# The institutional evolution of the WTO Government Procurement Agreement: towards an understanding of the peripheries of domestic economic policies

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## ABSTRACT

The rules of the international economic order have traditionally sought to reduce trade barriers between national markets; domestic policy autonomy has been viewed as an inviolable sovereign freedom. The 1994 WTO Government Procurement Agreement requires Member States to introduce a series of administrative procedures for their tendering processes, as well as institutional avenues through which individual suppliers can invoke indirect "rights" they gain from these "common rules"; its positive disciplines represent a departure from the traditional, negative GATT regulatory "methodology". This thesis involves a study of what these institutional changes have to say about economic policy-making and enforcement processes in an interdependent world.

Part I presents an institutional history of the GPA and an analysis of how it works.

Part II examines the kind of domestic intervention associated with the Agreement, concluding that the most significant interference with sovereigns' autonomy is neither strictly legislative nor administrative. The GPA's enforcement mechanism - in conjunction with the individual "rights" arising from its procedural obligations - "constitutionalises" the rights to national treatment it engenders. This implies a US-style relationship between property and the state. Executive and legislative powers are separated and both are limited by law. Judicial-like entities, in turn, fulfill an arbitrator's role, charged with determining whether a government entity has acted in a manner consistent with its legally-delimited powers.

The final section presents reasons why GPA Member States may have been willing to accept the "intervention" that is implicit in the Agreement, developing an argument that the GPA is a "means" to Members' "shared end" of facilitating the integration of markets and, most importantly, ensuring their subsequent integrity. States, in implementing the "common rules", act as agents on behalf of the economic order because, in a globalising world, cooperation is consistent with citizens' welfare. The way in which this cooperation is structured allows for heterogeneous political interests to be accommodated. To the extent that the GPA protects individual rights for "collective ends", it is not inconsistent with unitary state notions of sovereignty.

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- Early on, Alice Enders and Annet Blank of the WTO Secretariat patiently guided me through reams of technically tedious material, introducing me to the "abstruse treasures" that it could conceal.

- Later, Jennifer Milliken of the Graduate Institute for International Studies made sure my "gambol through the theory" retained a measure of academic rigour.

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# INTRODUCTION

## GATT's Domestic Policy Dilemma

The rules of the international economic order have traditionally sought to reduce trade barriers between national markets and ensure that Member States' trade policies do not harm the interests of their trading partners; domestic policy autonomy has been viewed as an inviolable "sovereign freedom". Since the outset of the GATT in 1947, it has, however, been formally recognised that domestic policies could be employed to undermine the tariff and trade policy concessions that Member States had exchanged under the accord. Article III of this Agreement seeks to ensure that imported goods receive the same treatment as goods of local origin with respect to policy matters under government control, reading in part: "The contracting parties recognise that internal taxes and other internal charges, and laws, regulations and requirements... should not be applied to imported or domestic products so as to afford protection to domestic production".[1] Like all Part II GATT duties, or rules embodied in the latter's "Code of Conduct", however, this obligation - under the Protocol of Provisional Application through which it was initially applied - was only binding to the extent that it was not inconsistent with Contracting Parties' (hereafter CPs) existing national legislation. Furthermore, as will be seen, it was vague. Because of the way in which it was specified, the "national treatment" obligation represented a "political aspiration", more than a "legal commitment". Through the early 1960s, despite the fact that a few factious disputes relating to Article III arose, multilateral liberalisation focused almost exclusively on the reduction of tariff barriers. It was

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[1] GATT. "The Text of the General Agreement on Tariffs and Trade". Geneva: July 1986, p. 6.

not until the Tokyo Round Codes were agreed in 1979 that this started to change in an institutionally significant way.

This thesis involves a study of the evolution of one of these "codes", known today as the WTO Government Procurement Agreement (hereafter GPA). This Agreement's plurilateral - or something less than multilateral but more than bi-lateral - disciplines govern the administrative processes associated with government procurement, or public purchasing. One of four agreements separate from, and annexed to the WTO Charter, it remains outside of the latter's broad institutional parameters, or what is known colloquially as the Charter's "umbrella". This thesis is a study of the question of *why*. Its focus, accordingly, is largely historical. For this reason, the GATT 1947 - the treaty that established the postwar international order - will be the broader institutional measure against which most of the discussion takes place.[2]

Public purchasing, an activity that accounts for roughly 10 - 15% of most countries' GNPs, is one of the most important tools that governments wield for the promotion of political objectives. It is, in a sense, the "carrot" that goes with the "stick" of

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[2] It should be mentioned that, as from 1994, the GATT 1947 technically ceased to exist; its substantive provisions were formally incorporated into a "new GATT 1994", and its institutional concepts and procedures were enveloped by the WTO Charter.

As regards the historical orientation of the thesis, an Early Review of the GPA is currently underway in Geneva, as well as procurement-related negotiations in two other WTO fora, a newly created Working Group on Transparency in Government Procurement and the Council for Trade in Services Working Party on GATS Rules. Despite the many interesting, institutionally-oriented questions surrounding these ongoing activities - eg. the possible "multilateralisation" of the GPA and/or the introduction of a simpler "Transparency Agreement" - this thesis is premised on an assumption that, prior to considering them, it is important to understand why the GPA emerged in the "institutionally unorthodox" way in which it did, and what its "methodology" necessarily implies.

taxation. For this reason, it is hardly surprising that government procurement was specifically excluded from the national treatment obligations of Article III of the GATT. Paragraph 8(a) of the latter stated categorically: "The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes..."[3] Although the possibility of bringing procurement under multilateral supervision was raised during the Kennedy Round (1963 - 67), formal disciplines for procurement only emerged in the context of the Tokyo Round (1973 - 1979), more than 10 years later.[4] They came in the form of a self-standing, conditionally-reciprocal "Government Procurement Code". Like the 5 other "codes" negotiated at this time, it was generally procedural in nature, restricted in application - both in terms of coverage and Member State participation - and designed to be self-enforcing. Along with its fellow Codes, too, it came to be recognised as the source of ineffective, or asymmetrically-credible disciplines. Not reconciled by the intra-Member re-negotiation of the accord that was completed in 1986, this problem became an important issue in yet another "round" of re-negotiations that commenced in 1987, especially after a national treatment-related dispute arose between the US and Norway in 1991. This thesis will study the Agreement that resulted from the most recent negotiations, focusing on the "institutionally innovative" way in which it

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[3] op. cit., GATT, "The Text of the General Agreement on Tariffs and Trade", p. 7.

[4] Under Article XXIII, paragraph 1 of this Agreement, defense-related procurement is still generally excluded from its market disciplines; Member States' scheduled commitments specify positive listings of any military entity's procurement that is to be covered by the accord, eg. motor vehicles and foodstuffs for the Ministry of Defense. The thesis' Part I discussion of the way in which concessions with respect to GPA coverage were negotiated will consider this issue in more detail. See below, pp. 83 - 86.

addressed the issue of enforcement and asking what its reinforced domestic disciplines necessarily imply as regards relations amongst its Member States.[5]

The regulatory "dilemma" that is reconciled in the GPA originates, in very general terms, from the fact that every national economic system reflects the institutionalisation of different social values, or conceptions of the "political good". These values, as John Rawls has explained, determine how the advantages of social cooperation are distributed; practically speaking, they usually operate by constraining the objectives of policy - either formally or informally.[6] In so doing, they define the legitimate functions of government. They also, as will be seen, dictate the nature of the relationship between the state and the individual. The manner in which all of this transpires is largely a question of how political authority is structured in a given society. For example, in a federal state wherein political authority is based on popular sovereignty and allocated on the basis of a written constitution, the elected representatives of the sovereign people may have chosen to use public procurement to facilitate affirmative action. To achieve this value-related objective, legislators have enacted substantive law - eg. legislating that specified margins of preference be granted to qualifying minority suppliers - and designated formal, detailed legal

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[5] In an unpublished speech given to employees of the WTO Secretariat on 11 June 1996, John Jackson used the term "practice resolutions" when describing the GPA and other WTO Plurilateral Agreements, underscoring their "quasi-legal" nature. Whilst this is a critically important distinction for any legal analysis of these international agreements, it is not one that necessarily precludes this thesis' analysis of the political theory that is implicit in the GPA. Considerably more will be said regarding this subject in the second section of this thesis wherein the kind of political intervention that the Agreement entails will be analysed. See below, pp. 208 - 257.

[6] Rawls, J., *A Theory of Justice*. Cambridge: The Belknap Press of Harvard University Press, 1971, p. 7.

procedures, dictating the role that the executive's administrative officials are to play in implementing the law and thereby facilitating the objective. The purpose of the procedures is to clarify the substantive objective and define the limits of executive discretion. They operate by creating corresponding individual rights to affirmative action; rights which may be invoked before the judicial branch of government by the individuals who possess them if there is some question as regards whether they have been respected. In political contexts of this nature, law is used as a tool to implement, albeit indirectly, the "sovereign will".[7] It is also employed as a mechanism for the distribution of political authority and a "check" on its exercise.

Even amongst democratic governments, there is a variety of different ways in which the exercise of political authority may be structured. Since the French Revolution, however, there have been two roughly competing approaches amongst such entities: that, on the one hand, of the Anglo-American, or common law countries which tends to privilege the rights of the individual over those of society, versus the Continental, or civil law approach which favours the equal rights of man as a citizen and thus generally tends to advantage the interests of the collective relative to the individual.[8]

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[7] In an article entitled, "Binding sovereigns: authorities, structures, and geopolitics in Philadelphian systems", Daniel Deudney described this approach to the organisation of political authority as that of "recessed" authority. "The sovereign of a polity," he said, "is recessed when the exercise of authority has been delegated to some other body or bodies." This is as opposed to the "engaged sovereign", or one who actually wields authority directly. See *State Sovereignty as Social Construct*, edited by T. Biersteker and C. Weber. Cambridge: Cambridge University Press, 1996.

[8] This distinction is described more fully in George Sabine's "The Two Democratic Traditions". *The Philosophical Review*, Vol. LXI. No. 4, October 1952, pp. 451 - 474.

Michael Sandel has explained these differences on the basis of the relationship between liberty and self-government:

"On the liberal view, liberty is defined in opposition to democracy, as a constraint on government. I am free insofar as I am a bearer of rights that guarantee my immunity from certain majority decisions. On the republican view, liberty is understood as a consequence of self-government. I am free insofar as I am a member of a political community that controls its own fate, and a participant in the decisions that govern its affairs".[9]

In practice, the political theory that constrains the exercise of authority in any given sovereign jurisdiction is likely to represent a combination of the two traditions, especially given the economic, political and legal integration that has occurred since the end of the Second World War.[10] "Equality," as George Sabine put it, "does depend on liberty and liberty on equality, because each expresses a phase of the kind of human relationship that democracy hopes measurably to realise".[11] Nevertheless, he concludes, "...(T)he simple device of rejecting one is not a live option. Ideals that have been imbedded for centuries in a culture are not discarded with impunity..." The contrasting democratic traditions, in other words, lie at the heart of the intellectual foundations on which the institutions of Western society have been structured.

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[9] Sandel, M. *Democracy's Discontent: America in Search of a Public Philosophy.* Cambridge: The Belknap Press of Harvard University Press, 1996, pp. 25 - 26.

[10] Ernst-Ulrich Petersmann describes this process as a movement from the "international law of co-existence" to an "international law of co-operation". See the discussion on pp. 49 - 53 of his paper, "Constitutional Functions of Public International Economic Law" in *Restructuring the International Economic Order: The Role of Law and Lawyers*, edited by P. van Dijk, F. van Hoof, A. Koers and K. Mortelmans. Deventer: Kluwer Law & Taxation Publishers, 1987.

[11] op. cit., Sabine, p. 474.

As will be seen in Part I of the thesis, the evolution of the GPA is fundamentally a story about an evolving international understanding of the concept of discrimination, or problems of individual *in*equality before the law. Because of the way in which diverging national perspectives with respect to the "political good" and the contrasting democratic traditions and cultures with which they are associated ultimately affect the realities of day-to-day politics, this concept - which might also be described as "non-national treatment" - is institutionally contingent; each participant in the international economic order has a unique perspective on what constitutes "discrimination". The task of the GPA negotiators who were sitting at the juncture of potentially more than 100 different economic systems - as well as that of the GATT and OECD delegates who had proceeded them - was, accordingly, to specify a common "domestic policy denominator". One that was credible and, above all, did not substantially undermine any of the local values represented in the economic systems that were to be amalgamated under the accord, or, less theoretically, one that was politically palatable irrespective of the relationship between values and domestic policies within any given national jurisdiction. The specific issues that this thesis will investigate surround the question of *what* was finally going to constitute discriminatory behaviour in government procurement and *how* assessments with respect to this behaviour were going to be made and enforced. Because of the potential relationship between the administrative activities to be "regulated" and any given nation state's normative underpinings, negotiators' "solution set" was constrained by the need to accommodate what have been referred to as "inviolable sovereign freedoms". Any negotiated domestic disciplines could not, that is, threaten state autonomy, or the equal liberty of sovereign entities to

assess and pursue their citizens' interests.[12] Better known as the principle of non-intervention, this constraint necessarily implied that any Agreement would effectively delimit the boundaries of the GATT's "inviolable sovereign freedoms", at least in they existed in this particular policy context.

Through a study the institutional evolution of the GPA, and an examination of how its domestic disciplines, or "practices" work and differ from the traditional GATT regulatory methodology, this thesis seeks a better understanding of the boundaries of "sovereign freedom" within the international economic order. This objective will be pursued through an analysis of three different lines of questioning, each relating, as will be seen, to a different aspect of "sovereign freedom", namely: 1) the institutional history and innovations of the GPA; 2) the nature of the intervention, or interference with sovereign entities' autonomy that is implicit in the Agreement; and 3) its political economic context and implications as regards relations between its Member States.

**The Institutional Evolution of the GPA**

- The GPA requires that its Member States introduce a series of administrative procedures for their tendering processes, as well as institutional mechanisms through which individual suppliers can invoke indirect "rights" that they gain from the common procedures; these positive policy obligations represent a departure from the negative disciplines, or policy proscriptions that have traditionally characterised the

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[12] These definitions are taken from Charles Beitz' discussion of the principle of non-intervention in *Political Theory and International Relations*. Princeton: Princeton University Press, 1979, pp. 71 - 83.

rules of the multilateral trading system. The first series of questions looks at the way in which the GPA's policy "practices" differ from the GATT's conventional "regulatory methodology" and why. Proceeding from a general review of the modified liberal theory on which the international order was structured, explaining the origins of the GATT's traditional disciplinary methodology, the analysis draws heavily on "regulatory learning experiences" offered by economic integration in a European context.

**Political Implications: Issues of Intervention**

- The second line of questioning is more theoretical; it focuses on the issue of intervention, taking a closer look at how "sovereign freedom" is constrained by the Agreement. At first glance, the kind of intervention that is entailed in the GPA would appear to be relatively straightforward. The Agreement's positive policy disciplines, or "transparency procedures" impinge upon Member States' legislative authority to the extent that the latter are committed to implement national procurement rules that are in conformity with them. Similarly, Member States' administrative authority is affected to the extent that they must ensure that domestic "court-like" review entities have been designated and given the necessary authority to act as agents of enforcement for the "common rules". In that all of these requirements are voluntary and can be seen as "means" to otherwise unobtainable sovereign "ends", however, neither of these two kinds of intervention, per se, constitute serious infringements of "sovereign freedom". Nevertheless, the overall "solution" to the problem of discrimination that is embodied in the GPA is generally consistent with a particular way of thinking about the "political good". One that, in

keeping with its intellectual roots in the doctrine of natural rights, seeks to enable individuals to choose and pursue their own ends, or political "goods". In this sense, the way in which the legislative and administrative intervention that the GPA entails are combined are particularly significant. This section analyses the specific form of political organisation that GPA Member States must introduce for the conduct of administrative activities covered by the accord, determining that the Agreement establishes a US-style institutional relationship between individual property owners and the state. In using law to structure and limit the exercise of political power, the GPA effectively "constitutionalises" certain "property rights" of potential suppliers. Boundaries between and amongst institutions of government are established, and the rights of individuals are privileged relative to those of the collective.

**The Context of the Agreement**

- The final series of questions is contextual. It asks why GPA Member States may have been willing to accept the kind of "quasi-legal" domestic discipline that is embodied in the Agreement, particularly given their long-standing reticence to entertain even the most limited of "political" domestic policy constraints. An argument is developed that the GPA is a "means" to the "shared end" of facilitating the integration of markets and, most importantly ensuring their on-going integrity. Member States, in implementing the "common rules", effectively act as agents on behalf of the economic order because, in a globalising world, cooperation is not only consistent with citizens' welfare, but may be absolutely required if a sovereign is to fulfill certain of its duties.

Normative implications of the American approach to the ordering of political authority that is implicit in the GPA will also be considered in this section. An argument will be developed that the Agreement's common "practices" should be viewed as means to independent, albeit shared, sovereign ends. Economic interdependence is necessitating a greater degree of precision as regards the definition of the principles of international law, and, more specifically, how they interface with domestic legal structures. Although the GPA's "regulatory methodology" is unquestionably interventionary, the voluntary character of all its obligations - combined with the way in which reciprocity has facilitated the factoring of local values and preferences into the exchange of market access concessions under the Agreement and the cultural homogeneity on which competing political philosophies are premised - suggest that it may provide the only politically viable institutional avenue for further liberalisation. In addition, given the "mortal diseases under which popular governments have everywhere perished," capitalism may not be a sustainable process if a GPA-style separation of political powers is not adopted and the process of globalisation continues apace.[13]

**A Gambol Through the Theory**

The relationship between values and economic policies, including those governing public procurement, has been introduced and briefly considered. This section will develop some of the thinking behind this linkage a bit further. Its focus, however, will be on theoretical aspects of the broader, corresponding relationship between

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[13] The reference here is to James Madison's famous description of the "problem of factions", a "problem" that will be discussed at length in chapter 2.3, pp. 226 - 250.

values and the functions of government. More particularly, the section highlights the awkward international interface between economics and politics that results from the fact that every sovereign entity has a different value-related perspective regarding the legitimate ends of collective endeavour. The international economic order currently sits at an "institutional intersection" between 131 independent entities; its purpose, from this theoretical perspective, is to politically defuse policy externalities arising, ultimately, from competing conceptions of the "political good" reflected, as will be seen, in the positive policies of negative, or liberal states. This section surveys what political theory has to say regarding the way in which this system is structured relative to this "end". Because of broad parallels between the economic philosophy on which the order is premised and that underlying the liberal nation state, it is organised around the three fundamental duties that Adam Smith specified for a liberal nation state, namely defending the realm, protecting civil rights - including those of property - and providing public, or collective goods. Particular attention is given to the problems that are inherent in applying this theory extranationally. The chapter concludes with a review of existing academic work in this area and a discussion of the thesis' relationship to these prior enquiries.

**The Social Function of Economic Systems**

Earlier sections of this chapter cited Rawls' comments concerning the social function of economic systems. He referred to such institutions, it will be recalled, as social

arrangements that "distribute fundamental rights and duties and determine the division of advantages from social cooperation".[14] More specifically, they govern:

"what things are produced and by what means, who receives them and in return for which contributions, and how large a fraction of social resources is devoted to saving and to the provision of public goods".[15]

The political connotations of an economic system arise from the fact that, in all nation states, it is a major factor in determining a citizen's life prospects, or, as Rawls put it, "what they can expect to be and how well they can hope to do".[16] Each society must decide how these opportunities are to be distributed amongst its members; it must have, that is, standards of equity against which determinations of this nature can be assessed. "(A)ny economic system," as Joan Robinson has explained, "requires a set of rules, an ideology to justify them, and a conscience in the individual which makes him strive to carry them out".[17] Social values, in this sense, lie at the heart of every economic system.

The international economic order, as has been mentioned, sits at an institutional juncture between more than 100 different national economic systems. On a Rawlsian view, each one is an "outgrowth of different notions of society against the background of opposing views of the natural necessities and opportunities of human

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[14] op. cit., J. Rawls, p. 7.

[15] ibid., p. 266.

[16] ibid., p. 7.

[17] Robinson, J. *Economic Philosophy*. Harmondsworth: Penguin Press, 1962, p. 18. As quoted by J. Mayall in "The Liberal Economy", op. cit., p. 96.

life".[18] At this "higher level" of social order, how do questions pertaining ultimately to equity, or economic justice get resolved? The answer, on one theoretical view, at least, is that they are not supposed to arise in the first place. This theory, that of economic liberalism, provides the conceptual foundations for the postwar trading system; for this reason, a rough sketch of its outlines follows.

**Economic Liberalism**

A liberal economic system is governed by a set of economic rules that are, according to the theory, impersonal, politically neutral and universal. These rules facilitate the creation of a self-regulating market economy, one in which a society's distributional dilemmas are largely resolved by the price mechanism. As Karl Polanyi has explained:

"A market economy is an economic system controlled, regulated and directed by markets alone; order in the production and distribution of goods is entrusted to this self-regulating mechanism. An economy of this kind derives from the expectation that human beings behave in such a way as to achieve maximum money gains. It assumes markets in which the supply of goods available at a definite price will equal the demand at that price. It assumes the presence of money, which functions as purchasing power in the hands of its owners. Production will then be controlled by prices; for the profits of those who direct production will depend on them; the distribution of the goods also will depend upon prices, for prices form incomes, and it is with the help of these incomes that the goods produced are distributed amongst the members of society. Under these assumptions order in the production and distribution of goods is ensured by prices alone."[19]

The political neutrality of a self-regulating market economy emanates from the longer-term harmony of interests on which it is premised. A self-regulating market,

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[18] op. cit., Rawls, p. 9.

[19] Polyani, K. *The Great Transformation; the political and economic origins of our time.* Beacon Hill: Beacon Press, 1957, p. 68.

distributionally speaking, portends that "...everyone will gain in accordance with his or her contribution to the whole".[20] Because individual abilities differ, however, the benefits of such a system are not distributed uniformly; nevertheless, a longer term harmony of interests is maintained because the economic growth that the market facilitates eventually benefits all. As Robert Gilpin put it:

"Individual pursuit of self-interest in the market increases social well-being because it leads to the maximization of efficiency, and the resulting economic growth benefits all".[21]

The public, on this view, is better off with what Andrew Wyatt-Walter recently termed "overtly self-interested behaviour than with (a sovereign's) superficial public minded virtue".[22]

The duties of a liberal, negative or laissez-faire state, as have been mentioned, are limited to the protection of civil interests from both internal and external "invasion", and the provision of public, or collective goods.[23] Sidney Fine described such entities as merely "passive police(men)... protecting property and administering justice, but not interfering with the affairs of... citizens".[24] To the extent that

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[20] op. cit., Gilpin, p. 30.

[21] Gilpin, R. *The Political Economy of International Relations.* Princeton: Princeton University Press, 1987, p. 30.

[22] Wyatt-Walter, A. "Adam Smith and the liberal tradition in international relations". *Review of International Studies*, Vol. 22, No. 1, January 1996, p. 9.

[23] A liberal state, as will be seen, is not necessarily the same as a nation state that adheres dogmatically to the principles of laissez-faire. The major reasons why will be explored at length in this thesis. For the purposes of this introduction, in any case, what is important is the idea on which such entities are premised, namely that of limited government.

[24] Fine, S. *Laissez Faire and the General-Welfare State: A Study of Conflict in American*

(continued...)

competition regulates economic affairs and governments refrain from interfering with the commercial activities of their citizens, the intersection between national economic systems and the international economic order, is thus a seamless one. Competing interests, if they arise, are transitory. The market - "led by an invisible hand to promote an end which was no part of its intention" - reconciles private interests with the various market-defined "public goods".[25] Earlier sections of this chapter, however, have described this thesis as a study of the GPA as an institutional "methodology" for the reconciliation of competing economic philosophies reflected, ultimately, in diverging domestic policies and practices; from this practical perspective, it is clear that distribution-related problems have arisen within the international economic order, and, furthermore, that they have proven exceedingly difficult to resolve. To explain why, it is necessary to take a closer look at the conceptual issues at play, starting with the particular economic philosophy on which the international trading system is based.

## Defusing the "Political Fallout" from the Positive Policies of Negative States: The Problems of Liberal International Order

The very existence of the postwar trading system provides evidence of problems in the operationalisation of the philosophy of economic liberalism. If, that is, an international "harmony of interests" truly prevailed, there would be no need for an institution whose purpose is to ensure the peaceful operation of a worldwide

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(...continued)
*Thought, 1865 - 1901.* Ann Arbor: The University of Michigan Press, 1956, p. 9.

[25] Smith, A. *The Wealth of Nations: an inquiry into the nature and causes of the wealth of nations.* London: J.M. Dent & Sons, Ltd., 1914, p. 400.

commercial community. The following offers a brief overview of these problems; it then surveys theoretical issues relating to the way in which they have been accommodated in the GATT. The balance of the thesis, to reiterate, will be devoted to a study of the WTO GPA as a practical example of how those problems relating specifically to Member States' diverging civil laws and practices might be reconciled.

Since the early 1900s, the Western liberal economies have struggled to resolve two inter-related, social dilemmas arising from their economic philosophies: 1) the fact that a self-regulating market has never been cleanly excised from the society of which it is a product, giving rise, ultimately, to various security-related, positive duties for the otherwise negative liberal nation state and; 2) the international mis-alignment of economic and political boundaries. These enduring political conundrums have dictated the parameters of the "job specification" of the international economic order. They have necessitated what J.M. Keynes called institutions to "save liberalism from itself".[26]

The duties that Adam Smith outlined for the liberal sovereign were duties for a liberal *nation state*; indeed, they were premised on the priority of the defense of that realm.[27] Each one of them, nevertheless, is reflected in the structure of the

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[26] See the discussion in James Mayall's "The Liberal Economy", op. cit., p. 100.

