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The EC's Government Procurement Directive: Has "Fortress Europe" Arrived?

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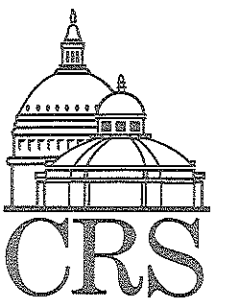

THE EC'S GOVERNMENT PROCUREMENT DIRECTIVE: HAS "FORTRESS EUROPE" ARRIVED?

SUMMARY

On January 1, 1993, the European Community put into effect new rules on government procurement (the Utilities Directive) that the Bush Administration, in accordance with Title VII of the Omnibus Trade and Competitiveness Act of 1988, had determined would result in discrimination against U.S. businesses. On February 1, 1993, the U.S. Trade Representative, Mickey Kantor, announced that the United States would impose sanctions on the European Community and some or all of its member states on March 22, 1993, in response to discriminatory government procurement policies.

The initial reaction from the EC came from Sir Leon Brittan, the EC Commission Vice-President in charge of trade policy and negotiations. He described the action as one of "unilateral bullying." On March 19, 1993, Ambassador Kantor and EC Commission President Jacques Delors, in a joint communique, announced that "the EC will address constructively U.S. concerns. At that time, Ambassador Kantor indicated the United States would refrain from taking further action under Title VII of the 1988 Trade Act until after his visit to Brussels and discussion of these proposals with Commissioner Leon Brittan." At the March 29, 1993, meeting between Ambassador Kantor and Sir Leon Brittan, the Community put forward a new set of proposals for an agreement on procurement. In response, Ambassador Kantor announced that the United States would delay the imposition of sanctions until after a further meeting on April 19-20, 1993. He also said that the United States would go forward with sanctions if an agreement is not reached.

The procurement issue is quite complex, but is made more so because of systemic differences between the Community and the United States. In the EC, regulated, publicly owned utilities are predominant, while in the United States, the sector is characterized principally, although not exclusively, by private ownership. The Utilities Directive extends government procurement rules to public and private companies alike. This is likely to have the salutary effect of opening up government procurement within the EC, while at the same time permitting discrimination against export-oriented firms of third countries (e.g., the United States). The main issues in the dispute over procurement are (1) Article 29 of the EC Utilities Directive, which permits discrimination against U.S. and other third-party tenders that do not meet a 50-percent EC-content requirement and awards a 3-percent price-preference to local (EC) tenders containing at least 50- percent local content; (2) a demand by the EC Commission that investor-owned telecommunication and energy utilities be brought under the GATT Government Procurement Code (the Code); and (3) a demand by the EC that subcentral government (i.e., state and local government) procurement be brought under the Code. Negotiations over the future of the GATT Procurement Code appear to offer the best hope for a long-term resolution to procurement problems.

CONTENTS

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On January 1, 1993, the European Community put into effect new rules on government procurement (the Utilities Directive) that the Bush Administration, in accordance with Title VII of the Omnibus Trade and Competitiveness Act of 1988,[1] had determined would result in discrimination against U.S. businesses.[2] On February 1, 1993, the U.S. Trade Representative, Mickey Kantor, announced that the United States would impose sanctions on the European Community and some or all of its member states on March 22, 1993, in response to discriminatory government procurement policies.

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[1]Title VII of the Omnibus Trade and Competitiveness Act of 1988 ("Buy American Act of 1988") (P.L. 100-418) amended the Buy American Act of 1933 and Title III of the Trade Agreements Act of 1979 to address continued discrimination by foreign governments against U.S. suppliers and to strengthen what many Members of Congress believed to be an inadequate multilateral enforcement mechanism. Title VII was not enacted in response to the Utilities Directive. The passage of the Directive led to identification of the EC as a discriminating government.

