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United States-Japan Trade Developments Under the MTN Agreement on Government Procurement

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Abstract

This Note examines the Government Procurement Code and its impact on United States-Japan trade relations. It begins with a summary of discriminatory procurement practices previously permitted by the United States and Japan, followed by a brief history of the Code. The Note then addresses the Code's operative mechanisms and its effect on United States and Japanese procurement practices. Finally, it considers the NTT Agreement as an illustration of the Code's potential for opening the Japanese market to foreign suppliers.

NOTES

UNITED STATES-JAPAN TRADE DEVELOPMENTS UNDER THE MTN AGREEMENT ON GOVERNMENT PROCUREMENT

INTRODUCTION

The Tokyo Round of Multilateral Trade Negotiations (MTN), concluded on April 12, 1979,¹ significantly advanced multilateral efforts to eliminate non-tariff barriers (NTBs) to trade.² While

1. AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTI-LATERAL TRADE NEGOTIATIONS, _____ U.S.T. _____, reprinted in H.R. DOC. NO. 153, 96th CONG., 1st SESS., pt. 1 (1979) [hereinafter cited as MTN]. The impetus for the Tokyo Round of Multilateral Trade Negotiations was the "Tokyo Declaration," a result of a ministerial meeting of nearly 100 nations in Tokyo in September 1973, to advocate the reduction of trade barriers among nations. General Agreement on Tariffs and Trade: Tokyo Declaration on Multilateral Trade Negotiations, September 14, 1973, General Agreement on Tariffs and Trade (GATT) Press Release GATT/1134, para. 9, reprinted in 12 INT'L LEGAL MATS. 1533 (1973) [hereinafter cited as Tokyo Declaration]. Although the GATT discussions pursuant to the Tokyo Declaration were dubbed the "Tokyo Round," actual negotiations were held at GATT headquarters in Geneva.

Established as a reaction against the excessive protectionist trade policies of the 1930's, the GATT sought to raise worldwide standards of living, assure full employment, increase the growth of real income and market demand and to expand the production of goods. These goals were to be achieved through "the substantial reduction of tariffs and other trade barriers and to the elimination of preferences, on a reciprocal and mutually advantageous basis." The General Agreement on Tariffs and Trade, concluded Oct. 30, 1947, 61 STAT. A3, A7, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 188 [hereinafter cited as GATT]. See generally J. JACKSON, WORLD TRADE AND THE LAW OF GATT 329-32 (1969). As a stand-by agreement to put into immediate effect many of the provisions of the Havana Charter, the GATT required its initial members to sign the Protocol of Provisional Application of the General Agreement on Tariffs and Trade signed at Geneva, on October 30, 1947, 61 STAT. A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308, effective January 1, 1948. H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 1149 (2d Ed. 1976). Still applied through this Protocol, the GATT has become the legal cornerstone for international trade, binding eighty-five signatory countries. GENERAL AGREEMENT ON TARIFFS AND TRADE, STATUS OF LEGAL INSTRUMENTS, GATT/LEG/1 [hereinafter cited as GATT STATUS], 3 Accessions.

2. Non-tariff barriers fall under the general rubric of trade-distorting policies. One author has defined trade-distorting policies 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.

R. BALDWIN, NONTARIFF DISTORTIONS OF INTERNATIONAL TRADE 5 (1970). A non-tariff barrier would be any such measure exclusive of tariffs. Some examples of non-tariff barriers are: subsidies, import licensing systems, customs valuation methods, product standards and gov-

previous rounds of negotiations conducted pursuant to the General Agreement on Tariffs and Trade (GATT) focused primarily on the reduction of tariffs,³ the Tokyo Round undertook the removal of NTBs⁴ through a complex system of disciplinary codes of con-

ernment purchasing requirements. Strauss, *Symposium on the Multilateral Trade Agreements I—Foreward*, 11 LAW & POL'Y INT'L BUS. 1257 (1979). The Secretariat for the General Agreement on Tariffs and Trade has enumerated over 800 NTBs. *Id.* Non-tariff barriers are also referred to as non-tariff measures (NTMs) and non-tariff distortions (NTDs) to trade. The term NTB is used in this Note simply because it appears to have gained the greatest acceptance. See also R. BALDWIN, *supra*, at 2 n.4. From its inception, the signatories of the General Agreement on Tariffs and Trade intended to eliminate NTBs. Part II of the GATT, Articles III to XXIII, specifically address NTBs such as dumping, customs valuations, quantitative restrictions on trade and subsidies. Unlike Parts I and III of the GATT which require unconditional application by the signatories, Part II requires only that its provisions be applied "to the fullest extent not inconsistent with existing legislation." Protocol of Provisional Application of the General Agreement on Tariffs and Trade, *supra* note 1. Because GATT signatories encountered difficulties in trying to deal with NTBs, i.e., identifying NTBs, working out procedures, monitoring, obtaining implementing legislation, etc., no serious attempt to address NTBs occurred before the Tokyo Round. See R. BALDWIN, *supra*, at 1-3.

3. The six earlier rounds of GATT were held in: Geneva, Switzerland, 1947; Ancey, France, 1949; Torquay, England, 1951; Geneva, Switzerland, 1955-56; Geneva, Switzerland, 1960-62 (the "Dillon Round"); Geneva, Switzerland, 1964-67 (the "Kennedy Round"). K. DAM, *THE GATT LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 56 (1970). Following the Kennedy Round tariff cuts on dutiable nonagricultural goods averaged over 35% for the United States, European Economic Community, United Kingdom and Japan, and covered approximately \$20 billion in trade. This left the United States with an average tariff on nonagricultural goods at 9.9%, the EEC 8.6%, the United Kingdom 10.8% and Japan 10.7%. R. BALDWIN, *supra* note 2, at 1. The Kennedy Round addressed two non-tariff matters, an antidumping code and customs valuation, but the resulting agreements were not implemented by Congress. Brown, *The New International Government Procurement Code Under GATT*, 53 N.Y. ST. B.J. 198 n.4 (1981); Marks & Malmgren, *Negotiating Non-tariff Distortions to Trade*, 7 LAW & POL'Y INT'L BUS. 327, 333-34 (1975). In addition, one NTB, quantitative restrictions for balance-of-payments reasons, had been virtually eliminated in earlier rounds of GATT. R. BALWIN, *supra* note 2, at 2. Commenting on the rise in NTBs relative to the decline of tariff barriers, one perceptive author stated: "the lowering of tariffs has, in effect, been like draining a swamp. The lower water level has revealed all the snags and stumps of non-tariff barriers that still have to be cleared away. . . ." Jones, N.Y. Times, July 10, 1968, quoted in R. Baldwin, *supra* note 2, at 2. See Note, *The Trade Agreements Act of 1979: The Agreement on Government Procurement*, 14 J. INT'L L. & ECON. 321, 322 (1980) [hereinafter cited as *TAA of 1979*].

4. The basis for negotiating NTBs was paragraph 3(b) of the Tokyo Declaration, which set out to "reduce or eliminate non-tariff measures or, where this is not appropriate, to reduce or eliminate their trade restricting or distorting effects, and to bring such measures under more effective international discipline." Tokyo Declaration, *supra* note 1, para. 3(b). Although tariffs were also an important aspect of the negotiations, the principal objective of the Tokyo Round was the elimination, reduction, harmonization of certain non-tariff barriers. See *Hearing on Implementation of the NTT Procurement Agreement Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the Comm. on Energy and Commerce*, _____ Cong., _____ Sess. 40 (June 9, 1981) (statement of Robert Cassidy) (Transcript obtained from the United States Embassy, Tokyo. Copy on file at the Fordham International Law Journal office.) [hereinafter cited as *NTT Hearing*].

duct.⁵ This undertaking has been considered by many to be GATT's most ambitious attempt to liberalize the international economic order.⁶ One major achievement of the MTN is the Agreement on Government Procurement⁷ (hereinafter referred to as

5. The Tokyo Round agreements on NTBs have been commonly referred to as "codes." See Strauss, *supra* note 2, at 1258; Bus. Am., Feb. 23, 1981, at 3, 11; JAPAN ECONOMIC INSTITUTE, JAPAN INSIGHT, No. 11, at 9 (Mar. 20, 1981). The codes are disciplinary in the sense that they prescribe new rules and procedures which require a gradual alteration and formalization of government and business behavior, and contain dispute provisions providing for relief from injury caused by a signatory. Previous GATT rounds were largely "self-executing"; they involved automatic, phased tariff cuts. The Tokyo Round Agreements, on the other hand, covering a much broader and complex field of NTBs, require permanent monitoring, interpretation and negotiation. GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES IN 1980, at 8 (1981). Eleven agreements were completed at the MTN in addition to the ones concerning tariffs and a provision within GATT for a permanent legal basis for preferential trade treatment on behalf of, and between, developing countries. Six of these agreements specifically addressed non-tariff barriers: Subsidies and Countervailing Duties, Technical Barriers to Trade, Import Licensing, Government Procurement, Customs Valuation and Revised Anti-Dumping Code. The other agreements include: Framework for the Conduct of World Trade, Bovine Meat, Dairy Products, Tropical Products and an Agreement on Trade and Civil Aircraft. MTN, *supra* note 1. See GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES IN 1979, at 5-36 (1980). The Customs Valuation and Government Procurement codes were the last of the MTN agreements to go into effect. They entered into force on January 1, 1981. *Id.* at 9; JAPAN ECONOMIC INSTITUTE, *supra*, at 9.

6. See GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES IN 1979 at 9 (1980); GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES IN 1978 at 11-12 (1979); Marks & Malmgren, *supra* note 3, at 327; President's Remarks on Signing the Trade Agreements Act of 1979 Into Law, 15 WEEKLY COMP. OF PRES. DOC. 1311 (July 26, 1979).

7. Agreement on Government Procurement, April 12, 1979, T.I.A.S. No. _____ [hereinafter cited as GPA], reprinted in AGREEMENTS REACHED IN THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS, H.R. DOC. NO. 153, 96th Cong., 1st Sess., pt. 1, at 67-189 (1979) (The House Report, *supra*, refers to the Articles of the Agreement on Government Procurement as "Parts." Commentators, the GATT sources and others, however, more commonly refer to these divisions as "Articles." Hereinafter, in keeping with the vast weight of the GATT related literature, the term "Articles" shall be used). The negotiators at the MTN had different approaches which could have been taken to harmonize, reduce or eliminate trade barriers. Article III of GATT excludes government procurement expressly from its national treatment, and, indirectly from its most-favored-nation (MFN) obligations. One way of initiating an agreement on government procurement would have been to draft an amendment to the GATT. A two-thirds vote of approval by signatory countries, however, is necessary to amend Article III, and a unanimous vote is required to amend Article I (MFN status)—a vote which has been nearly impossible to attain in recent times. GATT, *supra* note 1, art. XXX. An alternative to amendment involved the implementation of a supplementary code open to signature by other parties which desire to obtain its benefits and shoulder its obligations. This was the approach that the negotiators in the Tokyo Round of MTN adopted when developing the Code on Government Procurement. UNITED STATES INTERNATIONAL TRADE COMMISSION, 6 MTN STUDIES: AGREEMENTS BEING NEGOTIATED AT THE MULTILATERAL TRADE NEGOTIATIONS IN GENEVA, PART 3, ANALYSIS OF NONTARIFF AGREEMENTS, prepared for the SENATE COMM. ON FINANCE, SUBCOMM. ON INTERNATIONAL TRADE; 96TH CONG., 1st Sess. 211-212 (Comm. Print (96-27) 1979) [hereinafter cited as MTN Study].

Government Procurement Code or Code). The Code seeks to eliminate the non-tariff barrier of discriminatory treatment of foreign suppliers in government procurement contracts.⁸

During the course of the MTN talks in Geneva, a dispute⁹ arose between the United States and Japan concerning the extent of Japanese procurement to be covered under the Code.¹⁰ More spe-

8. Basically, the Agreement on Government Procurement endeavors to increase competition in the international procurement market. See GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES IN 1978 at 33-34 (1979). Greater competition should save taxpayers money in government purchases of goods, reallocate those savings to more productive areas of the economy and benefit suppliers, either domestic or foreign, who are the most efficient. See *id.*; TAA of 1979, *supra* note 3, at 326. This reasoning is based on the theory of comparative advantage generally attributed to David Ricardo in the early nineteenth century, which asserts the proposition that nations should specialize in those sectors of the economy which enjoy the greatest relative efficiency to other countries, even if a nation is not the most efficient producer. See C. KINDELBERGER & P. LINDERT, INTERNATIONAL ECONOMICS 16 (6th ed. 1978), cited in TAA of 1979, *supra* note 3, at 326 n.28. Such emphasis on "comparative advantage," maximizes the real income of a nation, but only if there is a free flow of goods to allow each nation to share in the cheaper products of efficient industries abroad. Trade barriers such as discriminatory procurement are thus inefficient to the extent that they impede free trade. TAA of 1979, *supra* note 3, at 326. For a general discussion on discriminatory government procurement, see notes 35-41 *infra* and accompanying text.

9. This acrimonious and highly publicized debate took place from January to June 1979. UNITED STATES-JAPAN TRADE COUNCIL, COUNCIL REPORT, No. 6, at 3 (Feb. 8, 1980). See also note 187 *infra* for a discussion of the origins of the dispute.

10. NIHON KEIZAI SHIMBUN, INDUSTRIAL REVIEW OF JAPAN, 1980 at 84 (1980) [hereinafter cited as IRJ]. The Code was negotiated at the MTN in two stages. The first stage undertook to develop the Code, i.e., formulate rules and procedures to implement the basic principle of non-discrimination in government procurement. NTT Hearing, *supra* note 4, at 10 (statement of W. Douglas Newkirk). The second stage sought to arrive at an equitable arrangement for reciprocal opportunities under the Code. In other words, each country had to offer a list of central governmental entities—ministries, departments, agencies, etc.—to be covered under the Code's provisions. A yen-to-dollar, or ministry-to-department basis, for example, was insufficient to determine equitableness. Rather, a judgment had to be made purely on commercial terms. Hormats, MTN Codes and Telecommunications: Toward an Equitable Balance (testimony before the House Ways and Means Subcomm. on Trade, Sept. 18, 1980), reprinted in 2 SPEAKING OF JAPAN, No. 3, June 1981 at 19. The United States took a maximalist approach and offered all of its major purchasing entities in the hope that other governments would follow. However, because some of the United States' key negotiating partners were unwilling to submit all of their entities, most notably the European Economic Community (EEC) in their offers of telecommunications, power generating and transportation equipment, the United States withdrew such entities as the T.V.A., the Army Corps of Engineers, and the Department of Transportation from bids by European Economic Community manufacturers. NTT Hearing, *supra* note 4, at 11 (statement of W. Douglas Newkirk). See generally Bus. AM., Feb. 23, 1981, at 5, 6. In the case of Japan, all of its central government ministries were offered, so on a theoretical basis there appeared to be parity. The United States, however, felt that the offer was inadequate. Japan conducts much of its purchasing through public corporations and its procurement system is highly decentralized. This meant that a large portion of Japan's procurement would be exempt or below the

cifically, the dispute involved entity coverage¹¹ of the Nippon Telephone & Telegraph Public Corporation (NTT), a quasi-public monopoly whose annual purchasing totalled an estimated \$3.3 billion.¹² Although the United States and Japan completed the five years¹³ of Tokyo Round negotiations as general signatories to the

minimum contract price under the Code. *NTT Hearing, supra* note 4, at 12 (statement of W. Douglas Newkirk) (*see* notes 118-128 *infra* and accompanying text for a discussion of the Code's exemptions).

11. *See* note 10 *supra* for a discussion of entity coverage. The extent to which entity offerings would actually provide commercial opportunities for a negotiating partner was a vital issue in the discussion on entity coverage. *NTT Hearing, supra* note 4, at 13 (statement of W. Douglas Newkirk). Thus, the United States could only achieve a balance by gaining access to Japan's procurement in areas where it was competitive, such as telecommunications, power generating and aircraft equipment. *Id.* at 41 (statement of Robert Cassidy). It became apparent to the United States that the Nippon Telephone & Telegraph Public Corporation (NTT) (*see* note 12 *infra* for a further description of NTT) was the only Japanese entity whose inclusion under the Code would provide this necessary balance; NTT buys centrally in large quantities, including high-technology products. Hormats, *supra* note 10, at 19-20.

