

"BARRIERS TO TRADE AND INVESTMENT IN THE US"

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I. INTRODUCTION

1. The Historic Background

Many of the barriers to trade and investment which are now in place in the US are the result of a long history of trade legislation in the US. They reveal important changes in the constitutional practices of the US Congress and reflect a permanent struggle in the US between a liberal trade policy approach and protectionism. US trade policy is also a result of the political role and the economic weight of the US in the post-war period.

During the period before World War II, there was a clear tendency in the US towards **economic and political isolation**. In trade policy, this period culminated with the passage of the **Tariff Act of 1930**, also known as the "**Smoot-Hawley Act**". This law imposed steep duties on all imported goods, amounting to an average levy of sixty percent of their overall value. The subsequent decrease in world trade was one of the main sources for the dramatic decay of the world economy in the early 1930's and contributed considerably to the political instabilities which finally lead to World War II.

At the end of the war the US had gained unprecedented economic and military power, and thus found itself in a position of much greater international responsibilities. An uncompromising western stance against the Soviet Union and the willingness of the US to help its allies rebuild their economies shaped the emerging **post-war order**.

Its constituent economic elements all bore clear signs of **American hegemony**:

- The Bretton Woods system established the dollar as the world's anchor currency;
- the General Agreement on Tariffs and Trade (GATT) was based on the assumption that freer trade would lead to a freer political order as well;
- the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD, the so-called 'World Bank') are both located in Washington, D.C.

One essential element of US strategy was its **support for European integration**. Thus, in 1949, Secretary of State Acheson made it perfectly clear to the Ministers of Foreign Affairs of the Atlantic Pact countries, that an economically strong and politically stable Europe would be necessary to counterbalance the weight of the USSR on the European continent¹.

2. Theory and Practice of Trade Politics

Economic theory provides the intellectual basis for the concept of trade liberalisation. It demonstrates that specialisation and division of labour between

¹Memorandum of conversation - The White House, 3 April 1949

individual firms and nations can lead to greater global economic benefits. The theory of **comparative advantage** thus justifies the reduction of barriers to trade and investment.

It has its shortcomings, however, as far as the **effects of trade liberalisation on "losers"** in specific sectors or regions of the economy are concerned. In practice, three approaches have developed to deal with this problem. First, losers can be compensated through direct payments from their government as under the US Food, Agriculture, and Trade Act of 1990 (the Farm Act) and its precursors. Second, labor and capital may simply give up their previous activities and move into new sectors of the economy. Third, governments may support the structural change by facilitating the mobility of the factors of production through financial incentives, as the US have undertaken to do with the Trade Adjustment Act of 1962.

Obviously, trade losers will try to defend their position in the **political arena** if they fail in the market place. As they call upon their governments for help, these can hardly turn their backs and ignore the clamor: too many votes may depend on the issue. Whether the concept of trade liberalisation can prevail over protectionist temptations therefore depends to a large extent on the constitutional framework determining the political decision-making process.

3. Evolution of the US Trade Policy

Legally, the situation is clear: **Article I Section 8** of the United States' constitution stipulates that Congress "*regulate commerce with foreign nations*" and make all laws necessary to that end. As pointed out above, a highly sensitive chamber with virtually immediate connections to its electorate can easily be pressured into adopting protectionist measures. **Public opinion** will usually be in favour of any such measure that pretends to protect the 'national interest'. This is especially true for those parts of the population that have come under pressure from international competition. It is therefore an 'unnatural act' for politicians to lower tariffs when they are under pressure from their respective district to do the exact opposite. Clearly, the most prominent example of this logic at work was the Smoot-Hawley Act of 1930².

Hence, in the post-war world, the US political elite was faced with a dilemma: it had to reconcile foreign policy goals -- free trade and open markets -- with the domestic repercussions of the international trading system that had been installed under its own leadership in the late 1940s. This dilemma still constitutes the **basic problem of US trade politics**.

In order to achieve the larger goal of a free world economy without compromising their positions at home, Members of Congress essentially abdicated their authority to legislate in the realm of international trade. In the Reciprocal Trade Agreements Act of 1934, they authorised the President to negotiate tariff reductions of up to fifty

²The following factual account relies in large parts on Destler, I.M., American Trade Politics, Washington, D.C./New York 1992.

percent without demanding further consultation. This power was originally intended to be used for the purpose of bilateral negotiations. It was later extended to allow the executive to set up and participate in the GATT multilateral trade talks as well. In 1974, the act was changed in two very important ways: first, the negotiating authority now applied to non-tariff barriers as well, and second, the final result of the talks now would be submitted to Congress for an "up-or-down" vote, i.e. without further amendments or changes. This procedure was labelled '**Fast-Track**' and still constitutes the most important instrument in US trade negotiations.

The end result of this development was a **dual solution** to the basic problem outlined above: Congress deflected domestic pressure towards the executive, and the executive in turn globalised the trade negotiations through the GATT. This multilateral approach enabled the government to invoke the global interests of the nation when specific industries complained about the granting of market access to foreign competitors.

The advantages of the system for Congress are evident. Still, the underlying problem had not been solved: How to deal with politically powerful losers ? Their pressure had only been deflected, not eliminated.

Internationally, the need for protection under special circumstances had long been recognised by both the US and the other Contracting Parties of the **GATT**. Hence, **Article XIX** of the agreement provides national governments with a so-called 'escape clause' under which they may legally take 'safeguard' measures to protect sectors or industries injured by competition from abroad.

