REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT

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Foreword

The 1997 Report on United States Barriers to Trade and Investment is the thirteenth such annual report. It has been compiled by the Unit for Relations with the United States of America in cooperation with the Market Access Unit, both part of the Directorate General for External Relations: Commercial Policy and Relations with North America, the Far East, Australia and New Zealand, on the basis of material available to the services of the European Commission. Its aim is to provide an inventory of obstacles that EU exporters and investors encounter in the US.

This Report needs to be placed in the context of a Transatlantic economic relationship which has grown particularly strongly over the years, to the benefit of both economies, and which is underpinned by the largest trade and investment links in the world. Moreover, EU-US relations entered an important new phase with the adoption at the EU-US Summit of December 1995 of the New Transatlantic Agenda (NTA) and accompanying EU-US Joint Action Plan. This 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 a joint EU-US study on ways of facilitating trade and of reducing or eliminating such barriers is being carried out.

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 or limitation of internationally agreed rules and disciplines, still need to be tackled. The Commission remains firmly committed to addressing these through the appropriate channels (bilateral, plurilateral and multilateral) particularly as the reinforcement of efforts to resolve bilateral trade issues and disputes is essential to the confidence-building process which is an integral part of the NTA.

More generally, this year's report should also be seen in the context of a major new policy initiative to improve access to foreign markets for European exports[1]. As part of this, the Commission has set up an extensive electronic Market Access Database available to the public on the Internet (http://mkaccdb.eu.int) (additional material on EU-US relations is available at http://europa.eu.int/en/comm/dg01/eu-us.htm). The Database provides market access information in the broadest sense, including economic and regulatory information, tariff levels as well as analyses of trade issues. The format of the present Report has been partly modified from previous years to correspond as much as possible with the database structure. For readers, this will facilitate access throughout the year to on-line updates of the material contained in the published report as well as to the additional background information which is included in the database.

It is to be hoped that, as a means of identifying problems of access to and of operating in US markets, the Commission services' Report will continue to play a useful role in focusing dialogue and negotiations - both multilateral and bilateral - on the elimination of obstacles to the free flow of trade and investment. The Report has taken into account developments until the beginning of July 1997. Any comments should be addressed to the Unit for Relations with the United States of America, DG I, European Commission, 200 rue de la Loi, 1049 Brussels.

[1] See Communication from the Commission, "The Global Challenge of International Trade: A Market Access Strategy for the European Union" (COM (96) 53 final, 14 February 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. Of particular concern at the present time are recent US legislative initiatives concerning Cuba, Iran and Libya.

Unilateralism

Unilateralism in US trade legislation also remains a matter of concern. While the US has in practice made extensive use of the new WTO dispute settlement system, it retains the possibility to take its unilateral trade measures which would be inconsistent with the internationally-agreed system of trade rules embodied in the WTO.

Tariff barriers

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

Other customs barriers

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

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. The FDA drug approval procedures continue to give non-US based firms difficulties. In the agricultural area, a number of sanitary and phytosanitary issues remain a significant source of difficulty for the EU, although some of these may be solved by the recent negotiations for a Veterinary Equivalence Agreement.

Government procurement

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

Aeronautics industry

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

Shipbuilding

The 1994 OECD Shipbuilding Agreement would go a long way towards

regulating unfair practices in this industry. The US failure to ratify the Agreement so far, as well as a number of US subsidies and tax policies, remains a matter of concern.

National security restrictions

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

Conditional national treatment

Furthermore, the provision of conditional national treatment in various US legislation, and notably in the area of science and technology research, remains troublesome.

Tax measures

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

Intellectual property

Following the implementation of the Uruguay Round commitments a number of positive changes have been introduced into - and are proposed to - the relevant US legislation. Nonetheless at present, some problems remain including that of informing right-holders of government use of patents as well as that of geographical designations.

Professional services

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

Telecommunication services

The recently concluded GATS Basic Telecommunications Agreement has led to significant commitments on market access. Nonetheless, the EU remains concerned about the considerable hurdles that the US legislation presents for non-US and foreign-owned firms wishing to invest in radio telecommunications infrastructure and to provide mobile and satellite services. In addition, the Federal Communications Commission exercises a high degree of autonomy and discretion in regulating this sector, including reciprocity-based licensing procedures for foreign-owned firms.

Air transport services

A number of issues continue to create problems including computer reservation system preferences for US carriers and foreign ownership restrictions.

Maritime services

The EU was disappointed that the extended WTO GATS negotiations on maritime transport, during which the US never tabled an offer, could not be brought to a successful conclusion. In addition, there has been no progress on the elimination of requirements that cargoes generated by US Federal programmes be shipped on US-flagged ships; on the contrary, this requirement has been extended to cover Alaskan oil exports.

TABLE OF CONTENTS

FOREWORD i

SUMMARY iii

1. INTRODUCTION 1

1.1 THE NEW TRANSATLANTIC AGENDA 1

1.2 THE ECONOMIC RELATIONSHIP 2

2. GENERAL FEATURES OF US TRADE POLICY 7

3. TARIFF BARRIERS 10

3.1 APPLIED TARIFF LEVELS 10
Ceramics and Glass 10
Chemicals 10
Textiles and Leather 11
Jewellery 11

3.2 TARIFF QUOTAS 11
Agriculture and Fisheries 11

4. NON-TARIFF BARRIERS 12

4.1 REGISTRATION, DOCUMENTATION, CUSTOMS PROCEDURES 12
Textiles and Leather 12
Agriculture and Fisheries 13

4.2 LEVIES AND CHARGES (OTHER THAN IMPORT DUTIES) 13
Automotive 14
Shipbuilding 15

4.3 IMPORT PROHIBITIONS 15
Agriculture and Fisheries 16

4.4 IMPORT QUOTAS 17
Agriculture and Fisheries 17

4.5 STANDARDS AND OTHER TECHNICAL REQUIREMENTS 17
Automotive 20
Pharmaceuticals 20
Textiles and Leather 21
Agriculture and Fisheries 21

4.6 GOVERNMENT PROCUREMENT 24
Iron, Steel and Non-Ferrous Metals 29
Telecommunications Equipment 29

4.7 TRADE DEFENCE INSTRUMENTS 30

4.8 EXPORT RESTRICTIONS 30

4.9 SUBSIDIES 31
Aircraft 31
Shipbuilding 32

5. INVESTMENT RELATED MEASURES 34

5.1 DIRECT FOREIGN INVESTMENT LIMITATIONS 34

5.2 TAX DISCRIMINATION 36
Aircraft 38

6. INTELLECTUAL PROPERTY RIGHTS 39

6.1 PATENTS AND RELATED AREAS 39

6.2 COPYRIGHT AND RELATED AREAS 39

6.3 GEOGRAPHICAL DESIGNATIONS 40

7. SERVICES 42

7.1 BUSINESS SERVICES 42
Professional Services 42

7.2 COMMUNICATION SERVICES 42
Telecommunication Services 42

7.3 FINANCIAL SERVICES 45
Banking 46
Insurance 47
Securities 47

7.4 TRANSPORT SERVICES 47
Air transport Services 47
Maritime Transport Services 48

LIST OF FREQUENTLY USED ABBREVIATIONS 50

1. INTRODUCTION

1.1 The New Transatlantic Agenda

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

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 the World Trade Organisation (WTO), the EU and the US have worked together to conclude the Information Technology Agreement and the Basic Telecommunication Services Agreement, which together liberalise approximately US$ 1 trillion in trade in goods and services, and are currently cooperating to reach an ambitious and Most Favoured Nation (MFN)-based Financial Services Agreement. In the Organisation for Economic Co-operation and Development (OECD), the EU and the US have contributed to the adoption of important decisions on combating bribery in international business transactions and are actively working to finalise the Multilateral Agreement on Investment by 1998.

