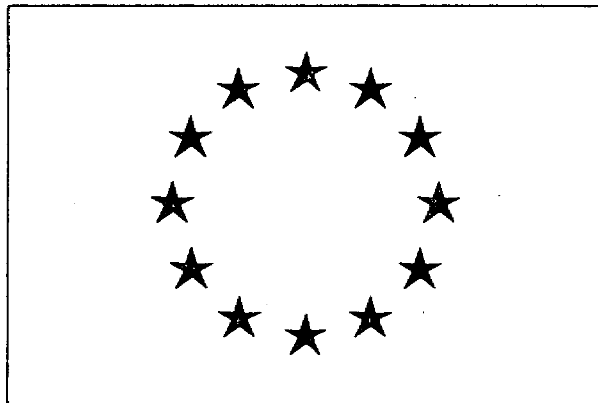
REPORT ON UNITED STATES TRADE AND INVESTMENT BARRIERS

1992

PROBLEMS OF DOING BUSINESS WITH THE US



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EC REPORT ON US TRADE AND INVESTMENT BARRIERS

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INTRODUCTION

This is the European Commission's eighth report on the barriers faced by Europeans wishing to trade with, and invest in, the United States. Originally, these reports were compiled in order to redress the impression given by the US National Trade Estimate reports that trade barriers are primarily a problem encountered by American business abroad, while the US market is essentially open. In reality, Europeans still encounter many serious problems in doing business in the American market.

As the Commission's reports have become better known in government, business and academic circles, there has been a steadily growing public interest in using them as a means of identifying problems of access to US markets and as a tool for focusing dialogue and negotiations, both multilateral and bilateral, on the elimination of the obstacles inhibiting the free flow of commerce and investment.

In order to appreciate the relevance of the issues raised in this report, they need to be placed in the context of the overall EC-US economic relationship. It is no exaggeration to say that it is the most important such relationship in the world today. Bilateral trade flows are currently running at about $190 billion a year and the exports of both partners have consistently increased since the early 1980s. To this total can be added the value of foreign direct investment (FDI) flows, the huge growth of which has greatly increased the economic linkages between the European Community and the United States. In 1990, Community investors owned more than half of the FDI stocks in the US, while over two fifths of American-owned FDI stocks were located in the Community. At historical prices, these investments together are worth more than $400 billion; and at current prices their value is certainly much greater.

As the US Commerce Department pointed out in a recent report[1], foreign owned companies now account for an impressive share of total employment, value added, sales and research and development expenditure on both sides of the Atlantic. Furthermore, a very important percentage of the merchandise trade between the industrialised countries takes place between parent companies and their affiliates. In the case of the US, this kind of trade amounted in 1990 to one fifth of total exports and one third of total imports. The common interest which the EC and US have in promoting these links is evident. It is also evident that whatever barriers to trade and investment may exist in the US and the Community, they have not prevented the development and growth of these economic links.

In fact, it must be remarked that since 1989, the US has been running a steadily growing trade surplus with the Community, which in 1991 stood at $17 billion, by far the largest which the US enjoys with any of its major partners. Indeed, the EC now takes almost 30% of US exports and thus has contributed in a large way to the healthy growth in the US export sector, which has consistently out-performed the rest of the economy in recent years. The US, on the other hand, takes only 18% of the EC's exports.

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(1) "Foreign Direct Investment in the United States : a Review and Analysis of Current Developments", August 1991

Yet despite these facts, the political relationship between the US and the Community is too much dominated by US domestic concerns about America's competitiveness and America's place in the world. The recession, falling living standards and rising unemployment in the US have brought trade and investment issues to the top of the political agenda. Europeans have been concerned to see protectionist trade legislation being tabled in Congress, ranging from a new and tougher "Super 301" procedure which can lead to unilateral action against trade partners, to provisions which would cut the US's trade deficit by administrative decree. Such measures would seriously undermine the multilaterally-agreed rules set down in the GATT and the OECD, and some of the central principles upon which the open trading system has been constructed, including the principles of most-favoured nation treatment and of national treatment.

The increasing tendency to try to solve US trade problems through bilateral agreements has the same effect : the discriminatory elements of the US-Japan "Global Partnership" are a case in point, as are other US agreements with Japan, with the Republic of Korea and with other partners. So does the US reluctance to accept GATT Panel rulings (as in the Marine Mammals case, see Chapter II) or to modify legislation when a Panel report has been adopted (as in the case of discriminatory action in the field of patents under Section 337 - see Chapter XI).

In these circumstances, Europeans are perplexed and worried about the US's commitment to the open trading system, which has ensured the prosperity of the West for the past 40 years, and given the opportunity to many countries elsewhere in the world to improve their living standards. This concern is heightened by American reluctance to recognise that the US has its own trade impediments : its own high tariffs, non-tariff barriers, preferential procurement rules, export subsidies and all the other issues in this report.

* * * *

At the core of the GATT system is the multilateral dispute-settlement mechanism. The establishment of separate, arbitrary, and even GATT-illegal, dispute settlement procedures is damaging to the objective of freer trade and progressively more liberal regulation. Therefore, as in previous years, the unilateral elements in US trade law - in particular the "301" family of legislation - which are referred to in Chapter I, head the list of measures identified by this report. No other major trading partner of the Community has legislation of this nature. To strengthen the dispute-settlement mechanism is a central objective of the Uruguay Round negotiations. In particular it is hoped that all parties could agree to refrain from unilateral determinations which are incompatible with a multilateral approach to the settlement of disputes.

Moreover, linked with unilateralism are the various examples of the extraterritorial reach of US law set out in Chapter II. Both represent a threat to the sovereignty of the US's trading partners; both represent a clash between legal systems; both can lead to conflicts which damage trade and investment. The cases of the Cuban Assets Regulations and the Marine Mammal Protection Act, which appear for the first time in this year's report, are examples of what can happen when one trading partner seeks to impose its own standards and its own policies on others. In view of the

growing economic interdependence of Europe and North America, as evidenced by the figures quoted above, such conflicts are increasingly damaging and need to be addressed.

This year's report also groups together, in Chapter III, those aspects of US trade policy where national security considerations are cited by the US as a justification for trade restrictions. These range from limits on market share (S.232 of the Trade Expansion Act) to procurement restrictions, and from unilateral export controls to screening of, or restrictions on, foreign direct investment. Whereas every sovereign country is entitled to take such measures as are necessary to defend its national security, it may be that some criteria governing what is acceptable by way of national security exceptions to GATT and OECD rules should be developed. If the aim of "national security" were to be systematically transformed into "national economic security", it would represent a giant step backwards.

Procurement practices have always been a problem of particular importance in doing business with the United States. The Community has repeatedly expressed its deep concern about the continuation of, and increase in, "Buy American" provisions both at federal and sub-federal level. There are three main types of problem involved : discrimination in US federal law; the fragmentation of the US market caused by the introduction of uncoordinated restrictions by individual States of the Union; and structural impediments such as those which exist in the telecommunications market, of which whole sections are virtually closed to competition because common carriers either buy almost exclusively from their own manufacturing arm, or operate networks which were constructed by, and remain dominated by, North American companies. These aspects are set out in Chapter IV.

The report also brings out the extent of US import barriers, export subsidies and tax barriers affecting trade. The removal of high tariffs which protect the US markets for textiles, clothing, footwear, tableware, glassware and other products - some of them ranging between 30% and 40% - has been a priority for the Community in the Uruguay Round. A number of the EC's key export items are affected, and this year the customs classification of multipurpose vehicles has been added to this list. In addition, there are various fees which raise the cost of market access; quotas on agricultural and food products; and a range of measures affecting shipping and shipbuilding, including those in the Jones Act.

The Jones Act and other import barriers are to be found in Chapter V, and the US's agricultural subsidies are detailed in Chapter VI.

Sometimes, European exports face a number of barriers of different kinds. One important example is that of vehicles. In addition to the problems on multipurpose vehicles referred to above, European industry faces discrimination in the application of US tax laws (see Chapter VII).

Three new items are introduced in the chapter on standards, testing, labelling and certification. These are the federal regulations on food labelling and California State regulations on lead levels, particularly in tableware, and glass containers. This chapter again has a broad theme : the multiplicity of standards and standard-making procedures, the lack of conformity with international norms, and the consequent fragmentation of

the market. This same theme of fragmented markets and regulatory procedures at sub-federal level which impede trade is also a feature of the chapter on the financial services sector.

Finally, the chapters on intellectual property and investment barriers remain little changed this year. The Community hopes that the Uruguay Round will help to remove the discriminatory aspects of Section 337 of the 1930 Tariff Act, which allows the US to bar products which allegedly violate US patents and which has been ruled illegal by a GATT Panel; and to remedy the inadequate protection of geographical designations of European wines and spirits. The Community and its Member States have also appealed to the US to work with them in the OECD to reinforce the principles of national treatment and non-discrimination in the field of foreign direct investment - at federal and sub-federal level - and to help limit the extent of exceptions to these principles in the name of national security, so as to reduce the uncertainties faced by investors.

* * * *

When the 1991 version of this report was published, it was hoped that many of the issues in it would by 1992 have been solved in the context of the Uruguay Round and the negotiations in the OECD on strengthening the National Treatment Instrument. In particular, it was expected that multilateral solutions could be found to the problems caused by the unilateral and potentially GATT-illegal aspects of the "Section 301" family of legislation; the US's tariff peaks; the inadequate protection of geographical designations; and the many other barriers linked with sub-federal legislation and the fragmentation of US markets, some of which have been briefly referred to above. Indeed, despite the failure to conclude the Round on the timetable originally envisaged, much progress has been achieved in the negotiating groups. Nevertheless, although some of the issues raised in the last Report have been dropped this year, many of the barriers referred to in this and previous reports have proved intractable, despite diplomatic efforts by the Community and by the Member States.

It is often said that the US faces particular difficulties in the period preceding a Presidential election. Nevertheless, the Community continues to believe that an even-handed approach to trade barriers, taking account of the interest of both sides, is the only way successfully to handle the problems of trade liberalisation. These barriers will only be finally removed by mutual consent; and that consent will only be forthcoming once it is accepted that their removal is in the common interest. This is why the Community will continue, alongside multilateral efforts to remove barriers, its bilateral dialogue with the United States. As was emphasised in last year's report, many trade barriers result from divergences between the types of economic regulation developed on the two sides of the Atlantic. Intensive dialogue holds out the hope of achieving a greater degree of convergence between them in the long term, on a bilateral or multilateral basis, and creating an even better climate for the continued growth of the world's biggest and most beneficial bilateral relationship.

This dialogue on economic questions forms part of the broad system of consultation between the two sides which has come into being since the adoption by them of the EC/US Transatlantic Declaration in November 1990.

I US TRADE LEGISLATION

I.A Unilateralism in US trade legislation

Description

Unilateralism is a characteristic element of many US legislative provisions. It generally takes the form of unilateral sanctions or retaliatory measures against "offending" countries or natural or legal persons. These measures are unilateral in the sense that they are taken on the basis of a US judgment of the behaviour or legislation of a third country without reference to, and often in defiance of, agreed multilateral rules. Such measures are also to be found in US trade legislation.
The main objective of the Trade Act as amended by the Omnibus Trade and Competitiveness Act in 1988 is to open foreign markets to US goods and services and to provide effective unilateral sanctions against nations perceived by the US to be trading unfairly.

Section 301

Section 301 of the 1974 Trade Act authorised the US Administration to take action to enforce US rights under international trade agreements and to combat foreign governmental practices which the US government judges to be discriminatory or unreasonable and to burden or restrict US commerce. In GATT covered areas it permits unilateral action to be taken by the US against its trading partners, without the prior authorisation of the Contracting Parties. The 1988 Trade Act added strict time limits for completing the Section 301 process. In other cases of alleged trade agreement violations or cases where a foreign nation's policy or practice is judged to be "unjustifiable" and burdens or restricts US commerce, the Act makes retaliation mandatory rather than discretionary. It may thus oblige the US government to take further action contrary to its international obligations.

The US used the Section 301 procedure twice against the Community, in 1989, when retaliatory measures were introduced against the EC in the hormones dispute (see below), and when USTR made a determination of unfairness with respect to the EC oilseeds regime.

Additionally, the US has repeatedly used the threat of Section 301 action, in flagrant violation of GATT rules. The disputes concerning canned fruit, shipbuilding and Airbus were cases in point. The Community will continue to defend its GATT rights whenever Section 301 is used to the detriment of its trading rights.

Super 301

Although the so-called Super 301 lapsed in 1991, it is worth maintaining a "watch" on this kind of provision. The EC has voiced its concern about the various proposals pending in Congress with the view to reinstate this procedure, by which the US Trade Representative (USTR) was required to identify 'priority' unfair trade practices from 'priority' countries, and

self-initiate Section 301 cases against them with a view to their modification and eventual elimination.

Special 301

An additional provision introduced by the 1988 Trade Act is the "Special 301" procedure concerning intellectual property rights (IPR) protection.

This provision requires the Administration to identify priority foreign countries it considers to be denying adequate IP rights to US firms. This can, under certain conditions, lead to unilateral measures by the US.

Comments/Estimated Impact

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

The elimination of the unilateral provisions of the Trade Act remains an important EC objective in the Uruguay Round of GATT trade negotiations. The Community has sought an unequivocal undertaking from the US and other GATT Contracting Parties to bring their domestic legislation into conformity with GATT rules as part of the final Uruguay Round package.

I.B Hormones Dispute - US Unilateral Action

Description

An example of the use of Section 301 action by the US was the retaliation against the EC in the hormones dispute when the US raised tariffs to 100% in January 1989 on selected EC foodstuffs (Community directive 146/88 prohibits the use of certain hormones in livestock farming but does not discriminate between Community producers and those of third countries).

Comments/Estimated Impact

These trade sanctions were estimated to be worth $100 million annually. In an attempt to de-escalate the trade dispute a Task Force was set up in February 1989. The Task Force met several times and agreed an interim measure in May 1989 under which certain meat exports could take place on the basis of producer guarantees. However, US exports of beef to the Community did not significantly improve as the traditional big US exporters do not produce hormone-free beef. Consequently, the US have only readjusted their retaliation measures marginally.

Within the GATT, the large majority of Contracting Parties have voiced their disapproval of the retaliation measures. The Community, on 11 October 1989, obtained the consent of the Chairman of the GATT Council and

the Director General to hold informal consultations in their personal capacities, in an endeavour to find a solution to the hormones dispute. However, it is the Community's assumption that these illegal US unilateral retaliatory measures will be removed in the context of the successful conclusion of the Uruguay Round negotiations.

However, the elimination of the unilateral act of retaliation by the US against the Community remains an important EC objective, and continues to be sought both at bilateral level and within the framework of the Uruguay Round of trade negotiations.

The Harkin Amendment, signed by the President in mid-December 1989 relates to the supply and transport of US meat to US Military Commissaries in Europe who would normally buy European beef. The Congressional background to this measure leaves no doubt as to its purpose. The Congressional Record of 1 August 1989 indicates that Senator Harkin "offered his amendment because the EC put a ban on all US meat and meat products that were using hormones". The first shipments began in July 1990.

In July 1991, at the meeting of the Codex Alimentarius Commission, the question of the adoption, as a Codex standard, of maximum residue levels for hormones when used for growth promoting purposes was voted upon and it was decided to postpone the issue until the next session of Codex Alimentarius in 1993.

I.C Telecommunications - Trade Act

<u>Description</u>

The "Telecommunications Trade Act of 1988" is analogous to 'Super 301' in that it is based on identification of 'priority countries' for negotiation and the <u>threat of unilateral action</u> (e.g. termination of trade agreements, use of Section 301 and bans on government procurement) if US objectives are not met.

These objectives are to "provide mutually advantageous market opportunities", to correct imbalances in market opportunities and to increase US exports of telecommunications products and services.

<u>Comments/Estimated Impact</u>

The Community has been designated as a priority country under the Act, although a major liberalisation of the EC market is taking place in the context of the 1992 programme and negotiations on a range of telecommunications issues are still under way in the GATT-Uruguay Round negotiations.

Community legislation has now paved the way for liberalisation of public procurement, terminal equipment, and value-added and data services. Liberalisation in the satellite and mobile telecommunications sectors is also under way.

In the Uruguay Round, the Community has put forward substantial offers on procurement and services.

The Community cannot accept that the US unilaterally determines what constitutes a barrier or when "mutually advantageous market opportunities" in telecommunications have been obtained. Nor can the Community accept US efforts to negotiate under threat of unilateral retaliation, which can only hinder the multilateral negotiations. In addition, such sectoral reciprocity is inconsistent with the principles of the multilateral trading system.

Nevertheless in informal meetings the Community has provided the US with information relating to the EC legislation on the construction of the Single Market for telecommunications. It has also addressed actual or potential barriers to trade in the US market which have been identified in the telecommunications sector (see relevant sections of this Report).

The US continues to enjoy a substantial surplus in bilateral trade with the EC in this sector.

I.D Public procurement - Trade Act

Description

The Trade Act of 1988 (Title VII) stipulates that US procurement of goods, from signatories to the GATT Code that are "not in good standing" with the Code, shall be denied. Procurement prohibition is also mandated against any country which discriminates against US suppliers in its procurement of goods or services, whether covered or not by the Code, and where such discrimination constitutes a "significant and persistent pattern or practice" and results in identifiable injury to US business.

To this effect, the US President is required to establish, as from 30 April 1990, and on an annual basis a report on the foreign countries which discriminate against US products or services in their procurement.

By 30 April 1992, those foreign countries, which discriminate against US suppliers, have to be identified by the USTR. Two possible courses of action would then be possible:

- *the USTR may resort to unilateral action against the offending foreign country, if the Code dispute-settlement fails to give satisfaction to the US (for the procurement covered by the Code). The dispute-settlement procedure should be initiated within 60 days after 30 April 1992 (first week of July 1992) and should be concluded within one year (July 1993). After that date, the President is required to deny such countries access to US procurement (1);*

- *the USTR shall identify foreign countries discriminating against US suppliers in procurement not covered by the Code, and 60 days after 30 April 1992 (first week of July 1992), deny such countries access to US procurement[1].*

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(1) *The procurement prohibition is set out in Section 4 of the Buy America Act of 3.3.1933.*

Comments/Estimated Impact

In its recent text on telecommunications access, the US made great play of the discriminatory nature of Article 29 of the Utilities Directive. That provision is the only such provision analogous to the Buy America provisions affecting federal procurement. Article 29 is not yet in force and its impact is in any event under US control - the provisions will not apply against third countries with whom the Community has reached an agreement ensuring comparable and effective access.

The EC is actively negotiating in good faith with the US to achieve such an agreement both in the GATT Procurement Code and the telecommunications sector. The threat of retaliation against a provision which would only come into force if those negotiations fail is hardly conducive to success.

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

Furthermore, the US has not offered to amend or eliminate this provision of the Trade Act up to now in the Uruguay Round Procurement Code negotiations.

II OTHER UNILATERAL/EXTRATERRITORIAL LEGISLATIVE MEASURES

II.A Extraterritorial aspects of US laws

Description

For reasons of domestic or foreign policy, the US has adopted a number of laws which entail to some extent extraterritorial application. Despite the fact that the Community may in some cases understand the underlying reasons and might agree with the objectives, such legislation nevertheless can expose Community enterprises to conflicting requirements.