In the US, the government additionally proceeded to create a quasi-judicial process in order to channel and thus control increasing domestic pressure. To remedy the negative consequences of free trade, in 1962, the US Tariff Commission was given the task to determine which companies were hurt by imports. Depending on its findings, it would then recommend that action be taken or not. In the same year, Congress created the Special Trade Representative (now called the United States Trade Representative, or USTR) as a new administration post, charged with the coordination of the government's trade policies.

The delegation of power from Congress to the Administration contributed considerably to the successful conclusion of several rounds of tariff reductions since 1947. Through the success of the GATT rounds in reducing tariffs, however, other impediments to trade became ever more visible and important: the so called '**non-tariff barriers**' became a major issue in the trade policy debate. Referring to these barriers, US industry started to complain that it was obliged to compete on an **uneven playing field**. As the executive branch had rarely granted relief under the existing procedures, industries again turned to Congress for help.

Logically, this situation had to lead to **Congressional reaction**, and indeed, two laws were passed that were designed to tackle the new problems. The **Trade Act of 1974** aimed at reinforcing the quasi-judicial process under which struggling industries could ask for relief. Existing regulations governing antidumping, countervailing

duties, trade adjustment assistance and the escape clause were eased so as to provide more efficient relief measures. The thresholds for injury were lowered, time limits imposed and presidential discretion reduced. The result was a veritable surge in the number of cases in which foreign companies were penalised for their success in the US market. The innovative part of the law came to be known as 'Section 301'. It provided for sanctions against other countries if these were judged by the USTR to bar US companies from access to their markets. The **conceptual change** underlying this clause was the switch from an import-centred approach to trade politics to one that focused on the promotion of exports through the opening of foreign markets.

Still, in some cases, the officially available relief measures did not provide the degree of protection that US Congress wanted. As early as 1955, the US had to ask for a waiver to introduce import quotas for a number of agricultural products. "Voluntary" restraint agreements and orderly market arrangements for industrial goods complemented this waiver and made access to the US market even more difficult to obtain.

4. EU - US Trade Relations in Perspective

In spite of numerous deviations from the virtues of trade liberalisation, the post-war period has seen unprecedented economic growth and an increase in international trade.

Together, the European Union and the United States are the **world's largest trading partners**, accounting for more than one third of world trade. Bilaterally, the EU and the US continued to be each other's largest trading partner. In 1993, trade flows between them will have reached an estimated ECU 165 billion, constituting some 7% of world trade. Total exports from the EU to the US will have increased to a new peak of almost ECU 80 billion compared to ECU 73.9 billion in 1993. Imports from the US into the EU have remained almost the same at around ECU 86 billion. Thus, despite the recent increase in EU exports, the US retain a trade surplus of ECU 6.5 billion.

The substantial **foreign direct investment** (FDI) flows between the EU and the US have in the past greatly increased their economic linkages. Although foreign direct investment in the US generally has slowed down, in 1992 investors from the EU maintained more than half of the FDI stocks in the US, equalling almost \$ 220 billion. By contrast, in the same year US investors held \$ 200 billion worth of FDI stocks within the EU, which constituted 41% of all US direct investment abroad.

II. UNILATERALISM IN US TRADE LEGISLATION

The persisting **unilateral elements in US trade legislation** continue to be of major concern to other trading nations. Unilateralism in US trade legislation takes the form of either unilateral sanctions or retaliatory measures against "offending" countries, or natural or legal persons. These measures are unilateral in the sense that they are based on an exclusively US appreciation of the trade related behaviour of a foreign country or

its legislation and administrative practice, without reference to, and often in open defiance of, agreed multilateral rules.

The principal motivation behind this kind of unilateralism is the opening up of foreign markets for US industry. For the US, this is seen as vital in order to cut the trade deficit and to prevent economic distortions that foreign trade barriers allegedly cause. But unilateralism in US trade legislation has also always mirrored the US's discontent with GATT rules and the multilateral dispute settlement process. By enacting unilateral trade provisions, Congress had the chance to respond to public demands for an active support of US business concerns. However, the very nature of US unilateral trade legislation implies a real risk that the affected countries will adopt *quid pro quo* measures. Such developments would inevitably damage the multilateral trading system.

Section 301 of the 1974 Trade Act as amended by the **Omnibus Trade and Competitiveness Act of 1986** authorises the US Administration to enforce US rights under any trade agreement. The US government may combat those practices by foreign governments which it deems to be discriminatory or unjustifiable and to burden or restrict US commerce. Even in those areas covered by GATT and its dispute settlement mechanism, some provisions still require the US to take unilateral action against its trading partners, without any prior authorisation of the GATT Contracting Parties. In these cases, retaliation is thus mandatory rather than discretionary.

The Omnibus Trade and Competitiveness Act of 1988 also introduced the so-called "**Super 301**". "Super 301" is the term of art given to a special initiation procedure for investigations into unfair foreign trade practices. In 1989 and 1990 the USTR was required to identify US trade liberalisation priorities and priority foreign countries against which investigations and eventually trade action were officially to be initiated. The basis for the decisions was information contained in an annual National Trade Estimates Report which identifies foreign trade restrictions and estimates their impact on US commerce. Referring to the lapsed Super 301 provision, on 3 March 1994 President Clinton issued an **Executive Order on Identification of Trade Expansion Priorities**. It requires the US Trade Representative to identify "priority" unfair trade practices from "priority" countries in 1994 and 1995 and to self-initiate Section 301 investigations against them.