12. Japan Econ. J. (Int'l Weekly Ed. of *Nihon Keizai Shimbun*) [hereinafter cited as *Nihon Keizai Shimbun*], Dec. 23, 1980, at 1, col. 1. NTT is a quasi-public corporation whose budget is approved by the Diet, Japan's legislature, and is under the nominal control of the Ministry of Post and Telecommunications (MPT), SUBCOMMITTEE ON TRADE OF THE COMMITTEE ON WAYS AND MEANS AND THE UNITED STATES-JAPAN TRADE TASK FORCE, 96th CONG., 2d SESS., REPORT ON UNITED STATES-JAPAN TRADE 26 (Comm. Print (96-68) 1980) [hereinafter cited as U.S.-JAPAN TRADE REPORT]. Operating as virtually a monopoly in the Japanese telecommunications system, NTT is the largest buyer of telecommunications equipment in Japan. Weil & Glick, *Japan—Is the Market Open? A View of the Japanese Market Drawn from U.S. Corporate Experience*, 11 LAW & POL'Y INT'L BUS, 845, 880 (1979). Of its total revenues of over 4 trillion yen in 1980 (approximately \$15 billion), domestic telephone services accounted for 88%, telegraph 1.6%, and leased circuit service 6.3%. *Nihon Keizai Shimbun*, Sept. 8, 1981 at 9, col. 2. Among its many functions are the construction of large-scale telecommunications systems, the laying of cable, and purchase of equipment for lease to its end-users and private subscribers. Weil & Glick, *supra* at 880. Although government owned, NTT is virtually autonomous. It is a profit-making corporation similar to the American Telephone & Telegraph Co. (ATT). *NTT Hearing, supra* note 4, at 41 (statement of Robert Cassidy). Since the Code exempts entities not under the "direct or substantial control" of central governments, NTT's inclusion was a matter of contention in the early stages of the negotiations. *See* note 119 *infra* and accompanying text. Hormats, *supra* note 10, at 20. However, Japan soon realized that the United States was adamant about NTT coverage under the Code, and added NTT to its entity list. GPA, *supra* note 7, Annex I; *see NTT Hearing, supra* note 4, at 13 (statement of W. Douglas Newkirk). They were left with the problem of how much of the \$3.3 billion of NTT would be included under the Code.

13. The Tokyo Round of Multilateral Trade Negotiations began in early February, 1974, when the Trade Negotiations Committee adopted a detailed work program pursuant to the Tokyo Declaration. GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES IN 1973, at 13 (1974). The negotiations were concluded on April 12, 1979. *See* note 1 *supra* and accompanying text.

Code,¹⁴ the dispute regarding entity coverage continued.¹⁵ On June 2, 1979, the United States and Japan issued a joint statement providing that an agreement would be concluded by December 31, 1980, the last day before the Code was to go into effect.¹⁶ After a year and a half of often bitter negotiations,¹⁷ the two countries reached an agreement on December 19, 1980¹⁸ (hereinafter referred to as NTT Agreement). Under the NTT Agreement, Japan offered to the United States access to all of NTT's telecommunications purchases¹⁹ as well as a commitment to liberalize its domestic

14. GATT STATUS, *supra* note 1, 16 Multilateral Trade Negotiations 1973-79, 16-5.1/16-5.2, Agreement on Government Procurement, *Done at Geneva* on 12 April 1979, BISD 265, ____ U.N.T.S. _____. The signatories to the Code are Austria, Belgium, Canada, Denmark, France, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, the United Kingdom, Finland, Hong Kong, India, Jamaica, Japan, Nigeria, Norway, Switzerland, Sweden, and the United States.

15. N.Y. Times, March 30, 1979, § D, at 1, col. 6. Japan (subject to completion of Constitutional procedures) and the United States (subject to satisfactory completion of negotiations on entity coverage) formally accepted the Agreement on Government Procurement on December 17, 1979. GATT STATUS, *supra* note 1. At the end of the Tokyo Round the United States had succeeded in achieving reciprocal entity arrangements with all of its major trading partners except Japan. Hormats, *supra* note 10, at 19. Similarly, Japan had established entity parity with its trading partners, but had agreed to continue negotiations with the United States. The Code provides that it "shall not apply as between any two Parties if either of the Parties, at the time either accepts or accedes to [it], does not consent to such application." *Id.* art. IX, para. 9. An agreement between Japan and the United States, therefore, was necessary for reciprocal procurement access under the Code. See Pomeranz, *Toward a New International Order in Government Procurement*, 11 LAW & POL'Y INT'L BUS. 1263, 1292-93 (1979).

16. *Joint Statement of Ambassador Strauss and Minister Ushiba, June 2, 1979*, reprinted in U.S.-JAPAN TRADE REPORT, *supra* note 12, at 84 [hereinafter cited as *Joint Statement June 2*.] N.Y. Times, June 3, 1979, § 1, at 9, col. 1. Although the Code was completed on April 12, 1979 and formally accepted on December 17, 1979, it did not go into force until January 1, 1981. CPA, *supra* note 7, art. IX, para. 3.

17. JAPAN ECONOMIC INSTITUTE, JAPAN INSIGHT, No. 47, at 2 (Dec. 19, 1980). For a discussion of this dispute, see note 187 *infra*.

18. Agreement on Procurement in Telecommunications, December 19, 1980, United States-Japan, T.I.A.S. No. 9961, reprinted in E. Asian Exec. Reps., Jan. 15, 1981, at 24-30 [hereinafter cited as NTT Agreement]. The agreement consisted of four documents: (1) exchange letters between the Japanese Representative for External Economic Relations (JREEA), Dr. Saburo Okita, and the United States Trade Representative, (USTR), Reubin O'D. Askew; (2) an appended document attached to the Okita letter under the caption "NTT PROCUREMENT PROCEDURES" (Attachment I); (3) another appended document to the Okita letter labelled "*Procedures of Non-binding Arbitration*" (Attachment II); and (4) a Joint Statement concerning reciprocal liberalization of the interconnect market (Joint Statement). *Id.* See also 22 HARV. INT'L L.J. 464-473 (1981).

19. The final NTT procurement settlement was a two part package. The first part involved purchases of non-public telecommunications equipment, or Track I purchasing. The United States and other signatories to the Code have a legal right to non-discriminatory

interconnect market.²⁰ Both the Agreement and the Code became effective on January 1, 1981.²¹

These agreements are significant to Japan and the United States and to the international economic order. Japanese consumers and taxpayers should benefit directly from their government's access to new equipment and technology at competitive prices.²² United States industries should be able to increase exports to Japan,²³ thereby reducing the current trade imbalance.²⁴ Moreover,

competitive access to this portion of NTT procurement, approximately \$1.5 billion. NTT Agreement, *supra* note 18, letter of Dr. Saburo Okita, Attachment I, para. 2. *NTT Hearing*, *supra* note 4, at 22 (statement of Raymond J. Waldmann). The remainder of NTT's purchases falls directly under the NTT Agreement, a bilateral arrangement entitling the United States to about \$1.8 billion of NTT's procurement of public telecommunications equipment or Track II and Track III purchasing. *Id.* Despite the fact that the Code's procedures do not set forth the specific procedures needed for high-technology and joint research-oriented procurement, NTT is committed to adhere to non-discriminatory Code principles under this agreement. *Id.*, at 22-23 (statement of Raymond J. Waldmann).

20. NTT Agreement, *supra* note 18, Joint Statement. In the earlier joint statement of June 2, 1979, Japan agreed to provide mutual reciprocal market access opportunities in the telecommunications field. *Joint Statement of June 2*, *supra* note 16. This meant that negotiations by the United States and Japan on telecommunications would encompass NTT's opening both government procurement and the Japanese interconnect market (customer-provided leased-line equipment). See *Japan: Is the Market Open?*, 27 JAPAN REPORT, June-July, 1981, at 9. NTT virtually monopolizes the domestic telecommunications circuits and imposes strict restrictions on the use of leased circuits (interconnect market). Anyone who wishes to connect customer-provided equipment to leased circuits must obtain NTT's approval. *Nihon Keizai Shimbun*, Apr. 7, 1981, at 9, col. 1. Foreign manufacturers wishing to enter Japan's interconnect market have had difficulty in obtaining NTT's approval because of NTT's complicated procedural requirements and imprecise specifications for equipment. In addition, NTT required a unit-by-unit installation approval system which severely impeded foreign entry. See U.S.-JAPAN TRADE REPORT, *supra* note 12, at 27-28. The Joint Statement of December 19, 1980, was intended to liberalize NTT's procedures regarding these problems. NTT Agreement, *supra* note 18, Joint Statement.

21. NTT Agreement, *supra* note 18, letter of Dr. Saburo Okita. (NTT Agreement); GPA, *supra* note 7, art. IX, para. 3 (Code).

22. For example, the United States telecommunications industry is regarded as highly competitive internationally, and should be able to provide telecommunications equipment to NTT at competitive prices. See Hormats, *supra* note 10, at 20. See also STAFF OF SUBCOMM. ON TRADE OF THE COMM. ON WAYS AND MEANS, 96th CONG., 2d SESS., REPORT ON HIGH TECHNOLOGY AND JAPANESE INDUSTRIAL POLICY: A STRATEGY FOR U.S. POLICY MAKERS (Comm. Print (96-74) 1980), 37-38 [hereinafter cited as HIGH TECHNOLOGY REPORT]. This saving by NTT should presumably translate into cheaper telephone services in the case of Japanese consumers, and lower government costs in the case of taxpayers. See *generally* note 8 *supra*. It should be noted that NTT represents only one of Japan's governmental entities that will be open to procurement under the Code. See GPA, *supra* note 7, Annex I.

23. See U.S.-JAPAN TRADE REPORT, *supra* note 12, at 28-29. The Code and the NTT Agreement are expected to open more than \$8 billion of Japanese government contracts to United States suppliers. These agreements, of course, only set up the conditions for open

fair and open access to Japanese markets should create an atmosphere more favorable to Japanese trade in the United States.²⁵ There is a general consensus that both countries stand to benefit greatly from a strengthening of the GATT system²⁶ and the liberali-

competition. There is no automatic assurance that United States firms will gain a share of such purchases. For the interconnect market and Track I purchasing of non-public telecommunications goods, United States firms must compete against other foreign firms as well as domestic Japanese suppliers, which includes Japanese suppliers that have previously been outside the "NTT family." See note 107 *infra* and accompanying text. Under Tracks II and III purchasing of public telecommunications equipment, United States firms will only have to compete against Japanese suppliers. See note 19 *supra*. For an analysis of the problems which United States exporters face in penetrating the Japanese market, see Friedman & Pucik, *Obstacles to U.S. Exports to Japan—Not Insurmountable*, *Nihon Keizai Shimbun*, Apr. 7, 1981, at 20, col. 1.

24. In the last few years, the United States' trade deficit to Japan has increased from \$1.86 billion in 1975 to \$9.9 billion in 1980. The 1981 deficit is estimated to be a record \$15 billion. Lohr, *Trade Barriers? It's Not All Tokyo's Fault*, *N.Y. Times*, Sept. 30, 1981, § E, at 5, col. 1. For a discussion of the trade deficit and its impact on United States-Japan trade relations, see notes 32-33 *infra*.

25. An argument has been made that the crucial issue in present trade problems with Japan is not Japan's aggressive export policies, but the urgent need by certain long-established sectors of the United States economy to adjust to new economic situations. See Dunkel, *Japan's Role in Defense of Open Trading System*, *KEIDANREN REVIEW*, No. 70, Aug. 1981, at 8. For a discussion of United States industrial competitiveness, see JAPAN ECONOMIC INSTITUTE, *JAPAN INSIGHT*, No. 28, at 5-6 (July 24, 1981). Regardless of how accurate this representation is, Japan's willingness to adjust its own restrictive import policies should facilitate a more constructive approach to United States-Japan trade problems. *Id.* See REPORT OF THE JAPAN-UNITED STATES ECONOMIC RELATIONS GROUP, Prepared for the President of the United States and the Prime Minister of Japan (Jan. 1981) [hereinafter cited as WISE MEN'S REPORT]. See also JAPAN ECONOMIC INSTITUTE, *supra*, at 6-7. For a discussion on the efforts the Japanese Government is making to increase imports into Japan, see *Nihon Keizai Shimbun*, July 28, 1981, at 1, col. 1.

26. The existing international economic order is largely the legacy of United States leadership which created institutions such as the International Monetary Fund (IMF) and the GATT. Having emerged from World War II with a powerful agricultural and industrial base, the United States was able to capitalize on the market environment that these institutions facilitated—a stabilized currency and liberalized world trade, particularly in the form of lower tariffs. See JOINT ECONOMIC COMMITTEE CONGRESS OF THE UNITED STATES, 96TH CONG. 1st SESS., *THE U.S. ROLE IN A CHANGING WORLD POLITICAL ECONOMY: MAJOR ISSUES FOR THE 96TH CONGRESS 50-51* (Comm. Print 1979) [hereinafter cited as U.S. TRADE ROLE]. Hence through the 1950's and 1960's, the United States Government and the mainstream of United States industry supported the GATT-IMF system. See Amaya, *America's Deep-Rooted Protectionism*, *Nihon Keizai Shimbun*, July 7, 1981, at 20, col. 1. Despite a general deterioration of these institutions during the 1970's (see U.S. TRADE ROLE, *supra*, at 5-22) the basic objective of the GATT, international economic cooperation and trade liberalization, is still considered to be an objective of all trading nations, particularly the United States. See *id.* at 49. Although Japan did not join the GATT until some years after its inception it soon became a beneficiary of, and dependent on, the GATT multilateral trading system which facilitated an extraordinary 25-year boom in the world economy. As Arthur Dunkel, Direc-

zation of international trade.²⁷ As the world's two largest market economies,²⁸ the manner in which the United States and Japan conduct their trade policies sets an example for other countries to follow.²⁹ The extent to which they adhere to the free trade principles propounded by the GATT will have an important influence on the GATT's effectiveness as a mechanism for resolving international economic problems.³⁰

tor-General of the GATT, stated: "No country has made better use of the system than Japan. No country would lose more if the effectiveness of the system were allowed to erode." Dunkel, *supra* note 25, at 8. See also *Nihon Keizai Shimbun*, June 30, 1981, at 24, col. 3. For a survey of GATT's legal operations, see generally R. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY*.

27. See WISE MEN'S REPORT, *supra* note 25, at 1-2. Increased bilateral and global trade liberalization and economic interdependence should benefit the two countries by stimulating competition, expanding product choices, adding to available capital and technology and enhancing overall economic efficiency. *Id.* at v. On a more quantitative level, the results of the MTN's tariff cuts alone should amount to an annual gain of approximately \$1 billion to the United States economy. U.S. Trade Role, *supra* note 26, at 56. In the last decade United States-Japan bilateral trade has grown by about 400% from \$10.5 billion in 1970 to \$51.5 billion in 1980. See WISE MEN'S REPORT, *supra* at 13; 27 JAPAN REPORT, *supra* note 20, at 10. Each country is the other's largest overseas trading partner. WISE MEN'S REPORT, *supra*, at 13. In a recent hearing before a Joint Senate Economic Committee (J.E.C.) witnesses uniformly agreed that totally unrestricted trade between the United States and Japan would be of enormous benefit to both countries. JAPAN ECONOMIC INSTITUTE, JAPAN INSIGHT, No. 27, at 4-5 (July 17, 1981).

28. WISE MEN'S REPORT, *supra* note 25, at iii. Combined United States-Japan GNP accounts for over 30% of the world's gross product. Shimanouchi, *Japanese Foreign Policy and the United States: The Economic Scene*, 27 JAPAN REPORT, No. 6-7, June-July 1981, at 3.

29. For example, the United States' trade policy toward Japan in recent years has resulted in the occasional use of trade restrictive practices, such as the imposition of controls on textile imports pursuant to a United States initiated multi-national fabric agreement, and the restriction of imports of television sets through an orderly marketing agreement. In both these instances, European countries followed the United States' lead and called for self-restraint in the export of specific Japanese products, thereby achieving substantial import restrictions. K. TANABE, *NON TARIFF BARRIERS BEING DISMANTLED IN JAPAN 6* (1980). More recently when the Japanese government announced an orderly marketing agreement on automobile exports to the United States, both the Canadian government and the European Economic Community followed suit in requesting similar self-restraints by Japan. JAPAN ECONOMIC INSTITUTE, JAPAN INSIGHT, No. 19, at 3-4 (May 15, 1981).

30. As mentioned earlier, the United States and Japan have benefitted considerably from the free trade system advocated by the GATT. See notes 26 & 27, *supra*. Both economies also exert a substantial influence in the international marketplace covered by the GATT. Together, their gross national products comprise 35% of the world's gross product and represent almost 20% of world trade. WISE MEN'S REPORT, *supra* note 25, at 105. One free trade advocate states that the GATT system's resistance to deterioration in the 1970's was the result of the recognition by all the major trading nations, particularly the United States, Japan and the EEC that economic interdependence has reached a point where any provocation of protectionist measures by one country could set off a chain reaction that might lead to

Over the last few years, the single issue of the United States' trade deficit to Japan has obscured the importance of this multiplex United States-Japan relationship.³¹ In reaction to the trade deficit, there has been a tendency to seek short term ad hoc solutions at the sacrifice of long term mutual interests.³² The Government Pro-

worldwide depression as in the 1930's. Dunkel, *supra* note 25, at 5. See also Strauss, *supra* note 2, at 1259. This belief that economic health is linked to the maintenance of free trade, however, has not prevented the upsurge in NTB protectionist measures in the last five to ten years. A major reason for this upsurge, it is argued, "has been the reluctance of some sectors in the long-established industrial trading countries to accept as equal partners the newcomers on the world trading scene." Dunkel, *supra* note 25, at 5-6. In addition to NTB's, it is said that there has been an increasing move toward "organized trade": voluntary restraints, bilateral agreements, import surveillance systems, etc. See *Nihon Keizai Shimbun*, July 14, 1981, at 10, col. 1. These measures subvert the GATT's principles and the GATT's effectiveness. By going outside the established trading rules of GATT, it is stated that organized trade contributes "to a cumulative erosion of the authority of [these] rules, and to obscuring the operation of the trading system as a whole." Dunkel, *supra* note 25, at 6. The decade of the 1980's has been compared to the 1930's in terms of international economic stagnation. See Shimanouchi, *supra* note 28, at 3; Dunkel, *supra* note 25, at 5. In this context, the United States and Japan could either acquiesce to the continued subversion of the GATT system, or take positive steps toward the strengthening of the GATT by maintaining free trade principles, by opposing protectionist measures and by taking the initiative in reassessing and improving the GATT's mechanisms in dealing with multilateral trade issues. *Id.* For a discussion on the GATT's dispute mechanism, see generally R. HUDÉC, *supra* note 26.

