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PART 3

Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva—U.S. International Trade Commission Investigation No. 332-101

Analysis of Nontariff Agreements

Agreement on Technical Barriers to Trade
Agreement on Government Procurement

A Report Prepared at the Request of the

COMMITTEE ON FINANCE
UNITED STATES SENATE
RUSSELL B. LONG, *Chairman*

SUBCOMMITTEE ON INTERNATIONAL TRADE
ABRAHAM RIBICOFF, *Chairman*

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FOREWORD

This document represents a legal analysis of the agreements negotiated at the Multilateral Trade Negotiations in Geneva under the auspices of the General Agreement on Tariffs and Trade. The analysis was prepared as part of an investigation requested by the Senate Committee on Finance and the House of Representatives Committee on Ways and Means and instituted by the Commission on September 1, 1978 (Investigation No. 332-101, 43 F.R. 40935, of Wednesday, September 13, 1978), as to the effect on U.S. trade and industry of the adoption of agreements to be concluded in Geneva.

The report is being transmitted in accordance with the request by the Senate Finance Committee for information and analysis on these matters.

This volume is based upon the Agreement on Technical Barriers to Trade ("Standards Agreement"), initiated 12 April 1979, and received by the Commission on 17 April 1979.

Section I of this document represents the legal analysis of the Standards Agreement. Section II includes a number of brief reports on selected U.S. industries which have been significantly affected by existing standards, and which could materially benefit, on balance, from the adherence to this agreement.

The comments contained in this analysis on the implementation of the Standards Agreement into U.S. domestic law were made before any draft implementation legislation was developed in Congress. Thus, the comments are in no way intended to represent a legislative history of any such implementation legislation.

SUMMARY OF THE STUDY

Volume 1
Introduction and Overview of Legal Issues

Volume 2
Subsidy/Countervail Agreement

Volume 3
Safeguards Agreement (legal issues only at present)

Volume 4
Customs Valuation Agreement

Volume 5
Import Licensing Agreement

Volume 6
Agreement on Technical Barriers to Trade ("Standards Agreement")

Volume 7
Agreement on Government Procurement

Volume 8
Agricultural agreements

Volume 9
Aircraft

Volume 10
Frameworks Agreements

Volume 11
Wine-gallon method of Tax and Duty Assessment

CONTENTS

Conformity with technical regulations and standards

Certification systems

Information and assistance

Institutions, consultation and dispute settlement

Section II: Economic Analysis of Selected Industries

EXECUTIVE SUMMARY

Product standards which dictate quality, contents, and a wide range of other product characteristics are used to facilitate trade and to protect the public health and welfare. They are also used on occasion to impede international trade unnecessarily by setting up requirements that cannot be met in a practicable manner by foreign producers. The Agreement on Technical Barriers to Trade, or the Standards Agreement ("the agreement") as it is more commonly known, was initialed on 12 April 1979 and was negotiated for the purpose of eliminating or modifying, where possible, those product standards which unnecessarily interfere with international trade. No attempt was made to prohibit product standards which serve a legitimate commercial or protective purpose (such as protection of health, the environment, or national security), although the least restrictive means for providing this protection is to be used.

The agreement covers all aspects of product standards and certification activities: technical regulations (defined as standards requiring mandatory compliance), standards (defined as requiring only voluntary compliance), certification systems, and testing methods or administrative procedures associated with such systems. The agreement applicable to standards and certification systems which involve agricultural or industrial products, but it is not applicable to those which involve services, (e.g., professional or maintenance services, or are included as specifications in government procurement contracts or are established by individual companies for their own use.

Provisions of the agreement apply to all entities, governmental or nongovernmental, which promulgate technical regulations or standards, or which operate certification systems. However, a signatory to the agreement (which is referred to throughout the agreement as a Party) assumes different responsibilities depending upon which entity is involved. A Party must ensure that its central government complies with the agreement, but a Party is required only to use its "best efforts," a concept not specifically defined in the agreement, to ensure compliance by local political subdivisions, private groups, or international/regional organizations involved in standards or certification activities.

A key provision found throughout the agreement is the requirement that technical regulations, standards, test methods, and certification systems be applied or operated in a nondiscriminatory manner. National treatment and most-favored-nation (MFN) treatment is required.

The substantive terms of the agreement can be described and categorized as follows:

(a) Technical regulations and standards (articles 2-4). These articles provide that Parties are not to promulgate technical regulations or standards which cause unnecessary obstacles to trade; that Parties make use of, where appropriate for them, relevant international standards; and that Parties follow a transparent, or open, procedure when preparing or adopting technical regulations or standards.

(b) Conformity with technical regulations and standards (articles 5-6). Product testing and related administrative procedures are used to determine a product's conformity with technical regulations or standards. Under these sections, Parties are to accept foreign products for testing and related procedures under conditions which are no less favorable than those imposed on like domestic products. Parties must also accept, whenever possible, foreign test results even when the tests differ from those of the importing Parties if those tests are technically competent.

(c) Certification systems (articles 7-9). Parties are to be accorded nondiscriminatory access to all certification systems within the territories of other Parties, within regional systems in which other Parties are members or participants or within international systems. Access is to include obtaining the certification mark of the system under the rules of the system. The systems that Parties establish within their own territories must not be operated in a manner which unnecessarily impedes the flow of goods between countries. When certification systems are proposed, Parties must comply with a transparency procedure similar to that prescribed in regard to technical regulations and standards.

(d) Information, technical assistance, and special and differential treatment (articles 10-12). Parties may request and must give information to other Parties regarding standards and certification activities within their territories. Technical assistance is to be given on mutually agreed conditions for the purpose of developing and improving existing standards or certification activities. Special and differential treatment is also to be accorded developing countries which are party to the agreement; the only differential treatment specifically required is that their stages of development be taken into account when applying the agreement and that certain time extensions for fulfilling agreement provisions may be granted.

(e) Institutions, consultation and dispute settlement (articles 13-14). Disputes which arise in the operation of the agreement are to be settled through consultation among the Parties involved or through a specific procedure. The procedure, depending on the case, may include examination of the dispute by a group of technical experts and/or by a panel which considers the commercial policy aspects of a dispute; final determination of the matter and enforcement of that determination is made by a Committee on Technical Barriers to Trade, composed of representatives of the Parties. Sanctions which may be imposed are limited to withdrawing benefits obtained under the agreement.

The agreement is prospective in effect; it has a limited retroactive impact. Provisions of the agreement apply to all technical regulations, standards, certification systems, and related testing methods which are promulgated after the agreement enters into force. The agreement is not applicable to those existing when the agreement takes effect unless a Party interprets that its rights accorded by the agreement are violated by existing standards, etc. That Party can then pursue the dispute settlement mechanism provided in the agreement.

Since the agreement is prospective, the ultimate economic effects of its adoption may not be realized until several years after implementation. Although various product standards currently imposed by countries throughout the world negatively impact on the bulk of products in international trade, the degree of effect varies from product to product. In terms of U.S. trade, product standards, though somewhat limiting of imports, are particularly restrictive of exports. Thus, the adoption of the agreement should materially benefit U.S. trade, on balance.

Section I: Legal Analysis

6.0.1. Description of purpose and operation of the Agreement on Technical Barriers to Trade ("the Standards Agreement").

A. Introduction to the standards field.

Complying with standards 1/ set for industrial and agricultural products is unavoidable in commercial activities. Most countries and their political subdivisions have established standards for many products which must be met in order that the products may be legally sold on the domestic market. Certification of conformity with standards mandating compliance is often a prerequisite to entry into a country and sale of foreign goods. Even when compliance is voluntary, a certification mark representing that a product meets applicable standards may be a prerequisite to successful marketing since consumers will often discriminate against a product if there is not visible evidence that it meets well-known standards, for example, of safety or quality.

Standards, whether mandatory or voluntary, are numerous and cover a wide variety of products. In the United States alone there are over an estimated 10,000 mandatory federal standards and over 100,000 state and local mandatory standards. The number of standards promulgated by private groups is estimated to be around 25,000. The subjects of these standards cover practically all industrial and agricultural products, from automobile bumpers to the gold content of jewelry and from the purity of drugs to labeling of meat products.

1/ Standards are generally described as being technical specifications concerning quality, contents, weight, size, labeling or packaging of a product, performance, design, safety, and other characteristics which are applied to products by government bodies or various private sector groups. Determining conformity with standards is usually accomplished through testing.

The purpose of such standards is also varied. Often they regulate the quality of the product, its contents, the size or weight, or even the labeling or packaging of the product. Many have been promulgated to protect the health and safety of the public. Many countries in the world enforce their standards first by determining a product's conformity with a standard and then by certifying conformity through various certification systems.

Product standards, whether of a voluntary or mandatory nature, have been used in international trade with several effects. They protect or inform the consumers; they facilitate trade through harmonization of size and quality of content; they protect the environment; and they, to some extent, inhibit trade. The purpose of this agreement is to reduce, if not eliminate, the latter effect where possible while retaining the beneficial aspects of standards.

B. The standards agreement.

1. Generally.

The standards agreement (hereinafter "the agreement") has been negotiated to cover technical regulations, 2/ standards, 3/ methods for determining a product's conformity with a technical regulation or standard, 4/ and certification systems. 5/ Instead of formulating specific standards, testing methods, or certification systems, the agreement requires in certain

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2/ In the context of the agreement, these are standards with which a product must comply.

3/ In the context of the agreement, compliance is not mandatory for such criteria.

4/ These methods include tests and administrative procedures.

5/ These are institutions which certify that a product complies with a technical regulation or standard.

circumstances or encourages in others the signatories, referred to throughout the agreement as Parties, 6/ to avoid the use of standards activities which cause unnecessary technical barriers to international trade. The goal is to preclude standards and associated activities which are prepared, adopted, or applied with the purpose or effect of inhibiting trade, especially in a discriminatory manner.

The agreement is limited to standards and associated activities applicable to industrial and agricultural products. Standards relating to procurement by governments or international organizations are not covered, nor are individual company standards or standards which are contractual terms or provisions. Additionally, standards relating to services are not covered.

This text, which was initialed in Geneva on 12 April 1979, consists of a preamble, general provisions, thirteen operative articles, a procedural article, and three annexes. The substantive matters are found in the operative articles which have been divided and grouped under the following subject headings: (a) technical regulations and standards; (b) conformity with technical regulations and standards (i.e., testing methods and administrative procedures); (c) certification systems; (d) information and assistance; and (e) institutions, consultation, and dispute settlement. The procedural article consists of "final provisions" normally found in most international agreements. The preamble sets out the purposes and goals of this agreement while the general provisions delineate the coverage of the agreement (e.g.,

6/ The agreement refers to those countries which adhere to it as Parties, which is to be distinguished from parties, e.g., interested persons or countries which have not signed the agreement.

80-136 O - 79 - 2

standards relating to products but not services) and indicates what definitions are to be given to terms in the agreement. The three annexes consist of terms and their definitions as used in the agreement, a description of technical expert groups, and a description of panels; both groups are used in the dispute settlement procedures.

The contents of the major provisions are briefly outlined below. A more detailed analysis of all articles in the agreement is made in the provision-by-provision sections later in this report.

2. Operative articles.

The operative provisions provide guidelines and require Parties to meet various obligations regarding the preparation and application of technical regulations, standards, certification systems, and related testing methods. Parties are not to use technical regulations, standards, or certification systems with the purpose or effect of creating unnecessary obstacles to international trade. The term "unnecessary obstacles to international trade" is understood within the agreement and its negotiating context to mean technical regulations or standards whose requirements exceed what is necessary to protect a legitimate public welfare interest.

Parties are to use internationally accepted standards as a basis for new or revised domestic regulations and standards. If, however, the international standard is inappropriate for the purposes of the Party, there is no obligation to use it as a basis for domestic regulations or standards. The term "inappropriate" is delineated to mean that if an international standard would not adequately protect the Party's interest in, inter alia, public

health and safety, national security, or would require, for example, fundamental technological changes (e.g., rewiring an entire country to harmonize electric voltage levels), that standard would not have to be a basis for a domestic standard or technical regulation.

To prevent impediments to trade by nonsubstantive means, Parties agree to accept, whenever possible, the testing methods for determining product conformity of other Parties when the importing Party is satisfied that those methods are technically sufficient to determine if a product conforms to the applicable technical regulation or standard. Also, the tests and related matters, e.g., fees, testing sites, and confidentiality of information, are not to be administered discriminatorily.

Access to certification systems is to be granted to all suppliers of products in all Parties without discrimination. "Access" in the context of the agreement means that a product can be submitted to a certification system for testing, be certified if it conforms to applicable technical regulations and standards, and receive the certification mark of that system.

Parties are to establish an information bureau (called "enquiry point") which would inform upon request other Parties of existing and proposed technical regulations, standards, certification systems, and related testing methods. Parties are also to give, on mutually agreed terms and conditions, technical assistance regarding agreement-related matters to other Parties who request such. This assistance would include information on how to set up certification systems and what must be considered when promulgating technical regulations or standards. Special and differential treatment is to be given

to developing Parties. This consideration is to be based on the developmental, financial, and trade needs of those Parties.

All the above described provisions of the agreement apply prospectively. The agreement is non-retroactive to the extent that technical regulations, standards, testing methods, and certification systems which exist at the time the agreement enters into force are exempted from requirements of the agreement unless and until a Party considers them to be violative of the agreement. At that point, they may be made the subject of dispute settlement and enforcement procedures.

Disputes which arise from the operation of the agreement are to be settled through consultation or a resolution process. If Parties cannot reach a mutually satisfactory solution to their dispute through consultation among themselves, they may petition a committee of all the Parties to the agreement, the Committee on Technical Barriers to Trade, to investigate the matter and attempt to foster a mutually acceptable solution. If the Committee itself cannot settle the problem, it must establish, on the request of an involved Party, a technical group and/or panel to study the matter. The technical group examines technical questions involved; for example, a group of scientific experts would examine a test used to determine if a drug is safe for human consumption and decide whether such a test adequately determines safety and has a legitimate scientific basis. The panel would be used to examine any aspect of the dispute, e.g., whether the purpose of the drug-testing procedure was solely to discriminate against or eliminate foreign drug products.

The findings of both the technical group and the panel would then be considered by the Committee, which would issue its recommendations. If a Party does not comply with the recommendations, it would have to submit written reasons to the Committee for its inability to do so.

Time guidelines for completing all these investigations are established. Fourteen months from the date that a dispute was referred from consultation to the Committee would normally be the longest period for dispute settlement. However, this time period would ultimately depend on the complexity of the case.

Any Party is specifically permitted to invoke consultation or the other dispute settlement procedures in situations other than when the central government of a Party has failed to meet the obligations of the agreement. Two conditions, however, must be satisfied. First, another Party's political subdivisions or the nongovernmental groups in its territories or the international/regional certification groups in which it is a member or participant fails to achieve the same results required of any central government (e.g., publishing the texts of all technical regulations). Second, the trade of the complainang Party must be significantly affected by such failure.

As enforcement measures, the Committee could consider authorizing sanctions against a noncomplying Party. The sanctions would have to be limited to the suspension of obligations under the agreement; for example, the Committee could authorize the aggrieved Party to discriminate against the products of the noncomplying Party in regard to the standards applied to

them. A Party should try all dispute settlement mechanisms established by the agreement before going to the GATT for relief. Even then, the relief granted must be as redress for violations of the General Agreement itself and must be limited to relief available under the General Agreement. 7/

3. Procedural article.

The last article of the agreement is a series of administrative provisions. Reservation, the date of entry into force of the agreement, nonapplication of the agreement between Parties, annexes, the role of the GATT secretariat, the deposit and registration of the agreement, and authentic languages are addressed. Procedures are established for acceptance and accession, review of the operation of the agreement, amending the agreement, and withdrawal.

4. Other portions of the agreement.

Two of the less substantive portions of the agreement, the general provisions and the annexes, are of equal weight legally as the "operative" and "procedural" articles. The legal status of the preamble, however, is not clear.

5. Common elements occurring throughout the agreement.

(a) Entities involved. This agreement is written to reflect the reality of world-wide standards activities. The intent of the agreement is to affect the activities of all bodies (governmental or private) which prepare, adopt,

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7/ Art. XXIII:2 of the General Agreement permits a Contracting Party under certain conditions to suspend concessions made under the Agreement to another Contracting Party when the latter has impaired the benefits of the General Agreement to which the former Contracting Party is entitled.

or apply standards or certification procedures. Both governmental and private groups in most countries establish and enforce in some fashion standards and certification systems.

(b) Legal status. This agreement is to be a legally binding international agreement among the signatory countries. Political subdivisions of or private standards groups in the Parties are not, themselves, legally obligated to comply with provisions of the agreement. Therefore, standards activities of local governmental bodies, private groups, and international or regional groups are covered by obligations under the agreement assumed by Parties.

(c) Levels of obligation. The agreement creates two types of obligations in order to reach the activities of central and local governments, as well as private and international/regional groups. The type or level used will depend on the group whose activities the agreement attempts to reach.

The first level obligation applies to actions taken by central or national government bodies at that level. 8/ This level of obligation is triggered by the phrase "shall ensure," e.g., "Parties shall ensure that technical regulations and standards are published." The term "shall ensure" under the negotiated understanding indicates that the [Parties] have an absolute obligation to carry out those particular requirements at the central government level. In the example given, a central government must publish or

8/ The agreement defines a central government body as the " c entral government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question." See sec. 6.17.1, at 144, infra, in this volume. This would include the federal government of the United States.

cause to be published all technical regulations and standards that it adopts and enforces.

The second level obligation is less strenuous. It applies to actions taken by political subdivisions, private groups, and international/regional organizations connected to the Party. It is triggered by the phrase "shall take such reasonable measures as may be available to them Parties to ensure." The meaning of this phrase is not entirely clear. The language is from article XXIV:12 of the General Agreement. It suggests that best efforts on part of a Party to ensure that its political subdivisions, the private standards or certification organizations in its territories, and the international and/or regional standards or certification groups in which it is a member or participant comply with the agreement. There is no description of what "reasonable measures" requires. The meaning is not clarified by reference to past interpretation of article XXIV:12 since there have been alternative interpretations. 9/ Regardless of the language chosen, the exact

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9/ One interpretation is that such language recognizes that a central government does not have the power to order or restrict the actions of local political subdivisions in various matters. Under this interpretation, the central government would not be violating its international obligation if the local subdivision acted outside a provision of the agreement but within its own sphere of power.

The opposing interpretation is that a central government need only use reasonable means to encourage a political subdivision to comply with the central government's specific international obligations. The use of reasonable means would be sufficient to fulfill the central government's international obligation even if the local subdivision did not comply with the obligation. J. Jackson, World Trade and the Law of GATT, sec. 4.11 (1969). If the first interpretation were embraced, a central government would not have to do anything in regard to ensuring that a political subdivision comply with the agreement. However, if the second interpretation were used, a central government would have to at least encourage a political subdivision to comply. Otherwise, the central government would not have fulfilled its obligation.

content of the second level best efforts concept will depend on the constitutional and political complexion of each adherent and will have to be defined through use and future code interpretation.

(d) Most-favored-nation treatment. Parties incur first and second level obligations to ensure that their technical regulations, standards, testing methods, certification systems, and associated administrative procedures are applied to the products of another Party in a manner "no less favourable than that accorded. . .to like products originating in any other country . . . ." 10/ This would require that Parties grant to each other the most favorable treatment they now give to any country for the subjects covered by this agreement. 11/ The agreement sets out this "most favored" treatment for all Parties.

Fifteen countries and the European Communities, representing the nine Member States, have initialed the agreement and are potential Parties. These countries are the United States, the European Communities (nine Member States), Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain, Hungary, Czechoslovakia, and Bulgaria. Whether the nine Member States will be bound by the agreement on their own, outside the EC umbrella, remains to be seen. At present, they have not initialled the agreement themselves.

Whether MFN treatment regarding standards, technical regulations, testing methods, administrative procedures, and certification systems is granted by

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10/ See, for example, sec. 6.3.1, at 51, infra, in this volume.
11/ See volume 1 of this study for a discussion of most-favored-nation treatment in relation to all the MTN agreements negotiated at the Tokyo Round.

Parties to non-Parties is a decision left to each signatory. (The agreement is silent as to this matter.) Whether a non-Party is granted such MFN treatment by a Party and thus receives benefits of the agreement (e.g., elimination of unnecessary obstacles to trade) will depend on other international arrangements, usually of a commercial nature, 12/ and on internal policy regarding the grant of MFN treatment. 13/ The choice of granting conditional or unconditional MFN treatment would also depend on the situation of the individual Party.

(e) National Treatment. In addition to requiring MFN treatment for Parties, the agreement stipulates that a Party must grant the same treatment when applying technical regulations, standards, testing methods, administrative procedures or when operating certification systems to products or suppliers of products of other Parties as it does to like products of its own nationals or companies. This requirement is phrased in terms of treatment or conditions "no less favourable than that accorded to like products of

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12/ Thus, if Party and non-Party have agreed in a commercial treaty that neither would impose restrictions or prohibitions on the importation of any product of the other unless the importation of the like product of all third countries is similarly restricted or prohibited, the non-Party would be able to demand under that treaty language that the Party grant it the same treatment regarding standards, etc. that was granted another Party. See, e.g., Treaty of Friendship, Commerce, and Navigation, April 2, 1953, United States-Japan, art. XIV, para. 2, 4 U.S.T. 2063, T.I.A.S. No. 2863, which, if either of those countries did not adhere to the agreement while the other did, would pose such a problem.

13/ The United States, for example, in section 126(a) of the Trade Act, grants reciprocal nondiscriminatory treatment to the products of all countries except where otherwise provided for in the Trade Act or in other statutes. This most-favored-nation treatment is unilaterally accorded and does not depend on treaty or other international arrangements.

national origin" 14/ or "no less favourable . . . in a comparable situation." 15/ This requirement applies to products imported from or originating in the territories of other Parties.

(f) Transparency procedure. In two major portions of the operative provisions, subsection 2.5 and 2.6 concerning technical regulations and standards and subsections 7.3 and 7.4 concerning certification systems, 16/ a procedure for establishing such regulations, standards, and systems on an open basis is set out. The "transparency procedure," as it has been called, can be considered elaboration of article X of the General Agreement. 17/ The procedure includes the requirements that the Party (a) publish a notice that a regulation, standard, or system is being proposed; (b) notify the GATT secretariat of the products to be covered by technical regulations or certifications systems; (c) provide upon request copies of the text to other Parties and, in some cases, to interested parties in other Parties; and (d) allow other Parties and, in some cases interested parties in other Parties, to make written comments and to discuss the texts of the proposed regulations, standards, and certification systems.

An exception to this transparency procedure is permitted when urgent problems of a health, safety, environmental, or national security nature

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14/ See, e.g., subsection 2.1 of the agreement, at 51, infra.

15/ See, e.g., subsections 5.1.1, at 72, and 7.2, at 80-81, of the agreement, infra.

16/ See sec. 6.3.1, at 52, in this volume for subsections 2.5 and 2.6 of the agreement and sec. 6.8.1, at 81, in this volume, for subsections 7.3 and 7.4, of the agreement, infra.

17/ Article X provides for prompt publication of new laws or regulations involving international trade and prohibits the enforcement of new provisions until their publication.

arise. Even when this exception is necessary, the Party must complete the steps of the procedure (with the exception of publishing a notice of a proposal) after the adoption of the regulation, standard, or certification system.

6.0.2. History of the agreement's negotiation.

A. Pre-Tokyo Round negotiations.

In the GATT framework, or under its auspices, an agreement concerning technical barriers or standards has been contemplated and actively considered for several years. The Third Working Group of the Committee on Trade of Industrial Products of GATT has been given the assignment to draft such a document and has worked on it at least since 1967. Various drafts have been accomplished with most work prior to the Tokyo Round being done by the Trade Negotiations Committee during the years 1973 and 1974.

Outside the GATT efforts, several other international or regional groups have previously worked toward harmonizing technical regulations and standards. These attempts include work by the ECE, ISO, and the EC within its Member States. 18/ These previous discussions have undoubtedly contributed to the content of the present draft agreement.

18/ The United Nations Economic Commission for Europe, the International Organization for Standards, and the European Communities, respectively.

B. Tokyo Round negotiations.

1. International interest in and authority for negotiating a standards agreement.

In the Declaration of Ministers to GATT issued on 14 September 1973, 19/ prior to the commencement of the Tokyo Round negotiations, it was stated that the aims of the negotiations were to include "the expansion and ever-greater liberalization of world trade . . . which can be achieved, inter alia, through the progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade." 20/ More specific to the reduction of trade obstacles caused by standards was the statement that the negotiations should aim to "reduce or eliminate non-tariff measures or, where this is not appropriate, to reduce or eliminate their trade restricting or distorting effects, and to bring such measures under more effective international discipline . . . ." 21/ In 1975, the Trade Negotiations Committee established a Nontariff Measure subgroup, Subgroup on Technical Barriers to Trade, which performed some technical work before the substantive negotiations began. The agreement on standards has subsequently been negotiated and considered as part of the MTN package.

2. United States' interest in and authority to negotiate a standards agreement.

The major impetus for the United States to participate in negotiations of a standards agreement stems from the practice of a European certification

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19/ Declaration of Ministers approved at Tokyo on 14 September 1973, BISD (Supp. 20) 19, GATT Doc. No. MIN (73)1 (1973).
20/ Id., at 20.
21/ Id.

group known as CENEL (now CENELEC) not to grant certification of an electrical appliance's conformity with an applicable technical regulation unless the supplier or country of the supplier was a member of or participant in the certification group. By the United States being allowed membership or participation in the group, electrical appliances from the United States were expected to be precluded from the European market because of a lack of certification. A major aim of the United States was to gain access to such a certification system. This has been accomplished. 22/

The primary authority for the United States to enter into the negotiation of a standards agreement can be deduced from the Trade Act of 1974, 23/ which states in section 102(b):

> [T]he President . . . may enter into trade agreements with foreign countries or instrumentalities providing for the harmonization, reduction, or elimination of such barriers (or other distortions) nontariff barriers which, inter alia, reduce the growth of foreign markets for U.S. products or prevent the development of open and nondiscriminatory trade among nations or providing for the prohibition of or limitations on the imposition of such barriers (or other distortions). 24/

The Senate report on the Trade Act 25/ supports the idea that the President has the authority and is urged to negotiate agreements which reduce or eliminate barriers to trade, such as unnecessary standards. 26/

22/ See subsection 9.3 of the agreement, at 89. See also pp. 83-84 for an analysis of the concept of access as it is applicable in subsection 9.3 and elsewhere in the agreement.

23/ 19 U.S.C. secs. 2101 et seq. (1976).

24/ 19 U.S.C. sec. 2112 (1976).

25/ S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974).

26/ Id. at 22-23, 74.

The Trade Act also authorizes the President to take action necessary to bring the General Agreement "into conformity with principles promoting the development of an open, nondiscriminatory, and fair world economic system." 27/ The standards agreement, like other nontariff barrier agreements presently being negotiated, arguably moves the General Agreement toward a more open, nondiscriminatory, and fair trading system than is presently the case. 28/ The agreement does so where it elaborates on the subject matter of several articles in the General Agreement.

First, article X of the General Agreement (Publication and Administration of Trade Regulations) states that requirements, restrictions, or prohibitions pertaining to imports be promptly published. The agreement contains a similar, but more detailed requirement specifically related to technical regulations, standards, and certifications systems. Second, articles XX (General Exceptions) and XXI (Security Exceptions) do not prevent the institution of measures affecting trade which, if not applied arbitrarily or with unjustifiable discrimination, protect, inter alia, public morals, life, health, and national security. The agreement prohibits technical regulations, standards, etc. which are used to restrict international trade unnecessarily, but it, like articles XX and XXI does not prohibit technical regulations, etc. used nondiscriminatorily for the protection of, inter alia, life, health, and national security. Third, articles XXII (Consultation) and XXIII

27/ 19 U.S.C. sec. 2131 (1976); see also, S. Rep. No. 93-1298, 93d Cong., 2d Sess. 84 (1974).

28/ For a discussion of the relationship of and the effect on the General Agreement of these nontariff barrier agreements resulting from the Tokyo Rounds on the General Agreement, see Vol. 1, of this report.

(Nullification or Impairment) provide for consultation and dispute settlement when one Contracting Party thinks its rights under the General Agreement are being impaired or nullified by another Contracting Party. The agreement also provides for consultation and settlement of disputes arising from the agreement for which a detailed procedure has been created. 29/

3. Work during the negotiations.

The draft text first used in the negotiations contained areas for substantive discussion, but was in a more complete for than other MTN, non-tariff barrier agreements. Negotiations progressed reasonably quickly although there were questions concerning coverage and exact content.

The areas of discussion relating to the coverage and exact content of the agreement centered primarily on four issues: the right to participate in the certification systems of other Parties; the obligation of Parties to make their political subdivisions comply with the agreement; the accrual of benefits to non-signatories to the agreement and the conditions under which a non-Contracting Party could sign this agreement. The question of whether the agreement would apply to technical regulations, standards, and certification systems applicable to agricultural products was also under discussion, but the discussion focused primarily on whether the language of the agreement was sufficient for such coverage, not whether agricultural products should be included. These issues and questions were resolved as described below.

29/ An important distinction between the procedures found in the agreement and those found in the General Agreement is that the agreement attempts to limit the disputes arising under the agreement to its dispute settlement procedure alone, while the General Agreement provides that any benefits accruing to a Contracting Party either directly or indirectly under the General Agreement may the subject of GATT dispute settlement procedures.

The controversy over certification systems was based on whether Parties to the agreement would have to join or formally participate in the certification system of another Party or of a region even though membership or participation was not allowed in some cases in order to have the products originating in its territory certified as to conformity with appropriate technical regulations and standards. Formal membership or participation as a prerequisite to receiving a mark of certification would often prevent a product from entering a foreign market since formal membership or participation was not always available. The position finally arrived at is that all suppliers of like products originating in the territory of a Party would be given access to a certification system on a non-discriminatory basis. This access is defined to include the receipt, where appropriate, of the certifying mark of the system.

Negotiations in regard to the obligation a Party would assume to compel its political subdivisions to comply with the agreement arose from the concern of Parties with non-federal legal systems that Parties with federal or decentralized legal systems would not implement the agreement as completely as would non-federal Parties. Since in federal systems, the states, provinces, or Länder often have considerable autonomy in various matters, the Party with a federal system could arguably implement the agreement only in the areas where it had direct jurisdiction leaving the agreement unimplemented at levels which had some impact in the standards and certification fields.

80-138 O - 79 - 3

The solution to this problem is the two levels of obligations discussed earlier (first and second levels of obligation). 30/ These were created so that all Parties had an obligation to comply with requirements of the agreement at the central or national government level and that Parties also had an obligation to use their "best efforts" to achieve compliance with the agreement at the level of their political subdivisions.

An offshoot of this concern of how to make the agreement applicable at all government levels is whether private standards groups in the territory of a Party and international/regional standards organizations in which a Party is a member or a participant would be compelled or encouraged to comply with provisions of the agreement. The solution has also been to apply the second level obligation. The language to be used to express this obligation, the second level, was under discussion until it was agreed that the language of Article XXIV:12 of the General Agreement should be used. 31/

A third area of controversy involved the question of whether the benefits of the agreement would accrue solely to the Parties to the agreement or whether they would also accrue to non-signatories to the agreement who were Contracting Parties to the General Agreement. 32/ This is the dilemma of conditional and unconditional most-favored-nation treatment. The resolution of the problem for this agreement appears to be, although there is no direct statement of such resolution, that conditional most-favored-nation treatment

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30/ See pp. 9-10, supra, in this volume.

31/ This language is scattered throughout the agreement. See pp. 9-10, supra, of this volume for a discussion of this language.

32/ See Vol. 1, supra, for a discussion of this concept as it affects all the nontariff barrier agreements negotiated at the Tokyo Rounds.

will be appropriate. This conclusion is suggested by the language in two articles of the agreement, e.g., "products imported from the territory of any Party shall be accorded treatment no less favourable than that accorded . . . to like products originating in any other country . . . ." (emphasis added). 33/ There is no language which would suggest that benefits of the agreement should, must, or even can be equally applied to non-signatories who are, nonetheless, Contracting Parties to the General Agreement.

The fourth area of discussion involved the conditions under which a country, not a signatory of the General Agreement, could sign this agreement. Some earlier drafts would have permitted non-Contracting Parties to sign if they undertook to observe the provisions of the agreement and "such other provisions related to the effective application of rights and obligations as may be agreed." 34/ Other drafts did not stipulate such conditions. 35/ Those countries not Contracting Parties to GATT did not want such conditions placed upon accession. The initialed agreement, however, contains language which allows any government of a non-Contracting Party to accede to the agreement on "terms related to the effective application of rights and obligations under this Agreement, to be agreed between that government and the Parties to this Agreement . . . 36/ The thrust is the same but the presentation of the concept is more agreeable to the non-Contracting Parties concerned.

33/ Section 6.3.1, at 51, infra, in this volume. See also section 6.8.1, at 80, infra, in this volume.

34/ See, e.g., MTN/NTM/W/192/Rev. 3, article 15.1.

35/ See, e.g., MTN/NTM/W/150, article 22.a(i).

36/ See, section 6.15.1 of this report, at 112 of this volume.

The debate over whether the agreement should also apply to technical regulations, standards, testing methods, and certification systems applicable to agricultural products was settled when Group Agriculture of the GATT agreed that the language of the draft agreement, with minor additions, would be satisfactory. The minor additions to the language of previous draft texts were for the purpose of adapting the agreement to the problems unique to agricultural products. The most notable language addition stated that disputes involving perishable products should be resolved as promptly and expeditiously as possible. 37/

Aside from the issues discussed above which have sparked controversies, the legal status or weight of the agreement has also been debated. The question of legal status goes to the problem of whether the agreement would be legally obligatory at the international level for the Parties, whether the agreement would be a voluntary code in regard to compliance, or whether the agreement would be only a set of guiding principles. The consensus is that the agreement is a legally binding agreement at the international level, at least for those countries which sign it.

37/ See sections 6.6.1, at 72; 6.14.1, at 110, and 6.15.1, at 112, in this volume.

6.0.3. Implementation in United States law.

A. Introduction.

If legislation approving these MTN nontariff agreements is enacted pursuant to sections 102 and 121 of the Trade Act of 1974, 38/ then implementation of the standards agreement into United States law will require serious consideration due to the large number of the standards in effect in the United States. 39/

Implementation will fall into two categories: What should be implemented at or before the time the agreement enters into force if the United States is to comply and what may be necessary at some later date as a result of dispute settlement and enforcement procedures.

The first category includes implementing through legislation or executive action those rights which can be exercised or those obligations of the agreement for which no specific directives are given regarding the means of fulfilling them. These obligations and rights tend to encompass the substantive and most important aspects of the agreement. For example, article 2.1 states, inter alia, that Parties are to ensure that technical regulations are not adopted or applied with a view to creating obstacles to international trade. The details of how to implement that particular obligation is left to each Party. The first category also includes implementing those provisions of the agreement which require particular legislative or executive action, e.g., establishing an inquiry point, the functions for which have been clearly

38/ See discussion of the approval process as outlined in sections 102 and 121 of the Trade Act in Volume 1 of this study.

39/ See text at 1-2, supra, in this volume.

delineated in article 10.1, or establishing or designating an agency in the United States to represent U.S. complaints involving foreign standards practice.

The second implementation category involves possible violations of the agreement by technical regulations, standards, certification systems, and associated testing methods and administrative procedures which exist at the time the agreement enters into force and which create unnecessary barriers to international trade. Since the agreement is not automatically retroactive, 40/ no technical regulations, certification systems, etc. are required to be modified or eliminated through legislative or executive means unless they are declared violative of the agreement and the United States determines it is best to change or eliminate them rather than suffer agreement-related retaliation. Changes to such regulations, systems, etc. which might fall into this category may be implemented if and when a dispute arises. Future implementation of this nature is difficult to define and analyze, since it demands some degree of prophecy to predict what complaints will be made, what the outcome of the dispute settlement mechanism will be, and whether the existing, but questioned, standards activity is worth perpetuating given any resulting retaliation. Therefore, this report concen- trates on what needs to be done by the time the United States has accepted the agreement and the agreement enters into force.

Implementation of this agreement by the federal government can be accomplished by several means. Legislation is an important means, but it is

40/ See discussion of article 14.26 at 6, supra, and at 125, infra.

not the only method. Executive orders, regulations, policy decisions and administrative practices, or any combination of them are possible modes for implementing parts of the agreement into the United States domestic legal system. Legislation would be needed to require the establishment of the inquiry point in the United States 41/ and to appropriate funds for participation in the dispute settlement procedures. 42/ But executive orders could be used to require that executive branch agencies involved in standards-making consider any relevant international standard as a basis for their technical regulations. A policy might need to be developed or continued as to participation by the United States in international bodies that establish product standards; for example, the United States would need to decide how to vote in international organizations in which it was a member in regard to standards set for products of prime interest to developing Parties. In the next section, legislative alternatives for meeting first level obligations are discussed. Possible federal actions for fulfilling the second level obligations are examined in the following sections in this volume.

B. Implementation at the federal level.

The agreement, in creating the first level obligation for countries signing the agreement, requires the federal government, upon approval of the agreement by the United States Congress, to ensure compliance at the federal level.

41/ See discussion of this obligation at pp. 93-100, infra.
42/ Id., at 112-136.

1. Obligations which leave the method of implementation to the discretion of the Party.

As explained earlier in this section, 43/ some obligations of the agreement are made in broad, general terms and do not specifically direct the means to be used to fulfill such obligations. The method of implementation is therefore within the discretion of each Party. The discussion which follows attempts to provide some suggestions for implementing these broadly worded obligations.

(a) Avoiding the use of standards and certification activities as obstacles to trade. The obligations to avoid using standards and certification systems as unnecessary obstacles to trade are not explicitly required to be met at present in this country. It is certainly possible to direct all federal departments and agencies, which have some role in establishing or enforcing technical regulations, standards, or certification systems, to comply with the agreement. A model for such legislation might be section 1102 of the Federal Aviation Act of 1958, which requires the Secretary of Transportation to perform certain duties " . . . consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries . . . ." 44/ The problem with such an approach is that each department or agency would be denied some flexibility in carrying out its individual program. Private rights to sue various agencies to comply with the agreement may be created. Therefore, it is better to require

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43/ See p. 23, supra.
44/ 49 U.S.C. sec. 1502 (1970).

agencies to take obligations of the agreement into account (but not necessarily to require the agencies to abide by the obligations) when taking any action subject to the agreement.

(b) Using relevant international standards. The agreement requires Parties to use relevant international standards as a basis for their technical regulations or standards. The exception to such use is when the relevant international standard is "inappropriate" for the Party concerned. 45/ The term "inappropriate" is not defined in detail by the agreement and each Party has the authority to determine the term's meaning. A federal agency could be designated to serve that function. It could determine, with adequate technical advice, whether a particular international standard should not be used or adopted because it was "inappropriate" to do so. This agency could then advocate adoption or rejection, depending on its opinion of appropriateness, of the international standard by the interested department or agency. In this way, a department or agency charged by law (especially law existing at the time the agreement enters into force) to promulgate technical regulations, testing methods, or certification systems, etc. would retain its discretion to decide what regulation to use.

(c) Activities involving complaints of noncompliance by other Parties with provisions of the agreement. The agreement provides a dispute resolution procedure, which can only be activated by the government of a

45/ The exceptions to the obligation to adopt international standards appears in article 2 of the agreement. See sec. 6.3.1, at 51, in this volume, infra, for a description and analysis of the obligation and its exception.

Party. 46/ Some office or agency in the federal government could be designated as the office to receive complaints from American producers or exporters that a particular foreign regulation, standard, certification system, etc. violates the agreement. The agency could be delegated the authority to make recommendations as to whether a complaint should be made and the dispute settlement procedure initiated. That agency, or some other agency, might also handle any consultations or dispute resolution proceedings that were engaged in on the part of the United States. This function would at present be carried out by the Office of the Special Representative for Trade Negotiations (STR) under section 301 of the Trade Act of 1974. Under section 141(d) of that statute, STR is authorized to "utilize, with their consent, the services, personnel, and facilities of other Federal agencies," which might be enlisted for technical advice.

(d) Providing for complaints against the United States. It is presumable that exporters of articles from abroad will attempt in every way allowed by United States law to obtain the advantages of the new agreement. It is necessary to determine whether it will be this country's policy that the agreement's dispute settlement mechanism 47/ will be the foreign exporters' sole means of resolving disputes arising out of the agreement or whether they can bring these disputes into the legal and/or administrative systems of the

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46/ Under the agreement, only Parties, not individuals, will have standing on an international level to bring complaints against standards and certification systems that are thought not to be consistent with provisions of this agreement.

47/ See articles 13 & 14, at 110-136, infra.

United States. 48/ In some cases--such as standards activities of the United States federal government that are subject to the Administrative Procedure Act--it would be necessary to amend laws in order to deny other countries the benefit of domestic laws of the United States, but this would probably not be desirable. If the legal or administrative procedures of the United States are to be extended, it should be determined what causes of action or administrative procedures are to be made available and to whom. Several alternatives are possible.

The United States could attempt to limit claims of disputes arising under the processes of the agreement. Subsections 14.19-14.22 of the agreement 49/ provide means for a Party to enforce its rights under the agreement by suspending benefits of the agreement to other Parties. The disadvantage in limiting enforcement of the agreement as to the United States to the dispute settlement mechanism found within the agreement is that it forces into a diplomatic setting problems that might better be solved by administrative or judicial systems of the Unite' States. There are no provisions giving individuals, business entities, trade associations, or private persons standing to enforce the agreement against other Parties. If foreign-based individuals or business entities for example, wished to complain of violations of the agreement by other Parties, they would not be able to initiate the dispute resolution provisions of the agreement against the United States.

48/ No obligation arises under the agreement which would neccssitate opening federal or state courts to complaints pressed by other Parties or business interests, whether foreign or domestic.

49/ At 114-115, infra.

Their home government would have to agree to pursue the claim against another Party through the agreement's dispute settlement mechanism. If individuals or business entities in the United States, such as importers, thought they had been damaged by the United States' violations of the agreement, they would have no recourse in the United States unless judicial or administrative means already existed or were established. It is therefore useful to considered whether United States systems should be opened to complainants.

Private code enforcement action could be permitted in the federal courts to enforce a private foreign exporter's (or domestic importer's) rights (or some of these rights) arising under the agreement if domestic legislation implemented them. 50/ As to the federal government's first level obligation, while some statutes presently on the books may authorize private actions against federal agencies or the United States for failure to comply with statutory criteria that are basically in accordance with the agreement (such as procedural due process), a statute extending these rights to private

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50/ See volume 1 of the study, "Introduction and Overview," for a discussion of the circumstances under which private rights may arise out of international obligations of the United States. While our opinion is generally that no rights arise out of mere approval of agreements, the problem becomes more complicated if the Congress now enacts law requiring agencies to adhere to the agreement "when possible" (or words to that effect). In that case, even if no right of action is created by Congress, this new obligation may be the subject of actions, in the nature of mandamus, to compel federal officials to abide by the law. It may be desirable for this reason to consider a limited right of legal action for persons aggrieved under the statutes enacted to implement the agreement, if any. Note that unless foreign governments are specifically excluded from the class of persons who may sue under the implementing statute, another Party might be able to sue a federal department which did not act in accordance with the agreement. See generally, Pfizer, Inc. et al. v. Gov't of India, et al., 434 U.S. 308 (1978), in regard to when a foreign government is entitled to sue in United States district courts.

foreign persons has aspects which may be undesirable. It may increase the cost of government unnecessarily by requiring agencies to broaden the factors they consider. It may require new expertise the agencies do not have. And it may result in uneven interpretation of obligations of the agreement. Therefore, it is desirable, if Congress wants to enable anyone to compel agencies to abide by the agreement (for example, when the United States concedes in international negotiations that some agency action is inconsistent with the agreement), to give some office within the government the authority to petition agencies to act in accordance with agreement, much as the Department of Justice now appears before all types of regulatory agencies to argue its view of the antitrust implications of federal regulatory actions.

Another means of resolving disagreements involving implementation of the agreement by the U.S. federal government is through administrative procedures which can be had under existing statutes to conform to the agreement by regulation. Departments or agencies involved with the substance of the agreement could use existing or be delegated new powers to decide agreement-engendered issues that arise in the rule- making procedure. The agreement stipulates that when new standards activities are being formulated, other Parties--and in some cases, interested parties in other countries--are to be accorded a reasonable time to make written comments regarding the proposed text. The Administrative Procedure Act (APA) already requires federal departments and agencies to fulfill this obligation in many cases. By means of this process, foreign persons who have potential disputes as to whether a particular regulation conforms to provisions of the agreement will have opportunity to present its position during the rulemaking process.

Under the APA, American and foreign individuals or business organizations would be entitled to participate in federal rulemaking procedures for the establishment of technical regulations which would affect imported products 51/ and to participate in administrative adjudications where hearings on such rulemaking are authorized by statute. 52/ In some cases, other Parties would also be entitled to the benefits accorded by the APA. 53/ Along with the opportunities to participate in the rulemaking procedures and administrative adjudication, judicial review of an action or inaction by a federal department or agency would be available to address an alleged misuse

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51/ 5 U.S.C. sec. 553 (1976). Section 553(a)(1) does except application of the APA where a "foreign affairs function of the United States" is involved. In Hou Ching Chow v. Attorney General, 362 F. Supp. 1288 (1973) (adjustment of alien's status), the court interprets the term "foreign affairs functions" by quoting legislative history of the act which states that "affairs" are not merely functions extending beyond the borders of the United States but are these which have an effect on other governments and would lead to "definitely undesirable international consequences." Even if the domestic establishment of a technical regulation, standard, certification system, etc. were successfully argued to be a foreign affairs function, it is doubtful whether the exception to the APA could be logically extended to include domestic promulgation of regulations, etc. since the purpose of applying the APA would be to fulfill an international obligation and avoid "undesirable international consequences."

52/ 5 U.S.C. sec. 554 (1976). Section 554(a)(4) has an exception similar to Section 553 (a)(1). (See n. 54, supra.) The adjudicative provisions of the APA are not applicable where foreign affairs functions are involved. However, an argument can be made that the act would be applicable in a situation involving the preparation and adoption of technical regulations, standards, certification systems, etc. even as to imported products.

53/ 5 U.S.C. sec. 551 (2)(1976). "Person" is defined as including a "public or private organization other than an agency." In Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D.D.C. 1974), the court ruled that a "public or private organization" included a foreign government or the instrumentality of such a government. It did not define "instrumentality" and so it is unclear as to whether that term would include local government or regulatory bodies as covered in the agreement.

of discretion, an unauthorized act, or the failure to discharge statutory obligations. 54/

(e) Miscellaneous matters arising from the agreement. Two administrative functions are mandated by the agreement. These are: (a) notifying other Parties through the GATT secretariat of proposed, federal technical regulations and certification systems and (b) representing the United States in international and regional standardizing bodies in which the United States is a member or a participant. 55/

The notification functions could be carried out by interagency committees. A disadvantage of the interagency committee arrangement is that an interagency group lacks the necessary continuity needed to fulfill its administrative purpose. The quality of participation by the individual departments or agencies depends on a variety of changing factors, e.g., available personnel, time, effectiveness of the personnel, interest, etc. An agency or office established to fulfill the administrative functions would be more likely to provide a constant level of efficiency.

At present, the representative function is generally carried out by private groups in the United States. This could be continued where private groups are permitted by those organizations to represent their governments.

54/ 5 U.S.C. 702 (1976).

55/ Advisory committees composed of technical experts, private citizens, representatives of standardizing, testing, or certification groups, and officials of federal, state, and local government may be desirable for this purpose.

2. Obligations requiring specific action.

There are four first level obligations that require specific action in order to be implemented. They require particular action in the sense that their elements are specifically defined in the agreement.

The first is the inquiry point required in article 10. 56/ The inquiry point could be an office or bureau that would be able to answer "all reasonable enquiries" concerning government (federal or local) technical regulations and standards; test methods and administrative procedures; certification systems; the location of notices published "pursuant to the Agreement"; and the location of nongovernmental inquiry points in the United States. This function requires coordination of a large body of information. At the present, there is no one place in the federal government to obtain all this information, although the best source for most of the material is the National Bureau of Standards. A research library might be sufficient to fulfill this obligation, although the inquiry point must be able to "answer" inquiries. The options then would include establishing and staffing one location which could provide an informational service. This study has not investigated what level of funding or what skills are necessary to this function, but interested agencies such as the Department of Commerce may be able to use some existing resources for this purpose.

56/ See a description and analysis of article 10 in the provision-by-provision section of this volume at 92-100, infra. The agreement requires only one inquiry point. Article 10.1 states, "Each Party shall ensure that an enquiry point exists which is able to answer all reasonable enquiries . . . ." (emphasis added).

The second operational obligation is the requirement that the United States provide, if requested and on mutually agreed terms and conditions, technical assistance for the preparation of technical regulations, the establishment of national standardizing bodies, and the establishment of certification systems. 57/ There is no requirement that this technical assistance be available through one central location; assistance can be distributed through various agencies which presently possess the expertise which would be needed. In the case of developing countries, technical assistance (which is to be granted on terms and conditions agreed upon between the countries involved) might be administered through United States foreign aid.

Third, the agreement obligates signatories to participate in the Committee on Technical Barriers to Trade which consists of representatives from all signatories. Under article 13, the Committee determines the outcome of disputes brought before it. Legislation would be needed to authorize United States participation in the Committee and to authorize the appropriations for such participation. 58/

The fourth obligation requiring specific action is to notify other Parties through the GATT secretariat of new or proposed technical regula-

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57/ See a description and analysis of article 11 of the agreement in the provision-by-provision section of this volume at 100-104, infra.

58/ See, e.g., section 121(d) of the Trade Act of 1974 (19 U.S.C. sec. 2131 1976), which provides authorization for an annual appropriations for the U.S. "share" of the expenses of the Contracting Parties to the General Agreement. See also, 22 U.S.C. sec. 287 (1976). The latter section is entitled "Representation in organization" and provides, inter alia, for the President to appoint representatives to U.N. agencies and for their compensation.

50-138 O - 79 - 4

tions and certification systems. 59/ Some official action, such as legislation or an executive order, need only assign this function to an existing agency presently in contact with the GATT secretariat, e.g., the U.S. Mission in Geneva (Department of State), and it could also specify when such notification was required by the agreement. Alternatively, the function could be assigned to the various agencies that promulgate regulations regarding standards, testing, or certification matters. The advantage of this option is that it will not necessitate collecting the necessary information in one place in the United States before notifying the GATT secretariat; the disadvantage is that these agencies may not be in a position to know when notification is appropriate because, for example, it is possible that they will not know what significantly affects the trade of other countries which is one factor requiring notification of technical regulations. The functions of the inquiry point might include recommending to STR or other agencies when notification was appropriate under the code. A third alternative might be for the inquiry point to make notifications itself when appropriate.

Implicit in the requirement to notify other Parties through the GATT secretariat of these regulations and systems is the requirement to receive notifications from the secretariat of the activities of the other Parties. Therefore, to take full advantage of the agreement, it is desirable to authorize some central point to receive notifications. In order to derive any use from the information, it will be necessary that the agencies affected and

59/ See a description and analysis of articles 2 and 7 in the provision-by-provision sections of this volume at 51-63 and 80-83, respectively.

interested parties have access to the material, either by being directly contacted or by requesting information. If it is clearly established which agencies have an interest in which regulations and systems, those agencies could be notified. For example, the Industry and Trade Administration (ITA) of the Department of Commerce would be interested in any foreign standards applicable to all industrial products being produced specifically for export. Trade associations, such as the Electronic Industries Association, or individual manufacturing companies would be concerned about procedures and rules of new certification systems set up to certify the kind of industrial good it produced. The inquiry point could be given this function also, which would expand its functions to include service to domestic as well as foreign persons.

It appears that these four specified implementation efforts may be made without amendment of existing law. An inquiry point is really a collection of functions that can be assigned by executive order, although legislation may be considered necessary by the Congress to place limitations upon this function. Similarly, United States participation in the Committee on Technical Barriers to Trade under the agreement is probably authorized under the general functions of STR, section 141(c) of the Trade Act, although new enactment may be desirable. Legislation may be genuinely desirable in the event that Congress wants a number of functions under the agreement (such as supplying information, notifying GATT of new regulations, and receiving information on foreign practices) to reside in one office. Placing several functions in one office probably would have the advantage of increasing somewhat the accountability to Congress in these matters.

C. Implementation possibilities at state and local government levels.

The federal government's obligation insofar as ensuring compliance by state and local governments is a second level obligation. The meaning of the language to be used to signify the second level obligation is not entirely clear. 60/ Interpretation of the phrase "such reasonable measures as may be available," an element of the second level obligation, will be difficult. There are a range of possibilities. The federal government can (a) preempt by legislation states and local government bodies from legislating at all in areas covered by the agreement and in which the federal government has previously legislated, (b) direct the states and local governments through legislation to comply with all applicable provisions of the agreement, or (c) encourage compliance through legislative or administrative means.

1. Preemption.

The federal government in this country can preempt the states on matters for which it has constitutional authority to legislate. It has done so. In the National Traffic and Motor Vehicle Safety Act, 61/ the Fair Packaging and

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60/ See pp. 9-10, supra.

61/ 15 U.S.C. sec. 1392(d) (1976) which reads in part: Preemption. Whenever a Federal motor vehicle safety standard established under this title . . . is in effect, no State or political subdivision of a state shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

Labeling Act, 62/ and the Clean Air Act 63/, there are provisions which prohibit certain state or local government action. Their preemptive effect is not total, however, 64/ and it is clear that present federal law does not

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62/ 15 U.S.C. sec. 1461 (1976), which reads: It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this Act . . . which are less stringent than or require information different from the requirements of section 4 of this Act . . . or regulations promulgated pursuant thereto.

63/ 42 U.S.C. sec. 7543(a) (1970), which reads: Prohibition. No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

64/ 42 U.S.C. sec. 7543(b) (1970) which waives the prohibition of state action adopting or enforcing certain standards relating to emission control. The primary test for the waiver is whether the state standard is at least as protective of public health and welfare as are applicable federal ones. See, e.g., Chrysler Corp. v. Rhodes, 416 F.2d 310 (2d Cir. 1969) and Chrysler Corp. v. Tofany, 419 F.2d 499 (2d Cir. 1969). In these two cases, the court has interpreted the preemptive section of the National Traffic and Motor Vehicle Safety Act (at n. 64, supra) to mean that states were not preempted by federal regulations, which regulated headlight systems on passenger cars, to prohibit the sale of cars which had auxiliary lights only when they had a deleterious effect on the required headlights and did not reach any other effect of auxiliary lights. The state standard prohibited the sale of cars equipped with auxiliary lights which interfered with drivers of other cars. Since the "same aspect of performance" was not involved, the courts ruled that the state was not preempted in this area.

It is, therefore, within reason that a state could promulgate and enforce, for example, an air pollution control devise standard that did not reach the same aspect of performance as one established by the federal government but which was much more restrictive and arguably could be considered a barrier to international trade if it went beyond protecting the environment. Presumably the federal government would not have the authority to preempt such a state standard unless it enacted regulations covering the same aspect of performance, but with lower requirements.

always prohibit states or local governments from promulgating related technical regulations or standards even if they are more stringent than federal ones.

Where the agreement is implemented through legislation, such legislation would supercede existing state and local statutes and regulations and could preempt any future state or local action in the area at least to the degree legislated at the federal level. 65/ Whether supersedure actually occurs will depend on the language and expressed intent of the federal legislation. Recent cases suggest that a state or local regulation would have to be examined in light of whether it was inconsistent with a federal law or regulation which governs the same matter or whether it was an obstacle to accomplishing the objectives of the legislature as set out in the law or regulation. 66/ Therefore, any federal implementation legislation which attempts to ensure that states and local governments do comply with the agreement will need to be clear as to what states and local governments are prohibited from doing.

Policy considerations may often militate against preemptive legislation. Many state and local technical regulations are similar to current federal

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65/ See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) and Gibbons v. Ogden, 22 U.S. (9 Wheat.) (1824). A Constitutional basis for preemption is the Supremacy Clause which states "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land . . . ." U.S. Const., Art. VI, para. 2.

66/ See, for example, Kelly v. Washington, 302 U.S. 1 (1937); Hines v. Davidowitz, 312 U.S. 52 (1941); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960); Campbell v. Hussey, 368 U.S. 297 (1961); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963); and Minnesota v. Northern States Power Co., 447 F.2d 1143 (8th Cir. 1971); aff'd per curiam, 405 U.S. 1035 (1972).

ones, except that the differences are often tailored to particular needs of the state or localities. It is unlikely that a state or local area would always find it convenient or desirable to limit itself to the level promulgated by federal legislation or regulations.

2. Directed compliance.

Another means of fulfilling a second level obligation in relation to the states and local governments is to enact legislation which would direct them to comply with the provisions of the agreement which are applicable to them. For example, the federal government could require through legislation that all states and local governments operating certification systems that affect interstate or foreign commerce must grant access to those systems on a nondiscriminatory basis to all suppliers of like products from other Parties.

A basis for such directed action is the exclusive power of the federal government to "regulate Commerce with foreign Nations." 67/ Arguably, the federal government would have exclusive power to compel states and local governments to comply with an international agreement intimately related to foreign commerce. However, the problem with this reasoning is that standards

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67/ U.S. Const., Art. I, sec. 8, cl. 3. See also Buttfield v. Stranahand, 192 U.S. 470 (1904) where the Supreme Court held that Congressional authority to regulate foreign commerce is an authority "complete in itself, acknowledging no limitations other than those prescribed in the Constitution." At 492. the Court goes further and reasons that from the complete power of Congress over foreign commerce no individual has a right to trade with foreign nations "which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into the United States and the terms upon which a right to import may be exercised." Analogizing an individual to a state or local government, it follows that Congressional power is indeed exclusive and the right to import stems from Congress and cannot be limited by the states.

activities are not exclusively a foreign affairs matter, since these regulations and systems are adopted and enforced for internal regulatory purposes, such as the protection of health and the public welfare within a state. States have traditionally set and enforced such technical regulations or standards.

3. Encouraging compliance.

As preemption and directed compliance obviously have limitations, it is arguable that the United States could meet the second level obligation of the agreement by encouraging compliance. The obligation only requires that a Party "take such reasonable means as may be available"; preemption and directed action are not necessarily mandated by such language. Therefore, some other means, such as encouraging state and local governments to comply voluntarily with provisions of the agreement would arguably fulfill the obligation. For example, a federal agency could be established or designated to draft guidelines with which local governmental bodies would find useful for interpreting the agreement.

Federal funds can also be used as incentives for compliance. Where funds have been or are to be appropriated to state or local activities relating to standards or certification, 68/ a condition for receiving the funds could be added to require recipient states or localities to comply with the agreement where appropriate. A more positive incentive would be to help fund state

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68/ See, e.g., 20 U.S.C. sec. 1862 (1976) (authorization of grants, contracts, and financial assistance for educating students to use the metric system) and 42 U.S.C. sec. 7543 (1976) (authorization of grants for developing and maintaining vehicle emission testing and control programs).

or local programs which lead toward compliance. For example, the federal government might fund a state research program to determine if foreign testing methods were competent to determine a product's conformity to the state's technical regulations. 69/

D. Implementation possibilities regarding nongovernmental bodies.

In situations where nongovernmental, or private, bodies concerned with standards and certification systems are involved, the federal government also assumes a second level obligation. The problems of interpreting this "best efforts" requirement are the same as they were for the state and local government level, but are complicated by the fact that the federal government has broad power to legislate prohibitions on private activity under the Commerce Clause.

The power of private groups to affect the field of standards and certification lies in the commercial need for an assurance of quality and a strong voluntary adherence to what is agreed upon through these private groups. In some situations, the standards promulgated by a nongovernmental organization might currently violate existing United States laws, such as the laws designed to protect against unfair trade practices and monopolies. If the violation were also in contravention of the agreement, an action against the violator based on existing law would help to enforce the provision of the

69/ Of course, if the United States can comport with this agreement by mere "encouragement" at the local level, it is reasonable to suppose other federated countries may do the same. The value of the agreement vis-à-vis compliance by local government bodies will depend ultimately on the results of such encouragement.

agreement breached. For example, in 1970 the Justice Department filed a suit against The American Society of Mechanical Engineers, Inc. (ASME), and the National Board of Boiler and Pressure Vessel Inspectors (National Board) to enjoin them under the Sherman Act from discriminating against foreign-made boilers or pressure vessels with respect to the issuance of certification makes. 70/ A consent decree was issued in 1972 which enjoined the defendants from the unreasonable restraint of trade through discriminatory action against those foreign products and ordered them to establish fair and nondiscriminatory certification procedures. 71/ The decree, in effect, required the ASME and the National Board to grant national treatment, required under the agreement, to the products of other Parties.

Aside from possible limitations on private activity, voluntary compliance with the agreement can be encouraged. Coordination of standards and certification activities could be accomplished by an overview agency or central office. These nongovernmental groups could be encouraged to adopt appropriate international standards and to follow the transparency procedure when developing their own standards or certifications systems. Funds could be appropriated to some of these organizations for them to represent the United States in existing or future international standardizing bodies. At the present, the American National Standards Institute (ANSI) is the

70/ United States v. The American Society of Mechanical Engineers, Inc. and The National Board of Boiler and Pressure Vessel Inspectors, (1972) Trade Cases (CCH) 74,028 (S.D.N.Y. Sept. 11, 1972).

71/ The United States v. The American Society of Mechanical Engineers, Inc. and The National Board of Boiler and Pressure Vessel Inspectors, (1972) Trade Cases (CCH) 74,029 (S.D.N.Y. June 13, 1972).

representative of the United States to the International Organization for Standards (ISO), the leading international organization that promulgates international standards. The degree to which the United States can contribute to the development of these standards depends partially on the degree of representation. This in turn is affected by the ability of the ANSI to finance this participation.

E. Implementation possibilities regarding international and regional standardizing and certification organizations.

To fulfill the second level obligation 72/ in regard to international and regional organizations in which the United States is a member or participant, the United States could consider whether it should have a policy toward those organizations. 73/

Again, encouragement of compliance by these groups appears to be the most reasonable means. The voting power and financial contributions of the United States are methods by which it may influence the activities of those organizations. The policy and voting behavior could be directed toward creating standards and certification systems which comply with the transparency procedures set out in the agreement, and the United States could propose or advocate standards which closely approximated those which are promulgated or are to be created in the United States. The subsequent adoption of such international standards would then be more likely in this country.

72/ Here also, interpretative problems of the second level obligation arises. A policy decision can be made as to what the best efforts of the United States would be and then implement the relev. provisions of the agreement on that basis.

73/ These include, inter alia, ISO, the International Electrochemical Commission (IEC), International Bureau of Weights and Measures, and the Food and Agriculture Organization (FAO).

Preamble

6.1. Preamble

6.1.1. Interpretation

6.1.11. Text

Having regard to the Multilateral Trade Negotiations, the Parties to the Agreement on Technical Barriers to Trade, hereinafter referred to as "the Parties" and "this Agreement;

Desiring to further the objectives of the General Agreement on Tariffs and Trade;

Recognizing the important contribution that international standards and certification systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;

Desiring therefore to encourage the development of such international standards and certification systems;

Desiring however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and methods for certifying conformity with technical regulations and standards do not create unnecessary obstacles to international trade;

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade;

Recognizing that no country should be prevented from taking measures necessary for the protection of its essential security interest;

Recognizing the contribution which international standardization can make to the transfer of technology from developed to developing countries;

Recognizing that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and methods for certifying conformity with technical regulations and standards, and desiring to assist them in their endeavours in this regard;

hereby agree as follows:

6.1.111. Description

The preamble sets out the purposes and goals of the Agreement on Technical Barriers to Trade, (hereinafter "the standards agreement" or "the agreement"). It clearly states that the object of that agreement is not to eliminate all technical regulations and standards, but rather to ensure that technical regulations and standards are not used as unnecessary obstacles to international trade, whether through their requirements or application. Indeed technical regulations, standards, and certification systems are seen as facilitating trade and as a legitimate means to protect life and health, the environment, and national security as well as to prevent deceptive trade practices. It is seen that their legitimacy ends, however, when standards or certification systems are adopted and applied arbitrarily, unjustifiably, or discriminatorily or constitute a disguised trade restriction.

A possible benefit of the agreement, one which is subsidiary to preventing unnecessary trade barriers, is to contribute to the transfer of technology between developed and developing countries. The preamble states a commitment, not to technology transfer per se, but to help developing adherents comply with the code through technical assistance for the formulation and application or operation of technical regulations, standards, and certification systems.

6.1.112. Analysis

As with most preambles to international agreements, this preamble is only an aid to the interpretation of the provisions of the document which follow and does not set forth any legal obligations.

6.1.3. Implementation

Since the preamble does not constitute a legal obligation, no implementation of its contents is necessary. Attention to it would be beneficial, however, when implementing other articles as it is a guide as to the intended purposes of the agreement.

6.2. General provisions (Article 1)

6.2.1. Interpretation

6.2.11. Text

1.1 General terms for standardization and certification shall normally have the meaning given to them by definitions adopted within the United Nations System and by international standards organizations taking into account their context and in light of the object and purpose of this Agreement.

1.2 However, for the purposes of this Agreement the meaning of the terms given in Annex 1 applies.

1.3 All products including industrial and agricultural products, shall be subject to the provisions of this Agreement.

1.4 Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage.

1.5 All references in this Agreement to technical regulations, standards, methods for assuring conformity with technical regulations or standards and certification systems shall be construed to include any amendments thereto and any additions to the rules or the product coverage thereof, except amendments and additions of an insignificant nature.

6.2.111. Description

This article includes by reference the definitions of terms used in the agreement and outlines what the agreement does or does not cover.

The terms and their definitions used in the standardization and certification process have as their meanings, those generally accepted in the

international business community, and are to be supplemented by a list of terms with specific definitions and explanatory notes found in Annex I of the agreement. 74/ The definitions of the latter set of terms have been taken largely from the definitions of the International Organization for Standards (ISO) and the UN Economic Commission for Europe (ECE) and give the terms specific definitions important to the interpretion of the code.

The agreement covers all industrial and agricultural products.

Government procurement and production are not covered by the agreement. Thus, the standards, testing methods, etc. required for, inter alia, defense materials and government office equipment, would not be covered by the standards agreement.

Provisions of the agreement are applicable to any modifications made to technical regulations, standards, testing methods, administrative procedures, or certification systems. Technical regulations, standards, etc. which exist prior to the code's entry into force are affected only as provided in section 14.26, 75/ but amendments to them which are made after the agreement becomes effective will be subject to the appropriate provisions of the agreement.

6.2.112. Analysis

The term "United Nations System" (line 3) refers to a set of definitions regarding standardization that is sponsored by the United Nations. A Norwegian delegate stressed a need for incorporating this system.

74/ See sec. 6.17 in this volume, at 144-147 infra. This annex includes ten terms, their definitions, and explanatory notes.

75/ See that article (Retroactivity), in sec. 6.15.1, infra, at 115, in this volume.