New Transatlantic Marketplace

Without detracting from EU-US cooperation in multilateral fora, the NTA 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. In this context the EU and the US are carrying out a Joint Study which is expected to produce by the end of 1997 recommendations on "ways of facilitating trade in goods and services and further reducing or eliminating tariff and non-tariff barriers". The TABD has highlighted the importance of tackling standards, certification and regulatory issues in the New Transatlantic Marketplace, 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 has provided recommendation for action on government procurement, intellectual property rights, veterinary issues, customs cooperation and a series of other issues. 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. There are various specific initiatives which are already contributing to the construction of the New Transatlantic Marketplace. They include:

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

- The initialling of a Mutual Recognition Agreement covering various areas (telecom equipment, pharmaceuticals, medical devices, electromagnetic compatibility, electric safety and recreational craft). This will allow EU bodies to carry out conformity assessments to US requirements, and vice versa, thus eliminating some of the considerable costs involved for manufacturers on either side of the Atlantic;

- The negotiation at technical level of a Veterinary Equivalence Agreement aimed at facilitating trade in live animals and animal products;

- The negotiation of a new agreement in the area of enforcement of competition laws which is intended improve co-operation by complementing the 1991 Agreement between the US and the EC regarding the application of their competition laws, without replacing it. The agreement is expected to be approved in the not too distant future;

- Regulatory co-operation seeking to make regulators more aware of the trade and investment consequences of their decisions and to discourage the development of divergent regulations, so that issues which might otherwise become the source of a future trade dispute may be addressed at an early stage. Several pilot projects are already ongoing, including in the field of agri-food biotechnology;

- The Transatlantic Small Business Initiative (TASBI), which aims at assisting small and medium-sized enterprises from both sides of the Atlantic to form business alliances and partnerships;

- Joint efforts to establish a Global Navigation Satellite System, aimed at ensuring reliable, efficient and highly accurate navigation and position-fixing services for transatlantic users;

- The examination of key issues raised by the rapid growth of electronic commerce;

- Finally, negotiations for a Science and Technology Agreement with a view to expanding significantly co-operative activities between the two sides in the fields of science and technology research .

1.2 The Economic Relationship

Transatlantic economic relations are underpinned by the most important trade and investment links in the world. Such links have grown particularly strongly over the last few years, to the benefit of both economies. Taking goods and services together, the EU and the US are each other's largest single trading partner, with a two-way flow of more than 370 billion ECU. Similarly, the two sides remain each other's most important source and destination for foreign direct investment with a

combined stock of over US$ 600 billion. This section briefly reviews the data on EU-US trade and investment and places it in a global context (all EU data include the three new member states unless otherwise indicated).

Trade in goods

Trade in goods (exports plus imports) between the 15 Member States of the European Union (EU) and the US reached nearly 227 billion ECU in 1996, an increase of 11.8% for exports and 8.7% for imports over the previous year. After the EU registered a substantial trade deficit with the US for three consecutive years from 1990 to 1992, between 1993 and 1996 bilateral trade was almost in equilibrium. The EU recorded a surplus of 0.8 billion ECU in 1993, 2.5 billion ECU in 1994 and a deficit of 2.6 billion ECU in 1995 respectively. EU trade data for 1996 point to a small EU surplus of about 1.5 billion ECU.

The US is the EU's single largest trading partner, accounting for 19% in total EU-imports and 17.8% in total EU-exports in 1995. Likewise, the EU is one of the two top markets for the US, accounting for 21.2% of US exports and 17.7% of US imports in 1995.

The EU and the US are the world's most important traders. The EU's share in total world trade (excluding intra-EU trade) amounted to 19.3% in 1995 (20.2% for exports and 18.5% for imports); while, the share of the US amounted to 18% (15.9% for exports and 20% for imports). 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 the US and Japan represented 5% of total world trade.

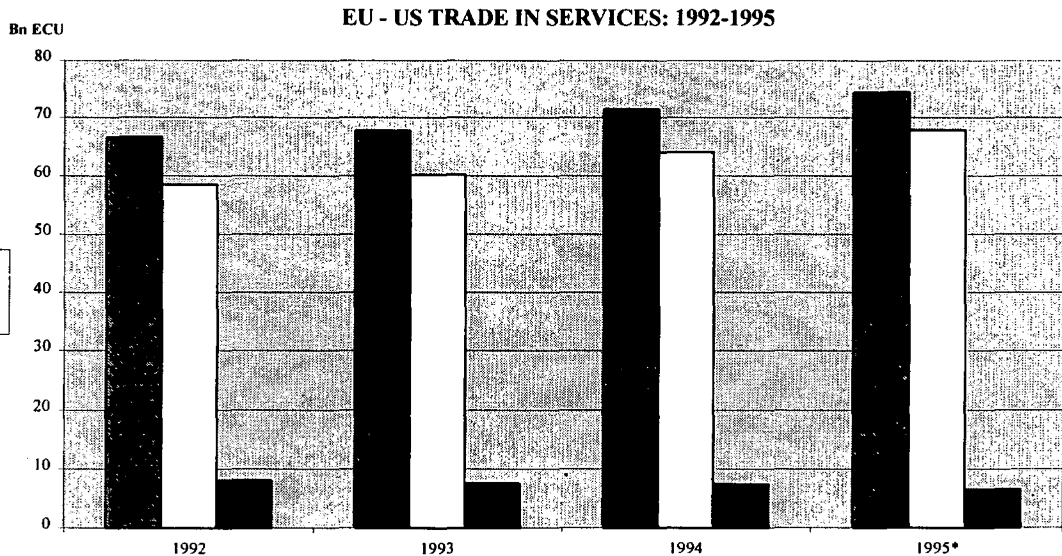
Source: Eurostat-Comext database.

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

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

Trade in services

Trade in services between the EU and the US is gaining growing importance both in absolute terms and relative to merchandise trade. Estimates for 1995 indicate that EU-US total turnover in services reached 142.5 billion ECU (74.5 billion ECU for EU's exports and 68 billion ECU for its imports) equal to 64 % of total turnover in merchandise trade with the US. Surplus on trade in services accounted for 6.6 billion ECU in 1995



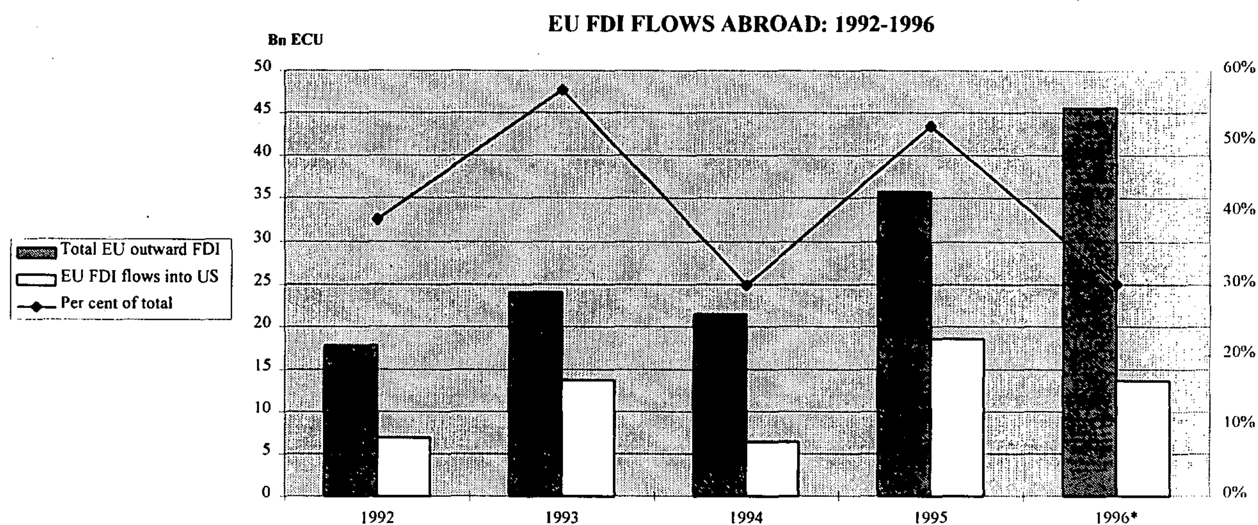
Source: Eurostat, *International Trade in Services, EU, 1985-1994*, (ed. 1996).
* 1995 data are estimated.

The rapid change taking place can be appreciated using historical figures for the EU excluding Austria, Finland and Sweden (EU(12)) for which longer statistical time series are available. In 1985, EU(12)-US bilateral trade in services accounted for 82 billion ECU, 54% of bilateral trade in goods. By 1994, this figure had risen to more than 125 billion ECU, 64% of bilateral merchandise trade, with a growth of 10%. While the EU accounted for 19% of US merchandise trade in 1995, more than 33% of US trade in services was with the EU. Similarly, for the EU in 1995 the US accounted for 18.5% of the extra-EU trade in goods, but for 39% of extra-EU trade in services. These trends compare with much lower values for trade in services with other major trade partners.