[2]Council of the European Communities. Council Directive of 17 September 1990 on the Procurement Procedures of Entities Operating in the Water, Energy, Transport, and Telecommunications Sectors (90/531/EEC). *Official Journal of the European Communities*. No. L 279. October 29, 1990. For a discussion of the EC's Utilities Directive, see: U.S. International Trade Commission, *The Effects of Greater Economic Integration Within the European Community on the United States: Second Followup Report*, Investigation No. 332-267, USITC Publication 2318, September 1990, Chap. 6; Stephen Cooney, *The Europe of 1992: An American Business Perspective*, National Association of Manufacturers, May 1992, pp. 34-37; U.S. Chamber of Commerce, *Europe 1992: A Practical Guide for American Business*, Update #3, 1991, pp. 49-51.

to Brussels and discussion of these proposals with Commissioner Leon Brittan."[3] At the March 29, 1993, meeting between Ambassador Kantor and Sir Leon Brittan, the Community put forward a new set of proposals for an agreement on procurement. In response, Ambassador Kantor announced that the United States would delay the imposition of sanctions until after a further meeting on April 19-20, 1993. He also said that the United States would go forward with sanctions if an agreement is not reached.[4]

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[3]*Agence Europe*. Immediate Relaunching of Talks on Uruguay Round and Trade Disputes, after American Decision not to Introduce Restrictions Concerning Public Procurement this Week. March 22, 1993.

[4]*Reuters*. Written Statement by U.S. Trade Representative Mickey Kantor on his Bilateral Meeting with European Community Chairman Sir Leon Brittan. March 29, 1993.

[5]The appendix contains a brief description of the GATT Government Procurement Code.

GOVERNMENT PROCUREMENT IN THE EUROPEAN COMMUNITY

In the 1985 White Paper[6] outlining the program to complete the single market by 1992 (the EC-92 program), the EC Commission proposed the creation of a single European public procurement market. The rationale for eliminating discrimination in government procurement through the Utilities Directive was almost entirely economic. Procurement by governments at all levels in the EC represents a significant amount of total economic activity. The benefits of open procurement within Europe are numerous: increased competitive opportunities for businesses to diversify geographically; realization of economies of scale, increased cooperation, and enhanced prospects for firms to cooperate on major government contracts. The benefits to EC firms were frequently cited by industry proponents and by the EC Commission as a major justification for a common EC procurement market: "The continuing partitioning of national markets denies many European firms the economies of scale they need to compete with American and Japanese rivals and is responsible for a general loss of efficiency in the European economy."[7]

The use of discriminatory public purchasing practices by national governments effectively excluded non-national firms from competing against domestic companies. Moreover, restrictive public procurement policies represented a major impediment to the completion of the single market:

> At present time the huge market represented by public-sector construction and public purchasing of goods and services is virtually closed to intra-Community competition. Only 2% of public supply contracts and 2% of public construction contracts have so far been awarded to firms from other Member States.[8]

But if the Commission ended discrimination within the EC, the Utilities Directive expanded discrimination against non-European firms and offered national and local procurement agencies the right to discriminate openly against

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[6]Commission of the European Communities. *Completing the Internal Market.* White Paper from the Commission to the European Council (Milan 28 and 29 June 1985). COM(85) 310 final. Brussels. June 14, 1985. pp. 23-24.

[7]Union of Industries in the European Community (UNICE). *UNICE position paper on public procurement in the Community, 14 September 1987.* This statement and document are cited in: Commission of the European Communities. *Public Procurement and Construction -- Towards an Integrated Market.* Second edition. Luxembourg: Office for Official Publications of the European Communities. 1989.

[8]Commission of the European Communities. The Economics of 1992. *European Economy.* No. 35, March 1988. p. 55.

bids of non-European origin. In the late 1980s, some EC observers questioned whether a "Fortress Europe" was in the works, citing the possibility of new or expanded forms of discrimination in areas as diverse as banking, procurement, standards, and broadcasting. The Utilities Directive provides considerable evidence that EC internal market liberalization can be accompanied by higher levels of trade protectionism.

The size of the EC market for public procurement is difficult to estimate, as is the size of the market affected by the dispute over the Utilities Directive. In a report (the multivolume Cecchini Report) designed to make the EC-92 program more attractive to governments, business, and labor in the member states, the EC Commission estimated government purchasing in the European Community amounted to an estimated 15 percent of gross domestic product (GDP).[9] The Commission estimated that government purchasing totalled $520 billion (ECU 530) in 1986. If the EC Commission's 15 percent estimate remains valid, government purchasing in the Community in 1991 was about $940 billion. In *The Economics of 1992*, the Commission points out that

> ...only part of public purchasing is put out to tender or is subject to formal contracts.... The contractual part of public purchasing, frequently called public (or government) procurement, was worth between [$236 and $334 billion] 240 and 340 billion ECU in the Community in 1986 (between 6.8 and 9.8% of GDP), with significant variations between Member States.[10]

Using the EC estimate of 6.8 to 9.8 percent, public procurement would have amounted to between $426 billion and $615 billion in 1991.