Extraterritorial reach affects inter alia:

- importers and exporters based outside the US, who have to comply with US export and re-export control requirements and prohibitions;
- US owned or controlled business in Europe which have to comply with US foreign policy trade sanctions (Cuban Assets Control Regulation);
- manufacturers, which have to keep track of end-users or potential mis-users of sensitive items;

The typical case of extraterritoriality is to be found in the Export Control Regulations issued under the IEEPA(1) and the EAA(2). These regulations require companies created under the law of the Member States and operating in the Community to comply with US export and re-export regulations. This includes compliance with US prohibitions on re-exports for reasons of US national security and foreign policy. Even when goods have left US territory, they are still regarded as being subject to US jurisdiction. These regulations have been criticized many times already by the Community and its Member States, notably during the Siberian pipeline dispute of 1982, but they continue to be applied.

Furthermore, serious extraterritorial concerns have also been raised by the US Trade Act of 1988 amendment to section II of the EAA which provides 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. Moreover these sanctions are of such a nature (prohibition on contracting/procurement by US entities and the banning of imports of all products manufactured by the foreign violator) that they are contrary to the GATT and its Public Procurement Code.

Comments/Estimated Impact

The impact on business is often increased red tape and legal arguments with foreign administrations as regards jurisdiction over the business concerned.

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(1) International Economic Emergency Powers Act of 1977 (50 USC Sec 1701-1706)

(2) Export Administration Act of 1979, as amended. The latter has been reintroduced in Congress this year. The President is using, ad interim, his regulatory powers, under the International Emergency Executive Order.

It is generally recognized that the extraterritorial application of US laws and regulations, where it exposes companies to conflicting legal requirements, may have a serious effect on international trade and investment (cf. in particular the work of the OECD on "Minimizing conflicting requirements. Approaches of Moderation and Restraint"). Moreover, in many instances the extraterritorial application of certain laws implies an intention to replace the laws or fundamental policy of another country or international entity, such as the EEC, within its own territory, by the policy or laws of the US. This is clearly contrary to international law.

It is also the reason why many close trading partners of the USA such as Canada and certain Member States of the EC have "blocking statutes" in order to preclude the extraterritorial application of foreign legislation within their own territory.

The continued extraterritorial application of US laws contributes to serious jurisdictional conflicts between the US and the Community and its Member States. It also has a negative influence on the climate for trade and investment between the US and the Community.

It should also be pointed out that under US law, extraterritorial reach by other countries is unacceptable to the United States. The Export Administration Act, PL 96-72, section 8 (a), provides that "...the President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law of regulation..."

II.B Cuban assets regulations

Description

The Cuban Assets Control Regulations prohibit US legal persons and individuals, and companies incorporated in the US, from doing business with Cuba. There has been a sustained effort in Congress to extend this prohibition to US owned or controlled subsidiaries in third countries (proposals to that effect have been tabled by Senator Mack).

Comments

The EC has expressed serious concern about the extraterritorial effect which would result from the enactment of such an amendment.

In the past, the US administration has opposed such amendments. President Bush decided, on 16 November 1990, to withhold his approval (pocket-veto) of the Omnibus Export Amendments Act, precisely with respect to a similar provision (§ 128 of HR 4653 of 1990).

II.C Marine Mammal Protection Act

Description

The US Marine Mammal Protection Act (MMPA) of 1972, as amended through 1988, is aimed at the protection of various species, including dolphins. The Act notably fixes a maximum level of dolphin mortality in the fishing operations of US tuna vessels in the Eastern Tropical Pacific Ocean. This US legislation also provides for trade sanctions on countries failing to observe comparable standards for protection of dolphins.

In this context, an embargo on imports to the US of yellowfin tuna products has been placed on Mexico since 20.2.1991 and on Venezuela since 26.3.91. Previous embargoes on Panama and Vanuatu were lifted when these countries adopted measures which conform to the provisions of the MMPA.

The embargo also applies to imports into the US of yellowfin tuna and tuna products from "intermediary nations". These "intermediary nations" are required to ban imports of yellowfin tuna and tuna products from those countries embargoed by the US. All "intermediary nations" who do not comply within 60 days of the initial US embargo are the subject of a secondary embargo on their exports of yellowfin tuna and tuna products to the US.

As a result of the judgement of a California Court, the indirect embargo has been considerably expanded, with effect from 31/01/92, and currently affects 20 countries. Under this judgement, the scope of the "intermediary nation" embargo provisions was expanded to include all countries which import yellowfin tuna from any source and export yellowfin tuna and tuna products to the US.

Comments/Estimated Impact

Four Member States of the Community (Italy, France, Spain, United Kingdom) are affected by this secondary embargo. The value of the tuna exports concerned was around 4 million ECU in 1990. Apart from this direct effect on Community exports, the embargo has also impacted negatively on the image of Community products and has contributed to considerable disruption and falling prices on the Community tuna market.

The Community does not contest the validity of the objective of this environment protection law, which it shares. However, the Community considers that measures for the conservation of living resources, including dolphins should be acheived through international cooperation and rejects the unilateral and extraterritorial elements of US law.
The Community considers that the analysis presented by the GATT Panel Report requested by Mexico on the tuna/dolphin problem and which concluded on the illegality of the embargoes should be fully taken into account. Consequently, the unilateral trade and GATT-illegal elements of the MMPA should be removed. The Community insists upon the need to adopt the Panel Report as a first step in clarifying the interactions between environmental and trade policy. In addition, the Community has requested consultations with the US under GATT Article XXIII.1 on this issue. Multilateral negotiations leading to agreed international rules are to be preferred to GATT-illegal, unilateral measures.

II.D Fisheries legislation

Description

In 1990 the US Congress passed a bill to reauthorise the Magnuson Fishery Conservation and Managment Act of 1983. The resulting amendments had a particular impact on international fisheries matters and the US relationship with its partners, including the Community.
The Act as amended proposed that the US apply a number of unilateral measures to partners in Governing International Fisheries Agreements (GIFAs) on the high seas. These proposals included the US having access to the positions of driftnet fishing vessels operating beyond their exclusive economic zone; the US having the right to board and inspect such vessels; the US right to have on-board observers etc.

The amendments also required the Department of Commerce to list the nations whose nationals engage in large scale driftnet fishing in a manner which is considered by the US as either diminishing the effectiveness, or as being inconsistent with any international agreement governing large scale driftnet fishing to which the US is a party. The nations so listed are "certified" for the purpose of section 8(A) of the Fisherman's Protective Act of 1967 (the so-called "Pelly amendment"). This section provides that the President may embargo the marine products of any "certified" nation.

In addition, the US has introduced a compulsory system of Certificates of Origin, with effect from 1 July 1991 for fish caught in the Souther Pacific, and 1 July 1992 for fish caught elsewhere. Certificates are required for experts to the United States of deep-frozen or canned yellowfin tuna or sides of Yellowfin tuna, of deep-frozen Albacore, Skipjack and Bluefin tuna and other species including shark, salmon, squid and swordfish. The certificates must give details of the type of vessel used, the date and location of the catch, the type of fishing gear used, and so on. Special rules are likewise set down for countries using large trawl nets. Community exporters feel that these Certificates of Origin constitute a serious obstacle, involving the need for an expensive registration system: the canning sector will find it difficult to meet the requirements.

Comments/Estimated Impact

The US is entitled to link access to the living resources in its exclusive economic zone to certain conditions.
Moreover, the US Administration has declared its intention to use some of the new Congressional directives as advisory guidelines for relations with third countries, stressing that it would prefer to make use of international cooperation to achieve the aims set out by Congress.
However, the amendments passed by Congress confirm a tendency of the US to use their own measures (e.g. US definition of large driftnets) as benchmarks for third countries' policies. The US authorities are also empowered to seek to impose these measures unilaterally, if necessary by

means of a total boycott of the fisheries trade. However well founded the US objectives, their actions should reflect the work of international cooperation. Otherwise, such unilateral measures can be disproportionate to the objective of conservation and destabilising for international trade.

III THE IMPACT OF NATIONAL SECURITY CONSIDERATIONS ON TRADE MEASURES

US trade policy includes various provisions which refer to national security considerations to justify trade actions against foreign imports, procurement, exports or investment. The EC is concerned that such justifications may on occasion be employed in areas where there is not a significant threat to national security and that this misuse constitutes a protectionist barrier.

A non-exhaustive presentation of these practices, affecting the trading partners of the US, is given in the following paragraphs.

III.A Import restrictions

The US can restrict imports, on the justification of national security. This is done through petitions of the US industry under Section 232 of the Trade Expansion Act of 1962. Protection measures can be taken for an unlimited period of time.

The Department of Commerce investigates the effects of importation which would threaten to impair the national security either by the quantity or by the circumstances. The purpose of Section 232 is supposed to be to safeguard the national security of the US, not the economic welfare of any company, except when that company's future may indeed affect US security. Section 232 may be invoked even if injury to national industry is not proven.

In the past, the EC has voiced its concern that Section 232 gives US manufacturers an opportunity to seek ostensible protection on grounds of national security, but in reality simply to curb foreign competition.

Machine tools

Following a Section 232 petition by the National Machine Tool Builders Association (NMTBA), the Department of Commerce found in February 1984 that imports of certain categories of machine tools threatened US national security.

As a result, in May 1986, the US President announced his intention to negotiate a series of voluntary restraint agreements (VRA) with Japan, the Federal Republic of Germany, Taiwan and Switzerland (79% of US imports) covering 7 of the 18 product categories identified in the Section 232 report.

Japan and Taiwan agreed to restrict their exports to the US market share levels they had in 1985 or 1981 depending on the product category.

When it was approached by the US, the EC did not accept the proposal to negotiate a VRA. The US then unilaterally set target market shares for imports of machine tools from the Federal Republic of Germany and has monitored such imports. German exporters are therefore under the threat of a unilaterally introduced import ban on their products should the target be exceeded.

At that time, the US Administration also warned other non-VRA countries, including the United Kingdom, Spain and Italy not to allow their exporters to fill the gap created by the VRAs.

The VRA lapsed on 31 December 1991. The US machine tool market was estimated at an annual value of $4.2 bn(1).

The US Administration is now considering the various options, and has consulted with all interested groups of industry. It is expected that the final determination by the ITC on whether to renew these restrictions will be made during the first quarter of 1992.

Gears

The American Gears Manufacturers Association (AGMA) has filed a petition under Section 232 in the wake of a report prepared by the Department of Commerce (Bureau of Export Controls) in January 1991, assessing national security and the US gears market and industry.

The AGMA is alleging that the US industry is declining, this being caused by an increased foreign market share.

The European Community and its Member States made demarches to the US Administration, requesting it to base its determination on all gear-manufacturing plants (including the automotive sector) since the output of such plants can be redirected to Department of Defense requirements in case of mobilisation.

The findings of the Secretary of Commerce are to be reported within 270 days to the President who has 90 days to accept or reject these findings and take corrective action.

US trade policy includes various provisions which refer to national security considerations to justify trade actions against foreign imports, procurement, exports or investment. The EC is concerned that such justifications may on occasion be employed in areas where there is not a significant threat to national security and that this misuse constitutes a protectionist barrier.

A non-exhaustive presentation of these practices, affecting the trading partners of the US, is given in the following paragraphs.

III.B *Procurement restrictions*

Description

Procurement by the Department of Defense (DoD) is considered as one means to address the issue of the maintenance of an industrial base capable of meeting national security requirements.

For the DoD, the "national security includes economic security and

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(1) Source : "Tooling up", in National Journal 19.10.91 p. 2544 and 2545.

requires that DoD have an assured and reliable source of supply of defense material in peace time, crisis, and war, in an era of declining budgets and increasing of defense markets"[1].

"National security" was originally used in the 1941 Defense Appropriation Act to restrict procurement by the DoD to US sourcing. It is remembered as the Berry Amendment and has been used even since as the means to restrict DoD procurement of a wide range of procucts to US suppliers. The latest version[2] reads as follows:

"SEC. 8005. No part of any appropriation contained in this Act, except for small purchases in amounts not exceeding $25,000 shall be available for the procurement of any article of food, clothing, tents, tarpaulins, covers, cotton and other natural fibre products, woven silk or woven silk bends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), or any item of individual equipment manufactured from or containing such fibers, yarns, fabrics or materials, or specialty metals including stainless steel flatware, or hand or measuring tools, not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles or itmes of food or clothing or any form of cotton, woven silk and woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, wool or specialty metals including stainless-steel flatware, grown, reprocessed, reused, or produced in the United States or its possessions cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States for the personnel attached thereto ..."

***The Berry Amendment** allows for some exceptions when:*

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

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(1) DoD Report to Congress on the <u>Defense Industrial Base</u> as required under Section 825 of the FY 1991 National Defense Authorization Act, November 1991, p. 4-7

(2) Department of Defense Appropriations Act, 1992, P.L. 102-172, 26 November 1991

__The National Security Act of 1947 and the Defense Production Act of 1950__ grant authority to the President and the Secretary of Defense to impose restrictions on foreign supplies to preserve the industrial mobilization base and the overall preparedness of the US.

Congress can also adopt additional Buy America restrictions citing national security interests. Each year, the Department of Defense Appropriations Act sets the Buy American requirements for DoD[1], but such restrictions may also be attached to other non-related legislation (e.g. the 1990 restriction on procurement of naval circuit breakers was introduced in the Dire Emergencies Supplemental Appropriations Act).

Canada is granted national treatment, since it is considered as part of the North American mobilisation sphere.

The Allies of the US have concluded with the US various cooperative industrial defense agreements or reciprocal procurement agreements (M.O.U.) including certain EC countries. These agreements provide for a blanket waiver of the Buy American Act by the Secretary with respect to products produced by the Allies, and they promote more efficient cooperation in research, development and production of defence equipment and achieve greater rationalisation, standardisation, and interoperability. The US has concluded such M.O.U. or similar cooperation arrangements with the UK (1975), France (1978), the Federal Republic of Germany (1978), Italy (1978), the Netherlands (1978), Portugal (1978), Belgium (1979), Denmark (1980), Luxemburg (1982), Spain (1982) and Greece (1986).

However, under Section 833, the US Administration (DoD and USTR) can determine the standing of an Ally (discrimination against US products) under the bilateral agreements and rescind the blanket waiver of the Buy American Act[2].

According to EC industry sources, there are good indications that US procuring officers disregard the exemption of Buy American restrictions for M.O.U. countries.

The criteria for DoD procurement of dual-use products introduced into the __FY 1992-1993 Authorisation Act__ create new uncertainties as to which areas the US considers to be covered by the GATT Procurement Code and which are subject to the national security exemptions.

Furthermore, under this legislation, DoD procurement of dual-use products will only be opened to "eligible firms", as determined by the Secretary of Commerce on the basis of three criteria :

- *a significant level of US - based activities*
- *US majority-ownership*

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(1) *Department of Defense Appropriations Act for FY 1992 PL 102-172 signed on 26 November 1991 (HR 2521); see also DoD Authorization Act 1992-1993, signed on 5 December 1991 PL 102-190 (HR 2100).*

(2) *National Defense Authorization Act for FY 1992 and 1993. PL 102-190, 5 December 1991.*

- reciprocity with countries and firms associated in cooperative agreements with the US.

This has consequences both for procurement and for the application of national treatment in respect of production of goods which are otherwise sold commercially.

Voice of America (US Information Agency/State Department)
The equipment for the "Voice of America" radio station is covered by the "overriding national security interest" criterion, which gives a 10% price preference to US contractors, as well as a domestic component requirement of 55%. Voice of America procurement concerns transmitters, antennae, spare parts and other technical equipment (Title IV of Public Law 100-204, Section 403(a)).

Furthermore, Section 403(d) (A)-(F) provides for mandatory countervailing pricing of foreign bids, when the bidder has received subsidies (proportionate to the amount of the subsidy).

The Buy American provision can be waived if the following criteria are documented :

- the foreign bidder can establish that the US goods and services content (excluding consulting and management fees) of his proposal will not be less than 55% of both the value of such a proposal and the resulting total contract (this clause also applies to domestic bidders);

- a Buy American preference is precluded by the terms of an international agreement with the host foreign country;

- the host foreign country offers US contractors the opportunity to bid on a competitive and non-discriminatory basis in its own radio and television sector;

the Secretary of Commerce certifies that the foreign bidder is not receiving any direct subsidy from any government, the effect of which would be to disadvantage a US bidder on the project.

The value of Voice of America procurement as foreseen by the Foreign Relations Appropriation Act is in the range of $1.3 bn.

Valves and machine tools
Although the Code on Government Procurement provides that machine-tools procured by DoD are generally included, the US has taken the approach since 1981 that most of these machine-tools are excluded for national security reasons. Furthermore, in 1986, Congress decided unilaterally to exclude machine-tools from the MOUs negotiated by the Administration with third countries.

This Buy American restriction, better known as the Mattingly Amendment, was first adopted by Congress in 1986 and Section 834 of the National Defense Authorisation Act, FY 1992-1993 extends it until 1996. It is applied in a discriminatory fashion, since only Canadian or US bidders are

allowed to supply the 21 Federal Supply Classes (FSCs) of machine-tools for use in DoD-owned or controlled facilities[1].

It may be waived if adequate and timely domestic supply is not available. The declared objective is to protect the US machine-tool industry against foreign competition in order to preserve the US industrial mobilization base.
Furthermore, US Federal procurement of foreign machine tools has been made more difficult by a change last year in the rule of origin applied (DoD Appropriation Act). The rule previously required 50% local content, but now requires that assembly should also take place in the US/Canada. To be able to sell in the US, EC companies now have to consider having their products built under licence in the US. Such forced investment is then the only avenue open to Community producers for access to this market.

Following a Section 232 petition (Trade Expansion Act of 1962) by the US National Machine Tool Builders Association (NMTBA), the Department of Commerce found in February 1984 that imports of certain categories of machine tools threaten US national security. The Department of Commerce is furthermore likely to formulate a case, and to subject it to inter-agency review, with a view to a recommendation by the Commerce Secretary to the President by 27 July 1992. The president then has 90 days to decide.

According to the US (the Defence Economic Impact Modelling System of 1985), the DoD procurement of machine-tools is estimated at $ 1 bn.

Antifriction bearings
This restriction is imposed on all types of bearings. The DoD rule has been extended for 18 months from October 1991 with the possibility to extend the restriction for another 2 years. However, Canadian supplies are not subject to this restriction.

US DoD Procurement of ball bearings amounted in 1988 to $800 m. according to the Department of Commerce Bureau of Census, which corresponds to 20 % of total US apparent consumption of ball bearings.

When this restriction was introduced, the EC expressed its doubts about the national security justification of a Buy America restriction on all ball-bearings. Since that time, evidence from US sources seems only to reinforce these doubts.

The International Trade Administration (ITA) found in its Section 232 study of the effects of imports of anti-friction bearings on national security (July 1988) that national security was not threatened by imports in eight categories of bearings. Only two of the fifteen categories reviewed experience shortfalls attributable to substantial import penetration: viz. regular precision ball-bearings under 30 mm, and between 30/100 mm.

The DoD report to Congress on the "Impact of BAR affecting defense procurement" (July 1989) concluded that the "protection provided by DoD to the domestic industry has had some negative impact", affecting US relations with its military partners and increasing US capacity utilization rates leading to longer times for supply.

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(1) Sec. 834 of PL 102-190, 5 December 1991.

(4)

In addition, an ITC decision of 1 April 1991 stated that there was no indication that any US industry was suffering material harm, or was in danger of suffering material harm as a result of imports of ball bearings from fourteen countries, including members of the Community. The significance of this decision is that it came only a few months after the Trade Department's rejection of a request submitted by American industry that a system be set up to monitor imports of ball bearings from the same fourteen countries.

