REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT

1996

Coordinated by the

Unit for Relations with the United States of America

Directorate General for External Relations:
Commercial Policy and Relations with North America,
the Far East, Australia and New Zealand

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Foreword

The 1996 Report on United States Barriers to Trade and Investment is the twelfth such annual report. It has been compiled by the Unit for Relations with the United States of America of the Directorate General for External Relations: Commercial Policy and Relations with North America, the Far East, Australia and New Zealand on the basis of material available to the services of the European Commission. Its aim is to provide an inventory of obstacles that European exporters and investors encounter in the US.

EU-US relations entered an important new phase with the adoption, at the EU-US Summit of December last year, of the New Transatlantic Agenda (NTA) and accompanying EU-US Joint Action Plan. This year's "Barriers Report" must therefore be seen against the background of the joint commitment, in the NTA, not only to strengthen and consolidate the multilateral trading system, but also to create a New Transatlantic Marketplace, by progressively reducing or eliminating barriers that hinder the flow of goods, services and capital between the EU and the US. As part of this latter initiative there will be a joint EU-US study on ways of facilitating trade and of reducing or eliminating such barriers. It is expected that the present Report will play a useful role in this exercise.

The "Barriers Report" also has to be seen in the context of a Transatlantic economic relationship which has grown particularly strongly over the years, to the benefit of both economies, and which is underpinned by the most important trade and investment links in the world.

The fact remains, however, that a considerable number of impediments, ranging from more traditional tariff and non-tariff barriers, to differences in the legal and regulatory systems, or due to the absence of internationally agreed rules and disciplines in new areas, such as investment and competition policy, still need to be tackled. The Commission remains firmly committed to addressing these through the appropriate channels (multilateral, plurilateral and bilateral) in particular since the reinforcement of efforts to resolve bilateral trade issues and disputes is essential to the confidence-building process which is an integral part of the NTA. As regards the WTO, which has been in existence for over a year, the focus is now very much on full implementation of the Uruguay Round agreements and on ensuring completion of unfinished business.

It is to be hoped that, as a means of identifying problems of access to and of operating in US markets, the European Commission services' Report will continue to play a useful role in focusing dialogue and negotiations, both multilateral and bilateral, on the elimination of the obstacles inhibiting the free flow of trade and investment.

The Report has taken into account developments until the beginning of May 1996.

Summary

Extraterritoriality — The EU strongly opposes the extraterritorial provisions of certain US legislation which hamper international trade and investment by seeking to regulate EU trade with third countries conducted by companies outside the US. Particular problems are raised at the present time with regard to US legislative initiatives concerning Cuba, Iran and Libya.

Unilateralism — Unilateralism in US trade legislation is a major concern. The use of such legislation undermines the internationally-agreed system of trade rules embodied in the WTO. This is truer than ever following the extension of WTO disciplines to new fields, such as services and intellectual property.

National security — Although the principle of national security has a long tradition in trade policy, the EU has repeatedly expressed concern about its excessive use by the US as a disguised form of protectionism, particularly in relation to the application of import, procurement and investment restrictions, as well as the extraterritorial application of export restrictions.

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

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

Technical barriers to trade — EU exporters continue to face a number of behind-the-border impediments. The proliferation of regulation at State level presents particular problems for companies without offices in the US. In addition, some federal standards differ from international norms meaning that manufacturers cannot directly export to the US products made to EU standards (normally based on international ones). Other related difficulties concern labelling requirements and excessive reliance on third-party certification. Finally, the FDA drug approval procedures continue to give non-US based firms difficulties.

Intellectual property — As with other sectors, the implementation of Uruguay Round commitments are changing the legislative landscape for intellectual property rights. Although recent changes to patent law are welcome, some problems remain including that of informing right-holders of government use of patents.

Tax measures — Concerns about federal tax measures focus on the nature of reporting requirements and the specific manner for calculating what is due. More significantly, however, State "world-wide" unitary taxes are inconsistent with US obligations under its tax treaties with third countries.

Conditional national treatment — Although the present Congress does not appear to be threatening the same kind of widespread restrictions on national treatment as its predecessor, the EU is eager to work with the US to establish solid ground rules for the national treatment of investors, so as to provide a framework which gives businesses real confidence when they invest abroad.

Agriculture and fisheries — The conclusion of the Uruguay Round has to some extent given rise to an easing of trade tensions in agriculture but a variety of issues remain unresolved and some others have re-emerged. Certainly, US export subsidies should become less of a concern over the course of the six year Uruguay Round transition period. Sanitary and phytosanitary

issues have therefore become the main source of difficulty for the EU. There is also concern about the abuse of geographic designations for wines.

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

Shipbuilding

The conclusion in the OECD of a Shipbuilding Agreement in December 1994 is anticipated to go a long way towards regulating unfair practices in this industry. While the EU expects that the US will ratify the Agreement soon, it remains concerned about a number of US subsidies and tax policies.

Aeronautics industry

The EU remains concerned about the level of implicit subsidies to US aircraft manufacturers. This is clearly an area for multilateral action, and progress needs to be made on the Civil Aircraft Agreement which remains stalled in the WTO.

Maritime services

With the entry into force of the WTO GATS disciplines, this sector is for the first time subject to multilateral trade rules. Although there are no specific commitments as yet to reduce trade barriers the EU remains hopeful that the ongoing negotiations in the WTO context will be brought to a successful completion by the agreed deadline. The US reluctance to table an offer so far is a matter of concern.

In addition, there has been no progress on the elimination of requirements that cargoes generated by US Federal programmes be shipped on US-flagged ships, on the contrary, this requirement has been extended to cover Alaskan oil exports.

Air transport

There has been no progress over the last year on the issues of computer reservation systems and foreign ownership restrictions. The Commission is also concerned by the recent enactment of the Hatch Amendment which amounts to a breach of international rules.

Financial services

The US financial services industry is in the throes of major reform, which will sweep away many of the inter-state banking restrictions to the benefit of US and non-US banks as well as their customers. However, US sectoral segmentation rules remain in place and effectively block the establishment of globally integrated financial services organisations. This has consequences for EU firms making strategic business decisions for the single European market. For example, link ups between banks and insurance firms face difficulties if both parties have US subsidiaries.

As regards activity in the WTO, the US decision only to make partial commitments in the context of the extended GATS negotiations - and to take broad MFN exemptions in respect of future business and activities - reduces the value of the liberalisation package secured in these negotiations.

Professional services

The implementation of the GATS schedules for professional services should result in some improvement in market access. However, a number of problems, especially due to regulation at the State level, still remain to be tackled in order to secure a more transparent and open access to the US.

Information society

The EU is moving rapidly towards a largely deregulated market without ownership restrictions, and is looking to the on-going - and recently prolonged - GATS Basic Telecommunications negotiations to engage all the leading industrialised parties in a firm set of commitments on market access respecting the MFN principle and national treatment.

The EU remains concerned about the considerable hurdles that the US legislation presents for non-US firms and foreign-owned firms wishing to invest in radio telecommunications infrastructure and to provide mobile and satellite services. In addition, the Federal Communications Commission (FCC) exercises a high degree of autonomy and discretion in regulating this sector, including reciprocity-based licensing procedures for foreign-owned firms.

Impact of the New Transatlantic Agenda

The NTA commits the EU and the US to the creating of a "New Transatlantic Marketplace" by progressively reducing, or eliminating barriers that hinder the flow of goods, services and capital across the Atlantic. There is also a commitment to fostering an active and vibrant transatlantic community by deepening and broadening commercial, social, cultural, scientific and educational ties. The following specific initiatives are of particular relevance in the context of the present report:

- The negotiation of a Mutual Recognition Agreement covering various sectors. This will allow certification to US standards by EU bodies, and vice versa, thus eliminating some of the considerable costs involved for manufacturers on either side of the Atlantic.

- Regulatory cooperation seeking to make regulators more aware of the trade and investment consequences of their decisions and to discourage the development of divergent regulations. The existing dialogues between regulators should play a more substantial role in addressing issues which might otherwise become the source of a future trade dispute.

- The negotiation of a customs cooperation and mutual assistance agreement which is expected to be concluded by the year's end. It will cover, inter alia, simplification of customs procedures, data and personnel exchanges and increased investigative cooperation.

- The launching of negotiations for a science and technology agreement with a view to broadening cooperation in this field.

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1. INTRODUCTION

1.1. The New Transatlantic Agenda

Madrid Summit

During 1995, a detailed review of transatlantic relations was carried out. This led, at the EU-US Summit in Madrid on 3 December 1995, to the adoption of the NTA and the accompanying Joint EU-US Action Plan. These documents provide a new basis for transatlantic relations by moving the relationship from one of consultation to one of joint action. Apart from a whole range of commitments in areas such as foreign and security policy, international crime, drug trafficking, migration, environment and health as well as with regard to increasing the number of players directly involved in transatlantic contacts ("Building bridges across the Atlantic"), the documents contain notably a substantial chapter on economic and trade issues ("Contributing to the expansion of world trade and closer economic relations"). The economic chapter is divided in two sections, dealing with multilateral and bilateral issues respectively.

Transatlantic Business Dialogue

In agreeing the very substantive provisions of this chapter, EU and US were able to draw on the recommendations of the business communities on both sides of the Atlantic, through the auspices of the Transatlantic Business Dialogue (TABD), an initiative of the late Secretary of Commerce Brown together with Commissioners Brittan and Bangemann. These recommendations were adopted by a meeting of top American and European business leaders in Seville in November 1995. Since then, further meetings of the TABD Steering Committee have taken place and 15 issue groups have been set up to develop more specific recommendations on individual sectors and issues on which a report will be made to the EU-US Summit in June 1996.

Strengthening the Multilateral Trading System

In line with the recommendations of the TABD, the main focus of the NTA provisions relating to trade and economic relations is on strengthening the multilateral trading system. In this context there is a specific commitment to work together in the preparation of the WTO Singapore Ministerial meeting. Other issues that are addressed here are for example the Uruguay Round's unfinished business (where both sides commit themselves to work for the successful conclusion of the current negotiations in all services sectors by the agreed timetables); government procurement (where there is a commitment to promote the launching, by Ministers in Singapore, of negotiations covering substantially all government procurement and WTO members); cooperation on the new trade issues (including a commitment to work together to conclude an ambitious Multilateral Agreement on Investment at the OECD and develop discussions of this issue at the WTO); launching a specific exercise with a view to concluding an Information Technology Agreement and exploring, in the perspective of the Singapore meeting, possible further tariff reductions on industrial products and possible accelerations in the implementation of existing obligations.

New Transatlantic Marketplace

The bilateral section foresees the creation of the "New Transatlantic Marketplace" by progressively reducing or eliminating barriers to the flow of goods, services and capital between the EU and the US. Again in line with TABD recommendations, the Transatlantic Marketplace highlights standards, certification and regulatory issues, calling in particular for cooperation in the international standard setting process, the conclusion of a Mutual Recognition Agreement for testing and certification and enhanced regulatory cooperation. In addition it contains commitments for action on government procurement, intellectual property rights, veterinary issues, customs cooperation and a series of other issues. Importantly also, the EU and the US will carry out a joint study on "ways of facilitating trade in goods and services and further reducing or eliminating tariff and non-tariff barriers".

Working towards the full implementation of the commitments in the Action Plan as well as the recommendations of the Joint Study will be at the top of the EU-US agenda for the coming years (for more specific information on the state of play on some of the key initiatives under the NTA see below, chapter 4). The progressive elimination of

identified trade barriers will not only directly benefit EU-US trade, but is expected to be conducive to further multilateral trade liberalisation. The joint study which will involve reports to the next three EU-US Summits, is expected to make recommendations for action as well as analysing the problems.

