-United States-
last updated on 2004-03-19

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GENERAL FEATURES OF TRADE POLICY

1. Overview of EU-US Trade relationship

The EU and the US are each other's main trading partners (taking goods and services together) and account for the largest bilateral trade relationship in the world. In the year 2001, the total amount of 2-way investment amounts to over €1.5 trillion, with each partner employing about 4 million people in the other. Total investment outflows from the EU to the US for this same year were €108 billion (46% of total EU foreign investment), while €82 billion of US investment flowed into the EU (69.3% of total US overseas investment outflows). In the year 2002, exports of EU goods to the US amounted to €240 billion (24.2% of total EU exports), while imports from the US amounted to €176 billion (17.7%of total EU imports). Concerning trade in services, exports of the EU amounted in 2002 (preliminary figures) to € 124 billion (38.3% of total EU exports) while imports from the US amounted to € 111 billion (36.8% of total EU imports).

2. Framework for Bilateral Trade Relations: the Transatlantic Economic Partnership

The EU and the US are committed to a politically and economically significant co-operation agenda. This was cemented by the signing of the *New Transatlantic Agenda (NTA)* and the accompanying *Joint EU-US Action Plan* at the EU-US Summit in Madrid on 3 December 1995. In particular, the NTA commits the EU and the US, without detracting from the existing co-operation in multilateral fora, to progressively reduce or eliminate barriers that hinder the transatlantic flow of goods, services and capital.

This commitment under the NTA led to the adoption of a joint statement on the *Transatlantic Economic Partnership (TEP)* at the May 1998 London Summit. The TEP includes both multilateral and bilateral elements. The core bilateral element of TEP is to tackle those trade issues - mainly regulatory barriers - which are now the main obstacle to transatlantic business, while preserving a high level of protection for health, safety, consumers and the environment. At the same time, TEP is designed to stimulate further multilateral liberalisation, by establishing closer EU-US co-operation on the preparations for new multilateral negotiations in the WTO. An innovative aspect of TEP is the joint determination to better integrate the views of labour, environmental and consumer organisations into the process.

At the beginning of November 1998, a *TEP Action Plan*, with target dates, was agreed with the US Administration. This document identifies areas for common actions both bilaterally and multilaterally. Despite the difficulties encountered in ensuring timely implementation of the Action plan, the EU and the US have maintained an on-going dialogue and satisfactory work on most issues covered by the Action plan, and some progress has been made in areas such as technical barriers to trade, regulatory co-operation, consumer product safety, food safety, biotechnology and competition. However, in other sectors, such as services, intellectual property and procurement, implementation has proved slower and more cumbersome.

At the end of March 2001, the Commission adopted a Communication to the Council setting out proposals for *reform of the NTA* and, in particular, streamlining the structure of the NTA. The new US administration is also considering this matter, which is currently being discussed by both sides.

3. Bilateral Agreements

One of the outcomes of the EU-US co-operation has been the adoption of agreements covering different aspects; i.a. the Agreement on Customs Co-operation and Mutual Assistance in Customs Matters (May 1997); the Mutual Recognition Agreement (MRA) covering specific goods areas - telecom equipment, pharmaceuticals, medical devices, electromagnetic compatibility, electric safety and recreational craft- (September 1997); the EU-US Agreement on the application of positive comity principles in the enforcement of their competition laws (June 1998); the EU-US Veterinary Equivalence Agreement (July 1999), aimed at facilitating trade in live animals and animal products ; the Safeharbour Arrangement (July 2000), setting out the principles for the adequate protection of personal data transfers ; the MRA of Marine Equipment (June 2001), etc.

4. Assessment of EU-US trade relationship

Despite the reinforced co-operation between the EU and the US, the fact remains that a considerable number of impediments, ranging from more traditional tariff and non-tariff barriers, to differences in the legal and regulatory systems, still need to be tackled. The Commission remains firmly committed to addressing these through the appropriate channels, particularly as the reinforcement of efforts to resolve bilateral trade issues and disputes is essential to the confidence building process which is an integral part of the TEP.

There are two particular aspects of US trade policy that are sources of concern to the EU. The first is extra-territoriality. The EU strongly opposes the extraterritorial provisions of certain US legislation, which hampers international trade and investment by seeking to regulate EU trade with third countries conducted by companies outside the US. Of particular concern are the Helms-Burton Act and the Iran Libya Sanctions Act. Progress towards a lasting solution to this dispute was made at the 18 May 1998 EU/US Summit. Implementation of the Understanding reached at that occasion however, continues to depend on US Congress legislative action.

There is a second element in US trade policy-making about which the EU has regularly complained: unilateralism. Whilst the US has in practice made extensive use of the WTO dispute settlement system, it retains the opportunity to take unilateral trade measures. In 2000 the EU won two dispute settlement cases before the WTO, one against the suspension of customs liquidation in the banana dispute, and one against Sections 301 to 310 of the US 1974 Trade Act. The EU also requested WTO consultations in relation to the "carousel" legislation signed into law on 18 May 2000 (section 407 of the Trade and Development Act of 2000), with no successful outcome. The Commission continues to oppose the implementation of this legislation and to monitor the situation. Finally, on 10 September 2001, the EU, together with other 8 complaining Parties, requested the establishment of a panel in relation to the Byrd Amendment.

The large number of high-profile EU-US trade disputes that have erupted in recent years has produced a widespread public perception that EU-US relations are mainly characterised by trade disputes. This is not the case. Such disputes touch only a minimal percentage (less than 2%) of an otherwise very healthy two-way trade flow. However, more differences are bound to arise between the EU and the US due to increasing interdependence between the world's two major markets and often diverging domestic rules. These rules are frequently based on very different societal values and sensitivities as regards health, consumer and environmental protection. There are, nevertheless, legitimate expectations both among EU and US citizens and economic operators that the two sides should strengthen their capacity to properly manage differences.

For this purpose, the Bonn EU-US Summit on 21 June 1999 agreed on a set of principles, using the existing mechanisms established under the TEP, for rendering early warning more effective in future. The *early warning mechanism* aims at identifying and preventing problems at an early stage, in order to avoid conflicts and facilitate their resolution before they risk undermining the much broader EU-US relationship. This does not guarantee the resolution of problems, but should constitute a serious effort to take each side's interests into account when taking policy, legislative or regulatory decisions.

For more information, visit the **EU-US Bilateral Trade Website**

The following table is an overview of the tradeflow between the European Union and United States

Section	Year	Import(Euro)	Export(Euro)
Animals & animal products	1996	572,637,990	629,624,530
	1997	655,779,680	688,729,600
	1998	687,712,630	744,729,890
	1999	697,427,130	887,768,540
	2000	854,658,130	1,085,096,700
	2001	873,251,980	1,126,906,780
	2002	808,270,970	1,106,637,170
	2003	709,552,080	1,109,308,720
Vegetable products	1996	4,332,642,390	643,387,100
	1997	4,349,954,790	853,773,510
	1998	3,841,088,130	988,764,540
	1999	3,282,612,750	942,385,050
	2000	3,710,077,990	1,131,084,820
	2001	3,564,652,550	1,201,527,370
	2002	3,682,793,040	1,337,399,960
	2003	3,416,112,040	1,258,268,760
Animal or vegetable fats	1996	178,707,510	294,792,740
	1997	127,629,580	219,678,290
	1998	130,149,220	213,878,530
	1999	94,148,900	112,822,940
	2000	80,790,950	370,339,080
	2001	133,130,470	296,548,350
	2002	101,059,890	469,698,450
	2003	76,821,430	386,922,290
Prepared foodstuffs	1996	2,640,116,600	3,262,995,020
	1997	2,899,151,360	4,116,315,930
	1998	2,938,113,320	4,542,507,330
	1999	2,715,259,260	5,414,832,670
	2000	2,999,298,560	6,197,577,050
	2001	3,098,578,510	6,698,124,180
	2002	2,705,690,530	7,283,443,410
	2003	2,335,118,870	7,012,964,400
Mineral products	1996	3,205,691,530	3,268,697,230
	1997	3,292,902,830	3,475,223,940
	1998	2,934,027,520	2,908,656,010
	1999	2,431,520,850	4,525,340,900
	2000	3,297,612,580	10,611,076,930
	2001	3,357,106,860	8,775,056,750
	2002	2,640,953,930	9,329,567,940
	2003	2,319,601,730	9,646,465,410
Chemical products	1996	11,120,616,800	10,542,450,550
	1997	13,684,231,870	14,573,844,980
	1998	15,639,577,580	17,888,537,550
	1999	16,626,928,450	23,349,130,800
	2000	20,937,819,070	27,139,665,130
	2001	23,511,755,570	31,307,674,290
	2002	25,697,006,640	40,937,182,160
	2003	23,895,675,650	40,920,570,190
	1996	3,653,622,110	2,630,817,180
	1997	4,469,127,330	3,310,883,400
	1998	4,592,583,670	3,809,813,910

Plastics & rubber	1999	4,688,789,970	4,290,457,720
	2000	5,605,395,670	5,083,023,000
	2001	5,381,767,320	4,991,688,420
	2002	5,022,078,600	5,095,522,520
	2003	4,617,276,520	4,833,331,020
Hides & skins	1996	312,006,140	902,740,520
	1997	336,668,750	913,822,430
	1998	381,748,530	898,482,850
	1999	315,634,470	944,491,620
	2000	401,688,620	1,290,030,310
	2001	434,964,500	1,363,894,680
	2002	342,011,630	1,234,276,630
	2003	353,736,880	1,123,047,920
Wood & wood products	1996	1,206,589,610	385,496,160
	1997	1,532,070,460	486,568,080
	1998	1,484,208,960	658,846,800
	1999	1,334,632,950	736,885,740
	2000	1,550,821,370	1,023,307,630
	2001	1,313,692,340	1,214,856,100
	2002	1,103,170,640	1,504,560,630
	2003	976,935,350	1,340,381,080
Wood pulp products	1996	3,082,250,380	2,010,006,310
	1997	3,464,603,760	2,352,848,750
	1998	3,521,469,080	2,744,114,460
	1999	3,330,213,720	2,896,788,490
	2000	4,299,830,500	3,656,326,200
	2001	3,948,600,380	3,419,495,940
	2002	3,529,159,050	3,452,992,420
	2003	3,045,037,100	3,322,982,710
Textiles & textile articles	1996	1,873,658,820	3,187,918,500
	1997	2,109,394,440	3,805,675,500
	1998	2,031,869,740	4,149,831,400
	1999	1,737,402,840	4,382,765,220
	2000	1,917,051,980	5,308,319,450
	2001	1,775,171,430	5,384,471,850
	2002	1,497,617,240	4,872,227,340
	2003	1,210,981,300	4,370,336,020
Footwear, headgear	1996	165,115,220	1,462,034,680
	1997	153,856,870	1,657,684,670
	1998	140,989,060	1,666,607,270
	1999	128,500,260	1,763,535,240
	2000	140,087,940	2,153,241,080
	2001	131,856,630	2,135,020,040
	2002	107,901,160	1,941,446,230
	2003	94,637,550	1,605,149,200
Articles of stone, plaster, cement, asbestos	1996	628,860,690	2,103,028,820
	1997	775,370,290	2,613,060,680
	1998	861,111,120	2,922,063,940
	1999	876,530,630	3,250,079,750
	2000	1,117,942,310	4,047,219,400
	2001	1,202,867,180	3,988,011,630
	2002	928,692,620	3,904,640,180
	2003	852,272,040	3,556,101,460
Pearls, (semi-)precious stones, metals	1996	2,773,788,260	3,289,738,270
	1997	3,213,296,370	3,970,308,000
	1998	4,046,841,500	4,345,101,440
	1999	2,760,305,070	5,037,060,320
	2000	4,029,388,830	7,305,994,030
	2001	4,071,260,790	7,022,032,410
	2002	3,228,135,450	6,203,637,860
	2003	1,826,953,140	4,383,467,790

Base metals & articles thereof	1996	2,700,079,680	5,963,877,650
	1997	3,086,755,900	6,964,978,870
	1998	3,506,235,350	6,844,586,650
	1999	3,487,377,790	6,891,566,770
	2000	4,103,274,470	9,280,197,460
	2001	4,229,545,210	8,667,778,350
	2002	3,438,296,320	7,778,450,810
	2003	3,266,121,310	7,170,124,420
Machinery & mechanical applicances	1996	33,440,997,350	26,701,942,340
	1997	39,815,658,860	33,258,734,340
	1998	44,911,372,670	38,896,114,030
	1999	48,299,578,920	42,675,397,420
	2000	65,221,451,640	53,485,052,130
	2001	59,096,457,070	54,104,952,220
	2002	46,754,538,930	49,806,442,160
	2003	39,166,919,370	45,269,038,070
Transportation equipment	1996	6,959,818,760	7,146,680,280
	1997	14,127,558,580	9,595,845,410
	1998	16,047,084,690	10,279,823,740
	1999	18,903,221,330	12,536,767,220
	2000	20,099,957,230	15,410,401,360
	2001	20,478,268,950	18,443,100,230
	2002	22,287,299,390	19,101,284,390
	2003	18,456,673,710	18,492,330,860
Instruments - measuring, musical	1996	7,635,940,170	4,993,711,380
	1997	9,079,808,460	6,086,143,410
	1998	9,934,531,580	6,848,244,910
	1999	11,605,259,130	7,748,006,670
	2000	15,411,138,540	9,918,167,730
	2001	16,607,053,690	11,914,407,100
	2002	15,209,398,730	13,204,413,630
	2003	13,999,514,790	13,506,501,210
Arms & ammunition	1996	124,221,620	211,016,970
	1997	197,740,270	224,337,570
	1998	182,938,050	234,326,100
	1999	215,911,470	284,692,520
	2000	313,395,540	387,077,020
	2001	289,829,620	373,296,200
	2002	562,270,980	398,640,650
	2003	287,472,310	378,263,670
Miscellaneous	1996	1,233,422,520	2,154,366,400
	1997	1,469,438,650	2,696,748,350
	1998	1,481,616,360	2,980,214,260
	1999	1,566,182,430	3,411,046,630
	2000	1,953,256,470	4,347,270,590
	2001	1,727,278,680	4,312,417,720
	2002	1,532,507,260	4,141,571,150
	2003	1,396,844,790	3,616,007,680
Works of art	1996	729,581,070	1,155,654,410
	1997	954,492,490	1,649,474,390
	1998	1,376,101,930	1,715,275,980
	1999	1,428,400,230	2,139,096,950
	2000	1,511,609,590	2,835,418,660
	2001	1,893,569,970	2,609,159,320
	2002	1,705,141,640	2,670,311,700
	2003	1,352,095,340	2,520,707,040
Other	1996	1,007,305,760	457,910,520
	1997	1,138,309,000	502,906,300
	1998	1,384,817,020	657,269,730
	1999	1,379,216,160	670,346,240
	2000	1,764,402,330	754,299,560

	2001	1,799,702,530	935,446,790
	2002	1,665,207,290	932,786,950
	2003	1,745,492,810	1,090,607,450

Overview

960061- *Iran/Libya Sanctions Act* [2004-06-07]

The Iran and Libya Sanctions Act (ILSA), signed into law on 5 August 1996, provides for mandatory sanctions against foreign companies that make an investment above US$ 20 million contributing directly and significantly to the development of petroleum or natural gas in Iran or Libya. In addition, mandatory sanctions are also applicable against companies that violate the UN Security Council trade sanctions against Libya. ILSA spells out the following possible sanctions:

1. The President may direct the US Export-Import Bank not to approve any guarantee, insurance, or credit in connection with any goods or service to the sanctioned company.

2. The President may order the US government not to issue any specific license or grant any permission to export goods or technology to the sanctioned company.

3. US financial institutions may be barred from making loans or providing credits totalling more than US$ 10 million in 12 months to a sanctioned company, unless the loans or credits are to be used «-´in activities to relieve human suffering»-´.

