UNITED STATES BARRIERS TO TRADE AND INVESTMENT REPORT FOR 2008

EUROPEAN COMMISSION

Issued: July 2009

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For market access information, economic and regulatory information, applied tariff levels and analysis of trade issues, please consult the European Commission's Market Access Database website:

http://madb.europa.eu

For an overview of all the U.S.-related fiches in the Market Access Database, please click here.

Additional information and updates on EU-U.S. trade relations, as well as this report. can be found in the "Bilateral Trade Relations" section of the website of the European Commission's Directorate General for Trade:

http://ec.europa.eu/trade/issues/bilateral/countries/usa/index_en.htm

Information from the Directorate General for Enterprise and Industry on notifications of technical regulations and conformity assessment procedures is available at:

http://ec.europa.eu/enterprise/tbt

This report has been compiled by the European Commission's Directorate General for Trade in co-operation with the European Commission's Delegation in Washington, D.C. and other services of the Commission on the basis of material available to them at the end of December 2008.

This year's Report on U.S. Trade and Investment Barriers focuses on some key active, upcoming trade barriers and measures that prevent EU exporters from effectively drawing upon the full potential of EU-U.S. trade relations. Details on the trade barriers mentioned in the body of the report are attached in the annex.

If you feel that a trade barrier has not been sufficiently covered in either this report or the MADB, you may now lodge an on-line complaint about the barrier you experience with the European Commission's Market Access Team via

http://madb.europa.eu/madb_barriers/complaint_home.htm

U.S. Barriers to Trade and Investment Report for 2008

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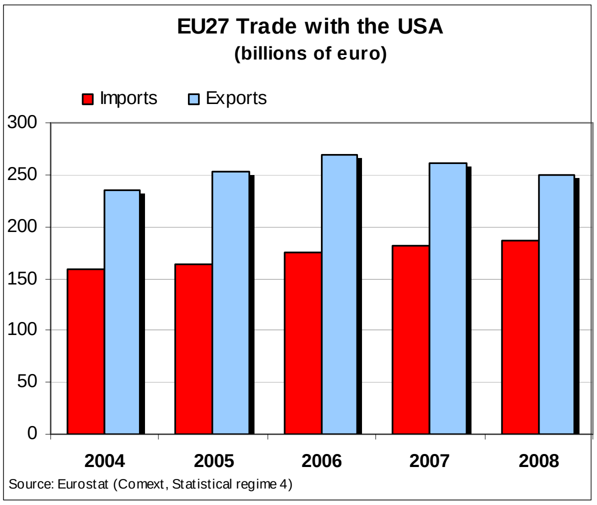
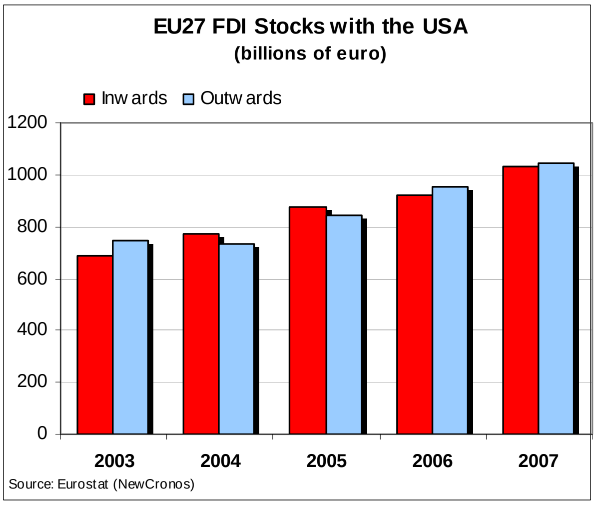
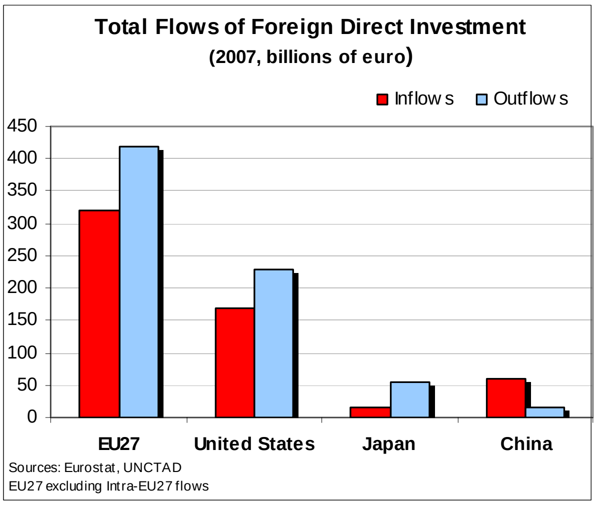
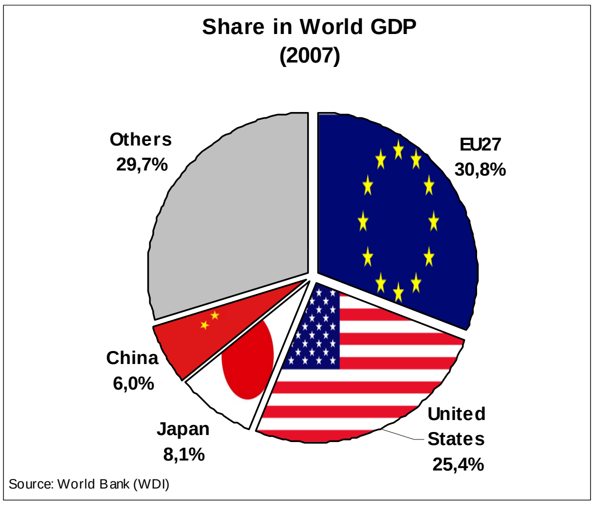
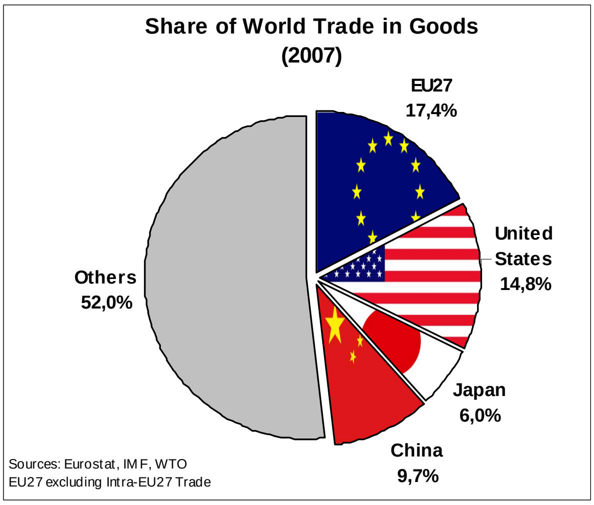
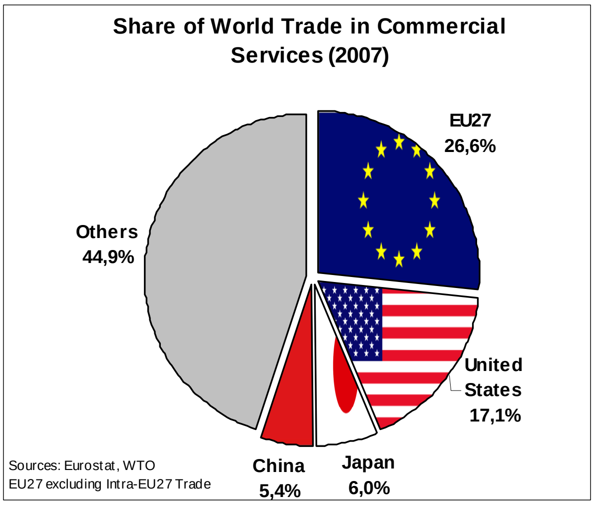

EU27 Trade with the USA
(billions of euro)
Imports
Exports
300
250
200
150
100
50
0
2004
2005
2006
2007
2008
Source: Eurostat (Comext, Statistical regime 4)


EU27 FDI Stocks with the USA
(billions of euro)
Inwards
Outwards
1200
1000
800
600
400
200
0
2003
2004
2005
2006
2007
Source: Eurostat (NewCronos)


Total Flows of Foreign Direct Investment
(2007, billions of euro)
Inflows
Outflows
450
400
350
300
250
200
150
100
50
0
EU27
United States
Japan
China
Sources: Eurostat, UNCTAD
EU27 excluding Intra-EU27 flows


Share in World GDP
(2007)
Others
29,7%
EU27
30,8%
China
6,0%
Japan
8,1%
United
States
25,4%
Source: World Bank (WDI)


Share of World Trade in Goods
(2007)
EU27
17,4%
United
States
14,8%
Others
52,0%
Japan
6,0%
China
9,7%
Sources: Eurostat, IMF, WTO
EU27 excluding Intra-EU27 Trade


Share of World Trade in Commercial
Services (2007)
EU27
26,6%
Others
44,9%
United
States
17,1%
China
5,4%
Japan
6,0%
Sources: Eurostat, WTO
EU27 excluding Intra-EU27 Trade

1. EU-U.S. TRADE RELATIONS – A BRIEF OVERVIEW

The European Union and the United States are each other's main trading partners and enjoy the largest bilateral trade relationship in the world. In 2007 their combined economies accounted for nearly 60 % of global GDP, approximately 33 % of world trade in goods and 44% of world trade in services. The total flow of Foreign Direct Investment (FDI) between the EU and the U.S. was approximately Euro 147 billion. The EU FDI stock held in the U.S. amounts to roughly Euro 926 billion. Total FDI stocks held in each others countries reach approximately Euro 1.89 trillion.

The onset of the financial crisis in 2008 has resulted in a rapid deterioration of the real economy all over the world, which has had a major impact on trade volumes. In this changing environment the United States and the European Union are the main engines of global growth and must remain committed to free and non-discriminatory trade. For this reason, the unfolding economic recession makes the transatlantic relationship even more pertinent.

The size and importance of the bilateral trade relationship makes the EU and the U.S. the key players on the global scene. EU-U.S. economic cooperation defines the priorities to be addressed in different fora and sets the pace in the WTO. Europe and the U.S. support a “rules-based” trading system and are working towards a successful conclusion of the Doha Development Agenda (DDA) round of trade talks.

In 2007, the EU and the U.S. launched a new effort, the Transatlantic Economic Council (TEC), to integrate our economies even more fully by identifying key areas where greater convergence between economies and systems could reap rewards on both sides of the Atlantic. Bringing together governments, the business community and consumers, the TEC holds the promise of an ever deeper and more mutually productive transatlantic relationship. The TEC has had three meetings so far, addressing issues like investment, financial markets' issues, mutual recognition of accounting standards and secure trade, as well as a number of more technical regulatory issues.

In even this closest of partnerships, however, there still exist trade barriers and differences that hinder trade and investment. This annual report on U.S. trade barriers from the European Commission highlights some of the impediments that the European Union encounters when doing business with the U.S. The barriers described range from the small and relatively easily addressed to larger, more complicated problems, including challenging regulatory questions and some issues that have been or are being litigated at the World Trade Organisation. No matter the size or economic impact, all barriers need to be addressed, as far as possible, to help maintain and strengthen both transatlantic confidence and broader faith in the multilateral trading system.

While the overall economic impact of outstanding EU-U.S. trade disputes constitutes only a small proportion of the total EU-U.S. trade volume, our differences should be carefully managed to prevent unnecessary conflict, including costly and time-consuming litigation, and damage to the economies on both sides of the Atlantic. The European Commission remains firmly committed to addressing existing and future obstacles to trade and investment in the U.S. market in a constructive way, through bilateral, plurilateral and multilateral channels.

2. SECURITY RELATED TRADE BARRIERS

2.1. *Cargo Trade*

The U.S. launched the Container Security Initiative (CSI) in 2002 to counter potential terrorist threats to the international maritime container trade system. The CSI consists of four elements: security criteria to identify high-risk containers; pre-screening containers before they arrive in U.S. ports; using technology to pre-screen high-risk containers; and developing and using smart and secure containers. The U.S. Customs and Border Protection (CBP) launched the system to achieve a more secure maritime trade environment while attempting to accommodate the need for efficiency in global commerce. Ports participating in the CSI use technology to assist their officers in quickly inspecting high-risk containers before they are shipped to U.S. ports. So far, ten Member States have signed declarations of principle with the CBP to introduce CSI in their ports as well as an agreement on stationing U.S. Customs officials in their ports.

In order to ensure a level playing field among European ports, the EU concluded an agreement that expands the EU-U.S. customs co-operation agreement to include transport security aspects and to prepare minimum standards for all EU ports to participate in the CSI. In August 2005, the U.S. agreed to the participation of more EU ports in the CSI where they comply with certain jointly agreed minimum standards and where no U.S. officials will be stationed. For this project, a pilot action was carried out in 2007 in the port of Szczecin (Poland). This pilot is likely to be re-activated in 2009. Similar actions started at the beginning of 2008 in Aarhus (Denmark) and Salerno (Italy). Further EU ports may, by mutual consent, partake in this initiative in 2009. The EU-U.S. working group established by the expanded agreement is currently working on further measures which are intended to diminish the barriers caused by this initiative.

According to EU industry, the CSI screening and related additional U.S. customs routines are causing significant additional costs and delays to shipments of EU machinery and electrical equipment to the U.S. This burden is so severe that a number of small European engineering companies have decided not to export to the U.S. any longer. There is also competitive distortion in this fiercely competitive engineering market between the EU and U.S. engineering companies since to date there is, de facto, no reciprocity between the EU and the U.S. in this regard.

On 13 October 2006, U.S. President Bush signed into law the Safety and Accountability for Every Port Act, the so-called SAFE Port Act which provides the legislative authority to expand the Container Security initiative launched in 2002. The Act contains a number of provisions that impact upon port security as well as international supply chain security. Section 231 of the Act foresees the establishment of a pilot programme at some foreign ports to test integrated non-intrusive imaging and radiation detection scanning equipment for all U.S.-bound containers. This pilot programme goes against a modern customs approach of multi-layered risk based controls through effective targeting followed by scanning and/or inspection when necessary and may slow down traffic in ports.

The port of Southampton (UK) had been chosen to participate in this pilot project to study the feasibility of a 100% scanning approach. However, the U.S. did not await the results of this pilot action before pressing ahead with the "Implementing Recommendations of the 9/11

Commission Act of 2007" (also known as the 9/11 Commission Recommendations bill), which were signed on 3 August 2007.

As far as maritime cargo is concerned, the implementation of the 100 % scanning requirement is foreseen with a 5-year deadline by 1 July 2012. For the EU and other major partners, the envisaged scanning of all U.S.-bound containers in more than 600 ports from which ships leave for the U.S. would lead to major trade disruptions and an additional administrative burden. It would require major re-structuring of EU ports and place a very heavy financial burden on EU business and ultimately its taxpayers. The bill does not include a spending authorisation/financial clause for equipping foreign ports. Therefore costs for the installation of the necessary equipment are expected to be borne by the port and shipping companies. An indication of the potentially devastating economic impact was provided by the pilot programme in the context of the U.S. Secure Freight Initiative (SFI) that was intended to evaluate the feasibility of 100% scanning and to install such full scanning equipment in seven international ports. It appropriated roughly $60 million to cover costs in some, although not in all of the ports. For the Southampton pilot alone the costs were estimated at $14.5 million.

For cargo carried on passenger aircraft the bill even requires a 3-year phase-in implementation with benchmarks of 100 % "screening", but at this stage, it is not yet clear whether and how the requirements for air cargo will affect international transport.

Together with the Security Filing regulation (a Customs and Border protection scheme commonly known as the "10+2" initiative that requires importers and vessel operating carriers to provide advance trade data), this new legislation has the potential to hamper the possibility for EU trade to compete fairly with their U.S. competitors and to excessively burden the EU export supply chain.

The Commission, Member States, the vast majority of port operators and the entire trade community are seriously concerned aboutthe potential costs of the scanning requirement, its possible effects on competitiveness, and its negative impact on transatlantic trade flows. This measure is unilateral and is not consistant with the WCO (World Customs Organization) SAFE framework of standards, which is based on a risk-management approach to address security threats and foresees targeting criteria to control containers.Besides,,it would create a false sense of security as 100% scanning does not imply 100% security.

3. EXTRATERRITORIALITY AND UNILATERALISM

3.1. Extraterritoriality

U.S. provisions having extraterritorial effect are a frequently used tool to implement U.S. policies across their own border. Today, the U.S. has a number of such provisions in place which hamper international trade and investment and may not as such conform to international trade law. These include for example the Cuban Liberty and Democratic Solidarity Act, known as the Helms Burton Act signed by Bill Clinton in 1996. The Act has been repeatedly condemned by the EU, which reserves the right to resume actions at the WTO. Other examples include the Iran-Libya Sanctions Act (ILSA). This Act was amended by President Bush in April 2004, terminating actions against Libya in light of its renunciation of international terrorism. In 2006 Congress passed the Iran Freedom Support Act, extending the provisions of ILSA in the case of Iran for another five years until 2011.

These extraterritorial provisions continue to cause problems for EU companies. Subsequently the EU has expressed its opposition to this kind of legislation, or any secondary boycott or legislation having extraterritorial effects, through a number of representations and steps, such as the Council Regulation 2271/96 (the so-called "Blocking Statute") of 22 November 1996. Other trading partners of the U.S., such as Canada and Mexico, have strengthened or adopted similar blocking legislation.

Another example of such legislation concerning Iran is the Iran Non-Proliferation Act (INPA) signed into law on 14 March 2000. It allows the U.S. Administration to apply its own sanctions to exports which are subject to EU Member State and EU export control regimes, while also unilaterally expanding the scope of export controls on EU exports beyond those agreed multilaterally.

Nevertheless, 2008 saw welcome developments with regard to the Securities and Exchange Commission (SEC) regulations for securities firms. On 1st February 2008 the Commission and US SEC issued a joint press release on mutual recognition in securities in relation to brokers, dealers and exchanges, in which both the SEC Commissioner Cox and Commissioner McCreevy agreed to work together on this initiative. On 24th March the SEC announced the 'next steps for the implementation of the mutual recognition concept'. This statement indicates different processes to be put in place between the SEC and other actors, including the EU. Since then, SEC and European Commission officials have worked together on defining a process for carrying out a comparability assessment of the U.S. and EU securities regimes. The TEC endorsed this work in May 2008 and encouraged the parties to conclude this first phase as soon as possible in order to start with the comparability assessment of the U.S. and EU securities regime in 2009. However, due to the financial crisis and the change in the U.S. Administration work on defining a process arrangement for carrying out a comparability assessment of the EU and US securities regimes has been delayed during the last months. Feedback from the US in the Financial Markets Regulatory Dialogue confirms that the work shall be taken up in the future, but no date has yet been confirmed.

In parallel, the SEC launched a consultation on the Rule 15a6 amendments in order to improve the process by which US investors have access to foreign broker-dealers, which closed in September 2008. However, this consultation has not to date resulted in new initiatives.

Section 319 of the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" Act, known as the Patriot Act, signed in 2001, deals with allegations of money laundering and the forfeiture of funds in U.S. inter-bank accounts. Some European banks have alleged that it applies extraterritorial provisions to financial services. The European Commission has been concerned about the lack of legal certainty and the potential impact on the ability of European banks to conduct business in the U.S. as a result of this legislation, but concrete problems have not been brought to our attention over the last two years.

3.2. *Unilateralism*

'Unilateralism' may take the form of either unilateral sanctions or unilateral retaliatory measures against allegedly 'offending' countries or companies. Both types of measures are based on an exclusive U.S. assessment of the actions of a foreign country or its legislation and administrative practice irrespective of multilaterally agreed rules. This approach has in the past cast doubt on U.S. support for a multilateral rules-based system to address trade problems. Whilst the U.S. has in practice made extensive use of the WTO fora, including its dispute settlement system, it has not renounced the possibility of taking actions unilaterally. As a result, the EU has obtained important results in two WTO dispute settlement cases, one against the U.S. suspension of customs liquidation in the banana dispute, and one against Sections 301-310 of the Trade Act of 1974. The latter authorises the U.S. Government to take action to enforce U.S. rights under any trade agreement and to combat practices by foreign governments which the U.S. Government deems to be discriminatory, unjustifiable or restrictive to U.S. commerce.

Regarding the long-standing Hormones case, the US and the EU agreed in principle in May 2009 on a way forward in their long-running dispute over hormone-treated beef. Under the terms of the agreement, the U.S. would agree not to impose new so-called "carousel" sanctions (Section 407 of the Trade and Development Act of 2000) which were due to come into force and would have affected a range of EU products including Italian mineral water, Roquefort cheese and a number of other food products. In return, the agreement would provide additional duty-free access to the EU market for U.S high quality beef (see details in the annexed fiche on Hormones dispute).

4. TARIFF BARRIERS

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

The EU hopes to achieve further reductions of U.S. tariffs within the context of the ongoing Doha Development Round. According to the current state of play, substantially all tariff peaks should be eliminated following the 'Swiss Formula'. Although little progress has been made, the EU continues to pursue this goal throughout the negotiations.

A more recent example of tariff barriers is the issue concerning multilayer parquet. The EU parquet industry, as well as several EU Member States, have raised their concerns at the tariff duty applied by US Customs to multi-layer parquet panels, notably following the 2007 modification of the Harmonised Tariff System of the US (HTSUS). Several products that had been subject to a zero duty for many years are now subject to duties of 3.2 % and 8 %. This appears to be an erroneous classification, which, would seem to contradict the tariff commitments of the US.

5. NON-TARIFF BARRIERS

5.1. Regulatory Divergences

In a global economy international standards are an indispensable tool to eliminate technical barriers to trade, to facilitate and increase market access, to improve the quality and safety of products and services, and to promote and disseminate know-how and technologies. For governments, the use of international standards in the context of their regulatory policy is also an important element for the implementation of the WTO-TBT Agreement. All parties to the Technical Barriers to Trade (TBT) Committee are committed to the wider use of international standards as the basis for their regulation.

However, regulatory barriers have also long been recognised as significant impediments to trade and investment between the EU and the U.S. A particular problem in the U.S. is the relatively low level of implementation and use of international standards set by the international standardisation bodies. The EC and the US are examining how international standards are used in their respective bodies of legislation. A report on the use of standardisation in legislation will be produced in mid-2009 for the Transatlantic Economic Council (TEC), which will provide a basis for identifying possible new areas for convergence.

Furthermore, EU exporters to the U.S. market face steep regulatory barriers. In the U.S., products are increasingly being required to conform to multiple technical regulations regarding consumer protection (including health and safety) and environmental protection. Although, in general, not *de jure* discriminatory, the complexity of U.S. regulatory systems can represent an important structural impediment to market access.

Other regulatory obstacles for European exporters include a burdensome pharmaceutical approval system, the American Automobile Labelling Act, documentary and labelling requirements for textiles, and sunscreen protection factor labelling. There are also restrictions regarding the distribution of wines and spirits.
Cosmetics in the United States are subject to a number of labelling requirements under the provisions of the Federal Food, Drug and Cosmetic Act and the Fair Packaging and Labelling Act. The FDA has issued regulations that describe the selection of the names and the manner of listing them on the product label. The primary source of names for label declarations is the PCPC (formerly the CTFA) International Cosmetic Ingredient Dictionary (ICID) but these are outdated. Cosmetics ingredient labelling in the EU uses the International Nomenclature Cosmetic Ingredient name or INCI name and is based on a Nomenclature developed jointly by the EU and US cosmetic industries. Although multiple names exist for certain ingredients in the INCI system, EU industry considers the common adoption of a unique INCI name would be beneficial for all stakeholders.

It is not uncommon that equipment for use in the workplace is subject to a number of different standardising bodies. For example pressure equipment is subject to the U.S. 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. For instance, this is the case for product-safety requirements and other standards for electrical and electronic equipment as well as construction products. In the case of electrical and electronic equipment the US Occupational Safety & Health Administration (OSHA) requires that products go through nationally recognized testing laboratories (NRTL'S) in order to establish conformity with US standards. However, towards the end of 2008 they published a request for information and comments on a proposal to permit the use of Suppliers Declarations of Conformity (SDoC) as an alternative to the NRTL's product-approval process.

As concerns food safety, differences in standards and requirements between the U.S. and the EU are exemplified by the export conditions for Grade-A milk products (See section 5.5) or provisions for organic products under the National Organic Program of 2001.

A more integrated and streamlined transatlantic regulatory environment would significantly reduce costs for producers and consumers on both sides of the Atlantic and improve the competitive situation of EU and U.S. companies in the global economy. As the world's two most important trading partners there is much to gain from fewer barriers to bilateral trade and investment. Reinforced regulatory cooperation is therefore important to help dismantle existing regulatory barriers and to prevent new ones from emerging. Regulatory authorities on both sides aim at achieving greater convergence of technical rules through a number of sectoral and methodological regulatory dialogues. Since its inception in 2005, the High Level Regulatory Cooperation Forum has met regularly to facilitate the exchange of best regulatory practice across sectors. HLRF reports to the Transatlantic Economic Council on the progress made in this area. Although progress is being made through EU-U.S. regulatory cooperation, EU exporters continue to face a number of post-import impediments. The proliferation of regulations at State level presents particular problems for companies without offices in the U.S. Moreover, the EU-U.S. Agreement on Mutual Recognition, in force since 1 December 1998, has not been fully implemented. This is due to the absence of mandatory third party certification and operational difficulties which were not foreseen at the time of the agreement.

5.2. Registration, Documentation, Customs Procedures

There is a lack of recognition of EU origin, while the EU is a customs union with a single customs territory; the direct consequence is non-acceptance of EC certificates of origin by U.S. Customs. As a consequence of the increasing integration of European manufacturing processes, exporters experience more and more difficulties in indicating one single Member State as the country of origin for their products.

The implementation of the food-related provisions of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, known as the Bioterrorism Act, puts severe burdens on trade in food and feed products to the U.S. Additionally, in response to recent scandals and scares around imports of unsafe food, feed and drinks, the U.S. is currently considering a number of independent proposals on how to tighten import conditions for food and beverages and improve the safety of such imports. The outcome of this initiative is still widely unpredictable. However, it is apparent that a few elements are contained that may negatively impact on EU exporters. These include for example import inspection fees, country of origin labelling, and mandatory certification of 'high risk foods'.

The U.S. Code, Title 46, Section 12108 and the American Fisheries Act of 1998 represent considerable shipping restrictions for fishermen as foreign-built vessels are not eligible to receive a fishing licence. U.S. rules of origin for textiles continue to affect European exports of fabrics, scarves, bed linen, table linen, bedspreads as well as quilts containing cotton and wool. Equally burdensome are the restrictions introduced through Section 8e of the Agricultural Marketing Agreement Act of 1937, stipulating that the importation of a number of agricultural commodities regulated under the Federal Marketing Orders (MO) shall be prohibited unless they are in compliance with grade, size, quality and maturity provisions set in the MO. Such restrictions prevent fair access to the US market. They discriminate firstly between domestic and foreign producers and secondly between different foreign producers and result in additional costs (eg inspection costs) for EU exporters.
In 2008, another barrier concerning registration, documentation and customs procedures has been reinforced: the Lacey Act, initially adopted in 1900, is the United States' oldest national wildlife protection statute and serves as an anti-trafficking law protecting a broad range of wildlife and wild plants. In May 2008, the Lacey Act was amended to extend its scope to all plants, including timber or associated wood products with the objective to combat illegal

logging. The amendment added a new requirement for an import declaration, which will oblige importers of covered plants and plant products to list shipment information along with information such as plant scientific name and country of harvest to prove compliance with the Lacey Act requirements. This obligation is burdensome especially for products containing several different types of plants (fibreboard, plywood, hardboard, laminated wood, flooring, paper pulp, paper and paper products).With regard to the implementation, the European Commission supports the phase-in system, but requested through the submission that the United States allow at least nine months for each phase-in period. The European Commission is also concerned that some of the plant declaration requirements, such as value of imports and quantity of the plants, would duplicate information already provided by importers during the customs clearance process.

5.3. *Import Prohibitions*

The right of sovereign nations to take measures to protect their essential national security interests has been widely recognised by multilateral and bilateral trade agreements and, of course, particularly since the events of 9/11. However, it is in the interest of all trade partners that such measures are prudently and sparingly applied. Restrictions to trade and investment cannot be justified on national security grounds if they are, in reality, essentially protectionist in nature and serve other purposes. Under Section 232 of the Trade Expansion Act of 1962, U.S. industry can petition for the restriction of imports from third countries on the grounds of national security. The application of Section 232 is however not dependent on proof from industry. Consequently, the law provides U.S. manufacturers with the opportunity to seek protection on the grounds of national security, when in reality the aim can be simply to curb foreign competition. In addition, the chemicals sector might be affected by import restrictions for certain drug precursor chemicals following the introduction of the USA Patriot improvement and authorization act of 2005. Similarly, the Jones Act uses national security reasons to prohibit the use of foreign vessels.
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In the area of fisheries, the Marine Mammal Protection Act of 1972 establishes significant import prohibitions. While the EU wholeheartedly supports the protection of marine mammals, particularly dolphins; it rejects certain provisions – not directly related to animal protection –which may impede trade. Hopefully, the entry into force on 10 October 2008 of the IATTC (Inter-American Tropical Tuna Commission) Antigua convention, which permits the European Community to be a member of the IATTC, will make it easier for EU tuna products to access the U.S. market. Another example is the recently introduced restriction on the commercialisation and production of foie gras in a number of states.

5.4. *Levies, Charges and Import Duties*

EU exports face a number of additional customs impediments, such as import user fees and excessive invoicing requirements on importers, which add to costs in a similar way to tariffs. The most significant user fee is the Merchandise Processing Fee, which is levied on all imported merchandise except for products from the least developed countries, from eligible countries under the Caribbean Basin Recovery Act, the Andean Trade Preference Act, U.S. FTA partners, or from U.S. Offshore possessions. Although the current MPF includes an upper limit on the custom user fee, it is still likely to exceed service costs as the charges are based on the value of the imported goods.

Furthermore, the U.S. levies two taxes/charges on the sale of cars in the U.S. Both the

Corporate Average Fuel Economy (CAFE) payment and the so-called Gas Guzzler Tax, place the tax primarily on imported cars and are therefore of concern to European exporters.

European wine producers have to compete against another significant barrier. According to U.S. federal law, wine produced in or imported into the U.S. is subject to a "gallonage tax" with different tax bands according to the alcoholic content. However, while 'small' U.S. producers are eligible for a tax credit, their European counterparts are not entitled to the same rebate. The issue has been raised at the occasion of the EC/US wine talks meetings in 2006, 2007 and 2008.

