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**THE GATT-MTN SYSTEM AND THE EUROPEAN COMMUNITY
AS INTERNATIONAL FRAMEWORKS FOR THE REGULATION OF
ECONOMIC ACTIVITY: THE REMOVAL OF BARRIERS TO TRADE
IN GOVERNMENT PROCUREMENT**

MARK L. JONES*

INTRODUCTION

This article explores the attempts made at the international level, both within the GATT-MTN system and the European Community,¹ to liberalize international trade and stimulate international competition in the area of government supply contracts. It appears that government officials have traditionally discriminated against or otherwise disadvantaged foreign suppliers in their purchasing activities, and that such practices have constituted one of the most significant non-tariff barriers² to international trade in purely quantitative terms.³

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1. The General Agreement on Tariffs and Trade — Multilateral Trade Negotiations (GATT-MTN) system and the European Community are discussed *infra* notes 4-21 and accompanying text.

2. Apart from the imposition of tariffs, imports can be restricted in a great variety of ways. In the late 1960s the GATT CONTRACTING PARTIES began to inventory and catalog the non-tariff barriers (NTBs) of all participating countries. By 1973 the inventory contained over 800 entries. See J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 433 (1977) [hereinafter cited as J. JACKSON, *LEGAL PROBLEMS*].

The effect of the many non-tariff barriers to imports has become more noticeable in recent years for a number of different reasons:

(a) The relative decline in the importance of tariff barriers due to:

(i) the progressive reduction in tariffs as a result of various rounds of multilateral trade negotiations conducted under the auspices of the GATT, see *infra* note 5; (ii) the advent of floating exchange rates since 1971.

(b) An upsurge in the use of NTB protectionist measures.

For a survey of GATT activity in the area of NTBs, see *Focus on Quantitative Restrictions and Other Non-Tariff Measures*, GATT FOCUS No. 28, March-April 1984, at 2-4.

3. See K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 199 (1970).

See also GATT "The Tokyo Round of Multilateral Trade Negotiations — Report of the Director-General of GATT" (Geneva, April 1979) at 75, and the discussion in Bourgeois, *The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective*, 19 COMMON MKT. L. REV. 5 (1982). Bourgeois cites some revealing statistics (at 12). For example, in 1967 in France only 0.99% of public contracts were

Part I of the article draws some contrasts between the GATT-MTN system of international regulation and that of the European Community, in order to provide a context for appreciating the significance and impact of the various international measures taken to open up national government procurement markets to foreign suppliers. Although the focus of the article is on the removal of barriers to trade in the field of government purchasing, these considerations are also of more general relevance for other areas of regulation as well.

Part II of the article describes the many visible and less visible barriers to international trade and competition that may be encountered by foreign suppliers, and that result from national laws, regulations, administrative rules and practices in the area of government purchasing.

In Part III the discussion turns to the relevant rules of the GATT-MTN system. Although the GATT itself does not seek to regulate national government purchasing activity, one of the more significant results of the Tokyo Round of Multilateral Trade Negotiations was the conclusion of an Agreement on Government Procurement, which entered into force on January 1, 1981. In November 1983 the Committee on Government Procurement (composed of representatives from each of the Parties to the Agreement) initiated negotiations with a view to improving the Agreement and expanding the coverage.

This attempt, at the more general international level, to remove barriers to international trade in the field of government purchasing, was preceded by measures taken at the regional level within the European Community. Part IV of the paper therefore describes the structure of legal regulation for public supply contracts within the EEC prior to implementation of the MTN Agreement in the Community legal system. The discussion then considers the problems which arose in connection with that implementation, both with regard to the impact of the Agreement on the pre-existing legal regime as well as the method chosen to give effect to the Agreement in the Community legal system.

Part V focuses more closely on certain institutional and structural differences between the two systems. It compares the respective "international" dispute settlement and enforcement procedures, and examines the possibility for private individuals to invoke rights under the international rules directly before national courts, in a private dispute with the national authorities. Such an evaluation of the comparative effectiveness of these mechanisms may assist in assessing the degree of likely compliance with, and effectiveness of, the rules of the system in general and the rules on government procurement in particular.

I. DEFINITION OF CONTEXT—SOME CONTRASTS BETWEEN THE GATT-MTN SYSTEM AND THE EUROPEAN COMMUNITY

The problem of barriers to trade in the area of public supply contracts has been faced both within the General Agreement on Tariffs and Trade (GATT) and the European Community. An appreciation of the differences between the two systems may be helpful in providing a context for evaluating the significance and impact of the solutions attempted.

The GATT is a multilateral trade agreement, concluded in 1947, with 90 signatory contracting parties.⁴ Most of the MTN agreements that resulted from the Tokyo Round of Multilateral Trade Negotiations are also multilateral agreements, each one binding a varying number of signatories and dealing with a specific aspect or sector of trade liberalization.⁵ Because

4. The General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 194. The current version of GATT is contained in IV GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969). The text of the GATT is reproduced in J. JACKSON, LEGAL PROBLEMS, *supra* note 2, DOCUMENTS SUPPLEMENT 1-72 (1976).

On the GATT generally, see J. JACKSON, WORLD TRADE AND THE LAW OF THE GATT (1969) [hereinafter cited as J. JACKSON, WORLD TRADE]; K. DAM, *supra* note 3.

In the interest of accuracy, it should be pointed out that the GATT is not applied definitively as such, but is instead applied through a Protocol of Provisional Application. See J. JACKSON, LEGAL PROBLEMS, *supra* note 2, at 398, 401-05, and J. JACKSON, WORLD TRADE, at 60-66.

For a list of 88 of the contracting parties to the GATT, as well as the one country which has acceded provisionally and three of the six countries which apply the GATT de facto pending final decision as to their future commercial policy, see E. MCGOVERN, INTERNATIONAL TRADE REGULATION 45-46 (1982). The Maldives and Belize became the 89th and 90th contracting parties in 1983. See *Maldives Latest Member of GATT*, GATT FOCUS No. 21, April-May 1983, at 4; *Belize 90th Member of GATT*, GATT FOCUS No. 25, October-November 1983, at 4.

5. The GATT has sponsored seven rounds of multilateral trade negotiations. Six earlier rounds of multilateral trade negotiations had resulted in a progressive reduction of tariff barriers. In addition, during the sixth round (known as the Kennedy Round, 1962-67) two agreements on NTBs (non-tariff barriers) were concluded — an agreement on anti-dumping duties and an agreement on the American Selling Price (ASP) method of valuing certain goods for customs purposes. The attempted implementation of these agreements into United States Law ran into considerable difficulties; see J. JACKSON, LEGAL PROBLEMS, *supra* note 2, at 145.

In addition to the Agreement on Government Procurement, the Tokyo Round of Multilateral Trade Negotiations (1973-79), resulted in the conclusion of several other Agreements and Understandings (the MTN Agreements): (i) agreements on tariff reductions, subsidies and countervailing duties, anti-dumping, standards, customs valuation, import licensing, trade in civil aircraft, dairy products, bovine meat; (ii) a number of Understandings resulting from the work of the "Group Framework" relating to developing countries, balance of payments measures, safeguard actions for development purposes—notification, consultation and settlement of disputes.

of the difficulty of amending the GATT itself,⁶ the MTN non-tariff barrier agreements are technically "side agreements" to the GATT and may be viewed as creating separate "sub-systems."⁷

The European Community, on the other hand, is a regional organization, created by three treaties, the most important of which is the Treaty of Rome of 1957 creating the European Economic Community (EEC).⁸ The European Community currently includes ten West European countries as its Member States.⁹

A. *Contrasts Between the GATT-MTN System and the European Community*

Although the European Community was created by a number of international treaties, its unique and particularly intensive form of international cooperation and integration represents a radical departure from more con-

See "Agreements Reached in the Tokyo Round of the Multilateral Trade Negotiations," U.S.T. reprinted in H.R. Doc. No. 153, 96 Cong., 1st Sess., pt. 1 (1979). The text of the Agreement on Government Procurement, GATT Doc. No. MTN/NTM/W/211, [hereinafter cited as the Agreement] is reproduced in 18 INT'L LEGAL MATERIALS 1052 (1979).

For a survey of these MTN Agreements, see Jackson, Louis & Matsushita, *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 MICH. L. REV. 267, 271-77 (1982). For a status report on the number of countries accepting the various Codes as of October 1983, see the report in *Nonmarket Economy, Developing Countries Among Those Signing GATT Trade Codes*, 20 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 101, 112-14 (October 18, 1983).

6. Indeed it is generally considered almost impossible to amend the GATT nowadays (except for technical amendments resulting from tariff concessions). See J. JACKSON, *LEGAL PROBLEMS*, *supra* note 2, at 402; Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 LAW & POL'Y IN INT'L BUS. 21, 32 (1980).

7. The exact relationship of these MTN "side agreements" to the GATT is unclear. See Jackson, Louis & Matsushita, *supra* note 5, at 272. It should be noted, however, that the Agreement on Government Procurement, unlike some of the other NTB agreements, does not purport to be an "agreed interpretation" of various articles of the GATT.

8. Thus the European Community in fact consists of three Communities, established by three separate Treaties: (1) the European Coal and Steel Community, established by the Treaty of Paris of April 18, 1951, 261 U.N.T.S. 140; (2) the European Economic Community, established by the Treaty of Rome of March 25, 1957, 298 U.N.T.S. 3; (3) the European Atomic Energy Community, established by another Treaty of Rome, also of March 25, 1957, 298 U.N.T.S. 259. The text of these treaties is reproduced in E. STEIN, P. HAY & M. WAELBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* (1976), DOCUMENTS SUPPLEMENT 1-39, 40-86, 206-43 respectively (1976). Where detailed consideration of the Community is called for, the discussion will be confined to describing the EEC.

9. The six original Member States of the European Community were Belgium, Luxembourg, the Netherlands (the three Benelux countries), France, Italy, and West Germany. Denmark, Ireland and the United Kingdom acceded to the Community on January 1, 1973 and Greece acceded on January 1, 1981. Spain and Portugal are currently negotiating to join.

ventional forms of international regime, such as the GATT and the MTN Agreements. For present purposes, it is sufficient to note two vital differences that distinguish the European Community from the GATT-MTN system of international economic regulation. These differences concern objectives and scope, and institutional structure.

1. *Objectives and Scope of Matters Covered*

The GATT-MTN system pursues the limited objective of removing barriers to trade in goods,¹⁰ albeit within a wide grouping of countries. The EEC Treaty, on the other hand, pursues much more ambitious goals, em-

10. In addition to obligations resulting from the tariff commitments made by the contracting parties (embodied in Article II and incorporated schedules), the GATT, *supra* note 4, also contains an MFN obligation (Article I) and a number of rules of conduct regulating non-tariff barriers to trade (Part II of the GATT, Articles III-XXI).

For an outline of the GATT, see J. JACKSON, *LEGAL PROBLEMS*, *supra* note 2, at 399-401.

The limited objectives of the GATT are clear from the recitals in the Preamble, which states that the governments of the contracting parties:

[Recognizing] that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods; [Being] desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.

Compare the fifth recital of the Preamble to the Agreement on Government Procurement, which states that the Parties to the Agreement:

[Recognizing] the need to establish an agreed international framework of 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.

It should be noted, however, that consideration is now being given to a possible new round of negotiations within GATT in 1986, which would include subjects outside the traditional GATT-MTN ambit, such as trade in services and investment. See *Compromise GATT Accord Adopted, Though Differences Remain on Agricultural Trade*, 18 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 311 (November 11, 1982), and the text of the communique issued after the GATT ministerial meeting, *id.* 362 at 367; *U.S. Completes Its Study of Services Trade, Hoping for Another GATT Round*, 20 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 493 (January 3, 1984); *Informal Meeting on Proposals to GATT Produces Varying Degrees of Enthusiasm*, 20 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 755 (March 13, 1984); *OECD Ministerial Meeting Focuses on Trade Problems, Support For New Round of MTN*, 20 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 968 (MAY 22, 1984); *Economic Summit Produces 10-Point Program But No Agreement on New MTN Round at GATT*, 20 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 1046 (June 12, 1984); *Britain Joins U.S., Canada in Calling For Inclusion of Services in GATT MTN*, 1 INT'L TRADE REP. CURRENT REPORTS (BNA) 20 (July 4, 1984).

bracing an extremely wide range of economic activities,¹¹ with a view to creating a common market, and eventually a full economic and monetary union¹² between its ten Member States.

The creation of the "common market" is achieved essentially by laying down two main kinds of rules. The first are those rules abolishing the restrictions imposed by the Member States, not only on the free movement of goods but also the factors of production (labor, capital and enterprise). Other policies and rules are designed to supplement these "four freedoms," such as rules on competition, approximation of laws, common commercial policy, and special legal regimes for transport and agriculture.¹³

11. Article 3 of the EEC Treaty enumerates the various activities of the EEC: For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein

(a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;

(b) the establishment of a common customs tariff and of a common commercial policy towards third countries;

(c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;

(d) the adoption of a common policy in the sphere of agriculture;

(e) the adoption of a common policy in the sphere of transport;

(f) the institution of a system ensuring that competition in the common market is not distorted;

(g) the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied;

(h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market;

(i) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living;

(j) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources;

(k) the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development.

12. See Article 2 of the EEC Treaty, which states that:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

13. F.R. Root describes the place of the EEC on what may be termed a "continuum of economic integration," in the following terms:

A free trade area is established when a group of countries abolishes restrictions on mutual trade but each member country retains its own tariff and quota system on trade with third countries. An industrial free trade area covers only trade in industrial products while a full free trade area includes all products. As an industrial free trade area, the European Free Trade Association (EFTA) represents only a modest form of economic

2. Institutional Structure and System of Legal Regulation

The institutional structure of the GATT-MTN system is deficient in its

integration.

A customs union is created when a group of countries removes all restrictions on mutual trade and also sets up a common system of tariffs and quotas with respect to third countries.

A customs union becomes a common market with the removal of all restrictions on the movement of productive factors—labor, capital, and enterprise. The EEC is now in this state of evolution and is proceeding toward an economic union.

The completion of the final stage of economic union involves a full integration of the member economies with supranational authorities responsible for economic policy making. In particular, an economic union requires a single monetary system and central bank, a unified fiscal system, and a common foreign economic policy. The task of creating an economic union differs significantly from the steps necessary to establish the less ambitious forms of economic integration. A free trade area, a customs union, or a common market mainly result from the abolition of restrictions, whereas an economic union demands a positive agreement to transfer economic sovereignty to new supranational institutions.

See F.R. ROOT, *INTERNATIONAL TRADE AND INVESTMENT—THEORY, POLICY, ENTERPRISE* 378-79 (1973), extracted in E. STEIN, P. HAY & M. WAELBROECK, *supra* note 8, at 364-65.

The EEC is a "customs union" within the meaning of Article XXIV(8)(a) of the GATT, which in effect exempts the members of a customs union from their MFN obligations towards non-member contracting parties to the GATT.

Article XXIV(8)(a) provides that:

A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that:

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.

The following potential economic effects of a customs union have been noted:

(i) viewed from the perspective of the world trading system, a customs union may have both positive trade creating and negative trade diverting effects. Trade creation results because, within the union, resources are shifted from a high cost production point to a lower cost production point. On the other hand, trade diversion results when the union causes a shift of resources from more efficient producers outside the union to less efficient producers within the union.

(ii) in addition, extending the market within which firms can operate may also have certain other, more controversial dynamic effects on the members' level of economic activities, e.g., because of the increased opportunity to take advantage of economies of scale, the tendency towards larger firms able to finance the research and development for product innovation, stimulation of competition, etc.

(iii) the larger economic unit has greater bargaining power in dealing with third

lack of developed institutional mechanisms for rule formulation and dispute resolution. This deficiency results in increased risks of non-compliance with its rules and difficulties of effective enforcement.¹⁴

By contrast, the EEC is characterized by the endowment of sovereign powers, both legislative and judicial, upon a number of central Community institutions.¹⁵ This highly developed institutional structure facilitates both

countries and may thus exercise greater leverage in allocating the gains from trade.

E. STEIN, P. HAY & M. WAELBROECK, *supra* note 8, at 366-68.

Article XXIV of the GATT seems to be based on the assumption that the positive trade creation effects of a customs union (or free trade area) will outweigh the negative trade diverting effects. See E. STEIN, P. HAY & M. WAELBROECK, *supra* note 8, at 368. Article XXIV(4) of the GATT states that:

The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

14. The institutional structure of the GATT is described in J. JACKSON, *LEGAL PROBLEMS*, *supra* note 2, Chapter 7, esp. 410-30.

Professor Jackson has analyzed the deficiencies and weaknesses in the institutional structure of the GATT-MTN system, in Jackson, *supra* note 6.

The particular problem of dispute settlement, compliance and enforcement is discussed further *infra* notes 144-198 and accompanying text, in the twin contexts of the Agreement on Government Procurement and the European Community.

15. See Article 4 of the EEC Treaty.

Very generally, the principal decision-making and legislative power resides with the inter-governmental Council of Ministers, (EEC Treaty, Articles 145 *et seq.*), which generally cannot act, however, without a proposal from the Commission, which possesses the "power of initiative" and is also the executive arm of the Community. The Commission is an independent body which acts in the general interest of the Community as a whole (Article 155 of the EEC Treaty, Article 10 of the Merger Treaty. The Treaty Establishing a Single Council and a Single Commission of the European Communities, April 8, 1965 (Merger Treaty) is reproduced in E. STEIN, P. HAY & M. WAELBROECK, *DOCUMENTS SUPPLEMENT*, *supra* note 8, at 245-50.)

Moreover, in many cases the Council must consult the Assembly of the European Communities ("European Parliament") (EEC Treaty Articles 137 *et seq.*) and the Economic and Social Committee (EEC Treaty Articles 193 *et seq.*), for an advisory opinion, before it takes any final decision.

Article 189 of the EEC Treaty enumerates three basic forms of binding act—regulations, directives and decisions. The text of Article 189 of the EEC Treaty reads as follows:

In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A *regulation* shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A *directive* shall be binding, as to the result to be achieved, upon each Member

effective rule formulation and dispute resolution, with resulting gains in increased compliance with the rules of the system and more effective enforcement.¹⁶ In exercising these sovereign powers, the Community institutions not only regulate the community of Member States but also govern the activities of private individuals within the Community.¹⁷ In the view of the Court of Justice, this endowment of sovereign powers is the result of a *transfer* of powers from the Member States to the Community, which entails "a *permanent limitation* of their sovereign rights."¹⁸

State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A *decision* shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

The task of the Court of Justice is to "ensure that in the interpretation and application of this Treaty the law is observed" (Article 164 of the EEC Treaty). The main heads of its jurisdiction may be classified as follows:

(a) original jurisdiction to resolve disputes arising on the Community ("international") plane, in actions by Member States or relevant Community institutions for: (1) failure by a Member State to fulfill its obligations under the Treaty (Articles 169 and 170); (2) annulment of acts of the Council and the Commission other than recommendations or opinions (Article 173); (3) unlawful failure to act by the Council or the Commission (Article 175). Under Article 219 the EEC Member States agree to the exclusive jurisdiction of the Court of Justice to resolve disputes concerning the interpretation and application of the Treaty.