4. The US government may not buy or contract to buy any goods or services from the sanctioned company.

5. The president may impose other sanctions to restrict imports related to the sanctioned company.

6. The law also provides possible sanctions against a sanctioned financial institution.
The president may delay the imposition of sanctions for up to 90 days for consultations with the government with jurisdiction over the person or company.

- 26 February 2004: The White House announced the lifting of the 23 year old ban on travel to Libya.
- 29 April 2004: In light of Libya's recent efforts to dismantle its weapons of mass distruction and missile programs and its renunciation of terrorism US Department of Commerce, Bureau of Industry and Security (BIS) issued new interim regulations removing most of the restrictions on the export and re-export of goods, technology, and software to Libya.

960295- *Helms-Burton Act* [2002-02-14]

On 12 March 1996, President Clinton signed into law the *Cuban Liberty and Democratic Solidarity (Libertad) Act* of 1996 (referred to as the *Helms-Burton Act*). This is one of the latest in a series of legislative initiatives since the US proclaimed a trade embargo against Cuba in 1962 (Section 620(a) of the Foreign Assistance Act of 1961, further reinforced by the Food Security Act of 1985 and the Cuban Democracy Act of 1992).

The principal US measures to which the EU objected are:

a) The extra-territorial application of the US embargo of trade with Cuba insofar as it restricts trade between the EU and Cuba or between the EU and the US.

b) The denial of access to the US tariff rate quota for sugar to a country that is a net importer of sugar unless that country certifies that it does not import Cuban sugar that could indirectly find its way to the US (several Member States of the EU are net importers of sugar and have been unable to export sugar to the US under the quota because of this provision).

c) The denial of transit - if the US Treasury Department has not issued a special license - by EU goods and vessels of EU Member States, if vessels are carrying goods or passengers to or from Cuba or are carrying goods in which Cuba or a Cuban national has any interest; further, the denial of transit of vessels which have entered a Cuban port for trade in goods or services from loading or unloading freight in US ports within 180 days after having departed from the Cuban port through ports in the US.

d) The prohibition of the provision of "any loan, credit or other financing" (including provisions of performance guarantees, insurance and some payments) by US persons to any person for the purpose of transactions involving any confiscated property the claim to which is owned by a US national.

e) Under *Title III of the Libertad Act*, the creation of a right of action in favour of US citizens to sue EU persons and companies in US courts in order to obtain compensation for Cuban properties to which these US nationals have a claim, in cases where the EU persons or companies concerned have "trafficked" in such property that was confiscated by the Cuban government from persons who were or are now US nationals.

f) Under *Title IV of the Libertad Act*, the denial of visas and exclusion from the US (or threat thereof) of persons involved in confiscating or "trafficking" in confiscated property a claim to which is owned by a US national and persons who are corporate officers, principals or shareholders with a controlling interest of an entity which has been or involved in "trafficking" etc. in such property. Spouses, minor children and agents of such persons are also denied visas and excluded from the US under this provision.

990003- *Sections 301-310 of Trade Act* [2004-05-05]

Section *301 of the 1974 Trade Act*, as amended by the Omnibus Trade and Competitiveness Act of 1986, authorises the US Administration to take action to enforce US rights under any trade agreement and to combat those practices by foreign governments which the US government deems to be discriminatory or unjustifiable and to burden or restrict US commerce.

Title III, chapter 1 (sections 301-310) of the US Trade Act of 1974, as amended, in particular sections 306 and 305, imposes strict time limits within which unilateral determinations must be made and trade sanctions must be taken. The legislation mandates USTR to take this kind of unilateral action within time frames that in certain cases cannot possibly comply with WTO rules. This is particularly relevant in cases where the US should follow the procedure of Article 21.5 DSU to resolve disagreements over the WTO compatibility of measures taken by other Members to implement panel rulings. However, in the context of a Panel proceeding, the US Administration indicated formally that the Act would always be applied in a manner consistent with the US obligations under the WTO.

In addition, in cases where bilateral (as opposed to WTO) agreements are alleged to have been violated, Section 301 is still regularly used as a unilateral trade policy instrument. Under the various elements of Section 301 legislation, trading partners are given no choice but to negotiate on the basis of an agenda set by the US, on the basis of judgements, perceptions, timetables, and indeed, US legislation.

- The US continues to stick by its formal Statement of Administrative Action in which it undertakes to always act in a manner consistent with the US obligations under the WTO.
- 5 May 2005: USTR released its "Special 301" annual report on the adequacy and effectiveness of IPR protection in trading partners around the world. The European Union remains on the Priority Watch List because of insufficient progress regarding the dispute over EU Regulation 2081/92 (GI Regulation). In addition, USTR states that lack of full implementation of the EU Biotechnology Directive continues to be a concern. Six EU Member States (Italy, Hungary, Latvia, Lithuania, Poland, Slovakia) are placed on the Watch List.

Agriculture and Fisheries
last updated on 2001-12-06

The US is one of the world's largest importers of food. Nevertheless, a range of measures are in place to ensure the protection of a number of sensitive agri-food sectors from competition.

Tariffs and quantitative restrictions

Tariffs are in certain cases of a specific or compound nature, thus affording additional protection in case of falling import prices. Tariff peaks reach prohibitive levels for some products. Furthermore, as a result of WTO Dispute Settlement rulings in the Bananas and Hormones cases, where the relevant EU legislation was found WTO inconsistent, several EU agricultural products have been subject to retaliatory duties of an "ad valorem" rate of 100%. In regard of the Bananas case, with the entry into force of the new EU legislation, as of July 2001, the US lifted the retaliatory duties on EU products. Sanctions remain, however, in relation to the Hormones case, though the EU and the US are engaged in consultations to find a solution.

Tariff quotas are in place on the most sensitive products (beef, dairy products, sugar and some sugar products, peanuts, tobacco and cotton), and in view of the high out-of-quota rates, may act as "de facto" quantitative restrictions on imports. The EU remains concerned about certain in-built rigidities in the import licensing system for dairy products. This is in part based on historical trading and sometimes even results in licences being awarded to companies who no longer trade in milk products. The division of quotas for certain cheeses into Tokyo Round quantities and Uruguay Round quantities, which has no other purpose than to fragment access to and complicate license applications by traders, should be eliminated. A single quota for each cheese group would be more transparent, comprehensible and accessible.

Concerning fisheries, imports of certain fish and seafood are controlled or prohibited for conservation purposes. Currently, the EU cannot import tuna products from the

Eastern Tropical Pacific (ETP) Ocean into the US, as, for reasons beyond its control, it has not met the requirements set out by the *Marine Mammal Protection Act of 1972* in order to receive an "affirmative finding" from the National Marine Fisheries Service (MMFS). We must also take into consideration *Section 609 of Public Law 101-162*, concerning exports of shrimp to the US, and the revised guidelines for its implementation, issued in July 1999 by the Department of State in order to comply with a WTO Appellate Body ruling that found former guidelines WTO inconsistent. On 15 June 2001, a WTO Panel found the new measure justified under Article XX of the GATT, as long as certain conditions remain satisfied.

Sanitary and phytosanitary measures

A number of sanitary and phytosanitary requirements also remain a significant source of difficulty for EU exporters.

Approval of new non-manufactured agricultural products for import can take several years, even for products from the same area of production for which the same phytosanitary risks were permitted. Furthermore, a variety of EU exports to the US have encountered problems due to delays in US Customs sampling and inspection procedures, resulting in damage to the goods and subsequent commercial losses for the exporters.

Some agricultural products (i.e. apples and pears) are subject to pre-clearance inspection programmes whose aim is to guarantee, prior to shipment, that consignments are free from "insect pests that do not exist in the US or that are not widespread in the US." Operating in this way on the basis of an open list of unspecified pests is not a scientific approach and is contrary to the spirit of transparency as provided for in the International Plant Protection Convention and to the requirement of pest risk analysis and transparency laid down in the WTO SPS Agreement. The stringent inspections and the increased costs arising from the pre-clearance inspection programmes have clearly had a negative effect on EU exports of apples and pears to the US. Consultations with the aim of implementing the "inspection at port of arrival" option resumed in 1996. A draft protocol for a "Schedule of Conditions" concerning participation in an "experiment" for the export of apples and pears from the EU to the US without phytosanitary pre-clearance by the US in the Member State of production, has been submitted to the US. However, the consultations have not yet been conclusive.

Other undue obstacle to trade is the restriction, in the case of approved citrus consignments, of the ports of landing to those on the North Atlantic shores. This requirement leads to unnecessary costs of land transport into the southern and western parts of the US.

The EU is also concerned by the eventual impediments to trade that the organic standard "final rule" introduced by the US in February 2000 might create.

Trade in plants also encounters several restrictions related to phytosanitary measures, such as the extremely long delays of "Pest Risk Assessment" (PRA) - required for import of plants in growth media- by the US Department of Agriculture (USDA) Animal Plant and Health Inspection Service (APHIS).

On the other hand, the mandatory requirement for a two-year post-entry quarantine on an importer's premises for hardy nursery stock is considered by the EU to be excessive. Its main purpose is believed to be the detection of latent infections by organisms of quarantine concern. Although this measure may be justifiable in the case of new or developing trade in specific commodities, the EU considers this not to be the case if the measure is required for long-term trade on a permanent basis.

We must also note that there also remain significant sanitary obstacles to trade in live animals and animal products in the US market. It was expected that some of these issues might be solved by the Veterinary Equivalence Agreement, signed on 20 July 1999. However, no real progress has materialised so far.

In 1997, the US introduced rules on the import of ruminant animals and products thereof from all European countries, based on concerns about Bovine Spongiform Encephalopathy (BSE). These requirements are not scientifically based, do not follow the "Organisation Internationale Epizootique" (OIE) Code, and discriminate in targeting European countries. The US makes no distinction between countries where the incidence of BSE is high or low (the latter being countries with occasional cases). In addition, in December 2000, imports of all rendered animal protein products form most EU countries were banned, regardless of species.

The EU has raised its concerns at this excessive action bilaterally. During the Committee on Sanitary and Phytosanitary Measures in Geneva of 10-11 July 2001, the EU announced to intensify its efforts through bilateral discussions in the first instance with other WTO Members. If this would not help to solve the issue, further steps might be undertaken.

Quite apart from the BSE restrictions, the US also imposes animal health restrictions on the import of goats on the grounds of the risk of scrapie in sheep. These restrictions are not justified because of the widespread presence of scrapie in the US sheep population.

An issue of particular concern to the EU is precisely the repeated failure of the US to apply the EU-US Veterinary Agreement provision on regionalisation, most recently in the case of the Food and Mouth disease (FMD), where restrictions were imposed on the whole of the Community, although the disease had occurred in four Member States only. Subsequently, and though US restrictions were finally lifted for EU countries with no FMD cases, restrictions remained in place in France and Ireland, although these countries have been free of FMD for a period longer than the 90 day period established in the framework of OIE.

Other restrictions on live animals relate to the non-recognition by the US of the EU's freedom from certain diseases. The US published a proposed rule on the recognition of the disease status of certain member States for certain diseases on 14 November 1997 and confirmed it as a final rule in 1998. The US further committed itself in March 1998 to publish a further proposed rule covering the outstanding recognition of Member States and diseases, notably as regards classical swine fever. The Proposed Rule - published in the Federal Register on 25 June 1999 - together with the additional written assurances allowed the EU-US Veterinary Equivalency Agreement to be signed on 20 July 1999. The acceptance of regionalisation for classical swine fever (Finalisation of Proposed Rule), which was for the EU a precondition for signing the Veterinary Agreement with the US, has never materialised.

The US authorities have not been willing either to apply the Veterinary Agreement provision on non-comminglement. According to such provision, EU establishments exporting meat or meat products to the US may handle meat or meat products from countries that are not recognised as being free from certain diseases of concern to the US, provided that there is a separation in time between handling both products.

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

We must also note that the import of egg products is allowed only under strict conditions, e.g. the requirement for continuous inspection of the production process. Such continuous inspection is superfluous and expensive, and has a negative effect on prices and competitiveness.

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

Subsidies

The agri-food sector is the largest recipient of US government outlays, both in absolute value and in relation to value added. Government support to agri-food production and exports is provided under the authority of the *Agriculture Improvement and Reform Act of 1996 (FAIR Act)*, effective until 2002.

As a consequence of natural disasters and falling prices in agricultural products, direct government assistance to the agri-food sector nearly tripled between 1997 and 2000, and currently amounts to over one half of the net farm income. In 2000, the US made available a record of $28 billion in direct assistance to farmers and ranchers. The overall increase in direct payments over the 1997-2000 more than offset the decline in the value of agricultural output.

On the other hand, delays in WTO notification reduce transparency and hinder discussion of the potential trade effects of support in agriculture.

Export subsidies

The US maintains an aggressive export policy for agricultural products through a range of programmes designed to subsidise and promote exports of US agricultural products. The two long-standing agri-food export subsidy programmes are the *Export Enhancement Programme (EEP)* , which allows US producers to apply for a cash subsidy designed to make US products competitive with exports from other countries, and the *Dairy Export Incentive Programme*.

The *Export Guarantee Programme*, which offers US government guarantees of private-bank loans at commercial interest rates, has recently become the main export policy tool of the US Department of Agriculture (USDA), with annual allocations exceeding $5 billion and declared annual subsidy levels of over $400 million. We must note that according to a 200 OECD study, 88% of trade distortions arising from export credits in the agricultural sector came from the US. The adoption of an *OECD Sector Understanding on Export Credits for Agricultural Products* is still pending.

Finally, the EU continues to complain about the US practice to use *food aid* to countries not suffering food shortages as a means of surplus disposal of farm products. In the 1999-2000, there was a large increase in food aid volumes.

Domestic subsidies

In addition to the support provided under the FAIR Act, several *emergency assistance* packages have been enacted since October 1998. The recent increase in outlays has been mainly the result of emergency market loss payments and "ad hoc" disaster assistance.

One issue of concern to the EU is the *marketing loan programme*, which permits farmers to repay a loan at the lower of the current market price or the original loan rate. The difference between the loan rate and the loan payment is a subsidy to producers. Alternatively, farmers are allowed to collect this subsidy directly through loan deficiency payments (LDPs). This situation is particularly serious in relation to soybeans. Marketing loan programmes for soybeans have resulted in considerable increases in areas planted with soybeans and in record production levels. US market prices have decreased by over 40% since the current marketing loans system was introduced and assistance payments to soybean growers have considerably increased thereafter.

Geographical indications

The US legislation does not grant sufficient protection to EU geographical indications for wine and spirits. An issue of major concern to the EU is the use of *semi-generics* in the US market.

The amendment to the US trademark law (new subsection 2(a) of the Lanham Act), adopted for the purpose of implementing Articles 23.2 and 24.5 of the TRIPs Agreement, creates grounds for refusal or cancellation of a trademark that consists of, or comprises, a geographical indication which, when used on- or in connection with- wines and spirits, identifies a place other than the origin of the good. This provision does not apply to indications that an applicant first used in connection with wines or spirits before the TRIPs Agreement entered into force. However, Art. 24.5 of the TRIPs allows continued use only of those trademarks used or registered in good faith before 1995 or before the geographical indication is protected in its country of origin. Thus, it will have to be closely followed whether the US complies with its TRIPs obligations, by ensuring that a trademark used or registered in bad faith in the US can no longer be maintained where it is identical with or similar to a geographical indication.

US regulations allow some EU geographical denominations of great reputation to be used by US wine producers to designate products of US origin, many being used in word and service marks, even for products other than wine. The most significant examples are Burgundy, Claret, Champagne, Chablis, Chianti, Malaga, Madeira, Moselle, Port, Rhine Wine (Hock), Sauterne, Haut Sauterne and Sherry. Despite the fact that in 1997 the D'Amato amendment codified US regulations on the use of semi-generic wine names in the US into Federal law, some progress was made in the context of current bilateral negotiations between the EU and the US, where the US took a conditional commitment to phase out semi-generic names. This commitment, as well as all other areas of the protection of geographical indications, is currently under discussion between the EU and the US.