The distinction between public purchasing and public procurement is somewhat blurry. But the Commission clearly states its preference for expanding the coverage of public procurement as a percentage of total public purchasing from 45-65 percent of total purchasing to 80 percent: "the major part

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[9]*European Economy*. No. 35. March 1988. p. 54. This study is based on: Commission of the European Communities. *The "Cost of Non-Europe" in Public-Sector Procurement*. Research on the "Cost of Non-Europe," Basic Findings, Vol 5, Pt. A. Luxembourg: Office for Official Publications of the European Communities, 1988. p. 83. The data on which the 15 percent figure is based are from 1984. But as the authors of the above cited study make quite clear, "Statistics on public purchasing and public contracts [for the EC] are not readily available, nor are they easy to put on any comparable basis between countries" (p. 82). The same study also notes that "the [U.S.] Federal government is required to publish a much greater volume of information regarding its procurements than public authorities in Europe" (p. 383).

[10]p. 54.

of public purchasing of goods and services should be thrown open to foreign suppliers (80% of the total or 12% of GDP) apart from the current expenditure which is incurred locally and is estimated at around 20% of total public purchasing."[11] If 80 percent of public purchasing were open to foreign suppliers, the procurement market would have amounted to $752 billion in 1991. Some observers believe the Cecchini report may have overstated the size of the public procurement market in the EC. Alternative estimates range from $200-400 billion to $400-500 billion.[12]

The GATT Government Procurement Code covers only a small amount of the total procurement market. National security-related defense procurement is excluded from Code coverage, as is public procurement in other sectors such as water, energy, transport, and telecommunications. The Code also does not cover subcentral (state and local) procurement. Additionally, the Code does not cover contracts for the purchase of goods or services that are valued at less than $176,000. In recent years, Code-covered procurement opportunities in the EC have ranged from $3-8 billion a year. The United States opens from $15 to $20 billion a year in Federal Government procurement opportunities to EC and other foreign bidders.[13]

The United States has expressed serious concerns with the EC's Utilities Directive, which was adopted in September 1990, and became effective on January 1, 1993. The directive covers public purchasing in the sectors not covered by the GATT Government Procurement Code: telecommunications, water, energy, and transport. The Utilities Directive covers an estimated $50 billion a year in European procurement.[14] Given the contract threshold limit of $176,000, the amount of effective additional market opportunities that might result (in the absence of discrimination) is estimated at between $15 billion and

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[11]Ibid., p. 54.

[12]See, for example, the March 1, 1993, letter from the National Association of Manufacturers to USTR Michael Kantor.

[13]Agence Europe reports that the Head of the U.S. Delegation to the European Community, Ambassador James Dobbins, recently noted that Code-covered procurement by the EC amounts to $7.8 billion, while Code-covered procurement in the United States amounts to $16.8 billion. *Agence Europe*. EC/United States: Ambassador Dobbins in Favour of Deepening and Enlarging the EC - Washington Wants More Coordination on Macroeconomic and Monetary Policy. March 4, 1993.

[14]Dobbins, cited in *Agence Europe*, March 4, 1993.

$20 billion a year in the telecommunications and power-generating sectors.[15]

In a recent speech, Ambassador James F. Dobbins, the head of the U.S. Delegation to the EC, noted that Germany, France, Belgium, Denmark, and Greece have closed procurement markets for telecommunications equipment, and that, with respect to heavy electrical equipment, no American firm has ever sold a steam turbine in the European Community. On the other hand, Ambassador Dobbins pointed to the rising percentage of the U.S. market for telecommunications equipment claimed by European suppliers, and noted that EC firms have 20 percent of the U.S. market for gas turbines and 30 percent of the market for steam turbines.[16]

Article 29 of the directive provides that **any** tender may be rejected without explanation if the proportion of non-EC products in the total value of the tender exceeds 50 percent.[17] Additionally, bids of EC origin are granted a 3 percent price preference over non-EC bids that meet the 50-percent EC-content requirement. The directive provides for the extension of national treatment to third countries with which the EC reaches multilateral or bilateral agreements. So far, negotiations to conclude such an agreement, either as part of the Uruguay Round or bilaterally, have not been successful.