31. One study notes that the "singular and simplistic" focus by the United States on the United States-Japan bilateral merchandise trade imbalance is unrealistic and politically divisive. WISE MEN'S REPORT, *supra* note 25, at 16. See also note 32 *infra*. The report points out that a nation's world current account for merchandise, goods and services and capital is a more realistic indication of a nation's overall economic performance. For example, despite the approximately \$10 billion imbalance in merchandise between the United States and Japan in 1980, the United States had a global current account surplus, while Japan had a \$13 to \$15 billion deficit. *Id.* at 17. The report states that structural differences between the Japanese and United States economies are an important source of the merchandise imbalance. Japan is highly dependent on imported oil and must pay for such imports by exporting manufactured goods. The United States is the world's largest market for manufactured goods and does not export oil. Consequently, even if Japan's market was completely open to United States merchandise, a large bilateral merchandise imbalance might still exist. *Id.* at 19-20. The study sets forth the following "[b]etter criteria for evaluating whether or not a country's behavior is beneficial to the operation of the international economic system":

- (1) its macroeconomic policies are stable and predictable;
- (2) market tactics and strategies of its companies do not involve dumping, subsidies, collusion, or other unfair activities or disruptive injury to trading partners;
- (3) access to its market for foreign goods, services, and assets is promoted on a reciprocal basis with trading partners;
- (4) its exchange rate policy is not manipulated to promote exports and reduce imports; and
- (5) its trade policy responses to domestic dislocation caused by international competition stress positive measures of structural adjustment assistance and worker retraining rather than protectionist measures.

Id. at 18.

32. The trade deficit between the United States and Japan has become a highly politicized issue, i.e., given considerable media attention, often commented on by politicians, and

curement Code provides an opportunity for the United States and Japan to examine critically their trade relationship with a view toward improving bilateral relations³³ and promoting fair and open trade in the international market place.³⁴

commonly the object of lobbying efforts. This is to be expected, given the magnitude of the trade flow between the two countries, the visibility of the merchandise involved and the rapidity in which certain industrial sectors have lost their competitive edge. The emphasis on the bilateral trade imbalance, however, also serves to reinforce and heighten certain stereotypes, namely that the United States is declining in economic strength and that "Japan Inc." is not playing by the rules of international trade. These stereotypes "strengthen the sense of righteousness by each country's publics and often governmental leaders in their country's position on trade issues, reducing the room for quiet, negotiated compromise and increasing the chances of polarization of national attitudes and politicization." WISE MEN'S REPORT, *supra* note 25, at 97. Under such circumstances it becomes difficult to negotiate constructive approaches to United States-Japan long-term interests such as the liberalization of trade, energy alternatives to OPEC, the coordination of fiscal and macroeconomic policies, the clarification of the United States' strategic, political and economic role in East Asia, and the more equitable sharing of costs incurred by mutual security requirements. See U.S. TRADE ROLE, *supra* note 26, at 387. For further discussion of United States-Japan political-economic relations, see WISE MEN'S REPORT, *supra*, at 96-103; U.S. TRADE ROLE, *supra* note 26, at 386-402.

33. One report notes that the increasing interdependence in trade between the United States and Japan will continue to generate economic conflicts. WISE MEN'S REPORT, *supra* note 25, at 22. These conflicts are inevitable when there is a massive volume of trade and a constant shifting of relative industrial competitiveness, see *id.* at 23, e.g., the automobile industry in the United States, and the aluminum ingot industry in Japan. See JAPAN ECON. INSTITUTE REPORT, No.17, May 1, 1981 (automobile dispute); N.Y. Times, Nov. 21, 1981, at 35, col. 1 (aluminium dispute). The Government Procurement Code will open up formerly protected markets in Japan and the United States to foreign competition. It is likely that certain industrial sectors will be hurt. For example, many small companies who have relied on NTT for most of their business may now be displaced by United States firms. See IRJ, *supra* note 10, at 85. United States industries may also be hurt. See Goldstein, *Doing Business Under the Agreement on Government Procurement: The Telecommunications Business—A Case in Point*, 55 ST. JOHN'S L. REV. 63, 86 (1980). In addition, there is no way to predict whether the Code actually will make any appreciable dent in the United States-Japan trade deficit. See NTT Hearing, *supra* note 4, at 50-51 (statement of Robert Cassidy). In this context, it is important that both countries be sensitive to the adjustments which will have to be made in order to resolve trade problems in ways which encourage competition and cooperation rather than conflict and isolation. WISE MEN'S REPORT, *supra* note 25, at 22-23. One way to do this is for government to create the environment for business to make such adjustments. For example, to alleviate the trade deficit problem, the United States government could provide assistance to United States businesses to become more competitive abroad. Assistance could be provided by, *inter alia*, tax and research and development incentives, providing information of foreign markets, credit assistance, etc. See Friedman & Pucik, *Obstacles to U.S. Exports to Japan—Not Insurmountable*, *Nihon Keizai Shimbun*, Apr. 7, 1981, at 20, col. 1. Another way is to establish bilateral consultation groups where serious and objective discussions can take place, for example, the Japan-United States Economic Relations Group (Wise Men's Group), The Task Force on United States-Japan Trade of the House Ways and Means Committee, The Trade Study Group, The United States-Japan Economic Council and the Advisory Council on United States-Japan Economic Relations. See WISE MEN'S REPORT, *supra* note 25, at iii, 100, 67-68.

34. See notes 26-27 & 30 *supra*.

This Note examines the Government Procurement Code and its impact on United States-Japan trade relations. It begins with a summary of discriminatory procurement practices previously permitted by the United States and Japan, followed by a brief history of the Code. The Note then addresses the Code's operative mechanisms and its effect on United States and Japanese procurement practices. Finally, it considers the NTT Agreement as an illustration of the Code's potential for opening the Japanese market to foreign suppliers.

I. UNITED STATES AND JAPANESE DISCRIMINATORY PROCUREMENT PRACTICES PRIOR TO THE CODE

It is an ostensible goal of all governments to maximize their efficient use of public moneys.³⁵ A variety of provincial concerns, however, have led most nations to withdraw their government purchases from the international market place, leaving competition largely to domestic suppliers.³⁶ The methods used to promote discriminatory procurement practices include: laws which restrict government purchasing from non-domestic sources;³⁷ the granting of broad discretionary powers in procurement officers to ignore foreign bids;³⁸ limited publicity on procurement opportunities;³⁹

35. MTN STUDY, *supra* note 7, at 202-03. See also note 8 *supra*.

36. MTN STUDY, *supra* note 7, at 202-03. There are several factors that account for domestic preferences in government procurement: a natural bias to favor familiar suppliers for political economic and cultural reasons; political pressure from special interest groups; balance of payment deficits; close relationships between government and business; practical factors such as lack of uniformity in product specifications; language barriers; accessibility of service, maintenance, and repair parts when dealing with a domestic companies; the greater facility to legal recourse in case of default; and national security reasons. See TAA of 1979, *supra* note 3, at 321; Marks and Malmgren, *supra* note 3, at 403-04. International trade is substantially restricted by buy-national policies. Each government is its nation's largest single consumer, and it has been estimated that 25-40% of the GNP of most nations is passed through their public budgets. Allison, *The Nontariff Trade Barrier Challenge: Development and Distortion in the Age of Interdependence*, 12 TULSA L.J. 1, 12 n.43 (1976).

37. The United States' Buy American Act is one such example. 41 U.S.C. §§ 10a-10d (1976). See also notes 53-58 *infra* and accompanying text.

38. This form of discrimination may be the most effective because it provides no record or trace of authorization on which to base a complaint. See K. DAM, *supra* note 3, at 204. The Japanese government uses this broad discretion in the form of "administrative guidance." See note 113 *infra* and accompanying text.

39. Failure to provide adequate information concerning bidding opportunities is one of the simplest methods of procurement discrimination. Publication may be limited so that only a few firms find out about a government purchasing opportunity. Furthermore, the information contained in the publication may be insufficient to make intelligent bids. This tends to favor domestic suppliers with long established ties to government procurement agencies. See R. BALDWIN, *supra* note 2, at 61-62.

selective tendering, where a selective group of suppliers is invited to bid;⁴⁰ and single tendering, where only one source is contacted to bid.⁴¹

Both the United States and Japan have shown preference to their domestic suppliers in government procurement.⁴² The manner of treatment, however, has differed drastically.⁴³ In contrast to the direct, legally endorsed discriminatory government procurement procedures in the United States,⁴⁴ preferential purchasing in Japan has been tacit and often present in the form of administrative practices.⁴⁵

A. *United States Procurement Practices*

1. Authority

The most conspicuous form of American discrimination against foreign exporters has been the Buy American Act of 1933,⁴⁶

40. Selective tendering is when only a limited number of suppliers, usually from pre-established lists, are solicited to compete for government tenders. Because inscription on such lists is largely discretionary in many countries, procurement officials may easily exclude foreign suppliers. See Note, *Eliminating Nontariff Barriers to International Trade: The MTN Agreement on Government Procurement*, 12 N.Y.U. J. INT'L L. & POL. 315, 326-27 (1979) [hereinafter cited as *Eliminating NTBs*]; R. BALDWIN, *supra* note 2, at 59-61.

41. Single tender allows no competition and is highly discretionary. Because single tender is often used in research and development-type procurement which requires close government supervision, domestic firms with long established relationships to government agencies are often given preference over foreign firms. See R. BALDWIN, *supra* note 2, at 61.

42. See notes 46-113 *infra* and accompanying text.

43. See W. CLINE, N. KAWANABE, T. KRONSJÖ & T. WILLIAMS, *TRADE NEGOTIATIONS IN THE TOKYO ROUND 190* (1978) [hereinafter cited as W. CLINE].

44. An underlying principle of United States government procurement is open competition. Anthony & Hagerty, *Cautious Optimism As a Guide to Foreign Government Procurement*, 11 L. & POL'Y INT'L BUS. 1301, 1309 (1979). For example, if contract specifications are so restrictive as to preclude open competition, the Comptroller General may cancel the contract. Goldstein, *supra* note 33, at 68 n.34. Thus the procurement process in the United States is highly visible—the solicitation of bids and contract specifications are openly advertised, awards published, and bid protests followed by published decisions. Anthony & Hagerty, *supra*.

45. Open competition has not been an underlying principle governing the procurement process in Japan. See *Eliminating NTBs*, *supra* note 38, at 332-33; Anthony & Hagerty, *supra* note 44, at 1308-09.

46. 41 U.S.C. §§ 10a-10d (1976). The Act provides:

Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been

which directs the federal government to give a six percent⁴⁷ price preference for goods of domestic origin.⁴⁸ Under certain circumstances, the Act permits this six percent preference to be modified or waived.⁴⁹ The margin of preference is twelve percent if the United States firm is a small business⁵⁰ or located in a designated area of unemployment.⁵¹ The Defense Department currently grants a fifty percent differential for balance of payment reasons.⁵²

The Buy American Act, however, is not the only barrier preventing procurement from abroad.⁵³ A host of statutes and administrative procedures also restricts United States procurement from

manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured 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. § 10a. A complete analysis of the Buy American Act is beyond the scope of this Note. For a thorough review of the Act, see generally Chierichella, *The Buy American Act and the Use of Foreign Sources in Federal Procurements—An Issues Analysis*, 9 PUB. CONT. L.J. 73 (1977); Gantt & Speck, *Domestic V. Foreign Trade Problems in Federal Government Contracting: Buy American Act and Executive Order*, 7 J. PUB. L. 378 (1958); Knapp, *The Buy American Act: A Review and Assessment*, 61 COLUM. L. REV. 430 (1961); Trainor, *The Buy American Act: Examination, Analysis and Comparison*, 64 MIL. L. REV. 101 (1974).

47. Exec. Order No. 10,582, § 2, 19 Fed. Reg. 8,723 (1954), [hereinafter cited as E.O. 10,582]. This six percent differential may alternatively be raised to ten percent if duty and costs incurred in the United States are deducted from the foreign bid price. *Id.*

48. A "fifty percent test" is used to determine domestic origin. Materials are considered to be of domestic origin if the cost of foreign products used in such materials constitutes less than fifty percent of all such materials. E.O. 10,582, *id.*, § 2(a). See Chierichella, *supra* note 46, at 78-81.

49. E.O. 10,582, *supra* note 50, §§ 3, 5. See Trainor, *supra* note 46, at 117-20.

50. A small business concern is defined generally as an independently owned and operated business which is not dominant in its field of operation. For the definition of a small business concern, see 41 C.F.R. § 1-1.701-1 (1976). E.O. 10,582 § 3(b). For the current law on small business and minority business set aside programs, see 15 U.S.C. §§ 631-647 (1976 & Supp. III 1979), 22 U.S.C. § 2352, 41 U.S.C. § 252(b) (1976).

51. A labor surplus area is generally defined as an area which is designated by the Secretary of Labor as containing six percent or more of the labor force unemployed. For the definition of a labor surplus area concern, see 41 C.F.R. § 1-1.801 (1976). For the current laws on programs for areas of substantial unemployment, see Defense Manpower Policy No. 4A, 32A, C.F.R. Part 134 (1979).

52. 32 C.F.R. § 6-104.4 (1979).

53. For a list of the United States laws and regulations potentially affected by the Code, see MTN Study, *supra* note 7, at 233-37.

foreign suppliers.⁵⁴ For example, the General Services Administration Appropriations Act provides a fifty percent differential for purchases of hand tools.⁵⁵ Foreign procurement of clothing, food and certain other items is prohibited pursuant to the Department of Defense Appropriations Act.⁵⁶ Small business and minority "set-aside" programs and laws exclude foreign suppliers by requiring that a "fair" proportion of total government purchases be set aside for such purposes.⁵⁷ In addition, many states and municipalities have purchasing rules that openly discriminate against foreigners.⁵⁸

2. Practices and Procedures

Government purchasing in the United States is based in principle on open competition,⁵⁹ and is highly "visible" or "transparent."⁶⁰ Easily identifiable statutes, regulations and published agency directives to procurement personnel overwhelmingly govern the procurement process.⁶¹ Purchasing is generally carried out by the General Services Administration for civilian goods, by the Department of Defense for military items, and by individual agencies for those purchases which are peculiar to their own needs.⁶² The

54. The Buy American Act is not the primary barrier to procurement from abroad. This is because the price differentials of the Act only go into effect if there is competition between foreign and domestic suppliers. Other discriminatory restrictions such as national security, specific legislation and practical considerations often prevent foreign competition from ever reaching the point where the Buy American Act would be used. See *Anthony & Hagerty*, *supra* note 44, at 1305 n.21.

55. Act of Aug. 9, 1975, Pub. L. No. 94-91, § 505, 89 Stat. 441. 41 C.F.R. § 5A-6.104-50 (1979).

56. Department of Defense Appropriations Act, Pub. L. No. 94-212, §§ 709, 723, 729, 90 Stat. 153 (1976).

57. See, e.g., Small Business Act, 15 U.S.C. §§ 631-47 (1976), as amended by Act of Oct. 24, 1978, Pub. L. No. 95-507, tit. II, 92 Stat. 1761.

58. For a list of these state practices, see *Eliminating NTBs*, *supra* note 38, at 321 n.35. While these state "Buy-National" statutes have been criticized for interfering with federal policy, see, e.g., Note, *State Buy-American Laws—Invalidity of State Attempts to Favor American Producers*, 64 MINN. L. REV. 389 (1980), under the Code such entities have been expressly excluded. GPA, *supra* note 7, art. I, para. 2. See also MTN STUDY, *supra* note 7, at 224-25.

59. *Anthony & Hagerty*, *supra* note 44, at 1309.

60. See MTN STUDY, *supra* note 7, at 233. See also S. REP. NO. 249, 96th Cong., 1st Sess. 1, 128, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381, 514-15 [hereinafter cited as S. REP. NO. 249].

61. *Anthony & Hagerty*, *supra* note 44, at 1309. S. REP. NO. 249, *supra* note 60, at 514-15.

62. [1972] GOV'T CONT. GUIDE (CCH) 11.

