NOTE

UNITED STATES AND JAPANESE GOVERNMENT PROCUREMENT: THE IMPACT ON TRADE RELATIONS

In the decades following World War II, the United States made massive expenditures to rebuild Japan.[1] Once Japan recovered economically from the war, trade between the two countries became increasingly important and mutually beneficial.[2] As a result of internal

1. At the end of the Second World War, the United States undertook two basic projects: the resolution of Japanese security and military problems and the establishment of Japanese economic recovery. *See* C. LEE & H. SATO, U.S. POLICY TOWARD JAPAN AND KOREA: A CHANGING INFLUENCE RELATIONSHIP 2-6 (1982). These two themes became inextricably intertwined.

The United States disarmed and demilitarized Japan at the end of the war. K. LATOURETTE, A SHORT HISTORY OF THE FAR EAST 732 (4th ed. 1964). This action eliminated the need for the Japanese to make massive capital expenditures for military procurement and allowed these funds to be used instead to rebuild the economic structure of the nation. It also committed the United States to the military protection of Japan. *Id.* at 733. The United States further assisted Japanese economic recovery through the expenditure of $2.118 billion in aid from 1945 to 1951. Another $741 million was expended on Allied procurement within Japan during this period. C. LEE & H. SATO, *supra*, at 5.

The presence of American military forces remains noticeable in Japan, although the formal occupation ended in September 1951. K. LATOURETTE, *supra*, at 741-42. In the Mutual Security Treaty of 1960, the United States agreed to defend Japan. In return, Japan agreed to defend its homeland and granted the United States the right to use bases and facilities on Japanese soil. F. GREENE, STRESSES IN U.S.-JAPANESE SECURITY RELATIONS 31-2 (1975). Today, Japan remains unenthusiastic about expanding her military focus beyond the home islands, although Japan recently indicated a willingness to increase its defense expenditures. N.Y. Times, Nov. 9, 1983, at 3, col. 4. *See also* C. LEE & H. SATO, supra at 128. The authors indicate that the United States considers Japan a "free rider." This term means that Japan "failed to assume international responsibilities commensurate with its newly acquired economic power while depending heavily on the United States for its own defense." *Id.*

2. In 1981 and 1982, the United States imported goods from Japan worth $37.61 billion and $37.74 billion; during those two years the United States exported to Japan $21.82 billion and $20.96 billion. 63 BUREAU OF ECONOMIC ANALYSIS, U.S. DEPARTMENT OF COMMERCE, SURVEY OF CURRENT BUSINESS, NO. 11, S16-17 (November 1983).

From the end of World War II until the early 1970s, most industrialized nations had as their international economic policy objective the expansion of access for their goods in foreign markets. J JACKSON, THE LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1 (1977). In the 1950s and 1960s, the United States' share of world trade and world GNP declined as a result of the world recovery from World War II. COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 51-55 (1983). In the 1970s, this decline leveled off and remained constant through 1980. *Id.* at 53. The 1983 Economic Report of the President recognized the recent increase in demands for protectionist policies from American industry and urged that "[t]hese

pressures, each country imposed domestic constraints on private international trade.[3] Antagonism resulted from the belief that Japan adopted more significant restraints than the United States, thereby destroying reciprocity[4] between the two nations. Thus, the belief arose that the United States remained "open" as a mentor of free trade while

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problems must not be allowed to disrupt world trade. If the system comes apart—if the world's nations allow themselves to be caught up in a spiral of retaliatory trade restrictions — a long time may pass before the pieces are put back together." *Id.* at 51. The report also observed that "[d]uring the 1970s the world's market economies became more integrated with each other than ever before. . . . This close linkage of economics was mutually beneficial." *Id.*

3. *See generally Foreign Barriers to U.S. Trade: Hearing Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs, Part II—Merchandise Exports,* 97th Cong., 2d Sess. 11 (1982) (as of March 1982, 27 major food items imported by Japan were subject to import quotas); *U.S.-Japanese Agricultural Trade Relations: Hearing Before the Subcomm. on Foreign Agricultural Policy of the Senate Comm. on Agriculture, Nutrition, and Forestry,* 97th Cong., 2d Sess. 4 (1982) (Japan maintains strict protectionist policies to insure that levels of rural income are consistent with urban incomes); *Japanese and American Economic Policies and U.S. Productivity: Hearing Before the Subcomm. on Monetary and Fiscal Policy and the Subcomm. On Trade, Productivity and Economic Growth of the Joint Economic Comm.*, 97th Cong., 1st Sess. 29 (1981) (explaining "infant industry approach" employed by Japanese government that uses direct government subsidies and protectionist policies to stimulate fledgling industries; once industry develops capability to compete with foreign competitors, Japanese domestic market becomes open to imports); *U.S.-Japanese Economic Relations: Hearings Before the Subcomm. on International Trade, Finance, and Security Economics Comm.,* 97th Cong. 1st Sess. 12 (1981) (documenting Japan's recent advances in computers and industrial robotics); *U.S.-Japanese Trade Regulations: Hearing Before the Joint Economic Comm.,* 96th Cong., 1st Sess. 10 (1979) (describing Japanese automobile distribution system as non-tariff barrier to trade because American manufacturer must sell his products to Japanese firm with existing exclusive dealerships); Borrus, Millstein & Zysman, *International Competition in Advanced Industrial Sectors: Trade Development in the Semiconductor Industry* (1982), *in* STAFF OF THE JOINT ECONOMIC COMM., 97TH CONG., 2D SESS., INTERNATIONAL COMPETITION IN ADVANCED INDUSTRIAL SECTORS: TRADE DEVELOPMENTS IN THE SEMI-CONDUCTOR INDUSTRY 13 (Joint Comm. Print 1982) (noting that the United States' dominance in semiconductor market resulted from "market pull" created by Department of Defense and National Aeronautics and Space Administration, and that Japanese industry had no such "pull"); STAFF OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 2D SESS., GOVERNMENT DECISIONMAKING IN JAPAN: IMPLICATIONS FOR THE UNITED STATES 10, 12 (Comm. Print 1982) (outlining Strauss-Ushiba Agreement in which Japan limited restraints on agricultural imports including citrus and beef); REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, UNITED STATES-JAPAN TRADE: ISSUES AND PROBLEMS 177 (1979) (outlining the practice of the Japanese government and its Ministry of International Trade and Industry (MITI) of isolating key industries and assuring their growth) [hereinafter cited as ISSUES AND PROBLEMS].

4. In the context of international trade, reciprocity means "a mutual exchange of trade or other concessions or privileges (as reduction of tariff rates and liberalization of quota and ex-

Japan fostered a "closed" market.[5] Although both nations endorsed

change restrictions) between two countries." WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 1895 (16th ed. 1971). A more detailed definition is

> . . .it is a tactic, it is a means to our free market goal, not an end in itself.
> The idea of reciprocity can best be summarized by a series of principles:
> It is intended to open others' doors, not shut ours.
> It is concerned with market access, not absolute trade levels or bilateral balances.
> It approaches trade problems broadly, not sectorally.
> It provides tools which are discretionary, not mandatory.
> It is concerned with barriers to service and investment as well as goods.
> It is directed at many countries, not just Japan.
> It is intended to strengthen the multilateral process, not weaken it.

Trade Reciprocity: Hearings on S.2067, S.2071 and S.2094 Before the Subcomm. on International Trade of the Senate Comm. on Finance, 97th Cong., 2d Sess. 8 (1982) (testimony of Senator John Heinz).

5. The most comprehensive and unbiased research on American-Japanese trade is THE JAPAN-UNITED STATES ECONOMIC RELATIONS GROUP, REPORT OF THE JAPAN-UNITED STATES ECONOMIC RELATIONS GROUP (1981) [hereinafter cited as WISE MEN'S REPORT]. *See also* JAPAN-UNITED STATES ECONOMIC RELATIONS GROUP, SUPPLEMENTAL REPORT OF THE JAPAN-UNITED STATES ECONOMIC RELATIONS GROUP 31 (1981) (warning that the United States has yet to understand the Japanese insecurity regarding its dependence on food imports). Established by a joint communique between Japan's late Prime Minister Ohira and President Carter, the "purpose of the Group is to examine factors affecting the bilateral economic relationship over the longer-run and make recommendations to the President and the Prime Minister designed to strengthen it." *Id.* at *i. See generally* Abbott & Totman, *"Black Ships" and Balance Sheets: The Japenese Market and U.S.-Japan Relations,* 3 NW. J. INT'L L. & BUS. 103, 107 (1981) (the reason for the group's 'balance' lies in its composition: prominent members of Japanese and American business, banking, government and education).

Whether Japan presents a closed or an open market depends greatly on one's perspective; the Japanese consider their market to be open and consider it the American businessman's mistake not to exploit it fully. WISE MEN'S REPORT, *supra*, at 54. While the Japanese feel they present ample opportunities, they perceive a growing sense of protectionism in the United States, as evidenced by the Fair Practices in Automotive Products Act (H.R. 5133). This bill forces all domestic and foreign manufacturers of automobiles that possess a market in the United States to include a certain "domestic content ratio" of American parts and labor in each car produced. The ratio varies according to the number of cars sold in the United States. H.R. REP. No. 842, 97th Cong., 1st Sess. 5 (1982). Because there was a significant increase in the proportion of Japanese automobiles in the United States, from 15.2 percent in the fourth quarter of 1978 to 28.2 percent of the American market in the third quarter of 1980, some saw this legislation as the answer to the United States' auto industry problems. *Id.*

Individuals detached from the auto industry assert that such legislation would disturb the balance of world trade, destroy as many jobs as it creates and "that it would not long be confined to automobiles." N.Y. Times, Aug. 2, 1982, at A14, col. 1. More important, although the House of Representatives amended and later passed the Fair Practices in Automotive Products Act by a roll call vote, 2 CONG. INDEX (CCH) 34,512 (1982), the Reagan Administration remains opposed to it. H.R. REP. NO. 842, *supra*, at 35. Malcolm Baldridge, Secretary of Commerce, and John Block, Secretary of Agriculture, observed that such legislation would be in violation of the United States' commitment to the GATT. *Id.* at 32-33.

For discussions of the Japanese-American tensions resulting from the automobile trade, see generally de Kieffer, *Antitrust and Japanese Auto Quotas,* 8 BROOKLYN J. INT'L L. 59 (1982) (relax-

the General Agreement on Tariffs and Trade (GATT)[6] prior to the rise

ation of Japanese automobile imports reconfirms the importance of American antitrust laws applied in an international context); Note, *Regulating Japanese Automobile Imports: Some Implications of the Voluntary Quota System,* 5 B.C. INT'L & COMP. L. REV. 431 (1982) (discussing voluntary restraint agreements (VRAs) as a method of settlement between two trading partners in which the exporter agrees to limit exports); Note, *An Update of the Japanese Automobile Export Restraint,* 8 BROOKLYN J. INT'L L. 159 (1982) (Japanese compliance with United States' demands for auto import relief not a reaffirmation of American industrial and economic superiority).

Some American businessmen claim that the Japanese market remains closed but admit the presence of signs of improvement. In the tobacco and leather industries, however, American sellers encounter a market closed by high tariffs and low import quotas. STAFF OF THE HOUSE SUBCOMM. ON TRADE OF THE COMM. ON WAYS AND MEANS, 95TH CONG., 2D SESS., TASK FORCE REPORT ON UNITED STATES-JAPAN TRADE 39-41 (Comm. Print 1979) (documenting Japanese practice of importing raw products, such as leather and tobacco leaf, yet requiring the Japanese industry to provide high value-added finishing of the products) [hereinafter cited as TASK FORCE]. On April 17, 1984, the Japanese agreed to substantial increases in imports from the U.S. for citrus and beef. *Japan Agrees to Buy More U.S. Beef, Citrus U.S., Industry Drop Plans to File Complaints,* INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 27, at 838 (Apr. 10, 1984).

6. The General Agreement on Tariffs and Trade (GATT) describes either the agreement or the institution. Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade,* 80 YALE L.J. 1299, 1299 n.2 (1971).

During World War II, the United States became the principal impetus behind the creation of the International Trade Organization (ITO) and GATT. J. JACKSON, *supra* note 2, at 396. "The ITO was to have been the twin of the International Monetary Fund, a specialized agency of the United Nations dealing with the non-monetary side of economic affairs — trade, economic development, commodity agreements, restrictive business practices and employment policy." Hudec, *supra*, at 1302 n.7. Although GATT focuses on tariff negotiations, the framers intended it to be part of the larger framework of ITO. Comment, *GATT and the Tokyo Round: Legal Implications of the New Trade Agreement,* 11 CAL. W. INT'L L.J. 302, 302 n.3 (1981). The designers did not intend GATT to become an organization. Moreover, Congress objected to the creation of such an organization in hearings before the House Ways and Means Committee and the Senate Finance Committee because the Executive did not possess the authority to place the United States in an international organization without congressional approval. J. JACKSON, *supra* note 2, at 397. This congressional resistence and the fading "aura of cooperation" in America immediately following the war, caused the ITO charter to fail in Congress. *Id.* at 398. Nonetheless, GATT eventually evolved as an institution and sponsored a number of negotiations. *Id.* At last count, 117 countries, accounting for over 80 percent of world trade, had signed the GATT. Ribicoff, *The U.S. Trade Agreements Act of 1979,* 8 BROOKLYN J. INT'L L. 3, 3 (1982).

The scope of GATT, as an agreement, is very broad. The focus of GATT lies in Article II, which contains the tariff schedules and outlines the commitments by each nation to minimize the size of tariffs on imports. J. JACKSON, *supra* note 2, at 399. Article XIX, an article the United States demanded, restricts the scope of Article II by presenting an escape or safeguard clause. Merciai, *Safeguard Measures in GATT,* 15 J. WORLD TRADE L. 41, 42 (1981). Article XIX provides

> 1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as maybe

of current domestic protectionist pressures, both nations welcomed the Multilateral Trade Negotiations (MTN)[7] as an additional means of improving international trade relations.