Standards regulating services, whether applied in the sale of an industrial product or not, are not affected by the agreement. 76/ This eliminates all professional standards as well as codes of ethics which pertain to services.

The only exception to the applicability of the agreement to amendments or modifications of existing standards, technical regulations, or methods for testing conformity is if the amendments or modifications are "of an insignificant nature" (line 20). This term is not defined. The result should be to exclude changes to technical regulations, standards, testing methods, and certification systems which have little, if any, substantive effect. This would avoid, for example, unnecessary paperwork which would stem from complying with the transparency procedure.

6.2.3. Implementation

It is not necessary that the terms as defined and explained in Annex 1 be directly included in United States domestic law. However, their content would have to be considered when drafting legislation or regulations implementing specific provisions in the agreement since the terms assist in defining the coverage and limitations of the agreement. For example, the explanatory note for the term "standard" specifically excludes from coverage standards of an individual company devised for its own production or consumption requirements.

76/ For example, professional standards regarding the installation or servicing of a pressure vessel when the installation or servicing was included in the sales contract would not be covered although the technical regulations applicable to the pressure vessel, itself, would.

No implementation of article 1.5 (lines 25-20) would be necessary. The provision must be considered, however, when implementing other articles, such as those establishing an inquiry point (article 10) and the transparency procedures relating to the preparation of technical regulations, standards, and certification systems (articles 2.5 and 7.3).

Technical regulations and standards

6.3. Preparation, adoption and application of technical regulations and standards by central government bodies (Article 2).

6.3.1. Interpretation

6.3.11. Text

1 With respect to their central government bodies:

2.1 Parties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade. Furthermore, products imported from the territory of any Party shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country in relation to such technical regulations or standards. They shall likewise ensure that neither technical regulations nor standards themselves nor their application have the effect of creating unnecessary obstacles to international trade.

2.2 Where technical regulations or standards are required and relevant international standards exist or their completion is imminent, Parties shall use them, or the relevant parts of them, as a basis for the technical regulations or standards except where, as duly explained upon request, such international standards or relevant parts are inappropriate for the Parties concerned, for inter alia such reasons as national security requirements; the prevention of deceptive practices; protection for human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological problems.

2.3 With a view to harmonizing technical regulations or standards on as wide a basis as possible, Parties shall play a full part within the limits of their resources in the preparation by appropriate international standardizing bodies of international

50-138 O - 79 - 5

standards for products for which they either have adopted, or expect to adopt, technical regulations or standards.

2.4 Where appropriate, Parties shall specify technical regulations and standards in terms of performance rather than design or descriptive characteristics.

2.5 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation or standard is not substantially the same as the technical content of relevant international standards, and if the technical regulation or standard may have a significant effect on trade of other Parties, Parties shall:

2.5.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable Parties to become acquainted with it, that they propose to introduce a particular technical regulation or standard;

2.5.2 notify other Parties through the GATT secretariat of the products to be covered by technical regulations together with a brief indication of the objective and rationale of proposed technical regulations;

2.5.3 upon request, provide without discrimination to other Parties in regard to technical regulations and to interested parties in other Parties in regard to standards, particulars or copies of the proposed technical regulation or standard and, whenever possible, identify the parts which in substance deviate from relevant international standards;

2.5.4 in regard to technical regulations allow, without discrimination, reasonable time for other Parties to make comments in writing, discuss these comments upon request and take these written comments and the results of these discussions into account;

2.5.5 in regard to standards, allow reasonable time for interested parties in other Parties to make comments in writing, upon request discuss these comments with other Parties, and take these written comments and the results of these discussions into account.

2.6 Subject to the provisions in the heading of Article 2.5, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Party, that Party may omit such of the steps enumerated in Article 2.5 as it finds necessary provided that the Party, upon adoption of a technical regulation or standard, shall:

2.6.1 notify immediately other Parties through the GATT secretariat of the particular technical regulation, the products covered, with a brief indication of the

objective and the rationale of the technical regulation, including the nature of the urgent problems;

2.6.2 upon request provide, without discrimination other Parties with copies of the technical regulation and interested parties in other Parties with copies of the standard;

2.6.3 allow, without discrimination, other Parties with respect to technical regulations and interested parties in other Parties with respect to standards, to present their comments in writing, upon request discuss these comments with other Parties and take the written comments and the results of any such discussion into account;

2.6.4 take also into consideration any action by the Committee as a result of consultations carried out in accordance with the procedures established in Article 14.

2.7 Parties shall ensure that all technical regulations and standards which have been adopted are published promptly in such a manner as to enable interested Parties to become acquainted with them.

2.8 Except in those urgent circumstances referred to in Article 2.6, Parties shall allow a reasonable interval between the publication of a technical regulation and its entry into force in order to allow time for procedures in exporting countries, and particularly in developing countries, to adapt their products or methods of production to the requirements of the importing country.

2.9 Parties shall take all reasonable measures as may be available to them to ensure that regional standardizing bodies of which they are members comply with the provisions of Articles 2.1 to 2.8. In addition Parties shall not take measures which have the effect of directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with these provisions.

2.10 Parties which are members of regional standardizing bodies shall, when adopting a regional standard as a technical regulation or standard fulfill the obligations of Articles 2.1 to 2.8 except to the extent that the regional standardizing bodies have fulfilled these obligations.

6.3.111. Description

This article applies to central government bodies which are defined in Annex I of the agreement as the central government of a Party to this agreement and any body or ministry or department under its control in respect

to a standardization or certification activity. A first level obligation 77/ is incurred by the central government of a Party to fulfill the provisions of the agreement concerning the preparation, adoption, and use of technical regulations and standards of central government bodies.

Any technical regulation or standard promulgated is not to be prepared or applied for the purpose of creating obstacles to international trade. Nor can the text of the technical regulation or standard be prepared or applied in a manner which does actually create unnecessary obstacles to international trade.

National treatment and most-favored-nation (MFN) treatment in regard to technical regulations and standards are to be accorded to imported products.

Central governments are required to insure that relevant international standards 78/ are used as a basis for preparing future technical regulations and standards when these are required. This obligation is qualified by the exception that international standards do not have to be used when they are determined to be "inappropriate for the adherents concerned." This exception is illustrated by a non-exclusive list of reasons for which an international standard might be determined to be inappropriate. This list includes national security requirements, protection of health and safety, fundamental climatic or other geographical factors, and fundamental technological problems.

Harmonization of technical regulations or standards on as wide a basis as possible is to be achieved by the Parties through their participation in the

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77/ See sec. 6.0.1 of this report, supra, for a detailed discussion of the concept "first level of obligation."

78/ See sec. 6.17, at 146, in this volume, infra, for a definition of "international standard."

preparation of international standards by appropriate international standardizing bodies. This participation by the Parties is qualified by the phrase "within the limits of their resources."

Technical regulations and standards are to be specified in terms of performance of a product rather than in terms of design or descriptive characteristics, such as color, of a product. This obligation is qualified also by the term " w here appropriate" (line 29).

One hindrance to international trade may not be the content of an applicable technical regulation or standard, but rather a lack of notice that it exists or is being developed. To help alleviate this barrier, a transparency, or open, procedure has been developed. The procedure is triggered, and the central government of a Party must follow, it when two factors occur in combination. First, a relevant international standard does not exist or the proposed national one differs from a relevant international standard. Second, the proposed national technical regulation or standard might affect the trade of another Party in a significant manner.

The procedure includes four steps: (a) publishing a notice in an official publication at an appropriate stage that the technical regulation or standard is being prepared; (b) notifying other adherents through the GATT secretariat of the products covered and of the objective of the proposed technical regulation; (c) providing without discrimination and upon request copies of the proposed technical regulation or standard pointing out, when possible, substantial deviations from relevant international standards; and (d) allowing reasonable time for written comment to be made on the proposed

technical regulation or standard, discussing the comments on request, and taking the results of the comments and discussions into account.

Exceptions to this procedure are allowed when urgent problems of safety, health, environmental protection, or national security surface or threaten to arise. Adherents retain the authority to determine when such an exception is necessary. Other obligations attach, however, when urgent problems cause the procedure to be breached. These are: (a) to notify immediately other adherents through the GATT secretariat of the details of the technical regulation and of the urgent problem; (b) to provide without discrimin ion and upon request copies of the technical regulation or standard under the same conditions as in the normal procedure; and (c) to allow without discrimination comments and discussion concerning the proposed technical regulation or standard.

Those countries which sign the agreement have a first level obligation to publish, in a prompt manner after promulgation, all technical regulations and standards. A first level obligation also attaches in regard to ensuring that there be a reasonable amount of time between publication of a technical regulation or a standard of a central government and its entry into force. The "urgent problems" exception is likewise applicable to this obligation.

A second level of obligation 79/ is assumed by a Party to ensure that any regional standardizing body in which it is a member complies with articles 2.1 to 2.8. A first level obligation to fulfill those same provisions attaches,

79/ See sec. 6.0.1 of this report, supra, for a detailed discussion of the concept "second level of obligation."

however, when a Party decides to adopt any standard of a regional standardizing body in which it is a member. The Party is obligated to fulfill such to the extent that the regional standardizing body has not done so. This means that a Party will have to allow comments to be made regarding the standard and publish its text if the regional body has not already done so. Additionally, a Party has a first level obligation not to encourage those regional standardizing bodies from complying with the agreement.

6.3.112. Analysis

The term "unnecessary obstacles to international trade" (line 11) is not specifically defined in the agreement. Its exact meaning is therefore unclear in the sense that no criteria are set out which will help determine what trade barrier creates an obstacle to trade that can, for various accepted reasons, be permitted. What the phrase does indicate and what appears to be its meaning as understood in the negotiations is that technical regulations and standards can by their nature create obstacles to trade, but that the purpose served by many of them, i.e., to protect the health and welfare of citizens, outweighs the harm of the obstacle created. The purpose of the agreement is to eliminate or modify technical regulations or standards which are created specifically for the purpose of creating obstacles to international trade or which have the result of causing "unnecessary obstacles" to such trade. The agreement does not aim to frustrate those technical regulations or standards which are prepared and applied for the purpose and with the effect of protecting, inter alia, human life and health, national security, and the environment.

The concept of national treatment (lines 6-7) is a term of art which in the context of the agreement means that products of another Party are to be treated in a fashion no less favorably than similar products of the importing country. For instance, if both the United States and France produce industrial boilers to which the same technical regulations and standards should be applied and a French exporter sought to import them into the United States, the French boiler could not be required to meet a greater level of safety than was required of American boilers.

An obligation to accord most-favored-nation (MFN) treatment (lines 6-8) to the products of other Parties to the agreement attaches through this language. The most-favored-nation concept is described here as according treatment to imported products of Parties which is "no less favourable than that accorded to products originating in any other country . . . ." This parallels article I of the General Agreement. The standards agreement does not specifically address, in this article or in any other provision, the question of whether the GATT MFN obligation would require a Party to the standards agreement which is also a Contracting Party to grant MFN treatment to a Contracting Party which is not a Party to the standards agreement. 80/

The exception to the obligation to use international standards where they are relevant is a broad one. The term "inappropriate" (line 17) is not specifically defined, but the reasons (lines 18-22) for determining whether an international standard is inappropriate does somewhat delineate the term. However, by the phrase "inter alia," it is clear that the list is illustrative

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80/ See Vol. 1, supra.

only. The Committee on Technical Barriers to Trade, as established in articles 13 and 14, will ultimately determine the criteria for deciding whether an international standard is inappropriate.

None of the reasons for invoking the exception are specifically defined; each would be opened for interpretation by the Party using the exception to the obligation to use relevant international standards and by any eventual dispute settlement proceedings. Thus a Party would have wide discretion in interpreting the term "inappropriate." A good faith use of this discretion and effective dispute settlement and enforcement procedures would be the means for preventing abuse of the exception.

On the face of these listed reasons, their meaning and purpose are relatively clear. "[N]ational security requirements" (line 18) refers to matters pertaining to the security of a country, however that is defined; "prevention of deceptive practices" (line 19) would refer, inter alia, to standards for labeling which does not adequately state the intended scope or limitations of a product or to standards which are not up-to-date with existing technology. "Protection for human health, or safety, animal or plant life or health, or the environment" (lines 19-20) presumably would allow the use of technical regulations or standards with requirements concerning the level of performance that were greater than those of an existing international standard. A question arises here as to what level of proof or justification would likely be required to show that the higher level of performance was necessary and was commensuate with the needs of the adherent. This question would have to be answered through the use of the dispute settlement and

enforcement procedures. An international standard which prescribed requirements for products based on "fundamental climatic and other geographical factors" (line 21) could be deemed inappropriate when the standard was based on significant climatic factors which did not have any relevance in the adopting adherent. For example, a standard requiring light sockets to withstand extremely cold temperatures might be inappropriate for adoption by countries with temperate climates. " F undamental technological problems" (lines 21-22) could be used to prevent the adoption of an international standard requiring a different voltage for electrical wiring when that would demand electrical rewiring of an entire country.

There is no definition of the term "within the limits of their resources" (line 25) which qualifies the obligation of Parties to participate fully in the preparation of international standards. The parameters of this qualification will also depend on the goodwill of the Parties, the ability of nongovernmental groups to represent a Party, and the effectiveness of dispute settlement and enforcement procedures.

As with the term "inappropriate" used earlier, there is no guideline for determining the meaning of the term "appropriate" (line 29). Conceivably, a case-by-case interpretation will eventually define the concept and its application.

In regard to the transparency procedure, one of the factors which must exist before the procedure is required to be followed is that the proposed technical regulation or standard be of the nature that it "may have a significant effect on the trade of other Parties" (lines 36-37). There is no

definition of what constitutes a "significant effect;" the Parties involved would decide its meaning at first.

Whatever "significant effect" does require, the effect on another adherent's trade does not have to be accomplished. The words "may have a significant effect" indicate that there need be only the possibility that the proposed technical regulation or standard have such an effect, not that such an effect would in all probability occur. There is, then, a low threshold for this particular factor.

In the case where copies or portions of a proposed text are to be provided or comments are to be made on proposed texts, there is a distinction made between who can request copies of or make comments on a technical regulation and who can make the request for or make comments on a standard. Only "other Parties" (lines 47-48, 55, and 77-78, and 81) may request copies of or make comments regarding technical regulations, but "interested parties in other Parties" (lines 49, 60, 79, and 82-83) may request copies of or make comments regarding standards. The latter category of entities is, of course, more inclusive. The result of this would be that non-governmental business entities might find it difficult to participate in the discussion of technical regulations unless they have sufficient and effective input into some governmental group which would organize and funnel those comments to the adherent proposing the technical regulation. This limitation of persons with standing to request copies or discuss the contents of a technical regulation is obviously advantageous to a government since it would make the preparation, adoption, and application process less cumbersome. On the other hand, this

limitation, assuming it results in a coordinated government position or even a collection of viewpoints within a Party's territory, could be advantageous to Parties or business entities in the sense that a Party could possibly make a stronger argument for change or modification of a technical regulation than could several, uncoordinated businesses or even trade associations. Equally, it might in some circumstances regulate the actions that a strong economic business power, e.g., a transnational corporation, could take in regard to a proposed technical regulation.

The reason for the distinction between entities with standing to make written comments and discuss them is that such language reflects a compromise of the different opinions among negotiating countries as to who should be allowed to request copies and/or make comments.

No guidelines are given for determining what would constitute an "urgent problem" (line 66). This leaves the question open for each Party to determine when a problem of safety, health, etc. would reach or might reach a stage of urgency that would require suspension of the transparency procedure.

If an exception is made to the transparency procedure on the grounds of an urgent problem, then subsequent requirements must be fulfilled. These requirements are similar in content to those required under the normal procedure.

The requirement to publish all technical regulations or standards does not specifically state where or for how long the publication must appear, nor does it indicate when or in what language the publication must be made. However, it is clear that such publication must be made promptly after the

promulgation of a technical regulation or standard and in such a manner that interested Parties may examine and become familiar with them. To further explain that requirement, it is helpful to note that article 10.5 81/ states that the agreement is not to be construed so as to require publication of texts in any language other than the language of origin. Article 2.8 of the agreement 82/ requires that, except in cases of urgent problems as referred to earlier, Parties to the agreement must allow a reasonable time between publication of a technical regulation and its entry into force. No similar provision is made regarding standards, but this is probably not necessary because of their nature. 83/

In the requirement to provide a reasonable interval of time between the publication of technical regulation and its entry into force, the term "reasonable interval" (line 97) is not qualified. The purpose, however, is to allow time for products and methods of production in exporting countries to be adapted to the new regulations. The needs of developing countries are to be particularly considered. The time needed for adaptation could reasonably vary from country to country depending on the requirements of the technical regulation and the ability of the exporting country to comply. In the case of a developing country, a lack of technology might necessitate a period of time longer than an average "reasonable interval." There is no language in this section as to how to deal with that type of problem.

81/ See sec. 6.11.1, at 92-93, in this volume, infra.
82/ See sec. 6.3.1, at 51-53, in this volume, supra.
83/ By the code definition a standard does not mandate compliance and would become a de facto mandatory standard only after extensive usage and subsequent widespread acceptance.

6.3.3. Implementation

Implementing legislation will need to be enacted so that all departments, agencies, and commissions in the federal government which have the authority to promulgate technical regulations or standards are directed not to create or to apply those technical regulations or standards in a manner which creates unnecessary obstacles to international trade. 84/ Language which will guarantee treatment to foreign products no less favorable than that accorded to similar products of the United States or other countries should be included. This would satisfy the obligation to grant national and most-favored-nation (MFN) treatment. With regard to MFN treatment, it should be determined if the United States is to grant conditional or unconditional MFN treatment.

Those same federal bodies must be directed to adopt or use as a basis for technical regulations or standards existing international standards which are appropriate to perceived needs. Since the reasons as to when an international standard might not be appropriate are not defined, no particular guidelines need to be established. However, for purposes of avoiding confusion and ensuring a good faith use of discretion, clarification of those bases as viewed by the United States would undoubtedly be helpful. This could be accomplished by law or by policy statement.

Participation, within the limits of a Party's resources, in international standardizing bodies for the purpose of preparing harmonized technical

84/ This type of language would most likely be suitable for a purpose clause in proposed legislation rather than as a guideline or text.

regulations and standards is a first level obligation. Authorization to participate, either through executive departments, 85/ individual representatives, 86/ or nongovernmental standardizing bodies 87/ in international bodies should be given where appropriate. Appropriations could also be made for financial contributions to these organizations if such are requested or desired by those groups. 88/ If private individuals represent the United States, appropriation for per diem expenses and/or salaries could be made. 89/

Federal standardizing bodies must be directed to formulate technical regulations in terms of performance rather than design, where such is possible.

The transparency procedure that is to be followed when preparing a technical regulation or standard is similar to requirements presently made of federal departments and agencies which promulgate technical regulations and standards. The Administrative Procedure Act (APA) 90/ requires notification, publication, opportunity to submit comments, and a specified period of time

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85/ E.g., Department of State. See 22 U.S.C. sec. 287(f) (1976).

86/ E.g., representative to organs and agencies of the United Nations. See 22 U.S.C. sec. 287(d) (1976).

87/ E.g., the American National Standardization Instituted (ANSI) represents the United States in the International Organization for Standardization (ISO).

88/ See, for example, 22 U.S.C. sec. 262 (1976). See generally, 15 U.S.C. sec. 205 (a), (k).

89/ See 22 U.S.C. sec. 287(g) (1976) which provides compensation for persons appointed as U.S. representatives to the United Nations.

90/ See APA, 5 U.S.C. sec. 551 et seq. (1976), especially sec. 553 (b), (c), and (d).

between publication of a rule and its effective date. 91/ Implementing legislation or an executive order could require, where necessary, that the GATT secretariat be notified of the products covered by the proposed technical regulations. One office in the federal government could be designated to collect the necessary information and notify the secretariat.

United States policy and practice in regional standardizing bodies must include efforts to encourage those organizations to follow subsections 2.1-2.8, supra, of the agreement. The obligation incurred by the United States to do such is only a second level obligation. Thus implementation would necessitate best efforts through policy formulation and practice.

There is a first level obligation for the United States to comply with the relevant provisions of this article (article 2) when a regional organization in which it is a member or a participant fails to do so. For example, when a regional body establishes a standard but neither publishes it nor gives Parties or interested parties the opportunity to comment on it, the United States if adopting the standard in question would be obligated under the agreement to publish the text and allow comments. The latter action would be superfluous if no further input were made into the regional organization for purposes of amending the standard where advisable. Thus, on a

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91/ There could be some discrepancy between United States statutory and the language of the agreement regarding this point. Section 553 (d) of Title 5 requires 30 days between publication and entry into force of a rule. The agreement states in article 2.8 that "Parties shall allow a reasonable interval" between publication and entry into force so that products and methods of production can be adapted. The question is be whether 30 days is a reasonable time for adaptation, especially for developing countries.

case-by-case basis, the United States might advocate amendment of a regional standard so that it conformed to the agreement.

6.4. Preparation, adoption and application of technical regulations and standards by local government bodies (Article 3).

6.4.1. Interpretation

6.4.11. Text

3.1 Parties shall take such reasonable measures as may be available to them to ensure that local government bodies within their territories comply with the provisions of Article 2 with the exception of Articles 2.3, 2.5.2, 2.9 and 2.10, noting that provision of information regarding technical regulations referred to in Articles 2.5.3 and 2.6.2 and comment and discussion referred to in Articles 2.5.4 and 2.6.3 shall be through Parties. In addition, Parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such local government bodies to act in a manner inconsistent with any of the provisions of Article 2.

6.4.111. Description.

A second level obligation is incurred by a Party to ensure that its local government bodies comply with the provisions stated in article 2, supra. This article does qualify the obligation in eliminating the requirements that local government bodies participate in or influence international/regional standardizing bodies and notify the GATT secretariat of the technical regulations that they promulgate. Any request for copies of technical regulations which differ from international standards, any comments made, or discussions entered into about such technical regulations are to be handled through the Party, not by the local government body. This perpetuates dialogue between sovereign entities and does not necessitate direct communication between a Party and a political subdivision of another Party.

50-138 O - 79 - 6

Aside from a second level obligation to ensure that local government bodies comply with the agreement, the Parties have a first level obligation not to act in a manner which would require or even encourage those subdivisions to act contrary to the provisions of the agreement. This abstention would extend to all actions which would directly or indirectly foster noncompliance.

6.4.112. Analysis

"Local government bodies" (line 2) is defined in Annex I of the code, infra. 92/

6.4.3. Implementation

Given the preemptive power of federal legislation and regulations through the Supremacy Clause over state and local legislation and regulations, 93/ it is not likely that many legal problems would arise in fulfilling the second level obligation specified in this article. However, problems of a policy nature would conceivably hinder implementation of this article, which directs the Parties to use their "best efforts" to ensure that their local government bodies comply with the agreement in all aspects.

If it becomes feasible to use the federal preemptive power, then legislation could be drafted which would preclude states or their local subdivisions from promulgating or enforcing technical regulations or standards which differ from those of the federal government covering the same aspects. An example of this in existing legislation is the National Traffic and Motor Vehicle Safety

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92/ See sec. 6.17, at 144 et seq., in this volume, infra.
93/ See sec. 6.0.3, at 38-41 supra, for a discussion of preemption in regard to this agreement.

Act. 94/ One subsection of this act 95/ prohibits the enforcement of state technical regulations or standards which are not identical to federal ones which cover the same subject, e.g., seat belts. Case law has clarified the area in which the state may act. 96/

Where it is not feasible to use the federal preemptive power in regard to the states and their political subdivisions, then legislation could be drafted which would allow local governmental bodies to prepare, adopt, and enforce technical regulations or standards whose requirements are not identical to those of their federal counterparts. 97/ If the levels of protection embodied in such technical regulations or standards were significantly higher, then the United States would conceivably be subject to the dispute settlement and enforcement procedures of the agreement.

94/ 15 U.S.C. sec. 1381 et seq. (1976).

95/ 15 U.S.C. sec. 1392(d) (1976) preempts states or their political subdivision from establishing or continuing in effect any motor vehicle safety standard which is not identical to its federal counterpart. The state or political subdivision does, however, retain power to enact and enforce technical regulations or standards which concern subjects not already covered by federal legislation.

Under the Supremacy Clause, however, any subequent federal legislation or resulting regulation covering such an area would supercede the state or local technical regulation or standard.

96/ See sec. 6.0.3, at 38-41, supra.

97/ It is unlikely that local governmental bodies would want to prepare, adopt, or enforce technical regulations or standards whose requirements are less than those of the federal government since most state and local technical regulations and standards are promulgated to protect the health and safety of the public. Even if a state did adopt a technical regulation or standard with requirements lower than federal ones, the federal technical regulation or standard would probably take precedent over state or local political subdivisions if interstate commerce were involved. The problem under the agreement would arise when a technical regulation or a standard of a state or a political subdivision is more stringent than a federal one if such difference significantly affects international trade.

6.5. Preparation, adoption and application of technical regulations and standards by non-governmental bodies (Article 4).

6.5.1. Interpretation

6.5.11. Text

1 Parties shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories comply with the provisions of Article 2, with the exception of Article 2.5.2 and providing that comment and discussion
5 referred to in Articles 2.5.4 and 2.6.3 may also be with interested parties in other Parties. In addition, Parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such non-governmental bodies to act in a manner inconsistent with any of the provisions of Article 2.

6.5.111. Description

Parties have a second level obligation to ensure that nongovernmental bodies which are active in the standards field conform with all provisions of article 2 that could be applied to them. The provision requiring notification to GATT of all technical regulations, is specifically excepted since nongovernmental bodies generally do not deal directly with international organizations composed of governments. Provisions permitting comments and discussion on proposed technical regulations or standards are retained but may be carried out with interested parties in other Parties which is broader than Article 2 allows.

In addition to this second level obligation, Parties assume a first level obligation to refrain from requiring or encouraging nongovernmental bodies within their territories not to comply with article 2. This required abstention extends to actions which would directly or indirectly require or encourage noncompliance by such nongovernmental bodies.

6.5.112. Analysis

The term "non-governmental bodies" (line 2) is not defined in Annex I of the agreement, but it would include such groups as Underwriters' Laboratories (UL) and American Society for Testing Materials (ASTM).

6.5.3. Implementation

Implementation of this provision will be difficult. Provisions could be made for governmental departments and agencies or an interagency group to encourage or coordinate compliance or at least have a knowledge of the activities of nongovernmental standardizing bodies. Legislation which would require such organizations to comply with provisions of the agreement, e.g., to use, where appropriate, existing international standards as a basis for their technical regulations and standards and to discuss comments made, might not be successful since nongovernmental standardizing bodies in the United States generally are strongly independent of government. Underwriters Laboratory, for example, sets its own standards and strives to remain independent from all other bodies, governmental or private.

The pressure to implement fully this article is, however, lessened by the fact that only a second level of obligation exists. Thus a "best efforts" policy, i.e., one which would utilize the "un-easonable measures available," would be sufficient.

Conformity with technical regulations and standards

6.6. Determination of conformity with technical regulations or standards by central government bodies (Article 5).

6.6.1. Interpretation

6.6.11. Text

5.1. Parties shall ensure that, in cases where a positive assurance is required that products conform with technical regulations or standards, central government bodies apply the following provisions to products originating in territories of other Parties:

5.1.1 imported products shall be accepted for testing under conditions no less favourable than those accorded to like domestic or imported products in a comparable situation;

5.1.2 the test methods and administrative procedures for imported products shall be no more complex and no less expeditious than the corresponding methods and procedures, in a comparable situation for like products of national origin or originating in any other country;

5.1.3 any fees imposed for testing imported products shall be equitable in relation to any fees chargeable for testing like products of national origin or originating in any other country;

5.1.4 the results of tests shall be made available to the exporter or importer or their agents, if requested, so that corrective action may be taken if necessary;

5.1.5 the siting of testing facilities and the selection of samples for testing shall not be such as to cause unnecessary inconvenience for importers, exporters or their agents;

5.1.6 the confidentiality of information about imported products arising from or supplied in connexion with such tests shall be respected in the same way as for domestic products.

5.2 However, in order to facilitate the determination of conformity with technical regulations and standards where such positive assurance is required, Parties shall ensure whenever possible, that their central government bodies:

accept test results, certificates or marks of conformity issued by relevant bodies in the territories of other Parties; or

rely upon self-certification by producers in the territories of other Parties;

even when the test methods differ from their own, provided they are satisfied that those methods employed in the territory of the exporting Party provide a sufficient means of determining conformity with the relevant technical regulations or standards. It is recognized that prior consultation may be necessary in order to arrive at a mutaully satisfactory understanding regarding self-certification, test methods and results, and certificates or marks of conformity employed in the territory of the exporting Party, in the territory of the exporting Party, in particular in the case of perishable products or of other products which are liable to deteriorate in transit.

5.3 Parties shall ensure that test methods and administrative procedures used by central government bodies are such as to permit, so far as practicable, the implementation of the provisions in Article 5.2.

5.4 Nothing in Article 5 shall prevent Parties from carrying out reasonable spot checks within their territories.

6.6.111. Description

This article regulates testing methods and administrative procedures which are used for determining whether imported products conform to the technical regulations or standards established by central government bodies. This is done by obligating the central government body to apply six provisions to products originating in other adherents. These six provisions are (1) accepting an imported product for purposes of testing under at least the same conditions as similar domestic or imported products; (2) not using tests and procedures which are more difficult or time consuming than those performed on similar domestic or imported products; (3) charging fees similar to those assessed against domestic or imported products; (4) making available test results to the exporting or importing parties who request such; (5) not establishing test facilities or taking of samples in a manner which would unnecessarily inconvenience the parties concerned; and (6) not disclosing confidential information about a product which is provided for or results from

the tests where similar information for domestic products would receive confidential treatment.

Additionally, Parties are to ensure that testing methods or marks of certification which differ from their own are accepted as proof that imported products conform to the applicable technical regulation or standard. Self-certification of conformity by producers is to be accepted also. A caveat to such acceptance of testing methods and administrative procedures is that they be competent to determine conformity. Consultations regarding a mutual understanding of such competence may be held prior to the acceptance of differing testing methods or self-certification. Prior consultations may be particularly necessary for perishable goods, e.g., agricultural products.

The easiest way to avoid disputes over the sufficiency of testing methods and administrative procedures is to harmonize the methods. Article 5.3 (lines 50-53) attempts a weak form of harmonization by requiring parties to ensure that the testing methods and administrative procedures could actually be implemented or used in another Party to adequately determine a product's conformity with a technical regulation or standard. No formal harmonization efforts are called for, however.

Parties may administer reasonable spot checks within their borders of imported products. This section is not intended in any fashion to prohibit such examinations.

6.6.112. Analysis

Under article 5.1.3 (lines 15-18) fees assessed for testing imported products only need be "equitable" (line 16) in relation to those charged like

domestic or imported products. The fees assessed do not have to be equivalent in amount or in kind to those charged domestic or other imported products. This would allow the actual cost of testing for a particular product to be taken into account. Protection against discriminatory fees is provided by the requirement that national and most-favored-nation (MFN) treatment be accorded the products of other adherents (lines 17-18).

No time or language guidelines or requirements are made for providing test results (lines 19-21) to an exporter or importer who requests them. 98/ Lack of time requirements provides the opportunity for discriminatory treatment against imported products of a Party since test results could be withheld from a foreign producer but promptly supplied to a domestic producer. The purpose of providing test results is to allow the producer to take any necessary corrective action, and the untimely provision of the results would unnecessarily hinder the trade of that particular product. However, such discriminatory treatment is prohibited by section 5.1.2 (lines 10-14).

The only guideline given for the protection of confidential information supplied for or arising from product testing is that imported products must be afforded national treatment (lines 26-29). In effect, this protection will vary from Party to Party depending on their domestic laws and practices.

98/ However, section 10.5 expressly prohibits construing any article of the agreement to require that texts or the provisions of information such as copies of drafts be furnished in a language other than the language of origin. Article 10.5 does not specify texts of any specific documents, so presumably texts or particular details of test results would be covered by this article. Therefore, it is arguable that test results must be provided and may be obtained only in the language of origin.

Where patented information and trade secrets are protected, as in the United States, producers in the Parties can be confident that their trade secrets and patents recognized in the importing country will be kept confidential. In Parties where trade secrets are not protected or where the patent of the product is not recognized or not fully protected, confidentiality may not be guaranteed even if national treatment is extended to the imported product. Current international negotiations regarding the transfer of technology could, in the future, have an effect on the confidentiality requirement, but given the national treatment qualification, the effect could be minimized. 99/

The term "sufficient means for determining conformity" (lines 41-42) is not defined in the agreement and is therefore left for interpretation by the importing Party. If the discretion used by an importing Party in applying this provision were challenged in some dispute settlement procedure, then the question of whether the exporting Party's testing methods were a sufficient means could be submitted to technical experts.

The phrase "so far as practicable" (line 52) qualifies the requirement that domestic testing methods and administrative procedures be of such quality that they could be used by other Parties to determine a product's conformity. The phrase is not defined; this again is left to the discretion of the Parties.

99/ At the present, UNCTAD is sponsoring negotiations on a code of conduct for the transfer of technology. Issues under consideration include (a) the availability of patented information which would be involved in a technology transfer, (b) the extent of protection for trade secrets, and (c) the linking of the supply of technical information with the access to markets.

There are also current negotiations involving the Paris Convention on Patents which are examining the time periods and conditions of validity of patents.

The term "reasonable spot checks" (line 55) is not defined. Interpretation of "reasonable" is left to the Party making the spot check and the dispute settlement procedures if and when these are initiated.

6.6.3. Implementation

Legislation or executive orders would be necessary in order to specifically direct that national and most-favored-nation (MFN) treatment be given to foreign products in four areas: accepting products for testing in the United States (lines 6-9), applying relevant test methods and administrative procedures used in determining conformity (lines 10-14), charging fees for testing (lines 15-18), and protecting the confidentiality of information concerning the imported product (lines 26-29). Additionally, testing results must be made available to exporters or importers of the products who request them. Testing facilities and sample selection for testing must be established with consideration for the problems of exporters. For example, facilities which are operated at entry ports would probably meet requirements of the agreement whereas those not on major transportation routes could be considered unnecessarily inconvenient by foreign traders.

Federal government standardizing bodies will need to be directed through legislation or regulation to promulgate test methods and administrative procedures which would be likely to be accepted by other Parties as being a sufficient means of determining conformity with technical regulations and standards. There is a first level obligation incurred regarding such, but it is qualified by the phrase "so far as practicable."

The term "reasonable spot check" (line 55) could be defined through legislation or regulations. However, this seems unnecessary and perhaps even detrimental to United States interests since a definition of the term would lock the United States into a policy which might be difficult to change if the need ever arose. An established definition could become troublesome in dispute settlement procedures.

6.7. Determination by local government bodies and non-governmental bodies of conformity with technical regulations or standards (Article 6).

6.7.1. Interpretation

6.7.11. Text

1 Parties shall take such reasonable measure as may be available to them to ensure that local government bodies and non-governmental bodies within their territories comply with the provisions of Article 5. In addition, Parties shall not take measures which have
5 the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with any of the provisions of Article 5.

6.7.111. Description

This article establishes a second level obligation for a Party to meet in order to comply with the agreement. The entities to which a Party must direct its best efforts to ensure that the obligation is met are those local government bodies which are independent of the central government of the Party or nongovernmental bodies which develop standards. The Party must use its best efforts to ensure that those bodies comply with article 5 of the agreement 100/ which concerns testing methods and administrative procedures for determining conformity with technical regulations or standards. As with

100/ See sec. 6.6.1, at 72-73, in this volume, supra.

second level obligations in the previous articles, Parties are not to require or encourage, either directly or indirectly local government bodies or nongovernmental bodies to act inconsistently with the applicable provisions, namely article 5 in this case.

6.7.112. Analysis

Comments about the terms used in this section are the same, with one exception, as those made in section 6.6.112 in this volume, supra. The exception is the requirement to grant national treatment to imported products. This concept is unclear insofar as it is to be applied by political subdivisions. If national treatment means treatment no less favorable than that accorded to domestic entities by the central government, then political subdivisions would have to be encouraged to grant that level of treatment. But treatment no less favorable than that accorded to entities within the political subdivision could be quite a different thing. It is arguable that entities from foreign countries or even other subdivisions can be discriminated against at least where the central government authority has not or does not preempt action by political subdivisions. The most likely understanding of the negotiating and interpretive history for the concept of national treatment within the GATT is that a political subdivision would have to accord a foreign product treatment no less favorable than that granted on a nation-wide basis. This problem could arise only Parties which have federated legal structures. 101/ However, it may be that only the dispute settlement

101/ The Parties where the risk would most likely occur is Australia, Canada, and possibly the European Communities. The fact that the United States is a more strongly unified or federated system than those countries eliminates most of the risk that this would become a problem in the United States.

procedure can resolve the problem where it occurs or that the negotiators may have an understanding with their opposites on how this obligation of national treatment is to be fulfilled.

6.7.3. Implementation

Implementation is as problematic in this article of the agreement as it is earlier in article 2 102/ because of the federal-state relation. Remarks made earlier 103/ in regard to the legal and political aspects of preemption apply equally to this article. Since there is only a second level obligation, a combination of legislation and regulations could be used to construct a system to encourage coordination of efforts among the federal and local governmental bodies.

Certification systems

6.8. Certification systems operated by central government bodies (Article 7).

6.8.1. Interpretation

6.8.11. Text

1 With respect to their central government bodies:

7.1 Parties shall ensure that certification systems are not formulated or applied with a view to creating obstacles to international trade. They shall likewise ensure that neither such
5 certification systems themselves nor their application have the effect of creating unnecessary obstacles to international trade.
7.2 Parties shall ensure that certification systems are formulated and applied so as to grant access for suppliers of like products originating in the territories of other Parties under conditions no
10 less favourable than those accorded to suppliers of like products

102/ Article 2 of the agreement differs from this section in that it involves the preparation, adoption, and use technical regulations and standards rather than conformity with such.

103/ See sec. 6.0.3, at 38-41, supra, in this volume.

of national origin or originating in any other country, including the determination that such suppliers are able and willing to fulfil the requirements of the system. Access for suppliers is obtaining certification from the importing adherent under the rules of the system. Access for suppliers also includes receiving the mark of the system, if any, under conditions no less favourable than those afforded to suppliers of like products of national origin or originating in any other country.

7.3 Parties shall:

7.3.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable parties to become acquainted with it that they propose to introduce a certification system;

7.3.2 notify the GATT secretariat of the products to be covered, including a brief description of the objective of the proposed system;

7.3.3 upon request provide, without discrimination, to other Parties particulars or copies of the proposed rules of the system;

7.3.4 allow, without discrimination, reasonable time for other Parties to make comments in writing on the formulation and operation of the system, discuss the comments upon request and take them into account.

7.4 However, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Party, that Party may omit such of the steps enumerated in Article 7.3 as it finds necessary provided that the Party, upon adoption of the certification system, shall:

7.4.1 notify immediately the other Parties through the GATT secretariat of the particular certification system, the products covered, with a brief indication of the objective and rationale of the certification system including the nature of the urgent problems;

7.4.2 upon request provide, without discrimation, other Parties with copies of the rules of the system;

7.4.3 allow, without discrimination, other Parties to present their comments in writing, discuss these comments upon request and take the written comments and results of any such discussion into account.

7.5 Parties shall ensure that all adopted rules of certification systems are published.

6.8.111. Description

This article is applicable to central government systems which certify a product's conformity with relevant technical regulations or standards.

Parties are required through a first level obligation to ensure that the practices of the certification systems they establish and operate do not unnecessarily cause barriers to international trade. As with technical regulations and standards, certification systems in general are viewed as advantageous. The goal is to prohibit those which are created or operated with the purpose of erecting unnecessary obstacles to trade. For example, a system which is operated so that a foreign product can neither be certified nor receive the mark of the system from the importing Party, which is necessary for sale of a product in the market of that Party, is one practice that the agreement purports to eliminate.

Requirements are set out for promulgating these systems. Suppliers of products from Parties are to be granted access to the system on the basis of national and most-favored-nation treatment. Access to a system also includes receiving without discrimination the mark of a system. Parties must follow a transparency procedure when proposing a new certification system. The procedure encompasses the same steps as set out for the preparation and adoption of technical regulations 104/ with the same exception to the procedure on the basis of urgent problems of safety, health, environmental

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104/ These steps are the following: (a) publishing a notice in order that interested parties will be familiar with the proposed system, (b) notifying the GATT secretariat of the proposed system, (c) providing copies of the proposal and the rules to other Parties when requested, and (d) accepting and discussing comments on the proposed system.

protection, or national security. 105/ Lastly, the Party is to publish all the rules of any certification system it operates.

6.8.112. Analysis

The term "access" (lines 8, 13, and 15) to certification systems is the compromise language used to solve the problem of deciding under what conditions Parties could have products originating in their countries certified by the systems of the importing Party. In the past, membership or participation in a system has been required before a produce could be certified. However, such a connection with a system has often been denied other countries or countries outside the territory of a regional certification system. "Access" is to be understood to mean the ability to submit products for certification, to be granted certification, and to receive the mark of the system without the Party being a member or participating. The important factor is that a supplier will be able to obtain the mark of the system on the basis of national and most-favored-nation treatment. 106/ However, the supplier must be willing and have the ability to meet the requirements for suppliers that are made by the system. These requirements will vary according to the system in question.

In lines 20-21, Parties are required to publish a notice of a proposed certification system at an early appropriate stage. No clarification is made

105/ The exception includes the requirement that steps be taken subsequent to omitting parts of the transparency procedure. These include (a) immediately notifying the GATT secretariat of the system and related elements, (b) providing copies of the rules upon request, and (c) accepting written comments and considering them.

106/ This advantage was strenuously negotiated for by the United States and eventually conceded by the European Communities.

as to what publications are required or acceptable. Presumably publications such as the Federal Register and the Official Journal of the European Communities are of the type of publication envisaged. The determination of what is "an early appropriate stage" (lines 20-21) is left to each Party. Dispute settlement procedures are always open for discussion of any problems which might arise.

No time limits or guidelines are given for the reasonable time period (line 30) to be allowed other Parties to make written comments on proposed systems and for discussion of such comments. Defining this term is left up to the Party establishing the system as was the case in the article regarding technical regulations and standards. 107/

The exception to the transparency procedure, "urgent problems of safety, health, environmental protection or national security" (lines 34-35), is not defined. As in the exception to the transparency procedure for technical regulations and standards, 108/ the determination of the urgency of the problem remains within the discretion of the Party. Dispute settlement procedures would be available to resolve differences of opinion that might arise.

6.8.3. Implementation

There is a first level obligation that national certification systems, which are set up after the agreement has entered into force, must conform to applicable provisions. As with the preparation, adoption, and use of

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107/ See sec. 6.3.1, at 52, supra, in this volume.
108/ See sec. 6.3.1, at 52-53, supra, in this volume.

technical regulations and standards, this obligation can be discharged by requiring federal departments and agencies which operate certification systems to comply with provisions of the agreement, such as avoiding obstacles to trade through the formulation or operation of such systems and granting access to certification systems on a national and most-favored-nation basis. Access to certification systems should be specified to include granting certification and the mark of the system where a product conforms to the relevant technical regulation or standard.

Remarks made earlier regarding the transparency procedure for technical regulations and standards are applicable to certification systems as well as to preparation and adoption of technical regulations and standards. 109/

6.9. Certification systems operated by local government and non-governmental bodies (Article 8).

6.9.1. Interpretation

6.9.11. Text

8.1 Parties shall take such reasonable measures as may be available to them ensure that local government bodies and non-governmental bodies within their territories when operating certification systems comply with the provisions of Article 7, except 7.3.2, noting that the provision of information referred to in Article 7.3.3 and 7.4.2, the notification referred to in Article 7.4.1, and the comment and discussion referred to in Article 7.4.3, shall be through Parties. In addition, Parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with any of the provisions in Article 7.

8.2 Parties shall ensure that their central government bodies rely on certification systems operated by local government and non-governmental bodies only to the extent that these bodies and systems comply with the relevant provisions of Article 7.

109/ Id.

6.9.111. Description

Parties assume a second level obligation toward local governmental and nongovernmental bodies in regard to the certification systems which those groups establish and operate. Under this obligation, the Party must use its best efforts to ensure that those groups comply with all appropriate provisions set out in article 7 of the agreement. 110/ These provisions include (a) establishing and operating certification systems in a manner which would not unnecessarily impede international trade among Parties, (b) granting access to suppliers of like products from other Parties on the basis of national and most-favored-nation treatment, and (c) fulfilling the applicable requirements of a transparency procedure. The procedure includes the same steps as those outlined in article 7 of the agreement, and the agreement allows the same exception, triggered by urgent problems with subsequent procedural steps. The provisions of article 7 which would be inappropriate for local governmental or nongovernmental bodies to comply with directly, are specifically excluded. These include notifying the GATT secretariat of certification systems; providing copies, upon request, of rules of these systems; and allowing comments and discussions of adopted systems. These functions are to be carried out through the Parties rather than directly by the local government or nongovernmental bodies.

Parties assume a first level obligation in lines 8-15. Central government bodies may not depend on the certification systems operated by local governmental where those systems and groups do not comply with

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110/ See sec. 6.8.1, at 80-81, supra, in this volume.

provisions of the agreement concerning certification systems, e.g., article 7 of the agreement.

6.9.112. Analysis

The first and second levels of obligations (lines 8-15 and 1, respectively) are explained in section 6.0.1., supra, of this report.

Both the terms "local government" body and "non-governmental" body (lines 2, 3, 10 and 13-14) are defined in Annex I of the agreement, infra. 111/

Article 7 of the agreement as it relates to in this article is analyzed in section 6.8 in this volume, supra.

6.9.3. Implementation

Here again the problem of the federal-state relationship arises. Preemption of state and municipal laws and regulations would be the most direct and efficient means of fulfilling the obligation incurred in this article regarding local government bodies. However, political problems, similar to those associated with implementing article 3 (Preparation, adoption and use of technical regulations and standards by local government bodies), 112/ will arise. Thus, a more feasible means of implementation would be to encourage state and local compliance through various federal policies, e.g., promote harmonization through coordination of efforts or financial incentives or disincentives.

Federal departments and agencies can be directed to rely on local certification systems only to the extent the latter comply with the provisions in article 7.

111/ See sec. 6.17, infra, in this volume.
112/ See sec. 6.4.1, at 67, supra, in this volume.

Implementation of this article as it relates to non-governmental bodies will be difficult as nongovernmental certification groups in the United States generally prefer to remain independent of government influence. However, the federal government is not totally without power to affect the activities of these groups. In United States v. The American Society of Mechanical Engineers, Inc. (ASME) and the National Board of Boiler and Pressure Vessel Inspectors, ASME was ordered to grant its certification mark to boilers imported into the United States which conformed to its standard. 113/

The importance of encouraging nongovernmental certification bodies to conform with the terms of the agreement is very clear in cases where states or the federal government will require a nongovernmental certification mark in order for a product to be imported or marketed. 114/ If access to such certification systems is denied to suppliers of foreign products, Parties would, under article 14.24 have reason for invoking dispute settlement procedures since denial of access and the eventual affixture of a respected and trusted label would significantly affect their trade in United States markets.

113/ See nn. 70 & 71 supra, and accompanying text.

114/ States will often require that a product relating to life or fire hazards and used in a manufacturing plant, for example, have a UL label affix to it before it can be used in the plant or insurance will not be issued.

6.10. International and regional certification systems (Article 9).

6.10.1. Interpretation

6.10.11. Text

9.1 Where a positive assurance, other than by the supplier, of conformity with a technical regulation or standard is required, Parties shall, wherever practicable, formulate and national certification systems and become members thereof or participate therein.

9.2 Parties shall take such reasonable measures as may be available to them to ensure that international and regional certification systems in which relevant bodies within their territories are members or participants comply with the provisions of Article 7, with the exception of 7.2 having regard to the provisions of Article 9.3. In addition, Parties shall not take any measures which have the effect of, directly or indirectly, requiring or encouraging such systems to act in a manner inconsistent with any of the provisions of Article 7.

9.3 Parties shall take such reasonable measures as may be available to them to ensure that international or regional certification systems, in which relevant bodies within their territories are members or participants, are formulated and applied so as to grant access for suppliers of like products originating in the territories of other Parties, under conditions no less favourable than those accorded to suppliers of like products originating in a member country, a participant country or in any other country, including the determination that such suppliers are able and willing to fulfil the requirements of the system. Access for suppliers is obtaining certification from an importing Party which is a member of or participant in the system, or from a body authorized by the system to grant certification, under the rules of the system. Access for suppliers also includes receiving the mark of the system, if any, under conditions no less favourable than those afforded to suppliers of like products originating in a member country or participant country.

9.4 Parties shall ensure that their central government bodies rely on international or regional certification systems only to the extent that the systems comply with the provisions of Article 7 and Article 9.3.

6.10.111. Description

Parties assume a first level obligation to create and/or become members of international certification systems. This obligation is not absolute since

it applies only where such membership would be practicable and where assurance of conformity cannot be accepted from the product's supplier.

A Party is to use its best efforts to see that the international or regional certification systems in which it is a member or a participant comply with all of article 7 except subsection 7.2. (However, subsection 9.3 restates the concept of access enunciated in 7.2 and applies it to international and regional certification systems.) 115/ This would include best efforts to ensure that international and regional certification systems are open to suppliers of like products from Parties which would require granting access to the system to suppliers for testing, certification of conformity, and receipt of the system's mark of conformity on the basis of national and most-favored-nation treatment. A supplier, however, must be willing and able to meet the rules of the certification system. In fulfilling these obligations, no Party may take any actions which would directly or indirectly encourage or require international or regional systems not to comply with the agreement.

Parties assume a first level obligation to ensure that their central governments depend on international and regional certification systems only to the degree that those systems conform with articles 7 and 9.3 of the agreement (e.g., grant access to all Parties, comply with the transparency procedure, publish all rules, etc.).

115/ See this article 7, at 80-81, supra, in this volume.

6.10.112. Analysis

The obligation of Parties to create and participate in international certification systems is qualified by the phrase "wherever practicable" (line 3). This, as most qualifying phrases used in this agreement, is not defined and is left to the Parties to determine their own policies. The dispute settlement mechanism is available to settle controversies which might arise from the interpretation and application of this article.

The term "relevant bodies" (lines 8 and 17) refers to groups within the territories of Parties which operate certification systems or have some connected function. These groups might be governmental or nongovernmental.

6.10.3. Implementation

Present U.S. membership or participation in international or regional certification systems should be continued under the conditions outlined in this article as in the case with U.S. membership in international or regional standardizing bodies. 116/ This would require authorization to participate, authorization for appropriations, and actual appropriation of funds where contributions are required by membership or participation obligations.

United States policy toward these certification systems can be directed to influencing practices in such systems so that they will conform to article 7 and this article of the agreement. United States policy should also include

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116/ For example, the American National Standards Institute (ANSI) represents the United States on many of the committees of the ISO. At the present the federal government does not finance this participation. Suggestions have been made that federal funds be contributed to ANSI for the purpose of financing this representation and presenting at least a semi-official position to ISO.

refusing, when politically feasible, to rely on international or regional certification systems when their procedures do not comply with article 7.

Information and assistance

6.11. Information about technical regulations, and standards and certification systems (Article 10).

6.11.1. Interpretation

6.11.11. Text

10.1 Each Party shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from interested parties in other Parties regarding:

10.1.1 any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which have legal power to enforce a technical regulation, or by regional standardizing bodies of which such bodies are members or participants;

10.1.2. any standards adopted or proposed within its territory by central or local government bodies, or by regional standardizing bodies of which such bodies are members or participants;

10.1.3 any certification systems, or proposed certification systems, which are operated within its territory by central or local government bodies, or by non-governmental bodies which have legal power to enforce a technical regulation, or by regional certification bodies of which such bodies are members or participants;

10.1.4 the location of notices published pursuant to this Agreement, or to provide information as to where such information can be obtained; and

10.1.5 the location of the enquiry points mentioned in Article 10.2.

10.2 Each Party shall take such reasonable measures as may be available to them to ensure that one or more enquiry points exist which are able to answer all reasonable enquiries from interested parties in other Parties regarding:

10.2.1 any standards adopted, or proposed within its territory by non-governmental standardizing bodies, or by regional standardizing bodies of which such bodies are members or participants; and

10.2.2 any certification systems, or proposed certification

systems, which are operated within its territory by non-governmental certification bodies, or by regional certification bodies of which such bodies are members or participants.

10.3 Parties shall take such reasonable measures as may be available to them to ensure that where copies of documents are requested by other Parties, or by interested Parties in other Parties in accordance with the provisions of this Agreement, they are supplied at the same price (if any) as to the nationals of the party concerned.

10.4 The GATT secretariat will, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Parties and interested international standardizing and certification bodies and draw the attention of developing Parties to any notifications relating to products of particular interest to them.

10.5 Nothing in this Agreement shall be construed as requiring:

10.5.1 the publication of texts other than in the language of the Party,

10.5.2 the provision of particulars or copies of drafts other than in the language of the Party; or

10.5.3 Parties to furnish any information, the disclosure of which they consider contrary to their essential security interests.

10.6 Notifications to the GATT secretariat shall be in English, French or Spanish.

10.7 Parties recognize the desirability of developing centralized information systems with respect to the preparation, adoption and application of all technical regulations, standards and certification systems with their territories.

6.11.111. Description

This article requires the establishment of offices which will provide information about standards and related activities and which will provide other information, such as where notices regarding proposed technical regulations can be found, that will help efficiently execute the purposes of this agreement.

The Parties have a first level obligation to establish an office, bureau, or agency which would answer questions about the entire procedures concerning standards, technical regulations, and certification systems enforceable in

their territories. The inquiry point, as it is called in the agreement, must be set up so that all reasonable inquiries from all interested parties within the Parties may be answered. Reasonable inquiries can be made and are to be answered concerning the following subjects:

(a) technical regulations and standards, enforceable by law and are either adopted or proposed within the territory of a Party;
(b) certification systems, enforceable by law and are either adopted or proposed within the territory of a Party;
(c) the location of notices which are required by the agreement or details as to where such information can be found; and
(d) the location of inquiry points established to answer questions about standards not enforceable by law. (These inquiry points are provided for by the agreement in article 10.2.)

Information concerning technical regulations, standards, testing methods, administrative procedures, and certification systems must include those promulgated by central governments, local governments, nongovernmental bodies, and all regional standardizing groups in which government bodies are members or participants. The information is to be given upon any reasonable request made by any interested party in any Party.

Other inquiry points are to be established for the purpose of responding to all reasonable inquiries about the standards and certification activities of nongovernmental groups lacking legal power to enforce their standards or certification procedures. Parties, however, are only required to use best efforts to encourage the establishment of this service. There is no obligation on the part of a Party to encourage the coordination of this information.

Subjects which may be the focus of these inquiries include standards used by voluntary standardizing bodies and certification systems operated by nongovernmental groups which are in the territory of a Party.

Where copies of texts of rules, standards, or other documents are requested by other Parties or interested parties in the Parties these are to be supplied at a cost no greater than that charged to nationals of the country providing the information. Only a best efforts obligation is incurred by the Parties in this regard.

The secretariat of the GATT is assigned a role to help distribute information about current technical regulations and certification activities. The secretariat is to inform Parties, especially the developing countries, and interested international standardizing bodies of proposed technical regulations and certification systems. This is to be done upon receipt by the secretariat of notifications made by Parties in accordance with their agreement obligations. 117/

This article also prohibits the agreement from being construed in certain ways. No interpretation of the provisions are to be made which require (a) the publication of the text of standards, rules, etc. in any language other than the language of origin, (b) copies of drafts to be provided in a language other than the language of origin, and (c) the disclosure of information by Parties which would be detrimental to their national security.

Notifications of proposed technical regulations, certification systems, etc. which are made to the GATT secretariat are to be in English, French, or Spanish which are the three official languages of GATT.

The last subsection of this article contains no obligation with which the Parties must comply. It merely recognizes the advantage of establishing

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117/ See, for example, sec. 6.8.1, at 80-81, supra, in this volume.

information systems which are centralized and which concern technical regulations, standards, and certification systems within their territories.

6.11.112. Analysis

The term "reasonable enquiries" (line 2) is not defined in the agreement. Presumably it is intended and understood to mean questions which would clarify technical regulations, etc. or would provide any other pertinent information not published or notified to the GATT secretariat. It is not likely that a reasonable inquiry would include a request for information as to how to meet the technical elements of technical regulations or standards (e.g., request for technical knowledge itself).

The determination of what requests are reasonable can be made by the Party to whom the request is directed.

In several lines of this article, the agreement provides that "interested parties in other Parties" (lines 2-3, 27-28, and 41-42) may make inquiries of Parties or request documents. This means that not only the governments of countries signing this agreement may make such inquiries and requests, but also businesses and private individuals. This provision is in contrast to some other provisions through which only Parties may make comments concerning proposed technical regulations, standards, and certification systems.

It can be assumed that an "interested party" would have an interest in the subject of the regulation, standard, certification system, etc. about which it inquires. However, the agreement does not stipulate whether that interest must be substantial or even great. The agreement is also silent on whether the inquiry point may refuse to answer inquiries based on the fact that a party making an inquiry does not have sufficient interest in the matter.

It is not clear what connection the interested party must have, to a Party except to be within the territory of a Party. If a liberal interpretation were given to the phrase, a corporation from a non-signatory to the agreement, which had a branch or agent doing minimal business in one Party, for example, would be able to request and receive information about the standards and certification system of another Party. This would obviously further the purpose of the agreement: to eliminate or reduce unnecessary technical barriers to trade. But it would give advantages to the nationals of non-Parties, and therefore to non-Parties themselves, without there being reciprocal obligations demanded of the country not signing the agreement. The Party providing the information would arguably not get a reciprocal benefit of the agreement with which it complies.

The interpretation of the term "interested party" is facilitated by the fact that the obvious purpose of this article is to distribute information about technical regulations, standards, certification systems, etc. so that through ignorance of their existence or content they would be obstacles to international trade. The term, then, should probably be interpreted broadly to include as many parties as possible who may make inquiries.

This article of the agreement permits an inquiry point to charge fees for copies of requested documents (if the fees are assessed nondiscriminatorily, lines 39-44). The agreement is silent, however, on whether fees can be charged for the services provided. Nothing prohibits such charges, assuming they are nondiscriminatory.

Parties are not required by any provision of the agreement to disclose information which they consider to be contrary to their "essential security interests" (lines 56-58). Under the agreement each Party retains the power to determine its essential security interests. By specifically leaving this discretion to the Parties, the area for dispute settlement in this regard is narrowed. Since the test of whether disclosure of information is contrary to essential security interests is whether the reserving Party decides it is such, it will be very difficult to challenge successfully the withholding of the information in question.

6.11.3. Implementation

The agreement, in line 1 of article 10.1, contemplates one inquiry point. (This is probably the case so that persons need only go to one place for information.) The proposed functions of that inquiry point are outlined in this article and include providing information concerning technical regulations, certification systems, et al., of federal, state, and local governmental bodies. This, of course, will require a large degree of centralization and coordination of information. (It remains to be seen whether the states or their local subdivisions would object strenuously to such centralization.)

The agreement does not, however, require that the inquiry point be operated by the central governmental body or even by a governmental body; it only sets out a first level obligation that the Party ensure the establishment of an inquiry point. This allows the United States a wide variety of alternatives, e.g., federal agency, quasi-governmental body, or private group,

for setting up an effective information point which would be more likely to satisfy the demands of all involved.

Even if this inquiry point is undertaken as a governmental function of the United States, and this would probably be the best method of fulfilling the requirement of the agreement the inquiry point need not be a new federal agency. Since the only obligation is to create an information point, the obligation can, and at the beginning perhaps might be, fulfilled from within existing programs until at least the full scope of this burden is revealed.

At present, the Administration might be give. an opportunity to suggest, if not to decide, where this inquiry point will be. Since the function will most likely begin in the middle of a fiscal year, and the implementing bill will probably be enacted rather late in the budgetary process, supplemental appropriations may be required. It is therefore useful to at least require the Executive Branch to indicate in the statement of administrative action accompanying the MTN implementing bill where the inquiry point will be and how it will be staffed and funded. The implementing bill could require that reports on its operation be made annually to Congress. The United States has previously undertaken to create central source points for information required to be made available under international agreements. 118/

118/ See "U.S. Directory of Environmental Sources," U.S. Environmental Protection Agency (2d Ed., 1977, EPA-840-77-009), at 1, describing the process by which the U.S. Department of State designated the EPA as the "U.S. National Focal Point" for the United Nations Environmental Program's International Referral System.

80-138 O - 79 - 8

The agreement is not clear regarding the languages to be used in answering inquiries. Presumably there is no obligation to answer requests in any language other than the language of origin. 119/

The United States will be required to use best efforts to ensure that inquiry points, other than the one required in article 10.1, exist which will perform similar functions for voluntary standardizing and certification groups. Implementation could be through legislation requiring such groups to answer the requests of interested parties or through encouraging them to do such. The agreement specifies that "one or more enquiry points" (line 22) should exist; no effort would have to be made to coordinate the inquiry points of these voluntary groups. Since there are several hundred of these voluntary groups in the United States, the absence of an obligation to coordinate them is important. Of course, nothing prevents the United States from empowering the inquiry point of article 10.1 to attempt to obtain all United States standards information.

6.12. Technical assistance to other Parties (Article 11).

6.12.1 Interpretation

6.12.11. Text

> 11.1 Parties shall, if requested, advise other Parties, especially the developing countries, on the preparation of technical regulations.
> 11.2 Parties shall, if requested, advise other Parties, especially the developing countries and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies and participation in the international standardizing bodies and shall encourage their national standardizing bodies to likewise.

119/ See section 10.5 of the agreement, at 93, supra, in this volume.

11.3 Parties shall, if requested, take such reasonable measures as may be available to them to arrange for the regulatory bodies within their territories to advise other Parties, especially the developing countries, and shall grant them technical assistance on mutually agreed terms and conditions regarding:

11.3.1 the establishment of regulatory bodies, or certification bodies for providing a certificate or mark of conformity with technical regulations; and

11.3.2. the methods by which their technical regulations can best be met.

11.4 Parties shall, if requested, take such reasonable measures as may be available to them to arrange for advice to be given to other Parties, especially the developing countries, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of certification bodies for providing a certificate or mark of conformity with standards adopted within the territory of the requesting Party.

11.5 Parties shall, if requested, advise other Parties, especially the developing countries, and shall grant them technical assistance on mutually agreed terms and conditions regarding the steps that should be taken by their producers, if they wish to take part in certification systems operated by governmental or non-governmental bodies within the territory of the Party receiving the request.

11.6 Parties which are members or participants of international or regional certification systems shall, if requested, advise other Parties, especially the developing countries, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of the institutions and legal framework which would enable them to fulfil the obligations of membership or participation in such systems.

11.7 Parties shall, if so requested, encourage certification bodies within their territories, if such bodies are members or participants of international or regional certification systems to advise other Parties especially the developing countries, and should consider requests for technical assistance from them regarding the establishment of the institutions which would enable the relevant bodies within their territories to fulfil the obligations of membership or participation.

11.8 In providing advice and technical assistance to other Parties in terms of Article 11.1-11.7, Parties shall give priority to the needs of the least-developed countries.

6.12.111. Description

This article requires the Parties, either through a first or second level obligation, to provide technical assistance to other Parties on matters

ranging from the preparation of technical regulations to advising on the establishment of certification systems. To receive this technical assistance, a Party must request it of the other Party; no provision is made for giving technical information unless it is requested. Once technical assistance has been requested, the terms and conditions under which such assistance is to be given are to be settled between the Parties. It is only on mutually agreed terms and conditions that technical assistance must be given.

Developing Parties are particularly entitled to receive advice from other Parties. No specific guideline or special treatment is outlined as to how their requests are to be handled. Although mutually agreed terms and conditions are a basis for receiving technical assistance, no specific consideration for developing countries is granted in this article; however, there are provisions in article 12 of the agreement, infra.

Parties assume a first level obligation to provide technical assistance on mutually agreed terms and conditions regarding the following materials, if such is requested:

(a) preparation of technical regulations;
(b) establishment of national standardizing bodies;
(c) participation in international standardizing bodies;
(d) procedure that producers must follow in order to participate in governmental or nongovernmental certification systems within the advising Party's territory; and
(e) possible infrastructures which would enable a Party to satisfy membership or participation obligations of international or regional certification systems.

A best efforts obligation arises when Parties are requested to provide assistance in regard to (a) the establishment of regulatory or certification bodies concerned with technical regulations or standards and (b) the means to

satisfy relevant technical regulations. This second level obligation extends no further than to require Parties to take all reasonable measures available to it to advise Parties requesting such assistance.

There is one other category of obligation in this article to provide technical assistance. Parties are to encourage their national standardizing bodies, where they exist, to advice other Parties, if those Parties so request, on the establishment of similar bodies in their own territories or on participation in international standardizing groups. Also Parties are to encourage, if requested, the certification bodies which are within their territories and are members or participants of international or regional certification systems to advise or give technical assistance to other Parties on fulfilling the obligations of membership or participation in such systems.

6.12.112. Analysis

Granting technical assistance on "mutually agreed terms and conditions" lines 6, 15, 23, 29, 37) is not defined. The request need not be automatically granted as it is assumed that technical assistance will be given only on conditions with which both countries will be satisfied. Most likely this will result in contractual arrangements.

The reference to assisting developing countries adhering to the agreement (inter alia, lines 2, 5, 13) is not explicit. There are no requirements or guidelines in this article which require or even recommend that certain types of action be taken or avoided. The basic purpose served by the language is to recognize that developing countries signing the agreement will need technical assistance to a degree greater than developed Parties.

In lines 8 and 40 the term "shall encourage" is used as an obligation form. Parties assume what can be described as a second level (best efforts) obligation toward providing technical assistance for developing standards and certification procedures in the sense that the second level obligation requires the use of all "reasonable measures" available 120/ to ensure the fulfillment of any particular requirement of the agreement. This would include encouraging compliance with relevant provisions of the agreement.

6.12.3. Implementation

Some agency or office, existing or which can be created, would have to be delegated the authority to enter into technical assistance agreements with Parties to the agreement. It could be centralized in the sense that technical assistance for the preparation of technical regulations would be given by that agency notwithstanding the subject area, or it could be decentralized so that each standards or certification agency or group could be contacted for their expertise. Any inquiry point established under article 10.1 of the agreement could provide Parties with information of where to request assistance if a decentralized system were chosen. Either of these arrangements could be used to fulfill the first level obligations of this article.

Parties may fulfill their second level obligation to arrange for regulatory bodies within their territories to advise other Parties by two methods. Where the regulatory body is a government agency, legislation can be used to direct the agency to advise a Party on the establishment of regulatory or certification bodies, etc. Where the regulatory body is nongovernmental,

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120/ See, e.g., lines 10-11 of this article, at p. 101, supra, in this volume.

service contracts between the federal government and the nongovernmental body could be awarded for the purpose of providing this advice.