Commerce Business Daily publishes all United States government procurement invitations and contract awards for civilian procurement actions of \$5,000 or more,⁶³ and for military purchases of greater than \$10,000.⁶⁴

Broadly speaking, federal procurement can be divided into two categories, advertised procurement and negotiated procurement.⁶⁵ Advertised procurement, the United States' preferred form of procurement, is a highly formalized procedure mandated by statutes and regulations.⁶⁶ Generally, bids are solicited from as many qualified sources of supplies or services as are deemed necessary to assure full and free competition.⁶⁷ With a few exceptions, the government must advertise for bids when costs are predictable, specifications are readily obtainable, and adequate time and qualified suppliers are available.⁶⁸ In contrast to formal advertising, negotiated procurement is a flexible process by which the government solicits proposals or quotations with the provision that it may hold discussions to allow a modification of the proposals or quotations.⁶⁹ The form of the contractual arrangement, the product specifications and the criteria for awarding the contract need not be exact and may be negotiated until the time of award.⁷⁰ Generally, however, no procurement will be made by negotiation if formal advertising is practicable under the circumstances.⁷¹

Negotiated procurement is permitted only under statutory exemptions⁷² such as non-military purchases of under \$10,000⁷³ or when only one supplier exists.⁷⁴ Competition is encouraged to the maximum practical extent,⁷⁵ and any supplier who alleges unfair

63. See *id.*; 41 C.F.R. §§ 1-2.203-4, 1-1.1003. (1976).

64. See GOV'T CONT. GUIDE, *supra* note 62, at 11.

65. BASIC TECHNIQUES OF PUBLIC CONTRACTS PRACTICE 3-52 (W. Huffcut & M. Haiken eds. 1977) [hereinafter cited as PUBLIC CONTRACTS].

66. See generally 41 U.S.C. § 5 (1976). Advertised public procurement is the most important non-defense solicitation procedure in the United States. In 1965, 77% of the value of all General Service Administration contracts were of this type. R. BALDWIN, *supra* note 2, at 60.

67. See 41 C.F.R. § 1-2.102 (1976).

68. See 10 U.S.C. §§ 2304-2305 (1976) (military purchases); 41 U.S.C. §§ 5, 252-253 (1976) (civilian purchases).

69. PUBLIC CONTRACTS, *supra* note 65, at 36.

70. *Id.* at 37-38.

71. See 41 C.F.R. § 1-3.101 (1976).

72. See 41 C.F.R. § 1-3.200 (1976).

73. *Id.* § 1-3.203.

74. *Id.* § 1-3.210.

75. *Id.* § 1-3.101(d).

exclusion from a proposed purchase may promptly file a protest requesting a determination on the merits.⁷⁶

Except in the area of defense,⁷⁷ the foreign procurement discrimination by the Buy American Act and other statutory and administrative provisions is relatively mild when contrasted with procedures used by other governments.⁷⁸ Furthermore, the comparatively visible legislative authority and procurement procedures of the United States, with their underlying principle of competition, serve to discourage discretionary, administrative discrimination against foreign suppliers.⁷⁹ As a result, the United States has consistently been a major proponent of a comprehensive international agreement on government procurement.⁸⁰

B. Japanese Procurement Practices

1. Authority

During the late 1950's and early 1960's, Japan experienced a period of unprecedented growth.⁸¹ This rapid development was in part attributable to the Japanese government's policy of "prohibition in principle" toward foreign imports and investments.⁸² In

76. See PUBLIC CONTRACTS, *supra* note 65, at 312-14.

77. See note 52 *supra* and accompanying text.

78. Anthony & Hagerty, *supra* note 44, at 1305. One commentator states that the Japanese and European telecommunications markets were virtually closed to United States telecommunications products before the implementation of the Code. (Under the Code, European public Postal Telegraph and Telephone (PTT) entities are still closed, but telecommunications equipment can be purchased by non-PTT entities.) With government controlled foreign telecommunications markets closed to United States exports, American firms were disadvantaged by not being able to maintain the economies of scale to plough back research and development monies necessary to remain competitive. Inversely, foreign entities such as NTT were able to reap high profits from protected home markets to compete successfully abroad. In the United States' immense telecommunications market, it is stated that the Buy-American Act's six percent differential has provided a meaningful edge for United States suppliers of central office and other switching equipment. See Goldstein, *supra* note 33, at 85-87.

79. For example, it is a regular procedure in the United States to allow bid protests to be heard by the General Accounting Office (GAO). After the hearing a decision will be published. Such built-in grievance procedures serve to deter discriminatory practices. See Anthony & Hagerty, *supra* note 44, at 1309.

80. See Pomeranz, *supra* note 15, at 1270-79. See also MTN STUDY, *supra* note 7, at 201-217; Marks & Malmgren, *supra* note 3, at 401-04.

81. Between 1955 and 1969, Japan's average annual rate of growth exceeded 10%. H. FUKUDA, JAPAN AND WORLD TRADE: THE YEARS AHEAD 26 (1973). See also HOW THE UNITED STATES AND JAPAN SEE EACH OTHER'S ECONOMY (I. Frank & R. Hirono eds.) 9-36 (1974) [hereinafter cited as ECONOMY].

82. These controls were instituted during the reconstruction phase following World War II for balance-of payments reasons and to protect infant industries. THE U.S.-JAPAN

1963 a cabinet order was issued requiring government agencies to purchase certain products from domestic producers in preference to foreign suppliers.⁸³ The decree was designed to aid domestic industry and to impede the outflow of hard currency.⁸⁴

Responding to representations by other industrial nations that its trade restrictions were inconsistent with its economic strength,⁸⁵ Japan began gradually to relax its protective barriers in the 1960's and 1970's.⁸⁶ In 1972, the Finance Ministry abolished the cabinet order for products in fourteen commodity groups.⁸⁷ Only computers and related software items remained on the list. Finally, in 1975, they too were removed.⁸⁸ Further commitments by Japan to liberalize government procurement developed from discussions pursuant to the Tokyo Declaration in 1973⁸⁹ and from participation in the MTN.⁹⁰ By December 1977, the Japanese government had embarked upon an "Eight-Point External Economic Measures" program, which included in one of its points "participation by foreign corporations in the public bidding for government purchase orders."⁹¹

TRADE COUNCIL, JAPANESE EXPORTS TO THE UNITED STATES: ANALYSIS OF "IMPORT-PULL" AND "EXPORT PUSH" FACTORS 27 (1978). See Weil and Glick, *supra* note 12, at 854-56. See also ECONOMY, *supra* note 81, at 42-44; WISE MEN'S REPORT, *supra* note 25, at 56. For an historical background of Japanese trade and investment restrictions, see generally W. LOCKWOOD, THE ECONOMIC DEVELOPMENT OF JAPAN (expanded ed. 1968).

83. Cabinet Order No. 336 of September 25, 1963. See J.W. MARLOW, STATUTES, REGULATIONS, POLICIES, AND PRACTICES OF SELECTED FOREIGN COUNTRIES PROVIDING FOR PREFERENCES FOR DOMESTIC MATERIALS AND FIRMS IN THE AWARDED OF PUBLIC SUPPLY AND PUBLIC WORKS CONTRACTS 41 (1965), reprinted in 111 CONG. REC. 9706 (1965).

84. *Eliminating NTBs*, *supra* note 38, at 332.

85. See Weil & Glick, *supra* note 12, at 857. From 1955 to 1972 Japan's share of total world exports more than tripled from 2.1% to 7.1%. Japan's percentage of world imports increased at a slower rate, from 2.5% to 5.6% during the same period. ECONOMY, *supra* note 81, at 35.

86. Weil & Glick, *supra* note 12, at 856-61. For a discussion of the laws and policies relating to foreign business entry into Japan during this libera[liza]tion phase, see generally D. HENDERSON, FOREIGN ENTERPRISE IN JAPAN (1973).

87. J. W. Marlow, *supra* note 83, at 41, 111 CONG. REC. at 9706.

88. *Id.* at 42, 111 CONG. REC. at 9706.

89. See note 3 *supra*.

90. JAPAN EXTERNAL TRADE ORGANIZATION (JETRO), OVERSEAS PUBLIC RELATIONS DEPARTMENT, THE IMPORT SYSTEM OF JAPAN—EXPORTERS GUIDE 1 (1978).

91. *Id.* at 2. This resulted in a cabinet decision on January 13, 1978, to encourage foreign sales to government entities such as NTT, the *Kokusai Denshin Denwa* (KDD) (the Japanese government's international telecommunications carrier), the *Nippon Hoso Kyokai* (NHK) (the government broadcasting station), the Defense Agency, the National Space Development Agency and local and municipal governments. UNITED STATES DEPARTMENT OF

Japan has not had a formal "buy-national" scheme similar to the Buy American Act.⁹² Nor does it presently have any legislation giving preference to domestic suppliers.⁹³ Rather, discriminatory purchasing has appeared in other forms.

2. Practices and Procedures

A major source of foreign discrimination in government purchasing in Japan stems from the procurement system. Although regulations establish guidelines for public purchasing, the Japanese government has no central procurement office. Instead, a unit of each ministry or agency has been assigned to handle purchasing.⁹⁴ There has also been no centralized system for publicizing procurement notices.⁹⁵ This decentralized procurement system has given each agency a wide latitude to establish purchasing procedures.⁹⁶

There are three types of Japanese government procurement: public notice procurement, selective tender procurement and negotiated private procurement.⁹⁷ Under public notice procurement,

COMMERCE, INDUSTRY AND TRADE ADMINISTRATION, U.S. EXPORT OPPORTUNITIES TO JAPAN 261 (1978) [hereinafter cited as U.S. EXPORT OPPORTUNITIES]. The basic guidelines of the decision are as follows:

- (1) To endeavor to achieve greater recourse to competitive tendering. (2) To seek to improve the dissemination of information. (3) To give due consideration to the period for receiving bids, in order to make it possible for more to participate in tendering. (4) To endeavor to improve operational procedures with regard to other matters concerning the entering of bids.

MINISTRY OF FOREIGN AFFAIRS OF JAPAN, 100 QUESTIONS AND ANSWERS ON JAPAN'S ECONOMY AND JAPAN-U.S. TRADE 13 (1978) [hereinafter cited as 100 Questions]. On April 1, 1978, a directive was issued by the Ministry of Finance to implement these guidelines. *Id.*

92. H. FUKUDA, *supra* note 81, at 90; Anthony & Hagerty, *supra* note 44, at 1308.

93. 100 QUESTIONS, *supra* note 91, at 13; W. CLINE, *supra* note 43, at 190.

94. U.S. EXPORT OPPORTUNITIES, *supra* note 91, at 346.

95. *Id.* Without a centralized system of publicizing, domestic firms which have an ongoing relationship with government procurement offices are at an advantage. A foreign supplier who does not have a functional understanding of the procurement system may not be able to find out about procurement opportunities, or about how to participate in the procurement process once these opportunities are known.

96. In both the United States and Japan, potential bidders are first screened in order to prevent unreliable or irresponsible firms from participating in the tendering process. *See, e.g.*, 41 C.F.R. § 1-1.310 (1976) (U.S.); UNITED STATES DEPARTMENT OF COMMERCE, OVERSEAS BUSINESS REPORTS, MARKETING IN JAPAN 11 (1980) [hereinafter cited as MARKETING IN JAPAN] (JAPAN). For nonmilitary contracts United States procurement "screening" is conducted under 41 U.S.C. § 5 (1976). Procurement regulation 41 C.F.R. § 1-1.310 (1976) sets forth the criteria that a contracting officer must follow in determining a responsible contractor. In Japan the criteria for screening is largely left to individual agencies to determine. MARKETING IN JAPAN, *supra*.

97. MARKETING IN JAPAN, *supra* note 96, at 11.

all registered firms are eligible to submit bids on a competitive basis. Announcement of such requests should contain pertinent information concerning the item to be tendered,⁹⁸ and must be posted at least ten days prior to the closing of bids.⁹⁹ This is often barely sufficient time to study the specifications and prepare a bid, especially if the firm is unfamiliar with the procedures.¹⁰⁰ Publicizing of public notice procurement, however, has generally been given limited circulation because there has been no requirement for publication in the government's official gazette the *Kampo* or in newspapers.¹⁰¹ Foreign firms without access to such information may be effectively excluded from procurement participation.¹⁰²

Under the selective tender system, bids are solicited from a list of selected suppliers.¹⁰³ This list is usually drawn up by each purchasing agency from its records of registered firms.¹⁰⁴ Selective tender may be used when the purchasing agency determines that just a few suppliers are interested, public notice is disadvantageous under the circumstances, or the value of purchasing is below a certain monetary level.¹⁰⁵ In Japan, selective tender has been the most prevalent method of government purchasing.¹⁰⁶ Since the criteria for establishing a list of suppliers are largely discretionary, this method of procurement has been criticized for excluding foreign competition as well as other domestic suppliers.¹⁰⁷

98. Announcements must contain: information on the object of the tenders, qualifications for bidders, location from which to make inquiries about bid specifications, time and place at which there will be opening of bids, and matters concerning required financial guarantees. *Id.*

99. *Id.* In contrast, the United States establishes a 15 day minimum for standard commercial articles, and a 30 day minimum for non-standard items. 41 C.F.R. § 1-2.202-1 (1976).

100. U.S. EXPORT OPPORTUNITIES, *supra* note 91, at 347.

101. *Id.* The official gazette is called the *Kampo*.

102. *Eliminating NTBs*, *supra* note 38, at 327.

103. U.S. EXPORT OPPORTUNITIES, *supra* note 91, at 347.

104. *Id.*

105. *Id.*

106. *Eliminating NTBs*, *supra* note 38, at 332.

107. "Families" of firms with long established ties with government agencies are often the only firms on these lists. This means that other Japanese suppliers are excluded from bidding, and foreign firms resorted to only if goods or services are not available domestically. H. FUKUDA, *supra* note 81, at 90-91; Anthony & Hagerty, *supra* note 44, at 1309. For example, NTT has until recently maintained closed dealings with the "Den Den Family," a select group of Japanese manufacturers who receive the bulk of NTT's contracts. Because of this procurement practice of excluding foreigners, NTT had been criticized for "incubating" its domestic suppliers—allowing them to develop new technology in a closed market, espe-

Negotiated private procurement transactions involve either selected suppliers or a single supplier.¹⁰⁸ Such procurement may be used when the nature and objectives of the contract do not allow competition, or when competition is deemed disadvantageous. The purchasing agency may also use negotiated private procurement when the circumstances call for urgency or when the cost of the procurement is less than a certain monetary value.¹⁰⁹ A substantial percentage of goods and services procured by Japan's central government entities has been secured by negotiated direct procurement.¹¹⁰ This method allows the most discretion in extending an offer to potential bidders and thus affords the fullest opportunity to favor domestic suppliers.¹¹¹

Japan's government procurement practices and procedures have resulted in the unintentional, systemic exclusion of foreign competition. Logistical obstruction of foreign entry can be found in the decentralized procurement system, nominal publicity requirements, the short period in which to respond to government procurement proposals, and the lack of open bidding. This system perpetuates an inherent bias in favor of domestic suppliers.¹¹² To some degree, Japan's exclusion of foreign suppliers has also been a matter

cially semi-conductor, computer and telecommunications equipment and thus moving them into the position of becoming major competitors abroad. See U.S.-JAPAN TRADE REPORT, *supra* note 12, at 26. NTT is already a major exporter of telecommunications in Southeast Asia and has begun to expand its markets to Central and South America. See *Nihon Keizai Shimbun*, May 5, 1981, at 9, col 3.

108. MARKETING IN JAPAN, *supra* note 96, at 11-12.

109. *Id.*

110. U.S. EXPORT OPPORTUNITIES, *supra* note 91, at 347.

111. *Eliminating NTBs*, *supra* note 38, at 327.

112. H. FUKUDA, *supra* note 81, at 90. "[T]echnological standards and specifications unique to Japan" have also been cited as a barrier to competition by foreign firms. *Eliminating NTBs*, *supra* note 38, at 332-33. Another problem has been product testing. The testing of electrical equipment, for instance, must be conducted in Japan. WISE MEN'S REPORT, *supra* note 25, at 59-60. Even if product standards and tests are met, traditional business and cultural factors create unique problems in penetrating the Japanese market. The difficulty of translating documents from, and into, Japanese, is often cited as a factor which puts foreign firms, especially small firms, at a disadvantage. *Eliminating NTBs*, *supra* note 38, at 332-33. Of course, as a matter of reciprocity, the United States does not publish its procurement notices in Japanese. The complex distribution system held together by a long-established network of personal relationships, has also been a major barrier to foreign business entry into Japan. See WISE MEN'S REPORT, *supra* note 25, at 63-64. A discussion of the problems of commercial entry into Japan is beyond the scope of this Note. For a more extensive review of these issues, see generally U.S. EXPORT OPPORTUNITIES, *supra* note 91; Weil & Glick, *supra* note 12; and WISE MEN'S REPORT, *supra* note 25.

of choice. Either under "administrative guidance"¹¹³ or because of personal nationalistic, nepotistic or complacent tendencies, procurement officials have exercised their discretion to prevent foreign access in government procurement.