5.5. *Sanitary and Phytosanitary Measures*

In the agricultural area, a number of sanitary and phytosanitary (SPS) issues remain a significant source of difficulty for EU producers. Most problematic in this respect is the trading of animal products. For example, since 1997 the U.S. has had special rules in place on the import of ruminant animals (beef, sheep, goats) and products thereof from all European countries based on concerns about Bovine Spongiform Encephalopathy, commonly termed BSE. Although the EU and U.S. collaborated closely towards the adoption of a global BSE standard in the Global Animal Health Organisation (OIE), and although the U.S. insist that their trading partners, notably in Asia, use this standard to assess the risk of U.S. beef, the U.S. remains unwilling to use these agreed rules for EU products.

Other long-standing trade barriers apply to exports of beef, pork and poultry products and are originally motivated by animal health protection. Imposing trade restrictions on products from a region which is affected by disease outbreaks is a quick, administrative process - and rightly so. However, the lifting of these trade restrictions should be equally fast and pragmatic once the disease has been eradicated. In many cases the U.S. administration has used complex and lengthy rulemaking procedures to restore trade, which can take several years longer than the re-acquaintance of an official disease-free status under the global rules of the OIE. Some progress has been made in the recent past to implement pragmatic administrative procedures notably for Classical Swine Fever and Newcastle Disease, at least for some of the Member States. But much remains to be done by the US to treat exports from EU with a similar degree of trust and flexibility as US exports are treated vice versa.

The Veterinary Equivalence Agreement, signed on 20 July 1999, provides a framework for pragmatic regulatory cooperation between the EU and U.S. in these areas of animal health and food safety. But the pace of discussions is very slow and does not at all exploit the opportunities provided by the Agreement. An example of the slow progress in regulatory cooperation is the sanitary measure applied by the U.S. for imports of live bivalve molluscs. The EU and the U.S. apply different testing methods to determine the safety of molluscs. According to the EU both approaches yield the same result and are equally effective. The U.S. however does not currently recognise the EU approach as equivalent, which effectively prevents European producers from exporting to the U.S.

The current U.S. import regime for Grade A Pasteurised Milk Products constitutes an effective block to any trade as there is currently no Federal State that would be willing to inspect establishments in the EU (or any other foreign country) under the Pasteurized Milk Ordinance. Discussions with the Food and Drug Administration (FDA) to regulate Grade A milk imports under a federal regime have stalled and no progress has been made for two years. This obstacle to trade might be further exacerbated by proposed changes to the definition of Grade A milk products to be considered by the National Conference of Interstate

Milk Shippers in April 2009 and by the 2008 Farm Bill, which contained provisions that resulted in the publication on 19 May 2009 of a proposed ruleregarding a mandatory Dairy import assessment.

The U.S. requires that Pest Risk Analysis (PRA) be carried out for fruits, vegetables and other plants before the import conditions are established. The current regulatory process for imports into the US is very slow: the time between applying and inclusion on the list of approved products can take several years, or even decades, even when other products with the similar phytosanitary risks are permitted. A technical working group (EU-US PHTWG) was established in 2008 to address these difficulties but no tangible results have been achieved so far.

Other SPS-related restrictive measures exist for plant health covering imports of hardy nursery stock as well as standards and certification of ornamental plants established in growing media.

5.6. *Public Procurement*

In the field of public procurement, the main U.S. trade barriers are contained in a wide array of clauses in federal, state and local legislation and regulation giving preference to domestic suppliers or products, or excluding foreign bidders or products altogether. In addition, there are federal restrictions on the use of federal grant money by State and local government. These restrictions are called 'Buy America' (Buy America Act or BAA) and were reinforced in February 2009 by the American Recovery and Reinvestment Act (ARRA) which foresees additional "Buy American" provisions. Taken together, these restrictions, which include also the "Buy America" provisions of the Department of Transportation (DoT), cover a significant proportion of public purchasing in the U.S. Furthermore, as the U.S. International Trade Commission noted in its 2004 report: "The Economic Effects of Significant U.S. Import Restraints", the complexity and partially overlapping nature of existing restrictions makes it nearly impossible to determine the total value of government-purchased imports subject to these restrictions. Regarding development aid, restrictive provisions for U.S. Food Aid purchases and transportation require that at least 75% of tonnage is transported on vessels carrying the U.S. flag. Moreover, on a significant number of sectoral issues, "Buy American" restrictions are imposed for ball and roller bearings and are the legal basis of local content requirements for steel in public procurement cases.

Another practical limitation lies in the lack of transparency related to sub-federal procurement opportunities. Unlike the EU - where all tender notices for central and sub-central procurements are published on a single electronic site free of charge (the TED data base) - only U.S. federal notices are published on a single electronic site (fedbizopps.gov). This situation effectively hinders foreign suppliers' access to sub-federal procurement markets. Potential bidders do not know where to look for relevant procurement opportunities and/or information relating to sub-federal purchases.

Despite the fact that the WTO Government Procurement Agreement (GPA) substantially increased tendering opportunities for both sides, the EU remains concerned about the wide variety of discriminatory "Buy America" provisions that persist. Small business set-aside schemes, exemplified by the Small Business Act of 1953, also limit bidding opportunities for EU contractors.

The Department of Defense (DoD) also has significant procurement expenditures that exclude foreign suppliers of goods or services. The DoD is the largest public procurement agency within the U.S. government, spending billions of dollars annually on supplies and other requirements. Many procurements fall under "national security" exceptions to open procurement obligations. The concept of "national security" was originally used in the 1941 Defense Appropriations Act to restrict DoD procurement to U.S. sourcing. Now known as the "Berry Amendment", its scope has been extended to secure protection for a wide range of products only tangentially-related to national security concerns. There has been a trend towards making the DoD's other domestic preferences, apart from the BAA, less restrictive by expanding them to qualifying countries which maintain reciprocal Memoranda of understanding (MoU) with the U.S. In practice, all North Atlantic Treaty Organisation (NATO) countries (except Iceland), as well as all major non-NATO allies of the U.S. have signed MoUs with the U.S. allowing for a waiver of the corresponding restrictions. However, these MoUs are subject to U.S. laws and regulations, and consequently, other overriding ad hoc restrictions can be imposed annually by Congress through the authorisation/appropriations process.

The Commercial Space Act of 1998 applies national security restrictions to space launching services. These restrictions, which initially applied to the launch of military satellites, are now also applied on national security grounds to satellites for civilian use. The measures are part of a set of co-ordinated actions to strengthen the U.S. launch industry and are clearly detrimental to European launch service providers. European operators remain effectively barred from competing for most U.S. government launch contracts which account for approximately 50% of the U.S. satellite market, while the EU has no similar barriers to space launch services.

5.7. *Trade Defence Instruments*

Several U.S. trade defence measures have been brought by the European Union to the WTO Dispute Settlement system. Many aspects of U.S. trade defence legislation and practices have already been ruled as inconsistent with WTO Agreements. Implementation by the U.S. of these WTO findings has, at best, also been slow. The methodology and application of U.S. trade defence instruments has been challenged frequently and successfully - and not only by the EU - in the WTO Dispute Settlement system, such as the laws, regulations and methodology for calculating dumping margins (*zeroing*). As a result, the Department of Commerce (DoC) stopped the use of zeroing in original investigations when comparing export prices and normal value on an average-to- average basis. However, the U.S. is yet to address the issue of zeroing in reviews of AD measures and in other comparison methods.

Other WTO rulings against U.S. trade remedies include the Continued Dumping and Subsidy Offset Act of 2000 ("Byrd Amendment"). Despite the welcome news of its repeal in 2006, the Byrd Amendment's WTO-incompatible distribution of collected anti-dumping and countervailing duties to the U.S. complainants will continue for several more years as a result of a transition clause. Since in the US, these duties are usually collected several years after the import, this means, in turn, that distribution under the Byrd Amendment may continue for several years after 1 October 2007. The Congressional Budget Office foresees that the repeal of the Byrd Amendment will not produce effects before 1 October 2009.

The Antidumping Agreement and the Subsidy and Countervailing Measures Agreement (SCM) contain a so-called "sunset review" provision. Measures should not last longer than five years unless it is deemed that their termination would likely lead to the continuation or recurrence of dumping or subsidisation which are causing injury. For many years the U.S.

kept in place antidumping and countervailing duty measures on firms dating back as far as 1985, often with no justification. However, the U.S. International Trade Commission has decided in recent years to revoke most of those measures. Together with a successful outcome of the ongoing WTO disputes on zeroing has significantly reduced the number and scope of EU products subject to US TDI. There is however, no indication that the US approach will change for measures more recently imposed.

The U.S. had also enacted anti-dumping and countervailing duties on low-enriched uranium imports from France, Germany, the Netherlands, and the UK in 2002. The measures against Germany, the Netherlands and the UK were revoked in 2006 and the remaining measures against France were subject to a sunset review in 2007. Following the review, concluded on 29 November 2007, the countervailing duty order against France was also revoked. Nonetheless the anti-dumping measures on low-enriched uranium from France remain in force, following a finding of the US Supreme Court in January 2009, although there are still further issues subject to litigation in lower US courts.

5.8. *Subsidies*

The EU continues to be concerned about the significant direct and indirect government support given to U.S. farmers and industry by means of direct subsidies, protective legislation and tax policies. In June 2008 the US passed the 2008 Farm Act (Food Conservation and Energy Act (FCEA) of 2008). Despite a consensus among WTO Members that farm policies should be reformed in the direction of less trade-distorting forms of support, the 2008 Farm Act went in the opposite direction, just like the 2002 Farm Bill and again reinforced the trade-distorting nature of US farm subsidies.
A key feature of the 2008 Farm Act was the introduction of a new support scheme for arable crops known as the Average Crop Revenue Election programme (ACRE). Where traditionally most US support schemes compensate farmers in case of commodity price drop, ACRE compensates farmers for a drop in income. Thus ACRE addresses the concern that producers were overcompensated in times of low prices and high yields, when incomes were high, but undercompensated for low incomes when low yields forced prices above the level that would trigger price support. ACRE allows producers to lock in an income guarantee based at recent comparatively high levels. However, in order to participate in ACRE, producers must accept a reduction both in price linked support and in the decoupled support that they receive. The EU, in defending its rights, will closely monitor the implementation of the 2008 Farm Act for its compliance with trade rules in accordance with both the provisions of the WTO Agreement on agriculture and the WTO trade policy review mechanism.

Closely related to the Farm Bill are the commodity loan programmes with marketing loan provisions for crops like wheat, rice, corn, soybeans and other oilseeds. These programmes are administered by the Farm Service Agency (FSA) through the Commodity Credit Corporation (CCC).
Additionally, several agricultural export programmes such as the Export Enhancement Program, the Dairy Export Incentive Program, the Market Access Program and the Export Credit Guarantee Program (GSM- 102) provide considerable amounts of subsidies for U.S. farmers. The main export subsidy program - the export credit guarantee program - would need to undergo further changes should the current draft modalities on export credits be agreed in the context of the WTO negotiations. The modalities foresee a credit guarantee of up to a maximum of 180 days with requirements on self-financing of these programs. However, there are indications that funding for export credit programs may be increased in 2009 in the context of the economic crisis.

As far as the Food Aid Program is concerned, Under US regulations, only agricultural commodities produced in the US may be used in food aid transactions. Legislation expressly includes among its food aid objectives to "develop and expand export markets for United States agricultural commodities" and provision for overseas donations of surplus commodities acquired by the Commodity Credit Corporation. The provision of such non-genuine food aid causes significant losses to commercial supplies of commodities.
On 6 October 2004, the EU initiated a WTO dispute settlement procedure against a number of U.S. federal, state and local subsidies to Boeing. This action followed the U.S. purported unilateral withdrawal from the 1992 EC-U.S. Agreement on Trade in Large Civil Aircraft on the same day and the initiation of WTO dispute settlement procedures against alleged European support for Airbus. U.S. subsidies challenged by the EU in the WTO include a USD 4 billion package in the State of Washington (combining tax breaks, tax exemptions or tax credits), infrastructure projects for the exclusive benefit of Boeing, USD 16.6 billion funding from NASA and DoD for aeronautics R&D and a USD 900 million package in the State of Kansas in the form of tax breaks and subsidised bonds. WTO panel proceedings in both cases are ongoing, and are expected to last well into 2009. The EU also remains concerned about the significant level of subsidies to the U.S. shipbuilding, aircraft engine manufacturers and steel industries.

The EU recognises the severe financial consequences of 9/11 on U.S. airlines and the need to ensure that vital transport services in the U.S. are maintained. Nevertheless, the on-going large scale state aid for airlines represents a significant protection from commercial pressures also faced by foreign carriers and is an impediment to fair trade on transatlantic air routes. EU Regulation No 868/2004 allows for specific measures to be taken against third countries' carriers in order to counteract subsidisation and unfair pricing practices resulting from such non-commercial advantages.

U.S. subsidies also cause problems for the European biodiesel industry. The issue has emerged due to a surge in subsidised biodiesel exports to the EU, which has depressed prices and profits and caused several producers to shut down their operation. The problem is that the U.S. subsidises biodiesel producers by means of tax credits, which impacts not only on U.S. sales but also on exports to other countries, notably the EU. In contrast the EU provides subsidies to consumers, which only affect the EU market and imports are eligible for the same benefits as EU products. The subsidies are significant ($1 per gallon or Euro 200 per tonne) and they are enabling imports from the U.S. to enter at below the EU industry's raw material costs. In effect U.S. biodiesel exports to the EU have increased sharply, from less than 100,000 tonnes in 2006 to an expected 1,5 million tonnes in 2008, which already represents nearly 20% of the EU market. Following the tax technical correction act of 2007 which became public law on December 29, 2007 a tax credit of 0,50/gallon for the production of an "alternative fuel mixture" has also been introduced and was extended under the Emergency economic stabilization act of 2008 until December 2009. Pulp and paper industry will benefit from this new Alternative fuel tax credit for black liquor as eligible producers are likely to modify their operations in order to receive payments before it expires on December 2009.

Transparency in the area of subsidies is an obligation of the Agreement on Subsides and Countervailing Measures (SCM). However, the notification of subsidies is frequently delayed. For the fiscal years 2005 and 2006 no new and full subsidy notification has been submitted yet although it was due by mid-year 2007.

6. INVESTMENT RELATED MEASURES

6.1. Foreign Direct Investment Limitations

The Foreign Investment and National Security Act of 2007 ("FINSA") amends the so-called Exon-Florio amendment of the Defense Production Act of 1950, which authorises the US President to investigate foreign acquisitions, mergers, and takeovers of, or investments in, US companies from a national security perspective. In November 2008, final regulations that implement FINSA were published. Along with the Executive Order issued by US President Bush in January 2008, these regulations complete the reform of the Committee on Foreign Investment in the United States ("CFIUS"), an inter-agency committee chaired by the US Treasury to which the US President's review and decision-making authorities provided by the Exon-Florio amendment have been delegated.

The EU is convinced that measures that address genuine national security concerns can be introduced or maintained, without compromising on conditions for an open investment environment. In this respect, the EU welcomes several of the changes introduced by FINSA and the guidance provided to investors that can help to determine the necessity to voluntarily file a transaction to CFIUS. However, while the regulations usefully add some examples to illustrate the application of principles like the notion of "control", the EU believes that only an examination of CFIUS' practice will allow for a full appreciation of these changes. Moreover, the EU remains concerned about the legal and economic costs for investors and investments that undergo CFIUS review, as well as about uncertainties inherent to this review and its ultimate outcome (such as the circumstances under which the President or CFIUS could re-open a transaction). Finally, the EU is concerned by the absence of any judicial review of CFIUS decisions by US Courts.

U.S. restrictions on foreign investment are particularly evident in the shipping, energy and communications sectors. Apart from this matter, the EU would like the U.S. to resolve outstanding foreign ownership issues to allow the EU-U.S. agreement on aviation services to be brought to a rapid conclusion.

Further investment constraints exist in the telecommunication sector (Section 310 of the 1934 Communications Act*)*, where U.S. law enforcement agencies have imposed strict corporate governance requirements on companies seeking Federal Communications Commission (FCC) approval of the foreign takeover of a U.S. communications firm in the form of far-reaching Network Security Arrangements. (See also section 8.1). Foreign investment is also restricted for coastal and domestic shipping under the Jones Act and the *U.S. Outer Continental Shelf Lands Act*, which includes fishing, dredging, salvaging or supply transport from a point in the U.S. to an offshore drilling rig or platform on the Continental Shelf. Non-U.S. investors must form a U.S. subsidiary for exploitation of deep- water ports and for fishing in the U.S. Exclusive Economic Zone (*Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987*). Under the American Fisheries Act of 1998, fishing vessel-owning entities must be at least 75% owned and controlled by U.S. citizens in order to receive a fishing permit. Licences for cable landings are only granted to applicants in partnership with U.S. entities (*Submarine Cable Landing Licence Act of 1921*).

Under the Federal Power Act, any construction, operation or maintenance of facilities for the development, transmission and utilisation of power on land and water over which the Federal government has control, are to be licensed by the Federal Energy Regulatory Commission.

Such licenses can be granted only to U.S. citizens and to corporations organised under U.S. law. Thus the only possibility for non-US citizens to obtain such a license would be to form a US company.

6.2. *Tax Discrimination*

Several aspects of U.S. taxation practices constitute additional difficulties to foreign investment in the U.S. market. These are mainly related to the nature of reporting requirements and conditions for deductibility of interest payments. Firstly, concerns about federal tax measures focus on the nature of reporting requirements and the fact that domestic and foreign companies are treated differently. Secondly, the so-called "earnings stripping" provisions in the Internal Revenue Code 163j and its limits on tax deductibility of interest payments applies relatively strict rules that do not necessarily always conform to internationally-accepted principles.

7. INTELLECTUAL PROPERTY RIGHTS

7.1. *Copyright and Related Areas*

Despite a number of positive changes in U.S. legislation following the Uruguay Round, copyright issues are still problematic due to Section 110(5) of the 1976 U.S. Copyright Act ("Irish Music" case). Despite losing a WTO case on the issue, the U.S. has not yet brought its Copyright Act into compliance with the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs). The EU has safeguarded its rights to suspend trade benefits granted to the U.S. if the Copyright Act is not amended.
Furthermore, European industry complains that producers and performers do not enjoy broadcasting rights or public performance rights in the U.S. The U.S. has not joined the Rome Convention of 1961, which recognises these rights, and it has taken an exception under the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty (WTTP) of 1996, actively excluding them. To the contrary, the EU does grant rights to both producers and performers since 1992, through the Rental Directive (2006/115/EC). Consequently U.S. right holders are protected in a large number of EU Member States. Although the U.S. has acceded to the Berne Convention in 1989, which contains an obligation to make moral rights available for authors, these rights are recognised only to a very limited extent in U.S. legislation.

7.2. *Appellations of Origin and Geographical Indications*

Difficulties to protect their rights and the continuing misuse of EU geographical indications on food and drinks produced or sold in the U.S., especially in the wine sector, as well as other food products, like cheese or meat products, is a source of considerable frustration for EU producers. Particularly problematic is the fact that the U.S. still considers a number of European wine names as 'semi-generics'. U.S. producers making use of 'semi- generics' can take advantage of, or could damage, the reputation of the Community geographical indications in question. Since June 2006 negotiations have been taking place in order to reach an agreement to diminish the material impact on the legal status of the semi-generics in the US market.

7.3. *Patents, Trademarks and Related Areas*

Under Article 31 of the TRIPS Agreement, governments that use patents are required to promptly inform the patent right holders. Although patents are extensively used by the U.S authorities, it appears that U.S. government departments frequently fail to comply with that obligation. This is problematic because right holders are consequently likely to miss the opportunity to initiate an administrative claim process.

Section 337 of the Tariff Act of 1930 provides remedies for holders of U.S. intellectual property rights by keeping the imported goods which are infringing on such rights out of the U.S. ("exclusion order"), or to have them removed from the U.S. market once they have come into the country ("cease and desist order").

Section 211 of the U.S. Omnibus Appropriations Act of 1998 ("Havana Club") 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. No U.S. Court can recognise or enforce any assertion of such rights. According to the Appellate Body report of 2002, Section 211 is in violation of both the national treatment and the most favoured nation obligations of the TRIPs. By the end of 2008 the US had not yet brought its legislation into conformity with its TRIPs obligations.

The co-existence of fundamentally different patent systems(the U.S. continuing with its "first-to-invent" system whilst the "first-to-file" system is followed by the rest of the world) continues to create considerable problems for EU companies, especially considering the high U.S. litigation costs in patent matters. The existence of different systems is a shared EU-U.S. problem and there is a need to harmonise the systems. However, there seems to be prospects for a solution in the near future as the U.S. no longer fundamentally opposes the first-to-file system. Although to date no agreement has been reached on the issue, negotiations seem to be going in a good direction.

In a similar fashion, transatlantic differences regarding patents are exemplified by the application of the Hilmer Doctrine in patent interference cases, which has been clearly detrimental to European companies. Further complications emerge because American and European law take different approaches to the question of patentability of software and business methods.

Potential problems are posed by the differential treatment of encryption items depending on whether they are transferred to government or non-government end users. In addition, US re-export controls on goods and intellectual technology create a difficulty for the European industry for cases of re-export. A combination of the continuing constraints on the export of strong encryption products and on the interoperability of systems employing such technology inhibits not only trade in encryption products but also, more importantly, the effective growth of e-commerce.

Last but not least, U.S. provisions concerning plant variety such as the Plant Patent Act seriously impede trade in breeding material for ornamental plants. For foreign plant breeders it is very difficult in case of vegetative reproduced plants to get a Plant Patent. Contrary to most other countries, foreign breeders only have a period of one year after the marketing of their plants outside the U.S. to get plant patent protection in the U.S. for their varieties. This means that a marketing decision has to be made immediately whether or not to protect a certain variety in the U.S.

8. SERVICES

8.1. Communication Services

The GATS *Basic Telecommunications Agreement*, in force since February 1998, has a widely positive impact on communication services. Nonetheless, EU and foreign-owned firms are still faced with substantial barriers to access the U.S. market. These include for example restrictions to investment, lengthy proceedings, conditionality of market access and reciprocity-based procedures. Section 310 of the 1934 Communications Act established restrictions to foreign direct investment in U.S. companies holding a broadcast or common carrier radio licence (See also section 6.1). There are also limits to foreign indirect investment, although this is subject to a public interest waiver. The U.S. Administration and the Federal Communications Commission (FCC) consider that this waiver provision is sufficient for the FCC not to apply *Section 310(b) (4) of the 1934 Communications Act* to WTO Members. This situation, however, does not provide certainty to European operators.

Market access barriers also exist for digital terrestrial television services. In 1996 the FCC mandated an exclusive transmission standard in the U.S., known as ATSC. This has since prevented the competing European technology (DVB-T) from accessing the U.S. market. Further difficulties accessing the U.S. market are encountered by EU based satellite communications operators.
The reduction in the number of competitors in the wire line sector and internet backbone market, notably as a result of mergers, coupled with a litigious environment raises some concerns and will require particular attention to ensure fair and non-discriminatory access. Particularly problematic is the question of how to guarantee last mile access to customers.

8.2. Business and Financial Services

Much of the focus of EU-U.S. discussions in the field of financial regulation over the past three years has been to find pragmatic and mutually satisfactory solutions to ensure that provisions of the U.S. law do not have unintended consequences for activities of EU established entities and vice-versa. In general, recognition of equivalence of home-country standards for capital and banking markets would significantly reduce the regulatory burden of firms and financial institutions that are active on both sides of the Atlantic. Since 2002, the EU-U.S. Financial Markets Regulatory Dialogue has been tackling existing issues of concern and acting to prevent new ones from emerging. Financial services negotiations in the framework of the GATS are also important. In this context, the EU is working to improve access for European financial institutions to U.S. markets in a number of key sectors.

The implementation schedule of the General Agreement on Trade in Services (GATS) for professional services has brought about some improvement in market access. However, a number of problems remain to be tackled in order to secure more transparent and open access to the U.S. market. The Sarbanes-Oxley Act of 2002, adopted as a reaction to U.S. corporate scandals, has had a significant impact on U.S.-listed EU companies, as well as on EU auditing firms, which could face conflicting laws on audit and corporate governance. As a result of this new momentum and the commitment of EU institutions, significant progress is currently being made in the area of mutual recognition of accounting standards. On 15 November 2007, the Securities and Exchange Commission (SEC) agreed that foreign companies preparing their accounts in accordance with International Financial Reporting Standards (IFRS) would

no longer have to reconcile them with U.S. GAAP. A two year transitional regime will be applicable to firms using the EU opt out from International Accounting Standard no. 39. Discussions have also started on the issue of mutual recognition of auditing oversight. EU took its equivalence decision on 12 December 2008 when the measures adopted under the Prospectus Directive and Transparency Directive determined that the US GAAP (and a number of other third country GAAPs) are equivalent to IFRS as adopted by the EU, and consequently, the US issuers can use US GAAP for their filing in the EU regulated market.
Furthermore, on 14 November 2008, the US Securities and Exchange Commission formally put forward its "Roadmap for the potential use of financial statements prepared in accordance with international financial reporting standards by U.S. issuers". It laid out a provisional timetable for US companies to switch from US GAAP to International Financial Reporting Standards. Providing certain conditions were met by 2011, the main date for the changeover would have been 2014.
Finally, EU firms wishing to leave U.S. capital markets used to be virtually prevented from doing so due to excessively restrictive SEC deregistration. These rules have now been relaxed since the adoption of a new SEC rule on deregistration, effective since June 2007, and several EU firms have already taken advantage of this new possibility. EU has done its best to cooperate with the US regarding auditing as we have granted a transitional period until July 2010 to US auditors whereas the US has not taken any action whatsoever.

The treatment of EU global custodians in the U.S. International banks remains problematic since they must register in the U.S. as broker-dealers under Section 15 of the Securities and Exchange Act 1934 if they provide global custody and certain related services directly to U.S. investors from outside the U.S. This is not the case for U.S. banks doing the same business since they are covered by an exception pursuant to SEC "Regulation R" adopted in September 2007. As it is now, U.S. banks enjoy an advantage as they are able to provide the same services to investors in the EU without registration in the EU and they are spared from SEC supervision in this respect. Within the Financial Markets Regulatory Dialogue, discussions are ongoing to find a mutually acceptable solution, in particular because the issue will not be solved in the context of the SEC's proposed revisions to Rule 15a-6. Against this background, the more appropriate approach would be to provide relief comparable to what is provided to U.S. banks under Regulation R.

The current requirement for non-U.S. reinsurers to post 100% collateral for their U.S. acceptances is both discriminatory and technically unjustifiable in the modern age. In December 2008, the National Association of Insurance Commissioners (NAIC) endorsed the principle of a move away from the discriminatory reinsurance collateral requirements, substantially reducing such requirements for non-U.S operators, whilst nevertheless remaining discriminatory. The plan would also institute a single licensing system for U.S. reinsurers, and a single "port of entry" for non-U.S. companies. The new rules are now awaiting uniform nationwide enactment via federal legislation. Discussions remain ongoing both within the Financial Markets Regulatory Dialogue and the Trans-Atlantic Economic Council in order to ensure the new rules are actually implemented and remaining discrimination is addressed.

Concerns relating to access to U.S. financial markets frequently centre on the extent to which compliance with U.S. regulatory provisions is a proportionate or justified condition for providing financial services directly to U.S.-domiciled investors or counterparties. EU financial institutions are already subject to comparable and demanding authorisation and supervision in Europe. Several regulations of the U.S. Securities and Exchange Commission for foreign securities firms represent substantial barriers for the establishment of branches or subsidiaries despite positive developments in 2008 (see Section 3.1).

The crisis in the financial sector has significantly affected US and European Capital markets and the wider economy. Both the US and the EU and its Member States are engaged in a regulatory repair programme. Objectives of such repairs on both sides of the Atlantic are very similar and are more generally co-ordinated within the G20. Within the context of ongoing dialogues, efforts are undertaken to avoid regulatory divergences between the EU and US that may result in unwelcome trade barriers.

8.3. Transport Services

With regard to market access in air transport, progress was made in 2008, notably with the EU-US first-stage Air Transport Agreement coming into effect on 30 March 2008. The Agreement encompasses 60% of world traffic. It allows EU and US air carriers to operate to and from any point in the US from and to any point in the EU. It also provides possibilities to operate air transport services on international routes beyond the EU and US. Furthermore, the Agreement refers to further harnessing investment opportunities, thus addressing foreign ownership limitations, in second-stage negotiations. The first-stage agreement also creates new opportunities for EU air carriers to wet lease aircraft to U.S. air carriers for use on international routes between the US and third countries. Measures adopted on aviation security since 9/11 as well as the large scale governmental financial assistance provided to U.S. airlines are issues that also need addressing. *Section 1117 of the Federal Aviation Act* requires that, in general, transportation funded by the US Government (passengers and cargo, mail is covered by separate legislation) must be performed by US carriers. By contrast, in the EU, any obligation for government officials to use “national flag” is considered to be anti-competitive. The EU-US Air Transport Agreement creates new rights for EU airlines to carry certain categories of US Government-financed traffic under the Fly America programme, with a commitment to pursue further access in the future.

Regarding the security certification of foreign aeronautical repair stations, the Federal Aviation Administration (FAA) was prohibited from issuing new foreign repair station certificates unless the Department of Homeland Security's Transportation Security Administration (TSA) issued its final repair station security rules by 3 August 2008. As the TSA failed to meet this deadline, foreign repair stations can not be certified unless the repair station was previously certified and up for renewal or is already in the process of certification.

The 'Merchant Marine Act of 1920 (Jones Act)' prohibits foreign-built vessels from engaging in (direct or indirect) coastal trade and they cannot be documented or registered for dredging, towing or salvaging. In addition, there has been no progress on the elimination of requirements that US Government-owned or financed cargoes be shipped on U.S flagged ships. US maritime security legislation (such as the Container Security Initiative as well as the SAFE Port Act – see chapter 2.1 Cargo Trade) is also of concern to the EU. In addition, the US has not included any maritime services-related commitments in any of its offers in services in the Doha Round negotiations under the aegis of the World Trade Organisation.