6.13. Special and differential treatment of developing countries (Article 12).

6.13.1. Interpretation

6.13.11. Text

12.1 Parties shall provide differential and more favourable treatment to developing countries Parties to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

12.2 Parties shall give particular attention to the provisions of this Agreement concerning developing countries' rights and obligations and shall take into account the special development, financial and trade needs of developing countries in the implementation of this Agreement both nationally and in the operation of this Agreement's institutional arrangements.

12.3 Parties shall, in the preparation and application of technical regulations, standards, test methods and certification systems, take account of the special development, financial and trade needs of developing countries, with a view to ensure that such technical regulations, standards, test methods and certification systems and the determination of conformity with technical regulations and standards do not create unnecessary obstacles to exports from developing countries.

12.4 Parties recognize that, although international standards may exist, in their particular technological and socio-economic conditions developing countries adopt certain technical regulations or standards, including test methods, aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Parties therefore recognize that developing countries should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

12.5 Parties shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international certification systems are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Parties, taking into account the special problems of developing countries.

12.6 Parties shall take such reasonable measures as may be available to them to ensure that international standardizing

bodies, on request of developing countries, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing countries.

12.7 Parties shall, in accordance with the provisions of Article 11, provide technical assistance to developing countries to ensure that the preparation and application of technical regulations, standards, test methods and certification systems do not create unnecessary obstacles to the expansion and diversification of exports from developing countries. In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting country and in particular to the least developed countries.

12.8 It is recognized that developing countries may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards, test methods and certification systems. It is further recognized that the special development and trade needs of developing countries, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Parties, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing countries are able to comply with this Agreement, the Committee is enabled to grant upon request specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards, test methods and certification systems and the special development and trade needs of the developing country, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall in particular, take into account the special problems of the least-developed countries.

12.9 During consultations, developed countries shall bear in mind the special difficulties experienced by developing countries in formulating and implementing standards and technical regulations and methods of ensuring conformity with those standards and technical regulations, and in their desire to assist developing countries with their efforts in this direction, developed countries shall take account of the special needs of the former in regard to financing, trade and development.

12.10 The Committee shall examine periodically the special and differential treatment as laid down in this Agreement, granted to developing countries, on national and international levels.

6.13.111. Description

The purpose of this article is to promote special treatment for developing countries which sign the agreement based on their development, financial, and trade problems. The treatment advocated consists of (a) giving special attention to the special conditions of developing countries as the standards agreement would affect them, (b) releasing developing countries from some obligations of the agreement for specified, limited periods of time when such is requested, and (c) providing technical assistance. The attempt on the part of developing countries to diversify exports should also be considered when Parties adopt and apply the agreement.

Technical assistance is to be granted to developing Parties to ensure that the preparation and adoption of technical regulations, standards, testing methods, and certification systems do not cause unnecessary barriers to their export trade. In determining the terms and conditions for providing technical assistance pursuant to article 11 of the agreement, the country's stage of development is a factor to be considered. This is to be especially the case for the least developed countries.

Where technical regulations, standards, etc. are adopted by developing Parties for the purpose of protecting indigenous technology or process and production methods consistent with their development needs, these should be allowed, even if they conflict with the obligation to adopt international standards provided for in article 2.2. Moreover, Parties should encourage international standards and certification organizations to operate in a manner that would permit all Parties, but especially developing countries signing the

agreement, to participate in those organizations though their relevant standards bodies. Additionally, international standards relating to the products of developing countries should be created where possible.

One specific example of special and differential treatment is that developing countries may request the Committee on Technical Barriers to Trade to grant them waivers to obligations in the agreement. These exceptions, whether as to the whole or part of an obligation, are to be limited, when granted, to a time period which must be specified by the Committee. The problems of the least developed countries are especially to be taken into account.

When consultations are on-going between developed and developing countries, the special problems faced by the latter in terms of trade, finance, and infrastructure should be considered and taken into account by the developed Party.

Periodic review of special and differential treatment must be made on national and international levels.

6.13.112. Analysis

This section is vaguely worded, e.g., "Parties recognize" (line 19), "It is recognized" (line 49). There are first level obligations but the obligations are vague; for example, "shall give particular attention" (line 5) and "shall take this fact [development needs] fully into account" when considering requests (lines 56-57).

The only form of special and differential treatment which is fully specified in this article is the availability of exceptions to obligations of

the agreement for developing countries (lines 57-61). When the Committee on Technical Barriers to Trade considers whether to grant a request for a time extension, it must take into account the developing country's problems in preparing or applying technical regulations, standards, testing methods, and certification systems as well as that country's development and trade needs and its level of technological development. These guidelines give more substance to the requirement for special and differential treatment than do the other provisions of this article. It is important to note, however, that the possibilities of these exceptions could serve as a basis for questioning the immediate efficacy of this agreement as an encouragement of U.S. or any Party's exports to developing Parties.

The requirement to grant more favorable treatment to developing countries, which are Parties, is not an obligation limited to developed countries adhering to the agreement. The entity which assumes the obligation is the "Party"; since there is no qualification of the term, it would include developing Parties. Presumably their obligation would be satisfied by their making whatever contributions they could, given their level of development and technological expertise.

One very instructive aspect of this article is the obligation that apparently arises under article 12.7 to provide developing countries such technical assistance as is necessary to ensure that the Parties' standards, etc. are not unnecessary obstacles to developing country exports. This would appear to answer a legitimate developing country concern that their exports not face greater obstacles by reason of those countries' stages of development than do the exports of developed countries.

6.13.3. Implementation

No program or office would need to oversee efforts to comply with this article (except possibly the provisions on technical assistance). Most of the obligations are of a policy nature; that is, the United States' actions and voting behavior in the Committee on Technical Barriers to Trade should reflect a concern toward the development problems of the developing countries. When federal government technical regulations or certification systems are prepared, there should be a consideration of whether the text or system would create unnecessary obstacles to the exports of developing countries. In creating by regulation or statute a general requirement for federal agencies to avoid standards, etc. that are an unnecessary barrier to trade, a special requirement might be created to implement this idea in regard to developing countries which adhere to the agreement.

Institutions, consultation and dispute settlement

6.14. The Committee on Technical Barriers to Trade (Article 13).

6.14.1. Interpretation

6.14.11. Text

1 There shall be established under this Agreement:

13.1 A Committee on Technical Barriers to Trade composed of representatives from each of the Parties to this Agreement (hereinafter referred to as "the Committee"). The Committee shall
5 elect its own Chairman and shall meet as necessary but no less than once a year for the purpose of affording Parties to this Agreement the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives and shall carry out such responsibilities as assigned to it under this
10 Agreement or by the Parties;
13.2 Working parties, technical expert groups, panels or other bodies as may be appropriate, which shall carry out such

responsibilities as may be assigned to them by the Committee in accordance with the relevant provisions of this Agreement.

13.3 It is understood that unnecessary duplication should be avoided between the work under this Agreement and that of governments in other technical bodies, e.g. Codex Alimentarius. The Committee shall examine this problem with a view to minimizing such duplication.

6.14.111. Description

This article provides an institutional structure for the agreement's dispute settlement mechanism. A committee, The Committee on Technical Barriers to Trade, consisting of representatives of all the Parties, is established and must meet at least once a year. The purpose of this committee, which elects its own chairman, is to provide an opportunity to all Parties to discuss through consultations the operation and progress in meeting the objectives of the agreement.

Also authorized is the establishment of working parties, panels, or other groups such as groups of technical experts 121/ which would be useful in helping the Committee oversee the successful operation of the agreement and settle disputes arising from the agreement. The establishment and responsibilities of these groups are assigned by the Committee according to the case in question, but their functions are outlined in article 14 of the agreement. These will be described below. 122/

121/ A "working party" is generally understood to be a group of representatives from the governments of Parties: their allegiances are to their government. "Technical expert groups" and "panels" are generally considered to be groups of persons acting independently of their governments when deciding an issue. The distinction made between a "technical expert group" and a "panel" is that the "technical expert group" examines solely the technical issues of a dispute while a "panel" may examine those issues as well as any commercial or other policy issue.

122/ See sec. 6.15.1, at 112-115, infra.

The Committee is to avoid any actions which would duplicate the work of governments in other technical bodies.

6.14.112. Analysis

An analysis of this article is best made in conjunction with article 14 which sets out the functions of the Committee, working parties, technical expert groups, panels, and other groups. 123/

6.14.3. Implementation

Legislation is necessary to authorize participation in the Committee and to authorize the appropriations for such participation.

6.15. Consultation and dispute settlement (Article 14).

6.15.1. Interpretation

6.15.11. Text

1 Consultation
14.1 Each Party shall afford sympathetic consideration to and adequate opportunity for prompt consultation regarding representations made by other Parties with respect to any matter
5 affecting the operation of this Agreement.
14.2 If any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of this Agreement is being impeded by another Party or Parties, and that its trade
10 interests are significantly affected, the Party may make written representations or proposals to the other Party or Parties which it considers to be concerned. Any Party shall give sympathetic consideration to the representations or proposals made to it, with a view to reaching a satisfactory resolution of the matter.
15 Resolution of disputes
14.3 It is the firm intention of Parties that all disputes under this Agreement shall be promptly and expeditiously resolved, particularly in the case of perishable products.
14.4 If no solution has been reached after consultations under
20 Article 14.1 and 14.2, the Committee shall meet at the request of any party to the dispute within thirty days of receipt of such a

123/ Id.

request, to investigate the matter with a view to facilitating a mutually satisfactory solution.

14.5 In investigating the matter and in selecting subject, inter alia, to the provisions of Article 14.9 and 14.4, the appropriate procedures the Committee shall take into account whether the issues in dispute relate to commercial policy considerations and/or to questions of a technical nature requiring detailed consideration by experts.

14.6 In the case of perishable products the Committee shall, in keeping with Article 14.3, consider the matter in the most expeditious manner possible with a view to facilitating a mutually satisfactory solution within three months of the request for the Committee investigation.

14.7 It is understood that where disputes arise affecting products with a definite crop cycle of twelve months, every effort would be made by the Committee to deal with these disputes within a period of twelve months.

14.8 During any phase of a dispute settlement procedure including the earliest phase, competent bodies and experts in matters under consideration may be consulted and invited to attend the meetings of the Committee; appropriate information and assistance may be requested from such bodies and experts.

Technical issues

14.9 If no mutually satisfactory solution has been reached under the procedures of Article 14.4 within three months of the request for the Committee investigation, upon the request of any party to the dispute who considers the issues to relate to questions of a technical nature the Committee shall establish a technical expert group and direct it to:

- examine the matter;
- consult with the parties to the dispute and give full opportunity for them to develop a mutually satisfactory solution;
- make statement concerning the facts of the matter; and make such findings as will assist the Committee in making recommendations or giving rulings on the matter, including inter alia, and if appropriate, findings concerning the detailed scientific judgments involved, whether the measure was necessary for the protection of human, animal or plant life or health, and whether a legitimate scientific judgment is involved.

14.10 Technical expert groups shall be governed by the procedures of Annex 2.

14.11 The time required by the technical expert group considering questions of a technical nature will vary with the particular case. The technical expert group should aim to deliver its findings to the Committee within six months from the date the technical issue was

referred to it, unless extended by mutual agreement between the parties to the dispute.

14.12 Reports should set out the rationale behind any findings that they make.

14.13 If no mutually satisfactory solution has been reached after completion of the procedures in this Article, and any party to the dispute requests a panel, the Committee shall establish a panel which shall operate under the provisions of Article 14.15 to 14.18 below.

Panel proceedings

14.14 If no mutually satisfactory solution has been reached under the procedures of Article 14.4 within three months of the request for the Committee investigation and the procedures of Article 14.9 to 14.13 have not been invoked, the Committee shall, upon request of any party to the dispute, establish a panel.

14.15 When a panel is established, the Committee shall direct it to:

examine the matter;

consult with Parties to the dispute and give full opportunity for them to develop a mutually satisfactory solution;

make a statement concerning the facts of the matter as they relate to the application of provisions of this Agreement and make such findings as will assist the Committee in making recommendations or giving rulings on the matter.

14.16 Panels shall be governed by the procedures in Annex 3.

14.17 Panels shall use the report of any technical expert group established under Article 14.9 as the basis for its consideration of issues that involve questions of a technical nature.

14.18 The time required by panels will vary with the particular case. They should aim to deliver their findings, and where appropriate, recommendations to the Committee without undue delay, normally within a period of four months from the date that the panel was established.

Enforcement

14.19 After the investigation is complete or after the report of a technical expert group, working group, panel or other body is presented to the Committee, the Committee shall give the matter prompt consideration. With respect to panel reports, the Committee shall take appropriate action within thirty days of, receipt of the report, unless extended by the Committee, including:

a statement concerning the facts of the matter; or

recommendations to one or more Parties to this Agreement; or

any other ruling which it deems appropriate.

14.20 If a Party to which recommendations are addressed considers itself unable to implement them, it should promptly furnish reasons in writing to the Committee. In that event the Committee shall consider what further action may be appropriate.

14.21 If the Committee considers that the circumstances are serious

enough to justify such action, it may authorize one or more Parties to this Agreement to suspend, in respect of any other Party, the application of such obligations under this Agreement as it determines to be appropriate in the circumstances. In this respect, the Committee may, inter alia, authorize the suspension of obligations, including those in Articles 5 to 9, in order to restore mutual economic advantage and balance of rights and obligations.

14.22 The Committee shall keep under surveillance any matter on which it has made recommendations or given rulings.

Other provisions relating to dispute settlements

Procedures

14.23 If disputes arise between Parties relating to rights and obligations of this Agreement, Parties should complete the dispute settlement procedures under this Agreement before availing themselves of any rights which they have under the GATT. Parties recognize that, in any case so referred to the CONTRACTING PARTIES, any finding, recommendation or ruling pursuant to Articles 14.9 to 14.18 may be taken into account by the CONTRACTING PARTIES, to the extent they relate to matters involving equivalent rights and obligations under the General Agreement. When adherents resort to GATT Article XXIII a determination under that Article shall be based on GATT provisions only.

Levels of obligation

14.24 The dispute settlement provisions set out above can be invoked in cases where a Party considers that another Party has not achieved satisfactory results under Articles 3, 4, 6, 8 and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those envisaged in Articles 2, 5 and 7 as if the body in question were a Party.

Processes and production methods

14.25 The dispute settlement procedures set out above can be invoked in cases where a Party considers that obligations under this Agreement are being circumvented by the drafting of requirements in terms of processes and production methods rather than in terms of characteristics of products.

Retroactivity

14.26 To the extent that a Party considers that technical regulations, standards, methods for assuring conformity with technical regulations or standards, or certification systems which exist at the time of entry into force of this Agreement are not consistent with the provisions of this Agreement, such regulations, standards, methods and systems shall be subject to the enforcement provisions in Articles 13 and 14 of this Agreement, in so far as they are applicable.

80-138 O - 79 - 9

6.15.111. Description

(a) Consultation. The first two subsections, 14.1 and 14.2 of this article establishing a mechanism for handling agreement-related disputes, call for discussion of any dispute between or among the Parties directly concerned. No reference of a dispute is made to all the Parties in this first step.

When questions or disputes arise as to the operation of the agreement (e.g., operating an inquiry point) or to the impairment or nullification of a benefit derived from the agreement (e.g., discriminatory application of technical regulations), and its trade interests are more than minimally affected, a Party, under these subsections, may request discussions with the Parties involved concerning the matter in question. All Parties have a first level obligation to give genuine consideration to the matter raised.

As to questions which concern the operation of the agreement, each Party has a first level obligation to provide promptly an opportunity for consultation to the Party requesting such. When benefits which accrue under the agreement are thought to be impaired or nullified, the adversely affected Party may make written representations or proposals concerning the matter to the other Party or Parties involved. The latter has a first level obligation to consider those representations or proposals and to work toward a mutually satisfactory solution.

(b) Resolution of disputes. 124/ The Parties state that it is their intention to resolve disputes, especially those involving perishable products, in an expeditious manner. However, if consultations, fail, any Party involved in the dispute may request that the Committee meet to examine the matter. The purpose of such investigation by the Committee is to help obtain a solution which is satisfactory to all Parties concerned.

In addressing a dispute, the Committee must take into account whether the issues involved are of a technical or a commercial policy nature which would demand examination by persons expert in those fields. This analysis is particularly necessary in order to determine what further procedures should be followed if the Committee does not reach a satisfactory solution within three months and a Party involved in the dispute requests the establishment of a group of independent experts. 125/

The Committee is to consider disputes involving perishable products as expeditiously as possible and to attempt to reach a mutually agreeable solution within three months of the request for the Committee investigation.

Where disputes involved crops with cycles of twelve months, the Committee is to exert all efforts to resolve the dispute within a twelve month period.

124/ To understand fully the operation of this portion of the dispute resolution procedure, this subsection "Resolution of disputes" will need to be read in conjunction with the following subsections, "Technical issues," and "Panel proceedings." The language in all these subsections help to delineate the functions and powers of the Committee and its groups of technical experts and panels.

125/ This is by operation of articles 14.9 and 14.14 which are more fully described and analyzed below in (c) Technical issues, and (d) Panel proceedings.

At any point of this dispute settlement procedure, the Committee may consult or invite to Committee meetings "competent bodies" 126/ and experts familiar with the matters involved. The purpose of these contacts is to aid the Committee in reaching a resolution of the problem.

(c) Technical issues. If the Committee has not achieved a resolution of the dispute which is satisfactory to all Parties involved within three months of the request for the Committee to investigate the matter, any of the parties may request that a technical expert group be established where a party considers there are issues of a technical nature involved in the dispute. The Committee must then establish such a group.

The purpose of the technical group is to examine any issues which are of a technical nature. For example, where a technical regulation required that an automobile meet certain emission standards in order to help protect the environment of the enforcing jurisdiction, the technical group could examine the requirements of the regulation to form an opinion as to whether such requirements were effective or technically unnecessary to achieve that purpose, which is legitimate under the agreement. The question of whether the regulation was being applied as a means to impede or inhibit foreign automobile trade would be examined, not by the technical group, but by the Committee or an appointed panel. 127/

To fulfill this role the technical group has four functions: (a) to examine the dispute (presumably for technical matters although this article

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126/ No definitions or examples of this term are given. See an analysis of this term at 127, infra.

127/ See (d) Panel proceedings, infra, at 119-120.

does not clearly limit its investigation, as distinguished from its opinion, to those matters), (b) contact the Parties and encourage them to reach a solution agreeable to all involved, (c) report on the facts of the matter (presumably the report is made to the Committee), and (d) make such findings as will assist the Committee to make recommendations on the dispute. Those findings may include detailed scientific judgments as to whether the measure or activity in controversy was necessary for the protection of life or health and whether the requirements made were based on a legitimate scientific judgment. Annex 2 of the agreement outlines the procedures to be followed by the technical expert groups.

The technical group should complete its findings within six months of the date of referral although it is recognized that the complexities of the technical issues will vary with each case. The Parties to the dispute may extend the time period by agreement.

The reports made are to include the rationale for the findings reached therein.

If no solution is reached through these procedures during the six months period, any Party involved may request a panel to consider the dispute. The Committee is then obligated to establish such a panel.

(d) Panel proceedings. Under these subsections, 14.14-14.18, of article 14, a panel may be requested by any Party involved in the dispute and thereafter must be established by the Committee. The conditions precedent to establishment are that no mutually satisfactory solution has been reached by the Committee within the three months allotted to it after a Party has

requested it to investigate the matter and that the technical group proceeding (subsections 14.9 to 14.13) has not been invoked. It should be noted, however, that by the operation of subsection 14.13, if the work of the technical group does not result in a mutually satisfactory solution with six months, then a panel can be requested and would operate according to the procedures described in subsections 14.15-14.18.

Once the panel is established, it is directed to examine the matter; consult with the Parties and assist them to arrive at a mutually agreeable solution, if possible; and to make a statement of facts (insofar as they relate to the application of the agreement) and findings which will assist the Committee in making its final recommendations. The panel can consider in regard to technical issues the report of the technical experts if such were made.

Procedures which the panel must follow are set out in Annex 3 (Panels). 128/

The findings of the panel should be submitted without undue delay. Four months from the establishment of the panel is suggested as the normal time period for submitting any findings or recommendations to the Committee. However, the agreement recognizes that the time needed to consider a case properly will depend on the complexities of each case.

128/ See sec. 6.19 of this report, at 150-156, infra, for a full description and analysis of this annex. In summary, it provides for the appointment of panel members, the independence from government instruction, the time period and procedure for making a finding, functions, and the roles of the panel and as the Parties involved in the matter.

(e) Enforcement. After the completion of investigations by the Committee, a group of technical experts, and/or a panel, the Committee must give prompt attention to the findings which have resulted. A period of thirty days is given as the time in which the Committee is to act on a panel report once received. However, this time may be extended by the Committee.

Action by the Committee is to include a statement of the facts of the dispute, recommendations to one or more Parties involved, and any other ruling the Committee finds appropriate to make.

The Party to whom a recommendation or ruling has been made considers the contents and if it is unable to comply, the Party must then give the Committee its reasons. The Committee then decides if further action is appropriate.

If action other than a recommendation or ruling is deemed appropriate because of the seriousness of the matter, the Committee may authorize sanctions under the agreement. These may include authorizing one or more Parties to the agreement, not just Parties involved in the dispute, to suspend its or their obligations under the agreement as toward the recalcitrant Party or Parties. Any obligations under the agreement may be suspended. However, the Committee cannot authorize that obligations not in the agreement, e.g., GATT-related obligations, be suspended. The purpose of such sanctions is to reach a balance of rights and obligations among the Parties.

Once the Committee has acted, it must continually survey the situation for which it has recommended action or made rulings.

(f) Other provisions relating to dispute settlement.

(1) Procedures. When a dispute between or among Parties arises out of the operation or application of the agreement, the Parties are to exhaust the dispute settlement procedures of the agreement before they take advantage of any rights under the General Agreement. In the event that a dispute under the agreement is referred to the CONTRACTING PARTIES, for example under articles XXII (Consultation) and XXIII (Impairment and Nullification), any findings, recommendation, or ruling made in the course of the dispute settlement procedure of the agreement may be considered by the CONTRACTING PARTIES. The agreement allows this consideration of recommendations, etc. only to the extent that those findings, recommendations, or rulings affect matters involving equivalent rights and obligations under the General Agreement. Additionally, the agreement stipulates that when a Party invokes article XXIII of the General Agreement, any determination under that article is to be based on GATT provisions only, not on provisions of this agreement. This stipulation, in effect, attempts to keep the interpretation and operation of the agreement in the hands of Parties, not under the ultimate control of the CONTRACTING PARTIES of the GATT.

(2) Levels of obligation. This article stipulates that dispute settlement procedures under the agreement may be initiated when a Party has not fulfilled its second level obligations in regard to the preparation, adoption, or enforcement of technical regulations, standards, testing methods, and certification systems and the trade of the aggrieved Party has been significantly affected. Compliance with those obligations is measured by whether the results of the actions of local government or private bodies, etc.

are equivalent to those results gained through complying with a first level obligation.

For example, a Party under article 3 of the agreement (Preparation, adoption and application of technical regulations and standards by local government bodies) must use "such reasonable measures as may be available to [it] to ensure" that a local government body publish notices of proposed technical regulations. Under this subsection of the agreement, 14.24, if (a) a local government of a Party does not publish such notices (and the failure is not due to an urgent problem of health, safety, etc.) and (b) the trade interests of another Party are significantly affected by that failure, the latter Party may institute dispute settlement procedures against the first Party even if the first Party used all reasonable measures available to it to have the local government body publish proposed technical regulations. The test for initiating the dispute settlement mechanism is whether the result of the action by the local government body is the equivalent as that which is anticipated through compliance by the central government of a Party. The test is not whether all reasonable, available measures were employed and, thus, a question of a violation of the agreement. Rather, it is a threshold test used to clarify when dispute settlement procedures can be used regarding second level obligations.

(3) Processes and production methods. The agreement up to this point has obligated Parties to promulgate technical regulations, standards, testing methods, administrative procedures, and certification systems which do not create or cause unnecessary obstacles to trade. Under definitions in the

agreement a technical regulation or a standard is a technical specification "contained in a document which lays down characteristics of a product" (emphasis added). 129/ Testing methods, administrative procedures, and certification systems are, by their functions, also linked to determining a product's conformity with specifications expressed in terms of the product's "characteristics." It is conceivable that the requirements of a technical regulation or standard (and thereby those of testing methods, administrative procedures, and certification systems) could be made to require methods of processing or production of a product which would cause unnecessary barriers to trade. This would have the effect of evading the obligations and purpose of the agreement. For this reason, subsection 14.25 permits dispute settlement procedures to be initiated when a Party considers that obligations under the agreement are being circumvented by requirements written in terms of processes and production methods rather than in the terms of characteristics of products.

For example, a Party promulgates a technical regulation which requires that a moped be assembled using electrically operated rather than manually operated equipment. The purpose of such regulation might be to impede trade in mopeds produced in Parties which made use of a source of inexpensive labor or did not have the most up-to-date technology. A dispute regarding this regulation could be taken to the dispute settlement procedure on the basis that the regulation was allegedly written in terms of production methods for the purpose of evading obligations of the agreement applicable to technical regulations.

129/ See sec. 6.17.1, at 144-146, infra.

(4) Retroactivity. The effect of this subsection is to exclude from immediate and automatic coverage by the agreement all technical regulations, standards, testing methods, administrative procedures, and certification systems existing at the time the agreement enters into force. Existing technical regulations, etc. are subject to the enforcement provisions when a Party finds reason to believe that such regulations, standards, methods, and systems abrogate any benefit of the agreement it should receive by virtue of having adhered to the agreement. The complaining Party must begin the dispute settlement procedure. 130/

6.15.112. Analysis

(a) Consultation. This first step in the dispute settlement procedure provides an opportunity to settle differences without escalating the matter to the level which would involve all the Parties. In a sense, it provides an opportunity to negotiate continually the meaning and manner of application of the agreement on a bilateral or multilateral basis.

These subsections, 14.1 and 14.2, parallel Article XXII:1 and Article XXIII:1 of the General Agreement which also provide for prompt and adequate consultation and the consideration of written recommendations or proposals. However, these subsections can be invoked only when a Party's trade interests are significantly affected, while the articles of the General Agreement do not require such effect before they can be invoked.

No guidelines are given as to what the terms "sympathetic consideration" (line 2), "adequate opportunity" (line 3), or "prompt consultation" (line 3)

130/ See this section, at 112-115, supra, in this volume.

actually require. The obligation to provide these items is expressed by the term "shall afford" (line 2) which is indicative of a first level obligation. However, the sense of the subsections 14.1 and 14.2 appears to require only a good faith effort in considering the problems raised and in arriving at a mutually agreeable solution.

Engaging in these consultation procedures does not preclude eventual reference of a dispute to all the Parties. However, consultation must be attempted first. It is conceivable that consultations could result in the solution of a problem, thereby avoiding the time, effort, and any risk associated with the full dispute resolution procedure.

(b) Resolution of disputes. Since disputes regarding regulations, standards, testing methods, and certification systems can involve technical issues, this group of subsections ("Resolution of disputes," 14.3-14.8) and the following two groups ("Technical issues," 14.9-14.13 and "Panel proceedings," 14.14-14.18) were designed to handle questions of technical complexity as well as those of a commercial policy nature. Each group must be read in conjunction with the other two and Annex 3 (Panels) in the agreement.

In "Resolution of disputes," the Parties agree that all disputes arising from the agreement "shall be promptly and expeditiously resolved" (line 16). No time guidelines are given at that point. However, in reading the three groups of subsections, it can be calculated that fourteen months will be the longest time normally available for the conclusion of these proceedings. 131/

131/ The fourteen months are calculated in the following manner: the Committee has three months from the time the Parties request the Committee to (footnote continued)

It should be stressed that fourteen months is the longest period of time normally available. If a dispute involved an agricultural product with a crop cycle of twelve months, the dispute should be settled within twelve months. On the other hand, if a case were complicated, these time periods could be waived. Equally, a case might not be sent to the Committee, a technical group, or a panel. The process would depend on the Parties involved since they must request the initiation of each step. If, for example, a technical expert group, but no panel, were requested, the Committee is bound only to consider "promptly" (line 105) the findings of the technical group. A thirty day time period is stipulated solely in regard to acting upon panel reports.

The purpose of such time restraints is to prevent extreme delays in settling disputes. The time periods set out are, in effect, guidelines rather than absolute requirements.

"Competent bodies and experts" (line 40) may be consulted and invited to attend Committee meetings in order to aid the Committee in attempting to reach a solution to the problem. No definition or examples of "competent bodies and experts" is given. Presumably these might include international standards organizations and technical experts whose assistance would be useful if a group of technical experts were not established.

(footnote continued)
investigate to try to reach by itself some solution of the dispute (subsections 14.9 and 14.14); the group of technical experts is given six months from the date the technical issues were referred to it (subsection 14.11); the panel should make its findings in four months from the date of referral (subsection 14.18), and the Committee should act on panel findings within thirty days of receipt of those findings (subsection 14.19).

In reading subsection 13.2, 132/ together with subsection 14.8, a working party can be established in this phase of the dispute settlement resolution procedure to aid the Committee in its investigation.

(c) Technical issues. Guidelines for the selection of technical experts who would serve in groups to examine the technical issues of a dispute are not given in subsections 14.9-14.13, but are incorporated by reference to Annex 2 of this agreement. There are no provisions in these subsections (or in Annex 2) allowing the Parties involved to accept or reject the experts named to serve. While the procedure lacks the opportunity for involved Parties to approve or reject technical group members, there is less chance that Parties involved would be able to cause delays by unnecessarily challenging the composition of a technical group. Equally true, of course, is the fact that there are no formal means to challenge incompetent technical experts.

Reports of a technical group may include findings as to detailed scientific judgments involved in the circumstances of the dispute; findings as to whether the disputed measures were necessary for the protection of human, animal, or plant life or health; and findings of whether a legitimate scientific judgment were involved in the circumstances of the dispute. The delegation of this part of an investigation to technical experts should help to clarify the issues of a dispute by separating the technical issues from the policy ones and arriving at competent opinions regarding the technical issues. The report of the group's findings is presented to the Committee

132/ See sec. 6.14.1, at 110-111, supra.

which may accept or reject those findings when making its final recommendations.

(d) Panel proceedings. The panel's report to the Committee differs from the report of the technical group in that the panel makes a statement of fact as those facts relate to the application of the agreement and makes a statement of findings which could involve both technical and non-technical issues. However, like the report of the technical expert group, the report of the panel when submitted to the Committee may be accepted or rejected by the Committee when making its final recommendations.

(e) Enforcement. The means for enforcing the agreement is left largely unspecified. Thus, the Committee is given much discretion in making recommendations or other rulings as to actions to be followed by the Parties involved. No procedure is set up for arriving at these recommendations or other rulings; it is not clear whether level of agreement among the representatives of the Committee is needed to make a recommendation.

The Committee always has the option of authorizing the agreement-related and agreement-confined sanctions. 133/ There is no requirement that these sanctions be limited to any prescribed length of time. However, given the purpose of allowing sanctions ("in order to restore mutual economic advantage and balance of rights and obligations," lines 121-122), it is arguable that the sanctions should not be allowed to continue if a Party eventually complies with the agreement or mutual economic advantage is restored.

133/ See p. 114-115, supra, in this volume.

(f) Other provisions relating to dispute settlement.

(1) Procedures. This subsection 14.23, which stipulates that Parties should exhaust all avenues in the agreement for dispute settlement before invoking their GATT rights, avoids forum shopping and retains control of the operation and enforcement of the agreement for the Parties to the agreement, rather than placing that control in the hands of the CONTRACTING PARTIES, some of whom will probably not be Parties to the agreement. This subsection further attempts to limit the influence of the CONTRACTING PARTIES in the resolution of agreement-related disputes by (1) restricting the use by CONTRACTING PARTIES of reports, statements of fact, and findings generated through the dispute settlement mechanism of the agreement to the matters which involve equivalent GATT rights and obligations and (2) restricting a GATT determination pursuant to article XXIII of the General Agreement to the provisions of that agreement only. The purpose of this subsection is clear. Whether the Parties will forego or limit their GATT rights for the benefit arising from the agreement remains to be seen.

(2) Levels of obligation. The purpose of this subsection, 14.24, is twofold: (a) to help clarify what degree of compliance with the agreement is necessary in order to fulfill a second level obligation and (b) to clarify when dispute settlement procedures may be initiated in regard to the violation of a second level obligation.

This subsection, 14.24, indicates that a Party must achieve "satisfactory results" (line 141) when fulfilling its second level obligation to ensure that its local subdivisions, the private standards groups within its territory, and

international/regional groups in which it is a member or participant comply with all applicable provisions of the agreement. "Satisfactory results" are defined as being results which are the equivalent to those required of a Party when ensuring that its central government meets requirements of the agreement. For example, a Party would not produce unsatisfactory results when its political subdivisions, for example, held hearings on proposed technical regulations at which all interested parties had an opportunity to appear.

Also under this subsection, dispute settlement procedures may be initiated when such satisfactory results are not achieved and the trade interests of the complaining Party are "significantly affected" (line 142). No definition or guideline is given to determine what "significantly affected" means. Presumably, the Committee could decide, when requested to investigate a dispute, if the effect on the trade interests of a Party were significant within the meaning of the agreement.

(3) Processes and production methods. Before this subsection was added, restrictions in the agreement on the use of technical regulations and standards causing unnecessary obstacles to trade were applicable only to technical regulations and standards expressed in terms of product characteristics, not methods of processing and production. 134/ The purpose of this subsection, 14.25, is to allow dispute settlement procedures to be invoked when technical regulations and standards causing unnecessary barriers to trade are written in terms of processing and production requirements rather

134/ For an example of this distinction, see p. 124, supra, in this volume.

than in terms of product characteristics in order to evade agreement restrictions.

(4) Retroactivity. The date for entry into force of this agreement is 1 January 1980. Any technical regulations, standards, testing methods, or certification systems which are promulgated before that date, even if a country has already signed and/or implemented the agreement, would be considered an "existing" regulation, method, etc. for purposes of the agreement and would therefore be subject only to dispute settlement procedures if they were initiated.

6.15.3. Implementation

(a) Consultation. Legislation could be enacted which would delegate the function of representing the United States in consultation procedures (either as initiator of or responding party to the request) to an existing agency which handles the operation and application of international agreements or to a new agency established for such a purpose which could represent United States' interests. Alternatively, legislation could simply direct that these subsections be complied with and leave the detailed implementation action to be accomplished by regulation.

Implementation of these subsections can be combined with implementation of the remainder of the dispute settlement procedure, described below.

(b) Resolution of disputes, technical issues, and panel proceedings. Implementation of these subsections will require that some agency or agencies be delegated the functions of representing the interests of the United States (either governmental or private) in dispute settlement proceedings. These functions will include;

(1) determining when the United States should initiate these proceedings and what the strategy for such should be,

(2) defending and determining strategy for complaints made against the United States, and

(3) providing names of potential panel members pursuant to Annex 3 (Panels). 135/

These functions could be assigned to one agency, such as the State Department, STR, or a standards agency if such were established. Alternatively, each agency involved in technical regulations, standards, certification systems, etc. could be delegated these functions to be exercised in the areas in which each agency has expertise. For example, the Department of Agriculture would be authorized and required to initiate any dispute settlement procedures arising from complaints about foreign technical regulations covering agricultural products. It would also be required to defend complaints regarding agricultural matters made against the United States. The Department of Commerce would be charged with doing the same in regard to technical regulations covering automobile bumpers or other industrial products.

This could be done through legislation which leaves the details to be worked out through regulations. For example, the Department of Commerce would be authorized through legislation to initiate dispute settlement proceedings. Department regulations could stipulate which division or office in the Department would actually handle the complaints and the procedure for doing so.

135/ See sec. 6.18.1, at 148, infra, in this volume.

(c) Enforcement. Implementation of enforcement procedures would require that some agency or agencies be authorized and required to respond to the recommendations or rulings of the Committee on Technical Barriers to Trade when those are made and directed toward the United States. Decisions will have to be made as to whether the United States can comply with those recommendations or rulings and, if not, reasons will have to be given as to why compliance is not possible. These functions would best be handled in the same fashion as those functions involving the dispute settlement procedure described above; that is, if one agency is charged with going forward with or defending against complaints, that agency should continue with enforcement-related functions. On the other hand, if the various agencies involved with standards or certification activities are delegated the dispute settlement functions, these enforcement functions could be similarly delegated. This would promote continuity.

When the Committee on Technical Barriers to Trade authorizes the suspension of obligations toward a Party, a policy decision will need to be made as to whether to suspend those obligations vis-à-vis the Party in question. This policy function could be delegated by legislation; alternatively, it could be assigned by executive order.

(d) Other provisions relating to dispute settlement.

(1) Procedures. No implementation other than what is described above regarding dispute settlement procedures and enforcement is necessary for this subsection, 14.23. However, the operation of this subsection should be considered when an agency is deciding whether to initiate dispute settlement

procedures. That is, the agency will have to consider the obligation to exhaust all agreement-related dispute settlement procedures before relying on their rights for dispute settlement under GATT.

(2) Levels of obligation. No implementation of this subsection, 14.24, is necessary, because it does not create any obligations for Parties. However, it is advisable to note for the purpose of implementing other subsections, e.g., 2.9 and 3.1, that there is a risk of being called to dispute resolution procedures when a state or private standards group is accused of violating the agreement.

(3) Processes and production methods. No implementation of this subsection, 14.25, is necessary. However, this subsection does provide that dispute settlement procedures can be initiated when the requirements of technical regulations, standards, etc. are specified for the purpose of circumventing the agreement in terms of production and process methods. This factor should be taken into account when implementating articles 2, 3, and 4 136/ as federal agencies and states or private groups could be required or encouraged to avoid technical regulations or standards improperly written in terms of process and production methods.

(4) Retroactivity. No implementation of this subsection, 14.26, will be necessary. Its effect will be to reduce the amount of implementation required when adhering to the agreement.

136/ These articles involve the preparation, adoption, and use of technical regulations and standards by central government bodies, local government bodies, and non-governmental bodies, including regulatory bodies other than central government bodies.

Modification or elimination of technical regulations, standards, testing methods, and certification systems (federal or otherwise) which might violate the agreement could be considered but would be impracticable and politically infeasible since such modifications might harm any bargaining position for consultations between Parties to a dispute.

Final provisions

6.16. Final provisions (Article 15)

6.16.1. Interpretation

6.16.11. Text

Acceptance and accession

15.1 This Agreement shall be open for acceptance by signature or otherwise, by governments contracting parties to the General Agreement on Tariffs and Trade, hereinafter referred to as "the GATT", and by the European Economic Community.

15.2 This Agreement shall be open to accession by any other government on terms, related to the effective application of rights and obligations under this Agreement, to be agreed between that government and the Parties to this Agreement, by the deposit with the Director-General to the CONTRACTING PARTIES to the GATT of an instrument of accession which states the terms so agreed.

15.3 Contracting parties may accept this Agreement in respect of those territories for which they have international responsibility, provided that the GATT is being applied in respect of such territories in accordance with the provisions of Article XXVI:5(a) or (b) of the General Agreement; and in terms of such acceptance, each such territory shall be treated as though it were a party to this Agreement.

Reservations

15.4 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Parties to this Agreement.

Entry into force

15.5 This Agreement shall enter into force on 1 January 1980 for the governments* which have accepted it or acceded to it by that date. For each other government it shall enter into force on the thirtieth day following the date of its acceptance or accession to this Agreement.

*The term "government" is deemed to include the competent authorities of the European Economic Community.

Review

15.6 Each Party shall, promptly after the date upon which this Agreement enters into force for the Party concerned, inform the Committee of measures in existence or taken to ensure the implementation and administration of this Agreement. Any changes of such measures thereafter shall also be notified to the Committee.

15.7 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the CONTRACTING PARTIES to the GATT of developments during the periods covered by such reviews.

15.8 Not later than the end of the third year from the entry into force of this Agreement and at the end of each three-year period thereafter, the Committee shall review the operation and implementation of this agreement, including the provisions relating to transparency, with a view to adjusting the rights and obligations of this Agreement where necessary to ensure mutual economic advantage and balance of rights and obligations, without prejudice to the provisions of Article 12, and where appropriate proposing amendments to the text of this Agreement having regard, inter alia, to the experience gained in its implementation.

Amendments

15.9 The Parties may amend this Agreement having regard, inter alia, to the experience gained in its implementation. Such an amendment, once the Parties have concurred in accordance with procedures established by the Committee, shall not come into force for any Party until it has been accepted by such Party.

Withdrawal

15.10 Any Party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of sixty days from the date on which the written notice of withdrawal is received by the Director-General to the CONTRACTING PARTIES to the GATT. Any Party to this Agreement may upon receipt of such notification, request an immediate meeting of the Committee.

Non-application of this Agreement between particular Parties

15.11 This Agreement shall not apply as between any two Parties to this Agreement if either of the Parties, at the time either accepts or accedes to this Agreement, does not consent to such application.

Annexes

15.12 The annexes to this Agreement constitute an integral part thereof.

Secretariat

15.13 This Agreement shall be serviced by the GATT secretariat.

Deposit

15.14 This Agreement shall be deposited with the Director-General to the CONTRACTING PARTIES to the GATT, who shall promptly furnish

to each Party to this Agreement and each contracting party to the GATT a certified copy thereof and of each amendment thereto pursuant to Article 15.9, and a notification of each acceptance thereof pursuant to Articles 15.1 and 15.2, or each withdrawal therefrom pursuant to Article 15.10.

Registration

15.15 This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Geneva this _____ day of _____ nineteen hundred and seventy-nine, in a single copy, in the English, French and Spanish languages, each text being authentic.

6.16.111. Description

This article provides for the administrative aspects of the agreement normally included in a treaty. These include, inter alia, provisions on accession, entry into force, review, amendments, services provided by the GATT secretariat, deposit of the instrument, and authentic languages.

Any country and the European Economic Community may sign the agreement as acceptance is not limited to the Contracting Parties of the GATT. The only requirement is that a country, which is not a Contracting Party, be willing to accede to the agreement on terms agreed upon by the government of that country and the Parties to the agreement.

Acceptance of the agreement extends to the territories for which a Party has incurred an international responsibility. This is qualified insofar as the GATT has been applied to those territories.

Reservations to any provision may be made by a Party only if the other Parties consent to the reservation.

The agreement is to enter into force on 1 January 1980, for those countries which have signed it by that date. After that date, the agreement

will become effective for any government adhering to the agreement on the thirtieth day after the date of signing.

Under the subsections 15.6-15.8 of this article, a system of review of the implementation, application, and operation of this agreement is established. Parties, after the agreement enters into force, are to promptly inform the Committee on Technical Barriers to Trade of their actions to implement and administer the agreement. Changes in such programs are also to be notified to the Committee.

The Committee is to review the implementation and operation of the agreement for two purposes. The first is that the Committee must annually inform the CONTRACTING PARTIES to the GATT of the developments in the operation of the agreement. The second is to examine every three years what adjustments should be made in order to perpetuate mutual economic advantages and a balance of rights and obligations and to propose amendments to the text of the agreement if such becomes necessary.

Parties may also amend the agreement. Procedures for doing so are to be established by the Committee. An amendment will enter into force for a Party only after that Party has accepted it.

Withdrawal from the agreement is permissible and effective sixty days after the Director-General to the CONTRACTING PARTIES to GATT receives such notification. No specific provisions are made for adjustment of rights and obligations which might be necessary to make. Any Party may, however, request the Committee on Technical Barriers to Trade to meet after being notified of a withdrawal.

As in article XXXV of the GATT (Non-application of the Agreement between Particular Contracting Parties), a Party may elect not to apply this agreement toward other parties. This election can be made by a country already party to the agreement or by a country becoming a party, but the election can be made only at the time of acceptance or accession of the agreement.

All three annexes to the agreement (terms and definitions; technical expert groups; panels) are legally binding parts of the agreement.

The completed agreement is to be serviced by the GATT secretariat.

The agreement is to be deposit with the Director-General to the GATT CONTRACTING PARTIES. The Director-General is to promptly furnish copies of the agreement, amendments thereto, and notification of each acceptance, accession, or withdrawal to each Party to the agreement and to each Contracting Party to GATT.

The completed agreement is to be registered with the United Nations Secretariat in accordance with article 102 of the United Nations Charter. The authentic languages of the text are English, French, and Spanish.

6.16.112. Analysis

If the European Economic Community signs the agreement, it will assume first level obligations toward implementing and applying the agreement within its own structure and institutions. 137/ The second level obligations would attach to the EEC in regard to the Member States and nongovernmental groups within that community. On 12 April 1979, the EEC had initialed the

137/ In Annex 1 of the agreement, the European Economic Community is included in the definition of a central government body. See 6.17.1, at 145, infra, in this volume.

agreement. It is presently unclear whether the nine Member States are to be bound by the EEC signing the agreement or are to be bound by their own responsibility also.

A country not a Contracting Party to the GATT may sign the agreement if its government and the Parties agree on terms which "relate to the effective application of rights and obligations" under the agreement (lines 7-8). There is no indication as to what those terms might be, but the purpose of such requirement is to ensure that non-Contracting Parties to GATT do not escape obligations Contracting Parties to GATT assume which would interfere with balance of rights and obligations under the agreement.

In the European Economic Community, the Council of Ministers must accept the agreement. 138/ If the agreement is implemented by an EC directive, it will be binding on the Member States when published. The French constitution requires that an international agreement, such as the agreement, be ratified or approved by law before it is effective. Once those legislative steps have been taken and the document is published, the instrument becomes superior to domestic laws. There is a reservation to such superiority: the other party or parties to the international agreement must also apply or implement the agreement. 139/

138/ Treaty establishing the European Economic Community (Rome Treaty), arts. 113 and 228.

139/ French Constitution, arts. 53 and 55.

The importance of the date for entry into force (line 24) is that such date will determine which technical regulations, standards, associated testing methods and administrative procedures, and certification systems are subject to provisions of the agreement. Any that are proposed or promulgated after 1 January 1980 will be subject to the provisions of the agreement. The same is true, pursuant to article 1.5, for amendments or revisions made after 1 January 1980 to standards, certification systems, etc. which are in force prior to 1 January 1980.

At the present time, the United States does not apply the GATT to Hungary and Romania pursuant to article XXXV of the GATT and United States trade law. If these countries as well as the United States decide to sign the agreement, 140/ the subsection on nonapplication (lines 65-68) would permit the same policy. Invoking this provision is an indirect way of making reservations to the agreement. While the provision does not allow reservations vis-à-vis the language, it would at least offer a Party or a potential Party the opportunity to reserve the application of the entire agreement as to any other country which signed the agreement. At the present there is no indication that any country intends to elect not to apply the agreement in regard to another country signing to agreement.

By registering the agreement with the United Nations Secretariat (lines 83-84), a Party may invoke the agreement before any organ of the United Nations. This arguably would permit the agreement to be considered as applicable law at the International Court of Justice, if a case were ever to be brought before that forum.

140/ Hungary initialed the agreement on 12 April but Romania did not.

6.16.3. Implementation

This article provides for the implementation of the agreement on an international level and does not establish any obligations for the United States which would necessitate implementation at the domestic level. However, there are two provisions in this article that will have an effect on how the United States implements other articles of the agreement.

If reservations to the agreement are desired, consent to them will have to be obtained from all other countries which sign before the reservation would be applicable.

Since entry into force will in 1980, the United States will have until that date to implement the agreement in this country assuming it is approved by Congress. Any institutional additions or modifications, appropriations, technical regulations, certification systems, etc. which need to be legislated or otherwise promulgated will not be required to be operational until that time.

A policy decision on whether to invoke the provision on nonapplicability will need to be made in regard to any other country signing the agreement. A decision not to apply the agreement to a particular country will have to be notified at the time of acceptance, not at the date specified for entry into force.

Annexes

6.17. Annex 1

6.17.1. Interpretation

6.17.11. Text

1 TERMS AND THEIR DEFINITIONS FOR THE SPECIFIC PURPOSES OF THIS AGREEMENT

Note: References to the definitions of international standardizing bodies in the explanatory notes are made as they stood in March 1979.

5 1. Technical specification

A specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions. It may include, or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or
10 labelling requirements as they apply to a product.

Explanatory note:

This Agreement deals only with technical specifications relating to products. Thus the wording of the corresponding Economic Commission for Europe/International Organization for Standardization definition
15 is amended in order to exclude services and codes of practice.

2. Technical regulation

A technical specification, including the applicable administrative provisions, with which compliance is mandatory.

Explanatory note:

20 The wording differs from the corresponding Economic Commission for Europe/International Organization for Standardization definitions because the latter is based on the definition of regulation which is not defined in this Agreement. Furthermore the Economic Commisson for Europe/International Organization for Standardization definition
25 contains a normative element which is included in the operative provisions of the Agreement. For the purposes of this Agreement, this definition covers also a standard of which the application has been made mandatory not by separate regulation but by virtue of a general law.

3. Standard

A technical specification approved by a recognized standardizing body for repeated or continuous application, with which compliance is not mandatory.

Explanatory note:

The corresponding Economic Commission for Europe/International Organization for Standardization definition contains several normative elements which are not included in the above definition. Accordingly, technical specifications which are not based on consensus are covered by this Agreement. This definition does not cover technical specifications prepared by an individual company for its own production or consumption requirements. The word "body" covers also a national standardizing system.

4. International body or system

A body or system whose membership is open to the relevant bodies of at least all Parties to this Agreement.

5. Regional body or system

A body or system whose membership is open to the relevant bodies of only some of the Parties.

6. Central government body

Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.

Explanatory note:

In the case of the European Economic Community the provisions governing central government bodies apply. However, regional bodies or certification systems may be established within the European Economic Community, and in such cases would be subject to the provisions of this Agreement on regional bodies or certification systems.

7. Local government body

A Government other than a central government (e.g. states, provinces, Lander, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.

8. Non-governmental body

A body other than a central government body or a local government body, including non-governmental bodies which has legal power to enforce a technical regulation.

9. Standardizing body

A governmental or non-governmental body, one of whose recognized activities is in the field of standardization.

10. International standard

A standard adopted by an international standardizing body.

Explanatory note:

The wording differs from the corresponding Economic Commission for Europe/International Organization for Standardization definition in order to make it consistent with other definitions of this Agreement.

6.17.111. Description

This annex gives the definition and explanatory notes for ten terms as they are specifically intended for use in the agreement. An attempt was made by the negotiators to relate these definitions to those of international standardizing bodies. Explanatory notes often refer to the international body whose definition was used and points out how the definition of the agreement differs. The two most important terms and definitions to note are "central government body" and "local government body" since the dichotomy between the two is the basis for the system of two levels of obligation.

6.17.112. Analysis

In the third term, Standard (lines 30-42), there is a sentence in the explanatory note which limits the coverage of the agreement. The definition of "standard" excludes all technical specifications used by an individual company for its internal purposes. In effect, such deletion precludes

coverage of standards which are de facto mandatory by use and practice. For example, a particular strength of steel might be required by contractual terms for use in manufacturing steel pipe and tubing. Such specifications, if appearing in a majority of contracts, could effectively preclude pipe and tubes using other steel strengths. If the specification were based on design criteria, rather than performance, pipe and tubing not meeting those design specifications would be unnecessarily excluded. On the other hand, by excluding such specifications from coverage under the agreement, the ability to contract freely is preserved.

6.17.3. Implementation

It is not necessary to implement the definitions of these terms in United States domestic law. However, it is necessary to use them in implementing the agreement, as they give a more precise meaning of the obligations under the agreement. For this reason, the relevant portions of the definitions and explanatory notes could be incorporated in a definitional section of any overall implementing bill; this might be helpful for interpreting the domestic obligations arising from the implementing legislation and regulations. For example, a standard which was purported to be an international standard would not have to be considered for adoption in the United States if the international body which promulgated the standard did not, in fact, open membership of the group to all Parties to the agreement. Such a standard would not qualify as an international standard for under the agreement.

6.18. Annex 2

6.18.1. Interpretation

6.18.11. Text

1 Technical Expert Groups

The following procedures shall apply to technical expert groups established in accordance with the provisions of Article 14.

1. Participation in technical expert groups shall be restricted to persons, preferably government officials, of professional standing and experience in the field in question.

2. Citizens of countries whose central governments are parties to a dispute shall not be eligible for membership of the technical expert group concerned with that dispute. Members of technical expert groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before a technical expert group.

3. The parties to a dispute shall have access to all relevant information provided to a technical expert group, unless it is of a confidential nature. Confidential information provided to the technical expert group shall not be revealed without formal authorization from the government or person providing the information. Where such information is requested from the technical expert group but release of such information by the technical expert group is not authorized, a non-confidential summary of the information will be provided by the government or person supplying the information.

4. To encourage development of mutually satisfactory solutions between the parties and with a view to obtaining their comments, each technical expert group should first submit the descriptive part of its report to the parties concerned, and should subsequently submit to the parties to the dispute its conclusions, or an outline thereof, a reasonably period of time before they are circulated to the Parties.

6.18.111. Description

This annex sets out the criteria for selecting technical experts to serve on technical expert groups pursuant to subsections 14.9-14.13 and other aspects of those groups. It is an integral party of the agreement by operation of article 15.12.

The technical expert should be a professional with experience in the field of the dispute. Government officials are preferred to private individuals. No provision is made for creating a list of recognized candidates as there is in the annex on panels (Annex 3, infra).

The experts cannot be a citizen of a country which is party to the dispute. They must serve in an independent capacity, and governments or organizations are not to instruct them in regard to any dispute which they are considering.

Information before a technical expert group must also be available to the parties to the dispute, unless the relevant information is of a confidential nature. In those instances, such information can be provided only if release is authorized. Where authorization is not given, a non-confidential summary must be provided by the government or person supplying the confidential information.

When the technical expert group has completed its review of the dispute, it is to circulate the descriptive portion and conclusions of its report to the parties involved, either in full or in outline form. The purpose to receive comments from the parties and to facilitate a mutually satisfactory solution. This circulation of the report is to be accomplished within a reasonable time before the Parties as a whole receives the report.

6.18.112. Analysis

The annex attempts to provide directions for the establishment and operation of technical expert groups authorized under articles 13 and 14. It parallels Annex 3, infra, which sets out the requirements and procedures for

panels. Annex 2, however, is less detailed than Annex 3 and leaves several points uncovered. No provision is made for who selects the technical expert nor for whether the parties to the dispute may reject a candidate. Additionally, there is no indication as to how many technical experts must or can serve on a group nor is there any indication of whether the Parties incur an obligation to cooperate with the group in regard to providing it information. Presumably they are obligated, at least under the spirit of the dispute settlement provisions.

6.18.3. Implementation

No implementation is mandated by this annex.

6.19. Annex 3

6.19.1. Interpretation

6.19.11. Text

1

PANELS

The following procedures shall apply to panels established in accordance with the provisions of Section 14.

1. In order to facilitate the constitution of panels, the Chairman of the Committee shall maintain an informal indicative list of government officials knowledgeable in the area of technical barriers to trade and experienced in the field of trade relations and economic development. This list may also include persons other than government officials. In this connexion, each adherent shall be invited to indicate at the beginning of every year to the Chairman of the Committee the name(s) of the one or two governmental experts whom the Parties to this Agreement would be willing to make available for such work. When a panel is established under Article 14.13, the Chairman, within seven days shall propose the composition of the panel consisting of three or five members, preferably government officials. The parties directly concerned shall react within seven working days to nominations of panel members by the Chairman and shall not oppose nominations except for compelling reasons. Citizens of countries whose central governments are parties to a dispute shall not be eligible for membership of the

panel concerned with that dispute. Panel members shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before a panel.

2. Each panel shall develop its own working procedures. All Parties, having a substantial interest in the matter and having notified this to the Committee, shall have an opportunity to be heard. Each panel may consult and seek information and technical advice from any source it deems appropriate. Before a panel seeks such information or technical advice from a source within the jurisdiction of a Party, it shall inform the government of that Party. In case such consultation with competent bodies and experts is necessary it should be at the earliest possible stage of the dispute settlement procedure. Any Party shall respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information provided to the panel shall not be revealed without formal authorization from the government or person providing the information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information will be provided by the government or person providing the information.

3. Where the parties to a dispute have failed to come to a satisfactory solution, the panel shall submit its findings in a written form. Panel reports should set out the rationale behind any findings and recommendations that it makes. Where a bilateral settlement of the matter has been found, the report of the panel may be confined to a brief description of the case and to reporting that a solution has been reached.

4. To encourage development of mutually satisfactory solutions between the parties and with a view to obtaining their comments, each panel should first submit the descriptive part of its report to the parties concerned, and should subsequently submit to the parties to the dispute its conclusions, or an outline thereof, a reasonable period of time before they are circulated to the Parties.

6.19.111. Description

This annex is an integral part of the agreement by operation of article 15.12. It was included in the agreement in order to provide some guidance for the establishment and operation of panels outlined under subsections 14.13-14.18.

The Chairman of the Committee on Technical Barriers to Trade is to compile and maintain a list of persons from which to choose panel members. These persons must have a knowledge of technical barriers to trade (technical regulations, standards, testing methods, and certification systems) and experience in trade relations and economic development. They may be either government or nongovernment experts, although there is a preference for government officials. 141/ A maximum of two government officials may be proposed each year by Parties for service on panels.

Within seven days of the request for a panel to be established under section 14.13, the Chairman is to nominate three or five persons to serve on the panel. The Parties involved then have seven working days to react to those nominations but may oppose them only for "compelling reasons" (line 19). No definition or example of "compelling reasons" is given.

Panel members may not be from the governments of Parties involved in the dispute. Panel members serve independently of their governments; Parties or organizations whose officials might serve on panels may not give their officials instructions involving the matters before those panels.

The working procedure of a panel is left to each particular panel. Generally, all Parties with substantial interest in the matter shall be given the opportunity to be heard. Additionally, a panel may seek information, from any source, including technical information from a group of technical experts if established. However, if the panel seeks information from a source within the territory or jurisdiction of any Party, it must first notify the

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141/ See line 16 of the text, supra, at 150.

government of that Party. The panel holds broad authority to seek such information, and Parties have a first level obligation to respond "promptly and fully" (lines 35-36) to panel requests for information.

Confidential information provided to a panel is to remain confidential and may be released only upon formal authorization of the government or person supplying the information. However, a non-confidential summary approved by the source of the information may be requested and must be provided.

A written panel report is to be issued when the panel has completed its review of the dispute. The report must include the panel's rationale for its findings and recommendations. This report is submitted by the operation of section 14.15 to the Committee on Technical Barriers to Trade in order to help it make its final recommendations or rulings.

Parties to a dispute should be informed of the panel's conclusions before other Parties are informed. This allows the panel to take into account the comments and reactions of the Parties involved in the dispute and presumably make appropriate changes in the conclusions so as to increase the chances for mutually satisfactory solution to the dispute.

6.19.112. Analysis

This annex gives detailed directions for the formation and operation of dispute settlement panels. The entire dispute settlement procedure set out in section 14 and this annex is an improvement, at least in terms of specificity, over the procedure established and sometimes followed under article XXIII of the General Agreement in cases where that article could be applied to matters involving technical barriers to trade.

Despite this improvement, there do remain three unclear terms. The agreement authorizes a list of persons from whom panel members may be selected. These persons are to be "knowledgeable in the area of technical barriers to trade and experienced in the field of trade relations and economic development." (line 6-8) No guidelines are given as to what constitutes "knowledgeable" or "experienced." While these requirements are not specified, the lack of clarity will not be detrimental to the operation of a panel since Parties could presumably reject a nomination on the basis of that person's lack of expertise.

Panel members are preferably to be government officials (line 16). The reason for such preference appears to be that the expense involved (salaries, per diem expenses, travel allowances, etc.) can be borne by the governments making their officials available for participation on the panel.

The second term which is not defined or illustrated is "compelling reasons" (line 19) which is used to indicate when a Party may oppose nominations of panel members. The purpose of such a concept is obviously to limit petty opposition to a nomination which could be used to impede dispute settlement procedures. Given this understanding, "compelling reasons" might include a nominee's lack of expertise or a lack of independence from government instruction. The term presumably would not include such reasons as citizenship or lack of past service on arbitral panels. The key, then, to the interpretation of this phrase is common sense applied in good faith.

The third term which is unclear is "substantial interest" (line 27) which is meant to be a guidepost for what connection with a case a Party must have

in order to speak before a panel. The purpose, similar to the previously described term, is to avoid unnecessary proceedings. "Substantial," then, should be interpreted to mean actual involvement in the dispute or at least being in the position in which significant trade interests are affected by the dispute.

A panel has, by operation of the annex, wide discretion in seeking and obtaining the information and technical advice it deems necessary to make its report (lines 29-30 and 35-37). A panel can seek information or technical advice from any source it finds necessary to consult, and all Parties have a first level obligation to respond promptly and fully to requests made of them.

This annex also provides for protection of confidential information (lines 37-40). There is no provision which authorizes the panel or a Committee official to determine what information is confidential and deserves protection. This allows the Parties or persons involved to decide what is confidential and thereby the information may receive such protection until the material is no longer considered confidential.

6.19.3. Implementation

To implement the provisions in this annex, legislation will need to be enacted which provides that the names of one or two government experts be supplied each year to the Chairman of the Committee for inclusion in the list of government experts which can be nominated to serve on panels. Some agency or interagency group could be delegated the task of selecting officials who have the necessary qualifications ("knowledgeable in the area of technical barriers to trade and experienced in the field of trade relations and economic development," lines 6-8).

Legislation delegating the authority to pursue or defend complaints should also assign to the agencies (or agency) involved the task of approving or opposing the nominations for panel members made by the Chairman of the Committee.

SECTION II: Economic Analysis of Selected Industries

6.20. Impact of the standards agreement on selected U.S. industries

A diversity of technical regulations, standards, certification systems, and testing methods imposed by countries throughout the world impact negatively, to varying degrees, on most products in international trade. Such non-tariff measures (NTM's), numbering in the thousands at the national, state and local levels, impact world trade in virtually all agricultural and industrial products. 142/

In developing information relating to the impact of these NTM's on U.S. trade, the Commission utilized, not only its own expertise, but also surveyed the ATAC and ISAC members, as well as other informed trade sources for their oral and written comments. The results of these inquiries were essentially twofold: (1) Although these trade restrictions affect, to some extent, virtually every product produced in the United States--from food to paint rollers--they are far more restrictive of U.S. exports than imports, on balance, and (2) although most products or industries conceivably are affected, only four product areas could be identified where U.S. exports are significantly affected, i.e., exports of these affected products and industries producing them are currently experiencing significant adverse effects from these practices, but would materially benefit, on balance, from the adoption of this standards agreement. However, it should be reemphasized that the standards agreement, as initialed, is prospective and will have

142/ See p. 1, supra.

limited retroactive impact. Therefore, in reporting on the economic impact of its adoption, the Commission made cetain assumptions regarding the impact on these selected industries of the standards agreement. In this connection, it is anticipated that certain NTM's will be modified as a result of the use of the dispute settlement mechanism, and that in some instances, voluntary compliance will result in the relaxation of other current restrictive practices. Thus, the effects given in each of the following reports represent the cumulative effect that will take place over a number of years.

In the judgment of the Commission, those U.S. industries that are most significantly impacted by existing trade barriers and whose export potential would most likely be improved by adoption of this standards agreement include: farm machinery and equipment; measuring, analyzing and controlling instruments; surgical and medical instruments and apparatus; and precious metal jewelry. Each of the reports which fcllow gives a brief profile of the affected industry, by U.S. Standard Industrial Classification (SIC) group(s), a description of the particular trade barrier(s) affecting trade, the effects of these barriers on U.S. trade, and the probable economic effects on such trade of adoption of this standards agreement.

6.21. Farm machinery and equipment

6.21.1. Industry profile

The machinery and equipment dealt with here includes wheel (farm) tractors, and cultivating, planting, fertilizing, harvesting, and farm dairy machinery, and equipment (SIC 352 pt.) used in raising livestock and preparing farm products for market.

In 1977, U.S. shipments of farm machinery and equiment, by about 1,500 establishments, were valued at about $8.8 billion, or 116 percent higher than in 1972; farm tractors accounted for $2.8 billion of the 1977 total. Production workers numbered about 94,000 in 1977, or 18 percent higher than in 1972.

Exports in 1977 were valued at $1.6 billion, or 219 percent higher than in 1972. In 1977, exports accounted for 18 percent of total U.S. shipments, compared with 12 percent in 1972; Canada received about half of U.S. exports during 1972-77. Other leading markets in 1977 were Australia, France, the United Kingdom, West Germany, Venezuela, Belgium, and Mexico.

In 1977, U.S. imports (which are duty free) were valued at about $1.2 billion, or 162 percent higher than in 1972. The imports-to-consumption ratio was 14 percent in 1977, up from 11 percent in 1972. Canada was by far the principal source of imports (over 50 percent) during 1972-77, followed by the United Kingdom, West Germany, Belgium, and Japan. U.S.-based and owned multinational producers account for a substantial portion of U S. imports.

Farm machinery produced in the United State is aimed at U.S. and Canadian farms that, on the average, are much larger than elsewhere in the non-Communist world. Consequently, a significant portion of U.S. exports consists of large, high-production machinery to Canada and other areas, such as Australia, where there is an increasing trend for the creation of larger farms. There is a significant export trade in components and parts; many of the exports of parts are to numerous foreign subsidiaries of U.S. firms (several in the EEC) that supply smaller equipment to local, third country, and some U.S. markets. U.S.

imports from Canada consist mainly of large cultivating and harvesting machines manufactured by U.S. subsidiaries and a large multinational Canadian firm which also has plants in the United States.

Because of its constantly advancing technology and competitive prices, and through its multinational production, distribution, and servicing facilities, the U.S. farm machinery industry is a strong competitor, both in the United States and world markets. The only exceptions are the non-Communist countries of the Far East to which Japan is the predominant supplier of equipment designed for rice farming.

6.21.2. Effects of the agreement

Despite the work of the International Standards Organization in which the United States is a participant through the American National Standards Institute, there is still no uniformity of technical standards and technical regulations for agricultural equipment from country to country. Thus, exports of agricultural equipment must contend with a multiplicity of standards and technical regulations ranging, for instance, from engine performance to the location of the headlights on tractors. These standards and technical regulations generally apply both to imported and domestic products, but since they were developed on the basis of existing local technology, they tend to favor, intentionally or unintentionally, locally produced articles.

In the foregoing context, a very restrictive practice by many countries (including in small degree the United States 143/) that acts as an NTM on farm

143/ In the United States, Nebraska is the only State that requires testing of agricultural tractors for certification. Results are published in a leading U.S. trade journal.

machinery trade is the requirement for local testing and certification of new models. Since virtually all countries refuse to accept certification tests performed in another country, these requirements significantly restrict trade.

Implementation of the standards agreement would further facilitate world trade in agricultural machinery, particularly if foreign and regional test certifications are made uniform and acceptable. The impact of the implementation on U.S. producers and labor would be beneficial on balance as exports ($1.6 billion in 1977) would likely increase significantly more than imports ($1.2 billion in 1977). U.S. purchasers of agricultural machinery would likely benefit from an even larger variety of equipment becoming available in the U.S. market than heretofore.