II. THE CODE

The MTN Agreement on Government Procurement¹¹⁴ proposes to reduce or eliminate trade protections created by preferential government procurement policies.¹¹⁵ Two levels of provisions in the Code are designed to accomplish this goal. First, the signatories have expressly agreed upon the basic principle of non-discrimi-

113. [Administrative guidance] is a method used by the Japanese government to achieve certain policy objectives. It reflects, in part, the Japanese penchant for avoiding confrontation by using informal channels to deal with problems, and provides the government with a flexible technique for maintaining "harmony" in the economy through the use of temporary measures that avoid the need for legislative action. Trade barriers accomplished through the use of administrative guidance are therefore considerably more subtle than overt product approval standards [or] government procurement . . . (citations omitted).

Weil & Glick, *supra* note 12, at 889.

114. The creation of an international agreement on government procurement was sparked in 1962 by complaints raised by representatives of Belgium and the United Kingdom before the Organization for Economic Cooperation and Development (OECD) regarding the United States government's use of the Buy American Act. The investigation of the dispute first resulted in a Working Party report on government procurement in the United States. Pomeranz, *supra* note 15, at 1271. When the report was being subsequently reviewed by the OECD Trade Committee, the United States shifted the emphasis of the investigation to all of the member countries. *Id.* at 1272. There resulted a study published in 1966 which was ultimately integrated into the MTN Government Procurement Code. MTN STUDY, *supra* note 7, at 208 n.3.

115. GPA, *supra* note 7. The Code consists of a preamble followed by nine articles and four annexes. Paragraph seven of the Code's preamble states "that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and to foreign or domestic suppliers so as to afford protection to domestic products or suppliers and should not discriminate among foreign products or suppliers." GPA, *supra* note 7, preamble. Discrimination in government procurement is the result of both deliberate efforts to favor domestic suppliers, and ignorance and complacency on the part of government officials who are unwilling to spend the time and take the risks of purchasing from foreign suppliers. Thus it is important that an international code on government procurement set forth administrative procedures which expose to public scrutiny the various stages of the procurement process and allow for bid protests to be heard, *i.e.*, full publicizing of procurement opportunities and specifications, disclosure of information as to why bids were rejected and access to a dispute mechanism. R. BALDWIN, *THE MULTILATERAL TRADE NEGOTIATIONS—TOWARD GREATER LIBERALIZATION?* 16 (1979). See also note 8 *supra* for a discussion of the economic theory behind the Code.

nation.¹¹⁶ Second, they have provided for specific guidelines to ensure that discrimination will in fact be eliminated.¹¹⁷

A. Scope

The Government Procurement Code is limited to procurement entities¹¹⁸ "under the direct or substantial control"¹¹⁹ of the signatory governments, and applies only to purchases of products.¹²⁰ Service contracts *per se* are exempt.¹²¹ This does not exclude, however, services that are "incidental to the supply of products."¹²² Government purchases below a minimum contract value of 150,000 special drawing rights (SDRs)¹²³ are also excluded.¹²⁴

116. Under Article II's "National Treatment and Non-Discrimination" requirements "all laws, regulations, procedures and practices regarding government procurement covered by this Agreement" must "immediately and unconditionally" accord foreign products and suppliers treatment no less favorable than that granted to domestic products and suppliers. Furthermore, no foreign products or suppliers may be accorded treatment more favorable than that given to any other foreign products or suppliers. GPA, *supra* note 7, art. II. This requirement of national treatment and non-discrimination applies to "products originating within the customs territories (including free [trade] zones)" of the signatory countries to the Code. *Id.* para. 1. Each country should apply its own rules of origin as applied in the normal course of trade. *Id.* para. 3. This non-uniform application may present problems in the future. See Brown, *supra* note 3, at 200-01. A country with strict rules of origin may be disadvantaged because non-signatories to the Code may be able to conceal product origin by transshipment through signatory countries. This means that a "strict-rule-of-origin" country may have to compete with non-signatories for procurement opportunities made available in other signatory countries. See MTN STUDY, *supra* note 7, at 259.

One major exception to the conditional most-favored nation (MFN) treatment of the Code is Article III, which provides for the concerns of developing countries and grants preferential treatment on the basis of the need to safeguard balance of payments and promote industry in key areas of economic development. GPA, *supra* note 7, art. III.

117. TAA of 1979, *supra* note 3, at 329.

118. See discussion at note 11 *supra*.

119. GPA, *supra* note 7, art. I(c). Annex I contains the lists of each of the parties entities which fall under the provisions of the Code. *Id.* Annex 1. These entity lists are an integral part of the Code, *id.* art. IX, para. 10, and are subject to adjustments. *Id.* art. IX, para. 5. "Entities" expressly includes agencies. *Id.* art. I, n.1.

120. *Id.* art. I(a).

121. *Id.* For example, construction, insurance and banking contracts. See Anthony & Hagerty, *supra* note 44, at 1319-21. There is a provision in the Code which states that within three years (from the Code's in-force date) the signatories shall undertake negotiation "at an early stage, [to] explore the possibilities of expanding the coverage of this Agreement to include service contracts." GPA, *supra*, art. IX, para. 6(b).

122. *Id.* art I(a). Such services are covered by the Code as long as their value does not exceed that of the products themselves. *Id.* The Code does not, however, indicate when a service is "incidental." Brown, *supra* note 3, at 200.

123. A "Special Drawing Right" (SDR), is a unit of international reserve assets instituted by the International Monetary Fund (IMF) in 1969. MTN STUDY, *supra* note 7, at 222

Further, the Code does not apply to regional and local government procurement,¹²⁵ nor does it cover contracts concerning tied aid to developing countries.¹²⁶

There are two other areas listed as exceptions in the Code. First, government purchases relating to arms, ammunition and war materials are exempted for reasons of national security and national defense.¹²⁷ Second, good-faith procurement which affects public morals, public order and safety, and which provides economic encouragement to certain disadvantaged groups is also exempted.¹²⁸

B. Technical Specifications

Product specifications and standards in government procurement can be used as an effective barrier to foreign suppliers if designed simply to accommodate domestic manufacturers.¹²⁹ Under the Code, such technical specifications shall not be prepared, applied or adopted to create non-tariff restrictions.¹³⁰ The Code encourages the use of uniform international standards and substituted product equivalents.¹³¹

n.1. SDR value is based on a "basket" of currencies, weighted by the percentage of world trade of 16 major trading nations. Since the SDR floats against the dollar, its value fluctuates. 150,000 SDRs is approximately \$195,000. See Brown, *supra* note 3, at 199 n.8.

124. GPA, *supra* note 7, art. I(b).

125. See *Id.* art. I, paras. 1(c), 2. See also note 58 *supra*.

126. See GPA, *supra* note 7, art. III. In general, the Code provides for special and differential treatment for developing countries. *Id.* It is beyond the scope of this note to deal with such issues. For a discussion of developing countries and the MTN, see G. M. Meier, *Tokyo Round of Multilateral Trade Negotiations and Developing Countries*, 13 CORNELL INT'L L.J. 239 (1980).

127. GPA, *supra* note 7, art. VIII, para. 1.

128. *Id.* art. VIII, para. 2. Both the national security and public morals exceptions have been criticized because the ambiguity of the language used leaves substantial room for interpretation and discretion. Anthony & Hagerty, *supra* note 44, at 1322-23; *Eliminating NTBs*, *supra* note 38, at 341-42.

129. Brown, *supra* note 3, at 201. For example, the differences of regional standards in Europe has significantly prevented a community-wide telecommunications market in the EEC. Goldstein, *supra* note 33, at 88 n.132. See also note 280 *infra* and accompanying text.

130. GPA, *supra* note 7, art. IV.

131. *Id.* The use of international or national standards should increase competition since suppliers are most likely to be familiar with them. The use of substituted product equivalents means that bid proposals should be set forth as specifications based on function rather than form. This should encourage innovation and efficiency. MTN STUDY, *supra* note 7, at 299.

C. Transparency

The Code's key function is to make government procurement procedures more "transparent," i.e., identifiable, open, and regularly administered.¹³² By prescribing publication and advertising requirements, the Code seeks to eliminate discrimination practiced by countries with no formal scheme of procurement bias.¹³³ Foreign suppliers should have access to all publications regarding procurement opportunities. Information necessary to acquire a functional understanding of qualification, tendering and award procedures should also be made available.¹³⁴

Under the Code, all procurement laws, regulations and procedures must be promptly set forth in certain designated publications.¹³⁵ Conditions of tender qualification and notice of procurement proposals also must be publicized,¹³⁶ and pertinent information must be included.¹³⁷ Adequate time must be afforded

132. Anthony & Hagerty, *supra* note 44, at 1323. See also notes 60 & 61 *supra* and accompanying text.

133. Prescribed transparency procedures and practices in the Code are designed to replace "administrative guidance" and other discretionary methods currently used by governments to discriminate against foreign goods in public purchasing. See *id.* at 1323-24.

134. TWENTY-THIRD ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM—1978, at 28.

135. GPA, *supra* note 7, art. VI, para. 1. The parties and entities should also be prepared to explain, upon request, additional information about practices and procedures. *Id.* Japanese laws, regulations and procedures are published in the *Genko-Nihon-Hoki* (compilation of Current Laws and Regulations of Japan), and/or *Kampo* (Official Gazette). United States laws, regulations and procedures are published in the United States Code, the United States Code of Federal Regulations and original-source reporters. See *id.* Annex IV.

136. *Id.* art. V. Notices are published as listed in Annex II. *Id.* art. V, para. 3. In Japan, publications will be in the *Kampo* (Official Gazette), in the United States, in the *Commerce Business Daily*. *Id.* Annex II. An amended or re-issued notice of a proposal must be given the same publication circulation as the original notice. *Id.* art. V, para. 8. In addition, the entity shall publish a summary of the notices of procurement proposal in one of the official languages of the GATT. *Id.* art. V, para. 4.

137. *Id.* art. V, para. 4. Each notice of a proposed procurement must contain:

(a) the nature and quantity of the products to be supplied, or envisaged to be purchased in the case of contracts of a recurring nature; (b) whether the procedure is open or selective; (c) any delivery date; (d) the address and final date for submitting an application to be invited to tender or for qualifying for the suppliers' lists, or for receiving tenders, as well as the language or languages in which they must be submitted; (e) the address of the entity awarding the contract and providing any information necessary for obtaining specifications and other documents; (f) any economic and technical requirements, financial guarantees and information required from suppliers; (g) the amount and terms of payment of any sum payable for the tender documentation.

Id.

suppliers to respond to such opportunities.¹³⁸ Entities maintaining permanent lists of qualified suppliers are required annually to publish the title and the conditions of inscription to those lists.¹³⁹

In addition, any inquiry regarding the procurement process must be given prompt attention by the purchasing entity.¹⁴⁰ If a firm has failed to qualify, has not been invited or permitted to tender, or has been unsuccessful in the award of a contract, then the purchasing entity must supply that firm with an explanation within a reasonable time.¹⁴¹

D. Tendering

The Code recognizes three tendering procedures, open tender, selective tender, and single tender.¹⁴² Open tender is the Code's preferred method of tendering.¹⁴³ The procedures for open tender, however, are inflexible and can be costly and cumbersome.¹⁴⁴ Therefore, the Code also recognizes selective and single tendering procedures.¹⁴⁵ In order to limit the discretionary application of these tendering processes,¹⁴⁶ the Code has qualified the use of selective tender¹⁴⁷ and allows single tender in only five instances.¹⁴⁸

138. *Id.* art. V, para. 2(a). For the qualification of suppliers, the Code states that there must be "adequate time to enable interested suppliers to initiate and, to the extent that it is compatible with efficient operation of the procurement process, complete the qualification procedures." *Id.* For the preparation of bids in response to proposals, the Code requires a 30 day minimum preparation period, subject to reductions in a "state of urgency," or if there is a recurring contract. *Id.* art. V, para. 10.

139. *Id.* art. V, para. 6(a). Such publications will appear as listed in Annex III. GPA, *supra* note 7, Annex III.

140. *Id.* art. V, para. 13; art. VI, para. 2.

141. *Id.* art. VI, paras. 3-5.

142. For purposes of the Code, open tendering is defined as "those procedures under which all interested suppliers may submit a tender"; selective tendering as "those procedures under which, consistent with [the Code], those suppliers invited to do so by the entity may submit a tender"; and single tendering as "those procedures where the entity contacts suppliers individually, only under the conditions specified in [the Code]." *Id.* art. V, para. 1.

143. Open tender is preferred in the sense that it offers the greatest competition among suppliers, and thus discourages preferential treatment in government procurement. *See Eliminating NTBs, supra* note 38, at 335. Unlike selective or single tender, its use is not limited or conditioned by the Code's provisions. *See generally* GPA, *supra* note 7, art. V.

144. *See* R. BALDWIN, *supra* note 2, at 61.

145. GPA, *supra* note 7, art. V. *See Eliminating NTBs, supra* note 38, at 335-36.

146. The use of pre-established lists to select suppliers allows purchasing officials an opportunity to favor domestic suppliers. *Eliminating NTBs, supra* note 38, at 335. *See* note 38 *supra* and accompanying text.

147. These qualifications are: (1) publishing the conditions and qualifications that a supplier must meet, GPA, *supra* note 7, art. V, para. 2(a); (2) considering for qualification

E. Settlement and Enforcement

Settlement and enforcement procedures are two-tiered. First, the Code requires that a procuring entity disclose to an unsuccessful supplier the reasons for rejection and the relative merits of the winning bid.¹⁴⁹ The unsuccessful foreign supplier is therefore able to learn if there were possible violations of the Code.¹⁵⁰ By following the Code's grievance procedures, the firm may settle directly with the procuring entity.¹⁵¹ As a result of this direct process of interaction between the complaining supplier and the procuring entity, the Code is rendered largely self-enforcing.¹⁵²

Second, the Code contains enforcement provisions which establish a Committee on Government Procurement to oversee, monitor and enforce the Code.¹⁵³ Resolution of any dispute should first be attempted through bilateral consultations between the govern-

and tender any new suppliers, *id.* art. V, para. 6(c); (3) including within a reasonable time qualified suppliers wishing to be placed on permanent lists, *id.* art. V, para. 2(d); (4) notifying qualified suppliers of their status on such lists, *id.* art. V, para. 2(e); and (5) annually publishing an enumeration of permanent lists including their title, the products to be purchased, conditions of qualification, their duration and the formalities for their renewal, *id.* art. V, para. 6(a).

148. These instances are: (1) the absence of response to open or selective tendering, or when tenders are collusive, nonconforming or from unqualified suppliers; (2) the product can only be acquired from one source, *e.g.*, patents, copyrights or works of art; (3) the circumstances call for extreme urgency brought about by unforeseeable events; (4) the subsequent purchase of additional or replacement parts by anyone other than the original suppliers would cause the replacement of existing equipment; and (5) the purchase of prototypes or a first product for research, experiment, study or original development. GPA, *supra* note 7, art. V, para. 15. In addition, the Code requires that a written report be filed with each single tender award. This report must contain the name of the entity, the value and type of product procured and the country of origin. The report must be retained for purposes of future disputes. *Id.* art. V, para. 16.

149. *Id.* art. VI, paras. 2, 4-5.

150. *Id.* art. VI, paras. 5-7. This procedure includes complaints arising at any phase of the procurement process, including the post award period. *Id.* The disclosure of confidential information which would impede law enforcement, be contrary to the public interest, prejudice the legitimate commercial interest of particular enterprises or might prejudice fair competition between suppliers, however, shall not be revealed without formal authorization from the party disclosing the information. *Id.* art. VI, para. 8.

151. *Id.* art. VI, para. 5. Article VI provides that "[t]here shall . . . be procedures for the hearing and reviewing of complaints arising in connexion with any phase of the procurement process, so as to ensure that, to the greatest extent possible, disputes . . . will be equitably and expeditiously resolved between the suppliers and the entities concerned." *Id.*

152. Strauss, *supra* note 2, at 1347.

153. GPA, *supra* note 7, art. VII. For a discussion on the effectiveness of the Code's enforcement provisions by way of a comparison with GATT's enforcement mechanism, see Anthony & Hagerty, *supra* note 44, at 1330-32.

ments involved.¹⁵⁴ Upon failure to reach a settlement, the Committee may then step in to make recommendations or rulings. The ultimate sanction is denial of the benefits of the Code.¹⁵⁵

III. UNITED STATES AND JAPANESE PROCUREMENT UNDER THE CODE

Discriminatory government procurement constitutes a substantial impediment to international trade.¹⁵⁶ With the Code now in effect, a potential world market of approximately \$33 billion has been opened up to foreign bidding.¹⁵⁷ United States and Japanese procurement represents more than half of this figure.¹⁵⁸ Their efforts to comply fully with the Code will be crucial to eliminating government procurement barriers in world trade.¹⁵⁹

A. United States Implementation

On July 26, 1979, the Trade Agreements Act of 1979 was approved by Congress.¹⁶⁰ United States implementation of the Code is found in Title III of the Act, which was ordered into effect on January 1, 1981.¹⁶¹ Title III gives the President the authority to waive federally mandated buy-national laws, regulations, proce-

154. CPA, *supra* note 7, art. VII, paras. 3-5.

155. *Id.* art. VII, paras. 6-14.