Investment links

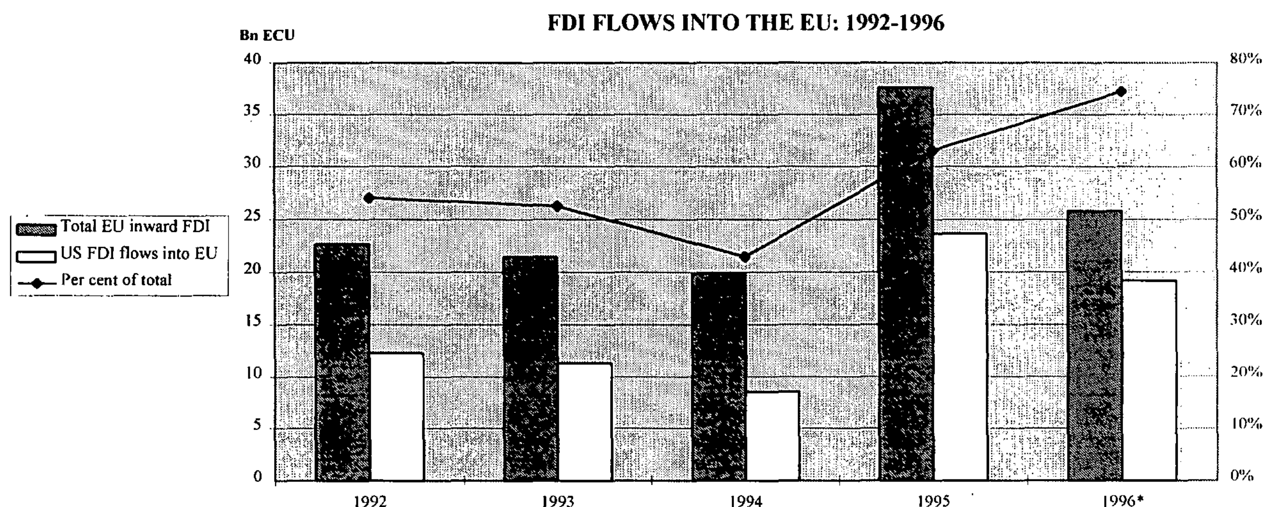
The EU and the US have by far the world's most important bilateral investment relationship and are each other's largest investment partner. The US market remained the main destination of EU foreign direct investment (FDI) with an average share of 41% between 1992 and 1996. Outflows from the EU to the US accounted for 13.7 billion ECU in 1996 or 30% of total EU outward flows. The US attracted 52% (18.6 billion ECU) of EU outward FDI flows in 1995, 30% (6.4

billion ECU) in 1994, 57% (13.8 billion ECU) in 1993 and 39% (6.9 billion ECU) in 1992.



Source: Eurostat, *European Direct Investment* (ed. 1996) and Eurostat, Statistics in Focus, *Economy and Finance*, No. 20, 1997.
* 1996 data are provisional.

The strong FDI links between the EU and the US are confirmed by the amount of US investment into the EU. Over the period 1992-1996, the US was the first contributor to extra-EU inflows with an average share of 59%. In 1996, 74% (19.2 billion ECU) of extra-EU inflows came from the US, against 63% (23.7 billion ECU) in 1995, 43% (8.5 billion ECU) in 1994, 53% (11.3 billion ECU) in 1993 and 54% (12.3 billion ECU) in 1992.



Source: Eurostat, *European Direct Investment* (ed. 1996) and Eurostat, Statistics in Focus, *Economy and Finance*, No. 20, 1997.
* 1996 data are provisional.

Looking at FDI stocks in the EU and the US, the importance of the Transatlantic investment relationship is also evident. By 1995, cross investment stocks between the EU and the US on a historical-cost basis reached US$ 636 billion, by far the world's largest investment relationship. EU investment in the US was valued at US$ 323 billion, while the US investment in the EU was estimated at US$ 313 billion. As with the bilateral trade relationship, investment stocks are both balanced and substantial. They have also been growing very quickly over the past few years, doubling between 1989 and 1995.

Once again, the EU and the US are each other's largest partner. The EU is by far the biggest investor in the US accounting for 57% of total FDI stock by 1995. The EU share has also been steadily increasing over the past decade. Likewise, the most important FDI market for the US is the EU. In 1995, 44% of US FDI stock was located in the EU.

2. GENERAL FEATURES OF US TRADE POLICY

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

Problem areas: Extraterritoriality

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

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

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

On August 1996 the **Iran and Libya Sanctions Act** (ILSA) was signed into law. The legislation provides for mandatory sanctions against foreign companies which make an investment above US$ 40 million contributing directly and significantly to the development of petroleum or natural gas in Iran and Libya. In addition, mandatory sanctions are also applicable against companies which violate the UN Security Council trade sanctions against Libya.

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

Furthermore, on 22 November 1996, the EU adopted Council Regulation 2271/96, with a view to protecting the EU and its economic operators, against the effects of extra-territorial legislation of this sort adopted by third countries. Other trading

partners of the US, such as Canada and Mexico, have strengthened or adopted similar blocking legislation.

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

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

Unilateralism

There is a second element in US trade policy-making about which the EU has regularly complained: **unilateralism**. This tendency takes the form of either unilateral sanctions or retaliatory measures against 'offending' countries, or companies. These measures are unilateral in the sense that they are based on an exclusive US appreciation of the trade-related behaviour of a foreign country or its legislation and administrative practice, without reference to, and sometimes in defiance of, multilaterally agreed rules. This approach casts doubt on US support for a multilateral rules-based system of addressing trade problems and can also lead to bilateral agreements with elements of discrimination. Admittedly, the US has used its unilateral trade policy arsenal more sparingly in the recent past and has made a greater use of the WTO dispute settlement system. However, the potential still exists to take unilateral measures which risk undermining the global trading system that both partners have greatly contributed to building and promoting.

The "Section 301" family of legislation provides a striking example of unilateral trade legislation which has been used on numerous occasions against the EU. Section 301 of the 1974 Trade Act as amended by the Omnibus Trade and Competitiveness Act of 1988 authorises the US Administration to take action to enforce US rights under any trade agreement and to combat those practices by foreign governments which the US government deems to be discriminatory or unjustifiable and to burden or restrict US commerce.

The Omnibus Trade and Competitiveness Act of 1988 also introduced the so-called "Super 301" provision. "Super 301" is the name given to a special initiation procedure for unfair foreign trade practice investigations following the Section 301 procedure. Originally limited to 1989 and 1990, President Clinton issued an Executive Order on Identification of Trade Expansion Priorities on 3 March 1994. Referring to the lapsed Super 301 provision, the Executive Order requires the US Trade Representative, on the basis of the information contained in the annual National Trade Estimates Report to identify "priority" unfair trade practices from

"priority" countries and self-initiate Section 301 cases against them. On 27 September 1995, the President amended this Executive Order to extend it to calendar years 1996 and 1997.

Furthermore, the 1988 Omnibus Trade and Competitiveness Act introduced a "Special 301" procedure targeting intellectual property rights protection outside the US. Under Special 301 the USTR (United States Trade Representative) 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. As a result of the 1997 Special 301 annual review both Greece, individually, and the EU have been included in the "priority watch list".

3. TARIFF BARRIERS

3.1 Applied Tariff Levels

Tariff peaks

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

The Information Technology Agreement

With regard to information technology (IT) products, the Information Technology Agreement (ITA) providing for the complete elimination of tariffs by the year 2000 on a large number of products has been concluded in March 1997 and will be implemented as from July 1997. The main elements of the new US tariff structure can be summarised as follows: elimination of tariffs on all semiconductors, computers, computer peripherals and computer parts, electronic calculators, telecommunication equipment, electronic components (capacitors, resistors, printed circuits), semiconductor testing and manufacturing equipment and certain consumer electronic items. Although tariffs on optical fibre cables will be eliminated under the ITA, the US refused to do the same for optical fibres on which they maintain a rather substantial protection; also tubes for computer monitors are excluded from the tariff elimination. The first review of the ITA in which further product coverage will be considered is scheduled to begin in October 1997. In addition the US will accelerate to the year 2000 the elimination of duties on brown spirits and will also eliminate by that year all duties on other spirits.

<u>Ceramics and Glass</u>

At the end of the Uruguay Round, customs duties on ceramics and glass products remain relatively important and higher in the US than in Europe. The US has rejected the Community's offer to abolish tariffs in this sector, even though Mexico, one of Europe's leading competitors in the US market, enjoys a zero rate by virtue of the NAFTA (North Atlantic Free Trade Area). At the end of the Uruguay Round, 30% of ceramics and 34% of glass products will still be subject to duties between 5 and 10%, and 8% of ceramics and 4% of glass products to duties of between 20% and 30%. Among the products of importance for EU trade which are confronted with high tariffs, are safety glass (28.5%), pressed glass (20%), roofing tiles (13.5%), and hotel and restaurant ware (9.8% - 20%).