(b) original jurisdiction in cases where private individuals challenge unlawful Community activity by the Community institutions, in actions for: (1) annulment (Article 173); (2) failure to act (Article 175); (3) damages (Articles 178 and 215).

(c) jurisdiction to give preliminary rulings, in particular on the interpretation of the Treaty and the validity and interpretation of acts of the Community institutions, following a reference by a national court (Article 177).

16. See further *infra* notes 164-67, 181-98 and accompanying text.

17. In Case 26/62 *Van Gend en Loos v. Netherlands Inland Revenue Comm'n*, 1963 E. Comm. Ct. J. Rep. 1, the Court described the essential features of this veritable "Community Constitution" in the following terms (at 12, *emphasis added*):

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that *this Treaty is more than an agreement which merely creates mutual obligations between the contracting states*. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of *institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens*. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

18. In other words, a new polity has resulted from a *re-ordering* of the "inward-looking" governmental powers of the "sovereign" over its traditional subjects, the private individual, in addition to a limitation of that outward-looking "sovereignty" of the state as a member of the international community of states.

This transfer of sovereign powers, with its attendant limitation upon Member State sover-

One consequence of this structural difference between the Community and the GATT-MTN system is that, in contrast to the latter, the Community possesses an autonomous and effective legal system which has become an integral part of the legal systems of the Member States.¹⁹

B. *A Tri-Level Comparison*

These observations suggest that the EEC may be compared and contrasted, not only with the GATT-MTN system but also with the federal system of the United States. On the one hand, all three systems must solve similar problems in pursuing the objective of removing barriers to trade in goods. On the other hand, the existence of a "supranational" governmental structure and legal system embracing an extremely wide range of economic activities brings the European Community system much closer to the U.S. federal system,²⁰ which presents analogous problems (and possible solu-

eignty, was noted by the Court in *Van Gend en Loos*, at 12:

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.

It was confirmed one year later in Case 6/64 *Costa v. ENEL*, 1964 E. Comm. Ct. J. Rep. 585, 593 (*emphasis added*).

By creating a Community of unlimited duration, having its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within a limited field, and have thus created a body of law which binds both their nationals and themselves.

The Court continued in a later passage (at 594): "The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights. . . ."

19. See Case 6/64 *Costa v. ENEL*, at 593, where the Court of Justice claimed:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

The present writer has undertaken a jurisprudential analysis of the legal nature of the European Community, using H.L.A. Hart's model of law and a legal system which, it is argued, illustrates, explains and supports this ambitious claim from the viewpoint of legal theory. See Jones, *The Legal Nature of the European Community: A Jurisprudential Analysis Using H.L.A. Hart's Model of Law and A Legal System*, 17 CORNELL INT'L L.J. 1 (1984).

20. As Professor Jackson has observed, however, the solutions which the Community has found to the various problems involved in attempting to create a common market and eventual economic and monetary union may shed light on possible solutions to analogous problems which arise in a wider international context, whether as part of the GATT-MTN system of regulation or in the context of other initiatives at the international level. See J. JACKSON, *LEGAL PROBLEMS*, *supra* note 2, at 280.

tions) both with regard to substantive regulation in a "common market" as well as the distribution of powers between central and subordinate units of government.²¹

II. THE PROBLEM DESCRIBED: NATIONAL LAWS, REGULATIONS, ADMINISTRATIVE RULES AND PRACTICES IN THE FIELD OF GOVERNMENT PROCUREMENT

There exists a great variety of national laws, regulations, administrative rules and practices which discriminate against or disadvantage foreign suppliers who may wish to compete for government supply contracts. Any attempt to liberalize international trade and increase competition in this

21. For an interesting and illuminating comparison of the formal structure of the European Community system with that of the U.S. federal system, see Bridge, *American Analogues in the Law of the European Community*, 11 *ANGLO-AMERICAN L. REV.* 130 (1982).

Two very important studies have recently been published, comparing the European Community with the United States federal system:

Jackson, Louis & Matsushita, *supra* note 5, where the authors undertake a comparative study which examines the relationship of the constitutional systems of the EEC, the United States and Japan, to the processes of negotiating, concluding and implementing international agreements, in particular the Tokyo Round of Multilateral Trade Agreements.

COURTS AND FREE MARKETS (T. Sandalow & E. Stein, eds. 1982). This work consists of a series of papers, undertaking a comparative study of the contribution made by the Supreme Court and the Court of Justice in maintaining a continental wide "common market" in the United States and in the European Community.

In their introductory essay, the two editors observe that there are a number of crucial similarities between the two systems:

- (1) a similarity of problems resulting from the division of governmental power between central and local ("state") authorities;
- (2) a similarity of objectives, which the authors describe in the following terms (at p. 3):

. . . [B]oth the Constitution and the EEC Treaty superimposed central institutional frameworks upon existing state structures with the objective of forming "a more perfect union." To be sure, the Constitution was intended to establish a nation, while the immediate purpose of the Treaty was limited to economic objectives, including a customs union and a "common market." But it is also true that, in the United States, a central reason for establishing the nation was to promote a "common market"; and among the animating impulses for creating the European common market was the vision of an economic and political union as the culmination of the integration movement;
- (3) a similarity of means, in that each system has relied heavily upon courts to achieve their objectives.

However, as the editors caution at 4-9, it is important not to lose sight of certain essential differences between the two systems. The two systems differ not only in terms of their historical origin as well as the differing social and cultural conditions, but also in the quantum of powers conferred on their central institutions. These differences are reflected, moreover, in differing designs of the central institutions.

area must therefore address not only the more visible forms of discrimination, but also the many less visible ways in which foreign suppliers may be discriminated against or disadvantaged in the operation of the government procurement procedures themselves.

A. *Visible, Open Discrimination Controlling the Procurement Decision*

Discrimination against foreign suppliers may take a very visible form. National government purchasing laws or regulations may openly control the procurement decision itself and mandate discrimination by, for example, imposing a total or partial prohibition on the purchase of imported products, or by requiring that products from domestic suppliers be granted a preference.²²

B. *Less Visible Forms of Discrimination or Disadvantage Resulting From the Operation of the Government Procurement Procedures*

Foreign suppliers may also be discriminated against or disadvantaged in many less visible ways, at any of the various different stages in the procurement process.²³

22. Such open, statutory discrimination is the approach adopted in the United States' "Buy American Act," 41 U.S.C. §10a-10d (1933). See also *infra* note 58.

23. The various practices engaged in are discussed generally in K. DAM, *supra* note 3, at 202-05; Horsch, *Eliminating Non-tariff Barriers to International Trade: The MTN Agreement on Government Procurement*, N.Y.U. J. INT'L L. & POL., 315, 325-33 (1979); Peterson, *The Trade Agreements Act of 1979: The Agreement on Government Procurement*, 14 J. INT'L L. & ECON., 321, 323-24, 344-45 (1980); Kono, *United States-Japan Trade Developments Under the MTN Agreement on Government Procurement*, 5 FORDHAM INT'L LAW J., 139, 150-151, 155-80 (1981). With regard to Japan, for example, Kono concludes that:

Japan's government procurement practices and procedures have resulted in the unintentional, systemic exclusion of foreign competition. Logistical obstruction to foreign entry can be found in the decentralized procurement system, nominal publicity requirements, the short period in which to respond to government procurement proposals, and the lack of open bidding. This system perpetuates an inherent bias in favor of domestic suppliers. To some degree, Japan's exclusion of foreign suppliers has also been a matter of choice. Either under "administrative guidance" or because of personal, nationalistic, nepotistic or complacent tendencies, procurement officials have exercised their discretion to prevent foreign access in government procurement.

Kono, *id.* at 159-60.

As far as the Member States of the European Community are concerned, it should be remembered that some of the measures taken to remove barriers to intra-Community trade in the area of government purchasing, may also incidentally benefit suppliers from third countries in any event, e.g., obligation to publicize government purchasing opportunities. These measures are discussed *infra* notes 92-109 and accompanying text. Compare Bourgeois *supra* note 3, at 16, where the author discusses the effect on non-signatories of compliance with the rules of the

1. *Invitation to Participate*

Certain practices may effectively ensure that a foreign supplier is never invited to participate in the tendering procedures in the first place. Such practices depend upon the type of tendering procedures used.

Open (or public) tendering, under which all interested suppliers are invited to submit a bid, is the least restrictive type of tendering procedure. However, it also appears to be the least frequently utilized procedure.²⁴ Even where it is used, the notice of tender (which constitutes an invitation to bid) may be inadequately publicized by being placed, for example, in a publication of such limited circulation that it is unlikely to reach foreign suppliers.²⁵

If a *selective tendering procedure* is followed, the purchasing authority only invites certain suppliers to submit a bid. Selective tendering may take one of two forms. The more usual form of selective tendering involves the use of pre-established lists of qualified suppliers. This method may discriminate against foreign suppliers in that suppliers who are not on the pre-established lists will not be invited to bid, and not every supplier who is on the list will necessarily be invited to bid for a particular purchase. Moreover, the criteria for admission to the list may be vague or even clearly discriminatory.²⁶ In addition, listing and delisting may lie in the ultimate discretion of the purchasing authority. In Japan, for example, "families" of firms with long-established ties with government agencies have traditionally often been the only firms on the lists, thus excluding not only foreign suppliers but also other Japanese suppliers. One example is the "Den Den Family," a group of Japanese manufacturers who traditionally received the bulk of contracts for NTT (Nippon Telephone and Telegraph Public Corporation).²⁷

In the second form of selective tendering, suppliers submit an application to be invited to bid for the particular purchase in question. In this case, the purchasing authority's decision to invite certain suppliers to bid may be made in a discriminatory fashion.

In both forms of selective tender, a notice of the proposed purchase may or may not be published. Once again, however, even if it is published,

MTN Agreement on Government Procurement.

24. See, e.g., K. DAM, *supra* note 3, at 203. Apart from their discriminatory effect, there are other reasons why a purchasing authority may prefer to utilize a selective or single tendering procedure, e.g., public tendering can be more costly and administratively cumbersome. See, e.g., Horsch, *supra* note 23, at 335.

25. See, e.g., K. DAM, *supra* note 3, at 203; Horsch, *supra* note 23, at 327.

26. The general problem of qualifying as an eligible supplier is discussed further *infra* note 28 and accompanying text.

27. See Kono, *supra* note 23, at 158.

the publication in which it is placed may be of such limited circulation that it is unlikely to reach foreign suppliers.

The *single tendering procedure* is an extreme version of selective tendering. Under this procedure the purchasing authority contacts only one supplier, with whom the authority then negotiates the terms of the proposed purchase.

2. *Obstacles Preventing Foreign Suppliers From Submitting a Responsive Bid*

Even if a foreign supplier is invited to participate in the tendering procedures, he may nevertheless encounter a number of obstacles in practice, which effectively prevent him from submitting a responsive bid.

Information. The notice of the proposed purchase may contain inadequate information on such essential matters as the products to be purchased, time limits, addresses, or specifications and requirements that must be satisfied by the product. Domestic suppliers with a close working relationship with the purchasing authority may have easy access to the necessary information, which the foreign supplier may experience difficulty in obtaining.

Time limits. The time period between the notice of tender and the deadline for submission of a bid may be too short to enable the foreign supplier to respond in time. Moreover, domestic suppliers, who are nearer to the scene and more often have a closer working relationship with the purchasing authority, are more likely to have advance knowledge of any forthcoming tender announcements.

Qualification as an eligible supplier. Conditions which a supplier must satisfy in order to qualify as an eligible supplier²⁸ may discriminate against or disadvantage foreign suppliers, either by imposing more stringent requirements for foreign suppliers or by being more difficult for foreign suppliers to meet in practice. Examples would include requirements concerning residence, registration, local representation, financial guarantees or evidence of ability to perform the contract. Moreover, the procedures for qualifying suppliers may be used in a discriminatory manner, such as dilatory processing in the case of foreign suppliers.

Technical specifications. Technical requirements that must be satisfied by the product may be framed in such a manner that they can only (or can more easily) be satisfied by a domestic product. Indeed, as was pointed out

28. Difficulties in qualifying as an eligible supplier may be encountered in public tendering procedures, as well as selective tendering procedures (e.g., in qualifying for inclusion on a pre-established list).

in a report by the U.S. Tariff Commission (now International Trade Commission), "purchasing authorities may specify technical requirements in advance collaboration with domestic suppliers, thereby limiting from the outset the possible competitiveness of the foreign bidder."²⁹

3. *Submission, Receipt and Opening of Tenders; Evaluation of Tenders and Award of Contracts*

A foreign supplier who is able to submit a responsive bid may nevertheless still encounter various other difficulties. The conditions under which bids may be submitted and received may operate in favor of domestic suppliers. Domestic suppliers, for example, may be permitted greater latitude in altering the terms of their bids, or receipt of a foreign supplier's bid at the correct destination may be delayed. Moreover, the purchasing authority may be permitted to open bids in secret, which presents a further opportunity for discrimination against foreign suppliers. Finally, the criteria for evaluating bids once they are submitted and received, and awarding contracts may be sufficiently vague to permit substantial discrimination in favor of domestic suppliers.³⁰

4. *Information and Review*

A dissatisfied foreign supplier may encounter difficulties in obtaining redress for any grievance he may have, because the purchasing authority may refuse to furnish relevant information or reasons for its decision, and because procedures for reviewing a purchasing authority's decision may be inadequate or even nonexistent.³¹

29. Horsch, *supra* note 23, at 327 n.73 (quoting TARIFF COMMISSION, TARIFFS, NON-TARIFF TRADE BARRIERS AND TRADE AGREEMENTS, U.S. AND WORLD 67 (1974)).

30. According to Dam, "The most effective method for discriminating against foreign suppliers is the vesting of discretion in procurement officials to select among bidders on the basis of criteria other than price." See K. DAM, *supra* note 3, at 204.

31. As is clear from the preceding discussion, foreign suppliers may be discriminated against or disadvantaged in a great variety of ways. Although the discussion has been primarily chronological, i.e., an examination of the various obstacles that may be encountered at the different stages in the procurement process, it is also possible to analyze these laws, regulations, etc., according to the different type of discrimination or disadvantage which they occasion.

It may be helpful at the outset to make a basic distinction between what may be termed "formal differentiation" and "material differentiation." In the former case, the measure in question makes a formal distinction between the domestic and foreign suppliers or products. In the latter case, on the other hand, the measures made no such formal distinction but the law, regulation, practice, etc. bears more heavily on, and thereby disadvantages, foreign suppliers or products. The terms "formal differentiation" and "material differentiation" are used by Wyatt

III. GATT-MTN REGULATION OF NATIONAL GOVERNMENT PROCUREMENT ACTIVITY

The rules of the GATT that are relevant to government procurement do not seek to control discriminatory practices in government procurement. Article III of the GATT contains the basic obligation of national treatment, i.e., an obligation of non-discrimination as between domestically produced products and products of other contracting parties with respect to matters of internal taxation and internal national regulation.³² Article III(8)(a), however, expressly exempts government purchases from the national treatment obligation of Article III, at least in the case of "products purchased

and Dashwood in D. WYATT & A. DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC* Ch. 10 (1980), *see especially* 99-102. Formal differentiation will normally involve purposeful discrimination, while material differentiation may or may not be the result of purposeful discrimination.

Visible, open discrimination in the procurement decision itself mandated by government purchasing laws or regulations is clearly a type of formal, purposeful differentiation. The operation of the government purchasing procedures themselves, however, may result in either formal or material differentiation and, in either case, may involve the application of general laws, regulations, administrative rules or practices, or simply particular decisions taken in individual cases (in the exercise of a permitted discretion, for example).

Among the reasons frequently given for purposeful discrimination are the following: (1) various economic concerns, e.g., improvement in the balance of payments, protection of domestic industry; (2) political pressures, e.g., from special interest groups in the business and labor sectors; (3) national security concerns, i.e., the desire to protect and develop industries that may be needed in time of war; (4) various practical factors, e.g., lack of uniformity in specifications; language barriers; familiarity and ease of dealing with local suppliers; availability of service, maintenance and repair parts; availability of legal recourse in case of default.

For further discussion of the motives underlying discriminatory procurement practices, *see* K. DAM, *supra* note 3, at 200-02; Peterson, *supra* note 23, at 323-25.

32. Of particular relevance in the present context are paragraphs (1) and (4) of Article III.

Article III(1) states generally that:

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

More particularly, with regard to internal national regulations, Article III(4) provides that:

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. . . .

For a general discussion of the national treatment obligation, *see* J. JACKSON, *LEGAL PROBLEMS*, *supra* note 2, at Ch. 10; J. JACKSON, *WORLD TRADE*, *supra* note 4, at Ch. 12.

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.”³³ Such government purchases probably also fall outside the scope of the MFN obligation in Article I,³⁴ by virtue of the particular wording of the two Articles.³⁵

Moreover, Article XVII(2) of the GATT also contains an exception for government procurement by state enterprises from any obligation which may be imposed on such state enterprises under Article XVII(1).³⁶ This la-

33. The full text of Article III(8)(a) reads as follows:

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 the production of goods for commercial sale.

For an example of a U.S. case where the exception was held not to apply, see *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 208 Cal. App. 2d 803, 25 Cal. Rptr. 798 (1962), extracted in J. JACKSON, *LEGAL PROBLEMS*, *supra* note 2, at 612. In that case the court held that the California Buy American statute was unenforceable in the case of a proposed city purchase of certain tubes and other equipment. Application of the statute to the proposed purchase would conflict with the GATT and did not fall within the government procurement exception since the equipment was for use in the generation of electric power for resale and thus “for use in the production of goods for sale.”

In addition, Article III(8)(b) provides that:

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.

34. The full text of Article I(1) reads as follows:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

35. The argument is that government procurement falling within Article III(8)(a) is not one of the “matters referred to in paragraphs 2 and 4 of Article III,” since Article III(8)(a) expressly states that Article III does “not apply” to such procurement. See J. JACKSON, *LEGAL PROBLEMS*, *supra* note 2, at 606.

Article III(2) does not deal with internal regulations but with internal taxes and charges.

36. Article XVII(1)(a) provides that:

Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of nondiscriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

cuna in the GATT has to some extent been remedied by the MTN Agreement on Government Procurement,³⁷ which was concluded as part of the Tokyo Round of Multilateral Trade Negotiations,³⁸ and which entered into force on January 1, 1981.³⁹ In evaluating the extent to which the Agreement seeks to regulate the various national laws, regulations, administrative rules and practices in the area of government procurement, it is first necessary to examine its limited application, scope and coverage, before considering the substantive provisions which are directed at the removal of discrimination or disadvantage for foreign suppliers.