[27] More precisely, in describing the duties of a liberal state, Smith, said:

"... the sovereign has only three duties to attend to... first, the duty of protecting society from the violence and invasion of other independent societies; secondly, the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it... and, thirdly, the duty of erecting and maintaining certain publick institutions, which it can

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international economic order. To understand why and how, it is helpful to think about the organisation and operation of social order in Hayekian terms. Order, that is, as "stratified structure", existing within and amongst over-lapping layers of social aggregation. Nation states, on this view, are an important locus of order, but they exist alongside of other entities like municipalities, regional bodies and groups of sovereign nation states. As Hayek explained:

"Societies differ from simpler complex structures by the fact that their elements are themselves complex structures whose chance to persist depends on (or at least is improved by) their being part of the more comprehensive structure. We have to deal here with integration on at least two different levels, with, on the one hand, the more comprehensive order assisting the preservation of ordered structures on the lower level, and, on the other, the kind of order which on the lower level determines the regularities of individual conduct assisting the prospect of the survival of the individual only through its effect on the overall order of the society".[28]

So as to emphasise areas in which there have been major difficulties in applying liberal theory at a "higher level" of social aggregation - or across over-lapping national domains of order - this thesis' discussion of the political theory of the international trading system will be structured around Smith's description of the 3 duties of the liberal state. The first section, relating to the obligation of national defense, introduces the fundamental political problem of liberal international order, namely differing security-related, positive policies of otherwise negative states. It

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(...continued)
never be for the interest of any individual, or small number of individuals, to erect and maintain". As quoted by Wyatt-Walter, op. cit., p. 10.

[28] Hayek, F.A. *Studies in Philosophy, Politics and Economics.* London: Routledge & Kegan Paul, 1967, p. 76. As quoted by J. Tumlir in "Strong and Weak Elements in the Concept of European Integration" in *Reflections on a Troubled World Economy: Essays in Honour of Herbert Giersch*, edited by F. Machlup, G. Fels and H. Muller-Gröeling. London: Macmillan, 1983, pp. 32 - 33.

develops an associated vision of the purpose of order that highlights parallels between the way in which domestic law has gradually "freed" the individual within national liberal society, and how the GATT norm of non-discrimination, combined with the negative disciplines of its Part II Code secure "sovereign freedom" within the international community of states. The next section reviews the "civil law functions" of the trading system. Incorporating a brief discussion of the context of Adam Smith's political economic theory that focuses on the relationship between capitalism and the replacement of the absolute sovereign with the "state according to law", and the "rationalised" view of the public interest vis-à-vis the economy that began to emerge at this time, it surveys legislative and enforcement-related problems stemming from the fact that there is no transnational sovereign. A final section considers sovereign duties relating to the provision of public goods; it focuses on the allocation of the costs associated with the "collective good" that is represented by economic order. Parts II and III of the thesis, in turn, will use the institutional example that is provided by the GPA to illustrate one way in which the political problems that are inherent in liberal international order might be resolved in a world wherein nation states remain the central locus of social cooperation.

**Defending the Realm: Positive Duties for the Negative State**

The post-WWII multilateral trading system was founded on a modified liberal vision. The reasons why are tied to the "defense-related duties of Smith's liberal state; they have allowed politics to "crash" the otherwise harmonious international economic "party". The functions of a liberal government have traditionally been defined in negative terms. Individuals - either as autonomous entities, or in their capacities as

members of the national collective - are central to this doctrine. The job of the state, more precisely, is defined relative to them - and in particular, either their liberties, or, to employ a more modern vernacular, state-guaranteed "rights". As Smith said, the duties of the liberal sovereign extend little further than the protection of these "personal freedoms" from threats posed by either "the violence and invasion of other independent societies", or the "injustice or oppression of other members of the national society".[29] Liberties - or what Isaiah Berlin described as things individual citizens should be "able to do or be... without interference by other persons" - play this central role in the liberal state because individual human purposes and activities do not automatically harmonise with one another.[30] If individuals are to be "free", accordingly, they must be prepared to sacrifice a measure of the personal power that they would enjoy outside of the bounds of organised society.[31] This sacrifice enables a frontier to be drawn between, respectively, areas of private life and those subject to public authority. Liberties, in this sense, define the job of government by specifying what it exists to protect, namely rights as "ends" in themselves, or "means" to the common "ends" of the collective; the rule of law, as later sections of this chapter will explain, governs this process.

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[29] op. cit., as quoted by Wyatt-Walter, p. 10.

[30] Berlin, I. *Four Essays on Liberty*. Oxford: Oxford University Press, 1969, p. 124.

[31] Whether this surrender is a conscious one, or merely a matter of convention has important implications as regards the nature of a sovereign's authority. This issue - and, in particular, the implications of political authority premised on a "social contract" - will be the focus of the concluding analysis in chapter 2.3. See below, especially pp. 245 - 250.

Defense-related obligations are "theoretically problematic" in liberal states because they engender, on the other hand, positive duties for governments that are inherently difficult to circumscribe. Unity is a first requirement in the face of threat, but it is also the antithesis of limited government; any effort to contain a sovereign's defense-related powers potentially constitutes a threat to the realm in its own right. A sovereign, in acting to ensure the security of the state, inevitably interferes with the otherwise market-governed economic activities of its citizens; individuals' economic liberties are thus conditioned upon their government's judgment of the security needs of the collective. National security, in this very fundamental sense, "sullies" the "politically pure" operating principles of laissez-faire government.

The market disruption and uncertainty engendered by a sovereign's obligation to defend the nation, in turn, are intensified in an extranational setting; just as with the values that underlie its economic philosophy, each sovereign has its own perspective regarding what constitutes a threat to the realm, *including dangers that may come from social unrest within its own borders.*[32] For this reason, although the multilateral trading system was structured around the principles of economic liberalism, to the extent that its participating governments intervened in their domestic markets for defense-related reasons, politics could not be kept out of the wider system. If markets had been either more perfectly self-regulating, or political and economic boundaries coincident, the situation might have been different. The international economic order would not be necessary to ensure peaceful commercial relations

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[32] The fact that threats may be either externally or internally-generated bears emphasis. As will be seen, many of the social welfare-related positive duties that have been assumed by states since WWI are motivated by governments' desire to stem domestic political unrest.

between nation states, in other words, if the individual freedoms - and those pertaining to property in particular - that otherwise limit a state's authority and enable the market to function as a social decision procedure had not been conditioned on sovereign perceptions relating to the security of a realm, or, alternatively, perceptions of the latter nature had been aligned in a more "melodious manner" with market boundaries.

In order to appreciate the profusion of political problems potentially associated with this situation and the way in which the GATT sought to palliate them, it is helpful to have a general understanding of the historical context from which the postwar economic order emerged. Contracting Parties' prior experiences with 19th century liberal international economic order and their perceptions of the role that economics had played in outbreak of the Second World War, in this sense, are particularly significant: The first World War destroyed what had been a generally stable, liberal international economic order.[33] It also contributed to the formation of new ideas concerning the proper economic role of the nation state. Jan Tumlir, in describing this period, observed:

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[33] Many interesting issues surround the "disharmony of interests" that ultimately resulted in the implosion of this 100 year old institution, eg. the role played by Germany and the US, the "emerging economies" of the day, in undermining British hegemony. For the general purposes of this theoretical review, however, it is sufficient to note that "market justice" during the 19th century was Darwinian in its rawest form. Robert Gilpin, in describing it, said:

"The goals of economic policy were modest in this prewelfare state era... This, it should be remembered, was still an age when society's demands on government were few, and the ruling elites preferred the dangers of tight money and deflation to those of cheap money and inflation. Both the poorer nations and the poorer classes within societies frequently paid the price of adjustment through higher rates of unemployment and decreased welfare".

See the discussion in R. Gilpin, op. cit., p. 126.

(After the war, governments) governed with far less assurance than before 1914... (A)s the nationalist fever subsided and people began to ask what it had all been for, all the belligerent European governments, whether winners or losers felt weakened".[34]

He concluded, quoting E.M.H. Lloyd:

"For the first time in history the world began to have a vision of what human association, raised to its highest degree might accomplish... Men who have breathed the larger air of common sacrifice are reluctant to return to the stuffy air of self-seeking".[35]

A world wide depression and another war intervened before these ideas were of much practical influence. Both of these events, however, proved to be major factors in the development of a general consensus amongst Western political economists that a broader, re-distributive economic role for the state might be appropriate. In surveying the policy environment from which the GATT emerged, Tumlir stated:

"During the Second World War, the view gained almost universal acceptance that the inter-war economic disaster was due to laissez-faire, and in particular to the premature dismantling of government controls in the 1920s in the midst of economic dislocations so severe that private markets could not cope with them. This view was particularly influential in Britain but also in the underground movements of the occupied European countries, and strongly influenced their post-war governments".[36]

John Keynes' demand management theories were of particular influence in the "theoretical compromise" that was finally realised in the postwar trading system.

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[34] Tumlir, J. "Evolution of the concept of international economic order 1914 - 80", in *Changing Perceptions of Economic Policy: Essays in honour of the seventieth birthday of Sir Alec Cairncross*, edited by F. Cairncross. London: Methuen, 1982. p. 154.

[35] ibid., p. 155.

[36] op. cit., Tumlir, p. 172.

Developing an argument that a self-regulating market could not facilitate a stable process of economic growth, they tied full employment and domestic stability to the issue of national security, the one area in which economic liberalism endorsed positive duties for the otherwise negative state.[37] James Mayall has motivated Keynes' ideas in the following manner:

"Keynes... was convinced that, in the absence of effective international machinery, national governments had to take unilateral action to overcome the problem of mass unemployment and to lay to rest the spectre of communist revolution to which it had given rise throughout the capitalist world".[38]

Keynesian theory caused a major difference of opinion between the UK and the US, the initiators of the postwar negotiations for an "international trade organisation"; nonetheless, it found direct reflection in the objectives of the provisional Agreement that established the GATT in 1947:

"...Relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, *ensuring full employment* (emphasis added), and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods".[39]

The Anglo-American controversy surrounded the issue of employment, and, specifically, what the state's responsibilities should be as regards its availability. It is of particular importance here because, fundamentally, the disagreement involved the

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[37] The thesis' discussion of Keynesian political economy draws heavily on chapter 6 of J. Caporaso and D. Levine's *Theories of Political Economy*. Cambridge: Cambridge University Press, 1992, pp. 100 - 125.

[38] Mayall, J. *Nationalism and international society*. Cambridge: Cambridge University Press, 1990, p. 88.

[39] op. cit., GATT, "The Text of the General Agreement on Tariffs and Trade", p. 1.

proper economic role of the state. Keynes had called for government intervention in domestic markets to stimulate demand and, thereby, ensure optimal levels of employment and investment. Such intervention, however, like the other defense-related obligations of the sovereign, involved more positive duties for the negative sovereign. The UK and the US were not the only GATT Contracting Parties that failed to share common perspectives regarding the extent of the state's employment-related responsibilities - to say nothing of *how* they should be realised. The following section explains how Keynes' ideas were factored into the postwar order, illustrating why, from the very outset of the postwar order, the institutional floodgates were wide open for further "political adulteration" of international economic relations.

**Technical aspects of the "theoretical compromise"**

Practically speaking, the GATT's "theoretical compromise" was reflected in the myriad of exceptions that were built into its Part II commercial policy disciplines, as well as the provisional way in which these "policy restraints" were applied nationally up until the creation of the World Trade Organisation. Crafted to facilitate the exchange of tariff concessions on a reciprocal basis during a period in which the US Congress was debating approval of the International Trade Organisation, the GATT, itself, represented a compromise; it was not designed to fulfil the institutional role that it eventually assumed when the US Congress failed to approve the ITO. The Agreement's "code of conduct", in any case, sought only to ensure that the commercial value of a tariff concession negotiated under its "organisational aegis" was not undermined by the subsequent introduction of a non-tariff barrier to trade.

In keeping with the liberal theory on which the ITO had been premised, the "regulatory logic" of the GATT's commercial disciplines was negative in nature; they sought to limit Contracting Parties' ability to interfere with the flow of trade to the use of protective tariffs, forbidding, *inter alia*, quantitative restrictions, currency devaluations designed to frustrate trade, discriminatory administration of trade policies and preferential customs arrangements not designed to lead to integration.[40] The theoretical idea implicit in such restraint involved the creation of autonomous, domestic policy realms with which other sovereigns could not legitimately interfere. That is, in much the same way that the clarification of individual rights vis-à-vis a sovereign "frees" them within a national society, the specification of things that GATT governments could not do was aimed at the "freeing" of sovereigns within a liberal international society. This "institutional logic", as Part II of the thesis will explain in some detail, was consistent with the way in which political authority was disciplined under the unwritten British Constitution; anything that the sovereign was not specifically forbidden to do was within its legitimate powers.

One further duty, also traditionally understood in negative terms, was specified for the economically "autonomous national entities" differentiated by the GATT, that of non-discrimination; embodied in norms of most favoured nation (hereafter MFN) and national treatment, it operated to ensure that a Contracting Party's exported goods were not the objects of discrimination by a foreign government. This thesis, as was mentioned in the Preface, is basically a story about an evolving understanding of the

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[40] GATT rules regarding customs arrangements are not included in Part II of the Agreement; nevertheless, they are mentioned here because their negative "disciplinary methodology" is consistent with that of the "code" that is under discussion.

implications of this commitment, specifically as it relates to the norm of national treatment. For the purposes of this theoretical introduction, however, it is sufficient to note the fundamental objectives of the mutually-reinforcing GATT norms of non-discrimination: The MFN obligation functioned at the border, governing the application of customs measures, including tariffs. Its purpose has been described by John Jackson as that of ensuring that Contracting Parties "treat(ed) activities of a particular country or its citizens at least as favourably as... the activities of any other country".[41] Interpreted in unconditional terms, this duty, more precisely, obliged Contracting Parties to extend policy-related advantages offered to one Contracting Party to all others, regardless of whether any given third party was prepared to offer equivalent privileges. Obligations of national treatment, on the other hand, arose once imported goods cleared customs and became subject to domestic laws, or regulations governing local commerce; their aim was to preclude the use of internal policy mechanisms as surreptitious systems of protection. Jointly, the duties of MFN and national treatment defined a sovereign "right" to equality before the law. This "right", in turn, along with the one to non-intervention emanating from the various negative policy duties contained in Part II of the GATT, specified the parameters of the "sovereign freedoms" resulting from the Agreement.[42]

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[41] Jackson, J. *The World Trading System: Law and Policy of International Economic Relations.* Cambridge: The MIT Press, 1992, p. 136.

[42] The indirect nature of these "rights", as well as the role that individual GATT member sovereigns have always been required to play in their application bears emphasis. The rights that are engendered by the GPA generally arise from the implementing legislation through which its individual Member States comply with its obligations; the Agreement is not, as the lawyers would say, directly effective. This issue, as will be seen, is tied to the lack of supranational representative and executive institutions. See below, pp. 193 - 207.

The theoretical compromise embodied in the GATT, as has been mentioned, was achieved via the introduction of a series of exceptions to each of the Agreement's Part II policy proscriptions. The purpose of these exceptions was to allow sovereigns maximum flexibility for the implementation of positive domestic policies designed to facilitate national stability and security. Practically speaking, it is not an exaggeration to say that they had the effect of seriously undermining the liberal logic of the Agreement's disciplines.[43] In outlining the exceptions, Victoria and Gerard Curzon-Price said:

"Although the vital m.f.n. (most favoured nation) rule... was most forcefully formulated, it was followed by a blanket exception for all preferential agreements which existed prior to GATT's establishment. Another exception... permitted countries to form customs unions and free trade areas. In addition, while quantitative restrictions were firmly prohibited in Article XI (with the exception of the loophole for agricultural products..), they were immediately reintroduced in Article XII as suitable measures for safeguarding the balance of payments... (Similarly, if) a domestic producer were threatened with injury due to import competition, in turn due to past tariff concessions, a contracting party could take emergency action according to Article XIX... Finally, a general escape clause was to be found in Article XXV, which permitted the 'waiver' of any GATT obligation 'in exceptional circumstances not elsewhere provided for in this Agreement'".[44]

The basic problem created by the exceptions was that they left the trading system with the responsibility of reconciling the irreconcilable. A liberal economic order, regardless of the level of social aggregation by which it is bound, is premised on a harmony of interests. A cacophony of competing national perspectives regarding

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[43] On this point, Victoria and Gerard Curzon-Price quote Michael Heilperin as having described the GATT as "one of the most hypocritical state documents of modern times". See Heilperin's "How the US lost the ITO conference", *Fortune*, September 1949, p. 80, as quoted in "The Multilateral Trading System of the 1960s", in A. Shonfield's *International Economic Relations of the Western World 1959-1971*. London: Oxford University Press, 1976, p. 152.

[44] ibid., p. 152.

these interests had now been introduced into this extranational "de-politicised policy environment". Worse still, there were no agreed methodologies for resolving differences of opinion arising from the diverging perspectives. An institutional dilemma relating to the fact that economic boundaries were not necessarily aligned with political ones had been built into the Agreement.[45] As Ebba Dohlman has explained:

"Although the basic principles of the GATT acknowledged the necessity for governments to maintain full employment, the Agreement contained no substantive proposals to cope with any potential problems of structural adjustments or the provision of welfare. While the Keynesian revolution had led to acceptance on the national level that free play of market forces was not automatically redistributive and that some form of government intervention was therefore required... (there had been) no attempt to accommodate the enlarged role of the state in providing security for its citizens within the international trade order..."[46]

An international harmony of interests is, furthermore, a harmony of *individual* interests. The individual, as has been explained, is the basis of a liberal society and the negative, or liberal state is one in which the job of government is dictated by a concern for such interests. The postwar order, despite this fact, did not, for all practical purposes, even acknowledge individual interests.[47] Nation states were the

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[45] John Ruggie, in describing the implications of this incongruency said, "The relationship between economic regimes and international transaction flows is inherently problematical, because the domain of international regimes consists of the behavior of states, vis-à-vis one another and vis-à-vis the market-place, *not* the market-place itself. See "International regimes, transactions, and change: embedded liberalism in the postwar economic order". *International Organization*, Vol. 36, No. 2, Spring 1982, p. 383.

[46] Dohlman, E. *National Welfare and Economic Interdependence: The Case of Sweden's Foreign Trade Policy*. Oxford: Clarendon Press, 1989, p. 26 and p. 212.

[47] Article X, paragraph 3(b) of the GATT 1947, however, obligates Contracting Parties to create court-like entities for the review of "administrative action relating to customs matters". The rights that individuals gain indirectly via this obligation are, however, different from those flowing from the new GPA in important ways. This issue will be the focus of the discussion in Part III of the thesis. See below, especially pp. 258 - 263.

subjects and respondents of the rights and duties arising in this institutional setting; they were to be "freed" by the GATT in international society, not their individual citizens. John Jackson, in describing the implications of this situation, said:

"When individuals have a complaint against some foreign nation, the traditional approach requires those individuals to get their own governments to bring up the matter in international diplomatic processes or tribunals... If the nation refuses to proceed, the individual usually has no recourse under international law.[48]

**The "Civil Law Function" of Order**

In one sense, the way in which the GATT addressed the inevitable law-making, application and enforcement-related problems flowing from the lack of an international sovereign was simply not to deal with them; through the first 15 years that the Agreement was in effect, it did little more than provide an institutional forum in which sovereign entities could negotiate reciprocal tariff concessions, and offer informal, "political judgements" concerning the way in which the latter were subsequently applied. The interpretation of the Agreement's fundamental negative disciplines remained, for all practical purposes, little more than a discretionary matter for the executives of its individual Contracting Parties. Whilst a GATT Working Party, or Panel might rule that a particular trade policy was inconsistent with a Party's obligations under the treaty - or had the equivalent effect - it could call on nothing stronger than moral suasion to enforce compliance with its ruling; the only available remedy consisted of withdrawal of whatever benefits had been granted in exchange for the concession that was at the heart of the dispute, and/or one equivalent to it. As regards the question of rule-making in this extranational policy environment, the

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[48] Jackson, J. *The World Trading System: Law and Policy of International Economic Relations*. Cambridge: MIT Press, 1992, p. 42 and p. 103.

principle of sovereignty made it difficult to envisage "representation in the GATT" on anything other than the basis of one country, one vote. This approach, however, left economically powerful Contracting Parties convinced that their interests were being consistently under-represented, and, as will be seen, increasingly unwilling to be bound by any rules agreed under the system.

Part of the reason for this situation, no doubt, was the interim nature of the GATT; although its "code of conduct" was essentially a replica of the ITO's commercial policy sections, the Agreement did not include any of the latter's carefully specified domestic policy disciplines, including those dealing with private restrictions on competition.[49] Nor were anything like the ITO's relatively "legalised" dispute settlement procedures grafted onto the GATT; interpretation of the sovereign "freedoms" arising from the Agreement's negative disciplines was, as has been mentioned, to be political rather than judicial, and remedies were limited. At the same time, a more structured approach was adopted in the Agreement's provisions governing administrative actions relating to the implementation of customs policies, or, more specifically, those:

"pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale,

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[49] The purpose of the latter disciplines, according to a recently produced WTO Secretariat document, was specifically "to prevent, on the part of private or commercial public enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives of the Charter". WTO Secretariat. "Competition-related provisions in existing WTO Agreements". 17 June 1997, p. 2.

distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use".[50]

Article X, Paragraph 3, in particular, obliged Contracting Parties to:

"... administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings... (and) maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters".[51]

Individual importers, furthermore, were to be given legal standing to invoke such review. Nevertheless, for reasons that will be the focus of the analysis in Part II of the thesis, no standards were specified to guide the review processes concerned; the matter of what was to constitute discrimination in the administration of customs matters was left to the discretion of individual contracting entities. If, in turn, a Contracting Party's administrative entities made an error that impinged upon an importer's civil interests - as opposed to those that the national collective generally had in "fair" administrative processes - the Agreement made no provision for the payment of compensatory damages; the purpose of the Article X procedures was solely to facilitate the correction of administrative errors. Finally, the review provisions of Article X did not cover the domestic application of the "internally-oriented" Part II norm of non-discrimination; there were no institutional avenues of appeal for importers who felt that domestic laws or regulations had been administered in a manner that impinged upon trade, or, in other words, that a state had failed to respect its duty of national treatment.

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[50] GATT. *The Text of the General Agreement on Tariffs and Trade*. Geneva: July 1986, pp. 16-17.

[51] ibid., pp. 16-17.

This section proceeded from an observation that the GATT addressed the law-related problems of extra-national order largely by not dealing with them. In another sense, it might be said that the postwar trading system confronted these institutional challenges as would have most unitary, Parliamentary sovereigns. The GATT, that is, was structured in a way that was constitutionally consistent with the organisation of political authority in a nation state in which the power of the government was centralised, based on some variation of majority rule and administered by a strong executive. Virtually the same kind of national government, in fact, that Adam Smith had been involved in "re-engineering" at the end of the 18th century. Part II of this thesis will examine differences between sovereigns of this nature and those that embrace its prime democratic alternative, consensual or popular sovereignty. These differences are significant herein because, as was suggested in the Preface, they affect the way in which states organise themselves to conduct the business of government, including the regulation of economic activities; in this sense, it is not a coincidence that popular sovereignty was an "institutional innovation" that emerged during Smith's time. The remainder of this "civil law" section, in any case, serves as a brief historical introduction to the more detailed discussions that will follow by outlining main features of the political context in which Smith and the early "oeconomists" were operating. Its purpose is to illustrate how the rise of capitalism necessarily affected the nature of the relationship between the individual and the state, and, in turn, contributed to the "rationalised" vision of the economy that developed at this time. The chapter then concludes with a survey of problems relating to the provision of public goods in an extranational political context - the third area in which a

negative state must act - and, finally, a review of existing academic work relating to the broader issues to be addressed by the thesis.

**Contextual parameters of a new economic philosophy**

Adam Smith's *Wealth of Nations* was published in 1776. It provided what Robert Heilbroner has described as a "philosophy" for the social revolution then underway throughout Europe.[52] The revolution was that of an emerging capitalism; authoritarian and traditional approaches to the management of man's "economic problem" - namely, that of survival - were being replaced by those of the market. Owing, at least in part, to its natural advantages in the production of wool, the process was particularly advanced in England. The political implications of this social transformation were fundamentally associated with the fact that it necessitated a modification of the relationship between the individual and the state, as well as different ways of thinking with respect to the nature of the public interest relative to the economy. Two aspects of the shift to market society, according to the theory developed the classical "oeconomists", are of particular relevance for the regulatory issues under consideration in this thesis: 1) the recognition that property rights had to be tradable if the market was to function, and; 2) the role that political stability played in the operation of this new social decision procedure. To facilitate market exchange, sovereigns were obliged to enact civil rules that would enable the accumulation of private property. They were also compelled to show a minimum of respect for these canons themselves. This, in itself, was intellectually revolutionary;

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[52] Heilbroner, R. *The Worldly Philosophers: The Lives, Times, and Ideas of the Great Economic Thinkers.* New York: Simon and Schuster, 1964, p. 24.

prior to this time, the king's power - at least vis-à-vis subjects who were not members of the nobility - had been formally absolute.[53] Law, enacted by representative assemblies, became the instrument of these changes; it facilitated a limitation and re-organisation of state powers, including those relating to property.[54] It also enabled a distinction to be made between constituent and constituted power. By the beginning of the 19th Century, throughout Europe, the modern "state according to law" was rapidly replacing absolute government.