Furthermore, indication of the recovery of US domestic production is to be found in the US Bureau of Census's Report on the US Industrial Outlook 1991 as well as its specific reports on antifriction bearings which have confirmed the opinion of the EC that the US ball-bearing industry has regained full competitivity and is now even in a position to compete abroad on export markets. Under these circumstances, there can be no justification for the continuation of the current Buy America restriction on ball-bearings on the grounds of a threat to the US industrial strategic base.

Synthetic fibres
This restriction was introduced in the DoD Appropriations Act of 27 November 1991 (HR 2521). This prohibits the use of synthetic fibres from a foreign source as long as they are available domestically. It is therefore not possible for products containing European (or other foreign made fibres) to be supplied to DoD. The annual Procurement value of clothing is estimated by the DoD at $ 200 m.

The EC rejects the US argument that the articles in question are ipso facto covered by the general exemption applied for reasons of national security.

Forging items
This restriction covers automotive propulsion shafts, as well as other forging items (see DoD Appropriation Act of 27 November 1991 - HR 2521).

It is not applied to Canadian supplies.

Given that total DoD procurement of these items accounts for 5 % of the US forging consumption and less than 10 % of all DoD procurement for forging items, it is clear that defence mobilization would exist irrespective of DoD purchases. Hence it is difficult to see how national security can be used as a justification for these restrictions.

The DoD report to Congress itself (July 1989), states that this restriction on forging items in general does not need to be continued, because the US industry has become more competitive. Bilateral agreements with its military allies required that these items be covered in order to maintain an industrial base on both sides of the Atlantic.

The US is clearly in violation of the Procurement Code, since these items are covered by the Code and the restriction is discriminatory in favour of Canada.

Hand and measuring tools
This restriction was introduced in 1987. It is maintained in the DoD

Appropriations Act of 27 November 1991 and concerns the products listed in Federal Supply Classes (FSCs) 51 and 52. A 75% price preference is accorded to US made tools.

The following procurement restrictions were also adopted on "national security" grounds. This is not an exhaustive listing.

Coal and coke for use by the American forces in Europe
This restriction provided by Section 8008 of PL 102-172[1] is intended to protect the market of US anthracite producers and shippers. It may not be applied if no US supplies are available. There is no exemption for procurement for US installations abroad from local European suppliers.

Supercomputers for the US Army
Since 1987 only US supercomputers are to be bought by DoD. The justification given for this restriction is the need to develop US capability in this area for national security purposes. It may be waived if the Secretary of Defense certifies to Congress that foreign supply is necessary to acquire capability, for national security reasons, which cannot be met by domestic sources.

Circuit breakers
This restriction is imposed by US C 2507(F) DoD FAR 48 CFR 225 and 252 which prohibits purchases for air circuit breakers for naval vessels that are not produced in the US. In addition, US components must exceed 50% of the cost of its components.

Carbon fibres
The DoD Appropriations Act of 1987, effectively requires that 100% of DoD purchases of polyacrylonitrile carbon fibre be supplied by US sources by 1992. The objective is to establish and maintain a US industry in advanced composite materials. No waiver or exemptions are provided. Furthermore, the 1992 DoD Appropriations Act requires the Secretary for Defense to ensure that 75% of other types of carbon fibres be procured from domestic sources by 1994[1].

Naval vessels and coastguard vessels
The "Burnes-Tollifson" amendment of 1964 (Section 7309, title 10 USC) requires that US naval vessels and coastguard vessels be built in US shipyards. This restriction is extended to cover small inflatable boats or rafts.

High-carbon ferrochrome
This restriction is part of the Stockpile Conversion Program and was the result of a Section 232 study which concluded that the five US firms which produce these chromites were threatened by imports.

Selected forging items
This restriction covers anchor chains, propulsion shafts, periscope tubes, rings, cannons, mortars, small calibre weapons, turrets, gears, crankshafts, etc. DoD procurement for these items accounts for 5% of the US consumption of forging items.

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(1) Department of Defense Appropriations Act, 1992-1993.
PL 102-172, 26 November 1991. Section 8040.

Speciality metals
This restriction is based on the Berry Amendment and it limits procurement exclusively to US suppliers for the following metals: alloyed steel, hafnium (HS 81.12.91.10, 81.12.99.10), alloyed metals, titanium and its alloys (HS 81.08.90), zirconium and its alloys (HS 81.09, 10.10, 81.09.90). However, there are indications that the waiver for suppliers from countries which have a bilateral cooperative agreement with the US, is not implemented by DoD procuring officers.

Supply of anchor and mooring chains
This restriction applies to welded shipboard anchors and mooring chains under 4 inches in diameter (Sec. 8040. PL 102-172, Nov. 26, 1991). The restriction exists despite the finding in the report presented to Congress by the Department of Defence in July 1989, entitled "The Impact of Buy America Restrictions Affecting Defense procurement", which stated that "anchor and mooring chain are not considered a mobilization critical item" (p 114).

Comments

National security may be invoked, under Article VIII of the GATT Procurement Code, to deny national treatment to foreign suppliers.

However, the use of the "national security" justification by the US has led in practice to a substantial reduction of the DoD supplies covered by the GATT Public Procurement Code.

The DoD report to Congress (July 1989) considers that many of the procurement restrictions justified on so called national security grounds "provide protection and guaranteed business to US industries without any requirement or incentives for the industry to modernize and become competitive", and therefore do not even fulfil the domestic objective of an essential US industrial base. As an example, see their comments about anchor and mooring chains, quoted above.For example

The DoD concluded in its report that in many cases, restrictions should be terminated and Congress should instead support Domestic Action Plan or National Stockpiling Programs. The main arguments against procurement restrictions are, according to the DoD:
- *they increase by 30 to 50% the price of DoD requirements;*
- *they are a disincentive for investment and innovation;*
- *they are costly in terms of paperwork and management;*
- *they have produced increased leadtimes for supply by domestic industries;*
- *they maintain a climate of protectionism;*
- *they create an atmosphere of animosity with allies, particularly when they violate the spirit of the M.O.U.'s.*

In a second report to Congress about the US defence industrial base, the DoD recognises that "when it is in the national interest, many products used by DoD are purchased from foreign sources - for example, when foreign goods provide performance, cost, or quality advantages or further the goal

of commonality with Allies"[1].

Furthermore, the DoD admits that "overseas sources are a vital asset to our (US) national defense and help to strengthen the national security; however, there may be occasion when excessive reliance on a single overseas source potentially could lead to unacceptable risks to the continuity of supply ... Findings to date indicate that although foreign vulnerabilities are potentially of great concern to DoD, they represent an exceedingly small proportion of the items that are foreign-sourced today"[2].

However, the DoD notes that the "US Buy America prevents foreign suppliers from participating in certain aspects of US defense contracts"[3].

The Community would not disagree. It also considers that the changing defense balance in the West and the deepening of the US/EC relationship should allow for a rethinking of access to Department of Defense procurements or programmes.

During the Uruguay Round multilateral negotiations, in the market Access Group - tariff and non-tariff measures - and in the Procurement Informal Negotiating Group, the EC requested the US to eliminate Buy American restrictions (B.A.R.) applicable to broad categories of products regardless of their relation with defense issues. The US denied that there was any abuse of the security exception included in the General Agreement and the Procurement Code. The US recalled that these BAR had been notified but that they were not tabled for negotiation.

III.C Export restrictions

The US has established, under the Export Administration Act of 1979 (EAA), a comprehensive system of export controls, with a view to prevent trade with enemies or to unauthorised destinations. This system is also used to enforce US foreign policy decisions and international agreements on non-proliferation of certain types of goods or know-how (chemical precursors, nuclear items, etc.).

The Member States of the EC have their own export controls system and cooperate with the US in the COCOM. This makes the extraterritorial characteristics of the EEA mentioned in Chapter II.A above all the more inappropriate.

The EC has in the past expressed its concern as regards the unilateral determination made by the US concerning export licences for products made in the EC (Siberian pipeline case of 1982).

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(1) Report to Congress on the Industrial Base, under Section 825 of FY 1991 National Defense Authorization Act, November 1991, p. E-5

(2) Idem, p. 4-3, 4-4

(3) Idem, p. 4-2

III.D Investment restrictions

The US restricts foreign investments or foreign ownership in certain economic sectors, deemed to be essential to US national security.

An overview of investment restrictions is given in Chapter XII.

IV PUBLIC PROCUREMENT

Introduction

This chapter will first give a brief description of US discriminatory procurement practices and, the so-called Buy American provisions in general, and second will refer to those subject to the current negotiations for the extension of the Code.

The European Community has repeatedly expressed its deep concern not only about the continuation of and increase in Buy American provisions at federal level, but also about the legislative barriers and discriminations operated against European suppliers at State and lower levels.

The European Community has complained generally about the restrictive interpretation made by the US of Article VIII of the Code on Government Procurement (national security) and in particular about their exception list concerning Department of Defense (DoD) purchases. This interpretation has led in practice to a substantial reduction of the DoD supplies covered by the Code. (See Chapter III above)

The European Community will continue through a case by case analysis of unilateral reductions of coverage imposed by the US authorities and discuss these matters with them in GATT through consultations and panels in order to seek an improvement of the existing defence exception lists and to clarify above all the scope, which should be limited, for using the national security exception of the GATT Procurement Code. Concerning other cases of non-conformity with the GATT Code (non-defence related supplies), the European Community will initiate, if necessary, new consultations or pursue matters already engaged in with the US authorities.

The Uruguay Round multilateral trade negotiations give an unequalled opportunity to ensure the elimination of US discriminatory procurement practices. In the context of these negotiations, the EC is seeking to ensure that the Code will apply equally at the level of States and regional and local entities, in the sectors of utilities and in procurement of services (including public works). It is, of course, willing to commit itself to equivalent opening of its own procurement market in this context.

IV.A Buy American Restrictions (Bars)

Description

Buy American restrictions take several forms: some straightforwardly prohibit public sector bodies from purchasing goods from foreign suppliers, others establish local content requirements of anything up to 100% of the value of the product, while others still extend preferential terms to domestic suppliers. Furthermore contracts may require the set up of manufacturing or assembly facilities in the United States.

These restrictions derived from the ***Buy American Act*** *(BAA) of 3 March 1933*[1] *which applies to government supply and construction contracts. It requires that:*

- *federal agencies procure only domestically manufactured or unmanufactured supplies for public use*[2] *which have been mined or produced in the US and also only manufactured goods with a substantial local content defined as 50% by the Executive Order 10582 of 1954;*
- *only domestic materials shall be used in the construction, alteration, and repair of public buildings and public works.*

Executive Order *10582 of 17.12.1954, as amended, expanded the restriction in order to allow procuring entities:*

- *to set aside procurement for small business and firms in labour surplus areas;*
- *to reject foreign bids either for national interest reasons or national security reasons.*

The Buy American Act contains four exceptions. An executive agency may procure foreign materials when:

- *items are for use outside the US;*
- *domestic items are not available;*
- *procurement of domestic items is determined to be inconsistent with the public interest;*
- *cost of domestic items is determined to be unreasonable.*

Executive Order 10582 defines "unreasonable" as a cost differential greater than 6% of the bid price including duty and all costs after the arrival in the US. The Department of Defense applies a 50% price differential (exclusive of duty and costs) or 6% (inclusive of duty), whichever is the higher.

The ***Trade Agreement Act*** *of 1979 (Implementation of the Tokyo Round) waives the BAA for certain designated countries which grant reciprocal access to US suppliers.*

As regards construction, foreign materials may be procured when:

- *it is impractical to purchase domestic ones;*
- *procurement of domestic items will uneconomically increase the cost of a project.*

Buy American restrictions are also provided for in the following legislation:

- ***National Security Act of 1947 and the Defense Production Act of 1950****, which granted authority to the President and the Secretary of*

(1) PL 72-428, as amended by the Buy American Act of 1988 (PL 100-418, 102 Stat 1107, Title VII, 23.8.88)

(2) Title 41, § 10 a, American materials required for public use.

Defense to impose restrictions on foreign supplies to preserve the domestic mobilization base and the overall preparedness posture of the US. These restrictions are "justified" by "national security", although in most cases the issue is not the achievement of defense objectives but the protection of industry - they are also considered in Chapter III;

- ***Department of Defense Balance of Payments Program**, which provides for a 50% price correction on foreign offers when compared with US offers;*

- ***US Federal Departments Specific Annual Budget Appropriations and Authorization Acts**, which give a 10% to 30% price preference to US offers, notably in the following sectors :*

  - *water sector utilities*
  - *transport sector utilities*
  - *shipping of US goods and commodities*
  - *highway construction*
  - *energy utilities*
  - *telecommunication utilities*

- ***Trade Agreement Act of 1979** requires the President to bar procurement from countries which do not grant reciprocal access to US supplies covered by the GATT Code on Procurement.*

- ***Competition in Contracting Act of 1984 (CICA)**, which allows the procuring agencies to restrict procurement, on a case by case basis, in order to achieve industrial mobilization objectives,*

- ***Trade Act of 1988** modifies both the BAA of 1933 and the Trade Act of 1979 to allow the President to bar procurement from countries which do not provide access to US products and services.*

Legislation in at least 40 States also provides for Buy American restrictions on their procurement. US statistics show that State spending represents more than 70% of total US public procurement (see Chapter IV.B.1 below).

Comments/Estimated Impact

Buy American restrictions, provided for by federal and State legislation, are intended to secure procurement for domestic suppliers and to maintain a US industrial strategic base. In parallel to that, the US Federal budgetary policy has been to increasingly reduce federal expenditure and revenue. These policies have led to:

- *a continuing decline in the value of federal procurement and thus in the value of the procurement covered by the GATT Code;*
- *a shift in financial (revenue-raising and funding) and procuring responsibilities from the Federal Government to the State and local governments.*

US procurement at federal level totals approximately \$191.2 bn[1]. The value of US procurement covered by the GATT Code as reported by the US has declined from \$19.2 bn in 1987 to \$17.7 bn in 1989 whereas the contracts below the thresholds and falling outside the Code have increased over the same period from \$7.4 bn to \$9 bn.

In addition it is worth noting that almost the totality of non-GATT code covered US procurement is restricted to US suppliers through Buy American provisions. These Buy American provisions are only waived in the case of the Free-Trade Agreements with Canada and Israel, or of the bilateral reciprocal defense procurement and industrial cooperation agreements (M.O.U.) which can in any case be unilaterally modified by the US[2].

There are at least 40 Federal Buy American legal instruments and at least 37 States have Buy American legal instruments, and there are many more at local governmental level. Buy American restrictions are usually in the form of a Buy American preference (ranging from 6% to 50%) in favour of domestic products, i.e. products with a 50% domestic content (in some cases, the content must be as high as 65%). In some instances, the Buy American restriction is absolute.

The Department of Defense (DoD) report to Congress (July 1989) considers that many BARs "provide protection and guaranteed business to US industries without any requirement or incentives for the industry to modernize and become competitive", and therefore do not fulfil the objective of a US industrial mobilization base. Furthermore, the report states that they maintain a climate of protectionism, in the international relations of the US with its trade partners, especially when they fail to comply with the M.O.U. by allowing various Buy American restrictions to affect M.O.U. countries procurement.

It is thus clear that the potential US market for Community exports is significantly affected by these restrictions.

IV.B Measures in areas covered by the GATT Code negotiations

Introduction

The European Community considers that the following US procurement restrictions[1] should be eliminated through the current negotiation of

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(1) Source : US Federal Procurement Report Fiscal Year 1990.

(2) Cooperative industrial defense agreements or reciprocal procurement agreements (M.O.U) are concluded by the US with foreign countries including certain EC countries, to promote more efficient cooperation in research, development and production of defence equipment and achieve greater rationalisation, standardisation, and interoperability. The US has concluded such M.O.U. or similar cooperation arrangements with the UK (1975), France (1978), the Federal Republic of Germany (1978), Italy (1978), the Netherlands (1978), Portugal (1978), Belgium (1979), Denmark (1980), Luxemburg (1982), Spain (1982) and Greece (1986).

(1) This list is by no means an exhaustive one.

the extension of the GATT procurement Code[2]*. These restrictions are implemented at State level, or in the so-called "excluded sectors", or in the procurement of services.*

IV.B.1 State procurement restrictions

Description

The following US States impose Buy American requirements on their procurement:

Alabama:

Alabama legislation requires the use of US materials "if available at reasonable prices" for public works that are financed entirely by the State. It prohibits the purchase of foreign steel for highway and bridge construction.

California:

California legislation provides for total domestic supply. However, as regards public works, a price preference of 10% is used for products and services (Buy Californian Act of 1980).

Colorado:

Colorado legislation provides that only US produced or manufactured products are procured for highway projects.

Georgia:

Georgia legislation requires that only Georgia-made or US made products at equal quality and price are to be procured.

Hawaii:

Hawaii legislation requires that preference should be given to Hawaiian and other American products.

Idaho:

Calls for tender carry a clause restricting use of foreign items.

Illinois:

Illinois Domestic Procurement Act gives a price preference of 15% to US items. The Department of Transport (DoT) prohibits the procurement of foreign steel in highway and bridge construction.

Indiana:

Indiana legislation provides for a 15% price preference for domestic

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(2) The current round of negotiations does not include the negotiations on national security exceptions.

steel in all state and local public works, which may be increased to 25% in labour surplus areas, at the discretion of district officers of the Highway Commission. Calls for tender carry a clause restricting the use of foreign items.

Iowa:

The State Highway Commission prohibits foreign-made structural steel to be used in bridge construction.

Kentucky:

Under Kentucky statutes foreign supply is prohibited.

Louisiana:

The Department of Highways procures only US supplies of steel products.

Maine:

The Bureau of Purchases reserves its right to reject bids involving foreign products competing with US ones. Furthermore, bidders must disclose intent to use foreign items.

Maryland:

The State Highway Administration specifies in the call for tenders "domestic, not foreign, steel and cement". A 20% price preference for domestic steel in state and public works (up to 30% in labour surplus areas) is applied to contracts of at least 10,000 pounds of steel products.

Massachusetts:

Massachusetts legislation grants preference to in-state products first, and then to US products. The Department of Public Works stipulates that "structural steel regardless of its source shall be fabricated in the US".

Minnesota:

Minnesota legislation allows for specifications in calls for tenders to be determined in order to use only US items.

Mississippi:

The State Highway Department specifications for calls for tenders provides that "only domestic steel and wire products" may be used in road and bridge construction.

Montana:

Montana legislation gives preference to in-state and American products.

New Hampshire:

The Department of Public Works specifies in their calls for tenders that

"all structural steel shall be restricted to that which has been rolled in the US".

New Jersey:

New Jersey legislation requires US domestic materials such as cement, to be used on public works projects.

New York:

New York legislation provides for a restriction on procurement of structural steel, or steel items for contracts above $ 100,000 unless domestic supplies are not available within a reasonable time or are not of a satisfactory quality. Calls for tenders carry a provision restricting the supply to domestic items, through terms of reference or specifications.

New York City imposes value-added conditions on procurement, such as the location of the manufacturing plant in its jurisdiction or employment of the local workforce.

North Carolina:

Contracting officers impose ad hoc restrictions on foreign supplies.

North Dakota:

Calls for tenders carry the provision "bid domestically produced material only".

Oklahoma:

Oklahoma legislation requires the purchase of domestic items unless foreign ones are cheaper or superior in quality at equal prices. This is also applied to steel products.

Pennsylvania:

Pennsylvania legislation prohibits procurement of foreign steel, cast iron and aluminium products made in countries that discriminate against US products and a restriction to solely US steel is applied to public works (State and local). Suppliers must prove compliance by providing bills of lading, invoices and mill certification that the steel was melted, poured and manufactured in the US.

Rhode Island:

Rhode Island legislation gives preference to US suppliers.