9. Annex

	Security Related Trade Barriers
	Cargo Trade
Title:	**Container Security Initiative (CSI)**
Sector:	Horizontal
Description:	The US launched the Container Security Initiative (CSI) in 2002 so as to counter potential terrorist threats to the international maritime container trade system. The CSI consists of four elements: security criteria to identify high-risk containers; pre-screening containers before they arrive to US ports; using technology to pre-screen high-risk containers and developing and using smart and secure containers. The US Customs and Border Protection (CBP) launched the system to achieve a more secure maritime trade environment while attempting to accommodate the need for efficiency in global commerce. Ports participating in the CSI use technology to assist their officers in inspecting quickly high-risk containers before they are shipped to US ports. So far, ten Member States have signed declarations of principle with the CBP to introduce CSI in their ports as well as an agreement on stationing US Customs officials in their ports. The CSI screening and related additional US customs routines are allegedly causing significant additional costs and delays to shipments of EU machinery and electrical equipment to the US. This burden is so severe that a number of small European engineering companies have decided not to export to the US any longer because of CSI. There is also competitive distortion in this fiercely competitive engineering market between EU and US engineering companies since up to now there is, de facto, no reciprocity between the EU and the US in this issue.
State of Play:	In order to ensure a level playing field between European ports, the EU concluded an agreement that expands the EU-US customs co-operation agreement to include transport security aspects and to prepare minimum standards for all EU ports to participate in the CSI. In August 2005, the US agreed to participation in the CSI of more EU ports, which comply with certain jointly agreed minimum standards and where no US officials will be stationed. For this project, a pilot action was performed in 2007 in the port of Szczecin (Poland). This pilot is likely to be re-activated in 2009. Similar actions are underway in Aarhus (Denmark) and Salerno (Italy) and commenced at the beginning of 2008. Further EU ports may, by mutual consent, partake in this initiative in 2009. The EU-US working group established by the expanded agreement is currently working on further measures which are intended to diminish the barriers caused by this initiative.

Title:	**SAFE Port Act & Implementing Recommendations of the 9/11 Commission Act of 2007**
Sector:	Services - Transport
Description:	On 13 October 2006, U.S. President Bush signed into law the so-called SAFE Port Act (hereafter the Act). The Act contains a number of provisions that impact upon port security as well as international supply chain security. Section 231 of the Act foresees the establishment of a pilot programme at some foreign ports to test integrated non-intrusive imaging and radiation detection scanning equipment for all US-bound containers. This pilot programme goes against a modern customs approach of risk based controls through effective targeting followed by scanning and/or inspection when necessary and may slow down traffic in ports. The port of Southampton (UK) had been chosen to participate in this pilot project to study the feasibility of a 100% scanning approach. The US did not await the results of this pilot action, before pressing ahead with the 'Implementing Recommendations of the 9/11 Commission Act of 2007'. On 3 August 2007, the President signed

	into law the 'Implementing Recommendations of the 9/11 Commission Act of 2007'. This legislation introduces the requirement of 100% scanning in foreign ports of all maritime cargo destined for the US as from July 2012. The envisaged scanning of all US-bound containers in more than 600 ports from which ships leave for the US will be extremely expensive to implement at EU ports, could lead to major trade disruptions and add an additional administrative burden. Costs for the installation of the necessary equipment are expected to be borne by the port and shipping companies. In comparison, the costs of the pilot programme in the context of the US Secure Freight Initiative (SFI) that was intended to evaluate the feasibility of 100% scanning and to install such full scanning equipment in seven international ports, appropriated $60 million to cover costs in some, although not in all of those ports. For the Southampton pilot project alone the costs were estimated at $14.5 million. The new legislation also sets out other requirements (e.g. standards for container security devices and/or smart box technology), which have the potential to hamper the possibility for EU trade to compete fairly with their US competitors and to excessively burden the EU export supply chain. The Commission, Member States, vast majority of port operators and the entire trade community are seriously concerned about this new US legislation, in particular with respect to the potential costs of the scanning requirement, its possible effects on competitiveness and its negative impact on transatlantic trade flows. This measure is unilateral and would disrupt trade and cost legitimate EU and US businesses a lot of time and money. It would create a false sense of security and complacency since 100% scanning in no way implies 100% security.
State of Play:	The bill is to be implemented within a 5-year deadline (by 1 July 2012). For cargo carried on passenger aircraft the bill even requires a 3-year phase-in implementation with benchmarks of 100 % 'screening', but at this stage, it's not yet clear whether and how the requirements for air cargo will affect international transport. The Act includes an option to extend the implementation date by two years. This however is deemed not to provide sufficient certainty. Ports would need to plan well in advance such important investments as those required by the implementation of the scanning provisions. The EU continues raising its objections at political level, including at the meetings of the Transatlantic Economic Council (TEC) on 9 November 2007 and on 13 Mai 2008 as well as at DG level, especially through the promotion of mutual recognition of EU and US security standards and the need for proper risk analysis, which in our view is the right approach to 'secure trade'. Moreover, the Commission had submitted critical comments to the US Administration which have been included in the report US Customs Border Protection sent to Congress on Integrated Scanning System Pilots in June 2008. Besides, a long-term study on the impact of the US legislation has been launched.

	Extraterritoriality and Unilateralism
	Extraterritoriality
Title:	**Helms-Burton Act**
Sector:	Horizontal
Description:	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 was 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 Helms-Burton Act among others (a) allows US citizens to file lawsuits for damages against foreign companies investing in confiscated US (including Cuban-American) property in Cuba (Title III of the Act) and (b) requires the US Administration to refuse entry to the US of the key executives and shareholders of such companies (Title IV of the Act). The EU is of the view that these measures are contrary to US obligations under the WTO Agreements, in particular the GATT and GATS. In that respect, the EC initiated a WTO dispute settlement procedure on 3 May 1996.

State of Play:	On 11 April 1997, an Understanding was reached with the US concerning the Helms-Burton Act. The Understanding charted a path towards a longer-term solution through the negotiation of international disciplines and principles for greater protection of foreign investment, combined with the amendment of the Helms-Burton Act. The EC agreed to suspend its WTO case, but reserved the right to restart or to re-launch the WTO dispute settlement procedure, if action was taken against EU companies or individuals under the Helms-Burton Act, or waivers as described in the Understanding were not granted, or were withdrawn. At the 18 May 1998 EU-US Summit in London, building upon the April 1997 Understanding, the EU and the US reached an Understanding on a package of measures to resolve the dispute. The Understanding offers the real prospect for a permanent solution, but still depends on acceptance by the US Congress before full implementation may take place. The Understanding contains three main elements. The first element is the Understanding on investment disciplines. It contains a clear commitment on the part of the US Administration to seek from Congress the authority to grant a waiver from Title IV of the Helms-Burton Act (visa restrictions) without delay. With respect to Title III (submission of lawsuits against trafficking in expropriated property), the Understanding provides for a US commitment to continue to waive the right of US citizens to file lawsuits. Contrary to the Understanding, neither the waiver under Title IV nor a permanent waiver under Title III was granted. However, the Understanding waivers under Title III have been continuously granted on a six-monthly basis (the last waiver having been granted on 16 January 2008 with effect as of 1 February 2008) and no action has been taken, so far, against EU citizens or companies under Title IV, although the US Administration continues to investigate certain EU companies' investments in Cuba. The existence of the Helms Burton Act and the lack of permanent waivers under Titles III and IV continue to constitute an on-going threat to EU companies doing or intending to do legitimate business in Cuba. The second element is the Transatlantic Partnership on Political Co-operation (TPPC), which should be seen in conjunction with the EU's efforts vis-à-vis US Administration to restrain its use of unilateral sanctions with extraterritorial effects, so-called 'secondary boycotts'. The TPPC states that the US Administration will not seek or propose, and will resist, the passage of such sanctions legislation. The last element of the Understanding relates to the Iran-Libya Sanctions Act (ILSA). At the London Summit in 1998, the US Administration did not grant the EU a multilateral regime waiver as foreseen by the Understanding of 11 April 1997. However, the US determined, under Section 9(c) of ILSA, to waive the imposition of sanctions against a major EU investment project in gas exploration in the South Pars field in Iran and committed that similar cases could be expected to be granted similar waivers. The Understanding reached at the May 1998 Summit in no way softens the EU's position that the Helms-Burton Act is contrary to international law. The EU never acknowledged the legitimacy of these Acts and fully reserves its right to resume the WTO case against the Helms-Burton Act. Full implementation depends on congressional support, which still appears not to be forthcoming. The EU and its Member States can only fulfil the European commitments once the presidential waiver authority has been fully exercised.

Title:	**Iran-Libya Sanctions Act and Iran Freedom Support Act**
Sector:	Horizontal
Description:	The Iran and Libya Sanctions Act (ILSA), signed into law on 5 August 1996, provided for mandatory sanctions against foreign companies that made an investment above US$20 million contributing directly and significantly to the development of petroleum or natural gas in Iran or Libya. In addition, mandatory sanctions were also applicable against companies that violated the UN Security Council trade sanctions against Libya. ILSA spells out the following possible sanctions. 1. The President may direct the US Export-Import Bank not to approve any guarantee, insurance, or credit in connection with any goods or service to the sanctioned company. 2. The President may order the US government not to issue any specific license or grant any permission to export goods or technology to the sanctioned company. 3. US financial institutions may be barred from making loans or providing credits totalling more than US$ 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.

State of Play:	In November 1996, the EU passed a Blocking Statute which encompassed ILSA and Helms-Burton, among other U.S. laws. The 11 April 1997 EU-US Understanding on Helms-Burton and ILSA specified that the US agreed to work with the EU toward the objective of meeting the terms (1) for granting EU Member States with a Section 4 (c) waiver with regard to investments in Iran; and (2) for granting EU companies Section 9 (c) waivers with regards to investments in Libya. On 18 April 1997, the Council took note of the Understanding and agreed to suspend the WTO Panel while authorising the Commission to recommence or re-establish the Panel if adverse action pursuant to Helms-Burton or ILSA was taken against EU companies or waivers were not granted. On 21 April 1998, the WTO Panel lapsed automatically under WTO rules. Following the 1997 Understanding, the EU and the US agreed on a package deal at the 18 May 1998 EU-US Summit in London, which contains three elements (1) an agreement on disciplines for investments into illegally expropriated property; (2) a US commitment to self-restraint with regard to future extraterritorial sanctions legislation, as expressed in the Transatlantic Partnership on Political Co-operation; (3) an assurance of future waivers for EU companies under both the Helms-Burton Act and the ILSA. At the EU-US 1998 Summit, the US did not grant the EU a Section 4 multilateral waiver as foreseen by the 1997 Understanding, but opted instead to waive the imposition of sanctions against TOTAL for its investment in gas exploration in the South Pars field, and indicated that it expected to undertake the same waiver for similar cases in the future. With regard to Libya, the US agreed to 'engage with the EU in a sustained process for consideration of waivers under section 9 (c) of ILSA to companies for the EU'. ILSA was renewed in 2001. On 23 April 2004 in light of Libya's efforts to dismantle its weapons of mass destruction and missile programs and its renunciation of terrorism, the 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. On 30 September 2006, President Bush signed the 'Iran Freedom Support Act,' which extends and amends the Iran and Libya Sanctions Act of 1996, codifies certain existing sanctions against Iran, and authorizes assistance to support democracy in Iran. The Act basically extends ILSA for another five years, until 2011, and drops Libya from the law and its penalties.

Title:	**Iran Non-Proliferation Act**
Sector:	Horizontal
Description:	On 14 March 2000, the Iran Non-Proliferation Act (INPA) was signed into law. It provides for discretionary sanctions against foreign companies transferring to Iran goods, services and technology listed under the international export control regimes, as well as any other item prohibited for export to Iran under US export control regulations, as potentially contributing to the development of weapons of mass destruction. INPA constitutes extraterritorial legislation. On the one hand, it allows the US Administration to apply its own sanctions to exports which are subject to EU Member State and EU export control regimes. On the other hand, it unilaterally expands the scope of export controls on EU exports beyond those multilaterally agreed upon. Its adoption is incompatible with the US commitment under the Transatlantic Partnership for Political Cooperation (TPPC) to resist the passage of extraterritorial sanction legislation.
State of Play:	EU concerns were repeatedly expressed in the run-up to the adoption of this Act. Taking these into account, President Clinton issued a statement when signing the bill into law, undertaking to work with Congress in order to seek to rationalise the reporting requirements on transfers deemed legal under the applicable foreign laws and consistent with the multilateral export control regimes. In 2005 persons were arrested within the EU on grounds of extraterritorial application of criminal charges levied by the US against EU exporters who were not involved in export of dual use items covered by neither international export control regimes nor EC Regulation on export of dual use items and were not related to Weapons of Mass Destruction Programmes. The INPA also prohibits the US Administration to acquire space related technology and services from Russia. In the framework of the International Space Station (ISS) programme, the US has to acquire Russian Soyuz from 2006 in order to fulfil its space transportation obligations in the ISS programme, because the US Space Shuttle will not be available in the extent necessary for maintaining the ISS. Europe, as a partner in the ISS programme, depends on the US complying with its obligations. An amendment to the INPA authorises the Bush Administration to derogate from certain provisions that had become an obstacle to the acquisition of Russian space technology and services.

Title:	**US Dual-Use Export Controls**
Sector:	Horizontal
Description:	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. License Exception APR (Additional permissive re-exports) allows the re-exports from Country Group A:1 and cooperating countries, but that does not include Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia. This includes compliance with US prohibitions on re-exports for reasons of US national security and foreign policy. At present, the US export-control system for dual-use items listed on the US Commerce Control List (CCL) dictates that foreign companies require re-export licenses for items containing 25% or more of US-origin content. When such items are re-exported to countries listed on the US State Department's list of countries supporting terrorism, the requirement is stricter and all items with 10% or more of US-origin content listed on the CCL require re-export licenses. In some cases these re-export authorisations infringe European Single Market rules. The afore-mentioned License Exception APR (Additional permissive reexports) does not allow the reexports even from Country Group A:1 and cooperating countries if the commodities being reexported are controlled for missile technology (MT), chemical and biological weapons (CB), nuclear nonproliferation (NP), significant item (SI), or crime control (CC) reasons The extraterritorial nature of these controls has repeatedly been criticised by the EU, given the fact it consists of active members of all international export control regimes the Nuclear Suppliers Group, the Australia Group, the Missile Technology Control Regime and the Wassenaar Arrangement. Furthermore, on 12 December 2003, President Bush signed into law the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003 (SAA). The President has chosen to implement a SAA provision prohibiting exports of items listed on the Commerce Control List. This dual-use ban provision also constitutes a de facto prohibition on re-exports by EU companies, as US export control regulations require a new license every time an item with at least 10% US-origin content is re-exported from a third country to a country 'supporting terrorism' (i.e. Syria). Now that there is a general ban on exports and re-exports to Syria, such re-export licenses would not be given and this de facto prohibition on re-exports for reasons of US national security and foreign policy would negatively affect EU exports to Syria containing US components. The EU reiterates that its policy is to permit free circulation of dual use goods within the EU because of the single market with the exception of a few items listed in Annex IV of the Regulation 1504/2004 in force and that this policy applies equally to transfers which are tangible and intangible. Following a conference between the European Commission and EU dual use exporters in 2004, it became clear that US re-export clauses which affect EU companies exporting dual use items with some US content (in some cases as little as 10% of controlled technologies) and even in some cases, concern non US origin technologies exported by EU citizens to third countries under US unilateral embargo. This is creating barriers to market access in third countries to EU companies. They are not in line with the EU policy of dual use exports to those countries which deny some dual use exports based on Common Foreign and Security Policy grounds and do not apply 'total embargoes' to those countries.

Title:	**SEC Regulations for Securities Firms**
Sector:	Services - Financial
Description:	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 U.S. by foreign securities firms 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 has to register thus becoming subject to the Securities and Exchange Commission (SEC) regulation.

	Foreign mutual funds have not been able to make public offerings in the U.S. because the SEC´s conditions make it impracticable for a foreign fund to register under the U.S. Investment Company Act of 1940. The SEC has not so far clarified the conditions under which EU exchanges can place trading screens terminals with U.S. professional or institutional investors (without having to register as a 'national securities exchange'). The right to place trading screens with U.S. professional/institutional investors could attract increased liquidity for securities admitted to trading on EU exchanges, as well as reducing intermediation costs for U.S. market participants trading EU-listed securities. The efficient and transparent organisation of European exchanges and the demanding regulatory framework in which they operate suggest that regulatory considerations should not be a barrier to allowing sophisticated U.S. market participants to trade freely on those exchanges. The SEC has used a number of occasions since the beginning of 2007 to indicate its willingness to move away from its previous position to allow foreign brokers, dealers and exchanges to offer their services in the US. On 1st February 2008 the Commission and US SEC issued a joint press release on mutual recognition in securities in relation to brokers, dealers and exchanges, in which both the SEC Commissioner Cox and Commissioner McCreevy agreed to work together on this initiative. On 24th March the SEC announced the 'next steps for the implementation of the mutual recognition concept'. This statement indicates different processes to be put in place between the SEC and other actors, including the EU. Since then, SEC and European Commission officials have worked together on defining a process for carrying out a comparability assessment of the U.S. and EU securities regimes. The TEC endorsed this work in May 2008 and encouraged the parties to conclude this first phase as soon as possible in order to start with the comparability assessment of the U.S. and EU securities regime in 2009. In parallel, the SEC launched a consultation on the Rule 15a6 amendments in order to improve the process by which US investors have access to foreign broker-dealers, which closed in September 2008. However, due to the financial crisis and the change in the U.S. Administration work on mutual recognition of EU and US securities regimes and the revision of rule 15a6 have been stalled since Q4 of 2008.

Title:	**PATRIOT Act**
Sector:	Services - Financial
Description:	Section 319 of the PATRIOT Act, adopted in 2001, deals with the forfeiture of funds in United States inter-bank accounts by those accused of money laundering. It requires U.S. correspondent banks to maintain certain records concerning a foreign bank that has a U.S. correspondent account. Furthermore it provides authority for the Treasury Secretary and the Attorney General to subpoena the foreign bank's offshore records concerning the account and authorises forfeiture of deposits in the foreign bank.
State of Play:	Both the subpoena authority and the forfeiture clause have potential extraterritorial impact. The European Commission and others have complained vigorously both at the time of the adoption of the Act and during the comment period on proposed Treasury implementing regulations. In response, U.S. authorities said that they had no intention of using this seizure authority indiscriminately or in derogation of existing and efficient mechanisms, such as Mutual Legal Assistance Treaties, for the seizure of funds located outside of the U.S. Despite this reassurance, there were allegations in the past, from European banks and individual Member States, of a lack of clarity about the circumstances under which the U.S. would make use of Section 319 and when it would refrain from doing so, but for the last two years there have been no new allegations.

	Unilateralism
Title:	**Sections 301-310 of Trade Act**
Sector:	Horizontal
Description:	Section 301 of the 1974 Trade Act, as amended by the Omnibus Trade and Competitiveness Act of 1988 (hereafter, 1988 Omnibus Act), authorises the US Government to take action to enforce US rights under any trade agreement and to combat practices by foreign governments which the US Government deems to be discriminatory, unjustifiable or restrictive to US commerce. Title VII of the 1988 Omnibus Act relating to the removal of government procurement barriers was renewed. Furthermore, the 1988 Omnibus Act introduced a Special 301 procedure targeting intellectual property rights protection outside the US. Under Special 301, the US Trade Representative (USTR) has created a priority watch list to identify foreign countries that are deemed to deny adequate and effective protection of intellectual property rights (IPR). Countries placed on the priority watch list are the focus of increased bilateral attention and the USTR officially initiates investigation procedures that may eventually result in unilateral trade measures. The watch list is reserved for those countries that do not protect US intellectual property or that deny market access to IPR-related industries. 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 type 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. The US has resorted to unilateral action even since the WTO Uruguay Round Agreement entered into force on 1 January 1995. For instance, in the Bananas case, the US sought to suspend trade concessions against the EU before the DSB could decide whether the EU was in conformity with WTO rules. The EU challenged Section 301 legislation, as it may result in some cases in unilateral determinations and retaliatory action even before the WTO bodies can make their own judgement on a given situation. A WTO Panel ruled on 8 November 1999 that the statutory language of Sections 301 to 310 of the 1974 Trade Act was as such inconsistent with the rules of the WTO DSU. However, because the US administration formally undertook to always refrain from taking action under Sections 301-310 in the absence of a previous WTO determination, the Panel concluded that no violation was taking place. The practical result of this ruling has been to make Sections 301-310 ineffective against WTO members. Nevertheless, 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.
State of Play:	Member states Hungary, Italy, Lithuania, Poland and Romania remain on the 2007 Watch List. Bulgaria, Latvia and the EU were removed from the 2007 Section 301 Report. The Czech Republic was added to the Watch List in early 2008. 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.

Title:	**Hormones Dispute (Continued Suspension of Obligations)**
Sector:	Horizontal
Description:	In 1989 the EU banned imports of hormone treated meat. The US and Canada responded by imposing retaliatory measures, suspending their obligations and imposing import duties in excess of bound rates on imports from the EU, and by initiating a WTO dispute settlement proceeding. In 1998, the EU lost the WTO dispute brought by the US and Canada. The reason was that the legislation was not based on a full scientific risk assessment in relation to the risk arising from the ingestion of meat from animals treated with hormonal growth promoters. The Appellate Body overruled the earlier Panel but recommended that the EU bring its measures into conformity with obligations under the Agreement on Sanitary and Phytosanitary Measures (SPS). The EU followed by eliminating the WTO inconsistencies and based its new Hormones Directive of 22 July 2003 on a full scientific risk assessment. Despite compliance with WTO rules the US (and Canada) to this date continue to apply their retaliatory measures.
State of Play:	The amendments to the Hormones Directive were adopted by the Council on 22 July 2003, and the new Directive 2003/74/EC, implementing the WTO ruling, entered into force on 14 October 2003. On 27 October 2003, the EU notified to the WTO that it had implemented the WTO ruling of 1998 and that, as a consequence, the US' sanctions vis-à-vis the EU were no longer justified. However, the US disagreed and since then has not lifted its sanctions. At the Dispute Settlement Body meeting of 7 November 2003, the EU proceeded to notify the new Directive as compliant in this case. The US (and Canada) disagreed and kept their retaliatory measures. Furthermore the US did not initiate a compliance dispute in the WTO, as is foreseen for such situations according to the WTO's Dispute Settlement Understanding. Informal attempts to persuade the US to suspend its sanctions and to initiate a WTO review under Article 21.5 DSU failed. Consequently the EU requested on 8 November 2004 formal consultations with the US (and Canada) regarding the continued application of the countermeasures. The EU's challenge was directed against the US' continued suspension of its obligations and its continued imposition of import duties in excess of bound rates on imports from the EU despite the EU's removal of the inconsistent measures. The EU considered that the WTO Agreement does not allow simply continuing to apply sanctions since this would amount to a prohibited unilateral determination of alleged non-compliance by the EU. The Appellate Body however ruled that WTO Members are permitted to maintain sanctions until the WTO-compliance of the implementation measure has been demonstrated in a compliance WTO-dispute. The Appellate Body also recommended that the United States, (Canada) and the EU initiate such compliance proceedings without delay. The EU has already initiated such compliance proceedings by requesting consultations with the US and Canada. The U.S. and the E.U found a way forward in this long-running in May 2009. While new Carrousel sanctions would not apply, the U.S. would maintain the currently reduced level of existing sanctions against EU products (68% or USD 79 million lower) and would eliminate all sanctions beginning in the fourth year of the agreement. In return, the agreement would provide additional duty-free access to the EU market for the type of high quality beef traditionally exported by the U.S. and produced from cattle that have not been treated with growth-promoting hormones. The agreement would provide additional duty-free access for 20,000 tons of beef in the first three years, increasing to 45,000 tons beginning in the fourth year. Before the end of the four-year period, the two sides will seek to agree on the conditions for the settlement applicable beyond that period.

Title:	**Section 407 of the Trade and Development Act (Carousel Law)**
Sector:	Horizontal
Description:	Section 407 of the Trade and Development Act , enacted on 18 May 2000, enables the U.S. Trade Representative (USTR) to periodically revise the list of products subject to retaliation when, according to the U.S., another country fails to implement a WTO dispute decision. The periodic revision of the law has become known as 'carousel retaliation.' The law provides for a mandatory and unilateral revision of the list of products subject to suspension of GATT concessions 120 days after the application of the first suspension and then every 180 days thereafter, in order to affect imports from Members which have been determined by the US not to have implemented WTO recommendations.

State of Play:	The EU believes that the 'carousel' legislation is at odds with the basic principles of the WTO Dispute Settlement Understanding, being a unilateral act and affecting the predictability of the trading system. The cumulative effect of application of the 'carousel' system goes beyond what is authorised by the WTO. The EU therefore, requested WTO consultations, which were held on 5 July 2000, making it clear that it was not acceptable to apply this legislation. The US has for the time being refrained from applying it and, therefore, the EU has not requested the establishment of a panel. Following the provisional agreement (May 2009) between the U.S. and the E.U in their beef dispute (see previous fiche), the U.S. agreed not to impose the 'Carousel' sanctions which were due to come into force.

	Tariff Barriers
Title:	**Textile Tariffs**
Sector:	Textiles and Leather
Description:	High tariffs make the US one of the most difficult export markets for EU textiles and clothing industry. Industry considers that the US tariff peaks constitute a very harmful barrier because they are focussed on very competitive products. Tariffs peaks range from 32% for some clothing, 25% for fabrics and 13,2 % for yarns. In addition, specific duties apply for a wide range of textile products. Many significant tariffs and tariff peaks will remain on products of export interest to the EU. These include (a) certain woollen fabrics and articles of apparel for which duty rates in 2002 reached 27.6% plus a specific rate of 9.7 cents/Kg in certain fabrics and 32.5% for some apparel and (b) several footwear products for which the current duty rates are 48% or 37.50% plus a specific rate of 90 cents/pair.
State of Play:	In the context of the WTO negotiations on NAMA the EC in its second submission of 31 October 2003 (TN/MA/W/11), proposed, inter alia, that Members agree, to deeper tariff cuts for textiles, clothing and footwear with a view to bringing these tariffs within a narrow common range as close to zero as possible. This proposal has to be put in the context of the recent end of the textile and footwear quota regimes.

Title:	**Footwear and Leather Tariffs**
Sector:	Textiles and Leather
Description:	Tariffs levels on leather (3% or 5%) represent an important barrier for European exporters, considering the margins in the sector (from 1 to 5%) and the fact that EU leather is the most expensive of all US imports, while other competitors are able to import into the US at preferential regime (NAFTA and other preferential agreements). Furthermore, EU industry is denied access to footwear tenders for the US Army. As Canada is allowed to participate in those tenders, the measure could be described as discriminatory against European companies. US tariff peaks affect gaiters and other special footwear. Although gaiters are not a priority for the EU industry, it is interested in exporting hunting shoes. For the moment, such tariff peaks are a barrier to such exports. Tariffs for some footwear products are as high as 48% of the Free on Board (FOB) value (More information is available at DG Trades Applied Tariffs Database under Product Code 64).
State of Play:	In the context of the WTO negotiations on NAMA the EC in its second submission of 31 October 2003 (TN/MA/W/11), proposed, inter alia, that Members agree, to deeper tariff cuts for textiles, clothing and footwear with a view to bringing these tariffs within a narrow common range as close to zero as possible. This proposal has to be put in the context of the recent end of the textile and footwear quota regimes.

Title:	**Ceramics and Glass Tariffs**
Sector:	Ceramics and Glass
Description:	Tariff negotiations in the Uruguay Round still left a number of important tariff peaks, customs duties on ceramics and glass products remain relatively important and higher in the US than in Europe. The US rejected the Community's offer to abolish tariffs in this sector even though Mexico, one of Europe's leading competitors in the US market, should, after a transitional period, enjoy a zero duty rate by virtue of the NAFTA (North Atlantic Free Trade Area). In certain areas where EU producers have a traditionally strong position on the US market, such as hotel ware, the most that the

	Americans were willing to concede was a simple reduction of the rates. - For ceramic (not porcelain or china) hotel and restaurant ware, the rate is now 28%. - For porcelain or china, the rate is currently 25%. - For glassware, the maximum rate remains at 38% even if most of the glass products are between 10% and 20%.

Title:	**Parquet Tariffs**
Sector:	Wood, Paper and Pulp
Description:	The EU parquet industry, as well as several EU Member States, have raised their concerns at the tariff duty applied by US Customs to multi-layer parquet panels, notably following the 2007 modification of the Harmonised Tariff System of the US (HTSUS). Several products that had been subject to a zero duty for many years previously are now subject to duties of 3.2 % and 8 %. The products concerned are assembled 3-layer engineered wood panels with: (a) a top layer consisting of strips of hardwood of at least 2.5 mm; (b) a core layer constructed of strips of dense softwood about 10 mms thick or wood-based panels (such as MDF) and (c) a bottom layer consisting of a thin ply of wood or veneer. Most of the products concerned are classified in the EC as 'parquet panels' under HS subheading 4418 72, a subheading created by the 2007 HS out of the former subheading 4418 30. The US schedule contains a duty-free commitment for products falling under tariff sub-heading 4418 30 (currently, 4418 72). As regards US Customs classification, some of these products, namely those with a top layer of 4mm or more, are classified under sub-heading 4418 72 90, in line with a 2005 Classification Opinion by the WCO Harmonised System Committee (HSC) on classification of multilayer parquet panels. However, instead of the zero duty bound in the GATT US schedule for former 4418.30, the HTSUS imposes a duty of 8 % on sub-heading 4418 72 90. Given that this sub-heading comes out of former 4418.30, this appears to contradict the US commitment. Moreover, most of the EU products imported into the US are parquet panels with a top layer of less than 4 mm. Most of those products are currently classified as plywood flooring falling under the subdivisions of HTSUS 4412 31 and, therefore, also subject to an 8 % duty. However, most products concerned do not correspond to the definition of 'plywood' laid down in the HS. This appears to be an erroneous classification, which, therefore, would also contradict the tariff commitments of the US. US Customs is reportedly reviewing all declarations of shipments of wood flooring since 2003 in light of this classification and is notifying the imposition of large penalties on importers.