6.22. Measuring, analyzing, and controlling instruments

6.22.1. Industry profile

There are about 2,800 establishments in the United States that produce instruments for measurements, analysis, and control (SIC 3811, 3822, 3823, 3824, 3825, 3829, and 3832). Although there are a few leading manufacturers, some of which operate foreign subsidiaries, most are small and employ fewer than 20 people. Total employment increased from approximately 211,000 in 1972 to about 253,000 in 1977, or by 20 percent. The aggregate annual value of U.S. shipments increased from $5.6 billion in 1972 to $9.6 billion in 1977, or by 71 percent. Exports increasd from $960 million in 1972 to $2.2 billion in 1977, or by 129 percent. In recent years, exports amounted to 23-24 percent of U.S. production. Imports increased from $313 million in 1972 to $727 million in 1977, or by 132 percent. In 1977, imports amounted to about 9

percent of U.S. consumption. Canada, EEC/EFTA countries, and Japan are the principal U.S. export markets and also the sources of most U.S. imports. The strong domestic and foreign demand for these instruments can be attributed to the increased enforcement of safety and environmental standards and technical regulations, pressure for improved productivity, need for more efficient use of resources, and continued demand for scientific research instruments. As a whole, the U.S. instrument industry is healthy and is recording increased domestic and foreign sales.

6.22.2. Effects of the standards agreement

There are scores of voluntary industry design and/or performance standards in the United States which affect most instruments discussed herein. However, all aeronautical instruments must conform to the Technical Standard Orders issued by the Federal Aviation Administration (FAA), or the instruments must be certified by that agency.

As mentioned, U.S. instrument standards are largely voluntary industry standards. The relatively free business atmosphere in the United States makes it less likely for an industry standard to be used to discriminate against U.S. imports. Because of the superior quality of most U.S. instruments, the adoption of the standards agreement is unlikely to have an adverse impact on U.S. imports, U.S. industry, labor, and consumers. The aeronautical standards and technical regulations issued by the FAA are exempt from the agreement; these standards and regulations are intended to assure maximum quality and accuracy of the aeronautical instruments.

As in the United States, most foreign labeling, marking, and packaging standards, as well as design and peformance standards, are voluntary industry standards. However, according to some ISAC members, it is common practice for foreign governments, associations, importers, and/or buyers to require that an imported instrument meet the requirements of particular industry standards. These representatives are not overly concerned about foreign labeling. marking, and packaging standards; they believe, however, that design and performance standards are discreetly but effectively used by many foreign nations to protect the domestic industry from foreign competition. Those countries mentioned most often were West Germany, France, and Japan. Canadian and Mexican industry standards do not appear to be significant impediments to international trade. As a result of these and other nontariff barriers, many smaller U.S. firms have written off foreign countries as markets for their products and a number of larger companies have felt compelled to establish foreign subsidiaries in order to penetrate local markets.

Many U.S. high technology instruments are considered superior in performance and quality to foreign-made instruments, and are highly regarded by domestic and foreign end users. The adoption and enforcement of a uniform standards agreement will enable the U.S. industry to significantly increase its export, which have been expanding in recent years and amounted to $2.2 billion in 1977. These increased export shipments will likely have a significantly positive impact on the U.S. industry and labor; the consumer, however, will not likely be affected.

6.23. Surgical and medical instruments and apparatus

6.23.1. Industry profile

There are over 500 manufacturing establishments producing surgical and medical instruments (SIC 3841) in the United States. Approximately half of these plants are located in states along the Atlantic coast. Plants owned by the eight largest companies account for more than half of all shipments. Employment in the industry increased about 8 percent annually during 1973-78 and was estimated at 50,000 in 1978. Annual industry shipments of surgical and medical instruments doubled during the period 1973-78, rising from $1.2 billion to an estimated $2.4 billion. Over the same period, U.S. exports rose from $169.0 million to an estimated $416.0 million, or by 146 percent; such shipments accounted for approximately 16-18 percent of total industry shipment. The principal foreign markets in 1978 were Canada (19 percent), Japan (11 percent), West Germany (9 percent), United Kingdom (6 percent), and France (6 percent).

U.S. imports of surgical and medical equipment rose from $31.0 million in 1973 to an estimated $81.0 million in 1978, or by 162 percent; during that period imports accounted for about 3-4 percent of annual U.S. apparent consumption. The principal suppliers in 1978 were West Germany (39 percent), Japan (20 percent), Ireland (10 percent), United Kingdom (6 percent), and Canada (3 percent). The strong U.S. surgical and medical equipment industry is well recognized for its superior product and is expected to continue to find expanding markets both in the United States and abroad.

6.23.2. Effects of the agreement

There are no known U.S. standards currently affecting imports of medical and surgical equipment, other than the marking requirement specifying the country of origin. However, the Medical Device Act of 1976, when implemented, will require all imported medical devices to meet U.S. health and safety requirements. Enforcement of this regulation by the Food and Drug Administration has not yet occurred. It is expected, however, that when the FDA begins to monitor imports of such devices to determine their compliance with the requirements included in the Act, there will be some moderate decline in the level of imports.

Assuming that the effects of the adoption of this standards agreement will be less stringent than those requirements included in the Medical Device Act, U.S. imports of medical devices will likely recover to their current levels. However, such adoption will probably have little, if any, effect on the U.S. industry, labor, and consumers because of the superior quality of U.S. produced devices.

Most EEC countries have certain design standards, e.g., color and shape, (which act as effective nuisance restrictions), rather than performance standards, that restrict imports of medical equipment from entering their respective markets. These design standards severely curtail the volume of U.S. exports, even though the United States has an established reputation for advanced technology and consistent excellent quality in the medical instrument industry.

Assuming the elimination by foreign countries of certain of their design standards, the adoption of this standards agreement would substantially increase U.S. exports of medical instruments, which, in 1978, amounted to an estimated $416.0 million (about 16-18 percent of total shipments). In view of the increasing demand for better health care abroad and the superior quality of U.S. produced instruments, U.S. exports would most likely expand after the adoption of this agreement, with a resultant increase in production and employment levels. Assuming expansion in U.S. output, there would be no adverse impact on domestic consumers.

6.24. Precious metal jewelry

6.24.1. Industry profile

Precious metal jewelry (SIC 3911) is produced in the United States by skilled craftsmen in a large number of small establishments located mostly in the northeastern part of the country. The value of U.S. shipments, exports, imports and consumption increased substantially in 1972-77. Shipments rose steadily from $1 billion (1972) to $1.7 billion (1977) while imports climbed from $51 million to $307 million in the same period. Imports grew from 5 percent of consumption in 1972 to 17 percent in 1977. Exports rose each year from $40 million in 1972 to $87 million in 1977. Employment also increased each year, reaching an estimated 41,900 employees in 1977. A major reason for the large increase in the value of trade is the sharp rise in the price of precious metals and jewels, which account for the major share of the manufacturing cost of precious metal jewelry. The strength of "conspicuous" consumption as a market force, as well as the desire to offset dwindling

currency devaluations by investment in articles with intrinsic and rising values, have promoted demand despite the rise in the cost of jewelry.

6.24.2. Effects of the agreement

There are no known U.S. standards or technical regulations affecting U.S. imports of precious metal jewelry other than the federal regulations requiring that any labeling of jewelry of precious metal or precious stones be accurate; although marking of metal content, or gem type, is not required by law, any such voluntary marking must be free of deceptive practices. Since the standards agreement conforms to current U.S. practice by prohibiting such deception, U.S. adoption of this agreement will have no effect on U.S. imports, industry, labor, and consumers.

U.S. exports of precious metal jewelry have been limited by marking requirements and karat-gold content regulations as discussed below.

In the United Kingdom, France, Switzerland, and Italy, every piece of precious jewelry must be tested and marked. In France, the Napoleonic Code specifies 6 entry ports where the jewelry must be tested and marked. The testing process damages the article, so it must be refinished. The testing of imports in those countries is reportedly a lengthy procedure, usually 3 or 4 months, and ties up inventory and funds.

In Spain, France, and Italy, no article may be designated as gold unless it is 18 karat. Thus, gold jewelry may not be sold as such if its purity is less than 18 karat.

Switzerland is the only country requiring that silver plate be made by fusing the silver to the base metal rather than by electroplating.

The Canadian province of Quebec requires that markings be in two languages, adding to the manufacturers' costs.

The combined impact of foreign standards on the U.S. industry is to severely restrict U.S. exports, as well as to lower profits because of the higher cost of doing business with the countries involved. Foreign adoption of this agreement on standards would minimize U.S. export difficulties, lower the cost of doing business and result in a substantially greater volume of U.S. exports, which amounted to about $87 million in 1977--5 percent of total shipments. The resulting increased production requirement would probably necessitate a rise in employment; U.S. consumers, however, would not likely be affected.

FOREWORD

Section I of this document represents legal analysis of draft agreements negotiated at the Multilateral Trade Negotiations (MTN) in Geneva under the auspices of the General Agreement on Tariffs and Trade. Section II relates to selected U.S. industries that have been affected by existing government procurement policies, which would, on balance, materially benefit from the adoption by all major trading countries of uniform practices for government procurement. It was prepared as part of an investigation requested by the Senate Committee on Finance and the House of Representatives Committee on Ways and Means and instituted by the Commission on September 1, 1978 (Investigation No. 332-101, 43 F.R. 40935, of Sept. 13, 1978), to determine the effect on U.S. trade and industry of the adoption of agreements to be concluded in Geneva.

This study along with the other 10 volumes, is being transmitted in accordance with the request in April 1979 by the Finance Committee.

As noted throughout the reports, some of the agreements are incomplete and the status of signing of all of them remains open to the questions whether domestic legislatures (including the United States Congress) will approve all or any of them and whether additional signatories will appear. At present, we are informed by the administration that a proces verbal has been initialed by 24 countries. The attachments to the proces verbal have been initialed as follows:

(A) Standards: U.S., EC-9*, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain, Hungary, Czechoslovakia, Bulgaria.

(B) Government Procurement: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, and Argentina (with reservation).

(C) Subsidies/CVD: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina (with reservation), Spain (with reservation), Hungary, and Bulgaria.

(D) Meat: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Hungary, and Bulgaria.

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* EC-9" refers to all members of the European Communities.

(E) Dairy: DC version** was initialed by U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain (with reservation), and Bulgaria. Hungary initialed the Agreement with no designation as to whether it was the DC or LDC version. There were no known signatories to the LDC version.

(F) Customs Valuation: DC version was initialed by U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, and Bulgaria. Argentina and Spain initialed the LDC version. Hungary and Czechoslovakia initialed the valuation attachment with no indication as to whether it was the DC or LDC version.

(G) Licensing: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain (with reservation), Hungary, and Bulgaria.

(H) Agriculture Framework: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain, Hungary, Czechoslovakia.

(I) Group Framework: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain, Hungary and Czechoslovakia.

(J) Tariff Negotiations: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Hungary, Czechoslovakia, and Bulgaria.

(K) Civil Aircraft: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, and Switzerland.

(L) Antidumping: DC version was initialed by U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, and Spain. Hungary and Czechoslovakia initialed the antidumping attachment without designating the DC or LDC version. There were no known signatories to the LDC version. McNamara.

** "DC version" is the developed country version of the Arrangement on Dairy. "LDC version" is the one submitted by the less-developed countries.

SUMMARY OF CONTENTS

7. AGREEMENT ON GOVERNMENT PROCUREMENT

SUMMARY OF CONTENTS

CONTENTS

CONTENTS

CONTENTS

AGREEMENT ON GOVERNMENT PROCUREMENT

SUMMARY OF ANALYSIS

Government procurement as a trade barrier

Government procurement is the purchase of goods and services by governmental entities for their own consumption. It is distinguished from state trading in that the latter involves government purchasing with a view to commercial resale or for use in the production of goods for sale. The United States spent some $84 billion on government procurement in 1977; estimates of such expenditures elsewhere are unavailable.

Procurements are administered in different ways. The United States procedures and practices are found in statutes and their implementing regulations. They are easily identified, open, and regular in their administration, with provision of an extensive review and appeals process -- in other words, they are "transparent." In contrast, foreign nations' procurement practices are rarely published, often informal, and contain few remedies for disputants. These "invisible" practices are justified on the basis of an asserted danger of collusive bidding, protection of business secrets, and administrative costs.

Government procurement programs are often administered to implement social, economic, or political goals besides their ostensible goal of efficiently providing for government needs for goods and services. Included

among these programs are preferences for domestic industries to ensure that (1) certain industries vital to national defense are maintained; (2) economically depressed regions are assisted; (3) certain industries, such as ones involving sophisticated technology, are encouraged; (4) labor skills are not exported; and (5) balance of payments problems are ameliorated. Each of these programs involves discrimination in purchasing against foreign suppliers, either through percentage-of-bid-value preferences or through explicit or implicit bans on foreign purchases.

The result of such discrimination is an effective nontariff trade barrier. The increasing procurement market and beliefs that these programs interfere with the optimal allocation of world resources has led to calls for removal of procurement barriers.

Genesis of the procurement code

The General Agreement on Tariffs and Trade (GATT) excludes government procurement expressly from its national treatment obligations (Article III:8) and implicitly from its general most-favored-nation (MFN) clauses (Article I:1). However, a type of most-favored-nation treatment apparently applies to at least some procurements by state trading enterprises: parties must accord "fair and equitable" treatment to foreign suppliers when making such purchases (Article XVII:2). Because this provision has never been tested, its scope and meaning are unknown.

The advent of the U.S. balance of payments program in 1962 -- which imposed an exclusionary preference for domestic suppliers -- precipitated renewed complaints from abroad about American procurement policies. The United States responded with evidence that foreign practices, although less transparent than American practices, were equally discriminatory in effect.

The Organization on Economic Cooperation and Development (OECD) initiated studies of its members' practices with a view toward reducing the trade barriers raised by certain government procurement practices. Substantial progress has been made towards that goal. Also, European Free Trade Associations (EFTA) and European Communities (EC) countries have begun adopting regulations for the members of their respective organizations in their procurement practices.

The Declaration of Tokyo initiated the current round of trade talks with a view toward eliminating nontariff trade barriers among GATT members. The proposed code has arisen from the resulting negotiations, although the major participants have been the OECD members which are also parties to GATT.

The Trade Act of 1974 authorized the U.S. negotiators to seek agreements on nontariff barriers to trade and on the "reform" of GATT. The legislative history indicates that government procurement was to be an area of negotiation. Although the code does not specify its relationship to the GATT, it appears that it was intended to be a separate agreement. This status presents at least three significant difficulties. First, the code is a conditional MFN agreement. Article XVII:2 of the GATT provides for "fair and equitable" treatment to be accorded to GATT members with respect to their procurements, which may be interpreted by some nonparties as requiring the extension of the benefits of the code to them, leaving the extent of the government procurement exclusion uncertain. It is unclear whether Article XVII:2 can be invoked to grant its benefits to code nonsignatories, and disputes under GATT are therefore possible. Second, it is also uncertain whether parties to the code can invoke the GATT disputes settlement provisions when the consultative mechanism established in the code produces

unsatisfactory results. The code assumes that the GATT is a separate agreement, so that remedies under the code are exclusive. But it appears possible that a disaffected party may seek to bootstrap itself into the GATT dispute settlement mechanism by means of Article XVII:2. Finally, the United States is a party to a number of bilateral Friendship, Commerce, and Navigation (FCN) treaties containing unconditional MFN clauses. The status of the conditional MFN code vis-a-vis these treaties cannot now be determined.

The issues

The United States has viewed three propositions as essential to the success of a procurement agreement. First, maximum coverage of procuring entities must be attained while achieving an agreeable balance of coverage in terms of quality (type) and quantity (value) of goods procured. Second, transparency -- publication or other dissemination of information concerning procurement procedures, practices, opportunities, and results -- must be maximized to render the agreement as self-policing as possible. Third, there must be agreement on a minimum set of ground rules respecting procurement procedures, so that obligations and opportunities are evenly distributed and some minimum international standards may be expected by disparate suppliers.

In addition to these principles, two other issues have been of primary concern to the negotiating parties. First, developing countries seek special and differential treatment in the agreement because of their special concerns with establishing domestic industry. Second, the U.S. desires an effective dispute settlement mechanism.

The code

1. Coverage. -- The code defines scope and coverage as a function of four factors: (1) types of procurement actions; (2) value of the procured

product; (3) identity of procuring entity; and (4) specific exclusions from coverage. Each of these factors must be taken into account when determining the applicability of the code to any government contract action.

The code applies to "any law, regulation, procedure and practice regarding the procurement of products. . . ." (Part I:1(a); Part II:1). Both formal and informal practices regarding procurement are thus covered. However, only procedures and practices pertaining to procurement of products -- not services -- are covered, unless the value of services incidental to the supply of products is less than the value of the products. The threshold value at which contracts will become covered is SDR $150,000 (about $193,500; SDR's are "special drawing rights"). Further, the code purports to apply to procurement by entities "under the direct and substantial control" of the parties to it. The extent to which this normative rule is followed in actual practice will be found in a list of covered entities in Annex I. Althougn the language refers only to "entities" as being included on the list, it appears that specific procurement laws, practices, and programs -- which affect many or all entities otherwise covered -- may also be noted on this or another annex as being excepted from the code.

The entity list is the crucial element in negotiating an agreement which achieves meaningful coverage while reflecting a balance of concessions in terms of quality and quantity of procurements newly freed to foreign competition. The list is essential because of the difficult questions arising from the normative rule "under the direct or substantial control . . .," which is the standard purportedly used now and in future negotiations concerning the entity list. For example, agencies of ministerial rank clearly are to be

covered. More remote entities such as government-owned utilities and carriers and independent legal corporations must be examined in light of legal and financial ties to the central government and the practical relationships between the two. Even more difficult problems are presented by application of the code to entities in a federal system. Because treaties are binding upon states and localities under the supremacy clause, and regulation of this aspect of foreign commerce may be within the exclusive province of the federal government, a strong argument may be made that, for purposes of the code, state and local procurement practices are covered even if in other circumstances such political subdivisions are considered independent. However, under Part I:2 state and local units are excluded. This issue, like others concerning coverage, has thus been determined on an ad hoc basis, not by normative rules.

Other provisions of the code must also be examined to determine whether a procurement otherwise covered is, in fact, excluded. Among procurements or procurement practices not covered are those by state or local governments, unless specifically included on Annex I (Part I:2); tied aid to developing nations (Interpretative Note to Part I); import regulations and duties (Part II:2); some procurements of developing nations (Part III:4-5); licensing and offset arrangements (Part V:14(h)); and small and minority business set-aside programs (note to U.S. offer on Annex I). Another type of exception occurs where a procurement involves nations which have not consented to application of the code between themselves (Part IX:9).

The most far-reaching exceptions are in Part VII. They are of two types: exceptions intended to protect national security and defense programs and ones intended to preserve some discretion by governments in their attempts

to assist special groups of needy persons or in their exercise of the police power. The thrust of the national security exception is the preservation of traditional actions taken to ensure supplies of war materials and to prevent release of vital information. It is unclear whether the exception extends to many programs designed to protect domestic industries producing goods which are used by the military but are not usually considered essential defense materials; such questions must be resolved on an ad hoc basis. The entity list or another annex will also contribute to the settlement of this question, as in the case of most present U.S. appropriations acts restrictions, which are excepted by notes to Annex I.

2. Obligations. -- The universal commitment of the code is to accord national and most-favored-nation treatment to the suppliers and products of all parties. The national treatment and MFN principles are further repeated in relation to specific obligations found elsewhere in the agreement; for example, in qualifying suppliers, maintaining selective lists of suppliers, opening and considering bids, in single tendering, and in use of offsets. The MFN obligation may be qualified if the double entity list system is adopted. In addition, least-developed nations are entitled to the code's benefits without adhering to it.

Other parts of the code address the barriers raised by practices associated with administering procurements. In particular, an attempt is made to render the procedures as transparent as possible by ensuring that necessary procurement information is available and that certain minimum ground rules are universally observed. Thus, specific information must be made available with regard to contracting opportunities and qualification of suppliers, and

opportunities must remain open sufficiently long to account for foreign suppliers (Part V).

Other provisions require the use of internationally recognized specifications where possible (Part IV), discourage the use of single tendering, and prescribe accepted methods of tender, evaluation, and award (Part V). Further, "pertinent" information must be disclosed to disappointed tenderers and their governments (Part VI). The attempt to secure openness and regularity through such provisions as these reflects the desire to construct a self-policing agreement. Whether the attempt is successful is partially contingent on the manner in which the parties exercise the discretion vested in them by the qualifications modifying the code's obligations; for example, the scope of "pertinent" information may be easily abused.

Besides the obligations imposed with respect to all procurements, the parties undertake specific responsibilities regarding developing and least-developed countries (Part III). In general, these involve the recognition of the special concerns of such nations with encouraging the growth of their domestic industrial base and safeguarding their balance of payments positions. To this end the developed nations party to the code will accept less in the way of coverage and more derogations in obligations, while undertaking to provide special technical assistance to these nations in procurement matters. The agreement generally allows conditional MFN treatment, but least-developed countries need not sign the code to obtain special consideration from developed nations party to it. Few developing nations, however, have thus far evidenced interest in adhering to the code.

3. Disputes settlement. -- The code is designed to be self-policing in an attempt to avoid cumbersome and often inconclusive disputes settlement

procedures which would be of little value once an award has been made. Thus, specific rules are set forth concerning the qualification, tendering, and awards process (Part V). Certain information surrounding these procurement steps must be readily available (Part VI). These transparency requirements are designed to discourage disputes from arising in the first instance by subjecting the parties to maximum public scrutiny with the resulting tendency to adhere to the community consensus on proper administration of its obligations.

If a tenderer is dissatisfied with a party's compliance with the rules, a two-tier disputes settlement process is provided. First, the supplier must seek information surrounding the procurement from the government involved; if he is dissatisfied, his government may intercede on his behalf to obtain further information (Part VI).

The second tier of the process involves the formation of ad hoc panels to study disputes failing bilateral consultation among the concerned parties (Part VII). This process may be invoked whenever a party considers that benefits arising from the code are being nullified or impaired or that the code's objectives are being impeded by conduct of another party. The concept is analogous to that found in the GATT; further, the precise procedures mirror those found in the framework agreement, also a part of the MTN, which is intended as a statement of uniform GATT practices. Because the code apparently does not amend the GATT, and thus will not become a part of it, the sanctions possibly obtainable under GATT procedures are unavailable here. Rather, as an ultimate remedy a party may be authorized to suspend application of the code with regard to the offending party or parties.

4. Administration. -- The code is to be administered by a Committee on Government Procurement, composed of representatives from each of the parties. The primary functions of the Committee are to facilitate the dispute settlement process and to conduct reviews and negotiations of the operation of the agreement pertaining to expanded coverage and necessary improvements. The work of the Committee may be performed initially on particular issues by appointed panels or working parties. The agreement will be serviced by the GATT Secretariat.

Implementation

The code contains several obligations which conflict with U.S. law and practice. Most notable among these are the national treatment and MFN principles which cannot be reconciled with various buy-American programs or with international arrangements pertaining to procurement in defense matters. Buy-American provisions conflicting with the code must be eliminated. A summary of these provisions may be found in the Overview report. Because it may be desirable for these programs to continue in force for nations and procurements not covered by the code, and because the effect of the code on individual contracts must be determined on an ad hoc basis, an implementing statute must account for noncovered procurements in a manner reflecting Congressional policy in these areas. For example, the Congress may wish to raise the bid differentials, or ban foreign bids completely, for noncovered contracts. The same possibilities hold for treatment of nations which do not sign the code, but wish to bid on covered procurements. The Congress may wish to further distinguish between those nations - i.e., between developed, developing, and least-developed countries. Among policy considerations in

this area are the conditional MFN status of the code, a desire to encourage nonparties to sign, policies of special treatment for developing nations, and the desire to maximize competition for government contracts.

Other obligations will also require examination of U.S. procurement procedures. For example, regulations for advertising contract opportunities presently vary to some extent with the time limits enumerated in the code. Moreover, the United States will be obligated to adhere to certain publication requirements and data dissemination guidelines which must be incorporated into current law or regulations. These obligations will entail only minor adjustments in U.S. procedures, however.

A rule of origin to carry out the conditional MFN obligations must be enacted. The code suggests that the traditional "substantial transformation" rule used by the United States is expected to be adopted in this regard.

The United States is engaged in several international agreements respecting procurement. In general, these agreements are associated with the NATO standardization program. Because their subject matter is generally military goods, the agreements appear to be outside the scope of the code. Nonwarlike goods procured pursuant to these agreements may fall within the MFN obligations, however, unless elsewhere excepted. A careful study of Friendship, Commerce, and Navigation (FCN) treaties with nonparties which contain unconditional MFN clauses must be made.

Finally, the implementing legislation should specify what, if any, private rights of action are created by adoption of the code. Technical procurement regulations, most of which are already incorporated into U.S. law, should be enforceable by foreign bidders adversely affected by their violation. However, issues more closely related to policy matters covered by

the code--concerning qualification under rules of origin, for example--may better be left to administrative resolution without judicial interference. On the domestic side, a means of providing domestic suppliers with a forum for initiating inquiries into foreign actions contrary to the code must be adopted. This machinery is necessary for all the codes, and therefore may be better considered in an omnibus fashion.

Economic effect

The economic effect of the adoption of the Agreement on Government Procurement on U.S. industry may not be known for several years. Foreign producers and exporters have indicated that U.S. Government procurement practices, particularly the Buy American Act, are among the most formidable nontariff barriers to increasing their share of U.S. Government procurements. On the other hand, U.S. industry representatives claim the foreign "buy national" and other policies are even more restrictive of U.S. exports and an enlarged share of the foreign government procurement markets. While the policies of the United States are apparent and relate largely to price differentials, foreign government policies are rarely evident and often allegedly border on embargoes. If foreign signatories adhere in good faith to the provisions and stipulations of the Agreement on Government Procurement, adoption of the agreement should theoretically, on balance, be beneficial to the U.S. export trade; however, few individual industries, if any, will realize any major increase in their export potential.

AGREEMENT ON GOVERNMENT PROCUREMENT

7.0 INTRODUCTION

In searching for an optimal allocation of their resources, the contracting parties to the GATT devised rules to limit members' interference with international trading markets. 1/ Such interference may be accomplished in a number of direct and subtle ways; for example, directly through quantitative restrictions, tariffs, or procedural devices, or indirectly through various forms of subsidies to private firms or operation of state trading enterprises. While the GATT attempts to limit the conduct of governments in these areas, other indirect, nontariff barriers to trade such as restrictive technical standards and government procurement practices have heretofore remained unrestrained by the GATT or other multilateral agreements. One purpose of the Tokyo Round of trade negotiations was to ameliorate these sorts of distortions in international trade. 2/

Government procurement -- the purchase of goods and services by governmental entities for their own use 3/ -- offers ever-increasing

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1/ See generally J. Jackson, World Trade and the Law of GATT 329-32 (1969) (hereinafter cited as Jackson).

2/ Declaration of Ministers, 20th Supp. BISD 19,20 (14 Sept. 1973).

3/ Government procurement activities are distinguished from state trading matters by the purpose of the purchases involved: government procurement involves the purchase "of products. . .for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale." GATT Art. III, para. 8(a). See also Art. XVII, para. 2, which excepts from the state trading provisions "imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale."

incentives for nations to protect domestic industry. 1/ The potential trade leverage is impressive: the United States alone spent $84 billion in 1977 for the acquisition of goods and services, 2/ with unknown additional millions expended by state and local governmental procuring agencies. The potential procurement market outside of the United States, now essentially closed to American exporters, may amount to $20 billion. 3/ Because different criteria may be used to calculate actual procurement expenditures, these bare figures may not be easily compared, but they clearly represent a significant amount of trade subject to manipulation in favor of domestic concerns.

All governments ostensibly share a common goal of efficiency in their xpenditures of public moneys. But a variety of provincial concerns have led most nations effectively to withdraw their government purchases from the international marketplace, leaving competition to domestic or, occasionally, regional suppliers. These concerns are reflected in a number of procurement policies designed to insulate domestic procurement markets from foreign competition, including programs to (1) assist in erasing balance of payment difficulties; (2) ensure domestic sources of supply for national security needs or implement other security-related programs; (3) promote the growth of certain industries, particularly those involving sophisticated technology; (4)

1/ K. Dam, The GATT: Law and International Economic Organization 199-202 (1970) (hereinafter cited as Dam).

2/ Federal Acquisition Act of 1977, Report of the Comm. on Gov'l Affairs, S.Rep. No. 715, 95th Cong., 2d Sess. 3 (1978) (hereinafter cited as Senate Report). The $84 billion involved some 13 million contract actions. Id. In 1976 civilian and military procurements totaled $18 billion and $40.1 billion respectively. Id. at 39.

3/ Hearing Before the Subcomm. on Int'l Finance of the Senate Comm. on Banking, Housing, and Urban Affairs, 95th Cong., 2d Sess. 4 (1978) (testimony of Allan W. Wolff).

assist regions suffering from persistent unemployment or other economic problems; and (5) bar "exportation" of certain types of labor skills. 1/ Such programs share a common characteristic -- to a greater or lesser degree each grants a bidding preference to domestic suppliers or prohibits outright the procurement abroad of goods and services.

Various procurement practices promote domestic preference programs. For example, in the United States the Buy American Act, 2/ as implemented by Executive order, 3/ requires a percentage-of-contract-value preference to be granted to domestic suppliers of products for public use in the United States. 4/ Other statutes and executive actions prohibit the purchase of certain goods abroad, 5/ prohibit the transport of certain articles on U.S. flag carriers and grant preferences to such carriers in other instances, 6/ and establish preferences for various economically and socially disadvantaged

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1/ See Dam, supra page 2 n.1 at 200; Marks and Malmgren, "Negotiating Nontariff Distortions to Trade," 7 L. and Pol'y in Int'l Bus. 327, 403-04 (1975).

2/ 41 U.S.C. 10a-10d (1976). This law and each of those subsequently described in the text are discussed primarily at sections 7.1.31 and 7.2.31 in this report.

3/ E.O. No. 10582, as amended by E.O. No. 11051.

4/ See generally Chierichella, "The Buy American Act and The Use of Foreign Sources in Federal Procurements -- An Issues Analysis," 9 Pub. Contract L.J. 73 (1977); Trainor, "The Buy American Act: Examination, Analysis and Comparison," 64 Mil. L.R. 101 (1974).

5/ Pub. L. No. 90-500, 82 Stat. 849 (1968), section 404, Pub. L. No. 94-212, 90 Stat. 153 (1976), sections 709, 723, 729 and tit. IV (Department of Defense appropriations restrictions); Pub. L. No. 94-91, 89 Stat. 441 (1975), section 503 and Pub. L. No. 95-81, 91 Stat. 354 (1977), section 506 (GSA appropriations act restrictions); 46 U.S.C. 292 (Supp. V 1975) (dredging by foreign vessels); and Pub. L. No. 95-421, 92 Stat. 923 (1978) (AMTRAK Appropriations Act restrictions).

6/ 10 U.S.C. 2631 (1976) (vessels); 46 U.S.C. 883, 1241(b)(1) (Supp. V 1975) (vessels); and 49 U.S.C. 1517 (1976) (air carriers).

groups or businesses. 1/ In addition, there are various state and local "buy-American" laws and regulations. 2/

These American practices are found in published laws and regulations. In contrast, most other nations implement similar policies through less easily identifiable means. Discriminatory preferences abroad are more often found in unofficial administrative practices than statutes. Further, procurement procedures may be administered in ways disadvantaging potential foreign suppliers. For example, foreign firms may not be included on lists of potential suppliers; selective tendering procedures may be used to direct procurement to single domestic sources; technical specifications may be constructed to cause foreign bidders difficulty in submitting responsive bids; notice of contracting opportunities may be negligible; a limited time period for responses may be set so that only domestic firms are effectively allowed to bid on contracts; and finally, information concerning the proper methods of tendering and other data pertinent to competitive bidding are rarely supplied by governments. 3/ These practices not only reflect protectionist attitudes favoring domestic sources, but also result from beliefs that they are necessary to prevent collusive bidding and restrain administrative costs.

1/ 18 U.S.C. 4124 (1976) (prison-made goods); 41 U.S.C. 48, 252(b) (1976) (handicapped-made goods and small businesses, respectively); 15 U.S.C.A. 631-44 (West Supp. 1978) and Pub. L. No. 95-507, 95 Stat. 1757 (1978) (small, minority, and labor surplus area businesses); 22 U.S.C. 2352 (1976) (small businesses); 41 CFR Ch. 1 (1977) and E.O. 12073 (labor surplus areas); 32A CFR Ch. 1 part 134 (1977) (Defense Manpower Policy); 42 U.S.C. 6705(f)(2) (1976) and Pub. L. No. 95-507, 95 Stat. 1757 (1978), E.O.'s 11158, 11458, and 11625, and 41 CFR 1-1.13 (1977) (minority businesses).

2/ For a recent compilation, see General Accounting Office Report ID-79-1, pp. 2, 20-25 (November 30, 1978).

3/ See generally Baldwin, Nontariff Distortions of International Trade 58-70 (1970) (hereinafter cited as Baldwin); Dam, supra page 2 n.1, at 202-05.

The use of discriminatory procurement practices to attain socioeconomic ends has been criticized for poor results in many cases and for greatly increasing the costs of goods and services which governments purchase. 1/ The impediments to world trade are also significant: one recent study concluded that the discriminatory impact of American procurement practices on potential imports was approximately $1 billion, compared with an EC total of approximately $545 million. 2/ While estimates for other major markets are not available, major export possibilities clearly have been foreclosed by procurement policies.

The GATT and Government Procurement

In the negotiations to establish the International Trade Organization (ITO), the United States proposed that the national treatment and most-favored-nation (MFN) principles fundamental to the trade agreement be extended to government purchases. 3/ The draft provoked strong objections by other parties, however, because of the domestic concerns discussed above. Instead, government procurement was expressly excepted from the general national treatment obligations by GATT Article III:8 4/ and from the rules for

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1/ See, e.g., Miller, Government Contracts and Social Control: A Preliminary Inquiry, 41 Va. L. Rev. 27, 54-58 (1955).

2/ W. Cline, N. Kawanabe, T. Kronajo, and T. Williams, Trade Negotiations in the Tokyo Round: A Quantitative Assessment 193 (1978).

3/ This discussion is largely drawn from Jackson, supra page 1 n.1, at 290-93. See also Dam, supra page 2 n.1 at 199-200, 205-09.

4/ Article III:8 provides:

> (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in production of goods for commercial sale.
>
> (b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

state trading by Article XVII:2. 1/ The general MFN obligations of Article I do not expressly include government procurement, but Article I:1 incorporates Article III:2,4, 2/ which encompasses products procured from abroad. Although the question whether MFN obligations thus apply to government procurement actions has not been raised in GATT proceedings, 3/ it is generally thought that the exclusion of procurement from Article III by its paragraph 8 holds not only for purposes of applying Article III, but also for any interpretation

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1/ Article XVII:2 states:

> The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.

2/ Article III:2 states:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

Paragraph 4 then provides:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

3/ The closest related GATT proceeding was Belgian Family Allowances, 1st Supp. BISD 59 (1953), where the panel found that Article III:8 was inapplicable to consideration of the internal taxes associated with government procurement at issue. The panel further stated that the provisions of Article XVII:2 referred only to purchases by state trading enterprises and not to matters with which Article III was concerned.

f that article where it is elsewhere incorporated by reference. Therefore, .he exclusion of procurement from Article III carries through to Article I so .hat MFN obligations are also inapplicable. 1/ In addition, the state .rading rules of Article XVII include in paragraph 2 an obligation to "accord .o the trade of the other contracting parties fair and equitable treatment." .o known complaint by a contracting party has been based on this provision, nd it is uncertain whether it is intended as an MFN obligation even if limited in application to Article XVII.

Two aspects of these GATT rules are particularly germane to :onsideration of the proposed Agreement on Government Procurement (hereinafter lso referred to as the code). First, the exception does not extend to roducts imported with a view to use in production of "goods," a term which :xcludes services according to an Interpretative Note. 2/ Whether this .nterpretation is correct is disputed, 3/ but the important idea here is that procurement of goods has long been viewed as involving separate considerations 'rom procurement of services, a view carried into the coverage provisions of .he code. A second significant aspect of the exception is that the 'governmental agencies" referred to in Article III were considered by the draftsmen to include "all governmental bodies including local authorities." 4/

1/ This analysis is advocated in support of the legality under GATT of the roposed conditional MFN application of the procurement code, and will be urther examined infra at pages 50-54.

2/ See Article XVII:2 in GATT Annex I. Because the comparable language of rticle III:8 was intended to cover the same subject, the Interpretative Note of this Article XVII paragraph should be equally applicable to Article III.

3/ Professor Jackson argues that the intent of the language was to narrow .he exception, not broaden it; exclusion of services from the scope of "goods" ould have the latter effect. See Jackson, supra page 1 n.1, at 292 n.14.

4/ Id. at 292 (citing U.N. Doc. EPCT/174, at 9 (1947)).

An acceptable formula for coverage in the procurement code proved elusive; the GATT definition was not adopted. These two issues will be discussed below with respect to the proposed code. 1/

While domestic concerns led to the rejection of the original United States procurement proposal for the ITO, the competing consideration of ameliorating trade barriers soon spawned complaints from abroad about explicit American discriminatory procurement procedures. 2/ The United States subsequently pointed out that the practices of other nations, although not as highly visible, were at least equally effective as a barrier to American exports. The issue was of primary concern to the industrialized nations, and in response to the increasing interest the OECD initiated a study of its members' practices in 1963. 3/ Although progress toward agreement on the basic elements of a procurement code has been made, final OECD initiatives were integrated into the current negotiations.

Both the EC and EFTA organizations have taken steps to at least partially eliminate discriminatory procurement practices among their member states. 4/ In December 1976 the EC Council published a directive intended to harmonize its

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1/ See section 7.1.2 infra.

2/ In 1962 the Department of Defense imposed a 50 percent value differential upon foreign tenders under the Balance of Payments Program, thus precipitating the initial complaints.

3/ The results of the study were published in a 1966 booklet entitled "Government Purchasing in Europe, North America and Japan." An updated study was recently concluded in anticipation of the current negotiations. See Government Purchasing (OECD 1976).

4/ See Dam, supra page 2 n.1, at 205-209; Executive Branch GATT Studies, No. 5, Subcomm. on Int'l Trade, Sen. Comm. on Finance 79-84, 93d Cong., 2d Sess. (1974). The basic EC rules are contained in the Directive of 21 Dec. 1976, O.J.L. 13 of 15 Jan. 1977.

members' practices and open procurement opportunities to competition among their suppliers. Article XIV of the EFTA Convention obligates the members to work toward the elimination of certain governmental practices, including those relating to procurement. Pursuant to that Article, the EFTA members have adopted a set of procurement rules pertaining to publicity of procurement opportunities, use of selective or single tendering techniques, domestic preferences, and dispute settlement. Like the EC rules, the EFTA agreement only applies to the treatment accorded suppliers of member states; discriminatory practices may be continued with respect to third parties.

A more broadly based attempt to address procurement problems was first initiated in the Kennedy Round of trade negotiations conducted under the auspices of the GATT. Nothing resulted from those initial discussions, but the Declaration of Tokyo specifically called for efforts to eliminate nontariff barriers. 1/ The current procurement negotiations began in earnest in 1976.

The Trade Act of 1974 2/

The Trade Act of 1974 contains several Congressionally specified negotiating objectives which were to be sought by American representatives at the Tokyo Round. Section 102(a) states the Congressional findings--

> that barriers to (and other distortions of) international trade are reducing the growth of foreign markets for the products of United States agriculture, industry, mining, and commerce, diminishing the intended mutual benefits of reciprocal trade concessions, adversely affecting the United States economy, preventing fair and equitable access to supplies, and preventing the development of open and nondiscriminatory trade among nations.

1/ GATT Doc. No. MIN (73) 1, par. 3(b) (1973).

2/ Pub. L. No. 93-618, 19 U.S.C. 2102 (1976) (hereinafter referred to as the Trade Act).

Subsection 102(b) then authorizes the President to enter into trade agreements designed to ameliorate or eliminate these barriers. Section 103 states a further objective:

> The overall United States negotiating objective under sections 101 and 102 shall be to obtain more open and equitable market access and the harmonization, reduction, or elimination of devices which distort trade or commerce. To the maximum extent feasible, the harmonization, reduction, or elimination of agricultural trade barriers and distortions shall be undertaken in conjunction with the harmonization, reduction, or elimination of industrial trade barriers and distortions.

The goals of the United States thus clearly contemplate an agreement on nontariff barriers (NTBs).

That government procurement practices were to be among such NTB agreements is less clearly revealed in the Trade Act. Section 121(a)(3) and (a)(10) require the President "as soon as practicable" to take steps towards negotiating with respect to the GATT--

> (3) the extension of GATT articles to conditions of trade not presently covered in order to move toward more fair trade practices, (and)
>
> . . .
>
> (10) any revisions necessary to apply the principles of reciprocity and nondiscrimination, including the elimination of special preferences and reverse preferences, to all aspects of international trade. . . .

As noted above, Article III:8 excludes government procurement expressly from the national treatment obligations of the GATT and implicitly from its MFN obligations. While the legislative history is sparse, Congress apparently intended that section 121(a)(10) be interpreted to include the problems of government procurement within the negotiated "necessary revisions." Thus, the House report on the bill that became the Trade Act states that--

> Existing GATT provisions are also inadequate or nonexistent with respect to Government procurement. . . . One possibility is to develop satisfactory supplementary rules which could be implemented without formally amending existing articles of the GATT. Such rules might be incorporated in codes applied by the signatories, which could be implemented in U.S. law under the provisions of section 102 of this bill or by separate legislation. The committee would expect that any such codes would be developed consistently with the overall objectives and principles of trade negotiations, particularly that of trade liberalization. 1/

Similarly, the Senate report noted that existing GATT provisions were inadquate with respect to government procurement. 2/

Therefore, while the language of the Trade Act does not expressly refer to government procurement, American representatives were expected by the Congress to address that type of trade restraint.

The Agreement on Government Procurement

As suggested above, the Congress was aware that different approaches could be taken to harmonize, reduce, or eliminate trade barriers. The GATT excludes government procurement expressly from its national treatment, and, indirectly from its MFN obligations; therefore, one method of addressing procurement problems would be to draft an amendment to the GATT. However, a two-thirds vote of approval by the CONTRACTING PARTIES is necessary to amend Article III, and a unanimous vote is required to amend Article I 3/ -- a vote which has been nearly impossible to attain in recent times.

As the House report noted, an alternative to amendment is the implementation of a supplementary code open to signature by other parties which

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1/ Trade Reform Act of 1973, Comm. on Ways and Means, H.R. Rep. No. 571, 93d Cong., 1st Sess. 26 (1973).

2/ Trade Reform Act of 1974, Comm. on Finance, S. Rep. No. 1298, 93d Cong., 2d Sess. 84 (1974).

3/ GATT Article XXX:1.

desire to obtain its benefits and shoulder its obligations. This has been the approach of the negotiators in the Tokyo Round. The result of their efforts is the code now presented to the Congress for approval and will be discussed in detail following this brief description.

The United States has consistently maintained that several principles are essential to the successful implementation of a procurement code which obligates its signatories to nondiscriminatory conduct while providing flexibility in fulfilling individual domestic needs as well as commitments to developing nations. These principles include (1) reciprocity, or the necessity for foreign governments to adhere to the code's obligations in order for its exporters to benefit from American purchases following code rules; 1/ (2) transparency, or the adoption of procurement procedures fully publicized and consistently followed; 2/ (3) effective dispute settlement, a goal closely tied to the effectiveness of the transparency provisions of the code; 3/ (4) the adoption of common "ground rules" of procurement practice not only reflecting transparency principles but also providing a basic international norm of procurement procedure to the benefit of all suppliers interested in bidding on contracts abroad; and (5) maximum possible coverage of a code which will make an agreement meaningful and provide a balance of concessions by the parties in terms of quantity (total value) and quality (types of products of interest to particular nations). In ten different parts, the code attempts to synthesize these goals into a workable agreement on procurement. The precise

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1/ See section 126 of the Trade Act of 1974, 19 U.S.C. 2136 (1976).
2/ See generally Marks and Malmgren, supra page 3 n.1, at 401-94.
3/ See section 121(a)(9) of the Trade Act of 1974, 19 U.S.C. 2131(a)(9) (1976).

provisions will be discussed fully below, but they may be summarized as follows.

Part I broadly defines the scope of the agreement to include both official and unwritten policies pertaining to the procurement of products, but generally not services, by "entities" of the signatories. "Entities" are procuring units "under the direct or substantial control of parties to" the code, including agencies; the term, however, is otherwise undefined in normative terms. Indeed, the only entities to which the code will apply in actual practice are those specified in its Annex I. Expressly excepted from the agreement are contracts valued at less than a threshold amount of special drawing rights (SDR) 150,000 (approximately $193,500), contracts procured by regional and local governments (unless specified in Annex I), and contracts tied to aid to developing countries. Further, Part VIII excludes from coverage good-faith actions affecting procurement which governments may deem necessary in light of traditional concerns for national security, public health and safety, and economic encouragement to certain disadvantaged groups. Notably unmentioned here as appropriate exceptions are the common justifications of redressing balance of payments difficulties, spurring growth in underdeveloped regions of a nation, and providing assistance to small and minority owned businesses. Finally, Annex I includes a number of specific exceptions to the coverage offers of individual countries.

Part II of the code sets forth the policy of nondiscrimination upon which all other provisions are based. This is accomplished by requiring that national treatment and most-favored-nation principles be applied to all covered products and suppliers. Consonant with previous ministerial commitments, however, Part III obligates the parties to the code to recognize

the special circumstances of developing and least-developed nations in the implementation of the various provisions, and to provide technical and other assistance in their development of procurement programs.

The bid solicitation and award process is largely governed by Parts IV-VI. These sections substantially reflect the American concern with transparency already expressed in our own procurement laws, but incorporate a desire for retained discretion expressed by others.

Part IV promotes the use of technical standards in a way maximizing the opportunities for disparate suppliers to tender bids satisfying the required performance criteria. Adhering insofar as possible to international standards or their equivalents diminishes the tendency to discriminate in favor of national producers by limiting the source of components or cost of meeting unique specifications.

To ensure free competition, Part V generally requires the use of open bidding procedures or selective techniques with assured access to the pertinent list of suppliers. Adequate notice of prospective invitations to bid, sufficient time to respond, and information necessary for completion of the bid are required. Other provisions seek to insure openness in award procedures.

Part VI establishes another check on discrimination by requiring that unsuccessful tenderers be provided, upon request, with an explanation of their rejection. The government of a dissatisfied tenderer may intervene in its behalf, thus setting the stage for later dispute settlement if necessary. Protection for confidential security information or trade secrets is provided.

Dispute settlement procedures are outlined in Part VII. The procedures closely follow those contained in the GATT: if a party believes

its benefits under the code are nullified or impaired, or the code's objectives are impeded, by the actions of another signatory, then it must first attempt a bilateral resolution of the dispute. Failing that, the complainant may appeal to the Committee, the code governing body, composed of all of the signatories, which will first consider the matter as a group; if no solution is agreed upon, the Committee will then appoint a panel to review the dispute and make appropriate findings. The Committee will issue recommendations based on these findings; if a solution cannot be found, then it may authorize the aggrieved party to suspend application of the code to the extent necessary to restore the balance of obligations.

Finally, Part IX sets forth the procedures for acceptance and activation of the agreement, accession by new members, modification and amendment, and withdrawal.

The code in its entirety provides a framework which, if adhered to, will precipitate substantial changes in current procurement practices. In particular, the measure of transparency which the code will inject into foreign procedures -- through requirements of publication of tendering opportunities, specific time limits for tenders, information disclosure, and limited use of single tendering -- stand to significantly open and harmonize international practice. Also signaling vast changes are the reduction or elimination of preferences -- through application of the MFN and national treatment principles -- which will spur much new competition for domestic industries.

A few significant issues will require constant review to determine the effectiveness of the code. Of foremost concern is the question of

coverage. The breadth of the code's impact is partially a function of the rules determining what it covers. The code approach is to define coverage in terms of procuring entities (more or less associated with the governments of the parties) and value of contracts, together with numerous exceptions. The United States has pressed for broad normative rules with initial specific concessions on coverage consistent with those rules. Most other nations have preferred to limit the code's applicability initially, with the asserted goal of gradually broadening coverage as the code proves workable. The code provides for future negotiations to review what these competing philosophies have produced in the first instance, with the goal of gradual expansion of coverage.

Another important issue which is likely to engender difficulties with non-parties is the relationship of the code to the GATT. Although separate agreements have become accepted as a way of altering GATT obligations without amendment, the code in this case may be different from previous ones in that it does not seek merely to adjust or clarify GATT procedures but instead addresses an area of trade excluded from the GATT. This uncertain relationship spawns two particularly important issues: (1) in view of the general MFN obligations in GATT Article I and the specific MFN provision of Article XVII:2 relating to state trading enterprises, how parties to the code can deny its benefits to members of the GATT which are not signatories to the code; and (2) whether the dispute settlement mechanism of the GATT will be available to disputing parties. The code provides for conditional MFN treatment with regard to the first question, and assumes that the code provisions will be exclusive with regard to the second.

These issues and others are addressed more fully in the following report. For each part of the code, the report sets forth the text, discusses points of interpretation, and then describes what the potential impact of the particular provisions will be with regard to United States domestic law, including international procurement arrangements. Because many of the provisions are expected to occasion similar impacts, the implementation sections will necessarily be repetitious; it is hoped, however, that the encyclopedic format will ease the expected detailed examination of the provisions by providing a close correlation of interpretation and effect.

PROVISION-BY-PROVISION ANALYSIS

7.PRM. PREAMBLE

7.PRM.1 Text

Parties to this Agreement,

Considering that Ministers agreed in the Tokyo Declaration of 14 September 1973 that comprehensive Multilateral Trade Negotiations in the framework of GATT should aim, inter alia, to reduce or eliminate non-tariff measures or, where this is not appropriate, their trade restricting or distorting effects, and to bring such measures under more effective international discipline;

Considering that Ministers also agreed that negotiations should aim to secure additional benefits for the international trade of developing countries, and recognized the importance of the application of differential measures in ways which will provide special and more favourable treatment for them where this is feasible and appropriate;

Recognizing that in order to achieve their economic and social objectives to implement programmes and policies of economic development aimed at raising the standard of living of their people, taking into account their balance-of-payments position, developing countries may need to adopt agreed differential measures;

Considering that Ministers in the Tokyo Declaration recognized that the particular situation and problems of the least developed among the developing countries shall be given special attention and stressed the need to ensure that these countries receive special treatment in the context of any general or specific measures taken in favour of the developing countries during the negotiations;

Recognizing the need to establish rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade;

Recognizing that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and to foreign or domestic suppliers so as to afford protection to domestic products or suppliers and should not discriminate among foreign products or suppliers;

Recognizing that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement;

Recognizing the need to establish international notification, consultation, surveillance and dispute settlement procedures with a view to ensuring a fair, prompt and effective enforcement of the international provisions on government procurement and to maintain the balance of rights and obligations at the highest possible level;

Hereby agree as follows:

7.PRM.2 Background and Interpretation

The Preamble to the Agreement is largely self-explanatory, serving merely as an explanation of the agreed ground rules upon which the negotiations were based. In particular, the paragraphs recognize that government procurement is a type of nontariff barrier properly the subject of negotiations in the Tokyo Round; that developing and least-developed nations require special and differential treatment in trade matters because of their particular economic needs; and that besides the fundamental undertaking of national and MFN treatment to effect nondiscrimination in this type of trade, a procurement code necessitated agreement on transparency of domestic procurement procedures. The Preamble contains no obligations in and of

itself; it is entirely hortatory. Its principles, however, are elsewhere incorporated, such as in Part VII:11 with reference to disputes resolution.

Because "transparency" is a term of art when used to describe laws and procedures, it deserves some explication here. "Transparency" refers to the consistent and regular application of laws, regulations, practices, and procedures which are fully publicized or otherwise freely available to interested persons. In the United States, transparency might be associated with some notions of due process and equal competitive opportunities; indeed, American procurement law is grounded on these principles in both pre-award procedures and subsequent dispute settlement. For various historical and policy reasons, few other nations conduct their procurements in the public view. A major U.S. negotiating objective was to obtain an international agreement on transparency procedures. This idea will be discussed more fully in the context of the code, particularly at sections 7.5.2-3 and 7.6.2-3 infra.

7.1 PART I. SCOPE AND COVERAGE

Part I defines the scope of the procurement code as a function of types of procurement regulations, threshold value of covered contracts, and types of procuring entities. This part contains in addition the initial exceptions to the code's operation; others are found particularly in Part VIII.

7.1.1 Text

1. This Agreement applies to:

(a) any law, regulation, procedure and practice regarding the procurement of products by the entities 1/ subject to this Agreement. This

1/ Throughout this Agreement, the word entities is understood to include agencies. (Footnote in text.)

includes services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not service contracts per se;

(b) any procurement contract of a value of SDR 150,000 or more. 1/ No procurement requirement shall be divided with the intent of reducing the value of the resulting contracts below SDR 150,000. If an individual requirement for the procurement of a product of the same type results in the award of more than one contract or in contracts being awarded in separate parts, the value of these recurring contracts in the twelve months subsequent to the initial contract shall be the basis for the application of this Agreement;

(c) procurement by the entities under the direct or substantial control of parties to this Agreement and other designated entities with respect to their procurement procedures and practices. Until the review and further negotiations referred to in the Final Provisions, the coverage of this Agreement is specified by the list of entities, and to the extent that rectifications, modifications or amendments may have been made, their successor entities, in Annex I.*

2. Parties shall inform their entities not covered by this Agreement and the regional and local governments and authorities within their territories of the objectives, principles and rules of this Agreement, in particular the

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1/ For contracts below the threshold, the parties to this Agreement shall consider, in accordance with paragraph 6 of Part IX, the application in whole or in part of this Agreement. In particular, they shall review the procurement practices and procedures utilized and the application of nondiscrimination and transparency for such contracts in connexion with the possible inclusion of contracts below the threshold in the Agreement. (Footnote in text.)

*Annex I is set forth in full beginning at page 177 infra.

rules on national treatment and non-discrimination, and draw their attention to the overall benefits of liberalization of government procurement.

(The following statement regarding Part I:1 appears in the Intepretative Notes to the code:)

Having regard to general policy considerations relating to tied aid, including the objective of developing countries with respect to the untying of such aid, this Agreement does not apply to procurement made in furtherance of tied aid to developing countries so long as it is practised by parties to this Agreement.

7.1.2 Background and Interpretation

Paragraph (a) states that the Agreement applies to "any law, regulation, procedure and practice. . . ." The unwritten, unofficial discrimination devices commonly used in other countries are thus covered. Because domestic preferences in the United States are grounded in statutes, the effect of the language will be felt more strongly abroad where disputes are likely to arise over the existence or extent of a discriminatory practice.

The paragraph further limits the code to the procurement of products; only services incidental to a supplied product which has a value greater than the incidental services are subject to the code. Even in the latter case "service contracts per se" are excluded from the code regardless of the value of the services in relation to any associated product. Part IX:6(b) obligates the parties to review "at an early stage" -- perhaps within 3 years -- the status of service contracts.

Paragraph (b) reflects the general agreement that there should be a threshold value triggering the operation of the code; contracts below the minimum value are thus subject to preferential treatment as they are now. The threshold value is set at SDR 150,000, 1/ currently approximating $193,500. This value substantially exceeds U.S. proposals and will exempt significant numbers of procurements from the code. Indeed, one difficulty in weighing the relative advantages of the total value of coverage offers is the problem of identifying whether the total value reflects actual new bidding opportunities, or instead incorporates a number of products which in fact are unlikely to be procured in amounts which exceed the threshold and therefore make them open to international bids. Contracts for products "of the same type" issued within a twelve-month period will be integrated for valuation purposes, to prevent avoidance of the code through the execution of a series of contracts, each below the threshold.

Because of U.S. resistance to the high threshold, the EC at one time suggested adoption of a double threshold system as an incentive for the U.S. to accept its basic high threshold proposal. Under this system, a low threshold of SDR 50,000 (approximately $64,000) would be set to trigger application of several code provisions for contracts exceeding it, including the right to submit a tender, the right to national and MFN treatment, and the right to invoke dispute settlement procedures. The remaining obligations of the code would not become operative until the high threshold was reached. Because this system would have effectively gutted the code's transparency

1/ "SDR" is the abbreviation designating a unit of international reserve assets known as a "special drawing right." Use of SDR's was instituted by the International Monetary Fund in 1969.

provisions, and established an unacceptable precedent for the obligatory future coverage negotiations, the U.S. rejected the proposal. Note 2 to subparagraph 1(b), however, obligates the parties to reexamine the feasibility of a double threshold proposal in future negotiations under Part IX:6, to begin in 3 years. 1/

Computation of contract value at whatever threshold will raise problems in specific cases. For example, reading paragraphs (a) and (b) together, if the value of incidental services is less than that of the product, but together they exceed the threshhold value, is the contract covered if the product value alone is less than the minimum? What is the value of an option contract -- the value of the option or the underlying product? How can the provisions be applied retroactively where subsequent contracts for products of the same type are executed within twelve months of a contract procured in a manner varying from the agreement because alone it fell below the threshold value? What are "products of the same type"? Such questions presumably will be addressed on an ad hoc basis by the parties.

A further practical problem with the threshold presumably will be resolved before the code becomes operational. Because the SDR value floats daily, 2/ it will be difficult for potential bidders to determine if the code is applicable unless a benchmark date is specified in the invitation for bids or unless the procuring entity expressly acknowledges the applicability of the code. Thereafter, the code presumably will apply regardless of whether actual bids do not exceed the threshold, as seems likely to happen occasionally in a

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1/ Part IX:6 is discussed at pages 172-173 infra.

2/ The daily rates are published bimonthly by the International Monetary Fund in its IMF Survey.

competitive bidding system. Surely the spirit, if not the letter, of the code would be violated by denial of dispute settlement procedures to a bidder or its government because a winning bid unexpectedly fell below SDR 150,000. But the code now provides no answer to this problem.

Subparagraph (c) raises issues of particular importance to the United States. Although "entity" is not defined, 1/ the term presumably includes any unit procuring under the authority of a party to the Agreement. Subparagraph (c) extends coverage to "entities under the direct or substantial control of parties to this Agreement and other designated entities with respect to their procurement procedures and practices." But immediately the paragraph declares that the code will apply only to those entities specifically listed in Annex I, subject to later review and negotiation. 2/ Aside from the issues presented by paragraphs (a) and (b), therefore, the language of paragraph (c) raises further questions about the effective impact of the agreement. In addition, closely aligned with these subsections is paragraph 2, which refers to treatment of regional and local governments of parties to the agreement.

By way of background, it may be noted that the question whether governmental subdivisions should be covered by obligations assumed by central governments pursuant to international trade agreements is not a new one. For example, Article XXIV:12 of the GATT states: "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory." It is generally accepted that this

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1/ A footnote merely states that the term "entities" includes agencies.
2/ See Part IX:6, which obligates the parties to further negotiations.

provision requires signatories to take all possible steps to secure conformance with the GATT by political subdivisions to the extent their constitutions permit. 1/ State courts in the United States have accepted this view, holding that the Supremacy Clause of the Constitution renders the GATT superior to contrary State law. 2/ The inclusion of Article XXIV:12 resulted from recognition that local trade barriers may be as disruptive as national ones, an observation surely applicable to the local buy-national policies potentially subject to the procurement code.

Part I:1(c) of the code, unlike Article XXIV of the GATT, does not explicitly refer to political subdivisions. The broader language "direct or substantial control" apparently is intended to encompass not only governmental units but quasi-governmental purchasing agents as well. The latter purpose -- never an objective of the GATT -- may be accomplished by the chosen phrase, but would open substantial uncertainty as to the subnational application of the code in the absence of paragraph 2. Canadian Provincial governments, for example, reportedly objected to their inclusion on the entity list because they did not consider themselves within the normative language.

1/ See Jackson, supra page 1 n.1, at 106-17 (1969). The author notes the contrary position adopted by the Department of State, which has been rejected by the courts. Id. at 111-12.

2/ See, e.g., Baldwin-Lima-Hamilton Corp. v. Superior Ct., 208 Cal. App. 2d, 803, 25 Cal. Rpt. 798 (1962) (striking down California Buy-American Act as applied to purchase of generating equipment); Territory v. Ho, 41 Hawaii 565 (1957) (striking down territorial law requiring imported eggs to be so advertised by retailers). Contra, K.S.E. Technical Sales Corp. v. N.J. Dist. Water Supply Comm'n, 381 A.2d 774 (N.J. 1977).

Alternatively, State buy-American legislation may be invalidated as impermissibly intruding in foreign commerce, an area perhaps exclusively reserved to the Federal Government. See generally Jackson, "The General Agreement on Tariffs and Trade in United States Domestic Law," 66 Mich. L. Rev. 297-311 (1967). Cf. Japan Line, Ltd. v. County of Los Angeles, 47 U.S.L.W. 4477 (May 8, 1979) (State ad valorem property tax impermissibly intrudes upon Congress' power to govern foreign commerce). But cf. K.S.E. Technical Sales Corp. v. N.J. Dist. Water Supply Comm'n, 381 A.2d 774 (N.J. 1977)(Congress has evidenced no intent to preempt state buy-American law).

Paragraph 2, together with the phrase "other designated entities" in paragraph 1(c), apparently resolves the coverage rules pertaining to political subdivisions. The paragraph clearly withdraws such units from the normative rule, obligating the signatories solely to "inform" the appropriate governments of the "principles" and "benefits" of the code. Thus, State buy-American laws may continue to be applied without regard to this international agreement. If some nations in the future wish to apply the code to procurements by provincial governments otherwise satisfying the coverage criteria, these local governments may be placed among the "other designated entities" referred to in subparagraph 1(c).

Although Annex I is clearly the sole determinant of entities covered, the normative rule nevertheless warrants careful attention because it is the guide for future negotiations on expanded coverage. As an initial point, it is unclear whether the phrase "direct or substantial control" is alone the normative test for coverage, or is instead intended to be read only in conjunction with the further language ". . . with respect to (an entity's) procurement procedures and practices." The difference may be significant. In a federal system, "direct or substantial control" may necessarily signify that the only covered political subunits are those subject to constitutionally authorized constraints imposed by the central government, with the second phrase recognizing that the exercise of this control would only extend to the procurement area; alternatively, joining the phrases as one test ("substantial control . . . with respect to . . .") focusing on control over procurement suggests that parties are to exercise indirect leverage over subunits which may be legally removed but are otherwise associated with the central government in a procurement matter.

Purported "financial" control illustrates this difficult issue. For example, the Buy American Act is inapplicable to State or local purchases financed solely by Federal money because such purchases are not for a "public use" within the meaning of that statute. 1/ Beyond statutory interpretation, in view of the 10th amendment it is arguable that Federal financing does not suffice under our constitutional concept of federalism as "substantial control". Yet, regardless of whether State or local governments per se are excluded from coverage, the administration of Federal grants may be an aspect of procurement practice within the rules of coverage since such procurements are generated on the Federal level initially. Further, barring a "controlling constitutional prohibition," State or local laws are invalid to the extent that they conflict with terms imposed as conditions to Federal grants. 2/ Similarly, corporations established pursuant to Federal legislation, while largely independent in their operations, owe their continued existence to their enabling legislation and yearly appropriations; they thus might be considered within the ambit of "substantial control" as contemplated by the code. These problems are considered in detail in sections 7.1.3 and 7.2.3 3/ dealing with implementation of the code.

In sum, a fundamental inconsistency is presented by the normative "control" test of coverage and the further provision that the code applies only to the entities specified by the parties in Annex I. The Annex is in

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1/ Other statutes, however, contain buy-American conditions on such grants. See pages 33-37 infra.

2/ See King v. Smith, 392 U.S. 309 (1968); Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127 (1947); Florida Dep't of Health and Rehabilitative Services v. Califano, 449 F.Supp. 274 (N.D. Fla. 1978).

3/ See pages 30-49 and 59-85 infra.

fact the exclusive rule for code application. 1/ It is the product of negotiation, and will be used to except particular procurement programs as well as entities, although the language does not so provide (it speaks only of listed "entities"). The phrase "until the review and further negotiations referred to in the Final Provisions . . ." suggests that the list is temporary, perhaps serving only until the "control" test can be implemented. But Part IX:6 of the Final Provisions imposes no obligation for accepting the "control" test or enlarging Annex I to include more entities. Rather, the parties undertake only to "review" annually the operation of the code, "taking into account the objectives thereof," and after 3 years negotiate matters pertaining to coverage, with any changes made "on the basis of mutual reciprocity." The control test thus appears to impose no real obligation in implementation of the code; perhaps it will serve as the objective to which parties will refer when establishing the initial list and later in review and negotiation.

Nations often extend aid to others on the condition that these funds be expended solely on products of the aiding nation if the funds are utilized for procurement purposes. 2/ A note to the code exempts only tying arrangements with developing nations; thus, aid to developed nations, were it ever contemplated, could not be offered under similar conditions because the arrangement would constitute a prohibited discriminatory practice. The note s

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1/ Paragraph 1(c) states that "until the review and further negotiations referred to in the Final Provisions, the coverage of this Agreement is specified by the list of entities . . . in Annex I."

2/ Compare 22 U.S.C. 2354 (1976), which requires the President to make certain findings prior to his authorizing the procurement of foreign supplies with foreign aid funds. This law is described at pages 35 and 73-74 infra.

uggests that developing nations disapprove of tied aid because of general policy considerations. It is generally believed that tying aid is a dying practice -- thus the phrase "so long as it is practised. . . ."

Annex I to the code contains the entities of the parties which will be covered in their procurements pursuant to paragraph 1(c). Certain specific types of procurements (such as purchases by the Department of Defense of items covered by the Berry Amendment) and procurement programs (such as small and minority business set-asides) are withdrawn for some entities, as noted on the list. As the language of paragraph 1(c) states, successor entities to those listed will remain covered.

The approach of the parties in negotiating this annex was to achieve a balance of concessions in terms of quantity (total value) and quality (types of products) of procurements. The United States procurement market far exceeds that of any other party, so that reductions in the potential American procurement universe were made in an attempt to equalize the concessions. In return for offering entities with few or no restrictions on product types, the United States especially sought to open certain high-technology procurement markets abroad; in particular, those relating to communications, power generating, and transportation equipment. While not achieving every desired success, especially in terms of quality, the administration believes an overall satisfactory balance was obtained. Because these efforts threatened to substantially fail at one time with regard to the EC, a double coverage scheme was proposed whereby a separate, lesser universe of coverage was proposed for those countries. Japanese resistance to inclusion in their offer of significant purchases by Nippon Telephone and Telegraph Company (NTT) lead to suggestions for a similar arrangement. Further, Canada proposed that an

entirely separate, bilateral, supplementary agreement be entered into between the U.S. and Canada, possibly joined by Sweden and Switzerland. The purpose of such a separate agreement was to expand coverage as widely as possible between those parties, while recognizing special difficulties Canada has in asserting control over certain important independent corporations. The latter difficulty was to be cured by exempting these entities from certain code requirements involving high administrative costs. In addition, Canada sought an obligation that central governments would refrain from encouraging regional and local goverments to take action contrary to the code.