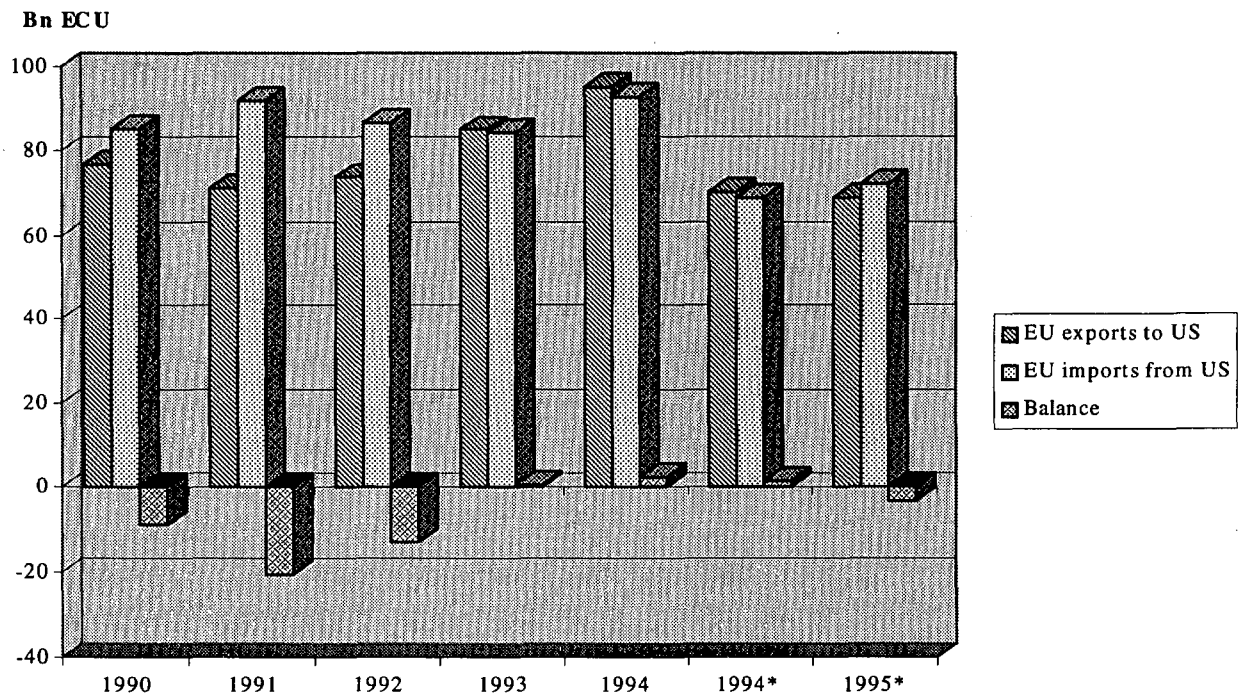
1.2. The Economic Relationship

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

Trade in goods

Trade in goods (export and imports) between the European Union (excluding the three new Member States) and the US reached nearly 190 billion ECU in 1994, an increase of about 11% over the previous year. After the EU registered a trade deficit with the US for three consecutive years from 1990 to 1992, in 1993 and 1994 bilateral trade was almost in equilibrium (surplus of 0.6 billion ECU and 2.5 billion ECU respectively). Complete EU trade data for 1995 are not yet available, but EU (12) data for the first 9 months indicate a slight EU deficit of about 3.3 billion ECU in the bilateral trade balance.

EU(12) - US TRADE IN GOODS: 1990-1995



**nine months.*
Source: Eurostat - Comext database

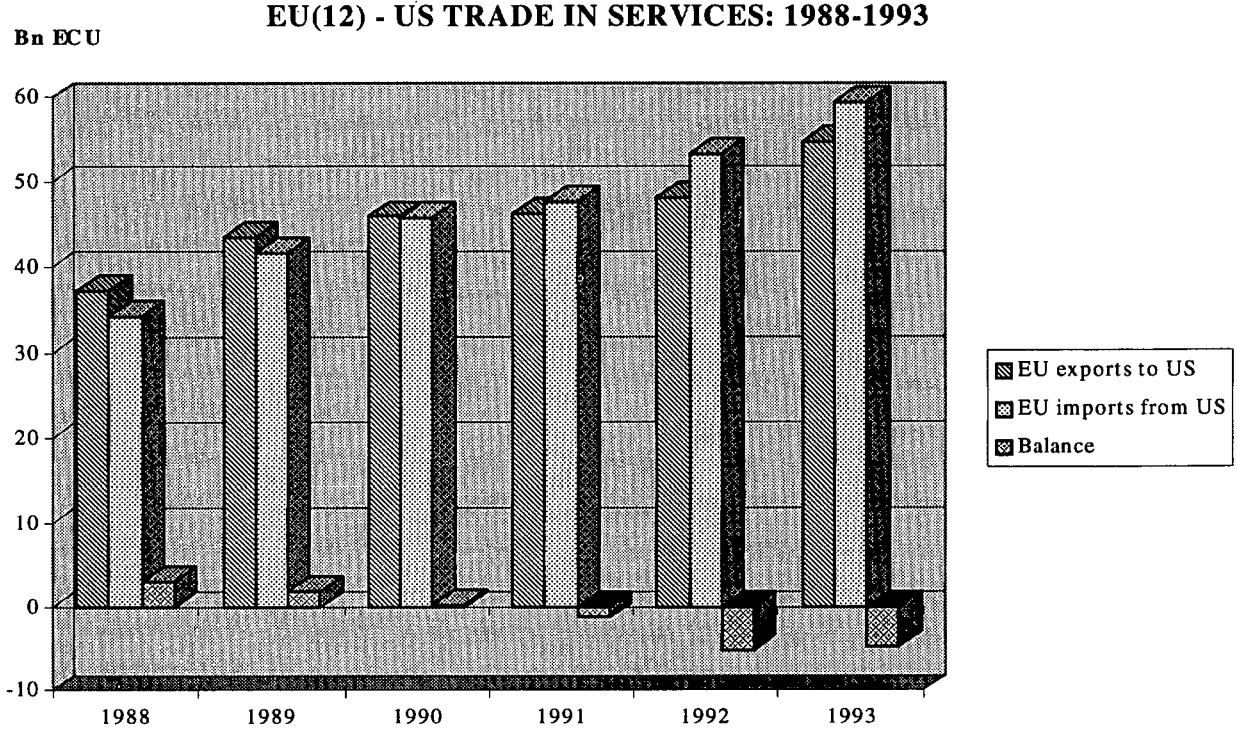
The US is the EU's single largest trading partner, accounting for 17% to 18% in both total EU-imports and total EU-exports in 1994. Likewise, the EU is one of the two top markets for the US, accounting for 21% of US exports and 18% of US imports in 1994.

The EU and the US are the world's most important traders. The share of the EU in total world trade (excluding intra-EU trade) amounted to 20% in 1994; while, the share of the US amounted to 18.3%. Taking only bilateral EU-US trade, it represents almost 7% of total world trade. This was only marginally less compared to US-Canada trade which was 7.4%. Trade between US and Japan represented 5.5% of total world trade.

Trade in services

Transatlantic trade in services is gaining importance both in absolute terms and relative to merchandise trade. In 1988, EU-US trade in services accounted for 71.4 bn ECU or about 51 per cent of trade in goods. By 1993, this figure had risen to 114.1 bn ECU or approximately 67 per cent of merchandise trade.

EU(12) - US TRADE IN SERVICES: 1988-1993

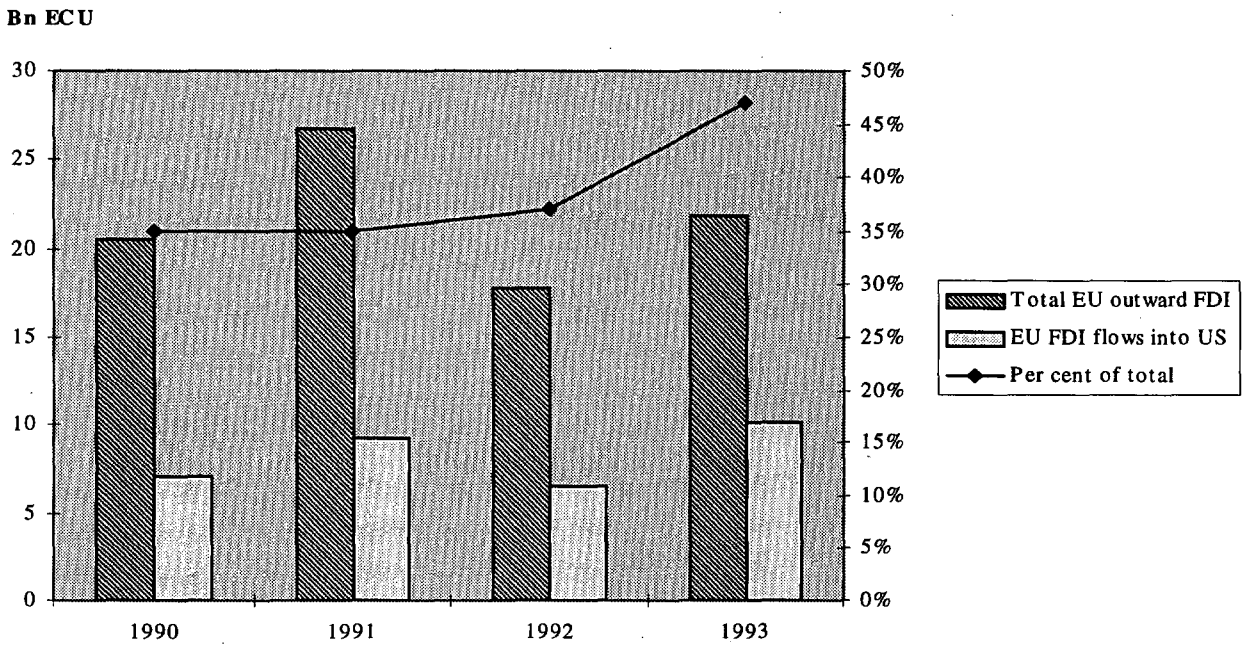


Source: Eurostat - Geographical Breakdown of the Current Account EUR 12, 1984-1993 (1995).

Investment flows

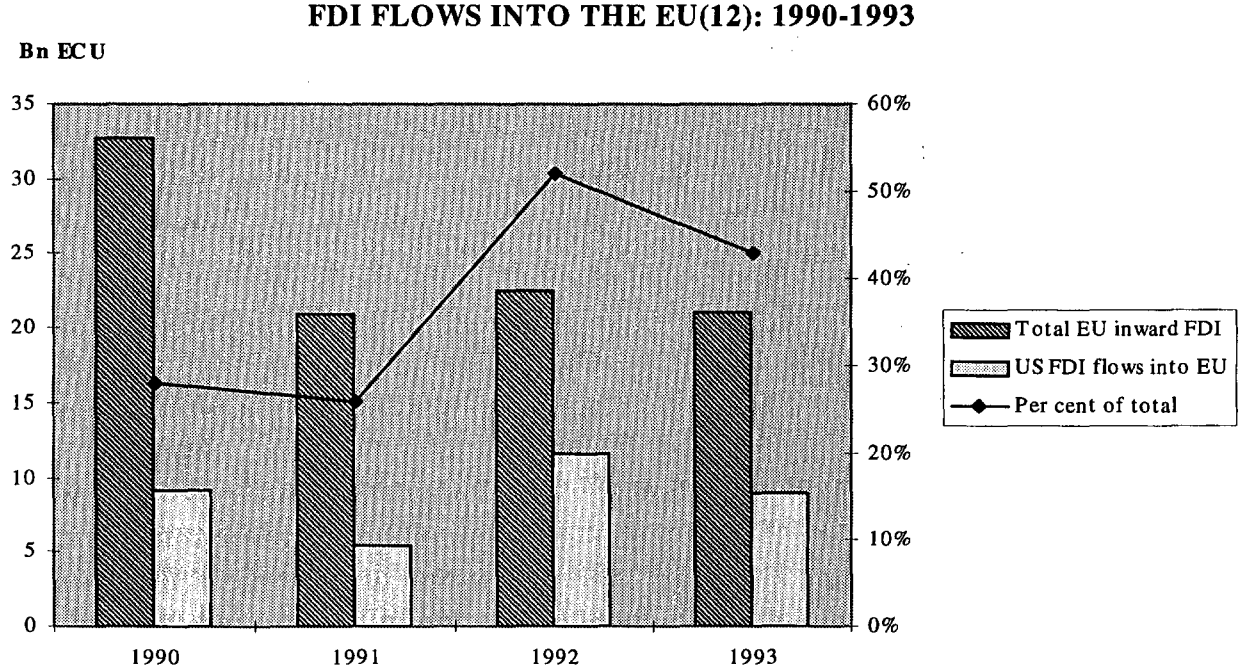
The EU and US have by far the world's most important bilateral investment relationship, and each is the other's largest investment partner. In 1993, which is the most recent year for which EU data is available, the strong, mutual links between the US and the EU were confirmed with the EU investing 10.2 billion ECU (accounting for 47% of the total EU outward Foreign Direct Investment, FDI) in the US and the US investing 9 billion ECU in the EU (accounting for 43 % of the total EU inward FDI).

EU(12) FDI FLOWS ABROAD: 1990-1993



Source: Eurostat - European Direct Investment 1984-93 (1995)

FDI FLOWS INTO THE EU(12): 1990-1993



Source: Eurostat - European Direct Investment 1984-93 (1995).

The cumulated flows over the period 1984-1993 shows that the US was the single largest contributor with 33% of the EU inflows. Conversely in the same period almost 60% of EU investment abroad went to the US. The US is thus the most important source and destination of EU FDI.

2. HORIZONTAL ISSUES

2.1. Extraterritoriality

2.1.1. Introduction

Extraterritoriality is a long-standing and growing feature of the US legal system, including - but not limited to - the fields of environmental, banking, tax and export control law. While the EU may share some of the objectives underlying such laws, it opposes the extraterritorial application of domestic legislation as a matter of principle, insofar as it purports to force persons present in - and companies incorporated in - the EU to follow US laws or policies outside the US. In particular the EU opposes the extraterritorial provisions of certain US legislation which hamper international trade and investment by seeking to regulate EU trade with third countries conducted by companies outside the US.

In the last year the US Congress has adopted (Cuba) or has initiated the adoption of (Iran, Libya) extraterritorial sanction legislation that could have severe economic and political consequences. The EU has expressed its opposition to the imposition of US foreign policy objectives on European companies in the strongest possible terms, reserving its right to address the conformity of the measures with the US' international obligations in the relevant international fora.