	Non Tariff Barriers
	Regulatory Divergences
Title:	**Non-Use of International Standards**
Sector:	Horizontal
Description:	The US standardisation system is different from the European model in respect to the development and use of international standards. Although a significant number of U.S. Standards Development Organisations (SDOs) standards often have a high standing internationally for their technical content in the industry sector and are claimed to be technically equivalent to international ones, their process do not require balanced representation, either in terms of nationality (US dominated) or participation

	of all interested parties and consensus building (NGOs and SMEs interests are not ensured as in ISO and IEC). Hence they may not fully meet the requirements of the TBT. The essential characteristic of the European Standardisation system which comprises the three European Standardisation Organisations, CEN, CENELEC and ETSI is the pursuit of total harmonisation. One European Standard (EN) is adopted and implemented as a national standard in all EU Member States. This access to a market of 490 million people through compliance with one European standard is available equally to European and non-European manufacturers and service providers. In addition the commitment of the European Standardisation system to the primacy of international standardisation through the existence of cooperative Agreements between ISO and CEN and IEC and CELELEC, ensures not just an open European market but also market access to those regions which have a similar commitment to the International Standardisation Bodies, ISO and IEC. The United States system is different from the European one. Although through its accreditation of about 250 Standards Development Organisations, ANSI-the American National Standards Institute-has made available more than 10.000 American National Standards, these alone rarely provide access to the US market, as exporters to the US must also meet prevailing state and federal laws. There are few unique national standards applied across the whole country and access to the US market is not granted simply through compliance with standards. Even though ANSI is a member of ISO and IEC, both these two International Organisations are viewed as little more than SDOs, competing with more than 800 SDOs in US. This fragmented and sectoral approach to US standards development activities encourages the most prominent SDOs not to limit their activities to national boundaries. In addition the sectoral and competitive bases of the SDOs activities make it extremely difficult to develop unique standards, which are able to grant access to the total US market. The EU has attempted to clarify some of these issues at the TBT Committee in Geneva but, as explained above due to the fundamental differences between the US and EU systems no progress was made in this respect.
State of Play:	The EC and the US are examining how international standards are used in their respective bodies of legislation. A report on the use of standardisation in legislation will be produced in mid-2009 for the Transatlantic Economic Council (TEC), which will provide a basis for identifying possible new areas for convergence.

Title:	**Pharmaceutical and Herbal Products (FDA Approval)**
Sector:	Pharmaceuticals
Description:	The Food and Drug Administration (FDA) must approve a new medicinal product before it can be commercialised. However, the delays in approval for non-US new medicinal products are longer than for US developed medicinal products. By means of an over-the-counter (OTC) procedure, some active substances at given dosages, formulations, indications and labelling are compiled as OTC monographs which are published in the Code of Federal Regulation (CFR). Medicines conforming with an OTC monograph can be marketed without delays. Some OTC medicines do not fall within the monograph system and require the submission of New Drug Application (NDA) which is an extensive and resource-intensive process. 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. Although, in principle, Time and Extent Applications (TEA) provide a route to permit foreign marketing data into the OTC monograph system, the data to be provided in a TEA are extensive and the development of an OTC monograph takes on average a decade. The issue has been explicitly discussed at the 'Transatlantic Administrative Simplification Workshop' on 28 November 2007.
State of Play:	New provisions clarifying the criteria and procedure for classifying foreign OTC products generally recognised as safe and effective were published on 23 January 2002. Main criteria for a condition to be considered eligible for the drug monograph system are marketing information in at least one country outside the United States and a number of further requirements. While these provisions were welcome in principle, the process in practice is extensive and requires a long time. Administrative market access hurdles for herbal medicines from Europe exist since new herbal medicines still face difficulties in the authorisation process. The last meeting took place in March 2005, where new terms of reference to guide future cooperation were developed and approved. In the framework of CHIC,

	the FDA and DG Enterprise and Industry have exchanged extensively information on respective regulatory systems, safety concerns, and alternative testing methods to animal testing, including discussing the establishment of a rapid alert system to exchange data on adverse reactions. The exchange of information is, however, only a first step. It is equally important that the US and EU authorities take each other's findings into consideration when regulating in particular cosmetic products and their ingredients, since some products may have a different classification in the US and in Europe (e.g. sun blocks are regulated as cosmetics in Europe but as OTC in the US).

Title:	**American Automobile Labelling Act**
Sector:	Automotive
Description:	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.

Title:	**Textiles Documentary and Labelling Requirements**
Sector:	Textiles and Leather
Description:	Extensive product description requirements complicate EU textile exports to the US and result in additional costs. Rules are burdensome for marking and labelling retail packages to clarify the country of origin, ultimate purchaser in the US and the name of the country in which the article was manufactured or produced. Furthermore, there are requirements relating to the typology/physical characteristic of clothing labels (given size, font used, etc). These standards are different than those from the EU, meaning that special labels are needed for the US market. In addition, customs formalities for imports of textiles, clothing and footwear to the US require the provision of particularly detailed and voluminous information, which lead to additional costs and in some cases include confidential processing methods (type of finishing, of dyeing, etc). Much of this information seems to be relevant for customs or statistical purposes. The extension of the liquidation period 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 two to three months) and therefore have to be marketed immediately. Consequently, the retailer or the importer is often not in a position to re-deliver the goods upon Customs and Border Protection (CBP) request, in which case CBP applies a high penalty (100% of the value of the goods). These delays are particularly damaging for seasonable products or for fashionable products.
State of Play:	In the context of the WTO negotiations on NAMA-NTBs, the EC and the US have made a specific negotiating proposal in relation to labelling for textiles, clothing, footwear and travel goods aimed at establishing disciplines on requirements for labels.

Title:	**Sunscreen products: Sunscreen protection factor labelling**
Sector:	Cosmetics
Description:	The FDA only recognises Sun Protection Factor (SPF) values of up to 30+, whereas the recommended limit of SPF on sunscreen products is SPF 50+ in many countries including the EU.

State of Play:	In August 2007 the FDA proposed an amendment to the rules and an increase from SPF 30 to 50, and there was a public consultation which ended in November 2007. A response has not yet been published.

Title:	**Wine Distribution**
Sector:	Wines & Spirits
Description:	Some state legislation prevents cross-state retail sales of wines and spirits; prohibits EU exporters from distributing, rebottling, or retailing their own wine; requires duplicate label approvals; levies fees and charges; and other procedures. Direct distribution is becoming an increasingly important issue. Certain states allow in-state wineries to ship directly to retailers and restaurants, bypassing the traditional three-tier system. As a result of the 'Costco' ruling, states that allow such direct-distribution will be forced to open direct-distribution to out-of state producers or to eliminate direct-distribution rights altogether. However, foreign wines are not allowed to be distributed directly to retailers. A number of states, termed the 'reciprocal states', have agreed among themselves to facilitate the distribution of wines among themselves, whilst requiring imported wines to continue to be channelled via the more burdensome procedures and trade-restrictive concessionary networks. In addition some state regulations on direct-to-consumer shipment are changing due to the US Supreme Court's Granholm ruling. As a result certain states are now allowing shipments of wine directly to consumers, if the winery obtains a permit from the state they wish to ship to. However, in most cases only domestic wineries are eligible to obtain the permit. In both cases, direct to consumers' shipment and direct distribution, state legislators do not take imported products into account when establishing regulations and appear to discriminate against foreign wines.
State of Play:	The issue is being discussed in the framework of the EU/US wine talks.

Title:	**International Nomenclature Cosmetic Ingredient (INCI) name**
Sector:	Cosmetics
Description:	The common name for cosmetics ingredient labelling referred to in the EU regulations is known as the International Nomenclature Cosmetic Ingredient name or INCI name. It is based on a Nomenclature developed jointly by the EU and US cosmetic industries. While a single INCI name exists for the vast majority of cosmetic ingredients, there are few cases where two (or more) variants exist for the same ingredient. The most famous example of this is the US special requirement that 'WATER' be used where the normal INCI code is 'AQUA', which in turn triggers the regulatory requirement in Canada to use the word 'EAU'. The existence of multiple INCI names leads to barriers to international trade and increased potential for confusion for consumers, whereas the use of a unique INCI name helps to ensure transparency, provides benefits to consumers, health care professionals, governments, and industry alike. European industry strongly advocates the adoption of a single INCI name.

Title:	Pressure Equipment Regulation
Sector:	Other Industries
Description:	Pressure equipment in the US is regulated on a local level, e.g. by local jurisdictions. For some specific pressure equipment used at the work place, this local regulation is complemented by Occupational Safety and Health Administration (OSHA) rules, which is part of the federal US Department of Labor. The regulation on pressure equipment in the US relies on the national standards of the American Society of Mechanical Engineers (ASME) code. Although the ASME code is the basis, most of the local jurisdictions" regulations complement it by additional and locally slightly different provisions mainly on administrative procedures resulting in what can be perceived as excessive red tape. Moreover, the prescriptive approach of the US legislation impedes innovative approaches to technical problems and grants a de facto regulatory monopoly to a private organisation. At the meeting in Washington on May 3, 2004, the US claimed that pressure equipment legislation on the state/jurisdiction level is considered to have no trade impact and is therefore not notified to the WTO. In order to have their products accepted in the US market, European manufacturers need to have their welders and non-destructive testing (NDT) personnel certified according to ASME requirements, which incurs extra costs. Another problem concerns ASME list of approved materials. European pressure equipment manufacturers envisaging to use a particular material for the US market, which is not listed in the ASME code, are faced with significant problems. The only possibility is the so called code case procedure that it is very time-consuming, costly and requires a lot of test series and corresponding data. Many US jurisdictions provide for state specials, which are items of pressure equipment that have been granted a (partial) exemption from the ASME code. 'State specials are very rare and in practice not economic for new pressure equipment (i.e. only to be considered if already-existing pressure equipment designed according to a foreign code should be brought to the US). Since state specials are implemented by State law, any improvement in this respect would require the modification of 50 State laws a process which is not feasible, moreover since no coordinated action can be expected. This prescriptive approach of the US legislation impedes any alternative solution to enter the market. No international or European standards are accepted. The ASME code requires a mandatory initial (and then frequently repeated) inspection of manufacturers - and independent of the amount of pressure equipment manufactured - by an Authorised Inspection Agency (AIA). For foreign manufacturers the AIA has to be an insurance company authorised to write pressure equipment insurance in at least one US jurisdiction, while third-party inspection of US manufacturers may also be performed by local jurisdictions. According to information from the National Board, the future nomination of non-US foreign government agencies as AIAs, which would have to be accredited to ASME criteria, is about to be approved. Although such a change would certainly be a positive development, the mandatory AIA inspection still creates high entry costs to the US market for European manufacturers and there is no analogy imposed by European legislation on US manufacturers. High entry costs particularly penalise small manufacturers producing only limited quantities of pressure equipment for the US market with respect to their US peers.

Title:	Electrical and Electronic Equipment Barriers
Sector:	Electronics
Description:	Most electrical products in the EU go through a product approval process called 'internal production control', which in international discussions often is referred to as Suppliers Declaration of Conformity (SDoC). The European Commission requested that the US Occupational Safety & Health Administration (OSHA) deregulates its current procedures that require products to go through nationally recognised testing laboratories, ideally by a move towards SDoC. Nationally Recognised Testing laboratories (NRTLs) are third-party laboratories that have met OSHA requirements for performing safety testing and certification of electrical and other products used in the workplace. NRTLs test and certify these products to determine whether they conform to appropriate U.S. product-safety testing standards. SDoC, applicable for most electrical products placed on the European Union market, obliges manufacturers to adhere to strict safety requirements and obliges them to be able to document compliance at all times. It leaves however the detailed modalities for the proof of compliance to the manufacturer and does not require him to use a locally recognised test laboratory. They therefore are free to use the services of any competent (e.g. accredited) test laboratory or use in-house competence.

State of Play:	On 20 October 2008 OSHA published a request for information and comments on a proposal to permit the use of Suppliers Declaration of Conformity (SDoC) as an alternative to the Nationally Recognised Testing laboratories (NRTLs) product-approval process. The public has had 90 days to respond (i.e. until 20 January 2009).

Title:	**Organic Products**
Sector:	Agriculture and Fisheries
Description:	The US National Organic Program (NOP) requires all agricultural products sold, labelled or represented as organic in the US to be certified by a U.S. Department of Agriculture (USDA) accredited certifying agent. However, imported organic agricultural products may also be sold in the US if they have been certified and recognized through a USDA recognition of conformity assessment or a recognition of equivalency. The EU and the US have entered into bilateral negotiations with a view to mutually recognising the equivalency of the organic production systems applied by each Party. This should facilitate trade in products originating from organic production methods while ensuring the integrity of the organic production method. While substantial progress had been made in the negotiations for two years, the talks are at a standstill since May 2004 and no further road map has been laid out.

	Registration, Documentation, Customs Procedures
Title:	**U.S. Customs Refusal of EU Origin**
Sector:	Horizontal
Description:	US Customs does not recognise the EU as a country of origin, nor does it accept EU certificates of origin. In order to justify EU country of origin status, EU firms are required to furnish supplementary documentation and follow further procedures, which can be a source of additional costs. The European Commission and the Transatlantic Business Dialogue (TABD) have consistently urged the US to recognise a simple EU origin. US Customs noted this issue extends the scope of customs policy and that inter-agency consensus did not yet exist. Some US industries and organised labour opposed the change whilst other business had cost concerns (i.e. marketing). For example, tyres imported into the US are required by law to be labelled with their country of origin. If tyres marked 'made in the EU' were accepted, market access would be improved and trade less onerous.

Title:	**Bioterrorism Act**
Sector:	Agriculture and Fisheries
Description:	The US Public Health Security and Bioterrorism Preparedness and Response Act was signed into law on 12 June 2002. The measure is intended to address security risk surrounding the supply of foodstuffs. The implementation of the so-called Bioterrorism Act (BTA) 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 measures 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 by private individuals are exempted, but foreign mail order companies are still subject to these burdens. The additional red-tape resulting from the implementation of the BTA does affect EU agri-food businesses in particular small and medium enterprises. Key elements of BTA include: • Registration of facilities - requires every 'food facility' from which foods are exported to the US to be registered with the US Food and Drugs Administration (FDA). Food facilities are also required to identify their US agent, which implies that they must have a US agent in order to be registered. • The prior notice measure requires that every shipment to the US must be preceded by advance notice of no more than 5 days and at latest by eight hours (if by sea) or by four hours (if by air) before arrival. Products imported from unregistered food facilities or for which inadequate notice is given cannot be imported and will be removed to secure storage. • Also, EU member states expressed concerns related to US lack of recognition of our plant-passport system, applied for re-exports of plant products originated in other MS different of the exit one. EUs certification system for re-exports is fully in line with ISPM 12 (Guidelines for Phytosanitary Certificates) and this lack of recognition is adversely affecting EU exports. Other trade concerns are related to US requirements for nursery products to be fumigated in a facility supervised by them before exporting. • Record-keeping provisions set out the minimum rules for documentation related to imported foodstuffs and in principle cover all facilities that have to register. This provision may have far reaching extraterritorial effects. The Commission has repeatedly stressed the need for transatlantic consultation on these issues to increase the effectiveness of EU-US coordination addressing potential terrorist threats to the food supply.

Title:	**[early warning] Tightening of US import conditions for food and beverages**
Sector:	Horizontal
Description:	The US response to recent scandals and scares around imports of unsafe food, feed and drinks is taking shape. Administration and legislators have introduced about a dozen independent proposals to improve the situation and the exact outcome of this debate is still unpredictable. However, a few elements emerge, which may have an impact on EU exports: Import inspection fees. Renewal of FDA registration of all establishments every two years. Mandatory certification for 'high risk foods' (on the basis of establishments or countries and under the conditions established in a Memorandum of Understanding). Voluntary certification programs, e.g. related to bio-preparedness, adherence to which will allow expedited border processing. Country of origin labeling. Increased civil penalties and bonding amounts for imports. Other, less predictable elements are the accreditation of private laboratories for conformity checks and possible adjustments in the Final Rule on Prior Notice for imported foods.

Title:	**Shipping Code Restrictions for EU Fishermen**
Sector:	Services - Transport
Description:	The US Code, Title 46, Shipping, Section 12108, prevents EU fishermen from fishing in US waters under the US flag as foreign-built vessels are not eligible to receive a fisheries licence. This situation also precludes the possibility of joint ventures and joint enterprises. In addition, the American Fisheries Act of 1998 included a provision that increased the percentage of shares in a vessel that must be held by US citizens in order for the vessel to be considered a US vessel from 50% to 75%.

Title:	**Textile Rules of Origin and Origin marking**
Sector:	Textiles and Leather
Description:	Under the U.S. rules of origin of 1996, the origin of apparel products is generally determined by the country where they are assembled. These rules being quite similar to EU rules of origin, there were few complaints made by EU producers of apparel. However, for certain products (mainly fabrics, bed and table linen, silk accessories), the country of origin is where the fabric is made. As a consequence, the origin of the final product becomes the third country origin (e.g. India or Pakistan) and it was required to indicate the name of the country where the fabric was made (e.g. made in China). This legislation particularly affected EU products imported into the EU as grey fabric from third countries (such as Pakistan or India) and processed into dyed, printed fabrics or table linen before being re-exported to the US. In order to address this issue, in July 1997, the EU signed an Agreement with the U.S. for certain products (silk scarves and fabrics, printed cotton and printed man-made fabrics). The Agreement concerned specifically two aspects (1) U.S. authorities agreed to return to former rules of origin; (2) U.S. authorities exempted a limited number of products from existing marking rules (the requirement to indicate the country where the fabric is produced, i.e. made in) in order to allow the import into the U.S. of silk accessories with a different marking. For example, a silk scarf processed (dyed and printed) in Italy with imported silk fabric could be marked designed in Italy with Chinese fabric. The Congress adopted in May 2000, the Trade and Development Act reinstating the rules of origin that existed prior to 1996 for certain textile products. Nevertheless, European companies still face difficulties with the rules of origin, especially for products such as scarves, bed linen, table linen, bedspreads, quilts containing cotton and wool. For these products, according to the U.S. rules of origin, the country of origin is still the country of origin of the fabrics, even if the fabrics have been dyed and printed and have undergone two or more finishing operations in the EU. Therefore, the producers of these products have to label their products with the country of origin of the fabric. This, according to them, does not reflect the work of design and the production process, which have been made in Europe. Regarding marking of origin, customs allow some flexibility. The goods can be marked with, for example, designed in Italy, but in immediate proximity of this indication and at least in comparable size, there should be marked legibly and permanently the name of the country of origin preceded by "Made in" and "Product of".
State of Play:	In the context of the WTO negotiations on NAMA-NTB, the EC and US have made a joint specific negotiating proposal in relation to labelling for textiles, clothing, footwear and travel goods aimed at establishing disciplines on requirements for labels.

Title:	**Section 8e of the Agricultural Marketing Agreement Act of 1937 (Act)**
Sector:	Agriculture and Fisheries
Description:	The following commodities are currently regulated under Federal Marketing Orders (MO): tomatoes, raisins, olives (other than Spanish-style green olives), avocados, mangoes, limes, grapefruit, green peppers, Irish potatoes, cucumbers, oranges, onions, walnuts, dates (other than dates for processing), hazelnuts (filberts), table grapes, eggplants, kiwifruit, nectarines, pistachios, apples, cherries, caneberries. These MOs provide requirements for the above mentioned commodities produced in one

	or more American States during a certain period of time. In the 2008 Farm Bill, clementines have now been added to the list. Section 8e of the Agricultural Marketing Agreement Act of 1937 (Act) provides that the importation into the United States of any such commodity, during the period of time such MO is in effect shall be prohibited unless it complies with grade, size, quality and maturity provisions set in the MO. In practice it means that any such commodities, imported from third countries, are checked against these requirements before release into free circulation in any American States. In the same time, such commodities produced and sold in an American State where the MO does not apply are not checked and do not need to meet these requirements. According to TBT, all technical requirements should equally apply both to imported and domestic products.

Title:	**The Lacey Act Amendments**
Sector:	Horizontal
Description:	The Lacey Act, initially adopted in 1900, is the United States oldest national wildlife protection statute and serves as an anti-trafficking law protecting a broad range of wildlife and wild plants. In May 2008, the Lacey Act was amended to extend its scope to all plants, including timber or associated wood products with the objective to combat illegal logging. The amendment added a new requirement for an import declaration, which will oblige importers of covered plants and plant products to list shipment information along with information such as plant scientific name and country of harvest to prove compliance with the Lacey Act requirements. In the initial phase (starting on 15th December 2008), the declaration would be voluntary, however, if found untruthful it will be directly enforceable. Obligatory declarations will be gradually phased in during 2009 and onwards. The amended Lacey Act covers an extremely broad scope of plants and plant products with a specific timeline for coverage issued in the Federal Register on October 8, 2008. The proposal would also implement enforcement of the declaration requirement in stages. First, products classified under Chapters 44 and 6 of the Harmonized System tariff nomenclature (wood products and live trees and plants). A second stage would cover products classified in Harmonized System Chapters 47 and 48 (wood pulp and paper and articles thereof). According to the federal register, after September 30, 2009, APHIS will enforce declaration requirements for additional chapters containing plants and plant products covered by the Lacey Act, including (but not limited to) Ch. 12 (oil seeds, misc. grain, seed, fruit, plant, etc.), Ch. 13 (gums, lacs, resins, vegetable saps, extracts, etc.), Ch. 14 (vegetable plaiting materials and products not elsewhere specified or included), Ch. 45 (cork and articles of), Ch. 46 (basket ware and wickerwork), Ch. 66 (umbrellas, walking sticks, riding crops), Ch. 82 (tools), Ch. 93 (guns), Ch. 95 (toys, games and sporting equipment), Ch. 96 (brooms, pencils, and buttons), and Ch. 97 (works of art).
State of Play:	On 8 December 2008, the Commission submitted public comments in response to the Federal Register notice and request for comments issued on 8 October 2008. The Commission's main concerns included issues related to the extensive scope and implementation. Specifically, the scope of the declaration, covering a wide range of products that lack an identifiable connection, or realistic possibility of a link to illegal logging, should be reduced in order ensure the efficiency and the relevance of the proposed legislation for actually combating illegal logging. Imposing onerous declaration requirements to products covering most of the HTS chapters would increase the cost of imports and cause delays in trade flows, without any evident added value as to combating illegal logging. Moreover, the European Commission considers that the additional HTS chapters indicated as subject to an additional enforcement phase in schedule after September 30, 2009, do not present any clearly identifiable link with illegal logging, and should therefore be excluded from the scope of the act. Alternatively, the Commission proposed several exemptions if agencies do not have the legal capacity to limit the scope of the act through full exclusions of the chapters listed in the last phase. In order to have greater clarity of the scope of the act, definition of the exclusions provided in the act like 'common cultivars' and 'common food crops' would be essential and need to be issued as soon as possible. APHIS is currently working on definitions of these terms, and it is our understanding that the definitions should be issued in early 2009. Another aspect which would require more clarity is the declaration requirement for 'plants' beyond the products linked with illegal logging. The Commission also requested clarification of the exclusion of 'any plant that is to remain planted or to be planted or replanted'. With regard to the implementation, the European Commission supports the phase-in system, but

	requested through the submission that the United States allow at least nine months for each phase-in period. The European Commission is also concerned that some of the plant declaration requirements, such as value of imports and quantity of the plants, would duplicate information already provided by importers during the customs clearance process. Lastly, given the wide range of product scope, the European Commission suggested to the United States to consider introducing de minimis rules as regards the proportion/weight of the wooden/plant originated part in a product. In response to the public comment and once the electronic system is near completion, APHIS should be publishing a federal register notice which will clarify declaration requirements enforcement and other details and definitions necessary for the full implementation of the Lacey Act Amendments.

	Import Prohibitions
Title:	**Section 232 of the 1962 Trade Expansion Act**
Sector:	Quantitative Restrictions and Related Measures
Description:	Only two EU firms have been able to make it onto the NCIMS list, considering the requirement to meet all PMO provisions and to finance the ongoing inspections by US state officials. Upon the European Commission request, FDA has agreed to enter into equivalence discussions with the EU and a working plan for these discussions was agreed in October 2005. Several meetings have been held since but progress is limited so far. It is the hope of the European Commission that these discussions can be advanced expeditiously in order to remedy the present situation in which it is extremely difficult to export Grade A milk products into the US.

Title:	**Drug Precursor Chemicals**
Sector:	Chemicals
Description:	In the area of drug precursor chemicals, the 'Combat Methamphetamine Epidemic Act of 2005' contained in the US Patriot Act authorisation establishes potential import prohibitions for certain drug precursor chemicals. The Act was signed by US President Bush on 9 March 2006 and became Public Law Number 109-177. In particular, Sections 721 and 722 require the importer to provide information on distribution including sales along the supply chain and allow the Attorney General to prohibit the importation of the concerned precursor chemicals in the case of refusal to fully co-operate with the Attorney General. The State Department is responsible for implementing these provisions and determines the world's largest exporters and importers who will then be subject to certification. EU Member States are likely to be on that list. The deadline for this new law will be March 2009.

Title:	**Jones Act and Shipbuilding Subsidies**
Sector:	Shipbuilding
Description:	The Merchant Marine Act of 1920 'Jones Act', as amended in 1936, 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). Pursuant to this act, the United States prohibits the use, sale or lease of foreign built or foreign

	reconstructed vessels in commercial application between points in national waters or the waters of an exclusive economic zone. Despite the discriminatory nature of this US regulation, the United States is permitted to continue to apply the Jones Act under paragraph 3 of the GATT 1994. Pursuant to this article, the United States may prohibit the use, sale or lease of foreign built or foreign reconstructed vessels in commercial application between points in national waters or the waters of an exclusive economic zone. Even if there is strictly speaking no prohibition of import, we can see that this prohibition of use is a de facto prohibition on imports. Moreover, the definition of vessels has been interpreted by the US Administration to cover hovercraft and inflatable rafts. These limitations on rebuilding act as another discrimination against foreign materials the rebuilding of a vessel of over 500 gross tonnes (gt) must be carried out within the US if it is to engage in coastwise trade. A smaller vessel (under 500 gt) may lose its existing coastwise rights if the rebuilding abroad or in the US with foreign materials is extensive (46 U.S.C. 83, amendments of 1956 and 1960). 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. In December 1994, the OECD Shipbuilding Agreement was signed. It aims at the elimination of all direct and indirect support in the shipbuilding sector and was expected to have an impact on the US subsidy programme. The EU, South Korea and Norway deposited their instruments of ratification for the Agreement in December 1995 with Japan following in June 1996. Opposition in the Congress originating from the naval industry prevented the US from ratifying the Agreement. Subsequent bills attempting to implement the ratification failed and the US did not enter the Agreement in 2001. 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. From FY2001-2004 MARAD has approved over US$1258 million in loan guarantees. For Fiscal Year 2004, the Maritime Administration (MARAD) approved $152 million in loan guarantees. For Fiscal Year 2005, MARAD approved $140 million in loan guarantees. This measure is subject to a substantive review in the WTO according to Article III of the GATT.

Title:	**Marine Mammal Protection Act**
Sector:	Agriculture and Fisheries
Description:	The Marine Mammal Protection Act of 1972 aims to protect marine mammals, particularly dolphins, by progressively reducing the acceptable level of dolphin mortality in U.S. 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). Spain was unable to join the IATTC within the 6 month time period. Therefore, it would appear that Spanish tuna products coming from the Eastern Tropical Pacific would not be allowed to enter the U.S. market. Additionally, canned tuna from Spain, not explicitly labelled as coming from outside the ETP would probably be prohibited from entering the U.S. market due to the difficulty to determine the origin of the canned tuna.
State of Play:	The Community, by Council Decision 1999/405/EC of 10 June 1999, authorised Spain to join the IATTC, on a provisional basis. This authorisation was granted pending the entry into force of the new Convention of IATTC (the so called Antigua Convention) which permits membership of the European Community. Spain formally acceded to the Convention in June 2003. The EU has recently become a full member of the AIDCP and has already introduced into Community Law the System for Tracking and Verification of Tuna through the Council Regulation (EC) N° 882/2003 of 19 May

	2003. On 7 June 2006 the EU notified its ratification of the Antigua Convention. The IATTC Antigua Convention entered into force on 10 October 2008, 15 months after the deposit of the seventh instrument of ratification or accession of the Parties to the IATTC Convention.

Title:	**Sub-federal ban on the commercialisation and production of foie gras**
Sector:	Agriculture and Fisheries
Description:	A number of US states have introduced potentially excessive restrictions on the commercialisation of foie gras, effectively banning it from their markets. On 26 April 2007 the municipal council of Chicago introduced legislation banning the commercialisation of foie gras in restaurants as of June 2007. California has introduced a ban on the commercialisation and production of foie gras, effective as of 2012. Other US states are also considering the adoption of similar legislation, notably New York, Oregon, Massachusetts and Washington. EU industry fears that this trend will continue, leading to an eventual closure of the US market.

	Levies, Charges and Import Duties
Title:	**Merchandise Processing Fee**
Sector:	Internal Taxation
Description:	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. At the request of Canada and the EU, the GATT Council instituted a Panel in November 1987 that stated that the US Customs user fees for merchandise processing were not in conformity with the General Agreement. The Panel ruled that customs user fees should reflect the approximate cost of customs processing for the individual entry in question. This principle was not met by an ad valorem system such as that used by the US. The GATT Council adopted the Panel report in February 1988. The present customs user fee structure is somewhat more equitable, since the fixing of a ceiling makes it less onerous for high-value consignments. However, the fee is still likely to exceed the cost of the service since it is still based on the value of the imported goods.
State of Play:	Whilst the MPF was to last until 30 September 1990 when established, it was recently extended (as part of the American Jobs Creation Act of 2004) until 30 September 2014.

Title:	**Corporate Average Fuel Economy (CAFE) Payment**
Sector:	Internal Taxation
Description:	The Corporate Average Fuel Economy (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). CAFE 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 European cars. According to the latest estimates available, European-based auto makers with a total market share in the US of only 9%, bear almost 100% of the CAFE penalties. Since 1983, manufacturers have paid more than $675 million in CAFE civil penalties. According to the National Highway Traffic Safety Administration, most European manufacturers regularly pay CAFE civil penalties ranging from less than $1 million to more than $20 million annually.