A. *Application of the Agreement*

By its own terms, the Agreement as such is intended only to apply as between its Parties.⁴⁰ A non-signatory GATT contracting party could ar-

It seems that the "nondiscriminatory treatment" referred to means MFN treatment and not national treatment. "Thus, the enterprise is entitled to discriminate between domestic and foreign products in its purchases or its sales, as long as it does so on a 'MFN' basis," J. JACKSON, *LEGAL PROBLEMS*, *supra* note 2, at 1054.

If government procurement by a state enterprise falls within Article XVII (2), the obligation is even weaker, namely "to accord to the trade of the other contracting parties fair and equitable treatment." The full text of Article XVII(2) reads as follows:

The provisions of paragraph 1 of this Article shall not apply to imports or 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.

37. For a general description of the MTN Agreement on Government Procurement, see Bourgeois, *supra* note 3, at 11-19; Horsch, *supra* note 23, at 333-42; Kono, *supra* note 23, at 160-66; Peterson, *supra* note 23, at 329-46; Pomeranz, *Toward a New International Order in Government Procurement*, 11 *LAW & POL'Y IN INT'L BUS.*, 1263, 1279-93 (1979); Anthony and Hogerty, *Cautious Optimism as a Guide to Foreign Government Procurement*, 11 *LAW & POL'Y IN INT'L BUS.*, 1301, 1310-34; and Fiaschetti, *Technical Analysis of the Government Procurement Code*, 11 *LAW & POL'Y IN INT'L BUS.*, at 1345-58.

38. The Tokyo Round of negotiations on government procurement continued the work which had begun within the Organisation for Economic Cooperation and Development (O.E.C.D.) in the early 1960s. The Tokyo Round initiative was preceded, moreover, by two attempts to open government procurement markets at the regional level, namely within the European Community and within the European Free Trade Area (E.F.T.A.). See K. DAM, *supra* note 3, at 206-09 and Pomeranz, *supra* note 37, at 1270-79. The measures taken by the European Community are discussed *infra* notes 92-109 and accompanying text.

39. Article IX(3) of the Agreement.

40. As of October, 1983, the Agreement had been accepted by the following: Austria; Canada; European Economic Community; Finland; Hong Kong; Israel; Japan; Norway; Singapore; Sweden; Switzerland; and United States. A number of other countries have apparently expressed interest in acceding to the Code. See *Focus on Agreement in Government Procurement*, GATT FOCUS No. 23, July-August 1983, at 2; *Non-Market Economy, Developing*

guably claim the benefits of the Agreement, however, by virtue of the MFN obligation in Article I of the GATT.⁴¹ Any such claim may be met by two arguments. First, since government procurement probably falls outside the scope of the MFN obligation in Article I altogether, GATT contracting parties are free to discriminate and grant more favorable treatment to the products of certain countries, either by unilateral decision or by virtue of an international agreement.⁴²

Second, even if government procurement is covered by the MFN obligation in Article I, it can be argued that Parties to the Agreement would only be obligated to extend benefits of the same nature as those granted directly to other signatories under the Agreement. Since these benefits are themselves expressly subject to reciprocity, any claim under Article I may also be subject to a similar condition of reciprocity.⁴³

B. *Scope and Coverage of the Agreement*

The impact of the Agreement is restricted not only because non-Parties are excluded from receiving its benefits,⁴⁴ but also by various limitations on its scope and coverage. As a result, a significant amount of government purchasing activity may be unaffected by obligations under the Agreement,

Countries Among Those Signing GATT Trade Codes, 20 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 101, 112-14 (October 18, 1984).

41. See *supra* note 34. It is also possible, of course, that a Party to the Agreement may be bound by an MFN obligation contained in some other international agreement, e.g., a bilateral commercial treaty or a Friendship, Commerce and Navigation (FCN) Treaty. See further on bilateral treaties J. JACKSON, LEGAL PROBLEMS, *supra* note 2, at 363-66.

42. Such as the Agreement on Government Procurement.

43. For further discussion of this issue see Bourgeois, *supra* note 3, at 15, 16; Hufbauer, Erb & Starr, *The GATT Codes and the Unconditional Most-Favored-Nation Principle*, 12 LAW & POL'Y IN INT'L BUS., 59, esp. 88-91 (1980); Rubin, *Most Favored Nation Treatment and the Multilateral Trade Negotiations: A Quiet Revolution*, 6 INT'L TRADE L. J. 221; Jackson, *Equality and Discrimination in International Economic Law (XI): The General Agreement on Tariffs and Trade*, in Y.B. OF WORLD AFFAIRS 1983, 224, 234 and 238-39.

Even if a non-signatory is not entitled to receive the benefits of the Agreement by virtue of an MFN obligation, compliance with certain of the obligations under the Agreement will inevitably be of incidental benefit to all foreign suppliers, e.g., certain publicity requirements. See further Bourgeois, *supra* note 3, at 16.

The issue of whether a Party to the Agreement is obligated by an MFN obligation to extend its benefits to a non-signatory should be distinguished from the MFN obligation which that Party owes under the Agreement itself to other Parties. Thus, under Article II(1)(b) of the Agreement, Parties are to accord to the products and suppliers of each other "treatment no less favourable than . . . that accorded to products and suppliers of any other Party." Article III of the Agreement provides an exception to this MFN principle, however, in its provisions for "special and differential treatment for developing countries."

44. Subject to any possible MFN claim.

and thus significant barriers to trade may remain, even as between Parties to the Agreement. The exclusions and exceptions which limit the scope and coverage of the Agreement may be classified as follows:

1. *Exclusions Relating to Subject Matter and Value of Contracts*

The Agreement covers only the procurement of products. Service contracts *per se* are expressly excluded, although services incidental to the supply of products may be covered if their value does not exceed the value of the products themselves.⁴⁵ Moreover, to be covered by the Agreement, the procurement contract must have a value at or above the threshold of SDR 150,000.⁴⁶

45. Article I(1)(a) provides that the Agreement, *supra* note 5, applies to: any law, regulation, procedure and practice regarding the procurement of products by the entities subject to this Agreement. This 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*.

Expansion of the coverage of the Agreement to include service contracts is currently being studied within the framework of the negotiations initiated in November 1983. See *infra* note 91 and accompanying text.

46. According to Article I(1)(b) the Agreement, *supra* note 5, applies to: any procurement contract of a value of SDR 150,000 or more. 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.

SDRs are the International Monetary Fund's international reserve unit of account based on a basket of currencies of 16 different countries. See "The Trade Agreements Act of 1979: Statement of Administrative Action," H.R. Doc. No. 153, Part II, 96th Cong., 1st Sess. 465 (1979). SDR 150,000 were equivalent to approximately \$190,000 at the time the Agreement was concluded. S. REP. NO. 249, 96th Cong., 1st Sess. 130, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 516.

Note 2 to Article I provides, however, that:

For contracts below the threshold, the Parties shall consider . . . 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 non-discrimination and transparency for such contracts in connexion with the possible inclusion of contracts below the threshold in this Agreement.

This provision of the MTN Agreement specifying the threshold value for coverage of a procurement contract has led to the first formal reference to the Committee on Government Procurement and subsequent establishment of a panel under the dispute settlement and enforcement procedures of the Agreement. In February 1983, the United States requested that a panel be established to examine the practice by which Member States of the European Community exclude value added tax (VAT) from the contract price in determining the threshold value. The panel found in favor of the United States, which had argued that the value of the contract should include indirect taxes such as VAT. The Committee on Government Procure-

2. Exclusions Relating to Purchasing Authorities

Procurement by certain authorities is not covered at all, whatever the value of the contracts concerned. Since the Agreement applies only to "entities under the direct or substantial control of Parties and other designated entities,"⁴⁷ purchases by regional or local governments are completely excluded. Furthermore, purchasing by a central government entity is only covered if that entity is listed in Annex I of the Agreement,⁴⁸ and, even in the case of a listed entity, purchases of certain products may be expressly

ment adopted the Panel Report on May 16, 1984, but apparently declined to issue any recommendation. See *Government Procurement, Adoption of Report on VAT*, GATT FOCUS No. 29, May-June 1984, at 3; see also *EC Delays Accepting GATT Panel VAT Report, Manufacturing Clause Trade-off Suggested*, 20 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 728-29 (March 6, 1984); *U.S. Effort to Expand GATT Procurement Code Making Progress, But EC VAT Issue Unresolved*, 20 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 878-79 (April 14, 1984); *GATT Agrees to Accept Report on EC VAT Use in Procurement Despite Protest by British*, 20 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 924 (May 29, 1984). The dispute settlement and enforcement procedures under the Agreement are discussed *infra*, in Part V. A.

47. Article I(1)(c) of the Agreement, *supra* note 5.

48. Article I(1)(c) of the Agreement, *supra* note 5, provides that it applies to: procurement by the entities under the direct or substantial control of Parties 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 lists of entities, and to the extent that rectifications, modifications or amendments may have been made, their successor entities, in Annex I.

Under Article IX(10), the annexes to the Agreement "constitute an integral part thereof." The original United States' negotiating objective was for all entities "under the direct or substantial control of Parties" to be included under the Agreement. However, some of the other negotiating partners refused to include in their offers entities in certain important product sectors, such as telecommunications, power generating and transportation. This resulted in the limited coverage of only those entities listed in Annex I.

By the end of the Tokyo Round the U.S. and Japan had reached reciprocal entity arrangements with all their negotiating partners except each other. The U.S. negotiators insisted that Japan include NTT (Nippon Telephone and Telegraph Public Corporation) in its offer, since it was felt that access to the telecommunications field, in which U.S. suppliers could be competitive, was necessary to achieve the necessary balance. These negotiations culminated in the so-called NTT Agreement of December 19, 1980 [Agreement on Procurement in Telecommunications, December 19, 1980, United States-Japan, T.I.A.S. No. 9961]. For a description of the NTT Agreement and its impact, see Kono, *supra* note 23, at 169-182. On January 30, 1984, this Agreement was renewed until December 31, 1986, with certain modifications. See *NTT Pact Extended For Three Years, ABE Holds Trade Talks With U.S. Officials*, 20 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 580 (January 31, 1984); *U.S. Procurement Opportunities in Japan: Renewal of the NTT Agreement*, INT'L PROCUREMENT COMMITTEE REPORT (INTERNATIONAL PROCUREMENT COMMITTEE OF THE ABA SECTION OF PUBLIC CONTRACT LAW) Vol. 1, No. 3, February 1984, at 1.

excluded.⁴⁹

3. *Exclusion of Purchases for Certain Specific Purposes*

Purchases by covered entities for certain specific purposes may be excluded, either generally under the Agreement itself⁵⁰ or in the case of individual signatories, as noted in the relevant entity list. The United States in its list, for example, has expressly excluded "set asides on behalf of small and minority businesses."⁵¹

4. *General Exceptions to the Agreement*

Article VIII of the Agreement contains two general exceptions to the scope and coverage of the Agreement.⁵² Under Article VIII(1) of the Agreement, a Party may take actions "which it considers necessary for the protection of its essential security interests," with regard to certain types of procurement.⁵³ In addition, Article VIII(2) contains certain "police power" or "public policy" exceptions.⁵⁴

49. Such as, for example, certain purchases by the Department of Defense in the U.S. entity list.

It should be noted that the Agreement does obligate the Parties to inform the authorities which are not covered of certain matters. Thus Article I(2) provides that:

The 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 rules on national treatment and non-discrimination, and draw their attention to the overall benefits of liberalization of government procurement.

50. Thus a General Note to the Agreement provides that:

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.

51. Annex I to the Agreement, *supra* note 5.

52. Although the wording and detailed ambit differ, these exceptions are similar in their general ambit to the exceptions to the GATT contained in Article XXI (security exceptions) and Article XX (general exceptions).

53. The full text of Article VIII(1) provides that:

Nothing in this Agreement shall be construed to prevent any Party from taking 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 defense purposes.

It remains to be seen whether this exception will be abused by expansive auto-interpretation. Compare Horsch, *supra* note 23, at 341-42; K. DAM, *supra* note 3, at 201.

54. Article VIII(2) provides that:

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

C. National Government Purchasing Laws, Regulations and Administrative Rules and Practices Under the Agreement

In describing the provisions of the Agreement dealing with the various national laws, regulations and administrative rules and practices in the area of government purchasing, we shall follow the basic scheme adopted in Part II of the article.

1. *Visible, Open Discrimination in the Procurement Decision*

Article II(1) of the Agreement imposes a general national treatment and MFN obligation⁵⁵ in the following terms:⁵⁶

With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, the Parties 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 Parties⁵⁷ treatment no less

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.

One author has remarked on the noticeable omission from this exception of certain common exclusions, e.g., balance of payments reasons, aiding growth in underdeveloped regions of a nation, assistance for small and minority owned businesses. See Peterson, *supra* note 23, at 337.

55. The concepts of national treatment and unconditional most-favored-nation (MFN) treatment under the GATT are discussed *supra* notes 32-35 and accompanying text.

56. The full text of Article II of the MTN Agreement, *supra* note 5, reads as follows: National Treatment and Non-Discrimination

1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, the Parties 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 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 connexion with importation, the method of levying such duties and charges, and other import regulations and formalities.

3. The Parties shall not apply rules of origin to products imported for purposes of government procurement covered by this Agreement from other Parties, 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.

57. Under Article II(3), in order to determine the origin of imports for purposes of the

favorable than:

- (a) that accorded to domestic products and suppliers; and
- (b) that accorded to products and suppliers of any other Party.

This language clearly prohibits Parties from adopting laws and regulations which openly mandate discrimination in the procurement decision itself (e.g., by imposing a ban or requiring that domestic suppliers be granted a preference).⁵⁸

2. *Less Visible Forms of Discrimination or Disadvantage Resulting From the Operation of Government Purchasing Procedures*

a. *Invitation to participate.* The Agreement contains a number of provisions designed to ensure that the maximum number of foreign suppliers will be invited to participate in the tendering procedures in the first place.

Single tendering. Article V(15) limits the use of single tendering, the most restrictive method of tendering,⁵⁹ to five carefully circumscribed situations, namely:

- (i) where open or selective tender has been unsuccessful;
- (ii) for works of art or patented or copyrighted material, where the products can be supplied by a particular supplier only;
- (iii) for reasons of extreme urgency;
- (iv) for additional deliveries by the original supplier in certain circumstances;

Agreement, Parties are to apply the rules of origin normally applied in trade with each other. This provision may be criticized because: (1) a Party may apply different rules of origin to trade from different Parties, thus giving rise to possible disparate treatment between imports; and (2) different Parties apply different rules of origin, thus giving rise to a possible imbalance of benefits as between Parties with rules of origin of differing strictness. *Compare* Peterson, *supra* note 23, at 339-40.

58. For a description of the U.S. Federal Buy American Act, and the measures taken to implement the Agreement into U.S. law, *see, e.g.*, the articles by Peterson, *supra* note 23; Kono, *supra* note 23; and Pomeranz, *supra* note 37.

59. Article V(1) of the Agreement, *supra* note 5, defines open, selective and single tendering procedures as follows:

Open tendering procedures, for the purposes of this Agreement, are those procedures under which all interested suppliers may submit a tender. Selective tendering procedures, for the purposes of this Agreement, are those procedures under which, consistent with paragraph 7 and other relevant provisions of this Article, those suppliers invited to do so by the entity may submit a tender. Single tendering procedures for the purposes of this Agreement, are those procedures where the entity contacts suppliers individually, only under the conditions specified in paragraph 15 below.

(v) for research and development.

Even in these situations, however, single tendering must not be 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.”⁶⁰ Moreover, an entity must prepare a written report on its use of single tendering,⁶¹ while Parties must also include, in their annual statistical report to the Committee on Government

60. Article V(1) of the Agreement, *supra* note 5, specifies that:

The Parties shall ensure that the tendering procedures of their entities are consistent with the provisions below.

However, Article V(15) of the Agreement, *supra* note 5, lays down an exception for single tendering, and provides in full that:

The provisions of paragraphs 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 patents 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 Article.

61. Under Article V(16) of the Agreement, *supra* note 5:

Entities shall prepare a report in writing on each contract awarded under the provisions of paragraph 15 of this Article. 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 Article 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 Articles VI and VII of this Agreement.

Procurement, statistics on the number and volume of contracts awarded under single tender.⁶²

Selective tendering. Under the Agreement an entity is at liberty to choose between open, public tendering and selective tendering. Use of the selective tendering procedure is subject to certain qualifications, however, which are designed to control possible discrimination against foreign suppliers.

In the case of selective tendering involving the use of pre-established lists, the Agreement specifies that, although entities may select suppliers to be invited to tender from among those listed, any selection "shall allow for equitable opportunities for suppliers on the lists."⁶³ Moreover, any qualified supplier who so requests shall be included in the lists "within a reasonably short time,"⁶⁴ and any qualified supplier included on a permanent list must be notified if the list is terminated or if its name is removed.⁶⁵ The entity must publish annually, in one of the publications in Annex III of the Agreement, information regarding the existence of the lists, the conditions to be filled by potential suppliers for inclusion on the lists, and the period of validity of the lists and the formalities for their renewal.⁶⁶

In addition, the Agreement contains obligations which appear to apply to both types of selective tender. Article V(5) provides that, under selective tendering procedures, entities shall invite tenders from the "maximum number of domestic and foreign suppliers"⁶⁷ and "shall select the suppliers to participate in the procedure in a fair and non-discriminatory manner." Article V(7) provides that suppliers who request to participate in a particular proposed purchase must be permitted to submit a tender and be

62. See Article VI(9) of the Agreement, *supra* note 5:

The Parties 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 this 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 Article V, paragraph 15.

63. Article V(6)(b) of the Agreement, *supra* note 5.

64. Article V(2)(d) of the Agreement, *supra* note 5.

65. Article V(2)(e) of the Agreement, *supra* note 5.

66. Article V(6) of the Agreement, *supra* note 5.

67. To the extent that this is consistent with efficient operation of the procurement system.

considered.⁶⁸

Publication of notice of purchase. To ensure that any invitation to participate does in fact reach foreign suppliers, Article V(3) of the Agreement requires that entities must publish, in the appropriate publication as listed in Annex II, a notice of each purchase they propose to make under open or selective tendering procedures. Such notice must contain certain essential information,⁶⁹ including whether the procedure is open or selective, and, under Article V(3) "shall constitute an invitation to participate in either open or selective tendering procedures."

b. *Obstacles preventing foreign suppliers from submitting a responsive bid.* The Agreement also contains various provisions aimed at removing the various obstacles which may in practice effectively prevent a foreign supplier from submitting a responsive bid.