This Note focuses on the improvement of international trade relations through the use of one aspect of the MTN, the Government Procurement Code (Code).[8] Part one analyzes the continued protectionist policies of the United States and Japan and the impact of these policies on trade relations between the two countries.[9] Part two discusses the relevant portions of the Code and the ways those sections altered methods of government procurement.[10] Part three discusses the recent eas-

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necessary to prevent or remedy such injury, *to suspend the obligation in whole or in part or to withdraw or modify the concession*.

J. JACKSON, DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 34 (1977) (emphasis added). As Merciai observed, "the objective [of Article XIX and other similar escape clauses] is to enable a government to aid a certain industry which is no longer internationally competitive." Merciai, *supra*, at 41. *See infra* notes 109-10 and accompanying text.

7. The MTN resulted from the Tokyo Round that lasted five and one-half years and ended in April 1979. It was one round in a series of amendments to GATT. Comment, *supra* note 6, at 302. In addition to a Government Procurement Code, discussed *infra*, the MTN outlines various codes of conduct regulating non-tariff barriers to trade. These include codes on subsidies/countervailing measures, antidumping, customs valuation, technical barriers to trade, import licensing procedures, trade in civil aircraft, international dairy arrangement and bovine meat arrangement. STAFF OF THE HOUSE COMM. ON WAYS AND MEANS AND SENATE COMM. ON FINANCE, 96TH CONG., 1ST SESS., MULTILATERAL TRADE NEGOTIATIONS-INTERNATIONAL CODES AGREED TO IN GENEVA, SWITZERLAND V (Joint Comm. Print 1979) [hereinafter cited as INTERNATIONAL CODES].

8. The Code standardized methods of government procurement of capital goods. The federal government possesses the authority to purchase from foreign manufacturers pursuant to the Trade Agreements Act of 1979, 19 U.S.C. §§ 2511-2518 (1982).

According to the preamble of the first revision, the Government Procurement Code reduces or eliminates "non-tariff measures or, where this is not appropriate, their trade restricting or distorting effects, and. . .bring[s] such measures under more effective international discipline." INTERNATIONAL CODES, *supra* note 7, at 132. In addition, the preamble expresses the concern "that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement." *Id.* The thrust of the preamble, therefore, is that signatory nations will not discriminate against the products of other signatory nations. *International Trade Administration, U.S. Department of Commerce, Agreement on Government Procurement: A Descriptive Summary, reprinted in Impact of Non-Tariff Barriers on the Ability of Small Business to Export to Japan: Hearing Before the Senate Select Comm. on Small Business,* 96th Cong., 2d Sess. 120-21 (1980) [hereinafter cited as *Intern. Trade Admin.*]. The Code seeks to lessen non-tariff barriers to trade by businesses in signatory nations and affects at least twenty-one nations. Anthony & Hagerty, *Cautious Optimism as a Guide to Foreign Government Procurement,* 11 LAW & POL'Y INT'L BUS. 1301, 1301 (1979). For a discussion of the Code's attempt to eliminate discriminatory practices, see *infra* notes 125-57 and accompanying text.

9. *See infra* notes 13-110 and accompanying text.

10. *See infra* notes 111-64 and accompanying text.

ing of barriers to government procurement pursuant to the Code in the telecommunications network of Japan, through the Nippon Telephone and Telegraph (NTT) Agreement.[11] Part four concludes that the NTT Agreement illustrates the benefits to both countries through the reduction of domestic restraints and urges the federal government to lessen barriers to government procurement by eliminating such inefficient protectionist legislation as the Buy American Act and the state buy-national laws.[12]

I. GOVERNMENT PROCUREMENT IN THE UNITED STATES AND JAPAN

Although the United States agreed to reduce barriers to government procurement when it signed the Code, many domestic restraints remain. The Code must exist in harmony with federal laws. Yet, the Buy American Act,[13] Trade Agreements Act of 1979[14] and general government procurement procedures[15] clearly conflict with the general purpose of the Code.[16] In addition, some states use buy-national or buy-local laws that create a secondary level of government procurement barriers to foreign suppliers.[17]

The Japanese constructed significant barriers to government procurement before the Code.[18] Gradually, however, the Japanese government reevaluated and reduced some of these barriers. This change in policy resulted in its acceptance of the MTN Code.[19]

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11. *See infra* notes 165-81 and accompanying text.

12. *See infra* notes 182-88 and accompanying text.

13. 41 U.S.C. § 10a-d (1976).

14. 19 U.S.C. §§ 2501-2582 (Supp. V 1981).

15. 41 U.S.C. §§ 251-260 (1976).

16. These laws form a net of protectionist policies for American industry. Protectionism is

> [i]n public commercial law, a system by which a government imposes customs duties upon commodities of foreign origin or manufacture when imported into the country, for the purpose of stimulating and developing the home production of the same or equivalent articles, by discouraging the importation of foreign goods, or by raising the price of foreign commodities to a point at which the home producers can successfully compete with them.

BLACK'S LAW DICTIONARY 1100 (rev. 5th ed. 1979).

17. *See infra* notes 69-78 and accompanying text.

18. *See infra* notes 95-107 and accompanying text.

19. *See infra* notes 105-07 and accompanying text.

A. The Buy American Act

In response to the unemployment pains of the Depression,[20] Congress enacted the Buy American Act (Act)[21] to restrict foreign competition for government procurement contracts. Although the Act purports to insure that all government procurement contracts contain "domestic source end products,"[22] it also possesses many restrictions on this broad purpose. For instance, it requires purchases to be consistent with the public interest.[23] Many procuring entities use this requirement as an exception to allow them to make foreign purchases.[24] In addition, the

20. Senator Johnson (California) introduced the Buy American Act as an amendment to appropriations bill H.R. 13520 during the Depression. From the floor of the Senate, Senator Davis (Pennsylvania) claimed that "[t]he adoption of this amendment will mean work for our workers. It will help stem the tide of foreign competition and thus prevent further reduction of wages of the American worker." 76 CONG. REC. 2985 (1933). A lack of unanimity existed, however, on the merits of the proposed bill. Senator Gore (Oklahoma) claimed "[the Act] will but protract this depression, will multiply and aggravate its evils. . . . Trade in its very nature is reciprocal. Trade cannot be ex parte. Trade can not be a one-way highway." 76 CONG. REC. 3178-79 (1933). It becomes obvious that the United States government sought to protect those weak industries from foreign competition, rather than to take positive actions to improve the competitiveness of those industries. *See supra* note 6 and accompanying text.

21. 41 U.S.C § 10a d (1976).

22. The definition of "end product" is

> articles, materials, and supplies which are to be acquired for public use. As to a given contract, the end products are the items to be delivered to the Government, as specified in the contract, including articles, materials, and supplies to be acquired by the Government for public use in connection with service contracts.

41 C.F.R. § 1-6.101(a) (1982). The phrase "to be delivered" is central to this definition. *See infra* note 34.

"Domestic source end product" is

> an unmanufactured end product which has been mined or produced in the United States, or an end product manufactured in the United States if the cost of its components which are mined, produced or manufactured in the United States exceeds 50 percent of the cost of all its components. The cost of components shall include transportation costs to the place of incorporation into the end product and, in the case of components of foreign origin, duty (whether or not a duty-free entry certificate may be issued).

41 C.F.R. § 1-6.101(d) (1982). There are two distinct inquiries: whether the end product's components are less than 50 percent foreign and whether the end product is manufactured in the United States or abroad. *See* Textron, Inc. v. Adams, 493 F. Supp. 824, 831 (D.D.C. 1980).

23. 41 U.S.C. § 10a (1976).

24. Gantt & Speck, *Domestic v. Foreign Trade Problems in Federal Government Contracting: Buy American Act and Executive Order,* 7 J. PUB. L. 378, 390 (1958). These authors claim that as long as the public interest exception is broad enough to include all other exceptions to the Buy American Act, *see infra* notes 25-28 and accompanying text, the public interest exception presents "an undefined catchall to apply where general policy dictates an exception from the Act." *Id.* at 390. *See generally* Buy American Act — Supply and Service Contracts, 41 C.F.R. § 1-6.103-3 (1982) (public interest exception also appies to supply and service contracts).

For litigation involving the public interest exception, see Self-Powered Lighting, Ltd. v. United

statute applies only to goods manufactured "substantially all," or seventy-five percent, from American resources.[25] Finally, the Act fails to apply if the goods are unavailable[26] or if the acquisition is unreasonably expensive[27] or impracticable.[28]

Following World War II, commentators attacked the Act because it placed restraints on American foreign policy.[29] President Eisenhower further restricted the applicability of the Buy American Act in an Executive Order.[30] First, the Order reduced the "substantially all" require-

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States, 492 F. Supp. 1267 (S.D.N.Y. 1980) (negotiated bidding and subsequent award to foreign bidders best served the public interest when procurement officer believed only a few companies would bid on the contract); *In re* Brown Boveri Corp., 56 Op. Comp. Gen. 596 (1977) (upholding government's discretionary refusal to make award to foreign supplier despite understanding between Department of Defense and foreign government); Campbell Chain, 51 Op. Comp. Gen. 195 (1971) (decisions concerning question of public interest dictates an application of the Buy American Act and also presents a discretionary decision for the head of the procuring government agency).

25. 41 U.S.C. § 10a-b(a) (1976). The "substantially all" requirement also applies to materials used in construction contracts. *Id.* § 10b(a).

The first buy national bills introduced in Congress, H.R. 10743 by Congressman Wilson and S. 5411 by Senator Steiwer, required "wholly" manufactured American goods as opposed to "substantially all." *See* 76 CONG. REC. 2072 (1933). When Senator Johnson introduced his amendment to H.R. 13520 that requested only a "substantially all" provision, *see supra* note 20 and accompanying text, Congress realized that it was a more moderate approach than the Wilson-Steiwer bills. *Id.*

26. 41 U.S.C. § 10a (1976). The Buy American Act does not apply to goods and products that "are not mined, produced or manufactured, as the case may be, in the United States *in sufficient and reasonably available commercial quantities* and of a satisfactory quality." *Id.* (emphasis added). *See In re* Maremont Corp., 55 Op. Comp. Gen. 1362 (1976) (machine guns); 32 Op. Comp. Gen. 233 (1952) (copper); 21 Op. Comp. Gen. 298 (1941) (aluminum). These examples illustrate perhaps the most widely used and least understood exception. Gantt & Speck, *supra* note 23, at 392. *See also* Buy American Act — Supply and Service Contracts, 41 C.F.R. § 1-6.103-2 (1982) (applying sufficient quantities criterion).

27. 41 U.S.C. § 10b(a) (1976).

28. *Id.* The expense and impracticable exceptions are in a stipulation to § 10b(a):

> *Provided, however*, that if the head of the department . . . making the contract shall find that in respect to some particular articles, materials or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular article . . . .

Id.

See, e.g., 39 Op. Comp. Gen. 309 (1959) (head of procuring agency with sole discretion to find domestic supplier's bid exceeding foreign bid by 43% "unreasonable"); 39 Op. Comp. Gen. 435 (1959) (holding foreign bid acceptable when 36% under domestic bid).

29. Gantt & Speck, *supra* note 24, at 397.

30. Exec. Order No. 10,582, 3 C.F.R. 96 (1954), *reprinted in* 41 U.S.C. § 10d (1976). President Kennedy later modified this executive order to require the Director of the Office of Emergency Planning to provide advice about government procurement if national security interests were involved. Exec. Order No. 11,051, 3 C.F.R. 635 (1962) at § 603(e).

ment to fifty percent.[31] Second, the Order declared that a domestic bid qualifies as unreasonable or inconsistent with the public interest if it exceeds the cost of a foreign bid by six percent, resulting in the award of the contract to the foreign supplier.[32] Third, the Order required a procuring authority to reject a foreign bid if that contract involved a product costing less than $25,000 and the domestic bid exceeded the foreign bid by less than ten percent of the cost of the foreign product.[33]

As these exceptions illustrate, the Buy American Act possesses a limited scope. Despite its inherent restrictions, however, it continues to regulate business procedures in a manner contrary to the methods outlined by the MTN Government Procurement Code.[34] The labyrinth of Buy American regulations fosters parochial favoritism that, in turn, obstructs the operation of the MTN Government Procurement Code.

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31. Exec. Order No. 10,582, *supra* note 30, § 2(a).

32. *Id.* § 2(b)-(c)(1). *See infra* note 33.

33. *Id.* § 2(b)-(c)(2).

Subsequently, the federal government approved two changes in the Buy American Act that favored domestic suppliers. First, if the domestic supplier qualifies as a small business concern or conducts business in a labor surplus area, the procuring entity applies a twelve percent factor instead of the six percent factor. Buy American Act—Supply and Service Contracts, 71 C.F.R. § 1-6.104-4(b) (1982). Therefore, the domestic supplier may receive the contract even though it exceeds the foreign bid by up to twelve percent. The head of the procuring agency makes the decision to award the contract to the domestic supplier in these situations. *Id.* Second, if an adjusted foreign bid equals a domestic bid, the purchasing authority will award the contract to the domestic supplier. *Id.*

34. Recently, for example, in Allis-Chalmers Corp. v. Friedkin, 481 F. Supp. 1256 (M.D. Pa.), *aff'd*, 635 F.2d 248 (3d Cir. 1980), a government agency only continued to consider a domestic bid in the face of a lower Japanese bid because of the six percent adjustment factor of the Act. The case involved a federal government contract for the construction of a hydroelectric plant procured by the United States Section of the International Boundary and Water Commission (Section) and aided by the Army Corps of Engineers (Corps). *Id.* at 250. Pursuant to a complicated bidding process, in March 1979 the plaintiff (Allis-Chalmers) submitted an adjusted bid excluding service costs of just over $3,768 million, while Hitachi America submitted the lowest foreign bid of $3.4 million including service changes. *Id.* at 250-51. The Buy American Act subjected the Hitachi bid to a surcharge of either six or twelve percent. *Id.* at 251. After checking with the Department of Labor, the Corps found that Allis-Chalmers conducted business in a labor surplus area requiring the addition of the 12 percent factor to Hitachi's bid. *Id.* Hitachi's final and adjusted bid, including service costs, was approximately $20,000 less than Allis-Chalmers' bid. *Id.* at 251-52. The Section agreed with the Corps' recommendation to award the contract to Hitachi, but decided that the six percent factor was appropriate. *Id.* at 252. Allis-Chalmers protested these findings to the Comptroller General, who denied the protest and affirmed the award of the contract to Hitachi. *Id.*

Subsequently, Allis-Chalmers sued for a temporary restraining order and a preliminary injunction at the district court. 481 F. Supp. at 1262. The court denied the request, *id.* at 1269, and the court of appeals affirmed the denial of the motion in December 1980. 635 F.2d at 257. Thus, Allis-Chalmers delayed the award of the contract for almost two years.