South Dakota:

Specifications in calls for tenders are designed to procure US items.

West Virginia:

West Virginia Law provides that contracts must specify US steel, aluminium, glass to be used in public works projects, and give 20% price preference for domestic steel, aluminium and glass in state and local public works (up to 30% in labour surplus areas).

Wisconsin:

Wisconsin legislation requires the procurement of US items.

District of Columbia:

The Federal Buy American Act applies in DC.

States with 5% price preference for in-state suppliers:

- *Alaska*
- *Arizona*
- *Arkansas*
- *New Mexico*
- *Wyoming*
- *Nebraska*
- *Kansas*

Comments/Estimated Impact

State and local government procurement represents 70% of the total US procurement. Federal funding to the States and local government represents 16% of the annual expenditures of States and local government, and such federal funding is usually conditioned by the respect of the BAR mandated by Congress (refund of federal money is the sanction in the procurement of foreign products/services by States or local government).

IV.B.2 Set-aside for small business

Description

Special legal provisions restricting procurement to U.S. small and disadvantaged business exist in relation to federal procurement.

The most important of these is Public Law 95-507 (October 1978), which made major revisions to the Small Business Act of 1958. This sets out the obligations of federal agencies regarding contracting with small and disadvantaged businesses in the field of public procurement of supplies, services and works. The Small Business Administration has established industry size standards on an industry-by-industry basis, based on the number of employees (varying from 500 to 1,500), or annual receipts which are considered to be the maximum allowed for a concern, including affiliates.

Federal agencies are required to award contracts to certain small businesses in accordance with different rules. An important example is the minority business set-asides which are operated by the General Services Agency (GSA). The purpose of these set-asides is to award certain contracts exclusively to small business. There are three classes of set-aside :

- *small purchase set-asides ("reserved procurements") which are limited to acquisitions of supplies or services that have an anticipated dollar value of $25,000 or less. These set-asides are authorized unilaterally by the contracting officer;*
- *total set-asides, where the entire amount of an individual acquisition or class of acquisitions, including construction and maintenance is set-aside for exclusive small business participation;*
- *partial set-asides, where the acquisition is split between a "set-aside portion" and a "non set-aside portion" (not applicable to construction contracts).*

The GSA also operates a number of Business Service Centres which may challenge a decision of a contracting officer who does not set aside a contract for small business.

At State and local level, legally established preferences for small business exist in 18 States but practices having similar effects are found in a larger number of States. A small business preference can take at least three forms :

- *an outright percentage preference which can be a fixed or varying amount up to a ceiling;*
- *a pure "set-aside" programme;*
- *a quota system whereby a percentage of total awards shall be made to small businesses.*

Furthermore, Federal regulations must be applied where projects undertaken at State and local level are financed by Federal grants.

<u>Comments/Estimated Impact</u>

The GATT Code contains a US reservation indicating that it does not apply to small and minority businesses set asides. However, according to figures of the Federal Procurement Data Centre, small and disadvantaged businesses are currently obtaining between 25 and 30 percent of total Federal procurement (these percentages include direct contracts and subcontracting).

IV.B.3 ***Restrictions in the sectors of utilities and public works***

The following sectors which are protected by a Buy American preference are being negotiated in the Uruguay Round.

Description

a) *Water utilities*

- ***Pollution control equipment used in projects funded by the Federal Water Pollution Control Act and Section 39 of the Clean Water Act of 1977***

  Under the Waste Water Treatment Construction Program, the Environment Protecting Agency (EPA) provides funds to local units of government for up to 75% of the cost of the projects. The Federal Water Pollution Control Act, as amended by Section 39 of the Clean Water Act, provides for a 6% price preference for US suppliers.

b) *Transport and mass transport utilities*

- ***"Intermodal Surface Transportation Efficiency Act of 1991" (ISTEA) (1)***

  The ISTEA defines the US national policy for intermodal transport, which includes a national highway system and arterial roads essential for international interstate and regional commerce, travel, national defense, intermodal transfer facilities, etc.

  The ISTEA extends to iron products the existing Buy American restriction on steel (see below).

  Furthermore, it reserves not less than 10% of the total appropriations to US small business and disadvantaged business. Under Section 1048, it also provides for trade sanctions against a foreign country, which has violated, as determined by the Secretary for Transport (in consultation with the USTR), either an agreement in respect of transport activities or one in respect of products covered by ISTEA, or which is considered to have discriminated against US suppliers.

- ***Steel, construction and transport equipment (Surface Transportation Assistance Act of 1978 as amended by the STAA of 1982 and Section 337 of the Surface Transportation and Uniform Relocation Assistance Act of 1987)***

  Section 401 of the Surface Transportation Assistance Act of 6 November 1978 (STAA) is managed by the Urban Mass Transportation Administration and binds the recipients of federal funds (federal, State or local government).

  US States must meet the following requirements to receive federal funds from the Urban Mass Transit Administration:

  - *the State must certify that its laws, regulations and directives are adequate to accomplish the objectives of Section 165 of STAA;*
  - *standard specifications in contracts must favour US supplies;*

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(1) PL 102-240, 18 December 1991.

- *steel and cement must have been manufactured in the US.*

Violations of Section 165 by the States are sanctioned by the refund of the amount of federal appropriations used in the violating contracts (Federal Claims Collection Act of 1986 (31 USC 3711).

The above legislation is applied to mass transit equipment (rolling stock and other) and it requires that for all contracts, the local transit authorities give a 25% preference to bidders, supplying only US-made or assembled equipment with a substantial local content of 55% for contracts entered into on or after 1 October 1989 and of 60% for contracts entered into on or after 1 October 1991.

Furthermore, the domestic content requirement has also been extended to subcomponents (1987). Waivers for products or subcomponents may be granted by the Urban Mass Transportation Administration, when the use of domestic suppliers will prove non-economical and will result in unreasonable costs.

The Buy American preference has been tightened over the years. In 1978, the preference was 6% for US products and the US content requirement (for the purpose of determining the applicability of Buy America) was 50%. In 1982, the preference was raised to 10 % for rolling stock and 25% for other equipment. In 1987, the preference was raised to 25% for all equipment and the definition of a US product was changed from 50% US content to 55% for contracts concluded after 1 October 1989 and 60% for those entered into after 1 October 1991, and its application extended to subcomponents. In addition, final assembly of the vehicles must be carried out in the US.

Buy American provisions also apply to federally assisted programmes and contracts awarded by the Federal Highway Administration (23 CFR, 635-410), which do, however, allow for minimal procurement of foreign steel and cement (when foreign items value is under 0.01% of the total cost of a contract or $2,500).

- ***Steel and transport equipment by the Amtrak Improvement Act of 1978, amending the Rail Passenger Service Act as amended by the Amtrak Reorganization Act of 1979***

The 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 US within a reasonable time.

c) *Electricity utilities*

The Energy and Water Development Appropriations Act for fiscal year 1991 (PL 101-514) provides for a 30% price preference on extra high voltage equipment (EHVE) with a country exemption if the foreign country has completed negotiations with the US to extend the Government Procurement Code, or bilateral equivalent to EHVE, or which otherwise offers fair competitive opportunities to US suppliers in that country.

Comments/Estimated Impact

The procurement opportunities in these areas are extremely important. Water and energy projects alone total $7,25 billion, according to the amounts appropriated for fiscal year 1991[1]; moreover, the federal budget also provides for $2-3 billion annually in capital construction funds, through the Urban Mass Transit Administration of the Department of Commerce. Under the ISTEA, an annual amount of $18,3 billion will be spent on contracts for highway construction and intermodal transfer facilities[2].

In addition to the various Buy American provisions, access to procurement under ISTEA is subject to reciprocity provisions.

IV.B.4 Restrictions on the procurement of consulting services

Description

Federal contracts for consulting services (e.g. for US IDA and the DoD) require US citizenship or 51% US ownership. Certified US permanent residency is not sufficient for a consultant to compete for Federal contracts.

Comments/Estimated Impact

It seems evident that restrictions of this type completely exclude Community suppliers of these services from competing in these markets.

IV.B.5 Telecommunications Procurement

At present telecommunications equipment is excluded from the GATT Procurement Code - apart from the inclusion of NTT of Japan. A possible extension of the Code to this sector is currently under negotiation in association with the Uruguay Round.

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

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(1) Energy and Water Development Appropriations Act, 1991. PL 101-514, 5 November 1990.

(2) PL 102-240, 18 December 1991.

AT&T (the dominant long-distance carrier) and GTE (the largest provider of local services) also manufacture equipment, and, as vertically integrated companies, have both the ability and incentive to discriminate against unaffiliated network equipment vendors. These companies are far better placed than outside companies to supply their own networks, and in practice they buy most of their equipment from themselves. At the same time, their procurement procedures are not transparent. This represents a major barrier to market access, particularly since AT&T remains the dominant supplier of US long distance and international services.

Moreover, this company enjoys other advantages as a supplier of equipment. Most of the BOC's networks were originally installed by AT&T; the network specifications are thus based on the AT&T telecommunications network; and the company is therefore able to exercise an important influence on the standardisation process in the US.

With regard to the RBOCs, the Community is aware that these companies are obliged to ensure that their procurement procedures are nondiscriminatory. However, these procedures fall short of those set out in the EC directive on procurement. Notably, the procurement process followed by RBOCs is not very transparent - intimate knowledge of their organisation and preferences is necessary. The process inherently favours those suppliers which are most familiar with the RBOCs.

A 6% Buy America preference applies to DoD procurement (unless waived under the Memoranda of Understanding with NATO allies) and to procurement of Rural Telephone Cooperatives financed by the Rural Electric Administration (USDA).

In addition, as noted in the chapter VI on standards, testing, labelling and certification, the expense of testing certain network equipment through Bellcore can be very high in some cases, so that although the system is open to all in theory, in practice it is open only to those suppliers with the ability to make this investment.

The RBOCs enjoy monopolies on provision of basic services in their areas of operation, and are subject to regulation in a number of different ways. The FCC must authorise the construction of new lines (S.214 of the 1934 Communications Act). They also regulate interstate tariffs through price caps. Intrastate communications are regulated by the local State Public Utility Commissions (PUCs) whose administration of price-setting involves them in all aspects of RBOCs' operations - indeed, it is estimated that as much as 70% of BOC revenue is regulated by PUCs rather than by the FCC. This means that irrespective of ownership, public or private, the major telephone companies in the US are subject to a major degree of federal and local government control. Companies are therefore not free to act on the basis of purely commercial criteria, and there is concern that this applies to their procurement also.

Legislation currently under consideration by Congress which would explicitly impose local content requirements on BOC procurement is being closely monitored.

V IMPORT BARRIERS

V.A Tariff problems

V.A.1 High tariffs and tariff peaks

Description

Numerous products exported from the EC are subject to high US tariffs. Certain textile articles, ceramics, tableware, glassware, vegetables and footwear are all subject to tariffs of 20% or more. The following examples illustrate high US tariffs (the corresponding EC tariff rates are in brackets) :

Certain clothing (see note (1), end of sub-chapter A)	20-34.6% (13-14%)
Including soccer uniform and warm ups	35%
Silk and MMF/woollen-blended fabrics (2)	38% + 48.5 cents/kg (11%)
Ceramic tiles, etc. (3)	20% (8-9%)
Certain tableware (4)	26-35% (5.1-13.5%)
Including hotel porcelain dinnerware	35%
Certain glassware (5)	20-38% (12%)
Certain footwear (6)	37.5-48% (4-6-8-20%)
Garlic and dried or dehydrated onions(7)	35% (16%)
Zinc alloys (8)	19% + 48.5 cents/kg (3.5%)
Certain synthetic organic colouring matter(9)	20% (10 %)

Comments/Estimated Impact

Such high tariffs reduce EC access possibilities for these products.

Although it is difficult to measure this impact, tariff reductions on these products would significantly increase the competitiveness of EC firms on the US market. High tariffs have been singled out for considerable reductions in the Community's proposal for tariff reductions in the Uruguay Round in accordance with the Montreal Declaration which foresees the reduction or elimination of tariff peaks.

V.A.2 Tariff Reclassifications

Description

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

In particular, in its Harmonized Tariff Schedule (HTS), the US has

increased its duties on certain textiles. Duties on wool-woven fabrics and wool/silk blends (see note (10) at end of sub-chapter A) have been increased from 15 to 39%, 33% to 36% and 39% and from 8% to 33% respectively as a result of a change in classification by chief value to classification by chief weight of fabric.

In addition, US tariffs for certain wool-blended tapestry (11) and upholstery fabrics have increased from 7% to 33% and 38% as a result of the merging of several tariff lines. For acrylic textile wall coverings US tariffs have increased from 8.5% to 12.5% (12).

Moreover, duties on some marbles, in particular on "ivory cream marbles" (13) have increased from 2.8% to 6.2%.

Furthermore, the new classifications of gaskets and gaskets material (14) and red dye (15) have led to increases in duty rates from 3.5 and 3.7% to 18% and from 3.1% to 15 % respectively, without having been subject to joint HS negotiations. In the same manner, a classification of sugar confectionery (including white chocolate) has led to increased duty rate from 7% to 17.5% (16). The duty increases under the new tariff reclassification are not justified and contravene the agreed GATT guidelines for transposition to the HS.

The type of Spanish marble known as "Crema marfil" marble, was formerly classified under the TSUSA tariff classification as "marble; slabs; rubbed; or polished in whole or in part" (item 514.65), subject to an ad valorem tariff of 2.8%. In the new harmonized classification (HTSUS, harmonized Tariff Schedule of the United Sates), the US customs authorities have classified this marble under item 68.02.90.00, "other calcareous stones", with a tariff of 6%.

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

Comments/Estimated Impact

The overall impact of tariff reclassification is difficult to quantify. However, the textile tariff increases outlined above have serious repercussions for EC textile exports to the US : extra duties on wool-woven fabrics and wool/silk blends, mainly supplied by the EC, amount to approximately US $1.5 m. (average 86, 87, 88).

Notes to points A1 and A2

The Harmonized System (HS) codes of the items concerned are as follows :

(1)	61.01	61.09	62.01	62.09
	02	11	02	11
	03	12	03	12
	04	14	04	16
	05	15	05	
	06		06	
(2)	54.07.9105	54.08.3105		
	9205	3205		
	9305	3305		
	9405	3405		
(3)	69.07	69.08		
(4)	6911.1010	6911.10.50		
	35	6912.00.20		
(5)	70.13.1050	70.13.2920	70.13.3920	70.13.9940
	2110	3110	9110	9950
	2910	3220	9910	
(6)	64.01.1000	64.02.1950	64.02.9170	64.04.1170
	9100	3050	64.06.1025	1920
	9290	3060	1030	1935
	9960	3070	1050	1940
	9990	9150	64.04.1150	1950
	64.02.1930	9160	1160	
(7)	07.12.2020	07.12.9040		
(8)	7901.2000			
(9)	32.04.1150	32.04.1425	32.04.1650	
	1250	1450	1750	
	1325	1530	1919	
	1350	1550	1950	
(10)	51.11.1160	51.12.1100	54.07.9105	
	1960	1960	54.08.3205	
	2060	2000	3305	
	3060	3000		
	9060	9060		
(11)	51.11.2060	51.11.9060		
	3060	51.12.1960		
(12)	59.05.0090			
(13)	68.02.9200			
(14)	45.04.90.20	45.04.10.50		
(15)	32.05.00.10			
(16)	17.04.90.40			

V.A.3 *Classification of multipurpose vehicles*

Description

US practice is to classify two-door multi-purpose vehicles under heading 8704 of the Harmonised System, that is, "motor vehicles designed for the transport of goods". Four-door vehicles, however, are classified under heading 8703 ("motor vehicles designed for the transport of persons"). Thus effectively two-door vehicles are considered trucks, which are subject to a tariff of 25%, while four-door vehicles are treated as cars, subject to a tariff of 2.5%.

In February 1992 a bill was introduced in the US Senate which would have the effect of reclassifying all sport utility cars as trucks, subject to a 25% duty.

Comments/Estimated impact

The US understanding that two-door multipurpose vehicles are always designed for the transport of goods leads to a tenfold higher duty rate for these vehicles. This greatly reduces EC producers' ability to compete in the US market.

The criterion of the number of side-doors is inadequate for the classification of multipurpose vehicles. With the exception of the US, this is recognised by all members of the Customs Cooperate Council (CCC), whose Harmonised System Committee has always systematically rejected this criterion. Recently, it issued the opinion that a two-door multi-purpose vehicle is to be classified as car designed for the transport of persons. The US have, however, declared in the Committee that only vehicles equipped with four doors contain sufficient design features to satisfy the requirements for the classification as passenger cars.

The legal consequences of this US understanding are not confined to the Harmonised System Convention. The duty rates imposed by the US on passenger care are subject to GATT bindings and therefore may not exceed 2.5%. Insofar as the US systematically regards two-door multi-purpose vehicles as intended for the transport of goods, it is infringing its GATT obligation.

The contradiction with international law would be even more flagrant if the draft legislation tabled in the US Senate were to be adopted.

V.B **Fees**

Introduction

As a result of laws enacted in 1985 and 1986, the United States imposes user fees with respect to the arrival of merchandise, vessels, trucks, trains, private boats and planes, as well as passengers. The Customs and Trade Act of August 1990 and the Omnibus Budget Reconciliation Act of October 1990 extend and modify these provisions, among other things, by considerably increasing the level of the fees. This legislation indicates a certain tendency to seek to use fees rather than taxes, as a source of

revenue. Excessive fees levied for customs, harbour and other arrival facilities, that is for facilities particularly used by importers, place foreign products at an unfair competitive disadvantage vis-à-vis US competition.

V.B.1 Customs User Fee

Description

The most significant of the Customs User Fees (CUF) is the Merchandise Processing Fee levied on all imported merchandise, except for products from the least developed countries, from eligible countries under the Caribbean Basin Recovery Act, and the Andean Trade Preference Act or from United States insular possessions as well as merchandise entered under Schedule 8, Special Classifications, of the Tariff Schedules of the United States. In addition, the US/Canada Free Trade Agreement provides for a progressive phasing out of the fees, effective from 1.1.94.

The merchandise processing fee from December 1, 1986, to September 30, 1987 was 0.22 percent of the value of the imported goods and has been fixed at 0.17% ad valorem for 1988 and 1989.

The Customs and Trade Act of 1990, effective 1 October 1990, provides a number of modifications to the previous law for one year. The Omnibus Budget Reconciliation Act of October 1990 extends it for four more years, to 30 September 1995. It also provides for discretionary adjustment of fees.

In December 1991 the Customs Service proposed an adjustment of the fee which would increase it to 0.19%.

The main provisions of the current law are :

new law	*previous law*
- *0.17 percent ad valorem rate on formal entries*	*idem*
- *$21 minimum and $400 maximum on formal fees*	*no floor or ceiling*
- *$3 surcharge for manual formal entries*	*no surcharge*
- *discretionary adjustment of fees for formally entered merchandise within a range of 0.15 to 0.19% so as to offset Customs' salaries and expenses*	*no adjustment*
- *informal entries* *$2 for automated informal entries,* *$5 for manual and* *$8 for Customs prepared informal entries*	*no charge on informal entries*

Comments/Estimated Impact

It is estimated on the basis of the total value of about $86 billion of US imports from the Community in 1991 that the Merchandise Processing Fee cost the EC approximately $150 million (fees for informal entries not included).

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

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

V.B.2 Harbour Maintenance Fee

Description

In October 1986, the United States enacted a Harbour Maintenance Fee. The fee was set at 0.04 percent of the value of commercial cargo loaded or unloaded at US ports and on commercial ship passenger fares. Revenues from the tax were transferred to the Harbor Maintenance Trust Fund. The objective of the fee was to cover 40% of the cost incurred.