The separate entity lists and the supplementary agreement proposals, if adopted, would have caused considerable difficulty with the MFN obligations of the code. In any case, however, acceptable offers were agreed to by all parties in the form now presented, and it is not contemplated that separate agreements with the major developed countries will be entered into in the near future. Separate agreements with some developing nations are possible, however.

Annex I is subject to change as a result of modifications and further negotiations pursuant to Part IX:5 and 6, respectively. Such changes may occur especially with regard to developing countries. (See Part III:4-5.)

7.1.3 Implementation

7.1.31 International Arrangements

Part 1 purports to apply the code to "any law, regulation, procedure and practice regarding the procurement of products . . . ." In administering its buy-American programs, the United States has occasionally engaged in special treatment for certain nations pursuant to treaty agreements or internal practices. If applied literally, the language describing code coverage could call into question some of these arrangements.

One such agreement is found in the Memorandum of Understanding in the Field of Cooperative Development Between the United States Department of Defense and the Canadian Department of Defence Production, signed in November 1963. 1/ This agreement exempts from the Buy American Act Canadian products procured in connection with military or other programs "of mutual interest to the United States and Canada," except for civil works and food items. The purpose of the agreement is to achieve maximum coordination of defense material programs.

The code, if implemented, would require an examination of this agreement because it constitutes a "regulation, procedure (or) practice" within the ambit of Part I. As described further below in section 7.2.3, 2/ however, the code should have little effect on the agreement's continuing validity because most defense-related procurements are excepted from the code by Part VIII:1.

The United States recently concluded other similar defense-related procurement agreements with the following NATO members: the United Kingdom, the Netherlands, Norway, West Germany, and France. A similar accord may soon be reached with Belgium. The purpose of these agreements, pursuant to which the Department of Defense (DOD) waives Buy American Act requirements, is to implement the NATO military standardization program by arranging reciprocal military procurement offsets.

1/ See Defense Acquisition Regulations (DAR) 6-50, et seq., 41 CFR 6-501 et seq. (1976).

2/ See pages 59-85 infra.

Another somewhat different offset program is in effect with regard to the sale of F-5 warplanes to the Swiss Government. The sales agreement allows the Swiss to satisfy up to 30 percent of the $450 million cost of the planes by placing winning bids in the American defense procurement market, with the understanding that such restrictions as the Berry Amendment, Byrnes-Tollefson Amendment and others (all discussed below) remain applicable. Because the Swiss do not manufacture large quantities of military equipment likely to be attractive to the American defense procurement market, the offset is being effected through the marketing by the General Electric and Northrop companies -- major contractors in the F-5 program -- of Swiss streetcars, dam equipment and other products.

All of these offset arrangements clearly constitute procurement practices potentially subject to the code. Again, however, to the extent each agreement involves the purchase of military goods it will remain unaffected by the code's adoption. 1/

The United States formerly waived application of the Buy American Act to goods produced in Panama for use in the Canal Zone, and agreed to afford to Panamanian concerns "full opportunity" to compete for procurement contracts let by Canal Zone agencies. 2/ The recent Panama Canal treaty abrogates these commitments, however. 3/

1/ See section 7.2.31, infra pages 59-62.

2/ Memorandum of Understandings Reached on the Part of the United States of America, paragraph 3, associated with the Treaty of Mutual Understanding and Copoperation signed at Panama, January 25, 1955, 6 U.S.T. 2329, TIAS 3297.

3/ Panama Canal treaty, Art. I, para. 1(b).

7.1.32 United States Law

Paragraph 1(a)

Unlike those of most other countries, the procurement procedures of the United States are "transparent" -- easily identified through officially promulgated laws and regulations. Because U.S. procurement regulations are grounded in statutory authority, in defining the impact of the code when implemented the focus here will be primarily on affected U.S. statutes; it may be assumed that the regulations implementing those laws will incur equivalent derivative effects, most likely different only where the regulations are more detailed than the statutory authority on which they rest or where the organic authority resides in the executive branch. The various effects, and the changes in U.S. law necessary to accommodate them, are more appropriately considered at section 7.2.32, 1/ but the laws potentially impacted by the code may be identified in this section as follows:

1. The Buy American Act, 41 U.S.C. 10a-10d (1976), as implemented by Executive Orders 10582 and 11051, generally requires that products procured for public use within the United States and construction contracts for public works in the United States must originate in domestic sources if certain price differential criteria are satisfied -- i.e., foreign bids are increased by 6 percent generally, 12 percent if the low domestic bidder is a small or minority-owned business, and 50 percent if the purchase is made by the Department of Defense 2/ (see pages 64-65 infra);

2. Department of Defense Appropriations Act (see page 64 infra):

1/ See pages 62-85 infra.

2/ The DOD preference was initiated as a part of the Balance of Payments Program. (See DAR 6-104.4(b).)

(a) Pub. L. No. 94-212, 90 Stat. 153 (1976), sections 709, 723, and 729 (the "Berry Amendment"), prohibit the purchase from foreign sources of certain items, including stainless steel flatware, food, shoes, textiles, clothing and certain specialty metals;

(b) Pub. L. No. 90-500, 82 Stat. 849 (1968), section 404, prohibits the purchase or lease of foreign busses by the Department of Defense;

(c) Pub. L. No. 94-212, 90 Stat. 53 (1976), tit. IV (the "Byrnes-Tollefson Amendment"), prohibits the purchase of vessels or major components, including hulls or superstructures, from foreign sources;

3. GSA appropriations act restrictions (see page 65 infra):

(a) Pub. L. No. 95-81, 91 Stat. 354 (1977), section 506, generally prohibits the purchase of stainless steel flatware from foreign sources;

(b) Pub. L. No. 94-91, 89 Stat. 441 (1975), section 505, (see also 41 CFR section 5A.6.104-50(b) (1977)) mandates a 50 percent value differential discriminating against foreign suppliers as an alternate to the Buy American Act in some circumstances pertaining to handtools and measuring instruments procured by GSA;

4. Prison-made Goods, 18 U.S.C. 4124 (1976), imposes a preference for prison-made goods which satisfy procurement requirements (see page 164 infra).

5. Blind and Other Handicapped-Made Goods, 41 U.S.C. 48 (1976), imposes a preference for such goods which satisfy procurement requirements (see page 164 infra);

6. Small business programs (see pages 66-68 infra):

(a) 15 U.S.C. 631-44 (1976), including recent amendments found in Pub. L. No. 95-507, 92 Stat. 1757 (1978), mandates a preference for small and minority businesses bidding on Government contracts, and is the authority for the small business set-aside program;

(b) 41 U.S.C. 252(b) (1976) is an additional declaration of Congressional policy favoring small businesses in procurement;

(c) 22 U.S.C. 2352 (1976) requires the President to take certain steps guaranteeing direct opportunities for small businesses to bid on contracts abroad financed by AID funds;

7. Preferences for United States carriers (see pages 75-76 infra):

(a) 10 U.S.C. 2631 (1976) generally requires that only U.S. vessels be used to transport supplies procured by the armed forces, when transport is by sea;

(b) 46 U.S.C. 1241(b)(1) (Supp. V 1975), requires that at least 50 percent of the gross tonnage of goods procured by the U.S. must be transported on U.S.-flag vessels if the goods are to be shipped by sea and if the vessels offer a fair price; 22 U.S.C. 2353 (1976) modifies 46 U.S.C. 1241(b)(1) (1976) with regard to procurement effected under certain foreign aid laws;

(c) The International Air Transportation Fair Competitive Practices Act of 1974, 49 U.S.C. 1517, 1518 (1976), requires Federal agencies and Government contractors to use U.S. flag air carriers where possible for international transportation of property, which includes property the subject of a procurement contract; 1/

8. 46 U.S.C. 292 (Supp. V 1975) prohibits dredging in the United States by foreign-built vessels, unless they are documented as U.S. vessels (see pages 74-75 infra);

9. 46 U.S.C. 1155 and 1176 (1976) provide that ships authorized to be constructed under the Merchant Marine Act must be built in American shipyards with American materials, and ship operators generally must use American materials for subsistence items (see page 76 infra).

10. Foreign aid restrictions, 22 U.S.C. 2354 (1976), condition the procurement of foreign supplies with foreign aid funds upon several findings by the President, including the unlikelihood of potentially adverse impacts on the U.S. economy (see pages 73-74 infra);

1/ Section 1518 excepts the Department of State, International Communications Agency (ICA), Agency for International Development (AID) and Arms Control and Disarmament Agency (ACDA) from section 1517 insofar as transportation of their employees and employees' baggage is concerned.

11. AMTRAK Appropriations Act, Pub. L. No. 95-421, 92 Stat. 923 (1978), which allows only domestic procurement of products costing more than $1,000,000 (see page 73 infra);

12. 15 U.S.C. 637(e) (1976), 41 U.S.C. 5, 252(c) and 253 (1976), and 41 C.F.R. 1-2 (1976), generally set forth advertising requirements for procurements (see pages 124-28 infra);

13. 41 U.S.C. section 253(b) (1976) requires public bid openings and awards to be based on advantage to the government. In addition, 41 CFR 1-1.1004, 1-2.404-3, -2.408(a) and 1.3.103(b) (1976) set forth requirements for notification of awards (see page 129 infra);

14. 41 CFR sections 1-9.100 et seq. (1977) set forth conditions of government patent rights arising from research and development contracts (see page 129 infra);

15. The following statutes provide that buy-American conditions must be placed on the various types of grants to State and local governments which they authorize (see page 77 infra):

    (a) Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (1977 (section 103) (the previous version was 42 U.S.C. 6705(f)(1)(A-B) (West Supp. 1978), provides for a strong buy-American preference in connection with procurements for construction projects authorized under it;

    (b) Work Relief and Public Works Appropriation Act of 1938, 52 Stat. 809, section 401, amended the Rural Electrification Act of 1936 (7 U.S.C. 903 (1976)) to add a buy-American provision with respect to loans made under the latter statute;

    (c) Clean Water Act of 1977, 33 U.S.C.A. 1295 (West Supp. 1978), provides a buy-American provision for construction projects authorized under it; and

    (d) Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, 92 Stat. 2689, section 401 (1978), sets forth a buy-American preference for construction projects authorized under it;

16. 25 U.S.C. 47 (1976) provides that "so far as may be practicable . . . purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior" (see page 77 infra).

The regulations implementing these laws -- thereby being subject to derivative impacts -- are largely found in title 41 of the Code of Federal Regulations, which contains the general Federal Procurement Regulations, the Defense Acquisition Regulations, and procurement regulations issued by individual agencies. These regulations often contain detailed procedures not found in their authorizing statutes, but equally valid and therefore impacted by the code; for example, the time allowed for submission of particular bids may be shorter than that allowed by the code. 1/

In addition, some procurement regulations are derived from executive as well as statutory authority. Such regulations likely to be covered by the code are--

1. Labor Surplus Area Concerns, found, for example, in 15 U.S.C.A. 644(d) (West Supp. 1978), 2/ FPR section 1-1.800 et seq., (41 C.F.R. Ch. 1 (1977)), and E.O. 12073, which establish a set-aside policy for procurements in labor surplus areas (see also 29 CFR sections 8.1 et seq. (1977) and Defense Manpower Policy No. 4, 32A CFR Ch. 1, part 134 (1977)) (see pages 69-72 infra); and

2. Minority business set-aside programs, as found, for example, in FPR sections 1-1.13 et seq., 1-7.103-12, -7.202-28, -7.402-33, 41 CFR 1-1.13 (1977) (see also Executive Orders 11458, 11158 and 11625), 42 U.S.C.A. 6705(f)(2), 92 Stat. 1957 (1978), (West Supp. 1978) and Pub. L. No. 95-507), which mandate a preference for or require a certain percentage of contracts to be awarded to minority-owned firms, which by definition exclude foreign suppliers (see page 69 infra).

Paragraph 1(b)

Paragraph 1(b) establishes a threshold value of SDR 150,000 at which procurement contracts become subject to the agreement. The paragraph includes methods of calculating this value in some circumstances. The various U.S.

1/ See discussion at pages 124-128 infra.

2/ This provision expires September 30, 1979, unless renewed prior to that time. See 5 U.S.C.A. 644(f) (West Supp. 1978).

procurement regulations must reflect these provisions; contracts below the threshold value may be procured as they are under current law because the code will be inapplicable to them. No statutes need be amended to institute this paragraph. It may be desirable for implementing legislation to specify the agencies which will be affected, as listed in Annex I, and the threshold value. This specificity would thus require legislative review of changes occasioned by future negotiations. In the alternative, a legislation scheme granting broad discretionary authority to the President to administer the code in all areas may suffice for this purpose as well.

Paragraph 1(c)

Paragraph 1(c) states that the code will apply to "procurement by the entities under the direct or substantial control" of the signatories and "other designated entities." Temporarily, at least, these entities are only those found in Annex I. Assuming that the "substantial control" test will be the major guideline for determining the list in future negotiations, further questions are raised concerning the impact of the code because it is necessary to determine to what entities the code may apply.

Paragraph 1(c) is intended to reach entities outside of the central government structure. Unlike the Buy American Act, the code may thus reach products procured with Federal funds by non-Federal agencies -- "substantial control" arguably includes the ability to impose conditions on a funding grant. 1/ As discussed earlier at pages 24-30, it remains unclear whether

1/ See, e.g., the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (1977), section 103, which provides for a strong buy-American preference in connection with procurements for construction projects authorized for local governments.

control" refers to legal control of the entity or financial control of appropriations. In the latter case, it would appear that affirmative legislation would be required to ensure that Federal appropriations are conditioned on the recipients' agreement to adhere to the code's provisions. Because of the likely composition of Annex I and Part I:2, however, such legislation appears unnecessary at this time, since grantees are excluded from the list.

Similarly, Congressionally-created "independent" corporations and associations may give rise to difficult questions of coverage in the future. There are varying degrees of Congressional authority over such organizations. For example, the Corporation for Public Broadcasting (CPB) 1/ and the Legal Services Corporation 2/ are independent corporations owing their existence to Federal enabling legislation and appropriations. Both corporations' organic statutes contain provisions denying that the respective organizations are either Federal instrumentalities or under the control of the Federal Government. 3/ Yet one court cited reporting requirements of the statute creating the CPB and its legislative history for the proposition that "through the appropriation process and its control over the 'purse strings', Congress reserved to itself the oversight responsibility for the corporation." 4/

1/ 47 U.S.C. 396 (Supp. V 1975).

2/ 42 U.S.C. 2996 (1976).

3/ 47 U.S.C. 396(b) (Supp. V 1975); 42 U.S.C. 2996(e)(1) (1976).

4/ Accuracy in Media, Inc. v. Federal Communications Comm'n, 521 F.2d 288, 297-94 (D.C. Cir. 1975). Compare 47 U.S.C. 398 (Supp. V 1975) which states in part: "Nothing (in this part of the Code) shall be deemed to authorize any department . . . of the United States to exercise any direction, supervision or control over . . . the Corporation . . . ." The purpose of this section, however, is to preclude governmental interference with the corporation's program content -- not to prevent the exercise of Congressional oversight. See Network Project v. Corporation for Pub. Broadcasting, 561 F.2d 963 (D.C. Cir. 1977).

This view of control would appear to bring such independent corporations within the ambit of the code. However, the court was defining control for purposes of determining the jurisdiction of the Federal Communications Commission, and this definition should not be extrapolated into a binding rule for U.S. inclusions on the entity list: the thrust of the code is directed to covering ministeries only, not satellite agencies, and other nations as a general rule are reluctant to concede coverage of their comparable organizations. 1/ A resolution of these issues will necessarily be left to ad hoc negotiations because of the ultimate questions of total value of concessions.

Similarly, despite its normative test, the code is unlikely to reach Congressionally chartered but non-funded organizations, such as the American Red Cross and the various patriotic associations chartered in Title 36 of the U.S. Code. 2/ To find that such organizations are under the "direct or

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1/ More difficult questions are raised by AMTRAK, COMSAT, and the Postal Service, discussed on the following page. Also, a major impasse to agreement on coverage has been the question whether the Japanese should concede Nippon Telephone and Telegraph Company (NTT) -- a substantial purchaser of communications equipment -- for their coverage list. NTT is largely privately held, but the government retains substantial control over its direction. The status of NTT is thus comparable to that of the independent U.S. corporations discussed above.

2/ The associations chartered in Title 36 include:

(1) Section 1(a), The American National Red Cross;
(2) Section 18, Daughters of the American Revolution;
(3) Section 20, American Historical Association;
(4) Section 20a, Sons of the American Revolution;
(5) Section 21, Boy Scouts of America;
(6) Section 31, Girl Scouts of America;
(7) Section 41, The American Legion;
(8) Section 56, United Spanish War Veterans;
(9) Section 57, Marine Corps League;
(10) Section 61, Belleau Wood Memorial Association;
(11) Section 67, AMVETS:
(12) Section 71, Grand Army of the Republic;

(Continued)

substantial control" of the Federal Government, one must agree that the power to revoke a charter suffices alone to render an entity subservient to Congressional direction -- but this conclusion is at odds with the realities of the practical relationships between the two. 1/ It seems highly unlikely as a general proposition that the United States would consent to placing these organizations on Annex I or otherwise accept the argument that they are under the "direct or substantial control" of the federal government -- yet, the American Battle Monuments Commission, perhaps the only entity of the group really associated with the Federal Government in an official capacity, is included on the United States' list of covered entities.

Finally, special consideration must be given to three agencies: the Postal Service, 2/ the Communications Satellite Corporation (COMSAT), 3/ and the National Rail Passenger Corporation (AMTRAK). 4/ By the terms of their

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(Continued)

(13) Section 78, Ladies of the Grand Army of the Republic;
(14) Section 81, United States Blind Veterans of World War I;
(15) Section 90a, Disabled American Veterans;
(16) Section 91, American War Mothers;
(17) Section 111, Veterans of Foreign Wars of the United States;
(18) Section 121, American Battle Monuments Commission; and
(19) Section 139, The National Yeoman F.

1/ Compare Stearns v. Veterans of Foreign Wars, 394 F.Supp. 138 (143-46) (D.C.D.C. 1975), aff'd 527 F.2d 1387 (D.C.Cir. 1976), cert. den. 429 U.S. 822 (1976), where the court held that Congressional chartering of the VFW, together with its annual reporting requirement, tax-exempt status, and statutory entitlement to certain war surplus was insufficient entanglement to constitute "state action" for purposes of invoking the fifth amendment's due process clause as a remedy to alleged sex discrimination. The court further held that the VFW could not be said to be performing a "public function" as an alternative theory of state action.

2/ 39 U.S.C. 201 (1976).

3/ 47 U.S.C. 731 (Supp. V 1975).

4/ 45 U.S.C. 541 (Supp. V 1975).

respective charters, each is largely independent of the Federal Government; yet, unusual circumstances arguably bring each within the normative "direct or substantial control" rule. 1/

The Postal Service was created by Congress as an "independent establishment of the executive branch of the government. . . ." 2/ While Congress retains control over the Service's organic act and its appropriations, it is exempt from the application of many Federal laws, including the Buy American Act. Further, it no longer maintains Cabinet-level status. Because of the independent nature of the Service's operation and its disassociation with the ministerial level of government, as well as the reluctance by other nations to concede similar entities, the United States rejected attempts to include the Service among the code's covered entities. If the Service is exempt from coverage, then entities more remote from the Federal Government, such as those discussed above, will have an even stronger claim in the future to resist application of the code.

The chartering legislation for both AMTRAK and COMSAT is more emphatic: both contain provisions denying corporate status as "an agency or establishment of the United States Government." 3/ Both are structured and capitalized as private corporations, are subject to the District of Columbia Business Corporation Act, and are intended to be

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1/ Compare the status of Nippon Telephone and Electric Company, page 40 n. 1 supra.

2/ 39 U.S.C. 201 (1976).

3/ 45 U.S.C. 541 (Supp. V 1975) (AMTRAK); 47 U.S.C. 731 (Supp. V 1975) (COMSAT).

Each of the characteristics referred to in the text following this footnote may be found in statutory sections subsequent to 45 U.S.C. 541 and 47 U.S.C. 731 for the respective organizations.

profit-making enterprises carrying out functions normally associated with the private sector.

Yet, Congressional control over both corporations is manifested in several ways, apart from the ultimate power to amend or repeal the organic statutes. The corporations share many common links to the Government: several incorporators and directors are appointed by the President with the advice and consent of the Senate; both must consult with and in some instances are subject to actions taken by other agencies; and each must submit an annual report to the Congress and the President. In addition, AMTRAK receives substantial appropriations from Congress; loans received from the private sector may be guaranteed by the United States; the corporation is subject to audit by the Comptroller General of the United States; and purchases by the corporation amounting to more than $1,000,000 cannot be made abroad. 1/ Similarly, COMSAT must respect detailed Presidential obligations to implement national communications policy, and is subject to Federal Communications Commission direction in many operational areas, including procurement, rate-making, technical matters, construction, fiscal matters, and rulemaking. Particularly noteworthy with reference to COMSAT procurement matters is a statutory preference for small businesses.

Taken together, these attributes suggest that both AMTRAK and COMSAT remain under significant control by the executive and legislative branches. Whether this relationship should satisfy the normative test of the code cannot be answered with assurance. Recognizing that the language of the normative test will gain real import only as the entity list is negotiated, it appears

1/ Pub. L. No. 95-421, 92 Stat. 923 (1978).

most meaningful to compare the intent of Congress in chartering the independent corporations with the purposes of the code. On the one hand, the undoubted Congressional intent was that these two for-profit corporations would assume a place in the private sector to the greatest extent possible, with neither the corporations nor their officials imbued with Federal authority; viewed in this way, the retained links with the Government may be seen as only those necessary to ensure that the interests of the public are reflected in the operations of each corporation. On the other hand is the less clear, but strongly suggested, assumption that the code is aimed at government ministeries and their subdivisions -- not the myriad organizations tangential to the essential function of government. Comparing these purposes lends increased support to the argument that AMTRAK and COMSAT should never be included on the entity ist — but this may be countered in part by the small business and buy-American preferences mandated for COMSAT and AMTRAK, respectively. Further, U.S. pressure on other nations to concede comparable organizations would appear to estop as a practical matter outright rejection of reverse negotiating demands for reciprocity, at least to the extent that applicability of the normative rule could be denied. A confident resolution of the status of such entities must await the submissions by other signatories leading to formulation of the Annex in each round of future negotiations: negotiations rather than normative rules will always be determinative. For now, however, the operations of entities not on Annex I will continue unaffected by the agreement.

Finally, with regard to the present imposition of the entity list, it should be noted that section 126(b) of the Trade Act 1/ requires the President at the conclusion of these negotiations to determine whether any major industrial country 2/ has failed to make substantially equivalent concessions competitive trade opportunities "on an ove all basis" 3/ in the MTN. Section 126(c) 4/ then provides that the President must recommend to the Congress implementing legislation which will deny the benefits of the MTN agreements to such nations. Annex I is perhaps the major determinant of reciprocity of competitive opportunities in the government procurement code.

1/ Section 126(b) provides:

> The President shall determine, after the conclusion of all negotiations entered into under this Act or at the end of the 5-year period beginning on the date of enactment of this Act, whichever is earlier, whether any major industrial country has failed to make concessions under trade agreements entered into under this Act which provide competitive opportunities for the commerce of the United States in such country substantially equivalent to the competitive opportunities, provided by concessions made by the United States under trade agreements entered into under this Act, for the commerce of such country in the United States.

2/ Under section 126(d) major industrial countries include "Canada, the European Economic Community, the individual member countries of such Community, Japan, and any other foreign country designated by the President for purposes of this subsection."

3/ See Trade Reform Act of 1974, Comm. on Finance, S.Rep. No. 1298, 93d Cong., 2d Sess. 94-95 (1974).

4/ Section 126(c) states:

> If the President determines under subsection (b) that a major industrial country has not made concessions under trade agreements entered into under this Act which provide substantially equivalent competitive opportunities for the commerce of the United States, he shall either generally with respect to such country or by article produced by such country, in order to restore equivalence of competitive opportunities, recommend to the Congress--
>
> (1) legislation providing for the termination or denial of the benefits of concessions of trade agreements entered into under this Act made with respect to rates of duty or other import restrictions by the United States; and
>
> (2) that any legislation necessary to carry out any trade agreement under section 102 shall not apply to such country.

While the President is not required to make findings under section 126 with specific respect to the code, consideration of the MTN implementation package should include an examination of the contribution of the agreement to the overall balance of trade negotiated in all of the agreements. This calculus should account for the provision of the code which allows parties to refuse to extend benefits of the code to other signatories. 1/ Thus, for example, the U.S. may refuse to apply the code to Japan because of the coverage issues, even though Japan enters into the agreement with respect to other nations. In that event, the President's findings under section 126 would ignore the code insofar as Japan is concerned and only account for other agreements to which the two nations are parties.

Paragraph 2

Paragraph 2 acknowledges that regional and local governments will not be covered by the code (unless they are among the "other designated entities" included under paragraph 1(c)). Therefore, State and local buy-American laws will be unaffected by adoption of the code. Indeed, adoption of the code may be seen as an expression of Federal intent not to preempt this area of foreign commerce, and thus previous State court decisions striking down laws on this ground may not be good precedent for future cases involving similar nations. 2/

The question whether State or local procurements made possible by use of Federal funding -- especially where funds are derived directly from a Federal agency included in Annex I -- is not clearly resolved by paragraph 2.

1/ See Part IX:9.
2/ See pages 24-25, supra.

Further, what constitutes a "procurement" is nowhere defined in the code, so that in light of the normative coverage rule with its possibility of interpretation to include "financial control" of an entity, 1/ a procurement by a noncovered entity through the use of funds supplied by one covered might be viewed as in fact a procurement by the latter -- and thus subject to the code. It is arguable that such a rule would have the salutary effect of preventing circumvention of Annex I in some circumstances.

However, products are normally procured by agencies for their own use and if, as in the case of Federal grants, a procurement is made by a noncovered entity solely for its own purposes, then it seems doubtful that the purchase could be considered one "by the (covered) entity," as specified in paragraphs 1(a) and 1(c) -- the purchase is neither technically made by the grantee nor is it for the grantor. Inclusion of conditions regarding use of the funds would not change this relationship, unless the condition went to actual administration by the grantor of the funds. Thus, in the absence of agreement to the contrary (including provision for such arrangements in Annex I), it would appear that State and local procurements made with Federal funds may remain subject to their respective laws and regulations. Further, such laws as the Public Works Employment Act of 1977, 2/ the Rural Electrification Act, as amended, 3/ and the Clean Water Act of 1977, 4/ which authorize grants to local governments under buy-American conditions, should remain unaffected

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1/ See discussion at page 27 supra.

2/ Pub. L. No. 95-28, 91 Stat. 116, section 103 (1977).

3/ 7 U.S.C. 903 (1976), as amended by the Work Relief and Public Works Appropriation Act of 1938, 52 Stat. 809, section 401.

4/ 33 U.S.C.A. 1295 (West Supp. 1978).

by the code as long as the purchases are made by the localities, and not an "entity subject to this Agreement." 1/

. Aid may be granted by the U.S. to developing nations on the condition that only U.S. products could be procured with such funds. The Note referring to this practice sanctions such arrangements. Therefore, 22 U.S.C. 2354 (1976), which in effect requires tied aid where the President cannot make various findings there specified, 2/ need not be amended. This exception will cover the practice of tying use of U.S. carriers to such aid; thus, the preferences for U.S. flag carriers found in 10 U.S.C. section 2631 (1976), 46 U.S.C. section 1241(b)(1) (1976), and Pub. L. No. 93-623, 88 Stat. 2102 (1974), also would not need revision on these grounds alone. Because the practice of tying aid to domestic preferences is apparently utilized increasingly less often, the potential impact of the Annex is likely to be nominal in any case.

7.2 PART II. NATIONAL TREATMENT AND NON-DISCRIMINATION

Part II establishes the precept of nondiscrimination fundamental to the purpose and operation of the code. In essence, the well-known principles

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1/ See Part I:1(a), 1(c).

2/ Section 2354(a) provides:

> (a) Funds made available under this chapter may be used for procurement outside the United States only if the President determines that such procurement will not result in adverse effects upon the economy of the United States or the industrial mobilization base, with special reference to any areas of labor surplus or to the net position of the United States in its balance of payments with the rest of the world, which outweigh the economic or other advantages to the United States of less costly procurement outside the United States, and only if the price of any commodity procured in bulk is lower than the market price prevailing in the United States at the time of procurement, adjusted for differences in the cost of transportation to destination, quality, and terms of payment.

of national treatment and most-favored-nation status are accorded the products and suppliers of parties to the agreement.

7.2.1. Text

1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, parties to this Agreement shall provide immediately and unconditionally to the products and suppliers of other parties offering products originating within the customs territories including free zones of the parties to this Agreement treatment no less favourable than:

(a) that accorded to domestic products and suppliers; and

(b) that accorded to products and suppliers of any other party.

2. The provisions of paragraph 1 shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, and other import regulations and formalities.

3. Parties to this Agreement shall not apply rules of origin to products imported for purposes of government procurement covered by this Agreement from other parties to this Agreement, which are different from the rules of origin applied in the normal course of trade and at the time of importation to imports of the same products from the same parties to this Agreement.

7.2.2 Background and Interpretation

Like the comparable GATT Articles from which they are drawn, 1/ subparts (a) and (b) of paragraph 1 protect against two methods of trade

1/ GATT Articles I (Most Favoured Nation Treatment) and III (National Treatment). Articles II and XIII also express MFN principles with regard to tariff concessions and quantitative restrictions, respectively.

discrimination. First, subpart (a) requires that any treatment pertaining to domestic goods and suppliers be equally applied to goods and suppliers of other parties to the code. Subpart (b) then prohibits differential treatment among the goods and suppliers of the other signatories. Together these provisions should result in equal treatment for any signatory's goods and suppliers on any bid. Of course, the special treatment accorded developing nations and the numerous other potential exceptions to the application of the code, discussed elsewhere, will prevent unerringly nondiscriminatory treatment. Still, Part II is the standard by which all exceptions will be judged.

One significant difference between the GATT provisions and Part II, however, is that the latter provides for conditional MFN and national treatment: such treatment will be accorded only to other parties to the code. Therefore, members of GATT which do not sign the code will be subject to discrimination in procurement as they would in the absence of any agreement. As discussed previously in the introduction, the proponents of the code argue that because Article III:8, excepts government procurement from Article III:2, 4, which are incorporated into Article I:1, defining the scope of the MFN obligation, the latter clause is inapplicable to procurement matters and therefore nonsignatories of the code have no grounds for complaint about the conditional MFN provision. Although this interpretation is probably correct, some GATT members may argue that the Article III:8 exception only extends to matters with which that article is concerned (i.e., national treatment), and does not extend to matters in other articles even where the latter incorporate provisions of Article III -- the incorporation must be read

as encompassing only the precise language of the provision without interpretation by nonincorporated provisions like paragraph 8. Such an argument, if unpersuasive, may yet engender disputes under GATT.

More difficult is Article XVII:2, 1/ which requires members of GATT to accord "fair and equitable treatment" to products procured by state trading enterprises, although the provision otherwise excepts such "government" procurements from the nondiscriminatory obligations of paragraph (1) of that Article. Thus, purchases by state trading enterprises in furtherance of their commercial operations are subject to Article XVII's nondiscrimination and purchasing criteria obligations, but when such enterprises instead purchase imported products "for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale," they must only observe the "fair and equitable treatment" rule.

Because many of the entities listed in Annex I are state trading enterprises, 2/ their procurements are subject to Article XVII. If "fair and equitable" is intended as an MFN obligation, then Article XVII would conflict

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1/ The text of this provision is set out at page 6 supra.

2/ A GATT Panel has interpreted the term "state trading enterprises" in this way:

> . . .the Panel did not use the word "enterprise" to mean any instrumentality of government. There would be nothing gained in extending the scope of the notification provisions of Article XVII to cover governmental measures that are covered by other articles of the General Agreement. The term "enterprise" was used to refer either to an instrumentality of government which has the power to buy or sell, or to a non-governmental body with such power and to which the government has granted exclusive or special privileges. The activities of a marketing board or any enterprise defined in paragraph 1(a) of Article XVII should be notified where that body has the ability to influence the level or direction of imports or exports by its buying or selling.

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with the conditional MFN principle of the code. 1/ Denial of code benefits to nonsignatories insofar as noncommercial procurements by these enterprises is concerned may therefore, lead to disputes under the GATT.

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22. It is clear from the interpretative note to paragraph 1 of Article XVII that the activities of a marketing board or any enterprise covered by paragraph 1(a) of the Article and not covered by paragraph 21 of this report would not be notifiable solely by virtue of a power to influence exports or imports by the exercise of overt licensing powers; where such measures are taken they would be subject to other Articles of the General Agreement.

23. Where, however, an enterprise is granted exclusive or special privileges, exports or imports carried out pursuant to those privileges should be notified even if the enterprise is not itself the exporter or importer.

GATT, 9th Supp. BISD 183-84 (1961). Professor Jackson further states that the language of paragraph 1(a) includes a corporation or other "enterprise" that, though under nominal private control, has received some special favor from the state, giving it an advantage over other firms in the same country. The wording does not require that the special favor granted give the enterprise a monopoly in order that Article XVII apply. Jackson, supra page 1 n.1, at 340. Entities such as Japan's NTT and the TVA among many others, seem clearly to satisfy this interpretation.

1/ "Fair and equitable" may also be interpreted as a national treatment obligation; i.e., state trading enterprises must treat foreign supplies fairly and equitably as compared with domestic suppliers, as well as other foreign suppliers. The issue seems never to have arisen, however, despite the multiplicity of discriminatory practices which have prevailed heretofore, and, indeed, gave rise to the current negotiations. This may be due in part to the language of Article III:8, which exempts from the general national treatment provision products purchased "by governmental agencies . . . not with a view to commercial resale . . ."; products purchased with a view to commercial resale -- as are the vast majority of state trading enterprise purchases -- are covered by Article III. Procurements for internal consumption, and thus not within Article III, may also have been viewed as too insignificant to engender disputes. See Dam, supra page 2 n.1, at 321-23. In any case, because only the potential MFN conflict between GATT and the code has been raised in this regard, the national treatment interpretation will not be pursued here.

The "fair and equitable" clause was originally intended as an MFN obligation, although the draftsmen apparently felt that the usually tight MFN language did not quite fit with regard to government purchases. 1/ The clause was removed from its original position in Article I's general MFN provisions and placed in Article XVII, apparently "because it was considered more germane to the problem of state trading." 2/ But because "state trading enterprises" do not necessarily include all government entities which may be involved in procurement, an anomalous distinction was created whereby (1) government entities were generally excepted from MFN obligations with respect to their procurements (by the incorporation of Article III:4 into Article I:1); (2) state trading enterprises were obligated to act nondiscriminatorily in their commercial operations; and (3) state trading enterprises had to accord something close to MFN treatment to foreign suppliers with respect to the enterprise's purchases for its own use -- their procurements other than those related to their commercial purpose; for example, telecommunications equipment purchased by NTT for use by the Japanese public in their telephone system. 3/ The result hardly seems worth the convolutions: procurements by state trading enterprises as distinguished from all other government entities must be comparatively insignificant.

Despite the ambiguous language, this result seems probably correct if one recognizes the overall intent of the draftsmen to generally exempt government procurement of products from the GATT. 4/ Thus, the vast majority

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1/ See Jackson, page 1 n.1 supra, at 359-61.
2/ Id. at 360.
3/ This assumes that Article XVII:2 is interpreted to refer only to the entities with which Article XVII:1 is concerned, since the latter is incorporated into the former. See GATT, 1st Supp. BISD 60, par. 4 (1953)(The Belgian Family Allowances case).
4/ See the discussion at pages 5-7, supra.

of procurements subject to the code will not run afoul of Article XVII:2. Nevertheless, there appears to be significant potential for challenge by GATT members which do not sign the code, to discrimination by code signatories, in procurements by the latters' state trading enterprises where the purchases may be technically procurements but really associated with the commercial purpose of the enterprise. Unfortunately, a definitive estimate of the outcome cannot be made at this time because Article XVII:2 has never served as the basis for a complaint and its meaning is unknown. The code seems deficient in this regard because it fails to confront the problem of its relationship to the General Agreement.

Paragraph 1 requires that nondiscriminatory treatment be effected "immediately and unconditionally." These requirements apparently must be fulfilled as of January 1, 1981, when the agreement enters into force pursuant to Part IX:3. The forthcoming two years should allow sufficient time for entities to make necessary revisions in their procurement procedures and modify incipient invitations for bids so that as of the target date all covered procurements will satisfy code requirements as agreed in Part IX:6. "Immediately and unconditionally" may be read as an admonishment that nondiscriminatory treatment must be accorded with the commencement of each procurement after January 1, 1980.

Part IX:1(c) also allows nonparties to accede to the agreement on conditions "to be agreed between that government and the parties to this Agreement." 1/ Thus, "immediately and unconditionally" may be waived for new members.

1/ See the further discussion at page 171 infra.

Paragraph 2 simply recognizes that the customs duties and procedures associated with the importation process will remain unaffected by the procurement code. The language, however, does not imply the converse; i.e., that parties may discriminate in the application of such charges and procedures, Article I of the GATT, which requires MFN treatment in such matters, remains applicable to such conduct.

Paragraph 3 simply provides that whatever rules of origin are normally applied to the trade of products among the parties to the code will be applied for purposes of the code. Because suppliers of nonparty nations could effectively gain the benefits of the code without adhering to it, by transshipping their products through one nation party to the code, thence to the procuring government, the conditional MFN provision would be unworkable absent rules to determine whether the origin of tendered products is in fact a party to the code. 1/ Paragraph 3 purports to satisfy this need. It is not without interpretative difficulties, however.

The U.S. has long utilized a "substantial transformation" rule of origin for some customs purposes. 2/ Under this rule, the originating country is considered to be the one in which the constituent materials of a product were "substantially transformed . . . into a new and different article of commerce." 3/ While it is asserted that this rule is the one normally

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1/ See generally Nusbaumer, "Origin Systems and the Trade of Developing Countries," 13 J. World Trade L. 34, 34-37 (1979).

2/ The substantial transformation rule is one of judicial origin. It arose largely in connection with marking problems, and continues to be an integral part of the criteria for determining proper marks of origin. 19 U.S.C. 304, 1202 (1976) (19 CFR 134.1(d)(1), 134.34(h), 134.35 (1978)). See U.S. v. Friedlander & Co., Inc., 27 C.C.P.A. 297, 302-03, (1940) (citing T.D. 49658). It also is a significant part of the rules of origin developed for implementation of the GSP, as noted in the text on the following page. 19 U.S.C. 2461 et seq. (1976) (19 CFR 10.171-178 (1978)).

3/ 19 CFR 10.177(a)(2) (1978). See also 10 Cust. Bull. 176, T.D. 76-100 (1976)(GSP).

96-138 O - 79 - 17

applied to imports for MFN duty purposes - this is supposed to be signified by the phrase "normal course of trade" - the language of paragraph 3 and U.S. law belie any such direct conclusion. Thus, when deciding whether goods originate in Communist-dominated areas for purposes of applying column 2 duty rates, customs officials must determine whether the articles are "imported directly or indirectly (from such areas) (and are not) the growth, produce, or manufacture of any other nation or area." 1/ As one court noted: "It would be difficult, if not impossible, to define exact standards for determining the duration of stay of merchandise in an intermediate country, the nature of the transactions to which it is subjected there, and other circumstances necessary to divest it of its station as an import, direct or indirect, from the Communist-dominated country in which it originated." 2/ Whether an article has undergone a substantial transformation is thus obviously not the sole determinant of origin. Indeed, the origin rules promulgated in implementing the GSP rely primarily on a cost formula: an article is entitled to GSP treatment where the sum of (1) the cost of the materials produced and, (2) the direct processing costs performed in the beneficiary developing nation is not less than 35 percent of the appraised value of the article. 3/ For a material to be counted in calculating the cost, it must be a constituent material which is wholly the growth, product, or manufacture of the beneficiary country, or one substantially transformed there into a new and

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1/ T.D. 52788; 19 U.S.C. 1202, 3(e) of the General Headnotes to the TSUS.

2/ United States v. Hercules Antiques, The Danvill Co., 44 C.C.P.A. 209, 212 (1957).

3/ 19 CFR 10.176(a) (1976) (interpreted in T.D. 76-100, 10 Cust. Bull. 176 (1976)). The percentage rises to 50% when the article is produced in two or more beneficiary countries who are members of an association. Id. at 10.176(b).

different material. 1/ Because the rules for communist-dominated areas and GSP nations may be interpreted to be the "rules of origin applied in the normal course of trade and at the time of importation to imports . . . from the parties" to the code, since most trade with those nations is covered, it could appear that each rule must be implemented for appropriate application to procurements covered by the code; thus, for example, articles procured from a GSP nation party to the code would be subject to the GSP rules. Adoption of these rules in this instance might also be consonant with U.S. obligations under Part III:2 to "facilitate" exports from developing nations.

Similarly, various rules of origin criteria are employed by other nations "in the normal course of trade," assuming that phrase is not a term of art. For example, particularly important here may be those rules applicable to goods shipped between EC and EFTA countries which, because of their admittedly protectionist design and effect, 2/ have been the subject of

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1/ Id. at 10.177(a).

2/ U.S. exporters have complained both about the EC/EFTA rules and the way the rules are administered. These rules apply to products shipped between EC and EFTA countries. Generally, the rules require that to be deemed products originating in the EC or EFTA, and thereby entitled to preferential tariff treatment, nonorigin materials must be transformed so that the finished product attains a wholly different BTN four-digit classification. However, for some product categories additional rules must be satisfied. For example, for some final products origin status will not be accorded if certain manufacturing processes were used; others will fail if certain manufacturing processes were not used. Further, some final products may incorporate only a specified low percentage value of nonorigin materials. Still other rules allow origin status for products not satisfying the general tariff-heading rule if only 5 percent of the value of the finished product is of nonorigin material. Finally, to administer the rules certain accounting practices are required, such as physical segregation and identification of origin of constituent parts of imported products. Such segregation acts as an effective bar to textile imports, and would do the same for chemicals and small electronic components were not such segregation informally waived for those

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bilateral negotiations with the United States conducted concurrently with the MTN. Whatever results from the negotiations may be applied to exporters attempting to tender for procurements in EC or EFTA countries which are parties to the code. The application of these rules would have substantial indirect effects on U.S. exporters. For example, if Sweden, an EFTA member, were seeking to procure electronic computing equipment, a supplier in France (or any EC member) will be advantaged because of the EC/EFTA rules of origin which make lower duty rates -- and thus the costs of supply -- contingent upon meeting the rules of origin for electronic equipment. Because of the design of those rules, the French supplier will find it too expensive to incorporate U.S. components into his equipment. Thus, U.S. component suppliers will be deprived of the indirect benefits of increased procurement opportunities in these EC/EFTA for these products -- and cannot complain because they are not the suppliers to the procuring entity.

These particular EC/EFTA rules will not affect the status of U.S. bids because the United States is a country entitled to the benefits of the code; thus, there is no issue of allowing the U.S. benefits to which it is not entitled by transshipping procured goods through one EC to an EFTA country, or visa versa. From the language of the code, however, it is unclear whether

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(Continued)
two sectors. Nevertheless, the rules themselves are particularly restrictive of imports of (1) textiles, (2) machinery, electronic equipment and instruments (CCN chapters 84-92), and (3) chemicals. A good description of the problem may be found in Krist and Kristoff, EEC and EFTA Rules of Origin Governing Preferential Trade, U.S. Dept. Commerce Overseas Bus. Rep. (OBR 74-04, April 1974).

It is expected that an acceptable compromise liberalizing the rules will be reached for the latter two categories of products. A change in the textile rules seems, however, unlikely at this time.

these rules would be applicable to nonparty nations which attempt to transship through an EC or EFTA country. Moreover, it is unclear exactly what the EC, EFTA, or Japanese rules are which are used in the normal course of trade, and which are applicable to this agreement (but the particular EC/EFTA rules described above are not, we are assured, the MFN rules contemplated by paragraph 3). If the rules to be adopted by these countries are significantly more relaxed than the U.S. rules, then it would appear that U.S. suppliers will suffer comparative disadvantage because procurements by those nations will be more subject to bids from nonparty nations concealed by transshipments through member nations. The Commission has insufficient information to evaluate this issue at the present time.

7.2.3 Implementation

7.2.31 International Arrangements

As described above in section 7.1.31, the United States in certain circumstances waives application of the Buy American Act to Canada and facilitates bidding by Canadian firms on defense procurement contracts. 1/ Because Part II mandates most-favored-nation treatment by signatories to the code, this special agreement favoring procurement of Canadian products would be suspect in the absence of similar treatment for the other signatories. But the Canadian arrangement is limited to the procurement of defense-related goods, an area excepted in Part VIII from application of the code. 2/ To the extent implementation of the Canadian agreement complies with Part VIII --

1/ The waiver was promulgated by DOD pursuant to discretion vetoed in agency heads by section 10(d) of the Act, 41 U.S.C. 10(d) (1976). The Comptroller General does not question this exercise of discretion. See 54 Comp. Gen. 44 (1974).

2/ See the discussion at pages 159-62 infra.

i.e., material programs relate to procurement indispensable for national defense purposes -- it should remain unaffected by the code. The agreement would require re-examination to the extent that it allows special treatment of Canadian supplies of products not so indispensable -- i.e., nonwarlike goods.

The United States has entered into several military procurement offset agreements whereby Buy American Act requirements are waived, 1/ as described above in section 7.1.31. These are of two types: (1) agreements arising out of the NATO equipment standardization program, and (2) a "strict" sales offset with the Swiss Government associated with its purchase of F-5 warplanes. Because both types of offsets grant preferential treatment to the respective parties, on the surface they violate the MFN principle of Part II.

Exceptions to the code will likely exempt these arrangements from the necessity of adherence to code principles, however. Most importantly, Part VII:1 excepts actions "necessary for the protection of (a party's) essential security interests, relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes." 2/ The offset arrangements with the NATO countries clearly are directed towards developing a more effective defense system for the alliance and therefore generally fit within the Part VIII exception.

The only question likely to be raised in this regard would concern procurement of nonwarlike goods, such as uniforms, stainless steel flatware,

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1/ The waiver of the Buy American Act for purchases from foreign firms under these MOU's is also supported by the Comptroller General. See 51 Comp. Gen. 195 (1971).

2/ The text of Part VIII is set forth in its entirety in section 7.8.1, page 155 infra.

and similar items which are widely sold commercially outside of the military market. The thrust of the exception seems clearly intended to preclude abuse of the protection it affords; thus, actions must be "necessary for the protection of . . . essential security interests," or relate to the procurement of warlike goods or products "indispensable for national security (or defense)." 1/ The more remote NATO purchases are to these indicia, the less credible is an argument for exemption from the code.

A possible counterargument would be that while individual procurements of nonwarlike goods may not fit within the exception, the purchases should be viewed in the aggregate, as a single military standardization program of which each comprises a small but important part; the effectiveness of the entire program is directly related to the maximum achievement of standardized procurement. Further, because the overall program is clearly within the exception, each of its components should be as well. Therefore, all purchases made pursuant to the offset arrangement are arguably exempt from the code, including Part II.

Although the counterargument is persuasive in view of the clear purpose of the code, restrictive language of Part VIII certainly makes it arguable that those products most removed from "essential security interests" could be procured by the parties to the offsets only in accordance with code principles, if the purchaser is a signatory of the code.

1/ As discussed infra in section 7.8.3, pages 159-65, the language of the national security exception is ambiguous in that it is unclear whether a party must demonstrate a procurement program be both necessary to protect an essential security interest and relate to procurement indispensable for national security, or merely satisfy one of those criteria. The latter conclusion is assumed here.

A similar analysis is applicable to the strict offset arrangement with Switzerland. One further observation should be made, however. As described above, the General Electric and Northrop corporations are marketing Swiss nonmilitary products as part of the effort to fulfill Swiss offset rights gained pursuant to the sale of the F-5's. If such products are offered to government purchasing entities which are obligated to grant them preferences, and are otherwise covered by the code, then it would appear that despite any offset arrangement, the products could not achieve preferred status because they do not fit within any apparent code exception and to discriminate in favor of them would contravene Part II's MFN principle.

A final set of issues relating to conditional MFN arises from various bilateral FCN agreements to which the U.S. is a party. These agreements generally provide for unconditional MFN treatment, although most contain clauses allowing the U.S. to derogate from that obligation where its GATT obligations are in conflict. Assuming that the procurement code will be accepted as a part of U.S. GATT obligations -- a proposition closely tied to the dispute over conditional MFN among GATT members themselves -- most such FCN treaties should occasion no conflict with the code. For FCN treaties containing no GATT exception, however, there is a distant possibility that partners to the treaties would involve the unconditional MFN clause to assert entitlement to the benefits of the code without adhering to it. Whether this issue will be resolved through legal or diplomatic means cannot be determined at this time.

7.2.32 United States Law

Part II sets forth the national treatment and most-favored-nation principles central to the code's implementation of nondiscriminatory

procurement policies among its signatories. Thus, for those procurements covered by the code, nations must treat foreign goods and suppliers of signatories equal to its own and to all other such foreign goods and suppliers.

These requirements are contrary to the favoritism guaranteed American suppliers by the laws enumerated above in section 9.1.32. 1/ Some of those laws (and associated regulations) outright prohibit the purchase of foreign-made goods, while others merely grant preferential consideration to domestic firms; but no matter how achieved, each results in treatment more favorable for domestic than foreign suppliers. Such discrimination clearly contravenes Part II of the code.

As previously suggested, however, some of the laws are specifically excepted by the code and will remain unaffected by its adoption. Thus, Part II will clearly have no affect on the statutory preferences granted products made by prisoners and blind or handicapped persons because such programs are excepted by Part VIII:2. 2/ Further, the Buy American Act and several Defense Appropriations Act provisions which prohibit the purchase of certain foreign goods will be unaffected insofar as they are applied to entities or purchases not covered by the code. For example, AMTRAK observes a buy-American provision with regard to purchases exceeding $1,000,000, but will not be included on Annex I listing covered entities. 3/ Further, the Berry Amendment and Byrnes-Tollefson Amendment restrictions will not be affected.

1/ See pages 33-48 supra.
2/ This provision is discussed infra at section 7.8.3, pages 159-65.
3/ See the discussion of Annex I at pages 24-30, 38-46 supra.

Similarly, purchases valued at less than the threshold amount and those within other exceptions, such as found in Part VIII:1 (which excepts procurements indispensable to national defense or security), will not be affected by the code. 1/ The final compilation of Annex I will provide the most accurate measure of the applicable scope of various U.S. laws.

Specifically, U.S. laws and procedures which would appear to contravene Part II if applied to procurements within the code's coverage may be described as follows: 2/

1. The Buy American Act, 41 U.S.C. 10a-10d (1976), implemented by Executive Orders 10582 and 11051, is the type of law the code is expressly designed to repeal. The Act generally grants domestic sources a preference when consideration is made of bids on products procured for public use within the United States. This express discrimination against foreign suppliers clearly cannot stand in light of Part II of the Code, which requires national treatment to be accorded foreign goods and suppliers.

2. The various Department of Defense Appropriations Act provisions, Pub.L. No. 94-212, 90 Stat. 153 (1976), sections 709, 723, 729 and tit. IV, and Pub.L. No. 90-500, 82 Stat. 849 (1968), section 404, prohibiting the purchase of certain items abroad, must be examined in light of Part VII which excepts from the

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1/ In this regard, the mere insertion of a buy-American provision in a Defense Appropriations bill is clearly not determinative of whether the criteria for the national defense or security exception have been met.

2/ The provisions of these laws are described supra in section 7.1.3, pages 30-48.

code procurement indispensable to national defense or security. Procurements not so indispensable and otherwise covered must abide by the non-discrimination principles. The Act's ban on foreign purchases of stainless steel flatware, food, shoes, textiles, clothing, and busses is arguably not within the sphere of procurement indispensable to national defense or security, and would thus contradict the code. However, these laws are currently expressly excepted from Annex I, despite the inclusion of DOD otherwise, and therefore do not presently require repeal or amendment.

3. The provisions of the GSA Appropriations Act, Pub. L. No. 95-81, 91 Stat. 354 (1977), section 506 and Pub. L. No. 94-91, 89 Stat. 441 (1975), section 505, (see also 41 CFR 5A 6.104-50(b) (1977)), which prohibit the purchase of stainless steel flatware from foreign sources and impose a 50% value differential on the purchase abroad of measuring equipement and handtools as an alternative to the Buy American Act differential, 1/ fit within no obvious exception and would therefore contravene the code as to purchases otherwise covered. Again, however, these provisions are specifically excepted from Annex I and do not presently require repeal or amendment.

4. The several laws establishing a policy favoring the award of contracts to small businesses, including 15 U.S.C.A. 631-644

1/ Whichever percentage is higher is applied for purposes of comparing the domestic and foreign bids. See 41 CFR 5A 6.104-50(b) (1977).

(West Supp. 1978) and recent amendments in Pub. L. No. 95-507, (92 Stat. 1757 (1978)), 22 U.S.C. 2352 (1976), and 41 U.S.C. 252(b) (1976), establish a prohibited form of national treatment discrimination because for the purposes of these laws small businesses are defined to include only American enterprises fitting the pertinent criteria. The strong social and economic policies underlying these set-aside programs find no safe harbor in the code; only an express exception to Annex I protects them.

Small businesses are particularly competitive in regard to subcontracting opportunities, but the threshold amount triggering the Agreement may not alone be sufficient to avoid having the code apply to them, absent the exception, even where the value of the subcontracts is less than the threshold. 1/ For example, a procurement contract for the purposes of the code arguably must

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1/ The award of substantial contracts to small businesses is contemplated in U.S. procurement regulations. For example, FPR section 1-6.104-4(b) (41 CFR) enumerates the criteria for evaluating bids under the Buy American Act, including the imposition of a value differential to be added to foreign bids — usually 6% of the bid, but 12% where the firm submitting the low acceptable domestic bid is a small business or labor surplus concern. The section then provides:

> However, if an award for more than $100,000 would be made to a domestic concern if the 12 percent factor is applied, but would not be made if the 6 percent factor is applied, the case shall be submitted to the head of the agency for decision as to whether the award to the small business concern or labor surplus area concern would involve unreasonable cost or inconsistency with the public interest. . . . If the foregoing procedure results in a tie between a foreign bid as evaluated and a domestic bid, award shall be made on the domestic bid.

If the threshold value of Part I:1(b), becomes $100,000 or less after future negotiations, then this provision will be in obvious conflict with the code's national treatment obligation.

be viewed as a single purchase, regardless of whether the ultimate product will be supplied solely by the contractor or through a number of subcontracts. 1/ In this light, the requirement of discrimination in fulfillment of a part of the contract by preferring small businesses as subcontractors must be viewed as discrimination in the award of the whole: in effect, only qualified national treatment is being extended by precluding full foreign receipt of the total value of the contract.

Perhaps a sufficient answer with reference to subcontracting requirements may be that conditions imposed on a prime contract in favor of small businesses are ones affecting domestic and foreign suppliers alike -- both must observe the set-asides in administering the prime contract, and therefore national treatment obligations are satisfied when they are observed in regard to the prime contracts only.

But this rationale still leaves open the question whether the threshold amount is determined with reference to the size of the prime or the subcontract. If the subcontracts are considered an integral part of the prime contract, as suggested above, then the obligations of the entity procuring the prime contract, including those imposed by the code, may not be solely directed to the award of the prime contract but also carry forward to ensuring that it is administered in a way comporting

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1/ Compare Part I:1(b), discussed supra at section 7.1.2, which integrates procurements in some circumstances in order to preclude circumvention of the coverage rules.

with the code -- including the award of subcontracts. 1/ Because under the set-aside program a proportion of the subcontracts must be awarded only to domestic small businesses, a question of breach of code obligations would again arise for those subcontracts set aside.

At this time, of course, the set-aside programs will not be affected by adoption of the code. First, as a result of criticism of this impact, the United States obtained an express exception in Annex I for small and minority business set-aside programs 2/ in return for inclusion of NASA on the entity list. Second, it appears that at least limited offsets for small and minority business subcontractors could be sanctioned under Part V:14(h). Therefore, these set-aside programs should remain unaffected by the code. However, the problem may become increasingly significant as the signatories engage in the further negotiations to which they are obligated, with a view towards

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1/ Compare FPR 1-1.1310-2 (41 C.F.R. section 1-1.310-2 (1977)), which requires that certain clauses pertaining to minority subcontractors be inserted into prime and subcontracts. The effect of the provision is not only to impose the preference for minority businesses on prime contractors, but also to carry the program through to the subcontracts and subcontracts of the subcontracts, ad infinitum. Similar regulations produce the same preference carry-over for small businesses (FPR 1-1.710-2-3, 41 CFR section 1-1.710-2-3 (1977)) and labor surplus area concerns (FPR 1-1.805-2-3, 41 CFR 1-1.805-2-3 (1977)).

2/ See page 249, in Annex I infra.

expanding code coverage 1/ -- and the clear goal of the United States is to progressively decrease the threshold and otherwise extend coverage. Whether the set-aside programs will ever be covered cannot, of course, be answered at this time.

5. The minority business set-aside program, FPR section 1-1.13 et seq., 1-7.103-12, -7.202-28, -7.402-33, -7.403-55, -7.602-33, -7.603-24; 41 C.F.R. 1-1.13 (1977) (see also Executive Orders 11158, 11458, and 11625), 42 U.S.C.A. 6705(f)(2) (West Supp. 1978) and Pub. L. No. 95-507, 92 Stat. 1757 (1978), though not entirely statutory, must be analyzed in the same manner as the programs for small businesses. Minority businesses by definition include only American firms; thus, this preference program triggers the national treatment principles. Strong economic and social policies also underlie the minority business set-asides, but again there exists no textual provision which would allow it to continue for covered procurements. The same reasoning questioning application of the code to prime contracts only for the small business set-asides is equally applicable here. But because of the exception in Annex I, and the offset provision of Part V:14(h), this set-aside program will not be affected by the code.

6. The Labor Surplus Area set-aside program, as found in 15 U.S.C.A. 644(d) (West Supp. 1978), FPR 1-1.800 et seq (41 CFR Ch. 1 (1977)) and 29 CFR 8.1 et seq. (1977), and E.O. 12073,

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1/ See Part I:1(c), and Part IX:6.

also reflects strong economic and social policies but calls for additional, somewhat different analysis. This program is substantially derived from the section of Defense Manpower Policy No. 4, 32A CFR Ch. 1, part 134 (1977) 1/, providing that preference be given to bids which, if executed, would benefit areas of persistent unemployment or underemployment in the United States. The policy is a part of the overall defense preparedness plan, and can be construed to satisfy the language of Part VIII excepting from the code procurement indispensable to national defense or security. This justification may suffice to exempt the program despite alternative legislative grounds of program authority now found in 15 U.S.C.A. 644(d) (West Supp. 1978), 2/ and Executive Order 10582, which implement the Buy American Act in part by providing a similar preference for areas of substantial unemployment; if grounded on either of these alone, the labor surplus program would appear to conflict with the code because the Buy American Act contravenes the national treatment clause, as described above, and programs to ameliorate economically distressed areas find no shelter in the code.

1/ The original statutory authority for this executive branch policy statement resided in the Defense Production Act of 1950, 50 U.S.C. App. 2061-2166, E.O. 10480 (1953) and E.O. 11051 (1962).

2/ 15 U.S.C.A. 644(d) expires September 30, 1979, unless renewed prior to that time. See 15 U.S.C.A. 644(f) (1978) (West Supp. 1978).

Even if the program is recognized as being an essential part of the defense preparedness plan, however, some objections may be raised if the preference is applied to deny awards to foreign bidders on contracts unrelated to war materials. The essential issue is similar to that discussed above with reference to the NATO military standardization program: 1/ for purposes of determining whether the code applies, are procurements to be isolated or must a program of procurements be viewed in the aggregate because the goal of maximum military preparedness can only be achieved through total program implementation?

The analysis of this issue for the Labor Surplus Area program differs somewhat from that of the NATO program because the purpose of the latter is to standardize equipment, some of which is remotely related at best to essential defense needs; so long as a supplier from a non-NATO member could satisfy the pertinent performance requirements and could supply the goods to all NATO members, the immediate purpose of standardization would be satisfied. Only the further problem of ensuring an industrial base for future production and replacement parts would remain. For nonessential military purchases, however, there would be no further policy consideration of maintaining a domestic industry in case of national emergency; presumably, the consequences of a sudden scarcity of such goods would be negligible and therefore essential security interests are not at stake.

1/ See section 7.1.31, pages 30-33 supra.

The focus of the Labor Surplus Area program is not to maintain an assured supply of particular goods, but rather to maintain a stable, dispersed labor force. 1/ The achievement of this latter goal does not depend on what sort of goods are the subject of a contract to be granted a preference. Thus, unlike the NATO program, an argument could be made that the preference program must be viewed in the aggregate and as such fit within the national security exception of Part VIII.

This argument assumes the parties to the code agree that a stable, dispersed labor force is an "action. . .necessary for the protection of . . . essential security interests." 2/ But the Labor Surplus Area program in reality reflects the type of economic-based preference which the code was envisioned as prohibiting; it seems unlikely that the United States would be able to point to the demonstrable defense-related origins and goals of the program as sufficient to justify an exception under Part VIII. Therefore, the Labor Surplus Area set-aside program will most likely be treated under the code as the small business and minority business programs are: all are in conflict absent an exception. Unlike the latter two, this set-aside program has no protective exception in Annex I.

1/ See Defense Manpower Policy No. 4, 32A CFR Ch.1, part 134, par. 1 (1977).
2/ See Part VIII:1 discussed infra at section 7.8.3, pages 159-165.

It may be noted that the threshold value determinative of code coverage is far less likely to affect the practical impact of the code on the operation of the Labor-Surplus Area program than it may the small business and minority preference programs because the latter two are more often involved with smaller contracts or subcontracts. Moreover, the impact on this program will most likely increase as the obligatory further negotiations succeed in lowering the threshold.

7. The AMTRAK Appropriations Act provision, Pub. L. No. 95-421, 92 Stat. 923 (1978), which requires purchases of greater than $1,000,000 to be placed with domestic firms, contravenes the national treatment clause. Because it does not purport to be based on safety considerations, it could not be excepted under the provision of Part VIII dealing with considerations of public safety and no other exception is applicable. The Act will not be affected by the code, however, because AMTRAK is not a procuring entity covered by the code. As discussed previously, 1/ the question of coverage under the normative rule is a close one, likely to be resolved on an ad hoc basis only by the future negotiations affecting the composition of the entity list.

8. Provisions of the foreign-aid laws, 22 U.S.C. sections 2352 and 2354 (1976), restricting the purchase of foreign products with such funds appear valid despite their surface contradiction of

1/ See section 7.1.3, pages 30-48 supra.

the national treatment clause -- an interpretive note expressly exempts from the coverage of the code such provisions relating to tied aid. Both of these laws prescribe restrictions in the nature of tying arrangements, one for small businesses and the other for American enterprise generally, and are thus excepted.

9. The express purpose of the foreign-built dredge law, 46 U.S.C. 292 (Supp. V 1975), is "the protection of American shipyards, American shipping, and American labor against foreign competition." 1/ The law appears to cover the use of foreign-built dredges purchased by American firms, as well as their use by foreign firms under contract to perform dredging operations, the latter situation being likely exempt from the Code as constituting a service, not a product. Thus, the law would appear to conflict with Part II's national treatment principle insofar as it would prevent a procuring entity from purchasing a foreign-built dredge.

It should be noted, however, that the Byrnes-Tollefson Amendment to the DOD Appropriations Act, Pub. L. No. 94-212, 90 Stat. 153 (1976), tit. IV, prohibits the purchase of any foreign-built vessel. At least to the extent that dredges may be purchased by DOD funds, then, the viability under the Code of the foreign-built dredge law may be a moot issue, as the DOD provision is excepted from coverage in Annex I and could be used to require purchase of domestic-built dredges.

1/ S. Rep. 2384, 59th Cong., 1st Sess. 2-3 (1906).

Use of the Byrnes-Tollefson Amendment may prove particularly useful in this context. American dredge manufacturers have recently complained that the Corps of Engineers, among other purchasers, have been buying dredges that consisted of an American vessel carrying Dutch dredging machinery. Obviously, the machinery is the essential part of a dredge, but apparently because the vessel is documented as American, the dredge complies with the requirements of 46 U.S.C. 292. But the Byrnes-Tollefson Amendment prohibits both the purchase of vessels and major components -- which in the case of a dredge would seem to encompass the foreign machinery. A colorable argument thus could support use of the Byrnes-Tollefson Amendment to prohibit the purchase of dredges incorporating substantial foreign equipment without the conflict with the code which use of the foreign dredge law would precipitate.

10. The several statutory preferences mandated for U.S. flag air and sea vessels, 10 U.S.C. 2631 (1976), 46 U.S.C. 883 and 1241(b)(1) (Supp. V 1975) and 49 U.S.C. 1517 (1976), seem likely to withstand the application of Part II's national treatment clause in most cases -- transport of supplies constitutes a service, not a product, and therefore is not within the scope of the code as defined in Part I, paragraph 1(a). However, the latter paragraph brings within the code "services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves. . . ." Thus,

if a procuring entity entered into a C.I.F. contract with a foreign supplier for goods exceeding in value the cost of their shipment, the Code's national treatment clause would conflict with the laws to the extent they would require shipment on U.S. flag vessels.

11. The Merchant Marine Act, in 46 U.S.C. 1155 and 1176 (1976), provides that ships authorized to be constructed pursuant to programs administered under the Act must be built in American shipyards with American materials, and further, that ship operators who receive subsidies under the Act "with respect to subsistence of officers and crews" must also purchase where possible American materials for such subsistence. The law was a depression-era measure to assist the American maritime industry, and it does not appear that any grants or subsidies under the Act are used to procure vessels for the government, although some provisions are designed to allow acquisition or deployment of vessels which may contribute to the national defense in an emergency. Whether the Act must be administered in accordance with the code thus appears to be the question whether control over funding suffices to bring the procurements within the coverage contemplated by Annex I. Unless the code is amended to state otherwise, the purchases made with such grants appear to be outside the code because they are procurements not for the Department of Commerce, but for private parties. Viewed in this manner, the statute need not be amended or repealed.

12. The several appropriations restrictions which impose buy-American provisions on state and local grantees, including the Public Works Employment Act of 1977, 1/ the Rural Electrification Act of 1936, 2/ as amended, the Clean Water Act of 1977, 3/ and the Surface Transportation Assistance Act of 1978, 4/ appear not to be affected by the code because procurements made with funds authorized by them should not be considered purchases by entities listed on Annex I; rather, these are procurements made by state and local governments which are excepted from the code in Part I:2. This conclusion is discussed in more detail at pages 26-30 supra.