Up until this time, then-prevailing mercantilistic theory had viewed the economy as little more than the "personal war chest" of the sovereign. Adam Smith, however, suggested that the pursuit of private interests in this sphere could also be consistent with the public interest. The economy, he said, should be viewed as a realm apart, flawed by man's "slothful nature" but governed - in rough parallel with the physical world - by a "natural order". This was his famous "harmony of interests" doctrine; the idea, that is, that by selfishly directing his industry so that "its produce may be of the greatest value... every individual (also) necessarily labours to render the annual revenue of the society as great as he can".[55] The de-militarised or "rationalised" view of the economy that it engendered, in turn, would have had even more radical

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[53] Its exercise was, in some instances, however, disciplined by the existence of consultative parliaments, and traditions of respect for the principles of natural law, eg. as embodied in the British Magna Carta. More will be said about the political role of the former entities - as well as how it subsequently evolved - in Part II. See below, pp. 226 - 229.

[54] The thesis' discussion of the evolution of the modern state's submission to the rule of law draws heavily on part I of Allan Brewer-Carías' *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989) and chapter 3 of Jan-Erik Lane's *Constitutions and political theory* (Manchester: Manchester University Press, 1996).

[55] Smith, A. *An Inquiry into the Nature and Causes of the Wealth of Nations.* London: J.M. Dent and Sons, Ltd., 1914, p. 400.

implications for government at that time except for the fact that Smith's liberalism was qualified by the provision that complete freedom of activity within the private, or "civic realm" - even within one state - was Utopian. The introduction of positive law to enable the recognition and exchange of private property did not, in his view, entail a corresponding emancipation of the individual within civil society. Rather, as earlier sections of this chapter have explained, it was simply associated with a fundamental change in the regulatory role of the state; the "negative state", in other words, had begun to evolve.

During the next century, the English state came to represent a fairly close institutional approximation of classical "oeconomic" theory. Long before this happened, however, the British executive's subjugation to the Rule of Law, following the English Revolution in 1688, had had great influence on the re-organisation of political authority in other "modernising" European states. Part II of the thesis will take up this issue in greater detail, particularly as it relates to the way in which political authority is implicitly organised under the WTO GPA. For the purposes of this "historical digression", in any case, it is sufficient to note that the modern British state was, more expressly, constituted by a limited parliamentary government, operating under the rule of the law. Under its unwritten Constitution, anything that the sovereign "Queen-in-Parliament" was not legally forbidden to do, it was allowed to do; this included changing the laws under which the sovereign, as well as all of its organs and each one of its subjects was governed. The principles of natural justice - or customary standards of fairness that required authorities to act in an unbiased manner, after having given those affected by a decision a chance to put their case - in

turn, regulated the administration of the common law. To the extent that delegated authority was exercised within whatever limits happened to be attached to a given piece of legislation, however, administrative discretion knew no further significant legal bounds.[56]

This chapter had been in the process of outlining major difficulties associated with applying Smith's "economic philosophy" extranationally. Before returning to that broader discussion, however, a few words must be said regarding the one exception to Smith's "minimalist" perspective, namely, national security. This issue is tied to the political stability that was cited as the second area of major contextual change connected with the rise of capitalism, It is also responsible for what James Mayall has termed an "unresolved tension between collectivism and individualism" that lies at the heart of economic liberalism.[57]

The economic ramifications of a sovereign's security-related obligations are associated with the fact that individuals' "rational planning" with respect to the exercise of their property rights cannot take place in the face of "irrational belligerency" within, between, and/or amongst sovereigns. This is particularly true in the context of transactions that may require the passage of time in order to come to fruition. Liberal states, accordingly, are charged with defense-related responsibilities of avoiding unnecessary military entanglements and, somewhat paradoxically,

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[56] This approach to "administrative law" will be explained in greater detail and contrasted with that of the popular sovereign in Part II. See below, pp. 251 - 257.

[57] Mayall, J. *Nationalism and International Society.* Cambridge: Cambridge University Press, 1990, p. 75.

providing an adequate national defence. Standing armies are warranted because states need to be able to respond to the "irrational" behaviours of other sovereigns. Maintaining market security and stability under these conditions is inevitably a politicised task in that that which must be defended is typically significantly more than just a functioning market. As viewed by the classical economists, in any case, a market was a reflection of civil society. Civil societies were the products of unique cultural and natural circumstances; indeed, their variation across political boundaries was associated with the advantages of trade. Because of differences of this nature, a measure of political cooperation between sovereigns has always been required in order for the benefits of international commerce to be achieved. Markets engender a "harmony of interests", but they cannot co-exist on an extranational plane without governments' prior agreement to respect the sovereign freedoms and domestic obligations of their institutional peers. Institutional ambiguities are inevitably associated with this situation because both the national and international orders are otherwise generally organised to facilitate the realisation of individual ends. Defense of the realm, in other words, is an obligation that might be described as inevitably and "discordantly" collective.

**Public Goods, Hegemonic Theory and the "Costs of Adjustment"**

The balance of this chapter has been devoted to a review of the difficulties of applying classical liberal economic thought extra-nationally. Two of the three duties that Adam Smith identified for the liberal sovereign have been considered, namely those of ensuring national defense, and providing and enforcing civil law. The third and final traditional obligation of the negative state involves the rectification of

market failures relating to the provision of common goods, or the "duty of erecting and maintaining certain publick institutions, which it can never be for the interest of any individual, or small number of individuals, to erect and maintain".[58] This section surveys the way in which goods of this nature have been provided within the social order engendered by the GATT; it proceeds from Mancur Olson's idea of the international economic order, itself, as a public good, and is predominantly a review of hegemonic stability theory.[59] The purpose of this review is to present a theoretical framework for subsequent discussions concerning how dramatically the institutional "cost allocation strategy" embodied in the WTO GPA differs from that prevailing in the GATT during the heyday of US hegemony, as well as throughout the subsequent "Codes-approach"-era that commenced with the signing of the 1967 Anti-dumping Code .

Extranational problems relating to public goods start with the fact that the latter are outside of the normal "cost structures" of a liberal economy; neither the costs nor the benefits of collective goods can be evaluated on the basis of a "harmony of interests" calculus. "Consumption of .... (goods of this nature)", as Charles Kindleberger explained, "does not reduce the amount available for other potential consumers".[60]

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[58] op. cit., as quoted by Andrew Wyatt-Walter, p. 10.

[59] Olson, M. *The Logic of Collective Action: Public Goods and the Theory of Groups.* Cambridge: Harvard University Press, 1965. As quoted by Robert Gilpin in *The Political Economy of International Relations.* Princeton: Princeton University Press, 1987, p. 74.

[60] Kindleberger, C. Dominance and Leadership in the International Economy: Exploitation, Public Goods and Free Rides". *International Studies Quarterly*, 25, 1983. As quoted by R. Gilpin in *The Political Economy of International Relations*, Princeton: Princeton University Press, 1987, p. 74.

They can thus be consumed without the assumption of financial responsibility for the benefits enjoyed. This opportunity to "free-ride" means that such goods are typically underprovided unless someone is prepared to carry a disproportionate burden of the costs of their provision, or has the power to make others shoulder their fair shares. For these reasons, the state is typically left to oversee both their production and distribution.

Hegemonic theory developed in response to the absence of an international sovereign authority to underwrite and oversee the provision of collective goods whose consumption could not be disciplined within national borders. In its original form, it proceeded from the argument that an open international economy and a stable international currency were, in themselves, "collective goods".[61] In securing these goods, the hegemon, or what Charles Kindleberger termed, "leader" assumed the "provisory role" normally performed by the state in a national setting; in this role, it "establishes and enforces the rules of a liberal market regime and suppresses the ever-present tendencies toward economic nationalism".[62] Earlier sections of this thesis have referred to the international economic order as a "policy party"; hegemons are like "parents", chaperoning this "party". Not necessarily benevolent, they are there to ensure that participants do not act impetuously and forget about their liberal principles.

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[61] Subsequent variations on the theory, according to Robert Gilpin, have argued that international security is also a "collective good". See the discussion in Gilpin, op. cit., p. 74.

[62] op. cit., Gilpin, p. 75.

A hegemon's provisory duties, like those of the sovereign state, also entail "the prevent(ion of) cheating and free riding... (and the) encourage(ment of) others to share the costs of maintaining the system".[63] The hegemon, in fulfilling this responsibility, however, does not enjoy the same disciplinary authority as his national counterpart; "free-riding", or failure to assume financial responsibility for the benefits one enjoys from the public goods, as well as the exploitation of national market advantages that undermine the system are common. This, as the following paragraph will explain, has created particular problems in the context of the GATT.

The liberal order that the hegemon strives to maintain functions on the basis of a systemic logic different than its own. If economic boundaries were aligned with political ones, this would not necessarily be problematic. As it is, however, the operation of the international market ultimately engenders a re-distribution of economic power, or, at the very least, a dilution of the power retained by the hegemon. In time, the political environment from which the hegemon emerged is transformed. The hegemon is led to re-calculate the benefits of order; at some point, the conclusion that its interests do not extend to underwriting it is probable. As Robert Gilpin explained:

"...(T)he market produces profound shifts in the location of economic activities and affects the international redistribution of economic and industrial power. The unleashing of market forces transforms the political framework itself, undermines the hegemonic power, and creates a new political environment to which the world must eventually adjust... Capitalism and the market system thus tend to destroy the political foundations on which they must ultimately depend".[64]

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[63] ibid., p. 75.

[64] op. cit., Gilpin, pp. 77-78.

As long as the institutional "business" of the GATT was largely confined to the negotiation of tariff reductions, the costs of maintaining economic order were low for the US, the postwar hegemon. James Mayall, on this subject, said, "Every country operated a tariff and all could agree that, subject to certain safeguards, it was desirable that the overall level should be reduced".[65] The fact that these cooperative concessions were exchanged on the basis of reciprocity, in addition, made them easy for the hegemon to "sell" and subsequently maintain; each tariff reduction could be clearly associated with the gain of a market access opportunity, and access to the latter could "policed" on the basis of the former. "Free-riding", in this institutional context, was not a serious problem.

The "balance of benefits" flowing from this system to the US started to change once the process of post-war reconstruction had been substantially completed. Nevertheless, as long as the GATT continued to be a "rich man's club" and US economic growth proceeded at unprecedented rates, any additional "costs" associated with underwriting the institution were not difficult for it to overlook, particularly when security concerns relating to the Cold War were weighed in to the "hegemonic equation". During the 1960s, however, the political environment surrounding the GATT changed dramatically: First, the institutional agenda of the trading system shifted. NTBs became the "principle form of protectionism". Subsequently, a number of political economic developments came to fruition: As John Jackson has explained,

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[65] op. cit., Mayall, p. 102.

"International economic interdependence, the quadrupling of GATT membership to include countries with greatly divergent stages and systems of economic organization, and the crises of energy costs and unemployment... all buffeted the GATT".[66]

The 1967 Anti-Dumping Code (hereafter, AD Code) was a first attempt to re-distribute some of the additional costs that all of these changes effectively represented for the hegemon. The "allocational approach" that it embodied, as will be discussed in Part II, was subsequently replicated in 5 more "self-balancing" codes - designed to discipline various NTBs - that were agreed during the 1973-79 Tokyo Round. By the beginning of Uruguay Round in 1986, the GATT's institutional infirmity had been diagnosed by John Jackson as a conflict between "rule vs. power diplomacy".[67] The US, increasingly, was behaving like a hegemon on the decline, even though its economic power, in absolute terms, had never been more substantial. Politics, ever at the gates of the international economic "party", was threatening to over-run it completely. Now, 10 years and a protracted Round later, many of the political problems associated with developing multilateral disciplines to regulate non-tariff barriers to trade are still outstanding. This, despite the fact that the end of the Cold War has rejuvenated liberalism as an "economic philosophy" and contributed to a rash of WTO membership applications.

## Existing Work: The Thesis' Contribution

The proceeding section surveyed problems associated with the costs of maintaining international order. Many of these costs are associated with the fact that multilateral

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[66] Jackson, J.H. "The Birth of the GATT-MTN System: A Constitutional Appraisal", in *Law & Policy in International Business*, Vol. 12, No. 21, 1980, p. 30.

[67] ibid., p. 40.

cooperation has usually been viewed as an inherent threat to sovereign authority, irrespective of the local conventions in any given participating entity regarding the allocation of political power. Jan Tumlir, on this subject, said:

"The commitments which states accept, as participants in the international order, are generally thought of as constraints on economic sovereignty - more or less painful concessions of national interest made for the sake of international comity".[68]

In this sense, any policy "concession" a Member State makes is potentially at odds with the national values and local preferences and traditions that its existing policies and practices reflect, and, therefore, costly. Such costs are difficult for governments to justify politically if they cannot be associated with clearcut benefits that flow concurrently from participation in the international regime, eg. if they engender benefits that are disseminated. Furthermore, they can be difficult to quantify, particularly when they do not involve tariffs. The GATT approach to the discipline of domestic policies - or, heretofore, effective lack thereof - is a particularly vivid reflection of this institutional "cost structure". For reasons relating to the divergent, positive social welfare-related responsibilities liberal governments' have assumed, the postwar international economic order has sought only to reduce trade barriers between markets, leaving Contracting Parties' generally free to conduct their domestic policies as they see fit. This institutional lacuna, as explained in the previous section, represents a departure from certain tenets of liberal theory. It also stands at the academic portals of an area in which there has been relatively little recent, practical, politically-oriented work.

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[68] Tumlir, J. "Strong and Weak Elements in the Concept of European Integration" in *Reflections on a Trouble World Economy: Essays in Honour of Herbert Giersch*, edited by F. Machlup, G. Fels and H. Muller-Gröeling. London: Trade Policy Research Centre, 1983, p. 32.

Despite its theoretically-flawed pedigree, the GATT adheres to a "regulatory methodology" that is decidedly liberal. GATT disciplines, apart from the duty of non-discrimination, have taken the general form of precise policy restraints, discouraging all protectionist trade policies other than tariffs. During the early 1980s, a substantial literature concerning the way in which these negative disciplines operate to structure the exercise of political authority within GATT Contracting Parties was developed. Its theme was that the multilateral trading system, in providing "rules for the making of trade policy rules", served what Jan Tumlir, Frieder Roessler and others termed a "constitutional function".[69] The following, after a brief introduction to the political rationale behind constitutions, reviews this body of work and describes the way in which the thesis will contribute to it.

When the "state according to law" was first emerging, an important distinction was made early on between laws that government makes and those that make government. Although, as will be seen, this distinction was and *still is* relatively more important in states with written constitutions than those with unwritten ones, it is, nonetheless, of key importance for understanding negative political entities, or ones premised on notions of individual liberty. Charles McIlwain, a noted American constitutional scholar, had this to say on the subject:

"There is and there must be, in every free state, a marked difference between those laws which a government makes and may therefore change, and the ones which make the Government itself. The Government... is free of the law... but only of the

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[69] See, for example, Tumlir's "Economic Policy as a Constitutional Problem", published as the Harold Wincott Memorial Lecture, London: The Institute of Economic Affairs, 1984 and *National Constitutions and International Economic Law*, edited by M. Hilf and W. Petersmann Deventer: Kluwer Law and Taxation Publishers, 1993.

ordinary laws with the government itself has made or may make... The supreme authority established and defined by a fundamental law is bound absolutely by that law, though he is free of all other laws".[70]

Corwin Edwards, another American constitutional scholar has explained this distinction on the basis of differences between constitutional and civil liberty:

"(L)iberty signifies the absence of restraints imposed by other persons upon our own freedom of choice and action... (W)e enjoy civil liberty because of the restraints which government imposes upon our neighbors in our behalf and constitutional liberty because of the constitutional restraints under which government itself operates when it seeks to impose restraints upon us".[71]

In countries with written constitutions, restraints of the former nature are generally inflexible, allowing amendment only after approval by what Arendt Lijphart has termed "special majorities" or "popular referendums"[72]. Their purpose, in any case, is to provide an institutional framework for the exercise of political power; constitutions govern the making and implementation of a society's collective decisions, including those relating to the economy. John Rawls, in discussing their function, suggested that the political process be viewed as a machine which "makes social decisions when views of their representatives and their constituents are fed into it".[73] A constitution, he said, controls the operation of this machine. It specifies how a society will assess the justice of laws and policies, its output. In the case of

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[70] McIlwain, C. *Constitutionalism and the Changing World.* Cambridge: Cambridge University Press, 1939, p. 73. As quoted in A. Brewer-Carías' *Judicial Review in Comparative Law.* Cambridge: Cambridge University Press, 1989, p. 27.

[71] Edwards, E.S. *Liberty Against Government: The Rise, Flowering and Decline of a Famous Juridical Concept.* Baton Rouge: Louisiana State University Press, 1948, p. 7.

[72] Lijphart, A. *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries.* London: Yale University Press, 1984, p. 189.

[73] See the discussion on pp. 195-196 of *A Theory of Justice*, op. cit.

differences of opinion with respect to these measures, it stipulates procedures for the reconciliation of conflicting views. Finally, because of the inherent imperfectibility of human institutions, it also dictates when the enactments of the majority are to be complied with - assuming the society in question is a democratic one - and when they can be rejected as no longer binding.[74]

From the point of view of international order, it is particularly significant that constitutions 1) operate to structure the way in which law is made and applied, and; 2) privilege certain individual, or specific interests relative to those of the collective, namely those whose interests the law is supposed reflect. The latter function involves the specification of "constitutional rights". Such rights are subject to what Joseph Raz termed, "special institutional treatment" in that they are not governed by the ordinary legislative and administrative processes specified in the constitution of which they are a part; the judicial branch of government is typically allocated responsibility for their oversight. Constitutional rights reflect a society's values. The fact that some of them are also means to the end of the institutional protection of collective goods, as will be seen, is of particular relevance for international order. As Joseph Raz explained:

"At least some constitutional rights are primarily means of formal or informal institutional protection of collective goods. They protect these collective goods inasmuch as damage to them is caused by the harming of the interests of identifiable individuals... Where harming an individual seriously jeopardises the maintenance of a public good that harm is also a cause of a harm to the community. Therefore, there

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[74] The discussion that follows assumes that the political environments under consideration are liberal democracies. Part III of the thesis provides further insights concerning why such an assumption is appropriate. See below, especially pp. 212 - 224.

is in such cases an adequate instrumental justification for holding others to be subject to duties to refrain from such harm.[75]

The political literature concerning the "constitutional function" of the multilateral trading system deals almost exclusively with the structuring of the economic policy process, and, more specifically, trade policy processes. Much of it is premised on Jan Tumlir's ideas of order as a means through which "political process failures", reflected in protectionist trade policies, can be corrected. The following offers a brief review of Tumlir's thinking, highlighting areas in which it offers insights for the domestic policy issues under discussion. Parts II and III of the thesis will apply these ideas to an analysis of the way in which the GATT's "vague" duty of non-discrimination has been legally clarified under the WTO GPA, so as to effectively create indirect individual rights to national treatment and non-discrimination; they argue that this Agreement embodies an extension of the trading system's "constitutional disciplines" to domestic rule-making and implementation processes. Whereas Tumlir and most previous work in this area has generally focused on the GATT's "constitutional discipline" of trade policy-making processes, that is, this thesis will consider the institution's constitutional role in disciplining domestic policy-making and implementation.

Tumlir's ideas about international order proceeded from the premise that all economic policy is inherently redistributive. In describing democratic governments' "preoccupation with redistribution", he said:

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[75] Raz, J. *The Morality of Freedom.* Oxford: Clarendon Press, 1986, p. 258.

"Contemporary states are best understood as complex and costly redistributive systems. Price controls, licensing, other forms of regulation, protection, and subsidisation, public enforcement of private cartel agreements, and many other policies of this kind are presented in public discussion as means to objectives politically more appealing than redistribution..."[76]

Protectionist trade policies, in his view, thus were a manifestation of government or "constitutional failures" comparable to the market failures associated with public goods; both result from the fact that "adequate information is not, or cannot be, brought to bear on decisions".[77] As Uli Petersmann put it:

"(T)he term 'government failure' is used to denote badly functioning policy institutions and distorted democratic decision-making processes which fail to lead to political decisions and legal rules that maximise the equal rights and social welfare of domestic citizens".[78]

The institutional "remedy" that Dr. Tumlir was in the process of developing at the time of his death was premised on the observation that the political failures in question arose from the "absence or tolerated disregard for rules and institutions for structuring and informing political decision-making".[79] The fundamental problem, as he saw it, was that protectionist trade policies were typically made under the discretionary foreign policy powers of the executive, and, therefore, excused from most meaningful domestic constitutional constraints:

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[76] Tumlir, J. *Protectionism: Trade Policy in Democratic Societies.* Washington: American Enterprise Institute, 1975, pp. 13-16.

[77] Banks, G. and J. Tumlir. "The Political Problem of Adjustment" in *The World Economy*, Vol. 9, No. 2, June 1986, p. 146.

[78] Petersmann, E. *Constitutional Functions and Constitutional Problems of International Economic Law.* Fribourg: University Press, 1991, p. 205.

[79] Banks, G. and J. Tumlir. "The Political Problem of Adjustment", *The World Economy*, Vol. 9, No. 2, June 1986, p. 146.

"The constitutional jurists' avoidance of... matters of foreign policy was well founded throughout the centuries of virtually unbridled competition among nation states for territory and power... Today, however, with respect to foreign policy towards other democratic states, this traditional stance... has become anachronistic. Democratic countries... have no claims against and good knowledge of each other; they face common dangers and know that such prosperity as they may enjoy can only be enjoyed in common. The foreign policy issues among them have become largely economic and economic issues *demand* regulation by law".[80]

Following through on this line of reasoning, Frieder Roessler, shortly after Tumlir's death, described the purpose of the GATT as that of providing a constitutional framework for trade policy-making process through the regulation of policy instruments.[81] Multilateral trade policy disciplines, he explained, do not prevent sovereigns from pursuing specific economic policy goals, but, rather, discourage the use of policies with market distorting effects and/or negative international externalities.

Tumlir's theory also considered how the GATT would need to change in order to fulfill this "constitutional role" more completely. His institutional "prescription" would have involved many of the political and legal innovations reflected in European economic institutions, including the adoption of common domestic laws based on free market principles, rigid legal commitment to the principles of non-discrimination, private rights and review-like mechanisms to safeguard them, and, in addition, participation on the basis of something other than complete sovereign

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[80] Tumlir, J. "Economic Policy as a Constitutional Problem". The Wincott Memorial Lecture. London: The Institute of Economic Affairs, 1984, p. 80.

[81] Roessler, F. "The Constitutional Function of the Multilateral Trade Order" in *National Constitutions and International Economic Law*, edited by M. Hilf and E. Petersmann. Deventer: Kluwer Law and Taxation Publishers, 1993, p. 54.

equality, eg. the idea of a "GATT-Plus type of agreement between the major trading powers".[82] Each of these ideas, as will be seen, is reflected in the GPA.

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[82] Hudec, R.E. "The Role of Judicial Review in Preserving Liberal Foreign Trade Policies", in *National Constitutions and International Economic Law*, op. cit., pp. 507 - 508.

## PART I - The WTO Government Procurement Agreement

The "story" that this thesis is going to tell involves a policy area that was originally left essentially outside of the postwar trading system, government procurement. Today, nearly 50 years after that system was created, procurement is still not subject to the standard market disciplines of the international economic order; it is governed by one of 4 WTO Plurilateral Agreements, separate from, and appended to, the WTO Charter. The proceeding section introduced the liberal vision that is reflected in the multilateral trading system, along with its associated "negative" regulatory methodology. It also endeavoured to illustrate the difficulties that are associated with implementing this theory across over-lapping national realms of social order. The purpose of this section is to describe the institutional evolution and context of the WTO disciplines to which procurement is subject, and explain how they differ from mainstream WTO policy constraints. The discussion includes a review of the legislative and administrative intervention that the GPA's positive, procedural disciplines entail; it concludes that although they represent a dramatic change vis-à-vis the situation in this policy context circa 1948, they are not, per se, seriously interventionary. Rather, as with the common rules and compliance measures of the EU's procurement regime, it is more appropriate to view them as an institutional development that is complementary to the trading system's existing regulatory methodology. The most significant institutional "irregularities" embodied in the GPA, in this sense, include its: previously-mentioned limited membership; positive rather than negative policy disciplines; reciprocity-based discrimination in the exchange of its market access benefits; judicial

review-like enforcement mechanism, provisions for "correction of the breach of the Agreement or compensation for the loss or damages suffered" and; lack of an escape clause.

The chapter 1.3 discussion relating to the institutionally unorthodox way in which the GPA is structured - or, as will be seen, the way in which its positive disciplines serve to reinforce the negative commitments that Member States have undertaken not to discriminate in the application of their domestic policies and procedures - draws heavily on institutional learning experiences derived in the context of European economic integration, both in an EU and an EFTA setting. Lessons relating, specifically, that is, to the role of common rules and regulatory "flexibility" in disciplining national legislative processes, on the one hand, and stringent procedures to facilitate the uniform executive application of these rules, on the other.

Subsequent sections of the thesis will examine the issue of intervention from a broader, political perspective and consider the implications of the kind of legal cooperation that is implicit in the GPA.

## Chapter 1 - The Institutional Evolution of the Government Procurement Agreement

### What is Government Procurement?

Article III, paragraph 8 of the General Agreement on Tariffs and Trade generally exempts government entities' procurement-related activities from the national treatment obligations to which GATT Contracting Parties are obligated:

"The provisions of this Article shall not apply to laws, regulations, or requirements governing the procurement by government agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale."[83]

In so doing, it provides what two WTO Secretariat employees, Annet Blank and Gabrielle Marceau, have recently described as a commonly accepted GATT/WTO definition of government, or public procurement; neither the Tokyo Round Code, nor the re-negotiated Government Procurement Agreements of 1988, or 1994 contain formal definitions of this concept.[84] In the institutional setting that has grown up around the GATT, a working definition of government procurement thus is, or at least, has been:

"procurement by government agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale."

According to the aforementioned WTO authors, the 1992 Sonar Mapping System Panel Report addressed this definitional lacuna. It concluded that while there was no formal definition in the Agreement, the following characteristics could be used to provide guidance

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[83] GATT. *The Text of the General Agreement.* Geneva: July 1986, p. 7.