US producers also use some of the most prestigious European geographical indications as names of grape varieties. This could mislead consumers as to the true origin of the wines.

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

It should be also noted that the US protects geographical indications under Article 22 of TRIPs only in as much as they may mislead consumers rather than "per se". The practical approach would appear to be insufficient in the light of the TRIPs requirement that, while granting some leeway as to the means of protection, does not permit inadequate protection. Certain EU agri-food producers have seen their interests affected adversely by the US approach.

Aircraft
last updated on 2001-12-05

EU Concerns in this sector are mainly related to subsidies granted to US aircraft manufacturers.

In 1992, the EU and the US concluded a *Bilateral Agreement on Trade in Large Civil Aircraft*, which focuses on the limitation of both direct and indirect government support. However, the EU and the US have divergent interpretations of the indirect support discipline and, on the European side, there is a concern that its implementation has created an increasing imbalance of obligations. There is a very large public funding for NASA aeronautics and aeronautics budgets for R&D from the Department of Defense and the Federal Aviation Administration (FAA). According to EU estimates, for the FY 2000, US large civil aircraft manufacturers received indirect support in the range of $1.5 bill. and $2.3 bill. (4.7% to 7.1% of their commercial turnover). This is well above the 3% limit set by the 1992 Bilateral Agreement.

The FAA has also used its regulatory position to support Boeing. In January 2000, it decided to modify the operating rules for twin-engine aircraft (ETOPS), helping the competitive position of the twin-engine B-777 vis-à-vis the quad-engine A-340. On the other hand, in April 2000, the Secretary of Transportation was granted discretionary authority not to grant landing and take-off rights ("slots") at four US airports for airlines which did not fly Boeing with the passage of the AIR-21 FAA re-authorisation legislation. This constitutes discrimination violating three international agreements: the EU-US bilateral agreement, the 1994 GATT Agreement on Civil Aircraft and the 1994 GATT.

Finally, we have to note that the *Foreign Sales Corporation tax regime* (considered as a prohibited export subsidy by the WTO Dispute Settlement body) grants a considerable competitive advantage to US aircraft manufacturers to the detriment of their competitors. In its 2000 financial statements, Boeing declared that FSC tax benefits amounted to US$291 million. This accounted for about 14% of Boeing's net earnings for the same year.

Even in the large civil aircraft sector is generally subject to WTO rules on subsidies (*1979 GATT Agreement on Trade in Civil Aircraft-ATCA*), more specific multilateral rules are required to restrict all forms of government support and intervention for aircraft products. The EU hopes that the ATCA will become fully enforceable through the WTO Dispute Settlement. The EU has always regretted that, in 1993, at the end of the Uruguay Round negotiations, the US blocked at the last minute the adoption of a new Civil Aircraft Agreement supported by all other negotiating parties. Since then, no progress has been made.

Automotive
last updated on 2001-12-05

Trade in automotive goods involves a large proportion of total EU-US trade. However, some obstacles to EU imports remain in the US market, such as tariff peaks, tax discrimination and technical barriers.

Recently, a customs duty of 25% on vehicles for transport of goods with a weight greater than 5 tonnes but less than 20 tonnes was established.

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

Finally, certain US taxes/charges on the sales of cars have a higher incidence on imported cars than on US produced cars. This is the case of the luxury tax, the CAFE payment and the Gaz Gluzzer Tax. European automakers, with a total market share in the US of only 6%, bear between 70 and 100% of the revenue generated by these taxes.

The *luxury tax* is an excise tax imposed on cars valued above an arbitrary threshold (currently around US$36,000). This tax is scheduled to be eliminated in 2003, with the tax levied falling from 4% in 2001 to 3% in 2002. On the other hand, the *Corporate Average Fuel Economy (CAFE) payment*, a civil penalty payment levied on a manufacturer or importer whose range of models has an average fuel efficiency below a certain level (currently 27.5 miles per gallon), favours large integrated automakers or producers of small cars rather than those who concentrate on the top end of the car market, such as importers of EU cars. Finally, the so-called *Gaz Guzzler Tax* is an excise tax of US$1,000-7,700 per car, levied on all cars not meeting fuel economy standards set by the Environmental Protection Agency (EPA) (currently, 22.5 mpg). This fuel economy cut-off point is not founded on any reasonable or objective criterion and leads to discrimination against imported cars.

Ceramics and Glass
last updated on 2001-12-20

At the end of the Uruguay Round, customs duties on ceramics and glass products remain relatively higher in the US than in the EU. During the Uruguay Round, the US rejected the EC's offer to abolish tariffs in this sector, even though Mexico, one of EC's leading competitors in the US market, should, after a transitional period, enjoy a zero rate by virtue of NAFTA.

There are products of importance for EU trade which will continue to suffer from high tariffs even when the Uruguay Round reductions have been fully implemented. These include hotel and restaurant ware, on which duty rates currently are 30% if made of porcelain or china, and 31.5% for others, and certain drinking glasses and other glassware on which the duty rates currently are 33.2% and 38% respectively.

Electronics
last updated on 2001-12-20

Trade in electrical and electronic equipment is a significant ingredient in EU-US commercial relations. This product category amounts to 6% of total EU export to the US. However, EU exporters of electrical and electronic equipment and appliances face steep technical barriers to market their products in the US.

First, there is no single US market for electrical and electronic products- partially divergent federal, regional, state, sectoral and even county and city technical regulations, procurement specifications and product standards split up the market. The "de facto" fragmentation of the US market forces exporters to make expensive adaptations of their product models and type approvals to local and sectoral requirements, undermining the economies of scale that sales on a unified marketplace of the size of the US market would otherwise make possible.

Second, besides being divergent among themselves, the standards on electrical and electronic products used in the US diverge most often from international IEC standards. Even when US standards are based on international standards, they contain numerous deviations from the IEC standards which are many times not related to safety or specific US conditions (e.g. climate and geography). As a consequence, EU exporters cannot export to the US the electrical and electronic models that they sell to the rest of the world.

Third, for electrical equipment used in the workplace (much of which is also used elsewhere), the Occupational Safety and Health Administration (OSHA) requires onerous and cumbersome testing and certification procedures by a third party and according to, almost exclusively, US national standards. In addition, there exist "voluntary" marking and certification schemes which are "de facto" mandatory for market access, adding further burdens for EU exporters.

Fourth, the conditions and procedures applied by many states, cities and utilities to procure electrical and electronic equipment favour local suppliers and local content. At the federal level, the Department of Defence and to a lesser degree other departments, also utilise procurement rules that discriminate against foreign supplies.

Finally, the *Annex on Electrical Safety to the EU-US Mutual Recognition Agreement (MRA)*, which should facilitate market access, is not yet fully implemented on the US side. Under the MRA, EU designated laboratories should certify equipment according to US regulations. However, the OSHA continues to deny EU authorities the right to designate European laboratories to operate under the Annex. The Commission is firmly committed to step up confidence building until the MRA is applied fully in the US.

Iron, Steel and Non-Ferrous Metals
last updated on 2001-12-20

The EU is the world's largest steel producer (21% of world production). In 2000, the US was the second largest steel consuming country and the third largest steel producer in the world. The US is traditionally the largest importer of steel in the world, although, in the first half of 2001, the EU became the largest importer by volume.

However, due to the difficulties facing the US steel industry, EU exporters are confronted with various barriers in the US steel market, in particular, the abuse by US authorities of trade defence remedies. This route (shifting the cost of restructuring the US steel sector onto the rest of the world) has been repeatedly criticised by the EU, which has consistently signaled its willingness to promote international dialogue on this issue.

The US frequently attributes its industry's difficulties to imports. This has led to the initiation of several anti-dumping and countervailing duty investigations involving steel products. We must note that the DoC countervailing practice methodology with respect to steel privatised companies (*British Steel* case) was declared inconsistent with the WTO Subsidies Agreement by the WTO Dispute Settlement body. In view of the US denial to take this ruling into account in several other CVD investigations involving EU companies concerning similar issues, the EU has requested the establishment of a WTO panel.

In June 2001, the Bush Administration announced a *Multilateral Initiative on Steel*. As a part of this initiative, on 3 July 2001 the US initiated the largest trade defence (safeguard) action ever opened (more than US$17 bill., of which 6 are originating in the EU). In case safeguard measures are finally adopted, this would have a significant impact on the EU. In addition to their direct effect on EU exporters, they would divert substantial quantities of the world's steel production onto the EU market.

The EU has requested the establishment of three WTO panels on US trade defence measures imposed on steel imports: the aforementioned countervailing duty measures on privatised companies; the anti-dumping measures on *corrosion-resistant steel flat products* (concerning the expiry review standards); and safeguard measures imposed on *steel wire-rod and line pipe*. The EU has held several rounds of consultations with US authorities on these cases. Following these discussions, the US has modified the safeguard measure on steel wire-rod, providing EU exporters improved access to the US market. In addition, the Commission is also following closely the global safeguard procedure initiated in July 2001.

The EU has participated actively in international discussions to address the problems faced by the world steel industry in the OECD, most recently at a meeting held on 17-18 December 2001 in Paris.

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

Pharmaceuticals last updated on 2001-12-05

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

By means of an "over-the-counter" (OTC) procedure, approved active substances for many medicinal products are put on a list (OTC-Monograph) by the FDA, so that different final products derived from these active substances can be marketed without any application or delay. However, the OTC monograph requires that the active substance has a US market history. This restricts market access for OTC products with lengthy marketing experience in countries with equally sophisticated medicines regulatory systems and particularly hampers access for plant-based (herbal) medicinal products with a long tradition in Europe. A proposed amendment to the OTC monograph procedure was published on 17 March 1999 but does not yet allow for acceptance of foreign clinical data for ingredients commonly used in Europe but not in the US.

Services - Business last updated on 2001-12-06

Following the conclusion of the GATS negotiations in 1993, the access of professional service suppliers to the US has been improved, since a number of nationality conditions and in-State residence requirements have been removed. However, despite the improvements contained in the schedule of specific commitments, access to the US market, where licensing of professional service suppliers is generally regulated at State level, remains unsatisfactory. This is mainly due to the lack of transparency in - and divergence of - access conditions at State level, as well as the frequent absence of a transparent regulatory regime for the operation of foreign professional service suppliers.

In its GATS schedule of Specific Commitments, the US has listed a number of market access or national treatment restrictions to trade in professional services. The most common limitations are the requirement that only licensed practitioners may own and run practices; the obligation to maintain an office in-State; and residency requirements whose legal definition varies from State to State.

Furthermore, in the US GATS schedule of Specific Commitments, the movement of natural persons is unbound for all professional categories except as indicated in the horizontal section of the Schedule. US horizontal commitments include the provision that intra-corporate transferees, such as managers, executives, and specialists (including licensed professionals), may provide services through a branch, subsidiary or affiliated establishment in the US for a maximum of five years. In practice, foreign professional service suppliers may only enter the US to perform a professional service if employed by a company that is either established in the US or affiliated to one such company.

Finally, we must note that there are also obstacles for foreign professional service providers in government procurement terms. For example, the Buy America provision in Section 136 (1) of the Foreign Relations Authorisation Act for FY1990-91 gives US companies bidding for contracts to provide guard services for US embassies a 5% price preference.

This situation should improve steadily under the GATS: the Working Party on Professional Services has agreed on disciplines applicable to accountancy services, and the new Working Party on Domestic Regulation will continue working on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade. In addition, negotiations on market access and on the further liberalisation of professional services will take place as part of the Doha Development Agenda of trade liberalisation talks.

Services - Financial last updated on 2001-12-21

The *WTO Financial Services Agreement* was signed on 1 December 1997 and has been in force in the US since March 1999. The US bound commitments on market access and national treatment for all subsectors included in the *Annex on Financial Services in the GATS*, and in line with the *Understanding on Commitments on Financial Services*.

Nevertheless, several restrictions to foreign market access and national treatment remain. GATS negotiations were relaunched in 2000 to increase regulatory transparency and national treatment in this sector.

In November 1999, the US adopted the so called *Gramm-Leach-Bliley Act (GLBA)*, which codifies the gradual consolidation of US financial regulation that has taken place over the past decade. This Act definitively breaks from the segmentation in the financial services sector imposed during the Great Depression under the 1933 Glass-Steagall Act. Under the GLBA, domestic and foreign banks may affiliate with entities that engage in securities trading, insurance, underwriting, and other activities that are financial in nature or incidental to financial activities, thereby establishing what is referred as *financial holding companies (FHCs)*.

Banking

The US broadly maintains a policy of national treatment towards the US branches, agencies, securities affiliates and other operations of foreign banks.

However, a few restrictions to foreign market access and national treatment remain. For example, a majority of directors of national banks must be US citizens; and approximately one half of the States require all or the majority of board directors of depository financial institutions to be US citizens.

Federal and state banking laws are complex and involve several different regulatory bodies (the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and State regulators).

The European Commission is working to improve access of European financial institutions to US markets in a number of key sectors, including the new financial activities permitted under GLBA and reinsurance and other wholesale insurance markets.

In 2000, following intervention by the Commission, the Federal Reserve agreed to waive the "leverage ratio" requirement for EU banks wishing to qualify as financial holding companies (FHCs) under the GLBA. However, concerns still remain over the extent to which the Federal Reserve will take into account the views of the home country supervisory authority in assessing FHC applications.

The international banking community has also voiced concern over the requirement of the Office of the Comptroller of the Currency (OCC) and some State banking supervisors to maintain "asset pledges" in addition to the paid in capital they maintain in their home country. The Commission, assisted by the International Banking Advisory Committee, is reviewing these asset pledges requirements to determine whether they are appropriate from a procedural standpoint.

Insurance

A remaining impediment for EU insurance companies seeking to operate in the US is the fragmentation of the market into 54 different jurisdictions, with different licensing, solvency and operating requirements. Each state has its own insurance regulatory structure and, by contrast to banking, federal law does not provide for the establishment of federally licensed or regulated insurance companies. However, interest in establishing an optional federal statutory structure for licensing and regulation of insurance is growing.

Allied to the costs involved in dealing with this outdated regulatory structure, EU companies also face direct discrimination on a number of fronts. For example:

– not all states have "port of entry legislation"; in other words, to underwrite risks in one state, an EU insurance company must first be licensed in the other state before seeking a licence in the second state;

– some states require their insurers to buy reinsurance from state-licensed companies, before allowing reinsurance premiums to leave the state;

– those EU companies that specialise in the US$ 9 billion "surplus lines" market (large industrial, transport, or hard-to-place risks), such as Lloyd's and the Paris market have to be "white-listed" by the NAIC to operate on a cross-border basis in the US. In order to receive approval, companies have to, inter alia, name a US attorney and lodge a trust fund in a US bank of up to US$ 60 million. No credit is given for the fact that EU companies are effectively regulated in the EU or for situations where the retrocession takes place to US domestic reinsurers. Partly as a result of these requirements, market share of Lloyd's on the surplus lines market has dropped from 20% to 14% over the last 10 years. Other non-US companies' share of the market has dropped from 12% to 9% over the same period.

Securities

EU securities firms may register as broker-dealers or investment advisers, and in principle may establish both in the form of branches or subsidiaries. However, the establishment of a branch in the US by a foreign securities firm to engage in broker-dealer activities, although legally possible, is in fact not practicable, since registration as a broker-dealer means that the foreign firm establishing the branch has to register and become itself subject to Securities and Exchange Commission (SEC) regulation. Foreign mutual funds have not been able to make public offerings in the US because the SEC's conditions make it impracticable for a foreign fund to register under the US Investment Company Act of 1940.

Concerns are arising also over the limited access for the trading screens of EU exchanges to the US. This impedes the free flow of capital across the Atlantic.