Title:	**Gas Guzzler Tax**
Sector:	Automotive
Description:	Manufacturers who sell cars that fail to meet certain fuel economy levels have to pay the so-called Gas Guzzler Tax. The latter was introduced as part of the 1978 Energy Tax Act. Car manufacturers must follow U.S. Environmental Protection Agency (EPA) procedures to calculate the tax. This means that all cars (but not mini-vans, trucks or SUVs) failing to meet a fuel economy figure of 22.5 miles per gallon (approximately 10.5 litres per 100km) are subject to a tax of $1,000 per car for those just below the 22.5 miles per gallon threshold to $7,700 per car for models getting less than 12.5 miles per gallon. Fuel economy test results are calculated on the basis of a formula that weights city and highway driving cycles (55% city and 45% highway driving). Fuel economy values are calculated before sales begin for the model year; the tax has to be paid once the production has ended for the model year. The total amount of the tax, collected by the Internal Revenue Service (IRS), reflects the number of cars sold that fail to meet the EPA requirements. A particular fuel economy label (the window sticker on new cars) displays the amount of the tax paid. In general, the European Union wholeheartedly supports measures for environmental protection. However, in this particular case the tax has several flaws which in practice discriminate against European car manufacturers. First, the fuel economy cut-off point (i.e. less than 22.5 miles per gallon) is not founded on any reasonable or objective criterion. Second, the Gas Guzzler Tax is particularly unbalanced as it does not apply to minivans, sport utility vehicles (SUVs), and pick-up trucks. According to the EPA, Congress did not impose a tax on these vehicle types because in 1978, at the time the law was enacted, they represented a relatively small fraction of the overall fleet of passenger vehicles and were used more for business purposes than personal transportation. Congress updated the law in 1990 (by doubling the tax penalties) but chose not to address the discrepancy in treatment between cars and light trucks. However, the light-truck category (including minivans, SUVs and pick-up trucks) has been the fastest growing segment of the new-vehicle market.

Title:	**US Wine tax discrimination**
Sector:	Wines & Spirits
Description:	Under US federal law, wine produced in or imported into the US is subject to a 'gallonage tax' with different tax bands according to the alcoholic content. However, small US producers not producing more than 250.000 gallons a year (= ca. 125.000 bottles / 10.000 crates) are eligible for a tax credit of USD 0,90 per gallon on the first 100.000 gallons, and a degressive rebate for production between 100.000 and 250.000 gallons. The tax credit is a rebate on the federal excise duty on wine; the excise duty is paid by producers upon selling wine or by the importer of wine at the moment of taking the wine out of the customs depot. Only US producers have access to the federal tax credit and tax rebate. In addition to the federal tax, differential fiscal measures and excise duties are also levied on wine at State level. These measures provide for tax breaks for small domestic producers or tax credits for local producers whilst no similar exemptions / benefits are granted to imported wine.
State of Play:	The federal tax credit scheme targeting small domestic producers as well as the States differential treatment in favour of domestic products were examined by the GATT panel in US-Measures affecting alcoholic and malt beverages (16 March 1992) where it was found that the scheme violated the US's obligations under Art. III:2 of the GATT. Although the panel report was adopted, the federal law providing for the scheme was never repealed or modified and remains in application. The issue has been raised at the occasion of the EC/US wine talks meetings in 2006, 2007 and 2008. According to the information provided by U.S. authorities the scheme remains operational. US also mentioned that there is no rule requiring US origin of the grapes used to produce the wine but that this is the practice.

	Sanitary and Phytosanitary Measures
Title:	**United States- Ruminant animals and products**
Sector:	Agriculture and Fisheries
Description:	In 1997, the USA introduced rules on the import of **ruminant animals and products** thereof from all European countries based on concerns about Spongiform Encephalopathy (BSE). These rules are still in place. In response to the confirmation of the first case of BSE in the USA in December 2003, the US has voiced strong support for the respect of the World Organization for Animal Health (OIE) rules by importing countries. The OIE classified (on May 2008) 25 EU Member States as belonging to either a "controlled" or "negligible" BSE risk status.
State of Play:	The US Department of Agriculture, Animal and Plant Health Inspection Service (USDA/APHIS) is in the process of revising its rules to bring them in line with the OIE international rules. However, the current USA import rules do not follow the OIE (risk based) recommendations.

Title:	**Sanitary measures applied by USA for imports of live bivalve molluscs**
Sector:	Agriculture and Fisheries
Description:	The USA requires the testing of the water in which bivalve molluscs (e.g. oysters) are reared for coliforms, whereas the European Union requires testing of the flesh of the bivalve molluscs for *Escherichia coli*. The European *Community Reference Laboratory for monitoring bacteriological and viral contamination of bivalve molluscs* has studied the two approaches and has confirmed that the same level of protection is achieved. The EU claims that the two different approaches achieve the same level of protection, and therefore should be regarded as equivalent, within the framework of Article 4 of the WTO/SPS Agreement (Sanitary and Phytosanitary).
State of Play:	The EC would like the USA to reconsider its approach and to take the necessary steps for definitively allowing imports of EU bivalve molluscs into the USA. The issue has been repeatedly brought to the attention of the USA-Food and Drug Administration (FDA), by the European Commission, but it remains unsolved.

Title:	**Pasteurised Milk Products (Grade A)**
Sector:	Agriculture and Fisheries
Description:	Certain dairy products, called 'Grade A milk products' which include pasteurised milk and milk based products (fluid milk, cream, cottage cheese and yoghurt), are regulated under a Federal/State cooperative programme administered jointly by the Food and Drug Administration (FDA) and the National Conference on Interstate Milk Shipments (NCIMS) which is mainly comprised of state dairy regulatory officials. FDA and NCIMS jointly produce a Grade A dairy safety document, entitled the Pasteurized Milk Ordinance (PMO), which sets forth the rules and inspection requirements to be met by firms who would like to engage in the interstate commerce of Grade A products. According to an FDA notice published in January 2000 there are three options for firms interested in exporting Grade A dairy products to the US, the exporting company must sign a contract with a State, which must accept to treat it as if it were within its own jurisdiction (including the inspection and the control of the observance of the US regulation by inspectors of the State several times per annum); or the region/country of the exporting firm must adopt and comply with the US rules, in order to become a member of the Conference; or the programme and the regulations in the exporting country are recognised equivalent to the US programme by the FDA. The first two options are closed, however, because (1) no Federal State is currently prepared to accept an application from a foreign company or country and (2) full compliance with the Pasteurized Milk Ordinance is almost impossible for a EU company. Only two EU firms have been able to make it onto the NCIMS list, considering the requirement to meet all PMO provisions and to finance the ongoing inspections by US state officials. Upon the European Commission request, FDA has agreed to enter into equivalence discussions with the EU and a working plan for these discussions was agreed in October 2005. Several meetings have been held since but progress is limited so far. It is the hope of the European Commission that these discussions can be advanced expeditiously in order to remedy the present situation in which it is extremely difficult to export Grade A milk products into the US.

Title:	**[early warning] Dairy promotion and research assessment on imports**
Sector:	Agriculture and Fisheries
Description:	The 2008 Farm Bill includes an extension of the Dairy Promotion and Research Program (Sec. 1507). This provides a dairy assessment for imported products which appears discriminatory and would, if applied, lead to a levy of 7.5 cents per hundredweight milk equivalent for financing dairy promotion and research activities. Although domestic producers have to pay a higher rate they have the possibility to divert up to 2/3 of it into state, local or regional promotion programs which puts them into a more favourable position compared to importers.
State of Play:	The issue was addressed in a joint DG TRADE/DG AGRI letter to the US administration (September 2008). In the reply, USDA assured that the implementing regulations concerning the Dairy Import Assessment (which have not been issued yet) would not violate any trade obligations.

Title:	**Fruit and vegetables**
Sector:	Agriculture and Fisheries
Description:	Restrictions on the import of certain fruits into the USA are in place, and include - on a country by country basis - Pest Risk Analisys (PRA), stringen inspection programmes, cold treatment for certain varieties.
State of Play:	Member States have exchanged several letters over the years with the USDA/APHIS requesting the access to the USA market of certain fruits. Applications were accompanied by its respective Pest Risk Analysis (PRA), which followed international guidelines. Several Member States have been unsuccessful in getting information from USDA/APHIS on the status of their applications, or achieved no progress at all. The USDA/APHIS has recently stated that it would engage itself in reviewing/assessing the information received from the European Commission related with new market access applications from Member States.

Title:	**Hardy Nursery Stock**
Sector:	Agriculture and Fisheries
Description:	The US requires a two year post-entry quarantine on an importers premises for hardy nursery stock. Its main purpose is believed to be the detection of latent infections by organisms of quarantine concern.
State of Play:	The EU considers this measure to be excessive. 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.

Title:	**Ornamental Plants Established in Growing Media**
Sector:	Agriculture and Fisheries
Description:	The separate import into the USA of almost all sorts of plants and growing media (except soil) is permitted. However, when the plants are in growth media (i.e. authorised plants in authorised growing media), the import is not permitted, unless a special Pest Risk Assessment (PRA) has been performed by the USDA/APHIS. The process of obtaining this type of permission has proved to be virtually impossible or extremely slow. Furthermore, the USDA/APHIS phytosanitary risk approach appears to be disproportionate to the low risk involved.
State of Play:	The USDA/APHIS has recently stated that it would: • continue assessing the existing market access applications received from Member States, and • engage itself in reviewing/assessing the information received from the European Commission related with new market access applications from Member States.

	Public Procurement
Title:	**Buy American Act**
Sector:	Horizontal
Description:	1. The Buy American 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 American restrictions, which apply to government-funded purchases. The Executive Order 10582 of 1954, as amended, expands the scope of the BAA in order to allow procuring entities to set aside procurement for small businesses and firms in labour surplus areas, and to reject foreign bids either for national interest or national security reasons. The Buy American Act: 1) restricts the purchase of supplies, which are not domestic end products, for use within the US. A foreign end product may be purchased if it is determined that the price of the lowest domestic offer is unreasonable or if another exception applies, and 2) Requires, with some exceptions the use of only domestic construction materials in contracts for construction in the US 3) Buy American Act uses a two-part test to define a domestic end product a) the article must be manufactured in the US; and 2) the cost of domestic component must exceed 50% of the cost of all the components. The Buy American Act applies to purchase of supplies valued from US \$3,000 to US \$193,000 as well as construction purchases valued from US \$3,000 to US \$7,407,000. Some of the Buy American provisions 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. For example, Federal agencies are required to procure only US mined or produced unprocessed goods, and only manufactured goods with at least a 50% local content. In terms of price preferences, typically a 6% penalty would be added on the bid of a foreign firm for civilian projects; a 12% penalty for such projects when the local competitor is a small enterprise from an area with high unemployment; and a 50% penalty in the case of defence

	contracts. Buy American restrictions not only directly reduce the opportunities for EU exports, but via content requirements also discourage US bidders from using European products or services. The US industry, through the court system and legislative lobbying, ensures that Buy American preferences are vigorously enforced and maintained. Suppliers based in countries that are parties of the GPA are generally not directly excluded from the scope of the BAA and other restrictive regulations. Instead, legislation generally foresees the granting of waivers as regards these suppliers (inter alia, through the 1979 Trade Agreements Act). However, the actual implementation of these waivers may lead to legal uncertainty and act as a barrier. 2. In addition, significant barriers of access to the US procurement market result from Buy America provisions which prescribe the products, State or local authorities can purchase for projects co-funded by Federal grants. The European Commission estimated Buy America to affect about US$ 35 billion of contracts in Fiscal Year 2005. 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 Improvements Act. In accordance with these acts, the DoT provides aid to the State and local governments for various transportation-related procurements. 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%. Typically, these provisions also require that all iron, steel and other manufactured goods have to be assembled and originate in the US. 3. Buy American 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. 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. Although 37 of the 50 States are covered by the GPA of 1994, the scope remains very limited, as procuring entities such as municipalities and utilities are not included. Among the 13 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 limit 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). 4. Although the BAA applies in principle to the procurement of goods, it has also inspired similar provisions in the procurement of services. In March 2002, the State of New Jersey introduced new legislation for procurement of services specifying that only citizens of the United States and persons authorised to work in the United States pursuant to federal law may be employed in the performance of services under the contract or any subcontract awarded under the contract. This measure mainly affects computer services suppliers and suppliers with call centres outside the US. Although the State of New Jersey is not covered by the US commitments under the GPA, the measure risks creating a contagious effect. In August 2003, the State of Michigan adopted a bill containing similar provisions. Other States such as Connecticut, Maryland, Missouri and Wisconsin have announced similar bills.
State of play	In February of 2009 the U.S. Congress passed and President Obama signed the $789.5 billion American Recovery and Reinvestment Act (ARRA), which included so called "Buy American" provisions. The Buy American provisions would prohibits the use of funds appropriated or otherwise made available by the Act for any project for the construction, alteration, maintenance, or repair of a public

	building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. The law requires that this prohibition be applied in a manner consistent with U.S. obligations under international agreements, and it provides for waiver under three circumstances: 1. Iron, steel, or manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; 2. Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the contract by more than 25 percent; or 3. Applying the domestic preference would be inconsistent with the public interest. Although the US government had their Buy American provisions for the federal procurement since 1933, the US federal government was relatively open due to the Government Procurement Agreement, which would waive the Buy American requirement for GPA signatories. Since the legislation includes a clause that the provisions will be applied in a manner consistent with international obligations (and therefore mindful of GPA obligations), on the federal level, European companies will be affected in the areas not covered by the GPA, where they would like to bid on ARRA public building/work projects. For the non-GPA covered agencies/areas, the main change from the "old" Buy American Act provisions will be where our companies could qualify for the BAA exception (6-12% material cost differential), and where the exception changes to 25% project price differential, which would be extremely difficult to achieve. On sub-federal level, 37 states are GPA signatories (with different level of commitments by their agencies), while other states, municipalities and most cities are not GPA signatories. However, currently there is no Buy American requirement applicable to grants provided by federal government to states (aside from DoT grants), so if the state wishes to apply Buy American discriminatory measures (outside of their GPA commitments), they can do that, but it is not mandated. The Buy American provisions in the stimulus would mandate that the above listed Buy American measures are applied to funds provided by ARRA, where the agencies or states do not have any GPA commitments. Application of these discriminatory measures to the federal grants provided by ARRA will limit European companies' access to state and municipal government procurement (for ARRA funds) where there are no international obligations which would exempt states from application of these measures. The impact could be quite substantial on this level, as the GPA coverage is much more limited on the sub-federal level and therefore, where our companies were not facing any "Buy American" discriminatory provisions in the past, now they will face new provisions when bidding for projects funded by ARRA. In March and April, US government issued rule implementing the Buy American provisions on the federal and state level. Although there were some encouraging signs, such as no content requirements (such as 50% or more of domestic content), the fact remains that these provisions will ultimate limit access of European companies to the US government procurement market. Also, even though the new Buy American provisions apply to ARRA funding only, the danger remains that the state governments will unintentionally apply to provisions to other funding as well.

Title:	**Transport-Related Buy America Provisions**
Sector:	Services - Construction
Description:	One of the areas where Buy American provisions where applied with stricter rules for exception is for 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 this case, the provisions are called "Buy America". 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. Buy America provisions require the use of "steel, iron, and manufactured goods" produced in the United States (100% content requirement, 60% for rolling stock). This requirement can be waived under certain conditions, such as public interest, nonavailability of supply or unreasonable cost (domestic material would increase cost of the overall project by more than 25%).

Title:	**Food Aid Program**
Sector:	Services – Transport
Description:	Under US regulations, only agricultural commodities produced in the US may be used in food aid transactions. Legislation expressly includes among its food aid objectives to 'develop and expand export markets for United States agricultural commodities' and provision for overseas donations of surplus commodities acquired by the Commodity Credit Corporation. The provision of such non-genuine food aid causes significant losses to commercial supplies of commodities. Several EU markets have been targeted by non-genuine US food campaigns. While the US Farm Bill 2008 removes 'market development' as an objective of food aid programs it adds a similar provision such as 'development of trade capacity'. Regarding transportation of US food aid, the US imposes cargo preferences on the World Food Program (WFP) requiring that at least 75% of tonnage granted is transported on vessels carrying the US flag. It is, however, recognised that freight rates on ships carrying the US flag are generally higher than those of other ships. The cost difference between the estimated amount of freight on a ship not carrying a US flag and the actual freight on a US vessel is called the Cargo Preference Premium. From 2002, income and expenditure is being recorded on the basis of the adjusted global freight estimates (net of cargo preference premiums). However, as a service to the US, the WFP continues to account for cash receipts and cash disbursements related to US cargo preference premiums thus adding important operational costs. The EU considers this is a way of extending restrictive and discriminatory public procurement practices beyond the US public procurement market. In fact, this policy imposes Buy American requirements on a UN organisation. The propensity of the US to use food aid to countries not suffering food shortages as a means of disposal of surplus farm products has the effect of disturbing local markets, cutting out traditional supplies and undermining local producers. Following EU complaints, the US has partially reviewed its policy. However, the 2008 Farm Bill includes few provisions that significantly change US food aid policy. Congress has repeatedly opposed a proposal by the administration to allocate 25% (i.e. $300 million) of the PL 480 Title II programme for local and regional purchases of food commodities (by USAID) outside the US market. The 2008 Farm Bill only includes a pilot program for local and regional purchases of $60 million over four years (sec. 3206 of the Farm Bill). In addition, in the present WTO negotiations, the US -both Administration and Congress- are resisting strongly any attempt to strictly regulate food aid operations. In particular they oppose the principle of providing food aid in cash insisting that also in future all US food aid be procured on the US market (including preference for transport / handling on US logistics). Groups representing shipping companies and agribusiness interests have opposed using the budget of the main food aid program to buy food in developing countries instead of relying on American food shipped overseas. $375 million/year has been approved for non-emergency food assistance programs. The Farm Bill includes a new provision on oversight, monitoring and evaluation of US food aid programs. Especially the monetisation program has received harsh criticism from the US Governmental Accountability Office (GAO).

Title:	**Ball and Roller Bearings**
Sector:	Iron, Steel and Non-Ferrous Metals
Description:	Congress has imposed a Buy American requirement on the procurement of ball and roller bearings since 1988, which remained in effect in 2008. In May 1996, the Federation of European Bearings Manufacturers' Association (FEBMA) made a submission to the Department of Defense (DoD), in opposition to the restriction. The National Defense Authorization Act of Fiscal Year 1997 contains the McCain Amendment authorising the DoD to waive Buy America requirements that would impede the reciprocal procurement of defence items under the Memoranda of Understanding (MoU). In September 2005, the DoD issued a final rule amending the Defense Federal Acquisition Regulations Supplement (DFARS) to authorise the Defence Logistics Agency Component Acquisition Executive to waive domestic source requirements on the acquisition of ball and roller bearings, when adequate domestic supplies are not available to meet DoD requirements on a timely basis, and provided that such acquisition is made in order to acquire capability for national security purposes.

Title:	**Steel Local Content Requirements**
Sector:	Iron, Steel and Non-Ferrous Metals
Description:	Steel is subject to the imposition of local content requirements or preferences given in works and other government procurement contracts for bids which include locally produced steel. This practice is notably common at the sub-federal level. Many States (such as Connecticut, Louisiana, Maine, Michigan, Illinois, Maryland, New York, Pennsylvania, Rhode Island and West Virginia) have such requirements that also apply to private contractors and subcontractors.

Title:	**Small Business Act**
Sector:	Horizontal
Description:	The Small Business Act of 1953 (SBA), as amended, requires executive agencies to place a fair proportion of their purchases with small businesses. This 'set-aside' scheme is specifically exempted from application of the WTO Government Procurement Agreement (GPA) under General Note 1 to the US Appendix I. Under the SBA, any contract for the purchase of goods or services with an estimated award value greater than US$ 3,000 but not exceeding US$ 100,000 will be automatically set-aside for (US) small business unless fewer than two small businesses submit competitive bids for that procurement. Small business set-asides can occur in procurements above US$ 100,000 on a discretionary basis. In addition to meeting certain size criteria, a business is eligible for small business status, for procurement purposes, only if it maintains a place of business in the US and makes a significant contribution to the US economy through payment of taxes and/or use of US products, materials, and/or labour. The size criteria vary depending on the product or service being procured. The standard size criteria for eligibility as a small business for goods producing industries is 500 employees or fewer. However, for some industries (i.e. pulp, paper boxes, packaging; glass containers; transformers, switchgear and apparatus; relays and industrial controls; miscellaneous communications equipment; search, detection, navigation guidance systems and instruments) the employee limit is 750 and for some others (i.e. chemicals and allied products; tyres and inner tubes, flat glass, gypsum and generators; telephone and telegraph apparatus) it is 1,000. For services industries, depending on the sector, firms with total annual revenues of less than US$2.5 million to 17 million are considered to be small businesses. In 1999, the Small Business Administration launched another programme- HUBZone- that provides contracting benefits to small businesses located in 'historically under-utilised business zones'. The first goal of the programme was to channel at least 1% of overall federal procurement to HUBZone small businesses, which at federal spending levels at the time equated to about $2 billion. By the year 2003, that goal had risen to 3%, or about $6 billion. Until 30 September 2000, the procedures under the programme applied only to acquisitions made by certain departments and agencies; after that date, the procedures applyied to all federal agencies. For acquisitions beyond thresholds and open to competition, price evaluation preferences may be granted, calculated by adding a factor of 10% to all offers. The notion of fair proportion means that the government-wide goal for participation by small businesses shall be established at no less than 20% of the total value of all prime contract awards for each fiscal year. Under normal bid procedures, there is a 12% preference for small businesses in bid evaluation for civilian agencies (instead of the standard 6%). In the eight-year period from FY2000 through FY 2007 there were about 21,350 contracts totaling $6.28 billion awarded under these HUBzone mechanisms. An important number of States also operate particularly proactive small businesses and minority set-

	aside policies. The Small Disadvantaged Business Certification and Eligibility Program assists small disadvantaged businesses (SDBs) by certifying them as SDB-eligible firms. To be certified by the SBA as an SDB, a small business must be at least 51% owned and controlled by an individual determined as socially and economically disadvantaged. A price evaluation adjustment, as determined every year by the DoC., is applied for SDBs under the Programme in authorised competitive acquisitions meeting certain criteria. It is estimated that in States like Texas such policies effectively exclude foreign firms from around 20% of procurement opportunities. In Kentucky, as much as 70% is set aside for small businesses. The active promotion of small businesses is a common concern for the EU and the US. The EU is, however, concerned that the US 'set-aside' measures and their exemption from the GPA favour US industry and have exclusionary effects to the detriment of foreign competitors.

Title:	**Berry Amendment to the 1941 Defence Appropriations Act**
Sector:	Horizontal
Description:	The concept of national security was originally used in the 1941 Defence Appropriation Act to restrict procurement by the DoD to US sourcing. Now known as the Berry Amendment, its scope has been extended to secure protection for a wide range of products only tangentially related to national security concerns -- for example, the 1992 General Accounting Office ruling that the purchase of fuel cells for helicopters is subject to the Berry Amendment fabric provisions, and the withdrawal of a contract to supply oil containment booms to the US Navy because of the same textile restrictions. An audit report by the Defence Department's Office of Inspector General concluded that for certain DoD procurements during fiscal years 1996 and 1997, about half of the solicitations and contracts examined had not incorporated or enforced the relevant domestic sourcing requirements. In response, DoD's procurement director has taken steps to ensure that contracts at or above the simplified acquisition threshold (presently US$ 100,000) are domestically sourced. To comply with the Buy America provisions, contracting officers must generally add 50% to the price when evaluating offers with non-qualifying country end products against offers with domestic end products. In September 1996, 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 was that EU fibres and yarns could no longer be used by US manufacturers for producing fabrics that they sell to the DoD. In 1998, a waiver allowing the procurement of para-aramid fibres and yarns under certain conditions was adopted through the National Defence Authorisation Act for fiscal year 1999 (Strom Thurmond Act). The FY2006 Defense Authorization Act (Section 833) contains changes to the Berry Amendment that expand the coverage of this amendment's Buy American provisions. The new language requires DoD to notify Congress within seven days if it awards a contract to a foreign manufacturer and place the contract on a General Services Administration Web site. The new provisions also expand the coverage of the Berry Amendment by requiring that components of textiles and apparel are also made in the US. In addition, the bill contains a provision (Section 832) mandating training programmes for DoD personnel about the Berry Amendment. Taken together, these provisions will hamper DoD's flexibility in applying the Berry Amendment by opening DoD waiver decisions to continuous challenge by the US textile industry. The FY2007 Defense Authorization Act contains some Buy American/Berry Amendment provisions, including the one establishing a Strategic Materials Protection Board that would identify items critical to US national security and a related provision that instructs the Defense Department to work cooperatively toward complying with the 'Berry Amendment' (specialty metals). In this context, working cooperatively means that the bill prohibits the purchase of non-domestically melted or produced specialty metals but allows for certain exceptions like exemption for electronic components containing small amounts of specialty metals. Exception is made also for procurement outside the US and for cases when there is no domestically available specialty metal of satisfactory quality. Procurement of specialty metals from foreign sources is allowed also in furtherance of agreements with foreign governments or to offset sales made by the US government or US firms. One-time waiver authority of the specialty metals domestic source requirement is given by the Secretary of Defense for items manufactured before the date of enactment of this act. The FY2007 bill gives

	defence contractors four years to publicly disclose non-compliance or certify plans for future compliance and prevents the Board from adding or deleting items from the list of metals already protected by the Berry Amendment. Further DoD procurement restrictions are based on the National Security Act of 1947 and the Defence Production Act of 1950, which grant authority to impose restrictions on foreign supplies in order to preserve the domestic mobilisation base and the overall preparedness posture of the US. At the same time, defence procurement from foreign companies is sometimes also impeded by Buy America restrictions on federally-funded programmes. In 2009, the Congress passed the $789.5 billion American Economic Recovery and Reinvestment Act, which included provisions extending the current Berry amendment requirements to cover the Department of Homeland Security. The immediate practical effect of the textile provision in ARRA is that it would apply the Berry Amendment requirement only to the Transportation Safety Agency (TSA) within DHS (as these are the only DHS agencies exempted from the GPA coverage).

Title:	**Memoranda of Understanding (Defence Acquisitions)**
Sector:	Government Procurement
Description:	There has been a trend towards making the DoD's other domestic preferences, apart from the Buy American Act preferences, less restrictive by expanding the preference to qualifying countries. These are countries that maintain reciprocal memoranda of understanding (MoU) with the US. In practice, all North Atlantic Treaty Organisation (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 MoUs with the US allowing for a waiver of the corresponding restrictions. However, these MoUs are subject to US laws and regulations, and consequently, other overriding ad hoc restrictions can be imposed annually by Congress through the authorisation/appropriations process. There are also indications that US procurement officers disregard the exemption of Buy American restrictions for MoU countries (e.g. fuel-cells, ball and roller bearings, and steel forging items). The barriers to defence trade with the US result from a complex set of rules and practices aiming at imposing domestic source restrictions on 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 source restrictions. The following examples illustrate the large variety of obstacles facing EU exporters to the 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). - 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 carried out to assess the best product for goods not produced in the US. Funds to carry out such tests were reduced in 1999, although the defence budget itself was increased. Also, experience shows that, where an FCT pinpoints a successful product, DoD seeks a licence to make 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 for showing around for sales purposes) unless the US company is granted a licence to export that data and consequent 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). - Lack of access to bidder 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.

Title:	**Space Launching Services**
Sector:	Services - Transport
Description:	Federal law and policy maintain high barriers to U.S. Government utilization of foreign launch services. US National Space Policy (2006) states that it is in the interest of the US to foster the use of US commercial space capabilities around the globe and to enable a dynamic, domestic commercial space sector. To that end, departments and agencies shall use US commercial space capabilities and services to the maximum practical extent; purchase commercial capabilities and services when they are available in the commercial market and meet US Government requirements; and modify commercially available capabilities and services to meet those US Government requirements when the modification is cost effective. The President's U.S. Space Transportation Policy authorized on December 21, 2004, requires the launch of U.S. government payloads (satellites) on space launch vehicles manufactured in the U.S. unless exempted by the Director of the Office of Science and Technology Policy, in consultation with the Assistant to the President for National Security Affairs. An exception is provided for use of foreign launch vehicles on a 'no-exchange of funds' basis for limited scientific programmes. The NASA Authorization Act of 2005 enshrines the President's 2004 policy in law stating that NASA shall not launch a payload on a foreign launch vehicle except in accordance with the policy. The Commercial Space Act of 1998 also requires the Federal Government to acquire space transportation services from U.S. commercial providers whenever such services are required. The Act's definition of a U.S. commercial provider effectively excludes all foreign launch service providers by establishing domestic content in excess of 50 percent. Other restrictions on foreign launch services are now being considered by Congress. In December 2007, Members of the Florida Congressional Delegation introduced 'Launch America' legislation that could prohibit NASA from the utilization of foreign launch vehicles for cargo missions to the International Space Station (ISS) and mandate the use of U.S. space launch services. The prohibition against foreign launch services could apply to NASA funded missions conducted with Europe's ATV (Autonomous Transfer Vehicle), the Japanese Heavy Transfer Vehicle (HTV), or the Russian Progress supply vehicle. The legislation, if passed and signed into law, could have a serious impact on the utilization of the ISS during a five-year or even longer period, beginning in 2011, when the U.S. Space Shuttle is no longer in service and NASA's replacement systems, the Ares/Orion and U.S. commercial vehicles currently under development, are not yet operational. In addition to these barriers, subsidies for U.S. launch services providers are at an all-time high. The 2004 Space Transportation Policy provides that the Secretary of Defence fund the annual fixed costs for both primary U.S. launch systems, the Evolved Expendable Launch Vehicles (EELV) now operated by the Lockheed Martin-Boeing joint venture, the United Launch Alliance (ULA). The President's Budget for Fiscal Year 2009 requests $358 million in funding for launch services but proposes fixed cost funding under 'Assured Access' and 'Launch Capabilities' categories of $40 million and $747 million respectively-twice the amount of the variable launch services costs. These high fixed cost subsidies translate to competitive advantages for Atlas V and Delta IV in the commercial satellite launch market. Taken together, these measures are part of a set of co-coordinated actions to strengthen the U.S. launch industry and are clearly detrimental to European launch service providers. European launch operators remain effectively barred from competing for most US Government launch contracts, which account for more than 50 percent of the U.S. satellite

	market. Meanwhile, European Government support for fixed launch costs of 192 million Euros per year under the European Guaranteed Access to Space (EGAS) program are set to expire in 2010 as US subsidies, set at three times the European level, continue to grow. The EU has no similar barriers to space launch services or a 'Buy European' launch policy as demonstrated by the recent launches of the Sicral 1B and CosmoSkymed European government satellites on US launchers.