<u>Chemicals</u>

In the Uruguay Round the US, the EU, Canada and Japan agreed to harmonise customs duties around three central rates: 0 %, 5.5 % and 6.5 % as the maximum rate. As a result the average rate of duty in the US in the chemical sector will fall to around 4 %. Initial rates of duties of 10% will be reduced over 5 years, those between 10-25 % over 10 years and above that over 15 years. Most of the US top rates are to be found among organic chemicals and plastics (Chapter 29 and 39, respectively, of the Harmonised System), which account for the major proportion

of the US-EC trade in the sector.

Textiles and Leather

The average trade weighted reduction made by the US in the Uruguay Round was only 12 % for textiles and clothing and 5.2 % for footwear. For textiles and clothing the reductions which were made will be implemented over 10 years. However, these reductions disguise the fact that many significant tariffs and tariff peaks remain in products of export interest to the EU with duties up to 32% (e.g. wool yarn 9%, woollen fabrics 25% and sweaters 16%).

Jewellery

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

3.2 Tariff Quotas

Agriculture and Fisheries

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

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

4. NON-TARIFF BARRIERS

4.1 Registration, Documentation, Customs Procedures

Excessive invoice requirements

Invoice requirements for exporting certain products to the US can be excessive. The information requirements far exceed normal customs declaration and tariff procedures. They are unnecessary because customs are entitled to ask for all necessary supplementary documents and information during clearance (standard 15 of Annex B1 of the Kyoto Convention). There should be no systematic demand for this kind of information. These formalities are also burdensome and costly, thus constituting a barrier against new entrants and small companies. As a result, large established suppliers are privileged and small and new competitors disadvantaged. These effects are particularly disruptive in diversified high-value and small-quantity markets which are of special relevance for the EU.

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

<u>Textiles and Leather</u>

Customs formalities

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

Origin rules

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

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

similar problems. The total volume of EU exports adversely affected by the new rules is estimated to be US$ 450 million per year.

On 11 October 1996, the Italian industry (silk industry and finishers for cotton and synthetic) filed a complaint under the Trade Barriers Regulation. Given that the US Administration did not make any proposals which would satisfactorily resolve the various problems, the Commission put forward a request for WTO consultations on 22 May 1997.

Another issue relates to the possibility of claiming a NAFTA origin. In order to do so a "fibre forward" rule is applied. In practise this means that garments must be made from US home-grown cotton, domestically-produced wool or home-made synthetic fibres. Prior to NAFTA, European exporters of fabric had a large market in Canada and Mexico for processing garments which were subsequently exported into the US. With the introduction of new rules this trade has effectively ceased. Basic origin rules are set out in the NAFTA treaty itself. However, there is an administrative procedure whereby limited derogations can be granted in certain cases. EU exporters have already won a few concessions, mainly with the active support of the Canadian administration.

Agriculture and Fisheries

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

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

4.2 Levies and Charges (Other than Import Duties)

User fees

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

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

The most significant of the customs user fees is the Merchandise Processing Fee (MPF). The MPF is levied on all imported merchandise except for products from the least developed countries, from eligible countries under the Caribbean Basin Recovery Act and the Andean Trade Preference Act, and from US insular possessions. It is also levied on merchandise entered under Schedule 8, Special Classifications, of the Tariff Schedules of the US. Fixed previously at 0.17% of the value of the imported goods, the MPF rose to 0.19% in 1992 and amounts to 0.21%

ad valorem on formal entries with a maximum of US$ 485 as from 1 January 1995. Whilst the MPF was to last until 30 September 1990 when established, it is now set to run until 30 September 2003.

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

The present customs user fee structure is somewhat more equitable, since the fixing of a ceiling makes it less onerous for high-value consignments. However, the fee is still likely, in many cases, to exceed the cost of the service rendered since, irrespective of the level, it is still based on the value of the imported goods.

Harbor Maintenance Tax

US Customs also participates in the collection of the Harbor Maintenance Tax (HMT). The HMT is levied in all US ports on waterborne imports, exports and domestic cargoes at an ad valorem rate of 0.125%. Collected moneys are transferred to the Harbor Maintenance Trust Fund to provide for the operation and maintenance of channels and harbours. However, the ad valorem basis for the HMT collection makes it difficult to justify as a fee approximating the cost of the service provided. There is US$ 2.7 billion in the Trust Fund at present, only 700 million of which was paid by exporters from the US.

Moreover, there is a notable accumulation of unused funds which is projected to rise to US$ 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 tax.

The member countries of the Consultative Shipping Group (which includes all EC Member States with the exception of Austria, Ireland and Luxembourg) and the Commission have reiterated on several occasions 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.

The US Court of International Trade in October 1995 ruled that the HMT is a tax and not a user fee and exempted US exports from it as taxes on exports are forbidden by the US Constitution. In June 1997 the US Court of Appeals for the Federal Circuit affirmed this ruling, thus reinforcing the Community view that the tax is not related to the services provided and is therefore onerous. In order to ensure non-discrimination, importers should also be relieved from it.

<u>Automotive</u>

The US levies the following three taxes/charges on the sales of cars in the US that raise concern to European auto-makers: the Luxury Tax, the Corporate Average Fuel Economy (CAFE) payment and the so-called Gas Guzzler Tax. The Luxury Tax is an excise tax imposed since 1990 on cars valued above an arbitrary threshold, currently around US$ 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. 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. The so-called Gas Guzzler Tax is an excise tax of US$ 1,000 - 7,700 per car, levied on all cars not meeting fuel economy standards set by the US Environmental Protection Agency (EPA), currently 22.5 mpg. This fuel economy cut-off point is not founded on any reasonable or objective criterion and leads to discrimination against imported cars.

European 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. In 1992 the EC requested a GATT Panel to examine the measures with respect to GATT Article XXIII:1. The panel's report was issued on 30 September 1994. Its results were mixed. On the Luxury and Gas-Guzzler taxes, the Panel accepted that the setting of thresholds, which affected only a small proportion of the cars sold in the US, was consistent with the law's policy objectives. Although the Panel did level some criticisms at the CAFE provisions, the USTR dismissed these as technicalities, and announced that it would not change the provisions

Shipbuilding

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

4.3 Import Prohibitions

The right of sovereign nations to take measures to protect their essential national security interests has been widely recognised by multilateral and bilateral trade agreements. However, it is in the interest of all trade partners that such measures are prudently and sparingly applied. Restrictions to trade and investment cannot be justified on national security grounds if they are, in reality, essentially protectionist in nature and serve other purposes than the protection of security interests.

National security based restrictions

Under **Section 232** of the **Trade Expansion Act of 1962**, US industry can petition for the restriction of imports from third countries on the grounds of national security. Protective measures can be used for an unlimited period of time. The Department of Commerce (DoC) investigates the effects of imports 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.

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.

<u>Agriculture and Fisheries</u>

Tuna-Dolphin

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

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

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.

Drift net fishing

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

Shrimps

Pursuant to section 609 of Public Law 101-162n exports of shrimp to the US will be embargoed unless nations can provide evidence that their shrimp trawlers match the US efforts to protect sea turtles. Forty-two nations have now been certified by the US authorities (artisanal fishing, having a sea turtle excluder program or fishing for coldwater shrimp only), but five Member States (France, Spain, Portugal, Italy and Greece) have not been certified. Portugal presented a démarche to the Department of State in May 1996 underlining, inter alia, its concerns regarding the potential extraterritorial effect of this legislation. In December 1996, a WTO consultation was held, and Thailand and three other Asian countries thereafter launched a WTO Panel procedure (the first Panel meeting took place in June 1997). The EC participates as a third party.

Dairy products

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

the application of the Import Milk Act.

4.4 Import Quotas

Agriculture and Fisheries

Allocations to foreign fishing fleets

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

4.5 Standards and Other Technical Requirements

Complex regulatory system

In the US, products are increasingly being required to conform to multiple technical regulations regarding consumer protection (including health and safety) and environmental protection. Even if, in general, not intentionally discriminatory, the complexity of US regulatory systems can represent an important structural impediment to market access. For example, it is not uncommon that equipment for use in the workplace 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 public standards do not exist, product safety requirements can change overnight as the product liability insurance market makes a new assessment of what will be required for insurance purposes.

