Report on

UNITED STATES

TRADE BARRIERS
AND UNFAIR TRADE PRACTICES
1990

Services of the
Commission of the European Communities

EC REPORT ON US TRADE BARRIERS AND UNFAIR PRACTICES

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REPORT ON UNITED STATES TRADE BARRIERS AND UNFAIR PRACTICES 1990

It is widely acknowledged that the expansion of international trade is a necessary condition for sustained world economic growth. The need to reinforce and extend the multilateral trading system in order to facilitate international exchange and promote development on a world-wide scale is the driving force behind the present Uruguay Round of GATT negotiations. Like the European Community, the United States has repeatedly expressed its commitment to free trade and to the ongoing multilateral trade negotiations.

This report illustrates that although the United States is in general terms a comparatively open economy it, nevertheless, maintains numerous unfair or discriminatory practices and legislative provisions which impede and distort trade and which undermine the multilateral trade regime itself. It demonstrates that, contrary to popular belief in the US, the US is not free of the types of trade barriers condemned in its National Trade Estimate Report on Foreign Trade Barriers.

The list of measures set out in this report is by no means exhaustive. In particular, it does not reflect adequately the obstacles to the free flow of services, investment and technology, areas of ever growing importance in today's global economy. Similarly, the problem of the extraterritorial reach of US legislation is not treated in detail. It is also a matter for concern that the Defense Department spends huge sums in supporting Research and Development, indirectly subsidising its civil as well as its military applications. It should also be remembered that the US maintain a number of quantitative restrictions on imports and benefits from certain volontary restraint agreements.

The report does, however, give a good indication of the variety and scope of the barriers faced by economic operators seeking to export to or invest in the United States, as well as of the unfair pressures and uncertainty to which they are subjected as a result of the often arbitrary and unilateral nature of much of US Trade legislation.

It would be incorrect to wish to ascribe all the barriers and unfair practices listed in this report to growing protectionism in the United States. However, this is undoubtedly the case to some extent, as a certain temptation to protect the domestic US market is created by the persistent US current account deficit, and it is certainly true of those elements of US trade legislation which are incompatible with the multilateral obligations of the United States (e.g. mandatory, unilateral action under section 301). Nevertheless other factors can be identified which lead to the types of measures described.

For example, a piece of legislation which has been adopted for valid domestic reasons can have an unintended negative impact on the trade rights and opportunities of third countries. Thus, in general, divergent systems of economic regulation in different countries can give rise to problems between them. It is normal to solve such problems through bilateral consultation, with reference to international rules and using multilateral procedures where these are relevant.

However, the practices identified in this report raise doubts whether the United States is sufficiently committed to the multilateral system which provides the main reference point for resolving disputes. This is suggested not only by the adoption of numerous elements of trade legislation which conflict with multilateral rules, but also by the taking of clearly illegal measures (e.g. the unilateral retaliatory measures taken subsequent to the Community's directive banning the use of hormones for fattening livestock intended for human consumption in the Community), by the inordinate time taken to bring US legislation into conformity with the rulings of GATT panels (e.g. on Customs user fees, and Section 337), and by the inadequate US participation in international rule-making.

The latter is particularly striking with respect to the lukewarm US participation in international standard-setting, its non-adherence to the relevant annexes of the Kyoto Convention on rules of origin and the exemptions it seeks to international rules for the increasingly important economic regulatory activities of its States.

The Community is concerned by the extent to which non-tariff barriers to its exports now seem to be more and more at the State rather than at the Federal level. In the US, an increasing proportion of procurement is at the state level, while State regulations on taxation, on financial and professional services, in the area of standards, etc. , create serious handicaps to doing business in the US market.

Indeed, it is becoming clear that one of the major difficulties of selling into the US market is the extent to which the market is heterogeneous and fragmented. The Commission will be paying increasing attention to this phenomenon in the future.

In contrast, the Community market is moving rapidly to an open, competitive Single Market, in which companies can sell a single product to 325 million consumers through a single distribution system and with a single marketing concept.

In conclusion, it is indispensable for the US to eliminate the unilateral elements of its legislation and bring it fully into conformity with multilaterally agreed rules. The Commission remains convinced that the opportunity is available during the coming months to deal with many of the problems identified in this report provided that the necessary political will is brought to bear. In particular, many of these issues can be addressed within the Uruguay Round negotiations and other multilateral fora .

In addition, the reinforcement of the EC/US dialogue, which is currently under way will provide the opportunity of increasing the level of understanding with respect to each other's legislation and to avoid future divergencies .

I. US trade legislation

A. Section 301 of the trade act of 1988

1. Description

Section 301 is the statute under US law dealing with "unfair" foreign trade practices and measures to be taken to combat them. Major changes were made to Section 301 under the Trade Act of 1988. By substantially reducing the discretion available to the US authorities in administering the Act, the changes make it much more likely that GATT-illegal unilateral action will be taken to redress allegedly unfair trade practices. In fact, mandatory action, subject only to a few narrowly drawn waivers, is required in certain cases. In others some discretion, albeit reduced, remains. Furthermore, the scope of the statute has been enlarged to include new categories of practices.

The Trade Act also introduced a new procedure - the so-called "Super 301" - whereby USTR is required to identify priority unfair trade practices and priority foreign countries and initiate Section 301 investigations with a view to negotiating an agreement to eliminate or compensate for the alleged foreign practice. If no agreement is reached with the foreign country concerned, then unilateral retaliatory action is to be taken.
An additional new provision is the "Special 301" procedure concerning intellectual property (IP) 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.

2. 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 US used the Section 301 procedure twice against the Community in 1989 : first on 1 January when retaliatory measures were introduced against the EC in the hormones dispute (see below), and then, when on 5 July, the 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 1989, in flagrant violation of GATT rules. The disputes concerning canned fruit, shipbuilding and Airbus are cases in point. The Community will continue to defend its GATT rights whenever Section 301 is used to the detriment of its trading rights.

B. Hormones Dispute - US Unilateral Action

1. Description

A recent 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 (No 146/88), prohibits the use of certain hormones in livestock farming but does not discriminate between Community producers and those of third countries).

2. Comments/Estimated Impact

These trade sanctions were estimated to be worth $100 million.
In an attempt to de-escalate the trade dispute a Task Force was set up in February 1989. The Task Force met several times but US exports of beef to the Community did not significantly improve as the traditional big US exporters do not produce hormone-free beef and beef prices in the US are going up so that there is little incentive to export. Consequently, the US has only readjusted its 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, but the framework of these consultations has not yet been agreed.

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 which normally purchase European beef. The Congressional background of 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". In a recent interview USTR Hills added that the US intends to implement this measure in due course and the US has since confirmed that they are not prepared to readjust their retaliation measures to take account of the negative effects on EC beef exports.

In the Commission's view these new measures would constitute an effective increase in 1990 of at least $55 million to the US retaliation measures taken in response to the EEC's hormones directive.

C. Telecommunications - Trade Act

1. Description

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 threat of unilateral action (e.g. termination of trade agreements, use of S. 301 and bans on government procurement) if US objectives are not met.