13. A limited "Buy-Indian" provision is contained in 25 U.S.C. 47 (1976), which obligates the Secretary of the Interior, "so far as may be practicable . . . in (his) discretion," to purchase Indian products. When invoked, the provision becomes another kind of buy-American provision. However, the discretion vested in the Secretary could be exercised to avoid any possible conflict with the code, so that no implementing steps need be taken with respect to the statute. Further, native Americans are minorities within the meaning of the minority business set-aside program, which is excepted from the code and could be used in the same circumstances as the Buy Indian Act. See FPR sections 1-1.303, 1-1.310-2 (1978).

1/ Pub. L. No. 95-28, 103, 91 Stat. 116 (1977).
2/ 7 U.S.C. 903 (1976), as amended by 52 Stat. 809, 401 (1938).
3/ 33 U.S.C.A. 1295 (West Supp. 1978).
4/ Pub. L. No. 95-559, 92 Stat. 2689 (1978), section 401.

Thus, several of the above statutes, and the associated regulations promulgated thereunder, affect the American procurement process in a manner that will contravene the national treatment and MFN principles of the code under certain circumstances. If the United States is to adopt the code, legislative steps must be taken to conform these laws to code obligations.

Because the policies underlying these laws may still be desirable for procurements not covered by the code, the Congress may wish not to amend or repeal any of them. Further, because determination of the code's effects on particular procurements must necessarily be on an ad hoc basis -- owing to the questions of coverage, exceptions, conditional MFN, and similar issues -- and because these issues are subject to the changes wrought by the future, obligatory negotiations, the Congress should consider any implementing scheme incorporating a broad grant of authority to the executive branch to administer the code in a way accounting for the many variables occasioned both by code rules and broader foreign policy factors. The latter factors may be particularly important in allowing Presidential latitude to encourage nonparties, particularly LDC's, to accede to the code. In any case, at least some discretion to waive new preferences should be included in implementing legislation similar to that found in the present Buy American Act. 1/

The extent of discretionary authority which should be vested in the executive branch is primarily important in deciding the future operation of

1/ The Act provides exceptions (1) where articles, materials, or supplies cannot be found domestically in "reasonably available commercial quantities," (section 10a), and (2) where the agency head determines it is not in the public interest to apply the Act (section 10(d)).

the Buy American Act. The 6 percent, 12 percent, and 50 percent differentials currently applied to foreign bids are the result of policies promulgated by executive orders to carry out the Act's purpose. While a universal waiver of buy preferences could not be made without Congressional approval, the further question remains how to treat parties and procurements not covered by the code. The Congress may wish to address these issues in the implementing legislation. Options include prohibiting all purchases from suppliers in nonparty nations, or only covered procurements; prohibiting foreign bids on all noncovered procurements; raising the domestic preference for noncovered procurements; and distinguishing between types of nonparties (developed, developing, and least-developed countries). If the Congress wishes to grant broad authority to the executive branch to implement a revised buy-American policy incorporating any or all of these options, then the extent to which delimiting criteria for the exercise of that authority must be legislated should also be considered. For example, a type of legislative veto over waiver decisions may prove most easily administered from both branches' point of view. The 3-year comprehensive review of the code required by Part IX:6 appears to provide sufficient time to gain experience which will demonstrate the efficacy of whatever implementing scheme is chosen.

Paragraph 2 of Part II excepts from paragraph 1 customs duties and procedures connected with the importation process. U.S. laws pertaining to those matters will therefore remain unaffected by Part II. Presumably this will mean inter alia that duties imposed because of actions successfully brought under U.S. countervailing duty and antidumping laws may be imposed regardless of the code. The Congress may wish to consider, however, whether special means are needed to ensure that the bids of foreign tenders correctly

reflect the addition of any compensating countervailing or antidumping duties, since opening vast new U.S. markets should not concomitantly open opportunties to sell subsidized or dumped goods to the detriment of U.S. suppliers.

In a similar vein, the Congress may wish to consider one other statute relating to unfair trade practices associated with imports. Section 337 of the Tariff Act of 1930, as amended, 1/ grants the Commission authority to exclude from entry into the U.S. articles imported by a person in violation of section 337(a), or issue a cease and desist order to any person directing that person to refrain from violating that section. 2/ Section 337(a) is

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1/ 19 U.S.C. 1337 (1976).

2/ Section 337 provides in pertinent part:

(d) EXCLUSION OF ARTICLES FROM ENTRY.--If the Commission determines, as a result of an investigation under this section, that there is violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditrions in the United States economy, the production of like or directlycompetitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

(e) EXCLUSION OF ARTICLES FROM ENTRY DURING INVESTIGATION EXCEPT UNDER BOND.--If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary

(Continued)

violated by persons who utilize unfair acts or unfair methods of competition in the importation or sale of imported articles where such acts have the effect of injuring an efficiently operated domestic industry. 1/ Thus, a person who imports an article infringing a valid U.S. patent, 2/ or who imports and sells an article at less than its variable costs, may violate section 337 and be subject to an appropriate Commission order. 3/

(Continued)

shall, through the proper officers, refuse such entry, except that such articles shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary.

(f) CEASE AND DESIST ORDERS.--In lieu of taking action under subsection (d) or (e), the Commission may issue and cause to be served on any person violating this section, or believed to be violating this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved, unless after considering the effect of such order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such order should not be issued. The Commission may at any time, upon such notice and in such manner as it deems proper, modify or revoke any such order, and, in the case of a revocation, may take action under subsection (d) or (e), as the case may be.

1/ Section 337(a) provides:

UNFAIR METHODS OF COMPETITION DECLARED UNLAWFUL.--Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

2/ See, e.g., In the Matter of Doxycycline, Inv. No. 337-TA-3, USITC Pub. 764 (April 1979).

3/ See Certain Welded Stainless Steel Pipe and Tube, Inv. No. 337-TA-29, USITC Pub. 863 (February 1978).

Section 337(i), however, precludes the application of any exclusion or cease and desist order to articles imported for the use of the United States where the section 337 action was based on infringement of a valid U.S. patent. 1/ In such cases, the adversely affected patent owner may seek damages only in the Court of Claims. Thus, if a government agency procures a foreign product which is found to infringe a valid U.S. patent, then the domestic patent holder cannot seek to exclude the article from entry or prevent its sale to the government. 2/ The government has long asserted the right to procure allegedly infringing products with no recourse by the patentee except a suit for damages. 3/

1/ Section 337(i) states:

> IMPORTATIONS BY OR FOR THE UNITED STATES.--Any exclusion from entry or order under subsection (d), (e), or (f), in cases based on claims of United States letters patent, shall not apply to any articles imported by and for the use of the United States, or imported for and to used for, the United States with the authorization or consent of the Government. Whenever any article would have been excluded from entry or would not have been entered pursuant to the provisions of such subsections but for the operation of ths subsection, a patent owner adversely affected shall be entitled to reasonable and entire compensation in an action before the Court of Claims pursuant to the procedures of section 1498 of title 28, United States Code.

2/ This issue briefly was considered in Doxycycline, supra n.1. See Transcript of hearing, Feb. 6, 1979, at 55. It is not known whether any cases have been brought in the Court of Claims based on this section. Cases involving infringements not associated with imported goods are not uncommon, however, under 28 U.S.C. 1498 (1976). See, e.g., Hughes Aircraft Co. v. United States, 534 F.2d 889 (Ct. Cl. 1976); Carrier Corp. v. United States, 534 F.2d 244 (Ct. Cl. 1976).

3/ The forerunner of the present 28 U.S.C. 1498 first appeared in 1910. See 36 Stat. 851 (June 25, 1910).

If a foreign supplier was impleaded 1/ into such a damage suit, he could hardly claim that he was being discriminated against in violation of Part II -- his liability is no greater than that of any government contractor, foreign or domestic. However, a difficulty with this section with respect to the code arises because section 337(i) by its terms only bars exclusion or cease and desist orders relating to patent-based claims -- an order based on, for example, a predatory pricing violation has no obvious barrier under this section to enforcement in a section 337 action even where the product is procured by a government agency. Further, contracting officers have no duty to consider alleged antitrust violations when rendering an award; 2/ any action in this regard is apparently left to the Attorney General to prosecute, if at all, under the antitrust laws. Thus, an award could be made to a supplier engaging in unfair trade practices; if he is domestic, the contract ordinarily will proceed unaffected by these complaints, but if the supplier is foreign, a domestic firm could block the contract by gaining an exclusion or cease and desist order, assuming the President did not disapprove.

Under section 4 of the Sherman Act and section 15 of the Clayton Act courts have available a broad range of equitable relief, including the issuance of preliminary injunctions 3/ and orders compelling the defendant to

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1/ Government contracts commonly contain a patent indemnity clause which serves as the basis for the impleader. See Nash and Cibinic, I Federal Procurement Law 728-29 (1977).

2/ Id. at 621-22.

3/ See, e.g., United States v. Wilson Sporting Goods, 788 F.Supp. 543, 567-70 (N.D. Ill. 1968). See generally G. Lewis, "Preliminary Injunctions in Government Section 7 Litigation," 17 Antitr. Bull. 1 (1972); Note, "Preliminary Relief for the Government Under Section 7 of the Clayton Act," 79 Harv. L. Rev. 391 (1965).

forego the benefits of his unfair acts. 1/ While the effects of this relief may parallel that of an exclusion order directed at imported goods, foreign nations party to the code nevertheless may complain that because section 337(i) in nonpatent-based cases is aimed solely at foreign suppliers, its use would constitute a violation of the national treatment obligation of Part II.

Consultation with the Office of the Special Representative for Trade Negotiations (STR) should be undertaken to clarify any understanding with our trade partners reached on such issues, but at this time it appears that section 337(i) need not be amended because (1) the code should not be interpreted as an abrogation of U.S. unfair trade laws, and (2) comparable relief for foreign suppliers injured by domestic unfair trade practices is available under U.S. antitrust law.

Paragraph 3 provides that customary rules of origin will be applied to products imported for procurements associated with the code. Because no current U.S. rule of origin exists in customs law with respect to these imports, implementing legislation must incorporate a rule to carry out this provision. The language of paragraph 3 reflects the understanding that the traditional U.S. substantial transformation rule 2/ would be utilized by this country.

1/ United States v. Paramount Pictures, Inc., 334 U.S. 131, 171 (1948).
2/ The rule is described supra, at pages 55-56.

It may be noted, however, that regulations implementing the Buy American Act require that, to qualify as a domestic source endproduct, the procured article must have been manufactured in the United States incorporating, for greater than 50 percent of the total cost components which are mined, manufactured, or produced in the United States 1/ The purpose of the 50 percent rule is to determine the source of a product as between the United States and any foreign nation; the substantial transformation rule is generally used to prevent deflection of products originating in nations not entitled to some special U.S. import treatment through nations that are so entitled, in order to avoid the required penalties. The latter rule may be best suited for trade involving procured items because it looks to the substance of manufacturing steps rather than mere cost accounting (which may be difficult to obtain or verify); in this sense, it seems theoretically possible that greater than 50 percent of the cost of components of a product may be derived from an exporting nation party to the code, which had performed no process substantially transforming the end product which had largely been completed in a nation not party to the code. While these factors, plus the Customs Service long experience with the current rules, may mitigate against implementing a 50 percent rule for trade under the code, it must be noted that a combination of the percentage criteria and substantial transformation rules applies to GSP imports: "the sum of the cost or value of the materials produced in the beneficiary developing country, plus the direct costs of processing

1/ 19 CFR 1-6.101(d) (1978).

operations . . . (may not be) less than 35 percent of the value of the article . . .," 1/ and the substantial transformation rule is used in determining whether the constituent materials were "produced in the beneficiary developing country." 2/ As described above, under paragraph 3 products procured from countries entitled to GSP apparently are not subject to these rules of origin, but like other countries, are relegated to the normal substantial transformation rule. 3/ Before enacting a percentage rule, however, close consultation with the executive branch should be made to determine what is expected by parties to the code from the United States in applying its rules of origin.

7.3 PART III. SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES

For more than a decade industrialized nations have assisted developing countries by granting to them preferential import treatment with the goal of boosting their export income and assisting them to establish new industries. 4/ The Tokyo Declaration incorporated the question of such special and differential treatment into its policy objectives for the multilateral trade negotiations. 5/ Part III addresses this issue; however, the language largely obligates the parties to pursue only general policies and approaches to assistance, rather than firm commitments to specific measures.

1/ 19 CFR 10.176(a) (1978). The percentage raises to 50 percent where the article is the product of two countries which are members of an "association of countries. . . ." Id. at 19.176(b).
2/ Id. at 10.177(a).
3/ Id. at 134.1(b).
4/ Jackson, supra page 1 n.1 at 663.
5/ GATT Doc. No. MIN (73)1, at pars. 2, 5, 6 (1973).

7.3.1 Text

Objectives

1. Parties to this Agreement shall, in the implementation and administration of this Agreement, through the provisions set out in this Part, duly take into account the development, financial and trade needs of developing countries, in particular the least-developed countries in their need to:

(a) safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development;

(b) promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other sectors of the economy;

(c) support industrial units so long as they are wholly or substantially dependent on government procurement;

(d) encourage their economic development through regional or global arrangements among developing countries presented to the CONTRACTING PARTIES to GATT and not disapproved by them.

2. Consistently with the provisions of this Agreement, parties to it shall, in the preparation and application of laws, regulations and procedures affecting government procurement, facilitate increased imports from developing countries, bearing in mind the special problems of the least-developed countries and those at low stages of economic development.

Coverage

3. With a view to ensuring that developing countries are able to adhere to this Agreement on terms consistent with their development, financial and trade needs, the objectives listed in paragraph 1 above shall be duly taken into account in the course of the negotiations with respect to the lists of entities of developing countries to be covered by the provisions of this Agreement. Developed countries, in the preparation of their lists of entities to be covered by the provisions of the Agreement shall endeavour to include entities purchasing products of export interest to developing countries.

Agreed exclusions

4. Developing countries may negotiate with other participants in the negotiation of this Agreement mutually acceptable exclusions from the rules on national treatment with respect to certain entities or products that are included in their lists of entities having regard to the particular circumstances of each case. In such negotiations, the considerations mentioned in paragraph 1(a)-(c) above shall be duly taken into account. Developing countries participating in regional or global arrangements among developing countries referred to in paragraph 1(d) above, may also negotiate exclusions to their lists, having regard to the particular circumstances of each case, taking into account, inter alia, the provisions on government procurement provided for in the regional or global arrangements concerned and taking into account, in particular, products which may be subject to common industrial development programmes.

5. After entry into force of this Agreement, developing countries parties to this Agreement may modify their lists of entities in accordance with the provisions for modification of such lists contained in paragraph 5 of

Part IX of this Agreement, having regard to their development, financial and trade needs, or may request the Committee to grant exclusions from the rules on national treatment for certain entities or products that are included in their lists of entities, having regard to the particular circumstances of each case and taking duly into account the provisions of paragraph 1(a)-(c) above. Developing countries parties to this Agreement may also request, after entry into force of the Agreement, the Committee to grant exclusions for certain entities or products that are included in their lists in the light of their participation in regional or global arrangements among developing countries, having regard to the particular circumstance of each case and taking duly into account the provisions of paragraph 1(d) above. Each request to the Committee by a developing country party relating to modification of a list shall be accompanied by documentation relevant to the request or by such information as may be necessary for consideration of the matter.

6. Paragraphs 4 and 5 above shall apply mutatis mutandis to developing countries acceding to this Agreement after its entry into force.

7. Such agreed exclusions as mentioned in paragraphs 4, 5 and 6 above shall be subject to review in accordance with the provisions of paragraph 13 of this Part.

Technical assistance for developing country parties

8. Developed country parties to this Agreement shall, upon request, provide all technical assistance which they may deem appropriate to developing country parties in resolving their problems in the field of government procurement.

9. This assistance which shall be provided on the basis of non-discrimination among developing country parties shall relate, inter alia, to:

— the solution of particular technical problems relating to the award of a specific contract;

— any other problem which the party making the request and another party agree to deal with in the context of this assistance.

Information centres

10. Developed country parties to this Agreement shall establish, individually or jointly, information centres to respond to reasonable requests from developing country parties for information relating to, inter alia, laws, regulations, procedures and practices regarding government procurement, notices about proposed purchases which have been published, addresses of the entities covered by this Agreement, and the nature and volume of products purchased or to be purchased, including available information about future tenders. The Committee may also set up an information centre.

Special treatment for least-developed countries

11. Having regard to paragraph 6 of the Tokyo Declaration, special treatment shall be granted to least-developed countries parties to this Agreement and to the suppliers in those countries with respect to products originating in those countries, in the context of any general or specific measures in favour of the developing countries parties to this Agreement. Parties may also grant the benefits of this Agreement to suppliers in least-developed countries which are not parties, with respect to products originating in those countries.

12. Developed country parties shall, upon request, provide assistance which they may deem appropriate to potential tenders in the least-developed countries in submitting their tenders, selecting the products

which are likely to be of interest to entities of developed countries as well as to suppliers in the least-developed countries and likewise assist them to comply with technical regulations and standards relating to products which are the subject of the proposed purchase.

Review

13. The Committee shall review annually the operation and effectiveness of this Part and after each three years of its operation on the basis of reports to be submitted by the parties to this Agreement shall carry out a major review in order to evaluate its effects. As part of the three-yearly reviews and with a view to achieving the maximum implementation of the provisions of this Agreement, including in particular Part II, and having regard to the development, financial and trade situation of the developing countries concerned, the Committee shall examine whether exclusions provided for in accordance with the provisions of paragraphs 4 to 6 of this Part shall be modified or extended.

14. In the course of further rounds of negotiations in accordance with the provisions of Part IX, paragraph 6, developing countries parties to this Agreement shall give consideration to the possibility of enlarging their lists of entities having regard to their economic, financial and trade situation.

7.3.2 Background and Interpretation

Paragraph 1 obligates the signatories to "duly take into account" the special circumstances of developing nations, particularly their concerns with such matters as balance of payments and development of depressed regions and new industries. The special concerns here listed set the policies on which the subsequent specific allowances are based. While obviously not serving as

language binding parties to any course of action, the "duly take into account" clause — as the operative language in most of the paragraphs of Part III -- will likely serve to create a sort of presumption of validity aiding a developing nation in any dispute over procurement measures it adopts which might otherwise deviate from the nondiscriminatory principles of the code.

Paragraph 2 further suggests particular attention to developing and least-developed nations be given by parties in establishing their procurement laws and regulations by facilitating the development of exports from those countries. Because the code mandates MFN treatment for signatories, and this paragraph recognizes that any "facilitation" must be consistent with the code, it would seem that any efforts made to aid developing nations could not also disadvantage other parties — indeed, must be extended in kind to them. The actual impact of this provision would thus appear negligible. However, MFN treatment may account for the disparate needs of the various signatories, and special and differential treatment is an equally integral part of the code, so that as long as particular arrangements with developing nations do not significantly disturb the overall balance of MFN treatment afforded signatories the provisions of Parts II and III should consistently coexist.

Paragraph 3 specifically requires that the special concerns listed in the first paragraph "be duly taken into account" when the entity list defining coverage 1/ is negotiated. The factors would be so recognized with respect to both the quality and quantity of the coverage offered. The negotiations

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1/ See section 7.1.2., pages 21-30 supra.

presumably include both those leading to the initial coverage listed in Annex I and the subsequent negotiations provided for in Part IX:6. 1/

Paragraph 4 provides developing nations with a means of protecting domestic industries by negotiating mutually acceptable exclusions from the national treatment principles with respect to particular entities or products which are otherwise included on Annex I. Thus, foreign suppliers may find they are denied benefits to which they would otherwise be entitled. The paragraph further allows similar exclusions for developing nations which are parties to regional or global economic arrangements based upon provisions concerning government procurement contained in those arrangements. An exclusion may therefore be negotiated not on the basis of a particular need evidenced by the developing nation seeking the exclusion, but because of an alternative obligation owed to third party developing nations as a result of the regional or global arrangement.

After the Code enters into force, developing countries may attain similar exclusions by following the modification process set forth in Part IX:5 2/ by requesting the Committee 3/ to grant exclusions from the national treatment principles for certain products or entities on the coverage list for an agreed period of time. An exclusion request may also be based on obligations incurred by a developing nation because of its membership in a regional or global economic arrangement. If the normal code modification process is invoked then the Committee deliberations must take into account the

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1/ See section 7.9.2, pages 170-73 infra.
2/ Id.
3/ The Committee is composed of representatives of all parties to the agreement. See Part VII:1, discussed infra at section 7.7.2, pages 146-47.

"development, financial and trade needs" of the requesting developing nation; this may result in an adjustment of the balance of coverage favoring the developing nation which was the basis of the original agreement on coverage. Consideration of a request for an exclusion must similarly "duly take into account" the special concerns enumerated in the first paragraph. Finally, if the modification process is invoked the developing nation must submit documentation supporting the request.

Paragraph 6 provides that developing nations later acceding to the code will enjoy the benefits of paragraphs 4 and 5 as would any other such country. It is unclear why only those two paragraphs are specified with the resulting implication that the other benefits of Part III are not equally available. The answer may be that the objectives of paragraph 1 are incorporated by reference in paragraphs 4 and 5, and the other paragraphs of Part III either apply to preentry into force negotiations or are addressed to the obligations of other parties rather than rights of developing nations.

For developing, signatory countries, paragraph 8 promises that developed nations "shall, upon request, provide all technical assistance which they may deem appropriate" in the resolution of procurement problems. "Technical assistance" is then defined in Paragraph 9 to include assistance relating to technical problems in specific awards and other mutually agreeable subjects. In essence, the types of assistance obligated by these paragraphs will only be that to which the parties agree.

Paragraph 10 provides for the establishment of an "information centre" by each developed signatory nation or by a group of nations, to which signatory developing countries could look for answers regarding those parties' procurement practices, procedures, expected needs for goods, and other similar

procurement information. If a nation operating such a center so chooses, there appears no prohibition against the use of the centers to aid any other party as well.

Paragraphs 11-12 provides that similar special and differential treatment must be accorded to "least-developed" countries (LDC's) which are parties, and in apparent contrast to developing countries, LDC's need not be signatories in order for their suppliers to receive the benefits of these paragraphs if a signatory so desires; these benefits, however, are limited to products originating in those LDC's. "Originating" is not here defined; presumably then, the rules of origin provision (Part II:3) governs.

Paragraphs 13 and 14 provide for annual "minor" reviews of derogations, with "major" reviews every 3 years, in an attempt to absorb developing nations into the mainstream of the agreement's operation once they no longer need differential treatment. The specific negotiations referred to are those provided for in Part IX:6. 1/

7.3.0 Implementation

7.3.31 International Arrangements

The international procurement agreements concerning the Department of Defense and the FCN treaties to which the United States is a party 2/ contain no rights or obligations which will be affected by Part III. The arrangements merely create special reciprocal procurement relationships between the parties to them, and do not relate to the rights of developing nations or obligations of parties towards developing nations contained in this part.

1/ See section 7.9.2, pages 171-74 infra.
2/ See section 7.1.31, pages 30-33 supra.

7.3.32 United States Law

Part III establishes no rights of developing nations which will conflict with U.S. procurement law or practice. Of course, as signatories, developing nations are entitled to all other rights afforded by the code, in particular the national treatment and MFN principles of Part II. The potential conflicts with U.S. law raised by those rights are discussed in the pertinent corresponding sections found elsewhere in this analysis.

Part III, however, does impose certain obligations which will require affirmative implementing steps to be undertaken. First, but most vague, are the provisions of paragraph 2 requiring parties to implement their procurement laws in a way which will "facilitate increased exports from developing countries" -- while being consistent with the code. As pointed out above, the net result of the latter qualification may be to minimize any far-reaching impact of this obligation, since MFN principles generally require equal treatment of all parties; however, the code clearly contemplates special and differential treatment for developing nations which would not necessarily apply to other parties. Further, the provisions contemplate that such treatment may be tailored to the needs of individual developing or least-developed nations, so that MFN principles should not require automatic extension of assistance granted one nation to all others. Until experience with the code provides more guidance as to how this provision will be applied, it seems reasonable to assume that parties will satisfy their obligations by ensuring that their laws, regulations and procedures do not hinder the development of exports from developing nations, and further give sympathetic consideration to requests by those nations for action relating to their

specific needs. The provision does not require developed nations to provide assistance in constructing export programs in developing nations.

Paragraphs 8-9 obligate the U. S. to provide technical assistance relating to U.S. contracts upon request. Other than problems relating to particular awards, however, the type and extent of assistance is negotiable. In any case, the assistance contemplated should require no legislative implementing action nor should it contravene any current U.S. law.

Paragraph 10 requires the U.S. to maintain an information center to which developing nations could look for domestic procurement information and explanations. An implementing bill must provide for the creation of such a center, either by authorizing an existing agency (such as the Office of Federal Procurement Policy (OFPP)) 1/ to undertake those responsibilities, or by creating a new office to do so, by merely authorizing the President to exercise his executive powers to establish the center.

7.4 PART IV. TECHNICAL SPECIFICATIONS

Government contracts contain increasingly complex technical specifications, especially in developed nations where the required products are often highly sophisticated and the demand for performance and safety standards particularly acute. Part IV attempts to preclude the use of technical specifications as a nontariff trade barrier where possible by encouraging uniform international standards to be specified and the allowance of substituted equivalents if the conditions cannot be met precisely.

1/ The OFPP may already have sufficient statutory authority for this role. See 41 U.S.C. 405(d)(5) (1976), which authorizes the administrator to establish a system for collecting and disseminating procurement information.

7.4.1 Text

(a) Technical specifications laying down the characteristics of the products to be purchased such as quality, performance, safety and dimensions, testing and test methods, symbols, terminology, packaging, marking and labelling, and conformity certification requirements prescribed by procurement entities, shall not be prepared, adopted or applied with a view to creating obstacles to international trade nor have the effect of creating unnecessary obstacles to international trade.

(b) Any technical specification prescribed by procurement agencies or entities shall, where appropriate:

(i) be in terms of performance rather than design; and

(ii) be based on international standards, national technical regulations, or recognized national standards.

(c) There shall be no requirement or reference to a particular trade mark or name, patent, design or type, specific origin or producer, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tenders.

7.4.2 Background and Interpretation

Paragraph (a) prohibits the adoption of technical specifications by procurement entities with "a view to creating obstacles to international trade," or which "have the effect of creating unnecessary obstacles to international trade." Apparently a party cannot intend to create an obstacle, whether necessary or unnecessary; on the other hand, actions unintentionally having adverse effects on international trade may be taken if "necessary."

However, the action must not be "necessary" in the sense that it is necessary for the party to obstruct international trade to attain some further trade objective, for then it falls within the proscription of the first clause. In any case, what is "necessary" and what is not presumably will be resolved on an ad hoc basis.

Paragraph (b) facilitates suppliers' flexibility in meeting specifications by encouraging procuring entities "where appropriate" first, to refrain from using specifications when a supplier may be able to attain the same required performance using materials and designs more available to him, and second, by utilizing recognized international or national standards where specifications must be used at all, since suppliers are most likely to be familiar with them and have available the resources to satisfy those norms.

Paragraph (b) demonstrates a trend prominent in American procurement practices to solicit bids based on performance needs through the use of "functional specifications." 1/ The use of functional specifications should encourage optimal creativity and efficiency in the proposals submitted in response to invitations to bid. A recent Senate report outlined the following advantages to be gained by the use of functional specifications:

1/ The term 'functional specification' means a statement of a needed function to be performed by a product or service, of the essential characteristics and standards required, and of the conditions or constraints surrounding its intended use or application. (Legislation requiring the use of functional specifications) encourages the Government to state its purchase requirements functionally, that is, to describe the problem to be solved rather than predetermining what specific product will best solve it. A valid functional specification should accurately reflect the needs of the Government while avoiding unduly restrictive requirements which tend to limit competition without satisfying a real need. Federal Acquisition Act of 1977, Report of the Comm. on Governmental Affairs, United States Senate, S.R. 715, 95th Cong., 2d Sess. 20 (citing Judson, "The Use of Functional Purchase Descriptions for Advertised Procurements," 11 Nat'l Contract Management J. 1-13 (1977)).

--Significant cost saving opportunities are created because a variety of product solutions may be considered. Detailed specifications on the other hand, offer little or no latitude for choice of product, design shortcuts, materials or manufacturing method. Competitor costs, and prices cannot be very different.

--More firms, especially small businesses, will be likely to compete. Unlike rigid specifications, functional specifications do not limit bidders only to those who can build the one pre-specified design.

--Innovation and the play of new technologies will be encouraged, since specifications would be end use descriptions rather than product design blueprints. For example, stating a need as "Rodent elimination" rather than calling for a particular mousetrap design could foster some imaginative solution. The "better mousetrap" of folklore may not be a conventional mousetrap at all if today's sciences and creative design processes are challenged. The idea is to confront creativity with a function to be performed or a problem to be solved, and to open the door to all valid alternative solutions.

--The use of commercially available products will be encouraged, doing away with the need for suppliers to redesign products because Government specifications often trail current commercial products even in mature technological fields.

--Functional specifications are less threatened by obsolescence since they usually encompass the needs of more customers, and since they can be continually reused despite changes in technology which would immediately make product specifications obsolete. 1/

These advantages may not be realized in particular procurements; for example, where operational interchangeability (such as required in a common multinational defense program like NATO) is a requisite characteristic of the solicited product. Thus, the general movement toward adopting functional specifications must be qualified by the circumstances of particular procurement needs.

1/ Id. at 21-22.

The encouragement of the use of functional specifications in paragraph (b) reflects the above factors, but is especially aimed at the potential for detailed specifications to act as an invisible barrier to the tendering of bids by foreign suppliers. The paragraph in subparagraph (i) thus sets forth the general rule of using functional specifications, but limits the rule to use "where appropriate"; the qualification apparently refers to purchases of goods where, as suggested above, the circumstances of their use requires that detailed criteria be met.

Paragraph (c) is similarly intended to encourage flexibility in meeting performance requirements and discourage protectionist measures for domestic producers accomplished by prescribing specifications of particular goods or designs.

7.4.3 Implementation

7.4.31 International Arrangements

There are no international arrangements to which the U.S. is a party that will be affected by the adoption of this provision of the code.

7.4.32 United States Law

Part III will largely affect U.S. procurement regulations rather than statutes. The most extensive specifications are associated with procurements by the Department of Defense and the General Services Administration. Most such specifications were designed to ensure that price was the determinative factor in awarding contracts, the assumption being that once detailed specifications were met by a responsive bid then all other government needs were satisfied. Recent executive action 1/ and proposed legislation in

1/ See, e.g., DOD Directive 500.37 and other OFPP orders.

Congress 1/ reflect the trend to dispense with detailed specifications and, instead, invite bids based on general performance criteria. This trend is in full accord with Part IV of the code and it appears unlikely that substantial change must be effected in current procurement procedures if the code is adopted. An executive action could implement the requirements of this provision without more.

As a caveat to this conclusion, however, it must be recognized that the recent moves to dispense with detailed specifications have drawn much opposition from domestic businesses which operate primarily to meet these detailed specifications where large firms find it unprofitable to do so. Because most of these firms are relatively small, the Small Business Administration has registered strong disapproval of the program since it

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1/ Section 302 of the proposed Federal Acquisitions Act of 1977, S. 1264, 95th Cong., 2d Sess., with respect to procurement by "competitive negotiation" provides in part:

> (c) To the maximum extent practicable and consistent with agency needs, solicitations shall encourage effective competition by --
>
> (1) setting forth the agency need in functional terms so as to encourage the application of a variety of technological approaches and elicit the most promising competing alternatives,
>
> (2) not prescribing performance characteristics based on a single approach, and
>
> (3) not prescribing technical approaches or innovations obtained from any potential competitor.
>
> . . .
>
> (e) The preparation and use of detailed specifications in a solicitation shall be subject to prior approval by the agency head. Such approval shall include written justification to be made a part of the official contract file, delineating the circumstances which preclude the use of functional specifications and which require the use of detailed product specification.

Section 3(g) elsewhere defines "function specification" as "a description of the intended use of a product required by the Government. A functional specification may include a statement of the qualitative nature of the product required and, when necessary, may set forth those minimum essential characteristics and standards to which such product must conform if it is to satisfy its intended use." Id. The general basis for encouraging the use of functional specifications is described above in the text, pages 99-101 supra.

reatens to introduce perhaps overwhelming competition from large firms whose
:oducts can meet the general performance criteria. 1/ The DOD remains at
:esent the only procurement agency to adopt the performance criteria
:ogram. If the program is not adopted by other agencies covered by the code,
en a more intensive examination of the pertinent specification regulations
st be undertaken to ensure that the requirements of Part IV are satisfied.

.5 PART V. TENDERING PROCEDURES

.5.1 Text

1. Parties to this Agreement shall ensure that the tendering rocedures of their entities are consistent with the provisions below. Open endering procedures for the purposes of this Agreement are those procedures nder which all interested suppliers may submit a tender. Selective tendering rocedures, for the purposes of this Agreement are those procedures under hich, consistent with paragraph 7 and other relevant provisions of this Part, hose suppliers invited to do so by the entity may submit a tender. Single endering for the purposes of this Agreement, is a procedure where the entity ontacts suppliers individually, only under the conditions specified in aragraph 15 below.

2. Entities, in the process of qualifying suppliers, shall not iscriminate among foreign suppliers or between domestic and foreign uppliers. Qualification procedures shall be consistent with the following:

1/ The Senate report on the proposed Federal Acquisitions Act, however, uggested that the use of functional specifications would benefit small usinesses by encouraging innovation presumbly stifled by prespecified esigns. Id. at 21 (quoted above in the text at section 7.4.2, pages 90-100).

(a) any conditions for participation in tendering procedures shall be published in adequate time to enable interested suppliers to initiate and, to the extent that it is compatible with efficient operation of the procurement process, complete the qualification procedures;

(b) any conditions for participation required from suppliers, including financial guarantees, technical qualifications, information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, shall be no less favourable to foreign suppliers than to domestic suppliers and shall not discriminate among foreign suppliers;

(c) the process of, and the time required for, qualifying suppliers shall not be used in order to keep foreign suppliers off a suppliers' list or from being considered for a particular proposed purchase. Entities shall recognize as qualified suppliers such domestic or foreign suppliers who meet the conditions for participation in a particular proposed purchase. Suppliers requesting to participate in a particular proposed purchase who may not yet be qualified shall also be considered, provided there is sufficient time to complete the qualification procedure;

(d) entities maintaining permanent lists of qualified suppliers shall ensure that all qualified suppliers so requesting are included in the lists within a reasonably short time;

(e) any supplier having requested to become a qualified supplier shall be advised by the entities concerned the decision in this regard. Qualified suppliers included on permanent lists by entities shall also be notified of the termination of any such lists or of their removal from them;

(f) nothing in sub-paragraphs (a) to (e) above shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Agreement.

Notice of proposed purchase and tender documentation

3. Entities shall publish a notice of each proposed purchase in the appropriate publication listed in Annex II. Such notice shall constitute an invitation to participate in either open or selective tendering procedures.

4. Each notice of proposed purchase shall contain the following information:

(a) the nature and quantity of the products to be supplied, or envisaged to be purchased in the case of contracts of a recurring nature; (b) whether the procedure is open or selective; (c) any delivery date; (d) the address and final date for submitting an application to be invited to tender or for qualifying for the suppliers' lists, or for receiving tenders, as well as the language or languages in which they must be submitted; (e) the address of the entity awarding the contract and providing any information necessary for obtaining

specifications and other documents; (f) any economic and technical requirements, financial guarantees and information required from suppliers; (g) the amount and terms of payment of any sum payable for the tender documentation.

The entity shall publish in one of the official languages of the GATT a summary of the notice of proposed purchase containing at least the following:

(i) subject matter of the contract;

(ii) time-limits set for the submission of tenders; and

(iii) addresses from which documents relating to the contracts may be requested.

5. To ensure optimum effective international competition under selective tendering procedures, entities shall, for each proposed purchase, invite tenders from the maximum number of domestic and foreign suppliers, consistent with efficient operation of the procurement system. They shall select the suppliers to participate in the procedure in a fair and non-discriminatory manner.

6. (a) In the case of selective tendering procedures, entities maintaining permanent lists of qualified suppliers shall publish annually in one of the publications listed in Annex III, a notice of the following:

(i) the enumeration of the lists maintained, their headings, in relation to the products or categories of products to be purchased through the lists;

(ii) the conditions to be filled by potential suppliers in view of their inscription on those lists and the methods according to which each of those conditions be verified by the entity concerned;

(iii) the period of validity of the lists, and the formalities for their renewal.

(b) Entities maintaining permanent lists of qualified suppliers may select suppliers to be invited to tender from among those listed. Any selection shall allow for equitable opportunities for suppliers on the list.

(c) If, after publication of the notice under paragraph 3 above, a supplier not yet qualified requests to participate in a particular tender, the entity shall promptly start the procedure of qualification.

7. Suppliers requesting to participate in a particular proposed purchase shall be permitted to submit a tender and be considered provided, in the case of those not yet qualified, there is sufficient time to complete the qualification procedure under paragraphs 2-6 of this Part. The number of additional suppliers permitted to participate shall be limited only by the efficient operation of the procurement system.

8. If after publication of a notice to purchase but before the time set for opening or receipt of tenders as specified in the notices or the tender documentation, it becomes necessary to amend or re-issue the notice, the amendment or the re-issued notice shall be given the same circulation as the original documents upon which the amendment is based. Any significant information given to one supplier with respect to a particular proposed

purchase shall be given simultaneously to all other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to it.

9. (a) Any prescribed time-limit shall be adequate to allow foreign as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. In determining any such time-limit, entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the proposed purchase, the extent of sub-contracting anticipated, and the normal time for transmitting tenders by mail from foreign as well as domestic points.

(b) Consistent with the entity's own reasonable needs, any delivery date shall take into account the normal time required for the transport of goods from the different points of supply.

10. (a) In open procedures, the period for the receipt of tenders shall in no case be less than thirty days from the date of publication referred to in paragraph 3 of this Part.

(b) In selective procedures not involving the use of a permanent list of qualified suppliers, the period for submitting an application to be invited to tender shall in no case be less than thirty days from the date of publication referred to in paragraph 3; the period for receipt of tenders shall in no case be less than thirty days from the date of issuance of the invitation to tender.

(c) In selective procedures involving the use of a permanent list of qualified suppliers, the period for receipt of tenders shall in no case be less than thirty days from the date of the initial issuance of invitations to tender. If the date of initial issuance of invitations to tender does not coincide with the date of the publication referred to in paragraph 3, there shall in no case be less than thirty days between those two dates.

(d) The periods referred to in (a), (b) and (c) above may be reduced either where a state of urgency duly substantiated by the entity renders impracticable the periods in question or in the case of the second or subsequent publications dealing with contracts of a recurring nature within the meaning of paragraph 4 of this Part.

11. If, in tendering procedures, an entity allows tenders to be submitted in several languages, one of those languages shall be one of the official languages of the GATT.

12. Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including the following:

(a) the address of the entity to which tenders should be sent;

(b) the address where requests for supplementary information should be sent;

(c) the language or languages in which tenders and tendering documents must be submitted;

(d) the closing date and time for receipt of tenders and the length of time during which any tender should be open for acceptance;

(e) the persons authorized to be present at the opening of tenders and the date, time and place of this opening;

(f) any economic and technical requirement, financial guarantees and information or documents required from suppliers;

(g) a complete description of the products required or of any requirements including technical specifications, conformity certification to be fulfilled by the products, necessary plans, drawings and instructional materials;

(h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of foreign products, customs duties and other import charges, taxes and currency of payment;

(i) the terms of payment;

(j) any other terms or conditions.

13. (a) In open procedures, entities shall forward the tender documentation at the request of any supplier participating in the procedure, and shall reply promptly to any reasonable request for explanations relating thereto.

(b) In selective procedures, entities shall forward the tender documentation at the request of any supplier requesting to participate and shall reply promptly to any reasonable request for explanations relating thereto.

(c) Entities shall reply promptly to any reasonable request for relevant information submitted by a supplier participating in the tendering procedure, on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract.

Submission, receipt and opening of tenders and awarding of contracts

14. The submission, receipt and opening of tenders and awarding of contracts shall be consistent with the following:

(a) tenders shall normally be submitted in writing directly or by mail. If tenders by telex, telegram or telecopy are permitted, the tender made thereby must include all the information necessary for the evaluation of the tender, in particular the definitive price proposed by the tenderer and a statement that the tenderer agrees to all the terms, conditions and provisions of the invitation to tender. The tender must be confirmed promptly by letter or by the despatch of a signed copy of the telex, telegram or telecopy. Tenders presented by telephone shall not be permitted. The content of the telex, telegram or telecopy shall prevail where there is a difference or conflict between that content and any documentation received after

the time-limit; requests to participate in selective tendering procedures may be submitted by telex, telegram or telecopy.

(b) the opportunities that may be given to tenderers to correct unintentional errors between the opening of tenders and the awarding of the contract shall not be permitted to give rise to any discriminatory practice;

(c) a supplier shall not be penalized if a tender is received in the office designated in the tender documents after the time specified because of delay due solely to mishandling on the part of the entity. Tenders may also be considered in other exceptional circumstances if the procedures of the entity concerned so provide;

(d) all tenders solicited under open and selective procedures by entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings as well as the availability of information from the openings. The receipt and opening of tenders shall also be consistent with the national treatment and non-discrimination provisions of this Agreement. To this effect, and in connexion with open procedures, entities shall establish provisions for the opening of tenders in the presence of either tenderers or their representatives, or an appropriate and impartial witness not connected with the procurement process. A report on the opening of the tenders shall be drawn up in writing. This report shall

remain with the entities concerned at the disposal of the government authorities responsible for the nt : order that it may be used if required under the proc ⌄ of Parts VI and VII of this Agreement;

(e) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from suppliers which comply with the conditions for participation. If an entity has received a tender abnormally lower than other tenders submitted, it may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract;

(f) unless in the public interest an entity decided not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic or foreign products, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous;

(g) if it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation, the entity shall, in any subsequent negotiations, give equal consideration and treatment to all tenders within the competitive range;

(h) entities should normally refrain from awarding contracts on the condition that the supplier provide offset procurement opportunities or similar conditions. In the limited number of cases where such requisites are part of a contract, parties to this Agreement concerned shall limit the offset to a reasonable proportion within the contract value and shall not favour suppliers from one party over suppliers from any other party. Licensing of technology should not normally be used as a condition of award but instances where it is required should be as infrequent as possible and suppliers from one party shall not be favoured over suppliers from any other party.

Use of single tendering

15. The provisions of paragraph 1-14 above governing open and selective tendering procedures need not apply in the following conditions, provided that single tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among foreign suppliers or protection to domestic producers:

(a) in the absence of tenders in response to an open or selective tender, or when the tenders submitted have been either collusive or do not conform to the essential requirements in the tender, or from suppliers who do not comply with the conditions for participation provided for in accordance with this Agreement, on condition, however, that the requirements of the initial tender are not substantially modified in the contract as awarded;

(b) when, for works of art or for reasons connected with protection of exclusive rights, such as patent or copyrights, the products can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

(c) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the products could not be obtained in time by means of open or selective tendering procedures;

(d) for additional deliveries by the original supplier which are intended either as parts replacement for existing supplies or installations, or as the extension of existing supplies or installations where a change of supplier would compel the entity to purchase equipment not meeting requirements of interchangeability with already existing equipment;

(e) when an entity purchases prototypes or a first product which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. When such contracts have been fulfilled, subsequent purchases of products shall be subject to paragraphs 1-14 of this Part. 1/

1/ Original development of a first product may include limited production n order to incorporate the results of field testing and to demonstrate that :he product is suitable for production in quantity to acceptable quality tandards. It does not extend to quantity production to establish commercial viability or to recover research and development costs. (Footnote in text.)

16. Entities shall prepare a report in writing on each contract awarded under the provisions of paragraph 15 of this Part. Each report shall contain the name of the purchasing entity, value and kind of goods purchased, country of origin, and a statement of the conditions in paragraph 15 of this Part which prevailed. This report shall remain with the entities concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures of Parts VI and VII of this Agreement.

. . . . .

ANNEX II *

PUBLICATIONS UTILIZED BY PARTIES TO THIS AGREEMENT FOR THE PUBLICATION OF NOTICES OF PROPOSED PURCHASES - PART V, PARAGRAPH 3

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ANNEX III*

PUBLICATIONS UTILIZED BY PARTIES TO THIS AGREEMENT FOR THE PUBLICATION ANNUALLY OF INFORMATION ON PERMANENT LISTS OF SUPPLIERS IN THE CASE OF SELECTIVE TENDERING PROCEDURES - PART V, PARAGRAPH 6

* The texts of Annex II and Annex III are set forth respectively at pages 249 and 251, infra.

9.5.2 Background and Interpretation

Tendering procedures are ordinarily characterized in one of three ways: (1) public, or open, where bids are publicly advertised to solicit from an unlimited number of suppliers; (2) selective, where the invitation to bid is extended to a limited group of competitors, often only those on a predetermined list; and (3) single tender, where only one supplier is solicited. 1/ Closely associated with the method of tender are the criteria under which bids will be considered. In this regard, three general practices may also be identified: (1) automatic tenders, where awards are based only on predetermined criteria; (2) discretionary, where a combination of factors, some usually predetermined, may be weighed in evaluating the bids, with a general standard such as "most advantageous" the guiding principle; and (3) negotiated tenders, where awards are fully the product of negotiations between procuring entities and potential suppliers. 2/ Negotiated awards are most often associated with single tenders. 3/

Public tendering, associated with public opening of sealed bids, has a strong statutory base 4/ in American procurement practice because it has long been thought to provide maximum transparency and price competition to the awards process. Other countries have largely adhered to selective or single

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1/ Organization for Economic Cooperation and Development, Government Purchasing Regulations and Procedures of OECD Member Countries 6 (1976) (hereinafter OECD); R. Baldwin, Nontariff Distortions of International Trade 59-61 (1970).

2/ OECD at 6-7.

3/ Id. at 7.

4/ See 41 U.S.C. 253(b) (1976).

tendering methods in the belief that such methods are administratively cheaper and decrease the opportunities for collusive bidding. In response to the initial foreign complaints concerning American buy-national statutes and policies, the United States pointed out that through the ubiquitous use of selective and single tendering techniques, together with other nontransparent procurement procedures, other nations practice procurement discrimination at least equally effective as buy-American policies. 1/

A universal trend in procurement practice has been the increasing use of negotiated tenders. The United States is clearly moving in this direction: in FY 1976, civilian procurements worth $12.3 billion, or 68 percent of total procurement expenditures, and military procurements worth $37.4 billion, or 92 percent of total military procurement expenditures, involved negotiations at some stage of the awards process. 2/ This trend reflects the increasing complexity of products procured, the substantial amount of R & D contracts awarded inherently involving criteria which cannot be predetermined, and the recognition that nonprice considerations may be involved which cannot be fully explicated without intervening discussions.

Part V attempts to secure generally uniform procedures by striking a balance between the practical necessities of negotiated and selective tendering procedures and the desired goal of transparency. The provisions

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1/ Marks and Malmgren, "Negotiating Nontariff Distortions to Trade," 7 L. and Pol'y in Int'l Bus. 327, 401-03 (1975).

2/ See Senate report, supra p. 98, n.1, at 39 n.31.

Even where negotiations are employed in American procurements, however, highly transparent procedures are used to ensure continued competition. See, e.g., 10 U.S.C. 2304(g), DAR 3-805 (41 CFR 3-805 (1976)). Negotiations abroad are more associated with single tenders involving no competition and no public release of information.

appear largely self-explanatory and in contrast to the other parts of the code, are remarkable in their careful narrowing of the discretion allowed procuring entities when they are subject to one of the detailed paragraphs covering various tendering procedures.

For example, consistent with the goal of nondiscrimination, paragraph 1 limits the use of single tenders to the conditions set forth in paragraph 15. The latter paragraph states the idea -- consistently repeated throughout Part V -- that tendering methods cannot be used in a manner contravening the national treatment and MFN principles basic to the code. Further, single tenders may only be made in certain situations well-recognized as appropriate to this method; for example, where open or selective procedures fail due to nonresponsiveness or collusion among bidders; where no reasonable alternative to a particular supplier exists; where an emergency exists; where the products are replacements or additions to an existing order; or where the procurement involves the common practice of government support for research and development projects, often by their nature incapable of being offered within a competitive framework -- but single tenders may be made even then only for prototypes or first products arising from the R & D contract, with subsequent purchases subject to the rules of paragraphs 1-14. Finally, paragraph 16 requires that a report be prepared to document each award granted after a single tender, in anticipation of consultations initiated under Parts VI and VII.

Paragraph 2 ensures that parties cannot use the process or criteria of qualification of suppliers to exclude foreign participation. Thus, procedures for timing and access must account for foreign competitors more removed from the facilities of qualification. Further, suppliers must be

notified of their qualification status, both initially and later if there is any change.

Paragraphs 4-13 outline procedures for the tendering process. Access and criteria for placement on qualified suppliers lists must be publicized and operated in a nondiscriminatory manner. (Pars. 5-7). Proposed purchases must be published, along with information necessary for suppliers to respond properly with a tendered bid. (Pars. 3-4). A summary notice, in an official GATT language (of which English is one) must also be published; apparently the original full proposal need not be and the risk of lack of notice or subsequent misinterpretation -- clearly a disadvantage -- falls on foreign suppliers who cannot claim the practice violates the national treatment principle of the code. However, if suppliers are allowed to tender in several languages, at least one so allowed must be an official language of GATT. (Par. 11).

Reissued invitations must adhere to all rules governing the original. (Par. 8). Further, "significant information" cannot be unilaterally given to selected suppliers, even if they alone request it; all suppliers must receive "significant information" simultaneously.

After notice of invitation for bids, adequate time for responses from all interested suppliers must be allowed, but in no event shall the period be less than thirty days unless there is a "duly substantiated" emergency rendering acceleration necessary or unless the contract is a recurring one as provided in paragraph 4(a). (Pars. 9-10). "Due substantiation" of a state of urgency appears to serve merely as another admonition against pretext and discrimination, because there is no mechanism in the code for immediate review

of whether the acceleration was justified. The reasons given by the party must therefore function only as a basis for discussing complaints in the consultation process established by Parts VI and VII. 1/

Adequate data must be provided upon request of qualified suppliers so that suppliers may make "responsive" bids (ones satisfying the criteria for consideration for award). Paragraph 12 lists the minimum information required. Paragraph 13 further requires that entities provide suppliers with the tendering documentation and other relevant information upon request. This requirement must be read in conjunction with paragraph 8, which provides that suppliers must receive significant information simultaneously.

"Submission" refers to the documentation upon which the evaluation of a bid solely will be based. Procuring entities commonly prescribe strict rules of form and method of proffer, which can be used to thwart unsuspecting foreign suppliers. Paragraph 14 governs the submission, evaluations, and award process, essentially requiring transparent procedures which include safeguards for assuring their nondiscriminatory application. For example, subparagraphs (a) and (e) impose rather strict rules for the form in which bids are to be tendered; yet, subparagraphs (b) and (c) caution entities against utilizing exceptions to the strict submission rules for purposes of discrimination, and subparagraph (d) further requires that the receipt and opening of bids "shall be . . . under procedures and conditions guaranteeing the regularity of the openings as well as the availability of information from the openings (and) . . . shall also be consistent with the national treatment

1/ See section 7.6.2 and 7.7.2, pages 134-38 and 146-48 infra.

and nondiscrimination provisions" of Part II -- subparagraph (d) thus constitutes an explicit statement of transparency. Further, subparagraphs (f) and (g) require the awards to conform to previously published evaluation criteria, whether the criteria are automatic or discretionary. Negotiated tenders do not obviously fit within the code's award scheme except in the unusual circumstance of equally advantageous bids and in single tendering; but even then all tenderers must continue to receive equal treatment, presumably including the opportunity to negotiate. (Par. 14(g)).

Subparagraph (h) provides that awards generally should not be conditioned on offsets or licensing requirements, both common conditions for contracting with developing nations and with developed nations in defense matters. The proscription against offsets appears aimed at reciprocal agreements such as ones the U.S. has entered into with a number of countries with regard to sales of military equipment. 1/ The provision would allow offsets, provided they are limited to a "reasonable proportion (of) the contract value" and do not "favour suppliers from one party over suppliers from any other party."

The intent and effect of this language is somewhat unclear. The purpose of most offsets is to afford a purchaser a means of partially financing its purchase through guaranteed reciprocal purchases by the seller -- usually in the form of preferential market access and award consideration rather than sales of particular goods. 2/ This guaranteed preference

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1/ See the discussion at section 7.2.31, pages 59-62 infra.
2/ Id.

nherently contradicts MFN principles; thus, by apparently recognizing offsets n some circumstances subparagraph 14(h) obviously is intended to create an xception to Part II.

But there seems to be an internal inconsistency. The final condition - that an offset may not favor one party's suppliers over another's -- would nherently preclude such agreements among code signatories thus prohibiting hat the earlier language seemed to allow, if the procuring nation's suppliers ire included in the phrase "suppliers from one party. . . .": the condition ould in effect become the rule, and bring the provision back within Part II's ondiscrimination principles, rendering the entire exercise superfluous. hus, the condition must be intended as a MFN, but not national treatment, ondiscrimination rule. Parties can use offsets to favor domestic suppliers, ut cannot construct such offsets in a way discriminating (apparently either irectly or indirectly) among foreign suppliers.

Although the U.S. generally opposes the use of offsets, this rovision ironically may allow the U.S. to protect its labor surplus set-aside rogram which finds no other safe harbor in the code, unlike the small and minority business set-asides which are protected by an express exception. For contracts otherwise covered, it would appear that limited use of labor surplus set asides could continue to be made, especially since they are normally limited to less than half of a proposed procurement -- an amount perhaps satisfying the criterion "reasonable proportion within the contract value." 1/

1/ See 43 Comp. Gen. 487 (1963).

7.5.3 Implementation

7.5.31 International Arrangements

There are no international agreements to which the U.S. is a party which contain obligations regarding tendering procedures. Part V, however, includes paragraph 14(h) which discourages the negotiation of offset agreements in general and specifically prohibit grants of preferential treatment to suppliers of one party over those of another. The United States is a party to several reciprocal defense procurement arrangements with various NATO members 1/ which grant national treatment to suppliers of the parties for certain defense-related procurements. In addition, the U.S. has an offset arrangement with the Government of Switzerland whereby certain American defense contractors have agreed to market Swiss goods in an effort to offset a part of the cost of the F-5 warplanes sold to the Swiss Government. 2/ The NATO and Swiss agreements would appear within the scope of paragraph 14(h). Nevertheless, as explained previously the NATO agreements will likely be excepted from the code's coverage by Part VIII:1, 3/ and therefore paragraph 14(h) will be inapplicable to these agreements.

Further, for the same reason the Swiss offset arrangement also will be immune to code obligations insofar as the U.S. grants national treatment to Swiss suppliers of warlike or similar defense-related goods. To the extent the offset involves the marketing by American firms of Swiss goods in the private market, the agreement appears equally immune because neither paragraph

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1/ These arrangements are described in section 7.2.31, pages 59-62 supra.
2/ Id.
3/ See section 7.2.31, pages 59-62 supra, and section 7.8.31, pages 159-62 infra.

4(h) nor any other provision covers private purchases. Only where covered procuring entities are required to grant preferential treatment to Swiss nondefense-related goods would the paragraph be applicable. But even in that case, because the only firm prohibition is one against discriminatory treatment among suppliers, it appears the arrangements will not be affected. The only obligation therein is to accord national treatment to Swiss products and suppliers -- treatment to which they and all other parties are already entitled under Part II for purchases covered by the code.

7.5.32 United States Law

Part V affirmatively obligates the signatories to take the necessary steps to conform their tendering procedures to the stated requirements. American procedures largely reside in agency regulations and practices, so that while current statutes may be affected somewhat by the adoption of the precise procedures set forth in this Part, those effects will be multiplied by the derivative effects distributed throughout the multitude of implementing regulations.

One set of statutory provisions requiring review if Part V is adopted is embodied in the general procurement procedures enumerated in 41 U.S.C. ch. 4, 251 et seq. (1976). The procedures set forth therein apply to executive agencies other than the Department of Defense, the Coast Guard, and NASA. 1/ The chapter covers tendering procedures such as conditions for negotiated contracts, 2/ advertising, 3/ and finality of agency determinations. 4/ The

1/ 41 U.S.C. 252(a)(1) (1976).
2/ Id., 252(c) and 254.
3/ Id., 253.
4/ Id., section 257.

procedures are implemented in title 41 of the CFR, both in the Federal Procurement Regulations and in the chapters containing the regulations of the individual agencies. 1/ In general, the sections and their implementing regulations comport with the intent of the code, but vary slightly in their specific provisions.

For example, section 252(c) establishes the general rule that government contracts may be let only after advertising, but also provides that contracts may be negotiated without advertising if any one of the numerous listed exceptions is met. 2/ Section 253 then states that "the advertisement

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1/ Compare, e.g., part 3 of each of the various chapters dealing with negotiated procurements.

2/ Section 252(c) in its entirety reads:

> (c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if --
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> (1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;
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> (2) the public exigency will not admit of the delay incident to advertising;
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> (3) the aggregate amount involved does not exceed $10,000;
>
> (4) for personal or professional services;
>
> (5) for any service to be rendered by any university, college, or other educational institution;
>
> (6) the property or services are to be procured and used outside the limits of the United States and its possessions;
>
> (7) for medicines or medical property;
>
> (8) for property purchased for authorized resale;
>
> (9) for perishable or nonperishable subsistence supplies;
>
> (10) for property or services for which it is impracticable to secure competition;
>
> (11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of property for experimentation, development, research, or test;

(Continued)

for bids shall be made a sufficient time previous to the purchase or contract and specifications and invitations for bids shall permit such full and free competition (consistent with the contract requirements)." In addition, the Secretary of Commerce is obligated under 15 U.S.C. 637(e) (1976), 1/

(Continued)

(12) for property or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in special situations or in particular localities in order to assure standardization and interchangeability is necessary in the public interest;

(14) for property or services as to which the agency head determines that bid prices after advertising therefor are not reasonable (either as to all or as to some part of the requirements) or have not been independently arrived at in open competition: Provided, That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all or some of the bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder and (B) the negotiated price is the lowest negotiated price offered by any responsible supplier; or

(15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.

1/ Section 637(e) provides:

It shall be the duty of the Secretary of Commerce, and he is empowered, to obtain notice of all proposed defense procurement actions of $10,000 and above, and all civilian procurements actions of $5,000 and above, from any Federal department, establishment, or agency engaged in procurement of supplies and services in the United States; and to publicize such notices in the daily publication "United States Department of Commerce Synopsis of the United States Government Proposed Procurements, Sales, and Contract Awards", immediately after the necessity for the procurement is established; except that nothing herein shall require publication of such notices with respect to those procurements (1) which for security reasons are of a classified nature, or (2) which involve perishable subsistence supplies, or (3) which are for utility services and the procuring

(Continued)

subject to the numerous exceptions listed therein, to obtain and publish information on Federal defense-related procurements exceeding $10,000 and civilian procurements exceeding $15,000. Finally, section 5 of title 41 1/ also sets forth a general advertising rule for government purchases not made

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(Continued)

agency in accordance with applicable law has predetermined the utility concern to whom the award will be made, or (4) which are of such unusual and compelling emergency that the government would be seriously injured if bids or offers were permitted to be made more than 15 days after the issuance of the invitation for bids or solicitation for proposals, or (5) which are made by an order placed under an existing contract, or (6) which are made from another Government department or agency, or a mandatory source of supply, or (7) which are for personal or professional services, or (3) which are for services from educational institutions, or (9) in which only foreign sources are to be solicited, or (10) for which it is determined in writing by the procuring agency, with the concurrence of the Administrator, that advance publicity is not appropriate or reasonable.

The publication referred to is listed on Annexes II and III, so that no further affirmative implementing steps in this regard need be taken.

1/ 41 U.S.C. 5 (1976) provides:

> Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed $10,000, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis. Except (1) as authorized by section 1638 of Appendix to title 50, (2) when otherwise authorized by law, or (3) when the reasonable value involved in any one case does not exceed $500, sales and contracts of sale by the Government shall be governed by the requirements of this section for advertising.
>
> In the case of wholly owned government corporations, this section shall apply to their administrative transactions only.

"Unless otherwise provided in . . . other law" refers to statutes such as section 252 discussed above.

pursuant to chapter 4 of that title (including section 252 described above); this section will be impacted similar to section 253. 1/

Paragraphs 3-13 of the code set forth requirements for notification of proposed purchases and will impose some specific rules of implementation upon the discretionary language contained in these statutes and their implementing regulations. Thus, the advertisements must be carried in certain publications listed in Annexes II and III (pars. 3, 6); 2/ specific information regarding the proposed procurement is required to be included in the advertisement (par. 4); reissued notices must follow the same circulation requirement (par. 8); and the discretion in determining the time for allowing tender after advertisement must account for the special difficulties faced by foreign suppliers (par. 9) -- in general, this will mean thirty days as a minimum (par. 10).

The exceptions included in these statutory sections could not be used to avoid advertising to foreign suppliers where it would otherwise be required by the code. For example, section 252(c)(7) excepts from the advertising requirement procurement of medicines or medical property; if such a purchase met the coverage requirements the procuring agency would be required to satisfy the notice provisions of Part V. In contrast, an advertising exception for procurement in "a state of urgency" is found in paragraph 10(c) of the code, 41 U.S.C. 5 and 252(c)(2), and 15 U.S.C. 637(c), so that no

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1/ The text of section 253 is set forth at page 129 n.1 infra.

2/ Under 15 U.S.C. 637(e) (1976), notice of most proposed procurements are required to be published in the Commerce Business Daily. The publication of all proposed purchases covered by the code will be performed because of this statute, without the necessity of further legislation. The Commerce Buisiness Daily is listed by the U.S. in the appropriate annexes.

conflicts will arise between the code and domestic law where advertising is waived under the statutory provisions.

Section 253(b) requires bids to be publicly opened and the award made to the responsible bidder whose responsive bid "will be most advantageous to the Government, price and other factors considered. . . ." 1/ These requirements are consonant with the provisions of Part V:14(d-g), except that the code further requires submission of a written report on the opening of the tenders.

The government ordinarily conditions the award of research and development contracts on the licensing of technology arising therefrom. 2/ Paragraph 14(h) discourages -- but does not prohibit -- this practice. Further, the regulations allow modifications to standard practice "to the extent that (the prescribed clauses) are inconsistent with the requirements of statutes, treaties, or agreements." 3/ Thus, it appears that no steps are required to conform the regulations to the code.

1/ Section 253 in its entirety provides:

> Whenever advertising is required --
>
> (a) The advertisement for bids shall be made a sufficient time previously to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned. No advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, or width.
>
> (b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: Provided, That all bids may be rejected when the agency head determines that it is in the public interest so to do.

2/ See CFR 1-9.107 et seq. (1977).

3/ Id., section 1-9.107-1(b).

As a whole, Part V reflects procedures generally followed in Federal rocurement. Procurement regulations of the various agencies potentially ontrary to the enumerated procedures must be repromulgated or amended to ccord with the code. (Of course, agencies or purchases not covered by the ode need not follow Part V.) Although the specific requirements of the code not contravene U.S. statutes and regulations so much as they restrict uthorized discretion and impose additional obligations, it may be desirable o amend each of these statutes or regulations to specify that treaty bligations of the U.S. must be observed.

.6 PART VI. INFORMATION AND REVIEW

The United States has traditionally maintained open award procedures o that information concerning both winning and losing bids is available for nspection by the public. Fearing high administrative costs, collusive idding, and the creation of artificial bid platesus, foreign governments have a.:'y revealed the circumstances of an award. Part VI attempts to ensure the ward procedure does not mask discrimination against foreign suppliers.

?.6.1 Text

1. Any law, regulation, judicial decision, administrative ruling of eneral application, and any procedure (including standard contract clauses) egarding government procurement covered by this Agreement, shall be published promptly by the parties to this Agreement in the appropriate publications listed in Annex IV and in such a manner as to enable other parties and suppliers to become acquainted with them. Parties to this Agreement shall be prepared, upon request, to explain to any other party their government procurement procedures. Entities shall be prepared, upon request, to explain

to any supplier from a country which is a party to this Agreement their procurement practices and procedures.

2. Entities shall, upon request by any supplier, promptly provide pertinent information concerning the reasons why that supplier's application to qualify for the suppliers' list was rejected, or why that supplier was not invited or admitted to tender.

3. Entities shall promptly, and in no case later than seven working days from the date of the award of a contract, inform the unsuccessful tenders by written communication or publication that a contract has been awarded.

4. Upon request by an unsuccessful tenderer, the entity concerned shall promptly provide that tenderer with pertinent information concerning the reasons why the tender was not selected, including information on the characteristics and the relative advantages of the tender selected, as well as the name of the winning tenderer.

5. Entities shall establish a contact point to provide additional information to any unsuccessful tenderer dissatisfied with the explanation for rejection of his tender or who may have further questions about the award of the contract. There shall also be procedures for the hearing and reviewing of complaints arising in connexion with any phase of the procurement process, so as to ensure that, to the greatest extent possible, disputes under this Agreement will be equitably and expeditiously resolved between the suppliers and the entities concerned.

6. The government of the unsuccessful tenderer, which is a party to this Agreement, may seek, without prejudice to the provisions under Part VII, such additional information on the contract award as may be necessary to

ensure that the purchase was made fairly and impartially. To this end, the purchasing government shall provide information on both the characteristics and relative advantages of the winning tender and the contract price. Normally this latter information may be disclosed by the government of the unsuccessful tenderer provided it exercises this right with discretion. In cases where release of this information would prejudice competition in future tenders this information shall not be disclosed except after consultation with and agreement of the party which gave the information to the government of the unsuccessful tenderer.

7. Available information concerning individual contract awards shall be provided, upon a request, to any other party.

8. Confidential information provided to any party to this Agreement which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, shall not be revealed without formal authorization from the party providing the information.

9. Parties to this Agreement shall collect and provide to the Committee on an annual basis statistics on their purchases. Such reports shall contain the following information with respect to contracts awarded by all procurement entities covered under the Agreement:

(a) global statistics on estimated value of contracts awarded, both above and below the threshold value;

(b) statistics on number and total value of contracts awarded above the threshold value, broken down by entities, categories of products and either nationality of the winning tenderer or

country of origin of the product, according to a recognized trade or other appropriate classification system;

(c) statistics on the total number and value of contracts awarded under each of the cases of Part V, paragraph 15.

ANNEX IV *

PUBLICATIONS UTILIZED BY PARTIES TO THIS AGREEMENT FOR THE PROMPT PUBLICATION OF LAWS, REGULATIONS, JUDICIAL DECISIONS, ADMINISTRATIVE RULINGS OF GENERAL APPLICATION AND ANY PROCEDURE REGARDING GOVERNMENT PROCUREMENT COVERED BY THIS AGREEMENT - PART VI, PARAGRAPH 1

7.6.2 Background and Interpretation

As previously described, foreign nations have been far more reluctant to disclose information about awards than American procuring entities because they believe that post-award disclosure invites future collusion among suppliers, entails unnecessary administrative costs, establishes artificial bidding plateaus, and intrudes upon expectations of confidential treatment of business data. 1/ While there is meager evidence to support these fears, it is clear that the dearth of information concerning potential contracts and tendering practices is an effective deterrent to suppliers interested in seeking contracting opportunities abroad. Part VI seeks to neutralize these

* he text of this annex is set forth at page 252 infra.

