembled in the US. As of 30 September 1993, Title XI guarantees in force amounted to just over $1.8 billion. The guarantees covered more than 1900 vessels (including 288 barges). In the 1993 fiscal year, 8 applications amounting to nearly $49 million were approved for new construction while 6 applications were for the refinancing of outstanding debt.

Conclusion of an agreement necessary

The Buy America requirements imposed in these different types of subsidies clearly favour US shipbuilders and equipment manufacturers and act as a restriction on imports. Even if certain of these measures have not been used for some years, there is no guarantee that they will not be implemented in the future, unless they can be eliminated through the conclusion of the draft agreement on normal competitive conditions in the shipbuilding and repair sector, on which negotiations in the OECD recommenced in 1993 and are continuing in 1994.

The National Shipbuilding Initiative (NSI) - **FY 1994 Defence Authorisation Bill** (HR 2401/S.1298) also includes an Administration-proposed NSI plan, announced at the beginning of October 1993. It consists of a 5-part program aimed at rejuvenating the US civilian shipbuilding industry by increasing its world-wide competitive position through the provision of federal loan guarantees ($147 million in Title XI export loan guarantees) to US shipyards to subsidise exports and $50 million in defence conversion funds for ship design/production R&D. Participation in the NSI is limited to US-owned US-located yards. In addition, the program calls for a regulatory reform review program and the increased use of existing export promotional programs to help US shipyards secure foreign orders.

Increasing the US competitive position

The United States applies a 50% ad valorem **tax on non-emergency repairs** of US owned ships outside the USA and on imported equipment for boats, including fish nets. The basis of this tax is Section 466 of the **Tariff Act of 1930**, amended in 1971 and in July 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. Furthermore, the NAFTA agreement provides for the elimination of these type of taxes for Mexico and Canada by 1999 at the latest. A similar provision should be extended to Member States of the European Union.

Discrimination in ship repairs

3 Maritime Transport

The use of certain categories of foreign-built vessels is restricted in the US. This is the case for fishing vessels, vessels used in coastwise trade and special work vessels.

A foreign-built US flag vessel cannot be documented for **fisheries** in the US's 200 mile exclusive economic zone. This prohibition is wide-ranging since the definition of fisheries includes processing, storing, and transporting (**Commercial Fishing Industry Vessel Anti Reflagging Act of 1987**). The US has entered into **Governing International Fishing Agreements** (GIFA), which give some foreign flag vessels rights to fish in the US fishing zone. These, however, expired at the end of 1993.

Foreign-built (or rebuilt) vessels are prohibited from engaging in **coastwise trade** either directly between two points of the US or via a foreign port. Trade with US island territories and possessions is included in the definition of coastwise trade (**Merchant Marine Act of 1920** - The Jones Act). Moreover, the definition of vessels has been interpreted by the US administration to cover hover craft and inflatable rafts. The **US Flag Passenger Vessel Act of 1993** would include a US built requirement for the vessels involved in "cruise to nowhere".

Exclusion of foreign ship owners

The Limitations on Rebuilding Act is another discrimination against foreign materials: the rebuilding of a vessel of over 500 Gross Tons (GT) must be carried out within the US if it is to engage in coastwise trade. A smaller vessel (under 500 GT) may lose its existing coastwise rights if the rebuilding abroad or in the US with foreign materials is extensive (see section 883 of volume 46 of US Code, amendments of 1956 and 1960). In addition, no foreign-built vessel can be documented and registered for **dredging, towing** or **salvaging** in the US. Third countries are thus not able to have access to the US market at a time when part of the ageing US fleet needs to be renewed.

Furthermore, the Jones Act provides for an effective monopoly of the US Coast Guard Administration for **ship classification** and inspection services to the American Bureau of Shipping. EU classification companies are therefore excluded from this market.

Filing of tariffs

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. The Authorisation Act puts at risk the business of many EU freight forwarders by subjecting them to a range of requirements such as posting of a bond and appointing a resident agent in the US.

Financial responsability requirements

In 1991, the **Non-Vessel Operating Common Carriers Act** amended the 1990 Act allowing the Federal Maritime Commission to accept - in addition to bonds - insurance and other surety as proof of a NVOCC's financial responsibility. The $50,000 minimum amount for a bond was deleted.

A final rule published in the Federal Register on 22 January 1993, amended the FMC regulations on NVOCC's in order to implement the 1991 Act. Despite this new flexibility regarding the financial responsibility requirements, no amendment has been introduced on the tariff filing obligation. 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.

Furthermore, according to provisions included in the following statutes, certain types of government owned or financed cargoes are required to be carried on US-flag commercial vessels.