In addition, many close trading partners of the US, such as Canada and certain Member States of the EU are considering triggering domestic legislation, including "blocking statutes", in order to preclude the extraterritorial application of foreign legislation within their territory. Others are contemplating strengthening the existing legislation in order to have a more effective response to this kind of problem.

2.1.2. Illustrative cases

Cuba

On 5 March 1996 the US Congress adopted the **Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996** (formerly the "Helms Bill", S 381 and its companion HR 927, the "Burton Bill") and on 12 March 1996 President Clinton signed the bill into law. This is the latest in a series of legislative initiatives since the US proclaimed a trade embargo against Cuba in 1962 (**Section 620 (a)** of the **Foreign Assistance Act of 1961**; further reinforced by the **Food Security Act of 1985** and the **Cuban Democracy Act of 1992**).

Since the two bills were first tabled, in February 1995, the EU has forcefully expressed, through a number of representations and démarches, its opposition to this kind of legislation - or any secondary boycott legislation having extraterritorial effects. The EU has also stressed the potential incompatibility of the LIBERTAD Act with WTO rules and its negative impact on bilateral EU-US relations. Most recently on April 22 the Council of the EU adopted a Declaration concerning the US trade legislation on Cuba, as well as Iran and Libya, which reiterates its continued and strong opposition to these legislative initiatives. On 3 May 1996 the EU and its Member States requested Article XXIII consultations with the US in the WTO concerning the LIBERTAD Act.

The following provisions of this Act are of particular concern:

- It reconfirms the trade embargo against Cuba, including its extraterritorial effects on subsidiaries of US companies, incorporated in the EC;

- It prevents the US government, any US national, or any permanent resident alien from knowingly lending to any foreign person, any US national or permanent resident alien in order to finance transactions involving confiscated US property;

- It establishes an annual report on all assistance to and commerce with Cuba. The report must include, *inter alia*, a list of companies involved in joint ventures, a determination of outstanding Cuban foreign debt and a description of steps taken to ensure Cuban goods are not re-exported from their trading partners to the US;

- It states that the essential security interests of the US require assurances, through a certification plan, that Cuban sugar does not enter the US. If a certificate to this effect is not provided, access to the US sugar quota is denied;

- It creates a new right of action in US courts for US nationals against any person (natural or legal, of whatever nationality, as long as he is within the *in personam* jurisdiction of the US courts) who "traffics in confiscated property". This means that anyone who is involved in investing in, managing of or otherwise engaging in commercial activity relating to property seized by the Cuban government since 1959 from US nationals or former Cuban citizens (now US nationals) runs the risk of having to pay the value of that property (or even four times the value, if they continue to "traffic" after having received notice of a claim from a US national);

- It vests a new right in the US authorities to exclude aliens (whether natural persons or persons who are corporate officials or controlling shareholders of a company, spouses and minor children) who "traffic in confiscated property" from the US, and to deny them a visa.

The Commission is of the view that these measures are in part, actually or potentially, contrary to US obligations under the WTO Agreements, in particular the GATT and GATS, and that they raise serious questions about the scope of the national security exceptions to GATT and GATS, including their possible abuse in relation to third countries and their nationals. The Commission also deems that some of the LIBERTAD Act provisions are inconsistent with various rules and standards of international law in so far as they unreasonably and exorbitantly extend US jurisdiction in regard to aliens.

Iran and Libya

In March 1995 Senator D'Amato proposed legislation that envisaged a US trade ban on Iran and would impose various sanctions against foreign persons and foreign companies trading with Iran. President Clinton subsequently issued an executive order to prevent any US person from financing petroleum development projects in Iran and two months later (7 May 1995) signed an executive order banning all US exports and investments to Iran by US companies and their overseas subsidiaries.

Following the discussion on Iran at the EU-US Madrid Summit and the joint EU Presidency/Commission démarche in Washington on 7 December 1995 the US Senate adopted a revised version of the **Iran Oil Sanctions Act of 1995** (S 1228) on 20 December that shifted the focus from trade restrictions for foreign companies to foreign investment (above 40 million US$) in the development of petroleum resources. The revised legislation set forth a list of sanctions including denial of Export-Import Bank assistance, export sanctions and denial of loans by US financial institutions under specified conditions. In a last minute action on the floor, the scope of the Senate bill was also expanded to include Libya.

On January 23 a further joint EU Presidency/Commission démarche was conducted to reiterate the EU's objection - in view of the adopted Senate bill - to the extraterritorial application of pending US legislation that would impose sanctions on foreign companies for trade with - and investment in - Iran and Libya. This action was accompanied by letters to key members of both chambers of the US Congress. This issue was also taken up at the ongoing negotiations on a multilateral agreement on investment in the OECD as well as in a WTO General Council meeting.

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A consolidated bill (HR 3107) is currently pending in the US House of Representatives. On 21 March 1996 the House Committee on International Relations unanimously approved HR 3107, widening even further the range and scope of sanctions against foreign companies. In addition to the above-mentioned sanctions proposed in the Senate text, the House bill adds imports and procurement sanctions. The sanctions would apply also to Libya and targets investment as well as trade in petroleum and natural gas related technology.

Tuna-Dolphin

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

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

The EU is carefully monitoring the progress of the current legislative initiatives before Congress which may improve the situation in that they can allow the embargo to be lifted in return for certain undertakings from the nations subject to the primary embargo.

Export controls

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

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

2.2. Unilateralism in US trade legislation

2.2.1. Introduction

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

US unilateralism undermines the global trading system in that it demonstrates a limited confidence in, and discontent with, multilateral rules and the multilateral dispute settlement process, and runs a risk that the affected countries will adopt countermeasures.

While the European Commission clearly remains concerned about unilateral provisions in US legislation, it considers that with the entry into force of the WTO their practical application should be significantly reduced.

Reinforced dispute settlement

The US - like other WTO members - is now bound under international law "to ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the [Uruguay Round] Agreements" (Art. XVI of the Agreement establishing the WTO). Among those obligations, Art. 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes is of special importance. WTO members are from now on precluded from making any determination on their own that a violation of the agreements covered (i.e. the GATT, GATS, TRIPs) has occurred, that benefits have been nullified or impaired or that the attainment of any objective of these agreements has been impeded. Rather, WTO members have recourse to the reinforced dispute settlement system and any determination of the above kind needs to be made in accordance with the rules and procedures of the Understanding and the findings of the panel or Appellate Body. WTO members are also bound as regards the time allowed to abide by a panel ruling and the level of possible retaliation.

2.2.2. The relevant legislation

Section 301 family

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

Super 301

The **Omnibus Trade and Competitiveness Act of 1988** also introduced the so-called "Super 301". "Super 301" is the name given to a special initiation procedure for unfair foreign trade practice investigations following the Section 301 procedure. Originally limited to 1989 and 1990, President Clinton issued an **Executive Order on Identification of Trade Expansion Priorities** on 3 March 1994. Referring to the lapsed Super 301 provision, the Executive Order requires the US Trade Representative, on the basis of the information contained in the annual National Trade Estimates Report to identify "priority" unfair trade practices from "priority" countries and self-initiate Section 301 cases against them. On 27 September 1995, the President amended such Executive Order to extend it to calendar years 1996 and 1997.

Special 301

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

The US has initiated Section 301 procedures against the EU in 29 cases altogether. In at least 8 cases, the US threatened the imposition of punitive duties or counter-subsidies, or eventually resorted to such unilateral retaliation against the EU.

2.2.3. Hormones

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

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

Since then US exports of beef and beef products to the EU have risen steadily, to $34.3 million in 1994. The EU has therefore repeatedly requested that a further reduction in the retaliation measures be made. The US has maintained, having examined the relevant trade data, that no such adjustment is warranted. Although the issue has been raised on numerous occasions, and in particular during the final phase of the Uruguay Round negotiations, the US Administration is currently not prepared to give a commitment to reduce the retaliation. The US retaliation measures remain in force even though the US has now finally requested the establishment of a panel in the WTO. In April 1996 the Community requested WTO consultations with the US regarding the retaliation measures.

2.2.4. Procurement sanctions

The EU and certain Member States also continue to be subject to sanctions under **Title VII** of the **Omnibus Trade and Competitiveness Act of 1988**. The sanctions bar EU suppliers from bidding, *inter alia*, for US federal government contracts that are below the threshold values of the WTO Agreement on Government Procurement. The US imposed these sanctions in 1993 after bilateral negotiations failed to lead to agreement on liberalising purchases of telecommunications equipment on both sides of the Atlantic. The EU responded with counter-sanctions (Regulation 1461/93) that also bar US bidders from applying for contracts awarded by central government agencies below the threshold values. Following the bilateral Marrakech procurement agreement of April 1994, which liberalised around $100 billion of procurement opportunities on both sides, the EU considers that the sanctions are an unnecessary impediment to the bilateral relationship, and is urging a reciprocal lifting of sanctions.

2.3. Impediments through national security considerations

2.3.1. Introduction

Danger of overly restricting trade

The right of sovereign nations to take any measure to protect their essential national security interests has been widely recognised by multilateral and bilateral trade agreements. However, it is in the interest of all trade partners that such measures are prudently and sparingly applied, as for example manifested by the OECD National Treatment Instrument and Codes of Liberalisation. Restrictions to trade and investment cannot be justified on national security grounds if they are, in reality, essentially protectionist in nature and serve other purposes than the protection of security interests. This latter concern is particularly appropriate in the case of the US which generally regards its national security as interwoven with domestic economic strength.

US legislation includes numerous restrictions on foreign imports, exports, procurement and investment which are justified on national security considerations. The EU continues to have major concerns about the overuse of these provisions and the US' apparent undermining of international agreements designed to alleviate some of the restrictions. The EU is carefully monitoring US implementation of the new WTO procurement rules, and is addressing some of the matters raised in this chapter in the negotiations on investment issues.

2.3.2. Import restrictions

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

Disguised protectionism

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

2.3.3. Export restrictions

Unilateral determinations

A comprehensive system of export controls was established, under the **Export Administration Act of 1979**, and continued under the **International Economic Emergency Powers Act of 1977** to prevent trade to unauthorised destinations. This system is also used to enforce US foreign policy decisions and international agreements on non-proliferation of certain types of goods or know-how. The EU has repeatedly expressed its concern about the unilateral determination by the US concerning export licences for products made in the EU: this creates a conflict of jurisdictions and requirements for European companies whenever their products or exports have had a component or an element controlled under US export control regimes. One particular element is the US policy to consider a 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 (cf. under "Export Controls", chapter 2.1.2.).

EU-US dialogue

The EU Member States cooperate with the US in various "non-proliferation" agreements, such as on nuclear, chemical and biological warfare, and missile technology. Both sides are also working together to establish the new multilateral arrangement for export controls - the New Forum - to respond to threats caused by the proliferation of sensitive dual use items, as well as of arms and arms-related technologies.

2.3.4. Procurement restrictions

Reduced scope of GPA

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

More clarity on GPA

While the US denies abusing the WTO national security exemption, it has indicated a readiness, in the context of the implementation of the GPA, to disseminate more guidance to US procurement officials for identifying which procurements are covered by the Agreement and which by national security exemptions. It has also expressed its intention to ensure clear and consistent identification of national security procurements, and improve the coherence of the US Federal Supply Classification System with the international Harmonised System. Together, these mark a first small step towards more acceptable practices.

The concept of "national security" was originally used in the **1941 Defence Appropriation Act** to restrict procurement by the DoD to US sourcing. Now known as the **Berry Amendment**, its scope has been extended to secure protection for a wide range of products only tangentially related to national security concerns - for example, the General Accounting Office 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.

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

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

Buy America restrictions

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

MOU's undermined

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

Restrictions are counter-productive

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

- increase by 30 to 50% the price of DoD requirements;
- are a disincentive for investment and innovation;
- are costly in terms of paperwork and management;

- have produced increased lead-times for supply by domestic industries;
- maintain a climate of protectionism;
- create an atmosphere of animosity with allies, particularly when they violate the spirit of the MOUs.

2.3.5. Investment restrictions

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

Since being introduced, the scope of Exon-Florio has been further enlarged:

Reinforcing Exon-Florio

- Since 1992, an Exon-Florio investigation must be made if a foreign government owned entity engages in any merger, acquisition or take-over which gives it control of the company. Further provisions contain a declaration of policy aimed at discouraging acquisitions by and the award of certain contracts to such entities.

- The Fiscal Year **1993 Defence Authorisation Act** requires a report by the President to Congress on the results of each CFIUS investigation and by including, among other factors to be considered, *"the potential effect of the proposed or pending transaction on US's international technological leadership in areas affecting US national security"* - again blurring the line between industrial and national security policy.

OECD efforts in question

The Exon-Florio provisions inhibit the efforts of OECD members to improve the free flow of foreign investment and could conflict with the principles of the OECD Code of Liberalisation of Capital Movements.

Uncertainties about implementation

While the EU understands the wish of the US to take all necessary steps to safeguard its national security, there is continued concern that the scope of application may be carried beyond what is necessary to protect essential security interests. In this context, the EU has drawn attention to the lack of a definition of national security and the uncertainty as to which transactions are notifiable. Although the US Treasury's implementing regulations, which were published in November 1991, did provide some additional guidance on certain issues, many uncertainties remain. Coupled with the fear of potential forced divestiture, many, if not most, foreign investors have felt obliged to give prior notification of their proposed investments. In effect, a very significant number of EU firms' acquisitions in the US are subject to pre-screening.