Information. To ensure that foreign suppliers receive adequate information on certain essential matters, the Agreement provides that the entity must include certain essential information in the notice and it must also publish a summary of that notice in one of the official languages of the GATT.⁷⁰ Tender documentation must be provided, on request, to any supplier participating in an open procedure and to any supplier requesting to

68. ". . . [P]rovided, in the case of those not yet qualified, there is sufficient time to complete the qualification procedure under paragraphs 2-6 of this Article. The number of additional suppliers permitted to participate shall be limited only by the efficient operation of the procurement system." Article V(7) of the Agreement, *supra* note 5.

69. As specified in Article V(4), discussed *infra* note 70 and accompanying text.

70. Article V(4) of the Agreement, *supra* note 5, provides in full that:

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 tender or an application to be invited to tender; and

(iii) addresses from which documents relating to the contracts may be requested.

Article V(8) lays down conditions governing the case where it is necessary to amend or re-issue the notice.

participate in a selective procedure.⁷¹ The documentation must contain "all information necessary to permit them to submit responsive tenders," including information on certain specified matters.⁷²

Time limits. With regard to time limits, Article V(9)(a) provides generally that "[a]ny 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," and the provision specifies the factors to be taken into account in determining the time limit.⁷³ More particularly, Article V(10) prescribes a minimum time limit of 30 days for the various stages in open and selective procedures.⁷⁴

71. Article V(13)(a) and (b). Article V(13)(c) of the Agreement, *supra* note 5, provides for a prompt reply to any reasonable request for relevant information submitted by a supplier participating in the tendering procedure.

72. Article V(12) of the Agreement, *supra* note 5, provides in full that:

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.

73. Article V(9)(a) of the Agreement, *supra* note 5, provides that:

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.

74. Article V(10) of the Agreement, *supra* note 5, reads as follows:

(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 Article.

Qualification as an eligible supplier. Article V(2) addresses the problem of discriminatory practices in the qualifying of suppliers. Paragraph 2 provides generally that "Entities, in the process of qualifying suppliers, shall not discriminate among foreign suppliers or between domestic and foreign suppliers." Certain specific obligations⁷⁵ are then set forth to ensure that the conditions for participating are not discriminatory;⁷⁶ that those condi-

(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 the 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 Article.

Moreover, under Article V(9)(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.

75. Article V(2)(a)-(c) of the Agreement, *supra* note 5, reads in full as follows:

Entities, in the process of qualifying suppliers, shall not discriminate among foreign suppliers or between domestic and foreign suppliers. Qualification procedures shall be consistent with the following:

(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 and 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;

76. Article V(2)(b). This language clearly seems to prohibit conditions of participation which are more stringent for foreign suppliers (formal differentiation). It is less clear, however, whether the Agreement also prohibits conditions which make no formal distinction between

tions are published in a timely fashion;⁷⁷ and that the process of qualifying suppliers is not abused to the disadvantage of foreign suppliers.⁷⁸

Technical specifications. Article IV of the Agreement seeks to control the possible discriminatory use or effect of technical specifications laying down the characteristics of the products to be purchased.⁷⁹ Article IV(1) provides generally that such specifications "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." Where appropriate, technical specifications are to be framed "in terms of performance rather than design" and "be based on international standards, national technical regulations, or recognized national standards."⁸⁰

c. *Submission, receipt and opening of tenders; evaluation of bids and award of contracts.* Article V(14) of the Agreement lays down provisions designed to eliminate the various discriminatory practices that may still be encountered by a foreign supplier who is able to submit a responsive bid.

foreign and domestic suppliers but which have a disparate impact in that they are more difficult for foreign suppliers to meet in practice (material differentiation) (e.g., requirement that foreign suppliers maintain a postal address or bank account or adopt a certain business form in the adjudicating country).

On the one hand, such a disparate impact may in practice be "less favourable to foreign suppliers" (compare also language in Article II(1), *supra* note 56). On the other hand, Article V(2)(b) avoids the use of the apparently wider language employed in addressing technical specifications, which must not "have the effect of creating unnecessary obstacles to international trade," Article IV(1), of the Agreement, *supra* note 5.

77. Article V(2)(a), of the Agreement, *supra* note 5.

78. Article V(2)(c). Article V(2)(f), of the Agreement, *supra* note 5, does provide, however, that:

[N]othing 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.

See also Article V(6)(c) which requires an entity promptly to start the procedure of qualification, where a supplier not yet qualified requests to participate in a particular tender after publication of the notice of proposed purchase.

79. Relating to characteristics "such as quality, performance, safety and dimensions, testing and test methods, symbols, terminology, packaging, marking and labeling, and conformity certification requirements prescribed by procurement entities." Article IV(1), of the Agreement, *supra* note 5.

80. Article IV(2). Additionally Article IV(3), of the Agreement, *supra* note 5, provides that:

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.

Article V(14)(d) provides generally that the receipt and opening of tenders must be consistent with the national treatment and non-discrimination provisions of the Agreement and subject to "procedures and conditions guaranteeing the regularity of the openings as well as the availability of information from the openings." More specifically, Article V(14)(a)-(c) regulates the form in which tenders may be submitted,⁸¹ the opportunities to correct unintentional errors between the opening of tenders and the award of a contract,⁸² and the treatment of delayed tenders.⁸³ Article V(14)(d) provides for the supervision of tender openings in open tendering procedures.⁸⁴

Under the Agreement the purchasing authority may still retain substantial discretion in the evaluation of bids and the actual award of the contract. Thus, Article V(14)(f) merely provides that:

[U]nless 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*.⁸⁵

d. *Information and review.* The Agreement aims to be largely self-

81. Article V(14)(a), of the Agreement, *supra* note 5.

82. Article V(14)(b), of the Agreement, *supra* note 5.

83. Article V(14)(c), of the Agreement, *supra* note 5.

84. Article V(14)(d), of the Agreement, *supra* note 5, states as follows:

. . . 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. . .

Article V(14)(d) additionally requires the entity to draw up a written report on the opening of tenders, for use in any possible dispute.

85. *Emphasis added.* The degree of discretion retained will presumably depend to a large extent on the terms in which the specific evaluation criteria are framed. Compare Article V(12)(h), referring to the criteria for awarding the contract, which must be included in the tender documentation, "including any factors other than price." See *supra* note 72.

Article V(14)(e) states that tenders can only be considered for an award if they conform to the essential requirements of the notice or tender documentation at the time of opening and are from suppliers who comply with the conditions for participation.

Article V contains additional provisions dealing with the treatment of abnormally low tenders (Article V(14)(e)), the procedure to be followed where no one tender is obviously the most advantageous (Article V(14)(g)), and the grant of an award on conditions, such as those relating to offset procurement opportunities or licensing of technology (Article V(14)(h)).

policing, by enabling suppliers to settle disputes directly with purchasing entities. To this end, Article VI contains provisions to ensure the availability of information and the establishment of procedures for review.

In addition to the obligation on Parties to publish their general rules and procedures regarding government procurement,⁸⁶ entities must provide aggrieved suppliers with information regarding particular decisions taken during the various phases of the procurement process. Certain information must be given as a matter of course;⁸⁷ in other cases the entity is only obligated to give information upon request.⁸⁸ Furthermore, the government of an unsuccessful tenderer may intervene to obtain additional information on the contract award.⁸⁹

The Agreement requires the establishment of "procedures for the hearing and reviewing of complaints arising in connection with any phase of the procurement process. . . ." This requirement is set forth in Article VI(5).

86. Article VI(1), of the Agreement, *supra* note 5:

Any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses) regarding government procurement covered by this Agreement, shall be published promptly by the Parties 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. The Parties 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.

87. Unsuccessful tenderers must be informed that a contract has been awarded (Article VI(3)) and a supplier who applies to become a qualified supplier must be informed of any decision on the application (Article V(2)(e)).

88. E.g., (1) reasons for the rejection of a supplier's application to qualify for a supplier's list (Article VI(2)); (2) reasons for the refusal to invite a supplier or admit him to tender (Article VI(2)); and (3) reasons why a supplier's tender was not accepted, including information on the characteristics and the relative advantages of the tender selected, as well as the name of the winning tenderer (Article VI(4)). Entities must also provide a "contact point" to provide an unsuccessful tenderer with additional information, if he is dissatisfied with the reasons given for rejection of his tender or has further questions about the award (Article VI(5)).

89. Article VI(6) provides that:

The government of the unsuccessful tenderer, which is a Party to this Agreement, may seek, without prejudice to the provisions under Article 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.

E. Evaluation

As the above discussion demonstrates, the MTN Agreement attempts to control not only the more visible forms of open discrimination in the procurement decision itself, but also the many less visible ways in which foreign suppliers may be discriminated against or disadvantaged by the operation of the procurement procedures. The Agreement seeks to achieve this through the general obligation of national treatment and MFN treatment in Article II, as well as a number of more specific provisions regulating the various stages in the procurement process. These more specific provisions include provisions that impose a particular obligation of non-discrimination or other treatment, and provisions that prescribe rules of conduct. The rules of conduct require that various steps be taken during the procurement process and ensure that the procedures are "transparent," i.e., identifiable, open and regularly administered.⁹⁰

The impact of the Agreement is considerably restricted, however, by its limited application and by the various limitations on its scope and coverage. Moreover, its provisions are frequently vague and unclear. The need to expand the scope and coverage of the Agreement, and to clarify and improve its provisions, was recognized in the Agreement itself. Article IX(6)(b) requires the Parties to undertake further negotiations with a view to broadening and improving the Agreement on the basis of mutual reciprocity. Such negotiations, which under the terms of this provision are to take place no later than the end of the third year from the Agreement's entry into force, were initiated in November 1983.⁹¹

90. It is not clear whether the general obligation in Article II and/or the more particular obligations of non-discrimination reach not only "formal differentiation" but also any "material differentiation" that may remain and which has not been removed through compliance with specific rules of conduct (e.g., are certain conditions for qualifying suppliers which make no formal distinction between foreign and domestic suppliers but disadvantage the former, covered by the "no less favorable" language?). See *supra* note 76.

91. The matters currently under consideration include: expanding coverage of the Agreement to include service contracts and leasing transactions (although the U.S. apparently considers that the Agreement already applies to leasing transactions); extending the lists of governmental entities; lowering the threshold value for contracts; improving various provisions on the tendering procedures. The target date for completion of the negotiations is June 1985. See *Focus on Agreement on Government Procurement*, GATT FOCUS No. 23, July-August 1983, at 3; *Pilot Studies on Certain Services*, GATT FOCUS No. 29, May-June 1984, at 4; *U.S. Effort to Expand GATT Procurement Code Making Progress, But E.C. VAT Issue Unresolved*, 20 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 878 (April 24, 1984); *Meeting of the GATT Committee on Government Procurement*, INT'L PROCUREMENT COMMITTEE REPORT, *supra* note 48, Vol. 1, No. 3 at 7 (February 1984), Vol. 1, No. 4 at 1 (May 1984), Vol. 2, No. 1 at 6 (August 1984). The IPC Report is published quarterly and reports on the meetings of the Committee on Government Procurement, which meets periodically during the year

IV. EEC REGULATION OF NATIONAL GOVERNMENT PROCUREMENT ACTIVITY

National government procurement laws, regulations, and administrative rules and practices have created barriers to trade between the ten Member States of the European Community. The establishment of the common market therefore required the removal of these barriers.

Section A of this Part of the article discusses the legal regime that applied to government purchasing in the EEC before implementation of the MTN Agreement in the Community legal system. Section B then examines the problems which arose in connection with that implementation, both with regard to the impact of the Agreement on the pre-existing legal regime, as well as the method chosen to give effect to the Agreement in the Community legal system. In both Sections it will be necessary to distinguish between the rules applicable to trade between the Member States (intra-Community trade) and trade between the Member States and third countries.

A. *The Legal Regime Regulating Government Purchasing in the EEC Prior to Implementation of the MTN Agreement*

1. *Intra-Community Trade*

a. *Applicable provisions of Community law.* In the GATT-MTN system the rules on government procurement are contained essentially in a single instrument, the MTN Agreement on Government Procurement. In the EEC, on the other hand, a number of different provisions are relevant.

EEC Treaty Articles 30-37 and Commission Directive No. 70/32/EEC. Of central importance are Articles 30-37 of the EEC Treaty which prohibit restrictions on the free movement of goods between the Member States. Article 30 states that "[q]uantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States."⁹²

to consider matters relating to the implementation of the Agreement and its renegotiation.

92. Articles 30-37 of the EEC Treaty are found in Part Two of the Treaty (Foundations of the Community), Title I (Free Movement of Goods), Chapter 2 (Elimination of Quantitative Restrictions Between Member States).

Articles 30-33 provide for the abolition of quantitative restrictions on imports from other Member States and of all measures having equivalent effect, and envisage a timetable for the abolition of existing restrictions. Article 34 prohibits quantitative restrictions on exports to other Member States and all measures with equivalent effect. Article 36 contains a number of exceptions. Article 37 deals with state monopolies of a commercial character.

The EEC Commission was required under Article 33(7) of the EEC Treaty to issue directives establishing an appropriate procedure and timetable for the abolition of measures that had an effect equivalent to quantitative restrictions on imports in intra-Community trade and that were in existence at the time the Treaty entered into force.⁹³ To this end, on December 17, 1969, the Commission adopted a Directive "on supply of products to the State, its local authorities and legal persons under public law."⁹⁴ Article 4 of this Commission Directive provides that:

Member States shall take all necessary measures to abolish measures which have an equivalent effect to quantitative restrictions and arise from the provisions⁹⁵ referred to in Article 3 with regard to products which must be admitted to free circulation pursuant to Articles 9 and 10 of the Treaty.

It should be noted that, independently of the obligations contained in the Commission Directive, the prohibition of trade barriers contained in Article 30 has, in any event, itself applied unconditionally since the end of the transitional period.⁹⁶ The Directive may still retain importance, however,

Chapter 1 of Title I concerns the Customs Union (elimination of customs duties and charges of equivalent effect on trade between Member States, and the setting up of a common customs tariff).

93. Articles 31 and 32 of the EEC Treaty impose various standstill obligations on the Member States.

94. Commission Directive No. 70/32/EEC, 13 J.O. COMM. EUR. (No. L 13) 1 (1970). Article 1 of the Directive (quotations from the Directive are from an unofficial English translation) states that:

This Directive shall apply to the supply of products to: the State; its local authorities; other legal persons under public law. There shall also be considered as coming within this Directive supplies intended for the execution or completion of public works.

The Commission has also adopted a directive of more general scope, requiring the abolition of measures with equivalent effect to quantitative restrictions. See Commission Directive No. 70/50/EEC of 22 December 1970 "based on the provisions of Article 33(7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty," 13 J.O. COMM. EUR. (No. L 13) 29 (1970), Spec. Ed. 1970(I)17 extracted in E. STEIN, P. HAY, & M. WAELBROECK, *supra* note 8, at 392-95.

The Council has also adopted a similar directive aimed at the abolition of discrimination in the field of public works. See Council Directive 71/304/EEC of July 26, 1971, adopted on the basis of Articles 54(2) and 63(2) of the EEC Treaty. 14 J.O. COMM. EUR. (No. L 185) 1 (1971).

95. Defined under Article 2 of the Directive as "[M]easures imposed by law, regulation, or administrative rules and administrative practices relating to the supplies referred to in Article 1, in existence at the time of entry into force of the Treaty."

96. The transitional period expired as of January 1, 1970 in the case of the original Mem-

not merely as an independent (albeit somewhat redundant) source of obligation upon the Member States but also as an expression of the Commission's interpretation of the notion of measures with equivalent effect.⁹⁷

Neither Article 30 of the EEC Treaty nor the Commission Directive is restricted in scope or coverage to a list of particular purchasing entities or to contracts above a certain value. Moreover, they apply not only to products which originate in Member States but also to products imported from third countries that are in free circulation in Member States.⁹⁸

ber States. For new Member States, the prohibition has applied unconditionally since the date of accession, except as otherwise provided in the relevant Act of Accession. See Van Gerven, *The Recent Case Law of the Court of Justice Concerning Articles 30 and 36 of the EEC Treaty*, 14 COMMON MKT. L. REV. 5, 5-6 (1977). This result is envisaged in the Commission Directive 70/32/EEC, *supra* note 94, itself. Thus, the 10th recital notes that:

. . . whereas, not later than by the end of the transitional period, all measures having an equivalent effect to quantitative restrictions must be abolished by the Member States even if they are not specifically required to do so by a Commission Directive.

The same holds true of the more general Commission Directive 70/50/EEC, *supra* note 94.

97. The status of the Commission Directive for either purpose appears to be quite unclear. Compare the discussion regarding the status of the general Commission Directive No. 70/50/EEC of 22 December 1970, *supra* note 94, in Oliver, *Measures of Equivalent Effect: A Reappraisal*, 19 COMMON MKT. L. REV. 217, 221-22 n.24 (1982) and Barents, *New Developments in Measures Having Equivalent Effect*, 18 COMMON MKT. L. REV. 271, 299 (1981). Oliver enumerates the five directives which the Commission adopted under Article 33(7) and, in discussing the status of the general Commission Directive, refers to the differing views of various authors: that this general Directive is binding; and that it is not binding but now merely fulfills the function of a bundle of non-binding guidelines as to the meaning of measures with equivalent effect under Article 30. He also points out that, although the Court has never taken a position on whether the Directive is binding, it has frequently referred to its provisions with approval. Barents criticizes the Communication which the Commission issued following the Court's judgment in Case 120/78 *Rewe v. Bundesmonopolverwaltung*, 1979, discussed *infra* note 109, because it does not state whether the Commission still follows the approach set out in the general Directive. These considerations would appear to be equally applicable to the status of the Commission Directive on public supply contracts.

98. The relevant provisions are contained in Articles 9 and 10 of the EEC Treaty. Article 9 of the EEC Treaty provides that:

1. The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

2. The provisions of Chapter 1, Section 1, and of Chapter 2 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

Article 10(1) of the Treaty provides that:

Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such

The application of these provisions is subject, however, in particular to the general "police power" and "national security" exceptions contained in Articles 36 and 223 of the EEC Treaty respectively.⁹⁹

Council "Coordination" Directive No. 77/62/EEC. These provisions

duties or charges.

In Case 41/76 *Donckerwolcke and Schou v. Procureur de la Republique*, 1976 E. Comm. Ct. J. Rep. 1921, the Court of Justice elaborated on the effect of these provisions in the following terms (at considerations 16-18):

Products in free circulation are to be understood as meaning those products which, coming from third countries, were duly imported into any one of the Member States in accordance with the requirements laid down by Article 10.

It appears from Article 9 that, as regards free circulation of goods within the Community, products entitled to 'free circulation' are definitively and wholly assimilated to products originating in Member States.

The result of this assimilation is that the provisions of Article 30 concerning the elimination of quantitative restrictions and all measures having equivalent effect are applicable without distinction to products originating in the Community and to those which were put into free circulation in any one of the Member States, irrespective of the actual origin of these products.

This principle of free circulation is subject, however, to any derogations which may be authorized by the Commission under Article 115 of the EEC Treaty. See *infra* note 117 and accompanying text.