The US has initiated Section 301 procedures against the EU in 28 cases altogether. In the following 7 cases, the US threatened the imposition of punitive duties or counter subsidies, or eventually resorted to such unilateral retaliation against the EU:

- Subsidies to wheat flour in 1975;
- Preferential tariffs for citrus fruits in 1976;
- Export subsidies for pasta products and production subsidies for canned fruit in 1981;
- Accession of Spain and Portugal to the EU leading to reduced import quotas for US agricultural products in 1986;
- Oilseed subsidies in 1987;

- Ban of hormones in meat in 1987.

The unique feature of the family of "301" legislation is that it permits unilateral determinations and action, or threats thereof, inconsistent with, and in clear contradiction to, the multilateral trading system. No other major trading nation has similar trade legislation. Under Article XVI.4 of the Agreement establishing the World Trade Organisation (WTO), the Contracting Parties are obliged to ensure conformity of their domestic legislation, regulations, and administrative procedures with all of the Uruguay Round agreements. Together with the new dispute settlement procedure (DSP), this represents an essential progress towards the elimination of unilateral trade measures.

The DSP is the core element of the WTO. The improvements of the DSP in the form of stringent decision making procedures will provide an effective mechanism to any infringements of any part of the Uruguay Round Agreement. Paragraph 23 of the **Understanding on Rules and Procedures Governing the Settlement of Disputes** contains a binding commitment by the Contracting Parties that they will have "*recourse to, and abide by, the rules and procedures*" of the DSP. Thus, the DSP renders the use of any unilateral trade measures on matters covered by the WTO illegal. Accordingly, the Contracting Parties will also have to revise their trade policy instruments to the extent that they contain elements of unilateralism. For the US, this means that Section 301 and its hybrids will have to undergo revision in order to ensure compliance with the new WTO dispute settlement structure.

III. ENFORCEMENT OF US LEGISLATION OUTSIDE US TERRITORY

The extraterritorial enforcement of some US trade acts is closely linked to the aspect of unilateralism. The extraterritorial reach of national legislation may not only provoke clashes with the sovereignty of trading partners, but may also lead to legal dilemmas for economic operators. In these circumstances, trade as well as investment may be negatively affected. There should be no room in a multilateral trading system for one country imposing its own standards and policies on others. Examples of the US legislation with extraterritorial effects are the **Cuban Democracy Act**, **re-export controls** and the **Marine Mammal Protection Act**.

To some extent, one can understand the underlying reasons for, and might agree with, the objectives of these laws. However, the measures by which these objectives are being achieved have been criticised repeatedly. The extra-territorial application of US laws and regulations may have a serious effect on international trade and investment if and when they expose foreign-incorporated companies to conflicting legal requirements. Moreover, in many instances the extra-territorial application of certain laws aims at overriding the laws or policies of other countries within their own territory. This is clearly contrary to generally accepted principles of international law. Accordingly, many close trading partners of the US, such as Canada and certain Member States of the EU have "blocking statutes" in order to preclude the extra-territorial application of foreign legislation within their territory.

Despite frequent international criticism, the US has so far shown no willingness to bring this aspect of its legislation in line with generally accepted principles of

international law. The issue will therefore remain on the agenda of future negotiations, particularly within the framework of the OECD Committee on International Investment and Multinational Enterprises.

IV. IMPEDIMENTS THROUGH NATIONAL SECURITY CONSIDERATIONS

The US continues to put forward **national security considerations** to justify trade and investment restrictions which rather pursue protectionist objectives. Measures range from limits on market share to procurement restrictions, such as those contained in **Berry Amendment** legislation, and from unilateral export controls to the screening and possible prohibition of foreign direct investment as provided for by the so-called **Exon-Florio Amendment**. There is no question about the right of every sovereign country to take the necessary measures in defence of its national security. However, there is increasing concern that the rather vague and undefined US concept of national security is beginning to embrace aspects of **domestic economic security** as well.

It is in the interest of all trading nations that measures based on national security considerations are prudently and sparingly applied. The US committed itself to doing so by signing on to the National Treatment Instrument of the OECD as well as to its Codes of Liberalization. Nonetheless, US Authorities retain great flexibility in interpreting the term national security and appear to make abundant use of it. Increasingly, their discretion appears to be used to include purely economic considerations. There is an inherent danger that restrictions to trade and investment that are justified on national security grounds are, in reality, merely expressions of covert protectionist policies.

V. PUBLIC PROCUREMENT

The **public procurement sector** has been of particular sensitivity for foreign companies seeking access to US markets. Discrimination in and exclusion from public procurement of non-US companies by so-called "**Buy America**" legislation has led to considerable potential for conflict at all levels: federal, State and local.

Under the US doctrine of international trade law, domestic legislation such as the **Buy America Act of 1933** overrides US international obligations. This means that Buy America provisions apply unless waived in response to specific international obligations of the US, such as the GATT Government Procurement Code.

Buy America restrictions may take several forms. Some straightforwardly prohibit public sector bodies from purchasing goods from foreign suppliers. Others establish local content requirements ranging from 50% to 65% or extend preferential terms to domestic suppliers, the price preference ranging anywhere from 6% to 50%.