156. See Note, *Technical Analysis of the Government Procurement Agreement*, 11 LAW & POL'Y INT'L BUS. 1345 (1979).

157. S. REP. No. 249, *supra* note 60, at 527. This figure is limited to the potential government procurement market opened up as a result of the Code. It therefore does not account for purchases of non-signatory countries nor exclusions under the Code. See *id.* Another source estimates this figure to be as high as \$50 billion. See BUS. WEEK, Dec. 29, 1980, at 50.

158. United States procurement under the Code is estimated at \$17.5 billion, Japan's at \$8 billion. See 22 HARV. INT'L L.J. 464, 465 (1981).

159. See note 30 *supra*. See also note 290 *infra*.

160. 19 U.S.C. §§ 2501-2582 (Supp. III 1979). As an executive agreement, the Code does not *ipso facto* preempt United States discriminatory government procurement legislation such as the Buy American Act. The Trade Agreements Act of 1979 creates the authority to do so, and is carried out by Executive Order No. 12260 of Dec. 31, 1980, 46 Fed. Reg. 1653 (1981) and the Determination of the Special Trade Representative, 46 Fed. Reg. 1657 (1981). This discrepancy created by the implementation process had been an issue of concern for Japanese suppliers. They feared that the Trade Agreements Act's provisions would not conform with the Code. See WISE MEN'S REPORT, *supra* note 25, at 93-94. Since the Trade Agreements Act is what preempts the Buy American Act, it would be the Trade Agreements Act, not the Code, that would govern on appeal.

161. 19 U.S.C. §§ 2511-2518 (Supp. III 1979); see S. REP. No. 249, *supra* note 60, at 514.

dures and practices under four circumstances,¹⁶² and to order a prohibition on goods procured by countries that fail to reciprocate under the terms of the Code.¹⁶³ This waiver applies only to the Buy American Act and to those labor surplus set-aside laws which do not affect minority or small businesses.¹⁶⁴ Several laws and regulations which would appear to contravene the Code's provisions are not affected.¹⁶⁵

In its implementation of the Code under Title III, the United States should incorporate into current laws and regulations certain publication requirements and data dissemination guidelines.¹⁶⁶ In contrast to other countries with less visible forms of government procurement,¹⁶⁷ the United States will not have to make more than minor adjustments in its procedures.¹⁶⁸ Good faith adherence to

162. 19 U.S.C. § 2511(a) (Supp. III 1979). These four circumstances are: (1) the country is a party to the Code and provides "appropriate reciprocal competitive government procurement opportunities to United States products and suppliers of such products," *id.* § 2511(b)(1); (2) the country is unwilling to become a party under the multilateral obligations of the Code, but nonetheless assumes *de facto* the procedural obligations with respect to the United States by signing a bilateral agreement, *id.* § 2511(b)(2); (3) the country is a non-signatory to the Code and is unwilling to assume its procedural obligations, but agrees to provide reciprocal competitive opportunities, *id.* § 2511(b)(3); and (4) the country is among the "least" developed countries, *id.* § 2511(b)(4). See also S. REP. No. 249, *supra* note 60, at 519. As a major industrial country, Japan is eligible for a waiver only in the first circumstance.

163. *Id.* § 2512(b)(3). When the President grants any waiver, he must enact a prohibition on the procurement of goods from all countries which did not obtain a waiver. *Id.* § 2512(a). The prohibition is immediately effective for major industrial nations, but may be delayed up to two years for other countries. *Id.* § 2512(b)(1). See also S. REP. No. 249, *supra* note 60, at 519-20.

164. Pomeranz, *supra* note 15, at 1294. See notes 46-52 *supra* and accompanying text for a discussion of the Buy American Act. For a discussion of the labor surplus set-aside laws, see MTN STUDY, *supra* note 7, at 269.

165. S. REP. No. 249, *supra* note 60, at 518. See also TAA of 1979, *supra* note 3, at 333-35.

166. A discussion of all the affected laws and regulations is beyond the scope of this Note. There are three general situations where such regulations will have to conform to the provisions of Title III: (1) when the statutory authority for the regulation violates Title III, *e.g.*, the Buy American Act; (2) when the regulation is more detailed than the statutory authority and violates Title III in implementation of the statute, *e.g.*, when the time allowed for submission of a particular bid is shorter than allowed by Title III, (3) when the organic authority for the regulation resides in the executive branch. See MTN STUDY, *supra* note 7, at 233, 237.

167. See Anthony & Hagerty, *supra* note 44, at 1309. See also, *e.g.*, Goldstein, *supra* note 33, at 69-70 n.39; S. REP. No. 249, *supra* note 60, at 514.

168. See S. REP. No. 249, *supra* note 60, at 514.

the Code by foreign signatories should provide important new opportunities for United States exporters.¹⁶⁹

B. Japanese Implementation and the NTT Agreement

1. Japanese Implementation

The Code entered into force on January 1, 1981.¹⁷⁰ Under its provisions, an estimated \$8 billion of Japan's procurement is now open to international competition.¹⁷¹ Affected are all of Japan's central governmental ministries and agencies,¹⁷² including three quasi-public corporations: the Japan National Railways (JNR),¹⁷³ the Japan Tobacco and Salt Public Corporation (JTS)¹⁷⁴ and the Nippon Telegraph and Telephone Public Corporation (NTT).¹⁷⁵

In principle, implementation of the Code reforms many of the previously mentioned discriminatory practices of Japan.¹⁷⁶ Application of the various transparency requirements of the Code potentially imposes regularity and uniformity in Japan's procurement procedures.¹⁷⁷ Since publicizing of procurement announcements is now centralized and each agency's purchasing regulations are in conformity with the Code,¹⁷⁸ discretionary procurement practices should be limited and, in any event, subject to guidelines which prohibit discriminatory conduct.¹⁷⁹ Minimum time limits for al-

169. See *id.* at 533. R. BALDWIN, THE MULTILATERAL TRADE NEGOTIATIONS—TOWARD GREATER LIBERALIZATION? 16 (1979). See Anthony & Hagerty, *supra* note 44, at 1339-42.

170. GPA, *supra* note 7, art. IX, para. 3.

171. Bus. AM., FEB. 9, 1981, at 39.

172. GPA, *supra* note 7, Annex I.

173. The JNR is a public corporation similar to NTT, and under the nominal control of the Ministry of Transportation and Construction. The JNR operates nearly 80% of Japan's railway network, and represents 90% of the Japanese market for railway equipment. See Weil & Glick, *supra* note 12, at 887-89.

174. The JTS is a public corporation under the Ministry of Finance. It virtually controls Japan's entire tobacco market through the manufacture, import, sale and distribution of tobacco products, See Weil & Glick, *supra* note 12, at 886-87. In December, 1980, Japan announced that it would facilitate foreign market entry of tobacco products, including a tariff reduction of up to 55% on cigarettes, cigars and pipe tobacco. See Bus. AM., Feb. 9, 1981, at 39.

175. See note 12 *supra*.

176. See notes 78-133 *supra* and accompanying text.

177. See WISE MEN'S REPORT, *supra* note 25, at 63.

178. See notes 135-37 & 139 *supra* and accompanying text. See also, *e.g.*, Bus. AM., May 18, 1981, at 13-15.

179. Article II of the Code provides the general rule of non-discriminatory treatment. GPA *supra* note 7, art. II. See also note 116 *supra* and accompanying text. Article V, for

lowing firms to respond to proposals,¹⁸⁰ provisions for the disclosure of information about procurement documentation,¹⁸¹ tendering in the presence of all bidders¹⁸² and constraints on the use of pre-established lists¹⁸³ promise to put foreign suppliers on an equal footing with domestic firms. Since the use of negotiated private procurement is now restricted under the Code,¹⁸⁴ the number of long established purchaser-supplier "family" relationships should be reduced.¹⁸⁵ Furthermore, a foreign supplier's access to post qualification and post award information should ensure full compliance with these procedures.¹⁸⁶

2. The NTT Agreement

Concluded as a result of protracted negotiations between the United States and Japan over entity coverage under the Code,¹⁸⁷ the

example, states that the selection of suppliers to participate in tendering shall be "in a fair and non-discriminatory manner." GPA *supra* note 7, art. V, para. 5.

180. There has been an extension of the minimum time period between tender announcements and the close of bidding from 10 to 30 days. This is consistent with the Code. See also notes 98 & 138 *supra* and accompanying text; see, e.g., NIPPON TELEGRAPH & TELEPHONE PUBLIC CORPORATION SPECIAL REGULATIONS FOR HANDLING GOODS PURCHASE CONTRACTS (English Translation), arts. 9.2, 10.2 (1980) [hereinafter cited as NTT SPECIAL REGULATIONS].

181. This is in conformity with the Code. See notes 135-137 & 139 *supra* and accompanying text; see, e.g., NTT SPECIAL REGULATIONS, *supra* note 180, arts. 9, 12.

182. This follows the Code's provisions. GPA, *supra* note 7, art. V, para. 14(d); see, e.g., NTT SPECIAL REGULATIONS, *supra* note 180, art. 19.

183. See notes 103-07, 139 & 147 *supra* and accompanying text; see, e.g., NTT Agreement, *supra* note 18, Attachment I, paras. 12, 19, 22.

184. See notes 97, 108-11 & 148 *supra* and accompanying text; see, e.g., NTT SPECIAL REGULATIONS, *supra* note 180, art. 24.

185. See note 107 *supra* and accompanying text.

186. See notes 141 & 149-53 *supra* and accompanying text; see, e.g., NTT Agreement, *supra* note 18, Attachment I, para. 20.

187. The NTT Agreement has its origins in a United States trade mission visit to Japan, in the fall of 1978, for the purpose of promoting United States exports. In light of the United States' technological strength in the telecommunications field, the trade mission visited the Nippon Telephone and Telegraph Public Corporation (NTT), and demanded that the Japanese telecommunications agency open its doors to United States manufacturers. IRJ, *supra* note 10, at 84. The President of NTT made an untimely statement that there were not many items to be purchased from the United States "excepting housecloths and buckets." *Id.* This comment enraged many United States businessmen who had been trying unsuccessfully to export goods to Japan. NTT soon became a symbol to United States manufacturers and officials of Japan's "unfair" closed market policies. *Id.* See also U.S.-JAPAN TRADE REPORT, *supra* note 12, at 29. During the discussions at the Tokyo Round of MTN on government procurement, the United States pressed hard to have Japan include the NTT in the list of governmental entities covered under the Code. NTT was considered the only governmental

bilateral NTT Agreement entitles the United States to \$1.8 billion of NTT's public telecommunications procurement.¹⁸⁸ This is in addition to NTT's \$1.5 billion of non-public telecommunications purchases covered under the Code.¹⁸⁹ The NTT Agreement repre-

entity whose purchases were of sufficient quantity and technological advancement to provide the necessary reciprocity of procurement opportunities. Japan reluctantly consented to include NTT in its procurement offer. See NTT HEARING, *supra* note 4, at 13 (statement of W. Douglas Newkirk). Bilateral talks continued after the Tokyo Round. Now that NTT was included as an entity under the Code, discussions focused on the amount of NTT's purchases that would be covered, particularly telecommunications equipment. See IRJ, *supra* note 10, at 84-85. A joint statement was issued in June, 1979, calling for Japan and the United States to reach an agreement on NTT coverage no later than December 31, 1980. If a settlement could not be reached at that time, both countries had the option of rescinding their procurement offers. *Joint Statement of June 2, supra* note 16. The negotiations had to resolve major differences. The United States wanted NTT to include a greater portion of its procurement under the Code, and to subject those purchases to open competitive bidding. It feared that anything less than open competitive bidding would dilute the purposes of the Code. Furthermore, the American Electronic Industry Association (EIA) had voted unanimously that the only acceptable outcome of the NTT talks was a complete open coverage by NTT under the Code. See ECONOMIC WORLD (Feb. 1981) at 43; U.S.-JAPAN TRADE REPORT, *supra* note 12, at 28. Japan maintained the position that merely its offer to purchase telecommunications equipment exceeded the scope of the Code. Its need to maintain quality products, however, prevented it from opening all contracts to competitive bidding. IRJ, *supra* note 10, at 84-85. The practice of single tendering had long been maintained by NTT with a view towards maintaining a higher degree of reliability in the equipment. Also, joint development projects for new types of equipment was felt to require closed bidding with dependable firms. *Id.* Japan's fear that adoption of the Code would result in a lower standard of products, was a major stumbling block in the negotiations. NTT HEARING, *supra* note 4, at 14 (statement of W. Douglas Newkirk). Japan believed that the Code ignored quality control and gave total priority to price competition. See BUSINESS JAPAN, Nov. 1980, at 30. In addition, during the process of securing implementing legislation for the agreements pursuant to the MTN, the Japanese government had made a commitment to the Diet not to concede to Code coverage of NTT's purchases of "public telecommunications equipment." Full coverage of NTT under the Code would also give other MTN signatories, most notably the European Economic Community, non-reciprocal access to NTT's procurement. NTT HEARING, *supra* note 4, at 15 (statement of W. Douglas Newkirk).

188. NTT Agreement, *supra* note 18. The United States and Japan settled on a two-part procurement package. A liberal interpretation of "non-public telecommunications equipment," provided for an increase of NTT's formal Code procurement offer to almost half of its annual purchases. The rest of NTT's public telecommunications purchases, approximately \$1.8 billion, would be open only to United States manufacturers under the bilateral agreement committing NTT to procurement procedures consistent with Code obligations. *Nihon Keizai Shimbun*, Dec. 2, 1980, at 1, col. 1. A major reason for the Agreement's conclusion was the understanding that was reached concerning the flexible nature of the Code. See Hormats, *supra* note 10, at 21. Based on this understanding both parties made concessions. Japan offered to increase its purchasing by open bidding from \$600 million to \$1.5 billion. The United States agreed to accept the three-stage formula proposed earlier by Japan. *Nihon Keizai Shimbun*, Nov. 29, 1980, at 3, translated by The American Embassy, Tokyo, Political Section (Dec. 5, 1980) (copy on file at the Japan Society Library).

189. *Id.*

sents a major attempt by the United States to rectify its current trade deficit with Japan by opening procurement in a field where United States firms are highly competitive internationally—telecommunications.¹⁹⁰ In addition to opening telecommunications procurement to the United States, the Agreement embodies a promise by Japan to facilitate foreign access to its interconnect market.¹⁹¹

The Agreement sets forth three types of NTT procurement procedures, Track I, Track II and Track III.¹⁹² Track I applies to all NTT purchasing of non-public telecommunications equipment.¹⁹³ This area of purchasing is subject to bids by suppliers from all Code signatories.¹⁹⁴ Tracks II and III cover all public telecommunications procurement.¹⁹⁵ Only firms from the United States are granted the right to bid in this area.¹⁹⁶ Track II refers to purchases of “off the shelf” public telecommunications equip-

190. Indeed, NTT symbolized this bilateral trade “friction.” A United States House Report issued prior to the United States-Japan settlement on government procurement provides in pertinent part: “NTT is the single biggest opportunity for increased U.S. sales to a Japanese Government agency, and the failure to achieve progress in the NTT negotiations stands as the symbol of remaining Japanese industrial trade protectionism and her unfair approach to trade in high technology products.” U.S.-JAPAN TRADE REPORT, *supra* note 12, at 29. See also notes 32 & 187 *supra* and accompanying text.

191. NTT Agreement, *supra* note 18, Joint Statement. Since the interconnect market involved private users, this issue is separate from government procurement. Nonetheless, NTT’s approval is necessary in order to connect private leased-line equipment into Japan’s telecommunications system. See note 20 *supra*. On December 26, 1980, the Ministry of Posts and Telecommunications (MPT) authorized a deregulation for its international private leased-line telecommunications carrier, the *Kokusai Denshin Denwa Co., Ltd. (KDD)*. The MPT’s approval allows the use of multiple processing centers in Japan and overseas—a new market for foreign manufacturers. See *Bus. Am.*, Feb. 9, 1981, at 40.

192. NTT Agreement, *supra* note 18, Attachment I, para. 2.

193. See *Id.* Covered under Track I are:

1. General Materials—poles, hardware, clothing and paper, fuel, furniture, stationery, and purchases by local branch offices.

2. Non-Telephone Type Terminals and Machineries—computers (off-line or stand-alone use), peripheries for off-line computer systems, memory materials for computer systems, measuring instruments, power supply (storage batteries, engine generators, power receiving sets, transformers), conduits, vehicles, data terminal equipment, keyboard displays, marketsheet readers, magnetic card readers, keyboard printers, magnetic character readers, PBX and private line switching equipment, modem and network control units, facsimile (group 1,2,3 machines), and protective devices.

3. Planned New Services—video information retrieval terminals, and teleentering service terminals.

Bus. Am., Aug. 24, 1981, at 2.

194. *Id.*; see note 19 *supra*.