Foreign ownership restrictions

With regard to foreign ownership, the US has informed the OECD of a number of additional restrictions which it justifies "partly or wholly" on the grounds of national security. Foreign investment is restricted in coastal and domestic shipping under the **Jones Act** (see section 3.4.2) and the **US Outer Continental Shelf Lands Act,** which includes fishing, dredging, salvaging or supply transport from a point in the US to an offshore drilling rig or platform on the Continental Shelf. Foreign investors must form a US subsidiary for exploitation of deep water ports and for fishing in the Exclusive Economic Zone (**Commercial Fishing Industry Vessel Anti-reflagging Act of 1987**). Licences for cable landings are only granted to applicants in partnership with US entities (on the Submarine Cable Landing Licence Act of 1921, see section 3.8.2.).

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

2.4. Public Procurement

2.4.1. Introduction

In April 1994, the EU and US finalised a further round of bilateral negotiations. The new agreement, building on the 1993 Memorandum of Understanding, was - in essence - fully integrated into the WTO Government Procurement Agreement, which entered into force on 1 January 1996. The 1994 agreement expands coverage to include some sub-central government agencies, electricity utilities, ports and airports. However, US sub-federal coverage is still incomplete (only 39 of the 50 States, and 7 of the 24 largest US cities are covered), and the EU has therefore scaled back its offer to match.

Although this agreement reduces the number of "Buy America" restrictions, EU firms still face substantial difficulties when tendering in the US. A number of federally funded programmes still contain "Buy America" restrictions which limit export opportunities from EU firms. Set aside provisions for US small businesses also constitute a significant barrier for EU companies in the US government procurement market.

The EU is now looking to the new multilateral and bilateral agreements to expand the level of opportunities for EU suppliers and contractors. The EU will closely monitor US implementation of these agreements.

Furthermore, as part of the Joint EU-US Action Plan, the EU and US have agreed to discuss all outstanding bilateral issues on government procurement. Clearly, whilst welcoming progress already made on the US side to open its government procurement markets, the EU expects further improvements in the areas outlined below to be made in the context of the transatlantic dialogue.

2.4.2. Federal "Buy America" legislation

Many types of measures

The **Buy America Act of 1933**, as amended, contains the basic principles of a general buy national policy. It covers a number of discriminatory measures, generally termed "Buy America" restrictions, which apply to government-funded purchases. These take several forms: some prohibit public sector bodies from purchasing goods and services from foreign sources. Others establish local content requirements, while others still extend preferential price terms to domestic suppliers. "Buy America" restrictions therefore not only directly reduce the opportunities for European exports, but also discourage US bidders from using European products or services.

The restrictions apply to government supply and construction contracts, and require Federal agencies to procure only US mined or produced unprocessed goods, and only manufactured goods with at least a 50% local content. **Executive Order 10582 of 1954**, as amended, expands the scope of the Buy America Act in order to allow procuring entities to set aside procurement for small businesses (see section 2.4.6.) and firms in labour surplus areas, and to reject foreign bids either for national interest or national security reasons.

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

- the National Security Act of 1947 and the Defence Production Act of 1950 (see section 2.3.4);
- the **Department of Defence Balance of Payments Program**, which provides for a 50% price correction on foreign offers, when compared with US offers;
- the **Competition in Contracting Act of 1984**, which allows the procuring agencies to restrict procurement, on a case by case basis, in order to achieve industrial mobilisation objectives.

(4)

- the **National Space Policy Directive of 1990,** which establishes that US Government satellites will be launched solely on US manufactured launch vehicles, unless a specific exemption has been granted by the President. The measure is part of a set of coordinated actions to strengthen the US launch industry and is clearly detrimental to European launch service providers. European launch operators are effectively barred from competing for US government launch contracts, which account for approximately 80% of the US satellite market. The restriction, which initially applied to the launching of military satellites, was justified by the US on national security grounds, but is now also imposed on satellites for civilian use.

2.4.3. Telecommunications sector

The issue of procurement in the telecommunications sector remains unresolved between the EU and US. US telecommunications companies have historically bought equipment from local suppliers, and AT&T buys network equipment almost exclusively from its manufacturing arm, though this may change following the announced break-up of the company. Furthermore, "Buy America" rules continue to apply to purchases of telecoms equipment by rural telephone co-operatives financed by the Rural Electrification Administration (see below).

Not covered by WTO

Although the EU has sought negotiated solutions to these problems, neither the new GPA nor bilateral obligations cover this sector. One of the principal difficulties is the criteria for establishing which particular utilities should be included. The EU believes that coverage should not specifically distinguish between public and private companies, but should focus on the underlying conditions which lead telecommunications companies to pursue procurement policies that tend to favour particular national suppliers. These conditions include, first, insulation from market forces through the possession of a monopoly or a dominant position over a network, or through the possession of special rights relating to the management of the network; and, second, the means which government may use to influence the operations of an entity, such as regulation of tariffs and financing, or authorisation to operate. Thus, the EU argues that both publicly owned and private status utilities operating under monopoly or dominant conditions should be covered - this would introduce a higher level of transparency and would lead to improved market access.

2.4.4. Federal "Buy America" funding programmes

Additional Congressional restrictions

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

- The **Airport and Airway Safety, Capacity, Noise Improvement and Inter-modal Transportation Act of 1993** includes a price preference and local content provisions for US steel and manufactured products procured by the Federal Aviation Authority.

- The **Federal Water Pollution Control Act**, as amended by Section 39 of the **Clean Water Act**, provides for a 6% price preference for US suppliers for projects for water treatment.

- The **Surface Transportation Assistance Act of 1978** provides federal assistance for State transport projects, as long as States impose US standards, include a 25% price preference for US equipment and require the use of US manufactured steel.

- The **Inter-modal Surface Transportation Efficiency Act of 1991** extends the existing Buy America restrictions on steel to iron products and reserves at least 10% of the total appropriations for US small and disadvantaged businesses. It also provides for trade sanctions against a foreign country which is considered to discriminate against US suppliers. According to the EU steel industry, this legislation has a negative impact on trade opportunities with respect to procurements carried out by the Department of Transportation.

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

- The **Rural Electrification Administration** provides loans and loan guarantees to telephone and electric authorities, subject to all the materials and equipment being domestically produced. Following ratification of the bilateral Marrakech agreement, "Buy American" restrictions will only apply to loans made to telephone utilities.

- The **Clean Coal Technology Program**, which is part of the **Energy Policy Act** requires that projects selected by the Agency for International Development for this programme must ensure that at least 50% of the equipment supplied must be manufactured in the US.

- Defence Appropriation and Authorisation Acts (see section 2.3.4.).

2.4.5. State Buy America legislation and restrictions

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

2.4.6. Set aside for Small Businesses

Federal set-aside

The **Small Business Act of 1953**, as amended, requires executive agencies to place a fair proportion of their purchases with small businesses. These are defined as businesses located in the United States which make a significant contribution to the US economy and are not dominant. Currently, the concept of fair proportion means that the Government-wide goal for participation by small businesses shall be established at no less than 20% of the total value of all prime contract awards for each fiscal year. Under the normal bid procedures, there is a 12% preference for small businesses in bid evaluation for civilian agencies (instead of the standard 6%). In the case of the Department of Defence, the standard 50% preference applies to all US businesses offering a US product.

State set-aside

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

2.5. Tariff Barriers and Equivalent Measures

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

Tariff reduction

The US committed itself in the Uruguay Round to an average tariff reduction on industrial products of 37%; vis-à-vis the EU it went even further and will reduce its tariffs by 46%. The US commitment covers both the elimination and harmonisation of duties in certain sectors and the reduction of certain tariff peaks (defined as tariffs of 15% and higher). Tariff reductions will be implemented over a period of 5-10 years, beginning on 1 January 1995. Beyond this, total tariff elimination was negotiated on a plurilateral basis, among a number of industrial countries, in various sectors, including: beer and brown distilled spirits; some pharmaceutical products; paper, pulp and printed matter; steel; construction and agriculture equipment; medical equipment; toys and furniture.

Tariff peaks

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

NTA

In the context of the NTA the EU and the US are committed to exploring the possibility of agreeing on a mutually satisfactory package of tariffs reductions on industrial products and to considering which, if any, Uruguay Round obligations on tariff can be implemented on an accelerated basis. They are also committed to attempt to conclude an information technology agreement which should, *inter alia*, further reduce or eliminate tariffs in the information technology sector. Moreover, bilateral trade should be facilitated by the simplification in customs procedures arising out of the Customs Cooperation and Mutual Assistance Agreement which is under negotiation (see section 4.3.).

2.5.2. Customs User Fees

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

Fees becoming excessive

As a result of laws enacted in 1985 and 1986, the US imposes user fees on the arrival of merchandise, vessels, trucks, trains, private boats and planes, as well as passengers. The **Customs and Trade Act of 1990** and the **Omnibus Budget Reconciliation Act of 1990** extended and modified these provisions by, among other things, considerably increasing the level of the fees. Excessive fees levied for customs, harbour and other arrival facilities, that is for facilities mainly used by importers, place foreign products at an unfair disadvantage vis-à-vis US competition.

Merchandise Processing Fee

The most significant of the Customs User Fees (CUF) is the Merchandise Processing Fee (MPF). The MPF is levied on all imported merchandise except for products from the least developed countries, from eligible countries under the Caribbean Basin Recovery Act and the Andean Trade Preference Act, and from US insular possessions. It is also levied on merchandise entered under Schedule 8, Special Classifications, of the Tariff Schedules of the US. Fixed previously at 0.17% of the value of the imported goods, the MPF rose to 0.19% in 1992 and amounts to 0.21% ad valorem on formal entries with a maximum of $485 as from 1 January 1995. Meant, when established, to last until 30 September 1990, it has been extended on various occasions. It now runs until 30 September 2003.

GATT ruling

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

The present Customs User Fees structure is somewhat more equitable, since the fixing of a ceiling makes it less onerous for high-value consignments. However, the fee is still likely, in many cases, to exceed the cost of the service rendered since, irrespective of the level, it is still based on the value of the imported goods. Moreover, if the most recent increase was essentially designed to balance the shortfall of customs revenues as a consequence of the Uruguay Round duty rates reduction, the EU would be particularly concerned.

2.5.3. Harbour Maintenance Fee

US Customs also participates in the collection of the Harbour Maintenance Fee (HMF). The HMF is levied in all US ports on waterborne imports, exports and domestic cargoes at an ad valorem rate of 0.125%. It serves to fund dredging and other harbour maintenance activities. However, the ad valorem basis for its collection makes it difficult to justify as a fee approximating the cost of the service provided. While enforcement through Customs ensures that imported merchandise bears the fee, the same is not true for domestic cargo. As a consequence, for instance, 1992 data show that imports bear 65% of the levy, exports 27% and domestic cargo 3%.

Moreover, there is a notable accumulation of unused funds which is projected to rise to $1.66 billion by 1999. According to US Authorities this is due to the absence of proper budgeting of dredging works or to the blockage of projects by environmental lobbying groups. However, the European Commission is closely monitoring the accumulation of unused funds as this may point to the excessive nature of the fee.

The member countries of the Consultative Shipping Group (which includes all EC Member States with the exception of Austria, Ireland and Luxembourg) together with the Commission conducted a démarche on 18 March 1996 to the Department of State reiterating that the user fees for shipping should be related to the costs they are intended to cover while fees set in excess of that are not fees but taxes.

US Court of International Trade ruling

The US Court of International Trade in a recent judgement found that the HMF is a tax and not a user fee and exempted US exports from it. This ruling reinforces the Community view that the fee is onerous and not related to the customs services provided. Since it no longer applies to US exports, it should not any more apply to imports. Compatibility with GATT Art. III now also arises.

2.5.4. Excessive invoicing requirements

Textiles and clothing

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

Other products affected

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

Reforms pending

The information requirements far exceed normal customs declaration and tariff procedures. They are unnecessary because customs are entitled to ask for all necessary supplementary documents and information during clearance (standard 15 of Annex B1 of the Kyoto Convention). There should be no systematic demand for this kind of information. These formalities are also burdensome and costly, thus constituting a barrier against new entrants and small companies. As a result, large established

suppliers are privileged and small new competitors disadvantaged. These effects are particularly disruptive in diversified high-value and small-quantity markets which are of special relevance for the EU.

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

2.6.1. Introduction

Complex regulatory system

In the US, products are increasingly being required to conform to multiple technical regulations regarding consumer protection (including health and safety) and environmental protection. Even if, in general, not intentionally discriminatory, the complexity of US regulatory systems can represent an important structural impediment to market access. For example, it is not uncommon that equipment for use in the workplace be subject to US Labour Department certification, a county authority's electrical equipment standards, specific regulations imposed by large municipalities, and other product safety requirements as determined by insurance companies.

This situation is aggravated by the lack of a clear distinction between essential safety regulations and optional requirements for quality, which is due in part to the role of some private organisations as providers of assessment and certification in both areas. Moreover, for products where national standards do not exist, product safety requirements can change overnight as the product liability insurance market makes a new assessment of what will be required for insurance purposes.