Another issue of EU concern is the political use of SEC in support of US extraterritorial sanctions. Recent statements from the SEC appear to indicate a change in the definition or interpretation of the "material information" to be disclosed by companies under SEC rules. According to the new definition, companies trading with countries subject to US unilateral santions would have to disclose information on business operations in such countries. This information is largely inmaterial to the prudential requirements on the profitability and financial outlook of companies. The EU is also concerned by certain capital market provisions of the version of the *Sudan Peace Act* adopted by the House of Representatives in June 2001. This legislation, if adopted, would impose enhance disclosure requirements to companies trading with this country, as well as even closing access to US capital markets to companies engaged in oil or gaz development in Sudan. The version adopted thereafter by the Senate does not contain the aforementioned provisions. The competing versions of the Act had to head to the Conference Committee for reconciliation. The Bush Administration has expressed its opposition to the capital market provisions of the Sudan Peace Act.

The Commission is also encouraging the SEC to take a positive role in the creation of international accounting standards (IAS), and to allow their use by companies listed on an exchange in the US by 2005.

Shipbuilding last updated on 2002-02-15

Despite fierce competition, the EU has been able to maintain a market share over the recent years of about 20% in volume in the shipbuilding sector. The US shipbuilding industry now represents 2% of the world market.

The US shipbuilding sector is highly protected. The maintenance of a number of US subsidies, protective legislation and tax policies remain a matter of EU concern.

We must note that the 1994 *OECD Shipbuilding Agreement* provides for specific disciplines for the shipbuilding sector. The signing of this Agreement was a major achievement and was expected to have a significant impact on US subsidy programmes and unfair practices in the shipbuilding sector. However, the US has failed to ratify the agreement, due to opposition in Congress originating from the naval industry. The EU continues to monitor the impact of the existing subsidy programmes and to request the ratification of the OECD Agreement by the US.

The *Jones Act* (Merchant Marine Act of 1920) provides a protected market for US shipbuilders, who are the sole suppliers of ships on domestic routes. Under paragraph 3 (a) of the GATT 1994, the US was granted an exemption from GATT rules for measures prohibiting the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone. These measures can be considered tantamount to an import ban on foreign ships for commercial use.

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

In addition, the US Administration introduced in 1997 a new programme, the "Capability Preservation Agreement Scheme", which allows qualified shipyards to claim for reimbursement on their US Navy shipbuilding contracts for certain costs attributable to work on their commercial shipbuilding.

By virtue of Title XI of the Merchant Marine Act, the Maritime Administration of the Department of Transportation (MARAD) provides assistance to US and foreign shipowners through the Federal Ship Financing Programme. This programme provides for federal government guarantees (Maritime Guaranteed Loan) of private sector financing or refinancing obligations for the construction or reconstruction of both US flags and foreign-owned vessels in US shipyards, including export projects. The OECD implementing legislation will have to provide for the amendment of these loan guarantees in order to put them in conformity with the rules of the 1994 Understanding on export credits for ships, which would have entered into force together with the OECD agreement.

Finally, we must note that the US applies a 50% ad valorem tax on non-emergency repairs of US-owned ships outside the US and on imported equipment for boats, including fishnets, on the basis of Section 466 of the Tariff Act of 1930, as amended in 1971 and 1990. This tax will have to be abolished by the implementing legislation of the OECD Shipbuilding Agreement as applicable to its contracting parties.

Telecommunications Equipment
last updated on 2001-12-06

Barriers to EU exports of telecommunication equipment to the US are essentially related to conformity assessment and government procurement.

Under the *WTO Information Technology Agreement (ITA)*, the US committed to eliminate tariffs by the year 2000 on a large number of products (all semiconductors, computers, computer peripherals and computer parts, electronic calculators, telecommunication equipment, electronic components- capacitors, resistors, printed circuits-, semiconductor testing and manufacturing equipment and certain consumer electronic items). However, the US schedule excludes optical fibres, on which they maintain a rather substantial protection, and tubes for computer monitors from the tariff elimination.

The Federal Communications Commission (FCC) has regulated its requirements for terminal equipment attachment (much in line with the regulatory approach used in the EU). However, the FCC continues to require third party certification of radio transmitters that have also been deregulated in the EU in terms of technical support requirements and approval procedures. The FCC should therefore be encouraged to move toward a "suppliers declaration of conformity" for radio transmitters. Otherwise, an unbalanced market access situation between the EU and the US will persist.

On the other hand, we must note that, as a result of the failure to liberalise purchases of telecom equipment, the US decided in 1993 to impose sanctions against the EU and certain Member States under Title VII of the Omnibus Trade and Competitiveness Act of 1988. In particular, the justification for the US sanctions was that the EU telecommunications operators were subject to the constraints imposed by the "Utilities Directive" (93/38 EC), which applies to procurement contracts awarded by service providers in the utility sectors, including telecommunications. However, the constraints of the Directive do not apply once effective competition is in place.

The sanctions bar EU suppliers from bidding, "inter alia", for US Federal government contracts that are below the threshold values of the WTO Agreement on Government Procurement. The EU responded with counter-sanctions that also bar US bidders from applying for contracts awarded by central government agencies below threshold values.

The bilateral Marrakech procurement agreement of April 1994 liberalised around US$ 100 billion of procurement opportunities on both sides. In this context, the EU considers that the sanctions are an unnecessary impediment to the bilateral relationship. Furthermore, following the liberalisation of the EU telecom sector, which implies that EU telecom companies are exempted from the coverage of the aforementioned directive, the US Administration is considering the possibility of mutually lifting the sanctions and countersanctions. The Commission even started to prepare a draft proposal for a Council regulation repealing EU counter-measures, though adoption by the Council will be conditioned upon prior repeal of US sanctions.

However, the US does not yet appear decided to go ahead with this process and has not started any legislative process to repeal the sanctions.

Textiles and Leather last updated on 2001-12-20

The EU is the world's second largest exporter of textiles and clothing products, and the world's largest exporter of textiles (yarns, fabrics). On the other hand, the US is the world's leading importer of textiles and clothing.

Even if there is free trade in textile and clothing products between the EU and the US (no quantitative restrictions), EU exporters still encouter important barriers in the US market. Those barriers involve mainly tariff peaks, burdensome customs formalities (long customs liquidation periods, detailed product description requirements, etc.) and labelling requirements. In the context of the so-called Doha Development Agenda, the EU will work towards less prohibitive tariff levels, as well as the elimination of non-tariff barriers to trade in textiles.

US tariffs still constitute a very important obstacle for various EU exporters. The average trade weighted reduction in tariffs made by the US in the Uruguay Round was only 12% for textiles and clothing (to be implemented over 10 years) and 5.2 % for footwear. This means that many significant tariffs and tariff peaks will remain on products of export interest to the EU even when the Uruguay Round reductions have been implemented fully. The main products affected by tariff peaks are wool products (27% on some suits and 35% on some wool fabrics), some synthetic fabrics or apparel products (28.3% on synthetic suits) as well as embroideries. According to a major wool producer in the EU, tariff peaks make it impossible to sell their products on the US market.

In addition, an additional import fee is collected on the import of all cotton products. The *Cotton fee* was established in order to provide money to raw cotton producers. At first, only cotton producers were required to give a financial contribution. Nevertheless, the payment of the fee was extended to all imported cotton products. This creates situations where a given product may be subject to the fee twice. For example, raw cotton is exported to Portugal and manufactured there for clothing. Afterwards, it is exported to the US (the fee is paid once by the US producer of raw cotton and a second time by the US apparel importer). The level of the fee is calculated by the Agriculture Department according to the price of cotton. Customs authorities transfer the funds collected during the clearance to the Cotton Board.

Customs formalities for imports of textiles, clothing and footwear to the US require the provision of particularly detailed and voluminous information. These requirements lead to additional costs and in some cases include confidential processing methods (type of finishing, of dyeing, etc.). Much of this information would appear to be irrelevant for customs or statistical purposes. For example, for garments with an outer shell of more than one construction or material, it is necessary to give the relative weight, percentage values and surface area of each component. For outer shell components which are blends of different materials, it is also necessary to include the relative weights of each component material.

Furthermore, the lack of a single legal text listing the description requirements for each tariff position creates confusion and uncertainty for EU producers. The requirement of any additional information on the imported product is at the discretion of Customs authorities.

The extention of the liquidation period (during which the US administration can ask for the return of the goods) up to 210 days also functions as an important trade barrier. Apparel articles often have a short life span (e.g. fashion items must be sold within 2 or 3 months) and therefore have to be marketed immediately. Consequently, because no operator can afford to block the merchandise over such a long period of time, almost all the operators take the risk of selling the goods before the end of the liquidation period and are exposed to a penalty equal to 100% of the value of the goods for not complying.

Furthermore, according to importers, Customs may extend the liquidation period beyond 210 days, sometimes up to a period of 3 years, without giving a detailed motivation. In some cases, a minor problem or error in invoice is sufficient. In addition, during the liquidation period, Customs may still request any additional information necessary to establish the classification of the country of origin.

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

Finally, there is an specific regime for textiles products in relation to the *bond requirement*, which is stricter (more expensive) than for other imports. According to Customs, the bond serves as a guarantee for origin purposes. Usually, importers pay in advance for a continuous bond covering all their imports, which is calculated on the bases of imports of the previous year. This bond was increased to all imported products. Furthermore, Customs authorities requested and obtained an additional increase of the bond to 2% of the goods, in order to guarantee the high penalty for non compliance with the liquidation period. The bond can amount from 2% to 5% of the total value of imports of the previous year.

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TARIFFS AND DUTIES

1. Applied Tariff Levels

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

2. Tariff Quotas

The import of certain agricultural products (beef, dairy products, sugar, etc) into the US takes place mainly under WTO bound tariff quotas.

3. Other Tariffs and Duties

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

The US imposes *user fees* on the arrival of merchandise, vessels, trucks, trains, private boats and planes, as well as passengers. The most significant of the customs user fees is the *Merchandise Processing Fee* (MPF). The fee is still likely, in many cases, to exceed the cost of the service rendered since, irrespective of the level, it is still based on the value of the imported goods.

US Customs also participates in the collection of *the Harbour Maintenance Tax (HMT)*. The HMT is levied in all US ports on waterborne imports. Collected monies are transferred to the Harbour Maintenance Trust Fund to provide for the operation and maintenance of channels and harbours.

Internal Taxation

960048- *Merchandise Processing Fee* [2004-03-04]

The most significant of the customs user fees is the Merchandise Processing Fee (MPF). The MPF is levied on all imported merchandise except for products from the least developed countries, from eligible countries under the Caribbean Basin Recovery Act and the Andean Trade Preference Act, and from US offshore possessions. It is levied also on merchandise entered under Schedule 8, Special Classifications, of the Tariff Schedules of the US. Fixed previously at 0.17% of the value of the imported goods, the MPF rose to 0.19% in 1992 and amounts to 0.21% ad valorem on formal entries with a maximum of US$485 as from 1 January 1995. Whilst the MPF was to last until 30 September 1990 when established, it is now set to run until 31 March 2004.

960049- *Harbour Maintenance Tax/Harbour Services Fee* [2004-04-29]

The *Harbour Maintenance Tax* (HMT) is levied in all US ports on waterborne imports at an *ad valorem rate* of 0.125%. Monies collected by US Customs are transferred to the Harbour Maintenance Trust Fund to provide for the operation and maintenance of channels and harbours. However, the ad valorem basis of the HMT attracted criticisms that it was difficult to justify as a "fee" when one considered the cost of the service provided. Moreover, there is a significant accumulation of unused funds, which reached US$1.609 billion in FY1999 and is projected to rise even further. This points to the excessive nature of the HMT.

In October 1995, the US Court of International Trade ruled that the HMT was a tax and not a user fee. This is significant since taxes on exports are prohibited by the US Constitution. Subsequently, both the US Court of Appeals and Supreme Court confirmed this ruling (June 1997 and March 1998). As a result, the US authorities ceased to collect HMT on exports, though HMT is still being collected on imports.

- October 1995: US Court of International Trade ruled HMT was a tax, not a user fee
- June 1997/March 1998: Above ruling confirmed by US Court of Appeals/Supreme Court
- 30 April 1999: Bill for a "Harbor Services Fee" introduced
- 2 August 2001: Borski Bill introduced (Treasury funding)

Tariff Levels

990090- *Carousel legislation* [2002-02-19]

On 18 May 2000, the US adopted *Section 407 of the Trade and Development Act of 2000* (referred to as the "Carousel" legislation), which provides for a mandatory and unilateral revision of the list of products subject to suspension of GATT concessions after the application of the first suspension and every 180 days thereafter, in order to affect imports from Members which have been determined by the US not to have implemented recommendations made pursuant to a WTO dispute settlement proceeding.

Agriculture and Fisheries

Other Tariffs and Duties

020078-*Tariff quotas and levies on dairy products* [2004-04-29]

In 2001 proposals for new legislation to introduce tariff rate quotas for milk powder concentrates and casein were tabled simultaneously in both chambers of Congress at the behest of the National Milk Producers Federation (NMPF, the US dairy producers association). The proposals involve:

1) a tariff rate quota of 54.051 Million tons (current import - 55.000 Mt) for the import of milk proteins which will raise the current duty rate from almost duty-free ($ 0,037 kg) to a prohibitive $2,81 kg attached to the trade Promotion Authority Bill),
2) a levy on imported dairy products in order to finance national promotion campainies for American dairy products (attached to the Farm Bill).

While these proposals never came to fruition, two new parallel bills, one in the House of Representatives and one in the Senate, were introduced in February 2003 foreseeing TRQs for MPCs and casein/caseinates. (Two similar bills had also been introduced under the previous congress but were outdated de facto after the Congressional elections).

Automotive

Internal Taxation

960071- *Luxury Tax on Car Sales* [2002-05-22]

Since 1990, cars valued at an arbitary threshold (currently $36,000) have been subject to a "Luxury Tax".

This tax has a higher incidence on imported cars than on US produced cars: European automakers have only a 6% total market share but bear nearly 70% of the revenue generated by the Luxury Tax.

960072- *CAFE Payment* [2002-05-22]

The CAFE payment is a civil penalty payment levied on a manufacturer or importer whose range of models has an average fuel efficiency below a certain level, currently 27.5 miles per gallon (approx. 10.3 litres per 100km).

960073- *Gas Guzzler Tax* [2002-05-22]

All cars that do not meet a fuel economy figure of 22.5 mile per gallon (approx. 12.5 lires per 100km) set by the Environmental Protection Agency, are subject to an excise tax of $1,000 - $7,700 per car (the "Gas Guzzler Tax").

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TRADE DEFENCE INSTRUMENTS

In recent years, US trade defence measures have experienced a substantial increase, notably in relation to steel products. The abuse of trade defence instruments by US authorities with protectionist purposes has been repeatedly denounced, not only by the EU, but also by other WTO Members.

This has been reflected in the increasing number of cases brought to the WTO Dispute Settlement system in relation to US trade defence legislation and proceedings. Several aspects of US trade defence legislation and practices have already been condemned for their inconsistency with WTO Agreements (e.g. the 1916 US Antidumping Act, the methodology used by the US DoC in privatisation cases, and the "Byrd Amendment".)

Anti-Dumping Measure

020004-*Byrd Amendment* [2004-02-04]

The *Continued Dumping and Subsidy Offset Act of 2000* (also known as the *Byrd Amendment*, and signed into law in October 2000), provides that proceeds from anti-dumping and countervailing duties shall be paid to the US companies responsible for bringing the cases. This provision is clearly incompatible with several WTO provisions.

On 22 December 2000, the EC, together with eight other WTO partners (Australia, Brazil, Chile, India, Indonesia, Japan, Korea, and Thailand), requested formal WTO consultations with the US. This joint action is a clear indication of the important systemic concerns that the legislation raises among WTO Members.