	Trade Defence Instruments
Title:	**Zeroing in Determination of Dumping Margins (WTO DS 294 and DS 350)**
Sector:	Horizontal
Description:	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. 'Zeroing' consists in disregarding the results of the sub-comparisons yielding a negative result when adding them to calculate dumping at the level of the product. In other words, when the zeroing methodology is applied, the absence of dumping on certain models 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, despite the fact that an overall comparison would have resulted in the absence of dumping. The use of zeroing by the United States in its dumping calculations prompted the EC to initiate a first WTO dispute (DS 294) on the law, the implementing regulation, the Department of Commerce (DOC) methodologies defining the zeroing practice and 31 specific cases (15 new investigations, i.e. leading to the imposition of the AD measure in the first place, and 16 annual administrative reviews of previously imposed AD measures) in which zeroing had been used.
State of Play:	As a result of the Panel and Appellate Body's findings adopted by the DSB on 9 May 2006, the US was condemned: (i) for using zeroing in 15 specific original investigations, and for maintaining in such investigations a zeroing methodology which is per se WTO-incompatible; (ii) for using zeroing in 16 specific reviews. As regards the EC challenge of the US zeroing methodology in reviews, the Appellate Body considered that there were insufficient facts on the Panel's record to complete the Panel's analysis and decide whether that methodology was WTO inconsistent as such or not. However, the finding on the 16 specific cases made clear that every calculation of a dumping margin with zeroing in a review will be considered WTO-incompatible. The US had until 9 April 2007 to implement the DSB ruling. However, to date, the implementation has been incomplete and unsatisfactory. On the one hand, the US stopped using zeroing when calculating dumping margins on a weighted average to weighted average basis in original investigations initiated after or ongoing on 22 February 2007 (cf. Final modification of methodology published by USDOC on 27 December 2006 - 71 FR 77722). In the 15 specific original investigations, the US re-calculated the dumping margins without zeroing and revoked the anti-dumping duty for those exporters who were as a result found not to have dumped or to have dumped below de minimis level. On the other hand, the US has left a number of important issues open: (i) The application of the new not-zeroed duty rate, not only to imports entering the US after 9 April 2007, but also to collect duties after 9 April 2007 even when the import entered the US before 9 April 2007. Collecting duties on the basis of the condemned 'zeroed' rate is tantamount to maintaining the WTO-incompatible measure after the implementation deadline. (ii) The non-elimination of zeroing in subsequent administrative reviews. In most cases, imports are currently subject to a duty rate established in a subsequent administrative review, which has replaced

	the rate of the original investigation. The WTO has already accepted that the measure taken in an administrative review, which was concluded after the implementing measure and replaces it, is also a measure taken to implement the ruling on the original measure, and may as such be condemned as an improper implementation to the extent that it is affected by the same WTO-inconsistency (US - Softwood Lumber IV, AB report (WT/DS257/AB/RW), paras 80-93). (iii) The proposed substantial increase of the 'all others' rate in 3 cases (Stainless Steel Bar from France: from 3,9% to 35,92%; UK: from 4,48% to 83,85%; and Italy: from 3,81% to 6,6%). This rate applies to imports from exporters which did not get their individual rates in the original investigation; notably new exporters. As a side effect of revoking the order on certain exporters, the 'all others' rate was re-calculated and exclusively based on the higher rate calculated for non cooperating exporters. This is in effect determining retroactively that exporters subject to the 'all others rate' were guilty of behaviour that would warrant the application of 'adverse inferences' without demonstrating that such treatment is appropriate. (iv) The absence of revision of the injury determination in certain cases. Where non-zeroing resulted in finding the imports from certain exporters as non dumped, the US did not analyse whether this modification in the volume of dumped imports affected the previous finding that dumped imports caused injury (cf. Bed Linen, Panel report, paras 6.138-6.140). (v) The absence of correction of a basic mathematical error in the original 1999 investigation on imports of Stainless Steel Sheet and Strip in Coils from ThyssenKrupp Italy. This error pushed the non-zeroed dumping margin just above de minimis level and allowed to maintain the AD measure, which would otherwise have been repealed. DOC admitted the error, but refused to correct it on the ground that this was not required by the DSB recommendation. (vi) On the 16 specific administrative reviews, the United States has not taken any action. It alleges that it does not have to, as each of the 16 measures condemned have been superseded by later administrative reviews in the meantime. As a result of all these shortcomings in the US implementation of the ruling in DS294, the EC has challenged the US implementing actions before the WTO in a so called Article 21.5 compliance procedure. A compliance panel was established on 25 September 2007 and composed on 13 November 2007. The final Panel report was circulated to all WTO Members in mid-December 2008 and may be followed by an appeal. In parallel, the EC is pursuing another WTO dispute on the use of zeroing by the US (DS 350) to address issues left open by the WTO ruling under DS 294. Thus, the United States has used zeroing in a number of anti-dumping measures, which were taken after the initiation of the DS 294 dispute and therefore could not be covered by it. The new dispute covers all those measures, which apply to exports from 10 Member States (Belgium, France, Finland, Germany, Italy, Latvia, Netherlands, Spain, Sweden and UK) to the United States, and include such products as pasta, ball bearings, steel products, brass sheet and strip, and chemical products. The other issue left open by DS 294 was the existence of a zeroing methodology in reviews, on which the Appellate Body could not make a finding in the absence of sufficient factual findings in the Panel's report. The new DS 350 dispute initially covered the zeroing methodology in reviews. But, this was dropped at the later stage of the Panel as Japan, in the meantime, had been successful in its claim that the US was maintaining a WTO incompatible zeroing methodology in reviews (DS 322 - decided by the Appellate Body on 23 January 2007). The panel in DS 350 was established at the DSB meeting of 4 June 2007 and its final report was circulated on 1 October 2008. The EC launched an appeal against certain elements of the panel report in DS 350 on 6 November 2008. While the panel in this case condemned the US practice of zeroing in anti-dumping proceedings, some important questions still remained unsolved. The primary objective of our appeal is for the Appellate Body to provide clarification on our key and innovative argument that a duty should be treated as a measure. The effect of this line of argumentation would be that of bringing the future use of United States zeroing in each case within the scope of the panel findings, and would as such represent a powerful tool against the abuse of Trade Defence Instruments. The appellate review should in principle not exceed 90 days, when the Appellate Body is expected to

	circulate its report. The Appellate Body's report will have to be adopted within 30 days after its circulation. Only once the appeal has concluded and the Appellate Body report is adopted, will there be a binding (and final) ruling in this WTO dispute.

Title:	**Byrd Amendment (Continued Dumping and Subsidy Offset Act)**
Sector:	Horizontal
Description:	The Continued Dumping and Subsidy Offset Act (CDSOA or the so-called Byrd Amendment) 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 is clearly incompatible with several WTO provisions. The enactment of this legislation raised immediate and widespread concerns not only in the EU but in the whole WTO membership. The EU and 10 other WTO members (Australia, Brazil, Chile, India, Indonesia, Japan, Korea, and Thailand later joined by Canada and Mexico) brought a complaint to the WTO dispute settlement system and their claims were supported by 5 other WTO Members acting as third-parties. This unprecedented joint action was a clear indication of the important systemic concerns that the legislation raises. Since the enactment of the CDSOA, the US authorities have distributed to domestic petitioners more than $1.6 billion. Further, a very limited number of recipients received a major part of the payments. Of the total disbursed so far, one third went to one company and its subsidiaries. Every year half of the payments went to a very limited number of companies. Following the condemnation of the Byrd Amendment in the WTO in January 2003, the United States finally repealed the Byrd Amendment on 8 February 2006, but allowed for a transition period. The repeal will not affect the distribution of the anti- dumping and countervailing duties collected on imports made before 1 October 2007. Since in the US, these duties are usually collected several years after the import, this means, in turn, that distribution under the Byrd Amendment may continue for several years after 1 October 2007. The Congressional Budget Office foresees that the repeal of the Byrd Amendment will not produce effects before 1 October 2009.
State of Play:	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 was a clear indication of the important systemic concerns that the legislation raises among WTO Members. [2005-06-27] 23 August 2001: Upon joint request from the nine co-complainants, a single panel was established by the DSB. [2005-06-28] 10 September 2001: Canada and Mexico, which had requested formal WTO consultations with the US on 21 May 2001, joined the panel proceeding initiated by the other nine co-complainants at a special meeting of the DSB. 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. [2005-06-28] 16 January 2003: The Appellate Body confirmed that the Act was an impermissible response to dumping and subsidisation and, per se, WTO incompatible. [2005-06-28] 13 June 2003: An arbitrator granted the US until 27 December 2003 to comply with this ruling, which the US failed to do. [2005-06-28] 31 August 2004: The WTO arbitrators concluded that the EU could impose retaliatory measures on imports from the US worth 72% of the payments made to the US industry in the most recent year from duties collected on EC products. The level of retaliation will consequently vary every year so as to reflect the fluctuations in the amount of payments made under the CDSOA. The award is the same for the other requesting parties as the 72% coefficient represents the average trade effect of each

	dollar disbursed under the CDSOA as measured by an econometric model. [2005-06-28] 10 November 2004: The EU and six co-complainants (Brazil, Canada, India, Japan, Korea and Mexico) requested the authorisation to suspend the application of concessions or other obligations to the US in accordance with the arbitration award. The requested authorisations were granted in the meeting of the Dispute Settlement Body on 24 November 2004. Chile requested and obtained the same authorisation in the following meeting on 6 December 2004 [2005-06-28] 25 April 2005: The Council adopted the Commission proposal to impose, from 1 May 2005, an additional import duty of 15% on paper, agricultural, textile and machinery products of the US. On the same day Canada also imposed additional import duties on certain US products. [2005-06-28] August/September 2005: Japan and Mexico started to apply retaliation. The House of Representatives requested public comments on whether to include a repeal of the Byrd Amendment into a miscellaneous trade bill. [2005-09-15] 8 February 2006: the United States enacted the Deficit Reduction Act of 2005, which among other provisions, repeal the Byrd Amendment but allows for a 2+ year transition. The repeal will not affect distribution of the anti-dumping and countervailing duties collected on imports made before 1 October 2007. Under US practice, collection of duties does not take place at the time of imports, but usually several years after the import, which means, in turn, that distribution under the Byrd Amendment may continue for several years after 1 October 2007. The Congressional Budget Office foresees that the repeal of the Byrd Amendment will not produce effects before 1 October 2009. 24 April 2006: The European Commission adopted a regulation for the 1st annual revision of the level of retaliation applied in the dispute. Eight new products were added to the list of products subject to retaliation (different types of blankets, paper products, photocopying apparatus and drills). [2006-06-14] 1 October 2006: the United States started the 6th distribution under the Byrd Amendment. The total amount paid in that distribution reached more than US $ 380 million putting the total amount distributed so far at more than US $ 1.6 billion. [2006-12-14] 16 April 2007: The European Commission adopted a regulation for the 2nd annual revision of the level of retaliation applied in the dispute. 32 new products have been added to the list of products subject to retaliation to reflect the increase in the amount disbursed under the Byrd Amendment (different types of paper products, textile products, footwear, mobile homes, and pieces of furniture and ball-point pens). On 1 May 2008, the EC sanctions were decreased in line with the decrease in distributions in the US. On 2 September 2008, Japan informed that it would maintain its sanctions for another year but at a lower level than applied since 1 September 2005 (=US$ 16,49 million instead of US$ 48.18 million) by lowering the rate of the additional duty to 10,6%. Canada s and Mexico's sanctions have expired and will not resume since the US Customs does not distribute duties collected on their goods any longer.

Title:	**Sunset Reviews**
Sector:	Horizontal
Description:	The Uruguay Round negotiations introduced in the Antidumping (AD) and Subsidy and Countervailing Measures (SCM) agreements the obligation to terminate the measures after five years unless the authorities determine in a review ('sunset review') that termination of the measures would likely lead to the continuation or recurrence of dumping and injury. The objective of introducing sunset review provisions was to avoid never-ending measures. It is the EU understanding that the substantive disciplines governing the imposition of the duty should apply, albeit with some modifications, to the prolongation of the duty for another five years. The US conduct of sunset reviews falls short of these requirements. For example, the US imposes unwarranted conditions on the participation of exporters in sunset reviews, requiring respondents to cover 50% of exports before it will conduct a full sunset review. In particular, the US Commerce Department is unwilling to revoke measures, even in cases where there seems to be no evidence of a continuation or recurrence

	of subsidy and/or dumping. The ITC, which looks at injury, seems to have been rather more even-handed. The US, due to this minimalist interpretation of the AD and SCM Agreement, has kept in place various orders dating back as far as 1987. Further to the 2006 revocations of AD and CVD orders on a number of products in sunset reviews (most notably cut-to-length steel plate from 8 EU Member States and carbon steel flat products from 4 EU Member States), that year has also been mostly successful for EU steel exporters. In June 2007, the DoC revoked the AD order on Oil Country Tubular Goods from Italy, which followed the revocation of the CVD order on the same product in December 2006. Furthermore, the US ITC revoked the AD order on Hot-rolled carbon steel flat products from the Netherlands (in April 2007) and from Romania (in October 2007). A number of additional revocations on steel products occurred as a result of the WTO 'zeroing' case (see barrier fiche Zeroing in Determination of Dumping Margins (WTO DS 294 and DS 350)). As regards stainless steel bars, a sunset review resulted in the revocation of the AD order against France, Germany, Italy, and the UK, and the CVD order against Italy, on 8 January 2008. These decisions mean that a large number of the US steel measures imposed in 1993 have now been repealed. This, together with a successful outcome of the ongoing WTO disputes on zeroing (see also barrier fiche Zeroing in Determination of Dumping Margins (WTO DS 294 and DS 350)), has significantly reduced the number and scope of EU products subject to US TDI. However, there remain other products subject to measures, especially stainless steel, pasta, bearings, brass sheet and strip etc. There is however no indication that the US approach with respect to sunset reviews will change for measures that have been more recently imposed.

Title:	**Uranium Antidumping Duties**
Sector:	Iron, Steel and Non-Ferrous Metals
Description:	In March 2002, the US imposed a countervailing duty on imports of low-enriched uranium from France, Germany, Netherlands and UK, and an anti-dumping duty on France. The countervailing duty for Urenco was only just over 2% (now de-minimis) but the combined duty for France was over 30% (since reduced substantially in the first two reviews). In a decision of 3 March 2005, further confirmed by a decision of 9 September 2005, the US Court of Appeals of the Federal Circuit ruled that enrichment was a service, not a good as the Department of Commerce (DoC) had found, and therefore could not be subject to anti-dumping or countervailing measures. In two remand orders dated 5 January 2006, the US Court of International Trade directed the DoC to revise its final antidumping and countervailing duty determinations, in accordance with the decision of the US Court of Appeals of the Federal Circuit. In July 2006, the CVD Orders on low-enriched uranium from Germany, Netherlands and the UK were revoked. The CVD order against France has also been revoked but the AD measures on low-enriched uranium from France continue to remain in force (following a sunset review concluded on 29 November 2007) pending an appeal by the US Government/Industry to the Supreme Court. This appeal was admitted by the Court in April 2008 and the hearing was held on 4 November 2008. The finding is expected in early 2009. If the Court decides that enrichment results in a good, rather than a service, the US will be able to maintain the measures. If not, it is likely that there will be legislative action (based on the so-called Whitfield Amendment- two identical bills introduced into the House and Senate in December 2007, with the support of the US administration) to change the definition of goods and services with regard to this product.

	Subsidies
Title:	**Farm Bill**
Sector:	Agriculture and Fisheries
Description:	In June 2008 the US passed the 2008 Farm Act, the Food Conservation and Energy Act (FCEA) of 2008. Despite a consensus among WTO Members that farm policies should be reformed in the direction of less trade-distorting forms of support, the 2008 Farm Act went in the opposite direction, just like the 2002 Farm Bill and again reinforced the trade-distorting nature of US farm subsidies. A key feature of the 2008 Farm Act was the introduction of a new support scheme for arable crops known as the Average Crop Revenue Election programme (ACRE). Where traditionally most US support schemes compensate farmers in case of commodity price drop, ACRE compensates farmers for a drop in income. Thus ACRE addresses the concern that producers were overcompensated in times of low prices and high yields, when incomes were high, but undercompensated for low incomes when low yields forced prices above the level that would trigger price support. ACRE allows producers to lock in an income guarantee based at recent comparatively high levels. However, in order to participate in ACRE, producers must accept a reduction both in price linked support and in the decoupled support that they receive. Producers may enter the scheme the first year, 2009/10 or in later years. But once producers choose ACRE, they must remain in the scheme for the whole implementation period of the 2008 Farm Act. If they want to maintain their current level of commodity price linked support and decoupled payments they cannot move to ACRE. Farmers will have to choose one of these options by end of May for 2009/10. Since ACRE uses product specific parameters in the establishment in the level of support, it should be considered a trade distorting Amber Box programme. Other changes introduced in the 2008 Act include: . A slight increase of some reference commodity prices (loan rate, target price) used in the calculation of price linked support. This implies, compared to previous reference prices, a higher compensation if prices drop; . For dairy price support the US, in the past, considered the whole milk production as benefitting from this support. However, with the 2008 Act the US limits this type of support to skimmed milk powder, butter and cheddar cheese; . A countercyclical programme in the dairy sector allowing direct payments to producers, when milk prices drop. The programme , initially created in the 2002 Bill was intended to expire, but is extended under the 2008 Act; . A new permanent disaster fund for crops and livestock replaces ad-hoc disaster payments as seen in the past; . Renewal of the export credit guarantee slightly modified and repeal of the export enhancement programmes (although there has been no expenditure under the EEP since 2002). Introduction of a small pilot programme of $5million a year for local procurement of food aid; . Expansion of subsidies for renewable energy production.

State of Play:	The US notified the implementation of the 2002 Farm Bill to the WTO in November 2007, as the 2002 Bill drew to a close, given that the commodity support provisions expired at the end of the 2007 crop year. Some of the price linked support under this Bill was notified to the WTO in such a manner that it did not count against its ceiling for trade distorting support. Several Members (including the EC) have questioned the justification for this approach. Beyond this more technical detail, the US 2002 Farm Bill was in a general way criticized, both within and outside the US. Three recurrent subjects for criticism were (a) the potential for the crop subsidies to depress world prices; (b) the counter-cyclical nature of price linked support, which shields US producers from the market and (c) the risk that the US could eventually exceed its WTO limit of $19.1 billion production-linked support (the AMS limit). These criticisms have been ignored in the 2008 Farm Act. Instead the new ACRE scheme creates yet another tier of countercyclical support, albeit this time income related.The EU, in defending its rights, will closely monitor the implementation of the 2008 Farm Act for its compliance with trade rules in accordance with both the provisions of the WTO Agreement on agriculture and the WTO trade policy review mechanism. Other WTO partners such as Canada and Brazil participate actively in this process.

Title:	**Agriculture marketing loans**
Sector:	Agriculture and Fisheries
Description:	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 programme 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.
State of Play:	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. 13 March 2003 Commission, after consultation of the Advisory Committee established by the TBR considered that the complaint contained sufficient evidence to justify the initiation of an examination procedure in accordance with Article 8 of the TBR. 20 October 2003 Investigation report was submitted to the Member States. Its findings were that some of the US oilseed subsidies would be protected by Article 13 of the Agreement on Agriculture, whilst for others the level of the US support in the marketing year 2001 appear to have had significant price effects, but the Commission did not have sufficient evidence to reach a final

	conclusion on whether they cause or threaten to cause serious injury. The Commission is monitoring the evolution of the oilseed market and the US subsidies in order to collect further evidence on the negative impact of the US oilseed subsidies on prices and will present a report, whenever appropriate, on the basis of the information available and in any event no later than the end of 2005, which will review the situation in the light of the further evidence obtained and the applicable legal provisions. In 2005, the Commission reviewed the situation and reported to the TBR Committee on the evolution of the case. The monitoring continues.

Title:	**Agricultural Export Subsidies and Promotion**
Sector:	Agriculture and Fisheries
Description:	Prior to the 2008 Farm Bill, the US operated a range of programmes designed to subsidise and/or promote exports of US agricultural products. In the Farm Bill 2008 the Export Enhancement Program (EEP) which allowed funding of $478 million annually in export subsidies was repealed. The program had been inactive since 2001. The Dairy Export Incentive Program (DEIP) is used for dairy market development purposes. Commodities eligible under the DEIP are milk powder, butterfat and cheddar, mozzarella, gouda, feta, cream and processed american cheeses. This program has been extended under the 2008 Farm Bill. The Market Access Program (MAP) offers a share of costs for promotion campaigns for agricultural products (the majority being high value and value added) in selected export markets. The US had three export guarantee programs. The Supplier Credit Guarantee program (SCGP) and two export credit guarantee programs GSM-103 and GSM 102 (GSM= General Sales Manager). The first two have been repealed and GSM-102 renewed providing credit guarantees up to 3 years with a $5.5 billion annual budget. The controversial 1% cap on fees has also been removed (see fiche on Export Credit Guarantee Program).

Title:	**Export Credit Guarantee Program**
Sector:	Agriculture and Fisheries
Description:	The Export Credit Guarantee Programme which is managed by USDA/FAS has had a major impact on a number of key agricultural markets. Under this programme, the US government used to guarantee credits up to 98 % of the export value on a short-term to long term basis varying from up to 180 days under the Supplier Credit Guarantee Program SCGP, 3 years under the General Sales Manager (GSM) 102 and up to 10 years under GSM-103. In the US farm bill 2008 the GSM-103 and SCGP programmes have been repealed. The export credit programmes include a specific list of commodities per country allocation and is one of the main export policy tools of USDA, with annual allocations exceeding $5 billion and declared annual subsidy levels of over $400 million. The programme 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 the terms and conditions which are more favourable than what the private sector is offering in this area, the rescheduling of payments or bilateral debt forgiveness. The GSM-102 is distortive insofar as the credit terms exceed the average life of the product/commodity in question, and the risk premia are inadequate to cover the long-term operating costs and losses of the programmes. Furthermore, new commitments are not only demand driven but based on a selection of buyer country and product by the US Administration. As a result of the dispute settlement case on upland cotton, changes have been made with regard to the currently only remaining export credit guarantee program ; the GSM-102. In US - Upland cotton, the Panel, in September 2004, and the Appellate Body, in March 2005, found that, despite Article 10.2 of the Agreement on Agriculture, export credit guarantees are not exempt

	from the export subsidy disciplines under this Agreement. The Panel and the Appellate Body condemned the export credit guarantee programmes at issue in this dispute (GSM 102, GSM 103 and SCGP) as prohibited under the illustrative list of the Subsidies Agreement because the premia paid by cotton exporters did not cover the expenses of the agency in charge of the programmes over the 1992-2002 period. Following the cotton ruling, the USDA announced some changes in the operation of GSM 103, GSM 102 and SCGP to bring them in conformity with WTO requirements. The US administration also proposed to repeal another export programme particular to cotton, the Step 2 program, which Congress ultimately passed into law, even though after the deadline imposed by the WTO rulings. The SCGP and GSM-103 programmes had subsequently been suspended and STEP2 users marketing payments had been repealed as of 1 August 2006. The GSM 102 (now the only operating programme) had been modified and increased fees have been introduced which vary with country risk, repayment term and frequency. Despite these changes by the US, Brazil initiated a WTO 'compliance' dispute against what it considered to be an insufficient US attempt to bring about compliance with WTO rules. The Panel, whose report was circulated on 18 December 2007, found, inter alia, that the modifications of GSM 102 were not sufficient to remove the subsidy and that by acting inconsistently with Articles 10.1 and 8 of the Agreement on Agriculture as well as with Articles 3.1a) and 3.2 of the Agreement on Subsidies and Countervailing Measures, the US failed to comply with the DSB recommendations. The European Commission is of the view that the changes (i.e. introduction of risk-based fees) to GSM 102, and the suspension and subsequent repeal by the US farm bill 2008 of GSM 103 and SCGP (introduced by the administration as a result of the Cotton ruling are a step in the right direction but are not sufficient either for purposes of implementation (as recently confirmed by the compliance panel) or to eliminate all forms of subsidies flowing through the US programmes. In the US Farm bill 2008 the cap of 1% on the premium exporters have to pay for the export credit guarantee under programme GSM 102 has been removed. This represented a significant subsidy element; however it is not clear whether the new premiums reflect market premiums. State-level export promotions remained unnotified to the WTO. In 2001, Washington State paid an export subsidy to foreign purchasers of apples. This was contrary to US WTO undertakings. Following representations by the EU, the USTR agreed to discontinue the measure and committed not to launch similar programmes in the future. Finally, the propensity of the US to use food aid to countries not suffering food shortages as a means of disposal of surplus farm products has the effect of disturbing local markets, cuts out traditional supplies and undermines local producers. Following EU complaints, the US has partially reviewed its policy. The US Farm bill 2008 did not introduce significant changes to US food aid policy. Although the objectives have been reworded it remains to be seen whether they will continue as an export enhancement tool for US agricultural products. The Congress consistently opposed a proposal by the administration to allocate 25% (i.e. $300 million) of the PL 480 Title II programme for local and regional purchases of food commodities (by USAID) outside the US market. The outcome as appearing in the US Farm Bill 2008 is only a pilot programme of $5 million per year. In the present WTO negotiations, the US - both Administration and Congress ; have resisted any attempt to strictly regulate food aid operations. In particular they oppose the principle of providing food aid in cash insisting that also in future all US food aid be procured on the US market (including preference for transport / handling on US logistics).

Title:	**Boeing Subsidies**
Sector:	Aircraft
Description:	Since 1992 direct and indirect government support to the aircraft industry in the United States and the European Union has been regulated by the bilateral EU-US Agreement on Trade in Large Civil Aircraft. The US purported to unilaterally withdraw from the 1992 bilateral EC-US Agreement on Trade in Large Civil Aircraft in October 2004(a move that the EU continues to consider invalid as it did not respect the required conditions), and, on 6 October 2004, requested consultations regarding alleged support to Airbus by the EU and certain of its Member States (DS 316). The EU responded immediately by initiating WTO dispute settlement proceedings regarding a number of US measures, including federal state and local subsidies (DS 317). For its part, the EU is challenging various US State subsidies benefiting Boeing. These subsidies amount to billions of USD for Boeing. Illustrative examples include a USD 4 billion package in the State of Washington (combining tax breaks, tax exemptions or tax credits and infrastructure projects for the exclusive benefit of Boeing) and a USD 900 million package in the State of Kansas in the form of tax breaks and subsidised bonds. As regards US federal measures, the EU has successfully challenged the tax breaks -- in theory repealed in 2006 by US legislation -- offered to Boeing under the Foreign Sales Corporation successor legislation, the American Jobs Creation Act. These tax benefits, which the EU estimates at a value to Boeing of USD 2.1 billion over the period 1989-2006, were supposed to end on 1 January 2007. However, a recent official IRS Memorandum allows US exporters, including Boeing, to continue to benefit from the illegal tax breaks even after the end of 2006 which should have marked the end of all benefits under the FSC and successor legislation. The EU is challenging these continued subsidies to Boeing, which could amount to USD tens/hundreds of millions. In addition to the federal tax breaks, the EU is challenging the US system under which: federal R&D contracts ultimately benefit Boeing's LCA division and Boeing's aircraft models;- Boeing sees its own R&D expenses reimbursed;- Boeing benefits from extensive cooperation with NASA and DOD engineers at no cost;- Boeing is able to use testing facilities and equipment also at no cost. In addition, under this system, a large number of patents and other technologies are put at the disposal of Boeing free of charge, including through the transfer of patents held by US federal agencies (and resulting from US government funded research) to Boeing. The EU estimates the total benefits of federal research programs to Boeing at around USD 16.6 billion. The EU considers that the above mentioned subsidies are in violation of Articles 3, 5, and 6 of the SCM Agreement and Article III of the GATT 1994. The EU intends to demonstrate before the WTO panel that the above subsidies benefiting Boeing have allowed the company to engage in aggressive pricing of its aircraft which has caused lost sales for and injury to Airbus. Consultations were held in Geneva on 5 November 2004. On 12 January 2005, the EU and the US agreed to suspend WTO action for 3 months pending discussions towards the conclusion of a new bilateral agreement on subsidies for Large Civil Aircraft. However, both sides did not reach an agreement and in the following, the US requested the establishment of a panel on 31 May 2005; the EU submitted a similar request the same day. During the DSB meeting on 13 June 2005, the US argued that a number of the measures referred to in the EU panel request of 31 May 2005 were not listed in the consultation request of October 2004. For reasons of absolute legal certainty, the EU on 27 June 2005 filed a second consultation request which explicitly lists all the measures in question. The US has accepted the request for consultations, which were held in Geneva on 3 August 2005. The Panel was established on 20 July 2005 and composed on 17 October 2005. The first phase of the fact-gathering (Annex V) procedure was completed by 22 December 2005 with the submission of replies by the parties to follow-up questions posed on information submitted on 18 November. The Facilitator submitted his report on the above procedure to the Panel on 24 February 2006. During the Annex V procedure the US refused to provide information, inter alia, on 13 programmes not explicitly listed in the initial consultation request of the EU. Unlike the EU, which filed a request for preliminary rulings in DS316 on 26 October 2005 requesting the Panel to clarify the scope of the proceeding, the US refused to do so in DS317. In view of this, on 23 November 2005 the EU requested the Panel to invite the US to make a preliminary ruling request before the completion of the Annex V process, or take any other decision with equivalent effect. The Panel did not issue such a

	decision. The final working procedures only require the US to make a preliminary ruling request at the latest at the time of their first submission. This situation of procedural limbo needed to be resolved quickly, since the US non-cooperation deprived the EU of access to documents falling within the scope of the dispute, in particular regarding NASA and Department of Defence subsidies. Consequently, the EU on 20 January 2006 filed a request for the establishment of a (second) panel based on its second request for consultations of 27 June 2005. The (second) panel (for DS317) was established on 17 February 2006. Subsequently, the US submitted a second consultation request in DS316 on 31 January 2006 (now DS 347), which has largely the same purpose as the EU request, i.e. to explicitly list measures which were contained in the US panel request, but not in the consultation request. The US repeatedly blocked the initiation of an Annex V process during DSB meetings. On 23 May 2006 the EU transmitted Annex V questions for the US to the Facilitator. The questions were substantially identical to the questions submitted in the previous Annex V procedure, but some new questions had been added. This was followed by a meeting between the parties, the Facilitator and the WTO Secretariat to resolve the blockage of the Annex V procedure, to no avail. The Facilitator then informed parties on 6 June 2006 that his views were that the initiation of an Annex V procedure requires positive consensus -- the EU objected, providing its own understanding of WTO law. The EU requested the WTO Director General to compose the panel in DS317 bis (second offensive EU case) on 17 November 2006. The Panel was composed on 23 November 2006, with Mr. Crawford Falconer as Chairman, and Mssrs. Francisco Orrego Vicuna and Varachai Plasai as Members. On 4 December 2006 the WTO Secretariat renamed DS317 bis, which became DS353. Pursuant to the composition of the Panel, the EU filed a request for preliminary ruling to the Panel on 24 November 2006, asking the Panel to:- either rule that the Annex V information-gathering procedure had been initiated at the EU's request in April/May 2006, and that the US was under an obligation to answer the questions that have been put to them on 23 May 2006 - or, alternatively, to use its fact-seeking powers under Article 13 DSU to request the US to provide relevant information that would be identified by the EU.The Panel rejected the EU's requests, and responded that it would not use its Article 13 DSU prerogatives before the parties have filed their first written submissions. Subsequently, following the first meeting of the Panel with the parties, the Panel posed questions to the Parties, including a number of questions to the US that related to the EU's earlier request. The EU filed its first written submission on 22 March 2007. The US for its part filed its first written submission on 6 July 2007. Third Parties filed their first written submissions on 1 October 2007. The first meeting of the Panel with the parties took place on 26 and 27 September 2007. The Parties had also agreed that parts of the hearing should be open to the public. As a result, a public screening of the open parts of the hearings was scheduled to take place at the WTO on 28 September 2007. The Parties filed their rebuttal submissions on 19 November 2007 (instead of 6 November 2007 as initially scheduled), and filed their responses to the Panel's questions, on 5 December 2007. The first meeting of the Panel with the Third Parties will take place on 15 January 2008, followed by the second meeting of the Panel with the Parties on 16-17 January 2008. According to the current timetable, the issuance of the final Panel report is due on 16 June 2008. In addition to the WTO case, the EU has also expressed its concern over legislation (Fiscal Year 2002 Defense Appropriations Act) that would have allowed 100 tanker aircraft to be ordered by the US Air Force (USAF) from Boeing (KC-767A tanker program) without allowing real competition from EADS/Airbus, which would have resulted in procurement at a price substantially above the market value of the aircraft. This legislation may also have contributed to a procurement scandal within the Air Force leading to several criminal, legislative, and administrative investigations of both government and Boeing officials, and to the cancellation of the contract awarded to Boeing under the KC-767A tanker program. In the wake of these investigations, the Fiscal Year 2005 Defense Authorization Act, which would seem to allow for competition, and the pledge by DoD (following a report of the DoD Inspector General on this matter) to seek such competition should the Air Force decide it needs new aircraft, chances for true competition appear much better. The Request for Information from USAF included language that would in effect have prevented EADS and its partner Northrop-Grumman to bid in the new competition. This language was subsequently removed from the Request for Proposal. The European Commission will continue to monitor the situation.