B. The Trade Agreements Act of 1979

Although the Buy American Act continues to affect the government's procurement of foreign goods, the Trade Agreements Act of 1979[35] (Trade Act), which implemented the MTN Government Procurement Code,[36] enables the President to waive partially or fully[37] any law of the United States that would discriminate between products of domestic and foreign suppliers or among foreign suppliers.[38] It also allows the President to withdraw such a waiver.[39] In order to expand the coverage of the Code, the Trade Act permits the President to designate countries and instrumentalities that would reciprocate by providing equal access to government procurement contracts for United States suppliers.[40]

In 1980, another Executive Order radically altered the structure of the Trade Act by delegating all of the functions reserved to the President under the Act to the United States Trade Representative (USTR).[41] In addition, the Order lists the executive agencies subject to

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35. 19 U.S.C. §§ 2501-2582 (Supp. V 1981).

36. *Id.* §§ 2511-2518

37. *Id.* § 2511(a).

38. *Id.* Section 2511 of the Trade Agreements Act states

> [t]he President may waive, in whole or in part, with respect to eligible products of any foreign country or instrumentality . . ., the application of any law, . . . that would, if applied to such products and suppliers, result in treatment less favorable than that accorded—
>
> (1) to United States products and suppliers of such products; or
>
> (2) to eligible products of another foreign country or instrumentality which is a party to the Agreement and suppliers of such products.

Id. The language and intent of this section parallels part V of the Code that endorses the nondiscrimination and transparency of the open tender procedure. *See infra* notes 139-43. More important, however, this provision permits the President to waive the Buy American Act. *See supra* notes 20-34 and accompanying text.

39. *Id.* § 2511(c).

40. *Id.* § 2511(b). The President may place nations into three categories: least developed countries that do not have to implement reciprocal benefits, major industrial nations that are signatories to the Code, and all other nations that agree to institute reciprocal benefits. *Id.*

41. Exec. Order No. 12,260, 46 Fed. Reg. 1,653 (1980), *reprinted in* 19 U.S.C. § 2511 (Supp. V 1981). As a result of this delegation, the President has no formal powers regarding government procurement pursuant to the Act, even though the President may rescind the delegation of these powers. The text of the Act still attributes the powers of the Act to the President. This Note, however, acknowledges the role of the USTR by substituting that title for the President's.

The function of the USTR was

> for developing, and for coordinating the implementation of, United States international trade policy, including commodity matters and, to the extent they are related to international trade policy, direct investment matters. The Trade Representative shall serve as the principal advisor to the President on international trade policy and shall advise the

the Code[42] and provides that the USTR will consult with potential procuring agencies.[43]

The Trade Act encourages nations to become signatories to the MTN Government Procurement Code.[44] It grants the USTR the authority to entice non-signatory nations to implement the Code by offering them conditional most-favored nation status, a condition generally available only to signatories of the Code.[45] The USTR also has the power to implement procurement restrictions on the products of non-signatory nations,[46] but must report such restrictions to Congress[47] and recommend legislation to increase the levels of procurement trade with these sanctioned nations.[48]

The Trade Act also delimits the objectives of the renegotiation of procurement agreements pursuant to the MTN Government Procure-

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President on the impact of other policies of the United States government or international trade.

Reorganization of Functions Relating to International Trade, Reorganization Plan No. 3 of 1979, § 1, 93 Stat. 1381, 1381 (1979).

42. Exec. Order No. 12,260, *supra* note 41, § 1-101 and annex.

43. *Id.* § 1-105.

44. *See* 19 U.S.C. § 2512(b) (Supp. V 1981) (succinctly stating this policy consideration).

45. *Id.* § 2512(a)(1).

46. This provision also prohibits domestic procuring entities from purchasing supplies from countries that failed to sign the Code. *See infra* note 131. To mitigate the harshness of this rule, the Act permits the USTR to waive the restraints on government procurement from non-signatory nations for two years. 19 U.S.C. § 2512(b) (Supp. V 1981). The Act also lists required procedures for procuring agencies when considering the appropriateness of a waiver. *Id.* §§ 2512(b)(1)-(3). These requirements include possible waiver of the prohibition by the USTR for a maximum of two years; waiver by the agency head, subject to interagency review, made on a case by case basis "when in the national interest;" and possible waiver by the Secretary of Defense of the procurement restrictions on a nation that entered into a reciprocal agreement with the Department of Defense. *Id.*

47. *Id.* § 2512(c)(1). The USTR reports the implementation of procurement restrictions to the House Committee on Ways and Means and the Committee on Government Operations, as well as to the Senate Committees on Finance and Government Affairs. *Id.* This preliminary report must include an evaluation of alternative means needed to obtain equity and reciprocity; the impact of these alternatives on employment, production and inflation; and an evaluation of the impact of the Buy American Act in labor surplus areas. *Id.* § 2512(c)(2). After this preliminary report, the USTR submits a final report containing the actions deemed necessary to improve procurement trade with the sanctioned countries to the same congressional committees. *Id.* § 2512(d)(1). *See infra* note 54.

48. *Id.* § 2512(d)(1). Thus, the Act consciously attempts to bring developing nations under the Code. *Id.* § 2512(c)(1). Prior to the delegation of all authority to the USTR pursuant to Executive Order 12,260, the President had the power to submit legislation to Congress that would implement these policies. *Id.* § 2512(d)(2). Because the USTR has no power to introduce legislation, one must assume that the USTR recommends legislation to the President, who subsequently introduces a bill into Congress.

ment Code.[49] The USTR seeks those products that facilitate government procurement, the "appropriate product sectors,"[50] and attempts to verify information provided pursuant to the Code[51] before recommending renegotiation of a procurement agreement. The USTR also takes precautionary steps if the renegotiations appear to be approaching a deadlock.[52] Once the respective governments negotiate or renegotiate the procurement agreements, the Trade Act provides monitoring[53] and enforcement[54] procedures. After a two year monitoring period, the USTR submits an evaluative case study to Congress

49. *Id.* § 2514(a). For the review process pursuant to part IX paragraph 6 of the Code, see infra note 116.

50. 19 U.S.C. § 2514(b). The Act fails to define "appropriate product sectors." It states that "[t]he President shall seek, . . . with respect to appropriate product sectors, competitive opportunities for the export of United States products to the developed countries of the world equivalent to the competitive opportunities afforded by the United States. . . ." *Id.* From the context of this section, "appropriate product sectors" refers to a broad category of products, void of unreasonable specifications, appropriate to faciliate increased government procurement.

51. *Id.* § 2514(c). *See infra* notes 149-53 and accompanying text. Part VI, paragraph 9 of the Code provides that signatory nations will supply the Committee on Government Procurement, *see infra* text accompanying notes 154-57, with the appropriate statistics on annual government procurement contracts. The Committee compiles this information and the USTR then makes it available to Congress. 19 U.S.C. § 2517 (Supp. V 1981). The report includes the global statistics on the value of the contracts awarded above and below the 150,000 SDR threshold, *see infra* note 124, statistics on the number and value of contracts above the threshold broken down according to the type of product, and statistics on the number and value of contracts awarded by the single tender method pursuant to part V paragraph 15 of the Code.

52. 19 U.S.C. § 2514(d)(1) (Supp. V 1981). The precautionary steps include notification by the USTR to the congressional committees listed in § 2512(c)(1) of the reasons for deadlock and the possible solutions, as well as the introduction of corrective legislation. *Id.* § 2514(d)(2)-(3).

53. *Id.* § 2515(a). The Act requires close attention to the tendering procedures employed by those countries for which the United States waived the Code pursuant to Section 2511(b). *Id.* The monitoring procedure of this section requires the Secretary of the Treasury or his delegate to issue advisory opinions on whether the procured product is "foreign." *Id.* § 2515(b)(1). The determination of whether a product qualifies as foreign arises from a "rules of origin" test. As defined,

> [a]n article is a product of a country or instrumentality only if (i) it is wholly the growth, product or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character or use distinct from that of the article or articles from which it was so transformed.

Id. § 2518(4)(B). If an article qualifies as foreign according to the rules of origin and if the country is nonsignatory to the Code, the USTR may waive the application of restrictive procurement laws pursuant to § 2511(a) if the nation qualifies under § 2511(b).

54. *Id.* § 2515(a). If evidence of fraudulent conduct in the determination of a product's origin arises during the monitoring process, the United States may initiate criminal proceedings. *Id.* § 2515(b)(2). According to 18 U.S.C. § 1001 (1976), any person who willfully schemes against or defrauds a department or agency of the United Staes federal government by false "statement or

recommending actions to improve foreign procurement of United States' exports.[55] Another USTR report informs Congress of the economic impact of waiver of the Buy American Act in labor surplus areas.[56]

The reports of the USTR to Congress under the Trade Agreement Act of 1979 remain integral to the support of the policy objectives of encouraging nations to become signatories to the MTN Code and of lessening barriers to government procurement among signatory nations. The Trade Agreement Act's waiver of the Buy American Act illustrates Congress' anticipation of increased reciprocal government procurement trade. By implication, therefore, it acknowledged the ineffectiveness of protectionist legislation.[57]

C. The United States' Government Procurement Procedures

While the Trade Agreement Act of 1979 implemented the MTN Government Procurement Code, it failed to alter significantly the United States' general government procurement procedures that conflict with the Code. These procurement practices have as their foundation the open method of tender. Section 252(c) of Title 41 of the United States Code requires procuring agencies to make all purchases and contracts by advertisement,[58] resulting in a potentially large number of bidders and suppliers. The director of the procuring agency, however, may avoid compliance with the advertisement requirements in a number of specific instances.[59] If one of those exceptions applies,

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entry" is subject to a $10,000 fine or five years imprisonment. The existence of criminal sanctions emphasizes the importance of the rules of origin. *See supra* note 53 and accompanying text.

55. *Id.* § 2515(c). This report includes recommendations, both legislative and executive, on necessary improvements and simplifications of administrative practices for government procurement, as well as recommendations to improve foreign procurement of United States' exports. *Id.* § 2515(c)(1)-(2).

56. *Id.* § 2516(a)-(b). Exec. Order No. 12,073, 43 Fed. Reg. 36,873 (1978) requires executive agencies to emphasize government procurement in labor surplus areas. *Id.* § 1-101. The Administrator of the General Services Administration coordinates this effort and establishes targets for the executive agencies. *Id.* § 1-101 to -102. The Secretary of Labor designates those areas as labor surplus areas. *Id.* § 1-301.

57. *See supra* note 6 and accompanying text.

58. 41 U.S.C. § 252(c) (1976).

59. *Id.* The circumstances that mandate a waiver of the advertisement requirement include a national emergency, a contract with a value of less than $10,000, a contract involving medicine, a need for personal or professional services, or an event making the securing of competition impractical. *Id.* §§ 252(c)(1)-(15). The discretion whether to waive the advertising requirement lies with the agency head.

the agency must use a negotiated contract.[60] If these exceptions do not apply, the agency must comply with certain requirements. First, the procuring entity must publish the advertisement sufficiently far in advance of the date of award of the contract to ensure open competition.[61] Second, the agency must open all bids at the time and place specified in the advertisement, and award the contract within a reasonable period of time to the seller who presents the bid most advantageous to the government.[62]

Thus, procurement pursuant to this statute demands, with limited exceptions, that all contracting by the departments and agencies of the United States government be initiated by advertisement. The Code, however, allows selective and single tender in rare instances.[63] Therefore, the government procurement statute and the Code direct federal agencies to procure products differently.[64]

D. State Procurement Policies

In addition to the federal laws and practices that restrict the importation of foreign goods and products, most states passed laws that create a secondary level of non-tariff barriers. A majority of states require their governmental agencies to provide preferential treatment to local products when purchasing raw materials, labor or finished goods.[65]

60. *Id.* § 254(c) (1976). The single-negotiated tender provides the procuring entity with an opportunity to enter direct negotiations with a potential seller absent competitive bidding. *See infra* notes 137-48 and accompanying text.

61. *Id.* § 253(a).

62. *Id.* § 253(b).

63. *See infra* notes 140-41 and accompanying text.

64. STAFF OF THE SUBCOMM. ON INTERNATIONAL TRADE OF THE SENATE COMM. ON FINANCE, 96TH CONG., 1ST SESS., MTN STUDIES, PART 6-3: AGREEMENTS BEING NEGOTIATED AT THE MULTILATERAL TRADE NEGOTIATIONS IN GENEVA-U.S. INTERNATIONAL TRADE COMMISSION INVESTIGATION NO. 332-101, ANALYSIS OF NONTARIFF AGREEMENTS: AGREEMENT ON GOVERNMENT PROCUREMENT 325-29 (Comm. Print 1979) [hereinafter cited as MTN STUDIES].