As in earlier years, the US Congress enacted a number of **ad hoc Buy America provisions** in fiscal year 1993 when it adopted the budget of the different Federal departments and agencies. These provisions extend the scope of the Buy America Act of 1933 as amended and affect primarily products and sectors not covered by the GATT Government Procurement Code. In the defense field, they represent unilateral changes to

the Memoranda of Understanding (MOU) on defense cooperation between foreign governments and the US Administration. The numerous amendments to the Buy America Act have resulted in a lack of transparency and predictability in the implementation of US obligations under the GATT.

The EU and the US have liberalized their procurement markets through the conclusion of a Memorandum of Understanding in May 1993. Under the bilateral agreement, barriers to European companies to bid for supply contracts for goods, works and services with US central government agencies (category "A") were removed, as well as those for goods and works for six federally funded electrical utilities. The US also made a commitment to start an internal process to get maximum coverage of sub-federal entities and the elimination of Buy America provisions in a subsequent agreement.

Nevertheless, public procurement in the telecommunications sector remains a bone of contention between the EU and the US. Sanctions imposed by the US in May 1993 under Title VII of the **1988 Trade Act** are still in force against European bidders for certain federal contracts. They prevent European companies from participating in federal agency procurement below \$176,000 for supplies and services contracts and below \$6.5 million for construction. The US estimates the effect of sanctions on European business to be of the order of \$19 million. The counter-sanctions implemented by the EU on 8 June 1993 are also still in force against US bidders for supplies, works and services; they mirror the US sanctions in that they apply to below-threshold procurements.

US procurement at federal level totals approximately \$210 billion annually. The value of US procurement covered by the GATT Government Procurement Code as reported by the US has declined from \$18.8 billion in 1985 to \$13.1 billion in 1990, whereas contracts not within the scope of the Code have increased over the same period. This potential US market for EU exports is significantly affected by Buy America restrictions.

Within the framework of the GATT, a new Agreement on Government Procurement (GPA) has been negotiated and finally concluded at the Marrakech conference in April 1994. In this context, agreement has been reached to expand GPA coverage to new entities at federal level, e.g. the Department of Transportation and the Department of Energy, and to include procurement in services. The inclusion of sub-federal entities (Category B) and of utilities (Category C) has also been advanced considerably. Still, the new GPA will not dissolve existing uncertainties as to the actual scope of the exemptions authorized for reasons of public interest and national security.

The objective in negotiations with the US has been to reduce the negative economic impact of protectionist legislation at federal and sub-federal level. Due to the agreement on the opening of public markets on a reciprocal basis under the GATT Government Procurement Code, Buy America stipulations should disappear. A common study by the European Commission and the US government on the bidding potential that companies from both sides have in each others' markets indicates that Buy America restrictions and other exemptions (such as those for small businesses) in the US cover

large areas of procurement opportunities at state and other sub-federal levels. The conclusion of the aforementioned agreement therefore considerably increases procurement opportunities for foreign bidders in the US.

VI. TARIFF BARRIERS AND EQUIVALENT MEASURES

Tariffs are a classic means of protecting a market against foreign imports. The US maintains high tariffs called tariff peaks (defined as tariffs of 15% and higher) on numerous products imported into the US

As a result of the Uruguay Round negotiations, the overall US tariff burden on foreign exporters will be reduced. The issue of **high tariffs** has thus lost some of its importance. However, for products such as textiles, clothing, footwear, tableware, and glassware, some of which are burdened with tariffs of up to 40%, the Uruguay Round negotiations have only partially succeeded in bringing about reductions. This also holds true for the question of classification of **two-door multi-purpose vehicles**. The US presently consider them to be trucks and thus subject to a 25% tariff. In May 1993, the US Court of International Trade in May 1993 ruled that two-door multi-purpose vehicle are passenger cars with only a 2.5%. The US Government has appealed this decision.

VII. TAX LEGISLATION AFFECTING TRADE AND INVESTMENT

The US has taken radical steps to reduce its budget deficit with the **Omnibus Budget Reconciliation Act of 1993**. Considerable budget cuts have been applied across the board. Additionally, federal tax revenue has been increased, and a number of budgetary burdens have been shifted to the States. However, this last measure in particular has given rise to some anxiety amongst foreign investors in the US. It is not yet clear to what extent an already existing discriminatory tax burden will remain in place and/or new revenue mechanisms which target non-US economic operators will be instigated.

The example of US car taxes shows how tax legislation can have discriminatory effects against imported products. Since 1990, sales of European automobiles in the United States have been severely affected by the cumulative impact of new **luxury excise** and higher "**gas guzzler**" taxes. In addition, the **Corporate Average Fuel Economy (CAFE)** regulations continue to harm European car makers. These three provisions of US law have almost exclusively affected non-US automobiles. Domestic manufacturers and their customers have had to pay virtually no CAFE penalties and only minimal gas guzzler and luxury taxes for comparable vehicles. Together, these measures have resulted in disproportionate and discriminatory tax burdens on imported European passenger cars sold in the US.

The national treatment obligation of GATT Article III is a cornerstone of the General Agreement on Tariffs and Trade (GATT). Article III obliges each contracting party to provide non-discriminatory treatment to imported goods. It guarantees imported products **equality of competitive opportunity** by prohibiting discriminatory internal taxes, laws, and regulations. Such discrimination can take two forms. The most straightforward type of discrimination involves laws and regulations that single out

imports for less favourable tax or regulatory treatment on the basis of origin. In addition, GATT has long recognised that laws and regulations which appear to apply to both imported and domestic products can violate Article III if they have the **effect of imposing disproportionate burdens on imported merchandise or serve to protect domestic industries**. There is a clear GATT precedent prohibiting a contracting party from using artificial and contrived tax categories and criteria to target imports for higher tax burdens than similar domestic products.