The Community would like to see procurement rules extended to all regulated utilities, whether public or private. U.S. companies affected by such an extension of government procurement rules include AT&T, MCI, Sprint, the regional Bell operating companies (also known as the "Baby Bells"), and the many privately owned energy-sector utility companies. The EC would also like to see Federal preemption of State and local procurement rules and the repeal or suspension of "Buy America" rules that are used by some Federal agencies and by 37 State governments.[18]

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[15]Estimate provided by the Office of the U.S. Trade Representative, phone conversation, March 15, 1993.

[16]*Agence Europe*. March 4, 1993.

[17]See Appendix for excerpts from Article 29 of the Utilities Directive.

[18]For European Community criticisms of U.S. government procurement policy, see Services of the European Communities. *Report on United States Trade and Investment Barriers 1992: Problems of Doing Business in the United States*. Brussels, 1992. pp. 29-41.

GATT GOVERNMENT PROCUREMENT CODE NEGOTIATIONS

The Clinton Administration is currently engaged in negotiations with the EC over the future of the GATT Government Procurement Code, the discriminatory requirements of EC laws, and a bilateral market access agreement for telecommunications equipment procurement. In a February 1993 report to the Congress, the State Department noted that "in the current negotiations to expand the [GATT Government Procurement] Code, the United States is trying to extend coverage to the four sectors covered by the EC directive and thereby escape the discriminatory impact of the directive."[19]

Because the Utilities Directive went into effect as planned on January 1, 1993, U.S. businesses are subject to the provisions of Article 29. This means that bids that do not meet the 50-percent EC-content requirement may be rejected without explanation. Friedl Weiss, of the London School of Economics, suggests the requirement represents a negotiating ploy on the part of the EC: "This clearly provisional measure is considered to be a useful lever in ongoing negotiations on an extension of the GATT AGP [Agreement on Public Procurement] to these sectors."[20]

Similarly, European bids that meet the 50-percent-content requirement now receive a 3-percent price-preference over equivalent third-country bids that do not meet the 50-percent local-content requirement, but which have not been rejected by the awarding authority.[21] It should be noted, however, that a subsidiary of a U.S. firm that is located in the EC may be considered to be a "European" company for the purposes of the Utilities Directive, as defined in Article 58 of the Treaty of Rome. If the EC content of the product tendered by the EC subsidiary of such a firm exceeded 50 percent, the bid could not be rejected outright, and it would also qualify for the price preference granted to EC-origin bids.

On the other hand, not all firms can afford to locate production facilities in the EC. With the 50-percent domestic-content requirement, the European Community sends a strong message that it favors foreign investment over trade. A number of questions are raised by this policy. Will U.S. companies be forced to relocate plants to the EC in order to win business? If they do, will the U.S. have to import high technology goods (telecommunications and energy-related

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[19]*Country Reports on Economic Policy and Trade Practices*, February 1993, p. 187.

[20]Weiss, Friedl. Public Procurement Law in the EC Internal Market 1992: the Second Coming of the European Champion. *The Antitrust Bulletin*. Summer, 1992. pp. 327-328.

[21]Ibid., p. 328.

equipment) that were previously manufactured in this country? Will this reduce U.S. exports and cause workers to be laid off? Will the U.S. industrial base be weakened by such a policy? Does such a policy undermine the open, multilateral trading system? These are questions that are raised by the Article 29 approach, which seeks to force foreign firms to invest and manufacture in the EC. This approach also sends a strong message anti-import message.[22] The entirety of Article 29 should be considered a negotiating tool that the Community intends to use to achieve bilateral or multilateral agreements ensuring comparable and effective access for Community bidders to third country markets.[23]