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

2. Comments/Estimated Impact

The Community has been designated as a priority country under the Act, despite the fact that a major liberalisation of the EC market is taking place in the context of the 1992 programme and that negotiations on a multilateral services agreement are under way in the GATT-Uruguay Round negotiations.

The Community cannot accept a unilateral determination by the US of what constitutes a barrier or when "mutually advantageous market opportunities" in telecommunications have been obtained. US efforts to initiate negotiations under threat of unilateral retaliation can only hinder the multilateral negotiations.

Nevertheless in informal meetings the Community has provided the US with information relating to the EEC 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.

D. Public procurement-Trade Act

1. 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 persistant pattern or practice" and results in identifiable injury to US business.

To this effect, the US President is required to establish, not later than 30 April 1990, a report on the foreign countries which discriminate against US products or services in their procurement.

By 30 April 1990, those foreign countries which discriminate against US suppliers, have to be identified by the USTR. The USTR will then have one of two possible courses of action:

- it 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 the 30 April 1990 (first week of July 1990) and should be concluded within one year (July 1991). After that date, the President is required to deny such countries access to US procurement (1);

- It shall identify foreign countries discriminating against US suppliers in procurement not covered by the Code, and after 60 days (30 April 1990 /first week of July 1990), deny such countries access to US procurement[1].

2. Comments/Estimated Impact

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.

Once again, the disregard for the GATT, implicit in this provision, is detrimental to the Uruguay Round Procurement Code negotiations and to the shared EC-US objective of bringing more countries' products and services under multilateral free trade disciplines.

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

II. TARIFF AND OTHER IMPORT CHARGES

A. Tariff Barriers

1. 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 chapter)	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 à 13,5%)
including hotel porcelain dinnerware	35%
Certain glassware (5)	20-38% (12%)
Certain footwear (6)	37.5-48% (4-6-8-20%)
Certain titanium (7)	15% (5-7%)
Garlic and dried or dehydrated (8) Onions	35% (16%)
Zinc alloys (9)	19% + 48,5 cents/kg (3,5%)

2. 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 higher reductions in the Community's proposal for tariff reductions in the Uruguay Round.

B. Customs User Fees

1. Description

As a result of laws enacted in 1985 and 1986, the United States imposes customs user fees with respect to the arrival of merchandise, vessels, trucks, trains, private boats and planes, as well as passengers. The most significant of these fees is that levied for the processing of formal customs entries. This applies to all imported merchandise, except for products from the least developed countries, from eligible countries under the Caribbean Basin Economic Recovery 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.

These customs user fees, which are calculated on an ad valorem basis, are incompatible with the international obligations of the United States under Articles II and VIII of GATT.

2. Comments/Estimated Impact

Based on the US 1989 imports value from the Community, the merchandise processing fee costs the EC approximately $ 145 millions.

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 CUF was not in itself illegal but that it should be limited in amount to the approximate cost of services rendered.

The GATT Council adopted the panel report in February 1988. The CUF remains unamended two years after the adoption of the Panel Report despite repeated requests from the EC and other GATT Contracting Parties for the US to do so. In addition, the US has failed to offer any compensation to its trading partners.

The failure of the US to implement a GATT Panel Report puts the credibility of internationally agreed dispute settlement procedures into question.

C. Other User Fees

1. Description

In July 1986 US customs regulations were amended to impose customs user fees for the arrival of passengers ($5 per arrival) and commercial vessels ($397 per arrival, with a maximum of $5,900 per year for the same vessel).

The United States enacted a law in October 1986 requiring the collection of a $5 immigration user fee for the inspection of passengers arriving in the United States aboard a commercial aircraft or vessel, effective December 1, 1986. The United States uses the fee to fund the United States Immigration and Naturalization Service.

The United States also enacted a harbour maintenance fee in October 1986. The fee, which is to finance the cost of harbour dredging and channel maintenance, amounts to 0.04 percent of the value of commercial cargo travelling through United States ports. There is a proposal in this year's budget to triple the harbour maintenance fee to approximately 0.12 percent of cargo value.

2. Comments/Estimated Impact

In 1988, the estimated annual cost of these fees to the EC was $89.5 million for the passenger fee, $19.4 million for the vessel fee, and $147 million for the harbour maintenance tax.

D. Tariff Reclassifications

1. 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 HS, the US has increased its duties on certain textiles. Duties on wool-woven fabrics and wool/silk blends (see note (10) at end of chapter) have been increased from 33% to 36% 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).

Furthermore, the new classifications of agglomerate marble tiles (13) and certain jams (14) have led to increases in duty rates from 5.3% to 21% and from 3-7% to 4.9-35 % respectively, without having been subject to joint HS negotiations. In the same manner, a new classification of sugar confectionary (including white chocolate) has led to increased duty rates and decreased quotas (from 10% without quota or 16% with quotas to 17,5% with very limited quotas) (15). The duty increases under the new tariff reclassification are not justified and contravene the agreed GATT guidelines for transposition to the HS.

There are other examples of products being unilaterally reclassified under the HS by the USA, leading to a significant increase in the duties which applied under the former nomenclature. These have been maintained in the HS and the Community has received no compensation. These include orange juice concentrate-based products, prefinished hardboard siding, unfinished ducktype footwear, cab chassis, Unimog vehicles, polypropylene rope and twine, continuous cast iron bars, certain garments with simulated features as non ornamented wearing apparel, and cookware of enamelled steel bodies. This list is not exhaustive.

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.

2. 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 mio. (average 86, 87, 88).

E. Tax on maritime equipment and repair of ships abroad

1. Description

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

- repairs of US owned ships outside the USA and ;
- imported equipment for boats.

The basis of this tax is Section 466 of the Tariff Act of 1930, amended in 1971.

2. Comments/Estimated Impact

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

Notes to points A and D

Harmonized system (HS) codes of the items concerned :

(1) The items concerned can be found in the following headings :

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	(3) 69.07	(4) 6911.1010
9205	3205	69.08	35
9305	3305		50
9405	3405		6912.0020

(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) 81.08.1050	(8) 07.12.2020	(9) 7901.2000
9060	9040	

(10) 51.11.1160	51.12.1100	51.12.9060
2060	1960	54.07.9105
3060	2000	54.08.3205
9000	3000	3305

(11) 51.11.2060	(12) 59.05.0090	(13) 68.10.1910
3060		
9060		
12.1950		

(14) 20.07.9905	(15) 17.04.90.40
10	
20	
25	
35	

III. QUANTITATIVE RESTRICTIONS AND IMPORT SURVEILLANCE

A. Agricultural Import Quotas

1. Description

The United States regulates imports of a variety of agricultural products through the establishment of quotas. These cover certain dairy products (including cheese), icecream, 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 30 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 and 1989 resulted in a globalisation of certain EC allocations in favour of other third countries. Such a decision was incompatible with the provisions of the 1979 cheese arrangement between the EC and US.

2. Estimated Impact

EC exports are most heavily affected by United States quotas on dairy products, cheese and sugar-containing articles. In Fiscal year 1989 Community exports to the US of dairy products and cheese were $166 million, while exports of sugar and related products were $23.7 million.