The effect of the luxury and gas guzzler taxes, as well as of the CAFE penalties, is to shift to foreign auto makers a disproportionate share of the burden of reducing the US federal budget deficit. As a result, European automobiles have been uniquely saddled with steep US excise taxes. Moreover, they are made to bear the stigma of being labelled as overpriced and environmentally unsound "luxury" products. The case is currently pending before a GATT panel which should deliver its report in the course of 1994.

VIII. STANDARDS, TESTING, LABELLING AND CERTIFICATION

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

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 GATT Code on Technical Barriers to Trade are committed to the wider use of these standards; but although a significant number of US standards are claimed to be "technically equivalent" to international ones, very few indeed are directly adopted. Some are in direct contradiction.

There are more than 2,700 State and municipal authorities in the US which require particular safety certifications for products sold or installed within their jurisdictions. These requirements are not always uniform or consistent with each other. Sometimes, a national standard does not exist. In this case, product safety requirements are not set out by mandatory technical regulations, but are determined in the market place through product liability insurance. Individual States may set environmental standards going far beyond what is provided for at federal level, as has occurred in California (with regard to lead levels and glass recycling). Then again, the US Labour Department may require certification for equipment used in the workplace; the county authorities for electrical equipment; large municipalities for virtually any equipment they choose to regulate; and insurance companies for other product safety aspects depending on the company.

Acquiring the necessary information and satisfying the necessary requirements is a major undertaking for a foreign enterprise, especially a small or medium sized one. At present there is no central source of information on standards and conformity assessment.

One company has estimated that the volume of lost sales in the US due to these factors is 15% of total sales. The hidden costs could be much greater because the time and cost involved can be greatly reduced simply by using US components which have already been individually tested and certified. In addition, the private organizations providing quality assurance may impose the use of certain specific product components under their own programs which are not in conformity with international quality assurance standards (ISO 9000). In some cases (e.g. that of telecommunications network equipment) an expensive evaluation procedure is required which does not lead to certification and does not take account of any additional requirements by individual buyers.

In the Uruguay Round the US have agreed on an expanded **Agreement on Technical Barriers to Trade** (TBT) which will improve the rules for enforcing standards and technical regulations. The TBT Code will be applicable by all WTO members ensuring for each country the right to adopt and maintain appropriate international standards, with the exception of their chosen level of protection for health and human, plant, animal life and the protection of environment. A proportionality criterion is found in the TBT Code to ensure that standards do not create unnecessary obstacles to trade and that they can be justified on the basis of the best available scientific evidence.

IX. THE PROTECTION OF INTELLECTUAL PROPERTY

The protection of **intellectual property rights** has been at the origin of several trade conflicts between the EU and the US. Notably the continuing discrimination against non-US products by Section 337 of the Tariff Act of 1930, remains a source of dispute. This provision is still on the books despite a GATT panel declaring it inconsistent with the principles of the multilateral trading system at large.

Section 337 of the Tariff Act of 1930 provides holders of US patents manufacturing in the US with remedies to keep imported goods which infringe upon such patents out of the US (exclusion order), or to have them removed from the US market once they have entered 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 upon US patents. Under the **Omnibus Trade and Competitiveness Act of 1988**, several modifications have been introduced to Section 337, such as the availability of remedies in relation to imported goods which infringe a US process patent.

US patent law is based on the "*first to invent system*", whereas the rest of the world follows the "*first to file system*". **Section 104 of the US Patent Law** states that it is not possible to establish a date of invention by reference to any activity in a foreign country. A non-US inventor who typically carries out research and development activities outside the US cannot therefore establish a date earlier than that in which he or she applied for the patent. This treatment clearly discriminates foreign inventive activities vis-à-vis US domestic ones. Foreign companies are thus forced to carry out research and development in the US rather than in their respective home countries. The discrimination under Section 104 appears incompatible with Article 27 of the **Agreement on Trade-related Aspects of Intellectual Property Rights** (TRIPS). The US will have to

undertake the necessary modifications when implementing the results of the Uruguay Round.

US law allows **governmental use of intellectual property rights** without even having to notify the right holder. This practice is particularly frequent in the activities of the Department of Defence. For obvious reasons this practice is particularly detrimental to foreign right holders because they will generally not be able to detect such government use and are thus very likely to miss the opportunity to initiate an administrative claims procedure. The TRIPS Agreement contains some safeguards for the patent holder which should eventually lead to considerable changes in the US law and practices on mandatory licensing.

The full and faithful implementation of the Uruguay Round Agreement on TRIPS would not only reduce present trade frictions but also prevent future ones. The EU and the US have an interest in multilateral rules which both protect intellectual property rights and make redundant the use of unilateral trade measures. The Agreement on TRIPS is an important step as it includes a national treatment provision and is built upon the dispute settlement procedure of the new World Trade Organization. It will cover a wide range of European industries: consumer goods, textiles and clothing, processed food, wines and spirits, pharmaceuticals, chemicals, computer programming and entertainment.