The Budget Reconciliation Act of 1990 increases the fee to 0.125 percent, effective 1.1.1991. The new legislation allocates revenues to the navigational programmes undertaken by the National Oceanic and Atmospheric Administration, as well as to the Harbor Maintenance Trust Fund.

Comments/Estimated Impact

The increase in fees is more than three fold. The new fees appear to have an impact equivalent to the Customs User Fees. In Fiscal Year 1990 (Oct. 1.1989 - Sept. 30.1990) the Harbor Maintenance Fees, levied at the earlier rate of 0.04% ad valorem, raised US $109 million for all imports into the US. After the trebling of the rate the impact on trade in 1991 was US $374 million. The EC share could be estimated to be about $107 million.

The Harbour Maintenance Fees are nominally nondiscriminatory, because they are levied on imports and exports alike, as well as on cargo transported internally. In practice, however, importers paid 67% of the fees collected

between 01.04.1987 and 30.09.1991, while exporters paid only 24% and 9% were levied on internal cargo.

The Harbour Maintenance Fees appear to be similar to the Customs User Fees. The ad valorem structure of the fees and any cross-subsidisation of activities constitute grounds for a GATT challenge. The EC has therefore requested Art. XXIII GATT consultations with the US.

V.B.3 US Cotton Import Fee.

Description:

The Cotton Research and Promotion Act Amendments of 1990, enacted under the 1990 Farm Bill provide, inter alia, for a levy of $1 per bale on imports of cotton and cotton-containing products, in addition to a supplemental assessment of six tenths of one percent of the historical value of the cotton (based on the average price received by US producers of upland cotton).

This import fee does not appear to discriminate, in principle, against foreign producers exporting to the US, as a similar fee is imposed on domestic US producers of raw cotton. However, it could prove discriminatory in practice for the following reasons:

1. *Administration of assessment:*

   The fee is levied domestically on the production of raw cotton and the administration of this system is relatively straightforward and the administrative costs for companies are likely to be low. However, with regard to imports, the fee is also assessed on cotton content in a large range of cotton-containing products. The assessment of the fee for imports is consequently more onerous than for the domestic product and the administrative costs much higher. The reimbursement mechanism for products containing US-produced cotton is also cumbersome and tends to place the cost of administration disproportionately on imports. These high administrative costs, besides being burdensome in themselves, may also have the effect of a non-tariff barrier in discouraging foreign producers from exporting to the US. The European Community is also concerned that the list of imported products upon which this fee is to be levied appears to include a range of products which are classified as containing blends of a high percentage of other textile fibres, for example, many wool garments, sales of which would in no way benefit from measures destined to increase cotton consumption.

2. *Activities of Cotton Board:*

   It is understood that this fee will be used to fund the US Cotton Board. To the extent that the activities of this organisation benefit domestic and foreign cotton equally, there would not appear to be discrimination. However, the European Community is concerned that foreign cotton may not, in fact, receive equitable treatment, especially as one of the express purposes of the Cotton Board, as

set out in the Federal Register notice, is "to maintain and expand domestic and foreign markets and uses for US cotton".

Comments/Estimated Impact:

In summary, the European Community is concerned that the two aspects of the proposed legislation referred to above may amount to de facto discrimination against imports into the US and a non-tariff barrier for foreign exporters of cotton-containing products. The Community has accordingly reserved its GATT rights on this issue.

V.C Quantitative Restrictions and Import Surveillance

V.C.1 Agricultural and Food Import Quotas

Description

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

Section 22 of the US Agricultural Adjustment Act of 1933 requires import restrictions to be imposed when products are imported in such quantities and under such conditions as to render ineffective, or materially interfere with, any United States agricultural programme. Such restrictions are a breach of GATT Articles II and XI. Therefore, the United States sought and was granted in March 1955 a waiver, subject to certain conditions, for its GATT obligations under the above articles with respect to Section 22 quotas. More than 35 years have since elapsed and in the Community's view the continuation of the waiver cannot be justified. In GATT practice a waiver is usually of limited duration.

Unilateral decisions of the US administration on the application of the cheese import quota in 1988, 1989 and 1991 resulted in a globalisation of certain EC allocations in favour of other third countries. Such decisions are incompatible with the provisions of the 1979 cheese arrangement between the EC and US.

Comments/Estimated Impact

EC exports potentially most heavily affected by United States quotas are dairy products, cheese and sugar-containing articles. In 1990 Community exports to the US of dairy products and cheese were approximately 240 million ECU, while exports of sugar and related products were approximately 130 million ECU.

V.C.2 *Excessive invoicing requirements*

Description

Invoice requirements for exporting certain products to the US can be excessive. This is particularly the case for textiles/clothing where customs formalities include the provision of particularly detailed and voluminous information.

Much of this information would appear to be irrelevant for customs or statistical purposes. For example, for garments with an outershell of more than one construction or material, it is necessary to give the relative weight, percentage values and surface area of each component ; for outershell components which are blends of different materials, it is also necessary to include the relative weights of each component material.

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

Comments/Estimated impact

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

V.D. Measures affecting vessels

Introduction

The US maintains a whole battery of measures designed to support its ailing shipbuilding industry. Apart from the measures identified in the sections which follow, new measures continue to be tabled in Congress, such as HR 2056 the Shipbuilding Trade Reform Act of 1991 (the Gibbons Bill). This Bill would bar foreign-built or repaired ships from US ports if they received any form of subsidy unless it could be certified that the full amount of subsidy had been returned to the granting authority or to the US Treasury. It would also amend anti-dumping and countervailing duty laws so that they would apply to commercial vessels.

V.D.1 **Tax on maritime equipment and repair of ships abroad**

Description

The United States applies a 50% ad valorem tax on:

- *non-emergency repairs of US owned ships outside the USA and;*
- *imported equipment for boats, including fish nets.*

The basis of this tax is Section 466 of the Tariff Act of 1930, amended in 1971 and in July 1990. Under the later 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.

Comments/Estimated Impact

The direct revenue from the tax on repairs outside the US is $10-15 m. on an annual basis but its effect in terms of loss of activity for European shipyards is much greater (the turnover of shipbuilding repairs inside the US amounts to $1.5 bn., as compared to $30 m. spent on repairs outside the US).

V.D.2 **Buy American requirements for certain categories of vessels**

Description

The use of certain categories of foreign-built vessels is restricted in the US. This is the case for:

- ***Fishing vessels***

  A US flag vessel when foreign-built, cannot be documented for fisheries in the US's 200 mile exclusive economic zone (section 12108 of volume 46 of United States Code).

  This prohibition is wide-ranging since the definition of fisheries includes processing, storing, and transporting (Commercial Fishing Industry Vessel Anti Reflagging Act of 1987).

  The US has, however, entered into Governing International Fishing Agreements (GIFA), which give some foreign flag vessels rights to fish in the US fishing zone.

- ***Vessels used in coastwise trade***

  Foreign-built (or rebuilt) vessels are prohibited to engage 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 (US Merchant Act of 1920 - Jones Act, section 883 of volume 46 of United States Code).
  Moreover, the definition of vessels (Jones Act and section 390 of volume 46 of US Code) has been interpreted by the US administration to cover hovercraft and inflatable rafts. The limitations on rebuilding act as another discrimination against foreign materials:

the rebuilding of a vessel of over 500 Gross Tons (GT) must be carried out within the US if it is to engage in coastwise trade. A smaller vessel (under 500 GT) may lose its existing coastwise rights if the rebuilding abroad or in the US with foreign materials is extensive (see section 883 of volume 46 of US Code, amendments of 1956 and 1960).

- ***Special work vessels***

  No foreign-built vessel can be documented and registered for dredging (see section 292 of volume 46 of US Code), towing or salvaging in the US (see points a) and d) of section 316 of volume 46 of US Code).

Comments/Estimated Impact

The analysis of EC exports to the US of certain categories of vessels shows the negative impact of US restrictions on EC imports (average 84/90):

category CN code	average EC exports in 1000 ECUs	
	to the world extra 12	US share %
fishing boats 8902.00 11 + 19	200,213	3.3
vessels for towing or pushing 89.04	66,592	0.55
dredgers 8905.10.10 +90	50,721	0.12
vessels for the transport of goods and passengers 8901.90.10	822,787	8.5

The "Buy American" requirements for various categories of vessels mean that third countries will not be able to have access to the US market at a time when part of the ageing US fleet needs to be renewed.

V.D.3 Subsidies and tax policies

Description

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

- ***Construction differential subsidy (CDS)***

  Title V of the Merchant Marine Act of 1936, as amended, provides for a direct Federal grant for the construction of US-flag merchant ships in US ship yards under Buy American requirements.

  Although no public source funding seems to have been provided by the Government since 1981, the legislation is still on the statute book and can be used in the future.

- ***Capital Constructions Fund (CCF) + Construction Reserve Fund (CRF)***

  Section 607 of the Merchant Marine Act, as amended, enables US shipowners to defer certain taxable income via the CCF or CRF to buy or transform vessels under the condition that they use American material or goods (Buy America) except for fisheries vessels (under the CCF program).

  Approximately $1.2 billion in funds had cumulated in the CCF as of the end of 1990. The CRF fund was $ 5 million in Fiscal Year 1990.

  However, it should be noted that in recent years use of these funds has been limited.

- ***Operating Differential Subsidy (ODS)***

  Section 601 of the Merchant Marine Act of 1936, as amended, provides for the payment of an Operating Differential Subsidy (ODS) to US operators of ships built in the US of US materials so as to place their operating costs on a parity with those of foreign competitors.

  No new ODS contract has been given since 1981. During Fiscal Year 1991, the US authorities have distributed in excess of $217.6 million in funds on old ODS contracts.

- ***Federal Ship Financing Guarantees***

  Title XI of the Merchant Marine Act of 1936, as amended, authorizes the US Government to provide direct guarantees to US shipowners to obtain commercial loans for the construction or reconstruction of nearly all categories of vessels (except fishing vessels). Guarantees may be granted for up to 75% of the vessel's actual cost. In order for a new non-fisheries vessel to be eligible for these financial guarantees, it must be built entirely in a US shipyard, all components of the hull and superstructure fabricated in the US and the vessel entirely assembled in the US.

As of 30 September 1991, Title XI guarantees in force amounted to just over $2.7 billion. The guarantees covered 2.876 vessels.

Comments/Estimated Impact

The Buy America requirements imposed in these different types of subsidies clearly favour US shipbuilders and equipment manufacturers and act as a restriction to imports. Even if certain of these measures have not been

used for some years, there is no guarantee that they will not be implemented in the future, unless they can be eliminated through the conclusion of the draft agreement on normal competitive conditions in the shipbuilding and repair sector currently under negotiation in the OECD.

V.E Abuse of national security

Import barriers may result from trade measures justified by "national security". A description of import barriers based on national security considerations is given in Chapter III above.

VI. EXPORT AND OTHER SUBSIDIES

VI.A Export Enhancement Programme (EEP)

Description

The Food Security Act of 1985 (the Farm Bill) required the United States Department of Agriculture (USDA) to use Commodity Credit Corporation stocks worth $1 billion over a three-year period to subsidise exports of US farm products, with the option of going up to $1.5 billion. This programme was intended to support wheat exports to a limited number of countries, most of which are traditional EC markets. It is now used for a wide range of commodities (mainly wheat, wheat flour, barley malt, feed grains, vegetable oils, frozen poultry, eggs, rice and dairy cattle) and for exports to over 40 food-importing countries. In particular, in 1987, the United States added China and the USSR to the list of countries to which EEP can apply .

The 1988 Trade Act prolonged the programme to 1990 and increased it from $1.5 billion to $2.5 billion, thus extending further its depressive effect on world markets.

The 1990 Farm Bill reinforced the tough US attitude, providing for the continuation of EEP without specified programme limits. It maintained a minimum of $500 million per year, for five years. The budget outlay for FY 1991 was $916.6 million, while the estimated expenditure for FY 1992 and 1993 is $1,200 million per year.

Under the Dairy Incentive Program, (instituted under Section 153 of the 1985 Farm Bill until 30/09/89, extended through September 1990 under the Hunger Prevention Act of 1988) over half the countries targeted were EC markets.

Comments/Estimated Impact

FY 1985 through 1991 about 94.2 million tons of wheat, 3.1 million tons of wheat flour, 10.3 million tons of feed grain, 0.20 million tons of frozen poultry, and substantial quantities of eggs, dairy cattle, barley malt, vegetable oil, and mixed poultry feed have been announced for export subsidisation within the programme. In financial terms, subsidies already granted are valued at approximately $3,765 million. In February 1992, the US authorities announced that the EEP would be extended to include canned fruit. The estimated expenditure on this measure is $1 million.

In addition to EEP, the Dairy Export Incentive Program, as of 31/10/91, had attained sales of 143,000 tons of butter, 19,000 tons of cheese and 432,000 tons of non-fat dry milk.

These programmes would appear to be against the spirit of the Mid-Term Review of the Uruguay Round of trade negotiations which commits participants, "to ensure that current domestic and export support and protection levels in the agricultural sector are not exceeded". The Uruguay Round provides an opportunity to address this and other forms of US agricultural subsidies.

VI.B **Other subsidies**

Description

VI.B.1 ***Marketing Loans :***

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

VI.B.2 ***Market Promotion Program (Targeted Export Assistance) :***

The Food Security Act of 1985 established a new programme, entitled Targeted Export Assistance (TEA). Under this programme, the Secretary of Agriculture had to provide $110 million (or an equal value of Commodity Credit Corporation commodities) each fiscal year until FY 1988, specifically to offset the adverse effect of subsidies, import quotas, or other unfair trade practices abroad. For fiscal years 1989 and 1990 figures of $200 million and $220 million were approved. For the purposes of the TEA programme, the term "subsidy" included an export subsidy, tax rebate on exports, financial assistance on preferential terms, financing for operating losses, assumption of costs of expenses of production, processing, or distribution, a differential export tax or duty exemption, a domestic consumption quota, or any other method of furnishing or ensuring the availability of raw materials at artificially low prices.

Under the 1990 Farm Bill the TEA programme was renamed the Market Promotion program (MPP) and expanded to "encourage the development, maintenance and expansion of commercial export markets for agricultural commodities". Whereas the TEA programme was limited to commodities where the US considered that exports had been adversely affected by unfair foreign trade practices, the MPP, while according such exports priority for assistance, allows consideration also to be given to other commodity groups. The estimated expenditure is $200 million annually for fiscal years 1992 and 1993.

VI.B.3 Deficiency Payments :

The US supports its agriculture by commodity loans which guarantee the farmer a minimum price (loan rate) if he cannot sell his produce above this price on the open market and by deficiency payments which are calculated as the difference between a government-established target-price and the higher of the market price and the loan rate.

Deficiency payments are an internal support measure which, nevertheless, may impact substantially on external trade. Whether they function as an import barrier or as an export subsidy depends on whether the country is a net importer or a net exporter.

The present deficiency payment for wheat in the US is $1,47/bushel or $54,04/ton which represents the difference between the target price ($4/bushel or $147/ton) and the domestic market price.

Deficiency payments allow the US to have lower internal prices than within the Community and to start with direct export subsidies from lower levels.

VI.B.4 Credit guarantee and food aid programmes :

The Export Credit Guarantee Program (GSM-102) is the largest US agricultural export promotion program and has been functioning since 1982. It guarantees repayment of private, short-term credit for up to three years.

The Intermediate Export Credit Guarantee program (GSM-103) was established by the Food Security Act of 1985 and complements GSM-102 by guaranteeing repayment of private credit for 3-10 years.

A total of $4.5 billion of guaranteed credit was approved in FY 1991 under GSM-102 and GSM-103. In FY 1992, GSM-102 allocations totaled $2.7 billion as of 08/11/91 and on 20/11/91 an additional $1.25 billion was announced for the Soviet Union. Also, as of 08/11/91, GSM-103 allocations for $109 million had been announced.

Public law 480 (P.L.480) has amongst its other (generally altruistic) aims the expansion of foreign markets for US agricultural products. Its Title I makes US agricultural commodities available through long-term dollar credit sales at low interest rates for up to forty years. Donations for emergency food relief are provided under Title II. Title III authorises "food for development" projects. The programme level for P.L.480 for FY1992 is about $1.6 billion.

VI.B.5 Californian subsidies on water :

Each year, the Central Valley Project provides 7 million acre-feet of water to some 3 million acres of Californian farmland. The amount of the federal subsidy has been calculated by the General Accounting Office to be worth half a billion dollars annually. Legislative efforts are under way to reform this programme, which distributes 90% of its water to Central Valley farmers. These deliveries are guaranteed by long-term contracts which the federal government renewed for another forty years as recently

as 1989. However, last summer, the Central Valley Project had to cut its deliveries to farmers by 75% due to the drought and, despite recent rainfall, further delivery cuts are envisaged for the 1992/93 season. The big "water guzzlers" are livestock, feedstuffs, rice, corn, cotton and sugar-beet. Some of these crops are heavily subsidised at federal level and the low rates charged for water (around $10 per acre-foot of water compared to $500 per acre-foot paid by some urban users) have led farmers to waste it on high water-demanding crops of comparatively low value.

Draft bills moving through both houses of Congress would force farmers to give up part of their allotments. At the same time, Governor Wilson is developing his own less drastic plan wich may pre-empt Congressional action and involves measures to increase conservation, expand sales of water by farmers to non-agricultural users, improve the environment and build new water transfer and storage facilities.

The EC is closely monitoring these efforts to reform the Project.

Comments/estimated impact

These support measure all have a substantial impact on external trade and world prices.

In the Uruguay Round both the issues of internal support and export subsidies are important elements in the negotiations and the measures are therefore likely to be subject to the disciplines resulting from the conclusion of the Round.

VI.C Double Price System: Rock Phosphate/Fertilizer

Description

Producers of rock phosphate have an export cartel which results in this raw material for fertilizers being sold for export at a price well above the domestic price and only marginally below the price of the phosphate-based fertilizers sold by the selfsame producers.

European fertilizer manufacturers are thus forced to pay excessively high prices for their raw material, the rock phospate, and face low priced competition in the EC and on third markets from fertilizer manufacturers who have privileged access to the rock phosphate raw materials.

Comments/Estimated Impact

The US Department of Justice explicitly approved the export cartel for rock phosphate.

The effect is to reduce sales and squeeze profits on those sales made by EC fertilizer producers by forcing up input costs while charging low prices for the finished fertilizer sold in competition by US fertilizer manufacturers.

According to reports of the US Bureau of Mines, average prices for rock phosphate were the following :

	US price for US market $/mt *	US price for exports $/mt*	$/mt*	Difference %
1988	18.36	25.58	7.22	39
1989	20.40	28.98	8.58	42
1990	21.99	30.70	8.71	40

According to some estimates, the additional cost for EC fertilizers producers was $26 million in 1989 and $21 million in 1990 (based on EC import figures from the US of 3 million tonnes in 1989 and 2.4 million tonnes in 1990). Indirect losses were higher because of lost sales by EC producers.

* metric tonnes

VII TAX BARRIERS AFFECTING TRADE

Introduction

Much attention has been devoted in recent years to macroeconomic imbalances among the world's major trading partners. In particular, it is widely considered that there is a relationship between the persistence of the US deficit on current account and the inability of the US legislative process to reduce the Federal budget deficit. Under these circumstances, the Community welcomes, in principle, US efforts to reduce Federal expenditure and raise Federal revenues by appropriate means. 1990 did, however, show an unfortunate tendency to introduce revenue-enhancing measures (higher taxes, user fees, etc.) which discriminate, either de jure or de facto, against foreign citizens, companies, or products. The following sections illustrate this tendency.