B. Import licensing for quota measures

1. Description

When the United States imposes unilateral quota restrictions on imports, the merchandise to be cleared by customs must be accompanied by a special invoice authorising importation. However, such a clearance cannot be obtained until the goods are physically in the US customs territory. Thus importers and exporters have no assurance at the time of the shipment that the goods will be allowed to enter the US. If the quota has been filled, the goods must be re-exported or stocked in a warehouse until a quota is available. The fact that the import authorisation cannot be obtained prior to the shipment creates a barrier to trade and is a violation of the GATT Agreement on Import Licensing Procedures (Art. 2 d of the Code).

2. Comments/Estimated Impact

It is difficult to quantify the total economic impact of the above but considerable warehouse and transportation costs are incurred if goods are not licensed immediately up on arrival in the US. Furthermore, the uncertainty created is an additional obstacle to trade.

C. Beverages and Confectionery

1. Description

In May 1986 the US introduced quotas on imports from the Community of certain wines, beers, apple and pear juice, and candy and chocolate in the context of the dispute over the enlargement of the Community. These quotas have since been slightly relaxed.

2. Comments/Estimated Impact

The quotas were set at levels which have not proved restrictive, but importers have experienced delays in customs clearance, particularly for beer toward the end of 1989. Uncertainty regarding access has proved to be an obstacle to trade and, in some cases, has led importers to look for alternative sources of supply.

D. Vessels

1. Description

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

1.1 Fishing vessels

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

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

1.2 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, USC 46 883).

Moreover, the definition of vessels (Jones Act and 46 USC 390) 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 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 46 USC 883, amendments of 1956 and 1960).

1.3 Special work vessels

No foreign-built vessel can be documented and registered for dredging (46 USC 292), towing or salvaging (46 USC 316 a, d) in the US.

2. Comments/Estimated Impact

The analysis of EC exports to the US of certain categories of vessels show the negative impact of US restrictions on EC imports (average 84/88):

category CN code	average EC exports in 1000 ECUs	
	to the world extra 12	US share
fishing boats 8901.40 + 74	165,986	0
vessels for towing or pushing 89.02	74,965	0
dredgers 8903.11 + 91	46,189	0
vessels for the transport of goods and passengers 8901.61 + 65	870,077	8 %

IV CUSTOMS BARRIERS

A. Excessive invoicing requirements, delays in customs clearance

1. Description

Invoice requirements for exporting certain products to the US can be excessive.This is particularly the case for textiles/clothing where all shipments are subject to the completion of a very detailed and complicated form (Customs Form N° 5515). Many points on this form 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).

In addition, a new US Customs Directive (Accurate and Complete Invoices) applicable to a wide range of products (chemicals, textiles, ball or roller bearings, machines, machine tools, plastics, printed matter, etc.) may be introduced shortly, under which reporting requirements for information on imports will be further tightened. Concerning textiles, for example, detailed indications of prices, the composition of garments and parts of the body covered by garments will be required if this directive is introduced. Similarly, requirements for data on products such as chemicals, pharmaceuticals and essential oils are tantamount to the disclosure of commercial secrets (exact composition of a dyestuffs, individual components of a surface-active preparation, etc.)

Moreover, under the new directive the importer, rather than exporter, would be responsible for supplying detailed information and in case of non respect, penalties would be applied.

In addition to excessive invoicing requirements, customs clearance delays, which can exceed 2 months, represent an additional burden for exporters to the US.

The abolition of informal entry procedures for textiles in February/March 1986 have also caused particular hardship for certain companies who send small consignements of textiles or clothing on an irregular basis to the US, as they now have to employ customs brokers or arrange for the importers to attend at Customs to clear goods formally.

2. 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. The new US provisions, if implemented, would not have the effect of standardizing or improving the handling of invoices and/or customs declarations but rather constitute obstacles to exports to the US.

Excessive delays in customs clearance procedures can prevent exporting companies from complying with delivery deadlines and can hinder future involvement in projects which are on tight deadlines.

V. STANDARDS, TESTING, LABELLING AND CERTIFICATION

Introduction

In general, there is a continuing concern in the EC with regard to the standardisation process in the United States. Whereas the European Community is fully committed to the implementation of international standards as a way of ensuring open access to markets, the United States still appears to place more emphasis on non-standard solutions.

According to US sources, as of 1989, out of 89,000 standards used in the US, only 17 are directly adopted from ISO (International Organization for Standards) standards. No IEC (International Electrotechnical Commission) standards have been adopted. The Federal Government refers to about half of these standards in its technical regulations, thereby making them mandatory. This situation is difficult to reconcile with the GATT Standards Code. Under this GATT Agreement the US Federal government is obliged to use international standards as a basis for its own technical legislation and therefore not to use US standards which deviate from international standards. The US Federal government is also obliged to take such reasonable measures as may be available to it to ensure that private standardizing bodies and states use international standards. None of this seems to happen in practice.

This situation represents a fundamental problem for EC companies wishing to sell in the US market. They often have to produce a separate product for the US market, thus incurring extra costs unnecessarily and reducing their competitiveness.

Problems for potential EC exporters are further increased by the lack of any central standardizing body covering the entire US territory, as exists in the Community and in other countries such as Canada. In the US, there are more than 600 private organizations engaged in standardizing activities. There is no guarantee that by following one particular standard a product will be accepted throughout the US, the more so as states and other local government bodies often have additional legal requirements of their own. A similar situation exists for testing and certification requirements.

If one adds to this the fact that there is no central source of information on the entire range of standards and conformity assessment procedures, and the fact that the US has a very strict product liability system, it is easy to see that exporting to the US can be a major headache, especially for small and medium enterprises. This general problem may be illustrated by the following examples :

A. Telecommunications

1. Description

With regard to telecommunication services, while recognising the problems arising from the innovation and the speed of standards-setting, the EC is concerned about certain developments taking place currently in the United States and is also concerned that these developments are not transparent. For example, the ONA (Open Network Architecture) plans filed by the BOCs (Bell Operating Company) during 1989 are not closely related to international standards-setting. The indications are that ONA is being developed independently of national and international standardisation procedures, and that this is true for ISDN equipment and service plans also.

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 limiting entry to the market to those companies with the requisite financial resources. This is all the more apparent given that even when the Bellcore evaluation 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 (Federal Communications Commission) requirements are limited to "no harm to the network", manufacturers, in practice, have to comply with a number of voluntary standards, set by industrial organisations (such as Underwriters Laboratories) 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 (Underwriters Laboratories).

Moreover, under the National Electrical Code manufacturers of equipment to be attached to telecommunications networks will be required to submit their products to a nationally recognised laboratory to assess conformity with appropriate standards. Most US jurisdictions will make the Code mandatory. In reality, therefore, the FCC requirements are not the only ones which imported equipment will have to meet and it is not clear which requirements will apply in a given jurisdiction.

2. Comments/Estimated Impact

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

b) 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.

B. Sanitary and phytosanitary barriers.

1. Description

These barriers are of two types :

- Discrepancies in the legal sanitary and phytosanitary requirements implemented on each side of the Atlantic. This situation is well known for meat and meat products but it is also frequent with regard to the approval of pesticides and residue tolerances.

  For instance, the US insists on zero residue levels for substances which have not been approved for use in the US. Therefore the question of residue tolerance is often settled purely by chance, depending on whether or not an application for use in the US has been forwarded.