X. CONDITIONAL NATIONAL TREATMENT

The principle of national treatment is one of the pillars of liberalization of the world economy. It is a well established legal standard, used in international treaties and other multilateral instruments. OECD Member countries have declared that "*enterprises operating in their territories and owned and controlled directly or indirectly by nationals of another Member country*" should be accorded "*treatment no less favourable than that accorded in like situations to domestic enterprises*", that is to say they should be accorded "**National Treatment**". This principle was incorporated in the GATT 1947 and continues to be fundamental to the GATT 1994 as applied to goods. It has been included within the framework of the Uruguay Round in the Agreements on TRIMS and TRIPS. Also, the General Agreement on Trade in Services (GATS) promotes the principle of national treatment, provided this qualification is set out in the respective schedules.

Recently, however, there has been growing international concern about the US discussion about '**conditional**' **national treatment** of foreign-controlled economic operators. Thus, companies with non-US parents are treated differently from those with US parents as regards, for example, antitrust exposure of production joint ventures or the participation in federally funded R&D activities. This discrimination is brought about mainly by sectoral and cross-sectoral **reciprocity conditions** as well as economic **performance requirements**. If the trend notably in the US Congress towards more conditional national treatment were to prevail, it would seriously make foreign investment in the US less attractive. In a multilateral context, proliferation of provisions conditioning national treatment would profoundly distort the global trading system. Eventually, it may also cause a blurring of the principle of Most Favoured Nation (MFN) treatment. The formulation of mutually acceptable criteria regarding the eligibility of

companies for participation in R&D and technology programs would therefore contribute much towards creating a stable investment climate in the US.

XI. SECTORAL BARRIERS AND IMPEDIMENTS

In sectors such as **agriculture and fisheries, services, telecommunications and broadcasting**, the successful conclusion of the Uruguay Round has brought some relief to conflictual situations, although to a differing degree. There remain in the US notably in the telecommunications, broadcasting and services sectors considerable obstacles which will have to be overcome to provide foreign companies with meaningful market access opportunities.

Other areas of concern are the direct and indirect support measures provided for the US shipbuilding and aircraft industries. In both sectors the US will have to work on the basis of what has been achieved in the UR negotiations for a multilaterally agreed framework to reduce barriers and distortions, also in these important sectors.

1. Agriculture and Fisheries

Traditionally, EU-US agricultural trade has been one of the more contentious areas of international trade. However, in recent years, several factors have contributed to a distinct relaxation of trade tensions. First, the EU's **internal reform of its agricultural policy** has also had beneficial external effects, notably the reduced level of export refunds on a range of agricultural products as well as the elimination of export subsidies for some others. Second, the solution to the long-running **oilseeds dispute** removed a serious bone of contention between the US and the EU. Third, the December 1993 conclusion of the **Uruguay Round negotiations** also constitutes a positive development for trade in agricultural goods. The overall effect of these developments will be to facilitate international trade flows and reduce the possibility of potentially trade disrupting disputes in the future. The relative peace between the world's two major agricultural traders should have spillover effects in terms of the expansion of global agricultural trade and important economic benefits for both agricultural producers and those involved in agribusiness throughout the world.

The conclusion of the Uruguay Round negotiations in December 1993 represents the integration of agricultural trade into the multilateral trading system. This agreement, once implemented, will ensure that in the future agricultural trade will be subject to rigid multilateral disciplines. In addition, the US, together with other GATT Contracting Parties, has agreed to specific disciplines on **internal support measures**, on **export subsidies** and on **market access**. With regard to internal support, for instance, it has been agreed that deficiency payments may be exempted from the requirement of reduction provided they satisfy certain criteria such as a direct link to set-aside. However, the internal support provided by marketing loans will require reduction.

In addition, the UR package of 15 December 1993 includes an Agreement on Sanitary and Phytosanitary measures (SPM). This Agreement will allow for the distinction between legitimate SPMs and protectionist SPMs. The Agreement both acknowledges the right of the importing countries to establish the level of protection

determined by any of these countries and the right of the exporting countries to certify that certain exports are free of pests or diseases subject to the importing countries concerned. Contracting Parties have agreed to the principle that "*a scientific justification*" is a basis for a SPM which is more stringent than the international standard but which "*is not more trade restrictive than required to achieve their appropriate level of protection*". Being placed under the World Trade Organisation (WTO) dispute-settlement procedure, it is possible that many instances of abuse of SPM will be brought to the attention of the WTO.

2. Services

The US economy, although still considered to be strongly based on manufacturing, has become increasingly orientated towards the services sector. Whether this will continue at the same pace as in the 1980s is unclear. The Clinton Administration has pledged to stimulate capital growth in small and medium size businesses. It has also indicated its intent to focus on the promotion of industrial growth in certain high-tech and strategic industries.

Services exports from the US have grown steadily over the past six years - from \$77 billion in 1986 to \$152 billion in 1991. The services sector includes areas such as communications, transport, public utilities, finance, insurance and real estate, wholesale and retail trade, government, as well as business and health care services. Nearly 75% of the US labour force is employed in service industries. In each and every State, more people are employed in service jobs than in manufacturing, agriculture, or mining. Foreign companies are therefore extremely concerned about the widespread impediments to obtaining effective access to the services market in the US.

The **General Agreement on Trade in Services (GATS)** is one of the major achievements of the Uruguay Round. It provides a framework of open trade rules relating to transparency, MFN and national treatment, together with a first package of initial market opening concessions, which are included in sectoral annexes. The US schedules of concessions include commitments in specific sectors such as:

- professional services (accounting, architecture, engineering);
- business services (computer services, rental, leasing, advertising, market research, consulting, security services);
- communications (value-added telecoms, couriers, audio-visual services);
- construction;
- distribution (wholesale and retail trade, franchising);
- educational services;
- environmental services;
- financial services (banking, securities, insurance);
- health services;
- tourism services.