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

they are designed to cover.

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

Non-use of international standards

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

Illustrative cases:

Fastener Quality Act

- The 1990 Fastener Quality Act (FQA), which aims to deter the introduction of sub-standard industrial fasteners into the US, includes onerous compliance costs. In March 1996 Public Law 104-113 enacted a much amended version of the FQA. The amended law tightens the original FQA, withdrawing the possibility to grant waivers to imported fasteners. FQA regulations discriminate against non-NAFTA suppliers in that they demand from them an original laboratory testing report or certified copy thereof to be attached to each lot, fastener parts' logos must be registered with the US Patent & Trademark Office and the testing laboratory must be accredited by the US National Institute of Standards and Technology (NIST). Compliance of exports from non-NAFTA countries with the FQA will be enforced by the US Customs Department but no organisation has been set up to ensure compliance by US and other NAFTA manufacturers. The US Administration has announced that the implementation of the amended version of FQA, foreseen for 17 May 1997, has been delayed by up to one year; the Commission welcomes this development. The problem remains that to date no EU laboratory has been recognised by NIST, although the UK accreditation service has been recognised. NIST has also refused to accept the EU laboratory accreditation organisation (EAL [European Accreditation of Laboratories]) as an umbrella accreditation body under the FQA. The EU and the US have commenced mutual recognition negotiations with respect to fasteners which, if successful, could help alleviate some of the problems related to the FQA requirements.

Nutrition labelling

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

Discriminatory standards: Reformulated gasoline

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 of the GATT and was not justifiable under paragraph (b), (d) and (g) of Article XX. The US has appealed against 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. The report, although finding that some of the panel's interpretations were erred in law, confirmed that the EPA regulation on imported gasoline was in breach of WTO rules. The EPA is currently revising requirements for imported gasoline.

Excessive reliance on mandatory certification

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

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

As far as IT products are concerned, since they are subject to continuous testing and assessment in their development and production process, it should be unnecessary to repeat such tests by a third party. Industry stresses the advantages of an appropriate "supplier declaration of conformity".

Regulatory differences at State level

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

Acquiring the necessary information and satisfying the necessary procedures is a major undertaking for a foreign enterprise, especially a small or medium sized one, as at present there is no central source of information on standards and conformity assessment. One company has estimated the volume of lost sales in the US due to the multiplicity of standards and certification problems to be about 15% of their

total sales. The expense of certification alone was put at 5% of total sales, as was the amount spent on product liability insurance (a far less significant factor in Europe).

The hidden costs could be much greater because the time and cost involved can be greatly reduced simply by using US components 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 programmes which are not in conformity with international quality assurance standards (such as the International Organization for Standardization (ISO) 9000 series). In some cases (e.g. that of telecommunications network equipment) an expensive evaluation procedure is required which does not lead to certification and does not take account of any additional requirements by individual buyers.

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 Laboratory (UL) against its standards. UL has complete discretion on its standards and, on occasion, can make seemingly arbitrary changes to them.

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 the Comité Européen de Normalisation Electrotechnique (CENELEC) [European Electrotechnical Standards Committee]).

Labelling requirements

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

Automotive

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

Pharmaceuticals

Approval procedures for drugs and drug ingredients

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

By means of an "over-the-counter" (OTC) procedure, approved active substances

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

In addition, the problem of admission of European suntan lotions to the US market was first raised with the FDA in 1991. The FDA also received a petition by European cosmetic firms to open the simplified drug approval procedure to UV-filters that had already been accepted in the EU. While the FDA did approve sunscreen products containing avobenzone in concentrations of up to 3%, final monographs covering this and other sunscreen products are still pending.

Textiles and Leather

Marking requirements

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

Agriculture and Fisheries

Wine labelling

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

Sanitary and phytosanitary issues: delays at customs controls

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

Canned peaches

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

Apples and pears

Regulations governing the entry of apples and pears from certain member states (Code of Federal Regulations of 1996, Title 7, Subtitle B, Ch. III, §319-56-2r)

provide for a pre-clearance inspection programme, with the aim of guaranteeing, prior to shipment, that consignments are free from certain specified insect pests such as the pear leaf blister moth, and from "other insect pests that do not exist in the US or that are not widespread in the US".

Operating in this way on the basis of an open list of unspecified pests is not a scientific approach and is contrary to the spirit of transparency as provided for in the International Plant Protection Convention and to the requirement of pest risk analysis and transparency laid down in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. The stringent inspections and the increased costs arising from the pre-clearance inspection programme have clearly had a negative effect on EU exports of apples and pears to the US. Consultations with the aim of implementing the "inspection at port of arrival" option have resumed in 1996, but have not yet been conclusive. However, an arrangement for the next shipping season based on a Community proposal and a subsequent Animal and Plant Health Inspection Service (APHIS) response is currently under examination.

Pathogen free regions

Under US Regulations (Code of Federal Regulations of 1996, Title 7, Subtitle B, Ch. III, §319-56-2) the import of fruit and vegetables from an EU Member State, in which the relevant pathogen is known to occur, is not only prohibited from the infested area of that Member State, but also from the pathogen-free areas thereof. This creates undue obstacles to exports from pathogen-free regions within the EU. An example is the prohibition of imports of tomatoes from Brittany because of the presence of the Mediterranean Fruit Fly in the Mediterranean regions of France. Although Brittany is ecologically isolated from the infested regions of France, and the French authorities carry out the necessary surveillance to avoid dissemination of the pest, imports into the US of ripe tomatoes from Brittany are not allowed by the US authorities. The EU considers these measures to be excessive; they discriminate Brittany against other pathogen-free areas in the Community, which is not justifiable on phytosanitary grounds, having regard to the conditions of the internal market within the Community.

Potted plants

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

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

In addition, the US is deferring the review of further categories of plants for import, in particular for Rhododendron (Azaleas). This review will involve a very long procedure which may considerably delay the approval of EU plant genera. In consultations held in 1996, it was noted that the review has been suspended. Moreover, there are strong reasons to believe that the ban, in particular on Rhododendron, has been maintained on grounds other than those relating to plant health.

Hardy nursery stocks

The mandatory requirement for a two year post-entry quarantine on an importer's premises for hardy nursery stock is considered by the EU to be excessive. Its main purpose is believed to be the detection of latent infections by organisms of quarantine concern. Although this measure may be justifiable in the case of new or

developing trade in specific commodities, the EU considers this not to be the case, if the measure is required for long-term trade on a permanent basis. This requirement should be examined in consultations with the US.

BSE

As with 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 requirements are in conformity with the recommendations of the authoritative international institution in this area, the International Office for Epizooties (OIE), those of the US are not. In particular, the US does not make a 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, Dutch, French, Irish and Portuguese exports have been subject to requirements not deemed necessary under EU and OIE rules. Also in this context, the issuing of US import permits for bovine embryos and semen from countries which have had cases of BSE were suspended, although no formal change was made to the US import rules. Following complaints from the EC, the US restarted issuing permits for bovine semen.

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 not justified because of the widespread presence of scrapie in the US sheep population.

Recognition of the Community

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

Regionalisation

The EU operates a policy of regionalisation, where restrictions are applied in zones affected by certain animal diseases, with free movement of animals and products outside the affected zones. An animal or product fit for movement is then considered fit for export. The principle of regionalisation as an effective means of controlling animal disease has now been incorporated into the US Tariff Act 1930 by the NAFTA and is part of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. However, US import administrative rules concerning Foot and Mouth Disease, Rinderpest and other relevant diseases have still not been amended to reflect this change in legislation, despite a clear commitment in the EC/US agreement on application of the Third Country Meat Directive, reached in 1992. The US published a proposed rule on "Importation of Animals and Animal Products" covering only ruminants and swine on 18 April 1996. The EU made substantive critical comments, and has continued to press for the US to recognise the EU's application of regionalisation in the context of an EU-US Veterinary Agreement. An agreement was negotiated on a technical level on 30 April 1997. The US will now take the necessary steps to accurately review the animal health status of EU Member States and regions the by 1 October 1997.

The consequence of the current US position on regionalisation can be illustrated by the example of Spain which is declared affected by hog cholera although the problem only relates to some specific areas of the Lerida province.

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

Egg products

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

Canned food

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

4.6 Government Procurement

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 (GPA), 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.

Federal Buy America legislation

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; some establish local content requirements, while others still extend preferential price terms to domestic suppliers. Buy America restrictions therefore not only directly reduce the

opportunities for EU exports, but also discourage US bidders from using European products or services.