- The US often insists on its own controls to make sure that the US requirements are fulfilled and the USDA does not recognize the certifications provided by Third Countries to warrant that imported horticultural products are free from pests or diseases covered by the quarantine regulations.

  This mistrust becomes an impediment to exporting to the US when the relevant services of the American administration drag their feet to perform the required reviews (e.g. plants from the Netherlands, Belgium and Denmark using sterile growing media).

2. Comments/Estimated Impact

It is difficult to measure the impact of those obstacles. Either they deprive EC exporters of markets that they previously had in the US (e.g. certain meat products from the Federal Republic of Germany), or they prevent the EC exporters from taking advantage of potential markets (e.g. potted plants, vegetables).The potential impact is, however, very serious.

C. Cured Meat

1. Description

Exports of cured meat from the EC are subject to restrictive controls in the US market. For example, imports into the US of certain types of ham have been subject to a long-standing prohibition, ostensibly for health reasons. Following repeated approaches by the Community, US import regulations have been modified to permit importation of Parma ham.

However, the US still applies a prohibition on other types of uncooked ham, notably San Daniele, Ardennes ham and German and Spanish ham.

2. Estimated Impact

The above, high quality hams are a luxury product and enjoy a considerable international demand. Exports of these hams to the US, with its high per capita income, are expected to be substantial.

D. Electrical Products and Components

1. 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 in fact more than 2,700 state, city and municipal governments in the US that require divergent safety certifications on certain products sold or installed within their juridictions.

2. 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. Steep 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.

E. Assorted Equipment

1. Description

Various manufacturers have raised the issue that the US requires that their products be certified by US inspectors, despite having received certification by European authorities.

2. Comments/Estimated Impact

European manufacturers of pressure vessels indicate that the US requires its pressure vessels to be certified as meeting the relevant standard only by a company allowed to use an official US stamp. The stamps of European testing laboratories are not accepted as such by the US. The requirement to use one of the small number of US testing laboratories granted access to the stamp costs the European company time and money.

Another example is given by a producer of safes which are tested and rated by independent European authorities prior to export and then required to be retested and labelled in the US by the US Underwriter's Laboratories (UL) for burglary and fire protection characteristics in order to be accepted by US insurance companies. In addition to these procedures, these companies must replace some of their European locks with UL-approved American locks at an additional cost to the European companies in order to be acceptable to US.

VI. Public procurement

Introduction

This chapter will first give a brief description of the so-called Buy American provisions in general, and second will distinguish between US procurement restrictions which violate the existing GATT Code and those which are subject to the current negotiation 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.

Among the first type of discriminations, numerous barriers involve the Department of Defense. The European Community has already raised several cases in the GATT context with US authorities. It 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 DOD purchases. This interpretation has led in practice to a substantial reduction of the DOD supplies covered by the Agreement.

The European Community will continue through a case by case analysis of unilateral reductions of coverage imposed by the US authorities, both to discuss these matters with the US authorities in GATT through consultations and panels and to seek an improvement, in the context of the negotiations in GATT, of the existing Defense exception lists in order to clarify the scope of the Code and the use of the national security exception. Concerning other cases of non-conformity with the GATT Code (non-defense related supplies), the European Community will initiate, if necessary, new consultations or pursue matters already engaged in with the US authorities. It considers that the negotiations in Geneva on broadening of the Code should also ensure the elimination of such provisions as they represent serious obstacles to trade.

In addition, in the context of these negotiations, the EC is seeking to ensure that the Code will apply equally at the states' level (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.

A. Buy American Restrictions (BARs)

1. Description

The **Buy American Act** (BAA) of 3 March 1933 (PL 72-428), as amended by the Buy American Act of 1988 (PL 100-418, 102 Stat 1107, Title VII, 23.8.88), requires that:

- federal agencies procure only domestically manufactured or unmanufactured supplies for public use[1]; it also provides for a substantial local component requirement in the value of the items supplied, 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 labor 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.

In these cases, Executive Order 10582 establishes two alternative costs differentials: one is a 6% of the bid price including duty and all costs after the arrival in the US, and the other, 10% of the bid price excluding duty and costs after arrival in the US. The Department of Defense applies a 50% price differential (exclusive of duty and costs) or 6% (inclusive of duty), which ever is the higher.

Furthermore, 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.

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

Furthermore, 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 Defense to impose restrictions on foreign supplies to preserve the domestic mobilization base and the overall preparedness posture of the US. These restrictions "justified" by "national security" are considered in Chapter X of this Report;

- **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 37 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 Paragraph C.1 below).

2. Comments/Estimated Impact

   Buy American restrictions, provided for by federal and states 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 to the decline in the value of the procurement covered by the GATT Code;

- there has been a shift in the 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 $200 bn. The value of US procurement covered by the GATT Code has been declining from $19 bn in 1982 to $15 bn in 1986. It should also be borne in mind that approximately 15% of Code-covered products fall below the $150.000 threshold and are therefore not governed by the GATT code.

It is worth noting that procurement worth $180 bn is restricted through Buy American provisions to solely US suppliers. These Buy American provisions are waived by the Free-Trade Agreements with Canada and Israel, as well as by bilateral reciprocal defense procurement and industrial cooperation agreements (M.O.U.)(1). However, as mentioned earlier, these M.O.U.s can be unilaterally modified by the US.

There are at least 40 Federal Buy American legal instruments and at least 37 States Buy American legal instruments, and many more at local Government 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 BAR "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 modify unilaterally the M.O.U. concluded with them. The Commission shares this view. It is thus clear that the potential US market for Community exports is significantly affected by these restrictions.

(1) 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 equipement and achieve greater rationalisation, standardisation, and interoperability. The US has concluded such M.O.U. or similar cooperation arrangements with the UK (1975), France, the Federal Republic of Germany, Italy, the Netherlands, Portugal (1978), Belgium (1979), Denmark (1980), Luxemburg (1982), Spain (1982) and Greece (1986).

B. Measures contrary to GATT

The European Community considers that the following, by no means exhaustive, list of Buy American restrictions as applied to sectors, products or entities covered by the GATT Code, constitute an unacceptable violation of the Code.

i) Valves and machine tools

1. Description

a) 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, first adopted by Congress in 1986 and valid until the end of Fiscal Year (FY) 1991, is applied in a discriminatory fashion, since only Canadian or US bidders are allowed to supply the 21 Federal Supply Classes (FSC) of machine-tools for use in DoD-owned or controlled facilities.

   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 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 the 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.

b) Following a Section 232 petition (Trade Expansion Act of 1962) by the US National Machine Tool Builders Association (NMTBA), the International Trade Commission (ITC) decided in February 1984 that imports of certain categories of machine tools threaten 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 market share levels they had in 1985 or 1981 depending on the product category.

The EC did not agree to negotiate a VRA. The US then unilaterally set target market-share for imports of machine-tools from the Federal Republic of Germany and has monitored such imports. German exporters are therefore under threat of a unilaterally introduced import ban on their products should the target be exceeded.

The US administration has 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.