99. Article 36 of the EEC Treaty provides that:

The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 223 of the Treaty provides that:

1. The provisions of this Treaty shall not preclude the application of the following rules:

(a) No Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

2. During the first year after the entry into force of this Treaty, the Council shall, acting unanimously, draw up a list of products to which the provisions of paragraph 1(b) shall apply.

3. The Council may, acting unanimously on a proposal from the Commission, make changes in this list.

For a general discussion of these and other "safeguard clauses," see E. STEIN, P. HAY & M. WAELBROECK, *supra* note 8, at 405-09.

are supplemented by a Council Directive "coordinating procedures for the award of public supply contracts."¹⁰⁰ The purpose of this Coordination Directive is to supplement the prohibition in Article 30 by introducing equal conditions of competition for public supply contracts in all the Member States, thereby "allowing the observance of this prohibition to be better supervised."¹⁰¹

The Coordination Directive applies to public supply contracts with "the State, regional or local authorities and the legal persons covered by public law."¹⁰² In contrast to Article 30 of the Treaty and the Commission Directive, its scope and coverage is limited by excluding purchasing author-

100. Council Directive No. 77/62/EEC of December 21, 1976, 20 O.J. EUR. COMM. (No. L 13) 1 (1977). Adopted on the basis of Article 100 of the EEC Treaty. Article 100 provides that:

The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

The Assembly and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation.

A similar Council Directive, coordinating the procedures for the award of public works contracts, was adopted on July 26, 1971. See Council Directive No. 71/305/EEC, 14 J.O. COMM. EUR. (No. L 85) 5 (1971). Some of these measures adopted in the area of public contracts are discussed in Turpin, *Public Contracts in the EEC*, 9 COMMON MKT. L. REV. 411, (1972).

101. Council Directive 77/62/EEC. The full text of the first two recitals is as follows:
Whereas restrictions on the free movement of goods in respect of public supplies are prohibited by the terms of Articles 30 *et seq.* of the Treaty;
Whereas that prohibition should be supplemented by the coordination of the procedures relating to public supply contracts in order, by introducing equal conditions of competition for such contracts in all the Member States, to ensure a degree of transparency allowing the observance of this prohibition to be better supervised.

According to the 12th and 13th recitals:

Whereas to ensure development of effective competition in the field of public contracts it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community; whereas the information contained in these notices must enable suppliers established in the Community to determine whether the proposed contracts are of interest to them; whereas for this purpose it is appropriate to give them adequate information about the goods to be supplied; whereas, more particularly in restricted procedures, advertisement is intended to enable suppliers of Member States to express their interest in contracts by seeking from the contracting authorities invitations to tender under the required conditions;

Whereas additional information concerning contracts must, as is customary in the Member States, be given in the contract documents for each contract or in an equivalent document.

102. Or, in Member States where the latter are unknown, the corresponding bodies specified in Annex 1. Article 1(b) of the Directive.

ities in certain sectors¹⁰³ as well as contracts below a certain threshold.¹⁰⁴ In common with these other provisions, however, the Coordination Directive is also subject to the general "police power" and "national security" exceptions contained in Articles 36 and 223 of the EEC Treaty.¹⁰⁵

b. *National government purchasing laws, regulations and administrative rules and practices under Community law*

Visible, open discrimination in the procurement decision. Laws and regulations which openly mandate discrimination against foreign suppliers in the procurement decision itself (e.g., a ban or certain preferences) clearly seem to be prohibited by Article 30 of the EEC Treaty as measures having equivalent effect to quantitative restrictions. Such measures are specifically enumerated, moreover, in Article 3 of the Commission Directive.¹⁰⁶

Less visible forms of discrimination or disadvantage resulting from the operation of government purchasing procedures. As in the case of the MTN Agreement, the Community has also attempted to control not only the more visible kinds of open discrimination, but also the many less visible ways in which foreign suppliers may suffer discrimination or disadvantage in the operation of the purchasing procedures themselves. These less visible measures must be evaluated under the general prohibition of measures with equivalent effect in Article 30 of the Treaty. They also must be evaluated under the more specific rules that regulate the various stages in the procurement process. Provisions in the Commission Directive require the abolition of particular national measures that are regarded as being measures with equivalent effect to quantitative restrictions.¹⁰⁷ The Coordination Di-

103. Under Article 2(2) the Directive does not apply to "bodies which administer transport services," or to "bodies which administer production, distribution and transmission or transport services for water or energy and telecommunications services."

104. Defined in Article 5(1)(a) as public supply contracts whose estimated value net of VAT is not less than 200,000 European units of account. For the national currency equivalents of the ECU to be used as of January 1, 1984 for determining the value of public supply contracts covered by the Directive, see 26 O.J. EUR. COMM. (No. C 320) 2 (1983).

105. See 5th recital.

106. The first part of Article 3 states that the Commission Directive 70/32/EEC, *supra* note 94, relates to:

- a. provisions which prohibit, in whole or in part, the supply of imported products;
- b. provisions which limit, in whole or in part, supply to domestic products or grant them a preference, other than aid within the meaning of Article 92 of the Treaty, whether or not accompanied by conditions;

107. Article 3 of the Commission Directive, 70/32/EEC, *supra* note 94, continues:

- c. provisions which are applicable only to imported products and which, by some means other than taxation, make the supply of imported products more difficult

rective, moreover, contains provisions that prescribe particular rules of conduct, requiring various steps to be taken during the procurement procedures and ensuring transparency of those procedures. These provisions are broadly similar to those in the MTN Agreement, although there are frequent variations in detail and wording.¹⁰⁸

or costly than that of domestic products.

It relates, in particular, to the following provisions—

- provisions which prescribe differentiation in treatment, to the detriment of imported products, with regard to the lodgment of a deposit or payments on account;
- provisions which make admission of imported products conditional upon the granting of reciprocity by the Member State from which they come;
- provisions which prohibit the substitution during execution of the contract, of products exported from a Member State other than that, if any, referred to in the contract, in so far [sic] they have the same characteristics as those prescribed in the contract;
- provisions which prescribe, as a condition of admission of supplies of imported goods only, the agreement or the opinion of a body other than the adjudicating body;
- provisions which require only suppliers of imported products to open a postal or banking account.

Article 3 goes on to provide that the Directive relates, moreover, to the following provisions—

- provisions which require suppliers of both domestic and imported products either to have a postal address or to open a postal or banking account in the country of the adjudicating body;
- provisions which impose technical requirements applicable to domestic and imported products indiscriminately;

Insofar as their restrictive effect on the free circulation of goods goes beyond the effect proper to provisions of the kind.

This is the case, in particular, where—

- the restrictive effect on free circulation of goods is out of proportion to the desired result;
- the same objective may be attained by another method which represents less of an obstacle to trade.

108. See part I.2 of the Commission's Explanatory Memorandum accompanying its Proposal for a Council Directive Amending Directive 77/62/EEC Coordinating Procedures for the Award of Public Supply Contracts, 22 O.J. EUR. COMM. (No. C. 287) 9 (November 17, 1979). The Commission notes that "in matters of procedure and transparency, the arrangements under the MTN Agreement do not differ greatly from those adopted by the Council in the Community Directive."

Thus the Council Directive 77/62/EEC, *supra* note 100, also contains provisions dealing with: the use of single tendering; the use of selective tendering—called "restricted procedures" (the Directive, however, does not seem to envisage selective tender involving the use of pre-established lists); the publication of a notice of proposed purchase; the provision of information in the notice, invitation to tender, and tender documentation; time limits; the qualification of suppliers; technical specifications for products; the evaluation of bids and award of contracts.

The implementation of the MTN Agreement in the Community legal system necessitated the adoption of measures to take account of differences between the two instruments, *see infra* notes 121-35 and accompanying text.

Any discrimination or disadvantage that may remain and that has not been removed by compliance with specific rules of conduct or the particular obligations in the Commission Directive may be caught by the general prohibition in Article 30.¹⁰⁹

109. The Court of Justice has given a wide interpretation to the concept of measures with equivalent effect under Article 30 of the EEC Treaty. See the Court's formulation in Case 8/74 Procureur du Roi v. Dassonville, 1974 E. Comm. Ct. J. Rep. 837, where the Court stated (at consideration 5):

All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

This definition has been repeated on a number of occasions. See, e.g., Case 41/76 *Donckerwolcke*, at consideration 19.

The Court has clearly endorsed the Commission's view (see, e.g., the Commission Directive on public supply contracts, Article 3) that the concept includes measures which make no formal distinction between domestic and foreign products and suppliers (material differentiation) as well as those which formally discriminate between them (formal differentiation). See Case 120/78 *Rewe v. Bundesmonopolverwaltung für Branntwein*, 1979 E. Comm. Ct. J. Rep. 649 where the Court stated (at consideration 8):

In the absence of common rules relating to the production and marketing of alcohol . . . it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.

Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted insofar as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

The Court found, however, that the measures in question—the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption in Germany—were not justified and were therefore prohibited under Article 30.

It is not clear, however, whether the Court accepts the Commission's test of proportionality in *defining* measures with equivalent effect in the case of measures causing *material* differentiation, as contrasted with using such a criterion in evaluating the application of exceptions to the prohibition of Article 30. It is also unclear how the "mandatory requirements" exceptions mentioned in *Rewe* relate to the exceptions expressly provided for in Article 36 (see *supra* note 99).

In a recent case, in which the Court held the Irish Government's "Buy Irish" campaign to be contrary to Article 30 of the Treaty, the Court clarified that the prohibition in that Article also covers governmental measures which are not binding in nature, Case 249/81 *Commission of The European Community v. Ireland*, 1982 E. Comm. Ct. J. Rep. 4005, 4023 (Re "Buy Irish" Campaign). The Court stated (at consideration 28) that:

. . . Even measures adopted by the government of a member-State which do not have a binding effect may be capable of influencing the conduct of traders and consumers in that State and thus of frustrating the aims of the Community as set out in Article 2 and enlarged upon in Article 3 of the Treaty.

For a comment on this case, see Comment, 24 HARV. INT'L L. J. 205 (1983).

It seems to be generally considered that measures with equivalent effect may emanate

2. *Trade Between the Member States and Third Countries*

Member States' government procurement laws, regulations, administrative rules and practices which discriminate against or disadvantage foreign products and suppliers may also create barriers to trade between the Member States and non-Member States (third countries). In the preceding subsection the focus was on the removal of barriers to trade between the Member States themselves. The measures eliminating such barriers to intra-Community trade do not, however, apply as such to trade between the Member States and third countries.¹¹⁰

This treatment of third country products and suppliers is a commercial policy matter that has come within the exclusive competence of the Community since the end of the transitional period. Article 113(1) of the EEC Treaty provides that:

After the transitional period has ended, the common commercial policy shall be based on uniform principles, *particularly* in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.¹¹¹ [emphasis added]

from any layer of government (central, regional or local). The concept appears to embrace acts of the legislature and judiciary as well as the executive, and possibly even acts of private individuals as well.

A detailed discussion of measures with equivalent effect is beyond the scope of this article. For a full discussion of the intricate and perplexing problems of interpreting Articles 30 and 36, see, e.g., Oliver, *supra* note 97; Barents, *supra* note 97; Van Gerven, *supra* note 96; D. WYATT & A. DASHWOOD, *supra* note 31, at Ch. 10; see also Oliver, *A Review of the Case Law of the Court of Justice on Articles 30 to 36 EEC in 1983*, 21 COMMON MKT. L. REV. 221 (1984).

110. It should be remembered, however, that third country suppliers and products inevitably derive some incidental benefit from those measures. Compare *Bourgeois*, *supra* note 3 at 16, discussing the impact of the MTN Agreement and compliance with its rules of conduct.

111. Article 113(2) of the EEC Treaty provides that the Commission shall submit proposals to the Council for implementing the common commercial policy, and Article 113(4) provides that the Council shall act by qualified majority. Articles 113(3) and 114 lay down a special procedure for the negotiation and conclusion of agreements with third countries.

The Court has given a very broad interpretation to the concept of the common commercial policy. In *Opinion 1/75*, 1975 E. Comm. Ct. J. Rep. 1355, 1362, the Court stated that the concept of a commercial policy has ". . . the same content whether it is applied in the context of the international action of a State or to that of the Community." The Court confirmed this broad interpretation in *Opinion 1/78* on the International Rubber Agreement, 1979 E. Comm. Ct. J. Rep. 2871, where it also noted that the common commercial policy is an evolving concept (see consideration 44), and, moreover, that the enumeration of matters in Article 113 "is conceived as a non-exhaustive enumeration which must not, as such, close the door to the

The differing national policies regarding the access of third country suppliers and products to public supply contracts should have been harmonized, therefore, by the end of the transitional period, within the framework of Community common commercial policy measures adopted either as part of the Community's autonomous commercial policy or pursuant to an international agreement on the subject. As a matter of fact, however, in this, as in several other areas falling within the ambit of the common commercial policy, no such Community measures were adopted.

Some Community action was necessary, however, to deal with two problems which resulted from this situation. First, since the competence of the Community in this area had been exclusive since the end of the transitional period, the Member States arguably needed Community authorization to maintain their differing existing national commercial policy measures.¹¹² Such authorization was apparently given by the Council in a Resolution of December 21, 1976.¹¹³ Having recognized the need for uniform Community action in this area,¹¹⁴ the Council "noted" that ". . .

application in a Community context of any other process intended to regulate external trade" (see consideration 45).

112. As required by so-called *Donckerwolcke* doctrine. See *Case 41/76 Donckerwolcke*, at consideration 32, where the Court stated:

As full responsibility in the matter of commercial policy was transferred to the Community by means of Article 113(1) measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of a specific authorization by the Community.

See also, e.g., the submissions of the Commission in *Case 266/81, La Societa Italiana per l'Oleodotto Transalpino (SIOT) v. le Ministere Italien des finances*, 1983 E. Comm. Ct. J. Rep. 731, 751. For an analysis supporting this position, see J. USHER, *EUROPEAN COMMUNITY LAW AND NATIONAL LAW, THE IRREVERSIBLE TRANSFER?* 58-59 (1981).

The consequences of failure to obtain an authorization are not entirely clear. Even though a Member State may arguably be in breach of its obligations under the Treaty, in failing to obtain such an authorization for its national commercial policy measures, this would presumably not necessarily entail their automatic "invalidity."

For an analysis of an analogous problem in the United States, i.e., the constitutionality of state "Buy American" laws, see Olson, *Federal Limitations on State "Buy American" Laws*, 21 COLUM. J. TRANSNAT'L L., 177, 178 (1982).

113. Council Resolution of December 21, 1976 concerning access to Community public supply contracts for products originating in non-member countries. 20 O.J. EUR. COMM. (No. C 11) 1 (1977).

114. See the 2d recital of the Council Resolution (Dec. 21, 1976) *Id.*:

Whereas the implementation of this Directive (author's note: the Coordination Directive 77/62/EEC) increases the need for the Community to determine the conditions under which public supply contracts awarded by Member States may be open to products originating in non-member countries.

See also points 3 and 4 of the Resolution, under which the Council:

3. [C]onsiders it necessary in the first place to obtain balanced concessions in the areas in

the Member States may continue to apply, in accordance with the provisions of the Treaty, existing commercial policy measures in respect of public supply contracts concerning products and categories of products originating in non-member countries."¹¹⁵

Secondly, the existence of differing national measures could cause trade deflection or economic difficulties for certain Member States, in particular because tenders might include third country products already in "free circulation" within the Community.¹¹⁶ This type of problem is specifically addressed by Article 115 of the EEC Treaty, which empowers the Commission to authorize Member States to take measures to protect their national commercial policy, where such trade deflection or economic difficulties arise.¹¹⁷

The Commission accordingly issued a Statement,¹¹⁸ published simultaneously with the Council Resolution, stating its intention to authorize Member States, upon application and after examining such application, to exclude from their public contracts "certain goods or categories of goods originating in third countries which are in free circulation in another Member State, in all cases where similar arrangements are made as regards di-

question in the negotiations taking place within the OECD and due to take place later within the GATT; with this aim, invites the Commission to submit to it new proposals based on Article 113 of the Treaty;

4. [A]grees, independently of the results of the negotiations, to promote, on a proposal from the Commission, the coordination and progressive standardization of the policies referred to under 1 above.

This invitation for proposals based on Article 113 of the Treaty would seem to evidence the Council's acceptance of the argument that the access to public supply contracts for products originating in non-member countries is indeed a matter falling within the scope of the common commercial policy.

115. See point 1 of the Resolution.

116. See the discussion *supra* note 98 and accompanying text.

117. The first paragraph of Article 115 of the EEC Treaty provides that:

In order to ensure that the execution of measures of commercial policy taken in accordance with this Treaty by any Member State is not obstructed by deflection of trade, or where differences between such measures lead to economic difficulties in one or more of the Member States, the Commission shall recommend the methods for the requisite cooperation between Member States. Failing this, the Commission shall authorize Member States to take the necessary protective measures, the conditions and details of which it shall determine.

According to Usher, this means that a Member State needs to obtain a "double authorisation." See J. USHER, *supra* note 112, at 59:

The result of *Donckerwolcke* is, however, that in order to protect a national commercial policy threatened by imports via another Member State, a Member State must obtain a double authorisation: it needs Community authorisation to have the policy in the first place, and Community authorisation to protect that policy under Article 115.

118. 20 O.J. EUR. COMM. (No. C 11) 2 (1977).

rectly imported products originating in third countries." The Commission noted that "[T]he application of such measures will only have effect at the time of the examination of tenders and not at the point of importation into the Member State concerned."¹¹⁹

B. *Implementation of the MTN Agreement in the Community Legal System*

The Council concluded the MTN Agreement on Government Procurement in exercise of the exclusive competence of the Community to conclude international agreements falling within the scope of the common commercial policy.¹²⁰ The implementation of the MTN Agreement in the Commu-

119. With the result that these measures "will not therefore entail any controls nor will they lead to the creation of any form of barrier at the frontiers within the Community and will not affect the import arrangements for the import of products originating in third countries, nor in particular the extent of liberalization at Community or national level." 20 O.J. EUR. COMM. (No. C 11) 2 (1977). For further discussion of these various issues compare Bourgeois, *supra* note 3, at 31 (discussing the Council Resolution and Commission Statement following the conclusion of the MTN Agreement, *see infra* notes 142 and 143 and accompanying text.).

120. Council Decision No. 80/271/EEC of December 10, 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations. 23 O.J. EUR. COMM. (No. L 71) 1 (1980). *See* EEC Treaty, Art. 113, *supra* note 111, on the Common Commercial Policy.