[84] Blank, A. and G. Marceau. "History of the Government Procurement Negotiations Since 1945". Paper presented at WTO Conference on "Multilateral Rules for Government Procurement: Design, Implementation and Enforcement", 2-3 December 1995, p. 39.

as to whether a particular transaction should be considered an instance of government procurement: "payment by government, governmental use of or benefit from the product, government possession and government control over the obtaining of the product".[85]

For its part, Blank and Marceau's paper proceeded from the following definition:

"Government procurement involves the government or its agent acting as consumer, procuring for its own consumption and not for re-sale."[86]

This thesis will adopt these authors' definition, albeit with one major modification. As the purpose of this thesis is to examine the political implications of the multilateral rules embodied in the GATT/WTO procurement regime, insights from a more politically-oriented definition recently offered by Friedl Weiss will be grafted onto Blank and Marceau's definition. In a recent book about the EU's procurement regime, Weiss described procurement as:

"... an activity which is designed to fulfill the economic functions and powers attributed to the state and to some of its bodies and is carried out within the scope of the legal powers conferred upon them."[87]

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[85] Herein, these authors' mention of the definitional approach adopted by the 1976 "OECD Draft Instrument on Government Purchasing Policies Procedures and Practices" is also, arguably, of interest. This instrument, they say, proposed that countries agree on a list of definitions, much like the positive listing of situations in which single tendering was to be permitted, and the indicative lists of entities to be covered by the Instrument/subsequent GATT Agreements. Although it is beyond the scope of this paper to explore the implications of this listing approach in detail, it might have interesting things to say about the process of positive policy coordination.

[86] op. cit., Blank and Marceau, p. 5.

[87] Weiss, J.F. *Public Procurement in European Community Law*. London: The Athlone Press, 1993, p. 6.

So as to emphasise the fact that public procurement is an activity conducted in relation to a state's exercise of its political powers, the thesis' operating definition will be:

"Government procurement is an activity which is designed to fulfill the economic functions and powers legally attributed to the state, involving the government or its agent acting as consumer, procuring for its own consumption and not for re-sale."

Blank and Marceau's paper argued that it is also important to distinguish between procurement and state trading. In state trading, they said, "the government or its agent is involved in buying, selling, and sometimes in manufacturing operations for re-sales..."[88] The state is, in other words, a commercial actor much like any other firm. Such activities, as has been described, are considered to be outside the realm of public procurement, at least as it been understood in a GATT environment. To the extent that a particular state-trading entity is not a commercial actor with what the US has recently termed a "commercial function", however, its activities are of potential relevance to this discussion. In a 1989 paper submitted to the GATT Committee on Government Procurement's Informal Working Group on Negotiations (hereafter IWG), the US delegation made a distinction between procurement/trading activities with "government functions" and those with "commercial functions".[89] The former involve the performance of duties which "only governments can do", such as making laws, or "which governments reserve for themselves the right to do, eg. national defense, (or the) monopoly provision of services which are necessary to existence as a nation", whereas the latter entail the "performance of duties left entirely to the private sector, where there are no substantial controls exercised by

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[88] op. cit., Blank and Marceau, p. 5.

[89] United States Government. "Broadening: Submission by the United States". GATT Government Procurement Agreement Informal Working Group on Negotiations, Meeting of 13 June 1989.

governments on them... other than generally applicable laws such as tax laws". Government procurement is characterised by purchases of products for "government functions", wherein the behaviour in question is that of the Contracting Parties or Signatory, as distinguished from the behaviour of the firms or agencies themselves, or on their own. Such a distinction is of importance because of the process of privatisation that is underway in many countries. The disciplines embodied in the Government Procurement Agreement are designed to govern the activities of an entity procuring goods or services for government purposes, wherein these purposes dictate either the kind of competitive environment in which such entities operate, or the extent to which the profit motive is a factor in the entity's management decisions.

**The ITO Negotiations - Exemption from MFN and National Treatment**

The introductory section described the postwar trading system's regulatory methodology as being fundamentally negative in nature; anything Contracting Parties were not specifically forbidden to do remained within their legitimate sovereign prerogatives. The trade policy proscriptions contained in the Agreement's Part II "code of commercial behaviour" were designed to discourage all but tariff barriers to trade. They were accompanied by a duty of non-discrimination, also traditionally interpreted in negative terms. Embodied in the norms of most favoured nation and national treatment, the general idea of this concept has been described by J.F. Weiss as involving "formal equality before the law... (manifested in the) attribution of status, or the definition of common rules, or entitlements".[90] According to Petros Mavroidis and Bernard Hoekman, its norms have been understood in a GATT context to involve: "... a legal prohibition to discriminate

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[90] op. cit., Weiss, pp. 19-20.

between foreign products... (or,in the context of national treatment) a legal prohibition to discriminate between foreign and domestic sources".[91]

Article III, paragraph 8 of the General Agreement on Tariffs and Trades, as was mentioned at the outset of this chapter, generally exempted government entities' procurement-related activities from the national treatment obligations to which GATT Contracting Parties were obligated. Most legal commentators have interpreted this exemption as excusing such purchasing entities from general GATT MFN obligations as well. Paragraph 1 of Article I requires that Contracting Parties extend MFN treatment with respect to "all matters referred to in paragraphs 2 and 4 of Article III". As mentioned previously, however, Article III specifically exempts government entities from the duties of national treatment that it confers. Thus, it is argued, government procurement markets are not subject to either of the GATT's two fundamental disciplines, namely the duties of national treatment and non-discrimination on a most-favoured nation basis.[92]

Article XVII, paragraph 2 of the GATT similarly exempts state-owned trading enterprises' purchases of "products for immediate or ultimate consumption in government use and not otherwise for resale or use in the production of goods for sale" from the non-discriminatory disciplines to which such trading entities are otherwise subject, whilst

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[91] Hoekman, B. and P. Mavroidis. "The WTO's Agreement on Government Procurement: Expanding Disciplines, Declining Membership?" *CEPR Discussion Paper No. 1112*, January 1995, pp. 4 - 5.

[92] Herein, John Jackson, for example, refers to Edmund McGovern's argument that Article I's reference to the obligations of Article III implicitly makes government procurement activities exempt from MFN rules. See *The World Trading System: Law and Policy of International Economic Relations*, p. 199.

Article XIII, paragraph 1 of the WTO General Agreement on Trade in Services (hereafter GATS) exempts government agencies from the duties of most favoured nation and national treatment outlined in Articles II, XVI and XVII. In addition, GATT Article XXI(b)(ii) and GATS Article XXI:(b)(ii) contain broadly drafted "national security exemptions" for all measures considered:

"necessary for the protection of essential security interests... relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment".[93]

The complete exclusion of public procurement markets from multilateral policy disciplines was not, per se, an objective of the participants in the immediate post-war International Trade Organisation (hereafter, ITO) negotiations. On the contrary, according to the previously cited WTO authors' paper on the history of the GATT/WTO Agreement, "The first US draft for an ITO envisaged explicitly that the non-discrimination principles, reflected in the MFN and National Treatment obligations, were to apply to government purchases for governmental use... and to the awarding of contracts by governments for public works."[94] Nevertheless, the majority of the other 22 nation states participating in these negotiations held less liberal positions on this issue, a legacy - at least in part -

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[93] It should be mentioned that Article XVII, paragraph 2 requires that state trading entities "shall accord to the trade of the other contracting parties fair and equitable treatment". John Jackson has described this as an "MFN-like requirement", but it has never been questioned or raised as an object of complaint amongst CPs. See Jackson's *World Trade and the Law of the GATT*, op. cit., p. 360.

[94] op. cit., Blank and Marceau, p. 4.

of what Gary Hufbauer and others have termed the "protective orgy" that had proceeded the Great Depression.[95]

Blank and Marceau's paper provides an overview of the course of the ITO negotiations. From the outset, they say, discussions were plagued by definitional problems. What activities of which government entities were to be subject to any potentially-agreed multilateral disciplines?[96] During the first round of preparatory meetings (for the negotiation of an ITO Charter) that took place in London in 1946, the delegates' debate focused on the issue of coverage. A fundamental problem with which participants had to contend involved the issue of what these authors term, "constitutional differences". Because of the variety of ways in which participating states organised themselves to discharge the duties associated with governing, it was difficult to come up with a set of disciplines that would engender consistent obligations across national jurisdictions. For example, John Evans, in a book about the Kennedy Round (1963-67), discussed problems associated with the separation of executive from legislative authority in the US. This has meant, he said, "that the details of... government procurement practices... have had to be committed to statute, while in most countries the government officials concerned exercise much wider discretion. In addition, the constitutional rights of individual states

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[95] Hufbauer's comments were made in the context of a description of the "rise of the GATT... out of the ashes of the Havana Conference". Although they did not deal specifically with the negotiation of government procurement-related issues, they did reflect the broader policy concerns with which all ITO negotiators were contending, i.e. MFN and non-discrimination. See "The GATT Codes and the Unconditional Most-Favored-Nation Principle" by G. Hufbauer, J. Erb and H. Starr. *Law and Policy in International Business*, Vol. 12, 1980. This article also refers to R. Gardner's *Sterling Dollar Diplomacy*, arguably the classic text concerning the political objectives of the ITO/GATT negotiators (New York: Columbia University Press, 1980).

[96] op. cit., Blank and Marceau, pp. 2 - 18.

in... (the US has) created a twilight zone of jurisdiction within which some states have adopted laws or regulations that conflict with the policy and even with the international commitments of the federal government."[97] The negotiating dilemmas faced by the ITO negotiators were thus compounded by the fact that in order to implement many of the proposed non-discriminatory disciplines, some participating states would have had to alter significant portions of their national legislation.

The end result of the ITO discussions, according to Ken Dam, was that the US proposal to extend the duties of MFN and national treatment to the non-defense-related, public procurement activities of ITO signatories was dropped because "an attempt to reach agreement on such a commitment would... (have led) to exceptions almost as broad as the commitment itself".[98]

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[97] Evans, J.W. *The Kennedy Round in American Trade Policy: The Twilight of the GATT?* Cambridge: Harvard University Press, 1971.

[98] Dam, K. *The GATT: Law and International Economic Organization.* Chicago: University of Chicago Press, 1970, p. 200.

**The OEEC/OECD Dialogue (1960 - 1976)**

In 1962, Belgium and, later, the United Kingdom brought formal complaints within the newly formed Organisation for Economic Cooperation and Development (hereafter, OECD) against the US' Buy American Act. This, as described by Morton Pomerantz, an Office of the US Trade Representative (hereafter, USTR) negotiator during the Tokyo Round, was in response to the increased national procurement preference that had been enacted by the Department of Defense for balance of payment reasons in July of 1962.[99] It ultimately lead to the OECD's being given a mandate to investigate the general issue of preferences in its Member States' government procurement.

In early 1963, according to Blank and Marceau, it was decided, as a first step, to "gather information on procedures for government purchasing of supplies by central governments".[100] Before the results of this survey had even been fully compiled and published, it was clear that practically all OECD states had some kind of preferred treatment or preference schemes favouring national suppliers, whether formal price preference or informal discrimination against foreign suppliers or products.[101]

A Working Party on Government Procurement was accordingly created in the Trade Committee in early 1964. The objective of this initiative, according to an OECD document

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[99] Pomerantz, M. "Toward a New International Order in Government Procurement". *Law and Policy in International Business*, Vol. 11, 1980.

[100] op. cit., Blank and Marceau, p. 18.

[101] The results of the survey were published in 1966 by the OECD Secretariat. Known colloquially as the "pink book", this report was officially titled, "Government Purchasing in Europe, North America and Japan: Regulations and Procedures". Paris: OECD, 1966.

cited by Ken Dam, was to "...explore the possibility of elaborating guidelines which would ensure maximum fairness in the field of government procurement through limiting discrimination against the suppliers of foreign products".[102] By 1967, the group had developed and published draft guidelines for its Member States' public procurement.

The Americans were highly critical of the new guidelines. As Pomerantz put it, the draft would have required "the elimination of specifically stated preferences, such as those in the US system to domestic suppliers, and would not... (have adequately ensured) open bidding and award procedures by other countries".[103] By way of rejoinder, the US Delegation offered an alternative set of guidelines, calling for liberalisation premised on the principle of sectoral reciprocity. Their proposal called for the Working Party to continue its efforts by focusing on the heavy electrical equipment sector because of its "considerable trade importance... susceptibility to statistical study and its relevance to OECD members as (both) producers and consumers".[104]

Before 1969 had ended, the American proposal had proven impracticable; discrepancies in the degree of government ownership in the power generation field made it impossible to achieve meaningful reciprocity as regards the potential policy concessions of states participating in the negotiations. Nevertheless, according to Blank and Marceau, the US proposal did provide a useful platform from which subsequent OECD work proceeded;

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[102] op. cit., Dam, p. 206.

[103] op. cit., Pomerantz, p. 1273.

[104] ibid., p. 1275, which quotes the OECD Secretariat's "Working Party of the Trade Committee: Government Procurement (Note by the US Delegation)", OECD Document TFD/TD/521, dated 19 February 1969.

it offered norms that were "more binding than those that had been envisaged", whilst signalling that the US might be prepared to take a more active role in the OECD dialogue.[105]

The Working Party's studies continued, virtually uninterrupted, through 1975. Some of the most difficult questions yet to be addressed involved what Pomerantz termed, "finding a common terminology for the different kinds of procurement processes used by the negotiating countries".[106] Blank and Marceau have described this terminological quest as a debate over the "concept of discrimination".[107] The fundamental issue, they say, was what the Japanese delegate at the time termed, the "dual nature" of discrimination in public procurement markets. It involved the question of how countries' nationally-biased public procurement policies were implemented, namely via "formal" discrimination, in accordance with statute, or "informally", through the exercise of administrative, or procedural discretion. Incarnated in the dispute over whether public tenders should be made the "rule" under any potential Code, and selective tendering procedures an exception, having to be justified, this debate was significant from a policy point of view in that each of the competing approaches to discrimination dictated a contrasting approach to multilateral regulation. The fact that "formal" discrimination necessitated multilateral disciplines that involved legislative changes at the national level, as will be seen, compounded the difficulty of finding "commonalities" on which a code could be based.

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[105] op. cit., Blank and Marceau, p. 20.

[106] op. cit., Pomerantz, p. 1277.

[107] op. cit., Blank and Marceau, p. 23.

By 1970, the fundamental problem that had de-railed the ITO negotiations on public procurement was once again squarely facing OECD negotiators: "Constitutional differences", reflected in contrasting regulatory methodologies, were making it difficult to come up with a set of multilateral disciplines that would engender consistent obligations across national jurisdictions. The following chapter will examine environmental factors that may have been associated with changed incentives for multilateral cooperation and compromise in detail. As the objective of this chapter is solely to outline the institutional history of the WTO Agreement, suffice it for now to say that the OECD discussions, as Pomerantz put it, were "not proceeding in isolation".[108] During the early 1970s, a "sea change" in the context of the discussions was underway. There was, as Dam has described it, growing recognition amongst the participants that "getting rid of discrimination in these markets wasn't going to be simply a question of bargaining over formal restrictions".[109]

Once this consensus had been achieved and a restrictive listing of circumstances under which Members would be allowed to use single tendering procedures had been agreed, particular controversy continued to surround the issues of publicity in the context of both the tenders and awards procedures, and derogations from the Agreement's disciplines. According to Matthew Marks and Harald Malmgren, two American commentators on the process, bidders rights to secrecy were viewed by many participants as a vital element in the functioning of government-industry relations, beyond the appropriate jurisdiction of a set of international ground rules concerning procurement practices, whilst derogations

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[108] op. cit., p. 1273.

[109] op. cit., Pomerantz, p. 209.

for development purposes, and in connection with national industrial policies, were also highly contentious.[110]

Complete consensus on either of these issues was never reached amongst participants in the negotiations. On the one hand, the US continued to hold out for ex post, or post-award publication of the winning bid in a given tender, whereas the Europeans, in the words of Blank and Marceau, feared that this would "endanger subsequent competition, result in collusion on the part of suppliers, invite identical bids in new contracts... and lead to an excessive number of disputes".[111] Similarly, although there was broad agreement on the US' proposal for three main types of derogations, it was not possible to address this issue effectively in a forum in which the "beneficiaries" of many of these derogations - namely, the developing countries - had no formal standing.[112]

As 1975 came to a close, three main issues, according to Blank and Marceau, still needed to be addressed:

> "1) the scope of the agreement, i.e. the list of national entities to which the code was to apply...
>
> 2) the minimum dollar-value which would trigger the application of the guidelines;

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[110] op. cit., Marks and Malmgren, p. 402.

[111] op. cit., Blank and Marceau, p. 27.

[112] ibid., p. 29. Blank and Marceau identify the following "types" of derogations: "1) for developing countries; 2) for reasons similar to those contained in Article XX and XXI of the GATT and in the Treaty of Rome; and 3) for economic reasons which consisted of cyclical difficulties, balance of payment reasons, implementation of regional or sectoral development policies."

3) the procedure for the settlement of disputes, including the content of ex post publicity."[113]

It was decided to suspend the negotiations to "let capitals reflect on the main outstanding issues". By this time, the negotiators had effectively succeeded in operationalising the principles of national treatment and non-discrimination as they might be applied to Member States' public procurement practices. Most notably, innovative "transparency procedures" for Members' tendering and award practices designed to counter exclusionary practices had been identified, and there was general agreement that a conditional MFN obligation was going to govern the implementation of any eventual agreement.[114]

In the autumn of 1975, according to an OECD document cited by Blank and Marceau, the EC countries had "officially proposed the (re)opening of the necessary negotiations but then Canada, in particular and also the United States were already resolved to include government purchasing in the GATT MTN". By October of 1976, the EC and the other European Member States had agreed, "though somewhat reluctantly", to the establishment of a Multilateral Trade Negotiations (hereafter, MTN) Sub-Group on Government Procurement.

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[113] op. cit., Blank and Marceau, pp. 31-32. Herein, the authors cite questions surrounding the "use of subsidies to support national industries" as a possible fourth, yet-to-be-resolved issue. These issues, they say, were subsequently to be addressed in negotiations for the Tokyo Round Subsidies Code.

[114] The term "transparency procedures" was first employed by Patrick Messerlin in an article about the 1994 Procurement Agreement. See "Agreement on Government Procurement", in *The New World Trading System: Readings*. Paris: OECD, 1994. As regards the accomplishments of the OECD negotiators, both of the technical "innovations" mentioned are addressed by Blank and Marceau as significant accomplishments of the OECD negotiators. See, op. cit, p. 27 and p. 32.

Shortly thereafter, on 8 December 1976, OECD guidelines for Member States' public procurement policies, now known officially as the "OECD Draft Instrument on Government Purchasing Policies, Procedures and Practices" were transmitted to the GATT Secretariat. A principle reason for the movement of the discussions to the broader GATT forum was, according to Pomerantz, so that the "developing countries could participate and better evaluate the desirability of adhering to an eventual agreement".[115]

**Negotiation of the Tokyo Round Code and the 1988 Protocol (1976 - 1988)**

Not long after the OECD public procurement dialogue was initiated, the issue of government procurement had been raised again in a GATT setting, during the early days of the Kennedy Round (1962-1967). In October 1963, in response to an invitation issued by the executive secretary of the GATT, the UK, Japan, the US and Sweden had submitted lists of non-tariff barriers to trade (hereafter, NTBs) they considered should be the subject of GATT negotiations.[116] Government purchasing practices were included in the summary of these lists that the Secretariat subsequently prepared. A similar exercise was initiated shortly thereafter amongst all of the Round's participants. The UK, the EC and Japan formally complained about the US' "Buy American" law, whilst the US called for "more open procedures by government procurement agencies of other countries in advertising

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[115] op. cit., Pomerantz, p. 1279.

[116] op. cit., Evans, p. 257. Herein, it might also bear mention that, subsequent to a 23 March 1965 decision by the Contracting Parties, the title of the head of the GATT Secretariat was changed from "Executive Secretary" to "Director General". See BISD 13S/19, Geneva: July 1965.

and awarding contracts".[117] A multilateral negotiating group on government procurement was accordingly established.[118]

Given what Evans and others have described as the general failure of the Kennedy Round to achieve much in terms of the reduction of NTBs, it is hardly surprising that the negotiating group on government procurement failed to accomplish anything. Chapter 2.2 of this thesis will consider why the OECD might have been a more appropriate forum for discussions on discrimination in public procurement markets at this time, and how both this policy-making environment and the multilateral one were changing in the years prior to the Tokyo Round (1973 - 79). For the purposes of this institutional overview, it is sufficient to note that, at least through the 1960s, the political will necessary to develop effective multilateral disciplines for trade in public procurement markets in a GATT-setting did not exist.

Following on from the GATT Secretariat's earlier, preliminary efforts to survey the various NTBs employed by its Contracting Parties, a 1975 note by the GATT Secretariat set out the following as factors inhibiting foreign participation in public procurement markets:

> "a) the giving of preferences for products of local origin is widespread;
>
> b) these preferences basically divide into two types - price preferences and non-price preferences, with most countries using a combination of both;

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[117] ibid., p. 257.

[118] op. cit., Dam, p. 205.

c) the system of preferences for domestic products has sometimes been placed on a statutory basis of a generally mandatory character;

d) the preferential treatment applied in the field of government procurement to domestic products appears in many cases to be based on administrative discretion, practice and habit; and

e) the use of government procurement as an instrument of government policy is common to both the developed and developing countries..."[119]

This document also summarised the necessary "elements" for negotiators' consideration in a potential GATT Code on government procurement, describing, in some detail, the work on issues of this nature that had previously been conducted in an OECD setting. The properties that it identified for a potential multilateral Code included:

(1) Objectives and principles
(2) Definitions
(3) Procurement entities
(4) Elimination of existing discrimination
(5) Exceptions
(6) Purchasing procedures
(7) Publication of government procurement regulations
(8) Reporting, review, complaint and confrontation procedures[120]

As has been mentioned, this institutional reconnaissance was soon followed by the creation of a MTN Negotiating Sub-Group on Government Procurement and the Secretariat's receipt

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[119] GATT Document MTN/NTM/W/16, "Government Procurement: Note by the Secretariat". Geneva: 5 August 1975, pp. 6 - 7. This document described the activities of Working Group I, an entity charged with examining possibilities for concrete action on NTMs in the government procurement area identified in the "GATT Inventory of Non-Tariff Measures". (The "inventory" had evolved from the preliminary survey of NTBs that took place in October 1963; it turned into a decade-long project that, according to John Jackson, ultimately involved a catalogue of over 800 NTBs, listed by country. See *The World Trading System: Law and Policy of International Economic Relations*, op. cit., p. 130.)

[120] ibid., p. 1.

of the OECD "Draft Instrument". The task the GATT negotiators were now facing, as described by Blank and Marceau, remained essentially the same as that previously confronted by their OECD counterparts: the issues of a potential Code's coverage, thresholds and dispute settlement procedures still needed to be addressed. Nor had controversies surrounding the issue of ex post information been resolved.[121]

The major new issue on the Sub-Group's agenda, as has also been suggested, involved the matter of "special and differential treatment" for the developing countries. Indeed, Pomerantz has described Article III of the eventual Tokyo Round Code - or that addressing the "development, financial and trade needs of the developing countries" - as "the only part of the Agreement that did not have an antecedent text at the OECD negotiations".[122] These negotiations, as he put it, were subsequently governed by the idea that a "smaller entry fee" would be required for such countries' participation in the Code; they were, that is, not required to subject as great a percentage of their procurement entities to the disciplines of the Code as were its developed country signatories. In this sense, the Article III negotiations arguably fell under the broader umbrella of discussions concerning the Agreement's coverage that were underway. Provisions for technical assistance for the least developed countries also formed an important part of the provisions for special and differential treatment that were eventually agreed.

GATT negotiations with respect to the minimum value of the purchases to which a potential Code would apply and its coverage were conducted jointly; they were respectively governed

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[121] op. cit., Blank and Marceau, pp. 41-45.

[122] op. cit., Pomerantz, p. 1279.

by notions of administrative efficiency and a quest for balance of commitments. The task, as it eventually evolved, has been described by Gilbert Winham as being:

"similar to an item-by-item tariff negotiation... where the participants placed items on or withdrew them from the bargaining table in an effort to wangle an attractive offer from the other partners. The positions nations took... (bearing) some relationship to the rules that were negotiated ... such as the threshold value of the contracts to which the code would apply".[123]

According to Blank and Marceau, one of the most important "reinforcements" of the elementary procurement regime that had been negotiated in the OECD came from the procedures for consultation and dispute settlement that were agreed by GATT negotiators in Geneva. As in other policy areas governed by Tokyo Round Codes, a Committee on Government Procurement was established "to oversee" the implementation of these measures. What Pomerantz has termed the "self-policing" nature of the OECD Draft was maintained, but new dispute settlement mechanisms were crafted in accordance with GATT practices, and provisions that were being developed in the context of the negotiation of the other Codes.[124] It was assumed that the vast majority of disputes would be resolved during the procurement process, or following bi-lateral consultations. Those disputes that could not be resolved in this manner were to be referred to the Committee for examination. If, after three months, the Committee had failed to bring about accommodation between the parties, either of the aggrieved parties were given the right to request the establishment of an impartial panel of 3 - 5 members.

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[123] Winham, G.R. *International Trade and the Tokyo Round.* Princeton: Princeton University Press, p. 190.

[124] op. cit., Pomerantz, pp. 1286 - 1287.