65. Twenty-eight states have some form of a parochial procurement law. *See* ALA. CODE § 41-16-57(b) (1982) (preference for commodities produced or sold in Alabama if without loss in quality or price); ALASKA ADMIN. CODE tit. 2, § 15.080 (Oct. 1976) (bidder preference; preference for Alaskan goods repealed in 1976); ARIZ. REV. STAT. ANN. §§ 34-241 to -246 (Supp. 1982-1983) (political subdivisions of the state must favor bidders who purchase through Arizona dealers or furnish material produced in state, as long as competing bid is not cheaper than resident bid by more than five percent, all other things being equal); ARK. STAT. ANN. § 14-294(b) (Supp. 1981) (public agencies purchasing commodities by competitive bidding must accept lowest bid of an Arkansas resident if bid is not in excess of five percent of lowest bid of a foreign firm and Arkansas firms made written claim for preference when submitting the bids); COLO. REV. STAT. §§ 8-17-101 to 8-8-103 (1973 & Supp. 1982) (preference for Colorado labor on public works and prefer-

While the details of these parochial laws vary among the states, their common purpose remains to protect local labor and industries from

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ence for state materials in government contracts); FLA. STAT. ANN. § 255.20 (West 1975) (only wood grown and finished in Florida may be used in public construction unless insufficient quantities available); GA. CODE ANN. §§ 40-1903, 40-1920 (1975) (preference for goods produced, manufactured or sold in Georgia if without a sacrifice of quality or price); HAWAII REV. STAT. §§ 103-42 to -46 (1976 & Supp. 1982) (dividing state products into three classes with corresponding percentages of excess allowed over foreign bids while maintaining a preference); ILL. ANN. STAT. ch. 127, § 132.6(11(a-1) to (a-3(f)) (Smith-Hurd 1981) (preference for domestic bidders over bidder from any state that gives or requires domestic preference); IOWA CODE ANN. § 73.1-11 (West 1973 & Supp. 1982-83) (state purchasing agencies must use only products grown and coal produced in Iowa if available in marketable quanities without sacrificing suitability or cost); LA. REV. STAT. ANN. §§ 38:2225, 29:1595 (West Supp. 1983) (preference for food products grown or harvested in Louisiana and adjoining coastal waters and contracts for public works made with domestic bidders); ME. REV. STAT. ANN. tit. 5, § 1816(10) (1979 & Supp. 1982) (completely discretionary domestic preference); MD. ANN. CODE art. 21 § 8-301 (1957 & Supp. 1982) (preference when purchasing supplies for the state and awarding construction contracts — the latter only if the state of the non-domestic bidder has a preference policy and Maryland firm's bid does not exceed the low non-domestic bid by more than two percent); MASS. GEN. LAWS ANN. ch. 7, § 22(17) (West 1976) (preference first for Massachusetts goods and supplies, all other things being equal, and second for goods produced in the United States); MO. ANN. STAT. §§ 34.060-.100 (Vernon 1969) (state purchasing agent must prefer all commodities manufactured, mined, produced or grown in Missouri and businesses operating as Missouri firms if the product offered is of equal or better quality and equal or less price); MONT. CODE ANN. §§ 18-1-111 to -112 (1981) (forbidding department of revenue from showing any partiality in making awards except when price and quality of goods offered are equal); NEB. REV. STAT. §§ 73-101.01-.02 (1981) (providing resident bidder with preference over non-resident bidder from a state that provides preferences, by a margin equal to the preference of the other state); NEV. REV. STAT. § 333.300(3) (1979) (preference given to supplier who buys goods from or sells goods through Nevada dealer if the two bids are identical and furnished by non-resident bidders); N.M. STAT. ANN. §§ 13-4-5 to -7 (1978) (requiring New Mexico softwood in public buildings and preferring products produced, manufactured or grown in New Mexico unless authorities feel producers, manufacturers or growers have formed a price-fixing trust); N.C. GEN. STAT. § 143-59 (1983) (product preference if no loss in quality or price and if practicable); N.D. CENT. CODE §§ 43-07-20, 48-02-10 (1978) (favoritism for products and labor from North Dakota in state contracts, with preference given first to honorably discharged disabled veterans); OR. REV. STAT. § 279.021 (1981) (public contracting agency must prefer goods or services manufactured or produced in Oregon if equal in price, suitability, availability and quality); R.I. GEN. LAWS § 37-2-5 (1970) (state purchasing agents must favor food grown in Rhode Island); S.C. CODE ANN. § 11-35-1520(9)(a-c) (Law. Co-op. Supp. 1982) (if resident and non-resident bid are tied, bid goes to South Carolina firm; if bid concerns a commodity produced in South Carolina and one not produced in state, bid goes to former.); TENN. CODE ANN. § 12-3-809 (Supp. 1982) (commanding state agencies to give preferential treatment to "meat, meat food products or meat by-products" produced in Tennessee); VT. STAT. ANN. tit. 6, § 4601 (Supp. 1982) (state purchasing director must purchase agricultural products grown or produced in Vermont when both available and of established quality); WASH. REV. CODE ANN. §§ 39.24.010-.040 (1972) (preference for state purchases of fuel, although a given percent differential factor repealed in 1967); WYO. STAT. §§ 9-8-302 to -308, 9-8-401 to -406 (1977) (general preference for Wyoming contractors, labor and materials for state contracts and public works).

non-resident competition.[66] Although these laws originally referred to products only from neighboring states,[67] this type of legislation also constitutes protection against a foreign nation's entry into a state's markets.[68]

A minority of states enacted buy-national laws that establish a preference for domestic American goods over foreign products.[69] Three different classifications of state buy-national laws exist in the United States.[70] The first category, labeled "absolute" laws,[71] provides that all possible purchases are subject to domestic constraints.[72] The second

66. *See supra* note 65. For example, Illinois, Maryland and Nebraska expressly permit products and labor from another state if that state does not exercise a preference against their goods.

67. The origin of these laws provides proof for this assertion. For example, the Colorado legislature enacted its law in 1963, Georgia in 1937, Iowa in 1938, Missouri in 1931, Nevada in 1951 and Washington in 1933. Because competition from foreign nations remained relatively non-existent during this period, state legislatures designed these laws to preclude competition from other states. Only recently, with the proliferation of foreign competition, have these laws been capable of being construed to bar competition from foreign countries in addition to that from other states.

68. For example, Maryland defines a "nonresident firm" as "a business entity that has its principal office out of State." MD. ANN. CODE art. 21 § 8-301(a)(3) (Supp. 1982). Consequently, the law requires that the procurement agency favor a Maryland firm over a "nonresident firm" if the home state of the latter prefers its resident businesses. *Id.* § 8-301(b)(1). Consequently, "nonresident" may refer to another state or another country.

69. *See* Note, *Federal Limitations on State "Buy American" Laws,* 21 COLUM. J. TRANSNAT'L L. 177 (1982) (analysis on the constitutional and statutory limitations of state authority to enforce these laws); Note, *State Buy-American Laws — Invalidity of State Attempts to Favor American Products,* 64 MINN. L. REV. 389, 389 (1980) (analyzing the validity of these state laws with respect to GATT, the Commerce Clause, and federal foreign affairs power and concluding that "state Buy-Americanism" is invalid under the Commerce Clause and federal foreign affairs power) [hereinafter cited as Note, *Invalidity*].

70. *Id.* at 391.

71. *Id.*

72. Three states maintain absolute buy-national laws. Kansas law provides that all contracts and procurements, the specifications of which are fixed by the director of purchases, may be rejected "on the basis that the product is manufactured or assembled outside the United States." KAN. STAT. ANN. § 75-3739(5) (Supp. 1982). While this presents only an authorization to reject foreign goods, it is an authorization to reject *all* types of foreign goods.

Louisiana law provides that

> [a]ll bids submitted to any public corporation or political subdivision of the state for public work shall designate those products manufactured outside the United States of America to be provided or installed in the execution of such contracts whenever the aggregate cost to the contractor of such product exceeds fifty thousand dollars and five percent of the total amount bid for the contract. The use of such products in violation of the foregoing is hereby prohibited and the contractors shall be liable to the public body awarding the contract for those penalties which might be provided in the specifications and in the contract.

LA. REV. STAT. ANN. § 38:2184.1 (West Supp. 1981).

The language of the Massachusetts absolute statute is vague. It states "[a] preference in the purchase of supplies and materials, other considerations being equal, in favor, first, of supplies

group, termed "limited" laws,[73] endorses a preference for domestic suppliers except when it would be substantially less expensive to purchase foreign goods or when the goods do not exist in sufficient quantities in the United States.[74] Finally, some states require domestic purchases of specific products, usually those goods unique to a prevalent industry or natural resource of the state.[75] While most states that endorse a buy-

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and materials manufactured and sold within the commonwealth [Massachusetts] . . . . [a]nd second, of supplies and materials manufactured and sold elsewhere within the United States." MASS. GEN. LAWS ANN. ch. 7, § 22(17) (Law. Co-op. 1980). Besides providing a preference for goods made in Massachusetts, *see supra* note 65 and accompanying text, it favors domestic goods, qualified only by "other considerations being equal."

73. *See* Note, *Invalidity, supra* note 69, at 391.

74. Four states belong to this "limited" class: Minnesota, New Jersey, Oklahoma and Wisconsin. Pursuant to MINN. STAT. ANN. § 16.073 (West Supp. 1982), "no materials shall be purchased by the state for use for governmental purposes which are not manufactured in the United States. . . ." *Id.* § 16.073(2). Subsection three provides exceptions if a reasonable quantity is unavailable in the United States, if the domestic price "unreasonably exceeds" the bid of the foreign supplier, if the quality of a comparably priced foreign good is better than the domestic product, or if the domestic product is not in the public interest. *Id.* § 16.073(3). This law bears a close resemblance to the Buy American Act and its exceptions. *See supra* notes 20-34 and accompanying text. *See also* Wampler v. Goldschmidt, 486 F. Supp. 1130 (D. Minn. 1980) (constitutionality of Minnesota limited preference law drawn into question but not decided).

The New Jersey statute, although considered a "limited" law, provides fewer exceptions than the Minnesota law. The statute demands that state agencies procure domestic goods or farm products "whenever available." N.J. STAT. ANN. § 52:32-1 (West 1955). Although this section presents the only escape clause in the New Jersey law, as compared to four in the analogous Minnesota law, the former may authorize a greater sweep of exceptions because of the potentially expansive meaning of "whenever available." New Jersey also provides a buy-national law for public works projects, requiring the use of domestic materials except if not produced in the United States in "commercial quantities and of satisfactory quality." *Id.* § 52:33-2. The New Jersey statute is unique in requiring government procuring entities purchase only automobiles made in the United States, unless unreasonable or inconsistent with the public interest. *Id.* § 52:32-1.1 (West Supp. 1982-83). *See infra* notes 86-92 and accompanying text.

According to Oklahoma law, all governmental agencies must purchase "goods and equipment manufactured or produced in the United States of America, unless a foreign made product is substantially cheaper and of equal quality, or is of substantially superior quality to competing American products and is sold at a comparable price." OKLA. STAT. ANN. tit. 61, § 51 (West 1963). This statute effectively reduces foreign imports for governmental use by placing generally unattainable qualifications on the foreign product.

The Wisconsin "limited law" provides that state agencies shall purchase materials and products "when all other factors are substantially equal" and only when the industries manufacture the products to the greatest extent in the United States. WISC. STAT. ANN. § 16.754(2) (West Supp. 1982-83). This language resembles the "substantially all" requirement of the Buy American Act. *See supra* notes 20-34 and accompanying text. The Wisconsin legislature mitigated the severity of this constraint by providing that it ceased to apply if there were insufficient quantities or if the quality of the domestic good were inferior. *Id.* §§ 16.754(3)(a)-(b). *See supra* note 25 and accompanying text (discussing "substantially all" requirement of Buy American Act).

75. *See* Note, *Invalidity, supra* note 69, at 391.

national law opted for this latter type,[76] some states use a buy-national

76. Those states are California, Colorado, Indiana, Mississippi, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas, Virgina and West Virginia.

California specifically excludes certain equipment. CAL. GOV'T CODE §§ 4300-05 (Deering 1982). These products include scientific and medical equipment, sewing machines, and certain types of printing presses. *Id.* §§ 4302-02.6. California also applies a buy-national policy to public works. *Id.* § 4304. *See infra* notes 79-85 and accompanying text.

The "specific" state buy-national law in Colorado mandates that the state agencies prefer fresh and frozen meats as well as dairy products from the United States. COLO. REV. STAT. § 8-18-101 (Supp. 1982). This national preference exists in addition to a state parochial preference. *See supra* note 65 and accompanying text; *infra* note 77 and accompanying text.

Indiana provides that favoritism by state governments will be shown only to suppliers of domestic steel. IND. CODE ANN. § 5-16-8-2(a) (Burns 1983). This provision may be waived if the cost of domestic steel is unreasonable, or if there is an inadequate domestic supply. *Id.* The statute contains a value-added differential provision similar to that found in the Buy American Act. Under this system, a domestic steel bid is not unreasonable if it does not exceed the foreign bid by fifteen percent (15%). *Id.* §§ 5-16-8-2(b)(1) - (b)(2). The fifteen percent differential becomes twenty-five percent (25%) if the bid comes from an Indiana firm, thereby attempting to protect further state employment. *Id.* § 5-16-8-2(b).

Mississippi endorses a preference for beef produced in the United States. MISS. CODE ANN. §§ 31-7-61 to -65 (Supp. 1982). In addition, the statute provides penalties of up to thirty (30) days in jail or a fine of $100-$500. *Id.* § 31-7-63. The statute is violated only if an individual *knowingly* purchases foreign beef. *Id.* § 31-7-61.

Ohio, like Indiana, prefers only domestic steel producers in projects wholly or partially supported by the state. OHIO REV. CODE ANN. § 153.011 (Page Supp. 1982).

Pennsylvania enacted the Steel Products Procurement Act to require commonwealth agencies to procure domestic steel when needed. PA. STAT. ANN. tit 73, §§ 1881-1887 (Purdon Supp. 1982). This statute is one of the few that sets forth the public policy reasons for state buy-national legislation. *Id.* § 1883. These considerations include the preservation of employment, the use of steel sales to increase state revenues, the expansion of the industry, and the preservation of general welfare and national security. *Id.* Finally, the Pennsylvania legislature intended this legislation to be remedial and to receive a liberal construction. *Id.* § 1887.