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

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;
- the Department of Defense (DoD) Balance of Payments Program, which provides for a 50% price correction on foreign offers, when compared with US offers;
- the **Competition in Contracting Act of 1984**, which allows the procuring agencies to restrict procurement, on a case by case basis, in order to achieve industrial mobilisation objectives;
- The **National Space Policy Directive of 1990**, 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.

Federal Buy America funding programmes

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 Administration;
- 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 Marrakesh Agreement, Buy America 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 are manufactured in the US.

- Defence Appropriation and Authorisation Acts (see below).

Sub-federal selective purchasing laws

An unwelcome development, on June 1996, was the enactment by the Commonwealth of Massachusetts of legislation forbidding state agencies, state authorities, the House of Representatives or the State Senate to sign new contracts or renewals of existing contracts with companies doing business with or in Burma. The legislation also requires the drafting and maintaining of a restricted purchase list of companies "doing business with Burma" from which the authorities concerned cannot procure goods or services. This list has already been published and includes a significant number of companies in the Community.

Furthermore, similar legislation with regard to Indonesia was introduced in the State legislature of Massachusetts in July 1996 and reintroduced in December 1996 for the 1997 legislative session. In May, the bill was amended to contain an exception for procurement covered by the GPA. While this was a favourable development, the fact remains that such sub-federal selective purchasing laws have been adopted in several cities (including New York City) and are being proposed in a growing number of cities and States including Connecticut, California and Texas. Whilst the EU fully respects the right of Massachusetts and others to take direct action in support of human rights (the reason given for taking these measures) or other equally important issues - and indeed has itself taken a strong stance against the Burmese regime - the multiplication of such initiatives seems indicative of a worrying new trend in US sub-federal policy-making aimed at regulating the behaviour of economic agents beyond the US territorial jurisdiction. Quite apart from the strict legality of these actions, they are clearly troubling the conduct of normal international economic relations.

Although the Massachusetts law applies to all companies regardless of their origin, it does limit the access of European suppliers to the procurement of a state covered by the US under the GPA. It imposes, inter alia, conditions on a tendering company which are not essential to ensure the firm's capability to fulfil the contract and incorporate qualification criteria based on political rather than economic considerations. Thus, the law appears to be in breach of a number of provisions of the GPA and results in a de facto reduction of the US sub-federal offer under the

GPA. The EU has raised this issue with the US on several occasions and requested WTO consultations on 20 June 1997.

State Buy America legislation and restrictions

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

Set-aside for small businesses

The **Small Business Act of 1953**, as amended, requires executive agencies to place a fair proportion of their purchases with small businesses. This is achieved through two different types of set-aside schemes: one where US Federal government contracts are set-aside, regardless of the size of the contractor, in the event that there is a reasonable expectation of bids from two or more eligible US small or minority businesses; the other where all contracts below a certain threshold (currently US$ 100 000) are set aside for US small or minority businesses - contracts are only released for competitive bidding in the event that two or more eligible bidders cannot be identified. In this context, small businesses are defined as businesses located in the US which make a significant contribution to the domestic economy and are not dominant. The standard size criteria for eligibility as a small business for goods producing industries is 500 employees or less. However, for some industries (pulp, paper boxes, packaging; glass containers; transformers, switchgear and apparatus; relays and industrial controls; miscellaneous communications equipment; search, detection, navigation guidance systems and instruments) the employee limit is 750 and for some others (chemicals and allied products; tyres and inner tubes; flat glass; gypsum products; steel and steel products; computers, computer storage devices, terminals; motors and generators; telephone and telegraph apparatus) it is 1 000. For services industries, depending on the sector, firms with total annual revenues of less than US$ 2.5 million to 17 million are considered to be small businesses.

Currently, the notion of fair proportion means that the government-wide goal for participation by small businesses shall be established at no less than 20% of the total value of all prime contract awards for each fiscal year. Under the normal bid procedures, there is a 12% preference for small businesses in bid evaluation for civilian agencies (instead of the standard 6%). In the case of the DoD, the standard 50% preference applies to all US businesses offering a US product.

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

National security issues

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

While the US denies abusing the WTO national security exemption, it has indicated a readiness, in the context of the implementation of the GPA, to disseminate more guidance to US procurement officials for identifying which procurements are covered by the Agreement and which by national security exemptions. It has also

expressed its intention to ensure clear and consistent identification of national security procurements, and improve the coherence of the US Federal Supply Classification System with the international Harmonised System. Together, these intentions mark a first small step towards more acceptable practices.

Berry Amendment

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 fabric provisions, and the withdrawal of a contract to supply oil containment booms to the US Navy because of the same textile restrictions. Although the Berry Amendment does provide for waivers from its strict requirements, it is not clear whether the DoD actually utilises these possibilities.

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.

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

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

Bearings

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

so-called 'simplified acquisition threshold' (currently US$ 100 000). Again, this waiver possibility is of limited use since it applies only to commercial bearings purchased as end items provided that no 1996 or 1997 funds are used.

Iron, Steel and Non-Ferrous Metals

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

Telecommunications Equipment

Not covered by the GPA

The issue of procurement in the telecommunications sector remains unresolved between the EU and US. Buy America rules continue to apply to purchases of telecoms equipment by rural telephone co-operatives financed by the Rural Electrification Administration. Furthermore, US telecommunications companies have historically bought equipment from North American suppliers.

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.

Sanctions

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

4.7 Trade Defence Instruments

1916 Antidumping Act

The US maintains in force its 1916 Antidumping Act, which prohibits the import and sale of products "at a price substantially less than the actual market value in the principal markets of the country of their production". This Act appears to be at variance with multilateral rules, in particular the GATT and the Anti-Dumping Agreement, in many respects (e.g. injury standard; type and entity of available remedy - treble damages plus fine and/or imprisonment; direct standing of individual private parties irrespective of their "representativity"). Issues related to the 1916 Antidumping Act were raised before the WTO Anti-Dumping Committee by the Commission. Following receipt of the complaint from the industry, an examination procedure was initiated under the Trade Barriers Regulation on 25 February 1997.

Countervailing duties on pasta from Italy

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

4.8 Export Restrictions

Export controls

A comprehensive system of export controls was established, under the **Export Administration Act** (EAA) **of 1979** and the US Export Administration Regulations (EAR) to prevent trade to unauthorised destinations. This system, among other things, 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 also in light of the fact that the latter are active members of all international export control regimes: the Nuclear Supplier Group, the Australia Group, the Missile Technology Control Regime and the Wassenaar Arrangement.

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

Encryption

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

At present, both the EU and the US operate an export control regime to limit the cross-border movement of the strongest encryption products. On 30 December

1996, new US export control regulations were published transferring the licensing of commercial encryption products from the Department of State to the DoC and mandating key recovery for the future. The practical effects of this remain to be seen. A combination of the continuing constraints on the export of strong encryption products, on the interoperability of systems employing such technology and the dominant position of US suppliers in the provision of key computing components, inhibits not only trade in encryption products but, more importantly, the widescale deployment needed to promote the effective growth of electronic commerce. Moreover, many modern encryption techniques are patented and licenses may be required to achieve sales of European products in the US. Thus, significant barriers to international trade in encryption products without key recovery continue to exist.

4.9 Subsidies

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

Aircraft

The large civil aircraft (LCA) sector is generally subject to the WTO rules on subsidies (it is specifically excluded from several provisions of the Subsidies Agreement in anticipation of a broader Agreement on civil aircraft trade), but more specific multilateral rules are required to restrict all forms of government support and intervention for aircraft products. The EU regrets that, at the end of the Uruguay Round negotiations, the US blocked the adoption of a new Civil Aircraft Agreement supported by all other negotiating parties. Although negotiations have continued since, no progress has been made.

LCA Agreement

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

considered as a benefit for US industry.

Support from the NASA aeronautics budget

In particular, in the face of very large public funding for NASA (National Aeronautics and Space Administration) aeronautics R&D budgets, the US has so far denied the existence of any benefit to the US LCA industry. For instance, NASA's aeronautics budget for 1995 and 1996 amounted to US$ 1.15 billion and 1.1 billion, respectively. According to estimates carried out for the EU, about 70% of NASA's aeronautics spending can be classified as support to the US LCA industry. On an annual basis the Department of Defence (DoD) spends more than US$ 7 billion on R&D for the development of aircraft and related equipment. This translates into benefits to the civil aircraft manufacturers between US$ 720 million and 1.79 billion. Finally, the Federal Aviation Administration (FAA) has an annual aeronautics budget for research and development which exceeds US$ 2 billion. One of the FAA's stated objectives is "to foster US civil aeronautics". However, the US declared that only a negligible proportion of this spending has turned out to be an identifiable (indirect) support to the US LCA industry. According to EU estimates, for the fiscal year 1995, US LCA manufacturers received indirect support in the range of 8.8% to 15.9% of their commercial turnover. This is well above the 3% limit set by the 1992 bilateral Agreement.