2. Comments/Estimated impact

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

ii) Goods or equipment used by the Voice of America

1. Description

On 22 December 1987 the President signed the bill authorizing appropriation for, inter alia, the Voice of America (PL 100-204). The law includes a Buy American section (Section 403). The section will allow for a 10 % price preference in favour of US bidders unless :

- 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 "overriding national security interest aspects" clause is invoked to justify the preference for US contractors, as well as a domestic component requirement of 55%; in any case, a 10% price preference is also imposed. Voice of America procurement concerns transmitters, antennas, 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).

2. Comments/Estimated Impact

This restriction is set each year by the US Information Agency Appropriations and Authorizations Acts.

The value of Voice of America procurement as foreseen by the Foreign Relations Appropriation Act is 1.3 bn. per annum for the period 1988-91.

iii) Synthetic fibres (DoD Appropriation and Authorization Act):

1. Description

This restriction is derived, according to DoD, from the so-called "Berry Amendment". DoD claims that it 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.

2. Comments/Estimated Impact

Annual Procurement value of clothing is estimated by the DoD to be $ 200 m.

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

iv) Automotive forging items

1. Description

This restriction covers automotive propulsion shafts, as well as other forging items.

It is not applied to Canadian supplies.

2. Comments/Estimated Impact

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 defense 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 Code, since these items are covered by the Code and the restriction is discriminatory.

v) Hand and measuring tools

1. Description

This restriction is based on the Berry Amendment and concerns the products listed in Federal Supply Classes (FSCs) 51 and 52. Implementing legislation, as enacted on 9 July 1987, gives a 75% price preference to US made tools.

2. Comments/Estimated Impact

The procurement value of this restriction is about 1 % of the total of procurement of the DoD. The EC considers that this restriction contradicts the US GATT Code obligation under which these items are listed as eligible if procured from the Contracting Parties to the Code. A similar view is taken by the DoD report to Congress.

vi) Antifriction bearings

1. Description

This restriction, justified for "national security" reasons is imposed on all types of bearings. The DoD rule will be applicable until October 1991. However it is not applied to Canadian supplies.

2. Comments/Estimated Impact

The EC contests that this restriction can be justified on national security grounds and consequently considers that this represents a violation of the US's obligations under the Code.

It is to be noted that 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 product categories of bearings. Only two of the fifteen categories reviewed experience shortfalls attributable to substantial import penetration : i.e. regular precision ball-bearings under 30 mm, and between 30/100 mm. The DoD demand for bearings is estimated as being 20 % of the total US consumption of bearings. According to the DoD, this "restriction reflects the belief that the US bearings industry has eroded during the last decade and that failure to halt this erosion will result in a domestic bearings industry that is unable to meet industrial surge and mobilization requirements. The intention of the restriction is to protect and strengthen the domestic industrial base for an industry that is critical to national security."

It should be noted that the DoD has not yet fully taken into account the conclusions of the ITA Section 232 study in order to repeal the procurement restriction on those antifriction bearings which were not considered as threatened by imports.

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

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

C. US measures in areas covered by the code negotiations

The European Community considers that the following non-exhaustive list of US procurement restrictions should be eliminated through the current Code negotiations. These restrictions are implemented at State level, or in the so-called "excluded sectors", or in the procurement of services.

i) State procurement restrictions

1. Description

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

1. 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.

2. 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).

3. Colorado:

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

4. Georgia:

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

5. Hawaï:

Hawaï legislation requires that preference should be given to Hawaïan and American products.

6. Idaho:

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

7. Illinois:

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

8. Indiana:

Indiana legislation provides for a 15% price preference for domestic 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.

9. Iowa:

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

10. Kentucky:

Under Kentucky statutes foreign supply is prohibited.

11. Louisiana:

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

12. 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.

13. 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.

14. Massachusetts:

Massachusets 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".

15. Minnesota:

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

16. 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.

17. Montana:

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

18. 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".

19. New Jersey:

New Jersey legislation requires US domestic materials to be used on public works projects.

20. 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.

21. North Carolina:

Contracting officers impose ad hoc restrictions on foreign supplies.

22. North Dakota:

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

23. 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 also to steel products.

24. 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.

25. Rhode Island:

Rhode Island legislation gives preference to US suppliers.

26. South Dakota:

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

28. Virginia:

Virginia legislation stipulates that contracts of $ 50.000 or above must specify US steel products and give a price preference of 10% (including duties) to suppliers of US steel.

29. 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, glass in state and local public works (up to 30% in labour surplus areas).

30. Wisconsin:

Wisconsin legislation requires the procurement of US items.

30. District of Columbia:

The Federal Buy American Act applies in DC.

31. States with 5% price preference and preference to in-state suppliers:
- Alaska
- Arizona
- Arkansas
- New Mexico
- Wyoming
- Nebraska
- Kansas

2. Comments/Estimated Impact

State and local government procurement represents 70% of the total US public procurement. It is interesting to note that federal funding to the states and local government represents 16% of the annual expenditures of states and local government, and that 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).

Sources: National Association of State Purchasing Officials

ii) Set-asides for small business

1. Description

Special legal provisions requiring procurement from 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 small business set-aside programme and small and disadvantaged business sub-contracting programmes 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.

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

2. Estimated impact

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). Further, definitions of "small business" as established by the Small Business Administration enable abusive application of the Federal preference mechanism.

That is why the Community considers that, in practice, these preference mechanisms do substantially reduce the scope of application of the GATT Code. The Community will seek to obtain, in the context of the future Code negotiations, the elimination of such Federal or local preference schemes.

III) US restrictions in the utilities and public works

a) 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) 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

1. Description

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 favor US supplies;
- steel and cement must have been manufactured in the US.

Violations of Section 165 by the States are penalised 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 to 60% for contracts entered into on or after 1 October 1991.

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

Section 165 of STAA of 1982 extended BAR to all contracts, set a local component requirement of 50% or more of the cost of all components of the vehicle or equipment. In addition, final assembly of the vehicles must be carried out in the US. The STAA is implemented by the Federal Highway Administration regulations (23 CFR, 635-410), which do, however, allow for minimal procurement of foreign steel and cement (when foreign items value is under 10% of the total cost of a contract).

2. Comments/Estimated Impact

The above rules effectively exclude foreign bidders from a sizeable market.

Annually, the federal budget provides 2 to 3 billion $ in capital construction funds through the Urban Mass Transit Administration (UMTA-DoC). In fact, federal funds subsidize various projects heavily (75 % to 80 %).

c) Extra high voltage equipment

Section 507 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, has a bilateral equivalent to EHVE, or otherwise offers fair competitive opportunities to US suppliers in that country.

d) 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.

iv) Restrictions on the procurement of services

1. Description

a) Shipping and cargo under the Cargo Preference Act of 1954, the Food Security Act of 1985 and Public Resolution 17 (73d Congress)

The Cargo Preference Act requires that at least 50% of all cargo, shipped under any Federal government grant or subsidized loan, be transported on privately owned US flag commercial vessels.

The Food Security Act increases the cargo preference to 75% for agricultural cargoes under certain foreign assistance programs of the US-Department of Agriculture (USDA) and the International Development Agency (IDA).