For a discussion of the question of Community powers to conclude the Agreement and a description of the procedures involved, *see* Bourgeois, *supra* note 3, at 19-23, Jackson, Louis and Matsushita, *supra* note 5, at 279-89. The Commission had relied upon *Opinion 1/78*, *supra* note 111, to support its position that the Community possessed exclusive competence under Article 113 to conclude *all* of the MTN non-tariff barrier agreements. On this point and the ensuing "compromise solution," under which the Standards Code and the Civil Aircraft Code were concluded as "mixed agreements," with the participation of the Member States alongside the Community, *see* Bourgeois, *supra* note 3, at 21-22. Bourgeois also expresses the view that the reliance upon Article 113 as the legal basis for the power of the Community to conclude the MTN Agreements ought logically to lead to greater reliance by the Community upon this provision than hitherto in the area of external trade. *See* Bourgeois, *supra* note 3, at 22.

The particular point at issue in *Opinion 1/78* was the question whether the Community had exclusive power to conclude the International Rubber Agreement or whether it should be concluded as a "mixed agreement" with the participation of the Member States alongside the Community. The Court stated that, even though the Agreement "stands apart from ordinary commercial and tariff agreements" since it is a "more structured instrument in the form of an organization of the market on a world scale . . ." (consideration 41), it could nevertheless fall within the scope of the common commercial policy and thus within the exclusive powers of the Community. Moreover, if the "essential objective" of the Agreement fell within the common commercial policy, the Community would still possess exclusive power to conclude it, even though the nature of the Agreement also gave it the characteristic of a measure of general economic policy, or development aid (*see* considerations 42 and 47-49), and even if certain individual clauses "of an altogether subsidiary or ancillary nature" concerned matters which

nity legal system affected both the legal regime governing intra-Community trade as well as the regime applying to trade between Member States and third countries.

1. *Intra-Community Trade*

As will be discussed in Subsection 2(a), *infra*, Member State entities, when operating under the Agreement, are bound under Community law to observe its obligations with regard to suppliers and products from other signatories.

A potential problem arose, however, because the provisions of the Agreement are in some respects more favorable than those laid down in the Council Coordination Directive. Since the Agreement does not apply as such to suppliers and products from other Member States (intra-Community trade),¹²¹ it was necessary to ensure that Member States' suppliers and products would be treated at least as favorably as those from third country signatories.

a. *Council "Adaptation" Directive No. 80/767/EEC.* To deal with this problem, the Council adopted Council Directive No. 80/767/EEC,¹²² which is intended to introduce the more favorable provisions of the Agreement into the intra-Community regime by "adapting and supplementing" the provisions of the Coordination Directive which governs trade between the Member States.

The Directive is limited in scope, applying only to Member State entities¹²³ and contracts¹²⁴ covered by the MTN Agreement. Consequently, the

could be regarded as falling within the competences of the Member States (e.g., technological assistance, research programmes, labour conditions in the industry concerned or consultations relating to national tax policies, see consideration 56). The extent and nature of the treaty-making powers of the Community falls outside the scope of this article. However, there is abundant literature on this subject. For a general discussion, see e.g., T. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW*, 145-172 (1981).

121. See the Commission's Explanatory Memorandum, *supra* note 108, part I. 3.

See also Bourgeois, *supra* note 3, at 30.

122. Council Directive No. 80/767/EEC of July 22, 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC coordinating procedures for the award of public supply contracts 23 O.J. EUR. COMM. (No. L 215) 1 (1980).

It is possible that the principle of Community preference would in any event have obligated the Member States to extend these more favorable provisions to suppliers and products from other Member States. See Bourgeois, *supra* note 3, at 30.

123. See Article 1(1) of the Directive (80/767/EEC) *supra* note 122.

124. See Article 3(1) of the Directive, *supra* note 122. The current value denominated in ECU's of contracts covered by the Council Directive and the Agreement on Government Procurement (177,000 ECU's) is stated in 26 O.J. EUR. COMM. (No. C 320) 2 (1983). The

less favorable provisions of the Coordination Directive continue to apply to all other contracting authorities.

The adaptations and additions introduced by the Directive, even for entities and contracts covered, are in fact minimal. The Directive eliminates one of the exceptions to the Community procedures¹²⁵ and obligates the entities to prepare a written report on contracts awarded under single tendering.¹²⁶ Time limits applicable in open¹²⁷ and restricted¹²⁸ procedures are revised and extended. Finally, the Directive contains a general obligation on Member States¹²⁹ to "apply in their relations conditions as favorable as those which they grant to third countries in implementation of the Agreement, in particular those in Articles V and VI on the selective procedure,¹³⁰ information and review."¹³¹

In evaluating the impact of the Directive, several observations may be made. First, the Council declined to make use of an opportunity to increase the degree of liberalization in intra-Community trade by extending the more favorable provisions of the MTN Agreement to all the public purchasing already covered by the Coordination Directive. Second, with regard to those purchasing activities which are covered by the "Adaptation" Directive, the Directive does not appear to contain any provisions at all, incorporating the considerably more detailed rules of the Agreement on the submission, receipt and opening of tenders. Moreover, it is not entirely clear whether the general obligation of favorable treatment applies in any event, in the case of every purchase, or only when third country suppliers are actually involved.¹³² In the latter case, this could result in yet a further disparity in the intra-Community regime in that, in some cases, for example, an en-

threshold value in the MTN Agreement is lower than that specified in the Coordination Directive; *see supra* note 104.

125. *See* Article 4 of the Directive, *supra* note 122. These exceptions in the Coordination Directive, *see supra* note 100, mainly concern the use of single tendering.

126. *Id.* at Art. 5.

127. Forty-two days for the receipt of tenders, *see Id.* at Art. 6(1).

128. Forty-two days for the receipt of applications to be invited to tender. *Id.* at Art. 6(2); thirty days for the receipt of tenders, Art. 6(4).

129. *See* Article 7 of the Directive, *supra* note 122.

130. Especially MTN Agreement Article V(7) which provides that suppliers requesting to participate in a particular proposed purchase shall be permitted to submit a tender and be considered, subject to efficient operation of the procurement system, and provided, in the case of suppliers not yet qualified, there is sufficient time to complete the qualification process. *See supra* note 68 and accompanying text.

131. The Council Coordination Directive, 77/62/EEC contains no provision requiring the provision of information and establishment of review procedures by purchasing authorities.

132. In other words, when is an entity acting "in implementation of the Agreement" within the meaning of Article 7?

tity would be obligated to give information and afford opportunity for review, but not in other cases.¹³³

This "minimalist" approach of the Directive has been severely criticized elsewhere.¹³⁴ Indeed, the proposal by the Commission would have gone much further.¹³⁵ The Council's approach demonstrates that it is frequently difficult in practice to develop the political will necessary for further relinquishment of Member State sovereignty.

2. *Trade Between the Member States and Third Countries*

In examining the effect of the MTN Agreement on the legal regime applying to trade between Member States and third countries, it is necessary to make a distinction between procurement which is covered, and procurement which is not covered, by the Agreement.

a. *Procurement covered by the Agreement.* By concluding the MTN Agreement on Government Procurement in the exercise of its exclusive powers in the area of the common commercial policy under Article 113 of the Treaty,¹³⁶ the Community accepted the obligations of the Agreement and assumed responsibility for securing their due performance, i.e., for ensuring that the differing national commercial policy measures would indeed be brought into line with the provisions of the Agreement.¹³⁷

It was unnecessary for the Community institutions to take any action beyond proper conclusion of the Agreement, either to introduce its provisions into the Community legal system, or to create a Community law obligation upon the Member States to ensure its due performance for two reasons. First, a Community agreement is automatically "incorporated" into

133. On this point, compare Bourgeois, *supra* note 3, at 30.

134. *Id.*

135. 22 O.J. EUR. COMM. (No. C 287) 9 (1979). The Commission proposal would have introduced the more favorable provisions of the Agreement into the Coordination Directive by way of amendment, and in much more precise terms, in particular avoiding the ambiguous language of Article 7 of the Directive.

The Coordination Directive, as thus amended, would arguably have applied to *all* entities under the direct or substantial control of the Member States (and not just those listed in the Annex to the Agreement), when engaged in procurement above the threshold value in the Agreement. It would also have applied some of the amendments (e.g., regarding single tendering and time limits) to regional and local authorities and the legal persons governed by public law in the Member States.

136. *See supra* note 120.

137. *See* Case 104/81 Hauptzollamt Mainz v. Kupferberg, 1982 E. Comm. Ct. J. Rep. 3641, consideration 13, *quoted infra* note 140.

the Community legal system by virtue of its conclusion.¹³⁸ As the Court of Justice has stated, "[T]he provisions of the Agreement, from the coming into force thereof, form an integral part of Community Law."¹³⁹ Second, Article 228(2) states that an agreement concluded by the Community is "binding on the institutions of the Community and on Member States," thereby expressly creating a Community law obligation for the Member States to take the necessary measures to ensure proper implementation of such an Agreement.¹⁴⁰ Moreover, it is possible that an individual may have a right under Community law to directly invoke the provisions of the Agreement, in a case where a Member State has either incorrectly implemented its provisions or has failed to adopt any implementing measures at

138. *See infra* at 142.

139. *See* Case 181/73 *Haegeman v. Belgium*, 1974 E. Comm. Ct. J. Rep. 449, consideration 5. The Agreement referred to is the Athens Agreement, the Association Agreement between the EEC and Greece, concluded in 1961.

See also Case 104/81 *Kupferberg*, at consideration 13, *quoted infra* note 140.

140. Case 104/81 *Hauptzollamt Mainz v. Kupferberg* considerations 11 and 13. This Case contains a very interesting passage dealing with the matters presently under discussion:

11. The Treaty establishing the Community has conferred upon the institutions the power not only of adopting measures applicable in the Community but also of making agreements with non-member countries and international organizations in accordance with the provisions of the Treaty. According to Article 228 (2) these agreements are binding on the institutions of the Community and on Member States. Consequently, it is incumbent upon the Community institutions, as well as upon the Member States, to ensure compliance with the obligations arising from such agreements.

12. The measures needed to implement the provisions of an agreement concluded by the Community are to be adopted, according to the state of Community law for the time being in the areas affected by the provisions of the agreement, either by the Community institutions or by the Member States. That is particularly true of agreements such as those concerning free trade where the obligations entered into extend to many areas of a very diverse nature.

13. In ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. That is why the provisions of such an agreement, as the Court has already stated in its judgment of 30 April 1974 in Case 181/73 *Haegeman* form an integral part of the Community legal system.

14. It follows from the Community nature of such provisions that their effect in the Community may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States and, in the latter case, according to the effects in the internal legal order of each Member State which the law of that State assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community.

all.¹⁴¹

b. *Procurement which is not covered by the Agreement.* Since the application, scope and coverage of the MTN Agreement is limited, its implementation in the Community legal system only effects a partial harmonization of the differing national commercial policy measures concerning access of third country suppliers and products to government supply contracts. These measures remain unharmonized, therefore, to the extent they are not governed by the obligations under the Agreement.

Once again, therefore, the Council adopted a Resolution authorizing the Member States to maintain their differing national commercial policy measures,¹⁴² and the Commission again issued a Statement regarding its intended application of Article 115 of the Treaty.¹⁴³ These two measures apply to all entities not covered by the Agreement, entities covered by the Agreement but as regards products or contracts not covered by it, and entities covered by the Agreement vis-a-vis non-signatory countries.

V. COMPLIANCE WITH THE RULES OF THE SYSTEM AND THE ROLE OF INTERNATIONAL AND PRIVATE DISPUTE SETTLEMENT AND ENFORCEMENT MECHANISMS

So far we have examined the rules of two international regimes—those of the GATT-MTN System and of the European Community—regulating national government procurement activity. As in any international regime, the effectiveness of the rules depends on the degree of actual compliance by the national governments and their purchasing authorities. In addition to the willingness of governments to voluntarily ensure respect for the rules of the system in any event (for whatever reasons), compliance is also dependent to a considerable extent upon the effectiveness of available dispute settlement and enforcement mechanisms. The greater the effectiveness of such mechanisms, the greater is the likelihood of compliance with the rules, because effective dispute resolution and enforcement mechanisms remedy and deter departures from the rules, thus encouraging compliance, albeit involuntary. Moreover, by being effective, these mechanisms also preserve the integrity of, and develop confidence in, the system, and thus help to develop an attitude of willing, voluntary compliance.

141. See *infra* notes 173 to 180 and accompanying text.

142. Council Resolution of July 22, 1980, concerning access to Community public supply contracts for products originating in third countries, 23 O.J. EUR. COMM. (No. C 211) 2 (1980).

143. Commission Statement concerning Article 115 of the Treaty, 23 O.J. EUR. COMM. (No. C 211) 1 (1980).

This part of the article therefore examines the application of two types of mechanisms for settling disputes and enforcing the rules of the respective systems. An evaluation of their comparative effectiveness may assist in assessing the degree of likely compliance with, and effectiveness of, the international rules on government procurement. These two mechanisms, both of which may be regarded as dispute settlement and enforcement techniques, are the international dispute settlement and enforcement procedures which exist in those systems; and the possibility for a domestic court to apply the international rule directly, in particular in a dispute between the national authorities and a private individual, who can thus act as a "private policeman" for the system.

The international dispute settlement and enforcement procedures will be discussed in Section A. The possibility for an individual to invoke directly the international rule before a domestic court forms the subject of Section B.¹⁴⁴

A. *International Dispute Settlement and Enforcement Procedures*

This discussion will not attempt a detailed description of the various procedures in the two systems, but will instead focus on the following central issues: (1) the prosecutorial function; (2) the definition of the claim; (3) the adjudicative function; (4) the remedies available; and (5) the extent to which the procedures operate with reference to the power position of the parties (power diplomacy) rather than with reference to the interpretation or application of an agreed-upon existing rule (rule diplomacy), and with what consequences.

1. *International Dispute Settlement and Enforcement in the GATT-MTN System, With Particular Reference to the Agreement on Government Procurement*

The general dispute settlement and enforcement procedures of the GATT are found in Articles XXII and XXIII,¹⁴⁵ and the serious deficiencies inherent in these procedures have been described elsewhere by Professor Jackson.¹⁴⁶ The MTNs resulted in an "Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement." This

144. This part of the article, particularly in its discussion of the European Community, partly draws on another article by the present writer. See Jones *supra* note 19, at 25-27, 32-50.

145. For a description of these procedures, see JACKSON, *LEGAL PROBLEMS*, *supra* note 2, at 422-430; J. JACKSON, *WORLD TRADE*, *supra* note 4, at 163-89.

146. See the article by J. Jackson, *supra* note 6, at 40-43.

"Agreed Description" is an Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance which was formulated as part of the "Framework" Agreement.¹⁴⁷

In addition to this general Understanding on Articles XXII and XXIII, many of the MTN Agreements also contain their own provisions dealing with dispute settlement and enforcement, which basically mirror the scheme in Articles XXII and XXIII.¹⁴⁸

Although the question is not entirely free from doubt, it seems that the procedures in Article VII of the Agreement on Government Procurement are exclusive, i.e., there is no recourse to Articles XXII and XXIII after the Agreement procedures have been exhausted,¹⁴⁹ and the following discussion will therefore attempt to evaluate the extent to which the procedures in this Agreement alone represent an improvement over the procedures of Article XXII and XXIII, as well as the extent of any remaining deficiencies.

a. *Overview of the Government Procurement Agreement procedures.* The Agreement envisages five basic steps in the procedure. First, there is a bilateral consultation between the disputing states.¹⁵⁰ If the dispute is not resolved by such consultations, a party to the dispute may formally refer the matter to the Committee on Government Procurement, which is composed of representatives from each of the Parties to the Agreement.¹⁵¹ The

147. See *supra* note 5. The "Agreed Description" and the "Understanding" embody various minor reforms in the GATT Article XXII and XXIII procedures. The contracting parties agreed to some further minor modifications at the GATT ministerial meeting in November 1982. At that meeting the contracting parties also "reaffirmed that consensus will continue to be the traditional method of resolving disputes; however, they agreed that obstruction in the process of dispute settlement shall be avoided." See, the text of the communique issued after the GATT ministerial meeting, 18 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 362, 364-65 (November 11, 1982).

148. Bourgeois, *supra* note 3, at 16. For a description of the "Framework Agreement" and the dispute settlement procedures in the separate Agreements, see Jackson, *supra* note 6, at 44-47. Professor Jackson sees a number of dangers inherent in the "balkanization," or fragmentation, of dispute settlement under the various Agreements. See also, Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145 (1980) and Harris, *The Post-Tokyo Round GATT Role in International Trade Dispute Settlement*, 1 INT'L TAX AND BUS. LAW., 142, 155-169 (1983). The article by Harris also describes the experience gained in operating the post-MTN dispute settlement procedures.

149. Bourgeois, *supra* note 3, at 17. This contrasts with the position under the Standards Code, Article 14.23 of which provides that the Code's dispute settlement procedures must be exhausted before Parties can invoke the GATT procedures. See also Harris, *supra* note 148, at 163.

150. Article VII(3)-(5).

151. Article VII(6). In practice, of course, the Committee attempts to resolve problems concerning the operation and implementation of the Agreement at its periodic meetings, before

Committee then investigates the matter "with a view to facilitating a mutually satisfactory solution."¹⁵³ If no such solution can be reached, a panel may be established to examine the matter, consult with the parties and provide a full opportunity to reach a mutually satisfactory solution, and make a statement concerning the facts as they relate to application of the Agreement and such findings as will assist the Committee in making recommendations or giving rulings on the matter.¹⁵⁴ The final step is appropriate action by the Committee, including a statement concerning the facts, recommendations to one or more of the Parties, and/or any other ruling it deems appropriate. The Committee may in addition authorize "sanctions," i.e., the suspension of application of the Agreement, if its recommendations are not accepted.¹⁵⁴

b. *Evaluation.* Several observations may be made concerning the procedures under the Agreement. First, it should be noted that the "prosecutorial" function resides in the aggrieved Party, which desires to make a formal reference to the Committee. Precise definition of the claim is difficult, however, because the rules themselves are frequently vague and ambiguous;¹⁵⁵ and the focus of the claim is not on breach of the rules as such but on the vague and ambiguous concept of "nullification or impairment."¹⁵⁶ This detracts from the process of rule application and also places a considerable burden on the panel.¹⁵⁷

The adjudicative function is performed by the panel. Despite improvement in the panel procedure, particularly in the imposition of time limits and guarantees of impartiality and independence, a crucial deficiency re-

these problems result in such a formal reference. For examples of the kinds of problems brought to the Committee's attention, see, *Meeting of the GATT Committee on Government Procurement*, INT'L PROCUREMENT COMMITTEE REPORT, *supra* note 48, Vol. 1, No. 1 at 5 (May 1983), Vol. 1, No. 2 at 5 (September 1983), Vol. 1, No. 3 at 7 (February 1984), Vol. 1, No. 4 at 1 (May 1984), Vol. 2, No. 1 at 5 (August 1984).