Supersonic aircraft programme

Another area of great concern to the EU industry is the NASA programme for High Speed Civil Transport (HSCT), that is the programme for the development of a new supersonic aircraft to succede Concorde. The US aircraft and aero-engine industry are closely working with NASA on this project which is being funded at the level of more than US$ 200 million per year. US industry sets the initial research parameters, it defines NASA's research priorities with respect to HSCT, it has been awarded NASA HSCT contracts to perform the needed research and it is protected from sharing valuable data and results with others. Such research can therefore only be described as "direct" support. Nevertheless, the US refuse to notify the HSCT program as direct support thereby exempting it from the repayment obligations.

Active support from the Administration

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

<u>Shipbuilding</u>

OECD Shipbuilding Agreement

The signing of the OECD Shipbuilding Agreement in December 1994, which is meant to eliminate aids in the shipbuilding sector, was a major achievement and is expected to have a significant impact on US and all other signatories subsidy programmes in the shipbuilding sector. The Agreement aims to eliminate all direct and indirect support and to combat injurious pricing practices. Provision is made for a standstill on existing subsidy levels and on new measures of support during the intervening period, but allows for the continuation of previously committed aid subject to certain conditions.

In December 1995 the EC, South Korea and Norway deposited their instruments of ratification for the Agreement. Japan did so in June 1996. The failure of the US to ratify it is a matter of great concern. A revised legislative Bill (S 629) was introduced in the Senate on 22 April 1997 by Senator Breaux which could enable ratification. The EU will continue to monitor the ratification and implementation process and to verify that the legal basis for US ratification is in accordance with

the terms of the OECD Agreement and its impact on the existing subsidy programmes.

From 1980 until 1994 US shipbuilders did not succeed in building for export. The domestic market for the Navy and the protective Jones Act (which reserves the construction of the vessels used for coastwise traffic to US shipbuilders) provides the yards with orders. Production was less than 100,000 gross tonnes (gt) in 1993 while the available capacity was 250,000 gt. However, the potential capacity by 2000, taking into account the re-conversion of the military activity, is evaluated at 1.1 million gt. The **Merchant Marine Act of 1936**, as amended, provides for various shipbuilding subsidies and tax deferments for projects meeting domestic 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 in 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 vessels for export. As of 1 October 1996, applications pending for construction guarantees involved 18 shipyards, 27 companies and 112 vessels. The Maritime Administration (MARAD) received budget appropriations of $ 43.5 million in financial year 1996 and of $ 54.3 million in 1997 for these measures. In 1998 it is designated to receive $ 39 million, which will enable the guarantee of $ 500 million in loans from government funding. The new implementing legislation will have to provide for the elimination of these construction loan guarantees.

5. INVESTMENT RELATED MEASURES

5.1 Direct Foreign Investment Limitations

National security considerations: the Exon-Florio provisions

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

- Since 1992, an Exon-Florio investigation must be made if a foreign government owned entity engages in any merger, acquisition or take-over which gives it control of the company. Further provisions contain a declaration of policy aimed at discouraging acquisitions by and the award of certain contracts to such entities;
- The **1993 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 international technological leadership in areas affecting US national security" - again blurring the line between industrial and national security policy.

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

Uncertainties about implementation

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

Foreign ownership restrictions

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

Under the **Federal Power Act**, any construction, operation or maintenance of facilities for the development, transmission and utilisation of power on land and water over which the Federal Government has control are to be licensed by the Federal Energy Regulatory Commission. Such licenses can only be granted to US citizens and to corporations organised under US law. The same applies under the Geothermal Steam Act to leases for the development of geothermal steam and associated resources on lands administered by the Secretary of the Interior or the Department of Agriculture. 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.

Conditional National Treatment

The principle of National Treatment - that Foreign Direct Investment should not be treated less favourably than domestic enterprises in like circumstances - is one of the pillars of the liberalisation in the world economy and a well established legal standard in bilateral treaties and multilateral agreements. In OECD member states as well as 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, in the US, as in other countries, some long-established exceptions to this principle still exist thus giving rise to instances of Conditional National Treatment (CNT).

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

Reciprocity

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

Performance requirements

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

The EU has become increasingly concerned over recent years about US legislation taking the form of tests on whether a company, legally established in the US but whose ownership is foreign, meets certain conditions and requirements. CNT language is most notable in the area of science and technology and concerns the

granting of Federal subsidies for research and development, or other advantages, to US-incorporated affiliates of foreign companies.

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

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

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

5.2 Tax Discrimination

Cumbersome and discriminatory reporting requirements

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

"Earnings stripping" provisions

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

Internationally agreed approach overlooked

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

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

State unitary income taxation: arbitrary calculations

Certain US States (Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Kansas, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Rhode Island and West Virginia) assess State corporate income tax for foreign-owned corporations on the basis of an arbitrarily calculated proportion of their total 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 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.

Foreign Sales Corporations

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

The parent corporation is entitled to 100% tax exemption from tax for the dividends received from FSCs, provided the management of FSC and the economic processes it conducts are outside the US. The main criticism of the FSC system is that it is but an instrument to provide US manufacturers with a sort of export subsidisation (which is prohibited under the WTO). A very similar system to the FSC (the Domestic International Sales Corporation (DISC)) was challenged in the GATT in 1976 and it was ruled against by a panel as an export subsidy. Although the US did not accept the panel's report, in 1981 it modified the DISC legislation and introduced the FSC provisions, which it claimed it were in compliance with the GATT.

However, strong doubts remain concerning the compatibility of FSC with WTO rules. At first sight FSCs are designed as instruments to avoid double taxation of income earned abroad, a principle which is recognised in the WTO system. However, a closer look reveals that the requirements for establishing the existence of the economic activity performed abroad are of a merely formal nature. This opportunity may be rewarded disproportionately highly through the use of administrative rules which permit transfer pricing by reference to arbitrary formulae arguably inconsistent with the internationally accepted arms length standard. Hence, FSCs do not perform any concrete economic activity and the related tax exemption amounts to an export subsidy.

Aircraft

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

6. INTELLECTUAL PROPERTY RIGHTS

6.1 Patents and related areas

Measures affecting imported goods

Section 337 of the **Tariff Act of 1930** provides remedies for holders of US patents by 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 Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs); however, the US has to date not taken appropriate measures in order to fully do away with the main discriminating features of Section 337.

Government use

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 US Government Authorities. This practice is particularly frequent in the activities of the DoD 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.

Moreover, the co-existence of fundamentally different patent systems (US first-to-invent system versus first-to-file system followed in the rest of the world) continues to create interface problems. However, as a welcome development, there is a Patent Reform Bill pending in Congress which aims at bringing US patent law in conformity with international standards.

6.2 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. It is noted that the US has now signed the WIPO (World Intellectual Property Organisation) Copyright Treaty and the WIPO Performances and Phonograms Treaty. Adherence to these Treaties by the US would appear to require legislation on moral rights for both authors and performers.

Crossborder licensing of music

Following the lodging of a complaint under the Trade Barriers Regulation concerning US obstacles to trade for the licensing of music an examination procedure was initiated on 11 June 1977. The complainant, the Irish Music Rights Organisation (IMRO), unanimously supported by the Groupement Européen des Sociétés d'Auteurs et Compositeurs (GESAC), contends that such obstacles adversely affect the crossborder licensing by IMRO of its members' works in this country.

The US trade practices at the origin of the alleged trade obstacles are mainly contained in **Section 110(5)** of the **1976 Copyright Act**, which provides an exemption from the exclusive right of authors to authorise the public performing of their works provided in Section 106(4) of the same Act. Concretely, Section 110(5) exempts the use of home type apparatus of radio or television in a bar, restaurant, shop, factory or any other public place from the need to obtain an authorisation and, consequently, pay due remuneration. In addition, new US legislative proposals would enlarge the scope of this exemption. These exemptions could be contrary to the US' international obligations under the TRIPs Agreement and the Berne Convention on the protection of literary and artistic works.