Expansion of the Code remains a top priority for U.S. negotiators, and expansion of U.S. coverage of procurement is likely to occur within the context of a GATT agreement rather than a bilateral U.S.-EC deal. The GATT Government Procurement Code has produced limited results for U.S. business since its establishment in 1981, because many foreign public procurement entities are excluded from coverage by the Code.[24] Continued discrimination against U.S. suppliers by foreign governments led to the passage of Title VII of the 1988 Trade Act. Supporters of Title VII believed it would encourage foreign governments to halt discriminatory practices and lead to greater market opportunities for U.S. business.[25] U.S. business is supportive of U.S. Government efforts to expand the coverage of the GATT Procurement Code. Negotiations to expand and improve the Code began in 1990, with the intention on the part of Code signatories to complete the negotiations in parallel with the Uruguay Round.[26]

Two of the outstanding issues in U.S.-EC negotiations to expand the

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[22]For an insightful analysis of the use of EC industrial and trade policy as tools for generating inward investment, see Robin Gaster, *European Industrial Policy*, in U.S. Congress. House. Committee on Foreign Affairs. Subcommittee on International Economic Policy and Trade and Subcommittee on Europe and the Middle East. *Europe and the United States: Competition and Cooperation in the 1990s*. Committee Print. June 1992. 102d Congress, 2d Session. Washington, DC: Gov't. Print. Off., 1992.

[23]Utilities Directive. Article 29, paragraph 1.

[24]See NAM Letter to the Honorable Michael Kantor, March 1, 1993.

[25]See U.S. Chamber of Commerce. *The Omnibus Trade and Competitiveness Act of 1988: A Straightforward Guide to its Impact on U.S. and Foreign Business*. Washington, 1988.

[26]U.S. Congress. House. *The Extension of Fast Track Procedures*. Message from the President of the United States. House Document 102-51. 102d Congress, 1st Session. Washington, DC: Gov't Print. Off., 1991.

scope of the GATT Procurement Code are *entity coverage* and *coverage of subcentral procurement* (i.e., state and local procurement). A related issue concerns *contract threshold levels*.

In terms of entity coverage, the EC has extended procurement rules to all utilities, whether government- or investor-owned. A significant problem for the United States is that the EC Utilities Directive denies national treatment to non-Community firms in terms of access to the EC market. The objective of U.S. business in negotiations between the United States and the EC is "full national treatment access to all utilities entities, government or investor-owned, that are covered by the EC Public Procurement Utilities Directive."[27] The Community has insisted that the U.S. Government follow its lead and require that investor-owned utilities in the United States be covered by the Code. In a recent report, Stephen Cooney, of the National Association of Manufacturers (NAM), notes:

> These [investor-owned utilities] are private companies where procurement is determined by commercial considerations. There is no U.S. policy that mandates or encourages "Buy America" rules for these companies. Therefore, NAM, the U.S. industries involved and the U.S. Government have maintained that there should be no GATT discipline over these private sector companies.[28]

In its 1991 report to Congress that accompanied the request for extension of fast-track procedures, the Bush Administration rejected EC efforts to extend Code coverage to private firms: "The United States has argued that the Government Procurement Code is designed to cover government behavior, not that of privately owned firms."[29]

The second issue is coverage of subcentral government procurement. The EC is seeking an end to "Buy America" or "Buy Local" rules for EC suppliers in exchange for U.S. access to subcentral procurement in the EC. The U.S. Government response has been to offer coverage of central government procurement not covered by the Code and to invite local and State governments to volunteer to participate in the Code by becoming part of the coverage of the United States. States have been asked to volunteer procuring agencies which can be included for coverage under the Code. As of early 1993, approximately two-thirds of the States, representing 69 percent of the GDP of the United

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[27]Cooney, Stephen. *The Europe of 1992: An American Business Perspective.* Washington, D.C. National Association of Manufacturers. May 1992. p. 36.

[28]Ibid.

[29]Op.cit., p. 76.

States, had made a preliminary commitment to the Trade Representative's office.

The third issue concerns threshold values for contract coverage under the Procurement Code. The Code applies to contracts valued above a specific minimum contract value (US$176,000). In its report on the extension of fast-track procedures, the Bush Administration stated that

> meaningful coverage, particularly in the telecommunications area, must include contracts below the level of those offered by the European Community. The United States has proposed a threshold of approximately $65,000 for all contracts except construction contracts. The Community has offered to cover telecommunications contracts over approximately $600,000 and electrical equipment contracts over $450,000....