GATS aims at a progressive liberalization of international trade in services. Further negotiations have been scheduled to eliminate MFN exemptions, to adopt

substantive disciplines on subsidies, government procurement and safeguards, and to include new areas such as basic telephone services, maritime services and additional professional services.

It should be noted that the integrated dispute settlement procedure will apply to all sectors regardless of the level of commitment made in the schedules of concessions annexed to GATS. As a result, GATS and WTO should be the only fora in which future disputes would be addressed. This precludes the use of other means, such as unilateral trade provisions contained in general or specific national legislation

3. Telecommunications and Broadcasting

Both in Europe and in the US the issues of growth, competitiveness and employment are at the core of current economic and industrial policy debate. Special emphasis is put on the development of the **information technology and communications industries**. In the telecommunications sector, technological change is accelerating; regulatory reforms leading to the strengthening of competition on the US and the EU markets are introduced in order to foster the competitiveness of industry. New development prospects, in particular concerning telecommunications networks, are sketched out in the December 1993 White Paper for the EU side and the National Information Infrastructure (NII) for the US side. Hence initiating a dialogue with the US on telecommunications and information infrastructure seems appropriate. Yet there remain significant obstacles for foreign companies in acceding to the US telecommunications market, including ownership restrictions for the granting of radio licences to foreign owned carriers.

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

AT&T (the dominant long-distance carrier) also manufactures equipment. Therefore, as a vertically integrated company, it has little incentive to buy competitively. Thus it is far better placed than outside companies to supply its own network, and in practice buys most of its equipment from itself. AT&T also benefits from a range of advantages. These include the company's large base of equipment already in place, the fact that network specifications are based on the requirements of the **original AT&T monopoly telecommunications network**, and the influence that the company has on the standardisation process in the US. At the same time, however, its procurement procedures are not transparent, nor is it obliged to go out to tender.

The **RBOCs** are obliged to ensure that their procurement procedures are non-discriminatory in the sense of not favouring AT&T above other suppliers. Yet the procurement process followed by the RBOCs is not very transparent - intimate

knowledge of their organisation and preferences is necessary. Moreover, the required tests for certain network equipment can be very expensive. Thus, although the system is open to all in theory, in practice it is open only to those suppliers with the ability to make this investment.

Section 310 of the Communications Act of 1934 imposes limitations on foreign investment in radio communications: "No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station licence shall be granted to or held by" foreign governments or their representatives, aliens, corporations in which any officer or director is an alien or of which more than 20% of the capital stock is owned by an alien (25% if the ownership is indirect).

Most common carriers need to integrate radio transmission stations, satellite earth stations and in some cases, microwave towers into their networks. Therefore, foreign-owned US common carriers are faced with unnecessary obstacles in competing in much of the long-distance market and, more importantly, through a minority shareholding provision in the mobile market. Section 310 effectively obliges foreign carriers either to enter into subcontracting arrangements with US carriers, or to use alternative (non-radio) technology. As wireless services continue to grow in importance and customers demand integrated local and long-distance solutions from a single carrier, the ability to participate in and hold radio licences will become more critical to the long term success of all carriers. The ultimate rationale for these restrictions is the argument that US control of communications is essential at all times, for reasons of national security. However, where there is no national security risk there is no basis for invoking the policy.

Currently, highly competitive foreign manufacturing companies face great difficulties in the **US procurement market**, because US operating companies have historically bought equipment from local suppliers, and because AT&T buys network equipment almost exclusively from itself. A 6% Buy America preference applies to DoD procurement (unless waived under the Memorandum of Understanding with NATO allies), and to procurement of Rural Telephone Cooperatives financed by the Rural Electric Administration (USDA). Draft legislation tabled in Congress in 1990, 1992, 1993 and 1994 would explicitly impose local content requirements on RBOC procurement, adding new obstacles for foreign firms.

4. The Maritime Sector

The US Maritime Sector has a very long history of state intervention in the form of direct and indirect support for the American shipbuilding and repair industry as well as the maritime transport sector. Thus the **Merchant Marine Act of 1936**, as amended, provides for various subsidies schemes and tax deferment measures in the shipbuilding sector. In October 1993 the Clinton Administration announced a policy plan to support US shipyards. At the same time the US Congress considered the **Gibbons/Breaux legislation** which aims at eliminating foreign shipyard subsidies. Other legislation pending in Congress would call for sanctions - such as the denial of access to US ports and imposition of fines - against vessels owned or controlled by citizen of countries which subsidize shipbuilding or repair industries. All these issues are discussed in multilateral

shipbuilding negotiations at the OECD with a view to end the subsidisation and support race among the major shipbuilding nations.

As far as maritime transport is concerned, the use of certain categories of foreign-built vessels is restricted in the US. This is the case for fishing vessels, vessels used in coastwise trade and special work vessels. In general, foreign-built (or rebuilt) vessels are prohibited from engaging in **coastwise trade** either directly between two points of the US or via a foreign port.