Rhode Island, like Pennsylvania, enacted a Steel Products Procurement Act. R.I. GEN. LAWS §§ 37-2.1-1 to -5 (Supp. 1982). The legislature designed the Act "to be an exercise of the police powers of the state for the protection of the health, safety and general welfare of the people of the state." *Id.* § 37-2.1-2. Accordingly, the law provides that all public state agencies shall use steel produced in the United States unless such steel fails to be readily available or if the domestic cost exceeds the foreign cost by fifteen percent (15%). *Id.* § 37-2.1-3. The legislature reasoned that because the United States was a world leader in a steel industry that employed millions of taxpayers, the state could aid in the development and expansion of the industry. *Id.* § 37-2.1-2.

The South Dakota buy-national law prohibits the purchase of imported beef with public funds, except when canned meat products are domestically unavailable. S.D. CODIFIED LAWS ANN. § 5-19-1.1 (1969). Violation of this statute is a "Class 2 misdemeanor." *Id.*

The "specific" state government buy-national law in Texas requires that all "dairy products" purchased by state agencies be of American origin. TEX. STAT. ANN. art. 4476-6b (Vernon 1976). The legislature defined a dairy product as "milk, cream, butter, cheese or any product consisting largely of one or more of them." *Id.* § 4476-6a.

The state procuring entities of Virginia prefer domestic steel in "every contract and subcontract in an amount of fifty thousand dollars or more for construction, reconstruction, alteration, repair,

law in conjunction with a parochial law[77] or use no preference law at all.[78]

The constitutionality of these state buy-national laws in the face of international agreements such as GATT and the MTN remains inconclusive. In *Baldwin-Lima-Hamilton Corp. v. Superior Court*,[79] a California appellate court relying on the federal government's power to enter treaties pursuant to Article VI of the Constitution[80] held that GATT superceded the California buy-national law.[81] Several years

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improvement or maintenance of any public works. . . ." VA. CODE § 11-23.7 (Supp. 1982). As with similar laws, the Virginia legislature placed restrictions on this law. The state government could use domestic steel only if the cost does not exceed the foreign steel by more than ten percent (10%), *id.* § 11-23.7(B), and if it exists in the United States in sufficient quantities. *Id.* § 11-23.7(A).

Finally, West Virginia law resembles the laws of Indiana, Ohio, Pennsylvania and Virgina. The statute requires that if a state project is at issue or state funds are being used, steel, aluminum and glass must be supplied by domestic firms. W. VA. CODE § 5-19-1 to -4 (1979 & Supp. 1982). If insufficient quantities exist or if the purchase is inconsistent with the public interest, however, the foreign bid will be accepted. *Id.* § 5-19-2(a). Like the Indiana and Virginia laws, the West Virginia statute applies a value-added differential to the foreign bid. If the domestic bid exceeds the foreign bid by twenty percent (20%), the foreign supplier will be awarded the contract. *Id.* § 5-19-2(b).

77. Four states use a parochial law and some type of buy-national law in tandem. Colorado and Rhode Island chose a parochial law and a specific law, while Louisiana and Massachusetts use a parochial law in conjunction with an absolute law. *See supra* notes 65, 72 & 75.

78. Eight states do not endorse trade protectionism: Connecticut, Delaware, Idaho, Kentucky, Michigan, New Hampshire, New York and Utah. Of these, Kentucky and Utah adopted Model Procurement Acts. *See* KY. REV. STAT. ANN. § 45A.005-.990 (Bobbs-Merrill 1980 & Supp. 1982), and UTAH CODE ANN. § 63-56-1 to -64 (Supp. 1981).

79. 208 Cal. App. 2d 803, 25 Cal. Rptr. 798 (1962).

80. *Id.* at 819-20, 25 Cal. Rptr. at 809. Article VI of the Constitution states that treaties made pursuant to the authority of the federal government are the supreme law of the land. The California law remains unenforceable because it does not afford like treatment to foreign and domestic suppliers as required by GATT. *Id.* at 818-19, 25 Cal. Rptr. at 808-09. For the text of the California law, see *supra* note 76.

The decision in *Baldwin* that GATT supercedes state law has not been uniformly followed. In Territory v. Ho, 41 Hawaii 565 (1957), reasoning similar to *Baldwin* was evident in the court's decision that a state law was unconstitutional because it conflicted with GATT. *Id.* at 571. The court in Bethlehem Steel Corp. v. Board of Comm'rs, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969), see text accompanying *infra* note 82, failed to follow the reasoning of *Baldwin* and *Ho*, and noted the distinction between the *Baldwin* court's use of "superceded" and the *Ho* court's use of "unconstitutional" and "conflicted." 276 Cal. App. 2d at 227 n.9, 80 Cal. Rptr. at 804 n.9. This distinction may not be blatant, yet it remains significant; "superceded" connotes obsolescence, whereas "conflicted" and "unconstitutional" connote a previous error that needed a remedy.

81. 208 Cal. App. 2d at 819, 25 Cal. Rptr. at 809. Originally, GATT did not pertain to government procurement because of the exemption in article III paragraph 8. *See infra* note 113. Products at issue in this case, turbines and other electrical equipment, generate electricity. The *Baldwin* court reasoned that the electrical power produced by the turbines and other electrical

later, the same court considered the same law in *Bethlehem Steel Corp. v. Board of Commissioners*[82] and found it unconstitutionally encroached on the power of the federal government to engage in international relations.[83] The court reasoned that foreign trade is a federal concern and that the operation of the state law created too great an opportunity for potential conflict.[84] By avoiding the issue of whether the state law conflicted with GATT, the *Bethlehem Steel* court found it unnecessary to resolve the apparent conflict with *Baldwin*.[85]

Some jurisdictions, on the other hand, have held that state laws may co-exist with international trade agreements. In *K.S.B. Technical Sales Corp. v. North Jersey District Water Commission*,[86] the Supreme Court of New Jersey decided that the state buy-national law[87] does not interfere with the federal commerce clause[88] or with the federal government's power to conduct foreign affairs.[89] While the court acknowledged that the Constitution places stringent restrictions on state actions concerning foreign affairs,[90] the court focused its attention on the fact that the New Jersey buy-national law does not authorize judgments about, or discriminate among, the countries barred from importation because of their prevailng political ideologies.[91] The court upheld this state practice because it conformed with the Buy American Act that also does not condition national government procurement on

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equipment will be resold, thus constituting an exception to the article III paragraph 8 exception. 208 Cal. App. 2d at 819, 25 Cal. Rptr. at 809.

82. 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (Cal. Ct. App. 1969).

83. *Id.* at 224, 80 Cal. Rptr. at 802.

84. *Id.* at 226, 80 Cal. Rptr. at 803. The court reinforced its findings by claiming that foreign trade is a national concern, that international trade is the basis of foreign relations, and that any one state's activity cannot be allowed to defeat these national objectives. *Id.* at 226-27, 80 Cal. Rptr. at 803.

85. *Id.* at 227 n.9, 80 Cal. Rptr. at 804 n.9. *Bethelehem Steel* remains the only decision to rest on the federal government's supremacy in foreign affairs.

86. 75 N.J. 272, 381 A.2d 774, *rev'd on other grounds,* 151 N.J. Super. 218, 376 A.2d 960 (1977), *appeal dismissed,* 435 U.S. 982 (1978).

87. *See supra* note 74.

88. 75 N.J. at 300, 381 A.2d at 778. The court reasoned that the state buy-national law did not violate the commerce clause according to the Supreme Court opinion in Hughes v. Alexander Scrap Corp., 426 U.S. 794 (1976). Justice Powell in *Alexander Scrap* concluded that "[n]othing in the purposes animating the Commerce Clause forbids a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810.

89. 75 N.J. at 292, 381 A.2d at 784.

90. *Id.* at 290, 381 A.2d at 783.

91. *Id.* at 291, 381 A.2d at 783.

the ideological tenor of foreign nations.[92]

These cases illustrate the confusion among state courts with regard to the constitutionality of state buy-national laws. The paucity of litigation on these state laws illustrates their minor impact. Although the Constitution established the federal government's preeminence over the states in foreign affairs,[93] buy-local laws may overcome constitutional infirmities as states exercise their police power to protect their unique resources.[94] Alternatively, the state buy-national laws present significantly less compelling justifications.

E. Government Procurement in Japan

Before Japan became a signatory nation to the Government Procurement Code, its procurement practices were extremely restrictive.[95] Japan failed to accept open procurement practices, similar to those used in the United States, for a number of reasons. First, while the Japanese

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92. *Id.* at 291-92, 381 A.2d at 784.

93. This issue transcends the scope of this Note. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 227-48 (1972) (exhaustive treatment of state involvement in foreign affairs). At times, however, a state regulation withstands a constitutional challenge that it violates the commerce clause and therefore does not interfere with the federal government's power to engage in foreign affairs. *Compare* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 453-54 (1979) (California ad valorem tax on cargo containers of a Japanese shipping company "prevent[ed] the Federal Government from 'speaking with one voice' in international trade" and therefore was inconsistent with the congressional power to regulate foreign commerce) *and* Tupman Thurlow Co. v. Moss, 252 F. Supp. 641, 645 (M.D. Tenn. 1966) (Tennessee labelling and licensing laws imposed discriminatory restrictions and burdens on interstate and foreign commerce) *and* Bethlehem Steel Corp. v. Board of Comm'rs, 276 Cal. App. 2d 221, 225, 87 Cal. Rptr. 800, 803 (1969) (California Buy American Act usurped the power of the federal government to implement international trade policy) *with* Department of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734, 754 (1978) (Washington business and occupation tax on stevedoring did not interfere with the federal government's ability to conduct foreign policy) *and* Ray v. Atlantic Richfield Co., 435 U.S. 151, 179-80 (1978) (Washington tugboat design statute did not violate the commerce clause because it was an indirect regulation and it did not violate the federal government's power to conduct foreign affairs) *and* Michelin Tire Corp. v. Wages, 423 U.S. 276, 285-86 (1976) (the federal government's sole power to impose duties rests on the premises that the federal government "must speak with one voice when regulating commercial relations with foreign governments," that import taxes constitute a profitable source of revenue, and that harmony among the states would be promoted; the Georgia tax was nondiscriminatory and had no impact on federal regulation of foreign commerce) *and* Portland Pipe Line Corp. v. Environmental Improvement Comm'n, 307 A.2d 1, 46-47 (Me. 1973) (Maine law governing transfers of oil over water not invalid as an encroachment on the federal government's power to conduct foreign affairs and enter treaties).

94. *See, e.g., supra* note 76 (justifications for Pennsylvania buy local law).

95. TASK FORCE, *supra* note 5, at 31.

claimed that the government used public automatic tender,[96] selective automatic tender and private contract,[97] in reality the Japanese relied almost exclusively on the latter two methods of tender.[98] Second, no central procurement agency existed in Japan.[99] As a consequence, purchasing authority remained at the local level. Procurement decisions were subject to parochial concerns that favored local suppliers, which rendered government procurers inaccessible to foreign suppliers.[100] Third, American business failed to establish immediately branch offices in Japan,[101] further aggravating the effects of limited domestic suppliers and the lack of a central purchasing agency. Fourth, Japan restricted the sources in which they published requests for bids.[102] As a result, few businesses had access to government procurement. Fifth, in 1963 a Buy Japan Cabinet order, similar to the Buy American Act, forced Japanese government procuring entities to favor

96. *See infra* note 97 and accompanying text.

97. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, GOVERNMENT PURCHASING REGULATIONS AND PROCEDURES OF OECD MEMBER COUNTRIES 6-7 (1976) [hereinafter cited as GOVERNMENT PURCHASING]. Public automatic tender is an open procedure in which an unlimited number of suppliers have access to the contract. The contract relies on simple criteria, such as price, to determine who will be awarded the contract. *Id.* Selective automatic tender is the same as public automatic tender except that the procuring entity limits the number of suppliers. *Id.* In the private contract procedure, the purchaser and supplier negotiate the contract, irrespective of the predetermined conditions and requirements. *Id.* at 6. *See infra* note 141.

98. *Impact of Non-Tariff Barriers on the Ability of Small Business to Export to Japan: Hearings Before the Senate Select Comm. on Small Business,* 96th Cong., 2d Sess. 61 (1980) [hereinafter cited as *Impact*]. The Senate Select Committee on Small Business estimated that the Japanese government accomplished 90 percent of its procuring by using the private contract. *Id. See supra* note 97.

99. GENERAL ACCOUNTING OFFICE, GOVERNMENTAL BUY-NATIONAL PRACTICES OF THE UNITED STATES AND OTHER COUNTRIES - AN ASSESSMENT 49 (1976) (copy on file in "Readex" at the Thomas Jefferson Library, University of Missouri - Saint Louis) [hereinafter cited as BUY-NATIONAL PRACTICES]. This study is the most comprehensive source of pre-Code Japanese procurement law and practices.

100. TASK FORCE, *supra* note 5, at 31.

101. BUY-NATIONAL PRACTICES, *supra* note 99, at 52.

102. ISSUES AND PROBLEMS, *supra* note 3, at 74-75. *See generally* GOVERNMENT PURCHASING, *supra* note 97, at 67-68 (listing the requirements for notice of each method of Japanese procurement). *See supra* note 97 and accompanying text. One may wonder why public automatic tender was so ineffective. Part of the answer lies in the notification procedure. For private automatic tender prior to the Code, the government required the procuring entity to publish notice of solicitation of bids ten days in advance of the due date and only five days if the purchases were urgent. GOVERNMENT PURCHASING, *supra* note 97, at 66-67. If the required purchases are large or complicated, not only are most domestic Japanese firms precluded from bidding, but this procedure acts as a significant NTB by precluding foreign competition. This example illustrates an area in which the MTN Code had a significant impact because it extended such deadlines.

domestic suppliers. Unlike the unlimited application of its American counterpart, however, it pertained only to fourteen commodity groups.[103] Thus, this order further entrenched the first four practices. These five factors effectively barred foreign access to potentially large-volume markets.