It was widely recognised that procurement markets constituted the most significant opportunity for trade liberalisation that was opened up by the Tokyo Round. Prior to the Round, the GATT Secretariat estimated that such markets potentially offered market access opportunities worth roughly ?, excluding defense-related trade. The Code that eventually entered into force on 1 January 1981, however, covered only some $33.2 billion worth of opportunities.[125] It was, in the words of Gilbert Winham, clearly "just a beginning".[126]

**Re-Negotiations (The 1988 Protocol)**

Article IX, paragraph 6(b) of the Tokyo Round Government Procurement Code states:

"Not later than the end of the third year from the entry into force of this Agreement and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to broadening and improving this Agreement on the basis of mutual reciprocity... In this connexion, the Committee shall, at an early stage, explore the possibilities of expanding the coverage of this Agreement to include service contracts."[127]

On 1 January 1988, a series of amendments to the Code, representing the first phase of re-negotiations under this Article and designed to improve the functioning of the Agreement, broaden its coverage and start working towards the inclusion of service contracts came into force. Changes to the rules contained in the Agreement included: a lowering of the threshold value for procurement contracts to be covered by the Code from SDR 150,000 to SDR 130,000, extension of the Code to leasing, rental and hire purchase contracts, prohibition of discrimination against locally established firms on the

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[125] US Government estimate, excluding the offers of Austria and the developing countries. See D. V. Anthony and C.K. Hagerty's "Cautious Optimism as a Guide to Foreign Government Procurement", in *Law and Policy in International Business*, Vol. 11, 1979, p. 1341.

[126] op. cit., Winham, p. 232.

[127] GATT. *The Texts of the Tokyo Round Agreements*. Geneva: 1986, pp. 47-48.

basis of their degree of foreign affiliation, provisions for language assistance to developing country suppliers, and tightened restrictions on tendering procedures and qualification of potential suppliers, preparation of technical specifications, and publication of contract awards.[128] Progress in extending the terms of the Code, including coverage of service contracts, was much less substantial; it was effectively limited to the parties' agreement to set out work programmes for further consideration.

**The 1994 Agreement**

Further re-negotiation of the Agreement effectively commenced in 1987, during the early stages of the Uruguay Round; it was motivated by consensus that still more of the trade conducted in this context should be brought under GATT disciplines and that the opportunity that the Round presented to do this shouldn't be missed.[129]

Three separate issue areas were explicitly recognised for further work in the forequoted Article IX, paragraph 6(b) of the Tokyo Round Agreement. Blank and Marceau have summarised them in terms of the following: "broadening", or extension of the Agreement's coverage, "expansion", involving the inclusion of service contracts, and "improvement", dealing with amelioration of its text.[130] The 1988 Protocol of Amendments, as has been

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[128] International Chamber of Commerce. Policy and Programme Department, Document No. 103-4/26, November, 1985.

[129] Technically, these negotiations were not part of the Uruguay Round, although they represented an important element in the Round's broad market access concept. See A. Otten's "Improving the Playing Field for Exports: The Agreements on Intellectual Property, Investment Measures and Government Procurement", in *GATT - Uruguay Round: Nine Papers*, edited by T. Cottier. Bern: Stampfli and Cie AG, 1995. The idea that the Round presented a negotiating "opportunity not to be missed" is suggested by Weiss in his forequoted book, *Public Procurement in European Community Law*, p. 150.

[130] op. cit., Blank and Marceau, p. 51.

suggested, had stipulated that Parties to the Agreement were, in future, to adopt workprogrammes on "broadening" and "expansion". In October of 1987, before the Protocol had even officially entered into effect, the Committee on Government Procurement's Informal Working Group on Negotiations (hereafter, IWG) had reached consensus on the required workprogrammes.

**"Broadening" or Coverage**

The IWG's programme on "broadening" proved to be particularly significant for the negotiations that followed. As described by the forequoted WTO authors, it involved two distinct "stages": the first sought participants' written input on potential "spheres of application" for any future Agreement, and the second involved the derivation of negotiation "criteria" from the submissions received. By May of 1988, the Working Group had completed both phases of the plan. The "criteria" that were identified in the latter stage proved important factors in the remainder of the negotiations in that they established a "basic structure" for the bargaining processes that followed.

According to two EU delegates who were involved in the IWG activities, Gerard de Graaf and Matthew King, three "categories" of entities whose procurement activities might potentially be subject to an Agreement, A, B and C, were identified: "Category A" consisted of central government organisations, "Category B" included sub-central entities and "Category C" was made up of utilities and other miscellaneous organisations.[131] It

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[131] De Graaf, G. and M. King. "Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round". *The International Lawyer*, Vol. 29, No. 2, Summer 1995, p. 441. The GPA "categories" have subsequently come to be known colloquially as entity "annexes".

was decided that entities in the first two categories would be the prime subjects of the negotiations, whilst those in the third group could be covered, but it would depend on whether the benefits associated with coverage of a particular entity justified the additional costs it would be likely to engender for the Signatory whose entities were in question.

Thereafter, a quest for "balanced coverage" governed a "request-and-offer" negotiations process that essentially involved a bi-lateral exchange of market access concessions. As outlined by Annet Blank, the WTO Secretariat official responsible for the servicing of the Procurement Agreement, the term "balanced coverage" reflected a "measure of the market access opportunities offered by a given Party to the Agreement".[132] Reciprocal exchanges of such offers were made amongst the Parties on the basis of their relative value, expressed as a percentage of a participant's national GDP; the absolute value of an offer was not a factor in such transactions. The basis for the exchanges, in turn, was either the level of government involved in a particular purchasing activity - that is, "Category A", "B" or "C" - or a specific industrial sector, eg. the construction-related procurement of large Japanese cities.

Gerard de Graaf and Matthew King, the previously-cited members of the EU's WTO Delegation, have recently argued that the negotiations with respect to coverage, and, indeed, the latest "round" of re-negotiations in general cannot be understood without an appreciation of the specific negotiating objectives of the EU and the US:

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[132] Conversation with Annet Blank, employee of the Policy Affairs Division of the GATT Secretariat. Geneva, 27 July 1994.

"The United States' main negotiating target was to achieve unrestricted access to the strategically important electrical and telecommunications procurement sectors of the European Union... The European Union, on the other hand, (sought) ...unfettered access to state and major city level procurement entities in the US... the removal of "buy American" restrictions attached to federal funding (grants and loans) provided to states and localities... and comparable access for its suppliers to the US electrical and telecommunications markets..."[133]

Because of difficulties in resolving differences of opinion between these two Parties over the value of the market concessions each was prepared to offer, a deadlock arose between them in early 1992. It continued even after a bi-lateral Memorandum of Understanding was reached between them on 22 April 1993; it effectively reduced the remainder of the negotiations over the Agreement's coverage to a bi-lateral market access debate.

A 1994 study of the respective values of public procurement opportunities in the EU and the US that was jointly commissioned by these two parties and conducted by the consultancy firm, DeLoitte and Touche, played an important role in the resolution of this debate. It presented what de Graaf and King have called, "reliable estimates, indicative of the scale of procurement opportunities on both sides of the Atlantic", confirming "rough balance" between the two at the Category A level, a US$82 billion "credit" in the EU account at the Category B level (US$100 billion opportunity in the EU vs. US$18 billion offered by the US), and a US$37 billion "deficit" in the US account at the Category C level (US$40 billion of benefits in the EU vs. US$3 billion in the US).[134]

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[133] op. cit., de Graaf and King, pp. 442-443.

[134] ibid., p. 448.

This report was released on 22 March 1994, well after the 15 December 1993 deadline for the completion of all Uruguay Round negotiations. Negotiators thus had less than a month to resolve their bi-lateral differences, and "multilateralise the market access results" if they wanted their new Plurilateral Agreement to be signed in Marrakech along with the rest of the Uruguay Round accords; for this reason, the 1994 Agreement does not adhere to the "intra-Agreement GATT norm of MFN" that was established during the Tokyo Round.[135] The market access concessions that were ultimately exchanged under the Agreement, in other words, were exchanged on the basis of a strictly conditional variation on the norm of MFN. During the month before the ministerial meeting in Marrakech, the US and EU, in any case, managed to resolve their major differences of opinion surrounding the value of each other's respective offer, and began to focus on "opening up access to the markets of the Quad Countries", namely the US, EU, Canada and Japan.[136]

De Graaf and King have summarised the final results of the new Plurilateral Agreement's coverage in the following value terms:

| | |
|---|---|
| Category A | US$ 50-55 billion in opportunities |
| Category B | US$ 25 billion |
| Category C | |
| Ports | US$ 1 billion |
| Utilities | US$ 30 billion[137] |

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[135] Because of this derogation from the GATT MFN norm, Hong Kong, according to Annet Blank, refused to sign the Agreement. Op. cit., interview of 27 July 1994.

[136] Hill, A. "US, EU in procurement talks". *Financial Times*, 11 January 1994.

[137] op. cit., de Graaf and King, pp. 449 - 450.

**Improvement**

**Bid Challenge**

The Government Procurement Code was designed to be largely self-policing. Article VI, paragraph 5 of 1988 Agreement requires that:

"There shall also be procedures for the hearing and reviewing of complaints arising in connexion with any phase of the procurement process, so as to ensure that, to the greatest extent possible, disputes under this Agreement will be equitably and expeditiously resolved between the suppliers and the entities concerned."[138]

Under the terms of this Agreement, however, no criteria were provided for the establishment and operation of such review procedures; Parties to the Agreement were simply obligated to establish some kind of administrative review.

During some of the early meetings of the IWG in late 1988/early 1989, many of the participating delegations were of the opinion that the dispute settlement provisions of the 1988 Agreement, and, in particular, its review provisions, were problematic. A paper submitted by the Canadian delegation to the Committee in mid-June of 1989 touched on several of the arguments that were offered at the time regarding reasons why this issue should be on the agenda of its work programme on Surveillance, Monitoring and Control:

"This gap... (makes) it difficult for suppliers to be aware of the recourse available to them when they do, or seek to do, business with procuring entities in the other Parties' territories. More importantly, it leaves open the possibility that suppliers will be treated differently from one jurisdiction to the other, and potentially within the same jurisdiction..."[139]

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[138] GATT. "The Texts of the Tokyo Round Agreements". Geneva: August 1986, p. 41.

[139] Canadian Government. "Canadian Submission on Bid Protest Mechanism", GATT Government Procurement Agreement Informal Working Group on Negotiations, Meeting of 13-15 June 1989.

As has been mentioned, the re-negotiation of the Agreement that paralleled the Uruguay Round was motivated by its Parties' recognition that more of the trade conducted in this context should be brought under GATT disciplines. In what was to prove a key agenda-setting move for the surveillance, monitoring and control discussions, the European Community submitted a "non-paper" on 15 June 1989 that argued that a satisfactory broadening of the Agreement had to be achieved in such a way that it would be accompanied by a high degree of "credibility". To this end, it proposed guidelines for a non-discriminatory and independent national system of review, designed to ensure "mutual confidence between parties and potential suppliers and purchasers". The proposed review system was based on public purchasing review procedures contained in the EC's 1992 Remedies Directive; its fundamental objectives were to ensure that the Agreement's principles of non-discrimination were respected in an efficient and timely manner; that administrative errors in implementing these principles could be corrected when identified; and, that if such mistakes could not be amended, commercially satisfactory remedies would be available to the injured party. The following rules formed the basis of the EC proposal:

> "Review procedures should be made available, under non-discriminatory procedural conditions, to any person having or having had an interest in obtaining a particular award procedure in the field of public supplies and who has been or risks being harmed by an alleged infringement;
>
> Such review procedures would concern any aspect of the procurement procedure, including the decision to award the contract;
>
> Before starting an official review procedure, a supplier would be encouraged to seek a solution to his complaint with the awarding entity;
>
> Impartial and independent review bodies with no interest in the outcome of the procurement would have responsibility for receiving complaints and for taking decisions.

The review bodies, after receiving a complaint, would investigate the case and determine the appropriate remedy, which could include:

a. temporary suspension of the proposed award procedure;

b. setting aside illegal decisions including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedures;

c. repeating the procedure for the award of the tender concerned;

d. awarding damages." [140]

The key objective of the Community's proposed review system was improved efficiency in the resolution of supplier complaints. The EC defined efficiency in this context in terms of the extent to which suppliers have an opportunity to resolve their complaints informally with the relevant purchasing entity, that is, *before* formal international dispute settlement mechanisms are set in operation. Such an approach could be described as consistent with the aims of the negotiators of the original Code who'd endeavoured to institutionalise procedures for the resolution of government purchasing-related disputes during the procurement process. It is also reflected in the structure of the Tokyo Round Code, and all succeeding versions of the Agreement. Supplier-initiated information and review provisions are contained in Article VI of the 1981 and the 1988 Agreements, and Articles XVIII - XX of the 1994 Agreement. Formal state-to-state dispute settlement procedures, on the other hand, are defined in Article VII of the Code and 1988 Agreements, and Article

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[140] European Community. "Non-Paper of the European Community", submitted to the Government Procurement IWG Negotiating Group, 15 June 1989.

XXII of the 1994 Agreement, combined with the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes.[141]

**Damages**

Although the new bid challenge mechanism did not represent a departure from the established, "phased approach" to the resolution of government procurement disputes, it did introduce an important additional consideration to this process: damages, or measures to compensate individuals harmed by the illegal behaviour of institutions of the state. GPA Members, however, could limit their liability to the amount of loss a potential supplier had incurred in "tender preparation or protest". Article XX, paragraph 7 of the Agreement states:

"Challenge procedures shall provide for...

> (c) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest."[142]

**Miscellaneous Issues**

Other issues addressed in at least a preliminary fashion during the negotiations concerning improvement, according to Blank and Marceau, included: offsets, privatisation and "self

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[141] This basic "phased" approach to the resolution of differences of opinion with respect to the interpretation and application of the rules of the Government Procurement Agreement parallels that in the GATT, at least as the latter relates to "customs matters". Article X, paragraph 3(b) of the Agreement defines a series of review procedures relating to customs matters that Contracting Parties are obliged to maintain, while formal dispute settlement procedures are outlined in Articles XXII and XXIII (and, post-WTO Charter, in the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes). See "The Text of the General Agreement", op. cit., pp. 16-17 and 39-40.

[142] op. cit., "The Agreement on Government Procurement", p. 26.

denial", or non-interference in the procurement decisions of entities not subject to the Agreement whose activities are, nonetheless, commercial in character and subject to government control regulation and/or influence.[143]

### d) Further Re-negotiations

Article XXIV, paragraph 7(b) of the Agreement that was signed in Marrakech on 14 April 1994, included yet another provision for further re-negotiation:

"Not later than the end of the third year from the entry into force of this Agreement and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to improving the Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, having regard to the provisions of Article V relating to developing countries."[144]

In addition, the sub-paragraph that followed committed the Parties to avoid:

"...introducing or prolonging discriminatory measures and practices which distort open procurement and shall, in the context of negotiations under sub-paragraph (b), seek to eliminate those which remain on the entry into force of the Agreement."

The 1994 Agreement entered into force on 1 January 1996. Its signatories included: the EU, the US, Japan, Canada, Austria, Finland, Sweden, Norway, Switzerland, Israel and Korea.

Whereas the Tokyo Round Agreement covered procurement estimated to be worth approximately US$ 33 billion p.a., estimates for the volume of trade covered by the new

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[143] op. cit., Blank and Marceau, p. 62 and p. 73.

[144] op. cit., GATT, "Agreement on Government Procurement", p. 30.

agreement are in the neighbourhood of some US$ 350 billion p.a.[145] The total size of public procurement markets internationally is estimated to be well over US$ 1,000 billion p.a.

[145] The figure for the Tokyo Round Code is taken from A. Otten's "Improving the Playing Field for Exports...", op. cit., p. 69. Estimates for the volume of trade covered by the 1994 Agreement and the size of procurement markets in general come from de Graaf and King's "Towards a More Global Government Procurement Market...", op. cit., pp. 435 - 436.

## 1.2 - The Context of the GPA

The proceeding chapter outlined the dramatic changes that have taken place during the past fifty years in the multilateral regulation of public procurement markets. Inter-governmental processes that culminated in the 1994 WTO public procurement agreement were portrayed as a quest to determine: 1) How discrimination in these markets was going to be defined; 2) What the multilateral rules governing these markets were going to be and who was going to make them; 3) Which public entities they were going to cover, and; 4) How they were going to be enforced. This chapter takes a closer look at the interface between the new rules, and existing national and regional regulatory regimes and rule-making processes. It does so in an effort to trace the development of the political will that ultimately led to the polylateral Agreements. Its objective, more specifically, is to identify significant events that contributed to the dramatic institutional change that is reflected in the 1994 Agreement. Part III of the thesis will return to these issues, after having taken a closer look at how the GPA works and, in particular, the kind of domestic intervention that it entails; the final section analyses the question of what GPA Member States' willingness to accept the Agreement necessarily implies as regards their thinking about national interests.

### Setting the Stage

One political commentator, Gilbert Winham, has described the process of the negotiation of the Tokyo Round codes in general, including the Government Procurement Code, in terms of an analogy with "the lawmaking process of a modern parliament".[146] International diplomacy, he said, is becoming a "means for conducting policy at a broader level than

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[146] op. cit., Winham, p. 306.

the nation state". As he observed and in keeping with what earlier sections of the thesis have suggested, however, the "legislative processes" that the Tokyo Round entailed were complicated by the fact that each participant possessed national and, sometimes, sub-national rule-making institutions of its own. Furthermore, in most of the policy areas then under discussion, including government procurement, fundamental inconsistences between the existing national regimes of all of the sovereign entities participating in the negotiations needed to be reconciled before new, extranational "laws" could be agreed.

The central problem with which delegates to both the ITO negotiations and the subsequent OECD government procurement discussions had to contend, as has been described, involved the "concept of discrimination"; it arose from inconsistencies in the way in which national governments discriminated against foreign entities in their public purchasing-related activities. Delegates to the OECD discussions were ultimately faced with a decision regarding whether a potential set of multilateral rules should seek to constrain either legislatively-administered discrimination, or "exclusionary practices", emanating from the exercise of administrative discretion.[147] Resolution of this problem was complicated by the fact that it emanated from constitutional differences. These differences, in turn,

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[147] The term "exclusionary practices" is employed by Anthony and Hagerty in their discussion of the negotiation of the Tokyo Round Code. See their "Cautious Optimism as a Guide to Foreign Government Procurement", op. cit., p. 1304.

Herein it is also important to underscore the fact that, at the time of the ITO negotiations, the regulatory "problem" in question was more loosely diagnosed as one emanating from "constitutional differences". As was outlined in the preceding chapter, an important achievement of the OECD discussions was improved understanding of Member Countries' public procurement regulations, procedures and practices and how they interacted. This understanding enabled more precise definition of the problem with which delegates were contending.

implied that, in some national jurisdictions, any multilateral solution was necessarily going to involve changes to existing national legislation.

This situation posed a "chicken and egg" dilemma for the countries participating in the OECD rule-making exercise, pitting the US - with its politically-deviant form of presidentialism - against what have subsequently come to be known as its fellow "Quad countries", Japan, the states of the EU, and Canada.[148] Multilateral cooperation was contingent upon institutional change at the national level, or alterations to existing legislation and/or administrative practices. Such change, however, inevitably entailed "costs"; generally, though not exclusively, of a short-term political nature. Difficulties arose from discrepancies in the way in which these costs were allocated relative to the timing of potential benefits in different national jurisdictions. Delegates to the OECD discussions were, it might be said, involved in a balancing exercise, assessing the benefits of cooperation against its costs, given the constraints of their particular national jurisdiction. As has been mentioned before, however, this process "was not proceeding in isolation". During the early 1970s a "sea change" in the overall tenor of the political economic environment in which the discussions were taking place was underway. The remainder of this chapter looks at major national "constitutional constraints" with which delegates were having to contend, and then seeks to outline key features of the changing political economic environment in which the political "balancing exercises" were taking place.

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[148] Basic differences between the way in which political authority is organised in the US and the kind of majoritarian government that is prevalent in Europe and throughout the countries of the former British Commonwealth - as well as the kind of problems that they create for the development of multilateral domestic disciplines - will be examined in Part II. See below, especially pp. 198 - 215.

**Constitutional Discrepancies**

John Jackson has developed a model for the way in which treaty-making powers are allocated amongst national government institutions, and the procedures nation states follow when entering into a treaty.[149] This model, described by Jackson as a "landscape of treaty application", identifies the following features of national "legal and constitutional settings" that are relevant to the negotiation of a treaty:

" 1) the power to negotiate;
2) the power to "sign" (usually ad referendum, only to certify the text);
3) the power to "accept" the treaty as a binding international law obligation;
4) the "validity" of the treaty under national constitutional law (closely related to (3));
5) the power to implement the treaty obligations;
6) direct applicability of the treaty in domestic law;
7) invocability in municipal law (contrasted with direct applicability);
8) a hierarchy of norms in domestic law when treaty norms conflict with norms of that law; and
9) the power to administer the treaty, which includes a series of issues such as the procedure for formal "ratification"; the power to interpret the treaty for domestic application and as a matter of international law; the power to represent the country in institutional procedures relating to the treaty (e.g., bilateral or multilateral meetings); and the power to terminate the treaty..."[150]

Later sections of this thesis will examine some of the implications arising from Jackson's model in detail. It is presented in entirety here because it provides a good introduction to the scale of the challenge faced by negotiators trying to reconcile different national regulatory regimes: On the one hand, the model is indicative of the number of different policy permutations from which any set of negotiations may be proceeding. Each of its

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[149] Jackson, J.H. "Status of Treaties in Domestic Legal Systems: A Policy Analysis". *The American Journal of International Law*, Vol. 86, 1992, pp. 315-319.

[150] ibid., p. 316.

various elements potentially reflects an area in which national policies may be proceeding from differing assumptions with respect to the proper allocation of political power. On the other, it also highlights the institutional constraints under which individual negotiators must labour. The cooperative policy solution ultimately embodied in any treaty reflects a reconciliation of all of the potentially competing assumptions concerning the proper allocation of political authority.

In the OECD debate over discrimination in public procurement markets, the previously described "chicken and egg" dilemma emanated in large part from differing approaches to allocation of the power to negotiate and implement treaty obligations. In the US, because of the Constitutionally-mandated separation of powers, a division of labour exists between the different branches of government that is not present in most other liberal democracies, certainly, in any case, ones based on parliamentary majoritarianism. The American Constitution, in the words of Louis Henkin, "gives (domestic) legislative power to Congress, executive power to the President (and) judicial power to the courts". Foreign relations powers similarly:

"reflect commitment to Separation... but what each branch can do alone, when the other is silent or even in the face of its opposition, is not determined by any natural division... Foreign relations powers appear not so much 'separated' as fissured, along jagged lines indifferent to classical categories of governmental power..."[151]

The practical implications of this particular approach to the allocation of political authority stem from the fact that it generally dictates that the regulatory decisions of Congress have to be committed to statute in order for the executive to implement them.

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[151] Henkin. L. *Foreign Affairs and the Constitution.* New York: W.W. Norton & Company, Inc., 1972, pp. 31-32.

In 1933, during the Depression, the US Congress passed the Buy American Act, governing the "purchase of articles and supplies by, and the construction of public buildings or works for the federal government".[152] Designed primarily to relieve domestic unemployment, assuage protests by manufacturers of heavy electrical equipment against competition from German manufacturers and retaliate against trading partners' discriminatory practices, the Act effectively mandated discrimination against foreign participants in public procurement markets by prohibiting:

> "federal agencies from procuring raw materials or manufactured articles from foreign sources for use within the United States, unless the head of the procuring agency determines that domestic procurement is inconsistent with the public interest or that the domestic cost is unreasonable, or unless domestic materials or products are not available in sufficient quantities or not or satisfactory quality."[153]

Throughout the OECD discussions, and despite the earlier efforts of the ITO negotiators and the general inconsistency of this legislation with the American commitment to a liberal international economic order, these laws remained on the books.

Although the executive branch of the US Government is generally responsible for the negotiation of treaties and other international agreements, the Congress is charged with their implementation if they entail domestic legislation, or require appropriation of funds.[154]

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[152] Knapp, L.A. "The Buy American Act: A Review and Assessment". *Columbia Law Review*, Vol. 61, 1961, p. 431.

[153] See P.H. Gantt and W.H. Speck's "Domestic v. Foreign Trade Problems in Federal Government Contracting: Buy American Act and Executive Order", in *Journal of Public Law*, Vol. 7, 1958, p. 379 for a discussion of legislators' motivations for the Act and Knapp, op. cit., p. 431 for the quoted review of the terms of the Act.

[154] op. cit., Henkin, p. 161. Herein, it should be mentioned that the two houses of the Congress have differing responsibilities with respect to the treaty and executive agreement processes. For the purposes at hand, it is sufficient to note that the political controversy in question was related to the role that the legislative branch of the US Government would

Leaving aside questions concerning the mechanics of the actual application of the norms ultimately embodied in the GATT Government Procurement Agreement, this particular manifestation of Jackson's "landscape of treaty application" ultimately meant that the US executive would have to negotiate the abolition of the Buy America Act and other discriminatory legislation with the Congress *before* taking on new duties under any prospective multilateral procurement regime. This, in itself, did not present an insurmountable barrier to agreement. It did, however, pose particularly challenging problems when viewed from the perspective of the "constitutional landscapes" and associated political "cost structures" from which other participants in the discussions were proceeding.

In parliamentary democracies, like Japan, Canada and most of the national governments that make up the EU, there is no formal, or constitutionally-sanctioned rivalry between the executive and legislative arms of government; indeed, the prime minister is generally selected on the basis of his leadership of the party or coalition claiming a parliamentary majority. In terms of both national and international relations, this implies a much more relaxed approach to executive and administrative implementation of the "legislative will". Typically, there is no reason to commit regulatory policies to statute and/or identify explicit formal procedures for their implementation. Intra-party differences of opinion, if they are too severe, bring down governments. Checking discrimination in public procurement markets in "constitutional contexts" of this nature is largely a matter of introducing procedures to ensure what Winham and others have termed "greater transparency" in the

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ultimately have to play in any potential multilateral agreement.

public tendering process.[155] Procedures which, as was described in the introductory chapter, constitute "positive policy obligations", designed to compel equal treatment for foreign suppliers".