1/ See Baldwin, supra page 4 n.3, at 70.

diverse and invisible practices by imposing a common obligation of transparency in the way they are administered.

In addition, Part VI establishes the initial stage of a dispute settlement mechanism. Some countries, such as the United States, have long provided an appeals mechanism to oversee the conduct of contracting officers. Paragraph 5 requires an internal dispute settlement mechanism to be adopted by all parties. Further, the information disclosure framework established in this Part lays the groundwork for the invocation of the formal dispute settlement procedures set forth in Part VII. In contrast to the latter Part, however, Part VI attempts to allow the code to be as self-policing as possible by encouraging disputes to be resolved first among the suppliers and entities, and if not, then among the parties.

A brief description of each of the paragraphs suggests how the agreement seeks to accomplish the above objectives.

Paragraph 1 continues the attempt to guarantee free access to adequate information. Upon request, parties are to provide to one another and to suppliers from any signatory country explanations of their procurement procedures, and must explain in addition their "practices" to such suppliers. Because American judicial decisions, administrative rulings (for example, those of the Comptroller General), etc., are generally published in the publications listed in Annex IV, the obligations entailed in paragraph 1 would not impose new or unfamiliar procedures on the U.S., but would substantially alter the practices elsewhere.

The information which the purchasing government must provide is the same as required under paragraph 4, except apparently there must be more of it.

. The above paragraphs do not require the publication of specific information concerning the winning bid as the U.S. originally desired. Such an obligation contrasts with the above-described requirements because it would have entailed disclosure to the world, not just to interested parties. Although "sunshine" principles are one form of insurance against invisible discrimination, disclosure to the losing tenderers and their governments, with the possibility of some subsequent public disclosure by the latter, was the maximum which other nations were willing to concede.

Similar to paragraph 6, paragraph 7 requires "available" information about awards to be provided to other parties (nations, not private suppliers), but here the request need not be tied to a complaint by a losing tenderer. "Available" may be broader than "pertinent," with correspondingly less withholding discretion; the distinction may have been accepted because tenderers are not the recipients of the information and thus there is less danger of collusive bidding. On the other hand, "available" is clearly subject to definition in a way involving more discretion than "pertinent." The basis for the distinction is unknown.

Paragraph 8, however, allows the withholding of information -- unless the public or private party providing it consents — which if released would prejudice law enforcement, "legitimate" commercial interests, or "the public interest." The latter ground is especially open to discretionary application; for example, a perceived danger of collusive bidding arguably justifies protection of the public interest in achieving competitive bidding by withholding data about awards. If so interpreted, paragraph 8 would defeat the transparency afforded by the previous seven paragraphs.

Finally, paragraph 9 requires statistical compilation by the parties regarding purchases. Rather specific information must be provided.

7.6.3 Implementation

7.6.31 International Arrangements

The United States is not a party to any international procurement agreement which will be affected by adoption of Part VI. The offset arrangements previously described 1/ do not obligate the United States to adopt any procedures for information and review inconsistent with Part VI; indeed, to the extent that those arrangements involve procurement of defense-related products, they are excepted from the code and Part VI is therefore inapplicable. 2/ As previously noted, the question of the applicability of unconditional MFN clauses in FCN treaties is not yet resolved, so that whether the provisions of Part VI must be extended to nonparties is also unknown.

7.6.32 United States Law

Procedures for obtaining information on contract awards in the United States are found in various procurement regulations rather than statutes. 3/ The provisions of Part VI do not contravene the pertinent regulations so much as they impose additional obligations on procuring entities. For example, sections 1-2.404-3 and 1-2.408(a) of the Federal Procurement Regulations 4/ require that contracting officers, either orally or in writing, notify unsuccessful bidders where all bids have been rejected and at all other times

1/ See sections 7.1.31 and 7.2.31, supra, and 7.3.32 infra, pages 30-33, 59-62, and 96 respectively.

2/ Id.

3/ See, e.g., 41 CFR 1-2.408(c) (formally advertised contracts) and 1-3.103(b) (negotiated contracts) (1977).

4/ 41 CFR sections 1-2.404-3 and 1-2.408(a) (1977).

where feasible; further, notification must be given to all lower bidders where the award is made to other than the low bidder, and to unsuccessful bidders who may have had reason to expect the award. In comparison, paragraph 3 of Part VI provides that unsuccessful tenderers be informed "by written communication or publication" within 7 days of the award. After notification, however, the information to which an unsuccessful bidder is entitled is substantially the same under the code and the regulation. 1/

It is conceivable that under these paragraphs, and also under Part VII:9, 2/ information which would ordinarily be exempt from disclosure may be requested of the domestic procuring agency under the Freedom of Information Act. 3/ The argument supporting disclosure would be that release of otherwise exempt information to losing foreign bidders and/or their governments constitutes a waiver of the protection which the exemption affords. This rationale should prove unsuccessful. First, the Code should not be interpreted as requiring disclosure of information which the U.S. refuses to release under its own very broad disclosure statutes -- i.e., internal agency pre-decisional deliberations. Further, disclosure notwithstanding, exercise of the exemptions under the FOIA is clearly within agency discretion, 4/ and it appears unlikely that disclosure pursuant to treaty commitments could

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1/ Compare Part VI, pars. 4, 6-8 with 41 CFR 1-2.408(c) and 1-3.103(b) (1977).

2/ Part VII:9 requires parties to provide panels with requested information in dispute settlement procedures. It may be supplied in confidence, however.

3/ 5 U.S.C. 552(b) (1976).

4/ See, e.g., Chrysler Corp. v. Brown, 47 U.S.L.W. 4434 (U.S. April 18, 1979) (No. 77-922); Gen'l Dynamics Corp. v. Marshall, 572 F.2d 1211 (8th Cir. 1978); Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197 (7th Cir. 1978); and Pennzoil Co. v Fed'l Power Comm'n, 534 F.2d 627 (5th Cir. 1976).

(Continued)

constitute an abuse of discretion sufficient to withdraw agency discretion in the matter. 1/ The propriety of the exercise of such discretion is bolstered by the obligation of confidentiality which must be accorded under Part VI:8. Thus, there appears no need of adding another exemption to the FOIA to account for any effects of the code.

In addition, similar to Part VII this Part requires the establishment of a mechanism for providing information to foreign tenderers and for resolving complaints arising from the procurement process. (Pars. 1, 5). Further, annual statistical reports concerning procurements must be submitted by each of the signatories. (Par. 9). Each of these requirements must be affirmatively implemented, although current regulations already account for most obligations. Thus, laws, regulations, judicial decisions, administrative rulings, and procedures dealing with procurement (as outlined in paragraph 1) may already be found in various court reporters, Comptroller General decision reports, the Code of Federal Regulations, and similar sources; Annex IV contains the officially designated ones. The "contact point" required by paragraph 5 would logically be someone designated by the procuring entity, probably the contracting officer. 2/ An elaborate hearing and review system

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(Continued)

In this regard, paragraph 8 prohibits the release of confidential business data "without formal authorization from the party providing the information." Because of this provision and the possibility of a suit under the APA for abuse of discretion in release of information protected by the Trade Secrets Act, 18 U.S.C. 1905 (1976), (see Chrysler v. Brown, supra,) presumably any interested domestic party will be consulted in the remote circumstances where confidential information submitted in connection with a procurement may be provided a losing foreign bidder or his government.

1/ But cf. Halperin v Dep't of State, Civ. No. 75-674 (D.C.Cir. 1976).

2/ A "'contracting officer' means an official designated to enter into or administer contracts and make related determinations and findings." 41 CFR 1-1.207 (1977).

.s already in place as well, essentially involving internal agency review 1/ :ollowed by subsequent appeals to the Comptroller General. 2/ Procedures to :acilitate compliance with the statistical reporting obligations of paragraph may be promulgated pursuant to existing legislative authority. 3/

.7 PART VII. ENFORCEMENT OF OBLIGATIONS

Part VII establishes the dispute settlement machinery and procedures :or the code, building on the information disclosure provisions of Part VI. :his part departs from the self-policing aspects of the agreement where the .atter fail. In general, it mirrors the comparable provisions of the other :odes and the frameworks agreement.

.7.1 Text

:nstitutions

1. There shall be established under this Agreement a Committee on :overnment Procurement (referred to in this Agreement as "the Committee") :omposed of representatives from each of the parties to this Agreement. This :ommittee shall elect its own Chairman and shall meet as necessary but not .ess than once a year for the purpose of affording parties the opportunity to :onsult on any matters relating to the operation of the Agreement or the 'urtherance of its objectives, and to carry out such other responsibilities as ıay be assigned to it by the parties.

1/ See generally sections 2.407-8 of the various chapters of title 41 of he CFR (1977).

2/ See generally 4 CFR Part 20 (1977).

3/ See, e.g., 41 U.S.C. 405(d)(5) (1976) which includes among the duties of he Administrator of the OFPP the establishment of "a system for collecting, eveloping, and disseminating procurement data. . . ."

2. The Committee may establish ad hoc panels in the manner and for the purposes set out in paragraph 8 of this Part and working parties or other subsidiary bodies which shall carry out such other functions as may be given to them by the Committee.

Consultation

3. Each party shall afford sympathetic consideration to, and shall afford adequate opportunity for consultations regarding representations made by another party with respect to any matter affecting the operation of this Agreement.

4. If any party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective of the Agreement is being impeded by another party or parties, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the party or parties in question. Each party shall afford sympathetic consideration to any request from another party for consultations. The parties concerned shall initiate requested consultations promptly.

5. Parties engaged in consultations on a particular matter affecting the operation of the Agreement shall provide information concerning the matter subject to the provisions of Part VI, paragraph 8, and attempt to conclude such consultations within a reasonably short period of time.

Resolution of disputes

6. If no mutually satisfactory solution has been reached as a result of consultations under paragraph 4 between the parties concerned, the Committee shall meet at the request of any party to the dispute within thirty days of receipt of such a request to investigate the matter, with a view to facilitating a mutually satisfactory solution.

7. If no mutually satisfactory solution has been reached after etailed examination by the Committee under paragraph 6 within three months, he Committee shall, at the request of any party to dispute, establish a panel romptly to:

(a) examine the matter;

(b) consult regularly with the parties to the dispute and give full opportunity for them to develop a mutually satisfactory solution;

(c) make a statement concerning the facts of the matter as they relate to application of this Agreement and make such findings as will assist the Committee in making recommendations or giving rulings on the matter.

8. In order to facilitate the constitution of panels, the Chairman f the Committee shall maintain an informal indicative list of governmental fficials experienced in the field of trade relations. This list may also nclude persons other than governmental officials. In this connexion, each arty to this Agreement shall be invited to indicate at the beginning of every ear to the Chairman of the Committee the name(s) of the one or two persons hom the parties to this Agreement would be willing to make available for such ork. When a panel is established under paragraph 7, the Chairman, within even days, shall propose to the parties to the dispute the composition of the anel consisting of three or five members and preferably government fficials. The parties directly concerned shall react within seven working ays to nominations of panel members by the Chairman and shall not oppose ominations except for compelling reasons.

Citizens of countries whose governments are parties to a dispute shall not be eligible for membership of the panel concerned with that dispute. Panel members shall serve in their individual capacities and not as governmental representatives nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before a panel.

9. Each panel shall develop its own working procedures. All parties, having a substantial interest in the matter and having notified this to the Committee, shall have an opportunity to be heard. Each panel may consult with and seek information from any source it deems appropriate. Before a panel seeks such information from a source within the jurisdiction of a party it shall inform the government of that party. Any party to this Agreement shall respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information provided to the panel shall not be revealed without formal authorization from the government or person providing the information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the government or person providing the information, will be provided.

Where a mutually satisfactory solution to a dispute cannot be found or where the dispute relates to an interpretation of the Agreement, the panel should first submit the descriptive part of its report to the parties concerned, and should subsequently submit to the parties to the dispute its conclusions, or an outline thereof, a reasonable period of time before they are circulated to the Committee. Where an interpretation of the Agreement is

not involved and where a bilateral settlement of the matter has been found, the report of the panel may be confined to a brief description of the case and to reporting that a solution had been reached.

10. The time required by panels will vary with the particular case. Panels should aim to deliver their findings, and where appropriate, recommendations, to the Committee without undue delay, taking into account the obligation of the Committee to ensure prompt settlement in cases of urgency, normally within a period of four months from the date the panel was established.

Enforcement

11. After the examination is complete or after the report of a panel, working party or other subsidiary body is presented to the Committee, the Committee shall give the matter prompt consideration. With respect to these reports, the Committee shall take appropriate action normally within thirty days of receipt of the report unless extended by the Committee, including:

(a) a statement concerning the facts of the matter;

(b) recommendations to one or more parties to the Agreement; and/or

(c) any other ruling which it deems appropriate.

Any recommendations by the Committee shall aim at the positive resolution of the matter on the basis of the operative provisions of this Agreement and its objectives set out in the Preamble.

12. If a party to which recommendations are addressed considers itself unable to implement them, it should promptly furnish reasons in writing to the Committee. In that event, the Committee shall consider what futher ction may be appropriate.

13. The Committee shall keep under surveillance any matter on which it has made recommendations or given rulings.

Balance of rights and obligations

13. If the Committee's recommendations are not accepted by a party, or parties, to the dispute, and if the Committee considers that the circumstances are serious enough to justify such action, it may authorize a party or parties to this Agreement to suspend in whole or in part, and for such time as may be necessary, the application of this Agreement to any other party or parties, as is determined to be appropriate in the circumstances.

7.7.2 Background and Interpretation

Paragraph 1 provides that representatives of the parties shall comprise a Committee on Government Procurement to handle disputes and other matters authorized elsewhere in the code. The Committee will elect a chairman, and its work generally will be initially addressed by working parties or panels. (Par. 2). All other MTN codes establish similar administrative bodies.

Failing settlement through the procedures in Part VI, the party in which the supplier originates may decide to invoke consultation under paragraphs 3-5. These provisions are patterned after GATT Articles XXII and XXIII, which require that "sympathetic consideration" be given by the alleged offending party to complaints that benefits of the code accruing to the complaining party are being "nullified or impaired," or that "any objective" of the agreement "is being impeded" by actions of the alleged offender.

"Nullification and impairment" remains an uncertain phrase, even after three decades of Article XXIII. 1/ A few principles may be

1/ See Jackson, supra page 1 n.1, at 178-87.

identified: violations of specific obligations indisputably nullify or impair benefits; less clear, but generally accepted as nullification or impairment, is a breach of "reasonable expectations" arising from status as a party to an agreement. Importing Article XXIII concepts into the procurement code will not be without some difficulty, however, because obligations in the code are often vague and leave much discretion to the procuring party. Thus, what may be benefits or reasonable expectations subject to impairment will be a subject of dispute even prior to addressing the issue of alleged impairment once benefits and reasonable expectations are identified and agreed upon. Further, one view of GATT Article XXIII is that nullification or impairment occurs when the "balance of benefits" derived under GATT is disturbed. 1/ A disadvantaged party may be allowed under paragraph 14, barring resolution of the dispute otherwise, to make compensatory adjustments in its obligations to restore the level of benefits due. But the balance of benefits and obligations may be difficult to identify in the code, even if resort is made to the formula used in arriving at the concessions comprising Annex I.

Paragraphs 6 through 13 outline the steps to be taken in settling disputes failing bilateral resolution. First, the Committee will investigate the matter. (Par. 6). If a solution cannot be found, a panel including trade experts and/or government officials will be formed to investigate. (Pars. 7-8). Panel members will serve as individuals, not in their governmental capacities, and will be drawn from a list maintained by the Chairman. Panel procedures for investigation are largely discretionary but all substantially interested parties — not only those parties to the dispute — must be heard.

1/ Id., pages 170-77.

(Par. 9). A report will be formulated and, after being circulated to the concerned parties, 1/ will be submitted to the Committee, usually within 4 months. (Par. 10). However, the report will be merely briefly descriptive of the dispute where no interpretation of the code is involved or a settlement is reached. Although containing no recommendations, the reports will serve as the basis for further action by the Committee, which will issue a prompt statement (usually within 30 days) of facts, recommendations, and/or rulings. (Par. 11). A party need not adopt any recommendation: its ultimate obligation — even then not mandatory — is merely to supply written reasons for not doing so. (Par. 12). If the recommendations are not accepted, and if the Committee concludes the circumstances are sufficiently serious, it may authorize an aggrieved party to suspend its obligations under the code towards another party to restore the correct balance. (Par. 14). Because the code is not a part of GATT, further resort to the latter is apparently unavailable.

7.7.3 Implementation

7.7.31 International Arrangements

The U.S. is a party to no international agreements which will be affected by the code.

7.7.32 United States Law

The dispute settlement mechanism described above imposes no obligations on the parties other than to engage in consultations with an aggrieved party which alleges that its rights under the agreement are being

1/ Although all parties "having a substantial interest in the matter" may appear before the panel, only "concerned parties" — the parties to the dispute which first engaged in consultations (pars. 3-5) and invoked the panel proceeding (pars. 6-7) — have a right to review the proposed panel report prior to its submission to the Committee.

nullified or impaired or that the agreement's objectives are being impeded. This obligation does not require specific implementation action. The clear thrust of Part VII is to afford the milieu optimally conducive for conciliation among disputants. Recommendations by the Committee -- an action not within the province of the panels, who act only as factfinders -- need not be implemented by the affected parties, who are urged only to explain their reasons for not doing so. In keeping with traditional dispute settlement mechanisms contained in trade agreements, solutions to disputes will be negotiated, not imposed, on the assumption that the only workable solution is one acceptable to both parties.

Because the code deals with a subject matter expressly excepted from the GATT in Article III:8(a), 1/ it appears unlikely that the procedures for maintaining the balance of rights and obligations under Articles XXII and XXIII could be invoked unless the code is in fact to become an amendment to GATT. 2/ Even in the latter case, however, it is doubtful that action by the CONTRACTING PARTIES would threaten current American procurement law; therefore, the adoption of Part VI would appear to have only a negligible impact on U.S. law.

Two issues relating to domestic implementation of this section deserve comment, however. The first relates to the comparative remedies under

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1/ But see the potential difficulties with assertion of a blanket exception for government procurement, discussed at pages 5-8, supra.

2/ It is interesting to note that the other MTN codes contain statements to the effect that prosecution of disputes under their respective procedures -- which in most respects parallel the procedures here -- will not prejudice the rights of the parties under the GATT. Thus, parties may invoke Articles XXII and XXIII under those codes, perhaps as a sort of appeals mechanism.

domestic law; the second conerns the necessity of domestic administrative machinery to handle domestic complaints about foreign practices.

Unlike most foreign procurement systems, the U.S. maintains extensive adjudicatory means of resolving disputes between suppliers and the procuring agencies. 1/ Disappointed bidders may: (1) pursue agency remedies; 2/ (2) file bid protests with the GAO; 3/ (3) file for injunctive relief or a temporary restraining order in Federal district court; 4/ and (4) seek recovery of bid preparation costs in Federal district courts (under $10,000) 5/ or in the Court of Claims (any amount). 6/ Congressional approval of the code will give its provisions the force of law domestically, if the Congress

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1/ Part VI:5 requires that parties establish "procedures for the hearing and reviewing of complaints arising in connexion with any phase of the procurement process. . . ." (emphasis added). The U.S. procedures discussed in the text above, however, relate primarily to bid protest actions, since that is the area of procurement law the obligations of the code primarily impinge upon and to which code disputes will most likely correspond.

2/ See DAR 2-407.8, FPR 1-2.407-8 (41 CFR 1-2.407-8 (1978)).

3/ See 4 CFR 230.1 et seq. (1978).

4/ Injunctive relief is premised on the grounds that the agency award was an action arbitrary or capricious, or without rational basis, under the Administrative Procedure Act, (5 U.S.C. 702-706 (1976)). See Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C.Cir. 1970); Wheelabrator Corp. v. Chaffee, 455 F.2d 1306 (D.C.Cir. 1970). Some courts additionally assert that a private bidder has a right to vindicate his and the public's interest in a Government duty of fair and equitable conduct owed to bidders. Merriam v. Kunzig, 476 F.2d. 1233 (3d Cir.), cert. denied, 414 U.S. 911 (1973). These cases established that disappointed bidders have standing to sue under the APA in certain circumstances; authority to grant injunctive relief is grounded in 28 U.S.C. 1331 (1976).

5/ The Tucker Act, 28 U.S.C. 1346 (1976) authorizes this relief in certain circumstances, but only allows monetary damages less than $10,000. See Armstrong & Armstrong, Inc. v. United States, 356 F.Supp. 514 (E.D. Wash. 1973), aff'd 514 F.2d 402 (9th Cir. 1975).

6/ Keco Industries, Inc. v. United States, 142 Ct. Cl. 773, 428 F.2d 1233 (1970); Keco Industries, Inc. v. United States, 203 Ct. Cl. 566, 492 F.2d 1200 (1974).

so states, even where no procurement regulations need be promulgated to implement code obligations. Thus, failure of a contracting officer to follow code obligations — for example, by failing to receive tenders in an open bidding procedure for at least 30 days, contrary to Part V:10(a) -- may spawn an action by a foreign supplier prejudiced thereby in one of the available domestic forums, alleging the officer acted contrary to law. Simultaneously, the supplier could petition his government to initiate inquiries under Part VI:6, and thereafter pursue his complaint, by his government, through the disputes settlement procedures of the code. 1/ While the structure of the code procedures clearly precludes individual relief in specific contract disputes, 2/ at least not in a manner comparable to any of the available domestic actions, there is an undeniable possibility that the merits of the controversy may engender different conclusions in domestic and international forums. Whether the latent potential for contrary findings invites disruption in either the domestic procurement process or in U.S. international trade relations is a complex question necessitating clarification for the Congress when it considers the code for approval. In view of the lack of potentially contrary remedies, however -- the only specific sanction available under the code is withdrawal of benefits accorded to the offending party -- no legislation is necessary, nor probably desirable, which would govern the

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1/ STR has stated that it is understood among code parties that a disappointed bidder must exhaust domestic remedies before "appealing" to the dispute settlement provisions of the code.

2/ Rather, the emphasis on conciliation, the time-consuming procedures, and the lack of specific sanctions leave no doubt that disputes settlement in the code will most likely involve a pervasive scheme of disregard by a nation for code obligations, with the domestic procedures mandated by Part VI:5 available to suppliers on a case-by-case basis.

ability of foreign bidders to exercise their rights under existing U.S. procedures. 1/

A second aspect of the dispute settlement provisions which may require some implementing action is the means for U.S. suppliers to prosecute complaints about adverse conduct of other parties to the code. This issue is one arising under all of the agreements and has been the source of some complaints by domestic concerns relating to the prosecution by the U.S. of complaints under the GATT. Among subsidiary issues are the method of initially evaluating the merits of complaints, including the proper forum and procedures, and the role of domestic private parties most interested in the outcome in the subsequent code proceedings. The current proposals focus on a scheme to be established under a revised section 301 of the Trade Act, 2/ to be applicable to all MTN agreements. The current section is discussed in the Overview paper at pages ---; the ITC will comment on the proposed new section 301 at a later time.

1/ Indeed, aside from the question whether denial of some remedies to suppliers because of their origin is good foreign policy, such patent discrimination may well contravene the national treatment obligation of Part II. This may be questioned, however, because Part VI:5 only requires the establishment of some means of reviewing complaints from foreign suppliers -- not the same procedures for both domestic and foreign firms.

2/ 19 U.S.C. 2411 (1976). Section 301 provides in full:

> (a) Whenever the President determines that a foreign country or instrumentality --
>
> (1) maintains unjustifiable or unreasonable tariff or other import restrictions which impair the value of trade commitments made to the United States or which burden, restrict, or discriminate against United States commerce,
>
> (2) engages in discriminatory or other acts or policies which are unjustifiable or unreasonable and which burden or restrict United States commerce,
>
> (3) provides subsidies (or other incentives having the effect of subsidies) on its exports of one or more products to the United States or to other foreign markets which have the effect of substantially reducing sales of the competitive United States

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product or products in the United States or in those other foreign markets, or

(4) imposes unjustifiable or unreasonable restrictions on access to supplies of food, raw materials, or manufactured or semimanufactured products which burden or restrict United States commerce,

the President shall take all appropriate and feasible steps within his power to obtain the elimination of such restrictions or subsidies, and he --

(A) may suspend, withdraw, or prevent the application of, or may refrain from proclaiming, benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality; and

(B) may impose duties or other import restrictions on the products of such foreign country or instrumentality, and may impose fees or restrictions on the services of such foreign country or instrumentality, for such time as he deems appropriate.

For purposes of this subsection, the term "commerce" includes services associated with the international trade.

(b) In determining what action to take under subsection (a), the President shall consider the relationship of such action to the purposes of this act. Action shall be taken under subsection (a) against the foreign country or instrumentality involved, except that, subject to the provisions of section 302, any such action may be taken on a non-discriminatory treatment basis.

(c) The President in making a determination under this section, may take action under subsection (a)(3) with respect to the exports of a product to the United states by a foreign country or instrumentality if --

(1) the Secretary of the Treasury has found that such country or instrumentality provides subsidies (or other incentives having the effect of subsidies) on such exports;

(2) the International Trade Commission has found that such exports to the United States have the effect of substantially reducing sales of the competitive United States product or products in the United States; and

(3) the President finds that the Antidumping Act, 1921, and section 303 of the Tariff Act of 1930 are inadequate to deter such practices.

(d)(1) The President shall provide an opportunity for the presentation of views concerning the restrictions, acts, policies, or practices referred to in paragraphs (1), (2), (3), and (4) of subsection (a).

(2) Upon complaint filed by any interested party with the Special Representative for Trade Negotiations alleging any such restriction, act, policy, or practice, the Special Representative shall conduct a review of the alleged restriction, act, policy, or practice, and, at the request of the complainant, shall conduct public hearings

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thereon. The Special Representative shall have a copy of each complaint filed under this paragraph published in the Federal Register. The Special Representative shall issue regulations concerning the filing of complaints and the conduct of reviews and hearings under this paragraph and shall submit a report to the House of Representatives and the Senate semi-annually summarizing the reviews and hearings conducted by it under this paragraph during the preceding 6-month period.

(e) Before the President takes any action under subsection (a) with respect to the import treatment of any product or the treatment of any service --

(1) he shall provide an opportunity for the presentation of views concerning the taking of action with respect to such product or service,

(2) upon request by any interested person, he shall provide for appropriate public hearings with respect to the taking of action with respect to such product or service, and

(3) he may request the International Trade Commission for its views as to the probable impact on the economy of the United States of the taking of action with respect to such product or service.

If the President determines that, because of the need for expeditious action under subsection (a), compliance with paragraphs (1) and (2) would be contrary to the national interest, then such paragraphs shall not apply with respect to such action, but he shall thereafter promptly provide an opportunity for the presentation of views concerning the action taken and, upon request by any interested person, shall provide for appropriate public hearings with respect to the action taken. The President shall provide for the issuance of regulations concerning the filing of requests for, and the conduct of, hearing under the subsection.

7.8 PART VIII. EXCEPTIONS TO THE AGREEMENT

In addition to the previously discussed exceptions to coverage contained in Parts I and II, Part VIII reserves a number of actions affecting procurement which governments may take without fear of violating Code obligations. The reservations reflect both traditional American and foreign procurement policies, and comparable provisions in the GATT. 1/

7.8.1 Text

1. Nothing in this Agreement shall be construed to prevent any party to this Agreement from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests, relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any party from imposing or enforcing measures necessary to protect public morals, order or safety, human, animal, or plant life or health, intellectual property, or relating to the products of handicapped persons, of philanthropic institutions or of prison labour.

1/ See GATT Articles XX and XXI. The text of Article XX is set forth infra at pages 157-58.

7.8.2 Background and Interpretation

Paragraph 1 expresses the paramount concern for national security which all nations have expressed in procurement programs. 1/ Development of arms industries through purchases restricted to domestic suppliers is clearly of valid concern to governments, and is explicitly ratified here. More difficult are the preferences for other goods questionably justified as essential to national defense. Paragraph 1 excepts "procurement indispensable for national security or for national defense purposes" (emphasis added) -- the modifier "indispensable" is an attempt to preclude pretextual use of the exception to except from coverage industries manufacturing such products as "dental burrs, clinical thermometers, stencil silk, wool felt . . . wooden boats" 2/ and many others which have sought preferential treatment in the past, both in the United States and abroad.

Paragraph (1) establishes a reservation concerning information disclosure which may be compared with the narrow obligations to disclose procurement information elsewhere set forth in the code. 3/

A perhaps minor uncertainty arises from the construction of the paragraph with respect to its scope. One reading might focus on the conduct allowed in the clause ending with the first comma; thus, a party may take "any

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1/ Dam, supra page 2 n.1, at 201-02.

2/ Id. "Indispensable" presumably modifies "national defense" as well as "national security."

3/ See, e.g., Part VI:2 (parties shall disclose "pertinent information regarding nonqualification for bidders' lists); Part VI:4 (same regarding losing tender); Part VI:6 (disclose "pertinent" information to nation of losing tenderer); Part VII:8 (parties shall respond "fully" to requests for information which is "necessary and appropriate" in the opinion of a working panel).

action or (disclose) any information which it considers necessary for the protection of its essential security interests," with the discretion thus vested limited only by the remainder of the paragraph -- the actions must relate "to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes." In the alternative, the language might be viewed more broadly; thus, a party could take "any action which it considers necessary (1) for the protection of its essential security interests, (2) relating to the procurement of . . . war materials, or (3) relating to procurement indispensable for national security. . . ." The essential difference between the two possible interpretations is that the latter may offer a somewhat broadened range of allowable conduct because actions considered "necessary for the protection of its security interests" would not be qualified with the requirement of relating to procurement indispensable for national defense, etc. From a practical standpoint, however, any action which a party potentially might undertake would appear to fit within either interpretation.

The interpretation of paragraph (1) should take meaning from the boundaries delineated for "any action": actions must relate to "essential security interests," "procurement indispensable for national security," or to procurement of war materials. The spirit of the exception is clearly narrower than most current practices and will likely take on a consistent meaning in practice despite its ambiguities.

Paragraph 2 excepts nondefense related measures. 1/ These include actions protecting the public health and safety, preserving business property,

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1/ Compare GATT Article XX, which in full provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable

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discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(c) relating to the importation or exportation of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic, or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted in the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this subparagraph not later than 30 June 1960.

disadvantaging special groups of worthy suppliers. Certain of these latter exceptions -- purchases from handicapped persons or prisoners -- are undoubtably intended to preserve American laws precisely on point. 1/ Policies discriminating in favor of minority-owned businesses, labor surplus areas, or small enterprises do not fit within the ambit of these exceptions, neither literally nor in intent. Parties are constrained from exercising these exceptions unless the action is necessary and is not arbitrary or unjustifiable even though the conditions giving rise to it prevail elsewhere, and the action does not serve as a concealment for prohibited procurement bias. In contrast to paragraph (1), then, the conditions for invocation of these exceptions are relatively clear.

7.8.3 Implementation

Part VIII contains further exceptions to the coverage of the code. As such, this Part requires no affirmative actions to be undertaken and will affect U.S. law only in the sense that it sanctions international arrangements and domestic laws which might otherwise contravene the procurement. A brief description of such laws follows; a more detailed explanation may be found in section 7.2.3 supra.

7.8.31 International Arrangements

As described supra in section 7.1.31, the United States and several NATO countries have mutual understandings regarding defense-related procurements. Paragraph (1) of Part VIII exempts actions relating to "procurement indispensable for national security or for national defense

1/ Specifically, two statutes which will remain unaffected by adoption of the code because of these exceptions are 18 U.S.C. 4124 (1976) (prison-made goods) and 41 U.S.C. 48 (1976) (blind and other handicapped-made goods).

purposes," procurement of war materials, or "procurement necessary for the protection of . . . essential security interests." Thus, even if these actions are not elsewhere excepted from the code's coverage, Part VIII would allow them to proceed unaffected save for the requirement that they be "indispensable," "essential" or related to warlike goods.

The purpose of the procurement arrangements with the NATO partners is to "enhance NATO nationalization and standardization, and thereby to achieve the greatest NATO capability at the lowest possible cost." 1/ The programs are aimed at procurement and research and development relating to war materials, programs easily fitting within the paragraph (1) exception.

The arrangements, however, may extend to procurement of defense-related items, such as military uniforms and items common to the civilian sector, which are not clearly within the language or intent of the exception. The Memoranda of Understanding (MOU's) do not specify which goods are subject to the agreements; rather, they are to be identified after further negotiations. The full impact of Part VIII therefore cannot now be predicted.

But if the code and these arrangements are to be mutually operative, then some adjustments in the interpretation and application of the MOUs appear necessary. Part IX:4 of the code requires parties to conform all "laws, regulations and administrative procedures" with the code. 2/ On the other hand, the MOU's allow coverage to be agreed upon through negotiation, so that any areas of conflict with the code could be excepted from the scope of the MOU's. Therefore, to the extent that preferential treatment for procurement

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1/ This rationale is variously stated in the several Memoranda of Understandings with the NATO countries and in the implementing directions issued by the Secretary of Defense.

2/ See section 7.9.2, pages 171-72 infra.

of goods from NATO countries would conflict with code because Part VIII does not except them, the coverage of MOU's would need to be examined.

A further consideration may obviate the need for adjustment, however. The MOU's basically provide for national treatment to be granted suppliers originating in the parties to them. Thus, such suppliers are afforded the opportunity to bid on American procurements covered by the MOU's without regard to the Buy American Act and balance-of-payments program differentials, 1/ although other prohibitions statutorily imposed remain in effect. 2/ The foreign suppliers are essentially afforded notification and tendering opportunities equal to those of domestic suppliers -- the same opportunities to which parties are obligated under Part II. Therefore, as long as the MOU's are not construed to grant preferences to NATO suppliers over those of other foreign nations, then all suppliers will be placed in the same footing for bidding on procurements covered by the code, with the result that neither the MOU's nor the code are compromised. The MOU's would therefore be unaffected by adoption of the code.

The "strict" offset arrangements regarding particular military sales, such as the purchase by the Swiss Government of F-5 warplanes, generally obligate the seller (i.e., the United States) to undertake specific, preferential, procurement-related actions. Such actions may be specifically sanctioned by the code by Part V:14(h). 3/ If they are not, the

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1/ These requirements were waived in the public interest pursuant to 41 U.S.C. 10(a) (1976).

2/ For example, the Berry and Byrnes-Tollefson Amendments will continue to preclude foreign purchases of food, textiles, clothing, vessels, etc.

3/ See section 7.2.31, pages 59-62 supra.

arrangements would appear to contravene the MFN principle of the code for those procurements covered by it. Only if the offsets can be excepted from coverage or somehow be construed to fit within a code exception will they withstand challenge as conflicting with the code.

Representatives of the Department of Defense have been closely consulted by the STR with reference to these problems. Because the Department has satisfied itself that the NATO standardization program will not be affected by adoption of the code, it seems reasonable to conclude that most or all of the above-described issues have apparently been favorably resolved.

7.8.32 United States Law

No affirmative obligations are contained in Part VIII which will require Congressional implementation. However, several statutes and regulations will require examination to determine their consistency with Part VIII if disputes arise under other provisions of the code. In general, procurements will have to be examined on an ad hoc basis to determine whether the products they concern fit within the language of the exception. The particular statutes will be briefly described below; a more detailed analysis has been made previously. 1/

Actions relating to procurements of "arms, ammunition and war materials," "essential security interests," or procurement "indispensable to national security" or defense are excepted by paragraph 1. The Buy American Act 2/ may therefore be applied to such products without regard to the code. As suggested previously, however, the identification of products which satisfy

1/ See sections 7.1.32 and 7.2.32, supra, pages 33-48 and 62-84, respectively.

2/ 41 U.S.C. 10a-d (1976).

these criteria will be difficult in some cases if the criteria are not satisfied. Where the code is applicable, the Buy American Act may conflict with it. The same conclusion is generally true of the Act's application with regard to products potentially covered under the clearer exceptions of paragraph 2.

Amendments to the Defense Appropriations Act, 1/ and their counterparts in GSA appropriations acts, 2/ which prohibit the purchase abroad of various items, appear largely questionable as valid exceptions under Part VIII. The Byrnes-Tollefson Amendment prohibiting the purchase of vessels or major components thereof from foreign sources is most clearly within paragraph 1. This conclusion remains true even for nonmilitary vessels, as the prohibition is intended to maintain a strong domestic shipbuilding capability -- a rationale clearly within paragraph 1 because of its subject matter. Although the same rationale (i.e., preservation of domestic capability in case of war) may be applicable to other products, if indiscriminately invoked "the entire infrastructure of a country (may) take on national security aspects." 3/ The language of paragraph 1 was intended to preclude such wide application. Therefore, the prohibitions against the purchase abroad of stainless steel flatware, hand tools, food, shoes, textiles, clothing, certain specialty metals, and busses will likely be in conflict with the code, unless it can be shown that any or all of them are so clearly associated with

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1/ Pub. L. No. 90-500, 82 Stat. 849 (1968), section 404; Pub. L. No. 94-212, 90 Stat. 153 (1976), sections 709, 723 and 724; and Pub. L. No. 94-212 tit. IV 90 Stat. 53 (1976).

2/ Pub. L. No. 95-81,91 Stat. 354 (1977), section 506; Pub. L. No. 94-91, 89 Stat. 441 (1975), section 505.

3/ Dam, supra page 2. n.1, at 201-02.

essential security interests as to warrant exception. Again, the mere association of these prohibitions in a defense-related statute is not conclusive of the application of Part VIII. However, all of these restrictions are presently excepted from coverage by a specific caveat to Annex I.

The preferences for U.S. carriers must be treated similarly. As previously noted, 1/ most situations involving these laws pertain to procurement of services, not products, and will therefore be unaffected by the code. In the event that a purchase of products C.I.F. happened to trigger application of the code in conflict with these laws, the provisions of Part VIII may be pertinent to prevent a conflict between the two. The requirement that U.S. flag carriers be used to transport supplies procured by the armed forces 2/ seems clearly within paragraph 1. The general preference for U.S. vessels carrying other goods procured by the government 3/ could only be utilized for shipment of those products otherwise fitting within the criteria of Part VIII. It seems unlikely that an unqualified argument for the protection of American shipping trade as an "essential security interest" would be convincing to the parties to the agreement.

The prohibition against purchase of foreign-built dredges 4/ would not appear to be an action relating to an essential security interest unless the purpose of the dredges is to maintain open ports for military and similar

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1/ See section 7.2.32, pages 62-84 supra.
2/ 10 U.S.C. 2631 (1976), and 49 U.S.C. 1517 (1976) (to the extent it would apply to transport of defense-related goods shipped by air carrier).
3/ 46 U.S.C. 1241(b)(1) (Supp. V 1975).
4/ 46 U.S.C. 292 (Supp. V 1975).

vessels. Procurement of dredges used for more civilian purposes (i.e., in connection with a Corps of Engineers dam project) may be too remote from national security to successfully fit within Part VIII. 1/

The prohibition against purchase by AMTRAK of foreign products costing more than $1,000,000 2/ would not come within Part VIII as a general proposition. Because the amendment was clearly intended to prevent purchases abroad of train engines and other rolling stock, the rationale of maintaining a viable domestic industry for such goods takes on more substance as our efforts to protect an industry "essential" to national security interests. This justification not only seems questionable under the language and intent of the agreement, however, but would starkly contrast with the American efforts to open foreign carriers to competitive tendering. Thus, the prohibition is unlikely to find shelter under Part VIII. However, AMTRAK is not an entity included in Annex I at this time.

The statutory preferences for prison-made 3/ and handicapped-made goods 4/ clearly fall within paragraph (2) and therefore will not be affected by the code.

The small business 5/ and minority business 6/ preference programs serve to provide economic opportunities to groups which would otherwise be

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1/ See the further discussion of foreign dredges in section 7.2.32, pages 62-84, supra.

2/ Pub. L. No. 95-421, 92 Stat. 923 (1978).

3/ 18 U.S.C. 4124 (1976).

4/ 41 U.S.C. 48 (1976).

5/ 15 U.S.C. 631-44 (1976), as amended by Pub. L. No. 95-507 92 Stat. 1757 (1978); (West Supp. 1978) 22 U.S.C. 2352 (1976); and 41 U.S.C. 252(b) (1976).

6/ 42 U.S.C.A. 6705(f)(2); Pub. L. No. 95-507, 92 Stat. 1757 (1978); Executive Orders 11458 and 11625; and FPR sections 7-1.13 et seq., 1-7.103-12, -7.202-28, -7.402-33, 7.403-55, -7.602-33, -7.603.24.

unable to compete with larger and more entrenched firms. Neither the purpose nor the implementation of these programs find shelter in Part VIII.

Perhaps the most difficult determination is the question whether the Labor Surplus Area Concerns 1/ program is within Part VIII. The program clearly has a primary goal of assisting regions of higher or persistent unemployment. This goal is of a socioeconomic nature not consonant with Part VIII. But the program also is a part of the Defense Mobilization Plan, designed to ensure a wide and stable distribution of the labor force consistent with the need for quick mobilization in time of war. As such, the program is arguably an action relating to an essential security interest within the scope of paragraph 1.

Again, however, the program does not appear to comport with the intent or language of the exception. The essence of paragraph (1) is expressed by the modifiers "essential" and "indispensable," words which the United States will find difficult to argue as appropriately applying to the labor surplus program. Although any conclusion is dependent upon the attitude adopted by other signatories regarding their own similar programs, it seems unlikely that Part VIII could be used to shelter the Labor Surplus Area Concerns program from the code. 2/

7.9.0 PART IX. FINAL PROVISIONS

The last part of the code sets forth the procedures for putting the agreement into force and making subsequent modifications and amendments.

1/ 5 U.S.C.A. 644(d) (West Supp. 1978), 41 CFR 1-1.800 et seq. (1977); 29 CFR 8.1 et seq. (1977); Defense Manpower Policy No. 4, 32A CFR Ch. 1, part 134 (1977); and Executive Order 12073.

2/ See a detailed discussion in section 7.2.32, supra pages 62-84.

7. . Text

1. Acceptance and accession

(a) This Agreement shall be open by signature or otherwise, by Governments contracting parties to the GATT and by the European Economic Community whose agreed list of entities are contained in Annex I.

(b) Any government contracting party to the GATT not a party to this Agreement may accede to it on terms to be agreed between that government and the parties to this Agreement. Accession shall take place by the deposit with the Director-General to the CONTRACTING PARTIES to the GATT of an instrument of accession which states the terms so agreed.

(c) This Agreement shall be open to accession by any other government on terms, related to the effective application of rights and obligations under this Agreement, to be agreed between that government and the parties to this Agreement, by the deposit with the Director-General to the CONTRACTING PARTIES to the GATT of an instrument of accession which states the terms so agreed.

(d) Contracting parties may accept this Agreement in respect of those territories for which they have international responsibility, provided that the GATT is being applied in respect of such territories in accordance with the provisions of Article XXVI:5(a) or (b) of the General Agreement; and in terms of such acceptance each such territory shall be treated as though it were a party to this Agreement.

2. Reservations

Reservations may not be entered in respect of any of the provisions of this Agreement..

3. Entry into force

This Agreement shall enter into force on 1 January 1981 for the governments 1/ which have accepted or acceded to it by that date. For each other government, it shall enter into force on the thirtieth day following the date of its acceptance or accession to this Agreement.

4. National Legislation

(a) Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of the Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by the entities contained in its list annexed hereto, with the provisions of this Agreement.

(b) Each party to this Agreement shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

5. Rectifications or modifications

(a) Rectifications of a purely formal nature and minor amendments relating to Annexes I-IV to this Agreement shall be notified to the Committee and shall become effective provided there is no objection within thirty days to such rectifications or amendments.

(b) Any modifications to lists of entities other than those referred to in sub-paragraph (a) may be made only in exceptional circumstances. In such cases, a party proposing to modify its list of entities shall notify the Chairman of the Committee who shall promptly convene a meeting of the Committee. The parties to this Agreement shall consider the proposed

1/ For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Economic Community. (Footnote in text.)

dification and consequent compensatory adjustments, with a view to intaining a comparable level of mutually agreed coverage provided in the reement prior to such modification. In the event of agreement not being ached on any modification taken or proposed, the matter may be pursued in ccordance with the provisions contained in Part VII of this Agreement, taking nto account the need to maintain the balance of rights and obligations at the ighest possible level.

. Review and negotiations

(a) The Committee shall review annually the implementation and operation this Agreement taking into account the objectives thereof. The Committee all annually inform the CONTRACTING PARTIES to the GATT of developments uring the periods covered by such reviews.

(b) Not later than the end of the third year from the entry into force this Agreement and periodically thereafter, the parties thereto shall ndertake further negotiations, with a view to broadening and improving the reement on the basis of mutual reciprocity having regard to the provisions Part III relating to developing countries. In this connexion, the ommittee shall, at an early stage, explore the possibilities of expanding the overage of the Agreement to include service contracts.

. Amendments

The parties may amend this Agreement having regard, inter alia, to the xperience gained in its implementation. Such an amendment, once the parties ave concurred in accordance with the procedures established by the Committee, hall not come into force for any party until it has been accepted by such arty.

8. Withdrawal

Any party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of sixty days from the date on which the written notice of withdrawal is received by the Director-General to the CONTRACTING PARTIES to the GATT. Any party to this Agreement may upon such notification, request an immediate meeting of the Committee.

9. Non-application of this Agreement between particular parties

This Agreement shall not apply as between any two parties to this Agreement if either of the parties, at the time either accepts or accedes to this Agreement, does not consent to such application.

10. Annexes

The Annexes to this Agreement constitute an integral part thereof.

11. Secretariat

This Agreement shall be serviced by the GATT secretariat.

12. Deposit

This Agreement shall be deposited with the Director-General to the CONTRACTING PARTIES to the GATT, who shall promptly furnish to each party to this Agreement and each contracting party to the GATT a certified copy thereof and of each rectification or modification thereto pursuant to paragraph 5, each amendment thereto pursuant to paragraph 7, and a notification of each acceptance thereof pursuant to paragraphs 2 or 3 of this Part or of each accession thereto or accession thereto pursuant to paragraph 1, or each withdrawal thereform pursuant to paragraph 8 of this Part.

13. Registration

This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Geneva this ------- day of ---------- nineteen hundred and seventy-nine in a single copy, in the English, French and Spanish languages, each text being authentic.

7.9.2 Background and Interpretation

Paragraph 1 delineates the procedures for signature and acceptance. Governments which are contracting parties to the GATT as well as non-GATT members are eligible to sign; however, the latter may be allowed to sign only after further agreements are reached relating to "the effective application of rights and obligations." (Par. 1(c)). These further agreements may be particularly necessary to adjust the coverage formula (as expressed in Annex I) to arrive at an agreed level of quantity and quality of coverage. The EC may sign the agreement as a separate party, in addition to each of its constituent members. Paragraph 1(d) allows, but does not require, the signatories to accept the code on behalf of territories for which they have international responsibility under the GATT.

Under paragraph 2 parties must accept all or none of the code's rights and obligations; reservations are not allowed.

Paragraph 3 states that for the parties accepting the code it will become effective January 1, 1981; for parties accepting or acceding thereafter, it shall enter into force 30 days after acceptance or accession. 1/ (Par. 3). Before the dates of entry into force, the party

1/ Governments which are contracting parties to the GATT, and the EC, which participated in the negotiations and submitted an entity list at the time the proces-verbal announcing the agreement was signed, "accept" the code. All others "accede" to it, upon terms agreed upon by the parties to the code.

must ensure that its procurement laws, regulations, procedures, etc. conform to the code. (Par. 4). Consistent with the notification provisions elsewhere contained in the code, parties must inform the Committee of such changes. Thus, the implementing legislation must be so notified to the extent it causes such changes.

Paragraph 5(a) attempts to facilitate changes in Annex I caused by such events as governmental reorganizations, when the changes are not substantive in nature. "Purely formal" rectifications of schedules and minor amendments may be made unilaterally unless there is objection within thirty days of advance notice of the changes. Other modifications may be made only "in exceptional circumstances" and upon consultation with the Committee. (Par. 5(b)). 1/ The reason for requiring full Committee consultation on major modifications is that the initial coverage agreement will represent a careful balancing of concessions on the quality and quantity of procurement opened to foreign competition -- for example, the estimated total value and the types of newly competitive markets. Any major alteration in the balance thus achieved would have ramifications for all parties to consider with regard to their own positions. Thus, outside of changes resulting from the negotiations mandated by paragraph 6, alterations in coverage are highly discouraged.

It is generally recognized that the initial efforts to alter longstanding government procurement policies will be tentative and incomplete. It is hoped that acceptance of the general principles of the code, together with at least minimal coverage defining to what it will apply,

1/ The Committee is composed of the parties to the Agreement. See section 7.7.2, pages 146-48 supra.

will provide a basis from which positive experience may be gained, leading to increasing future acceptance. Paragraph 6(a) thus obligates the signatories to undertake review of the operation of the code annually and to report their findings to the GATT. Paragraph 6(b) then specifies that negotiations will be held within 3 years of the date of entry into force, and periodically thereafter, to consider the expansion of membership and coverage and other improvements. Coverage of service contracts will be specifically considered.

In additions to changes in coverage negotiated under paragraph 6, amendments to the agreement will be suggested for adoption upon a concensus of the Committee developed under procedures adopted by the Committee; but any such amendments will not come into force for a party until that party accepts it. (Par. 7).

Paragraph 6 allows withdrawal at any time, to become effective 60 days after the GATT Director-General receives written notice. A party may request an immediate Committee meeting, presumably to review the balance of coverage which may be upset by the withdrawal. This provision is in accord with section 125 of the Trade Act. 1/

1/ Section 125 provides in pertinent part:

(a) Every trade agreement entered into under this Act shall be subject to termination, in whole or in part, or withdrawal, upon due notice, at the end of a period specified in the agreement. Such period shall be not more than 3 years from the date on which the agreement becomes effective. If the agreement is not terminated or withdrawn from at the end of the period so specified, it shall be subject to termination or withdrawal thereafter upon not more than 6 months' notice.

(b) The President may at any time terminate, in whole or in part, any proclamation made under this Act.

. . .

(d) Whenever any foreign country or instrumentality withdraws, suspends, or modifies the application of trade agreement obligations of benefit to the United States without granting adequate compensation therefor,

(Continued)

Like Article XXXV of GATT, paragraph 9 allows a party to refuse application of the code between it and another party if the nonconsenting party makes its position known at the time of its or the other party's acceptance or accession. Under this paragraph, for example, the United States could refuse to apply the agreement to Japan should the coverage negotiations prove unsuccessful. The paragraph is in effect an exception to the national treatment and MFN principles of Part II for those parties.

Paragraphs 10-13 merely contain final procedures for servicing the code and its annexes.

7.9.3 Implementation

7.9.31 International Arrangements

The several international arrangements concerning procurement to which the United States is a party 1/ will be affected by Part IX only in the requirement that each party conform its laws, practices, and procedures to the code by the date of entry into force. (Par. 4). To the extent the United States retains obligations under those agreements which are inconsistent with the code, steps must be taken to rectify the conflict.

(Continued)
the President, in pursuance of rights granted to the United States under any trade agreement and to the extent necessary to protect United States economic interests (including United States balance of payments), may-

(1) withdraw, suspend, or modify the application of substantially equivalent trade agreement obligations of benefit to such foreign country or instrumentality, and

(2) proclaim under subsection (c) such increased duties or other import restrictions as are appropriate to effect adequate compensation from such foreign country or instrumentality.

1/ See sections 7.1.31 and 7.2.31, supra pages 30-33 and 59-62 respectively

As previously noted, 1/ however, the offset agreements generally provide that national treatment will be accorded the suppliers of parties to the agreements. Further, the offsets are primarily concerned with procurements of military goods which are excepted from the code, and may also be sanctioned by Part V:14(h). Therefore, the code will not apply to most procurements made pursuant to the offsets because of the Part VII exception for national defense, and, to the extent the code might be applicable, it will only obligate the same national treatment to be extended to all the suppliers, so that in effect the offset arrangements offer nothing that the code does not. 2/ Thus, it appears no particular actions need be undertaken with respect to the NATO MOU's.

For particular military sales offsets, such as the one entered into with respect to the sale of F-5 warplanes to Switzerland, the specific reciprocal obligations of the United States will have to be examined in order to determine whether steps need be taken under paragraph 6 to conform the offset to the code. Apparently, with regard to the Swiss sale, private American contractors have undertaken to market Swiss goods in an amount fulfilling the offset. The private marketing arrangement would not fit within the terms of the code, nor would actual sales to entities not listed in Annex I. But a sale of generating equipment to the TVA, for example — if it were covered -- would have to conform to the code so that a specific preference could not be granted to the Swiss goods. Again, however, Part V:14(h),

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1/ Id.
2/ Id.

may serve to protect such offsets from the application of the code. 1/

7.9.32 United States Law

Paragraph 4 also requires that the necessary changes in domestic law, previously discussed extensively, be implemented prior to January 1, 1981. See subsections .32 of each section of this report for a discussion of these changes.

Implementing legislation should include authority for the President to conduct the continuing negotiations mandated by paragraphs 1(b,c), 5, 6, and 7.

1/ See section 7.5.31, pages 124-25 supra.

7.10.1

ANNEX I

LISTS OF ENTITIES REFERRED TO IN PART I, PARAGRAPH 1(C)[1]

[1] For technical reasons, some adjustments to the lists which follow may be needed. (footnote in text)

AUSTRIA

I. Federal Chancellery
Austrian Central Statistical Office

II. Federal Ministry of Foreign Affairs
Procurement Office

III. Federal Ministry of the Interior
Procurement Office

IV. Federal Ministry of Justice
Procurement Office

V. Federal Ministry of Social Affairs
Procurement Office

VI. Federal Ministry of Health and Environment
Procurement Office

BELGIUM

1. List of Belgian Permanent-Departments

1. Services du Premier Ministre
2. Ministère des Affaires Economiques
3. Ministère des Affaires Etrangères, Commerce Extérieur et Coopération au Développement
4. Ministère de l'Agriculture
5. Ministère des Classes Moyennes
6. Ministère des Communications
7. Ministère de la Défense Nationale[1/]
8. Ministère de l'Education Nationale et de la Culture
9. Ministère de l'Emploi et du Travail
10. Ministère des Finances
11. Ministère de l'Intérieur
12. Ministère de la Justice
13. Ministère de la Prévoyance Sociale
14. Ministère de la Santé Publique et de l'Environnement
15. Ministère des Travaux Publics, dont
    - Fonds de Routes
    - Régie de Bâtiments
16. Régie des Postes[2/]

[1/] Non-warlike materials contained in Part II of this list

[2/] Postal Business only.

EUROPEAN ECONOMIC COMMUNITY

PART I

Notes:

1. This Agreement does not apply to procurement by entities otherwise falling under this Agreement made on behalf of and under the specific procedure of an international organization.

2. This Agreement shall not apply to procurement by entities falling under this Agreement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes.

2. List of actual Ministries, purchasing through entities listed under n° 1

Premier Ministre

Vice-Premier Ministre et Ministre de la Fonction publique

Vice-Premier Ministre et Ministre de la Défense nationale[1]

Ministre de la Justice

Ministre des Affaires étrangères

Ministre des Affaires économiques

Ministre de la Prévoyance sociale et Secrétaire d'Etat aux Affaires sociales, adjoint au Ministre des Affaires wallonnes

Ministre des Communications

Ministre de l'Education nationale Néerlandaise

Ministre de l'Agriculture et des Classes Moyennes

Ministre de la Culture néerlandaise et Ministre des Affaires flamandes

Ministre de l'Education nationale Française

Ministre de la Santé publique et de l'Environnement

Ministre des Finances

Ministre du Commerce extérieur

Ministre de la Coopération au Développement

Ministre des Postes, Télégraphes et Téléphones et Ministre des Affaires bruxelloises[2]

Ministre des Pensions

Ministre de l'Emploi et du Travail

Ministre de l'Intérieur

Ministre de la Politique scientifique

Ministre de la Culture française

Ministre des Travaux publics et Ministre des Affaires wallonnes

Secrétaire d'Etat à l'Economie régionale, adjoint au Ministre des Affaires wallonnes

Secrétaire d'Etat au Budget, adjoint au Premier Ministre, et Secrétaire d'Etat à l'Economie régionale, adjoint au Ministre des Affaires flamandes

Secrétaire d'Etat à la Réforme des Institutions, adjoint au Premier Ministre

Secrétaire d'Etat à la Culture française, adjoint au Ministre de la Culture française

Secrétaire d'Etat aux Affaires économiques, adjoint au Ministre des Affaires économiques, et
Secrétaire d'Etat aux Affaires sociales, adjoint au Ministre des Affaires flamandes

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[1] Non-warlike materials contained in Part II of this list

[2] Postal Business only

Secrétaire d'Etat à la Réforme des Institutions, adjoint au Vice-Premier Ministre

Secrétaire d'Etat à la Culture néerlandaise adjoint au Ministre de la Culture néerlandaise, et
Secrétaire d'Etat aux Affaires sociales, adjoint au Ministre des Affaires bruxelloises.

182

3. Other entities under direct control of central government

La Régie des Services Frigorifiques de l'Etat Belge

Le Fonds des bâtiments scolaires

La Société nationale du Logement

La Société nationale terrienne

L'Office national de sécurité sociale

L'Institut national d'assurances sociales pour travailleurs indépendants

L'Institut national d'assurance maladie-invalidité

La Caisse nationale des pensions de retraite et de survie

L'Office national des pensions pour travailleurs salariés

La Caisse auxiliaire d'assurance maladie-invalidité

Le Fonds des maladies professionnelles

La Caisse nationale de crédit professionnel

La Caisse générale d'Epargne et de Retraite

L'Office national des débouchés agricoles et horticoles

L'Office national du lait et de ses dérivés

L'Office national de l'emploi

Le Fonds de construction hospitalière et médico-sociale

DENMARK

Danish Government Procurement Entities

1.	Prime Minister's Office	
2.	Ministry of Labour	4 directorates and institutions
3.	Ministry of Foreign Affairs	2 departments
4.	Ministry of Housing	1 directorate
5.	Ministry of Finance (3 departments)	Directorate for Government Procurement with Government Printing Office 3 other institutions
6.	Ministry of Taxes and Duties (2 departments)	5 directorates and institutions
7.	Ministry of Fisheries	4 institutions
8.	Ministry of Trade, Industry and Shipping	- Research Establishment Risoe - 20 directorates and institutions
9.	Ministry of the Interior	- State Serum Institute - Danish National Civil Defence Directorate - 3 other directorates and institutions
10.	Ministry of Justice	- Office of the Chief of Danish Police - 3 other directorates and institutions
11.	Ministry of Religious Affairs	
12.	Ministry of Agriculture	- 19 directorates and institutions
13.	Ministry of Environment	- 5 directorates
14.	Ministry of Greenland	- Royal Greenland Trade Department - Greenland Technical Organization - 2 other institutions
15.	Ministry of Cultural Affairs	- 2 directorates and several state owned museums and higher educational institutions
16.	Ministry of Social Affairs	- 5 directorates
17.	Ministry of Education	- University Hospital of Copenhagen - 6 directorates - 11 universities and other higher educational institutions
18.	Ministry of Economic Affairs (3 departments)	- State harbours and State airports - - directorates and several institutions

19. Ministry of Public Works[1]
20. Ministry of Defence[2]

[1] With the exception of Danish State Railways. Postal Business only.
service.

[2] Non war-like materials contained in Part II of this list.

FRANCE

List of entities

1) Main purchasing entities

A. General Budget

Premier Ministre

Ministre délégué auprès du Premier Ministre, chargé de la condition féminine

Ministre de la justice

Ministre de la santé et de la famille

Ministre de l'intérieur

Ministre des affaires étrangères

Ministre de la défense[1/]

Ministre du travail et de la participation

Ministre de la coopération

Ministre de l'économie

Ministre du budget

Ministre de l'environnement et du cadre de vie

Ministre de l'éducation

Ministre des universités

Ministre de l'agriculture

Ministre de l'industrie

Ministre des transports

Ministre du commerce et de l'artisanat

Ministre du commerce extérieur

Ministre de la jeunesse, des sports et des loisirs

Ministre de la culture et de la communication

Secrétaire d'Etat aux postes et télécommunications[2/]

Secrétaire d'Etat aux anciens combattants

Secrétaire d'Etat auprès du Premier Ministre

Secrétaire d'Etat auprès du Premier Ministre (Relations avec le Parlement)

Secrétaire d'Etat auprès du Premier Ministre (Recherche)

Secrétaire d'Etat auprès du Garde des sceaux, Ministre de la justice

Secrétaire d'Etat auprès du Ministre de la santé et de la famille

Secrétaire d'Etat auprès du Ministre de l'intérieur (Départements et territoires d'outre-mer)

Secrétaire d'Etat auprès du Ministre de l'intérieur (Collectivités locales)

[1/] Non-warlike materials contained in Part II of this list

[2/] Postal business only.

Secrétaire d'Etat auprès du Ministre des affaires étrangères

Secrétaire d'Etat auprès du Ministre du travail et de la participation (Formation professionnelle)

Secrétaire d'Etat auprès du Ministre du travail et de la participation (Travailleurs manuels et immigrés)

Secrétaire d'Etat auprès du Ministre du travail et de la participation (Emploi féminin)

Secrétaire d'Etat auprès du Ministre de l'environnement et du cadre de vie (Logement)

Secrétaire d'Etat auprès du Ministre de l'environnement et du cadre de vie (Environnement)

Secrétaire d'Etat auprès du Ministre de l'éducation

Secrétaire d'Etat auprès du Ministre de l'agriculture

Secrétaire d'Etat auprès du Ministre de l'industrie (Petite et moyenne industrie

B. Budget annexe

Imprimerie Nationale

C. Comptes spéciaux du trésor

On peut notamment signaler:

- Fonds forestier national
- soutien financier de l'industrie cinématographique
- fonds spécial d'investissement routier
- fonds national d'aménagement foncier et d'urbanisme
- Union des groupements d'achats publics (UGAP)

2 Etablissements publics nationaux à caractère administratif

- Agence Nationale pour l'Emploi
- Institut national de la propriété industrielle
- Commission des opérations de Bourse
- Agence nationale pour l'amélioration de l'habitat
- Etablissement public du Centre Beaubourg
- Centre national de la cinématographie
- Office national des Anciens combattants et victimes de guerre
- Agence nationale pour l'indemnisation des français rapatriés d'outre-mer
- Office national d'immigration
- Fonds d'action sociale pour les travailleurs migrants
- Caisse d'aide à l'équipement des collectivités locales
- Caisse nationale des autoroutes
- Caisse des prêts aux organismes d'HLM
- Centre national des lettres
- Caisse nationale des monuments historiques et des sites

(3) Other entities

Académie de France à Rome

Académie de Marine

Académie des Sciences d'Outre-mer

Agence Centrale des Organismes de Sécurité Sociale (A.C.O.S.S.)

Agences Financières de Bassins

Agence Nationale pour l'Amélioration des Conditions de Travail (A.N.A.C.T.)

Agence Nationale pour l'Amélioration de l'Habitat (A.N.A.H.)

Agence Nationale pour l'Emploi (A.N.P.E.)

Agence Nationale pour l'Indemnisation des Français d'Outre-Mer (A.N.I.F.O.M.)

Assemblée Permanente des Chambres d'Agriculture (A.P.C.A.

Bibliothèque Nationale

Bibliothèque Nationale et Universitaire de Strasbourg

Bureau d'Etudes des Postes et Télécommunications d'Outre-Mer (B.E.P.T.O.M.)

Caisse d'Aide à l'Equipement des Collectivités Locales (C.A.E.C.)

Caisse Autonome de la Reconstruction

Caisse des Dépôts et Consignations

Caisse Nationale des Allocations Familiales (C.N.A.F.)

Caisse Nationale des Autoroutes (C.N.A.)

Caisse Nationale d'Assurance Maladie des Travailleurs Salariés (C.N.A.M.

Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (C.N.A.V.T.S

Caisse Nationale Militaire de Sécurité Sociale (C.N.M.S.S.

Caisse Nationale des Monuments Historiques et des Sites

Caisse Nationale des Télécommunications*

Caisse de Prêts aux Organismes H.L.M.

Casa de Velasquez

Centre d'Enseignement Zootechnique de Rambouillet

Centre d'Etudes du Milieu et de Pédagogie Appliquées du Ministère de l'Agriculture

Centre d'Etudes Supérieures de Sécurité Sociale

Centres de Formation Professionnelle Agricole

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*Postal business only.

Centre National d'Art et de Culture Georges Pompidou

Centre National de la Cinématographie Française

Centre National d'Etudes et de Formation pour l'Enfance Inadaptée

Centre National d'Etudes et d'Expérimentation du Machinisme Agricole

Centre National d'Etudes et de Formation pour l'Adaptation Scolaire et l'Education Spécialisée (C.N.E.F.A.S.E.S.)

Centre National de Formation et de Perfectionnement des Professeurs d'Enseignement Ménager et Ménager Agricole

Centre National des Lettres

Centre National de Documentation Pédagogique

Centre National des Oeuvres Universitaires et Scolaires (C.N.O.U.S.)

Centre National d'Ophtalmologie des Quinze-Vingts

Centre National de Préparation au Professorat de Travaux Manuels Educatifs et d'Enseignement Ménager

Centre National de la Promotion Rurale de Marmilhat

Centre National de la Recherche Scientifique (C.N.R.S.)

Centres Pédagogiques Régionaux

Centre Régional d'Education Populaire

Centres Régionaux d'Education Physique et Sportive (C.R.E.P.S.)

Centres Régionaux des Oeuvres Universitaires (C.R.O.U.S.)

Centres Régionaux de la Propriété Forestière

Centre de Sécurité Sociale des Travailleurs Migrants

Centres Universitaires

Chancelleries des Universités

Collèges

Collèges Agricoles

Commission des Opérations de Bourse

Conseil Supérieur de la Pêche

Conservatoire de l'Espace Littoral et des Rivages Lacustres

Conservatoire National des Arts et Métiers

Conservatoire National Supérieur de Musique

Conservatoire National Supérieur d'Art Dramatique

Domaine de Pompadour

Ecole Centrale - Lyon

Ecole Centrale des Arts et Manufactures

Ecole Française d'Archéologie d'Athènes

Ecole Française d'Extrême-Orient

Ecole Française de Rome

Ecole des Hautes Etudes en Sciences Sociales

Ecole Nationale d'Adminsitration

Ecole Nationale de l'Aviation Civile (E.N.A.C.)

Ecole Nationale des Chartes

Ecole Nationale d'Equitation

Ecole Nationale Féminine d'Agronomie de Marmalhat (Put-de-Dôme)

Ecole Nationale Féminine d'Agronomie de Toulouse (Htd-Garonne)

Ecole Nationale du Génie Rural et des eaux et forêts (E.N.G.R.E.F.)