195. NTT Agreement, *supra* note 18, Attachment I, para. 2.

196. *Id.*; see notes 19 & 23 *supra*.

ment.¹⁹⁷ Track III covers high technology public telecommunications equipment still in the experimental or developmental stage.¹⁹⁸

NTT's Track I procurement is covered by both the Code and the NTT Agreement.¹⁹⁹ Therefore, the NTT Agreement does not spell out Track I's procedures.²⁰⁰ Instead, its procedures are set forth in NTT regulations pursuant to Japan's implementation of the Code.²⁰¹ The procurement procedures under Track I involve pre-qualification,²⁰² tender offer²⁰³ and contract award.²⁰⁴ The pre-qualification process is intended to screen out unreliable firms.²⁰⁵ First an application is filed with NTT.²⁰⁶ Then NTT proceeds with an examination of the supplier's credentials.²⁰⁷ If the firm is pre-

197. This means "equipment which is available in the market place and which can be placed in service as it is or is capable of being modified as required." PROCUREMENT PROCEDURES FOR PUBLIC TELECOMMUNICATIONS EQUIPMENT (English Translation) 3 (1981) [hereinafter cited as PUBLIC TELECOMMUNICATIONS GUIDEBOOK]. Track II equipment includes switching systems, carrier transmission equipment, radio units, on-line computers, cable and telephone apparatus. *Id.* NTT has also announced that it will purchase digital echo suppressors. *Nihon Keizai Shimbun*, June 30, 1981, at 8, col. 3.

198. Covered under Track III are switching systems, carrier transmissions equipment, on-line computers, radio equipment, cable and telephone apparatus. Public Telecommunications Guidebook, *supra* note 197, at 3. NTT has opened bidding for Japanese-language teletex terminals and automobile telephones. *Nihon Keizai Shimbun*, June 30, 1981, at 8, col. 3.

199. See NTT Agreement, *supra* note 18, Attachment I, para. 2.

200. See *id.* Attachment I.

201. See NTT SPECIAL REGULATIONS, *supra* note 180, art. 1. Track I's procedures for United States suppliers are as follows: (1) A pre-qualification notice appears in the *Kampo*; (2) A translated copy is sent to the United States for dissemination; (3) United States firms request pre-qualification documents from NTT; (4) NTT inspects the United States firm's credentials; (5) NTT sends notice of pre-qualification results; (6) NTT issues tender to the United States firms which have successfully pre-qualified; (7) United States firms submit bids; and (8) NTT awards the final contract. See *Bus. AM.*, Aug. 24, 1981, at 3-4.

202. See NTT SPECIAL REGULATIONS, *supra* note 180, arts. 7, 8.

203. See *id.* arts. 9-20.

204. See *id.* art. 21.

205. See note 96 *supra*.

206. See NTT SPECIAL REGULATIONS, *supra* note 180, arts. 7, 8. NTT is required to specify the conditions of tendering qualifications in the initial *Kampo* pre-qualification notice each and every fiscal year. *Id.* art. 7.2; GPA, *supra* note 7, art. V, para. 2.

207. This process involves two steps. First there is a disqualification step where any firm that "has committed any misconduct with respect to the quality and/or quantity of any [p]roduct" or "conspired with . . . other . . . persons at any tendering with an intention to tender up or down the contract price," etc., may be excluded from participating in any NTT procurement. NTT SPECIAL REGULATIONS, *supra* note 180, art. 6. Second, once a firm has met these basic conditions, then it will be examined "in terms of the size of operation, business standing, production capacity, technical capability and various other requirements . . ." based on the particular product to be purchased. *Id.* art. 7.1.

qualified, it is placed automatically on a list of eligible firms.²⁰⁸ NTT issues a tender offer directly to the supplier.²⁰⁹ Bids are then opened to all tenderers at a time and place designated by NTT.²¹⁰ Then follows the final contract award.²¹¹

Tracks II and III are not covered by the Code.²¹² Nonetheless, NTT is committed to making these Tracks consistent with Code obligations.²¹³ In several key areas Tracks II and III mirror the Code's transparency provisions. These Tracks require that procurement information be publicized,²¹⁴ applications be handled in an equitable manner²¹⁵ and unsuccessful applicants be given reasons for rejection.²¹⁶

208. See *id.* art. 8.3. As of October, 1981, NTT's Track I procurement has been exclusively selective tendering. Under selective tendering only a portion of all qualified bidders need be invited as long as there is "optimum effective international competition." See GPA, *supra* note 7, art. V, para. 5. Thus far NTT has not had to determine a portion of qualified bidders because all qualified bidders have been invited. Telephone conversation with J. Urayama, Deputy Director of the New York Office of the Nippon Telegraph & Telephone Public Corporation, in New York City (Oct. 23, 1981). See also Bus. Am., Aug. 24, 1981, at 3.

209. See NTT SPECIAL REGULATIONS, *supra* note 180, arts. 4, 10, 11. A notice of the proposed purchase must also be published in the *Kampo*. *Id.* art. 9.1; GPA, *supra* note 7, art. V, para. 3. The notice must allow at least 30 days before the closing of tenders, but this may be shortened to 10 days in the case of a recurring contract or five days in an emergency. NTT SPECIAL REGULATIONS, *supra* note 180, art. 9.2; GPA, *supra* note 7, art. V, para. 10. A summary of the proposal must also be publicized in one of the official languages of GATT. *Id.* art. 9.4; GPA, *supra* note 7, art. V, para. 4. Tenders solicited by either direct solicitation letters issued by NTT or by notice in the *Kampo* must be treated equally. NTT SPECIAL REGULATIONS, *id.* art. 10.3.

210. NTT SPECIAL REGULATIONS, *supra* note 180, art. 19; GPA, *supra* note 7, art. V, para. 14.

211. NTT SPECIAL REGULATIONS, *supra* note 180, arts. 19, 20; GPA, *supra* note 7, art. V, para. 14.

212. See notes 248-54 *infra* and accompanying text.

213. Article V of the Code states that the signatories "shall ensure that the tendering procedures of their entities are consistent with [Article V's] provisions . . ." GPA, *supra* note 7, art. V, para. 1. The NTT Agreement provides in pertinent part, "In our view, these Procedures are not inconsistent with the provisions of the Code, in particular, Article V. In addition to implementing the Procedures, the NTT will also fully observe the requirements of the Code." NTT Agreement, *supra* note 18, letter of Dr. Saburo Okita, para. 3.

214. See generally PUBLIC TELECOMMUNICATIONS GUIDEBOOK, *supra* note 197, at 5-30; GPA, *supra* note 7, arts. V, VI.

215. As set forth in the Code, procurement documentation is to be furnished to suppliers on a timely basis. All such documentation must contain information necessary to permit responsive applications. Suppliers are given at least thirty days to respond. Moreover, any inquiries regarding either procurement proposals or procurement documentation shall be promptly addressed by NTT. Amendments or clarifications are to be provided simultaneously to all interested suppliers in a timely manner. Tracks II and III also provide that contracts will be awarded to the "most advantageous" applicant(s) in terms of the criteria set

By eliminating pre-qualification and the opening of bids in public, Tracks II and III simplify the procedures called for by the Code.²¹⁷ A firm wishing to submit a bid under these Tracks must request procurement documentation from NTT and then return a completed application with supporting documents.²¹⁸ This is followed by an extensive examination of the supplier's background, sample products and manufacturing facilities based on criteria specified in the procurement documentation.²¹⁹ Selected applicants are provided with procurement specifications and then awarded contracts.²²⁰ A thorough processing of applications,

forth in notices or procurement documentation. If it appears that no applicant is obviously the most advantageous, NTT will in subsequent negotiations give equal consideration to all applicants within the competitive range. See generally PUBLIC TELECOMMUNICATIONS GUIDEBOOK, *supra* note 197, at 5-30; GPA, *supra* note 7, art. V.

216. NTT will also facilitate the review of its procedures by informing unsuccessful applicants in writing of the final outcome of each contract award. Complete records will be kept of all matters concerning such awards. Unsuccessful applicants requesting reasons for the rejection of their bids will be promptly furnished such information. Further, an enumeration of qualified suppliers will be published annually in the *Kampo*, including relevant information regarding inscription to pre-established lists. See NTT Agreement, *supra* note 18, Attachment I; GPA, *supra* note 7, arts. V, VI.

217. Instead of having a pre-qualification step as in Track I, Tracks II and III consolidate this step into one "selection" process. See PUBLIC TELECOMMUNICATIONS GUIDEBOOK, *supra* note 197, §§ 5.5, 6.5. Applicants are not selected by an opening of bids in the presence of all bidders, as is required under Track I. See notes 182 & 210 *supra* and accompanying text. When NTT formulated this three track system, it looked to the procurement procedures of the United States Department of Defense and the General Services Administration and struck a balance somewhere between them. Conversation with K. Kubo, Senior Staff Engineer of the New York Office of the Nippon Telegraph & Telephone Public Corporation, in New York City (Sept. 29, 1981).

218. See PUBLIC TELECOMMUNICATIONS GUIDEBOOK, *supra* note 197, §§ 5.4, 6.4.

219. Track II provides eight criteria to select successful applicants. An applicant should have: (1) high quality products compatible with NTT's existing systems and lower in price; (2) sufficient technical development ability; (3) satisfactory financial resources and "maintains excellent technical standards and production facilities;" (4) "ample knowledge about public telecommunication;" (5) sufficient production and marketing experience; (6) stability of product supply, quality and price; (7) the ability to meet NTT's demands over a long period; (8) the ability to cooperate, assist in training, service repairs and replace parts. *Id.* § 5.5(2). Nine criteria are used in Track III procurement. NTT will expect an applicant to have: (1) high quality products and research and development which is compatible with NTT's existing systems and lower in price; (2) sufficient research and development ability and resources; (3) the ability to cooperate with NTT in research and development projects; (4) satisfactory financial resources and "maintains excellent technical standards and production facilities;" (5) "ample knowledge about public telecommunication;" (6) sufficient production and marketing experience; (7) stability of product supply, quality and price; (8) the ability to meet NTT's demands over a long period; (9) the ability to cooperate, assist in training, service repairs and replace parts. *Id.* § 6.5(2).

220. See *id.* §§ 5.7-5.8, 6.7-6.8. Tracks II and III also provide for "follow-on" procurement, designated by either Track II-A or Track III-A. Follow-on procurement refers to NTT

therefore, ensures NTT that manufacturers will be able to meet its standards for product reliability and quality control.²²¹

A significant feature of the NTT Agreement is Track III, which sets forth detailed provisions for purchasing telecommunications equipment under joint research and development programs.²²² Representing over half of NTT's annual procurement, this category offers the most lucrative and technologically advanced contracts for United States suppliers.²²³ Track III procurement, however, presents unique problems with respect to bringing high technology telecommunications purchasing in conformity with the Code's non-discriminatory principles. First of all, joint research and development projects often result in the creation of new technologies. NTT may feel compelled to develop these technologies domestically by awarding contracts to Japanese firms, thereby giving them a competitive edge over United States suppliers.²²⁴ Secondly, the close cooperation necessitated by joint projects may cause NTT to turn to domestic suppliers simply because such close dealings with United States firms may be difficult logistically.²²⁵

purchases of products which it previously purchased either under Track II or Track III, and is applicable only to firms which have already been awarded contracts. (Under certain circumstances a company may be placed directly in Tracks II-A or III-A if, for example, its product is sufficiently advanced to exempt it from the selection process. One United States firm, Motorola, Inc., became eligible for Track III-A procurement as a result of having a superior quality automobile telephone.) Once a firm is awarded an initial contract it becomes a "qualified supplier," and is placed on a permanent list. Such a designation is published in the *Kampo* as part of any procurement proposals of follow-on purchasing. As a matter of principle, NTT will place orders with these designated qualified suppliers for goods previously purchased under Tracks II and III. NTT will annually place in the *Kampo* an announcement of its fiscal year procurement requirements under Tracks II-A and III-A. Any new suppliers who wish to bid must apply through NTT's selection process. To be awarded a contract, a new firm must demonstrate that its products are better or cheaper than those being procured by designated qualified suppliers. See PUBLIC TELECOMMUNICATIONS GUIDEBOOK, *supra* note 197, § 7.4. Although follow-on procurement is administratively convenient it restricts competition because qualified suppliers are presumptively given purchasing orders. Furthermore, new suppliers are only able to find out about follow-on purchases on an annual basis. Follow-on procurement probably represents NTT's largest purchases for telecommunications equipment. NTT's fiscal 1981 follow-on procurement for Tracks II-A and III-A is projected to be approximately \$1.8 billion. NIPPON TELEGRAPH & TELEPHONE PUBLIC CORPORATION, PUBLIC NOTICE ON PROCUREMENT OF PUBLIC TELECOMMUNICATIONS EQUIPMENT, Aug. 28, 1981.

221. See notes 187-88 *supra*.

222. PUBLIC TELECOMMUNICATIONS GUIDEBOOK, *supra* note 197, § 6.7.

223. See BUS. WEEK, Dec. 29, 1980, at 50. This includes Track III-A "follow-on" procurement. See note 220 *supra*.

224. See U.S.-JAPAN TRADE REPORT, *supra* note 12, at 26.

225. This has already occurred to a Japanese supplier in the United States. See note 272 *supra*.

The NTT Agreement's primary purpose is to provide non-discriminatory access to NTT's procurement opportunities.²²⁶ As part of this objective, the Agreement is designed to achieve specific solutions to procurement problems in the telecommunications industry, namely the minimizing of incidences of product failure²²⁷ and the handling of research and development projects.²²⁸ If successfully implemented, its basic framework should be transferable to other areas of sophisticated government procurement.²²⁹

Although the Code and the NTT Agreement are designed to impose regularity and transparency in procurement procedures,²³⁰ they still allow ample room for the exercise of discretion in favor of domestic suppliers.²³¹ For example, the Code allows procurement officials to limit the number of potential suppliers if the number is "consistent with the efficient operation of the procurement system."²³² Even greater room for abuse is provided in Tracks II and III of the NTT Agreement, which allows NTT to conduct a "closed" selection process.²³³ This permits a wide latitude for determining the specific criteria by which firms will be determined "most advantageous." Since fairness of the procedures depends largely on the good faith of government agencies, it is essential for both Japan and the United States to monitor closely each phase of government procurement implementations.²³⁴

226. See NTT Agreement, *supra* note 18, letters of Dr. Saburo Okita and Reubin O'D. Askew. In addition, NTT's procurement procedures under the Agreement should become systematized and open, allowing NTT to select its suppliers from a larger pool of applicants. Greater competition should permit NTT to purchase reliable foreign products at competitive prices. This should give NTT greater confidence in establishing relationships with foreign manufacturers. See PUBLIC TELECOMMUNICATIONS GUIDEBOOK, *supra* note 197, § 1. See also note 8 *supra*.

227. See note 187 *supra*.

228. See notes 187 & 222-25 *supra*.

229. See NTT HEARING, *supra* note 4, at 45-46 (statement of Robert Cassidy).

230. See notes 176, 186 & 226 *supra* and accompanying text.

231. See notes 96, 107 & 113 *supra* and accompanying text.

232. GPA, *supra* note 7, art. V, para. 5.

233. See PUBLIC TELECOMMUNICATIONS GUIDEBOOK, *supra* note 197, §§ 5.5, 6.5; see also note 217 *supra*.

234. Of all the agreements concluded at the MTN, the Government Procurement Code will probably require the most careful monitoring. See S. REP. No. 249, *supra* note 60, at 533. The United States government and the Communications Division of the United States Electronic Machine Industry Association (EIA) will closely monitor NTT procurement under the Code. ECON. WORLD, Feb. 1981, at 43. See NTT HEARING, *supra* note 4, at 17 (statement of W. Douglas Newkirk). See also note 267 *infra* accompanying text.

a. *recent developments.*

It is important to examine the framework and purposes of the NTT Agreement in light of concrete developments. As of January 1981, NTT began implementing the first phases of its obligations under the NTT Agreement.²³⁵ Notice of qualification for its first round of procurement was published in the *Kampo*, and applications were sent to all interested firms.²³⁶

Early on, a problem arose relating to the application procedure used by NTT to select bidders. Foreign firms complained that the procedure was too complicated and meticulous.²³⁷ The lack of time given potential bidders to comply with applications posed another problem.²³⁸ This placed domestic firms or foreign firms with branch offices or subsidiaries in Japan at a distinct advantage.²³⁹ These problems were addressed in NTT's second round of qualification screenings, which featured the simplification of procedural requirements.²⁴⁰ In addition, a system was developed by the United States to translate procurement documents and disseminate them to United States suppliers.²⁴¹ By the end of February, thirty-six firms were eligible to participate in NTT's first round, involving

235. See *Nihon Keizai Shimbun*, Feb. 3, 1981, at 8, col. 4.

236. NIPPON TELEGRAPH & TELEPHONE PUBLIC CORPORATION, PUBLIC NOTICE CONCERNING THE EXAMINATION OF QUALIFICATIONS FOR PARTICIPANTS IN COMPETITIVE BIDDING, Jan. 10, 1981.