Public Resolution 17 requires that 100% of any cargo, generated by US loans such as commodities shipments financed by EximBank loans, be exclusively transported by US flag carriers.

b) Consulting services

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.

2. Comments/Estimated impact

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

v) Telecommunications Procurement

1. Description

Telecommunications equipment is at present excluded from the GATT Procurement Code - apart from the inclusion of NTT of Japan - but examination of a possible extension to this sector is currently taking place.

The Community's understanding of the US network equipment market is that it is difficult to access, because of a variety of barriers, such as insufficient transparency and publicity in Regional Bell Operating Companies (RBOC) and AT&T procurement procedures, given the special rights and/or dominant position enjoyed by these utilities; the existence on this market of strong manufacturers which 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.

With regard to the long distance carriers, AT&T (the dominant long-distance carrier) and GTE (a provider of local services) also manufacture equipment, and therefore have little incentive to buy competitively. 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&T in particular, with a 65% share of the switching market and a 75% share of the long distance services market, dominates both the equipment and services markets, and so benefits from a set of advantages. These include the company's large installed base; the fact that network specifications are based on the requirements of the AT&T telecommunications network; and the influence that the company has on the standardisation process in the US. At the same time, however, its procurement procedures are not transparent.

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 proposed 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 suppliers which are most familiar with the RBOCs. The RBOCs buy only 1% of their central switching requirements outside North America, while the independents buy 30%/40%.

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 No. V 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 pay.

Government influence on procurement can be very significant. The Community's view is that even privately owned telecommunications operators are liable to be politically influenced in their procurement.

With regard to the FCC, for example, the 1934 Communications Act (section 214) provides that the FCC may intervene in the procurement process through the authorisation needed for the construction of lines. The FCC may also exert an influence under the "rate of return" method of tariff regulation.

Likewise, the local state PUCs actively regulate intrastate communications. The most relevant aspect is their administration of the rate-of-return price-setting system, which involves them in all aspects of the RBOCs' operations. Indeed, it is estimated that the equivalent of 70% of BOC revenue is regulated by PUCs rather than by the FCC.

2. Comments/Estimated Impact

The Commission's services are at present exmining how best to estimate the impact of these restrictions.

D. Abuse of national security provisions

1. Description

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 Buy America restrictions citing national security interests.

Each year, the Department of Defense Appropriations Act sets the Buy American requirements for DoD.

The following procurement restrictions were adopted on "national security" grounds:

- **Coal and coke for use by the American forces in Europe**

  This restriction 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**

  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 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.

- **PAN carbon-fibres**

  This restriction requires that 50% of DoD purchases of polyacrylonitrile carbon fibre should 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. DoD proposes to require 100 % US sourcing this year.

- **Miniature and instruments (9-30 mm) ball bearings**

  This restriction was designed to protect the only three US firms involved in manufacturing these special bearings against imports from Japan and Singapore, which have achieved an import penetration of 70 % of the US apparent consumption.

- **Naval vessels and coastguard vessels**

  The "Byrnes-Tollefson" amendment requires that US naval vessels and coastguard vessels be built in US shipyards.

- **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 caliber weapons, turrets, gears, crankshafts, etc. DoD procurement for these items accounts for 5% of the US forging items consumption.

- **Speciality metals**

  This restriction is based on the Berry Amendment and it limits procurement exclusively to US suppliers for the following metals: alloyed steel, alloyed metals, titanium and its alloys, zirconium and its alloys. However, it is waived for suppliers from countries which have a bilateral cooperative agreement with the US.

- **Supply of anchor and mooring chains**

  This restriction applies to all kinds of chains under 4 inches in diameter. It may be waived if US firms cannot supply Dod requirements in a timely fashion.

In addition, the following items, which are listed for easier reference, have already been described under section VI.C:

- **Valves and machine tools**
- **Fibres**
- **Equipment used by the Voice of America**
- **Hand and measuring tools**
- **Automotive forging items**
- **Antifriction bearings**
- **Telecommunications**

2. <u>Comments/Estimated impact</u>

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

VII. EXPORT SUBSIDIES

A. Export Enhancement Programme (EEP)

1. 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. Although both ceilings were reached a long time ago, the programme is still in operation. 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, feed grains, vegetable oils, poultry, eggs and dairy cattle) and for exports to all food importing countries except Japan and South Korea. In particular, in 1987, the United States added China and the USSR to the list of countries to which EEP can apply and, overall, almost half of all EEP wheat sales have been targeted to these countries.

The 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 US Administration's proposed 1990 Farm Bill reinforces the tough US attitude, suggesting the continuation of EEP without specified programme limits and commodity coverage.

2. Estimated Impact

As of 2 January 1990 about 77.6 million tons of wheat, 3.0 million tons of wheat flour, 8.2 million tons of barley, 0.24 million tons of frozen poultry, 50.7 million dozen eggs and substantial quantities of dairy cattle, malt, vegetable oil, and feed grains have been announced for export subsidisation within the programme. In financial terms, subsidies already granted are valued at approximately $2,641 million.

B. Marketing Loans

1. Description

Marketing loans have been provided for in the Farm Act of 1985 but on an optional basis. So far they have only been used for cotton and rice. The most significant commodities have not yet benefited. The 1990 Farm Bill proposals suggest the continuation of mandatory marketing loans for upland cotton and rice.

2. Estimated Impact

Extended subsidies for agriculture, such as marketing loans, have the effect of continuing to exert downward pressure on world prices at a time when everybody should be working towards improving conditions on the world market.

C. Targeted Export Assistance

1. Description

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 have been approved. The proposed 1990 Farm Bill recommends continuing the T.E.A. at a maximum level of $200 million a year.

For these purposes, the term "subsidy" includes 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.

The 1985 Act authorises priority assistance to producers of those agricultural commodities that have been found under Section 301 of the Trade Act of 1974 to suffer from unfair trade practices or that have suffered retaliatory actions related to such a finding.

2. Estimated Impact

For fiscal year 1988 about $100 million has been used to provide subsidies for this programme for promoting exports of high value products (e.g. wine, fruits, vegetables, dried fruits and citrus), mostly to Europe and the Far East.

VIII INTELLECTUAL PROPERTY

A. Section 337 of the Tariff Act of 1930

1. Description

International Trade Commission procedures.

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 patents. ITC procedures entail a number of elements which accord less favourable treatment to imported products challenged as infringing US patents 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. 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". Suspension of a Section 337 investigation is not automatic when a parallel case is pending before a United States District Court.

2. Comments/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.

Ten months after its release and after the United States had ceased their opposition, the report was adopted by the Contracting Parties of the GATT in November 1989. However, the US Administration made it clear that it will 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. President Bush and USTR Hills declared on 7.1.90 that Section 337 will continue to be applied until the Round is concluded. The Community looks to the US to take full account of the conclusions of the Panel when revising the Section 337 mechanism, and expects the US to bring Section 337 into conformity with GATT by the end of the Uruguay Round.

B. Other Intellectual Property Issues

1. Description

a) Trade Marks

The US does not support international arrangements that would be of benefit to European interests in the US, particularly the Madrid Agreement on the International Registration of Marks and the Protocol relating to the Madrid Agreement, which was adopted at a Diplomatic Conference in 1989.