Ecoles Nationales de l'Industrie Laitière

Ecoles Nationales d'Ingénieurs

Ecole Nationale d'Ingénieurs des Industries des Techniques Agricoles et Alimentaires

Ecoles Nationales d'Ingénieurs des Travaux Agricoles

Ecole Nationale des Ingénieurs des Travaux Ruraux et Techniques Sanitaires

Ecole Nationale des Ingénieurs des Travaux des Eaux et Forêts (E.N.I.T.E.F.)

Ecole Nationale de la Magistrature

Ecoles Nationales de la Marine Marchande

Ecole Nationale de la Santé Publique (E.N.S.P.)

Ecole Nationale de ski et d'alpinisme

Ecole Nationale Supérieure Agronomique - Montpellier

Ecole Nationale Supérieure Agronomique - Rennes

Ecole Nationale Supérieure des Arts Décoratifs

Ecole Nationale Supérieure des Arts et Industries - Strasbourg

Ecole Nationale Supérieure des Arts et Industries Textiles - Roubaix

Ecole Nationale Supérieure d'Arts et Métiers

Ecole Nationale Supérieure des Beaux-Arts

Ecole Nationale Supérieure des Bibliothécaires

Ecole Nationale Supérieure de Céramique Industrielle - Sèvres

Ecole Nationale Supérieure de l'Electronique et de ses Applications (E.N.S.E.A.)

Ecole Nationale Supérieure d'Horticulture

Ecole Nationale Supérieure des Industries Agricoles Alimentaires

Ecole Nationale Supérieure du Paysage

Ecole Nationale Supérieure des Sciences Agronomiques Appliquées (E.N.S.S.A.A.)

Ecoles Nationales Vétérinaires

Ecoles Nationales de Perfectionnement

Ecoles Nationales de Premier Degré

Ecole Nationale de Voirie

Ecoles Normales d'Instituteurs et d'Institutrices

Ecoles Normales Nationales d'Apprentissage

Ecoles Normales Supérieures

Ecole Polytechnique

Ecole de Sylviculture - Crogny (Aube)

Ecole Technique Professionnelle Agricole et Forestière de Meymac (Corrèze)

Ecole de Viticulture et d'Oenologie de la Tour Blanche (Gironde)

Ecole de Viticulture - Avize (Marne)

Etablissement National de Convalescentes du Vésinet (E.N.C.V.)

Etablissement National de Convalescents de Saint-Maurice

Etablissement National des Invalides de la Marine (E.N.I.M.)

Etablissement National de Koenigs Warter

Fondation Carnégie

Fondation Singer-Polignac

Fonds d'Action Sociale pour les Travailleurs Migrants

Hôpital Hospice National Dufresne-Sommeiller

Institut d'Elevage et de Médecine Vétérinaires des Pays Tropicaux (I.E.M.V.P.T.)

Institut Français d'Archéologie Orientale du Caire

Institut Géographique National

Institut Industriel du Nord

Institut International d'Administration Publique (I.I.A.P.)

Institut National Agronomique de Paris-Grignon

Institut National des Appellations d'Origine des Vins et Eaux-de-vie (I.N.A.O.V.E.V.)

Institut National d'Astronomie et de Géophysique (I.N.A.G.)

Institut National de la Consommation (I.N.C.)

Institut National d'Education Populaire (I.N.E.P.)

Institut National d'Etudes Démographiques (I.N.E.D.)

Institut National des Jeunes Aveugles - Paris

Institut National des Jeunes Sourdes - Bordeaux

Institut National des Jeunes Sourds - Chambéry

Institut National des Jeunes Sourds - Metz

Institut National des Jeunes Sourds - Paris

Institut National de Physique Nucléaire et de Physique des Particules (I.N2.P3)

Institut National de Promotion Supérieure Agricole

Institut National de la Propriété Industrielle

Institut National de la Recherche Agronomique (I.N.R.A.)

Institut National de Recherche Pédagogique (I.N.R.P.)

Institut National de la Santé et de la Recherche Médicale (I.N.S.E.R.M.)

Institut National des Sports

Instituts Nationaux Polytechniques

Instituts Nationaux des Sciences Appliquées

Institut National Supérieur de Chimie Industrielle de Rouen

Institut de Recherches d'Informatique et d'Automatique (I.R.I.A.)

Institut de Recherche des Transports (I.R.T.)

Instituts Régionaux d'Administration

Institut Scientifique et Technique des Pêches Maritimes (I.S.T.P.M.)

Institut Supérieur des Matériaux et de la Construction Mécanique de Saint-Ouen

Lycées Agricoles

Lycées Classiques et Modernes

Lycées d'Enseignement Professionnel

Lycées Techniques

Musée de l'Armée

Musée Gustave Moreau

Musée de la Marine

Musée National J.J. Henner

Musée National de la Légion d'Honneur

Musée Postal

Muséum National d'Histoire Naturelle

Musée Auguste Rodin

Observatoire de Paris

Office de Coopération et d'Accueil Universitaire

Office Français de Protection des Réfugiés et Rapatriés

Office National des Anciens Combattants

Office National de la Chasse

Office National d'Information sur les Enseignements et les Professions (O.N.I.S.E.P.)

Office National d'Immigration (O.N.I.)

Office de la Recherche Scientifique et Technique d'Outre-Mer (O.R.S.T.O.M.)

Office Universitaire et Culturel Français pour l'Algérie

Palais de la Découverte

Parcs Nationaux

Réunion des Musées Nationaux

Service National des Examens du Permis de Conduire

Syndicat des Transports Parisiens

Thermes Nationaux - Aix-les-Bains

Universités

FEDERAL REPUBLIC OF GERMANY

I. List of Central Purchasing Entities

1. Ministry of Foreign Affairs
2. Ministry of Labour and Social Affairs
3. Ministry of Education and Science
4. Ministry of Food, Agriculture and Forests
5. Ministry of Finance
6. Ministry of Research and Technology
7. Ministry of Internal Relations
8. Ministry of Interior
9. Ministry of Youth, Family and Health
10. Ministry of Justice
11. Ministry of Planning, Public Works and Urban Affairs
12. Ministry of Posts and Telecommunications[1]
13. Ministry of Economic Affairs
14. Ministry of Economic Co-operation
15. Ministry of Defence[2]

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[1] Postal Buisness only.

[2] Non-warlike materials contained in Part II of this list.

FEDERAL REPUBLIC OF GERMANY

(1) List of Central Purchasing Entities

1. Auswärtiges Amt
2. Bundesministerium für Arbeit und Sozialordnung
3. Bundesministerium für Bildung und Wissenschaft
4. Bundesministerium für Ernährung, Landwirtschaft und Forsten
5. Bundesministerium der Finanzen
6. Bundesministerium für Forschung und Technologie
7. Bundesministerium für innerdeutsche Beziehungen
8. Bundesministerium des Innern (nur ziviles Material)
9. Bundesministerium für Jugend, Familie und Gesundheit
0. Bundesministerium der Justiz
1. Bundesministerium für Raumordnung, Bauwesen und Städtebau
2. Bundesministerium für das Post- und Fernmeldewesen (1)
3. Bundesministerium für Wirtschaft
4. Bundesministerium für wirtschaftliche Zusammenarbeit
5. Bundesministerium der Verteidigung (2)

(1) Nur Postwesen.

(2) Non-military materials contained in Part II of this list.

NOTE

According to existing national obligations the entities, contained in this list, shall in conformity with special procedures award contracts in certain regions which, as consequence of the division of Germany, are confronted with economic disadvantages.

The same applies to the awarding of contracts to remove the difficulties of certain groups caused by the last war.

Note

According to existing national obligations the entities, contained in this list, shall in conformity with special procedures award contracts in certain regions which, as consequence of the division of Germany, are confronted with economic disadvantages.

The same applies to the awarding of contracts to remove the difficulties of certain groups caused by the last war.

IRELAND

1. Main purchasing entities

   (a) Office of Public Works

   (b) Stationery Office

2. Other departments

President's Establishment
Office of the Houses of the Oireachtas (Parliament)
Department of the Taoiseach (Prime Minister)
Central Statistics Office
Department of Finance
Office of the Comptroller and Auditor General
Office of the Revenue Commissioners
State Laboratory
Office of the Attorney General
Office of the Director of Public Prosecutions
Valuation Office
Ordnance Survey
Department of the Public Service
Civil Service Commission
Department of Economic Planning and Development
Department of Justice
Land Registry
Charitable Donations and Bequests Office
Department of the Environment
Department of Education
National Gallery of Ireland
Department of the Gaeltacht (Irish speaking areas)
Department of Agriculture
Department of Fisheries and Forestry
Department of Labour
Department of Industry, Commerce and Energy
Department of Tourism and Transport
Department of Foreign Affairs
Department of Social Welfare
Department of Health
Department of Defence[1]
Department of Posts and Telegraphs[2]

[1] Non-warlike materials contained in Part II of this list.
[2] Postal Business only.

ITALY

Purchasing entities

1. Treasury[1]
2. Finance[2]
3. Justice
4. External Affairs
5. Public Instruction
6. Interior
7. Public Works
8. Agriculture and Forest
9. Industry, Trade and Craftworks
10. Employment and Social Affairs
11. Health
12. Cultural Affairs
13. Defence[3]
14. Postal Services[4]

Note: This Agreement shall not prevent the implementation of provisions contained in Italian Law No. 835 of 6 October 1950 (Official Gazette No. 245 of 24 October 1950 of the Italian Republic) and in modifications thereto in force on the date on which this Agreement is adopted.

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[1]Acting as centralized purchasing entity for most of other Ministries or entities.

[2]Except for purchases by the monopoly administration for tobacco and salt.

[3]Non-warlike materials contained in Part II of this list.

[4]Postal Business only

LUXEMBOURG

"Liste des entités acheteuses centrales susceptibles de relever du champ d'application de l'instrument"

1. Ministère d'Etat: Service Central des imprimés et des fournitures de l'Etat;
2. Ministère de l'Agriculture: Administration des Services Techniques de l'Agriculture;
3. Ministère de l'Education Nationale: Ecoles de l'enseignement secondaire, de l'enseignement moyen, de l'enseignement professionnel;
4. Ministère de la Famille et de la Solidarité sociale: Maisons de retraite;
5. Ministère de la Force publique: Armée[1/] - Gendarmerie - Police;
6. Ministère de la Justice: Etablissements pénitentiaires;
7. Ministère de la Santé Publique: Mondorf-Etat, Hôpital neuropsychiatrique;
8. Ministère des Travaux publics: Bâtiments publics - Ponts et Chaussées;
9. Ministère des Finances: Postes et Télécommunications[2/]
10. Ministère des Transports et de l'Energie: Centrales électriques de la Haute et Basse Sarre;
11. Ministère de l'Environnement: Commissariat général à la Protection des Eaux.

[1/] Non-warlike materials contained in Part II of this list

[2/] Postal Business only.

NETHERLANDS

Lists of entities

A.

1. Ministry of General Affairs
2. Ministry of Foreign Affairs
3. Ministry of Justice
4. Ministry of Home Affairs
5. Ministry of Defence (1)
6. Ministry of Finance
7. Ministry of Economic Affairs
8. Ministry of Education and Science
9. Ministry of Housing and Town and Country Planning
10. Ministry of Transport and Waterways, including
    (a) Department of Civil Aviation
    (b) Postal, telephone and telegraph services (2)
11. Ministry of Agriculture and Fisheries
12. Ministry of Social Affairs
13. Ministry of Culture, Recreation and Social Welfare
14. Ministry of Public Health and Environment
15. Ministry of Development Co-operation
16. Ministry of Science Policy
17. Cabinet of Netherlands Antilles Affairs
18. Higher Colleges of State.

B. Central procurement offices and the amount of their purchases

Entities listed above in A generally make their own specific purchases; other general purchases are effected through the entities listed below:

1. The Netherlands Government Purchasing Office
2. Directorate of Water Control
3. Quarter Master General's Office (1)
4. Air Material Directorate (1)

(1) Non-warlike materials contained in Part II of this list.

(2) Postal Business only.

5. Procurement Division of the Royal Netherlands Navy (1)
6. State Printing and Publishing Office
7. Postal, Services(2)
8. Governmental Motorvehicle Department
9. Governmental Centre for Office Mechanization and Automation
10. Governmental Forestry Directorate
11. Directorate for Ijsselmeer Polders

(1) Non-warlike materials contained in Part II of this list.

(2) Postal Business only.

NETHERLANDS

Lists of entities

A Ministeries en centrale overheidsorganen.

1. Ministerie van Algemene Zaken
2. Ministerie van Buitenlandse Zaken
3. Ministerie van Justitie
4. Ministerie van Binnenlandse Zaken
5. Ministerie van Defensie (1)
6. Ministerie van Financiën
7. Ministerie van Economische Zaken
8. Ministerie van Onderwijs en Wetenschappen
9. Ministerie van Volkshuisvesting en Ruimtelijke Ordening
10. Ministerie van Verkeer & Waterstaat (2)

11. Ministerie van Landbouw en Visserij
12. Ministerie van Sociale Zaken
13. Ministerie van Cultuur, Recreatie en Maatschappelijk Werk
14. Ministeries van Volksgezondheid en Milieuhygiëne
15. Ministerie van Ontwikkelingssamenwerking
16. Ministerie van Wetenschapsbeleid
17. Kabinet van de Nederlandse Antillen
18. Hoge Colleges van Staat

B Bovengenoemde organen kopen in het algemeen specifieke artikelen zelfstandig in ; voor de aanschaffing van artikelen voor algemeen gebruik, maken zij gebruik van een of meer van de navolgende centrale aanschaffingsdiensten.

1. Rijksinkoopbureau
2. Directoraal-Generaal voor de Waterstaat
3. Dienst van de Kwartiermeester-Generaal (1)
4. Directie Materieel Koninklijke Luchtmacht (1)

(1) non-warlike materials contained in Part II of this list

(2) Postal Business only.

5. Hoofdafdeling Materieel Koninklijke Marine (1)
6. Staatsdrukkerij - en - uitgeverijbedrijf
7. Centrale Afdeling Inkoop en Materieel controle van het Staatsbedrijf der P.T.T.[2].
8. Rijkszautomobielcentrale
9. Rijkskantoormachinecentrale
10. Staatsbosbeheer
11. Rijksdienst IJsselmeerpolders.

(1) Non-warlike materials contained in Part II of this list.

(2) Postal Business only.

UNITED KINGDOM

List of entities

Board of Inland Revenue
British Museum
British Museum (Natural History)
Cabinet Office
Central Office of Information
Charity Commission
Civil Service Department
  Ancient Monuments (Scotland) Commission
  Ancient Monuments (Wales) Commission
  Boundary Commission for England and Wales
  Boundary Commission for Northern Ireland
  Central Computer Agency
  Chessington Computer Centre
  Civil Service Catering Organisation
  Civil Service College
  Civil Service Commission
  Civil Service Pay Research Unit
  Historical Manuscripts Commission
  Historical Monuments (England) Commission
  Medical Advisory Service
  Museums and Galleries Standing Commission
  Office of the Parliamentary Counsel
  Review Board for Government Contracts
  Royal Commission on Criminal Procedure
  Royal Commission on Environmental Pollution
  Royal Commission on Gambling
  Royal Commission on Legal Services (England, Wales and Northern Ireland)
  Royal Commission on Legal Services (Scotland)
  Royal Fine Art Commission (England)
  Royal Fine Art Commission (Scotland)
Crown Estate Office (Vote-borne services only)
Crown Office, Scotland
Customs and Excise Department

Department for National Savings
Department of Agriculture and Fisheries for Scotland
  Artificial Insemination Service
  Crofters Commission
  Red Deer Commission
  Royal Botanic Garden, Edinburgh etc.
Department of Education and Science
  University Grants Committee
Department of Employment
  Duchess of Gloucester House
  Employment Appeal Tribunal
  Industrial Tribunals
  Office of Manpower Economics
  Royal Commission on the Distribution of Income and Wealth
Department of Energy
Department of Health and Social Security
  Attendance Allowance Board
  Central Council for Education and Training in Social Work
  Council for the Education and Training of Health Visitors
  Dental Estimates Board
  Joint Board of Clinical Nursing Studies
  Medical and Dental Referee Service
  Medical Boards and Examining Medical Officers (War Pensions)
  National Health Service
  National Health Service Authorities
  National Insurance Commissioners
  Occupational Pensions Board
  Prescription Pricing Authority
  Public Health Laboratory Service Board
  Supplementary Benefits Appeal Tribunals
  Supplementary Benefits Commission
Department of Industry
  Computer-Aided Design Centre
  Laboratory of the Government Chemist
  National Engineering Laboratory
  National Maritime Institute
  National Physical Laboratory
  Warren Spring Laboratory

Department of Prices and Consumer Protection
  Domestic Coal Consumers' Council
  Electricity Consultative Councils for England and Wales
  Gas Consumers' Councils
  Metrication Board
  Monopolies and Mergers Commission
Department of the Environment
  British Urban Development Services Unit
  Building Research Establishment
  Commons Commissioners - (except payment of rates)
  Countryside Commission
  Directorate of Estate Management Overseas
  Fire Research Station/Boreham Wood
  Hydraulics Research Station
  Local Valuation Panels
  Location of Offices Bureau
  Property Services Agency
  Rent Control Tribunals and Rent Assessment Panels and Committees
Department of the Government Actuary
Department of the Registers of Scotland
Department of Trade
  Coastguard Services
  British Export Marketing Centre, Tokyo
  Market Entry Guarantee Scheme
  Patent Office
Department of Transport
  Road Construction Units and Sub-Units
  Transport and Road Research Laboratory
  Transport Tribunal - (except payment of rates)
  Transport Users Consultative Committees - (except payment of rates)
Director of Public Prosecutions
Exchequer and Audit Department
Exchequer Office Scotland
Export Credits Guarantee Department
Foreign and Commonwealth Office
  Government Communications Headquarters
  Middle East Centre for Arab Studies
  Wiston House Conference and European Discussion Centre

50-138 O - 79 - 26

Home Office
  Gaming Board for Great Britain
  Immigration Appeals Tribunal
  Inspectors of Constabulary
  Parole Board and Local Review Committees
House of Commons
House of Lords
Imperial War Museum
Intervention Board for Agricultural Produce
Legal Aid Funds
Lord Chancellor's Department
  Council on Tribunals
  County Courts
  Courts Martial Appeal Court
  Crown Courts
  Judge Advocate General and Judge Advocate of the Fleet
  Lands Tribunal
  Law Commission
  Pensions Appeal Tribunals
  Supreme Court
Ministry of Agriculture Fisheries and Food
  Advisory Services
  Agricultural Development and Advisory Service
  Agricultural Dwelling House Advisory Committees
  Agricultural Land Tribunals
  Agricultural Wages Board and Committees
  Artificial Insemination Research Centres
  Central Council for Agricultural and Horticultural Co-operation
  Plant Pathology Laboratory
  Plant Variety Rights Office
  Royal Botanic Gardens, Kew
Ministry of Defence (1)
  Procurement Executive
Meteorological Office
Ministry of Overseas Development
  Centre for Overseas Pest Research
  Directorate of Overseas Surveys
  Land Resources Division
  Tropical Products Institute

(1) Non-warlike materials contained in Part II of this list

National Debt Office and Pensions Commutation Board
National Gallery
National Galleries of Scotland
National Library of Scotland
National Maritime Museum
National Museum of Antiquities of Scotland
National Portrait Gallery
Northern Ireland Government Departments and Public Authorities
  Department of the Civil Service
  Department of Agriculture
  Department of Commerce
  Department of Education
  Department of the Environment
  Department of Finance
  Department of Health and Social Security
  Department of Manpower Services
  Northern Ireland Police Authority
Northern Ireland Office
  Coroners Courts
  County Courts
  Crown Solicitor's Office
  Department of the Director of Public Prosecutions
  Enforcement of Judgements Office
  Forensic Science Service
  Magistrates Courts
  Pensions Appeal Tribunals
  Probation Service
  Registration of Electors and Conduct of Elections
  State Pathologist Service
  Supreme Court of Judicature and Court of Criminal Appeal of
    Northern Ireland
Office of Fair Trading
Office of Population Censuses and Surveys
  National Health Service Central Register
Office of the Parliamentary Commissioner for Administration and
  Health Service Commissioners

Paymaster General's Office
-The Post Office[1]
Privy Council Office
Public Record Office
Public Trustee Office
Public Works Loan Commission
Queen's and Lord Treasurer's Remembrancer
  Crown Office
  Department of Procurators Fiscal
  Lord Advocate's Department
  Lands Tribunal
Registrar General's Office, Scotland
  National Health Service Central Register
Registry of Friendly Societies
Royal Commission, etc. (see references under Civil Service Department)
  Commission on the Constitution
  Royal Commission on the National Health Service
  Royal Commission on Gambling
Royal Hospital, Chelsea
Royal Mint
Royal Scottish Museum
Science Museum
Scottish Courts Administration
  Court of Session
  Court of Justiciary
  Accountant of Court's Office
  Sheriff Courts
  Scottish Land Court
  Scottish Law Commission
  Pensions Appeal Tribunals
Scottish Development Department
  Local Government Reorganisation Commissions etc.
  Rent Assessment Panel and Committees, etc.
Scottish Economic Planning Department
  Scottish Electricity Consultative Councils
Scottish Education Department
  Royal Scottish Museum

[1] Postal Business only.

Scottish Home and Health Department
  Common Services Agency
  Council for the Education and Training of Health Visitors
  Fire Service Training School
  Inspectors of Constabulary
  Local Health Councils
  Mental Welfare Commission for Scotland
  National Health Service
  National Health Service authorities
  Parole Board for Scotland and Local Review Committees
  Planning Council
  Scottish Antibody Production Unit
  Scottish Crime Squad
  Scottish Criminal Record Office
  Scottish Council for Post-Graduate Medical Education and Training
  Scottish Police College
Scottish Land Court
Scottish Office
Scottish Record Office
Stationery Office
Tate Gallery
Treasury
  Exchequer Office, Scotland
  National Economic Development Council
  Rating of Government Property Department
Treasury Solicitor's Department
  Department of the Director of Public Prosecutions
  Law Officers' Department
  Department of the Procurator-General and Treasury Solicitor
Victoria and Albert Museum
Wallace Collection
Welsh Office
  Central Council for Education and Training in Social Work
  Commons Commissioners
  Council for the Education and Training of Health Visitors

Dental Estimates Board

Local Government Boundary Commission

Local Valuation Panels and Courts

National Health Service

National Health Service authorities

Public Health Laboratory Service Board

Rent Control Tribunals and Rent Assessment Panels and Committees

FINLAND *

1. Agricultural Research Centre
2. Board of Navigation
3. Finnish Meteorological Institute
4. Government Printing Centre
5. Ministry of Justice
6. Mint of Finland
7. National Board of Aviation
8. National Board of Forestry
9. National Board of Water Resources
10. National Board of Vocational Education
11. State Fuel Centre
12. State Margarine Factory
13. State Nourishment Centre
14. State Purchasing Centre
15. Technical Research Centre
16. General Headquarters*

Note 1

The listed entities include regional and local subdivisions.

Note 2

When a specific procurement decision may impair important national policy objectives the Finnish Government may consider it necessary in singular procurement cases to deviate from the principle of national treatment in the Agreement. A decision to this effect will be taken at the Finnish cabinet level.

Note 3

Procurement by defence entities (marked with *) covers the following products:

Motor vehicles

- delivery cars
- light trucks
- motorcycles
- buses
- ambulances

Spare parts

Foodstuffs

- coffee, tea
- rice
- frozen fish
- dried fruits
- spices

Machines

- office machines
- laundry machines

Miscellaneous

* Finland did not sign the proces verbal.

HONG KONG

Entity

Hong Kong Government Supplies Department.

215

INDIA *

S. No.	Purchasing entity	Categories of goods
1.	Oil and Natural Gas Commission	Offshore oil well drilling and allied equipment
2.	All India Radio)	Radio and TV broadcasting and allied equipment
3.	Doordarshan)	
4.	Ministry of Railways	Parts of railway and tramway locomotives and rolling stock

I. The offer is limited to the categories of goods stated in Column 3.

II. Purchases on behalf of All India Radio and Doordarshan are made by the Director-General of Supplies and Disposal.

III. Rail parts are at present being imported against credit from International Development Agency (IDA) and the procedures prescribed for IDA credit are followed.

IV. The offer does not extend to purchases in the context of bilateral arrangements that provide for balanced trade through a clearing account system.

* India did not sign the proces verbal.

JAMAICA

Jamaica Building Materials
(division of the Jamaican State Trading Company)

217

JAPAN *

Entities covered by the Accounts Law including all their subdivisions, local offices and affiliates, as listed below.[1,2]

House of Representatives
House of Councillors
Supreme Court of Justice
Board of Audit
Cabinet
Prime Minister's Office
Fair Trade Commission
National Public Safety Commission (National Police Agency)
Environmental Disputes Co-ordination Commission
Imperial Household Agency
Administrative Management Agency
Hokkaido Development Agency
Defence Agency[3]
Economic Planning Agency
Science and Technology Agency
Environment Agency
Okinawa Development Agency
National Land Agency
Ministry of Justice
Ministry of Foreign Affairs
Ministry of Finance
Ministry of Education
Ministry of Health and Welfare
Ministry of Agriculture, Forestry and Fisheries
Ministry of International Trade and Industry
Ministry of Transport
Ministry of Posts and Telecommunications
Ministry of Labour
Ministry of Construction
Ministry of Home Affairs
Japanese National Railways[4]
Japan Tobacco and Salt Public Corporation
Nippon Telegraph and Telephone Public Corporation[5]

Notes

[1]Products for resale or for the use in the production of goods for sale are not included.

[2]Where it is provided under the laws and regulations existing at the time of the entry into force of this Agreement for Japan, entities contained in this list may award contracts to specific co-operatives or associations thereof in accordance with the special procedures.

[3]Procurement by the Defence Agency cover the following items:

FSC	Description
22	Railway equipment
24	Tractors
32	Woodworking machinery and equipment
34	Metalworking machinery
35	Service and trade equipment
36	Special industry machinery
37	Agricultural machinery and equipment
38	Construction, mining, excavating and highway maintenance equipment
39	Materials handling equipment
40	Rope, cable, chain and fittings
41	Refrigeration, air conditioning, and air-circulating equipment
43	Pumps and compressors
45	Plumbing, heating and sanitation equipment
46	Water purification and sewage treatment equipment
47	Pipe, tubing, hose and fitting
48	Valves
51	Hand tools
52	Measuring tools
55	Lumber, millwork, plywood and veneer
61	Electric wire, and power and distribution equipment
62	Lighting fixtures and lamps
65	Medical, dental, and veterinary equipment and supplies
6630	Chemical analysis instruments
6635	Physical properties testing equipment

FSC	Description
6640	Laboratory equipment and supplies
6645	Time-measuring instruments
6650	Optical instruments
6655	Geophysical and astronomical instruments
6660	Meteorological instruments and apparatus
6670	Scales and balances
6675	Drafting, surveying and mapping instruments
6680	Liquid and gas flow, liquid level, and mechanical motion measuring instruments
6685	Pressure, temperature, and humidity measuring and controlling instruments
6695	Combination and miscellaneous instruments
67	Photographic equipment
68	Chemicals and chemical products
71	Furniture
72	Household and commercial furnishings and appliances
73	Food preparation and serving equipment
74	Office machines and visible record equipment
75	Office supplies and devices
76	Books, maps and other publications
77	Musical instruments, phonographs and home-type radios
79	Cleaning equipment and supplies
80	Brushes, paints, sealers and adhesives
8110	Drums and cans
8115	Boxes, cartons and crates
8125	Bottles and jars
8130	Reels and spools
8135	Packaging and packing bulk materials
85	Toiletries
87	Agricultural supplies
93	Non-metallic fabricated materials
94	Non-metallic crude materials
99	Miscellaneous

[4]Materials connected with operational safety of transportation are not included.

[5]Public telecommunications equipment is not included.

* Japan did not sign the proces verbal.

NIGERIA

1. Nigeria National Supplies Company:

For purchases of the following products:[1]

(a) Power generating equipment
(b) Telecommunications equipment
(c) Railway and structural parts and equipment
(d) Public clearing equipment
(e) Contractors plant
(f) Drilling equipment for water, oil and geological surveys
(g) Scientific instruments for survey
(h) Aircraft and equipment
(i) Fire fighting vehicles and equipment
(j) Petrol industrial engines.

[1] Subject to confirmation.

NORWAY

1. National Road Services
2. Central Government Purchasing Office
3. Postal Services Administration
4. State Hospital
5. University of Oslo
6. Police Services
7. Norwegian Broadcasting Corporation
8. University of Trondheim
9. University of Bergen
10. Coastal Directorate
11. University of Tromsø
12. State Pollution Control Authority
13. National Civil Aviation Administration
14. Ministry of Defence*
15. Norwegian Defence Medical Service*
16. Airforce Material Command*
17. Army Material Command*
18. Navy Material Command*
19. Combined Defence Material Command*

Note 1

The listed entities include regional and local subdivisions

Note 2

When a specific procurement decision may impair important national policy objectives the Norwegian Government may consider it necessary in singular procurement cases to deviate from the principle of national treatment in the Agreement. A decision to this effect will be taken at the Norwegian cabinet level.

Note 3

Procurement by defence entities (marked with *) covers the following products:

Replenishment material

- office machines and equipment, furniture, material for education, sport, welfare and other non-technical material

Running supplies

- technical consumption material
- medical and dental supplies and dressings
- kitchen and mess inventory
- stationary and office supply
- publications
- musical instruments

Fuels

- fuels, lubricants and other oil products

Motor vehicles

- passenger cars and transport vehicles
- ambulances
- fire engines
- aircraft service vehicles
- special purpose vehicles

Other technical equipment

- pilot equipment
- parachute equipment
- rescue equipment
- photo equipment
- pyro-technical equipment
- emergency electricity aggregate
- base, workshop, hangar and store equipment
- chemical/radiological equipment
- abc-safety protection equipment, workshops and stores

Medical and dental instruments

Catering equipment

- permanent operational equipment for kitchens, canteens, conference rooms, catering workshops and stores

SUISSE

1) Division centrale fédérale du matériel
2) Bibliothèque centrale fédérale
3) Direction des constructions fédérales
4) Ecole polytechnique fédérale de Zurich
5) Ecole polytechnique fédérale de Lausanne
6) Institut fédéral de recherches en matière de réacteurs
7) Institut fédéral de recherches forestières
8) Institut pour l'étude de la neige et des avalanches
9) Institut suisse de recherches nucléaires
10) Institut suisse de météorologie
11) Institut pour l'aménagement, l'épuration et la protection de l'eau
12) Service fédéral de l'hygiène publique
13) Bibliothèque nationale
14) Office fédéral de la protection civile[1]
15) Administration fédérale des douanes[2]
16) Régie fédérale des alcools
17) Monnaie fédérale
18) Bureau fédéral des mesures
19) Division de l'agriculture
20) Office fédéral de l'air
21) Office fédéral de l'économie hydraulique
22) Division commerciale du groupement de l'armement[1]
23) Département de la poste

Si une décision particulière concernant un marché peut compromettre la réalisation d'importants objectifs de politique nationale, le gouvernement suisse pourra juger nécessaire de dévier, dans le cas de marchés déterminés, au principe du traitement national inscrit dans l'Accord. Une décision à cet effet sera prise à l'échelon du gouvernement suisse.

Note 1
pour les produits, voir liste de matériel civil de la défense et de la protection civile.

Note 2
pour le corps des gardes frontière et les douaniers, voir liste de matériel civil de la défense et de la protection civile.

LISTE DES MATERIELS CIVILS DE LA DEFENSE ET DE LA PROTECTION CIVILE SOUMIS AU CODE "ACHATS GOUVERNEMENTAUX"

Chapitre 25: Sel; soufre; terres et pierres; plâtres; chaux et ciments

Chapitre 26: Minerais métallurgiques, scories et cendres

Chapitre 27: Combustibles minéraux, huiles minérales et produits de leur distillation; matières bitumineuses; cires minérales

Chapitre 28: Produits chimiques inorganiques; composés inorganiques ou organiques de métaux précieux, d'éléments radioactifs, de métaux des terres rares et d'isotopes.

à l'exception de:

ex 28.09 : explosifs
ex 28.13 : explosifs
ex 28.14 : gaz lacrymogènes
ex 28.28 : explosifs
ex 28.32 : explosifs
ex 28.39 : explosifs
ex 28.50 : produits toxicologiques
ex 28.51 : produits toxicologiques
ex 28.54 : explosifs

Chapitre 29: Produits chimiques organiques

à l'exception de:

ex 29.03 : explosifs
ex 29.04 : explosifs
ex 29.07 : explosifs
ex 29.08 : explosifs
ex 29.11 : explosifs
ex 29.12 : explosifs
ex 29.13 : produits toxicologiques
ex 29.14 : produits toxicologiques
ex 29.15 : produits toxicologiques
ex 29.21 : produits toxicologiques
ex 29.22 : produits toxicologiques
ex 29.23 : produits toxicologiques
ex 29.26 : explosifs
ex 29.27 : produits toxicologiques
ex 29.29 : explosifs

Chapitre 30: Produits pharmaceutiques

Chapitre 31: Engrais

Chapitre 32: Extraits tannants et tinctoriaux; tanins et leurs dérivés; matières colorantes, couleurs, peintures, vernis et teintures; mastics; encres

Chapitre 33: Huiles essentielles et résinoïdes; produits de parfumerie ou de toilette et cosmétiques

Chapitre 34: Savons, produits organiques tensio-actifs, préparations pour lessives, préparations lubrifiantes, cires artificielles, cires préparées, produits d'entretien, bougies et articles similaires, pâtes à modeler et "cires pour l'art dentaire".

Chapitre 35: Matières albuminoïdes; colles; enzymes

Chapitre 36: Poudres et explosifs; articles de pyrotechnie; allumettes; alliages pyrophoriques; matières inflammables

à l'exception de:

ex 36.01: poudres
ex 36.02: explosifs préparés
ex 36.04: détonnants
ex 36.05: explosifs

Chapitre 37: Produits photographiques et cinématographiques

Chapitre 38: Produits divers des industries chimiques

à l'exception de:

ex 38.19: produits toxicologiques

Chapitre 39: Matières plastiques artificielles, éthers et esters de la cellulose, résines artificielles et ouvrages en ces matières

à l'exception de:

ex 39.03: explosifs

Chapitre 40: Caoutchouc naturel ou synthétique, factice pour caoutchouc et ouvrages en caoutchouc

à l'exception de:

ex 40.11: pneus

Chapitre 43: Pelleteries et fourrures; pelleteries factices

Chapitre 45: Liège et ouvrages en liège

Chapitre 46: Ouvrages de sparterie et de vannerie

Chapitre 47: Matières servant à la fabrication du papier

Chapitre 65: Coiffures et parties de coiffures

Chapitre 66: Parapluies, parasols, cannes, fouets, cravaches et leurs parties

Chapitre 67: Plumes et duvet apprêtés et articles en plumes ou en duvet; fleurs artificielles; ouvrages en cheveux

Chapitre 68: Ouvrages en pierres, plâtre, ciment, amiante, mica et matières analogues

Chapitre 69: Produits céramiques

Chapitre 70: Verre et ouvrages en verre

Chapitre 71: Perles fines, pierres gemmes et similaires, métaux précieux, plaqués ou doublés de métaux précieux et ouvrages en ces matières; bijouterie de fantaisie

Chapitre 73: Fonte, fer et acier

Chapitre 74: Cuivre

Chapitre 75: Nickel

Chapitre 76: Aluminium

Chapitre 77: Magnésium, beryllium (glucinium)

Chapitre 78: Plomb

Chapitre 79: Zinc

Chapitre 80: Etain

Chapitre 81: Autres métaux communs

Chapitre 82: Outillage; articles de coutellerie et couverts de table, en métaux communs

Chapitre 83: Ouvrages divers en métaux communs

Chapitre 84: Chaudières, machines, appareils et engins mécaniques

III-138 C - 79 - 18

Chapitre 85: Machines et Appareils électriques et Objets servant à des Usages électroniques.

à l'exception de:

ex 85.03: Piles électriques
ex 85.13: Télécommunications
ex 85.15: Appareils de transmission

Chapitre 86: Véhicules et Matériel pour Voies ferrées; Appareils de Signalisation non électriques pour Voies de communication

à l'exception de:

ex 86.02: Locomotives blindées
ex 86.03: Autres Locoblindés
ex 86.06: Wagons blindés
ex 86.06: Wagons Ateliers
ex 86.07: Wagons

Chapitre 87: Voitures automobiles, Tracteurs, Cycles et autres Véhicules terrestres

à l'exception de:

87.03: Chars et Automobiles blindés
ex 87.04: Camions lourds
ex 87.11: Motocycles
ex 87.14: Remorques

Chapitre 88: Navigation aérienne

à l'exception de:

ex 88.02: Avions

Chapitre 89: Navigation maritime et fluviale

Chapitre 90: Instruments et Appareils d'Optique, de Photographie et de Cinématographie, de Mesure, de Vérification, de Précision; Instruments et Appareils médico-chirurgicaux;

à l'exception de:

ex 90.05: Jumelles
ex 90.13: Instruments divers, Lasers
ex 90.14: Télémètres
ex 90.28: Instruments de Mesure électriques ou électroniques

Chapitre 91: Horlogerie

Chapitre 92: Instruments de Musique; Appareils d'Enregistrement ou de Reproduction du Son; Appareils d'Enregistrement ou de Reproduction des Images et du Son en Télévision; Parties et Accessoires de ces Instruments et Appareils

Chapitre 93: Armes et munitions

à l'exception de:

ex 93.01: Armes blanches
ex 93.02: Pistolets
ex 93.03: Armes de guerre
ex 93.04: Armes à feu
ex 93.05: Autres armes
ex 93.07: Projectiles et munitions

Chapitre 95: Matières à tailler et à mouler, à l'état travaillé (y compris les ouvrages)

Chapitre 96: Ouvrages de brosserie et pinceaux, balais, houppes et articles de tamiserie

Chapitre 98: Ouvrages divers

PARTIE II

LISTE DES MATERIELS ACHETES PAR LES MINISTERES DE LA DEFENSE ET SOUMIS AU CODE "ACHATS GOUVERNEMENTAUX"

Chapitre 25: Sel; soufre; terres et pierres; plâtres, chaux et ciments

Chapitre 26: Minerais métallurgiques, scories et cendres

Chapitre 27: Combustibles minéraux, huiles minérales et produits de leur distillation; matières bitumineuses; cires minérales

à l'exception de:

ex 27.10 carburants spéciaux

Chapitre 28: Produits chimiques inorganiques; composés inorganiques ou organiques de métaux précieux, d'éléments radio-actifs, de métaux des terres rares et d'isotopes

à l'exception de:

ex 28.09 explosifs
ex 28.13 explosifs
ex 28.14 gaz lacrymogènes
ex 28.28 explosifs
ex 28.32 explosifs
ex 28.39 explosifs
ex 28.50 produits toxicologiques
ex 28.51 produits toxicologiques
ex 28.54 explosifs

Chapitre 29: Produits chimiques organiques

à l'exception de:

ex 29.03 explosifs
ex 29.04 explosifs
ex 29.07 explosifs
ex 29.08 explosifs
ex 29.11 explosifs
ex 29.12 explosifs
ex 29.13 produits toxicologiques
ex 29.14 produits toxicologiques
ex 29.15 produits toxicologiques
ex 29.21 produits toxicologiques
ex 29.22 produits toxicologiques
ex 29.23 produits toxicologiques
ex 29.26 explosifs
ex 29.27 produits toxicologiques
ex 29.29 explosifs

Chapitre 30: Produits pharmaceutiques

Chapitre 31: Engrais

Chapitre 32: Extraits tannants et tinctoriaux; tanins et leurs dérivés; matières colorantes, couleurs, peintures, vernis et teintures; mastics; encres.

Chapitre 33: Huiles essentielles et résinoïdes; produits de parfumerie ou de toilette et cosmétiques

Chapitre 34: Savons, produits organiques tensio-actifs, préparations pour lessives, préparations lubrifiantes, cires artificielles, cires préparées, produits d'entretien, bougies et articles similaires, pâtes à modeler et "cires pour l'art dentaire".

Chapitre 35: Matières albuminoïdes; colles; enzymes

Chapitre 37: Produits photographiques et cinématographiques

Chapitre 38: Produits divers des industries chimiques

à l'exclusion de:
ex 38.19: produits toxicologiques

Chapitre 39: Matières plastiques artificielles, éthers et esters de la cellulose, résines artificielles et ouvrages en ces matières

à l'exception de:
ex 39.03: explosifs

Chapitre 40: Caoutchouc naturel ou synthétique, factice pour caoutchouc et ouvrages en caoutchouc

à l'exception de:
ex 40.11: pneus à l'épreuve des balles

Chapitre 41: Peaux et cuirs

Chapitre 42: Ouvrages en cuir; articles de bourrellerie et de sellerie; articles de voyage, sacs à main et contenants similaires; ouvrages en boyaux

Chapitre 43: Pelleteries et fourrures; pelleteries factices

Chapitre 44: Bois, charbon de bois et ouvrages en bois

Chapitre 45: Liège et ouvrages en liège

Chapitre 46: Ouvrages de sparterie et de vannerie

Chapitre 47: Matières servant à la fabrication du papier

Chapitre 48: Papiers et cartons; ouvrages en pâte de cellulose, en papier et en carton

Chapitre 49: Articles de librairie et produits des arts graphiques

Chapitre 65: Coiffures et parties de coiffures

Chapitre 66: Parapluies, parasols, cannes, fouets, cravaches et leurs parties

Chapitre 67: Plumes et duvet apprêtés et articles en plumes ou en duvet; fleurs artificielles; ouvrages en cheveux

Chapitre 68: Ouvrages en pierres, plâtre, ciment, amiante, mica et matières analogues

Chapitre 69: Produits céramiques

Chapitre 70: Verre et ouvrages en verre

Chapitre 71: Perles fines, pierres gemmes et similaires, métaux précieux, plaqués ou doublés de métaux précieux et ouvrages en ces matières; bijouterie de fantaisie

Chapitre 73: Fonte, fer et acier

Chapitre 74: Cuivre

Chapitre 75: Nickel

Chapitre 76: Aluminium

Chapitre 77: Magnésium, béryllium (glucinium)

Chapitre 78: Plomb

Chapitre 79: Zinc

Chapitre 80: Etain

Chapitre 81: Autres métaux communs

Chapitre 82: Outillage; articles de coutellerie et couverts de table, en métaux communs

à l'exception de:

ex 82.05 : outillage
ex 82.07 : pièces d'outillage

Chapitre 83: Ouvrages divers en métaux communs

Chapitre 84: Chaudières, machines, appareils et engins mécaniques

à l'exception de:

ex 84.06 : moteurs
ex 84.08 : autres propulseurs
ex 84.45 : machines
ex 84.53 : machines automatiques de traitement de l'information
ex 84.55 : pièces du 84.53
ex 84.57 : réacteurs nucléaires

Chapitre 85: Machines et appareils électriques et objets servant à des usages électrotechniques

à l'exception de:

ex 85.13 : télécommunications
ex 85.15 : appareils de transmission

Chapitre 86: Véhicules et matériel pour voies ferrées; appareils de signalisation non électriques pour voies de communication

à l'exception de:

ex 86.02 : locomotives blindées
ex 86.03 : autres locoblindés
ex 86.05 : wagons blindés
ex 86.06 : wagons ateliers
ex 86.07 : wagons

Chapitre 87: Voitures automobiles, tracteurs, cycles et autres véhicules terrestres

à l'exception de:

87.08 : chars et automobiles blindés
ex 87.01 : tracteurs
ex 87.02 : véhicules militaires
ex 87.03 : voitures de dépannage
ex 87.09 : motocycles
ex 87.14 : remorques

Chapitre 89: Navigation maritime et fluviale

à l'exception de:

89.01A : bateaux de guerre

Chapitre 90: Instruments et appareils d'optique, de photographie et de cinématographie, de mesure, de vérification, de précision; instruments et appareils médico-chirurgicaux;

à l'exception de:

ex 90.05 : jumelles
ex 90.13 : instruments divers, lasers
ex 90.14 : télémètres
ex 90.28 : instruments de mesure électriques ou électroniques
ex 90.11 : microscopes
ex 90.17 : instruments médicaux
ex 90.18 : appareils de mécanothérapie
ex 90.19 : appareils d'orthopédie
ex 90.20 : appareils rayon X

Chapitre 91: Horlogerie

Chapitre 92: Instruments de musique; appareils d'enregistrement ou de reproduction du son; appareils d'enregistrement ou de reproduction des images et du son en télévision; parties et accessoires de ces instruments et appareils

Chapitre 94: Meubles; mobilier médico-chirurgical; articles de literie et similaires

à l'exception de:

ex 94.01A: sièges aérodynes

Chapitre 95: Matières à tailler et à mouler, à l'état travaillé (y compris les ouvrages)

Chapitre 96: Ouvrages de brosserie et pinceaux, balais, bouppes et articles de tamiserie

Chapitre 98: Ouvrages divers

SWEDEN

1. Defence Material Administration*
2. National Road Administration
3. National Board of Public Building
4. National Industries Corporation*
5. Post Office Administration
6. Swedish Forest Service
7. National Civil Aviation Administration
8. Royal Fortifications Administration*
9. National Board of Education
10. National Police Board
11. Agency for Administrative Development
12. National Prison and Probation Administration
13. National Administration of Shipping and Navigation
14. National Tax Board
15. National Board of Forestry
16. Medical Board of the Armed Forces*
17. National Road Safety Office
18. Royal Civil Defence Board*
19. National Industrial Board
20. National Board of Health and Welfare
21. Central Bureau of Statistics

Note 1

The listed entities include regional and local subdivisions.

Note 2

When a specific procurement decision may impair important national policy objectives the Swedish Government may consider it necessary in singular procurement cases to deviate from the principle of national treatment in the Agreement. A decision to this effect will be taken at the Swedish cabinet level.

Note 3

Procurement by defence entities (marked with a *)covers products falling under the following BTN-chapters:

BTN chapters	Exceptions	
25 - 26		
27	ex 27.10	special fuels
28	ex 28.09	explosives
	ex 28.13	explosives
	ex 28.14	tear gas
	ex 28.28	explosives
	ex 28.32	explosives
	ex 28.39	explosives
	ex 28.50	toxic products
	ex 28.51	toxic products
	ex 28.54	explosives
29	ex 29.03	explosives
	ex 29.04	explosives
	ex 29.07	explosives
	ex 29.08	explosives
	ex 29.11	explosives
	ex 29.12	explosives
	ex 29.13	toxic products
	ex 29.14	toxic products
	ex 29.15	toxic products
	ex 29.21	toxic products
	ex 29.22	toxic products
	ex 29.23	toxic products
	ex 29.26	explosives
	ex 29.27	toxic products
	ex 29.29	explosives
30 - 81		
82	ex 82.05	hand tools
	ex 82.07	hand tool parts
83		
84	ex 84.06	engines
	ex 84.08	other engines
	ex 84.45	machinery
	ex 84.53	ADP-machines
85	ex 85.13	telecommunication equipment
	ex 85.15	transmission apparatus

CN chapters	Exceptions	
86	ex 86.02	armoured locomotives
	86.03	other armoured locos
	86.05	armoured wagons
	86.06	repair wagons
	86.07	wagons
87	87.08	tanks and armoured vehicles
	ex 87.01	tractors
	ex 87.02	military vehicles
	ex 87.03	break-down lorries
	ex 87.09	motorcycles
	ex 87.14	towing vehicles
89	ex 89.01	warships
90	ex 90.05	binoculars
	ex 90.13	misc. instruments, lasers
	ex 90.14	telemotors
	ex 90.28	electric and electronic measurement instruments
91 - 92		
94	ex 94.01	aerodynamic seats
95 - 96		

UNITED STATES

The following entities are included in the coverage of this Agreement by the United States.

1. Department of Agriculture (This Agreement does not apply to procurement of agricultural products made in furtherance of agricultural support programmes or human feeding programmes.)
2. Department of Commerce
3. Department of Health, Education and Welfare
4. Department of Housing and Urban Development
5. Department of the Interior (excluding the Bureau of Reclamation)
6. Department of Justice
7. Department of Labour
8. Department of State
9. Department of the Treasury
10. General Services Administration (Purchases by the Automated Data and Telecommunications Service are not included; purchases by the National Tool Centre are not included; purchases by the Regional 9 Office of San Francisco, California are not included)
11. National Aeronautics and Space Administration
12. Veterans Administration
13. Environmental Protection Agency
14. United States International Communication Agency
15. National Science Foundation
16. Panama Canal Company and Canal Zone Government
17. Executive Office of the President
18. Farm Credit Administration
19. National Credit Union Administration
20. Merit Systems Protection Board
21. ACTION
22. United States Arms Control and Disarmament Agency
23. Civil Aeronautics Board
24. Federal Home Loan Bank Board
25. National Labour Relations Board
26. National Mediation Board

UNITED STATES (cont'd)

27. Railroad Retirement Board
28. American Battle Monuments Commission
29. Federal Communications Commission
30. Federal Trade Commission
31. Indian Claims Commission
32. Inter-State Commerce Commission
33. Securities and Exchange Commission
34. Office of Personnel Management
35. United States International Trade Commission
36. Export-Import Bank of the United States
37. Federal Mediation and Conciliation Service
38. Selective Service System
39. Smithsonian Institution
40. Federal Deposit Insurance Corporation
41. Consumer Product Safety Commission
42. Equal Employment Opportunity Commission
43. Federal Maritime Commission
44. National Transportation Safety Board
45. Nuclear Regulatory Commission
46. Overseas Private Investment Corporation
47. Renegotiation Board
48. Administrative Conference of the United States
49. Board for International Broadcasting
50. Commission on Civil Rights
51. Commodity Futures Trading Commission
52. Community Services Administration
53. Department of Defence (excluding Corps of Engineers)

This Agreement will not apply to the following purchases of the DOD:

(a) Federal Supply Classification (FSC) 83 - all elements of this classification other than pins, needles, sewing kits, flagstaffs, flagpoles, and flagstaff trucks;

(b) FSC 84 - all elements other than sub-class 8460 (luggage);

(c) FSC 89 - all elements other than sub-class 8975 (tobacco products)

UNITED STATES (cont'd)

(d) FSC 2310 - (buses only);

(e) Specialty metals, defined as steels melted in steel manufacturing facilities located in the United States or its possessions, where the maximum alloy content exceeds one or more of the following limits, must be used in products purchased by DOD: (1) manganese, 1.65 per cent; silicon, 0.60 per cent; or copper, 0.06 per cent; or which contains more than 0.25 per cent of any of the following elements: aluminium, chromium, cobalt, columbium, molybdenum, nickel, titanium, tungsten, or vanadium; (2) metal alloys consisting of nickel, iron-nickel and cobalt base alloys containing a total of other alloying metals (except iron) in excess of 10 per cent; (3) titanium and titanium alloys; or, (4) zirconium base alloys;

(f) FSC 19 and 20 - that part of these classifications defined as naval vessels or major components of the hull or superstructure thereof;

(g) FSC 51

(h) Following FSC categories are not generally covered due to application of Part VIII, paragraph 1:

10, 12, 13, 14, 15, 16, 17, 19, 20, 28, 31, 58, 59, 95

This Agreement will generally apply to purchases of the following FSC categories subject to United States Government determinations under the provisions of Part VIII, paragraph 1:

22. Railway Equipment
23. Motor Vehicles, Trailers, and Cycles (except buses in 2310)
24. Tractors
25. Vehicular Equipment Components
26. Tyres and Tubes
29. Engine Accessories
30. Mechanical Power Transmission Equipment
32. Woodworking Machinery and Equipment
34. Metalworking Machinery
35. Service and Trade Equipment

UNITED STATES (cont'd)

5. Special Industry Machinery
7. Agricultural Machinery and Equipment
8. Construction, Mining, Excavating, and Highway Maintenance Equipment
9. Materials Handling Equipment
0. Rope, Cable, Chain and Fittings
1. Refrigeration and Air Conditioning Equipment
2. Fire Fighting, Rescue and Safety Equipment
3. Pumps and Compressors
4. Furnace, Steam Plant, Drying Equipment and Nuclear Reactors
5. Plumbing, Heating and Sanitation Equipment
6. Water Purification and Sewage Treatment Equipment
7. Pipe, Tubing, Hose and Fittings
3. Valves
9. Maintenance and Repair Ship Equipment
?. Measuring Tools
3. Hardware and Abrasives
4. Prefabricated Structures and Scaffolding
5. Lumber, Millwork, Plywood and Veneer
6. Construction and Building Materials
.. Electric Wire, and Power and Distribution Equipment
3. Lighting Fixtures and Lamps
.. Alarm and Signal Systems
7. Medical, Dental, and Veterinary Equipment and Supplies
8. Instruments and Laboratory Equipment
. Photographic Equipment
.. Chemicals and Chemical Products
. Training Aids and Devices
9. General Purpose ADPE, Software, Supplies and Support Equipment
.. Furniture
3. Household and Commercial Furnishings and Appliances
.. Food Preparation and Serving Equipment
. Office Machines, Visible Record Equipment and ADP Equipment
. Office Supplies and Devices
.. Books, Maps and Other Publications

UNITED STATES (cont'd)

77. Musical Instruments, Phonographs, and Home Type Radios
78. Recreational and Athletic Equipment
79. Cleaning Equipment and Supplies
80. Brushes, Paints, Sealers and Adhesives
81. Containers, Packaging and Packing Supplies
85. Toiletries
87. Agricultural Supplies
88. Live Animals
91. Fuels, Lubricants, Oils and Waxes
93. Non-metallic Fabricated Materials
94. Non-metallic Crude Materials
96. Ores, Minerals and their Primary Products
99. Miscellaneous

General Notes

1. Notwithstanding the above, this Agreement will not apply to set asides on behalf of small and minority businesses.

2. Pursuant to Part I, paragraph 1(a), transportation is not included in services incidental to procurement contracts.

CANADA

1. Department of Agriculture

2. Department of Consumer and Corporate Affairs

3. Department of Energy, Mines and Resources

4. Department of Fisheries and Environment
   (except Fisheries and Marine Service)
   including: Fisheries Price Support Board

5. Department of External Affairs

6. Department of Finance
   including: Department of Insurance
   Anti-Inflation Board
   Anti-Dumping Tribunal
   Municipal Development and Loan Board
   Auditor General

7. Department of Indian Affairs and Northern Development

8. Department of Industry, Trade and Commerce
   including: Statistics Canada
   Machinery and Equipment Advisory Board

9. Department of Justice
   including: Canadian Human Rights Commission
   Criminal Code Revision Commission
   Statute Revision Commission

10. Department of Labour
    including: Canada Labour Relations Board

11. Department of Employment and Immigration
    including: Immigration Appeal Board
    Canada Employment and Immigration Commission

12. Department of National Defence*
    including: Defence Construction (1951) Limited

13. Department of National Health and Welfare
    including: Medical Research Council
    Office of the Coordinator, Status of Women

14. Department of Post Office [1]

(1) The Department of the Post Office is on this list of entities on the understanding that, should it cease to be a government department, the provisions of Part IX, paragraph 5(b) would not apply.

15. Department of Public Works

16. Department of Regional Economic Expansion

17. Department of Secretary of State of Canada
    including: National Library
    National Museum
    Public Archives
    Public Service Commission
    Office of the Representation Commissioner

18. Department of Solicitor General
    including: Royal Canadian Mounted Police
    Canadian Penitentiary Service
    National Parole Board

19. Department of Supply and Services (on its own account)
    including: Canadian Government Specifications Board

20. Department of Veterans Affairs
    including: Director of Veterans Land Act

21. National Research Council

22. Privy Council Office
    including: Canada Intergovernmental Conference Secretariat
    Commissioner of Official Languages
    Economic Council
    Public Service Staff Relations Board
    Federal Provincial Relations Office
    Office of the Governor General's Secretary
    Task Force on Canadian Unity

23. National Capital Commission

24. Ministry of State for Science and Technology
    including: Science Council

25. National Battlefields Commission

26. Office of the Chief Electoral Officer

27. Treasury Board

28. Canadian International Development Agency (on its own account)

The following products purchased by the Department of National Defence and the RCMP are included in the coverage of this Agreement, subject to the application of paragraph 1 of Part VIII.

(Numbers refer to the Federal Supply Classification Code)

22. Railway equipment

2340. Motorcycles, motor scooters and bicycles

24. Tractors

25. Vehicular equipment components

26. Tires and tubes

29. Engine accessories

30. Mechanical power transmission equipment

32. Woodworking machinery and equipment

34. Metal working machinery

35. Service and trade equipment

36. Special industry machinery

37. Agricultural machinery and equipment

38. Construction, mining, excavating and highway maintenance equipment

39. Materials handling equipment

40. Rope; cable, chain and fittings

41. Refrigeration and air conditioning equipment

42. Fire fighting, rescue and safety equipment
(except 4220 Marine lifesaving and diving equipment
4230 Decontaminating and impregnating equipment)

43. Pumps and compressors

44. Furnace, steam plant, drying equipment and nuclear reactors

45. Plumbing, heating and sanitation equipment

46. Water purification and sewage treatment equipment

47. Pipe, tubing, hose and fittings

48. Valves

52. Measuring tools

53. Hardware and abrasives

54. Prefabricated structures and scaffolding

55. Lumber, millwork, plywood and veneer

56. Construction and building materials

61. Electric wire and power and distribution equipment

62. Lighting fixtures and lamps

63. Alarm and signal systems

65. Medical, dental and veterinary equipment and supplies

66. Instruments and laboratory equipment
(except 6615: Automatic pilot mechanisms and airborne Gyro components
6665: Hazard-detecting instruments and apparatus)

67. Photographic equipment

68. Chemicals and chemical products

70. General purpose automatic data processing equipment, software, supplies and support equipment
(except 7010 ADPE configurations)

71. Furniture

72. Household and commercial furnishings and appliances

73. Food preparation and serving equipment

74. Office machines, visible record equipment and automatic data processing equipment

75. Office supplies and devices

76. Books, maps and other publications
(except 7650: Drawings and specifications)

77. Musical instruments, phonographs and home-type radios

78. Recreational and athletic equipment

79. Cleaning equipment and supplies

80. Brushes, paints, sealers and adhesives

81. Containers, packaging and packing supplies

8460. Luggage

85. Toiletries

87. Agricultural supplies

88. Live animals

91. Fuels, lubricants, oils and waxes

93. Non-metallic fabricated materials

94. Non-metallic crude materials

96. Ores, minerals and their primary products

99. Miscellaneous

General Note:

Notwithstanding the above, this Agreement does not apply to contracts set aside for small businesses.

Korea *

List of entities

Office of Supply

Classification of Purchases

CCCN

EX 6902:	Refractory Constructional Goods
EX 7316:	Railway and Tramway Track Construction Material of Iron or Steel
EX 8509:	Electrical Lighting and Signalling Equipment
EX 8607:	Railway and Tramway Goods Vans, Goods Wagons and Trucks
EX 8609:	Parts of Railway and Tramway Locomotives and Rolling Stock
EX 9028:	Electrical Instruments and Apparatus

* Submitted April 27, 1979. Korea did not sign the proces verbal.

7.10.2

ANNEX II[1]

PUBLICATIONS UTILIZED BY PARTIES TO THIS AGREEMENT FOR THE PUBLICATION OF NOTICES OF PROPOSED PURCHASES - PART V, PARAGRAPH 3

EUROPEAN ECONOMIC COMMUNITY

Belgium	- Official Journal of the European Communities - Le Bulletin des Adjudications - Other publications in the specialized press
Denmark	- Official Journal of the European Communities
France	- Official Journal of the European Communities
F.R. Germany	- Official Journal of the European Communities - Bundesanzeiger Postfach 108006 5000 Köln 1 - Bundesausschreibungsblatt GmbH Poststrasse 13 4000 Düsseldorf 1
Ireland	- Official Journal of the European Communities - Daily Press: "Irish Independant", "Irish Times", "Irish Press", "Cork Examiner"
Italy	- Official Journal of the European Communities
Luxembourg	- Official Journal of the European Communities - Daily Press
Netherlands	- Official Journal of the European Communities
United Kingdom	- Official Journal of the European Communities

FINLAND

Official Gazette of Finland

JAPAN

Kampô (Official Gazette)

[1] To be completed.

NORWAY

Official Gazette of Norway

SUISSE

Feuille officielle suisse du commerce

SWEDEN

Gazette of Government

Contracts, supplement to the Official Gazette

UNITED STATES

Commerce Business Daily

250

7.10.3

ANNEX III[1/]

PUBLICATIONS UTILIZED BY PARTIES TO THIS AGREEMENT FOR THE PUBLICATION ANNUALLY OF INFORMATION ON PERMANENT LISTS OF SUPPLIERS IN THE CASE OF SELECTIVE TENDERING PROCEDURES - PART V, PARAGRAPH 6

JAPAN

Kampô (Official Gazette)

[1/] To be completed.

7.10.4

ANNEX IV[1/]

PUBLICATIONS UTILIZED BY PARTIES TO THIS AGREEMENT FOR THE PROMPT PUBLICATION OF LAWS, REGULATIONS, JUDICIAL DECISIONS, ADMINISTRATIVE RULINGS OF GENERAL APPLICATION AND ANY PROCEDURE REGARDING GOVERNMENT PROCUREMENT COVERED BY THIS AGREEMENT - PART VI, PARAGRAPH 1

EUROPEAN ECONOMIC COMMUNITY

Belgium - Laws, royal regulations, ministerial regulations, main circulars on government procurement - Le Moniteur Belge
- Jurisprudence - pasicrisie

Denmark - Laws and regulations - Lovtidende
- Judicial decisions - Ugeskrift for retsvaesen
- Administrative rulings and procedures - ministerialtidende

France - Legislation - Bulletin officiel
- Jurisprudence - no official publication

Germany - Legislation - Bundesgesetzblatt
- Herausgeber: Der Bundesminister der Justiz
- Verlag: Bundesanzeiger
- Bundesanzeiger
Postfach 108006
5000 Köln 1.
- Judicial and administrative rulings:
Entscheidungsammlungen des
- Bundesverfassungsgerichts
- Bundesgerichtshofs
- Bundesverwaltungsgerichts
- Bundesfinanzhofs sowie der Oberlandsgerichts

Ireland - Legislation and regulations - Iris Oifigiuil (official Gazette of the Irish Government)

[1/] To be completed.

Italy
- Legislation - Gazette Ufficiale
- Jurisprudence - no official publication

Luxembourg
- Legislation - memorial
- Jurisprudence - Pasicrisie

Netherlands
- Legislation - Nederlandse Staatscourant and/or Staatsblad
- Jurisprudence - no official publication

United Kingdom
- Legislation - no such legislation
- Jurisprudence - Law Reports
- Standard Contract conditions - Document GC/Stores/1 obtainable from the Ministry of Defence. It should be noted that special conditions may apply to some contracts: details may be obtained from the department concerned.

FINLAND

The Code of Statutes of Finland (Suomen Asetuskokoelma - Finlands Författningssamling)

JAPAN

Genkō-nihon-hōki (Compilation of Current Laws and Regulations of Japan), and/or Kampo (Official Gazette)

NORWAY

The Code of Statutes of Norway (Norsk Lovtidend)

SUISSE

Recueil officiel des lois et ordonnances de la Confédération suisse (RO)

SWEDEN

1. The Swedish Code of Statutes (Svensk forfattningssamling, SFS)
2. Instructions to the Royal proclamations on Government Procurement, issued by the National Audit Bureau. (Riksrevisionsverkets tillampningsanvisningar till upphandlingskungorelsen)

UNITED STATES

All U.S. laws, regulations, judicial decisions, administrative rulings and procedures regarding government procurement covered by this Agreement are codified in the Defense Acquisitions Regulation (DAR) and the Federal Procurement Regulations (FPR), both of which are published as a part of the U.S. Code of Federal Regulations (CFR). The DAR is published in Title 32 of CFR and the FPR is in Title 41, Chapter 1 (CFR). Copies may be purchased from the Government Printing Office. These regulations are also published in loose leaf versions which are available by subscription from the Government Printing Office. Changes are provided to subscribers as they are issued.

For those who wish to consult original sources, the following published sources are provided:

Material	Publication Name
U.S. Laws	U.S. Statutes at Large
Decisions:	
- U.S. Supreme Court	U.S. Reports
- Circuit Court of Appeals	Federal Reporter - 2nd Series
- District Courts	Federal Supplement Reporter
- Court of Claims	Court of Claims Reports
Decisions:	
- Boards of Contract Appeals	Unofficial publication by Commerce Clearing House

ecisions:

Comptroller General of the U.S. — Those not officially published as decisions of the Comptroller General are published unofficially by Federal Publications, Inc.

SECTION II: ECONOMIC EFFECTS ON U.S. INDUSTRY

7.11 Impact of the Agreement on Government Procurement on Selected Industries

A wide variety of regulations, policies, and practices relating to purchases by national governments throughout the world impede international trade in virtually all agricultural and manufactured commodities. While the procurement practices may differ in principle or method of application, they all have the same trade-restricting effect. The purpose of the Agreement on Government Procurement is to ensure that all vendors in the signatory countries have an equal opportunity to participate in most purchasing programs of the signatory governments.

In developing information to evaluate the current impact of the divergent policies practiced in procurement programs in the U.S. and overseas, the Commission utilized, in addition to its resident expertise, information and opinions provided by industry and labor organizations, members of the Agricultural Trade Advisory Committees and the Industry Sector Advisory Committees and other knowledgeable individuals. It is apparent that concern in the U.S. exists that (1) many nations would actually choose to abandon their long-established principle of self-preservation and expose their more lucrative public and private markets to U.S. vendors, (2) the exceptions to the agreement, especially as they relate to "national security," are vague or ambiguous, (3) certain industrial sectors particularly attractive to U.S. exporters (for example, heavy electrical and telephone equipment) will remain closed to U.S. suppliers despite the agreement, and (4) despite the coverage offers, actual opportunities for contracts within the ostensible coverage universe will be limited by the high threshold (SDR 150,000).

Foreign procurement policies are generally viewed as being more restrictive of U.S. exports than U.S. procurement policies are of imports. Therefore, the adoption of and conformance to the Agreement on Government Procurement by major traders should be expected to have a significant positive effect on the net export trade of the U.S. The potential net export gain has been variously estimated to be upwards of $1 billion to $2 billion with a resulting increase in U.S. employment of upwards of 100,000 persons. Even if these gains materialize, they are relatively small compared with current U.S. exports ($141 billion) and civilian employment (96 million).

The Commission analyzed major industries to determine possible increased export potential that might result from the adoption of the Agreement on Government Procurement. It was determined that while in the aggregate the export potential of the U.S. might increase as a result of the agreement, few industries are likely to expect more than a marginal increase in export potential as a result of the Agreement and then only in selected product areas over an extended period of time.

Certain industry sectors, such as those producing products for utilities and for transportation and telecommunication systems, which might be expected to benefit significantly by the adoption of the Agreement on Government Procurement, will not. All or major parts of these areas have been reserved from the Agreement by signatory countries for many entities of their governments' procurement programs, and relatively minor portions of these U.S. industries are likely to enjoy increased exports.

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