Upon joint request from the nine co-complainants, a single panel was established by the DSB on 23 August 2001.

On 21 May 2001, Canada and Mexico had requested formal WTO consultations with the US on the Byrd amendment and they joined the panel proceeding initiated by the other nine co-complainants at a special meeting of the DSB on 10 September 2001. The Panel subsequently circulated its report, upholding the core of the complainants' claims on the 16 September 2002.

The Panel confirmed that the Act was an impermissible response to dumping and subsidisation and rendered meaningless the WTO provisions requiring Members to test the domestic industry's support for application before initiating an investigation, by making such support a condition to get access to funds. As a result of the WTO inconsistency of the Act itself, the Panel took the unusual step of recommending that the Act be repealed.

On 16 January 2003, the Apellate Body confirmed that the Act was an impermissible response to dumping and subsidisation and, *per se*, WTO incompatible. On 13 June 2003, an arbitrator granted the US until December 2003 to comply with this ruling.

In the meantime, the US authorities have already made two distributions. The amounts are substantial and a very limited number of recipients received a major part of the payments, increasing the distorting effects on fair competition. In the first annual distribution in January 2002, US $231 million were distributed mostly to steel producers and one producer of ball bearings alone received US$62 million. In the second distribution, about US$330 million were distributed: half of the total amount was distributed between three companies, among which the same producer of ball bearings which alone received more than US$72 million.

960298- *Anti-Dumping Act of 1916* [2004-04-28]

The US *Anti-Dumping Act of 1916* prohibits the importation and sale of goods "at a price substantially less than the actual market value in the principal markets of the country of their production."

The 1916 AD Act was condemned by the WTO in September 2000 for allowing sanctions against dumping (treble damages, imprisonment and / or fines) that are not allowed by WTO rules. The US was set a deadline of July 2001 to bring this piece of legislation in to compliance with those rules. Despite an extension of the implementation deadline (from July to December 2001) and a suspension of the arbitration process for 1 year and a half, the US still has not made any significant progress towards implementing the changes necessary to bring this legislation into conformity with WTO rules. Though a number of Bills have been introduced in Congress to repeal the 1916 AD Act over the last few years, these efforts have so far failed to produce any concrete results.

- **January 2004:** EC implemented a "blocking" regulation which offers relief to EC companies that were or may be sued under the 1916 Anti-Dumping Act. The regulation (1) prohibits the recognition and enforcement of Court or administrative decisions based on the 1916 AD Act in the EC (2) allows EC companies to counter-sue the US plaintiffs to recover any damages, including legal costs, caused by the application of the 1916 AD Act.
- **24 February 2004:** WTO arbitrators accepted the EC request to suspend the application to the US of its obligations under GATT 1994 and the WTO Anti-Dumping Agreement. This gives the green light for the adoption of a regulation applicable to US dumped products and mirroring the US 1916 Anti-Dumping Act.

040006-*'Zeroing' in determination of dumping margins* [2004-05-28]

In original investigations, the US Department of Commerce (DOC) employs the practice of 'Zeroing' in its calculation of dumping margins.

Dumping is established when the price of a product on the domestic market (normal value) exceeds the price on the export market. To obtain a more meaningful comparison however, the calculation is usually performed in different stages; most commonly, the product is sub-divided into models having similar characteristics and for which prices should be similar. Normal values and export prices are compared within these sub-groups and the dumping margin for the product is obtained by adding the results of these sub-comparisons.

When adding the results of the sub-comparisons however, the US disregards those yielding a negative result (treated as zero, hence the term zeroing): in other words, the absence of dumping on certain models (i.e. sub-divisions of a certain product) is not deemed to compensate for dumping that is taking place on others. This leads to an increase in the overall margin of dumping and, in certain cases, to a decision that dumping is taking place when an overall comparison would have resulted in the absence of dumping.

This practice has a serious adverse economic impact on EC exporters in various sectors.

- 12 June 2003: WTO Consultations requested
- 16 February 2004: WTO Panel requested
- 19 March 2004: Panel established

Agriculture and Fisheries

Anti-Dumping Measure

970292- *Countervailing Duties on Pasta* [2002-01-15]

On 24 July 1996, the US Department of Commerce (DoC) imposed antidumping and countervailing duties on pasta from Italy. The latter contained a component designed to countervail EC export refunds granted on cereals used in the manufacturing of pasta.

Safeguard Measures

990089- *Import Quotas Wheat Gluten* [2002-01-15]

On 1 June 1998 the US imposed safeguard measures in the form of a quota on imports of wheat gluten from, inter alia, the Community.

This reduced EU exports by more than 40% and was managed in such a way as to further disrupt trade.

A WTO Panel report, requested by the EU, and the Appellate Body repor that followed, found in favour of the EU and on 19 January 2001 the WTO Dispute Settlement Body adopted the Appellate Body and Panel reports in the case finding the US measure to be “without legal basis”. On 1 June 2001, the US complied with its obligations and withdrew the wheat gluten quota.

Iron, Steel and Non-Ferrous Metals

Safeguard Measures

020069-*Steel safeguard measures* [2004-03-08]

On 5 March 2002, the US President proclaimed definitive safeguard measures in the form of an increase in duties ranging from 8 to 30% on imports of certain steel products. Following inconclusive WTO consultations, the EC requested the establishment of a Panel in May 2002 supported by Japan, Korea, China, Switzerland, Norway, New-Zealand and Brazil.

The Panel delivered its report on 11 July 2003, ruling that the US measures violated WTO rules. The Panel agreed with the main inconsistencies put forward by the complainants: a violation of the requirement that safeguards are imposed as a result of unforeseen developments; a lack of "sudden, recent, sharp and significant" increase in imports; a failure to demonstrate a causal link between the alleged serious injury and increased imports; and the exclusion of imports from certain sources from the remedy while those imports had been included in the injury investigation (lack of parallelism). The US appealed on 11 August 2003, and the subsequent Appellate Body Report released on 10 November upheld the Panel’s findings in support of the EC’s claims. On 4 December 2003 the US President proclaimed the termination of all the steel safeguards, though a licensing system will remain in force to monitor steel imports into the US.

As a result of the US decision to rescind these steel safegurd measures, the EC will not now impose re-balancing measures against certain US imports. These EC measures would have entered into force automatically five days after the adoption by the WTO Dispute Settlement Body of the Appellate Body’s Report on 10 December 2003

While the EC welcomes the US decision to abide by the WTO’s decision and uphold the rules-based approach of the international trading system, it will continue to monitor the US licensing system to ensure that this mechanism is applied in full conformity with WTO rules.

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NON TARIFF BARRIERS

1. Registration, Documentation, Customs Procedures and Valuations

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

2. Quantitative Restrictions and Measures Having an Equivalent Effect

Quantitative restrictions are in place for commercial reasons in only a few sectors, notably textiles and clothing. However, for several sensitive agricultural products, such as sugar and dairy products, prohibitive out-of-quota tariffs may act as "de facto" quantitative restrictions on imports.

In general, most US quantitative restrictions and controls on trade are designed to ensure national security, safeguard consumer health, protect public morals, or are maintained for environmental purposes.

A matter of EU concern is the extraterritorial nature of the system of export controls for dual-use items established under the *Export Administration Act (EAA) of 1979* and the US *Export Administration*

Regulations (EAR). This system, among other things, requires companies incorporated and operating in EU Member States to comply with US re-export controls. This includes compliance with US prohibitions on re-exports for reasons of US national security and foreign policy.

3. Standards, Sanitary and Other Technical Requirements

Complex Regulatory System

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

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

Non-use of International Standards

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

The EU has attempted to clarify some of these issues in discussions in the TBT Committee in Geneva, and in particular, to establish the position of international standards bodies in the context of the Agreement, but at present agreement with the US has been difficult to reach. Discussions in the WTO on conformity assessment issues are progressing but are at an early stage.

Regulatory Differences at State Level

The proliferation of regulation at State level presents particular problems for companies without offices in the US. There are more than 2700 State and municipal authorities in the US, which require particular safety certifications for products sold or installed within their jurisdictions. These requirements are not always uniform or consistent with each other, or even transparent. In particular, individual States sometimes set environmental standards going far beyond what is provided for at Federal level. Agricultural and food imports are also often confronted with additional state-level requirements, which may lead to obstacles to trade. Acquiring the necessary information and satisfying the necessary procedures is a major undertaking for a foreign enterprise, especially a small or medium sized one, as at present there is no central source of information on standards and conformity assessment.

Excessive Reliance on Mandatory Certification

Against the background of an international trend towards deregulation or the minimising of third party intervention in the regulatory process and in favour of self-certification by manufacturers backed by post-market surveillance and control, the US continues to rely on third party conformity assessment procedures for many industrial products (e.g. electrical equipment and domestic appliances).

Cumbersome Labelling Requirements

Sometimes the information required to be put on a label seems to be specifically designed to influence consumer behaviour (e.g. the *American Automobile Labelling Act* provides that passenger cars and other vehicles must labelled with, inter alia, the proportion of US and Canadian made parts and the final point of assembly). For other products (e.g. textiles), labelling requirements seem to be another way of slowing down the process of getting a new product to the market.

Lengthy Product Approval and Control Procedures

One issue of concern for the EU is the time-consuming procedures of the Food and Drug Administration (FDA) and the stringent inspection programmes in place for medicinal and agricultural products. In addition, a variety of EU exports to the US have encountered problems due to delays in US Customs sampling and inspection procedures, resulting in damage of the goods and subsequent commercial loses for the exporters.

Sanitary and Phytosanitary Measures

In the agricultural area, a number of sanitary and phytosanitary issues remain a significant source of difficulty for the EU, in particular those related to animal disease. It was expected that some of these issues might be solved by the Veterinary Equivalence Agreement, signed on 20 July 1999. However no real progress has materialised so far.

4. Government Procurement

The *Buy America Act (BAA)*, initially enacted in 1933, is the core domestic preference statute governing US procurement. It covers a number of discriminatory measures, generally termed Buy America restrictions, which apply to government-funded purchases. These take several forms: some prohibit public sector bodies from purchasing goods and services from foreign sources; some establish local content requirements, while others still extend preferential price terms to domestic suppliers. Buy America restrictions therefore not only directly reduce the opportunities for EU exports, but also discourage US bidders from using European products or services. The domestic industry, through the court system and legislative lobbying, ensures that Buy American preferences are vigorously enforced and maintained.

As a result of the GATT (subsequently WTO) *Government Procurement Agreement* (GPA), waivers from many Buy America provisions have been foreseen for GPA Parties (inter alia, through the 1979 Trade Agreements Act), including for the EU. However, the actual implementation of these waivers may in some cases produce legal uncertainty and this may act as a barrier. In addition to that, some persistent Buy America provisions continue to limit access to the US procurement market in a significant way.

The European Commission estimates Buy America to affect about US$ 25 billion of contracts in FY2001, particularly mass transport and airport improvement. These are precisely the sectors where EU business is very competitive. This figure is expected to increase to about US$ 35 billion by 2005, taking account of budget growth forecasts. These restrictions will negatively impact European suppliers of products, including iron and steel and transport equipment.

National security issues

The 1941 *Defence Appropriation Act* (now known as *the "Berry Amendment"*) uses the concept of "national security" to restrict procurement by the Department of Defence (DoD), the largest public procurement agency within the US Government, to US sourcing. Its scope has been extended to secure protection for a wide range of products only tangentially related to national security concerns (e.g. textiles). Further DoD procurement restrictions are based on the National Security Act of 1947 and the Defence Production Act of 1950, which grant authority to impose restrictions on foreign supplies in order to preserve the domestic mobilisation base and the overall preparedness posture of the US.

Although the concept of national security can be invoked under Article XXIII of the WTO Government Procurement Agreement (GPA) to limit national treatment in the defence sector for foreign suppliers, the use of national security considerations by the US has led in practice to a disproportionate reduction in the scope of DoD supplies covered by the GPA. While the US denies abusing the WTO national security exemption, it has indicated a readiness, in the context of the implementation of the GPA, to disseminate more guidance to US procurement officials for identifying which procurements are covered by the

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

There has also been a trend towards making DoD's other domestic preferences, apart from the BAA preferences, less restrictive - by expanding the preference to qualifying countries. These are countries that maintain reciprocal memoranda of understanding (MoU) with the US. Currently, eleven EU Member States are qualifying countries. However, the EU has still some concerns on the implementation of MoU waivers in practice.

Sub-federal legislation

Buy America or "buy local" legislation is also rife at State level. More than half of all US States and a large number of localities do apply some "Buy Local" restrictions in one form or another.

On the other hand, selective purchasing laws (whereby the access of companies to contracts is severely or completely curtailed as a result of the companies' business links with particular third countries) adopted at sub-federal level continue to cause great concern. The EU strongly objects to these attempts to regulate the behaviour of EU companies that are acting in full compliance with EU and Member States' Laws.

Set-aside for small businesses

Under the Small Business Act of 1953, as amended, executive agencies must place a fair proportion of their purchases with small businesses (not less than 20% of the total value of all prime contract awards for each fiscal year). These “set-aside” policies also operate in an important number of states. Even if the active promotion of small businesses is a common concern for the EU and the US, the EU is concerned that the US "set-aside" measures and their exemption from the GPA are favouring US industry and restricting the ability of foreign (EU and other) companies doing business in the US.

Sanctions for non-reciprocity

Under *Section 305 (g) of the Trade Agreements Act of 1979*, the US has applied, since May 1993, sanctions on EU countries that are considered to discriminate against US products and services in their government procurement practices. The sanctions do not apply to contracts covered by the GPA or in support of US national security interests.

5. Subsidies

The agri-food sector is the largest recipient of government outlays, both in absolute value and in relation to value added. The oil and coal industries are also large recipients of government support provided through tax breaks and various other measures. Several programmes provide assistance to the aerospace and aeronautics sector. Support is provided by the aeronautics expenditures of the NASA and the Federal Aviation Administration (FAA), as well as by the DoD expenditure on R&D. Finally, by virtue of the Merchant Marine Act of 1936 (Jones Act) US shipbuilding benefits also from various subsidies and tax deferments.

Transparency

Transparency in the area of subsidies is an obligation of the WTO Agreement on Subsidies and Countervailing Measures. The EU still remains concerned by the lack of information on US State-level subsidies, particularly large, *ad hoc* investment incentives. The reporting of Federal subsidies has improved, although there are still gaps as regards certain sectors.

6. GATS Specific Measures

Professional Services

Following the conclusion of the GATS negotiations in 1993, the access of professional service suppliers to the US has been improved since a number of nationality conditions and in-State residence requirements have been removed. However, access to the US market, where licensing of professional service suppliers is generally regulated at State level, remains unsatisfactory. This is mainly due to the lack of transparency in - and divergence of - access conditions at State level, as well as the frequent absence of a transparent regulatory regime for the operation of foreign professional service suppliers. Nonetheless, the situation should improve steadily under the GATS: the Working Party on Professional Services has agreed on disciplines applicable to accountancy services, and the new Working Party on Domestic Regulation will continue working on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade. In addition, negotiations on market access and on the further liberalisation of professional services will take place as part of the Doha Development Agenda.

Communication Services

In spite of the *GATS Basic Telecommunications Agreement* concluded in 1997 and in force since February 1998, European and other foreign-owned firms seeking access to the US market still face important barriers, particularly in the mobile services sector (e.g. investment restrictions, lengthy and burdensome proceedings, protectionist attitudes in certain congressional circles and lack of access to frequencies for 3rd generation services) and in the satellite services sector (e.g. lengthy proceedings, conditionality of market access, de facto reciprocity-based procedures). Even if there have been gradual improvements on a number of issues, market access is still not fully ensured and this situation is not in line with the market access policy advocated by the US, as exemplified by the protectionist bills introduced in the Congress in 2000 and 2001 (re-introduction of the *Hollings Bill*) and the lengthy proceedings to allow transfer of licenses. Indeed it provides a competitive advantage to the significant number of US companies that already have access to the EU market in these fields.