WTO TBT Agreement

In the Uruguay Round the US has agreed on an expanded Agreement on Technical Barriers to Trade (TBT) which will improve the rules for enforcing standards, technical regulations and conformity assessment procedures. The TBT Agreement is applicable to all WTO members, but provides for the right to adopt and maintain appropriate technical rules for specific, legitimate objectives, such as protection of human health and safety, plant and animal health, and protection of the environment. The level of protection is discretionary as long as measures respect the basic provisions of the TBT Agreement. A feature of the new TBT Agreement is the *proportionality criterion* which is intended to ensure that technical regulations and conformity assessment procedures are not more trade restrictive than required for the legitimate purpose of the regulations concerned and the risks they are designed to cover.

The EU believes that the TBT provides an excellent base on which to tackle technical barriers to trade at the multilateral level. In particular, it specifies stricter disciplines in many of the areas of concern discussed below, such as the use of international standards, labelling requirements and sub-federal standards. The Agreement also provides for further bilateral follow-up actions. In this context, the EU and US are negotiating a Mutual Recognition Agreement (see section 4.1.) and working towards regulatory cooperation (see section 4.2.) to augment the impact of the existing numerous sectoral dialogues.

2.6.2. Non-use of international standards

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

Illustrative cases:

Industrial fasteners

- The **1990 Fastener Quality Act** (FQA), which aims to deter the introduction of sub-standard industrial fasteners into the US, includes onerous compliance costs. It also imposes a method of testing "lot-by-lot", which is burdensome as compared with other means of ensuring quality. The FQA has thus 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.

Furthermore, the **Technology Transfer Improvement Act of 1995**, recently signed into law, widens the scope FQA. The new statute repeals the Commerce Secretary's right to waive the requirement of the FQA for fasteners in "non critical applications". This effectively extends the scope of the FQA to all fasteners in commercial use. Regulations to implement the FQA are being drawn up by the US National Institute of Standards and Technology and it will be necessary to ensure that they allow for the use of internationally-agreed assurance systems such as ISO 9000.

- The **Nutrition Labelling and Education Act 1990** requires certain products to be labelled as to their content. The EU is concerned that the rules differ from international standards on labelling established by the Codex Alimentarius (upon which the corresponding EU legislation is based) and, furthermore, that this legislative action would have serious negative consequences on EU-US trade in foodstuffs. As it stands, the proposed implementing legislation would result in significant commercial obstacles to EU food products marketed in the US and vice-versa.

2.6.3. Discriminatory standards

WTO reformulated gasoline case

In January 1996 a WTO dispute settlement panel issued its report on US standards for reformulated and conventional gasoline. The complaint was brought by Venezuela and Brazil, with the EC intervening in their support. Under the Clean Air Act, the US Environmental Protection Agency (EPA) had issued a **Gasoline Rule**, which stipulates that from 1 January 1995 only gasoline of a specified cleanliness (reformulated gasoline) may be sold in areas of high air pollution. In other areas, only gasoline no dirtier than that sold in the base year of 1990 (conventional gasoline) may be sold. The problem with this regulation is that it lays down methods of calculating the 1990 baseline which give a more advantageous treatment to domestic products than to imported products. The panel ruled that this was a violation of the national treatment obligation of Article III:4 GATT, which was not necessary to protect human, animal or plant life or health under Article XX(b) GATT nor related to the conservation of exhaustible natural resources under Article XX(g) GATT.

The US has appealed this ruling. The EU has intervened before the appellate body, given that it has a substantial trade interest in the matter and in view of the importance of the legal principles involved. While the EU is in favour of the environmental objectives pursued, it considers that this should be done in a manner which does not distort the competitive conditions between US products and imports. On 29 April 1996 the WTO Appellate Body released its report which found the EPA regulation on imported gasoline to be in breach of WTO rules.

2.6.4. Regulatory differences at State level

There are more than 2,700 State and municipal authorities in the US which require particular safety certifications for products sold or installed within their jurisdictions. These requirements are not always uniform or consistent with each other, or even transparent. In particular, individual States sometimes set environmental standards going far beyond what is provided for at federal level. Agricultural and food imports are also often confronted with additional state-level requirements, which may lead to obstacles to trade.

No central source of information

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

Other hidden costs

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

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

Illustrative Cases:

Ceramic ware

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

Special labelling in California

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

Electrical appliances

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

Shaving equipment

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

2.6.5. Labelling requirements

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

Illustrative cases:

Car labelling

- The **American Automobile Labelling Act** provides that, from October 1994, passenger cars and other light vehicles must be labelled with, *inter alia*, the proportion of US/Canadian made parts and the final point of assembly. These requirements seem to be intended to influence consumers to buy cars of US/Canadian origin. They constitute an unjustifiable discrimination, contrary to Article 2.1 of the TBT Agreement, as the obligation to indicate engine and gearbox origin could discourage US constructors from importing parts from European component manufacturers. Moreover, since EU rules are quite flexible, due to the internal market, parts for any single model of motor vehicle may originate from one of several countries. The US proposal will therefore have greater administrative costs for European importers than for other importers. In addition, the fulfilment of the labelling requirement may involve the disclosure of confidential data from non-US manufacturers.

The EU is seriously concerned that the implementation of the labelling requirement will create unnecessary trade barriers, and put an excessive financial burden on importers to the US market. It has therefore taken up in the issue in the TBT framework.

Wine labelling

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

2.6.6. A heavy regulatory approach

Excessive reliance on mandatory certification

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

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

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

2.6.7. US approval procedures for drugs and drug ingredients

Long administrative procedures

In the US a new medicinal product must be approved by the Food and Drug Administration (FDA) before it can be commercialised. Long and uncertain administrative procedures prevail in the FDA in cases of approval of foreign drugs. For instance, in order to demonstrate the quality of a medicinal product, manufacturers have to observe standards, as set out in monographs of the US Pharmacopoeia. The latter is a commercial body without legislative association to the FDA. Therefore, new standards are delayed due to the "negotiation" between Pharmacopoeia and the FDA.

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

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

Suntan lotions

In addition, the problem of admission of European suntan lotions to the US market was first raised with the FDA in 1991. The FDA also received a petition by European cosmetic firms to open the simplified drug approval procedure to UV-filters that had already been accepted in the EU. The FDA indicated in 1992 that it would examine its current approval scheme with particular regard to this matter. A decision is still pending.

2.7. The Protection of Intellectual Property

2.7.1. Introduction

With the entry into force of the WTO, the area of intellectual property is now subject to additional international disciplines. In implementing the Uruguay Round Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs), the US has recently made a number of modifications to its legislation.

These changes are welcome, but the EU remains concerned that the amendments to patent legislation made by the US in the context of implementing the TRIPs Agreement remain insufficient to resolve the discriminatory practices identified by the 1989 GATT panel and that no action is being initiated on government use of patented items.

2.7.2. Patents and related areas

Measures effecting imported goods

Section 337 of the **Tariff Act of 1930** provides remedies for holders of US patents with a view to keeping imported goods which are infringing such patents out of the US ("exclusion order") or to have them removed from the US market once they have come into the country ("cease and desist order"). These procedures are carried out by the US International Trade Commission (ITC) and are not available against domestic products infringing US patents. Under the 1988 Omnibus Trade and Competitiveness Act, several modifications have been introduced to Section 337, such as the availability of remedies in relation to imported goods which infringe a US process patent.

The GATT Panel Report which was adopted by the Contracting Parties in November 1989 came to the conclusion that Section 337 was inconsistent with GATT Article III:4. The provision in question accords to imported products alleged to infringe US patent rules treatment less favourable than that accorded under Federal District Court procedures to like products of US. Some modifications have been made to Section 337 in the context of implementing the TRIPs Agreement; however, the US has to date not taken appropriate measures in order to fully do away with the main discriminating features of Section 337.

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

2.7.3. Government use

Government immunity impacting on EU firms

Under US law (**28 US Code Section 1498**) a patent owner may not enjoin or recover damages on the basis of his patent for infringements due to the manufacture or use of goods by or for the United States Government Authorities. This practice is particularly frequent in the activities of the Department of Defence but is also extremely widespread in practically all government departments. For obvious reasons this practice is particularly detrimental to foreign right-holders because they will generally not be able to detect such governmental use and are thus very likely to miss the opportunity to initiate an administrative claims procedure.

Article 31 of the TRIPs Agreement introduces a requirement to inform promptly a right holder about government use of his patent, but no action has been taken by the US so far to bring their legislation into conformity with this provision.

2.7.4. Copyright and related areas

Moral rights

Despite the unequivocal obligation contained in Article 6 bis of the Berne Convention, to which the US acceded in 1989, to make "moral rights" available for authors, the US has never introduced such rights and has repeatedly announced that it has no intention to do so in the future. It is clear that while US authors fully benefit from moral rights in the EU, the converse is not true, which leads to an imbalance of benefits from Berne Convention membership to the detriment of the European side.

2.7.5. Geographical designations

With respect to wines and spirits, the margin of discretion left to the director of the Bureau of Alcohol, Tobacco and Firearms (BATF) in defining the status of a geographical name (i.e. if the name is non-generic, semi-generic or generic) may give rise to violations of the TRIPs Agreement, in particular articles 23.1 and 24.3 (cf. section 3.1.7.).

Moreover, the amendment to the US trademark law adopted for the purpose of implementing TRIPs Agreement article 24.5, (the "trademarks grand-father clause") gives a priority to any use of a geographical indication as a trade mark before 1995. However the TRIPs Agreement article 24.5 grants priority only to a trademark used *in good faith* before this date. Thus the question of a trademark used or registered *in bad faith* in the US (i.e. to benefit from the reputation of a geographical indication) needs to be addressed.

2.8. Tax policy

2.8.1. Introduction

Tax policy debate

Tax policy options are expected to play a significant role in the run-up to the November 1996 elections in the US. Various radical tax reform proposals are currently being debated, including a national sales tax, a flat tax and a progressive consumption tax. This debate is taking place against the background of continued uncertainty over whether the tax reform proposals will provide sufficient revenue, with the possibility that greater pressure might fall on foreign taxpayers as a result. While no significant legislative change is anticipated until next year at the earliest, the implications of each proposal for international investment need to be thoroughly examined in terms of their potential negative impact on European investors (the banking branch profits tax is covered in section 3.6.5.).

On the positive side, the OECD Council's approval of new transfer pricing guidelines in July 1995 should greatly benefit international business. These ensure an internationally agreed standard for allocating taxable profits between jurisdictions.

The extent of the reservation for sub-federal tax measures which the US is seeking from the GATS continues, however, to give cause for concern. Finding the right solution will be of considerable importance both for tax policy and for the GATS as a whole (because of its wider impact on the application of national treatment at the sub-federal level).

2.8.2. Cumbersome and discriminatory reporting

Information reporting requirements

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

These requirements are onerous. Although their purpose, the prevention of tax avoidance and evasion, is reasonable, they are burdensome and add to the complexity for foreign-owned corporations of doing business in the US.

2.8.3. "Earnings stripping" provisions

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

Internationally agreed approach overlooked

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

The provisions relating to loans guaranteed by related parties could also disallow the interest on a number of ordinary commercial arrangements with US banks, and provide a disincentive from raising loans with them.

2.8.4. State unitary income taxation

Arbitrary calculations

Certain US States (Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Kansas, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Rhode Island and West Virginia) assess State corporate income tax for foreign-owned corporations on the basis of an arbitrarily calculated proportion of their total world-wide profits. This proportion is calculated in such a way that a company may have to pay tax on income arising outside the State, so giving rise to double taxation.

World-wide unitary taxation

"World-wide" unitary taxation is inconsistent with bilateral tax treaties concluded by the US at the Federal level. A company may also face heavy compliance costs in providing details of its world-wide operations. International attention has mainly focused on California, which from 1986 has allowed companies to elect for "water's edge" unitary taxation instead. Under this method, companies are taxed instead on the basis of a share of their total US (rather than world-wide) income.

The 1994 US Supreme Court ruling that California's former world-wide unitary tax was not unconstitutional was not encouraging. The EU and its Member States remain concerned about unitary regimes and will keep a watch on possible developments.

2.8.5. US taxes discriminating against imported cars

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

Luxury Tax

The Luxury Tax is an excise tax imposed since 1990 on cars valued above an arbitrary threshold, currently around $33,000. The tax has a higher incidence on imported cars than on US produced cars. Originally it also applied to leisure boats and jewellery but these items were later exempted due to pressure from US producers.

CAFE payment

The CAFE payment is a civil penalty payment levied on a manufacturer or importer whose range of models has an average fuel efficiency below a certain level, currently 27.5 miles per gallon (mpg). CAFE favours large integrated car makers or producers of small cars rather than those who concentrate on the top of the car market, such as importers of European cars.

Gas Guzzler Tax

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

European auto-makers, with a total market share in the US of only 4%, bear nearly 70% of the revenue generated by the luxury tax, 85% of that by the Gas Guzzler tax and almost 100% of the CAFE penalties.