"When nations meet to create a single international practice out of diverse national practices," as Winham put it, "it is to be expected that they will seek wherever they can to extend their national procedures into the international arena."[156] In the OECD discussions concerning the "concept of discrimination", the impasse that developed between the US and everyone else arose from the fact that the policy prescriptions that each of the competing camps was offering would not, in isolation, have resolved the multilateral problem. The US call for procedural mechanisms to counter informal discrimination would have done little to counter the discrimination implicit in its Buy American laws. Similarly, the other Quad countries' bid for commitment to the withdrawal of discriminatory legislation would not have checked the kind of discrimination manifested in non-US public procurement markets.

Another way of looking at this impasse, as has been suggested, might be in terms of the relative distribution, timing and certainty of national "costs and benefits" associated with multilateral cooperation. For the US, participation in a multilateral public procurement regime necessarily entailed high, "upfront" political costs; cooperation was conditioned on the withdrawal of discriminatory legislation. The executive could not "sell" an institutional change of this nature to Congress without compensating, immediate prospects

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155 op. cit., Winham, p. 192.

156 ibid., p. 192.

for cooperative gains. For the other Quad countries, on other hand, both the costs and benefits were more disperse. The realisation of gains required the introduction of legislative changes whose costs would be spread out over an indefinite future. This was problematic in that each participant had little security that the cooperative gains that were supposed to follow would actually be realised, i.e. that the other parties to the agreement would not, in the words of the game theorists, find a way to "defect from the game".

The reminder of this chapter looks at environmental issues that affected the perceived "political cost structures" with which the competing "constitutional camps" were contending, and, arguably, re-defined the parameters of the institutional problem.

**A Changing Political Economic Environment**

Nearly 50 years passed between the ITO negotiations, the signature of the Tokyo Round Government Procurement Code and its 1988 and 1994 revisions. During this time, the international political economic environment was not static. This section of the chapter outlines a series of developments in this context that may have contributed to the evolution of the political consensus that ultimately found reflection in the multilateral public procurement regime. It is organised around three different, albeit intimately inter-related areas in which changes were taking place: 1) The international institutional environment; 2) the international economy; 3) political environments, including national "constitutional landscapes".

**The Institutional Environment**

Most of the secondary literature on the evolution of the Tokyo Round Agreement on Government Procurement cites "lessons" from regional integration and the OECD discussions as particularly critical factors in the evolution of the Agreement. The learning processes described, whatever their institutional setting, fall into two distinct, although, at times, over-lapping phases:

A "definitional" stage - encompassing discussion and exchange relating to the nature of public procurement and discrimination in such markets, manifestations of the latter in different jurisdictions, and its political and economic costs and benefits.

An ongoing "remedial" stage - during which different policy options for rectifying such discrimination were identified, implemented and subsequently improved. This latter phase has been described by the OECD as a quest leading to the "framing of new rules or disciplines, or the reaffirmation of existing ones, making them more precise or... detailed".[157]

Activities in the context of OECD cooperation made particularly important contributions to the "institutional learning" that took place during the first phase. The previously-cited OECD study of its member states' procurement policies (the 1966 "Pink Book") was the first important formal exercise in this process. Although it had been motivated by Belgian and UK appeals against the US' Buy American Act, the significance of this study was associated with its findings that, in the words of Morton Pomerantz, "the US was not alone

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[157] OECD Document TD (91) 100. "The Trade Committee of the OECD: Thirty Years and a Hundred Meetings". Paris: November 1991, p. 43.

in favoring domestic suppliers in the procurement process".[158] As Blank and Marceau put it, "Practically all (of the) countries examined had in place some kind of 'preferred treatment' or 'preference'..."[159] A US Government report quoted by Pomerantz concluded:

"The major difference between the US and other countries was that the US stated clearly visible percentage preferences for domestic suppliers, whereas most other countries used highly invisible, administrative procurement practices and procedures to achieve the 'buy national' result".[160]

The "constitutional" reasons for these differences have been addressed. From an "institutional learning point of view", their significance lies in the fact that they were *formally* recognised. This was a key step in terms of the definition of the multilateral policy problem, requiring discussions in this forum covering nearly twenty years' worth of meetings.[161] According to Blank and Marceau, it ultimately "explains why the (institutional) solution elaborated later on addressed both the transparency of purchasing procedures (in setting minimum standards requirements) and formal price preferences".[162]

As regards the "second stage" of institutional edification, the introductory chapter of this thesis referred to Ken Dam's observation that the "general lesson" offered by the process of European integration for the liberalisation of trade in public procurement markets was

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[158] op. cit., Pomerantz, p. 1272.

[159] op. cit., Blank and Marceau, p. 15.

[160] Staff of the US Bureau of the Budget report on "Foreign Procurement of the US Government" (1964) quoted by M. Pomerantz in "Toward a New International Order in Government Procurement". *Law and Policy in International Business*, Vol. 11, 1979, p. 1272.

[161] Earlier sections of this paper have referred to the constitutional, or definitional problems faced by the ITO negotiators. If one considers these experiences as well, this definitional problem took significantly more than 20 years to resolve!

[162] op. cit., Blank and Marceau, p. 15.

that the elimination of discrimination in these markets was dependent on the introduction of policy measures that were both "negative" and "positive" in nature.[163] As Pomerantz has further suggested, however, this lesson is difficult to appreciate without an understanding of the complicated interplay between economic institutions of the Community, the EFTA and the OEEC/OECD.[164] It entails a "story" that, according to a previously-cited OECD Secretariat Report on the history of its Trade Committee, proceeds from the "lifting of quantitative restrictions between the European OEEC Member countries... (and) the 1958 return to currency convertibility".[165] At one level, this story relates to the question of what the trade role, or institutional competence of the OECD was going to be relative to that of the GATT. At another, and, more fundamentally, it concerns competing approaches to liberalisation.

The OEEC was established in 1948 to administer the Marshall Plan for European postwar recovery. Between then and 1957, when the European Economic Community was created by the signing of the Treaty of Rome, it was *the* forum for European economic cooperation. According to Willem Molle's, the OEEC "aimed for trade liberalisation by the elimination of all manner of obstacles", providing for a "light form of positive integration".[166] This integration involved only minimal "coordination of national policies", eg. with respect to energy and manufacturing. The EEC, on the other hand, sought to facilitate what Molle has described as, "drastic forms of integration", including, but not limited to a complete

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[163] op. cit., Dam, p. 209.

[164] op. cit., Pomerantz, pp. 1273 - 1276.

[165] op. cit., OECD Secretariat' s "The Trade Committee of the OECD", p. 8.

[166] op. cit., Molle, p. 51.

customs union, free movement of persons and capital and integrated policies in a number of important policy areas.[167] Its construction, as described by the OECD Secretariat, was based on the "pragmatic" concept of "mutual recognition", although the need for a certain degree of harmonisation with respect to national policies and practices affecting trade was recognised as inescapable.[168]

After the EEC came into being, negotiations between it and the remaining European OEEC Member countries were undertaken with the idea of establishing a vast European Free Trade Area. They quickly broke down, foundering on what the OECD terms, "conceptual and political" differences of opinion relating to "two different philosophies or concepts of free trade and how to achieve it".[169] The first of these concepts views free trade as ultimately demanding "a broad degree of harmonisation of the policies and practices affecting trade", whereas the second sets "few prerequisites for free trade" and doesn't involve "even partial relinquishment of internal or external economic independence". The debate between the two approaches is the same as the dilemma surrounding:

"the relationship between regional integration and multilateral liberalisation, i.e. about the question of whether there is a limit to the latter of which the former is an extension or, on the contrary, whether regional integration is an inevitable transition or one which facilitates multilateral progress".[170]

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[167] ibid., p. 52.

[168] op. cit., OECD Secretariat's "The Trade Committee of the OECD", p. 9.

[169] ibid., p. 9.

[170] ibid., p. 9.

Following the breakdown of the European Free Trade Area discussions, the European Free Trade Association was established in 1959 amongst non-EEC European countries to offset the economic division of Europe that seemed inevitable in the wake of the new Community. Its membership, according to Molle, consisted of those "countries that could not, for different reasons, accept the organisation of the Communities".[171] Shortly thereafter, in October of 1961, the OECD became the successor to the OEEC; its mandate in the trade area was the product of lengthy debate, both with respect to European-wide co-operation, and in terms of its relationship with that of the GATT. In the end, both the institution's agenda and membership were expanded. As the previously-cited OECD report put it, the

> "parenthesis represented by the OEEC was ending and the GATT was reclaiming its full role... On the other hand, the majority of European countries remembered with some nostalgia the atmosphere that had prevailed at the OEEC and the particularly effective form of co-operation that they had known there... GATT disciplines and cooperation seemed to them less sound than those they had known in the OEEC".[172]

Molle's text describes how, during the course of the 1960s, "the advantages of such integration as was being realised in the EC became rapidly evident to other European countries". In 1972, he says, "the UK, Denmark and Ireland left the EFTA to join the EC... (and, in) 1981, Greece was admitted, followed, on 1st January 1986, by Spain and Portugal".[173] This apparent change of "philosophical opinion" with respect to the technology of free trade is illustrated in the government procurement area by the 1967

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[171] op. cit., Molle, p. 52.

[172] op. cit., OECD Secretariat's "The Trade Committee of the OECD", p. 10. The fact that this report speaks of the Kennedy Round as a further "answer to the creation of the Common Market and its expansion" also bears mention. See p. 14.

[173] op. cit., Molle, p. 52.

EFTA review of national laws, regulations and practices relating to the award of public contracts. According to Pomerantz, it constituted a formal acknowledgement that "a normative rule would not be sufficient by itself to halt discriminatory practices".[174] Further European economic integration, in other words, was going to necessitate a measure of policy harmonisation, or positive coordination.

What then were the specific "lessons" offered by EC co-operation in the public procurement area? The Community's basic strategy for removing competitive distortions in its public procurement markets has been described by Freidl Weiss as being built on recognition of three sources of discrimination in the field of public procurement: a certain margin of inevitable administrative discretion, formal legal inequality of treatment, and discrimination due to habitual administrative practices.[175] Negative policy disciplines were introduced in a series of "liberalisation directives" designed primarily to counter formal barriers to legal equality, and positive integration measures, in the form of procedural requirements for the contracting process, were incorporated in a series of "coordination directives". To facilitate Member States' administration of these measures, the new rules only applied to positive lists of government entities (initially) and projects/supply contracts exceeding a certain minimal value.[176]

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[174] op. cit., Pomerantz, p. 1274. Similarly, Jacques Pelkmans has recently argued that this strategic "change of heart" is best illustrated by the EFTA's replacement of its so-called "Luxembourg process" with the "Oslo process", a regulatory approach that "entailed an almost wholesale adoption of EC regulatory strategy and substance". See "Towards a European Community Regulatory Strategy: lessons from 'learning-by-doing'" by J. Pelkmans and J. Sun in *Regulatory Cooperation for an Interdependent World*, edited by the OECD Secretariat. Paris: OECD Publications, 1994, p. 193.

[175] op. cit., Weiss, p 38.

[176] The coverage of Community Directives is still subject to limitations with respect to value thresholds. Nevertheless, these have been substantially decreased over time, and rules have been

It is important to distinguish here between this kind of positive policy cooperation and policy harmonisation. Because of what Weiss has described as the "great diversity of procurement systems in Member States" and "considerable differences in the organization of relevant markets and of public authorities and bodies", the strategy for the liberalisation of the Community's procurement markets did not entail the enactment of precise rules, embodied in a separate and independent Community legal regime.[177] Rather, the Commission proceeded pragmatically, elaborating lowest-common-denominator, procedural norms as a "first step towards legal integration". National rules, as long as they were consistent with the minimal legislative standards of the Community, remained the basis of applicable market disciplines.[178]

Returning to what Pomerantz described as the "complicated interplay between institutions of the Community, the EFTA and the OEEC/OECD", the ultimate implication of this European "lesson" is reflected in the OECD's "Draft Instrument on Government Purchasing Policies, Procedures and Practices": Blank and Marceau have characterised it as a

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introduced to proscribe the practice of "contract splitting". See Weiss, op. cit., p. 33 and the texts of the Public Works, Supplies, Services and Utilities Directives, i.e., respectively, Directive 71/305, OJL 185/5 of 16 August 1971, Directive 77/62, OJL 13/1 of 15 January 1977, Directive 92/50, OJL 209/1 of 24 July 1992 and Directive 90/531, OJL 297/1 of 29 October 1990.

[177] op. cit., Weiss, p. 33 and pp. 38-39.

[178] In a recent *Wall Street Journal* article entitled, "Time for a Trans-Atlantic Free Trade Agenda", Patrick Messerlin termed cooperative arrangements of this nature, "mutual recognition arrangements", or MRAs. Such institutions, he said, "consist of two parts - a set of common core rules negotiated and adopted by all signatories ("minimal harmonisation") and the commitment by each signatory to recognise the domestic provisions of the other signatories (the "mutual recognition" part). *Wall Street Journal Europe*, 17 November 1995.

"reconciliation of the US procedures and practices with the approach of the European Economic Community and the Directives which were being elaborated in the EEC".[179]

**The International Context**

It is difficult to divorce the institutional learning processes that have been described from the international economic environment in which they were taking place. It does not seem inappropriate, that is, to discuss the latter in terms of broader, on-going efforts to learn about how the international economy, in general, functions. The purpose of this thesis, however, is to study the political motivations underlying the multilateral public procurement regime. The dependent variable under analysis, might be described as a political decision; economic arguments for various policy alternatives are thus but individual factors in the equation that must ultimately be evaluated. Brian Hindley, an economist, has discussed this distinction in a procurement context in terms of a difference between politically and economically motivated multilateral agreements: Politically-motivated rules, he said, are designed to facilitate "commercially fair" public purchasing practices, whereas economically justified ones promote "more effective use of world resources".[180] For reasons that have been introduced in the introductory chapter and relate ultimately to values, the two types of agreements seek distinct objectives and implicitly involve different, though not necessarily mutually exclusive kinds of learning experiences. So as to underscore this distinction, environmental changes entering into economic assessments relating to

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[179] op. cit., Blank and Marceau, p. 1.

[180] Hindley, B.V. "The Economics of an Accord on Public Procurement Policies", *The World Economy*, Vol. 1, No. 3, June 1978, p. 286.

the WTO Agreement, as well as the implications of the lessons associated with such assessments will be addressed separately.

Ken Dam has described the economic learning processes that played a role in the evolution of the GATT public procurement agreement in terms of growing recognition of the cost of discrimination in these markets. In his 1969 text on the GATT, he identified three major factors contributing to costs of this nature, arguing that "In view of the incontestable impact of government procurement regulations and procedures on international trade, it is striking that the General Agreement does not attempt to control discrimination in procurement". These factors included: 1) the economic significance of government entities as consumers, broadly reflected in the percentage of the GNP that passes through public budgets; 2) Costs associated with foregone price competition in public procurement markets and; 3) Costs emanating from lost customs revenues.[181]

As regards the economic significance of government entities, statistics on the volume of public purchasing are not always readily available and can be difficult to compare across national jurisdictions. Nevertheless, the relative economic importance of the government sector, in general, has been widely recognised in recent years.[182] Weiss, for example, cites data compiled by the OECD that show that the size of the public sector as a percentage

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[181] op. cit., Dam, p. 199. Herein, in addition to the "percentage of the GNP of most countries that passes through public budgets", Dam also cites a 1954 US study that estimated that the Buy American Act was costing the US government up to $100,000,000 annually in higher prices and another $100,000,000 in foregone customs revenue.

[182] It will be recalled that earlier sections of this dissertation have described recent endeavours to find practical solutions to the problem of obtaining statistics on the value of public procurement contracts that took place in the context of the negotiations over the 1994 Government Procurement Agreement's coverage. See above, pp. 83 - 86.

of GNP has increased in every OECD country since WWI.[183] Similarly, John Jackson has referred to a "trend of increasing the government sector of a number of economies" throughout the 1960s, characterised by the nationalisation of a series of industries in which export trade opportunities were seen as an important area for future growth.[184] More recently, the *Economist*, in an article entitled, "The myth of the powerless state", commented on the fact that, since 1980, the average public spending ratio in the larger economies has increased, on average, from 36% to 40%.[185]

Costs relating to foregone customs revenues have become relatively insignificant as the average tariff in GATT countries has fallen from some x% in 1948 to y% today. Those generated by foregone price competition in these markets, on the other hand, have grown increasingly important. So much so, in fact, that David Held recently observed, "To remain in power in a liberal democratic regime, governments (today) must take action to secure the profitability and prosperity of the private sector... welfare, taxation and economic policies... must function in the context of powerful pressures to keep productivity costs/profit ratios competitive and to keep the economy in step with broad international trends".[186]

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[183] op. cit., Weiss, p. 6.

[184] op. cit., Jackson, p. 199.

[185] "The myth of the powerless state". *The Economist*, 7 October 1995, p 13.

[186] Held, D. *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*. Cambridge: Polity Press, 1995, p. 183.

The economic benefits that may be associated with multilateral disciplines in public procurement markets, according to Dr. Hindley's previously-mentioned paper, are relative in nature, and largely a factor of the "cost conditions that are assumed to prevail in a given industry".[187] Such conditions, he said, dictate the likely "distributional consequences" of policies designed to promote unbiased government procurement. Unlike the "costs" associated with the imposition of a tariff, the welfare loss emanating from discriminatory public procurement practices is likely to be borne by the country employing the policy. For this reason, a complete:

"ban on bias in public procurement policy... is not necessarily desirable... It is not an appropriate aim or function of international agreements to prevent a signatory country from 'damaging its (economic) interests' should it wish to do so. The aim of such agreements should be to prevent one country from damaging the interests of another."[188]

A 1988 study prepared for the European Commission on public procurement, more specifically, identified five "key characteristics" of the structure of the public sector that are important for national "patterns of public procurement":

"- the degree of de-centralistion, the number of individual purchasing entities and hence the size and accessibility of contracts

- the allocation of responsibilities for purchasing between central and local authorities, especially for roads, public works, health and public order

- the size, number and constitution of public enterprises, together with the degree of government control over their management and purchasing activities

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[187] op. cit., Hindley, p. 281.

[188] ibid., p. 281.

- the nature and extent of legal restrictions and central control over public sector purchasing procedures and policy".[189]

These "factors", the study concluded, determine the potential economic impact of opening up public procurement markets to greater competition.

The Commission's study also endeavoured to quantify economic costs associated with discriminatory purchasing practices in the EC. In the process of doing so, it identified the following as general types of benefits likely to be associated with the liberalisation of public purchasing markets:

"Static trade effects - emanating from new trade due to static price differentials between national markets, i.e. procurement from the cheapest supplier at present prices.

Competition effects - produced by the reduction in national producer's prices that follows their having to contend with foreign competition

Re-structuring effects - longer term benefits flowing from greater reliance on economies of scale, engendered by processes of industrial adjustment"[190]

**The Political Environment**

Just as it was difficult to isolate institutional learning experiences reflected in the multilateral public procurement regime from changes in the international economic environment in general, so, too, is the relationship between economic and political

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[189] Commission of the European Communities. *Research on the "Cost of non-Europe - Basic findings, Vol. 5, Part A - The "Cost of non-Europe" in public-sector procurement.* Luxembourg: Office for Official Publications of the EC, 1988, pp. 91 - 92.

[190] op. cit., p. 9. It might also be mentioned that this study qualifies its assessment of the potential benefits of liberalisation with observation that "public sector legislation alone may not achieve these benefits without... (inter alia) changes in supplier's attitudes and strategies." See p. 15.

developments relating to these rules often clouded.[191] Such difficulties are a product of the way in which political economic phenomena are connected with other phenomena in what Gunnar Myrdal termed the "social flux". As he explained,

"The causal phenomena... are so elusively intertwined, so difficult to grasp directly that a political measure which seems entirely justified as long as the indirect effects are disregarded, often turns out to be absurd from the standpoint of the same set of political valuations when *all* its... effects are taken into account."[192]

With due respect for the above and in keeping with arguments that have been presented earlier concerning the importance of understanding the variety of interdependent variables that can enter into a public policy equation of this nature, this section will summarise major political issues and developments, other than those associated with the previously-described international institutional environment, that may have played a role in the evolution of the GATT Government Procurement Agreement.

So as to illustrate the general economic importance of government entities, the proceeding section referred to statistics concerning the size of the public sector as a percentage of national GNP across various national jurisdictions. Aggregate statistics of this nature fail to capture the full political economic impact of the public sector in public procurement

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[191] This is not a problem unique to this particular policy context: Classical scholars viewed economics as a subdivision of political science in that both disciplines fundamentally involved the study of social activity. Since the time of Bentham, however, this relationship has frequently been inverted. In criticising this development, Gunnar Myrdal said, "From the point of view of its ideological origins, political economy is a grandiose attempt to state in scientific terms what ought to be... It is the tragedy of economic inquiry that the further we have advanced in out attempts to observe and explain social phenomena, the further away we have moved from our aim of *defining the conditions* (emphasis added) for the maximisation of social utility". See *The Political Element in the Development of Economic Theory*, London: Transaction Publishers, pp. 56 - 57.

[192] ibid, p. 2.

markets, at least as it has been recognised during recent years. The reasons why provide a good example of how the relationship between the disciplines of political science and economics can become clouded: In certain industries, governments are the most important clients, controlling budgetary means that can effectively seal off such markets from any meaningful competition. If a particular industry is, in turn, characterised by significant economies of scale and high research and development costs, the market power wielded by the government sector is likely to be compounded. This power may be further enhanced if the national market in question is substantial in size, enabling the achievement of local economies of scale. As Gerard de Graaf and Matthew King, two members of the EU delegation to the Uruguay Round negotiations, explained in a recent article on the negotiation of the 1994 WTO Government Procurement Agreement, "For dynamic industry, a wider market offers the possibility to benefit from economies of scale and provides a solid base to bear high r&d costs".[193]

An example of this phenomenon was suggested by an October 1995 *Wall Street Journal* article which cited a classified US report that predicted that more than $1 trillion in overseas capital projects will come up for bidding in the next decade.[194] Shortly thereafter, David de Pury, then co-chairman of ABB Asea Brown Boveri, a Swiss/Swedish producer of heavy capital goods, observed in a speech at the Graduate Institute of International Studies in Geneva that virtually all of the growth that his firm is likely to achieve in the medium to longer term is going to come from developing country infrastructure projects; unimpeded

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[193] op. cit., de Graaf, G. and M. King, p. 437.

[194] Greenberger, R.S. "U.S. Firms Lost Business Due to Bribes, Report Says," *The Wall Street Journal Europe*, 12 October 1995.

access to developing country procurement markets is therefore one of his firm's most critical strategic concerns.[195]

According to John Jackson, recognition of the strategic value associated with access to certain key public procurement markets was a critically important factor in the institutional advent of the Tokyo Round Code. In his previously-cited text, *The World Trading System*, he referred to the fact that "US manufacturers of heavy electrical equipment (such as turbines) saw great exporting potential if foreign restrictions on government purchases of imports could be softened" as one of the major reasons why the government procurement exception to the GATT rules of MFN and national treatment had become "very troublesome by the 1970s".[196] Taking this argument a bit further, Pomerantz has contended that,

"Since enactment of the Buy American Act, a very considerable part of the debate has continued to center on the manufacturers of heavy electrical equipment... The industry was involved in the initial (Tokyo Round) code negotiation on the basis that the opening of foreign procurement markets will ensure that competitors will not be able to use profits derived from protected home markets to subsidize marginal sales in the United States or third country markets."[197]

Gilbert Winham has described this situation in terms of the broader role played by "export interests", particularly in the US and Canada, in the Tokyo Round, whilst I.M. Destler, an American political scientist, has discussed it in the context of what he terms the "export

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[195] Speech delivered by David de Pury, Co-Chairman of the Board, ABB Asea Brown Boveri, Ltd. at the Graduate Institute of International Studies. Geneva: 25 October 1995.

[196] op. cit., Jackson, p. 200.

[197] op. cit., Pomerantz, p. 1270. Later sections of the thesis will return to the implications of some of the issues raised by Pomerantz for the most recently-concluded round of government procurement negotiations. See Part III below, especially pp. 258 - 266.

politics tradition" in international trade politics.[198] Destler's 1986 text, *American Trade Politics: System Under Stress*, defined this "tradition" as a way of resolving the political problems inevitably associated with trade liberalisation. "Export politics", he said, involves "bargaining over access to foreign markets as a way of countering pressures for import restrictions at home"; it seeks to focus political attention on the benefits of trade expansion.[199] From this perspective, the trade policy process is essentially a

"running battle between 'special interests' favoring protection and 'the general interest' in open trade. The 'losers' in international competition have their jobs hanging on the decision, while others have more diffuse interests..."[200]

The significance of this "battle" as regards the emergence of the Tokyo Round Government Procurement Code is associated with the fact that during "the last decade and a half, special interests that suffer from trade restrictions have mounted more vigorous and increasingly overt political efforts to oppose campaigns for new import restrictions".[201] As Robert Strauss, Head of the US Delegation to the Tokyo Round, observed,

"...the (Tokyo Round) agreements are an historic achievement. The achievement is more remarkable for having been accomplished over six years which saw the world economy deeply shaken by two recessions, energy crises, unemployment, inflation and balance of payments deficits. All of the economic indicators and political skeptics pointed in a

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[198] op. cit., Winham, p. 189, and I.M. Destler's *American Trade Politics: System Under Stress*. Washington: Institute for International Economics, 1986, p. 15.

[199] ibid., p. 45.

[200] Destler, I.M. *Anti-protection: Changing Forces in United States Trade Politics*. Washington: Institute for International Economics, 1987, p. 1.