The much higher EC thresholds for telecommunications and electrical equipment contracts[30] may provide EC procurement entities with considerable leeway in the awarding of contracts to small and medium-sized European enterprises. At the same time, the high thresholds may make sales by small-to-medium-sized U.S. exporters all but impossible--and especially if such bids can be thrown out because they fail to meet the EC content requirements.[31]

U.S. RESPONSE TO THE EC's UTILITIES DIRECTIVE

As required by Title VII of the Omnibus Trade and Competitiveness Act of 1988 (OTCA), the United States has identified countries whose government procurement practices discriminate against U.S. goods and services. Title VII requires the USTR to identify, in a report to Congress, countries that are signatories to the GATT Government Procurement Code, and are in compliance with the Code, but meet three statutory criteria for discrimination under the statute.

The three statutory criteria are (1) a significant and persistent pattern or practice of discrimination in government procurement against United States goods and services; (2) identifiable harm to U.S. businesses; and (3) significant purchases by the U.S. Government of products and services from the country. Title VII provides for consultations with countries identified in the report as discriminating, and for appropriate Presidential action with regard to such

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[30]Utilities Directive, Article 12.

[31]By law, the United States reserves a portion of Federal procurement for small and minority business set-asides. Such preferences are identified in a U.S. reservation to the Code.

countries if discrimination is not addressed within specified time frames.[32]

In accordance with the OTCA, the USTR issued an "Early Review" in February 1992 and determined that the European Community met the requirements for identification under the statute as a country that discriminates against U.S. products or services in non-Code-covered procurement. On April 29, 1992, the USTR issued the Title VII Report and identified the European Community and Norway as discriminating countries. In the report, the USTR noted:

> In the European Community, government-owned telecommunications and electrical utilities in certain EC member states discriminate against U.S. suppliers. In particular, the EC's "Utilities Directive," which is scheduled to come into effect by January 1993, will require EC utilities to favor EC goods and services over U.S. and other foreign ones, and will replace informal barriers U.S. firms face in some EC markets with official discrimination in all EC markets.[33]

In February 1992, the USTR requested consultations with the EC and announced that, if consultations were not successful in addressing U.S. concerns within the 60-day period specified in the statute, the President intended to implement the sanctions specified in the statute to take effect by January 1993, subject to EC implementation of the Utilities Directive. The Title VII Report noted that the 60-day period expired on April 22, 1992, without a successful resolution of U.S. concerns. At that time, the EC was formally identified as a discriminating country.

On February 1, 1993, the U.S. Trade Representative, Mickey Kantor, announced that the Clinton Administration would prohibit awards of contracts by Federal agencies for products and services from some or all of the member states of the EC as of March 22, 1993. The Administration also announced that it would conduct a study of the desirability and feasibility of withdrawing from the GATT Government Procurement Code, and also announced that it would consider restricting imports of telecommunications and power generation equipment from some or all EC member states.[34] The proposed sanctions

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[32]Office of the United States Trade Representative. *Title VII Fact Sheet.* April 29, 1993.

[33]Office of the U.S. Trade Representative. *Title VII Report.* April 29, 1992. p. 2.

[34]In a letter to the U.S. Trade Representative, the National Association of Manufacturers has taken the position that "withdrawal from the Code at this time would be premature." The NAM also argues that "the GATT Code is the best existing basis for negotiating broader access to the EC market." Letter from the NAM to the Honorable Michael Kantor. March 1, 1993.

against the EC will affect $40-50 million in sales to the Federal Government.[35]

In remarks made before the Semiconductor Industry Association on March 3, 1993, Ambassador Kantor noted that there had been no progress in discussions with the EC and that the U.S. would take action unless there is "satisfactory movement" on the part of the EC.[36] On March 12, 1993, U.S. Trade Representative Mickey Kantor announced that the United States would not attend a meeting in Brussels scheduled for March 15-16, 1993, and would "almost certainly" impose sanctions on March 22, 1993 barring a successful resolution of the problem.[37]

On March 19, 1993, Ambassador Kantor and EC Commission President Jacques Delors, in a joint communique, announced that "the EC will address constructively U.S. concerns. At that time, Ambassador Kantor indicated the United States would refrain from taking further action under Title VII of the 1988 Trade Act until after his visit to Brussels and discussion of these proposals with Commissioner Leon Brittan." At the March 29, 1993, meeting between Ambassador Kantor and Sir Leon Brittan, the Community put forward a new set of proposals for an agreement on procurement. In response, Ambassador Kantor announced that the United States would delay the imposition of sanctions until after a further meeting on April 19-20, 1993. He also said that the United States would go forward with sanctions if an agreement is not reached (see appendix for text of statement by Ambassador Kantor).