Although the US has modified its trademark legislation recently, it is still one of the very few countries in the world which requires that a mark be used before it can be registered. At the same time it criticizes the progress made in the Community in the intellectual property field and calls upon it to accelerate implementation of Community legislation which would benefit US commercial interests in Europe.

b) Discriminatory features of patent interference procedures.

In objecting to the granting of a US patent, evidence of prior inventive activity on US territory may be used to defeat an application. Evidence of even earlier inventive activity abroad by a foreign inventor is not taken into consideration.

c) Berne Convention

Until the United States acceded, in March 1989, to the Berne Convention, copyright relations with (certain) 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 party to the Berne Convention 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.

Despite the clear obligation in Article 6bis 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.

2. Estimated impact

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

C. Inadequate protection of geographical designations of European wines

1. Description

Community legislation protects the geographical designations of wines. In 1983 an exchange of letters at high officials' level between the Community and the US provided a measure of protection for EC geographical names to designate wine. The US undertook not to appropriate such names (unless use was traditional) . This is the so-called non-erosion clause. The exchange of letters expired in 1986 but the US has maintained its commitment to this clause. The US continues to provide less strict protection than exists within the Community and this leaves the way open for the improper use of geographical designations of wines. Thus the US government allows several EC geographical denominations of great reputation to be used by US wine producers to designate wines of US origin.
The most significant examples are Burgundy, Claret, Chablis, Champagne, Chianti, Malaga, Marsala, Madeira, Moselle, Port, Rhine Wine, Sauternes, Haut Sauternes, Sherry.

2. Comments/Estimated impact

In a bilateral context, the Commission is still awaiting the publication of a final rule by the Bureau of Alcohol, Tobacco and Firearms (BATF) which would set out a positive list of wines for wine designations.

In the multilateral Uruguay Round negotiations on intellectual Property the Community wishes to fix the standards defining the geographical designations of the wines to be protected, including those currently granted the status "semi-generic" under US law (Champagne, Chablis, etc.).

Thus, at present the strictly controlled Community products find themselves at a disadvantage on the US market in that they are in direct competition with products which are not as rigidly regulated.

IX. TAX BARRIERS

A. State Unitary Income taxation

1. 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. 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. 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 the internationally accepted principle that foreign-owned companies may be taxed only on the income arising in the jurisdiction of the host state - this is "the water's edge" principle. A company may also face heavy compliance costs in furnishing details of its worldwide operations.

The State of California, host to numerous foreign-owned companies, is considered one of the most important examples. In September 1986 it adopted a tax bill which provides for the water's edge alternative to unitary taxation. The water's edge treatment may be elected by a foreign corporation if more than 20% of its property, payroll and sales are in the US. An "election fee" of 0.03% of the foreign corporation's Californian property, payroll and sales has to be paid if the water's edge treatment is elected instead of unitary taxation.

In 1988 the law was modified in several ways which alleviated some of the 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 compnay must bind itself contractually to the water's edge approach for five rather than ten years, as the law originally required.

Although the latest Californian legislation can be considered a step forward, it is still less than satisfactory. Although the length of commitment has been shortened, a company must still bind itself contractually for a five-year period in order to "elect" the water's edge treatment. An annual election fee must be paid by a company that takes the water's edge approach. A more basic objection is that extensive discretionary tax powers continue to be granted to state tax authorities.

2. Estimated impact

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.

B. Premium Quality Automobiles

U.S. Federal law, including provisions of the Internal Revenue Code (IRC) and the United States Code (U.S.C.) impose certain taxes and penalties which function as trade barriers on imported premium quality automobiles.

While the EC does not contest the validity of the environment protection objectives of these two measures, it questions their application which discriminates against Community exports. In addition,it should be noted that the current application of these provisions does not fulfill their environmental protection objective (see in particular point (ii)).

(i) "Gas Guzzler" tax

1. Description

Since model year 1980, Section 4064 of the IRC has levied a U.S. Federal Excise Tax on any individual passenger automobile "of a model type" whose fuel economy, as prescribed by the U.S. Environmental Protection Agency (EPA), is less than the determined standard. The current standard is 22.5 miles per gallon (MPG). The tax, which ranges from a low of $500 to a high of $3,850 per car, known as the "Gas Guzzler" tax, is imposed on all vehicles sold in the U.S. that do not satisfy the prescribed standard. The tax, levied on the ultimate customer of a vehicle, is collected by the manufacturer for the IRS from the ulimate customer.

Although the gas guzzler has the appearance of a uniform domestic tax, in practice the methodology for calculating the tax benefits the U.S. domestic industry.
The benefit to domestic manufacturers derives from the EPA definition of "model type" (MT) which is the basis for determining the applicability of the tax. The EPA regulations define MT as any vehicle with the same engine, car line, and transmission. Generally, with limited-line European manufacturers, only one vehicle constitutes a MT. In contrast, full-line U.S. manufacturers have for years utilized a single engine, car line and transmission to market several different models. When this domestic practice is coupled with the mathematical procedure of sales weighting fuel economy calculations, it results in domestic manufacturers being able to market vehicles with equal and even lower fuel economy values than foreign-made vehicles without being subject to the gas guzzler tax.

An example of this practice is evident from a situation where a U.S. manufacturer has four vehicles that are classified as the same model type (MT). The actual fuel economy of the vehicles is 23.4 ; 21.8 ; 21.0 and 21.0 MPG. The plain meaning of the gas guzzler tax would indicate that all but one of these vehicles should have a gas guzzler tax applied. Indeed, this would be the case if the four vehicles were from a European or other foreign manufacturer.

However, because the EPA regulations allow all four vehicles to be grouped as a single fuel economy class based on MT, the domestic manufacturer is able to project sales of each of the four vehicles so that a single fuel economy figure above 22.5 is achieved as follows :

$$\frac{10{,}000 \text{ total MT sales}}{\frac{6000 \text{ MT1 Sales}}{23.4 \text{ mpg}} + \frac{2000 \text{ MT2}}{21.8} + \frac{1000 \text{ MT3}}{21.0} + \frac{1000 \text{ MT4}}{21.0}} = 22.6 \text{ mpg}$$

The sales numbers for the foregoing examples are not actual sales figures but are relative to the actual projections used by the manufacturer. In this example the manufacturer is permitted to sell cars with EPA mileage ratings of 21.8, 21.0 and 21.0 without the imposition of the gas guzzler tax.

2. Comments/Estimated Impact

The current EPA regulations clearly favor U.S. manufacturers. This is evident from the fact that although significant numbers of U.S. manufactured vehicles have fuel economy values below 22.5, the 1990 Fuel Economy Guide indicates that the gas guzzler tax was applied to only two vehicles built by U.S. car makers.

Since 1984, the cars of several European importers have been subject to this tax. This has greatly increased the burden on American customers. This results in putting United States dealers of European premium cars at a serious competitive disadvantage.

In addition to the gas guzzler tax having been applied selectively against European imported cars in the past, there have also been recent attempts to enact legislation which would double this tax burden. The ability of European premium car purchasers to absorb this unfair and discriminatory increased cost in an increasingly competitive U.S. car market is highly doubtful. Furthermore, importers or dealers cannot bear such an increase without serious economic consequences.