State of Play:	Some key dates in the WTO process in 2007/2008: 22 March 2007: EU files confidential version of First Written Submission 6 July 2007: US files confidential First Written Submission 26-27 September 2007: First panel hearing 28 September 2007: EU puts non-confidential version of First Written Submission on its website 16 and 17 January 2008: second panel hearing (rebuttals submitted on 6 November 2007) 7 April 2008: issuance of the confidential interim Panel report (to the Parties) 16 June 2008: issuance of the final Panel report Publication of the final report: (after translation of the final report ; approximately 2-4 months)

Title:	**Aircraft Engine Manufacturers**
Sector:	Aircraft
Description:	The EU is concerned by US Government subsidies granted to US engine manufacturers in the form of benefits from R and D funded by NASA, the DoD - dual use technology - and other mechanisms. GE and Pratt and Whitney are the dominant beneficiaries. These subsidies, which are non-repayable and can be directly traced to specific engine programmes, average around $2 billion annually.

Title:	**Airline State Aid**
Sector:	Services - Transport
Description:	The US government is still supplying third party war risks insurance at virtually no cost to US airlines and their suppliers. The programme was started following the September 2001 terrorist attacks and was extended until 31 December 2008. The assistance given by the US Government to the US industry represents significant protection from the commercial pressures facing foreign air carriers and is a potential impediment to fair trade on transatlantic air routes. In addition, in recent years several major US carriers have sought bankruptcy protection under Chapter 11. Such protection from creditors can distort the market for transatlantic air services. Provisions on government subsidies and support are included in the EU-US Air Transport Agreement, which entered into effect on 30 March 2008. It is recognised that government subsidies can adversely affect competition. If fair and equal opportunity to compete is adversely affected, the Joint Committee set up by the Agreement may develop appropriate responses. The Joint Committee maintains an inventory of issues regarding government subsidies and support.

Title:	**Biodiesel Subsidies**
Sector:	Other Industries
Description:	The Europe Union is the major market for Biodiesel and accounts for 77% of world production. The EU market is worth about €euro5 billion per year. The U.S. is the world's second largest producer and is by far the major source of EC imports. The issue has emerged due to a surge in U.S. subsidised Biodiesel exports to the EU, which has depressed prices and profits and caused several producers to shut down their operation. The problem is that the U.S. subsidizes Biodiesel producers by means of tax credits, which impacts not only on U.S. sales but also on exports to other countries, notably the EU. In contrast the EU provides subsidies to consumers, which only affect the EU market and imports are eligible for the same benefits as EU products. The subsidies are significant ($1 per gallon or 200 Euro per tonne) and they are enabling imports from the U.S. to enter at below the EU industry's raw material costs. In effect U.S. Biodiesel exports to the EU have increased sharply, from less then 100,000 tonnes in 2006 to 1 million tonnes in 2007, which presents already nearly 20% of the EU market share.

State of Play:	EU industries have repeatedly complained about these subsidies, which are the so-called 'B-99' tax credits to U.S. producers of Biodiesel, alleging that they are countervailable. The issue is becoming more urgent as the EU industry (EBB which has 52 member companies in 19 Member States) decided on 30 November 2007 to prepare anti-dumping and CVD complaints and the Commission expects to receive such complaints by March 2008.

Title:	**Alternative Fuel Tax Credit for Black Liquor**
Sector:	Pulp and Paper Industry
Description:	In 2005, Congress passed Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 which included provisions to encourage the production of renewable and alternative fuels. The bill included a tax credit of \$0.50/gallon for the production of an "alternative fuel mixture" (referred to as the "Alternative Fuel Mixture Credit" (AFMC)). Such a mixture consists of a qualified alternative fuel and a taxable fuel (such as diesel, gasoline or kerosene). In December of 2007, President signed into law Tax Technical Correction Act of 2007 which made technical corrections to a series of tax policies. One correction made by the Act was a redefinition of "alternative fuel". The definition of alternative fuel changed from reference to "liquid hydrocarbons" to "liquid fuel" for purposes of the alternative fuel excise tax credit and payment provisions. The tax credit was extended under the Emergency Economic Stabilization Act of 2008 until December 31, 2009. Although the language of the Tax Technical Correction Act of 2007 became public law on December 29, 2007, it was not until November of 2008 that some pulp producers realized that they could slightly modify their operations (by mixing diesel fuel into their black liquor) and become eligible for the AFMC. On March 24, 2009, International Paper received a payment of \$71 million from the IRS for one month's production (Nov. 14-Dec 15, 2009). Some analyses suggest that the pulp industry is fully aware of the AFMC, it can be assumed that eligible producers will modify their operations in order to receive payments before it expires on December 31, 2009. Some reports estimated annual benefit to the pulp industry provided by the AFMC is between \$2.778 billion to \$8.162 billion.

Title:	**State Subsidies WTO Notification**
Sector:	Horizontal
Description:	Transparency in the area of subsidies is an obligation of the Agreement on Subsides and Countervailing Measures (SCM). However, the notification of subsidies is frequently delayed.
State of Play:	Up to 1998 the US only notified a limited number of Federal programmes to the WTO, many of which were relatively small, and would not notify its many state-level subsidies. Following pressure from the EU, in the form of detailed questions and a counter-notification under Article 25.10 of the SCM, the US finally began to notify certain state-level subsidies in its new and full notification of 1998. The notification was reviewed in the WTO Subsidies Committee in May 1999. However, the EU still remained concerned by the lack of information on US state-level subsidies, particularly large, ad hoc investment incentives. Later the reporting of federal subsidies was improved, although there were still gaps as regards certain sectors, notably aerospace. The US undertook to include non-notified subsidies, including those identified by the EU, in the update notification due in 1999. However, no update was provided until the Subsidies Committee on 2 July 2002, when the US provided an update on subsidies for 1999 and 2000 and a new and full notification for 2001. In October 2003 the US presented a new and full notification for the 2002 fiscal year. The 2005 new and full subsidy notification covering the fiscal years 2003 and 2004 was submitted only after a 2 year delay by the end of 2007. For the fiscal years 2005 and 2006 no new and full subsidy notification has been submitted yet although it was due by mid-year 2007.

	Investment related Measures
Title:	**Exon-Florio Amendment**
Sector:	Horizontal
Description:	On 24 October 2007 the Foreign Investment and National Security Act of 2007 (FINSA) came into force, replacing Section 5021 of the 1988 Trade Act, the so-called Exon-Florio Amendment to the Defense Production Act. It requires the President to review mergers, acquisitions or take-overs that could result in foreign control of legal persons engaged in interstate commerce to determine their potential effects on US national security, if any. This screening is carried out by the statutory Committee on Foreign Investment in the US (CFIUS), which is chaired by the Department of Treasury acting on behalf of the President. It is composed also of various other Departments, including Homeland Security, Commerce, Defense and State, as well as the Director of National intelligence as a non-voting member and the Secretary of Labor (the regulations however state that the latter has no policy role). For each case under review, the Treasury designates a lead agency. It has been considered that the length of time taken by the screening process, the uncertainty, and the legal and economic costs involved, potentially have a negative impact on foreign investment. Moreover, should the President decide that any such transactions threaten national security, which is widely interpreted - he can take action to suspend or prohibit these transactions. This could include the forced divestment of assets. There are no provisions for judicial review or for compensation in the case of divestment. Since this legislation was originally introduced, the scope of Exon-Florio has been further enlarged. The new law is the result of extended public discussion and various motions in Congress following intended investment by Dubai Ports World and Chinese oil company CNOOC. In a post 9/11 scenario it tightened existing rules, but avoided worse restrictions such as extended timelines or overriding of Presidential decisions by Congress. While the time limit for the initial review (30 days) and subsequent investigation (45 days) remain unchanged, an investigation must be made if a foreign government-owned entity engages in any merger, acquisition or take-over that gives it control of the company, or if control of critical infrastructure is involved (except if the Secretary of the Treasury and the head of lead agency determine that the transaction will not impair national security). In October 2007, uncertainties remained, notably with respect to the need for pre-notification of proposed investments. The implementing regulations actually encourage pre-filing (which also appears to be in a potential investors' self interest in cases where other laws (on export controls for instance) also apply which provide for longer review periods). Reporting obligations towards Congress are enhanced. They include a report by the President to Congress on the results of each CFIUS investigation and an evaluation, among other factors to be considered, of the potential effect of the proposed or pending transaction on US international technological leadership in areas affecting US national security, blurring the line between industrial and national security policy. In effect, a very significant number of EU firms' acquisitions in the US are subject to pre-screening. On 23 January 2008, an Executive Order (EO) was issued. The purpose of the EO was to strengthen the process and powers of CFIUS to review all potential investments from foreign firms with national security implications while at the same time strengthening the role of Treasury. The law and the EO also impose additional analytical and procedural disciplines on CFIUS Agencies: risk mitigation provisions must be justified by a written analysis of the national security risk posed by a transaction, CFIUS must agree that they are justified, and no other law can adequately address the risk. It also prohibits CFIUS agencies from using CFIUS' authorities to gain leverage over the parties with regard to enforcement of the agencies' existing legal authorities outside the CFIUS process. It remains to be seen whether this will lead to a decline in the number of mitigation agreements. In recent years, the negotiation of agreements (to mitigate national security concerns) has become more common, although seldom publicised. These mitigation agreements can require the establishment of a separate subsidiary to handle classified contracts.

	On 21 April 2008, the proposed regulations implementing FINSA were published for notice and comments prior to finalisation. These regulations formalised many of CFIUS' informal practices, codifying and intending to clarify such practices while further defining concepts used (such as that of 'critical infrastructure'). The draft regulations, encouraging voluntary pre-filing, affected both the substance (by increasing the range of transactions and the degree of scrutiny of transactions under review) and the process (by doubling the information required). They also proposed civil penalties for certain violations and the possibility to negotiate liquidated damages provisions in mitigation agreements. Following comments, the U.S. Department of Treasury published, on 14 November 2008, the final regulations governing the national security review of foreign investments conducted by CFIUS. The final regulations formally implement FINSA. Since the final regulations were published in the U.S. Federal Register on 21 November, they became effective on December 20, 2008 (30 days after publication). In connection with the final regulations and as required by FINSA, the U.S. Treasury also published, on 1 December, guidance on the types of transactions that CFIUS has reviewed previously and that have presented national security considerations. The guidance also provides insight into how CFIUS identifies the national security effects of covered transactions. Previous assessments by the EU had considered that CFIUS legislation could conflict with the principles of the OECD Code of Liberalisation of Capital Movements and the National Treatment Instruments. While the EU understands the wish of the US to take all necessary steps to safeguard its national security, there was, and there remains, concern that the scope of application may be carried beyond what is necessary. In this context, the EU had drawn attention to the lack of a definition of national security and the uncertainty as to which transactions are notifiable. While this has now been improved, other concerns, such as the lack of judicial review, remain. The Final Regulations demonstrate a willingness on the part of the US to respond to concerns expressed when the Proposed Regulations were published. By increasing transparency and clarity, the Final Regulations do contain improvements which are welcomed. For instance, CFIUS reviews will remain focused on national security, the strict deadlines are maintained, the concepts of 'covered transactions', 'foreign person', 'US business' and 'control' are somewhat clarified, and the deadline for submission of additional information is extended from 2 to 3 business days. While the additional information to be provided has doubled and will be applicable to all cases (as opposed to a case-by-case basis), the confidential treatment of information is extended to information pre-filed, including if no notice is ultimately filed. While the 'evergreen' provision; providing for the re-opening of a transaction after conclusion of a procedure - remains in place, reviews may only be reopened in exceptional cases, such as where the parties made a material omission or misstatement to CFIUS or if the parties intentionally and materially breached a mitigation agreement and in the case of a breach, only if all CFIUS agencies find that no other remedy is sufficient. The regulations provide for a 'safe harbour' for 'covered transactions' notified to and reviewed by CFIUS. On the other hand, CFIUS may unilaterally review any 'covered transaction' that was not notified and does not have safe harbour. Time will tell whether these clarifications actually provide increased legal certainty. The Guidance is further welcomed as helpful to foreign investors in that it provides an insight on how CFIUS identifies risk, although it lacks force and effect of law. Concerns do remain however. Indeed, the legal and economic costs resulting from the CFIUS review process are expected to be higher than previously incurred, not to mention the delays in completing a transaction. There is still no possibility for judicial review. January 2009 saw the publication of an edited version of the annual report to Congress, which CFIUS is under an obligation to provide. The confidential version of the report was sent to Congress in November 2008. The report is divided in two parts: Part I provides aggregate information on 'covered transactions' for the period 2005-2007 while Part II focuses on one specific 'national security factor' which CFIUS must evaluate with respect to 'covered transactions', that is 'the potential national security-related effects on US critical technologies' in the period 2006-2007. The report concludes that (i) there is no credible evidence of a widespread coordinated strategy among foreign governments or corporations to acquire US companies involved in research, development or

	production of critical technologies through FDI; and (ii) foreign firms are not concentrating their investments solely in critical technology areas or taking an increasingly dominant position in US critical industry technologies.
State of Play:	The Executive Order and the Final Regulations implement FINSA and complete the reformation of the so-called Exon-Florio process governing national security reviews of foreign investments as conducted by CFIUS. Comments are now awaited from business organisations and law firms further to the publication of the Final Regulations and Guidance.

Title:	**Section 310 of the 1934 Communications Act**
Sector:	Services - Communication, incl. postal services
Description:	Foreign Ownership / Investment Regulations Section 310 of the 1934 Communications Act establishes restrictions to foreign investment in U.S. companies holding a broadcast or common carrier radio license (the latter include also aeronautical en route or aeronautical fixed radio station). Such licenses shall not be granted to, or held by, foreign governments or their representatives, aliens, foreign corporations, or corporations of which more than 20% of the capital stock is owned or voted by a foreign entity. Foreign indirect investment is limited to 25% subject to a public interest waiver. In addition, to provide telecommunications services, operators typically need to integrate radio transmission stations, satellite earth stations and in some cases, microwave towers into their networks. Foreign-owned U.S. operators face additional obstacles in obtaining the licensing of these various elements relative to U.S.-owned firms. As a result, the U.S. broadcasting market today is hardly accessible to foreign media companies. The Telecommunications Act of 1996 only eliminated the restriction on foreign directors and officers. It significantly relaxed many of the existing broadcast ownership rules (leading to substantial consolidation in the commercial broadcast radio industry) and mandated the FCC to review them every two years to determine 'whether any of such rules are necessary in the public interest as a result of competition. At the time, the U.S. undertook market access and regulatory commitments on most telecommunications services (voice telephone, data, telex, telegraph, private leased circuit services; local, domestic, long-distance and international, etc.). Regulatory commitments in particular impose that the U.S. regulation be in line with a number of principles to have inter alia adequate licensing procedures, to promote competition, and to ensure proper interconnection. The Basic Telecom negotiations in the WTO did not change the situation with respect to foreign direct investment, as limitations on direct foreign ownership of common carrier radio licences have been explicitly retained in the U.S. schedule of commitments. However, the U.S. took commitments on foreign indirect ownership but did not modify its domestic legislation. In November 1995, in the run-up to the WTO negotiations on Basic Telecommunications, the Federal Communications Commission (FCC) adopted a rule on entry of foreign-affiliated carriers into the U.S. market, adding a new factor to the FCC's public interest review, notably for the purpose of granting waivers to those restrictions on foreign indirect investment imposed by Section 310 of the 1934 Communications Act. Specifically, the FCC introduced an Effective Competitive Opportunity Test (ECO-test). The FCC also issued in May 1996 a notice of proposed rulemaking applying the ECO-test to foreign-licensed satellites. The EU submitted objections in both proceedings. On 25 November 1997, the FCC adopted two rulings (a general ruling on foreign participation in the U.S. market, and a specific one on the satellite services market entitled DISCO-II) to implement the commitments of the U.S. in the Basic Telecom Agreement. In these rulings the FCC replaced the ECO-test with a rebuttable presumption that entry by carriers from WTO countries and by satellites licensed by WTO countries is pro-competitive, but the FCC retained the unclear 'public interest' criteria which can still be invoked to deny a licence to a foreign operator for various motives, such as trade concerns, foreign policy concerns and very high risk to competition. Although the FCC expressed its intention to only deny market access on this basis in exceptional circumstances (which are not well defined) the discretion retained by the FCC remains of concern to the EU and raises questions as to the compatibility of the FCC rules with U.S. WTO commitments. In March 2004, the FCC amended its International Communications Policy in recognition that markets have become more competitive but it re-affirmed the relevance of its benchmarks policy applicable to international settlement rates since 1997. This policy, which seeks unilaterally and

	arbitrarily to move these rates towards costs, may violate WTO rules. Concerns were heightened in 2004 as some parties sought to apply the Benchmarks' policy to the mobile communications sector. The FCC decided instead to initiate in October 2004 a Notice of Inquiry to evaluate the effects of high foreign mobile termination rates on U.S. consumers and competition. General Ownership Regulations Within this context, the FCC conducted a comprehensive review of its media ownership regulations. In June 2003, it adopted an Order relaxing previous restrictions (e.g. elimination of the local TV broadcast duopoly rule, increase from 35 to 45% of the cap on a TV broadcast network's reach of the national audience and elimination of the existing ban on broadcast newspaper and radio-television cross-ownership in large markets and replacement of this ban by a set of cross-media limits in small and medium size markets). The Order was immediately challenged in the U.S. Court of Appeals for the 3rd Circuit. In June 2004, the 3rd Circuit U.S. Court re-affirmed the FCC decision to eliminate the ban on media cross-ownership but called in question the FCC methodology in setting specific limits on media combinations and remanded the Order to the FCC. In January 2005, the FCC decided not to appeal to the Supreme Court. Although a number of broadcasters and publishers took the issue to the Supreme Court, the Court decided not to review the Third Circuit Court decision. The 3rd Circuit did not address the FCC broadcast TV network ownership rules because Congress in the meantime rolled back the cap from 45% to 39%. In December 2007 the FCC concluded its quadrennial review of broadcast ownership rules. The Commission amended the 32-year-old absolute ban on newspaper/broadcast cross-ownership by crafting an approach that would allow a newspaper to own one television station or one radio station in the 20 largest markets, subject to certain criteria and limitations ; see below for more detail, although please note it is still possible that the new rule could be challenged in the Courts / Congress over the coming months. The rule adopted by the FCC would permit cross ownership only in the largest markets where there exists competition and numerous voices. The revised rule balances the need to support the availability and sustainability of local news while not significantly increasing local concentration or harming diversity. Under the new approach, the Commission presumes a proposed newspaper/broadcast transaction is in the public interest if it meets the following test: (1) the market at issue is one of the 20 largest Nielsen Designated Market Areas 'DMAs'; (2) the transaction involves the combination of only one major daily newspaper and only one television or radio station; (3) if the transaction involves a television station, at least eight independently owned and operating major media voices (defined to include major newspapers and full-power TV stations) would remain in the DMA following the transaction; and (4) if the transaction involves a television station, that station is not among the top four ranked stations in the DMA. All other proposed newspaper/broadcast transactions would continue to be presumed not in the public interest, subject to certain exceptions. Thus major U.S. players may now consider consolidating or swapping their assets. Non-U.S. companies however will not be able to participate in this development because of the existing foreign ownership restrictions. The U.S. Administration holds the view that it is not necessary to adopt specific legislation to abolish foreign indirect investment restrictions in the telecoms sector (namely Section 310(b) (4) of the 1934 Communications Act), since the FCC may waive these restrictions under the current law by invoking the public interest. However this waiver provision, which entails lengthy and costly proceedings, does not provide certainty to European operators. The EU will continue to monitor the situation carefully and will oppose any action, through legislation or otherwise, that would conflict with the U.S. WTO commitments.

Title:	**Energy Acts**
Sector:	Services - Energy
Description:	Under the Federal Power Act, any construction, operation or maintenance of facilities for the development, transmission and utilisation of power on land and water over which the Federal Government has control are to be licensed by the Federal Energy Regulatory Commission (FERC). Hence, FERC acts as licensing authority over non-federal hydroelectric facilities. According to the Act, such licences can only be granted to US citizens and to corporations organised under US law. Thus the only possibility for non-US citizens to obtain such a license would be to form a US company. For the operation, transfer, receipt, manufacture, production, acquisition and import or export of facilities which produce or use nuclear materials, the Atomic Energy Act (AEA) requires that a licence be issued, but the licence cannot be granted to a foreign individual or a foreign-controlled corporation, even if there is incorporation under US law. In this respect, the Nuclear Regulatory Commission interprets the AEA to prohibit 100% ownership of a nuclear facility by a foreign individual or corporation, but allows licensees to be partially (current standard is 50%) owned by foreign corporations.

	Tax Discrimination
Title:	**Tax Code Reporting Requirements**
Sector:	Horizontal
Description:	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. The information reporting requirements of the US Tax Code 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.

Title:	**Earnings Stripping Provisions**
Sector:	Horizontal
Description:	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. These 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 The objective of the 'earnings stripping' provisions 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.

	Intellectual Property Rights
	Copyright and Related Areas
Title:	**Section 110(5) of 1976 Copyright Act (Irish Music)**
Sector:	Services - Communication, incl. postal services
Description:	Section 110 of the US Copyright Act provides for limitations on exclusive rights granted to copyright holders for their copyrighted work, in the form of exemptions for broadcast by non-right holders of certain performances and displays, namely, 'homestyle exemption' (for 'dramatic' musical works) and 'business exemption' (works other than 'dramatic' musical works). Concretely, Section 110(5) permits the playing of broadcast music in public places (such as bars, shops, restaurants etc.) without the payment of a royalty fee. The described practice has caused a loss of income to right-holders, as a large number of commercial establishments do not pay any royalty fees. Moreover, the incomplete copyright protection in the US has broader economic effects negatively affecting the overall position of authors on the US market. At the request of the EU and its Member States, at the DSB meeting of 25 May 1999, a Panel was established. On 27 July 2000, the DSB adopted the Panel report that found Section 110(5)(B) of the US Copyright Act to be incompatible with the TRIPs Agreement, in connection with the Bern Convention on the Protection of Literary and Artistic Works, as it provides an exceedingly broad derogation from the exclusive right of authors to authorise the public communication of their works. In particular, Section 110(5) allows the public retransmission of broadcast music in commercial premises (bars, shops, restaurants etc.) without royalties being paid. In 2001, an arbitration panel determined that the level of nullification or impairment was equal to $ 1.219.900 per year. As the US declared that it was not in a position to comply promptly with the WTO ruling; the EC agreed to discuss a possible mutually acceptable arrangement. The parties eventually reached a common understanding the US was to provide financial assistance to EU performing societies with a view to developing activities for the promotion of authors' rights, pending compliance with the DSB recommendations and rulings. The understanding covered a 3-year period ending on 21 December 2004. In July 2002, the US Congress passed the Trade Promotion Authority Act, which included a provision setting up a fund for the payment of settlements of WTO disputes. In April 2003, the Wartime Supplemental Appropriations Act foresaw an appropriation to make a payment in connection with the Section 110(5) dispute. In the light of these legislative developments, the US and the EC notified to the WTO a mutually satisfactory temporary arrangement on 23 June. In September 2003, the US made the agreed payment. The arrangement expired on 21 December 2004 and the US has so far failed to offer either a temporary or definitive solution to the dispute. For the time being there are no legislative initiatives to bring the Copyright Act into compliance with the TRIPs Agreement. The EC's right to suspend concessions or other obligations has been safeguarded by means of a request under Article 22.2 DSU made on 7 January 2002. The requested suspension of TRIPs obligations consists in the levying of a special fee to US right holders that apply for action by the EU customs authorities to block pirated copyright goods. The EC request was immediately submitted to arbitration due to US opposition. The arbitration procedure is currently suspended.

Title:	**Broadcasting and public performance rights**
Sector:	Services - Other
Description:	European industry complains that producers and performers do not enjoy broadcasting rights or public performance rights in the U.S. The U.S. has not joined the Rome Convention of 1961, which recognises these rights, and it has taken an exception under the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty (WTTP) of 1996, actively excluding them. To the contrary, the EU does grant rights to both producers and performers since 1992, through the Rental Directive (2006/115/EC). Consequently U.S. right holders are protected in a large number of EU Member States. Furthermore, although the U.S. has acceded to the Berne Convention in 1989, which contains an obligation to make moral rights available for authors, these rights are recognised only to a very limited extent in U.S. legislation.

	Appellations of Origin and Geographical Indications
Title:	**Protection of EU wine Geographical Indications**
Sector:	Wines & Spirits
Description:	By virtue of the Agreement on trade in wine between the Community and the US of 2006, the US protects Community wine geographical indications, designated as 'names of origin', through labelling rules. This agreement is without prejudice to EC rights under the TRIPS and does not affect the EC legislative framework for GIs (Geographical Indications). The US implements its TRIPS obligations relating to GI in general via trademark law. This legal instrument is not appropriate for geographical indication protection for, among others, the following reasons: trademarks may be transferred (not possible for GIs since they can be used by any person established in the delimited area producing goods in compliance with the specification), trademarks shall be renewed otherwise the owner loses his protection (GI does not need to be renewed), trademark is owned by a person (there is no ownership for GIs).

Title:	**Protection of EU wine Geographical Indications (semi-generics)**
Sector:	Wines & Spirits
Description:	On 10 March 2006, the agreement between the Community and the US on trade in wine entered into force. With this agreement, both parties recognise and protect via their labelling rules each others 'wine names'. Regarding 17 important EU wine GI's considered as 'semi-generic terms' in the US, the US agreed to seek to change their legal status to restrict their use to EU wines only, as far as wine labels issued after a certain date are concerned. This restriction does not apply to wine labels issued for wines of US origin before that date. On 9 December 2006, US Congress adopted new labelling legislation for the EU semi generics (Tax Relief and Health Care Act of 2006- Section 422) restricting the use of these names to EU products at the expense of new wine labels. This act was signed by the US President and enacted as law on the 20 December 2006. However, the fact that these names are still considered in the US as semi-generics for wine labels existing before 10 March 2006 weakens the reputation of the Community geographical indications concerned in the US. US users of semi-generics can take advantage of, or could damage, the reputation of the Community geographical indications in question. The collective effort and investment made by producers of the EU geographical indications concerned to build the reputation of these names is materially impacted by the legal status of semi-generics in the US. A joint declaration attached to the existing EU-US wine agreement provides that issues such as geographical indications in connection with wine will be on the agenda.

	Negotiations for a second phase wine agreement were launched in June 2006 and further meetings have been held in 2006, 2007 and 2008.
State of Play:	Negotiations are ongoing.

	Patents, Trademarks and Related Areas
Title:	**IPR Infringement Cases (Section 337 of 1930 Tariff Act)**
Sector:	Other Industries
Description:	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. 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.
State of Play:	Since February 2000, the ITC has started new investigations against a number of European companies. In the absence of any abusive claim or dilatory claim concepts applicable to the Section 337 procedure they appear to have no other purpose than to compel the European defendants to settle. The Commission is concerned by these developments and it regularly raises the 'Section 337' issue in its bilateral contacts with the US Administration. The Commission does not discount further action at the WTO level.