[201] ibid., p. 1. It bears mention that an important purpose of this book is to explore the reasons *why* "anti-protection interests" may have become more active politically. To this end, Destler and Odell identify "three major forces" that seem to have been particularly important elements in this development: 1) the "increased ambitiousness of protectionist proposals"; 2) structural changes in the US economy that have left it more dependent on foreign trade and; 3) the enhanced "private organisational capacity" for political action. See pp. 26 - 30.

direction opposite from fairer, freer trade - toward a rush back to narrow and selfish trade restrictions and protectionism that were so destructive in the 1930s."[202]

"Export interests" could never have exercised the degree of influence that they did in the Tokyo Round negotiations were it not for certain changes in national and supranational "constitutional landscapes" that proceeded the Round. The re-specification of treaty-making powers that took place in the US and the EC during the early 1970s were particularly important political developments in this sense. The 1974 US Trade Act "democratised" the US negotiations process by giving the Congress what Harald Malmgren has termed a "new activist role", whilst structural changes in the EC consolidated the Commission's negotiating authority, making the EC into what Winham called a "commercial superpower".[203]

Earlier sections have described the obstacles that "peculiarities of the American constitutional structure" presented to Kennedy Round negotiators. Indeed, following the Kennedy Round, the European Community stated that it was not prepared to commit its members to another round of trade negotiations until the US had clarified its negotiating authority to implement the results of any future negotiation.[204] The 1974 US Trade Act addressed this problem. John Jackson has described it as an attempt to provide a better

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[202] Strauss, R.S. "Forward to the *Law & Policy* Symposium on the Tokyo Round". *Law and Policy in International Business*, Vol. 11, 1979, p. 1259. John Jackson, in an article entitled, "The Birth of the GATT-MTN System: A Constitutional Appraisal", has also made similar comments concerning the accomplishments of the Tokyo Round: "The MTN results are particularly impressive in light of the enormous difficulties through which the international economic system has been passing in the past decade..." See *Law & Policy in International Business*, Vol. 12, 1980, p. 23.

[203] See op. cit., Marks and Malmgren, p. 338 and op. cit., Winham, p. 84.

[204] op.cit., Marks and Malmgren, p. 333.

balance between the US legislature's Constitutionally-mandated responsibilities for the regulation of foreign commerce, and the practical realities associated with the way in which the Executive branch had to negotiate those regulations with foreign countries; it sought to ensure the consistency of international trade agreements with domestic law, whilst providing the Executive with a more functionally appropriate level of authority over the negotiations process. The Act itself consisted of a series of consultation procedures for the negotiations process, and what Jackson identified as "3 fundamental (legislative) rules":

"1) A bill, when introduced, would not be amendable;

2) Committees to which the bill was referred would be required to report out the bill within a short period of time; and

3) Debate over the bill in both houses would be limited."[205]

Matthew Marks and Harold Malmgren have attributed the political significance of the Act to the fact that it substantially modified the role played by the legislative branch in international trade negotiations.[206] Better known as the "fast track procedure", it created what these authors have termed a "new activist role" for the Congress in the GATT negotiations process. Under its provisions, members of both the House and the Senate were, in future, to serve as active advisors in the US delegation to the negotiations, and operating Executive trade policy decisions were to be subject to Congressional scrutiny and review. In addition, a number of negotiating objectives were set out for the reform of the GATT system and provisions were made for Executive denial of the benefits of new trade agreements to industrialised nations who were unwilling to provide their fair

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[205] op. cit., Jackson's *The World Trading System*, p. 73.

[206] op. cit., Marks and Malmgren, pp. 337-343.

share of concessions in GATT negotiations. Subsequent to its January 1975 signature by President Ford, the US' GATT negotiating partners were assured "expedited congressional approval not only of the agreements which are negotiated but also of the necessary implementing legislation".

In the EC, the re-specification of treaty-making powers was primarily reflected in the consolidation and expansion of the Commission's negotiating authority. The Kennedy Round, as Gilbert Winham put it, "marked the first time that the Europe of the Six had negotiated externally with other nations. This was not easily achieved... indeed, internal disagreement in the Six had stalled the Round for two years" [207] During the Paris summit of the heads of the EEC Governments in October 1972, however, the Community's intention to achieve economic and monetary union was reaffirmed. The following January, EEC membership was formally expanded to include Denmark, Ireland and the UK. In April - May 1973, the Commission submitted a document to the Council of Ministers that came to be known as the EC's Overall Approach to the Tokyo Round negotiations. Henceforth, the combined economies of the enlarged EEC were on a relative par in terms of political power with the US; the structure of GATT negotiations shifted from a unipolar configuration to a bipolar one.

Certain "institutional learning experiences" at the *multilateral* level have also been recognised as factors that could have influenced the political climate in which the Tokyo Round Government Procurement Code was agreed. Herein, as was briefly mentioned in the Introduction, Contracting Parties' experiences with the 1967 AD Code are of

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[207] op. cit., Winham, pp. 69 - 70.

particular relevance. From about 1958 on, what Bob Hudec has described as a "legal malaise" had been plaguing the GATT; Contracting Parties, and the US, in particular, generally felt that the Agreement as a whole had ceased to provide an "overall balance of legal reciprocity", a critical precondition for genuine political commitment to the reduction of such barriers.[208] The AD Code, the first "self-balancing", or conditionally reciprocical, multilateral agreement, tied the benefits of order more directly to its political costs. Contracting Parties could not enjoy its market-opening benefits without participating in the Agreement and offering comparable market access opportunities themselves. John Jackson used the term "interpretation" in describing it, highlighting its relationship to existing GATT rules governing contingent protection, or non-tariff-based, administrative barriers to trade.[209] Robert Stern and Bernard Hoekman subsequently discussed this relationship - and that of the GATT and the Tokyo Round Codes in general - in terms of the following:

"The Tokyo Round codes form an extension of GATT in that they explicitly extend trade discipline to, or define more precisely existing discipline and rules for, specific NTBs. GATT had already governed most of the subjects that the codes addressed... The basic

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[208] op. cit., Hudec, p 293. On this particular page of his book, Professor Hudec states that legal reciprocity is a precondition for *effective enforcement*. Earlier sections of Hudec's book, however, are devoted to a discussion of the relationship between political commitment and enforcement. His general premise would appear to be that effective enforcement requires political commitment which is unlikely to exist without rough legal reciprocity. See, for example, pp. 11-15.

[209] ibid., p. 33. It should be mentioned that the AD Code was not initially viewed in politically positive terms, particularly by the Americans. In his forequoted article, "The Birth of the GATT-MTN System...", Jackson refers to the fact that the US Congress had attempted to block implementation of the 1967 Code when the results of the Kennedy Round were presented for its approval. A good summary of the reasons why is provided by Matthew Marks and Harold Malmgren in "Negotiating Nontariff Distortions to Trade". Experiences with the Code, they conclude, offered a vital general lesson for future American negotiations on NTBs: the executive branch must work closely with Congress *before* taking on international obligations. This problem, as has been discussed, was subsequently addressed by the 1974 Trade Act.

principles of GATT... also apply generally to the codes. But the codes go a step further, in that procedures and provisions are more detailed and specific."[210]

The AD Code, in this sense, constituted a "model" for the discipline of NTBs; structurally speaking, it paved the way for the negotiation of the Tokyo Round Codes.

A final political issue that may have played a role in the evolution of the Procurement Agreement involves the fundamental inconsistency of formal, or legislated discrimination in these markets with both national security interests in a Cold War-dominated world, and the US' ideological commitment to a liberal economic order. These inconsistencies emanated in large part from the Buy American Act. Its relative institutional importance was, in turn, a factor of the ' hegemonic role" that the US played in the international political economic environment during the years that followed the negotiation of the GATT.[211] Earlier sections of this chapter have described how the Act emerged during the depths of the 1929 - 1939 Depression. During World War II, however, US Executive Order 9001 "expressly permitted procurement without regard to the Buy American Act".[212] Once the war had ended, this left officials involved in the administration of the Act facing a

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[210] Stern, R. and Hoekman, B. "The Codes Approach", in The Uruguay Round: A Handbook on the MTN, edited by J.M. Finger and A. Olechowski. Washington: The World Bank, 1987, p. 59. Two qualifications are in order here: The basic principles of the GATT - namely non-discrimination on the basis of most-favoured nation and national treatment - apply generally to the codes, but *within a code-specific context.* Non-Members are not extended these privileges. In addition, the Tokyo Round Government Procurement Code, unlike all 5 of the other Codes, governed an area of commercial activity that *had not previously* been subject to GATT disciplines.

[211] See the discussion of hegemonic stability theory in the Introduction to this thesis, pp. 46 - 51, or in Robert Gilpin, op. cit., pp. 72 - 80.

[212] Gantt, P.H. and W.H. Speck. "Domestic v. Foreign Trade Problems in Federal Government Contracting: Buy American Act and Executive Order". *Journal of Public Law*, Vol 7, 1958, p. 396.

"quandary", namely trying to reconcile the later's legislatively-mandated preferences with new, internationally cooperative programs like the Mutual Security Administration. Up until the War, the Buy American Act had been considered to be virtually a complete ban on the purchase of foreign goods and materials. After the war, however, trade liberalisation was increasingly seen as what Lawrence Knapp termed "an essential requirement of the individual and collective security of the United States and its allies".[213]

At the same time, economically-derived political pressures for repeal or liberalisation of the Act were also growing: As part of his discussion of "export politics", I.M. Destler outlined the objectives of US postwar economic policy:

"The ultimate goal of postwar US trade leaders was not maximum US advantage but openness in general, a trade world where American products and firms could compete as freely as possible with others... Trade was a positive-sum game, and liberal politics would make everyone better off..."[214]

A Congressional report published during this era baldly stated that the Buy American principle was "in direct conflict with the basic foreign economic polices of the United States".[215] Similarly, two other official US reports from this period cited by the Gantt and Speck article focused specifically on the costs associated with the Act.[216] According to these authors, pressures for change related to domestic political conflicts engendered

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[213] Knapp, L.A. "The Buy American Act: A Review and Assessment". *Columbia Law Review*, Vol. 61, 1961, p. 437.

[214] op. cit., Destler, p. 96.

[215] op. cit., Gantt and Speck, p. 397.

[216] Earlier sections of this paper have referred to the latter report's estimate that the Buy American Act was costing the US Government up to $100,000,000 annually in higher prices and another $100,000,000 in foregone customs revenues. Ibid, p. 398, and Dam, op. cit., p. 199.

by the Buy American Act were particularly strong until 1954. After this time, as described by Lawrence Knapp, they were effectively overwhelmed by "forces of protectionism that were growing apace in the US in consequence of the initiation and growth of foreign competition, induced by the success of the Marshall Plan and the Mutual Security Program".[217] Significantly, however, they never fully went away; "export interests" could always call upon them to supplement other arguments for change.

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[217] op. cit., Knapp, p. 437.

## 1.3 - The Institutional Mechanics of the GPA

The first two chapters of this section have traced the historical evolution of WTO public procurement disciplines and surveyed dominant features of the political economic context from which they emerged, underscoring the dramatic changes that have taken place both in terms of policy and its context during the past 50 years. The two remaining chapters will describe the way in which the market disciplines embodied in the GPA were designed to work and identify what is institutionally innovative about them. Chapter 1.3 focuses largely on the nature of the rules embodied in the Agreement, whereas chapter 1.4 examines issues relating primarily to their enforcement. The former proceeds from a brief review of the distinction between what procurement is, and the "potential" that it possesses as a mechanism for policy promotion and/or political patronage. It then outlines the "basic principles" that have served as the foundation for each of the Government Procurement Agreements, and illustrates the manner in which they have been institutionalised. Much of the latter discussion involves a review of the distinction between negative policy disciplines, or measures to contain formal discrimination, and positive ones, designed to check informal, or administrative discrimination. This distinction is portrayed through the use of examples taken from European "learning experiences" in the regulation of regionally-integrating public procurement markets.

Chapter 1.4 will discuss the GPA and enforcement relative to the "codes approach" that was introduced during the Tokyo Round to contend with the political problems of negotiating NTBs. In what way, it will ask, might the changes embodied in the most recent Agreement represent further evolution of this "institutional methodology"? Issues

surrounding the implementation of the Agreement's positive policy disciplines, and, in particular, problems relating to the maintenance of the "balance of benefits" flowing from it will provide the basis for discussion. A review of the 1992 WTO Trondheim Panel Case will be presented to illustrate some of these concerns.

**Public Procurement as a Policy Instrument**

Earlier chapters have outlined the way in which procurement in a GATT context has traditionally been viewed from the perspective of its immediate ends, namely the purchase of products for government consumption, and not for re-sale.[218] The paragraphs that follow return to some of the definitional issues addressed at the outset of the thesis in order to highlight the distinction between what public procurement *is*, and what it *has the potential to do*. These implications are central to an understanding of the way in which the GPA seeks to contain discrimination in the markets that it covers.

Friedl Weiss, in the chapter 1.1 discussion of definitional issues, characterised procurement as an activity conducted in relation to a state's exercise of its political powers. In a similar vein, another legal scholar, Sue Arrowsmith, has said that an "important feature of public procurement is the use of purchasing power to promote social and economic policies

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[218] These are the purposes of procurement, as outlined by Blank and Marceau in their recent paper on the history of the WTO Procurement Agreement, op. cit, p. 5.

unconnected with actual purchases".[219] The European Commission has been even more politically succinct:

"Public Procurement is a powerful economic policy instrument. For the public authorities, it is not only a means of securing the physical resources they need to carry out their tasks, but also a tool for stimulating economic activity..."[220]

Earlier sections of this thesis have suggested that procurement be viewed as the converse of taxation, and referred to the way in which such policies are ultimately related to the social role of economic systems. Practically speaking, Matthew Marks and Harald Malmgren have described problems caused by differing standards of social equity in a procurement context in the following fashion: The manner in which governments organise themselves to fulfill their economic functions is, they said, a reflection of vital national decisions with respect to 1) the appropriate role of government in shaping and guiding the economy and 2) the openness of governments in their internal decision-making processes.[221] Each state has its own conception of how the public sector should be structured; public purchasing practices are but one manifestation of it. Such conceptions impinge upon fundamental political issues in a society, including:

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[219] The operating definition bears reiteration: "Government procurement is an activity which is designed to fulfill the economic functions and powers legally attributed to the state, involving the government or its agent acting as consumer, procuring for its own consumption and not for re-sale."

The Arrowsmith quotation appears in *Government Procurement and Judicial Review*. Toronto: The Casewell Co., Ltd., 1988, p. 207.

[220] Commission of the European Communities. "The Large Market of 1993 and the Opening-up of Public Procurement". Brussels, 1991, p. 2.

[221] Marks, M.J. and H.B. Malmgren. "Negotiating Nontariff Distortions to Trade". *Law and Policy in International Business*, Vol. 7, 1975, p. 403.

"employment policy for providing jobs at home; regional development policy for assisting stagnant or relatively slowly growing regions; technology policy for promoting domestic sources of new technology and where possible, keeping new developments at home; and industrial policy for promoting growth or modernisation of specific industries."[222]

Willem Molle, similarly, has suggested that decisions of this nature be considered in terms of "public policy functions".[223] Citing the work of J. Buchanon and R. and P. Musgrave, he identified three general functions for economic policy:

> "· allocation of resources, requiring mainly micro-economic policy instruments aiming at the efficient use of resources...
> · stabilisation, requiring mainly macro-economic and monetary policy instruments to obtain such objectives as high growth rates, price stability and full employment;
> redistribution of income, requiring policies that aim to ensure to different social groups and regional groups a fair share of the benefits of integration should the market mechanism fail to achieve an equitable outcome..."

Public procurement policies potentially reflect normative, political decisions with respect to each one of these three fundamental areas of policy.

## Basic Principles

Three basic principles, according to Patrick Messerlin, have served as the foundation for each of the Government Procurement Agreements: national treatment, non-discrimination and transparency at every step of the national tendering process.[224] The obligations of non-discrimination and national treatment are reflected in stipulations that a participant's

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[222] ibid., p. 404.

[223] op. cit., Molle, pp. 27-28.

[224] Messerlin, P.A. "Agreement on Government Procurement" in *The New World Trading System: Readings*. Paris: The Organisation for Economic Co-operation and Development, 1994, p. 65.

tendering procedures "should not discriminate between suppliers from other Parties to the Agreement" and that potential suppliers from other Parties to the Agreement should benefit from treatment "no less favourable" than domestic suppliers, whereas the principles with respect to transparency are operationalised through procedural rules that effectively specify corresponding "minimum rights" of national treatment.

In a recent article in *EU Public Contract Law*, a monthly European periodical for public purchasing practitioners, Alfonso Mattera described the practical implications of these principles in the following manner:

> "...the relevant contracting authority may not select the award-winning company on the basis of criteria related to the origin of the relevant products or services, or of the bidder's nationality; instead its selection must be based on objective technical and economic and maximally transparent and reviewable criteria."[225]

Generally speaking, if a foreign firm offers products of better quality at a lower price, a procuring entity whose activities are "covered by the Agreement" must buy those goods rather than relatively more costly goods produced domestically. More specifically, Article XIII, paragraph 4(b) of the 1994 Agreement states that value-for-money and/or consistency with the terms of any "specific evaluation criteria set forth in the notices or tender documentation" are the grounds on which individual tenders are to be evaluated.[226]

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[225] Mattera, A. "The Beginning of a Long and Winding Road". *Eu Public Contract Law*, March 1994, p. 5. Although Mattera was describing the implications of the EU's public procurement regime, the non-discriminatory principles on which it was founded are similar to those of the GPA.

[226] op. cit., GATT, "Agreement on Government Procurement", p. 19.

The obligations of non-discrimination and national treatment only apply in the case of *potential suppliers from other Parties to the Agreement.* The Introduction to this thesis, in describing the fundamental duties to which all Contracting Parties to the GATT are bound, referred to the fact that the MFN obligation has traditionally been interpreted in unconditional terms. The benefits of cooperation arising from the Government Procurement Agreement, however, are distributed in a conditional fashion; they cannot be incurred without taking on all of the accord's corresponding obligations. Obligations that, in keeping with the previously described "self-balancing" nature of the Agreement and that of the Tokyo Round Codes in general, have been negotiated on the basis of strict reciprocity.

The rights and obligations engendered by the Agreement's duties of non-discrimination and national treatment, in addition, are limited by the fact that its rules only apply to purchasing entities participating in specifically-agreed sectors, when their purchases exceed certain value thresholds, and are not specifically excluded from the Agreement's coverage. A potential supplier's foreign ownership, or affiliation does not affect the grounds on which it may become subject to rights under the Agreement.

The GPA's principles with respect to transparency are operationalised through procedural rules that specify "transparency obligations" which the Agreement's participants must extend to suppliers from its fellow parties to the Agreement at every step in the government procurement process. Messerlin characterised such rules as addressing the following:

"...technical specifications of the items (goods or services to be subject to the tender (Article VI); the choice between the various tendering procedures (Article VII); the qualifications of suppliers (Article VIII); the invitation to participate for an intended procurement (Article IX); the selection procedure (Article X); the time limits for tendering and delivery (Article

XI); the tender documentation (Article XII); the submission, receipt and opening of tenders and awarding of contracts (Article XIII); the negotiation which could accompany the tender (Article XIV); the specific-rules for "limited" tenders, that is, tenders where the contracting entity contacts one or a few suppliers individually (Article XV); and the content of the notice of award of the contracts (Article XVIII).[227]

In addition, he said, Article II requires that the value of the contracts shall include "all forms of remuneration, including any *premia*, fees, commissions and interest receivable", while Article XVII outlines the rules covering suppliers from "non Parties" to the Agreement and Article XIX details reporting requirements that Participants are obliged to respect.

**The Nature of the Rules**

John Jackson has described the goal of the draftsmen of the original Tokyo Round Code as being establishment of a "framework for truly effective discipline against governmental discriminatory purchasing, recognising that such stringent requirements would make governments somewhat hesitant to include (purchasing) entities on their list(s)".[228] As has been suggested, it is important to appreciate the way in which states typically discriminate in favour of local producers if one is to understand how these disciplines are structured. In this sense, one of the most important accomplishments of the OECD discussions on public procurement was the better understanding that evolved amongst participants of the many ways in which discrimination can be manifested in these markets. Two basic types of discrimination, it will be recalled, were identified: formal and informal. Formal barriers to equality amongst competing suppliers in markets covered by the

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[227] op.cit., Messerlin, p. 66.

[228] op. cit., Jackson, *The World Trading System*, p. 201.

Procurement Agreement are "traditionally understood" as being forbidden in Article II, paragraph 1 of the Tokyo Round Code and the 1988 Protocol, and Article III, paragraph 1 of the 1994 WTO Agreement.[229] The latter reads:

"With respect to all laws, regulations, procedures and practices regarding government Procurement covered by this Agreement, the Parties shall provide immediately and unconditionally to the products, services and suppliers and service providers of other Parties offering products or services of the Parties, treatment no less favourable than: (a) that accorded to domestic products, services, suppliers and service providers; and (b) that accorded to products, services, suppliers and service providers of any other Party."

Informal discrimination, on the other hand, is also prohibited by Article III, paragraph 1, et. al., but, significantly, is meant to be contained by the increasingly stringent transparency obligations around which each of the Procurement Agreements has been structured. The essence of discrimination in this form, as has been described by Gilbert Winham, is that it can be "carried out without publicity and without legislation..." For this reason,

"The task in negotiating government procurement... (has therefore been) to introduce procedures into national legislation on government tendering that would compel equal treatment for foreign suppliers."[230]

Such procedures, to return to the distinction made by Brian Hindley and set out in chapter 1.2, function to ensure that the tendering process produces fair outcomes; they provide

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[229] This interpretation is that of Petros Mavroidis and Bernard Hoekman. In an article entitled, "The WTO's Agreement on Government Procurement: Expanding Disciplines, Declining Membership?", they said, "The two basic principles governing the GPA are non-discrimination and national treatment (Article III). The way... (they) have traditionally been understood in the GATT-context is that the former refers to a legal prohibition to discriminate between foreign products... (whereas) the latter refers to a legal prohibition to discriminate... between foreign and domestic sources". *CEPR Discussion Paper*, No. 1112, January 1995.

[230] ibid, p. 139

standards for the assessment of the commercial "reasonableness" of a particular purchasing decision, or, in other words, its consistency with Members' obligations of non-discrimination and national treatment.[231]

**Negative vs. Positive Disciplines**

Another way of looking at the two basic types of market discipline embodied in the Agreements is suggested by the EU's approach to the integration of its public procurement markets. Chapter 1.2 touched on this briefly, making a distinction between negative policy disciplines embodied in the Community's public purchasing "liberalisation directives", and positive policy disciplines reflected in its "coordination directives". The former entail the elimination of formal, legislated obstacles to trade; they involve governments undertaking obligations to each other *not to do* certain policy-related things. As a recent publication by the OECD's Public Management Committee put it,

"Negative integration... (involves) the removal of barriers, obstacles, constraints and distortions that impede transactions among economic actors in different countries".[232]

Positive policy disciplines, on the other hand, endeavour to create what Jan Tinbergen has been credited with identifying as equal conditions for the functioning of integrated parts of an economy.[233] They entail duties for states *to do* certain policy-related things,

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[231] op. cit, Hindley, p. 286. Although Dr Hindley's paper focuses on the problems associated with the inherent subjectivity of such commercial decisions and questions the objectives of the Agreement, it provides a good overview of the code of behaviour embodied in the Procurement Agreement.

[232] Metcalfe, L. "The weakest links: building organisational networks for multi-level regulation" in *Regulatory Co-operation for an Interdependent World*, edited by the OECD Secretariat. Paris: OECD Publications, 1993, p. 56.

[233] See op. cit., Molle, p. 11, referring to Tinbergen's 1954 classic, *International Economic Integration*. Amsterdam: Elsevier.

and function by engendering private rights that enable non-state entities to challenge governments' interpretation of these obligations.[234] For reasons that will be considered in some detail, the two must ultimately operate in tandem if the benefits of economic integration are to be achieved. The remainder of this chapter will explore European experiences in the regulation of "common" procurement markets. In keeping with the approach adopted in chapter 1.2, the exercise is premised on an assumption that institutional "learning processes" in regional settings may offer insights for multilateral policy-making.

Early efforts to integrate European public procurement markets involved the introduction of negative disciplines that were, in a word, ineffective.[235] The 1957 Treaty of Rome did not contain provisions specifically related public purchasing; rather, as Dennis Swann has reported, the Treaty "provide(d) general powers which could be brought to bear", including the provisions of Article 7 which "pronounced a general ban on discrimination on grounds of nationality and enabled the Council to enact measures designed to prohibit this", and those of Article 30 which "prescribed a prohibition on both quantitative restrictions on imports and exports and on measures having equivalent effect".[236]

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[234] ibid, p. 11.

[235] In the 1988 Cecchini Report, Paolo Cecchini, in describing the result of 30 years of negative integration - or what had by then come to be known as the EC's "Uncommon Market" - said, somewhat more dramatically, "In public procurement, the divide between economic reality and political appearances is so deep as to be almost hallucinatory". *The European Challenge 1992:The Benefits of a Single Market* by P. Cecchini with M Catinat and A. Jacquemin. Aldershot: Gower Publishing Co Ltd., 1988, p. 18.

[236] Swann, D. "Standards, procurement, mergers and state aids" in *The single European market and beyond: A study of the wider implications of the Single European Act*, edited by D. Swann. London: Routledge, 1992, p. 62.