The procurement policies in Japan changed gradually, culminating in the adoption of the MTN Code. In September 1972, the Japanese government rescinded the Buy Japan Cabinet Order of 1963.[104] In December 1975, the Japanese government removed the restrictions on importation of computers and electronic devices.[105] In 1978, Japan announced that it would engage in "unilateral efforts" to ease restrictions on government procurement.[106] Finally, in 1979, Japan furthered this goal by signing the MTN Code.[107]

F. Conclusions Regarding Government Procurement

American and Japanese procurement policies represent opposite views. The United States has an open procurement policy; the Japanese employ a closed procurement policy. Three fundamental distinctions exist between the procurement policy of the United States and that of Japan. First, the United States possesses a centralized federal statutory protectionist policy—the Buy American Act.[108] Although Japan used a Buy Japanese policy until 1972, it relies more heavily on numerous implied parochial policies to control government procurement.

Second, both countries employ substantially different methods of bid

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103. *Impact, supra* note 98, at 61. Although sovereign buy-national laws such as the Buy American Act, *see supra* notes 20-34 and accompanying text, restrict access to government procurement, at the very least the foreign nation knows the barrier it must overcome. The Japanese barriers are diffuse and not codified, thereby forcing suppliers into the morass of local government bureaucracy. *See supra* notes 93-102 and accompanying text. *See also* BUY-NATIONAL PRACTICES, *supra* note 99 at 50.

104. BUY-NATIONAL PRACTICES, *supra* note 99, at 50.

105. *Id.* This delay in easing import restrictions on computers and electronics provides a classic example of the infant industry approach. *See supra* note 3. As a consequence, until 1975 the Japanese computer, semiconductor and electronic industries grew unhindered by foreign competition. By 1975 the Japanese industries matured sufficiently to withstand foreign competition. Only then was the Japanese market "opened." *See supra* notes 3-7 and accompanying text.

106. TASK FORCE, *supra* note 5, at 31.

107. Annex I of the MTN Government Procurement Code indicated that Japan became a signatory to the Code and lists those Japanese agencies that must purchase pursuant to the Code. *See infra* note 113.

108. *See supra* notes 20-34 and accompanying text.

tender.[109] Through open and public automatic tender, the United States maximizes the number of suppliers and the ability to choose the product that best satisfies its needs. Japan, by using private negotiated tender, achieves a significant degree of control over its suppliers. Because of its open tender policy, the United States attempts to provide adequate notice and sufficient time for suppliers to respond to bids. Japan, by choosing the negotiated tender, need not provide notice nor an adequate response time.

State procurement policies in the United Staes present the third major difference between government procurement in the United States and Japan.[110] While not regulated by the Code, the state buy-national laws pose a secondary barrier to foreign trade with regard to specific products. No formal secondary restrictive level exists in Japan.

This section illustrates the complexity and diverse nature of procurement laws and practices in the United States and Japan. Such an environment contributed to trade stagnation and tense relations between the countries. The United States and Japan, among other nations, attempted to standardize and clarify government procurement by adopting the MTN Code.

II. THE MTN GOVERNMENT PROCUREMENT CODE

The Multilateral Trade Negotiations (MTN), which concluded in April 1979, resulted from a meeting held pursuant to the General Agreement on Tariffs and Trade (GATT), a multilateral trade agreement.[111] Pursuant to GATT, the signatory nations agreed to subsequent meetings or "rounds" to facilitate more responsive trade

109. *See supra* notes 96-98 and accompanying text.

110. *See supra* notes 65-92 and accompanying text.

111. 61 Stat. A5, T.I.A.S. No. 1700, 55 U.N.T.S. 187, *reprinted in* 4 Bevans 639 (1970) [hereinafter cited as GATT]. GATT negotiations concluded in Geneva, Switzerland on October 30, 1947. The text of GATT is reprinted in J. JACKSON, DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1-72 (1977). All citations to GATT's articles and sections will be to this edition.

The drafters of GATT designed it to provide not only for the reduction of import tariffs and trade barriers but also for the elimination of trade preferences. GATT, *supra*, art. I, ¶ 1. Simply, the agreement attempts to restrict and eliminate tariff barriers, including restrictions on the amount of goods to be imported and tariffs placed upon imported goods. MTN STUDIES, *supra* note 64, at 201. During the 1947 negotiations, a disagreement arose concerning the use of the word "goods." The result is in annex I to the GATT in which goods were "limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services." GATT, *supra*, at annex I (as an addition to Art. XVII ¶ 2).

negotiations through continued discussion and analysis.[112] Both nations acceded to the MTN at the seventh, Tokyo Round.[113] The MTN contains many trade agreements or "Codes,"[114] one of which is the Government Procurement Code (Code).

Certain exceptions, or escape clauses, to GATT led to the recognition of a need for a government procurement code. First, article III(8) provides that GATT shall not apply to government procurement by various "agencies."[115] Second, article XXI(b) states that nothing in GATT shall be interpreted in a manner that would compromise a na-

112. G. CURZON, MULTILATERAL COMMERCIAL DIPLOMACY, THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND ITS IMPACT ON NATIONAL COMMERCIAL POLICIES AND TECHNIQUES 87-107 (1965). The prior six rounds were, Kennedy Round (1962), Dillon Round (1958), Geneva Round (1956), Torquay Round (1951), Annecy Round (1949), and the original GATT in Geneva in 1947. *Id.* at 81. The time between the Kennedy and the Tokyo Rounds witnessed a significant change in the relative economic strengths of the major economic powers. A. LONG, DIRECTOR GENERAL OF GATT, THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS 1 (1979) [hereinafter cited as TOKYO ROUND]. Europe became the largest trading entity, and the United States and Japan constituted the top economic powers. *Id.* The content of the MTN is the result of the efforts of these three entities. *Id.*

113. *Multilateral Trade Agreements: Hearing Before the Senate Comm. on Governmental Affairs*, 96th Cong. 1st Sess. 130 (1979) [hereinafter cited as *MTA Hearing*]. This Note uses the second revised draft of the Code reprinted in *MTA Hearing* and dated April 11, 1979 - MTN/NTM/W/211/Rev. 2. The first revised draft is available in INTERNATIONAL CODES, *supra* note 7, at 129. The date of this version is April 5, 1979 - MTN/NTM/W/211/Rev. 1. The subgroup on government procurement accepted both revisions. Citation to the Code in this Note will be to GOVT. PROC. CODE and the applicable part and paragraph.

114. A difference of opinion exists between commentators and the federal government on the manner in which the sections of the Code should be labeled. The government refers to the sections as "parts." *See* INTERNATIONAL CODES, *supra* note 7, at 120; *MTA Hearing, supra* note 113, at 219-376; STAFF OF THE SENATE COMM. ON FINANCE, 96TH CONG., 1ST SESS., AGREEMENTS NEGOTIATED UNDER SECTION 102 OF THE TRADE ACT OF 1974 IN THE MULTILATERAL TRADE NEGOTIATIONS: SUBMITTED ON JUNE 19, 1979, FOR APPROVAL BY CONGRESS 65 (Comm. Print 1979). Commentators, however, refer to the sections as "articles." *See* Anthony & Hagerty, *Cautious Optimism as a Guide to Foreign Government Procurement*, 11 LAW & POL'Y INT'L BUS. 1301 (1979); Note, *United Staes - Japan Trade Developments Under the MTN Agreement on Government Procurement*, 5 FORDHAM INT'L L.J. 139, 141 n.7 (1982); Recent Development, *International Trade: Government Procurement of Telecommunications Equipment*, 22 HARV. INT'L L.J. 464, 466 n.13 (1981).

This Note uses that label preferred by the drafters, "parts."

115. Article III, ¶ 8 of GATT provides:

> (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.
>
> (b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies affected through governmental purchases of domestic products.

tion's security.[116] These two provisions, known as non-tariff barriers (NTBs),[117] effectively foreclose international competition in defense oriented procurement. In light of this difference between the imposition of some trade barriers under GATT and the lack of regulation of government procurement, the signatory nations, including the United States,[118] decided to address government procurement at the Tokyo Round of the MTN.[119]

GATT, *supra* note 111, art. III, ¶ 8. This article provides for legislation such as the United States' Buy American Act. *See supra* notes 20-34 and accompanying text.

Interpretive disagreements arose over the meaning of "governmental agencies" in article III ¶ 8. The draftsmen decided that this meant "all governmental bodies including local authorities." MTN STUDIES, *supra* note 64, at 207. Also, article XXIV, ¶ 12 of GATT states that "[e]ach contracting party shall take such reasonable measures as maybe available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory." GATT, *supra* note 111, art. XXIV ¶ 12. This definition is important in light of the federal Buy American Act and numerous state buy-local laws. *See supra* notes 65-92 and accompanying text.

116. GATT, *supra* note 111, art. XXI(b).

117. NTBs are discussed at length in R. BALDWIN, NONTARIFF DISTORTIONS OF INTERNATIONAL TRADE (1970). Baldwin asserts that nontariff trade distortions include export subsidies and government aids. *Id.* at 2 n.4 Baldwin defines nontariff trade distortions as:

> any measure (public or private) that causes internationally traded goods and services, or resources devoted to the production of these goods and services, to be allocated in such a way as to reduce potential real world income. Potential real world income is that level attainable if resources and outputs are allocated in an economically efficient manner.

Id. at 5.

118. Pursuant to the Trade Act of 1974, the United States possessed the authority to enter negotiations for the MTN, and subsequently, the Code. 19 U.S.C. § 2112 (1982). In § 2112(a), Congress concluded that barriers to international trade existed and that the barriers narrowed the availability of foreign markets for domestic industry. As a result, Congress authorized the President "to take all appropriate and feasible steps within his power . . . to harmonize, reduce, or eliminate such barriers to (and other distortions of) international trade." *Id.*

Part IX of the Code outlines the procedural steps to enact the Code into law in the signatory nations. GOVT. PROC. CODE, *supra* note 113, part IX, para. 3-4. Because the Code prohibits reservations, *id.* part IX, para. 2, these nations must accept all or none of the provisions. The drafters of the Code realized the impermanent nature of international trade, however, and provided procedures for review of the implementation of the Code, *id.* part IX, para. 6(a), and for the renewal of negotiations to broaden its scope. *Id.* part IX, para. 6(b). The drafters further provided that, upon reasonable notice, the signatory nations may amend annexes I-IV, *id.* part IX, para. 5(a), or withdraw their support. *Id.* part IX, para. 8.

119. MTN STUDIES, *supra* note 64, at 201. Although the government procurement did not become a topic for negotiation at the Tokyo Round until July, 1976, the Organization for Economic Cooperation and Development (OECD), an international organization established pursuant to the Convention on the Organization for Economic Cooperation and Development, 12 U.S.T. 1728, T.I.A.S. No. 4891 (U.N.T.S.), extensively researched procurement prior to the MTN. *See* TOKYO ROUND, *supra* note 112, at 76-77. Because government procurement policies noticeably lacked regulation and were discriminatory, both developed and lesser developed countries agreed upon the necessity of regulation. *Id.* The OECD drafted a document, "Draft Instrument

The preamble asserts that the purposes of the MTN include reducing and eliminating non-tariff barriers and their effects,[120] aiding the development of least developed countries whose position may be improved by adherence to the Code,[121] and clarifying methods of international notification so that Code provisions may be effectively enforced.[122] Although the preamble remains largely hortatory,[123] it attempts to ensure the "transparency of laws."[124]

Generally, the Code applies to any purchase of products by the entities[125] of signatory nations. It does not apply to the purchase of services.[126] The procuring entities must remain "under the direct or

on Government Purchasing Policies, Procedures and Practices," that the signatory nations of GATT used as a basis for research on government procurement during the Tokyo Round. *Id.* at 76.

120. GOVT. PROC. CODE, *supra* note 113, at preamble, para. 1.

121. *Id.* preamble, para. 2, 4.

122. *Id.* preamble, para. 8.

123. MTN STUDIES, *supra* note 64, at 218-19. In this regard the preamble remains clear because it outlines no obligations. *Id.*

124. GOVT. PROC. CODE, *supra* note 113, at preamble, para. 7. This provision provokes much discussion. *See supra* note 6. It appears, however, that the drafters based "transparency" on American procurement law by embodying "some notions of due process and equal competitive opportunities." MTN STUDIES, *supra* note 64, at 219. Accordingly, "transparency" is "the consistent and regular application of laws, regulations, practices, and procedures which are fully publicized or otherwise freely available to interested persons." *Id.*

125. *See* GOVT. PROC. CODE, *supra* note 113, part I, para. 1. In a footnote to this provision, the drafters of the Code make it clear that "entities" includes agencies. *Id.* at n.1. A question arises as to whether this means solely federal agencies or whether it means federal and state agencies. A similar problem developed with the interpretation of "government agencies" in article III, ¶ 8, of the GATT, and commentators defined the term to include state and local agencies. *See supra* note 115 and accompanying text. If the Code adopted that interpretation, however, serious federalism problems would develop between the Code and various state government procurement policies. *See supra* notes 93-94 and accompanying text.

126. MTN STUDIES, *supra* note 64, at 221. The drafters of the Code realized that some services had to be included, because there are times when the service is incidental to the product. *See supra* note 34. In this regard, service that does not exceed the cost of the product is part of that product, thereby regulated by the Code. GOVT. PROC. CODE, *supra* note 113, part I, para. 1(a). In part IX paragraph 6(b), the drafters of the Code recognized that this limitation places too narrow a scope on the Code and provided that within three years the signatory nations should negotiate to expand the scope of the Code to include service contracts. *Id.* part IX, para. 6(b).