152. *Id.*

153. Details of the panel procedure are found in Article VII(7)-(10).

154. Article VII(11)-(14).

155. Bourgeois, *supra* note 3, at 13-14.

156. Article VII(4). See Jackson, *supra* note 6, at 43, 45. The concept of nullification or impairment under the GATT (and presumably also under the MTN Agreement) relates to damage to the trading expectations of the aggrieved Party. As the focus of the claim is on "nullification or impairment," therefore, a breach of the rules is technically neither necessary (see Australian Subsidy on Ammonium Sulphate case, 1950) nor sufficient (though GATT practice has developed the concept of prima facie nullification or impairment *inter alia* where there is a breach of GATT obligations). These matters are discussed further in J. JACKSON, LEGAL PROBLEMS, *supra* note 2, at 424-28 and J. JACKSON, WORLD TRADE, *supra* note 4, at 178-87. See also Harris, *supra* note 148, at 147.

157. Jackson, *supra* note 6, at 43.

mains in that the panel, which acts as the adjudicatory body, also acts as "conciliator." The "moral effect" of its determination, therefore, may consequently be severely weakened.¹⁵⁸

Another weakness in the procedure is that the remedies are administered by the "political" Committee on Government Procurement. Again, there have been some improvements in this area, such as time limits for action, and a requirement that a Party which fails to implement a recommendation give written justification. As in the case of the GATT itself, however, it is doubtful whether sanctions in the form of authorized retaliation will have any significant effect in securing compliance.¹⁵⁹

Finally, the procedures may still operate to a large degree with reference to the relative power positions of the parties, rather than an agreed-upon existing rule.¹⁶⁰ This influences every stage in the procedures (including that of panel "adjudication," given its additional role as conciliator) and also results in the "filtering out" of certain "difficult" cases.¹⁶¹ Professor Jackson has concluded that "few fundamental changes or improvements can be found in the MTN Agreements" over the mechanism in GATT Articles XXII and XXIII,¹⁶² a mechanism which already "enjoys less than great confidence of the parties."¹⁶³

2. *International Dispute Settlement and Enforcement in the European Community*

a. *Overview of the procedures.* The main provision for international dispute settlement in the European Community is laid down in Article 169 of the EEC Treaty, which empowers the Commission to proceed against a Member State, which it considers to be in violation of Community Law—for example, by failing to ensure respect for the rules on government procurement.¹⁶⁴ This procedure is divided into two main stages, an adminis-

158. *Id.* at 46.

159. *Id.* at 41-42.

160. *Id.* at 46.

161. I.e., a political solution is reached, instead of a politically non-acceptable legal solution which might damage the system. *Cf. Bourgeois, supra* note 3, at 18.

162. Jackson, *supra* note 6, at 46.

163. *Id.* at 41, 43. The first formal reference to the Committee on Government Procurement and subsequent establishment and investigation by a panel is discussed *supra* note 46 (complaint by United States against the practice of Member States of the European Community excluding VAT from the contract price in calculating threshold value).

164. *See e.g.*, Case 133/80 Commission v. Italian Republic, 1981 E. Comm. Ct. J. Rep. 457 (failure to adopt national measures implementing Directive 77/62/EEC, the "Coordination" Directive). The full text of Article 169 of the Treaty is as follows:

If the Commission considers that a Member State has failed to fulfill an obligation

trative stage and a judicial stage. In the administrative stage, the Commission gives the defendant Member State an opportunity to submit its case, and then delivers a reasoned opinion. If the defendant State does not comply with the Commission's opinion within the period laid down, the Commission may then bring the matter before the Court of Justice. In this judicial stage, if the Court finds that the defendant Member State has failed to fulfill its obligations under the Treaty, then under Article 171 that State is "required to take the necessary measures to comply with the judgment."

b. *Evaluation.* There clearly exist some vital differences between this procedure and the procedures under the MTN Agreement. One very significant contrast with the MTN procedures is the central role played by the Commission in its prosecutorial "watchdog" capacity as "guardian of the Treaties."¹⁶⁵ Thus the decision to enforce Community Law, at least through use of the international dispute settlement and enforcement procedures under Article 169, is the responsibility of an independent body which represents the interests of the Community as a whole.¹⁶⁶

under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Article 170 of the EEC Treaty provides a closer analogue to the GATT-MTN procedures, in that it empowers one Member State to proceed against another Member State for failure to fulfill an obligation under the Treaty. A preliminary "administrative stage" before the Commission is also a necessary component of this procedure. This remedy is not discussed separately, however. Apart from the prosecutorial function, it does not differ fundamentally from the procedure under Article 169, and is in any event used very infrequently. Before a problem results in a formal proceeding under Article 169 or 170, the Commission in practice would doubtless attempt to seek a resolution within the Advisory Committee for Public Contracts. This Committee, which the Council established within the Commission in 1971 (originally only for public works contracts), is composed of representatives of the Member States meeting under the chairmanship of a Commission official. The function of the Committee is to examine problems concerning application of the Council Directives on contracts for public works and public supplies. Council Decision 71/306/EEC of July 26, 1971, 14 O.J. EUR. COMM. (No. L 185) 15 (1971), as amended by Council Decision 77/63/EEC of December 21, 1976, 19 O.J. EUR. COMM. (No. L 13) 15 (1977). See further, Turpin, *supra* note 100, at 424. Compare the discussion, *supra* note 151, on the Committee on Government Procurement.

A Member State violation of a provision in an international agreement between the Community and a non-Member State (e.g., the MTN Agreement on Government Procurement) would also probably be regarded as a violation of Community law justifying enforcement proceedings under Articles 169 or 170. See T. HARTLEY, *supra* note 120, at 286.

165. Under Article 155 of the EEC Treaty, one of the tasks of the Commission is to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied."

166. See Article 10 of the Merger Treaty, *supra* note 15.

In addition, the claim is defined much more precisely, because the applicable rules of Community Law are themselves more precise, and there is no concept akin to "nullification or impairment," or indeed damage or harm of any nature. The adjudicative function, moreover, is performed by a completely impartial body (the Court of Justice), with no attempt at conciliation with reference to the relevant power positions of the parties.

The remedy is also administered by the Court of Justice, and not by the "political" Council of Ministers. The remedy consists in a declaration whose consequences are determined by the Treaty itself. Finally, the procedure as a whole operates with much greater reference to the rules than the relative power positions of the Member States. In particular, there is no formal "consultation" or "conciliation" phase administered by the "political" Council of Ministers.

One the other hand, despite the superior nature of this Community international dispute settlement and enforcement mechanism as compared with the procedures in the Government Procurement Agreement, its effectiveness is nevertheless subject to certain limitations. First, the Commission is unable to uncover every breach of Community obligations by a Member State. In addition, the procedure may involve extensive delays. "Political" considerations may enter into the Commission's decision as to how a resolution to the dispute can be most effectively achieved in a particular case. Whenever "difficult" cases do arise, moreover, the Commission may delay in bringing the matter before the Court of Justice. Finally, even where a successful action is brought against a Member State in the Court of Justice, compliance with the Court's judgment depends, under Article 171 of the Treaty, upon the "good faith" of the Member State concerned.¹⁶⁷

B. *Direct Application of the International Rules on Government Procurement by a Domestic Court*

1. *Introduction: Central Issues*

Where a national government fails to ensure respect for the interna-

167. However, the Commission attempts to ensure that the Member States take the necessary steps to comply with the Court's judgment, without undue delay. See e.g., Answer of the Commission to W.Q. 988/83, 23 O.J. EUR. COMM. (No. C 335) 34 (1983). If necessary, the Commission may bring a further enforcement action under Article 169 for failure to fulfill the obligations under Article 171. See e.g., Case 48/71 Commission v. Italian Republic, 1972 Eur. Comm. Ct. J. Rep. 527, Cases 24/80R and 97/80R Commission v. France, 1980 Eur. Comm. Ct. J. Rep. 1319, see Fourteenth General Report on the Activities of the European Communities in 1980, pp. 301 and 307 (1981).

For a more detailed discussion of the procedure under Article 169, see T. HARTLEY, *supra* note 120, at 283-305.

tional rules on government procurement in its domestic legal system, for example because it either fails to adopt any implementing measures at all or because those measures result in defective implementation,¹⁶⁸ compliance with the rules may still be ensured to the extent that the domestic courts apply the international rule directly, particularly in any dispute between a purchasing authority and a private individual. The existence and extent of such direct "penetration" and application of the international rules will depend on the attitude of the courts in resolving three central issues. The first issue is whether the domestic courts are prepared to recognize an international norm as such as a "source of law". In other words, is the legal system "open" to international law, or do the courts only recognize domestic law norms as a "source of law". This is traditionally viewed as relating to the method of "incorporating" or "receiving" international law into the domestic legal system. If the domestic legal system is "closed" to international law, the norm of international law can only be applied by the courts after it has been "transformed" into a norm of domestic law.¹⁶⁹ The remaining two

168. Article IX(4)(a) of the Agreement on Government Procurement provides that: Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of this 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.

As far as the relevant provisions of European Community law are concerned:

- (1) Article 30 states that measures with equivalent effect to quantitative restrictions on imports "shall . . . be prohibited between Member States."
- (2) Article 4 of the Commission Directive 70/32/EEC states that "Member States shall take all necessary measures to abolish measures which have an equivalent effect to quantitative restrictions and arise from the provisions referred to in Article 3. . .".
- (3) Article 30 of the Council Coordination Directive 77/62/EEC provides that "Member States shall adopt the measures necessary to comply with this Directive within 18 months of its notification. . .".
- (4) Article 9 of the Council "Adaptation" Directive provides that "Member States shall adopt the measures necessary to comply with this Directive not later than 1 January 1981."

169. If the domestic jurisdiction is "strongly dualist," a norm of international law is never available to the domestic judge; in each case, the norm must be converted into a norm of domestic law before it can be applied by a court (the "transformation" theory).

Actual practice is more nuanced, however. Thus, the courts may recognize customary international law as a "source of law," while denying such status to treaty law, as for example in British practice.

On the other hand, if the domestic jurisdiction is "monist" (international law and domestic law are part of the same system) or "weakly dualist," (two different systems but international law is "adopted" by act of the sovereign), then the international law norm will be available to the domestic judge as such a source of law.

For a more detailed discussion of the various theories, see D.P. O'CONNELL, *INTERNATIONAL LAW*, 38-46 (2nd. ed. 1970); J. STARKE, *INTRODUCTION TO INTERNATIONAL LAW*, 68-

issues are only presented, therefore, if the legal system is "open" to international law.

The second issue concerns the effects in the domestic legal system of recognizing an international norm as such as a "source of law". In particular, does the norm directly alter the legal position of individuals, enabling them to invoke it in a dispute with their national authorities? In traditional U.S. terminology, a provision in an international agreement may only be directly invoked by individuals if it is "self-executing". In European Community law, a provision may only be invoked if it has "direct effect".¹⁷⁰

The third issue is the *status* of a norm of international law which has been incorporated as such into the domestic legal system. This involves consideration of the primacy of one norm over the other, in the case of any conflict between an international law norm and a domestic law norm. This issue may be presented in several different contexts, at the national level or, in a federal state, also at the state level. These contexts include the status of the international law norm relative to prior domestic legislation, implementing legislation, subsequent legislation, and constitutional law norms.¹⁷¹

International law does not require the domestic courts of a state to adopt any particular attitude to the reception of international law into the domestic legal system. Thus a state may perform its international obligations by *correctly* "transforming" international norms which are intended to be effective within the domestic system.

On the other hand, an effective mechanism of direct penetration and application by the domestic courts, in which the national governments are "by-passed", not only increases the level of compliance with international rules (and hence their effectiveness), but such judicial implementation may also thereby ensure that the state does not in fact act in breach of its international obligations.¹⁷²

74 (9th ed. 1984). See also March Hunnings, *Enforceability of the EEC-E.F.T.A. Free Trade Agreements: A Rejoinder*, 3 EUR. L. REV. 278, 278-79 (1978).

170. It is possible, of course, to envisage a variety of "direct effects":

(1) Direct effects in the relationship of the individual and the national authorities.

This may be termed "vertical direct effect," and may involve:

(a) obligations of the national authorities and correlative rights of the individual;

(b) obligations of the individual and correlative rights of the national authorities.

(2) Direct effects in the relationship of individuals *inter se*—this may be termed "horizontal direct effect."

For present purposes, the discussion is restricted to (1)(a), i.e., "vertical direct effects" involving obligations of the national authorities and correlative rights of the individual.

171. For example, guarantees of fundamental human rights.

172. At least if the obligation on the state is an "obligation of result" (the state can

2. *Direct Penetration and Application of the Rules of the GATT and the MTN Agreement on Government Procurement*

The existence and extent of direct penetration and application of the rules of the GATT and the MTN Agreement on Government Procurement in the domestic legal systems of the respective Parties is a matter of state practice, dependent upon the attitude of the national judiciaries in resolving the issues discussed above as matters of domestic constitutional law. State practice and judicial attitudes may, of course, vary considerably.

For example, the legal systems of both the United States and the European Community are "open" to international agreements, which are therefore automatically "incorporated" as a "source of law" for the domestic judge.¹⁷³ However, judicial attitudes vary, regarding both the effect and the status of an international agreement thus incorporated into the domestic legal system.

In the United States, several courts have considered the GATT to be "self-executing" and have permitted individuals to invoke its provisions to challenge state laws.¹⁷⁴ The language of the Trade Agreements Act of 1979, however, which approved the MTN Agreements and implemented them into U.S. law, would appear to exclude any possibility of recognizing their provisions as "self-executing".¹⁷⁵ In the European Community, on the

choose the appropriate means of implementation) rather than an "obligation of conduct" (duty placed on a particular organ). See e.g., Wyatt, *New Legal Order or Old?*, 7 EUR. L. REV. 147, 152-53 (1982).

173. In the case of the United States, Article VI, cl. 2 of the U.S. Constitution provides that ". . . all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land."

On the confusion between the two distinct concepts of incorporation and the "self-executing" nature of treaties in the United States, see Winter, *Direct Applicability and Direct Effect. Two Distinct and Different Concepts in Community Law*, 9 COMMON MKT. L. REV. 425, 427-28 (1972).

It seems that executive agreements may also be automatically incorporated, so as to become the "supreme law" of the land, with similar effects and status (at least in the case of congressional-executive agreements).

For the European Community, see Case 181/73, *Haegeman v. Belgium*, *supra* note 139, at consideration 5. See also the discussion in Bebr, *Agreements Concluded by the Community and Their Possible Direct Effect: From International Fruit Company to Kupferberg*, 20 COMMON MKT. L. REV. 35, 39 (1983) and Jackson, Louis & Matsushita, *supra* note 5, at 290.

For a general comparison of the European Community System with the U.S. Federal System, see *supra* notes 20 and 21 and accompanying text.

174. See, e.g., J. JACKSON, *LEGAL PROBLEMS*, *supra* note 2, at 408. For an extensive in-depth analysis of the position of the GATT in U.S. law, see Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249 (1967). See also Olson, *supra* note 112, at 177.

175. See Trade Agreements Act of 1979, Articles 3(a) and 3(f), Pub. L. No. 96-39 §503,

other hand, the Court of Justice has denied the "direct effect" of the GATT,¹⁷⁶ whereas the question appears to remain open in the case of the MTN Agreements.¹⁷⁷ Consequently, an aggrieved supplier or importer may be able to invoke the "direct effect" of the MTN Agreement on Government Procurement before a national court of a Member State, in any dispute with a covered entity, if the criteria for "direct effect" are satisfied.¹⁷⁸

93 Stat. 144 (1979). In the United States the courts look to the "subjective intent" of the draftsmen in order to determine whether an agreement is "self-executing." This intent is manifested primarily by the language of the agreement and secondarily by the preparatory work (in particular that of the U.S. draftsmen). If the agreement requires Congressional approval, the manifestation of intent by Congress is a major, perhaps conclusive, factor. See Jackson, Louis & Matsushita, *supra* note 5, at 374-75.

176. Joined Cases 21-24/72, *International Fruit Co. Nb. v. Produktshap voor Groenten en Fruit* 1972 E. Comm. Ct. J. Rep. 1219; Case 9/73 *Schluter v. Hauptzollamt Lorrach* 1973 E. Comm. Ct. J. Rep. 1135.

The Court has confirmed its denial of the direct effect of the GATT, as well as its reasoning, in two recent cases — Case 266/81 *La Societa Italiana per l'Oleodotto Transalpino (SIOT) v. le Ministere Italien des Finances et al.*, 1983 E. Comm. Ct. J. Rep. 731, 780 at consideration 28; Joined Cases 267/81, 268/81 and 269/81 *l'Administration des Finances de l'Etat v. la Societa Petrolifera Italiana S.P.A. (S.P.I.) et al.*, 1983 E. Comm. Ct. J. Rep. 801, 830, at considerations 23 and 24. For a comprehensive review of the cases before the Court of Justice involving GATT, see Petersmann, P. *Application of GATT by the Court of Justice of the European Communities*, 20 COMMON MKT. L. REV. 397 (1983).

177. See Jackson, Louis and Matsushita, *supra* note 5, at 294-95.

178. Although the jurisprudence of the Court is still evolving in this area of the direct effect of international agreements in the Community legal system, the following tentative conclusions, based in particular on the *GATT cases* and the *Kupferberg Case*, may be advanced:

(1) **Firstly**, as far as the "nature" or "system" of an agreement is concerned, the Court may still recognize direct effect, despite:

- a) the existence of a special institutional framework for consultation and negotiations among the contracting parties concerning performance of the agreement (Case 104/81 *Kupferberg*, at consideration 20)
- b) the existence of safeguard clauses (Case 104/81 *Kupferberg*, consideration 21)
- c) the refusal by the courts of another contracting party to give direct effect to the agreement. How a party ensures reciprocal performance in good faith is within its discretion (unless the agreement itself specifies the measures to be taken) (Case 104/81 *Kupferberg*, consideration 18).

(2) **Secondly**, the wording of the provision must satisfy the general criteria for "direct effect" applied to provisions of Community law origin, i.e., it must be precise and unconditional (see *infra* note 185 and accompanying text.). This question is determined in the context and framework of the agreement of which it forms part. In particular, the Court will have regard to:

- a) the object and purpose of the Agreement (Case 104/81 *Kupferberg*, consideration 23).
- b) certain features of the "system" of the Agreement:
 - (i) Does the provision require intervention within the institutional framework in order to become precise and unconditional?

In the United States, broadly speaking, an international agreement may prevail over all inconsistent state legislation, prior or subsequent, as well as inconsistent prior federal legislation. It does not, however, prevail over inconsistent subsequent federal legislation.¹⁷⁹ In the European Community, by contrast, an international agreement concluded by the Community appears to prevail over all inconsistent Member State legislation as well as Community legislation, whether prior or subsequent.¹⁸⁰

(ii) Is the use of the safeguard clauses strictly circumscribed?

In *Kupferberg*, no preliminary intervention within the institutional framework was required for the provisions to become precise and unconditional; moreover, the safeguard clauses could only apply under specific circumstances and, as a general rule, after examination of the joint committee (Case 104/81 *Kupferberg*, considerations 20 and 21).