Financial services

The European Commission is working to improve access of European financial institutions to US markets in a number of key sectors, including the new financial activities permitted under the 1999 *Gramm-Leach-Bliley Act* (GLBA, which codifies US financial regulation) and reinsurance and other wholesale insurance markets.

Financial services negotiations in the framework of the GATS are particularly important. A permanent and Most Favoured Nation-based agreement entered into force in March 1999 and *GATS negotiations on financial services* were re-launched in Geneva in 2000 to increase regulatory transparency in the US and other markets and ensure national treatment for EU institutions.

- Banking

US federal and state banking laws and regulations are complex and involve several different regulatory bodies. On the other hand, even if the US maintains a policy of national treatment towards US branches, agencies, securities affiliates and other operations of foreign banks (see commitments included in the Annex on Financial Services in the GATS), a few restrictions to foreign market access and national treatment remain.

- Insurance

A remaining impediment for EU insurance companies seeking to operate in the US market is the fragmentation of the market into 54 different jurisdictions, with different licensing, solvency and operating requirements. Each state has its own insurance regulatory structure and, by contrast to banking, federal law does not provide for the establishment of federally licensed or regulated insurance companies. However, interest in establishing a federal statutory structure for licensing and regulation of insurance is growing. The National Association of Insurance Commissioners (NAIC) has issued model laws, but implementation of these laws by the States is not compulsory.

Allied to the costs involved in dealing with an outdated regulatory structure, EU companies also face direct discrimination on a number of fronts (e.g. to underwrite risks in some states, an EU insurance company must first be licensed in another state; some states require their insurers to buy reinsurance from state-licensed companies, etc.).

- Securities

Obstacles are also found in the securities sector. The establishment of a branch in the US by a foreign securities firm to engage in broker-dealer activities, although legally possible, is in fact not practicable, since registration as a broker-dealer means that the foreign firm establishing the branch has to register and become itself subject to Securities and Exchange Commission (SEC) regulation. Foreign mutual funds have not been able to make public offerings in the US because the SEC's conditions make it impracticable for a foreign fund to register under the US Investment Company Act of 1940.

Another issue of EU concern is the political use of the capital markets in support of US extraterritorial sanctions and the consequent overt politicisation of the SEC. A recent memorandum from the SEC appears to indicate a change in the interpretation of the "material information" to be disclosed by companies under SEC rules. According to the new interpretation, companies trading with countries subject to US unilateral santions would have to disclose information on business operations in such countries where the information would have a "material" impact on the company's overall business. However, it is arguable whether such information would of itself be material as regards the profitability and financial outlook of companies. The EU is also concerned by certain capital market provisions in the version of the *Sudan Peace Act* adopted by the House of Representatives in June 2001. This legislation, if adopted, would impose enhanced disclosure requirements to companies trading with this country, as well as effectively closing access to US capital markets to companies engaged in oil or gas development in Sudan. The version adopted thereafter by the Senate does not contain the aforementioned provisions. The competing versions of the Act will go to a Conference Committee for reconciliation. The Bush Administration has expressed its opposition to the capital market provisions of the Sudan Peace Act.

Finally, the Commission is also encouraging the SEC to take a positive role in the creation of international accounting standards (IAS). It will be important that IAS be acceptable for listings of US exchanges by the 2005 date for their adoption in the EU.

Transport Services

There remain significant market access obstacles in both US air transport and US maritime service markets. We must note that domestic transportation, but also international government-financed air and maritime transportation is restricted to US carriers. The impact of these measures is significant. They deny EU competitors access to a very sizeable pool of US cargo, while providing US carriers with guaranteed cargoes at protected, highly remunerative rates.

Quantitative Restrictions and Related Measures

960050- *National Security Safeguard* [2002-02-14]

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

Standards and Other Technical Requirements

960054- *Underwriters´ Laboratories Approval* [2001-08-14]

The electrical safety field in the US is ruled by workplace safety regulations developed by the Occupational Safety and Health Administration (OSHA), the National Electric Code and industry safety standards for electrical equipment such as Underwriters´ Laboratories.

In practice, it is very difficult to market a product in the US which is not in conformity with Underwriters´ Laboratory requirements or has not been certified by such (indeed an electrical inspector will not permit such a device to be used).

However, Underwriters´ Laboratories have complete discretion on the standards concerning safety certification and, on occasion, can make seemingly arbitrary changes to them. They list the products that comply with the regulations but do not actually approve them. This is done by a variety of testing and certification agencies (some offering testing facilities in the EU).

Registration, Documentation, Customs Procedures

970144- *refusal of EC origin* [2001-12-19]

US Customs refuse to accept certificates of origin that indicate "EC" as the exporting country, rather than a particular Member State. This applies to all sectors.

The consequence of this measure is that, in order to justify EC country of origin status, EU firms are required to furnish supplementary documentation and follow further procedures. This results in additional expense.

Government Procurement

960057- *Space Launching Services* [2001-12-19]

The President's National Space Directive of 1990 and 1994 precluded US government agencies from using foreign launch services (except, in the case of NASA, in collaborative projects not involving an exchange of funds). This policy was subject to undefined exceptions - a possibility that was never, or almost never used.

In October 1998, President Clinton signed the *Commercial Space Act* of 1998. This law, on the one hand, calls on Federal agencies to buy space launch services - rather than launch vehicles. On the other hand, it requires these services to be procured from "US commercial providers", subject to certain exceptions, for instance for international collaborative efforts related to science and technology. It thus legislates the "Buy America" policy contained until then in the President's National Space Policy but opens the door for NASA to enter into collaborative projects with foreign space agencies even if they involve the disbursement of funds. It remains to be seen how the US Administration will interpret the notion of "US commercial provider".

960058- *Transport Related Projects* [2001-12-19]

One of the most obvious areas of Buy America is federal aid administered by the Department of Transportation (DoT) under several different acts, including the *Highway Administration Act*, the *Urban Mass Transit Act*, and the *Airports Improvement Act*. In accordance with these acts, the DoT provides aid to the State and local governments for various transportation related procurements. The State or local government at some level must match that money. Specifically, the Federal government may fund 40% to 80% of the project (depending on the nature of the grant), while the State or local government must fund the remaining share. All purchases of goods and services related to these projects must meet various Buy America provisions, usually domestic content requirements of 60% and, failing that, a price penalty of up to 25%.

960055- *National Security Exceptions* [2001-12-19]

The 1941 *Defence Appropriation Act* (now known as *the "Berry Amendment"*) uses the concept of "national security" to restrict procurement by the Department of Defence (DoD), the largest public procurement agency within the US Government, to US sourcing. Except as required by the Defence Suplement to the Federal Acquisitions Regulation (DFARS), contracting officers must apply "Buy American Act" (BAA) requirements to supply contracts exceeding US$2,500 micro purchase ceiling and to service contracts that involve finishing of supplies when the supply portion exceeds the micro-purchase ceiling. In addition, the scope of the Berry Amendment has been scope has been extended to secure protection for a wide range of products only tangentially related to national security concerns. In September 1996, the Congress adopted an amendment that extended the initial scope of the Berry Amendment to cover also all textile fibres and yarns used in the production of fabrics. The result of this extension is that Community fibres and yarns can no longer be used by US manufacturers for producing fabrics which they sell to the DoD.

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

960056- *DoD Defence Acquisitions* [2001-12-19]

In practice, all NATO countries (except Iceland), all major non-NATO allies of the US (e.g. Australia, New-Zealand) as well as Sweden, Finland and Austria have signed Memorandums of Understanding (MoUs) with the US allowing for a waiver of DoD´s domestic preferences. However, these MoUs are subject to US laws and regulations, and consequently, other restrictions can be imposed annually by Congress through the appropriations process. For example, US legislation allows the Administration (DoD and USTR) to rescind a

waiver if it determines that a particular ally discriminates against US products. In addition, Congress is unilaterally overriding the MoU by imposing "ad hoc" Buy America requirements during the annual budget process (e.g. in the case of anchor and mooring chains). There are also indications that US procurement officers disregard the exemption of Buy America restrictions for MoU countries (e.g. in the case of fuel-cells, ball and roller bearings and steel forging items).
In fact, the barriers to defence trade with the US result from a complex set of rules and practices aiming at imposing "domestic sources restrictions" in US defence acquisition. A partial identification of all these barriers is provided in a July 1998 report of the US General Accounting Office that was established to justify these "domestic sources restrictions".

The following examples illustrate the large variety of obstacles facing EU exporters to US:

- Specific requirements to produce goods on US soil. This can take many forms, for example as part of the DoD programme approval procedure, a requirement exists that any major defence item must be produced on US soil, so that EU companies can only do business by selling the licences to manufacture (e.g. Harrier Vertical Take-Off and Landing Jet). In relation to large calibre cannons, there is legislation in Congress requiring that they be produced in a particular US plant. Such requirements can also be buried in the Defense Appropriations bill - for example, in relation to small arms, DoD is required to justify the need to buy offshore.

-There is no grant-back given for changes made to products by the licensee (a common element of licensing systems in the area of non-defence goods, as the original owner then benefits from changes made).

-Foreign Comparative Tests (FCT) are tests carried out to assess the best product for goods not produced in the US. Funds to carry out such tests have been reduced in 1999, although the defence budget itself had been increased. Also, experience shows that, where an FCT pinpoints a successful product, DoD seeks a licence to produce that product in the US rather than entering into a direct supply contract with the offshore producer. The effect of this practice is that EU suppliers look for a US production partner early in the process.

-Barriers arising from the use of the Foreign Military Sales Regulation (FMSR). The FMSR introduces maximum foreign content threshold requirements for products exported with FMS support. This means that US prime contractors willing to seek FMS support are reluctant to design foreign content into their products. Instead, they prefer replacing any foreign content by US production under licence (e.g. armoured vehicles were obtained under licence from Austria and then sold on to Kuwait through the FMS system - this took sales to third countries away from European companies).

-Technical data/Technology export control requirements. Non-nationals cannot take their own foreign companies´ technical data out of the US (even if only showing around for sales purposes) unless the US company is granted a licence to export that data - and consequently rights over the data.

-US subsidiaries. One way of circumventing the US-soil production requirements is to set up a subsidiary in the US. However, such subsidiaries need to obtain both security clearance and authorisation to operate. A precondition for obtaining this is that the overseas parent company must relinquish management control of the subsidiary (US Security Manual). These so-called "Chinese walls" are quite systematically established. Well known examples are within Allison (part of Rolls-Royce) and Tracor (part of Marconi).

-Lack of access to bidders conferences / security clearance considerations. Foreign nationals rarely have access to bidder conferences and other pre-contract award procedures, because they are not granted the required security clearances at that stage of the procurement process.

-Congressional Approval of the Defence Budget. The defence budget is approved line-by-line and Congress regularly strikes out lines, including procurement programmes. The effect is that defence contractors lobby Members for support for individual programmes, offering inducements in return - sometimes ensuring that production capability will be located in Members´ districts. This represents a kind of "regional juste retour" built into the budget approval process. As an example, the company developing a particular missile programme ensured that 49 States benefited from that particular programme, thereby ensuring that programme´s survival in the budget.

960059- *Buy Local/State Level* [2001-12-19]

More than half of all US States and a large number of localities do apply some "Buy Local" restrictions in one form or another. In some cases, the procurement of particular products (e.g. steel, coal, printing and cars) are subject to such restrictions. Affirmative action schemes favouring small business or particular types of business (e.g. minority-owned) are also applied extensively in a large number of States.

37 States and 6 major cities have been covered by hte *1994 WTO Government Procurement Agreement* (GPA). Two additional States agreed to grant "out-of-state" treatment to EU suppliers under a *1994 EU-US bilateral agreement*. However, a number of these States have excluded local preferences from their coverage, including set-asides.

Among the 11 States that have not been bound by the US offer, some maintain very substantial local preferences, which have a very negative impact on EU and other foreign suppliers. This is the case of Alaska, New Mexico, South Carolina and, to a lesser extent, Ohio and Virginia. In the case of New Jersey, State legislation also provides that for the construction of public works projects financed by State funds, the material used (e.g. cement) must be of domestic origin.

Even in the GPA-bound states, various exemptions (i.e. for purchases of cars, coal, printing and steel and for set-aside) seriously limite the procurement opportunities open to foreigners. Besides, all procurements by States and localities that benefit from particular types of federal funding (e.g. in mass transit and highway projects) are subject to the Buy America Act (BAA).

Quantitative Restrictions and Related Measures

960060- *Export Controls* [2001-12-19]

A comprehensive system of export controls was established under the *Export Administration Act* of 1979 (EAA) and the *US Export Administration Regulation* (EAR) to prevent trade to unauthorised destinations. This system, among other things, requires companies, incorporated and operating in EU Member States, to comply with US re-export controls. This includes compliance with US prohibitions on re-exports for reasons of US national security and foreign policy.

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

Government Procurement

970152- *Sub-federal selective purchasing laws* [2001-12-19]

At sub-federal level, selective purchasing laws (whereby the access of companies to contracts is severely or completely curtailed as a result of the companies´ business links with particular third countries) are a cause of great concern. Such laws have been adopted by the Commonwealth of Massachusetts (e.g. the "Burma Law") and the State of New York ("MacBride principles") and more than 20 cities and local authorities, and are under consideration by a number of other sub-federal authorities.

Agriculture and Fisheries

Registration, Documentation, Customs Procedures

040003-*Bioterrorism Act* [2004-04-21]

The US “Public Health Security and Bioterrorism Preparedness and Response Act” was signed into law on 12 June 2002. Concern was immediately raised about the potential effects of the Act on trade in foods, in particular as regards small producers. The measure is intended to address part of a perceived security risk surrounding the supply of foodstuffs. The implementation of the Act necessitates the registration of all foreign facilities that supply food to the US; prior notification of all shipments to the US; record-keeping by foreign enterprises to allow traceability of foods; and procedures for the administrative detention of suspect foods.

The foods covered are all foods, feeds and beverages, with the exception of such meat, poultry and egg products that are "subject to the exclusive jurisdiction of the U.S. Department of Agriculture (USDA)". The measures will therefore cover all the main food exports to the US: beverages (including wines and spirits), processed foods, dairy products, and fruit and vegetables. Deliveries by international mail are also included, unless the food is produced by the sender.

- 12 December 2003: The four implementing rules outlined in the Bioterrorism Act came into effect. The rules on record-keeping and administrative detention, which include requirements for record-keeping and control visits, are still being finalised and will not come into effect until 13 August 2004.
- 14 April 2004: The FDA reopened the comment period on the implementation of the final rules on Registration and Prior Notice (but not Record-Keeping and Administrative Detention; final versions of those rules are still outstanding.)

Quantitative Restrictions and Related Measures

960096- *Large-scale Drift Net Fishing* [2001-10-01]

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

In March 1999, the DoC identified Italy as a nation whose fishing vessels may be conducting high sea, large-scale driftnet fishing in violation of the High Seas Driftnet Fisheries Enforcement Act.

This case is now solved, following recent discussions that established that the Italian "spadare" fleet had been reduced to less than 100 vessels.

960062- *Marine Mammal Protection Act* [2004-02-06]

The *Marine Mammal Protection Act* of 1972 aims at protecting marine mammals, particularly dolphins, by progressively reducing the acceptable level of dolphin mortality in US tuna-fishing operations in the Eastern Tropical Pacific (ETP) Ocean and providing for sanctions to be taken against other countries which fail to apply similar standards for dolphin protection.

The MMPA requires that countries that wish to import from the ETP must receive an "affirmative finding" from the National Marine Fisheries Service (NMFS). The criteria for receiving an "affirmative finding" relate to the membership (or launching and completing the accession within six months) to the Inter-American Tropical Tuna Commission (IATTC) and the need to have a "tuna tracking and verification system" that conforms to the Tuna Tracking and Verification System adopted under the Agreement for International Dolphin Conservation Programme (AIDCP).