6.3 Geographical designations

Inadequate protection of geographical indications of wines and designations of spirits

The amendment to the US trademark law (new **subsection 2(a) of the Lanham Act**) adopted for the purpose of implementing Articles 23.2 and 24.5 of the TRIPs Agreement creates grounds for refusal or cancellation of a trademark where it consists of - or comprises - a geographical indication which, when used on - or in connection with - wines or spirits, identifies a place other than the origin of the good. This protection cannot prejudice prior rights for any use of a geographical indication as a trade mark made before 1995. However, Art. 24.5 of the TRIPs Agreement grants prior rights to a trademark only 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.

Apart from this new provision in the US trademark law, enforcement of rights to a geographical indication in relation to wines or spirits in the US mainly depends on the Bureau of Alcohol, Tobacco and Firearms (BATF) regulation for the labelling of wine and spirits. These rules give 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. Such discretion may lead to violations of the TRIPs Agreement.

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 BAFT list of non-generic names

In April 1990 the 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.

Spirits

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

7. SERVICES

7.1 Business Services

Professional Services

New GATS disciplines

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

Problems at State level

However, despite the improvements contained in the schedule of specific commitments, access to the US market, where licensing of professional service suppliers is generally regulated at State level, remains unsatisfactory. This is mainly due to the lack of transparency in - and divergence of - access conditions at State level, as well as the frequent absence of a transparent regulatory regime for the operation of foreign professional service suppliers.

Improving outlook?

Nonetheless, the situation should improve steadily under the GATS: the Working Party on Professional Services is working on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the field of professional services do not constitute unnecessary barriers to trade. In addition, negotiations on market access and on the further liberalisation of professional services will take place as part of the next round of trade liberalisation talks.

7.2 Communication Services

Telecommunication Services

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

WTO Basic Telecom Agreement

The negotiations on basic telecommunication services, held in the GATS framework under the auspices of the WTO, concluded successfully on 15 February 1997. Thereby 69 Member countries reached agreement on the liberalisation of the global market for telecommunications, estimated to be worth approximately US$ 600 billion. As a result, the 69 governments undertook legally binding commitments on access to their telecommunications services' market. The agreement will enter into force on 1 January 1998.

The US undertook commitments on most telecommunications services (voice telephone, data, telex, telegraph, private leased circuit services; local, domestic,

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

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

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

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

In November 1995, the FCC adopted a new rule on entry of foreign-affiliated carriers 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" (ECO-test). This has been completed by an FCC Notice of proposed rulemaking (so-called DISCO II) released in May 1996 applying the ECO-test to satellites. The EU does not agree with the FCC contention that the Foreign Carrier Entry Order sets forth a clear and explicit entry standard to replace its previous case-by-case determinations. Both the ECO-test and the DISCO II will be reviewed in order to adapt them to the commitments undertaken by the US in the GATS as part of the Basic Telecom Agreement. The FCC issued a Notice of proposed rulemaking on 4 June 1997 which addresses Section 310 restrictions on foreign indirect investment and the ECO-test. The EU is examining this proposal.

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

Limited access to INTELSAT and INMARSAT

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

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

Finally, the **Submarine Cable Landing Licence Act of 1921** 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. The legal situation has to change by 1 January 1998 due to US commitments under the Basic Telecom Agreement. Again, the Administration seems to consider that it does not need new legislation to implement the Agreement with respect to the landing and operation of submarine cables because the President already has discretionary authority to grant or deny licences. This is also addressed in the FCC's Notice of proposed rulemaking issued on 4 June 1997.

Restrictions on service providers

Alongside with the limitations on services due to restrictions on owning radio licences, 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 as a result of the adoption by the FCC of its November 1995 rule on foreign carrier entry into the US market, this now includes an Effective Competitive Opportunities test with respect to both the provision of international simple resale and 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. The FCC's Notice of proposed rulemaking of 4 June 1997 also addresses this matter.

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 released in December 1996 a Notice of proposed rulemaking on international settlement rates. The final legislation is expected by the end of 1997. The EC has reserved its position in the WTO to challenge such final legislation if its results are incompatible with the MFN obligation.

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

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

7.3 Financial Services

The US financial services sector is characterised by industry and geographic fragmentation, but this situation is rapidly changing. The application of technology and new flexibility shown by federal regulators has increasingly blurred traditional product distinctions. The pace of affiliations between banks and securities houses and the conduct of insurance activities by banks are picking up. Moreover, greater reliance on electronic data flows is reinforcing the development of an interstate market already well underway as a result of the implementation of the interstate banking legislation passed in 1994. As a consequence, the US market will look very different in the early 21st century than it does now, with greater similarity to the EU financial sector. In this dynamic environment, it is important that EU financial firms are given competitive opportunities comparable to those afforded US institutions as new laws are passed, regulations adopted and the market restructured.

WTO Financial Services negotiations

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

The objective of the 1997 GATS negotiations is clearly to achieve a permanent and MFN-based agreement on financial services with a higher level of liberalisation commitments. This requires all WTO Members, including the US, to forgo the application of reciprocity measures in this sector. Such an agreement will provide predictable and legally enforceable commitments under the WTO, guaranteeing improved access of EU financial institutions to the US market, as well as non-discriminatory treatment of their operations. As a consequence some of the barriers still affecting EU firms, including those referred to below, should be reduced or eliminated.

Banking

Sectoral segmentation

Product-related limitations on activities and affiliations are of great interest to EU firms. Despite the absence of federal legislation in this area, there have been very positive developments: the Federal Reserve Board and Comptroller of the Currency have been increasing their flexibility toward new affiliations and activities permitted by banks. Moreover, financial modernisation legislation is moving through the House of Representatives which would remove many of the remaining restrictions in the financial sector. These include the **Glass-Steagall Act of 1933** which provides for the separation of commercial and investment banking in the US. While the prospects of this legislation in the immediate future are uncertain, the progress to date in the House suggests that the underlying consensus in the US is shifting in favour of a more modern structure. If substantial and non-discriminatory changes in the structure of US industry are adopted, this would be a major step forward for the US industry in general, and thus for the EU industry too.

Debanking problems

Extensive US financial sector restructuring could eventually have a positive impact on the "debanking" problem faced by EU financial firms operating in the US. At present, because of structural differences in the types and forms of banking affiliations permitted for companies operating in the US as opposed to the EU market, an EU firm may be required to give up its banking license in the US as a result of, for example, a merger in Europe 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.

Geographical segmentation

The long-standing geographical segmentation of the US financial services industry was addressed by the **Interstate Banking and Branching Efficiency Act of 1994** (the Riegle-Neal Act). The new legislation provides a framework for the reduction of barriers to interstate banking and is a very positive step. Interstate banking is now possible through bank acquisition, consolidation (or merger) and de novo branching on a non-discriminatory basis. Initial signs are that the law is having a considerable impact on the national financial sector structure. Although these changes are based on the principles of non-discrimination, in practice the ability to expand by acquisition of - or merger with - insured branches might be less advantageous to EU than US domestic banks because EU banks are for the most part in the wholesale banking market.

Insurance

Links to banks

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

A further important barrier for EU insurance companies seeking entry into the US market is the fragmentation of the market between 54 different jurisdictions, with different licensing, solvency and operating requirements.

Securities

Establishment problems

EU securities firms may register as broker-dealers or investment advisers, and may in principle establish both in the form of branches or subsidiaries. However, the establishment of a branch in the US by a foreign securities firm to engage in broker-dealer activities, although legally possible, is in fact not practicable, since registration as a broker-dealer means that the foreign firm incorporated outside the US establishing the branch has to register and become itself subject to Securities and Exchange Commission (SEC) regulation.

Reciprocity requirements

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

7.4 Transport Services

Air transport Services

Computers reservation systems

Under existing US legislation, computer reservation systems (CRS) can give preference in the US to "on-line" services (connections with the same carrier) over "interline" services (connections with other carriers). This practice implicitly disadvantages all non-US carriers which, unlike their US competitors, have to rely on interline connections for traffic to and from US points other than their own gateways (behind gateway traffic). The publication in August 1996 of a Notice of proposed rulemaking demonstrates a certain willingness by the US authorities to require CRS to have at least one display without on-line preference. If confirmed in the Final Rule, this opens the possibility to achieve a degree of progress on this long-standing issue.

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 especially since US procedures may not be the most effective in a non-US environment.

Maritime Transport Services

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

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

Coastwise trade

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

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

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

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

Cargo preferences measures

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

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

The relevant legislative provisions are:

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

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

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

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

Alaskan oil cargoes

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

LIST OF FREQUENTLY USED ABBREVIATIONS

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