Furthermore, the **Cargo Preference Act of 1904** requires that all items procured for or owned by the military departments must be carried exclusively on US-flag vessels. **Public Resolution N°17**, enacted in 1934, requires that 100% of any cargoes generated by US Government loans must be shipped on US-flag vessels, although the US Maritime Administration may grant waivers permitting up to 50% of the cargo generated by an individual loan to be shipped on vessels of the trading partner. The **Cargo Preference Act of 1954** requires that at least 50% of all US government generated cargoes subject to law be carried on privately-owned US flag commercial vessels, if they are available at fair and reasonable rates. Finally, the **Food Security Act of 1985** increases the minimum agricultural cargoes under certain foreign assistance programs of the Department of Agriculture and the Agency for International Development (USAID) to be shipped on US-flag vessels to 75%.

The impact of these cargo preference measures is very significant. They non-US competitors access to a very sizeable pool of US cargo, while providing US shipowners with guaranteed cargoes at protected, highly remunerative rates.

The US has not offered liberalisation of its maritime services. **GATS**, however, should prevent the future use of Section 19 by the Federal Maritime Commission unilaterally to force the opening of foreign ports and shipping facilities. The US have agreed further to negotiate the liberalisation of maritime services.

XII. OUTLOOK

On balance, the trade relations between the US and the EU have developed positively over the last forty years. However, as this account shows, there remains much to be improved. Furthermore, a number of new issues which may pose an even greater challenge have arisen. The problems posed by the so-called "**New Generation of Trade Issues**" all share one characteristic: it is extremely difficult to assess their precise numerical impact on international trade flows. At present, three main areas of concern have been identified:

- Trade and **competition** policies
- Trade and the **environment**
- Trade and **social issues**, particularly workers' rights

In the field of **competition**, US initiatives have originally been directed towards **Japan**. There, industrial conglomerates (the *keiretsu*) made it very difficult to enter certain markets, especially in areas like construction and services. With the lowering of tariffs on a multilateral basis, however, similar practices were identified in other countries as well. The US currently favor an approach that focuses more on traditional market access questions than on the development of a hard core of rules for competition policies. It is questionable whether this will contribute much to the solution of the problem.

The **problems that new rules would cause** in this field are manifold. To name only a few, the necessarily extraterritorial character of these rules, the problems of gathering information abroad, and the question of enforcement will be extremely difficult to solve. Only coordinated efforts in the field of competition politics will achieve the goals that have been widely recognised by now.

The relation of **environmental protection** to trade has also only recently become an issue. The traditional approach for trading nations to stimulate environmental protection abroad was to lower their tariffs for "green" products. With the general lowering of tariffs in the Uruguay Round, this option has become much less interesting. Instead, there is now a temptation to act in the other, more sensitive, way, i.e. raise market access barriers against products considered to be environmentally harmful.

Despite widespread consensus on the necessity for environmental protection, disagreement remains on whether **trade instruments** should be used in order to achieve this goal. In order to stimulate other countries to protect their own environment, it has been proposed that any GATT country can take trade restrictive measures against certain environmentally harmful products, provided that this country then pays a GATT price for it (e.g. market access concessions in other fields). The advantages of this proposal are as obvious as its risks: On the one hand, environmental protectionism would be given real trade and thus financial leverage. The incentive to adhere to higher environmental standards could be internationalised, rewarding countries that protect their environment and punishing those that do not.

On the other hand, the **risk of abuse** is just as real as the benefits one might expect: Environmental legislation can be used as a barrier to trade. Examples have been cited in the report but the US is not the only country that abuses environmental laws to keep certain products off its markets. Creating new restrictive instruments may well lead to cases of "green protectionism". The goal to strike a balance between legitimate environmental concerns and trade restrictive measures will only be achieved through multilateral cooperation. A confrontational approach on the part of the US or the EU would do harm to both environmental protection and trade liberalisation.

The final and perhaps most complicated new trade problem is the one of **trade and social issues**. Especially **workers' rights** have become an issue of heated discussion between industrialised and developing countries. Low production costs have been the mainstay of the latter's competitive advantage over certain producers in the northern hemisphere. But there is a difference between cost differentials as a result of comparative advantage and those resulting from adverse working conditions. If human rights are

violated in order to produce low cost goods (e.g. forced labour, child labour etc.), or if workers are denied basic rights (assembly, collective bargaining, etc.) it may be legitimate to bar these products from entering foreign markets.

On these issues the **American position has been inconsistent**. Of the International Labour Organisation's 174 resolutions, the US has ratified a mere eleven. When other interests weighed in more heavily, the workers' rights issue regularly lost out, as has been the case with China. However, the US has insisted on integrating the labour rights issue and trade matters in multilateral negotiations. Domestically, the Omnibus Trade and Competitiveness Act of 1988 contains a clause that "as a principle of the GATT (..) the denial of workers' rights should not be a means for a country and for industries to gain competitive advantage in international trade."

The US and the other major trading nations who have identified these new problems should be working on their resolution jointly. However, the **US Congress** is thinking aloud about a "**blue 301**" in order to deal with "social dumping", and a "**green 301**" in order to remedy trade distortions resulting from differing environmental standards. Such a unilateral approach would create new frictions rather than resolve the problems at hand. It would in all likelihood not be in conformity with the rules of the GATT and its successor, the WTO.

Only through an intensive dialogue between the world's two most important trading nations can these newly arising trade issues be tackled successfully. Clearly, the EU and the US will also have to co-opt Japan and the developing world into these efforts if they are to succeed in the long run. It remains to be seen what the Clinton administration will be able and willing to do after its initial successes in the area of international trade. Surely, it should preserve the combined wisdom of two great American statesmen, John F. Kennedy and Benjamin Franklin: "**Never fear to negotiate**" because "**no nation was ever ruined by trade**".