- The Community, by Council Decision 1999/405/EC of 10 June 1999, authorised Spain to join the IATTC, on a provisional basis. This authorisation has been granted pending the conclusion of the negotiations with the other contacting parties to the Convention on the necessary amendments to permit membership of the European Community. Spain formally acceded to the Convention in June 2003.

960097- *Shrimp Embargo* [2004-04-22]

Pursuant to section 609 of Public Law 101-162n exports of shrimp to the US will be embargoed unless nations provide evidence that their shrimp trawlers match US efforts to protect sea turtles (eg. artisanal fishing, having a sea turtle excluder program or fishing for coldwater shrimp only).

To date, the US authorities have certified forty-two nations, but five Member States (France, Spain, Portugal, Italy and Greece) have not been certified.

Subsidies

960303- *Export Credit Guarantee* [2004-06-07]

The Commodity Credit Corporation (CCC), US Department of Agriculture, administers export credit guarantee programs for financing of US agricultural exports. The Export Credit Guarantee Programs provide a guarantee to US banks willing to finance such transactions for exporters shipping US products on credit to foreign importers in elibible countries. It is targeted at countries that need guarantees to secure financing but show a reasonable capacity to repay. The programme offers US government guarantees of short-term GSM-102 (6 months - 3 years) and medium-term GSM-103 (3-10 years) private bank loans at commercial interest rates.

In recent years it has become the main export policy tool of USDA, with annual allocations exceeding $5 billion and declared annual subsidy levels of over $400 million. The program has a default rate of over 10% historically, and it is characterised by uncertainty (and lack of transparency) with respect to the implicit subsidy component stemming from rescheduling of payments or bilateral debt forgiveness.

The US is the largest user of export credit guarantee programmes for agriculture. According to a 2000 OECD report, US export credits are "almost twice as distorting" on a per unit basis as any other countries´ and, given the US' relatively large programme, these "account for the majority of distortions in world markets caused by officially supported export credits" (88%).

960093- *Dairy Export Incentive Program* [2002-01-15]

The US operates a range of programmes designed to subsidise and/or promote exports of US agricultural products. Currently operating in the same manner as the Export Enhancement Program (Trade Barrier Fiche No. 960092) is the Dairy Export Incentive Program (DEIP) which is also used for market development purposes.

960095- *Emerging Markets Programme* [2002-01-15]

The *Emerging Markets Program* (EMP) is authorised by the Food, Agriculture, Conservation and Trade Act of 1990 (FACT Act), as amended by the Federal Agriculture Improvement and Reform Act (FAIR Act). Under the FAIR Act, a programme of technical assistance to promote US agricultural exports is authorised to emerging markets in all geographic regions. The legislation calls for 10 million US dollars per year to be provided from the Commodity Credit Corporation (CCC) to support the EMP.

010050-*Marketing loans* [2004-05-05]

The Commodity loan programme allows US producers of designated crops to receive loans from the US government at a crop-specific loan rate per unit of production by pledging production as loan collateral. This programme has had significant budgetary outlays over the past few years, largely related to Marketing loans.

Marketing loan provisions allow farmers to repay commodity loans at less than the original loan rate (plus interest) when market prices are lower. Marketing loans provide farmers economic incentives to retain ownership of crops and sell them rather than forfeit ownership to the government to settle loans. Many US farmers use a two-step marketing procedure in which they receive programme benefits when prices are seasonably low (and programme benefits high) and then sell their crop later in the marketing year when prices have risen. Producers can receive marketing loan benefits through two different channels: the marketing loan gains (loan programme) and the loan deficiency payments. Under the loan programme, farmers place their crop under the commodity loan program by pledging and storing all or part of their production as collateral for the loan, receiving a per-unit loan rate for the crop. But rather than repay the full loan (plus interest), farmers may repay the loan at a lower repayment rate at any time during the loan period that market prices are below the loan rate. Marketing loan repayment rates are normally based on either local, posted country prices or the prevailing world market price. The difference between the loan rate and the loan repayment rate represents a programme benefit to producers.

Alternatively, farmers may choose to receive marketing loan benefits through direct loan deficiency payments (LDP). The LDP allows the producer to receive marketing loan benefits without having to take out and subsequently repay a commodity loan. The LDP rate is the amount by which the loan rate exceeds the posted county price or prevailing world market price.

As crop prices declined in the late nineties, total marketing loan benefits rose from less than US$200 million for 1997 to more than $3.8 billion for 1998 and about $8 billion for 1999 crops. Only for soybeans, they amounted to US$1.2 billion in 1998, and 2.8 billion in 1998. This represents a 9% of total value of the production in 1998 and 19% in 1999. US subsidies have led to a considerable increase of US soybean-cultivated land. This increase has caused a decline in international prices of around 10%, which directly affects EU producers.

- 10 January 2003: The EUropean Oilseed Alliance (EOA) lodged a complaint under the Trade Barrier Regulation, claiming that loan rates, marketing loan subsidies, direct payments and counter-cyclical payments granted to US oilseed producers under the 2002 Farm Act are causing serious prejudice to the EU.

020074-*US Farm Bill* [2004-05-05]

Agriculture policy was overhauled in 2002 with the passing of the Farm Security and Rural Investment Act of 2002 (2002 Farm Act). Despite a consensus among WTO Member States that farm policies should be reformed in the direction of less trade-distorting forms of support, the 2002 Farm Act goes in the opposite direction and increases the distortionary effect of US farm subsidies. The main elements of the new legislation are:

– increase of 80% in spending on commodity subsidies above the levels foreseen under the pre-existing policy (totalling $15-20 million per year, depending on market prices);

– introduction of new 'counter-cyclical' payments for arable crops, designed to compensate for falls in market prices. These payments, together with the continued 'loan programme', shield farmers from low prices and thus perpetuate a cycle of over-production and downward pressure on prices;

– updating of 'base areas' on hitherto 'fixed' arable crop payments, thus re-linking these subsidies to current production;

– payment of a new 'counter-cyclical' subsidy to dairy farmers to counteract price movements;

– introduction of a 'promotional levy' on dairy imports, which could be applied in a manner to act as a tariff increase;

– new subsidies for producers of fruit and vegetables, wool, mohair, honey, and for grassland livestock farmers;

– substantial increases in export assistance measures, including a 120% increase in the Market Access Promotion programme to $200 million per year, and non-emergency 'food aid' programmes explicitly designed to expand US export opportunities and dispose of surplus production;

– subsidies for energy producers who utilise agricultural commodities, such as maize and soya.

The new farm policy has been widely condemned, both within and outside the US. The main reasons for criticism are (a) the potential for the crop subsidies to depress world prices; (b) the probability that the US will exceed its WTO limit of $19.1 billion production-linked support (the 'AMS limit'); and (c) the failure of the US to play its part in the consensus among WTO members for continued and progressive reduction in trade-distorting farm support measures. The EU will monitor the implementation of the 2002 Farm Act for compliance with trade rules, and as necessary, defend its rights.

960092- *Export Enhancement Programme* [2004-06-07]

The US maintains an aggressive export policy for agricultural products. The US operates a range of programmes designed to subsidise and/or promote exports of US agricultural products. One of the two long-standing agri-food export subsidy programmes is the *Export Enhancement Programme* (EEP) [see also "Dairy Export Incentive Programme" (DEIP), Trade Barrier Fiche No. 960093].

Under the (EEP), the US Department of Agriculture (USDA) pays cash bonuses to exporters, allowing them to sell agricultural products in targeted countries at prices bellow the exporter's costs of acquiring them. The stated purpose of the programme is to enable US exporters to meet prices that are being subsidised by other Governments into the world market. The EEP has not been used to any great extent in recent years, but potentially applies to products exported to over 70 countries.

Sanitary and phytosanitary measures

960081- *United States-Plants in Growing Media* [2005-01-17]

The provisions on standards and certification of plants established in growing media (CFR 1996, Title 7, Subtitle B, Ch.III, §319-37-8) were last revised and effective on 3 November 1999 to permit the import into the US of certain plant genera in sterile growing media. This has reduced the obstacles encountered by EU exports of potted plants to the US.

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

Almost all sorts of plants and growing media (except soil) are permitted for import. However, when the permitted plants are in permitted growth media the import is not permitted, unless a special Pest Risk Assessment (PRA) has been performed by USDA´s Animal Plant and Health Inspection Service (APHIS). The process of obtaining PRA has proved to be extremely slow.

960083-*United States- Bovine animals and products* [2004-09-22]

In 1997, the US introduced rules on the import of ruminant animals and products thereof from all European countries based on concerns about Bovine Spongiform Encephalopathy (BSE).

These rules are still in place.

- General statement on BSE to all Third Countries on 17/03/2004 in reaction on the statement of the USA

  In response to the confirmation of the first case of BSE in the US in December 2003, the US has voiced strong support for the respect of OIE rules by importing countries. However, hypercritically, the US does not respect these rules for imports from the EU.

960080- *United States- Pathogen-free Areas* [2004-09-22]

Under the US Regulations (Code of Federal Regulations of 1996, Title 7, Subtitle B, Ch. III,

§319-56-2) the import of fruit and vegetables from a EU Member State, in which the relevant pathogen is known to occur, is not only prohibited from the infested area of that Member State, but also from the pathogen-free areas thereof. This creates undue obstacles to exports from pathogen-free regions within the EU.

960082- *United States- Hardy Nursery Stock* [2004-09-22]

The US requires a two year post-entry quarantine on an importer's premises for hardy nursery stock. Its main purpose is believed to be the detection of latent infections by organisms of quarantine concern.

960084- *United States- Goats/Risk of Scrapie* [2004-09-22]

The US imposes animal health restrictions on the import of goats on the grounds of the risk of scrapie in sheep.

960087- *United States- Non-Comminglement* [2004-09-22]

Non-comminglement means that establishments exporting meat or meat products to the US may not handle meat or meat products from countries which are not recognised as being free from certain diseases of concern to the US, and that there is no mixing of meat or meat products destined for the US with meat or meat products from such countries.

The EC-US Agreement on Application of the Third Country Meat Directive provides for an establishment to handle both categories of meat or meat products provided that there is a separation in time between handling them. So far, however the US has not been willing to apply this provision of the agreement. The EC-US Veterinary Agreement includes specific provisions for the application of non-comminglement.

960088- *United States- Uncooked Meat Products* [2004-09-22]

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

960089- *United States- Inspection of Egg Production* [2004-09-22]

The import of egg products is allowed only under very strict conditions, in particular, the requirement for continuous inspection of the production process.

970279- *Columbia- Meat/On-site Inspection* [2005-01-06]

The sanitarian regulations concerning the import of meat products, especially pork and products thereof, provide for time-consuming and costly procedures such as an on-site inspection by the Colombian veterinarian authorities of the production at the expenses of the exporter. The permission given lasts only for two years.
For exports from the US global permissions are issued. They should be available for EC exports as well.

040086-*United States- meat and meat products* [2004-09-22]

ban on import of pork and poultry meat and meat products due to the de-listing of French establishments by USA's competent authorities. Allegations were related to public health concerns resulting of a USA inspection mission in France to some French establishments which used to be listed for exports of meat and meat products to USA.

- The Commission services denounced this issue during the XXIXth SPS Committee (March 2004).

Chemicals

Standards and Other Technical Requirements

000016- *Gasoline oxygenates (MTBE)* [2002-05-15]

The US is taking measures on both federal and state levels to ban or discourage the use of Methyl Tertiary-Butyl Ether (MTBE).

MTBE is an "oxygenate" used to increase the level of oxygen in fuels in order to minimise atmospheric pollution. Its use in the US is based on the US Clean Air Act which imposes an obligation on fuels sold in the US to contain a minimumlevel of oxygenates (MTBE, ETBE, ethanol or methanol).

The US measures to ban or discourage the use of MTBE include:

(i) Progressive prohibition of sale and use of MTBE-fuel in California (Governors Executive

Order subsequently incorporated into State law).

(ii) The requirement that gasoline pumps in California, Colorado and Connecticut containing MTBE (or methanol) must be labelled.

The US measures are based on the argument that, in cases where gasoline leaks to the drinking water, MTBE is more harmful to the environment than other oxygenates or other substances contained in gasoline.

In addition to the existing state measures, the US Environmental Protection Agency announced its intent to initiate rulemaking in view of regulating, and possibly prohibiting the use of MTBE, as notified to the WTOs TBT Committee on 12 April 2000 (G/TBT/Notif.00/191, 12 April 2000 (00-1466)).

The US measures described above have been challenged by a Canadian company, Methanex, in the context of the investor-State dispute resolution mechanism of Chapter 11 of the NAFTA Agreement.

Services - Communications & Audiovisual

GATS Specific Measures

990085- *Mobile Services* [2001-08-28]

Access of third generation mobile communication systems to the US market could be restricted due to lack of availability of frequencies. This concern has arisen following the decision in the US to allocate to second generation systems the frequency bands which had been identified for third generation systems by the International Telecommunications Union (ITU) at its World Assembly Radiocommunications Conference in 1992. Such frequency bands are generally available for third generation systems in Europe and in most of the other countries throughout the world, as these countries have followed the ITU recommendation of 1992.

990087- *Foreign Investment/Restriction* [2001-08-28]

Within the framework of the Basic Telecom Agreement, the US has undertaken a commitment to abolish restrictions to indirect investment from 1 January 1998. However, the US holds the view that it is not necessary to implement specific legislation to achieve such a goal, on the grounds that the FCC can waive these restrictions under the current law by invoking the public interest and considers that this waiver provision is sufficient for FCC not to apply section 310(b)(4) to WTO Members.

Services - Financial

GATS Specific Measures

990025- *Establishment Problems* [2001-08-28]

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

Foreign mutual funds have not been able to make public offerings in the US because the SEC´s conditions make it impracticable for a foreign fund to register under the US Investment Company Act of 1940.

Shipbuilding

Subsidies

960098- *Shipbuilding Subsidies* [2001-08-23]

The Merchant Marine Act of 1936, as amended, provides for various shipbuilding subsidies and tax deferments for projects meeting domestic built requirements. These are provided via the Operating Differential Subsidy (ODS), the Capital Constructions Fund (CCF) and the Construction Reserve Fund (CRF).

In addition, the "Capability Preservation Agreement Scheme" included in H.R. 1119 of 18 November 1997, allows qualified shipyards to claim for reimbursement on their US navy shipbuilding contracts for certain costs attributable to work on their commercial shipbuilding.

The Merchant Marine Act also established under Title XI, the Guaranteed Loan Program to assist in the development of the US merchant marine by guaranteeing construction loans and mortgages on US flag vessels built in the US. In 1993, this was extended to cover vessels for export.

During FY2000, the Maritime Administration (MARAD) approved US$886 million worth of Title XI guaranteed loan applications for 15 vessels and barges and 2 cruise ships. As of July 2001, for FY2001 MARAD has approved US$536 million in loan guarantees. Since fiscal year 1994, the Title XI programme has guaranteed loans for at least 426 vessels covering US$5.75 billion in loans.

Telecommunications Equipment

Government Procurement

960063- *Procurement Sanctions* [2002-05-22]

In 1993, as a result of the failure to liberalise purchases of telecom equipment, the US decided to impose sanctions against the EU and certain Member States under Title VII of the Omnibus Trade and Competitiveness Act of 1988.

The sanctions bar EU suppliers from bidding, inter alia, for US Federal government contracts that are below the threshold values of the WTO Agreement on Government Procurement.

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INVESTMENT RELATED BARRIERS

1. Direct Foreign Investment Limitations

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

There is a continued EU concern that the scope of application of this national security safeguard may be carried beyond what is necessary. In this context, the EU has drawn attention to the lack of a definition of national security and the uncertainty as to which transactions are notifiable. Coupled with the fear of potential forced divestiture, many if not most, foreign investors have felt obliged to give prior notification of their proposed investments. In effect a very significant number of EU firms' acquisitions in the US are subject to pre-screening.