237. *Nihon Keizai Shimbun*, Feb. 3, 1981, at 8, col. 4. The applications went so far as to require personal career information on engineering staffs and the disclosure of business secrets. *Id.*

238. Under the NTT Agreement, NTT must allow a minimum of 30 days for a supplier to respond. See note 180 *supra* and accompanying text. The Department of Commerce was to be blamed in part for not issuing a translation of the solicitation notice until early February. NTT had made the announcement on January 10 and applications were open until the end of February. JAPAN ECONOMIC INSTITUTE, JAPAN INSIGHT, No. 11, at 9 (Mar. 20, 1981).

239. Small foreign firms without the resources of larger firms are the primary losers. One way of overcoming this problem is to use a Japanese trading company as an agent. See *Nihon Keizai Shimbun*, Feb. 3, 1981, at 8, col. 4.

240. See *Nihon Keizai Shimbun*, Mar. 24, 1981, at 9, col. 3.

241. The system works as follows:

[A]nnouncements of NTT's proposed purchases, as well as qualification procedures, are cabled by the Foreign Commercial Service to Washington [D.C.] and disseminated to U.S. firms through the computer-based Trade Opportunity Program. Key information is also published in *Commerce Business Daily*. The complete NTT tender documents are obtained and sent back to Washington via courier service.

BUS. AM., May 18, 1981, at 15.

several items of Track I equipment.²⁴² Fifteen of these firms were newcomers.²⁴³ Most were from the United States.²⁴⁴

Simultaneously, efforts were being made by Japan, pursuant to the NTT Agreement, to open its market of customer-provided lease-line equipment (interconnect).²⁴⁵ In the Agreement, NTT had promised to adopt type-approval methods and to accept testing data from abroad, which effectively would simplify product approval procedures.²⁴⁶ Again complaints arose because of the complexity of the applications.²⁴⁷ These applications were subsequently simplified, and in March one United States company that had attempted to penetrate the interconnect market for several years was granted product approval.²⁴⁸

In April, NTT announced two more rounds of Track I procurement.²⁴⁹ Nine United States firms qualified.²⁵⁰ In addition, an interconnect seminar was sponsored in Washington, D.C. and in Los Angeles to inform United States firms about NTT's new procedures and technical requirements for type-approval.²⁵¹ A similar seminar was held in Tokyo in May.²⁵² By early June, a procurement guidebook and several technical pamphlets had been published in English by NTT.²⁵³ Later that month, a seminar was held in Tokyo to help United States firms obtain a working understanding of NTT procurement procedures and the telecommunications industry in Japan.²⁵⁴ At the end of June an announcement was made for the first purchasing of three telecommunications items under Tracks II and III.²⁵⁵ By this time, four United States com-

242. *Nihon Keizai Shimbun*, Mar. 24, 1981, at 9, col. 3.

243. *Id.* This included domestic firms which were previously excluded from the NTT "family." See also note 107 *supra*.

244. *Nihon Keizai Shimbun*, Mar. 24, 1981, at 9, col. 3.

245. See *Nihon Keizai Shimbun*, Jan. 13, 1981, at 9, col. 2.

246. See NTT Agreement, *supra* note 18, Joint Statement.

247. See *Nihon Keizai Shimbun*, Apr. 14, 1981, at 9, col. 1.

248. Plantronics, Inc., of Santa Cruz, California, obtained NTT's type certification for headphone transmitter-receiver equipment. *Id.*

249. See NTT HEARING, *supra* note 4, at 25 (statement of Raymond J. Waldmann).

250. *Id.* at 18 (statement of W. Douglas Newkirk).

251. *Nihon Keizai Shimbun*, June 16, 1981, at 9, col. 1.

252. *Id.*

253. *Id.* This went beyond the requirements of the NTT Agreement, and indicates NTT's "genuine change in receptivity to foreign suppliers." JAPAN ECONOMIC INSTITUTE, JAPAN INSIGHT, No. 28, at 4 (July 24, 1981).

254. JAPAN ECONOMIC INSTITUTE, JAPAN INSIGHT, No. 28, at 4 (July 24, 1981).

255. *Nihon Keizai Shimbun*, June 30, 1981, at 8, col. 3.

panies had been awarded procurement contracts for Track I equipment.²⁵⁶

b. *assessment*

It is too early to draw any conclusions about the NTT Agreement.²⁵⁷ By examining each party's responsibilities and by determining criteria to be used in evaluating the Agreement's implementation, however, some light may be shed on the potential effectiveness of the NTT Agreement and its impact on United States-Japan bilateral relations.²⁵⁸

NTT's responsibilities include the prompt publicizing of tender proposals and the publishing of procurement information necessary to render its purchasing accessible to United States manufacturers.²⁵⁹ These responsibilities also involve giving United States firms fair treatment in the application and bidding processes.²⁶⁰ Good faith on the part of NTT will be required.²⁶¹ The recent developments indicate that NTT has, to a substantial degree, demonstrated its commitment to the Code's principles by closely adhering to, and sometimes going beyond, the terms of the NTT Agreement.²⁶²

256. UNITED STATES EMBASSY, TOKYO, NTT AWARDS CONTRACTS TO FOUR U.S. COMPANIES, CABLE REPORT #2686 (1981) (copy on file at the *Fordham International Law Journal* office).

257. It may take up to two years before any valid conclusions can be made. See NTT HEARING, *supra* note 4, at 50 (statement of Robert Cassidy).

258. *Id.* at 48-52.

259. *Id.* at 48-49.

260. See notes 213-16 *supra* and accompanying text.

261. See notes 230-35 *supra* and accompanying text; see also NTT HEARING, *supra* note 4, at 48-49 (statement of Robert Cassidy).

262. NTT HEARING, *supra* note 4, at 19 (statement of W. Douglas Newkirk). United States Trade Representative William Brock reported in a recent Joint Economic Committee hearing before the International Trade Subcommittee that "the professionalism and thoroughness that were evident in [NTT's procurement] seminars indicates the sincerity with which Japan is undertaking its obligations [and] . . . we are optimistic that the prospects for sales of high-technology American products are improving significantly as a result of the steps that both governments are taking." See JAPAN ECONOMIC INSTITUTE REPORT, No. 31, Aug. 14, 1981. Perhaps NTT's good faith can be attributed to events which coincided with the NTT Agreement's negotiation and implementation. As a result of an accounting scandal, NTT's former President, Tokuji Akikusa, resigned on January 5, 1981. Replacing him was an "outsider", Hisashi Shinto, the first person from the private sector to head NTT. *Nihon Keizai Shimbun*, Dec. 30, 1980, at 2, col. 4. This new management has created a catalyst for reform in NTT, and opened the way for international competition. See *BUS. WEEK*, May 4, 1981, at 67. NTT is taking steps to disband its former "family" of suppliers and will encourage those companies whose businesses may be under-cut by foreign suppliers to develop new markets. *Nihon Keizai Shimbun*, Aug. 11, 1981, at 9, col. 1.

The responsibility of United States manufacturers is to learn about the procurement process in order to compete effectively for NTT awards.²⁶³ A serious effort on the part of United States firms must be made to penetrate a highly competitive Japanese telecommunications market.²⁶⁴ This requires not only an active response to NTT's proposals, but also an incessant effort to surmount the commercial realities of doing business in Japan.²⁶⁵ Judging from the events of recent months, it is apparent that several manufacturers have made a serious effort to bear this responsibility.²⁶⁶

The United States and Japanese governments should cooperate closely to monitor the Agreement and to respond to any complaints or disputes which may arise.²⁶⁷ The United States government in particular must delineate the areas of responsibility between the United States Trade Representative and the Department of Commerce to oversee implementation of the Agreement.²⁶⁸

263. NTT HEARING, *supra* note 4, at 49 (statement of Robert Cassidy).

264. One United States company, Motorola, Inc., negotiated for two years before being accepted by NTT as a qualified supplier of pocket beepers (used by doctors). It has been awarded a significant contract for its diligence. JAPAN ECONOMIC INSTITUTE, JAPAN INSIGHT, No. 11, at 9 (Mar. 20, 1981). In an effort to establish an environment more favorable to United States exports, the United States Congress has addressed various legislative incentives. For example, the tax burden on United States citizens living and working abroad has been eased. Congress is also considering export trading company legislation, and amending the 1977 Foreign Corrupt Practices Act. See JAPAN ECONOMIC INSTITUTE REPORT, No. 31, Aug. 14, 1981, at 5-8.

265. See note 112 *supra* and accompanying text. To penetrate the Japanese market, it goes without saying that one must understand the manner in which business is conducted in Japan. For example, buyer-supplier relationships in Japan are perceived on a serious, personal level, especially in the initial stages of establishing the relationship. While a United States buyer who encounters a defective product may, without too much consternation, take it back to the manufacturer to be replaced, in Japan such a defect would cause considerable loss of confidence in the supplier. Thus, Japanese business practice requires a new supplier, domestic or foreign, to demonstrate his sincerity by meeting extremely strict standards. See NTT HEARING, *supra* note 4, at 49 (statement of Robert Cassidy).

266. See note 265 *supra* and accompanying text. As of October 20, 1981, six United States firms have been awarded contracts. Conversation with J. Urayama, Deputy Director of the New York Office of the Nippon Telegraph & Telephone Public Corporation, in New York City (Oct. 25, 1981).

267. See note 234 *supra* and accompanying text. The NTT Agreement provides its own procedures for non-binding arbitration. Any dispute arising out of the agreement which cannot be settled through consultation will be subject to an advisory report of a tribunal of three arbitrators, to be concluded within one year. NTT Agreement, *supra* note 18, Attachment II.

268. On June 9, 1981, a House of Representatives hearing was held before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce to discuss the implementation of the NTT Agreement. One of its

An assessment of the NTT Agreement's implementation will require time.²⁶⁹ Although the most obvious basis for this assessment is whether United States firms are awarded contracts, other factors must also be considered.²⁷⁰ This is because the amount of awards granted to or withheld from United States suppliers does not necessarily reflect the degree to which Japanese procurement practices are discriminatory. Instead, it might indicate relative competitive standing or commercial realities.²⁷¹

A successful implementation of the NTT Agreement will have a dual effect on bilateral relations between the United States and Japan. First, assuming that United States telecommunications manufacturers are competitive abroad, fair and open access to NTT procurement and Japan's interconnect market should ideally result in the reduction of the current trade deficit with Japan.²⁷² Greater

main purposes was to clarify the areas of authority between these two offices in monitoring the implementation of the NTT Agreement. Pursuant to the Trade Agreements Act of 1979, such authority is divided between the United States Trade Representative and the Department of Commerce. One witness stated

that the greatest weakness in U.S. international trade policy is in overseeing implementation of existing agreements. Generally speaking, neither Congress nor successive administrations have allocated sufficient resources to oversight of implementation If there is no sign of interest, then the foreign governments and the U.S. business community usually assume that the issue is no longer of political importance. If concern is expressed as bombastic attacks on the foreigners then the result is a negative reaction by the foreigners which usually prohibits effective implementation. The right balance depends entirely upon the details of the agreement at hand and the time in the agreement's history at which the oversight activity occurs.

NTT HEARING, *supra* note 4, at 47-48 (statement of Robert Cassidy).

269. See note 257 *supra* and accompanying text. A careful record of each contract should provide a statistical basis for evaluation. See NTT HEARING, *supra* note 4, at 8 (statement of John Sodolski). Both the Code and the NTT Agreement require that such records be kept. GPA, *supra* note 7, arts. V, para. 16, VI, para. 9; NTT Agreement, *supra* note 18, Attachment I, para. 20. The Department of Commerce is presently preparing an extensive report to submit to Congress on the implementation of the NTT Agreement. JAPAN ECONOMIC INSTITUTE, JAPAN INSIGHT, No. 28, at 4 (July 24, 1981).

270. See NTT HEARING, *supra* note 4, at 19-20 (statement of W. Douglas Newkirk). See also note 23 *supra*.

271. During the NTT Agreement's negotiations, NTT offered \$2.3 billion worth of equipment to be allocated for foreign procurement. IRJ, *supra* note 10, at 85. The United States rejected this "quota" approach, stating that although it might benefit United States manufacturers initially, it could cause injury to long-term United States industrial interests. Furthermore, such an approach would have defeated the Code's purpose—procurement based on competition in the open market place. See NTT HEARING, *supra* note 4, at 51 (statement of Robert Cassidy).

272. In addition to telecommunications equipment, United States sales of industrial products should be competitive in computers and related peripherals, various electronic components, process control units, biomedical instruments, electronic industry production

exports to Japan should deflate perceptions in the United States that Japan is unfairly and excessively exporting to the United States while maintaining an impenetrable market at home.²⁷³ Second, the efforts by Japan and NTT to open procurement to foreign firms, if continued in good faith, should indicate a Japanese willingness to share a greater burden in its bilateral economic and strategic partnership with the United States.²⁷⁴ This willingness should lead to a clearer demarcation of responsibilities, which would be favorable to the long term interests of both nations.²⁷⁵

CONCLUSION

The successful conclusion of the Tokyo Round of Multilateral Negotiations represents a significant step toward eliminating non-tariff barriers to trade. Through the multilateral framework established by the GATT, the Government Procurement Code attempts to reduce one NTB by providing for non-discriminatory guidelines in government procurement contracts. It is hoped that the United States and Japan can effectively implement these guidelines. Apart from implementation, however, the successful negotiation of the

and test equipment, aircraft, avionics and ground support equipment and building systems and materials. *Bus. Am.*, Feb. 9, 1981, at 40. Pursuant to mutual reciprocity under the Agreement, United States procurement will also be opened to competition from Japan. In the United States, most of the telecommunications purchases are conducted by privately owned companies, and are therefore exempt from the provisions of the Code. Anthony & Hagerty, *supra* note 44, at 1314 n.75. American Telephone and Telegraph Co. (ATT), is by far the largest supplier of telecommunications services in the United States and conducts two-thirds of its purchasing through its subsidiary, Western Electric, Inc. Pursuant to the NTT Agreement, the United States is committed to the encouragement of non-discriminatory access to ATT's purchases by Japanese manufacturers. A recent Federal Communication Commission (FCC) deregulation of ATT is designed to ensure that ATT buys from suppliers other than Western Electric. *Wall St. Journal*, Oct. 19, 1981, at 26, col. 3. Current events indicate, however, that the United States' tendencies to buy-national may create problems in the future regarding the NTT Agreement. For example, ATT recently denied a contract award to a Japanese supplier, Fujitsu Ltd., for the purchasing of a fiber optic communications system. Fujitsu had offered the lowest bid, but was rejected simply because it was a foreign supplier. Some of the reasons cited for the rejection were: national interest; logistical problems of developing technology with a foreign company; and advantages that such technological development would mean for the United States. *Wall St. Journal*, Oct. 30, 1981, at 56, col. 1. See also notes 22-25 *supra* and accompanying text.

273. See notes 31-33 *supra* and accompanying text.

274. See note 32 *supra* and accompanying text.

275. See Allison, *Productive Partnership: Productive of What and for Whom?* (keynote speech delivered on Sept. 14, 1981, at the Japan Society, New York, N.Y.) reprinted in *THE JAPAN SOCIETY NEWSLETTER* 2-4 (Oct. 1981). See also note 32 *supra*.

NTT Agreement by the two largest government purchasers of all the Code signatories²⁷⁶ is a favorable precedent in the direction of a comprehensive international system of government procurement.²⁷⁷ The NTT Agreement is a significant extension of the Code. It provides unprecedented procurement procedures addressing the handling of product reliability and research and development in the telecommunications industry.²⁷⁸

The Government Procurement Code expressly provides that future negotiations are to be held with a view toward expanding the Code's scope and coverage.²⁷⁹ With the implementation of the NTT Agreement, the United States and Japan are now in a position to appeal to other countries such as the European Economic Community (EEC) and Canada to open up their public Postal Telegraph and Telephone Systems (PTTs).²⁸⁰ Other problems of Code interpretation and implementation should await clarification in future discussions.²⁸¹

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276. See S. REP. No. 249, *supra* note 60, at 527. See also note 158 *supra* and accompanying text.

277. See note 30 *supra* and accompanying text; see also *NTT Hearing*, *supra* note 4, at 45-46 (statement of Robert Cassidy).

278. The NTT Agreement has been described as "by far, the most detailed arrangement relating to government procurement in existence today." *NTT Hearing*, *supra* note 4, at 45 (statement of Robert Cassidy).

279. GPA, *supra* note 7, art. IX. The NTT Agreement conforms to this provision and calls for the review of the Agreement in three years. If the arrangement should prove satisfactory, it will be renewed for another three years. *NTT Agreement*, *supra* note 18, letters of Dr. Saburo Okita and Reubin O'D. Askew.

280. It will be difficult for the United States and Japan to persuade the EEC and Canada to open their telecommunications procurement, as both the United States and Japan have had trade surpluses with respect to the EEC and Canada. In addition, the EEC has had considerable difficulty in establishing European wide standards for telecommunications equipment, and has allocated a meager 10% of PTT telecommunications procurement to be opened to non-European telecommunications companies established in Europe by 1986. See *NTT HEARING*, *supra* note 4, at 42 (statement by Robert Cassidy). See also note 78 *supra*.

281. For example: the floating nature of SDR's; the definition of service contracts, national security and public welfare interests; and the question of regional or local government interference with the Code's provisions. See generally *MTN Study*, *supra* note 7.