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[35]*Reuters*. U.S. Dumps EC Talks, Sanctions Closer - U.S. Official. October 12, 1993.

[36]Reuters. *U.S. Trade Representative Mickey Kantor Remarks at a Dinner Sponsored by the Semiconductor Industry Association*. March 3, 1993. (Wire Service Transcript).

[37]*Reuters*, U.S. Dumps EC Talks, Sanctions Closer -- U.S. Official, March 12, 1993. *Wall Street Journal*, U.S. Trade Representative Threatens Move Against EC on Buy-Europe Stance. March 15, 1993.

APPENDIX

Article 29 of the EC's Utilities Directive: Excerpts

1. This Article shall apply to tenders comprising products originating in third countries with which the Community has not concluded, multilaterally or bilaterally, an agreement ensuring comparable and effective access for Community undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the Community or its Member States in respect of third countries.

2. Any tender made for the award of a supply contract may be rejected where the proportion of the products originating in third countries, as determined in accordance with Council Regulation (EEC) No 802/68 of 27 June 1968 on the common definition of the concept of the origin of goods, as last amended by Regulation (EEC) No 3860/87, exceeds 50% of the total value of the products constituting the tender. For the purposes of this Article, software used in the equipment of telecommunications networks shall be considered as products.

3. Subject to paragraph 4, where two or more tenders are equivalent in the light of the award criteria defined in Article 27, preference shall be given to the tenders which may not be rejected pursuant to paragraph 2. The prices of tenders shall be considered equivalent for the purposes of this Article, if the price difference does not exceed 3%.

6. The Commission shall submit an annual report to the Council (for the first time in the second half of 1991) on progress made in multilateral and bilateral negotiations regarding access for Community undertakings to the markets of third countries in the fields covered by this Directive, on any result which such negotiations may have achieved, and on the implementation in practice of all the agreements which have been concluded.

Source: *Official Journal of the European Communities.*

Written Statement by U.S. Trade Representative Mickey Kantor on his Bilateral Meeting with European Community Chairman Sir Leon Brittan

Released March 29, 1993

On procurement, we discussed a new set of proposals from Sir Leon Brittan. We must emphasize that we've just seen these proposals. At first blush, they contain some constructive ideas for a comprehensive agreement to eliminate discriminatory practices -- including Article 29 -- but they also contain some ideas we would find unacceptable. Nevertheless, the EC's proposals indicate a serious desire to resolve the problem of discriminatory procurement and therefore give us a basis for continuing negotiations.

Commissioner Brittan made two additional proposals that are extremely useful. First, he has agreed to begin immediately the preparations for the EC Council of Ministers decision to terminate the imposition of Article 29 on U.S. bidders, on the assumption that we can achieve a final deal. Second, he agreed that when we meet on April 19-20 in Washington, we will try to reach agreement on the elements of a final deal covering both telecommunications and heavy electrical equipment which would open once and for all the EC markets to U.S. companies. On the basis of these positive steps, including his willingness to begin immediately the process of removing Article 29, Ambassador Kantor indicated that we will delay imposition of Title VII sanctions until after such meetings.

We want to emphasize that it is not certain we can reach a comprehensive deal on April 19-20. If agreement is not possible, the U.S. will go forward with its Title VII sanctions. We cannot allow Article 29 to remain in effect without a U.S. response. However, our purpose has always been to open markets--not close them. Sanctions are not an end in themselves, and thus we are interested in pursuing these new openings. Our patience is not unlimited, but given today's somewhat promising developments, we believe further negotiations are justified.

Source: *Reuters*, March 29, 1993.

QUICK REFERENCE GUIDE TO THE GATT GOVERNMENT PROCUREMENT CODE[38]

What is it?

The GATT Agreement on Government Procurement (the "Code") is one of the agreements that resulted from the GATT Tokyo Round of multilateral trade negotiations, which concluded in 1979. The Code guarantees non-discriminatory treatment for suppliers and products of all Code signatories in government procurements covered under the Code by requiring the use of competitive tendering procedures and the elimination of any discriminatory measures. The Code has opened major new sales opportunities in government procurement markets traditionally closed to competitive bidding.