VII.A Automobiles

U.S. Federal law, including provisions of the Internal Revenue Code (IRC) and the United States Code (U.S.C.) imposes certain taxes which discriminate against imported automobiles.

The three major taxes in question are the following :

- the Corporate Average Fuel Economy Law (CAFE),
- the luxury excise tax and
- the "gas guzzler" tax.

The EC does not contest the objectives of these measures to the extent that they aim to preserve the environment and save energy. But in practice, their combined effect is to impose additional costs on European vehicles sold on the US market. Moreover, as US domestic producers are able to escape these costs, the tax system simply discriminates against imported models - without fulfilling environmental objectives.

The Corporate Average Fuel Economy Law (CAFE) penalises car makers for failure to achieve minimum fuel efficiency standards, based on averages of the fuel economy of their entire U.S. sales. This penalty is levied on the manufacturers/importers. The U.S. federal law imposing such standards is 15 U.S.C. Sec. 2008. Enacted in 1975, CAFE is intended to increase fuel efficiency and thereby reduce the U.S.A.'s dependency on foreign sources of petroleum.

Although the CAFE tax applies theoretically to virtually all car makers doing business in the U.S., in reality the only makers who have paid the penalty are the limited-line premium car makers. The CAFE regulations are biased towards both the full line manufacturers (i.e. domestic manufacturers) that make both small, fuel-efficient and larger vehicles and limited line manufacturers that produce mostly small vehicles (e.g. Japanese manufacturers). Thus, the only CAFE penalties paid thus far have been paid by European limited-line car makers. Full-line car makers, such

as General Motors have been able to meet the CAFE standard by averaging the fuel economy of small, fuel-efficient cars with large cars.

The high cost of the CAFE penalties on limited-line car makers gives full-line domestic car makers a competitive advantage over imported European cars. Both the inadequacy of the system for the purposes of its declared objectives and its discriminatory nature are further demonstrated by the fact that a foreign company bought by a U.S. manufacturer would be able to avoid the CAFE penalties it had been paying in the past through use of the US manufacturer's excess CAFE credits. The fact is that the price of certain European cars includes this CAFE penalty, whereas the price of a comparable US car with the same fuel consumption does not.

In addition to its discriminatory impact, this measure unduly favors local content without any effect on the average fuel efficiency. In effect, each car maker's actual fuel efficiency is determined each model year by the EPA and is expressed by two fuel efficiency figures:

- *the first figure is the car maker's actual fuel efficiency for the category of cars domestically manufactured (i.e. with a local content of more than 75% of the total value of spare parts produced in the US);*
- *the second figure corresponds to "imported cars" (where less than 75% of the value of the spare parts is produced in the US).*

If any of these two figures is lower than the threshold, the manufacturer or importer is subject to the tax for the corresponding category.

A US manufacturer who would have to pay the fine for his own line of domestic car could escape paying this penalty by increasing the local content percentage of imported small vehicles he sells. Thus, cars previously considered as imported would now be considered as domestically produced. In this way, the average fuel efficiency of manufacturers would appear to increase, so reducing the penalty. The practical effect of these regulations would therefore be to "force investment" in the U.S. or to "Buy American" for car parts to the detriment of Community exports.

*The **luxury excise tax**, introduced as of 1st January 1991 by the Omnibus Budget Reconciliation Act of 1990, is levied as a 10% excise tax on automobiles above $30.000. (In addition to cars, the tax is levied on private boats, yachts, aircrafts, jewellery and furs in excess of specified thresholds.)*

The tax is applicable only to newly manufactured items (which are not exported) and is to be collected by the retailer who then remits it to the Internal Revenue Service (IRS). Passenger vehicles (and boats and aircraft) used exclusively by the federal government or a state or local government for public works purposes are exempt. All items subject to the tax are liable upon their importation into the US, regardless of whether the item was used outside the US prior to importation. This provision is projected to raise $1.5 billion over five years.

For automobiles, the $30,000 threshold seems to be set at a level so as to exempt or cause minimum pain to the domestic automobile industry, whereas it has a large impact particularly in terms of competitivity on foreign and notably, EC automobiles. About half of the cars exported from the

European community to the United States are subject to the luxury tax, compared to only 12% of total sales of U.S. cars.

The arbitrarily-designated threshold of $30,000 means that imported cars are treated less favourably than are domestic autos even though they compete in the same market. Although this tax is not discriminatory "de jure", its impact is far heavier on imports than on domestic products.

In 1991, an independent study financed by the Federation Against Inequitable and Regressive Taxation (FAIRTAX) concluded that the impact of the tax on imported European cars was devastating. Further, because of the deleterious effect of this tax upon trade, less customs duties are paid, the result actually being a net loss to the Federal Treasury.

Against the background of decreasing sales of the affected luxury products and therefore decreasing tax revenue, bills were introduced to Congress in 1992 which would repeal the luxury tax for all concerned items. The House Ways and Means Committee and the Senate Finance Committee, however, supported the repeal of the tax on all products <u>except cars</u>. The language related to automobiles calls for indexing the threshold to the inflation figure. This legislative proposal would retain the competitive advantage for the domestic industry, which currently markets a number of automobiles priced just below the current threshold of US $30.000.

*The **<u>"gas guzzler" tax</u>** (Section 4064 of the IRC) is levied on any individual passenger automobile "of a model type" sold in the US whose fuel economy, as prescribed by the U.S. Environmental Protection Agency (EPA), is less than the determined standard. As of 1986, if the EPA determines that fuel economy is at least 22.5 miles per gallon (MPG) then no tax is imposed. As of 1.1.1991, the Omnibus Budget Reconciliation Act of 1990 has doubled the tax rates (beginning at $1,000 for the automobiles that do not meet the 22.5 miles per gallon standard and increases to $7,7000 for the automobile models with fuel economy ratings of less than 12.5 miles per gallon). The tax, <u>paid by the ultimate customer of a vehicle</u>, is collected by the manufacturer or importer for the Internal Revenue Service (IRS).*

Although the "gas guzzler" tax has the appearance of a non-discriminatory domestic tax, in practice the methodology for calculating the tax discriminates against specialized car manufacturers, and most European importers to the United States are specialized. The tax calculation favors the domestic car industry. The "gas guzzler" tax is applied to specific "model types". Due to the definition of a "model type" domestic manufacturers are able to average different car lines within one model type. This enables U.S. producers to market cars with equal and even lower fuel economy values than imported vehicles without being subject to the "gas guzzler" tax. Importers of European cars tend for marketing reasons to offer only a limited range of vehicles using different engine sizes. This does not allow them to average the fuel consumption rates figures. The tax therefore falls disproportionately on imported vehicles. This is evident from the fact that although significant numbers of U.S. manufactured vehicles have fuel economy values below 22.5 mpg, the 1991 Fuel Economy Guide indicates that the "gas guzzler" tax was applied to only two vehicles built by U.S. car makers.

Even though the Omnibus Reconciliation Act of 1990 has repealed the

previous exemptions from payment of the tax for stretch limousines as well as the special rules permitting Treasury to set the rate of tax for small manufacturers, off-road and sport utility vehicles are still exempt from the gas guzzler tax, which weakens its credibility with respect to its declared policy objectives.

Comments/Estimated Impact

The total revenue of the three taxes levied in 1991 was US $558 million, of which $494 million were levied on European cars. Thus, around 88 % (100% of CAFE, 80% of the luxury tax and 80% of the "gas guzzler" tax) fall on European cars, versus a market share of only 4%.

These figures show the direct and serious effect of these tax measures on European car makers' business in the US. The combined application of the three taxes represents a considerable proportion of the retail price of a car and thus directly impacts on the competitive position of Community suppliers in the US market. The combination of three tax measures, of which each falls primarily or exclusively on imported cars, gives these tax laws the character of a hidden protectionist measure, contradictory to the GATT rules of non-discrimination.

These environmental measures in the car sector which function as trade barriers are currently subject to EC/US consultations on economic and fiscal instruments for energy and environmental policy objectives.

VII.B Beer & Wine Excise Taxes

Description

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

Comments/Estimated Impact

The increase in these taxes is of less significance than the fact that the law provides for a tax exemption that is solely available to qualifying "small" domestic producers and not for third country producers. In practice, this measure would provide a maximum total benefit of $660,000 per eligible brewery (of which, it has been estimated there are more than 200 in the US) and of $90,000 per winery (of which, there are 1,400 estimated beneficiaries).

In September 1991, the Community made a submission to the GATT panel which was requested by Canada on, inter alia, this issue. It claimed that the tax exemption for small domestic producers, which is not granted to foreign producers constitutes a tax discrimination contrary to Art. III.2, first sentence and since this discrimination also seems to afford protection to domestic production it is also contrary to Art. III.2, second sentence in conjunction with Art. III.1 of the General Agreement.

VIII STANDARDS, TESTING, LABELLING AND CERTIFICATION

Introduction

In the US products are increasingly being required to conform to technical regulations regarding consumer protection (including health and safety) and environmental protection. The complexity of US regulatory systems in this domain can represent a very important structural impediment to market access. This situation is aggravated by the lack of a clear distinction between essential safety regulation and optional requirements as to quality, which is due in part to the role of some private organisations as providers of assessment/certification in both areas.

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

There are more than 2,700 State and municipal authorities in the US which require particular safety certifications for products sold or installed within their jurisdictions. These requirements are not always uniform or consistent with each other, or even transparent; in some cases a national standard may not exist. In this case, product safety requirements are not set out by mandatory technical regulations, but are determined in the market place through product liability insurance. Individual States may set environmental standards going far beyond what is provided for at federal level, as has occurred in California (see the cases of lead levels and glass recycling at VIII.C and E). Then again, the Labour Department may require certification for equipment used in the workplace; the county authorities for electrical equipment; large municipalities for virtually any equipment they choose to regulate; insurance companies for other product safety aspects, depending on the company. Acquiring the necessary information and satisfying the necessary procedures is a major undertaking for a foreign enterprise, especially a small or medium sized one. One company has estimated the volume of lost sales in the US due to these factors at 15% of the total. Hidden costs could be much greater - if only because the time and cost involved can be greatly reduced simply by using US components which have already been individually tested and certified. In addition, the private 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 (ISO 9000).

In some cases (e.g. that of telecommunications network equipment, see VIII.D below), the buyers require an expensive evaluation procedure which does not lead to certification and does not take account of any additional requirements by individual buyers.

At present there is no central source of information on standards and conformity assessment.

It is hoped that some of these problems can be tackled if new rules, currently under negotiation in the Uruguay Round, can be adopted. An EC/US dialogue on mutual recognition of certification procedures has also been initiated. Furthermore, standardization and certification issues were discussed between the US Commerce Secretary Mosbacher and Vice-President Bangemann of the Commission in June 1991. The importance of international standardization and of openness regarding conformity assessment was recognised, and the exchange of information between officials and between standardization and certification bodies encouraged. US and European standardizers have committed themselves to promote the faster development and wider implementation of international standards.

VIII.A Sanitary and phytosanitary barriers

Description

These often arise from divergences in the legal sanitary and phytosanitary requirements implemented on each side of the Atlantic.

In addition, there have been cases where US customs follow a sampling and inspection procedure which fails to define adequately which goods require urgent processing by customs if detioration is to be avoided. EC exports of citrus fruit, cut flowers and smoked salmon to the US have encountered problems due to delays, resulting in damage to the goods and subsequent commercial losses for the exporters. The EC does not dispute the right of the US authorities to inspect imported goods but considers that adequate steps be taken to deal expeditiously with perishable goods.

In the phytosanitary field the following main difficulties persist:

- *Administrative instructions governing the entry of apples and pears from certain countries in Europe. (Fed. Reg. of 1987, title VII, ch.3, par. 319-56-2r)*

  Prior to the introduction of these administrative instructions a pre-clearance programme was applied in agreement between the French and US authorities with the objective of guaranteeing the absence of an insect pest known as the pear leaf blister moth.
  The new administrative rules extended the inspections to other Member States and to "other pests that do not exist in the US or that are not widespread in the US", the result being that US inspection was operated on the basis of an open list of prohibited pests.

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

- *Prohibition of import of fruit and vegetables from pathogen-free regions of an EC Member State adjacent to regions in which a given pathogen is known to occur. (Fed. Reg. of 1987, title VII, ch.3, par. 319-56-2r)*

  The non-acceptance by the US authorities of the notion "pathogen-free region" creates undue obstacles to export from pathogen-free regions within the EC. An example is the prohibition of import of tomatoes from Brittany because of the presence of the Mediterranean Fruit Fly in the Mediterranean regions of France.

  Although Brittany is ecologically isolated from the infested regions of France, and the French authorities carry out the necessary surveillance to avoid dissemination, imports into the US of ripe tomatoes from Brittany are not permitted by the US authorities. The EC considers these measures to be excessive and not justifiable on phytosanitary grounds.

- *Procedural requirements concerning plants established in growing media (Fed. reg., title VII, par. 319-37-8).*

  The revised provisions regarding standards and certification have reduced the obstacles encountered so far for EC exports of potted plants to the US. However, the procedures introduced for the certification of plant genera involves a very long procedure which may considerably delay the approval of EC plant genera. The EC considers the decision to reevaluate the previous risk analyses done on EC plant genera unnecessary and an undue obstacle to trade in this area.

- *Pesticide residues.*

  The US insists on zero residue levels for substances which have not been approved for use in the US or for which no import tolerance has been established. In some cases, time-consuming or unduly delayed approval procedures have led to trade disruption.

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

- *Obligatory registration of low acid/acidified products.*

  Table olives and pickled vegetables from certain Community Member

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

In the <u>sanitary</u> field the following difficulties persist :

- *Rules on importation of animal products and by-products from countries where Bovine Spongiform Encephalopathy (BSE) exists (docket number 90-252, Fed. Reg. 56 : 19794, April 30, 1991, amending 9 CFR parts 94 and 95).*

  The US measures consist of three requirements concerning ruminant animals:

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

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

- *US does not make any distinction between countries with low or high incidence of BSE, while the EC in accordance with IOE requirements takes restrictive measures only in countries with a high incidence of BSE (UK) ;*

- *all meat from all countries with BSE (FR, IRL and UK) must be deboned, while EC requirements for deboning only concern UK ;*

  - *double requirements of deboning together with ban on meat from animals present prior to the ban on feeding on ruminant meat and bone meal.*

The EC considers that the US measures constitute an unjustified restriction on trade. There is no justification to go beyond the recommendations of the authoritative international institution (IOE) especially when the US has not taken measures to protect its cattle population from the internal threat of scrapie in the US. In

particular, the application of the severe measures (as applied to the UK) to countries with only a few cases of BSE cannot be justified.

- *Freedom from contagious diseases.*

Some restrictions on live animals relate to the non-recognition by the US of freedom from certain diseases, e.g. contagious equine metritis. Long-standing prohibitions resulting from Member States' foot-and-mouth disease vaccination policies could be expected to be lifted now that the EC has ceased vaccination.

- *Prohibition of imports of uncooked meat products (sausage, ham and bacon).*

Imports into the US of certain types of meat products have been subject to a long-standing prohibition, part but not all of which, may be justified by health reasons. Following repeated approaches by the Community, US import regulations were modified to permit importation of Parma ham. However, the US still applies a prohibition on other types of uncooked meat products, e.g. San Daniele ham, German sausage, ham and bacon and similar hams from Spain.

VIII.B *US Food Labelling.*

Description:

The implementation of the Nutrition Labeling and Education Act 1990 requires the US Food and Drug Administration (FDA) to follow an accelerated timetable in their extensive programme of changes to US food labels. In this context, the FDA published a series of proposed rules (amounting to over 600 pages) in the Federal Register of 27/11/91, with a comment-period deadline of 25/02/92. The US Department of Agriculture is also working along the same timetable with regard to the labelling requirements for fresh meat and poultry.

Comments/Estimated Impact:

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

VIII.C *Lead levels ("Proposition 65" et al.):*

In 1986, California voters passed Proposition 65, the "Safe Drinking Water and Toxic Enforcement Act of 1986", which requires a warning label on all products containing substances known to the State of California to cause cancer and birth-defects. In some cases, levels under Proposition

65 are lower than federally-enforced tolerance levels for the same substances, e.g. lead.

Recently, law-suits have been filed by the Attorney General of California against a number of tableware manufacturers, both foreign and domestic, and against a number of wine-producers, with respect to enforcing the very restrictive Californian labelling requirements.

At a federal level, the Food and Drug Administration has unilaterally set tolerance levels for lead in wine (August 1991) and has begun enforcing reduced action levels for lead release from tableware, purely on its assertion that there is a health risk.

Comments/Estimated Impact:

EC exporters are having to comply with a minefield of regulations at both the federal and state level. They believe that if the FDA insist on new action levels, they ought to be introduced in such a way to prevent individual legislatures from enacting more stringent requirements and unnecessary labelling requirements (e.g. Proposition 65).

VIII.D Telecommunications

Description

While recognising the problems arising from the speed of innovation, the EC is concerned about the various systems of standards-setting and certification in the United States and in particular about their transparency.

With regard to network equipment, owing to the fact that the telecommunications technical environment in the US differs to a large degree from that of most other countries, the costs of adapting European-based switching equipment to US specifications are much higher than the costs for the necessary adaptation work required for other countries, thereby effectively limiting entry to the market to large companies with substantial financial resources. This is all the more apparent given that even when the equipment evaluation by Bellcore, the body which provides technical advice to the Bell Operating Companies (BOCs) has been completed, at a cost of perhaps many millions of dollars, a company has no guarantee that its products will be bought.

As regards standards for terminal equipment, although the FCC[(1)] requirements are, in principle, limited to "no harm to the network", i.e., essentially electrical safety and requirements according to FCC Part 68, manufacturers, in practice, have to comply with a number of voluntary standards, set by industrial organisations, such as Underwriters Laboratories (UL) in order to ensure end-to-end compatibility and safety. For example, Los Angeles and Chicago require that terminal equipment be manufactured according to UL standards and that it be tested by UL. In addition, standards or technical specifications to interface with the

(1) Federal Communications Commission

network and to secure interoperability of signalling systems are developed without direct reference to international standards and/or recommendations and must be adhered to, at least de facto.

The ONA (Open Network Architecture) plans of the BOCs , which set out the conditions of access to public networks for service providers, are developed independently of national and international standardisation procedures, and this is largely true for ISDN(2) and intelligent network equipment and service plans also.

Comments/Estimated Impact

It is difficult to quantify the cost to exporters of the necessary testing and adaptation work.

Although officially, FCC requirements are the only mandatory standards imported terminals have to meet, exporters have no certainty as to which other standards will in practice need to be complied with in order to sell their products.

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

VIII.E Recycled glass content in new glass containers

Description

A new section, added to the Public Resources Code of California, requires that glass containers to be used for food and beverages have a minimum percentage of recovered glass in their composition. The minimum percentage is progressive from 15% in 1992 up to 55% in 2002. Glass container manufacturers are requested to give a monthly report on the percentage of postfilled glass used. This legislation applies to all glass containers produced or sold in California, and thus can hit EC exports to California.

The law has entered into force on 1st January 1992 and is likely to be applied on imports soon (it has not, until February 1992, been applied so far). The only element of flexibility in the legislation is the possibility of a reduction or a waiver of the percentage requirement if its achievement is technologically infeasible.

On the federal level too, bills have been introduced in both houses, requiring minimum percentages of recycled glass in glass containers.