A number of additional foreign ownership restrictions are also justified partly or wholly on the grounds of national security, in particular in sectors such as shipping, fishing, cable landing and operation of power facilities,

On the other hand, in the US, as in other countries, some long-established exceptions to the national treatment principle still exist thus giving rise to instances of Conditional National Treatment (CNT). CNT may take the form of reciprocity, performance requirements, etc.

2. Tax Discrimination

Reporting requirements

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

"Earnings stripping" provisions

The so-called “earnings stripping” provisions in Internal Revenue Code 163j limit the tax deductibility of interest payments made to “related parties” which are not subject to US tax, and of interest payments on loans guaranteed by such related parties. In practice, most “related parties” affected will be foreign corporations.
The provisions are designed to prevent foreign companies from avoiding tax by financing a US subsidiary with a disproportionately high amount of debt as compared with equity, with the result that profits are paid out of the US in the form of deductible interest payments rather than as dividends out of taxed income. This objective is reasonable and in line with internationally agreed tax policy. However, the US rules for calculating the ceiling in any year on the amount of admissible interest uses a formula, the results of which can be inconsistent with the internationally accepted arm’s-length principle. If, ultimately, this leads to the disallowance of relief for the interest payable, it could have discriminatory consequences because a tax treaty partner would not be obliged to make a corresponding adjustment to taxable profits in the other country. The provisions relating to loans guaranteed by related parties could also disallow the interest on a number of ordinary commercial arrangements with US banks and provide a disincentive from raising loans with them.

State unitary income taxation

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

World-wide unitary taxation

This is inconsistent with bilateral tax treaties concluded by the US at the Federal level and a company may face heavy compliance costs in providing details of its worldwide operations. International attention has focused mainly on California, which from 1986 has allowed companies to elect for “water’s edge” unitary taxation. Under this method, companies are taxed on the basis of a share of their total US (rather than worldwide) income. The 1994 US Supreme Court ruling that California’s former worldwide unitary tax was constitutional was not encouraging. The EU and its Member States remain concerned about unitary regimes and will keep a watch on possible developments.

Foreign Sales Corporations

US legislation authorising so-called Foreign Sales Corporations (FSCs) (26 USC Sections 921-27) provides that, under specific conditions, certain income earned by a foreign subsidiary of a US corporation will not be subject to US tax. The statute’s presumption as to income allocation is questionable and gives rise to an objectionable tax benefit accruing to US firms. The purpose of the favourable tax treatment has been to encourage the export of US manufactured goods. The FSC is general legislation, applicable to all industrial and agricultural sectors and was recently expanded to cover the software and military sectors. The FSC system grants a particularly considerable competitive advantage to US aircraft manufacturers (Boeing) to the detriment of their competitors.

Subsidies that are contingent upon export performance or upon the use of domestic over imported goods are strictly prohibited under the WTO. The FSC scheme applies exclusively to the export of goods and these goods must have more than 50% of their market value of US origin. Therefore, the FSC scheme provides a prohibited subsidy within the meaning of Article 3 of the Agreement on Subsidies and Countervailing Measures (ASCM).

FSC tax exemptions cannot be justified by the aim to avoid double-taxation for US companies established abroad as FSCs are typically established in tax havens where no income tax is paid at all. For instance, in 1996, 91% of all FSCs were incorporated in the US Virgin Islands, Guam and Barbados.

The EU also considers that the FSC scheme is an export subsidy within the meaning of Article 1 of the Agreement on Agriculture. On 24 February 2000, the WTO Appellate Body ruled in favour of the EU, as it considered that FSC exemptions amount to a prohibited export subsidy under the ASCM as well as the Agreement on Agriculture. On 15 November 2000, the "FSC Repeal and Extraterritorial Income Exclusion Act" came into effect. This Act still provides US firms with the prohibited export subsidies and so does not comply with the Panel's rulings. The EU requested a Panel that, in its report circulated 20 August 2001, struck down the Act. The US has decided to appeal the report.

Tax Discrimination

960215- *Foreign Sales Corporations* [2004-03-03]

US legislation (26 USC sections 921-927) relating to Foreign Sales Corporations (FSCs) provides that, under specific conditions, certain income earned by those FSCs will be exempt from US tax.

The reason behind this statute is to encourage the export of US goods. It is applicable to all industrial and agricultural products and was recently expanded to include the software sector.

Furthermore, specific administrative pricing rules allow a transfer of taxable income from the US parent to the FSC. Instead of using arm's-length prices, as provided for in the 1995 OECD "Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations" and in Section 482 of the IRC, FSCs have the choice between applying the mechanism of Section 482 and two administrative pricing rules under Section 925. These special intercompany pricing rules allow a substantial part of the US parent company's profit to be attributed to the FSC. The FSC legislation includes a local content requirement since FSC tax benefits are only available if the exported product is at least of 50% US origin.

- 18 November 1997: EC requested formal WTO consultations
- 17 December 1997 and 10 February 1998: WTO consultations took place with no progress
- 4 March 1998: procedure extended
- 3 April 1998: further WTO consultations, again with no progress
- July 1998: EU request WTO Panel
- 23 July 1999: Panel issues interim report, finding in favour of EU
- 24 February 2000: WTO Appellate Body rule FSC exemptions are a prohibited export subsidy under ASCM and Agriculture Agt.
- 15 November 2000: "FSC Repeal and Extraterritorial Income Exclusion Act" comes into effect
- 20 August 2001: WTO Panel report rules new Act does not comply with earlier ruling
- 21 August 2001: EU monitoring the situation closely.
- 15 October 2001: US appeal presented
  14 January 2002: Appellate Body report to be circulated.
- 14 January 2002: Appellate Body confirms Panel report on new FSC Act.
- 29 January 2002: WTO adopts Appellate Body ruling and puts off arbitrators´ decision on level of retaliation until the end of April.
- 12 April 2002: WTO arbitration panel decision pushed back to 17 June from the previous 29 April deadline.
- 30 August 2002: Arbitration Panel awards the EU the full US$4,043 million in potential countermeasures. On the 7 May 2003, the Dispute Settlement Body authorised the EC to impose these countermeasures.
- 1 March 2004: The EU applies countermeasures on selected products consisting of an additional customs duty of 5% followed by automatic, monthly increases of 1% up to a ceiling of 17% to be reached on 1 March 2005. The EU estimates the amount of these countermeasures to be US$315 million in additional customs duties for the period 1 March to 31 December 2004.

Direct Foreign Investment Limitations

960301- *Conditional National Treatment* [2001-08-16]

The US places certain restrictions on foreign-owned firms that are not placed on domestic firms, resulting in "Conditional National Treatment" (CNT). Some examples concerning investment are:

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

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

- Subsidies: the area where CNT is most prevalent, most notable in the area of science and technology, where Federal subsidies for R&D are granted to US-incorporated affiliates of foreign companies. Specific examples can be seen with: the *American Technology Pre-eminence Act of 1991* that authorises the Advanced Technology Program, an industry-led, cost-shared R&D programme, designed to develop high risk technologies that the private sector is unlikely to pursue without government support; the *Energy Policy Act of 1992*, which authorises Federal programmes and joint ventures between industry and government laboratories in energy-related R&D; the *National Co-operative Production Act of 1993*, which extends the favourable antitrust treatment applying to joint R&D ventures to joint manufacturing ventures; and the *Advanced Lithography Program* which deals with research on semiconductor materials and processes.

960064- *Exon-Florio Amendment* [2002-02-15]

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

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

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

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IPR

1. Legislation on Copyright and Related Rights

Despite the unequivocal obligation contained in Article 6bis of the Berne Convention to which the US acceded in 1989 to make “moral rights” available for authors, the US has never introduced such rights and has repeatedly announced that it has no intention to do so in the future. If it is clear that while US authors benefit fully from moral rights in the EU, the converse is not true, which leads to an imbalance of benefits from Berne Convention membership to the detriment of the European side. It is noted that the US has ratified and implemented the World Intellectual Property Organisation (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty. Adherence to these Treaties by the US requires legislation on moral rights at least for performers.

In early 1999, the EU challenged in the WTO *Section 110(5) of the 1976 US Copyright Act*, which allows, under certain conditions, the playing of radio and television music in public places without the payment of a royalty fee (the so-called “home-style" exception). The Panel found US Copyright legislation to be inconsistent with US TRIPs obligations. The "reasonable period of time" for implementation of the Panel recommendations was determined to be 12 months after adoption of the Panel report (i.e. 27 July 2001). In July 2001 the EU and the US agreed to look for ways to compensate European performers and composers for the economic losses due to the copyright “business exemption”, until such time as the US Copyright Act is amended. The WTO Dispute Settlement Body (DSB) has approved the US request to postpone the deadline for implementing WTO rulings, in order to facilitate discussions with the EU on compensation. The parties now have until the end of the US Congressional session to negotiate a compensation deal.

Furthermore, on 12 October 2001, a WTO Panel of arbitrators determined that the benefits accruing to the EU that are being nullified or impaired amount to $ 1,100,000.

2. Trademarks legislation

Under US legislation, advertising low price perfumes imitating famous European brands and thus benefiting from the well-known reputation of the European brands is not prohibited. This practice may violate Article 6bis Paris Convention (confusion) and/or Article 10bis Paris Convention (unfair competition), as incorporated into the TRIPs Agreement through its Article 2.1.

The EU challenged in the WTO *Section 211 of the Omnibus Appropriations Act*, adopted in October 1998. This provision prohibits, under certain conditions, the registration or renewal of a trademark that is identical or similar to a trademark previously owned by a confiscated Cuban entity and sets forth that no US Court shall recognise or enforce any assertion of such rights. The WTO Panel report, issued on 6 August 2001, confirmed that Section 221 is in violation of TRIPs by denying trademark owners access to US courts and by applying when the trademark has been abandoned. However, the EU has decided to appeal the Panel ruling, as it did not agree with the panel's conclusion that trade names are not covered by TRIPs and that TRIPs does not regulate the question of the determination of ownership of intellectual property rights.

3. Appellations of Origin and Geographical Indications

US regulations allow some EU geographical denominations of great reputation to be used by US wine producers to designate products of US origin, many being used in word and service marks, even for products other than wines. Despite the fact that in 1997 the "D'Amato Amendment" codified US regulations on the use of semi-generic wine names in the US into Federal law, some progress was made in the context of the current bilateral negotiations between the US and the EU, where the US took a conditional commitment to phase out semi-generic names. This commitment, as well as all other areas of the protection of geographical indications, is currently under discussion between the EU and the US.

With regard to spirits, an agreement was approved by the EU and the US in February 1994 for the mutual recognition of two US and six EC geographical indications, which also provides for future discussions on the possibility of extending their mutual recognition. For the other EC designations, the US regulations provide a limited protection but do not prohibit their improper use: a geographical indication when qualified by ATF as "non-generic distinctive" may be used for spirits not originating in the place indicated but with a proviso such as "kind", "type", etc. in conjunction with the true origin of the product. This appears to violate Article 23.1 of TRIPs.

Also, it should be noted that the US protects geographical indications under Article 22 TRIPs only in as much as they may mislead consumers rather than per se. The practical approach would appear to be insufficient in the light of the TRIPs requirement that, while granting some leeway as to the means of protection, does not permit inadequate protection. Certain EU agri-food producers have seen their interests affected adversely by the US approach.

4. Legislation on Patents

Under US law (28 US Code Section 1498) a patent owner may not enjoin or recover damages on the basis of his patent for infringements due to the manufacture or use of goods by or for the US government authorities. This practice is apparently extremely widespread in all government departments and it appears to be inconsistent with Article 31 of the TRIPs Agreement, which introduces a requirement to inform promptly a right holder about government use of his patent.

European companies are also faced with indirect costs resulting from the 'first-to-invent' system for patent registrations in the US. The rest of the world follows the principle of 'first-to-file', fixing thereby a clearly defined moment when the priority right to a patent is established. The 'first-to-invent' principle creates several obstacles for EU and US companies trying to obtain a patent right in the US, namely because it has a considerable economic impact on the potential right holder. The issue has figured on top of the TABD agenda and the latter has recommended the adoption of the 'first-to-file' approach in the US.

Finally, the patentability of software and business methods in the US has been identified by many as a potential barrier to entry in markets.

5. Enforcement problems on IPR

Section 337 of the Tariff Act of 1930 provides remedies for holders of US intellectual property rights by keeping the imported goods which are infringing such rights out of the US ("exclusion order") or to have them removed from the US market once they have come into the country ("cease and desist order"). Such procedures are not available against domestic products infringing US patents. Under the 1988 Omnibus Trade and Competitiveness Act, several modifications have been introduced to Section 337, such as the availability of remedies in relation to imported goods that infringe a US process patent. The GATT Panel report, which was adopted by the Contracting Parties in November 1989, concluded that Section 337 was inconsistent with Article III:4 GATT. The provision in question accords to imported products alleged to infringe US patent rules treatment less favourable than that accorded to like US products. Some modifications have been made to Section 337 in the context of implementing TRIPs. However, in its present form, Section 337 does not eliminate the major GATT inconsistencies raised by the 1989 GATT Panel. As a result, Section 337 appears to continue to be in violation of Article III: 4 GATT and of a number of provisions contained in TRIPs. The EU has had WTO consultations with
the US and the issue is regularly brought up by the EC in bilateral fora. The Commission does not discard any posible further action.

Legislation on Patents (Including Plant Varieties)

980141- *Principle of First-to-Invent* [2004-04-22]

The US patent system applies the principle of "first-to-invent", while the rest of the world follows the principle of "first-to-file", fixing thereby a clearly defined moment when the priority right to a patent is established.

Other Industries

Legislation on Patents (Including Plant Varieties)

980139- *Section 337/Infringement Cases* [2002-01-16]

Section 337 of the Tariff Act of 1930 provides remedies for holders of US intellectual property rights by keeping the imported goods which are infringing such rights out of the US ("exclusion order") or to have them removed from the US market once they have come into the country ("cease and desist order"). These procedures are carried out by the US International Trade Commission (ITC) and are not available against domestic products infringing US patents.

Under the 1988 Omnibus Trade and Competitiveness Act, several modifications have been introduced to Section 337, such as the availability of remedies in relation to imported goods that infringe a US process patent.

The GATT Panel report which was adopted by the Contracting Parties in November 1989, concluded that Section 337 was inconsistent with Article III:4 GATT.

- February 2000: EU/US WTO consultations held with US claiming compliance with GATT and TRIPs.

980140- *Government Use of Patents* [2002-05-22]

Under US Code 28, Section 1498, a patent owner may not enjoin or recover damages on the basis of his patent for infringements due to the manufacture or use of goods by or for the US Government authorities. This practice is apparently extremely widespread in all government departments.

Legislation on Copyright and Related Rights

980142- *Authors' Moral Rights* [2002-01-16]

Article 6 bis of the Berne Convention, to which the US acceded in 1989, clearly makes "moral rights" available for authors. However, the US has never introduced such rights and has announced repeatedly that it has no intention to do so in the future.

Trademarks Legislation

990079- *Section 211/Cuban Trademark* [2002-09-19]

In October 1998, *Section 211 of the Omnibus Appropriations Act* was adopted. It prohibits, under certain conditions, the registration or renewal of a trademark previously owned by a confiscated Cuban entity and sets forth that no US Court shall recognise or enforce any assertion of such rights.

Legislation on Copyright and Related Rights

970191- *Exceptions to Music Licensing* [2004-04-16]

Section 110(5) of the 1976 US Copyright Act provided for an exemption to the author's exclusive rights to authorise the communication of their works to the public ("homestyle exemption"). Concretely, Section 110(5) permits the playing of "homestyle" radios and televisions in public places (such as bars, shops, restaurants etc.) without the payment of a royalty fee.