Current members:

Contractual rights and obligations under the Code apply to suppliers and goods from Austria, Canada, the European Community (participating EC Member States are Belgium, Denmark, France, West Germany, Ireland, Italy, Luxembourg, the Netherlands, and the United Kingdom), Finland, Hong Kong, Israel, Japan, Norway, Singapore, Sweden, Switzerland, and the United States.

Current coverage:

The Code currently covers:

contracts valued over 130,000 Special Drawing Rights (equivalent in 1991 to $172,000);

goods contracts (not services contracts);

procurements by designated central government agencies only (designated agencies are specified by each Signatory in an Annex to the Code).

For a list of covered U.S. agencies and further details on U.S. coverage, see the current U.S. Annex to the Code.

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[38]The information presented here provides a useful summary of the GATT Government Procurement Code. Source: Office of the United States Trade Representative. *The Agreement on Government Procurement: Participation of State and Local Agencies*. September 1991.

Exclusions from coverage:

The Code does not cover:

National security procurement (subject to Article VIII of the Code): procurements which are "essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national defense purposes");

Certain other measures covered under Article VIII: "measures necessary to protect public morals, order or safety, human, animal or plant life or health, intellectual property, or relating to the products of handicapped persons, of philanthropic institutions or of prison labor";

U.S. derogations (formal, U.S.-specific exclusions from coverage): minority and small business set-aside programs; certain specific subsistence programs; and transportation services incidental to the procurement of goods.

Rights and obligations of signatories:

For covered procurement, the Code requires:

Competitive purchasing procedures. The Code established a minimum standard for tendering procedures (see especially Articles IV and V). These rules include full transparency in the bidding and award process, the use of unbiased technical specifications and award criteria, and equal treatment for all offers of Code signatory origin. For the most part, these rules were based on existing U.S. practice;

Elimination of discriminatory provisions. For other Code signatories, the Code requires national treatment, such as the elimination of any Buy American or other policies and practices favoring local suppliers;

Reporting of procurement information on procedures and awards. (See especially Articles V and VI of the Code);

Participation in dispute settlement procedures as needed. (See especially Article VII of the Code.)

Effects of Code membership for the United States:

Greater Equity. Because all significant purchases financed by U.S. taxpayers are normally made under competitive tendering procedures, the Code has the effect of bringing the purchasing procedures of other

countries more into line with U.S. standard practice.

> *Increased export opportunities.* Under the Code, foreign government purchasing restrictions which discriminate against U.S. suppliers — such as local content requirements, prohibitions on awarding contracts to foreigners, or other preference schemes favoring local supplies — are eliminated. U.S. suppliers are provided greater transparency in the purchasing processes of some of the most important potential U.S. export markets. The right to predictable treatment in selling to foreign signatory governments allows U.S. exports to plan, make investments, and market their products and services abroad more effectively.

The value of all sales opportunities covered under the Code currently ranges from 20 to 30 billion dollars [annually]. Hard data on the value of non-Code-covered government procurement by our trading partners is difficult to obtain, since most countries do not have reporting systems in place for government procurement not covered by the Code. With some important exceptions, most of what is not covered by the United States and other signatories at the central level of government falls in the category of war materials and other national defense procurements, which the Code is not designed to cover. Other important exceptions to the Code's *current* coverage (e.g., government utilities that purchase telecommunications and electrical equipment, subcentral procurements, and services contracts) are the subject of the current renegotiation of the Code.

A long-term commitment:

The U.S. obligations to honor its Code commitments is a long-term one, which will continue in effect unless changed or withdrawn by the U.S. Congress or the President. Signatories to the Code made such long-term commitments for practical reasons — exports must make long-term commitments to be successful.

However, the Code does provide a certain degree of flexibility for governments to make minimum changes in their coverage, in exceptional circumstances, as long as the total coverage provided under the Code is not altered. In this way, suppliers can count on a certain stability of benefits, while governments are free to re-organize their agencies and departments without breaching their Code commitments. See especially Article IX.5 of the Code. This provision also provides for technical changes in the event that new agencies are created, agencies are abolished, or other organizational changes are made. Changes in the coverage must be negotiated by the USTR with other Code signatories.