In the case of the GATT, however, the Court has stressed "the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties" (Cases 21-24/72, *International Fruit*, at consideration 21).

On this analysis the difference in results (direct effect of the provision of the free trade agreement between the Community and Portugal at issue in *Kupferberg*, no direct effect of the provisions of the GATT) may be explained by the differing contexts and frameworks of the two agreements, which determine whether a provision of the agreement is precise and unconditional.

Petersmann is of the view, however, that the Court should recognize the direct effect of the GATT, because many of its provisions are precise and unconditional and there is in fact no essential difference between the context and framework of the GATT and that of many other international agreements, including free trade agreements such as in *Kupferberg*. See Petersmann, *supra* note 176, 429-36.

(3) Thirdly, although the Court never appears to have articulated this as a reason, it may perhaps be more willing to recognize the direct effect of a bilateral agreement than a multilateral agreement, particularly one with such a large membership as the GATT.

Applying the above analysis to the Agreement on Government Procurement, the most serious obstacle to direct effect of its provisions is perhaps its multilateral nature, and the possible lack of precision of the individual provision in question.

For a comprehensive review of the cases in this area, see *Bebr*, *supra* note 173; Jackson, Louis & Matsushita, *supra* note 5, at 292-96; Bourgeois, *supra* note 3, at 25-26; Petersmann, *supra* note 176.

It may be noted that, in contrast to the approach in the United States, based on the "subjective intent" of the draftsmen or intent of the legislature, criteria for the direct effect of an international agreement in Community Law are much more "objective." Indeed, it appears that the subjective interpretation principle, based on the intention of the parties, has been losing support in international law. See Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1, 9 (1981).

179. See D.P. O'CONNELL, *supra* note 169, at 62-65; J. STARKE, *supra* note 169, at 80-82.

180. See Jackson, Louis & Matsushita, *supra* note 5, at 290; Bourgeois, *supra* note 3, at 24.

3. *Direct Penetration and Application of the Rules of European Community Law*¹⁸¹

The national constitutional laws and judicial attitudes again show considerable variation among the Member States of the European Community, with respect to the direct penetration and application of international law in general.¹⁸² In the case of European Community law, on the other hand, there is largely uniform practice recognizing a very extensive direct penetration and application of the Community legal system within all the Member States.

This uniform practice is essentially the result of three main related factors. First, there is the Court of Justice, which has formulated various propositions of Community law resolving the issues relevant to the direct penetration and application of Community law within the Member States. Second, these doctrines have largely been generally accepted by the national judiciaries. Third, a preliminary ruling procedure is set forth under Article 177 of the EEC Treaty. Each of these factors will now be considered in turn.

a. *Propositions formulated by the Court of Justice.* The various propositions of Community law, which have been formulated by the Court, may be summarized as follows.

The "incorporation" of Community Law and the Community legal system within the Member States. In the view of the Court of Justice, Community law and the Community legal system apply *as such* within a Member State, merely as a result of its entry into the Community. This is clear from the Court's claim in *Costa v. ENEL*:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.¹⁸³

The "direct effect" of provisions of Community law. Although the terminology of the Court is not without ambiguity, it seems that if a provision

181. The subject of this sub-section is discussed generally in Stein, *supra* note 178; Jones, *supra* note 19, at 32-50.

182. For a survey of the constitutional position in the original six Member States, see Bebr, *Law of the European Communities and Municipal Law*, 34 MOD. L. REV. 481, 485-87 (1971); Sasse, *The Common Market: Between International and Municipal Law*, 75 YALE L.J. 695, 705-13, 740-41 (1966); Jones, *supra* note 19, at n.128.

183. Case 6/64 *Costa v. ENEL*, at 593.

of Community law has "direct effect", this means that it directly modifies the legal position of individuals, in particular enabling them directly to invoke the provision against the national authorities.¹⁸⁴ A particular provision of Community law, whether imposing a prohibition, or a duty to take action, may only produce such a "direct effect" if its wording satisfies certain criteria. First, the provision must be clear and unambiguous. Second, it must be unconditional, and in particular its operation must not be dependent upon the expiration of an unexpired time limit, or a discretionary decision-making power within the control of an independent authority, such as a Community institution, or national authorities of a Member State.¹⁸⁵

Regulations, which under Article 189 of the EEC Treaty are "directly applicable", may clearly produce "direct effects" if these criteria are satisfied. In addition, however, despite the opposition of Member State governments, the Court of Justice has extensively recognized the "direct effect" of non-"directly applicable" Treaty provisions,¹⁸⁶ as well as Directives and Decisions addressed to Member States.¹⁸⁷

Indeed, it has been said that the direct effect of provisions of Community law is the rule rather than the exception.¹⁸⁸ In reaching this result the Court of Justice appears to have been influenced largely by two central considerations. First of all, the Court has recognized that the "spirit" of the EEC Treaty involved the creation of a new and autonomous legal order, whose subjects comprise not only Member States but also private individuals.¹⁸⁹ The Court has therefore seen as one of its prime tasks the need to make this new legal order and Community Constitution a living reality, by shaping a Community constitutional law, in particular to guarantee private

184. On the other possible kinds of "direct effect," see *supra* note 170.

185. Compare T. HARTLEY, *supra* note 120, at 190-97.

186. Beginning with Case 26/62 *Van Gend en Loos*.

187. See the evolution of the Court's case law in Case 9/70 *Franz Grad v. Finanzamt Traunstein*, 1970 E. Comm. Ct. J. Rep. 825; Case 41/74 *Yvonne van Duyn v. Home Office*, 1974 E. Comm. Ct. J. Rep. 1337; Case 148/78 *Pubblico Ministero v. Tullio Ratti*, 1979 E. Comm. Ct. J. Rep. 1629; Case 8/81 *Ursula Becker v. Finanzamt Münster-Innenstadt*, 1982 E. Comm. Ct. J. Rep. 53.

The term "directly applicable" in Article 189 appears to mean not only that a regulation requires no further implementing measures to perfect its normative character (it is "legally perfect") but also that, unless authorized by the regulation itself, any such implementing measures, i.e., "transformation" into a national law norm by the national authorities, would in fact be improper. See, in general, the discussion in T. HARTLEY, *supra* note 120, at 201-04.

On the other hand, in the case of many Treaty provisions, as well as Directives and Decisions addressed to Member States, such "transformation" is both envisaged and required.

188. T. HARTLEY, *supra* note 120, at 196.

189. See Case 26/62 *Van Gend en Loos*, at 12.

individuals the "rights which become part of their legal heritage."¹⁹⁰ Secondly, the Court clearly considers that exclusive reliance upon the international dispute settlement and enforcement procedures under Articles 169 and 170 of the EEC Treaty would greatly reduce the effectiveness of Community law, whereas enabling private individuals directly to invoke their rights under Community law before the national courts greatly enhances its effectiveness.¹⁹¹

Consequently, if a purchasing authority in a Member State fails to observe the rules governing intra-Community trade in the area of government procurement, in a suitable case an aggrieved individual could directly invoke the prohibition in Article 30, which the court has already held to be directly effective.¹⁹² In addition, provided that the criteria for "direct effect" are satisfied, the individual may also be able to invoke provisions of the Commission Directive and the Council Coordination Directive.¹⁹³

The "supremacy" of Community law. Despite the absence of any explicit provision in the Treaties providing for the supremacy of Community law over national law in the event of a conflict, the Court of Justice nevertheless takes the view that such a rule is to be implied and has thus unequivocally recognized the absolute and unqualified supremacy of directly effective Community law over conflicting national legislation, prior and subsequent.¹⁹⁴

190. *Id.*

191. *Id.* at 13.

[A] restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Articles 169 and 170 would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.

See also Case 9/70 *Franz Grad*, at 837.

192. See Case 74/76 *Iannelli*, at 575.

193. As well as the "Adaptation" Directive. Cf. Case 76/81 SA *Transporoute et Travaux v. Minister of Public Works*, 1982 E. Comm. Ct. J. Rep. 417 (preliminary ruling on the interpretation of Council Directives 71/304 and 71/305 on the abolition of restrictions on freedom to provide services in respect of public works contracts, and on the coordination of procedures for the award of public works contracts respectively); see *supra* notes 94 and 100. For an annotation on this case, see Gormley, *Public Works Contracts and the Freedom to Provide Services*, 133 NEW LAW J. 533 (1983).

194. Case 6/64 *Costa v. ENEL*; Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E. Comm. Ct. J. Rep. 629. Community Law also prevails over fundamental rights guarantees in the national constitutions.

b. *General acceptance of these propositions by the national judiciaries.* These various propositions of the Court of Justice relating to the incorporation, direct effect and supremacy of Community law have in fact been largely accepted by the national judiciaries in all the Member States.¹⁹⁵ Indeed, in the absence of such acceptance, these doctrines would remain theoretical propositions of law—albeit perfectly “valid” within Community law—made by one system (Community law) about another system (national law).

c. *The preliminary ruling procedure under Article 177 of the EEC Treaty.* The preliminary ruling procedure under Article 177 of the EEC Treaty¹⁹⁶ has played a crucial role in ensuring the effective and extensive direct penetration and application of Community law and the Community legal system within the Member States. The existence of the procedure has given the Court of Justice an opportunity to develop the various doctrines discussed above in two ways. First, under Article 177 the Court possesses jurisdiction *inter alia* to give preliminary rulings on the “interpretation” of the Treaty and acts of the institutions of the Community. The Court has characterized the issues of “direct effect” and “supremacy” as questions of “interpretation” and has thus arrogated to itself jurisdiction to shape the “Community Constitution”. Secondly, the procedure ensures that issues of Community law arising in the national courts do in fact come before the Court of Justice and are resolved in accordance with Community law, so as to ensure the full and uniform application of Community law in all the Member States. This is because a court or tribunal *may* always ask for a preliminary ruling if it considers a decision on the question of Community law necessary to enable it to give judgment, while a court or tribunal of last resort *must* refer such a “necessary” question, unless it has already been decided by the Court in another case.¹⁹⁷

195. See Jones, *supra* note 19, at 46-47.

196. Article 177 of the EEC Treaty provides as follows:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

197. Or unless the correct application of Community law is “so obvious as to leave no

In addition, the better view appears to be that preliminary rulings have effect "*erga omnes*", so that not just the court making the reference but all national courts and tribunals in all the Member States are bound by the ruling even though it is open to them to make another reference to reconsider the question.¹⁹⁸

In general, the creation of such an "organic link" for mutual judicial cooperation between the Court of Justice and *all* the national judiciaries, with the aim of ensuring the *uniform* application of Community law, develops confidence in the system and thus itself helps to generate an attitude of acceptance among the various judiciaries as well as greater respect for the rules of the system in general.

VI. CONCLUSIONS

Attempts have been made at the international level, both within the GATT-MTN system and the European Community, to liberalize international trade and stimulate international competition in the government procurement market by removing the many visible and less visible barriers to such trade and competition which result from national laws, regulations, administrative rules and practices in the area of government purchasing.

Although the GATT itself does not seek to remove such barriers to trade, one of the more significant results of the Tokyo Round of Multilateral Trade Negotiations was the conclusion of an Agreement on Government Procurement, which entered into force on January 1, 1981.¹⁹⁹ This

scope for any reasonable doubt," Case 283/81 CILFIT v. Ministry of Health, 1982 E. Comm. Ct. J. Rep. 3415, 3432. See also the discussion in T. HARTLEY, *supra* note 120, at 269-72.

198. See T. HARTLEY, *supra* note 120, at 280-82. The Court has already established that a preliminary ruling declaring an act of a Community institution invalid has such an *erga omnes* effect. Case 166/80 International Chem. Corp. v. Amministrazione delle Finanze dello Stato, 1981 E. Comm. Ct. J. Rep. 1191, 1223. It has not yet decided, however, whether a preliminary interpretative ruling has such an effect.

199. The U.S. Senate Finance Committee, for example, estimated that the Agreement would open up a new potential market of \$20 billion for U.S. exporters. See S. Rep. No. 249, 96th Cong., 1st Sess., 128, 141, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 381, 514 and 527. The General Accounting Office (GAO), however, has recently published a less encouraging assessment of the commercial value of the Agreement to U.S. companies. According to the GAO report, the Agreement has had "far less commercial value than originally anticipated." Among the reasons given for this result are: the 150,000 SDR threshold cut off; the widespread use of single tendering procedures; repeated instances of non-compliance; the existence of previous agreements and practices that had already opened up foreign government procurement to U.S. companies; the inability of U.S. companies to sell competitively abroad. See, GAO, REPORT NO. GAO/NSIAD-84-117, THE INTERNATIONAL AGREEMENT ON GOVERNMENT PROCUREMENT: AN ASSESSMENT OF ITS COMMERCIAL VALUE AND U.S. GOVERNMENT IMPLEMENTATION, (1984), as summarized in GAO Says Activity Under GATT Procure-

attempt, at the more general international level, to remove barriers to trade in the field of government procurement between signatories to the Agreement, was preceded by measures taken at the regional level within the European Community. The structure of regulation differs, however, within the two systems. Unlike the GATT-MTN system, where the relevant rules are found in a single international agreement, EEC regulation is achieved through a combination of a Treaty provision (Article 30 of the EEC Treaty) and legislative measures in the form of a Commission Directive, adopted to effectuate the prohibition in Article 30, and a Council "Coordination" Directive designed to supplement that prohibition, by coordinating procedures for the award of public supply contracts.

Although the problems faced within the two systems are similar and the solutions comparable, an appreciation of certain vital differences between the two systems is essential, not only for understanding the structure of the systems themselves, but also for assessing the degree of likely compliance with, and effectiveness of, the rules adopted within those systems. Although the focus of this article has been on the removal of barriers to trade in the field of government purchasing, these considerations are clearly of more general application as well.

The European Community represents a unique and particularly intensive form of international cooperation and integration at the regional level, which differs from more traditional international regimes, such as that of the GATT-MTN system, both in the scope of its objectives and activities (i.e., creation of a "common market", not merely liberalization of trade in goods), as well as in the sophistication of its institutional structure for rule formulation and dispute settlement. This institutional structure is characterized by the endowment of "sovereign powers" upon those institutions to regulate the community of Member States and private individuals, as well as by the creation of a well-developed "legal system" which has become an integral part of the legal systems of the Member States.

One result of these vital differences between the two systems is the creation of certain unique problems within the EEC, resulting from the distribution of "sovereign competences" between central and subordinate units of government. The sovereignty of Member States is limited not only in their internal mutual relations (intra-Community trade) but also in their external relations with third countries, since the Community possesses exclusive power under Article 113 in the area of the common commercial

ment Code is Modest, Offers Recommendations, 1 INT'L TRADE REP. CURRENT REPORTS (BNA) 90-91 (July 25, 1984) and *The GATT Agreement on Government Procurement: GAO's Most Recent Assessment*, INT'L PROCUREMENT COMMITTEE REPORT, *supra* note 48, Vol. 2, No. 1 at 9 and 12 (August 1984).

policy.

On the other hand, despite the transfer of "sovereign competences" to the European Community that has already occurred, it is frequently difficult to develop the political will necessary for further relinquishment of Member State sovereignty. Thus the EEC Council adopted a "minimalist" approach in introducing certain more favorable provisions of the MTN Agreement into the intra-Community regime, thereby declining to follow the lead of the Commission, which sought to make use of an opportunity to increase still further the degree of liberalization already achieved. Similarly, national commercial policy measures regarding procurement not covered by the Agreement remain unharmonized in trade with third countries, even though exclusive Community competence in the common commercial policy area may necessitate Community authorization for the maintenance of such differing measures.

A further result of the differences between the two systems is that, as may be expected, the solutions to the problem of barriers to trade in the area of government procurement reflect the different degrees of cooperation and integration. Thus, the scope of regulation is much wider in the EEC, and the rules contained in Article 30 and the various Directives are on the whole stricter and more precisely formulated.

Furthermore, the more highly developed dispute settlement and enforcement mechanisms within the Community system ensure a greater likelihood of compliance with the rules of the system in general and the rules on government procurement in particular. This is not simply due to the superior nature of the "international" dispute settlement and enforcement mechanism under Article 169. Indeed, this mechanism alone is probably inadequate to ensure effective compliance with Community law. Of far greater importance is the largely uniform judicial practice recognizing the extensive direct penetration and application of Community law and the Community legal system within the Member States, which enables the private individual to invoke the "international" rule directly in a suitable case and thereby to enforce the rules of the system as a "private policeman" in a private dispute with the national authorities. This particular feature of the Community system is largely the result of the existence of a Community Court of Justice and an organic link between that Court and the national judiciaries under Article 177 of the EEC Treaty.

By contrast, in the GATT-MTN system, serious deficiencies remain in the international dispute settlement and enforcement mechanism under the Agreement on Government Procurement. In addition, any possibility of direct penetration and application of the rules of the Agreement within the signatory states depends on the varying attitudes of the national judiciaries (including the judiciary of the Community "legal system"). Prospects for effective compliance will therefore depend to a greater extent upon the good

faith of the governments of the signatories. Even within the Community system, with its more highly developed dispute settlement and enforcement mechanisms, the extent of actual compliance with the rules on government procurement is unclear.²⁰⁰

Prospects for effective compliance with the rules of the GATT-MTN system would be enhanced by improvements in the dispute settlement and enforcement mechanisms. It is perhaps unrealistic to expect the creation of judicial mechanisms, for "international" dispute settlement and enforcement (comparable to Article 169), or for ensuring uniform penetration and application of the rules between contracting parties (comparable to Article 177). However, one more modest improvement would be the creation of an impartial body to perform "watchdog" and "prosecutorial" functions, with recourse to another impartial body performing the adjudication function, under a set of more precise procedures operating with greater regard to the rules than to the respective power positions of the parties.²⁰¹ Direct access to the international procedures by the private individual could also be considered.²⁰² Moreover, greater judicial willingness to recognize the direct penetration and application of the GATT and MTN Agreements within the domestic legal systems of contracting parties would also strengthen the GATT-MTN system and increase prospects for effective compliance.²⁰³

200. Cf. Bourgeois, *supra* note 3, at 32.

201. Works relevant to the reform of GATT-MTN dispute settlement and enforcement procedures include: PANEL ON INTERNATIONAL TRADE POLICY AND INSTITUTIONS, AMERICAN SOCIETY OF INTERNATIONAL LAW, STUDIES IN TRANSNATIONAL LEGAL POLICY NO. 12, REMAKING THE SYSTEM OF WORLD TRADE: A PROPOSAL FOR INSTITUTIONAL REFORM (1976), extracted in J. JACKSON, LEGAL PROBLEMS, *supra* note 2, at 375-77; Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 103-105 (1978); Harris, *supra* note 148, at 169-76.

202. See J. Jackson, Louis & Matsushita, *supra* note 5, at 394-96.

203. See *Editorial Comment*, 20 COMMON MKT. L. REV. 393 (1983); Petersmann, *supra* note 176, at 426, 436.