The drafters placed a second limitation on the coverage of the Code by exempting purchases below a value of $150,000 special drawing rights (SDRs). *Id.* part I, para. 1(b). The drafters felt, however, that this value unduly restricted the scope of the Code, which had to remain flexible. The result was the inclusion of an exculpatory clause in which the trade committee "shall review annually the implementation and operation of this Agreement taking into account the objectives thereof." *Id.* part, IX para. 6(a). Specifically, the Code provides that the SDR limitation may be lowered pursuant to part IX, paragraph 6(a), enabling more contracts to come under the purview of the Code. *Id.* part I, para 1(c) n.2. The drafters engaged in extensive negotiations concerning

substantial control" of the nations.[127] Although the Code impliedly covers not only federal agencies but also state agencies, the United States presently includes no state agencies in its list of agencies affected, thereby partially resolving federalism problems.[128]

The Code also attempts to eliminate discrimination in the importation of goods. To achieve this goal, the Code requires not only that signatory nations refrain from favoring domestic suppliers over foreign producers,[129] but also that government procurement agencies treat all foreign suppliers equally.[130] While this non-discriminatory mandate attempts to bring all developed nations under the Code, in actuality the developed nations afford preferential treatment to the developing nations.[131] This provision for preferential treatment contravenes the

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the value of the SDR limit. The threshold could not be too low for fear of causing too large an administrative burden, TOKYO ROUND, *supra* note 112, at 78, but if the SDR limit were high, the purpose and intent of the Code would be frustrated. *Id.* Thus, it appears as though the 150,000 SDR represented a compromise.

An SDR is an international monetary reserve asset used to supplement gold when the need arises. Gold, *A Comparison of Special Drawing Rights and Gold as Reserve Assets,* 2 LAW & POL'Y IN INT'L BUS. 326, 331 (1970). The SDR grew as a consequence of the development of a stable international financial system by the International Monetary Fund. *Id.* The SDR remains useful because, like gold, it does not change as the value of currency fluctuates. *Id.* at 341.

In 1979, a 150,000 SDR was worth approximately $193,500. MTN STUDIES, *supra* note 64, at 222. In 1982, the United States Trade Representative lowered the ceiling to $182,000, thereby enhancing the effectiveness of the Code. Purchases Under the Trade Agreements Act of 1979, 47 Fed. Reg. 6021 (1982) (codified at 41 C.F.R. § 1-6.1601(e)).

127. GOVT. PROC. CODE, *supra* note 113, part I, para 1(c). The signatory nations submitted lists of the agencies to be covered by the Code to the trade committee, listed in annex I of the Code. *Id.* In addition, the Code authorizes the signatories to notify those agencies not covered by the Code "of the objectives, principles and rules of this Agreement [Code], in particular the rules on national treatment and non-discrimination," and to educate those agencies on the benefit of the Code. *Id.* part I, para. 2.

128. Annex I of the Code, that lists the agencies affected, resolves the federalism problem for the present. It remains clear, moreover, that annex I pursuant to part I paragraph 1(c) exists as the sole determinant of entities to be covered by the Code. MTN STUDIES, *supra* note 64, at 226. A strict construction of part I, paragraph 2 of the Code averts future conflict because "[p]arties shall inform their entities not covered by this Agreement *and the regional and local governments* and authorities within their territories . . ." GOVT. PROC. CODE, *supra* note 113, part I, para. 2 (emphasis added). Commentators and the government interpret this as meaning that the Code does not apply to regional and local governments. MTN STUDIES, *supra* note 64 at 246.

129. GOVT. PROC. CODE, *supra* note 113, part II, para. 1(a).

130. *Id.* part II, para. 1(b).

131. *Id.* part III, para. 1. This paragraph states:

> Parties to this Agreement shall, in the implementation and administration of this Agreement, through the provisions set out in this Part, *duly take into account* the development, financial and trade needs of developing countries, in particular the least developed countries, in their need to:

wholly non-discriminatory nature of the Code.[132] Finally, in order to prevent non-signatory nations from benefitting from the Code, paragraph three prohibits the procuring of products that originate in non-member nations but travel through a signatory nation to the procuring government.[133]

In an attempt to standardize government procurement, the drafters provided technical specifications for government procurement.[134] To discourage signatory nations from using such specifications as significant non-tariff barriers,[135] the article not only states that participating nations shall not prepare or use specifications to create barriers to international trade,[136] but also provides that technical specifications, when appropriate, shall be based on performance rather than design.[137]

(a) safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development;
(b) promote the establishment or development of domestic industries . . .;
(c) support industrial units so long as they are wholly or substantially dependent on government procurement;
(d) encourage their economic development through regional or global arrangements . . . .

Id. (emphasis added).

132. MTN STUDIES, *supra* note 64, at 250. This nondiscriminatory posture *among* signatory nations for government procurement is, by necessity, contradictary to the GATT most favored nation (MFN) clause in article I. GATT, *supra* note 111, art. I. A MFN clause is inherently discriminatory because it favors one nation over another. Part II of the Code, however, includes a "conditional" MRN clause that accords such status to non-signatory nations conditioned on their acceptance of the Code. MTN STUDIES, *supra* note 64, at 250.

133. GOVT. PROC. CODE, *supra* note 113, part II, para. 3. Without any regulation of "transshipping," the conditional MFN treatment among signatory nations for government procurement would be useless. MTN STUDIES, *supra* note 64, at 255.

134. GOVT. PROC. CODE, *supra* note 113, part IV, para. (a).

135. MTN STUDIES, *supra* note 64, at 297. The Japenese importation of autos presents one area in which technical specifications function as an effective NTB. *See* ISSUES AND PROBLEMS, *supra* note 3, at 54-55. For exported cars to be accepted as imports by the Japanese Ministry of Transport, modifications must be made. *Id.* at 51. Not only do these specifications and changes deter American manufacturers from selling in Japan, but such specifications are costly and partially responsible for the significant price difference between American imports and a comparable Japanese car. *Id.* at 46.

136. GOVT. PROC. CODE, *supra* note 113, part IV, para. (a). Paragraph (a) states that "[t]echnical 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." *Id.* This paragraph would appear to be directed against intentionally erected barriers. If, however, a barrier were unintentionally created, it may remain as long as it is necessary. MTN STUDIES, *supra* note 64, at 298.

137. GOVT. PROC. CODE, *supra* note 113, part IV, para. (b)(i). Americans prefer performance rather than design as the standard of Japanese automobile import restrictions. The Economic Relations Group, *see supra* note 5, acknowledges that this is a recurring problem. WISE MEN'S REPORT, *supra* note 5, at 60. The group observed that the importation of a product may be disap-

They also must reflect national and international standards rather than local standards.[138]

In addition to providing technical specifications, the Code outlines in detail methods of tender for government procurement. Because the integral policy of the Code rests on nondiscrimination and transparency,[139] the drafters of the Code designed the tendering process to reflect these principles.[140] The Code mandates three methods of tender: open, selective and single.[141] The Code qualifies the use of

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proved on the basis of design, even though the performance standards are similar to the comparable Japanese product. *Id.* Establishing functional specifications or preferring performance to design is a prominent trend in the United States' government procurement practices. MTN STUDIES, *supra* note 64, at 299. The use of functional specifications promotes cost savings, involves more businesses in the competitive bidding process, provides a forum for the use of new technology, eliminates the need to construct special products meeting certain specifications, and retains greater immunity from obsolescence than design specification. S. REP. No. 715, 95th Cong., 2d Sess. 21-22 (1977).

138. GOVT. PROC. CODE, *supra* note 113, part IV, para. (b) (ii). Because paragraph (b) does not favor local rules, this decision may affect the role of state procurement practices in the United States. *See supra* notes 65-92 and accompanying text.

139. *See supra* notes 124 & 127 and accompanying text.

140. TOKYO ROUND, *supra* note 112, at 80.

141. GOVT. PROC. CODE, *supra* note 113, part V, para. 1. The OECD, *see supra* note 119, divided the procurement terminology into two parts. GOVERNMENT PURCHASING, *supra* note 97, at 6-7. The first category regulates tendering procedures according to the number of suppliers who may bid for the contract. There are three types. Open or "public" tender, the broadest category, permits any interested supplier to submit a bid without requirements of specifications. *Id.* at 6. Selective or "restrictive" tender allows the government agency to invite a specified number of suppliers to submit bids. *Id.* Single tender or "private contract" procedure permits the government agency to enter into a contract with a single supplier. *Id.* This practice is the most restrictive type permitted.

The second category defines the tendering procedure according to the amount of authority the procuring agency may exercise. *Id.* "Automatic" tender grants the procurer the least possible latitude. The procurer must award the contract on such predetermined criteria as lowest bid or least amount of delivery time. *Id.* "Discretionary" tender permits the award of a contract based on a number of interrelated and basic criteria. *Id.* at 6-7. The "negotiated" tender grants the procurer the widest possible latitude. There are no predetermined criteria and the procurer conducts all negotiations with the supplier. *Id.* at 7.

Although part V of the Code recognizes open, selective and single tendering, the second category serves to clarify the procedure. For example, an open or selective tender may be either automatic or discretionary. Thus, one knows not only the number of suppliers involved, but also the degree of discretion the procuring entity exercises. The single tender, however, is only negotiated. *Id.*

The use of these categories includes more than simply providing consistent terminology. For example, the single-negotiated tender grants the procurer the widest possible discretion. This method condones the favoring of domestic suppliers because the limited resources of the procurer often precludes negotiations with foreign suppliers. Note, *Eliminating Nontariff Barriers to International Trade: The MTN Agreement on Government Procurement*, 12 N.Y.U. J. INT'L L. & POL.

selective tender[142] and permits a single tender only in limited instances.[143] Open tender, on the other hand, remains unrestricted. Although open tender provides optimal transparency, fosters maximum price competition and reflects American procurement practices,[144] other countries rely on the selective or single tender to realize lighter administrative burdens and diminished opportunity for collusion between the procuring agency and the potential supplier.[145]

The nature of selective and single tender requires that each procuring entity establish a list of qualified suppliers. The Code supplies guidelines so that the qualification procedure does not foster discrimination between domestic and foreign suppliers and among foreign suppliers.[146] Other safeguards to preclude discrimination and add transparency to procurement procedures include requirements that the

315, 327 (1979). Part V of the Code favors open-automatic or open-negotiated tenders, *see infra* notes 142-44, in an attempt to eliminate a significant NTB that favors domestic supplier. *See supra* notes 60 & 97 and accompanying text.

142. Paragraph 5 states that under selective tendering, the procuring entities shall still "invite tenders from the maximum number of domestic and foreign suppliers, consistent with the efficient operation of the procurement system." GOVT. PROC. CODE *supra* note 113, part V, para. 5. American concern for the maximum number of bidders and other nations' concern for administrative ease is obvious. *See supra* note 141.

Paragraph 6 further restricts the use of selective tendering. The Code requires that purchasing entities keep lists of qualified suppliers, publish those lists, file notice of the conditions the qualified suppliers met, and publish the dates of effectiveness of those lists. GOVT. PROC. CODE, *supra* note 113, part V, para. 6(a). Finally, in an effort to expand the number of suppliers contacted under selective tender procedures, on the request of a non-qualified supplier the procuring entity shall "promptly start the procedure of qualification." *Id.* part V, para. 6(c).

143. Single tendering cannot be used "in a manner which would constitute a means of discrimination among foreign suppliers or protection to domestic producers." *Id.* part V, para. 15. The single tendering procedure can be used only in five specific instances: when there is only one supplier and no reasonable substitute; when there is a lack of tenders in response to open or selective bids; when time constraints prohibit the use of open or selective tenders; when there is a need for additional goods from the original supplier as either replacement parts or as a supplement to existing supplies; and when the procuring entity purchases a prototype developed at its request. *Id.* part V, para. 15(a)-(e).

Once there is a single tender, paragraph 16 of the Code requires that the procuring entity shall prepare a written report. *Id.* part V, para. 16. The report must contain which provision in paragraph 15 permitted the single tender, the name of the procuring agency, the value and type of good purchased, and the country of the supplier. *Id.*

144. MTN STUDIES, *supra* note 64, at 317.

145. *Id.* at 317-18.

146. GOVT. PROC. CODE, *supra* note 113, part V, para. 2. This prohibition of discrimination could not be more clearly stated than in paragraph 2(b).

> (b) any conditions for participation required from suppliers, including financial guarantees, technical qualifications, information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifica-

agency issue notices of proposed purchase,[147] supply adequate time for domestic and foreign suppliers to tender bids,[148] publish certain information on the bids,[149] and standardize procedures for the period after the receipt of bids.[150]

The Code further safeguards nondiscriminatory procurement practices by outlining procedures and conditions for publishing new rules, regulations, and judicial decisions affecting government procurement.[151] This article also instructs the procuring entity to inform unsuccessful suppliers of the reasons for the rejection of their bids and the merits of the accepted bid.[152] The signatory nations disliked this open procedure, traditionally endorsed by the United States to facilitate public inspection,[153] for fear of administrative costs, "collusive bidding"

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tions, shall be no less favorable to foreign suppliers than to domestic suppliers and shall not discriminate among foreign suppliers;

Id. part V, para. 2(b)

147. *Id.* part V, para. 3. Paragraph 4 contains the content requirements of this notice; annex II contains the publications used by signatory nations to publish notices. For the purposes of this Note, Japan publishes its notices in KAMPO (the Official Gazette) and the United States publishes its notices in COMMERCE BUSINESS DAILY. *Id.* at annex II.

148. *Id.* part V, para. 9(a). The complexity of the purchase, the extent of subcontracting needed for the bid, and the estimated mail time determine this time limit. *Id.*

149. *Id.* at part V, para. 12. This paragraph lists the minimum requisite information needed by the purchasing entity to make an evaluation of the potential supplier's bid.

150. *Id.* part V, para. 14.

151. *Id.* part VI, para. 1. Annex IV contains a list of the publications in which the signatory nations publish changes and additions to the Code. In Japan it is GENKI NIHON HOKI (Compilation of Current Laws and Regulations of Japan) and KAMPO. The United States publishes these changes in many different sources, including Defense Acquisitions Regulation (DAR) and Federal Procurement Regulations (FPR) contained in the Code of Federal Regulations (CFR) and in various judicial decisions. *Id.* at annex IV.