Comments/Estimated Impact

In 1991, sales of European food and beverage glass containers to the US totalled US $10 million. Although the share being exported to California is not known, it can be assumed that it is a high percentage, as California is the main wine producing state. If the legislation were to be introduced at the federal level and extended to food and beverages sold in

(2) Integrated Services Digital Networks

such receptacles, the economic impact would of course be tremendous.

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

Furthermore, the reporting requirements are unnecessarily burdensome.

VIII.F *Electrical Products and Components*

Description

Federal, State and local jurisdictions require product testing and certification of the safety of numerous electrical products and parts thereof. On the State and local level, there are more than 2,700 State, city and municipal governments in the US that require particular safety certifications on certain products sold or installed within their jurisdictions.

Comments/Estimated Impact

These requirements are not always uniform and consistent with one another and in some cases, a national standard may not exist. In addition, the electrical code requirements are more closely monitored and more problematic (due to the use of non-US components) for suppliers of imported equipment than for US manufacturers.

These requirements translate into lost sales and further expense (in terms of time and money) related to hiring a US inspector. Expansive product liability insurance (a far less significant factor in Europe) is an additional expense borne by manufacturers on sales in the US.

One company estimated the volume of lost sales in the US due to the multiplicity of standards and certification problems to be about 15% of their total sales. The expense of certification alone was put at 5% of total sales, as was the amount spent on product liability insurance.

Federal, state and local jurisdictions should reduce the divergence in safety certifications and adopt and use national standards for electrical safety certification. Such national standards should be based on the appropriate international standards set in the International Electrotechnical Commission (IEC) or the International Standards Organisation (ISO).

IX. BARRIERS IN THE FINANCIAL SERVICES SECTOR

Introduction

An attempt by the US Government to reform the US banking system, in particular through allowing banks' groups to enter the securities and insurance markets eliminating current restrictions to the geographical expansion of their activities failed to pass Congress last year. In February, the Administration tabled a banking reform bill whose contents is similar to last years' bill.

The Commission welcomes the general thrust of these proposals and in particular the absence of a roll-up requirement for foreign banks operating through branches in the US ; as they could remove certain obstacles stemming from regulations imposing restrictions to the geographical expansion of banks or to the activities which may be carried out by banking organizations, and hopes for their early adoption. The Commission also expects that these reforms will benefit both US and non-US banks, bank holding companies and other financial firms alike, will respect the present degree of market opportunities which EC financial institutions already enjoy in the US market, and will not result in additional burdens for EC financial firms operating in the US.

Community financial institutions generally benefit from national treatment in the US; there are, however, certain aspects in which federal or State laws discriminate against non-US financial institutions. There are also restrictions to the expansion of activities which, while affecting in the same way EC and US financial institutions, may adversely affect the ability of EC financial institutions to compete.

IX.A Restrictions on geographical expansion (*)

Description

Bank holding companies (either incorporated in or outside the US) are prohibited from establishing or acquiring control of a bank outside their "home State", unless the host State expressly permits (section 5 of the International Banking Act and section 3(d) of the Bank Holding Company Act of 1956). However, a majority of States have now enacted laws allowing out-of-state banks to set up subsidiaries in their territory, although there are still some States which do not permit or impose restrictions on the establishment or takeover by bank holding companies which are not of the same State.

A foreign bank or its subsidiary not incorporated in the US cannot open branches in more than one State (section 5(a) of the International Banking Act) (foreign banks with branches in several States before 27 July 1978 were grandfathered - section 5(B) of IBA); domestic banks are similarly restricted by the McFadden Act.

(*) US banks and insurance companies may be affected by these provisions

As regards insurance, the fact that the competence to regulate and supervise insurance activities is left to the States (McCarran-Ferguson Act) has implied that there is a requirement to obtain a separate license to operate in each State.

IX.B Restrictions to the provision of securities and investment services

Description

Bank subsidiaries incorporated in the US of a non-US bank may not own a securities firm (section 20 of Glass Steagall Act, volume 12 of US Code §377), although in January 1990 some of them have been authorised to own subsidiaries which may engage to a limited extent in underwriting and dealing in corporate debt and equity securities on the same basis as US owned bank holding companies. Similarly, non-US banks with a bank subsidiary in the US may not own a securities firm (section 4(a)(1) of the Bank Holding Company Act); US branches of non-US banks are subject to the same restrictions to engage in securities activities (section 8(a) of International Banking Act). However, banks have been authorised by the Federal Reserve Board to enter a number of securities-related activities.

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

With certain exceptions, non-resident firms can only provide investment services, including provision of investment research to non-institutional investors, to US residents through a registered broker-dealer. However, as regards dealing in futures and options, CFTC Part 30 Exemption Order permits the exemption for foreign firms from US registration and regulation to provide services to US residents. While it is appreciated that there are benefits under this exemption, business done for US residents in non-US contracts on a non-US exchange by non-US firms is nevertheless subject to a number of burdensome and extraterritorial regulations, such as:

- *firms need to segregate all US customer money;*
- *firms must acquiesce to US customer rights to refer for arbitration in the US;*
- *foreign firms must provide CFTC with a list of all their US affiliates carrying on related business and procure a consent from those affiliates that CFTC may have access to their books (such requirement is not imposed on local dealers).*

Certain of these requirements may be imposed even in cases of unsolicited business carried out at the initiative of the investor.

Access by US residents to non-US markets may be otherwise hampered by the extraterritorial application of US regulations determining in certain instances, in the case of business carried out in a non-US exchange or market by a US resident, the terms of contracts, the acceptance by the foreign firm of the US jurisdiction, or otherwise imposing US regulation and jurisdiction on non-US exchanges or markets in which US residents participate.
The SEC have recently proposed large trader reporting rules which appear to require reporting of large trades in US-listed securities even when they take place outside the US and are not carried out through US brokers/dealers. The EC is concerned that, if implemented in the way apparently envisaged by the SEC, this proposal would have unwelcome extraterritorial effects.

IX.C Other restrictions operating at the Federal level

Description

Under Federal law, directors of EC banks' subsidiaries incorporated in the US must be US citizens, although under approval of the Comptroller of the Currency up to half of the number of directors may be foreign (cfr. 12 US CODE N° §72).

Taking into consideration concerns expressed in the 1990 Trade Barriers Report and by the International financial community, the Federal Reserve Board raised the uncollateralized Fedwire daylight overdraft ceiling for foreign banks last year. This change represents a positive step, but further progress is needed so that foreign banks no longer have lower uncollateralized overdraft possibilities than US banks.

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

IX.D Other restrictions operating at the State level

Description

- ***Banking:***

  Banking regulation at the State level is traditionnally important because of the existence of the dual banking system in the US, in which responsibilities are shared or divided between federal and State authorities.

  State activities have also become particularly significant because deregulation has often appeared first at the State level before being adopted at the national level. In the 1970's , deregulation of

interest rates occurred initially at the State level before being adopted by Congress. Similarly, in recent years many States are attempting to avoid federal interstate banking restrictions or limits on lines of business through changes in State law. The ability of foreign banks to take advantage of deregulation at state level, however, with effect from late 1992 will be limited by section 202 of the Federal Deposit Insurance Corporation Improvement Act of 1991, which limits the branches of foreign banks established under state law to the types of activity permissible for branches organised under federal law.
As activity at the State level has become increasingly important, there is concern that many States may have adopted or are introducing measures which discriminate against EC banks :

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

- ***Insurance:***

Certain States do not allow the operation and establishment of insurers owned or controlled in whole or part by a foreign government or State.

Certain States impose special capital and deposit requirements for non-US insurers or other specific requirements for the authorisation of non-US insurers. However, some of these requirements are also imposed on out-of-State US insurance companies.

Some States issue for non-US insurers only renewable licenses limited in time or for shorter periods.

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

IX.E **Other restrictions**

Description

Certain States impose reciprocity requirements for the establishment of branches or agencies of non-US banks, and most States impose similar reciprocity requirements for the establishment of branches of non-US insurance companies[1].
At the Federal level, the Primary Dealers Act (section 3502 (b)(1) of the 1988 Omnibus Trade Act) imposes the prohibition to become or to continue to act as primary dealers of US government bonds on firms from countries which do not satisfy reciprocity requirements, if they have not been authorised before 31 July 1987 (with the exemption of Canadian and Israeli firms).

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

In many instances, the most commonly available visa to executives or managers of non-US banks is temporary (maximum 5-6 years) and renewable only after the employee has left the US for one year.

Comments/Estimated impact of the restrictions in the financial services sector

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

The application of internal US specialisation requirements beyond US borders could also have a substantial and unwelcome impact on the structure of European financial groups, although the Commission acknowledges the flexibility shown by the Federal Reserve Board to limit

(1) US banks and insurance companies from other States may also be affected by these provisions.

to the extent possible under current US law these extraterritorial effects. Community banks having a bank subsidiary in the US may become affiliated within the Community with a Community insurance company having an insurance subsidiary in the US, or with a Community securities firm having a subsidiary in the US, or there may also be cases where a Community bank having a branch or subsidiary in a State of the US merges with another Community bank having a branch or subsidiary in the US in a different State. In those cases, it may be necessary either to divest existing bank, securities or insurance operations in the US, or in any case to restrict drastically existing US operations in the securities field.
The adoption of the Federal Deposit Insurance Corporation Improvement Act of December 1991 failed to address these restrictions affecting the operation of Community financial institutions in the United States ; in one aspect, it introduced a new restriction on the ability of foreign bank branches to take deposits under 100.000 $. The Commission expects that the new proposals to ease current restrictions issued this year by the Administration will be approved by Congress. The Comission also expects that these reforms will benefit both US and non-US banks, bank holding companies and other financial firms alike, will respect the present degree of market opportunities which EC financial institutions already enjoy in the US market, and will not result in additional burdens for EC financial firms operating in the US. The Act did, however, introduce or propose major changes in the system of regulation for foreign banks in the United States, many of which depend either on being implemented in the form of regulations or on further studies being conducted. This creates a period of uncertainty for foreign banks. Potentially the most far-reaching would be the outcome of the study (mandated by Section 215) into whether foreign banks should be required to conduct banking operations in the US through subsidiaries rather than branches: if this proposal were adopted and implemented it would impose serious competitive disadvantages on the operations of community banks in the US by comparison with US banks in the Community. The Act also contains a measure (Section 214) to the effect that foreign banks shall establish subsidiaries if they are to accept or maintain deposit accounts with balances of less than $100,000, unless they already have an insured branch ; if interpreted literally, this would place considerable constraints on the operation of foreign banks through branches in the US and the Commission hopes that legislation would be enacted quickly to reverse what may have been an unintended consequence of the Act.

The Commission stresses the need for any reform eventually adopted to end the adverse effects on non-US based banking organizations of the present application beyond United States' borders of United States' specialization requirements, geographical restrictions or other operating conditions, such as certain "firewalls" between the US securities operations and the non-US affiliates of the same financial group.

The restrictions and discriminations existing at the State level have a smaller adverse impact on the competitive opportunities available to EC financial institutions, but are nevertheless obstacles to effective market access.

X BARRIERS IN OTHER SERVICES SECTORS

X.A Maritime Transport

X.A.1 Non-vessel operating common carriers

Description

The "Federal Maritime Commission Authorisation Act of 1990" - HR 4009 - was signed by President Bush on 16.11.90 and a final rule was issued by FMC on 8.9.91. Section 710 of the Act, which deals with Non-Vessel Operating Common Carriers (NVOCC's), contains provisions which put at risk the business of many Community freight forwarders who are subject to a range of requirements such as posting of a bond and appointing a resident agent in the US.Furthermore, this Act prohibits the shipping lines to accept cargo from NVOCC's who have not filed a tariff with the Federal Maritime Commission.

Comments/Estimated Impact

The Community considers that the financial and administrative obligations of Section 710 impose an unnecessary and unwarranted burden on the international transportation industry.

X.A.2 Cargo Preference

Description

Certain types of government owned or financed cargoes are required by statute to be carried on US-flag commercial vessels.

The statutes are:

- **The Cargo Preference Act of 1904.** *This requires that all items procured for or owned by the military departments must be carried exclusively on US-flag vessels. Furthermore, the Cargo Preference Act of 1954 specifies that at least 50% of the 100% requirement must be met by the use of privately owned US-flag commercial vessels.*

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

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

- ***The Food Security Act of 1985,*** *which increases the minimum agricultural cargoes under certain foreign assistance programmes of the Department of Agriculture and the Agency for International Development (AID) to 75%.*

Comments/Estimated Impact

The impact of these cargo preference measures is very significant. They deny EC and other non-US competitors access to a very sizeable pool of US cargo, while providing US shipowners with guaranteed cargoes at protected, highly remunerative rates. The burden on the US federal budget is clearly considerable. In 1987, revenue from government-impelled cargo preference totalled approximately $570 million for US-flag ship operators.

X.A.3 **Maritime Shipping Services; Ship Classification Services**

Description

Based on the Merchant Marine Act, 1920, The Coast Guard Administration grants an effective monopoly for ship classification and inspection services to the American Bureau of Shipping.

Comments/Estimated Impact

Effective market access for Community classification companies is prohibited.

X.B *Air Transport*

X.B.1 **Airline foreign ownership**

Description

Foreign investors can now own up to 49% of the shares in an air carrier. However, other restrictions still apply such as the rule that 75% of the voting stock in the airline must be owned by US citizens.

Comments/Estimated Impact

These US restrictions place European investment interests at a disadvantage and thus inhibit the free flow of transatlantic investment.

X.B.2 **Antidrug programme**

Description

In November 1988, the Federal Aviation Administration (FAA) adopted regulations concerning an anti-drug programme for personnel engaged in specified aviation activities. According to these regulations, employees performing sensitive safety and security-related functions -including

employees located outside the territory of the US- would have to undergo a drug test.

The rule is already applicable within the US but in so far as it relates to testing outside US territory the FAA in April 1991 extended the compliance date to 2.1.93.

Comments/Estimated Impact

The drug testing for personnel located outside the territory of the US is objectionable because of its extraterritorial reach.

X.B.3 Computer Reservation System Displays

Description

US legislation allows the principal US Computer Reservation System (CRS) displays used in booking airline travel to give preference to connecting services with the same carrier ("on-line") to connections with other carriers ("interline"). This implicitly disadvantages all the non-US airlines which, unlike the US carriers, have to rely on interline connections for traffic to and from US points other than their own gateway points.

Comments/Estimated Impact

This amounts in effect to a disguised restriction of international trade in services. Airline bookings are as a result distorted, with the consumer (the passenger) being only given the selection of US on-line services and not the quickest connections, which may well be with interline services. Therefore the present restrictions work against EC airlines' interests as well as against consumer interests, including US consumers whose bookings are also affected.

X.B.4 Certification of foreign aircraft repair and maintenance stations

Description

In 1988, the Federal Aviation Regulation (FAR 145) was amended, changing restrictive regulations dating back 40 years as to allow routine repair and maintenance of US registered aircraft to be performed anywhere in the world.

These rules, however, are applied in a way which have discriminatory effects on foreign services providers.

In order to perform maintenance or repair work on US registered aircraft, a foreign repair station needs to be approved (certified) and annually inspected by the US Federal Aviation Administration (FAA). Until such approval is given, the station cannot be used by US registered aircraft. Today, it is virtually impossible for an EC firm providing maintenance and/or repair for aircraft to be certified by the FAA because the FAA does not carry out the necessary inspections/certifications across the Community.

Comments/Estimated Impact

The problem does not stem from the regulation itself but from its incorrect implementation which in fact acts as a barrier to trade.

X.C **Space Commercial Launch Policy**

Description

The National Space Policy Directive of 6 September 1990 establishes that US Government satellites will be launched on US manufactured launch vehicles unless specifically exempted by the President.

From the US viewpoint, the measure is explained as part of a set of coordinated actions which are required to fulfil the long term goal of creating a free and fair market in which the US launch industry can compete.

Comments/Estimated Impact

This US policy is clearly detrimental to European launch service providers and through it, the US intend to promote their commercial space launch industry. As all US launches of government satellites are reserved for domestic launch service suppliers, European launch operators are effectively barred from competing for US government launch contracts, which account for approximately 80% of the US satellite market. The restriction, which is justified by the US for national security reasons as regards the launching of military satellites, is now also imposed on government satellites for civilian use.

Europe has no equivalent policy; ESA or national government satellites are not banned from being launched by US vehicles, and US launch service operators can compete for and win the launch contracts of European governments.

X.D **Telecommunications**

Description

Foreigners are virtually precluded from offering common carrier (telephone, telex, etc.) services in the US using radio communications by the ownership restrictions imposed on common carriers (see chapter XII C).

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

X.D.1 Common carrier services

These may be provided by foreign-owned businesses (for long-distance service only - services at the local level being for the most part regarded as a natural monopoly) if no radio communication is involved. However, these businesses also face discrimination in their regulatory treatment.

The Federal Communications Commission (FCC) establishes a distinction between "dominant" and "non-dominant" carriers. Dominant carriers are those which FCC considers to hold market power and bottleneck facilities. They must comply with stricter regulations than non-dominant carriers. At present the only US carrier so designated is AT&T.

In practice, the FCC classifies as "dominant" all foreign-owned carriers, 15% or more of whose stock is owned by a foreign telecommunications entity, irrespective of their size. These foreign-owned carriers face discriminatory treatment in matters pertaining to the construction of lines, tariffs and traffic and revenue reports, as follows:

- ***Section 214 of the Communications Act** requires common carriers to seek FCC authorisation to construct new lines or extend existing lines. The FCC currently forebears regulation for domestic services; but for international services, "dominant" carriers must obtain authorisation for the construction and extension of lines; authorisation is required for each type of service, and each country; "non-dominant" carriers must only get authorisation for the construction of new lines.*

All carriers must file tariffs at the FCC for international services; however:

- *"dominant" carriers must file most tariffs at the FCC on a 45 days' notice instead of 14 days for "non-dominant" carriers;*

- *"non-dominant" carriers' tariffs enter automatically into effect at the end of 14 days unless found unlawful, whereas dominant carriers' tariffs must obtain a positive authorisation;*

- *"dominant" carriers must also submit their costs to justify any tariff changes.*

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

In December 1991 the FCC issued a proposal to revise its regulation of foreign-owned carriers so that they would no longer be treated as "dominant" per se. The proposal focuses on whether a US carrier's affiliate lacks bottle-neck control in the foreign market or whether the foreign affiliate has been placed under public regulation that effectively prevents discriminatory treatment. This development is being closely monitored by the Commission of the European Communities.

Regarding Section 214 authorisation, this requires that common carriers may not construct, extend or acquire a communications line unless the FCC determines it would be in the public interest. The legislative intent behind this section of the Act was to regulate monopoly providers of communication services, and to make sure that they did not duplicate facilities, which would lead to the monopoly's "captive" customers paying higher charges than they should for surplus facilities. However, there are no set criteria used by the FCC in order to judge whether it is in the present or future public interest that carriers provide services, and there is some concern that the FCC, through its application of Section 214, is beginning to move away from the original intent of the section and to independently make decisions affecting international trade. For example, the FCC in its Further Notice of Proposed Rulemaking (May 1991), on international accounting rates, sought comments on whether to make Section 214 authorisations conditional on non-discriminatory treatment of US carriers serving a given country.

Finally, the Cable Landing Act requires a common carrier to seek a (marine) cable landing licence from the Secretary of State. This authority has been delegated to the FCC. The Act requires consideration of reciprocity.

Comments/Estimated Impact

The discriminatory regulatory requirements relating to "dominance" which are applied to those foreign-owned carriers not already excluded by S.310 of the 1934 Communications Act, exacerbate the effective barriers to foreign competition in this sector. By regulating European competitors far smaller than many unregulated US companies, the FCC appears to be adopting criteria going beyond competition policy. Similarly, with regard to Section 214, the FCC should not use this authorisation procedure as a tool to address broader policy issues beyond the regulatory concerns regarding the service for which the authorisation is being sought.