GATT panel

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

2.8.6. Foreign Sales Corporations

US legislation authorising so-called Foreign Sales Corporations (**26 USC sections 921-27**) provides that, under specific conditions, certain income earned by a foreign subsidiary of a US corporation will not be subject to US tax. The statute's presumption as to income allocation is questionable and may give rise to an objectionable tax benefit accruing to US firms. Foreign Sales Corporations are often used in the aeronautics sector (see section 3.3.2.).

2.9. Conditional National Treatment

2.9.1. Introduction

National Treatment

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

Although the EU has at various times raised the issue with the US Administration, at both political and senior official level, the US has failed to date to provide any indications of how to handle the EU's concerns.

The European Commission attaches great importance to addressing the Conditional National Treatment (CNT) issue both as part of the negotiations of a new EC-US Science and Technology agreement and in the framework of the OECD Multilateral Agreement on Investment negotiations. In particular, the European Commission is insisting on the resolution of the issue through the establishment of common eligibility requirements for project funding.

2.9.2. What is Conditional National Treatment?

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

Reciprocity

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

Performance requirements

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

The EU has become increasingly concerned over recent years about US legislation taking the form of tests on whether a company, legally established in the US but whose ownership is foreign, meets certain conditions and requirements. CNT language is most notable in the area of science and technology and concerned the granting of federal subsidies for research and development, or other advantages, to US-incorporated affiliates of foreign companies.

Examples

Examples of conditional national treatment can be found in the **American Technology Pre-eminence Act of 1991** that authorises the Advanced Technology Programme, the **Energy Policy Act of 1992** that authorises federal programmes and joint ventures between industry and government laboratories in energy-related R&D, the **National Cooperative Production Act of 1993**, which extends the favourable antitrust treatment applying to joint R&D ventures to joint manufacturing ventures and in the **1993 Defence Appropriations Act** that authorises the Technology Reinvestment Project, a programme designed to ease conversion from defence to civilian manufacturing by funding technology development and deployment as well as education and training.

The current Congress, although mainly focused on scaling down federal support for technology programmes, also passed new CNT provisions. In particular, language to this effect can be found in the Advance Lithography Program which deals with research on semiconductor materials and processes, and which is included in the Defence Department Authorisation bill signed into law by the President on February of this year.

Cumbersome administrative work

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

3. SECTORAL ISSUES

3.1. Agriculture and fisheries

3.1.1. Introduction

The settlement of the Uruguay Round negotiations and the establishment of the WTO has far reaching consequences for international agricultural trade, and brought about a distinct relaxation in agricultural trade tensions between the European Union and the United States, which has traditionally been one of the more contentious areas of trade relations. The rapid conclusion of the WTO Article XXIV:6 negotiations on the impact of the enlargement of the EC has also contributed to easing trade tension.

However, notwithstanding this fact, a variety of issues remain unresolved and some others have re-emerged. There are acute difficulties in the sanitary and phytosanitary fields in spite of some progress within the framework of the European Commission - US Department of Agriculture (USDA) dialogue and the Agreement on Sanitary and Phytosanitary measures (SPS) in the Uruguay Round.

3.1.2. Sanitary and phytosanitary requirements

Delays at customs controls

Differences in US and EU sanitary and phytosanitary requirements can have restrictive effects on trade. A variety of EU exports to the US have encountered problems due to delays in US Customs sampling and inspection procedures, resulting in damage to the goods and subsequent commercial losses for the exporters. The EU does not dispute the right of the US authorities to inspect imported goods but considers that adequate steps should be taken to deal expeditiously with perishable goods.

Canned peaches

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

In the phytosanitary field, the following main difficulties persist:

Apples and pears

Regulations governing the entry of apples and pears from certain member states (Federal Register of 1987, Title VII, Ch. 3, §319-56-2r) provide for a pre-clearance programme, with the aim of guaranteeing, prior to shipment, that consignments are free from an insect pest known as the pear leaf blister moth and from "other pests that do not exist in the US or that are not widespread in the US".

Operating in this way on the basis of an open list is not a scientific approach and is contrary to the spirit of transparency as provided for in the International Plant Protection Convention. The stringent inspections and the increased costs arising from the pre - clearance programme have clearly had a negative effect on EU exports of apples and pears to the US. Consultations with the aim of implementing the "inspection at port of arrival" option have recently resumed.

Pathogen free regions

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

Potted plants

The revised provisions on standards and certification of plants established in growing media (Federal Register 7, §319-37-8) have reduced the obstacles encountered by EU

exports of potted plants to the US. However, the certification of plant genera for example Azaleas involves a very long procedure which may considerably delay the approval of EU plant genera.

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

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

Pesticide tolerance levels

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

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

Hardy nursery stock

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

In the sanitary field the following difficulties persist:

BSE

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

However, while the EU has subjected its requirements for approval to the authoritative international institution in this area, the International Office for Epizooties (IOE), the US has introduced measures which exceed those of the EU. In particular, the US does not make any distinction between countries where the incidence of BSE is high or low (the latter being countries with occasional cases) while the EU applies restrictive measures only in countries with a high incidence of BSE. As a result, French, Irish and Portuguese exports have been subject to requirements not deemed necessary under EU and IOE rules. In this context also the issuing of US import permits for bovine embryos and semen from countries which have had cases of BSE has been suspended, although no formal change was made to the US import rules.

Horses

The US has established unnecessarily strict conditions for the participation of piroplasmosis positive horses in the 1996 Atlanta Olympic Games. The Federation Equestre International, assisted by the EU, put forward detailed suggestions during 1995 on measures to prevent any transmission of piroplasmosis and the establishment of

piroplasmosis in native ticks. However, the US decided to exclude piroplasmosis positive horses from the 3 day event, and to allow such horses to complete only in the jumping and dressage events under exceedingly strict conditions.

Goats

The US imposes animal health restrictions on the import of goats on the grounds of the risk of scrapie in sheep. These restrictions are even less justified because of the widespread presence of scrapie in the US sheep population.

Recognition of the Community

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

Regionalisation

The EU operates a policy of regionalisation, where restrictions are applied in zones affected by certain animal diseases, with free movement of animals and products outside the affected zones. An animal or product fit for movement is then considered fit for export. The principle of regionalisation as an effective means of controlling animal disease has now been incorporated into the US Tariff Act 1930 by the North American Free Trade Agreement (NAFTA) and is part of the WTO Agreement on the application of sanitary and phytosanitary measures. However, US import administrative rules concerning Foot and Mouth Disease, Rinderpest and other relevant diseases have still not been amended to reflect this change in legislation, despite a clear commitment in the EC/US agreement on application of the Third Country Meat Directive, reached in 1992. The US published a proposed rule on "Importation of Animals and Animal products" covering only ruminants and swine on 18 April 1996, and the EU will make comments on this proposed rule.

African Swine Fever

The consequence of the current US position on regionalisation can be illustrated by the example of African Swine Fever (ASF). Because of the presence, in the past, of ASF in a small region of Spain, there is still a restriction of imports of certain pork products from Spain.

Non-recognition of disease-free status

Other restrictions on live animals relate to the non-recognition by the US of the EU's freedom from certain diseases.

Non-comminglement

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

Uncooked meats

Imports into the US of uncooked meat products (sausage, ham and bacon) have been subject to a long-standing prohibition. Following repeated approaches by the EU, US import regulations were modified to permit the import of Parma ham, Serrano hams, Iberian hams, Iberian pork shoulders and Iberian pork loins. However, US still applies a prohibition on other types of uncooked meat products, e.g. San Daniele ham, German sausage, "Ardennes" ham despite the fact that meat products may come from disease free regions and that the processing involved should render any risk negligible.

Egg products

The import of egg products is allowed only under very strict conditions, in particular, the requirement for continuous inspection of the production process. A system of periodic inspection of the production process would be acceptable from a human health point of view, but continuous inspection is superfluous and expensive, and has a negative effect on prices and competitiveness.

Dairy Products

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

3.1.3. Bananas

Following the 17 October 1994 opening of an investigation under Section 301 of the 1974 Trade Act to ascertain if the EU's banana regime is adversely affecting US economic interests, the USTR published a preliminary finding against our system in January 1995. However, the EU considers that there is no justification for the US to take unilateral action. The US has now sought a WTO panel on the EC banana regime.

3.1.4. Export subsidies

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

The **Export Enhancement Program** (EEP) allows US exporters to apply for a cash subsidy designed to make US products competitive with subsidised exports from other nations. EEP has been capped at $ 350 million in fiscal year 1996 but applies to products exported to over 70 countries. Currently operating in the same manner as EEP is the **Dairy Export Incentive Program** (DEIP) which is also used for market development purposes.

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

The **Export Credit Guarantee Program** offers US government guarantees of short-term GSM-102 (6 months - 3 years) and medium-term GSM-103 (3-10 years) private bank loans at commercial interest rates. There is no eligible list of commodities, though bulk products are the main beneficiaries. It is targeted at countries which need guarantees to secure financing but show a reasonable ability to repay.

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

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

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

3.1.5. Import arrangements

Tariff rate quotas

Under the terms of the Uruguay Round agreement, the former Section 22 import quotas are to be replaced by Tariff Rate Quotas (TRQs), where a prescribed quantity of a product may be imported at a lower rate of duty, with any quantities in excess being subjected to higher tariffs. The EC is monitoring closely the management of the quotas by the US Administration. The EC has held detailed discussions with the US Administration, particularly on the management of the dairy quotas. The EC remains concerned about certain in-built rigidities in the licensing arrangements.

As regards the proposed new methods for the management of the tariff rate quota for tobacco, negotiated under Article XXVIII of the GATT, the EC is concerned that these methods seem more restrictive than the existing ones.

3.1.6. Inadequate protection of geographical indications of European wines and designations of spirits

Enforcement of rights to a geographical indication in the US mainly depends on Bureau of Alcohol, Tobacco and Firearms (BATF) regulation for the labelling of wine and spirits which leaves the director of the BATF a large latitude of discretion, in particular in the definition of when a geographical name is a generic name and when it is not.

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 in principle maintained its commitment to this undertaking.

Incomplete BATF list of non-generic names

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

Semi-generic names

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

Grape names

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

Gamay Beaujolais

For example, on 5 April 1994 the BATF published in the Federal Register a Notice of Proposed Rulemaking, which would permit the use of the geographical designation "Gamay Beaujolais" for a US wine which BATF admits is now known to be neither Gamay nor Beaujolais. The EC has strenuously objected to this, and BATF has so far taken no final decision. The French wine industry has filed a case at the US District Court in Washington D.C. against "the unlawful approval by BATF of the use of the name Gamay Beaujolais".

Spirits

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

TRIPs Agreement

The Commission services consider that US practice which leaves the director of the BATF a large margin of discretion in deciding the status of a geographical name (i.e. whether a name is non-generic, semi-generic or generic) may lead to violations of the TRIPs Agreement (cf. chapter 2.7.).

3.1.7. Drift net fishing

The EU acknowledges the entitlement of the US to condition access to living resources in its Exclusive Economic Zone (EEZ). There seems to be a tendency, however, to use unilateral measures as benchmarks of other countries' policies, with the possibility of

sanctioning accordingly. The EU stresses the need for international cooperation in this sector, as unilateral measures may not necessarily be the appropriate means of achieving the objective of conservation and may be destabilising for international trade.

Unilateral determinations

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

Under the provisions of the **High Seas Drift Nets Fisheries Enforcement Act of 1992** the US Secretary of Commerce has identified Italy as "a nation for which there is reason to believe that its nationals or vessels are conducting large-scale driftnet fishing" and, if this issue has not been resolved at the end of the statutory consultation period, the US administration may impose an embargo on Italian exports of fish and fish products to the US. The EU has consistently opposed unilateral actions of this sort.

Compulsory Certificates of Origin

The US introduced a compulsory system of Certificates of Origin for yellowfin tuna caught in the Eastern Tropical Pacific since July 1992. Certification rules are also applied for countries using large-scale trawl nets. These rules may be considered to be a serious obstacle for EU exporters.

3.1.8. Shrimp

Forty nine nations have been warned, subsequent to section 609 of Public Law 101-162, that their exports of shrimp to the US will be embargoed unless they provide evidence that their shrimp fishermen have matched US efforts to protect sea turtles. Three EU Member States: Italy, Spain and Portugal figure on the list of countries potentially affected: Portugal presented a démarche to the Department of State in May 1996 underlining, inter alia, its concerns regarding the potential extraterritorial effect of this legislation.

3.1.9. Allocations to foreign fishing fleets

Squid and mackerel

Each year, the US fixes the total allowable level of foreign fishing (TALFF) and accordingly makes allocations to foreign fishing fleets. Squid fishing possibilities for EU vessels off the east coast of the US have been gradually phased out under the terms of both the MFCMA and the former Governing International Fisheries Agreement (GIFA) in favour of the development of the US domestic fishing industry. Though mackerel migrating off the east coast is the only stock currently identified as being in surplus in the US EEZ, the US authorities have set a zero TALFF since 1990 for this stock, following pressure from the domestic industry to protect its markets. A zero TALFF is proposed for 1996 too. The EU believes that this line neither corresponds to the provisions and intentions of the MFCMA nor to the provisions of Article 62 of the UN Convention on the Law of the Sea.