152. *Id.* part VI, para. 2.

153. MTN STUDIES, *supra* note 64, at 331. The congressional policy declaration contained in legislation establishing the Office of Federal Procurement Policy exemplifies the preference toward openness in federal government procurement.

> It is declared to be the policy of Congress to promote economy, efficiency, and effectiveness in the procurement of property and services by and for the executive branch of the Federal Government by—
>
> (1) promoting the use of full and open competition in the procurement of products and services;
>
> . . . .
>
> (10) minimizing possible disruptive effects of Government procurement on particular industries, areas, or occupations;
>
> . . . .
>
> (12) promoting fair dealing and equitable relationships among the parties in government contracting.

41 U.S.C. § 401 (1982).

and the maintenance of high bids.[154] The Code attempts to reconcile these concerns by providing for a review of the decision of the purchasing agency so that misunderstandings between the parties will be quickly and equitably resolved.[155]

When bilateral dispute resolution ends in deadlock,[156] the parties possess an automatic right of access to the Committee on Government Procurement, a formal mechanism established by the Code to resolve disputes.[157]

Two important important exceptions to the Code exist.[158] The first exception permits a nation to refuse to act or to disclose information pursuant to the Code that would jeopardize its national security interests.[159] The second exception permits a nation to exempt itself from the Code when, as applied, the Code would endanger public morals and national characteristics.[160]

The design and structure of the MTN Government Procurement

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154. MTN STUDIES, *supra* note 64, at 331.

155. GOVT. PROC. CODE, *supra* note 113, part VI, para. 5. The Code permits government intervention on behalf of a rejected supplier, *id.* part VI, para. 6, even though this complicates the dispute resolution process. This provision assures the aggrieved government that the procuring entity awarded the contract fairly and equitably. *Id.*

156. *Id.* part VII, para. 1. The other codes adopted pursuant to the MTN, *see supra* note 7, established similar administrative bodies. MTN STUDIES, *supra* note 64, at 346. The procurement panel consists of government officials with trade relations experience as well as nongovernment individuals. GOVT. PROC. CODE, *supra* note 113, part VII, para. 8. Citizens of those countries that are a party in the dispute are ineligible for service on the panel. *Id.* Interestingly, panel members serve in their capacity as individuals, not as representatives of their government. *Id.* The purpose of this, presumably, is to remove the arbitration process from international political biases.

157. *Id.* part VII, para. 1, The Committee may convene a panel to address the issue and to make factual findings. When appropriate, the panel submits a report of its findings and recommendations to the Committee. *Id.* part VII, para. 10. If the aggressor fails to observe the recommendations, the Committee may authorize the aggrieved party to forego application of the Code in that party's relationship with the aggressor. *Id.* part VII, para. 14. Suspension of the Code means that the censured party or nation no longer enjoys the conditional MFN standing among the signatory nations. *See supra* note 132.

158. GOVT. PROC. CODE, *supra* note 113, part VIII. An exception to the Code is an action, contrary to the explicit provisions, that a signatory nation may take without losing the Code's protection.

159. *Id.* part VII, para. 1. This exception only applies to procurement "indispensable" to national defense or security. *Id.*

Some commentators have little confidence in the "indispensable" requirement, arguing that the term has broad connotations allowing most industries to argue that their products have defense applications. Note, *Eliminating Nontariff Barriers*, *supra* note 141, at 341-42 (citing K. DAM, THE GATT LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 201 (1970)).

160. GOVT. PROC. CODE, *supra* note 113, part VII, para. 2. This paragraph provides an exception when the signatory nation must "protect public morals, order or safety, human, animal or

Code represent the procurement practices of all signatory nations.[161] The lack of standardization of administrative procedures,[162] technical specifications based on design rather than performance,[163] and the failure of notification of bids and purchases[164] were blantant non-tariff barriers associated with government procurement that no longer exist after passage of the Code.

III. THE NTT AGREEMENT

The telecommunications network in Japan provides an example of the effectiveness of the MTN Government Procurement Code. Japan became a signatory to the Code in 1979.[165] As a consequence, Japan's procurement procedures now mirror those practices of other signatory nations, although various minor technical differences remain.[166] After the negotiations concluded, the United States offered $16 billion of government purchases to foreign trade, later revising that amount to $12.5 billion; Japan opened $7.5 billion worth of procurement to international competition.[167]

Problems developed during the course of the negotiations and after the negotiations concluded, but before the Code became effective on January 1, 1981. One major problem concerned the extent to which certain Japanese agencies would implement the Code. The dispute focused on the Japanese nationalized industries, including Nippon Telephone and Telegraph (NTT), Japanese National Railways and the Japan Tobacco and Salt Public Corporation.[168] Japan argued that the

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plant life or health, intellectual property, or relating to the products of handicapped persons, of philanthropic institutions or of prison labour." *Id.*

161. These Code's two exceptions, wholly unrelated, establish the limits within which the Code operates. On the one hand, the defense exception illustrates that governments cooperate among themselves to a limited extent, thereby respecting state sovereignty. On the other hand, the public morals exception represents the limit beyond which no government is willing to apply the Code at the expense of its citizens.

162. *See supra* notes 125-33 and accompanying text.

163. *See supra* notes 134-38 and accompanying text.

164. *See supra* notes 139-55 and accompanying text.

165. GOVT. PROC. CODE, *supra* note 113, at annex I.

166. *See supra* notes 111-64 and accompanying text.

167. ISSUES AND PROBLEMS, *supra* note 3, at 77. The disparity in these figures should not lead to the conclusion that the Code endorses a lack of mutuality. Rather, these figures depend on various levels of economic performance, including "relative GDP [gross domestic product] levels, the relative amount of government intervention in the private sector, and the absolute size of the government sector." *Id.* at 77 n.1.

168. *See* Abbott & Totman, *supra* note 6, at 124-25 n.124. The Code listed these nationalized

nationalized industries contain independent purchasing authority and therefore remain separate from the government.[169] The Japanese wanted these nationalized industries exempt from the purview of the Code because their combined budgets constitute approximately one-half of Japan's budget.[170]

The United States and Japan tentatively resolved the problem of foreign access to Japan's nationalized industries in an exchange of diplomatic letters of December 19, 1980.[171] These letters, known as the NTT Agreement (Agreement),[172] addressed only the problems with NTT and not with other nationalized companies. The Agreement outlined the notification, qualification and tendering procedures needed for nondiscriminatory and competitive opportunities to NTT procurement pursuant to the Code.[173] It incorporates five "tracks," each describing a different tier of sophistication of telecommunications equipment.[174]

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industries in annex I. GOVT. PROC. CODE, *supra* note 113, at annex I. Yet, the dispute concerned the *extent* to which entities would procure from foreign suppliers. The nationalized industries constituted a large portion "of the Japanese market for value-added manufactured products in which the U.S. firms . . . [were] competitive." *Impact*, *supra* note 98 at 11 (prepared statement of Abraham Katz, Assistant Secretary of Commerce for International Economic Policy). For a detailed analysis of the problems with the NTT and the reasons for the disputes, see ISSUES AND PROBLEMS, *supra* note 3, at 59-84.

169. BUY-NATIONAL PRACTICES, *supra* note 99, at 6.

170. *Impact*, *supra* note 98, at 11 (prepared statement of Abraham Katz, Assistant Secretary of Commerce for International Economic Policy).

Preliminary negotiations, subsequent to the conclusion of the MTN, resulted in a joint communique between United States Ambassador Strauss and Japanese Minister Ushiba on June 2, 1979. The message acknowledged "that mutual reciprocity should be provided among Japan, the United States and other major countries in access opportunities to each other's markets, *including the market for telecommunications*." Text of Joint Statement by Strauss and Minister Ushiba, June 2, 1979, *reprinted in* ISSUES AND PROBLEMS, *supra* note 3, at 204 (emphasis added). That the ministers mentioned specifically telecommunications indicates the concern over the NTT and the lack of progress in the negotiations.

171. *Japan: U.S., Japan Accept NTT Telecommunications Pact*, INT'L TRADE REP., U.S. EXPORT WEEKLY (BNA) No. 338, at C-9 (Dec. 23, 1980) [hereinafter cited as *Telecommunications Pact*]. *See generally* Recent Development, *Telecommunications*, *supra* note 114 (letters-agreement constitute an important development in United States-Japan trade relations, although the effectiveness remains in doubt).

172. Letters Exchanged by USTR Askew and Japanese Trade Representative Okita and Text of U.S. - Japan Agreement on NTT Procurement Procedures, *reprinted in* INT'L TRADE REP., U.S. EXPORT WEEKLY (BNA) No. 338, at N-1 - N-5 (Dec. 23, 1980) [hereinafter cited as *NTT Agreement*].

173. *Id.* at N-1 (text of a letter from Trade Representative Okita to USTR Askew).

174. Track I includes general noncommunications equipment used in the telecommunications network. *Id.* at N-2. *See also Telecommunications Pact*, *supra* note 171, at C-9. Track II covers the procurement of telecommunications equipment that already exists in the market or that re-

Finally, the Agreement provides for non-binding arbitration if problems remain unsolved after consultation.[175]

The NTT opposed the Agreement because the integration of foreign products would destroy the standardization of the Japanese telecommunications network.[176] In addition, the NTT used the "family,"—Nippon, Oki, Fujitsu and Hitachi—as its primary source of supply prior to the Agreement,[177] and regarded this agreement as an infringement on that association. American business viewed the opening of NTT procurement to foreign bidding not only as a possible representation of the Japanese government's good faith,[178] but as a potential for large foreign contracts totalling $3.3 billion.[179] Thus, the NTT purchases amounted to less than one-half of the $7.5 billion Japanese government procurement opened pursuant to the Code.[180]

The differences between Japanese procurement prior to the Code and procurement pursuant to the Code appear significant. An increase in foreign access and the resulting increase in foreign contracts measure the degree of Japanese implementation. Thus, the framework exists on which increased government procurement trade rests. The most significant barriers to increased trade include the grudging abandonment by the Japanese of the private contract negotiated tender and the diffuse

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quires only minor modifications to meet NTT standards. *NTT Agreement*, *supra* note 172, at N-2. Track II requires a "FRP/Announcement" in which the NTT publishes its request for particular products, in addition to those bids the NTT solicits from its established suppliers. *Id.* at N-2. The NTT then provides the firms that responded to the FRP/Announcement with procurement documentation that supplies the bidders with the information needed to submit a competitive bid. *Id.* The firms selected through this procedure become qualified for Track II-A. *Id.* Track II-A, "[f]ollow-on purchases," concerned additional purchases of materials initially procured pursuant to Track II; the procedures and tenders of Track II apply "mutatis mutandis" to Track II-A. *Id.* at N-2 - N-3. Track II-A permits the NTT to maintain a list of qualified suppliers, "limited only by the efficient operation of the procurement system." *Id.* at N-3. The status of "qualified" arises if the firm successfully competes in Track II or if the firm requests qualification certification by the NTT. *Id.* Track III regulates the procurement of high technology to be developed for or with the NTT that is presently not available in the market. *Id.* Track IIIA resembles Track II-A except that it covers follow-on purchases to Track III. *Id.* at N-3 - N-4.

175. *Id.* at N-4.

176. *Japan, Business Fighting Back*, ECONOMIST, March 3, 1979, at 72 [hereinafter cited as *Fighting Back*].

177. *Issues and Problems*, *supra* note 3, at 65-66.

178. *Fighting Back*, *supra* note 176, at 72.

179. *Telecommunications Pact*, *supra* note 171, at C-9. The NTT offered to procure $3.3 billion, $1.5 billion pursuant to Track I of the Agreement and $1.8 billion pursuant to Tracks II and III. *Id.*

180. *See supra* note 167 and accompanying text.

purchasing authority, in favor of public automatic tender and central purchasing.[181]

IV. CONCLUSION

Government procurement in Japan and the United States prior to the adoption of the MTN Government Procurement Code provided little incentive for increased international trade. The Japanese and American procurement policies rested on fundamentally opposing principles. The federal Buy American Act and state buy-national laws provide formal examples of blatant government procurement non-tariff barriers.[182] Pre-Code Japanese procurement, on the other hand, included very informal yet restrictive and closed practices.[183]

The MTN Government Procurement Code standardized procedures among all signatory nations. The Code provided the means for lessening barriers to foreign suppliers for government procurement contracts.[184] The effectiveness of the Code became apparent shortly after the negotiations concluded when the United States and Japan permitted $12.5 and $7.5 billion respectively of government purchases to enter international competition.[185] The NTT Agreement, as part of Japan's liberalization of its procurement practices, involved about one-half of the $7.5 billion procurement in an area previously highly restricted.[186] Not only does the NTT Agreement provide American suppliers substantial access to the Japanese market, it also represents substantial financial gains for those suppliers.

Amidst numerous and complex local restrictive laws, the MTN Government Procurement Code established a favorable trend in government procurement as demonstrated by the NTT Agreement. The United States should further this trend toward better international trade relations by revising its blatant protectionist policies. In light of our acceptance of the MTN Code, Congress should eliminate the Buy American Act and amend present procurement statues to conform with the Code. Congress possesses the power to eliminate the Buy Ameri-

181. *See supra* note 141 and accompanying text.
182. *See supra* notes 22-36 & 67-94 and accompanying text.
183. *See supra* notes 95-110 and accompanying text.
184. *See supra* notes 111-64 and accompanying text.
185. *See supra* note 167 and accompanying text.
186. *See supra* notes 165-67 and accompanying text.

can Act pursuant to the Trade Agreements Act of 1979.[187] Finally, the federal government should encourage the states to eliminate their buy-national laws because they lack the compelling justifications that underlie state buy-local laws, and because the lack of litigation under these laws illustrates their ineffectiveness as protectionist measures.

The United States does not exist in a vacuum. As technology advances, the United States must assure its position in international trade relations. Altering our domestic practices to conform with international agreements would further this goal.

187. 19 U.S.C. § 2511 (1982).

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