Title:	**Section 211 of Omnibus Appropriations Act (Havana Club)**
Sector:	Wines & Spirits
Description:	Section 211 of the Omnibus Appropriations Act prohibits, under certain conditions, the registration or renewal of a trademark or a trade name which is identical or similar to a trademark or trade name used in connection with a business confiscated at the time of the Cuban revolution. It also prevents US Courts from recognising or enforcing any assertion of rights to such marks or trade names under the same conditions. Section 211 was introduced into the Omnibus Appropriations Act of 1998 at the behest of Bacardi, in order to bar its competitor, Havana Club Holding (HCH), from protecting its trade mark 'Havana Club' in the US. 'Havana Club' is a premium rum produced in Cuba and marketed worldwide by Havana Club Holding through Havana Club International (HCI). Formed in 1993, Havana Club Holding is a joint venture between Havana Rum and Liquors of Cuba and Pernod Ricard of France. Havana Club Holdings owns registration of the 'Havana Club' trademark in 183 countries and has the right to acquire the US registration from Cubaexport, which had registered the mark in the United States in 1976.
State of Play:	After WTO consultations failed, the EU and its Member States requested the establishment of a WTO Panel on Section 211. On 26 September 2000, a WTO panel was established to rule on the compatibility of Section 211 with the obligations of the US under the TRIPs Agreement. The Panel's report, issued on 6 August 2001, confirmed that Section 211 was in violation of Article 42 of TRIPs by denying trademark owners access to the courts. Furthermore, it stated expressly that Section 211 should not apply when the trademark has been abandoned. However, there were two points where the

	Panel did not agree with the EU's claims. The Panel considered that trade names are not covered by TRIPs and that TRIPs does not regulate the question of the ownership of intellectual property rights. The Appellate Body report, issued on 2 January 2002, substantially reversed the reasoning of the panel and ruled that Section 211 discriminates in favour of US nationals and against Cuban nationals vis-à-vis other foreigners. According to this report, Section 211 violates two core obligations of the TRIPs Agreement which are the National Treatment and Most Favoured Nation (MFN) Treatment obligations. The Appellate Body confirmed that, under the TRIPs, WTO Members do have an obligation to protect trade names. However, the Appellate Body found that the US statute was in conformity with Article 42 of the TRIPs Agreement, thereby reversing the panel findings on that point and maintained the finding of the panel that the TRIPs does not govern the issue of the determination of ownership of IP rights. The DSB adopted the Panel's and the Appellate Body's reports at the regular DSB meeting on 1 February 2002 , which implied the obligation for the US to bring its legislation in conformity with its TRIPs obligations. The reasonable period of time for implementation, extended several times, expired on 30 June 2005. In July 2005, the DSB adopted a US/EU agreement which preserves the right for the EU to request the authorisation to suspend the application to the United States of concessions or other WTO obligations at a later stage. In August 2006, Section 211 was used to deny renewal of the US trademark registration of 'Havana Club'. That decision has been appealed by the company concerned. By the end of 2008, the US has not adopted any implementing measure of the DSB ruling.

Title:	**Principle of First-to-Invent**
Sector:	Horizontal
Description:	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. 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 Transatlantic Business Dialogue agenda and the latter has recommended the adoption of the first-to-file approach in the US.
State of Play:	The issue is being discussed within the so called Alexandria process or Group B+.Since April 2007, there is a bipartisan, but not governmental, US patent reform bill in the US Congress that supports introduction of First-to-File system, but it is uncertain whether this bill will be finally adopted.

Title:	**Hilmer Doctrine**
Sector:	Horizontal
Description:	European companies are confronted with discrimination due to the application of the Hilmer doctrine which does not follow the rule that the prior art which is relevant for assessing the novelty and the inventiveness of an invention may be defined as all information which has been available to the public anywhere in the world in any form before the priority date of a claimed invention. Furthermore, an international application (Patent Cooperation Treaty, PCT) arising from European countries is not included in the US prior art until the date of the entry into the US national phase even if that application has been published previously. This doctrine is clearly detrimental for European companies although it is authorised by Article 27(5) of PCT.
State of Play:	The issue is being discussed within the so called Alexandria process or Group B+.

Title:	**Encryption Control Policy**
Sector:	Electronics
Description:	Potential problems are posed by the differential treatment of encryption items depending on whether they are transferred to government or non-government end users. In addition, US re-export controls on goods and intellectual technology create a difficulty for the European industry for cases of re-export. The effect of the Cryptography Note, as introduced in the Wassenaar Arrangement, has been reduced by the US authorities through the introduction of two new requirements : crypto functionality should not be modified or customised and the items cannot be network infrastructure products such as high end routers or switches designed for large volume communications. The latter items still need to be licensed. A combination of the continuing constraints on the export of strong encryption products and on the interoperability of systems employing such technology inhibits not only trade in encryption products but also, more importantly, the effective growth of e-commerce. Thus, significant barriers to international trade in encryption products without key recovery continue to exist, despite the fact that EU Member States, like the US, are all members of the Wassenaar Arrangement. There is a trend, reported by some EU Member States, of the US denying the export of certain dual-use items from EU Member States which is especially worrying, given the high non-proliferation commitment of the EU Member States and the substantial initiatives they have taken in this area, in particular at the Thessaloniki European Council meeting in June 2003. At this European Council meeting, a declaration of principles and an action plan against proliferation of weapons of mass destruction was adopted which contains a number of provisions regarding the strengthening of export controls of dual-use related items in an enlarged EU.

Title:	**Plant Patents**
Sector:	Agriculture and Fisheries
Description:	United States Department of Agriculture (USDA) and United States Patent and Trademark Office (USPTO) should revise the current interpretation of novelty criteria for plant patents (for asexually reproduced material) in-line with the International Convention for the Protection of New Varieties of Plants (UPOV). For foreign plant breeders it is very difficult in case of vegetative reproduced plants to get a Plant Patent. Contrary to most other countries, foreign breeders only have a period of one year after the marketing of their plants outside the U.S. to get plant patent protection in the U.S. for their varieties. This means that a marketing decision has to be made immediately whether or not to protect a certain variety in the U.S. This is extremely difficult as it must be verified if the variety performs well in the climatic environment of the U.S. Therefore, international agreements are based on a four year period, which takes into account this special situation. Although the Plant Patent Act does not represent a case of IPR infringement per se, the restriction of one year does seriously impede trade in breeding material for ornamental plants to the U.S. In addition, it is worthwhile to mention the difference between the duration of a Plant Breeders Right between EU (25 years for agricultural crops, ornamental plants and potatoes and 30 years for vines and trees) and the USA (20 years for any crops except 25 years for trees or vine) : these differences put EU breeders at a disadvantage when they want to trade with the USA; It is worth to notice also that, in contradiction with the UPOV Convention, there is no limitation in the US law on Plant Variety Rights concerning the use of farm saved seed compared with the EU legislation on Community Plant variety rights which limits the use of farm saved seed to certain agricultural crops only.

Services

Communication Services

Title: **Digital Terrestrial Television**

Sector: Services - Communication, incl. postal services

Description:

In 1996, the Federal Communications Commission (FCC) mandated an exclusive transmission standard for digital terrestrial television in the U.S., known as ATSC. This decision has prevented the technology (DVB-T), developed in Europe and being adopted in several countries around the world, from entering the U.S. market. Several market players in the U.S. have called for a review of the FCC decision regarding, at least, the modulation system of the ATSC transmission standard so as to allow the market to choose the technology best suited for the innovative services and applications to be offered to consumers.

Nevertheless, the FCC confirmed its decision in a January 2001 Order, following a period of comparative tests between ATSC and DVB-T modulation systems held in the U.S. whose procedure and results have been disputed by the DVB-T industry. This is in clear contradiction of U.S. Governments calls for technological neutrality and market driven approaches in other sectors, such as mobile communications.

Moreover, as another example of regulatory intervention in this market, the EU notes that on 8 August 2002, the FCC adopted an order requiring that almost all television receivers include digital television reception capability after 1 July 2007 (beginning on 1 July 2004, with receivers with screen sizes 36 inches and above). This order, which aims to speed up the conversion to digital television, will further strengthen the position of the ATSC digital transmission standard in the U.S. market. In addition, on 9 June 2005 the FCC modified the schedule by which new broadcast television receivers are required to include the capability to receive over-the-air digital television broadcast signals to further speed up the conversion to digital television. In this respect, Congress adopted legislation setting a firm date of 17 February 2009 to end the transition to digital TV and establish a $1.5 billion subsidy programme to help consumers dependent on over-the-air TV to purchase set-top boxes. In February 2009, new legislation moved the switch-off date to June 12, 2009 and appropriated an additional $650 million to the subsidy programme. The Department of Commerce's National Telecommunications and Information Administration (NTIA) appear to be on schedule to meet its obligations as they are defined in the Digital Television Transition and Public Safety Act of 2005. Beginning 1 January 2008, and continuing through 31 March 2009, consumers will be able to request up to two $40 coupons per household to purchase an approved DVT converter box. The FCC is also devoting significant resources to facilitate a smooth transition and is following a three-pronged approach including policymaking, enforcement and consumer outreach. The FCC has engaged the broadcast and cable industries in a public-private partnership to educate viewers on the transition.

Also noticeable is the adoption by the FCC, on 10 September 2003, of technical standards regarding the distribution of video programming on digital cable systems for devices marketed and labelled as digital cable ready and the establishment of some encoding rules. Finally, on 4 November 2003, the FCC adopted an anti-piracy mechanism, known as the broadcast flag for digital over-the-air broadcast television to limit the indiscriminate redistribution of copyrighted content via the Internet.

The European Commission submitted its views on this matter on 15 March 2004 to the U.S. State Department stressing that in the particular case of measures intended to guarantee the protection of intellectual property rights in the new digital world, regulators and policy makers must try to achieve a fair balance between the rights of content providers and the interests of other parties, such as consumers, broadcasters and manufacturers of equipment. On 12 August 2004, the FCC released an Order approving 13 digital output protection technologies and recording methods that will give effect to the broadcast flag, including the digital recording technology developed jointly by Philips Electronics North America Corp. and Hewlett Packard. The FCC encouraged the Federal Trade Commission and the Department of Justice to remain vigilant regarding possible anti-competitive behaviour by technology proponents.

However, this Order, as well as a related order concerning the compatibility of TV receivers with

	cable systems (the so-called Plug and Play Order), have been challenged in the U.S. Court of Appeals for the DC Circuit. The FCC asked the Court to stay its proceedings while it reviewed the Orders following Petitions for Reconsideration by Parties on all sides of the issues in the Plug and Play Order case, the Court agreed but in the Broadcast Flag Order case, the Court did not and on 6 June 2005 the Court decreed that the FCC lacked jurisdiction to impose the broadcast flag anti-piracy mechanism on manufacturers of TV sets and other apparatus capable of receiving a digital signal. European Commission services will continue to monitor developments in this area and, in particular, any future initiative at Congressional level to re-instate the broadcast flag and impose a similar protection for digital radio services. Digital Audio Broadcasting On 11 October 2002, the FCC approved a technology developed by iBiquity Digital Corporation for the transmission of analogue and digital radio signals and allowed radio stations to begin interim, voluntary digital transmission, deferring consideration of licensing and service rules to a future proceeding. On 15 April 2004, the FCC initiated a proceeding to explore rules for digital audio broadcasting. FCC sought in particular comments on whether the advent of DAB requires the adoption of service rules addressing music piracy.

Title:	**Satellite Services**
Sector:	Services - Communication, incl. postal services
Description:	European satellite operators have encountered serious difficulties in serving the U.S. market as a result of the FCC application of its DISCO II public interest framework that considers the effect on competition in the U.S., spectrum availability, eligibility and operating (e.g. technical) requirements, and national security, law enforcement, foreign policy and trade concerns. These difficulties were compounded by the ORBIT Act of 2000 which required, Intelsat, Inmarsat Ventures plc and New Skies N.V. to conduct Initial Public Offerings (IPOs) by a set deadline, and the FCC to apply the Act's privatisation criteria in order to determine whether to grant market access to these entities. There were serious concerns on the part of the EU that these criteria applied to no other competitor, foreign or domestic, and could lead the FCC to limit these entities' access to the U.S. market, thereby reducing competition. In the past, a number of cases were brought to the attention of the European Commission by satellites operators such as Inmarsat Ventures plc, New Satellites N.V, Eutelsat, and SES Global. UK based Inmarsat Ventures plc, for instance, was granted access to the U.S. market but this grant was subject to further review after Inmarsat conducted an IPO, or revocation of its authorisation to provide non-core services to the U.S. if it failed to conduct the IPO. In the case of Eutelsat, the FCC, upon a competing claim by Loral Skynet to use a specific orbital location to provide FSS, would not allow U.S. earth station operators to link up with Eutelsat's satellite at the disputed orbital location in the absence of a settlement with Loral Skynet in spite of the priority rights that Eutelsat had acquired by the ITU. Eutelsat's customers eventually received FCC authorisation to link up with its satellite. HISPASAT received authorisations by the FCC, according to DISCO II provisions, to operate its satellites in the USA but earth stations were not authorized to use these satellites to provide any Direct-to-Home (DTH) service, Direct Broadcast Satellite (DBS) service, or Digital Audio Radio Service (DARS) to, from, or within the United States. On the other hand, the 2003 ITU-R World Radio Conference (WRC-03) modified the conditions for use of the Ku extended band (13.75-14 GHz) to allow the implementation of FSS earth stations as small as 1.2 m whereas today only 4.5 m earth stations are generally permitted under the rules. The U.S., even though it recognized this modification to the international Radio Regulations as a signatory to the Final Acts of the WRC-03, and these Acts became international law as of 1st July 2003 (Article 59 of the ITU Radio Regulations), has not yet incorporated into its national radio regulations the results of the WRC-03 related to the FSS (Earth-to-space) in the band 13.75-14.00 GHz. This restriction implies that U.S. earth stations are not allowed to use HISPASAT satellites operating in this band and provokes an imbalance between other companies that are using Ku standard band and HISPASAT, noting that there is considerable demand for such stations, and consequently there are many locations in the United States where such terminals can in fact be used to deliver a variety of services. The adoption of rules such as those requested would permit the needed and long overdue expansion of such services.

These cases show that proceedings by the FCC on spectrum allocation and licensing have been rather difficult raising in certain cases questions on their objectivity, transparency and their applicability on a timely, consistent and non-discriminatory manner.

It must be noted that, between April and June 2003, the FCC introduced several reforms in its satellite licensing procedures to accelerate them and introduce more predictability. In particular, in an order issued in May 2003, the FCC attempted to expedite the satellite licensing process, creating a single queue for all new satellite applications and two different licensing frameworks and removing restrictions on sales of satellite licenses so as to facilitate transfers of licenses in the secondary market. Nevertheless, the DISCO II public interest framework is maintained in addition to those rules applying for U.S. market access. An ITU priority date is not considered sufficient to show that a non-U.S. licensed satellite operator will meet all the public interest factors weighed by the FCC and does not preclude the FCC from licensing the operator of a U.S.-licensed GSO satellite on a temporary basis pending launch and operation of a satellite with higher priority in cases where the non-U.S.-licensed satellite has not been launched yet.

Finally, the US still maintains a MFN exemption on the provision of one-way satellite transmission of Direct to Home (DTH), Direct Broadcast Satellite (DBS) and digital audio services, taken by the U.S. at the very end of the GATS negotiations on basic telecom services. The U.S. revised offer in the DDA round of negotiations offered the elimination of this exemption whose validity though will depend upon the successful conclusion of the Round.

Title: **Wire Line and Wireless Telecommunications**

Sector: Services - Communication, incl. postal services

Description: The reduction in the number of competitors in the wireline sector, notably as a result of mergers, raises some concerns, in particular regarding the provision of local connectivity (namely special access lines for businesses requiring dedicated, non-switched connections to external networks), as well as Internet connectivity services.

Special access lines are key inputs for the provision of global telecoms services and particular attention is required to ensure a fair and non-discriminatory special access offer. Several submissions to the Federal Communications Commission (FCC) in the relevant proceedings have also expressed concerns about a reduction of competition in the internet backbone market leading to de-peering, dominance and packet-discrimination concerns.

Meanwhile, the FCC has continued its work on several key proceedings concerning the provision of unbundled network elements by incumbent local exchange carriers, IP-enabled services, its ambitious Broadband Agenda and the allocation of spectrum for advanced wireless services.

Indeed, a number of court decisions have had a noticeable impact on some of the recent FCC rulings. The FCC has had to revise several times its Triennial Review Order concerning unbundled network elements, notably with respect to local access in residential markets, as a result of a succession of court rulings vacating its decisions. According to the FCC the resulting Order favours facilities-based competition by phasing out the permitting wide unbundling of circuit switching for key elements such as loops and significantly curtailing unbundling of higher capacity transmission facilities transport, where there is clear and demonstrable impairment, and by removing the obligation of incumbents to provide competing carriers with unbundled access to mass market local circuit switching.

As a result, services-based competition (where new entrants rely on the access to certain elements of the incumbents network to enter and compete in the market) may prove more difficult. The effects of the new regulatory framework emerging in the U.S. on the establishment of foreign operators will require continued monitoring, in particular, the FCCs new rules on the provision of unbundled network elements (UNEs) by incumbent local exchange carriers, which became effective on 11 March 2005.

In addition, in June 2005, the Supreme Court supported the FCC March 2002 Declaratory Ruling classifying cable modem broadband service as an information service, allowing the FCC to proceed with its deregulatory approach to broadband services. In general terms the FCC seems to favour the progressive establishment of a model based on competition between infrastructure-based operators (at least for advanced services).

The Supreme Court decision allowed the FCC in August 2005 to classify high speed Internet access services over wireline facilities (and cable modem) as information services, rather than telecommunications services. As a result, after a one-year transition period, facilities-based wire line broadband Internet access service providers are no longer required to separate out and offer the wire line broadband transmission component of wire line broadband Internet access services as a stand-alone telecommunications service, separately from their Internet service.

In the same line, the FCC declared in November 2006 Broadband over Power Line (BPL)-enabled Internet access service to be also an information service, as cable modem service and DSL Internet access service.

It will have to be assessed whether such classifications may affect competition and the ability of new players to enter the U.S. market. This question is equally linked to the proposed change in the classification of certain services in the initial U.S. offer in the current GATS negotiations (e.g. the classification of packet switched data transmission services as information services and no longer as basic telecommunication services or the creation of a new category of 'other communications services', which may result in the non-application of the provisions of the so-called GATS Reference Paper on Pro-competitive Regulatory Principles to services that otherwise would be covered by it).

Overall, the U.S. regulatory framework needs a comprehensive review to streamline it and make it less segmented along legacy technology lines. A more flexible approach based on a straightforward analysis of problematic market situations and identification of targeted adequate remedies rather than ad hoc legislative and/or regulatory solutions as new technologies and services develop would allow the regulator to focus on substantive competition issues where they arise and to apply targeted remedies. A more comprehensive and technology neutral approach to regulation of communications services would also address in a consistent manner public security or consumer protection issues that concern ultimately all communications services.

Despite the commitments made at the WTO and especially those pursuant to the GATS Basic Telecommunications negotiations concluded in 1997 and which entered into force in February 1998, European and other foreign-owned firms seeking access to the U.S. market have faced substantial barriers, particularly in the satellite sector (which has suffered from lengthy proceedings, conditionality of market access and de facto reciprocity-based procedures) and the mobile sector (e.g. investment restrictions, lengthy and burdensome proceedings and protectionist attitudes in certain congressional circles). A number of changes have been introduced, in particular in relation to the U.S. spectrum management policy and licensing procedures in the satellite sector. The EU notes these and other gradual improvements on a number of issues, but since some of the previously identified obstacles remain, must conclude that market access is still not fully ensured and this situation is not in line with the market access policy advocated by the U.S.

Finally, U.S. law enforcement agencies, in implementing the so-called Exon-Florio statute, have imposed strict corporate governance requirements on companies seeking FCC approval of the foreign takeover of a U.S. communications firm in the form of network security arrangements to mitigate alleged national security concerns.

	Business and Financial Services
Title:	**Sarbanes-Oxley Act**
Sector:	Services - Financial
Description:	The Sarbanes-Oxley Act of 2002, adopted as a reaction to U.S. corporate scandals, has a significant impact on U.S.-listed EU companies as well as on EU auditing firms, which could face conflicting laws on audits and corporate governance. On the implementation of the Sarbanes-Oxley-Act, the US Securities and Exchange Commission (SEC) and the Public Company Accounting Oversight Board (PCAOB) launched two public consultations in December 2006 with a view to reforming corporate governance aspects thus responding to strong market concerns on costs. The new SEC deregistration rules for foreign companies have entered into force in 2007. The continuing development of technical co-operation between the PCAOB in the US and the European Commission and Member States on audit regulation, in particular the independent public oversight of the audit profession on either side, remains a major (political) challenge in 2009.
State of Play:	Requirement to use US GAAP: EU companies admitted to trading on the New York Stock Exchange (or other U.S. exchanges) must reconcile financial statements with U.S. accounting standards (U.S. GAAP). This means a significant cost for EU companies raising capital in the U.S. Following the regulation adopted by the Council on 7 June 2002, all listed EU companies are required to prepare consolidated accounts under International Financial Reporting Standards (IFRS) (formerly international accounting standards) by 2005 thereby complying with international best practice set by independent accounting standard-setters. The EU believes that EU firms whose financial accounts are published in accordance with IFRS should not be required to publish reconciliations to U.S.-GAAP when being listed on U.S. exchanges. In April 2005, the SEC adopted a roadmap towards the recognition of IFRS by 2009 at the latest. With a view to convergence, the IASB (International Accounting Standards Board) and the US Financial Accounting Standards Board (FASB) published on 27 February 2006 a Memorandum of Understanding. It describes the projects they intend to undertake jointly and includes an estimated timeline. The Commission welcomed the MoU. However we have also pointed out that the IASB must focus firmly on business need before making any further changes to the accounting standards as companies need a period of relative stability in order to implement IFRS. On 3 July 2007, the SEC published for public comment a proposal to eliminate the current reconciliation requirement for foreign private issuers filing their financial statements using IFRS as published by IASB. On 15 November 2007, SEC voted on the final rule, which provides that foreign issuers publishing their accounts in accordance with IFRS will not have to reconcile them with US GAAP for their financial statements covering years ended after 15 November 2007. . EU took a mirroring decision on 12 December 2008 when the measures adopted under the Prospectus Directive and Transparency Directive determined that the US GAAP (and a number of other third country GAAPs) are equivalent to IFRS as adopted by the EU. Consistent with this, the European Commission recently issued a joint statement with the US SEC, the Japanese Financial Services Agency and IOSCO announcing reforms of the overall governance of the IASB and its parent entity, the International Accounting Standards Committee (IASC) Foundation. The statement foresees, among other requirements, measures to enhance the transparency and due process of the IASB s standard-setting process. Pursuant to the objective to reach one set of global accounting standards, the SEC engaged in a public consultation process inviting parties to submit comments on the plan and roadmap towards US accounts being drawn up according to IFRS. With the changeover of administration and leadership at the SEC the consultation period has been extended until end April 2009. Major elements in a possible decision on this are the milestones to be reached, the nature, substance and solidity of standards put forward by the IASB and the governance of the IASB. In December 2007, the PCAOB requested public comments on a proposed policy statement giving guidance regarding the implementation of PCAOB Rule 4012, clarifying the conditions under which the PCAOB might consider moving to full reliance on a non-US oversight body. On 15 June 2008, the PCAOB organised a roundtable with stakeholders to which DG MARKT participated. The PCAOB has not yet adopted this policy statement. The European Commission remains committed towards this objective. Under its new leadership the SEC will have to confirm its intentions in this respect. Confidence building measures are being discussed as are necessary changes to the Sarbanes Oxley Act to allow the PCAOB to share information with European Audit oversight bodies.

Title:	**Treatment of EU Global custodians**
Sector:	Services - Financial
Description:	International banks must register in the U.S. as broker-dealers under Section 15 of the Securities and Exchange Act 1934 if they provide global custody and certain related services directly to U.S. investors from outside the U.S. This is not the case for U.S. banks doing the same business since they are covered by an exception pursuant to SEC 'Regulation R' adopted in September 2007. The reasoning for exempting U.S. banks is that they are already subject to Fed supervision which should not be replicated by SEC (however, this also applies to foreign banks doing business in the U.S.).
State of Play:	The international banking community has been actively seeking a relief from the SEC that would allow banks headquartered in jurisdictions 'securing comprehensive consolidated supervision' (according to provisions by the Federal Reserve Board) to avoid registration. The relief asked for would be similar, yet narrower to the one afforded to U.S. banks. As it is now, U.S. banks enjoy an advantage (no level playing field), as they are able to provide the same services to investors in the EU without registration in the EU and they are spared from SEC supervision in this respect. The issue has been raised by the Commission within the Financial Markets Regulatory Dialogue and discussions are ongoing to find a mutually acceptable solution, in particular because the issue will not be solved in the context of the SEC s proposed revisions to Rule 15a-6. Against this background, the more appropriate approach would be to provide relief comparable to what is provided to U.S. banks under Regulation R.

Title:	**Insurance Market Fragmentation and Collateral Requirement**
Sector:	Services - Financial
Description:	A remaining impediment for EU insurance companies seeking to operate in the US market is the fragmentation of the market into 56 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. The decentralised US regulatory/supervisory structure entails heavy compliance costs for EU companies in each of the 56 jurisdictions. The National Association of Insurance Commissioners (NAIC) is making an attempt to harmonise some basic regulatory requirements between the states, but this will be a long process. The NAICs recommendations are not binding, so even if state insurance commissioners agree to some further harmonisation, implementation at state level cannot be guaranteed. A major issue of concern however has been the requirement for non-US reinsurers to post 100% collateral for their US acceptances (i.e. their US reinsurance business). The collateral requirement is not technically justified and leads to important costs not only for European reinsurers, but also for the US insurance industry and their policyholders. Discussions between the European Commission Services and US insurance commissioners on the collateral issue continue as part of the more general EU-US Financial Markets Regulatory Dialogue and the NAIC-CEIOPS-European Commission Dialogue on Insurance. The NAIC has now endorsed the principle of a move away from the current discriminatory collateral requirements for non-US, whilst nevertheless remaining discriminatory. The plan would also institute a single licensing system for U.S. reinsurers, and a single 'port of entry' for non-U.S. companies; uniform nationwide enactment via federal legislation is being prepared.

	Transport Services
Title:	**Air Transport Services (Foreign Ownership Restrictions)**
Sector:	Services - Transport
Description:	U.S. law requires U.S. airlines to be under the actual control of U.S. citizens in order to be licensed for operation. For airline corporations, 75% of the voting interest must be held by U.S. citizens and two-thirds of its board of directors must be U.S. citizens. This latter limitation makes US rules on foreign ownership considerably more restrictive than relevant EU rules. Reducing foreign ownership restrictions would give better access for carriers to international capital and facilitate cross-border restructuring, which in turn would contribute to growth, competitive effectiveness, and the promotion of competition and consumer benefits. The EU-US Air Transport Agreement, which entered into force in March 2008, refers to further investment opportunities as one of the objectives for second-stage negotiations.

Title:	**Aircraft Leasing**
Sector:	Services - Transport
Description:	Rules pertaining to the leasing of aircraft are determined by the Federal Aviation Administration (FAA) regulations which distinguish between dry leasing (without crew) and wet leasing (with crew). In general, for dry leasing, the lessee is granted operational control of the aircraft, whilst for wet leasing, the leaser retains operational control of the aircraft. The US rules on wet lease prevent any lease of non-US registered aircraft by US carriers for domestic flights. No Community-registered aircraft with Community crew can thus be leased to US companies for domestic flights in the US. The EU-US Air Transport Agreement includes the opportunity for EU carriers to lease to US carriers aircraft with crew for international air transportation. The Agreement is being applied provisionally since 30 March 2008. In February 2008, the U.S. Department of Transportation issued a notice setting forth the economic and technical requirements for the provision of aircraft with crew by foreign carriers to U.S. carriers on international flights.

Title:	**Security certification of foreign aeronautical repair stations**
Sector:	Aviation
Description:	The 2003 Federal Aviation Administration (FAA) Reauthorization Act called for the Department of Homeland Security's Transportation Security Administration (TSA) to develop a program that ensures security of aircraft repair stations, both domestic and international. These regulations were due in August 2004, 180 days after enactment, but TSA failed to meet the deadline. In August 2007 the 9/11 Commission Act was enacted and included a provision prohibiting the FAA from issuing new foreign repair station certificates unless the TSA issued its final repair station security rules by 3 August 2008, one year after enactment. TSA again failed to do so. As a result from 3 August 2008 the FAA is prohibited from certifying a foreign repair station unless the repair station was previously certified and up for renewal or is already in the process of certification.
State of Play:	TSA has not issued a Notice of Proposed Rulemaking, which is required before a final rule can be issued.

Title:	**Shipping on U.S.-flagged Vessels**
Sector:	Services - Transport
Description:	The US has a number of statutes in place that require certain types of government-owned or financed cargoes to be carried on US-flag commercial vessels. Whilst over 95% of all international maritime trade to and from the US is carried by foreign shipping companies, the impact of these measures denies EU competitors access to this pool of US cargo, while providing US ship owners with guaranteed cargoes at protected, highly remunerative rates. The application of these measures to US public procurement contracts introduces uncertainty for those businesses whose tenders include shipping goods to the US. Whether they are required to ship the goods on US-flagged vessels, which charge significantly higher freight rates than other vessels, is not known until after the award of the contract. The relevant legislative provisions are: - The Cargo Preference Act of 1904 requires that all items procured for or owned by the military departments be carried exclusively on US-flag vessels. Waivers may be granted if the rates charged are excessive or otherwise unreasonable. - Public Resolution N°17, enacted in 1934, requires that 100% of any cargoes generated by US Government loans (i.e. commodities financed by Export-Import Bank loans) be shipped on US-flag vessels. The US Maritime Administration, MARAD, may grant waivers due to, for example, insufficient number of vessels or tonnage capacity available, unsuitable scheduling, unreasonable rates. - The Cargo Preference Act of 1954 requires that at least 50% of all US government-generated cargoes covered be transported on US-flagged vessels to the extent such vessels are available at fair and reasonable rates. Waivers may be granted in an emergency. - The Food Security Act of 1985 amended the above US Cargo Preference Act of 1954 by introducing a provision to require that the percentage of shipments of agricultural cargo executed under foreign assistance programmes carried on US flagged vessels be increased from 50% to 75%. - US Mineral Leasing Act, as amended, stipulates that exports of Alaskan North Slope oil must be transported on US-flagged vessels (with some exceptions).