(II) CAFE (Corporate Average Fuel Economy) law

1. Description

From model year 1978 and on virtually all car makers marketing cars in the U.S.A. are subject to the imposition of penalties for failure to achieve a minimum fuel efficiency, based on averages of the fuel economy of their entire U.S. sales.

The U.S. federal law imposing such standards is 15 U.S.C. Sec. 2008 (commonly known as the Corporate Average Fuel Economy law, "CAFE"). Enacted into law in 1975 by the U.S. Congress, CAFE is intended to increase fuel efficiency and thereby reduce the U.S.A.'s dependency on foreign sources of petroleum.

2. Comments/Estimated Impact

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.
From 1983-89, a total of US $ 118 million has been levied on EC manufacturers.
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 premium 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 environmental protection 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.

In addition, 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 as a sales weighted average (MPG) for 2 categories of cars :

- the first category corresponds to 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 category corresponds to "imported cars" (where less than 25% of the value of the spare parts is produced in the US).

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. to the detriment of Community exports.

C. Others

1. Description

Foreign corperations and related parties have been placed at a disadvantage by federal and state US tax provisions :

- "Earnings stripping" provision

The so-called "earnings stripping" provision places 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.

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 and this is inconsistent with the internationally accepted arm's length principle. The law provides for regulations to ensure that the principle is adhered to. Until those regulations are published it will be impossible to judge whether or not the US practice is consistent with tax treaties.

- Information reporting requirements

The information reporting requirements of the US Tax Code with respect to certain foreign-owned corporations have been extended in a manner which is both burdensome and extra-territorial :

- The foreign ownership threshhold 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).

- Discriminatory taxation by states

An example of this is the discriminatory tax on imported wines applied by the State of Florida. While domestic wines are taxed at between $0.25 and $2.95 per gallon, imported wines are taxed at $1.75 - $3.58 per gallon.

2. Comments/Estimated Impact

The "earnings stripping" provision and the information reporting requirements could be discriminatory and are extra-territorial. They could have the effect of discouraging foreign investment in the US.

X. Misuse of "national security" provisions

A. Import restrictions

1. Description

In recent years in the United States, domestic industry has had increasing recourse to Section 232 of the Trade Expansion Act (the so-called national security clause). Under this section, the Department of Commerce investigates whether articles are being imported into the US in such quantities or under such circumstances as to threaten to impair US national security. Petition requirements are much looser under Section 232 than under other trade statutes. Recent cases affecting Community exporters have been machine tools (see separate entry under section VI), bearings, crude oil and petroleum products, and plastic moulding injection machinery. In the latter three cases, after exhaustive investigations, no action was finally taken to restrict imports.

Under the Trade Act of 1988 the US government has reduced the time limit for the Commerce Department to make an investigation from one year to nine months. In addition, the President must now decide what action to take within 90 days of the Department's report. Previously, there was no deadline for Presidential action.

The changes to Section 232 under the Trade Act add to the Community's concerns regarding the operation of this Section. It seems that certain US industries are attempting to obtain protection under this statute instead of, or in addition to, the relevant trade-related provisions (e.g. antidumping regulations). In the bearings case, the Section 232 case was one of three trade-related actions, including : Section 232, DOD Buy America rule (see separate entry under Section VI) and anti-dumping cases.

2. Comments/Estimated Impact

There was no direct impact in the case of bearings, oil and moulding machinery as no action was taken. Exporters were, nevertheless, subjected to uncertainty during the investigation and incurred heavy expenses in defending the case.

B. Exon-Florio Amendment

1. Description

Section 5021, 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.

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.

On 14 July 1989, the US Department of the Treasury published draft regulations to implement Section 5021 of the Trade Act of 1988.

2. 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 of the draft Regulations goes 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 definitions in the Regulations, the lack of a definition of national security, and the uncertainty as to which transactions are notifiable. These uncertainties coupled with the fear of potential forced divestment, have meant in practice that many foreign investors have felt compelled to give prior notification of their proposed investments. Indeed the Treasury itself has estimated that 350 of an expected 700 foreign acquisitions of $1 million or more will be prior notified this year.

If implemented in a restrictive manner, the Exon-Florio provisions could inhibit the efforts of OECD members to improve the free flow of foreign direct 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.

XI. EXTRATERRITORIAL ASPECTS OF US LAWS

1. Description

In the domain of international trade the US has a number of laws on the statute books which leave considerable scope for extraterritorial application. In particular the IEEPA[1] and the EAA[2] have been applied extraterritorially exposing Community enterprises to conflicting requirements in the different countries in which they operate.

The various regulations which are issued under these Acts employ various legal techniques whereby companies created under the law of the Member States and operating in the Community are regarded as US companies and whereby goods and technology, long after they have left the US, are still regarded as being subject to US jurisdiction. These legal techniques have been criticized already many times by the Community and its Member States, notably during the pipe-line dispute of 1982, but they continue to be applied.

Serious extraterritorial concerns have also been raised by the US Trade Act 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.

2. Comments/Estimated impact

It is generally recognized that the extraterritorial application of 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 foreign country in question. This is clearly contrary to international law.
It is also the reason why many states including Community Member States have adopted blocking statutes in order to counteract the consequences of the extraterritorial application of foreign legislation.

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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.

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

XII. BARRIERS RELATING TO FINANCIAL INSTITUTIONS

1. Description

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; besides, there are also restrictions to the expansion of activities which, while affecting in the same way EC and US financial institutions, are more cumbersome to the former :

a) Restrictions on geographical expansion(*) :

- 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); although some liberalisation has taken place recently, many States 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;

- 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 separate license to operate in each State.

b) Restrictions to enter securities business(*) :

Bank subsidiaries incorporated in the US of a non-US bank may not own a securities firm (section 20 of Glass Steagall Act, 12 USC §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.

c) Other restrictions operating at the Federal level :

- 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 USC §72);

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

- the way in which the Federal Reserve Board calculates the limits on banks' uncollateralised Fedwire daylight overdraft capacity results in substantially lower capacities for foreign banks non incorporated in the US than for US chartered 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) .

d) <u>Other restrictions operating at the State level</u> :

i) Banking :

Since deregulation is taking place at a fast pace but on a piecemeal basis, there is some concern that some 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 .

ii) 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 ;
- some States issue for non-US insurers only renewable licenses limited in time or for shorter periods .

e) Other restrictions :

- 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(*)
- 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 to firms from countries which do not satisfy reciprocity requirements which have not been authorised before 31 July 1987 (with the exception of Canadian and Israeli firms);
- tax barriers : 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 .

2. Comments/Estimated impact

The separation between banking and securities activities is likely to constitute, in an increasingly globalised international market, 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, nine EC banks have had securities firms' subsidiaries grandfathered under US legislation, and foreign banks now have an opportunity to undertake to a limited extent certain corporate securities activities on the same basis as that recently granted to US bank holding companies. The restrictions on inter-State activities are also a significant obstacle for the conduct of business within the US.

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

The extraterritorial application of internal US specialisation requirements could also have a substantial and unwelcome impact on the structure of European financial groups. 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 drastically restrict existing US operations in the securities field.

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.