The **Jones Act** (see also section 3.4.2.) blocks the potentially interesting possibility for EU fishermen to fish in US waters under a US flag as it provides that only fishing boats built in the US can fly the US flag, thereby preventing the possibility of joint ventures and joint enterprises.

3.2. Shipbuilding

3.2.1. Introduction

OECD Shipbuilding Agreement

The signature of the OECD Shipbuilding Agreement in December 1994, on the elimination of aids in the shipbuilding sector was a major achievement, and is expected to have a significant impact on US', and all other signatories', subsidies programmes in the shipbuilding sector.

In December 1995 the European Community, South Korea and Norway deposited their instruments of ratification for the Agreement. The US and Japan have committed themselves to ratify so as to allow the entry into force of the Agreement in July 1996. The Agreement aims to eliminate all direct and indirect support and to combat injurious pricing practices. Provision is made for a standstill on existing subsidy levels and on new measures of support during the intervening period, but allows for the continuation of previously committed aid subject to certain conditions. The EU will closely monitor progress in the ratification and implementation of the Shipbuilding Agreement into US legislation and its impact on the existing subsidy programmes.

3.2.2. Shipbuilding: subsidies and tax policies

Subsidies

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

Loan guarantees

The Act also established the Federal Ship Financing Fund to assist the development of the US merchant marine by guaranteeing construction loans and mortgages on US flag vessels built in the United States. In 1993 the guarantee program was extended to cover also vessels for export. The Maritime Administration (MARAD) issued new loan guarantees as follows: in 1994 - $290 million; in 1995 - $437 million and through March 1996 - $477 million in new loan guarantees. As of the end of March 1996, the fund amounted to a balance of $2.14 billion. As an example, in February 1996 MARAD announced the approval of $215 million in guarantees for the construction of five double-hull tankers.

Tax on non-emergency repairs

The United States applies a 50% ad valorem tax on non-emergency repairs of US owned ships outside the USA and on imported equipment for boats, including fishnets on the basis of **Section 466** of the **Tariff Act of 1930**, as amended in 1971 and 1990. Under the latter amendment the tax would not apply, under certain conditions, to foreign repairs of "LASH" (Lighter Aboard Ship) barges and spare vessel repair parts or materials. This tax will also have to be abolished to conform with the provisions of the Shipbuilding Agreement. The draft implementation bill provides for such abolition with respect to the Shipbuilding Agreement contracting parties.

3.3. Aeronautics industry

3.3.1. Introduction

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

3.3.2. Specific problems

Subsidies to the US industry

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

NASA

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

DoD

On an annual basis, the DoD spends about $ 7 billion on aeronautics research and development. US large civil aircraft manufacturers, as well as civil engine manufacturers, participate in such programmes and benefit from the substantial technological spin-offs which are then applied to civilian production. In addition, recent initiatives by the Clinton administration have enhanced programmes for the development and transfer of dual-use technologies, defence conversion research and reaffirmed the importance of the public-private partnership in aircraft sector.

MANTECH

The US aircraft industry also benefits from the DoD funding of Independent Research and Development (IR&D) projects, and the MANTECH programme. The latter is aimed at developing and encouraging contractors to use new technologies in their manufacturing process.

FAA

Finally the Federal Aviation Administration (FAA) has an annual aeronautics budget for research and development which exceeds $ 2 billion. One of the FAA's stated objectives is "to foster US civil aeronautics".

Other advantages stem from special tax programmes. One such example is the use of so-called Foreign Sales Corporations, which, although they are available to all qualifying business, in practice have particularly benefited the US aircraft industry (see section 2.8.6.).

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

3.4. Maritime services

3.4.1. Introduction

International maritime transport markets in the US are predominantly open. However, significant restrictions remain on the use of foreign built vessels in the US coastwise trade and in relation to access to certain international cargoes from which non-US vessels are excluded. Furthermore, the ease with which new restrictions are frequently proposed in the US is a cause for concern and constant vigilance.

Despite the fact that schedules of specific commitments and lists of MFN exceptions have yet to be definitively fixed, the EU remains hopeful that the introduction of GATS disciplines to the maritime services sector will create a better trade environment for shippers and ship operators both from the EU and from the US. Although progress has been limited so far in the ongoing work of the WTO's Negotiating Group for Maritime Transport Services, the EU and the US have jointly committed themselves to the successful completion of the current negotiations by the agreed deadline of 30 June 1996. The US reluctance to table an offer so far is a matter of concern.

3.4.2. Specific problems

Coastwise trade

Foreign-built (or rebuilt) vessels are prohibited from engaging in coastwise trade either directly between two points of the US or via a foreign port. Trade with US island territories and possessions is included in the definition of coastwise trade (**Merchant Marine Act of 1920 - The Jones Act**). Moreover, the definition of vessels has been interpreted by the US administration to cover hovercraft and inflatable rafts. These limitations on rebuilding act as another discrimination against foreign materials: the rebuilding of a vessel of over 500 Gross Tons (GT) must be carried out within the US if it is to engage in coastwise trade. A smaller vessel (under 500 GT) may lose its existing coastwise rights if the rebuilding aboard or in the US with foreign materials is extensive (46 U.S.C. 83, amendments of 1956 and 1960).

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

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

Ship classification

The **Jones Act** also confers to the American Bureau of Shipping (ABS) an effective monopoly over ship classification and inspection services for the US Coast Guard Administration. EU classification companies are therefore excluded from this market. However, the still pending US Coast Guard Authorisation for 1995 contains one important provision that would remove ABS's monopoly of US flag business.

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

Cargo preferences measures

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

In particular, the Commission is studying the conformity of such measures with US obligations agreements. The application of the measures to US public procurement

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

The relevant legislative provisions are:

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

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

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

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

Alaskan oil cargoes

In November 1995 President Clinton signed into effect legislation lifting the ban on the export of Alaskan oil, though reserving such shipments to US-flag vessels. This legislation represents a most unwelcome extension of the US cargo preference measures to commercial cargoes. The Commission and a number of Member States, along with Norway and Japan, made representations to the US Administration during the passage of the proposed legislation through Congress. In particular, the Community has made clear publicly that it considers that the final legislation is incompatible with the spirit of the Uruguay Round Ministerial Decision on Negotiations on Maritime Transport Services, is contrary to the OECD Common Principles of Shipping and clearly represents a discriminatory and protectionist measure.

3.5. Air transport services

3.5.1. Introduction

There has been no progress over the last year on the EU's long-standing complaints about computer reservation systems (CRS) and restrictions on ownership. The recent enactment of the Hatch Amendment represents an unwelcome new development.

3.5.1. Specific problems

Computer Reservation Systems

As far as CRS are concerned, no positive developments can be reported regarding the preference given to "on-line" services (connections with the same carrier) over "interline" services (connections with other carriers). As noted in previous editions of this Report, this practice implicitly disadvantages all non-US carriers which, unlike their US competitors, have to rely on interline connections for traffic to and from US points other than their own gateways (behind gateway traffic).

Foreign ownership of air carriers

One way for European carriers to balance the competitive disadvantages created by the on-line preferences and to get access to the behind gateway passenger would be to invest in a US carrier. Unfortunately, the Federal Aviation Act of 1958 prohibits foreign investors from taking more than a 49% stake in a US carrier and restricts the holding of voting stock to 25%. This latter limitation makes US rules on foreign ownership considerably more restrictive than relevant EU rules.

Hatch Amendment

The Hatch Amendment, which was signed into law on 24 April 1996, requires the Federal Aviation Administration (FAA) to apply security measures to foreign carriers, identical to those already applied by the FAA to US airlines serving the same US airports. Whilst the EU supports efforts to improve aviation security, such legislation amounts to a breach of international agreements. Efforts to improve international aviation security should be handled, as has hitherto been the case, by multilateral negotiations.

3.6. Financial services

3.6.1. Introduction

The US financial services sectors is characterised by industry and geographic fragmentation, but this situation is rapidly changing. The application of technology has increasingly blurred traditional product distinctions and greater reliance on electronic data flows is reinforcing the development of an interstate market underway as a result of the implementation of the interstate banking legislation passed in 1994. In this dynamic environment, it is important that EU financial firms are given competitive opportunities comparable to those afforded US institutions as new laws are passed and regulations adopted.

Debanking problems

One of the most critical improvements would be reform of the **Glass-Steagall Act**, which continues to be under consideration in Congress. If substantial and non-discriminatory changes are adopted, this would be a major step forward for the US industry in general, and thus for EU industry too. At present, if a financial conglomerate - foreign or domestic - includes a bank and if another financial company (e.g. an insurance company) or an industrial company within the conglomerate acquires 25% or more of the bank's shares, the bank will have to cease - debank - its activities in the US. It is not certain whether the adoption of financial modernisation legislation in the US will significantly ease the debanking problems faced by EU firms in the US market.

Because of structural differences in the types and forms of banking affiliations permitted for companies operating in the US versus the European market, an EU firm may be required to give up its banking license in the US as a result of, for example, a merger in Europe rather than developments in the US. These limitations are of particular concern to EU companies looking to exploit the new flexibility in the Single Market to develop integrated financial services operations. We would expect this problem to become more common for European firms operating in the US. Ironically, US authorities permit US firms to conduct a broader scope of activities in Europe and elsewhere than in the US. Both the EU and US lose as a result of this situation, in view of the significant contribution EU companies make to the liquidity of US capital markets and as significant providers of employment in the US.

GATS financial services negotiation issue

Financial services negotiations in the framework of the GATS, extended beyond the conclusion of Uruguay Round negotiations, were due to be concluded on 30 June 1995; However, the disappointing decision by the United States only to make partial commitments in the context of the extended GATS negotiations - and to take broad MFN exemptions in respect of future business and activities - has reduced the value of the liberalisation package secured in these negotiations. The European Community's suggestion to extend further the deadline for negotiations to 28 July 1995 permitted nevertheless the conclusion, without US participation, of a fixed term agreement on financial services within the GATS framework.

3.6.2. The new interstate banking framework

Geographical segmentation

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

Interstate banking will be possible through bank acquisitions, consolidation (or merger) and *de novo* branching on a non discriminatory basis. As from September 1995, a foreign bank, like a US bank holding company, is able to expand interstate through the

acquisition of another bank, without regard to State law. The regime for branching by consolidation and merger is different: individual states can "opt out" of the interstate provisions by enacting legislation to that effect before June 1997. A bank's establishment of *de novo* branches will only be permitted if a State "opts in", i.e., by enacting specific legislation permitting out-of-state banks to establish branches.

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

3.6.3. Non-national treatment for interstate banking

Despite its many positive features for European banking firms, the Riegle-Neal Act has not eliminated all of the non-national treatment provisions in this sector.

Two particular cases remain:

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

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

3.6.4. Sectoral segmentation

The **Glass-Steagall Act** provides for the separation of commercial and investment banking in the US. Yet, at a time when technology and other innovations are increasingly blurring distinctions between traditional financial services industries, it can be argued these provisions are standing in the way of the rational development of the market.

Links to insurance companies

A second problem is the restriction on banks affiliating themselves with other types of non-bank financial institutions (notably insurance operations) enshrined in the **Bank Holding Company Act** and implementing regulations. These prohibitions not only apply to all firms operating in the US market, but also to all non-US banking institutions which have operating subsidiaries in the US. The practical consequence is that banks, insurance companies or securities firms incorporated in the EU and which are legitimately affiliated among themselves within the EU may not operate in the US if those affiliations are not permitted under US law.

Moreover, when, for instance, an EU bank and an insurance company with US subsidiaries develop formal links, they may find themselves obliged to divest themselves of one of their US operations in order to avoid 'non permissible' affiliation in the US.

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

3.6.5. Other discriminatory practices

Branch profit tax

Some non-US banks operating in the US have to calculate their allowable interest expense deduction in a way which disadvantages them. They are subject to a 30%

branch profit tax, similar to a withholding tax, regardless of whether those earnings have been repatriated from the US. They are also subject to a tax dependent on the amount of the bank's deduction of its interest expenses (the amount of the excess interest tax), even if the bank has no taxable income. Furthermore, in application of this tax, some non-US banks are disadvantaged in the use of certain tax exemptions.

Separate State legislation

EU insurance firms face particular difficulties in the US as regulation and supervision of insurance activities is left to the States, and a separate licence is needed to operate in each State. Some States only issue renewable licenses limited in time for non-US insurers, while other States impose special capital and deposit requirements, or other requirements, for the authorisation of non-US insurers. However, some of these requirements are also imposed on out-of-state US insurance companies.

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

3.6.6. GATS financial services negotiations

Extended financial services negotiations in the GATS were concluded on 28 July 1995 through adoption of a fixed term agreement, which will expire in December 1997. Most major trading partners were willing to maintain or even improve their earlier commitments resulting from Uruguay Round negotiations, as well as not to seek a general exemption from the MFN principle. Thus, this deal offers important non-discriminatory market access opportunities, as well as national treatment guarantees, to foreign financial institutions.