The **Cargo Preference Act of 1904** requires that all items procured for or owned by the military departments must 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

Shipment by US-flag vessels only

(i.e. commodities financed by Eximbank loans) must be shipped on US-flag vessels, although the US Maritime Administration (MARAD) may grant waivers permitting up to 50% of the cargo generated by an individual loan 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. Finally, the **Food Security Act of 1985** increases the minimum agricultural cargoes under certain foreign assistance programs of the Department of Agriculture and the Agency for International Development (USAID) to be shipped on US-flag vessels to 75%.

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 shipowners with guaranteed cargoes at protected, highly remunerative rates.

Further liberalisation

The US has not offered liberalisation of its maritime services. **GATS**, however, will prevent the future use of Section 19 by the Federal Maritime Commission unilaterally to force the opening of foreign ports and shipping facilities. The US have agreed further to negotiate the liberalisation of maritime services.

Table of abbreviations

AMSC	American Mobile Satellite Corporation
AMSS	Aeronautical Mobile Satellite Services
BATF	Bureau of Alcohol Tobacco and Firearms
BSE	Bovine Spongiform Encephalopathy
CAFE	Corporate Average Fuel Economy
CCC	Customs Corporation Council
CCF	Capital Constructions Fund
CDA	Cuban Democracy Act
CDS	Construction Differential Subsidy
CEN	European Committee for Standardisation
CENELEC	European Committee for Electrotechnical Standardisation
CFIUS	Committee on Foreign Investment in the US
CFTC	Commodities and Futures Trading Commission
CIT	US Court of International Trade
COAP	Cottonseed Oil Assistance Program
COCOM	Coordinating Committee on Multilateral Export Controls
COMSAT	Communications Satellite Corporation
CRF	Construction Reserve Fund
CRS	Computer Reservation System
CUF	Customs User Fees
CVD	US Countervailing Duty
DECT	Digital European Cordless Telephones
DEIP	Dairy Export Incentive Program
DoD	Department of Defence
DoT	Department of Transportation
DSP	Dispute Settlement Procedure
EAA	Export Administration Act
EAPC	European American Phytomedicines Coalition
EAR	Export Administration Regulations
ECAC	European Civil Aviation Conference
ECU	European Currency Unit
EEP	Export Enhancement Program
EEZ	Exclusive Economic Zone
EN	European Norm
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FAA	Foreign Assistance Act
FAO	Food and Agricultural Organisation of the UN
FBSEA	Foreign Bank Supervisions Enhancement Act
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FDI	Foreign Direct Investment

FDICIA	Federal Deposit Insurance Corporation Improvement Act
FQA	Fastener Quality Act
FY	Financial Year
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GIFA	Governing International Fisheries Agreements
GPA	GATT Procurement Agreement
GSM	Groupe Speciale Mobile
HR	House of Representatives
HS	Harmonised System
HTS	Harmonised Tariff Schedule
ICC	Interstate Commerce Commission
IEC	International Electrotechnical Commission
IEEPA	International Emergency Economic Powers Act
IMTS	International Message Telephone Service
IOE	International Office for Epizooties
IRC	Internal Revenue Code
ISDN	Integrated Services Digital Network
ISO	International Standards Organisation
ISTEA	Intermodal Surface Transportation Efficiency Act
ITC	International Trade Commission
MARAD	Maritime Administration
MFCMA	Magnuson Fishery Conservation and Management Act
MFN	Most Favoured Nation
MMPA	Marine Mammal Protection Act
MOU	Memorandum of Understanding
MPG	Miles per Gallon
MPF	Merchandise Processing Fee
MPP	Market Promotion Program
MSS	Mobile Satellite Services
NAFTA	North American Free Trade Agreement
NASA	National Aeronautics and Space Administration
NCA	Nuclear Cooperation Agreement
NII	National Information Infrastructure
NNPA	Nuclear Non-Proliferation Act
NSI	National Shipbuilding Initiative
NVOCC	Non-Vessel Operating Common Carriers
ODS	Operational Differential Subsidy
OECD	Organisation for Economic Cooperation and Development
OFAC	Office of Foreign Assets Control
ONA	Open Network Architecture
OTC	Over the Counter
PL	Public Law
PUC	State Public Utility Commission
R&D	Research and Development

RBOC	Regional Bell Operating Companies
REA	Rural Electrification Administration
S	Senate
SDR	Special Drawing Rights
SEC	Securities and Exchange Commission
SOAP	Sunflower Oil Assistance Programme
SPM	Agreement on Sanitary and Phytosanitary Measures
STAA	Surface Transportation Assistance Act
TALFF	Total Allowable Level of Foreign Fishing
TBT	Technical Barriers to Trade
TEA	Targeted Export Assistance
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TWEA	Trading with the Enemy Act
UL	Underwriters' Laboratories
UR	Uruguay Round
USDA	United States Department of Agriculture
USAID	United States Agency for International Development
USTR	United States Trade Representative
WTO	World Trade Organisation