X.D.2 **Aeronautical satellite communications services**

In 1989, the FCC confirmed its 1987 decision to give American Mobile Satellite Corporation (AMSC) an exclusive licence to provide domestic mobile satellite-based aeronautical services in the US. Moreover, in its Order concerning AMSC, the FCC ruled that INMARSAT-based services may not be used on the domestic segments of international flights, thereby preventing effective market entry by INMARSAT-based systems, since any aircraft in flight between two US domestic points will be unable to use INMARSAT-based systems, but will instead be obliged to use AMSC's domestic system.

The US Court of Appeals reversed the FCC's decision to require several mobile satellite service applicants to join a consortium under a single license. However, in January 1992 the FCC launched the process for a final decision granting the US monopoly mobile satellite service licence to AMSC.

While the FCC, in a recent order, has decided to permit parties already authorised to provide Inmarsat aeronautical mobile satellite services to aircraft in international flight to provide interim services to aircraft

in domestic flight, it deferred consideration of a permanent waiver to allow use of Inmarsat for aeronautical mobile satellite services to aircraft in flight on domestic legs of scheduled international flights, such as Chicago to New York to London service.

X.E Professional services

Description

The provision of a wide range of professional and business services by Community nationals and firms is restricted in a number of states by local residency and establishment requirements. In addition there are US citizenship requirements for the provision of certain services. Examples of the later requirements include Rhode Island and District of Columbia for engineering services, Texas' reservation of the right not to allow foreign nationals to practice as legal consultants on home country and international law and the requirement of US citizenship for customs brokerage services.

Comments/Estimated Impact

US citizenship requirements prohibit market access for the provision of certain services by Community nationals and firms.

XI INTELLECTUAL PROPERTY

XI.A Section 337 of the Tariff Act of 1930

Description

Under this Section, as amended by the Omnibus Trade Act of 1988, complainants may choose to petition the International Trade Commission (ITC) for the issuance of an order excluding entry into the US of products which allegedly violate US intellectual property rights. ITC procedures entail a number of elements which accord less favourable treatment to imported products challenged as infringing US intellectual property rights than that accorded to products of US origin similarly challenged. The choice of the ITC procedure over normal domestic procedures for complainants with respect to imported products is itself an inconsistency, and the inconsistency is compounded by the fact that Section 337 proceedings are only available to a patentee who is manufacturing in the US. In addition, the ITC has to take a decision with regard to such a petition within 90 days after the publication of a notice in the Federal Register. Although in complicated cases this period may be extended by 60 days, even this extended period is much shorter than the time it takes for a domestic procedure to be concluded in cases where the infringer is a US company. There are also several other features of the Section 337 procedure which constitute discriminatory treatment of imported products: the limitations on the ability of defendants to counterclaim, the possibility of general exclusion orders and the possibility of double proceedings before the ITC and in federal district courts. Furthermore, Section 337 applies "in addition to any other provisions of law".

Comments/Estimated Impact

The rapid and onerous character of procedures under Section 337 of the Tariff Act of 1930 puts a powerful weapon in the hands of US industry. This weapon is, in the view of European firms, abused for protectionist ends. As a result, European exporters may be led to withdraw from the US market rather than incur the heavy costs of a contestation, particularly if the quantity of exports in question is limited or if new ventures and smaller firms are involved.

In the context of a procedure under its new commercial policy instrument, the Community decided in 1987 to initiate dispute settlement procedures under Article XXIII of the GATT. The Panel established upon the Community's request concluded that Section 337 of the United States Tariff Act of 1930 is inconsistent with Article III:4, since imported products challenged as infringing United States patents are less favourably treated than products of United States origin which are similarly challenged. This discrimination cannot, according to the Panel's findings, be justified under Article XX(d).

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

Following the adoption of the report by the Contracting Parties at the end of 1989, the US Administration made it clear that it would continue to enforce section 337 without change, pending enactment of amending legislation which, in its view, could most effectively occur through legislation implementing the results of the Uruguay Round negotiations. Given that the timing of the conclusion of the negotiations is now uncertain, the US should take steps to comply with the GATT panel ruling. Cases continue to be brought.

The discriminating character of this provision has only recently been illustrated in a case where the action in federal district court was suspended because of a binding arbitration clause and the action under 337 on the same claims went on.

Furthermore, although it was not addressed in the terms of reference of the Panel, the Commuity considers that the general issue of the access to 337 by foreign holders of US patents is still to be examined, since this access is restricted by a requirement to manufacture in the US and be representative of a US industry.

XI.B *Inadequate protection of geographical indications of European wines and spirits*

Description

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

In April 1990 the Bureau of Alcohol, Tobacco and Firearms (BATF) published a list of examples of "Foreign Nongeneric Names of Geographic Significance Used in the Designation of Wines". However, many Community geographical designations do not figure on this list and the E.C. indicated to BATF that the list, as published, is not satisfactory, since it does not improve protection of EC wine denominations in the US.

Moreover, no progress has been achieved to date with respect to wine names defined as "semi-generic" under US legislation. The US government allows some EC geographical denominations of great reputation to be used by American wine producers to designate wines of US origin. The most significant examples are Burugundy, Claret, Champagne, Chablis, Chianti, Malaga, Marsala, Madeira, Moselle, Port, Rhine Wine, Sauternes, Haut Sauternes and Sherry. This issue is clearly a major one in the ongoing EC/US discussions on a new and better "wine accord".

American producers also use some of the most prestigious European geographical indications as names of grape varieties. This abusive use could often mislead consumers as to the time origin of the wines.

With regard to spirits, the US regulations basically provide protection against practices misleading to the consumer. Furthermore, they explicitly protect five EC denominations. This limited protection does not prohibit the improper use of geographical designations of spirits or even the development of certain names into generic designations. Negotiations are continuing between the EC and the US on mutual protection of spirit drinks with a geographical designation.

Comments/Estimated Impact

The improper use of Community geographic designations for wines and spirits places these products at a disadvantage on the US market.

In the multilateral Uruguay Round negotiations on Intellectual Property the Community has been seeking to establish a high level of protection preventing any use of a geographical indication identifying wines and spirits not originating in the place indicated. The most recent draft text resulting from the Uruguay Round negotiations partially addresses this question. It aims to secure a "standstill" on the usurpation of geographical indications. The EC's goal, however, remains to eliminate the illicit use of its appellations.

XI.C Other Intellectual Property Issues

Description

Discriminatory features of patent interference procedures.

US law provides that a patent goes to the first person to make the invention. Section 104 of the US Patent Law however provides that it is not possible to establish a date of invention by reference to any activity in a foreign country. A non-US inventor cannot therefore establish a date earlier than that in which he applied for a patent. This is highly discriminatory and gives a marked advantage to patentees whose inventions are of US origin.

The elimination of discriminatory procedures is one of the objectives of the current TRIPs negotiations.

Berne Convention

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

- *Despite the clear obligation in Article 6 bis of the Berne Convention to provide for "moral rights" of authors, the United States has taken no action to implement this in their national law.*

<u>Comments/Estimated Impact</u>

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

XII BARRIERS TO INVESTMENT

Introduction: US policy and attitudes towards foreign direct investment

Foreign groups still own only some 5% of total US assets, a relatively low figure when compared to the position in some European countries. However, foreign direct investment continues to rise on both sides of the Atlantic. In 1990, the last year for which complete statistics[1] exist, foreign investment stocks in the US rose by 8% (7% from the EC), while US investment stocks abroad increased 14% (16% in the EC).

The Bush Administration continues to support the longstanding US policy to welcome foreign investment and a Presidential statement reaffirming US support for a policy of free and open foreign direct investment policy was published in December 1991. Nevertheless, an active and sometimes bitter debate is under way not only in the Congress, but among several federal agencies questioning whether this policy should be changed. This is, in large measure, a reaction to US-Japan trade and investment relations, which have deteriorated markedly in recent years. However, this changed political climate affects all foreign investors. In fact, EC countries account for a much greater percentage of foreign investment in the US than does Japan.

The first significant effect upon legislation of the squeeze on foreign investors was the "Exon-Florio" provisions of the 1988 Trade Act, which required that mergers and acquisitions deemed to affect national security (this concept remains undefined) be reviewed by a Committee; on recommendation from the Committee, the President may order divestiture of assets.

The second was the 1990 Omnibus Budget Reconciliation Act (Foreign Tax Equity provisions), which, inter alia, imposed reporting requirements on foreign companies, applicable retroactively. These are both onerous and extraterritorial in nature.

A number of bills which would interfere in various ways with the free flow of foreign direct investment were tabled in Congress in 1991. These have sought to introduce
- *extension of the definition of national security under Exon Florio to include "economic security";*
- *measures involving specific industries e.g. ownership restrictions in cable TV and direct satellite broadcasting;*
- *exemptions from anti-trust laws for industrial consortia whose members are US or Canadian;*
- *linkage between anti-trust and national security reviews;*
- *restricted access to government funding for R&D.*

There are a number of specific sectors where foreign ownership has been restricted, sometimes since the early part of the century. These include shipping, broadcasting, telecommunications and energy. The US Government has taken steps to relax similar restrictions in civil aviation.

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(1) *at historical values.*

The Community responded on 18 February 1992 to President Bush's Statement of December 1991, welcoming the Administration's support for an open investment policy. It stressed that this is a common objective and recalled that the US and the EC are already working together on strengthening international disciplines in this area, in the negotiations on the OECD National Treatment Instrument and on Trade-Related Investment Measures in the Uruguay Round. At the same time, it also drew attention to its continuing concerns over draft legislation tabled in Congress which is hostile to foreign direct investment and over the uncertainties over the implementation of the "Exon-Florio" provisions.

XII.A Exon-Florio Amendment

Description

Section 5021 of the 1988 Trade Act, the so-called Exon-Florio amendment (from the names of its sponsors), provides that the President or his nominee may investigate the effects on US national security of any mergers, acquisitions and takeovers which could result in foreign control of persons engaged in interstate commerce in the US. This screening is carried out by the Treasury-chaired Committee on Foreign Investment in the US.

Should the President decide that any such transactions threaten national security, he may take action to suspend or prohibit them. This could include the forced divestment of assets. There are no provisions for judicial review or for compensation in the case of divestment.

A number of bills intended to extend the scope of Exon-Florio provisions, or to widen the concept of national security to purely economic matters, have been tabled in Congress.

Comments/Estimated Impact

While the European Community understands the wishes of the United States to take all necessary steps to safeguard its national security, there is concern that the scope of application may be carried beyond what is necessary to protect essential security interests. In this context, the Community has highlighted in comments to the US Administration the wide scope of the statute, 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, do provide some additional guidance on certain issues, these uncertainties remain. Coupled with the fear of potential forced divestment, they have meant in practice that many, if not most, foreign investors have felt obliged to give prior notification of their proposed investments. In effect, a very significant number of EC firms' acquisitions in the US will be subject to pre-screening.

The Exon-Florio provisions could inhibit the efforts of OECD members to improve the free flow of foreign investment and could conflict with the principles of the OECD Code of Liberalisation of Capital Movements. Such an approach would also harm common EC-US efforts to establish multilateral

disciplines on trade-related investment measures in the Uruguay Round negotiations and to strengthen the OECD National Treatment Instrument.

XII.B Tax Legislation

XII.B.1 Information reporting requirements

Description

Information reporting requirements of the US Tax Code with respect to certain foreign-owned corporations treat domestic and foreign companies in a different fashion :

- *The foreign ownership threshold for reporting is expanded to include corporations with at least one 25% foreign shareholder.*

- *The record keeping requirements are extended offshore by requiring foreign corporations to transfer records, in certain circumstances, to their US subsidiary.*

- *US law is further extended offshore by requiring foreign corporations to nominate their US subsidiaries as their agents to receive IRS (Internal Revenue Services) summonses.*

- *Penalties for failure to comply with reporting requirements have been increased considerably (from US$1,000 to US$10,000).*

The Omnibus Budget Reconciliation Act of 1990 further extended the reporting requirements and related provisions :

- *The provisions apply not only to subsidiaries of foreign companies but also to all other "foreign" entities such as branches (this will primarily affect foreign banks).*

- *The requirements apply retroactively to all open tax years and to all records in existence on 20 March 1990.*

Comments/Estimated Impact

These requirements, particularly the retroactive provisions and the extension of the record keeping to the transactions of US branches of multinationals, are both onerous and extraterritorial. They appear to discriminate against foreign companies and could have the effect of discouraging foreign investment in the US.

XII.B.2 "Earnings stripping" provisions

Description

The Budget Reconciliation Act of 1989 contained the so-called "earnings stripping" provisions (Internal Revenue Code 163 (j)), which place a limitation on the extent to which interest payments can be deducted from taxable income. The limitation applies when the interest is paid by a

corporation which is subject to tax in the US, to a related party which is exempt from US tax. The majority of such tax exempt related parties will, in practice, be foreign corporations. The new law limiting excess interest is designed to prevent foreign companies artificially loading a US subsidiary with debt, beyond that which would be sustainable on the balance sheet of a dependent corporation. Such artificial loading can, in effect, transfer profits away from the US.

Comments/Estimated Impact

The objective of limiting excess interest is reasonable and consistent with the OECD model tax treaty. However, the US law uses a formula as part of its determination of excess interest which is inconsistent with the internationally accepted arm's length principle. This could, depending on the way this provision is implemented, be discriminatory and therefore discourage foreign investment in the US.

The law provides for regulations to ensure that the principle is adhered to. Those regulations have now been published in draft form. Until it is known whether revisions have been made to take account of concerns expressed, it will be impossible to judge whether or not the US practice is consistent with tax treaties.

XII.B.3 State Unitary Income taxation

Description

Certain individual US States assess State corporate income tax for foreign-owned companies operating within their state borders on the basis of an arbitrarily calculated proportion of the total worldwide turnover of the company[1]. This proportion of total worldwide earnings is assessed in such a way that a company may have to pay tax on income arising outside the State, thus giving rise to double taxation.

Comments/Estimated Impact

Quite apart from the added fiscal burden, a state which applies unitary taxation is reaching beyond the borders of its own jurisdiction and taxing income earned outside that jurisdiction. This is in breach of bilateral tax treaties concluded by the US with foreign countries. A company may also face heavy compliance costs in furnishing details of its worldwide operations.

In response to multinational corporations' protests and foreign governments' demarches the State of California enacted in 1986 "the water's-edge" legislation. In 1988 the Californian law was modified again

(1) According to a 1988 Price Waterhouse report "Doing Business with USA" (p. A-4), the States concerned are 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.

to further alleviate concerns of foreign-owned companies. Only companies that elect the water's edge approach are now required to file domestic disclosure spread sheets. The other major change was that if it qualifies and elects to do so, a company must bind itself contractually to the water's edge approach for five rather than ten years, as the law originally required. In November 1990, the California Appeals Court ruled that California's unitary tax method (which is known as "world-wide combined reporting") as applied to foreign-based groups is still unconstitutional under the foreign commerce clause of the Federal Constitution. However, because this ruling adressed California practice prior to 1986, it did not invalidate the current state tax law, which was adopted in 1986. The Appeals Court decision is being reviewed by the Supreme Court of California. If the Appeals Court decision is upheld, the issue of the validity of the 1986 legislation, and its subsequent amendment, will not remain unsolved and will thus continue to damage business confidence. Predictability would be increased by a decision repealing unitary taxation.

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

The EC and its Member States will continue to monitor the development of such legislation which are a disincentive for investment in the USA as well as a straightforward breach of bilateral tax treaties between the USA and the Member States of the EC.

XII.C Telecommunications

Description

Section 310 of the Communications Act of 1934 imposes limitations on foreign investment in radio communications: no broadcast (or aeronautical en route or fixed radio station licence) may be held by foreign governments, aliens, corporations in which any officer or director is an alien or of which more than 20% of the capital stock is owned by an alien (25% if the ownership is indirect). As most common carriers need to integrate radio transmission stations, satellite earth stations and in some cases, microwave towers into their networks, foreign-owned US common carriers are unable to compete in much of the long-distance market, and only through a minority shareholding in the mobile market. S.310 also applies to the Communications Satellite Corporation (COMSAT) which as US signatory to the INTELSAT and INMARSAT agreements is sole supplier of INTELSAT space segment services to US users and international service carriers, and of INMARSAT international maritime and aeronautical satellite telecommunications services. The Act provides for walvers but the Federal Communications Commission (FCC) has never used this possibility.

Comments/Estimated Impact

Foreign operators are denied access to ownership in these sectors in contradiction of the principles of the OECD Code of Liberalisation of Capital Movements. As they may not own wireless facilities and networks,

and may not take a large stake in US companies providing them, they are effectively prevented from competing in providing many common carrier services. Effectively, S. 310 obliges foreign carriers either to enter into subcontracting arrangements with US carriers, or to use alternative (non-radio) technology.

The ultimate rationale for these restrictions is the argument that US control of communications is essential at all times, for reasons of national security.

XII.D Other restrictions on foreign direct investment in the US

XII.D.1 National Security Restrictions

Description

Apart from the restrictions on foreign ownership of broadcasting and telecommunications facilities (see XII.C above and chapter X D) and of airlines (see also chapter X B 1), the United States has notified a number of additional restrictions on foreign ownership to the OECD, which it has justified "partly or wholly" on grounds of ***national security****:*

- *Foreign-owned or controlled firms are not accorded licences to operate nuclear energy installations, under the 1954 Atomic Energy Act.*

- *Foreign investment is restricted in coastal and domestic shipping under the Jones Act and the US Outer Continental Shelf Lands Act; this includes fishing, dredging, salvaging or supply transport from a point in the US to an offshore drilling rig or platform on the Continental Shelf (see chapter V D 2).*

- *Foreign investors must form a US subsidiary for exploitation of:*
  - *ocean thermal energy*
  - *hydroelectric power (e.g. under the Federal Power Act)*
  - *geothermal steam or related resources, on federal lands (Geothermal Steam Act)*
  - *deep water ports*
  - *mining on federal lands, the Outer Continental shelf or the deep seabed (US Outer Continental Shelf Lands Act and US Deep Seabed Hard Mineral Resource Act)*
  - *fishing in the Exclusive Economic Zone (Commercial Fishing Industry Vessel Anti-reflagging Act of 1987),*

  or for acquisition of rights of way for oil pipelines, leases (or interest therein) for mining coal, oil or certain other minerals

- *Licences for cable landings are only granted to applicants in partnership with US entities.*

XII.D.2 Restrictions at State level

Description

The United States has also informed the OECD of a number of restrictions at State level.

A significant number of States have laws directed at the ownership of US land by aliens and business entities. These laws vary greatly from State to State in their degree of severity (e.g. in terms of specification of types of land and of acreage amounts and in terms of exceptions). Twenty-nine States have some type of law restricting alien ownership of land. Nine States require aliens to report their landholdings within the State. Fifteen States restrict business entities from owning land or engaging in the business of farming. Eleven States have laws requiring business entities to report their landholdings within the State. An individual State may be included in more than one of the above categories.

Four States place restrictions on foreign access to mineral rights. One (Rhode Island) will not issue certificates for investments in public utilities. Four states have placed severe restrictions on ownership of real property by non-US citizens. For restrictions in the field of financial services, see chapter IX.

Comments/Estimated Impact

The US denies national treatment, in the cases referred to above, to foreign-owned businesses. Barriers to ownership in certain key sectors also affect procurement of goods and services.