US non-participation in the July 1995 agreement

Even if it did not sign up to this agreement, the United States is a participant to the benefits of it, through its GATS membership. This leads to a situation in which the United States will entirely enjoy other Members' national treatment commitments and market access, while its own commitments remain extremely limited. As for the former, it only guaranteed non-discriminatory operating conditions for already established foreign financial institutions. The situation is different with respect to market access commitments: the United States withdrew their previous more liberal offer and replaced it by a new, more limited schedule. Consequently, as regards the supply of services across a border as well as the establishment of a commercial presence through foreign financial institutions, no commitment has been undertaken in the WTO framework which would guarantee these activities in any financial services subsectors. In addition, the United States took a broad MFN exemption for the purpose of reciprocity measures. Even if it repeatedly confirmed that it has intention of imposing new restrictions on foreign firms, the US will thus, in principle, be entitled to apply differential treatment to new market entrants, as well as to new activities of foreign suppliers. It is to be hoped that at the end of the fixed-term Agreement the US will reconsider its position and withdraw its MFN exemption.

3.7. Professional services

New GATS disciplines

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

No State rules for access by foreign service suppliers

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

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

Improving outlook?

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

- The Working Party on professional services of the WTO's Council for Trade in Services will start reporting on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the field of professional services do not constitute unnecessary barriers to trade.

- Negotiations on the further liberalisation of professional services are expected in the framework of the GATS.

- The multilateral dispute-settlement procedure will apply to the professional services sector regardless of actual commitments in the schedules.

3.8. The Information Society

3.8.1. Introduction

G7 Conference

The G-7 Governments agreed in February 1995 that the Information Society is rapidly emerging as one of the key business sectors for the future. The development of global markets for telecommunications networks, services and applications are central requirements for the achievement of the Global Information Society.

US legislation presents considerable hurdles for non-US firms and foreign-owned firms wishing to invest in radio telecommunications infrastructure and to provide mobile and satellite services. In addition, the Federal Communications Commission (FCC) exercises a high degree of autonomy and discretion in regulating this sector, including reciprocity based licensing procedures for foreign-owned firms.

WTO negotiations

Basic telecommunications services is one of the sectors where the negotiations are extended beyond the Uruguay Round. Talks in a specially constituted WTO negotiating group on basic telecommunications concluded on 30 April with a decision to establish a new deadline for agreement on 15 February 1997. Liberalisation offers currently submitted will remain on the table for further discussion. The EU attaches great importance to these negotiations, and is concerned to see that the current debate about telecommunications reform will not prevent the US from making comprehensive MFN commitments on market access and national treatment, and agreeing to the establishment of firm regulatory disciplines for the future. The EU is also concerned about the US intention to exclude satellite facilities from the negotiations. (As regards the public procurement aspects of telecommunications see chapter 2.4.3).

3.8.2. Investment restrictions

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

Radio communications

Section 310 of the Communications Act of 1934 remains basically unchanged following adoption of Telecom Act of 1996. It contains restrictions on foreign direct and indirect investment in radio communications: No broadcast or common carriers or aeronautical en route or aeronautical fixed radio station licence shall be granted to - or held by - foreign governments or their representatives, aliens, foreign corporations, or corporations of which more than 20% of the capital stock is owned or voted by an alien (25% if the ownership is indirect). The one change brought by Telecom Act of 1996 was to eliminate the restriction on foreign directors and officers.

Last November, the Federal Communications Commission adopted a new **rule on foreign entry** into the US market, adding a new analysis to the Commission's public interest review for the purpose of granting waivers of Section 310 restrictions on foreign indirect investment. Specifically, the FCC introduced an "Effective Competitive Opportunity Test" and other criteria, such as "the general significance of the proposed entry to the promotion of competition in the US communications market". The EU does not agree with FCC contention that this order sets forth a clear and explicit entry standard to replace its previous case-by-case determinations.

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

Limited access to INTELSAT

Beyond its direct application, Section 310 also applies to the Communications Satellite Corporation (COMSAT), a private corporation created by the Communications Satellite Act of 1962 to enable the US to participate in INTELSAT. In addition, COMSAT is

the sole US access provider to INTELSAT and INMARSAT with respect to satellite services. As a result, non-US incorporated firms face difficulties in providing INTELSAT space segment services to US users and international service carriers, and INMARSAT international maritime and aeronautical satellite telecommunications services.

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

3.8.3. Services

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

Equivalency tests

- Under **Section 214** of the **Communications Act of 1934**, carriers must make applications to the FCC to provide services. The licensing conditions provide for public convenience and necessity criteria. In the case of foreign-owned US carriers, and a result of the adoption by the FCC of its November 1995 rule on foreign carrier entry into the US market, this now include an Effective Competitive Opportunities test with respect to both the provision of international simple resale and to provision of international facilities-based services. The test requires an assessment of whether the country of origin of a US affiliate provides competitive opportunities to US carriers for the services which the affiliate is seeking to offer.

Radio station licences

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

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

Mobile satellite services

The FCC decision to give American Mobile Satellite Corporation (AMSC) the monopoly rights to serve the domestic US mobile satellite services (MSS) market means that any foreign competition is excluded. The FCC has extended this monopoly to the domestic segment of international flights, although for the time being, FCC is granting interim waivers allowing INMARSAT-based services.

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

3.8.4. Data protection

Individuals who are the subject of data processing operations are protected in almost all EU states by 'data protection' laws.

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

Some Member States' laws prohibit transfers to countries where adequate protection cannot be provided and a new EU directive, adopted in October 1995, will prohibit such transfers for the EU as a whole. It is hoped, however, that progress in resolving this problem can be made during the coming year given the mutual commitment in the EU-US Action Plan to address the matter, and the positive nature of discussions already underway in the context of the Information Society dialogue.

3.8.5 Encryption

An essential requirement for the development of electronic commerce is the availability of reliable encryption to ensure the confidentiality of commercial transactions. There is an ongoing debate in both Europe and the US on how to reconcile the privacy protection expected by individuals and commercial organisations with the requirements for effective legal interception sought by the national security and law enforcement services.

At present, both the EU and the US operate an export control regime to limit the cross-border movement of the strongest encryption products. Moreover, many modern encryption techniques are patented and licences may be required to achieve sales of European products in the US. Thus, significant barriers to international trade in encryption products have been created leading, in turn, to the slow and ineffective development of electronic commerce and related applications in the Information Society. This situation may not only threaten the European encryption product industry but will dramatically influence the development of a competitive European electronic commerce capability.

4. IMPACT OF THE NEW TRANSATLANTIC AGENDA

The NTA commits the EU and the US to the creating of a "New Transatlantic Marketplace" by progressively reducing, or eliminating barriers that hinder the flow of goods, services and capital across the Atlantic. There is also a commitment to fostering an active and vibrant transatlantic community by deepening and broadening commercial, social, cultural, scientific and educational ties.

4.1. Mutual Recognition Agreement

Certification costs

With agreement on a further round of widespread tariff cuts in the Uruguay Round, the trade policy agenda is increasingly focusing on non-tariff barriers. Among these, some of the major costs faced by prospective exporters to the US relate to certification of product conformity with a variety of US requirements such as environmental and safety standards. In part, this is due to divergence in standards, but a major element is the delay and the costs of certification by a body based on the other side of the Atlantic.

What is a Mutual Recognition Agreement?

A Mutual Recognition Agreement (MRA) would empower EU bodies to certify particular products for the US market and to issue the relevant marks of conformity. In return, US bodies would be allowed to certify conformity with EU laws. The Commission's main objective is mutual recognition of all steps of the certification procedure which may have to be fulfilled for placing a product on the market, so as to obtain genuine market access. A MRA would be particularly valuable for small and medium-sized enterprises. The Commission is currently leading negotiations for MRAs with the US, Canada, Japan, Switzerland, Australia and New Zealand

State of negotiations with the US

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

One of the first tasks of the negotiations with the US was to establish a solid understanding of each other's regulatory systems. The second stage in this process is now to create a degree of confidence in their implementation and enforcement; a number of joint EU-US workshops have already been and are currently being organised to examine in more detail these questions. The US administration has submitted new proposals, in certain sectors only, in early April 1996. It is essential for the EU that the transition periods towards full certification contained in these proposals are simple, well-defined and short (two or three years maximum).

Recent transatlantic developments

The Transatlantic Business Dialogue (TABD) Conference in Seville in November 1995 called for full and complete MRAs in the field of medical devices, telecommunications terminal equipment, information technology products, and electrical equipment and a common transatlantic registration dossier for new drug products. Furthermore, the TABD conclusions considered that talks on MRAs in additional product sectors may be envisaged, although unfortunately good manufacturing practice in the pharmaceuticals sector was not included in the TABD proposals.

The joint EU-US Action Plan underlines the goal of concluding an agreement on mutual recognition of conformity assessment (including certification and testing procedures) for certain sectors as soon as possible, of continuing ongoing work in several sectors and identifying others for further work. It is hoped that these latest commitments will encourage progress in the negotiations towards a MRA.

4.2. Regulatory cooperation

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

Diverging regulations

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

WTO TBT Agreement

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

Protecting legitimate interests

There is a fine balance between protecting legitimate regulatory interests, while ensuring that trade interests are not excessively jeopardised. Regulatory cooperation is therefore a voluntary and non-binding process, and it will not directly change existing regulatory processes. However, it should play a role beyond that simply of an early warning mechanism. The aim is to reach more compatible regulations for the future. The initiative thus promises benefits for industry and regulators. Compatible standards in two of the world's largest markets will reduce entry costs in both directions. For regulators, cooperation offers the possibility of learning from each other, and can help cover gaps in expertise where it is too costly to dedicate staff.

Many forms of regulatory cooperation

Many regulatory agencies have already established close transatlantic contacts to exchange information. Some use this framework to *consult on the development* of new technical regulations and standards or in reviewing the adequacy of existing regulations (e.g. pesticides). Regulators also actively participate in *solving problems* arising out of incompatible regulatory frameworks or in creating special arrangements to bridge regulatory differences (e.g. slaughterhouse standards). Similarly regulatory agencies can *cooperate in the enforcement* of regulations (e.g. in the field of competition policy).

Joint Action Plan

In the context of the Joint Action Plan, the EU and the US have decided to provide strong political encouragement to respective regulatory agencies to enhance (or, where necessary establish) transatlantic cooperative relationships. Such agencies are asked to look for ways to work with their counterparts to this end. While the specific aspects of the cooperation will depend on the sector concerned and the mandate of the agencies involved, cooperative efforts can take the form of: cooperation on technical issues for regulatory projects of joint interest; greater use of each other's technical infrastructures; providing early warning of highly divergent or incompatible regulatory initiatives which may have trade implications; the development of cooperative procedures in the regulatory process; management of mutual recognition regimes for conformity assessment, testing and certification.

The Action Plan specifically calls for collaboration on promoting compatibility of standards and of health- and safety-related measures. Finally, although an early attempt to develop pilot cooperative projects became stalled in 1994, the Action Plan renews the invitation to pursue them.

4.3. Customs Cooperation

The EU and the US have undertaken in the NTA to conclude by the end of 1996 an agreement which will cover both customs cooperation and mutual assistance.

Scope of the Customs Cooperation and Mutual Assistance Agreement

As far as customs cooperation is concerned, the agreement will aim at simplifying customs procedures, at improving computerisation including data exchange and common access to databases, and at harmonising methods of work. In order to assist the realisation of these aims, the agreement will also provide for an exchange of officials and cooperation within international organisations such as the World Customs Organisation. Within the framework of this agreement, both parties will also work together towards a common approach on the harmonisation of the rules of origin and on classification and valuation issues.

The mutual assistance part of the agreement will provide for increased investigative cooperation in customs matters, an exchange of enforcement information, the protection of intellectual property rights and will cover commercial fraud, illicit nuclear traffic and trade in severely restricted chemicals.

State of negotiations with the US

Formal negotiations on a customs cooperation and mutual assistance agreement started in February 1996. Several meetings and an exchange of draft texts between EU and US representatives have already taken place. The Commission expects that an agreement will be reached this year as foreseen in the NTA.

4.4. Science and technology

Under the New Transatlantic Agenda and the Joint EU-US Action Plan both sides undertook to negotiate a new comprehensive science and technology cooperation agreement by 1997, based on the principle of mutual interest and with a view to achieving a balance of benefits for the two sides. To that end exploratory discussions have taken place and the Commission is seeking a negotiating mandate from Council. This agreement would address such issues as access to research programmes by researchers on both sides of the Atlantic and the related intellectual property issues.

Moreover, as set out in the Joint Action Plan work will continue to conclude an Agreement on Intelligent Manufacturing Systems. Both sides will also promote S & T cooperation in support of other topics mentioned in the Joint Action Plan.

In addition, collaborative S & T projects have been identified to address cross-border issues such as transportation, health and global climate change. Finally, both sides have undertaken to renew the mandate of the EU-US Task Force on Biotechnology Research.

LIST OF FREQUENTLY USED ABBREVIATIONS

DoD	Department of Defence
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
FDA	Food and Drugs Administration
GATS	General Agreements on Trade in Services
GPA	Government Procurement Agreement
HR	House of Representatives
ISO	International Standardisation Office
MFN	Most favoured nation
NTA	New Transatlantic Agenda
OECD	Organisation for Economic Co-operation and Development
TRIPs	Trade Related aspects of Intellectual Property rights
USDA	US Department of Agriculture
WTO	World Trade Organization