In late 1969, the Commission adopted a directive which gave effect to the Article 30 ban on discriminatory practices. Its purpose, according to a description that has been offered by Friedl Weiss, was to "establish the principle of national treatment for all Community supplies of goods..."[237] As described by the Commission, it functioned by defining "discriminatory practices which Member States... (had to) terminate in order to eliminate measures having an effect equivalent to quantitative restrictions".[238] Dennis Swann outlined the contents of the directive in terms of the following:

"The directive prohibited measures, imposed by law, regulation or administrative practice, which prevented the supply of imported goods from other member states, which granted domestic products a preference or which made the supply of imported goods more difficult or costly than domestic products".[239]

The following year, the Community formally recognised that general directives for the liberalisation of public procurement markets would no longer suffice, and that there was a need for "specific directives relating to particular kinds of... procurement"; it adopted the first Public Works Directive in mid-1971.[240] Moreover, before the year had ended, the Council enacted the first of its "coordination directives", introducing positive procedural obligations for Member States' tendering practices, and setting the stage for the liberalisation that was ultimately to follow during the coming two decades.

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[237] op. cit., Weiss, p. 34. It is also interesting to note that Weiss characterised this Directive as a "classic example" of one of the Commission's early liberalisation directives.

[238] European Commission. "Communication by the Commission to the Council. Public Supply Contracts: Conclusions and Perspectives". Brussels: 14 December 1984, p. 6.

[239] op. cit., Swann, p. 62.

[240] Friedl Weiss has described this as a regulatory "approach" based on the German model. It is, he has said, "based on the object of the procurement involved - supplies, works, utilities - not (as in France,) on the status of the purchasing entities - central government, territorial sub-divisions". See op. cit., p. 33.

Despite early optimism amongst proponents of the Common Market, by 1974, it was widely recognised that discrimination had not been eliminated in European public procurement "markets". The Commission commissioned a study designed to determine why the integration of these markets had stagnated. Conducted by G. Charpentier and R. Clarke, it confirmed that existing Community Directives were of "little practical effect", remarking upon the wide variation of public purchasing policies amongst the then-9 Member States and correspondingly varied commitments to market liberalisation.[241] This report called for reconsideration of the "political objectives" embodied in the Treaty of Rome, and recommended that, for strategic reasons, public utilities be excluded from any future exercise in Community liberalisation. It also observed that practical "experience(s) acquired by EFTA regarding public purchasing... could be most useful" should the Community find the political will to do something about the over-all situation, concluding:

"The necessary rules should.. be expressed less as a method of legal constraint than as instructions for the application of declared governmental policies and they must be the same for everyone. They should be oriented towards action, and not towards repression".[242]

10 years later, little had changed. Except perhaps for the fact that nationalistic political tides were ebbing. David Allen has described this period of EU liberalisation in the following terms:

"... (B)y the start of the 1980s European policy makers were beginning to lose faith in national solutions to their various economic problems and were once again beginning to show an interest in European solutions... The idea of completing the single market

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[241] Charpentier, G. and R Clarke. "Public Purchasing in the Common Market: Report to the Commission of the European Communities". Brussels: 15 May 1975, pp. 4-10.

[242] ibid., p. 13 and p. 29.

as a response to the... threat from Japan and the US... developed steadily during the early 1980s with considerable encouragement from influential transnational business elites".[243]

Reflecting an emerging political consensus, a 1984 document published by the European Commission, "Public Supply Contracts: Conclusions and Perspectives", stated,

"... the obligation not to take certain action... is... not (going to be) sufficient to bring about the desired interpenetration of the public procurement market. For that, an obligation to take certain action is required. While a regime that guarantees effective competition between private or public firms is sufficient to assure the interpenetration of markets, a complementary approach is needed to open up the public procurement market".[244]

For reasons that will be explored at the end of this chapter, the views expressed in this report are best understood in the overall context of the Community's 1985 initiative for the completion of the internal market, the research programme relating to the "costs of non-Europe" subsequently launched in 1986 by Lord Cockfield, then vice president of the Commission, and the re-allocation of Council voting rights mandated by the 1986 Single European Act. A period of regulatory co-operation that Jacques Pelkmans has termed "qualitatively different than earlier European integration" was burgeoning.[245]

The 1985 Single Market initiative, formally embodied in the Commission's White Paper on Completing the Internal Market, was an exercise to set the pace for the removal of

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[243] Allen, D. "European union, the Single European Act and the 1992 programme" in *The Single European Market and Beyond: A Study of the Wider Implications of the Single European Act*, edited by D. Swann, op. cit., p. 37.

[244] Commission of the European Communities. "Communication by the Commission to the Council - Public Supply Contracts: Conclusions and Perspectives". Brussels: 14 December 1984, p. 4.

[245] Pelkmans, J. and J. Sun. "Towards a European Community regulatory strategy: lessons from 'learning-by-doing'?" in Regulatory Co-operation for an Interdependent World , op. cit., p. 179.

remaining physical, technical and fiscal barriers to the free movement of goods, services, persons and capital in the Community. Jacques Delors, the former President of the Commission, described it an project in quest of a "common objective which could raise... (Member States') sights above daily routine problems and thereby concentrate their energies".[246] The "strategy of regulatory rapprochement" that it entailed focused on the removal of non-tariff, regulatory barriers to trade in the Community's internal markets, and introduced the ideas of "minimum harmonisation" and "mutual recognition" as tactics for balancing the demands of Community-wide liberalisation with the need to maintain nationally viable public policies.[247]

In addressing public procurement, the White Paper identified "transparency" and the "opening-up of the (public procurement) sector to effective competition" as "priority objectives" for the single market campaign. The specific policy mechanisms that were offered to achieve these ends were largely procedural in nature; they embodied the "action-orientation" that various experts had been proposing as a remedy for the Community's "integrative malaise" since at least the mid-1970s. "Community legislation", as the Cecchini Report put it shortly thereafter, had finally proven to be "no match for national and local purchasing bureaucracies".[248] According to a summary included in the latter Report, the reasons why centred on the following:

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[246] Forward to P. Cecchini's *The European Challenge 1992: The Benefits of a Single Market.* Aldershot: Gower Publishing Company, 1988.

[247] The term "regulatory rapprochement" was first employed by Jacques Pelkmans, and the summary of the objectives of the EC-1992 Programme is also his. See op. cit., p. 188.

[248] op. cit., Cecchini Report, p. 18.

"· there... (were) too many ways to evade the rules or influence the choice of supplier during the evaluation of bids;
· other barriers to trade (like divergent national standards) still exist(ed) and these... (led) to price differences, distorting competitive bidding;
· in many countries, purchasing... (was) significantly decentralized, making EC transparency rules hard to enforce."[249]

In 1991, the Commission published a report, "The Large Market of 1993 and the Opening-up of Public Procurement", that reviewed the policy obligations it had introduced to augment existing Community legislation to counter nationalistic practices in public procurement markets. This report stressed the fact that the aim of these obligations, embodied in a series of "coordination directives", was specifically "not to harmonise all national rules on public procurement". Rather they were to be viewed as "common rules", designed to contribute to the completion of the internal market by ensuring a minimal "coordination of national contract award procedures". The new "rules" consisted of the following:

"(1) rules defining the type of procurement agency and the scope of contracts subject to the Directives;
(2) rules defining the type of contract award procedure agencies should normally use;
(3) rules on technical specifications, whereby preference is to be given to Community standards, and discriminatory technical requirements from the contract documents;
(4) advertising rules, whereby tender notices must be published in the *Official Journal of the European Communities*, must comply with specific requirements concerning time-limits and must be drawn up in accordance with pre-established models;
(5) common rules on participation, comprising objective criteria for qualitative selection and for the award of contracts (either for the lowest price or the most economically advantageous tender, at the contracting authority's choice);

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[249] ibid., p. 18.

(6) obligations as regards statistical reporting."[250]

Les Metcalfe, in the previously-quoted OECD publication, defined positive policy integration as a:

"process of creating a comprehensive institutional framework, based on common principles, which both establishes the conditions in which markets operate and defines the rules of the game for non-market activities".[251]

Metcalfe's paper, in turn, argued that one of the most significant institutional lessons to emanate from European integration involved understanding that the "long-term success of a programme of negative integration depends on the development of a complementary programme of positive integration".[252] Jacques Pelkmans and Jeanne-Mey Sun, in another paper included in the same book, outlined the basic dynamics of this learning process, identifying "five guiding regulatory principles that emerged over the course of the 1992 programme". The remainder of this chapter will summarise Pelkmans and Sun's argument, highlighting those aspects of it that might lend themselves to application in a broader integrative setting.[253]

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[250] Commission of the European Communities. "The Large Market of 1993 and the Opening-up of Public Procurement". Luxembourg: Office for Official Publications of the European Communities, 1991, pp. 5-6.

[251] op. cit., Metcalfe, p. 56.

[252] ibid., p. 56.

[253] It is important to underscore the relative, dynamic and fora-specific nature of the positive policy integration process at the outset of such an exercise. As Pelkmans and Sun put it in describing the dangers of trying to draw policy analogies from EC experiences: "Carrying over the regulatory strategy of the Community to other regional groupings, to OECD co-operation, or to other global fora makes little sense, given the ambitious guiding principles at the core of the EC strategy". Later, in the same article, however, they concluded, "Partial applications of the various policy applications and innovations may be useful... In adopting such an approach... the nature of the integration accomplished thereby will... be less far-reaching". Op. cit., p. 193.

**Dynamics of the European Regulatory Context**

Earlier sections of this chapter suggested that the evolution of positive policy disciplines in the EC - or recognition of the fact that "the obligation (for EC Member States) not to take certain action... (was not going to be) sufficient to bring about the desired interpenetration of the public procurement markets" - was best understood in an "overall context" whose parameters were defined by the following: the Community's 1985 "Single Market" initiative, the Cecchini Report on the "costs of non-Europe", and the re-allocation of Council voting rights mandated by the 1986 Single European Act. Pelkmans and Sun's text proceeds from a description of how the 1985 initiative ushered in a period of regulatory reform "qualitatively different" from that of earlier European integration; this process, as it was generally manifested in European public procurement markets, has been reviewed. The role played by both the Cecchini Report and the 1986 Single European Act, as well as their relationship to the market disciplines emanating from the "Single Market" initiative, however, is somewhat less straightforward. The "EC brand" of regulatory co-operation, as Pelkmans and Sun emphasised in their paper, is the product of a series of "complex interactions".[254]

The Cecchini Report sought to quantify the costs of European "non-integration". The purpose of this exercise, as described by Lord Cockfield, was to provide "...hard evidence, the confirmation of what those... engaged in building Europe... have always known: that the failure to achieve a single market has been costing European industry millions in

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[254] op. cit., Pelkmans and Sun, p. 188 and p. 183, respectively.

unnecessary costs and lost opportunities..."[255] It identified three broad categories of "frontiers", or barriers to integration within the EC's internal market:

". physical barriers - like intra-EC border stoppages, customs controls and associated paperwork;
. fiscal barriers - especially differing rates of VAT and excise duties;
. technical barriers - for example, meeting divergent national product standards, technical regulations and conflicting business laws; entering nationally protected public procurement markets".[256]

Pelkmans and Sun's paper focused on the "institutional innovation" that occurred in the context of the latter. Its significance, they said, was associated with the fact that the changes in question "paved the road for the emergence of beneficial regulatory competition among the member states..." Such competition was, in turn, a product of the interaction of "five guiding regulatory principles": free movement, minimum harmonisation, mutual recognition, subsidiarity and no-internal-frontiers (elimination of the above-mentioned fiscal, physical and regulatory barriers to integration).

According to Pelkmans and Sun, EU Member states' commitment to an effective internal market, reflected in the principle of free movement, is the "cornerstone" on which the Community's post-1985 regulatory strategy rests. Charpentier and Clarke's 1975 report to the Commission illustrated the way in which earlier phases of European integration were handicapped by problems of political commitment. By comparison, however, the demands of negative integration on policy, as Willem Molle has put it, "are relatively simple":

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[255] op. cit., Cecchini Report, p. xiii.

[256] ibid., p. xiii.

"There is no need for permanent decision-making machinery... (negative integration measures) can be clearly defined, and once negotiated and laid down in treaties, they are henceforth binding on governments, companies and private persons."[257]

If there is sufficient political consensus to implement a given negative discipline, in other words, this is usually adequate for process of integration to continue.

The operationalisation of the rights and duties arising from positive policy disciplines, on the other hand, is impossible without commitment of this nature. Herein, Molle has said that the implementation of such measures "always involve(s) more complex forms of government policy":

"(Positive integration) often takes the form of vaguely defined obligations requiring public institutions to take action. Such obligations leave ample room for interpretation as to scope and timing. They may, moreover, be reversed if the policy environment changes... (The domain is one of) politics and bureaucracy rather than law".[258]

For these reasons, the "flexibility" that characterises the Community's post-1985 regulatory strategy cannot be what Pelkmans and Sun termed "an end in itself".[259] Fundamental transnational rights, emanating from shared political commitments, are driving the integration process that is now underway in the European setting.

In their 1975 paper, Charpentier and Clarke also addressed the wide divergence of opinion amongst member states with respect to how - and even whether - the process of integration

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[257] op. cit., Molle, pp. 11-12.

[258] ibid., p. 12.

[259] op. cit., Pelkmans and Sun, p. 189.

should proceed. Where did the political consensus that is embodied in the rights that are now compelling EU integration come from? Pelkmans and Sun characterised the co-operative policy-making environment that has evolved since the implementation of the Single Market programme as a "derivative of integration".[260] Understanding the process of change that is reflected in this "derivative", they said, requires, in turn, appreciation of the role of regulatory competition, or what might, in other words, be described as a process of differentiation on the basis of the five principles of the regulatory quintet.

The 1988 Cecchini Report, as has been mentioned, drew widespread attention to the costs associated with maintaining the status quo of "nationally fragmented markets" in an international economic environment characterised by regional and global integration. In so doing, it effectively started a process of re-allocation of the costs of European protectionism; considerations with respect to this process lie at the heart of Pelkmans and Sun's notion of "regulatory competition".

At the outset of the Single Market exercise, there were few incentives for European industry not to persuade national regulators to block competitive imports via the erection of protective NTBs. The balance of political pressure on the national officials receiving these appeals, in turn, was similar. As Molle explained,

"The negative effects of protection on welfare in terms of jobs lost... (were) plain to see and directly attributable to trade, while the positive effects ... (were) more general and diffuse and hence less visible".[261]

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[260] ibid., p. 193.

[261] op. cit., p. 448. Herein, Molle cites the work of Caves (1975), Frey and Schneider (1984) and Baldwin (1984) relating to the "political market for protection".

Such circumstances - especially when combined with "politicians anxious to be re-elected" - made for a policy environment in which it was not difficult to convince policy-makers of the need for protection.

"Regulatory competition" gradually evolved from the introduction of a series of new "intervening variables", or what Pelkmans and Sun termed the "regulatory quintet" into this political "policy equation". Its practical effect, in conjunction with competitive pressures emanating from the outside the Community, has been to force Single Market participants to take a broader, longer-term perspective when evaluating the potential benefits of "administered or contingent protection"; in particular, the institutionalisation of various avenues of appeal for non-national parties whose interests may have been negatively affected by a protectionist policy, and stringent limitations on what national policy-makers can do to shield local industries from external competitive pressures have fundamentally altered the dynamics of business-government relations. Although the way in which this new competition has been manifested is dependent on sector-specific market conditions and the relative geographic mobility of individual firms participating in a given market, in general, it has caused the inversion of incentives for protectionist lobbying. Increasingly, there is little to be gained from such a course of action and much more, from a national strategic perspective, to be lost. The "new competition" has, in addition, engendered positive incentives for firms to lobby national governments to adopt regulations that reduce regulatory discrepancies within the Community. Since barriers to free movement are now generally proscribed, such discrepancies potentially represent competitive *dis*advantages for firms. On the whole, the European regulatory environment

has become one in which a premium has been placed on the development of efficient institutions.[262]

Pelkmans and Sun's paper stressed the fact that regulatory competition and the EC's "brand of cooperation" are a result of a complex series of interactions amongst elements of the "regulatory quintet". Before concluding this discussion of their model, it is thus important to outline the general integrative roles played by the three other elements in the new "cooperative policy equation": minimum harmonisation, mutual recognition and subsidiarity.

Since the introduction of the 1985 Single Market programme, the job of the Community's policy-makers has entailed what these authors termed a quest for "an appropriate balance between liberalisation (the removal of barriers to intra-EC trade and production) and harmonisation (the centralisation of regulation at the EC level of government, when such regulation is justified by the existence of certain types of market failure)".[263] Much of the latter part of this chapter has been devoted to a description of the way in which EC officials' understanding of the mechanics of liberalisation has gradually improved during the years since the Treaty of Rome was signed in 1957. The majority of the institutional learning with respect to regulatory harmonisation, its integrative corollary, on the other hand, has been fairly recent; in this context, the policy reforms that were introduced in

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[262] The idea of "efficient institutions" has been developed by Douglass North in his book, *Institutions, Institutional Change and Economic Performance.* Cambridge: Cambridge University Press, 1990. Part III of this thesis will examine this idea and its applicability to the institutional innovation occurring in a WTO context. See below, pp. 263 - 266.

[263] op. cit., Pelkmans and Sun, p. 179.

the wake of the 1992 programme relating to minimum harmonisation, mutual recognition and qualified majority voting are of particular significance.

In the early years of the Community and through the beginning of the 1980s, "total ex ante harmonisation" of member state national regulations, via the introduction of Community directives and regulations, was the legislative means to the Community's integrative ends. "The objective," as Pelkmans and Sun put it, "was to replace national regulations with common regulations so that all member states would have the same regulations in a given policy area."[264] As summarised in the Cecchini Report, however, this approach presented two major problems: it was politically tedious and, therefore, practically infeasible and; when its protracted processes finally produced harmonised rules, they were often technically obsolete.[265]

The 1992 programme did not aim to achieve total harmonisation. Rather, as Friedl Weiss has explained, the initiative sought to leave room for the kind of regulation and intervention typically required in 'mixed economy systems':

"instead of the outright elimination of barriers, it... (sought) the approximation of their aims and form throughout the Community. Policy measures and domestic regulation, which have been successfully approximated, cause only insignificant distortion and may in consequence be subject of 'mutual recognition' as functionally equivalent and thereby cease to hinder trade within the Community".[266]

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[264] op. cit., Pelkmans and Sun, p. 180.

[265] op. cit., Cecchini Report, p. 29.

[266] op. cit., Weiss, p. 9.

The means to the new programme's ends, in other words, involved minimum harmonisation and mutual recognition, or what Pelkmans and Sun called "regulatory flexibility"; they reflected an "institutional lesson" that total uniformity is not practical, whereas a minimum of "common rules" is indispensable.

By comparison with total regulatory harmonisation, the aims of minimum harmonisation are modest: it seeks only to safeguard "inviolable interests such as 'public morality, public policy, or public security'" via the harmonisation of the "essential requirements" of national regulation.[267] Molle has used term policy "coordination" in describing the cooperative processes from which common rules, embodying these "essential requirements", are derived.[268] Such processes, he said, generally entail "the adaptation of regulation to make sure that they (sic) are consistent internationally". They reflect commitment amongst the parties concerned to "(sets of) actions needed to accomplish a coherent policy for the group" and may, in turn, lead to "convergence of the target variables of policy". The previously-cited "common rules" designed to engender minimal "coordination of national contract award procedures", in this sense, are typical "products" of this kind of cooperation.

Mutual recognition, on the other hand, might be described as a way of contending with the "regulatory remnants" of approximation. It is a policy convention that, as outlined in the Cecchini Report, is designed to "ensure that business avails itself of its basic right to trade within the Community..."[269] In describing how it works, Pelkmans and Sun said

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[267] op. cit., Pelkmans and Sun, p. 180.

[268] op. cit., Molle, p. 14.

[269] op. cit., Cecchini Report, p. 28.

that, compared to the other principles in their "regulatory quintet", this one operates indirectly, "against the background of the European Court of Justice's doctrine of judicial review..." The latter doctrine involves the Court's interpretation of the Community's principle of free movement as "not merely prohibit(in) barriers to intra-EC trade, but positively... (requiring) the mutual acceptance of the goods of one member country by another".[270] Thus, although Article 36 of the Treaty of Rome permits member states to restrict imports on the basis of their inconsistency with "inviolable interests", once these states harmonise "essential regulatory requirements" in a given policy area, there can be virtually no remaining legitimate barriers to free movement in that particular context. Superfluous national regulations that may be applicable to an exporter's production must be "mutually recognised" by importing country authorities.

Minimum harmonisation, and, therefore, the Community's general strategy of "regulatory flexibility" has been facilitated by changes in its voting procedures that were introduced under the 1986 Single European Act. Pelkmans and Sun argued that one of the main reasons that the post-1985 strategy is more flexible than its predecessor is because qualified majority voting (hereafter, QMV) has become politically acceptable, and formally been extended to govern all internal market legislation. The previous "requirement of unanimity in the Council", they say, "had proved extremely cumbersome, particularly where some

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[270] This summary of the way in which the principle of free movement was interpreted in the Cassis de Dijon case was extracted from the Cecchini Report, op. cit., p. 28. Pelkmans and Sun's review of the principle of mutual recognition appears on pp. 181-182 of their article, "Towards European Community regulatory strategy: lessons from 'learning-by-doing'". The following chapter will explore the implications of the Community's doctrine of judicial review in greater detail, i.e. examine the corresponding claim rights that are associated with Member States' duties of "mutual acceptance".

minimum harmonisation... (was) indispensable". QMV, on the other hand, has made such harmonisation both "more politically feasible" and "less costly":

"QMV has a potential to make it difficult for one or a few recalcitrant member states to 'extend' minimum harmonisation by detailing the 'essential requirements' beyond 'essentials'. Moreover... (it) makes it more difficult for one or a few member states to veto a proposed EC directive, as this requires a blocking minority. If it proves impossible to achieve such a minority, the minority countries are forced to innovate, find alternatives that are attractive or superior, or be overruled. This is likely to upgrade the quality of legislation and lower the costs of harmonisation".

Finally, there is the fifth principle of the "regulatory quintet", subsidiarity. It, too, is best understood in the context of its relationship to the other terms of the integrative function, but, generally, addresses questions surrounding the appropriate division of intra-governmental labour. "(F)or a given set of objectives", as Pelkmans and Sun explained, "to what level of government should various public economic and regulatory functions be assigned?" Subsidiarity is a principle based on the premise that "problems of information and preference-revelation, as well as regional and local differences in preferences between voters, prevents central government from supplying an optimal set of public goods, including regulation". Politically, it has the "great virtue of respecting local values and preferences as much as possible, and thereby avoiding superfluous centralisation", whilst facilitating the centralisation of measures necessary to safeguard the Single Market.

**Conclusion**

The institutional learning processes that Pelkmans and Sun describe did much to enhance European regulators' understanding of the policy dilemmas that integration was bringing their way, but they did not resolve them. The Single Market exercise resulted in a better Community rule-making process, but there were still lingering problems relating to the implementation of these rules. Commission papers on the Community's procurement regime have subsequently described this situation in terms of problems with the common rules' "credibility and efficiency". Questions, in other words, that generally pertain to issues of enforcement. The following chapter will address this situation in more detail, drawing parallels between the institutional dilemmas faced in a European context and those with which negotiators of the WTO procurement Agreement were contending in a multilateral setting.

## 1.4 - Institutional Innovations

Chapter 1.1 of this thesis described the obligations that States party to the Tokyo Round Government Procurement Code assumed with respect to re-negotiation of the Agreement. It also referred to commitments that signatories to the subsequent 1988 Protocol of Amendments took on concerning its improvement, broadening and expansion, or coverage of services contracts. Although the negotiations that followed the 1988 accord coincided with the Uruguay Round, they were technically separate. This, as has been described by Blank and Marceau, had implications with respect to the intra-institutional forum in which they were held (the Committee on Government Procurement's Informal Working Group on Negotiations as opposed to the Uruguay Round's Negotiating Group on Goods), the number of countries that participated in them, and the pace at which they proceeded.[271] Moreover, the 1994 WTO Government Procurement Agreement that they ultimately produced was plurilateral in nature; signature of the Uruguay Round's "Single Undertaking" did not automatically entail membership. Nor was the possibility of cross-Agreement retaliation, contained in the provisions of the Round's Dispute Settlement Understanding, to be allowed in the procurement area, or extended to disputes arising under this Agreement. This chapter examines the accomplishments of the latest round of government procurement negotiations from the perspective of this distinctive institutional context. It seeks answers to the following questions: "What are the specific institutional innovations associated with the new Agreement? Why were they agreed? How are they related to previous textual developments in this context? Are they in any way products of the "plurilateral setting"

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[271] op. cit., Blank and Marceau, pp. 40 - 41.

in which they were negotiated?" Subsequent chapters, in turn, will examine political reasons why the Agreement might have been negotiated in this manner.

This approach to the study of GPA innovations has been adopted because of superficially apparent consistencies between the way in which the Agreement was negotiated, how the benefits flowing from it are to be distributed, the institutional mechanisms that have been introduced for its enforcement, and the "codes approach" that was developed during the Tokyo Round for managing the political difficulties associated with the negotiation of NTBs. According to John Jackson, one of the most important institutional implications of the "Single Undertaking" of the Uruguay Round was that "... the Tokyo Round approach of side codes, resulting in a 'GATT à la carte'" would henceforth cease to be the rule-making norm.[272] Except for the fact that the US and EU, in their December 1995 Madrid Agreement on a "New Atlantic Agenda", called for its immediate "multilateralisation", the new WTO Procurement Agreement, would appear to be inconsistent with Jackson's observation. A secondary purpose of this chapter is to lay the groundwork for subsequent exploration of this "discrepancy", asking whether the latest re-negotiations are consistent with the "codes approach" and, if so, how and why. Part II of the thesis, as has been mentioned, will examine this issue in detail.

As was mentioned at the close of the previous chapter, this one's to be particularly concerned with issues of enforcement. It proceeds from a premise that there is an important

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[272] Jackson, J. "Testimony prepared for the US Senate Committee on Foreign Relations June 14, 1994 Hearing on the WTO and US Sovereignty".

distinction between the establishment of a set of international rules and compliance with these rules. Bob Hudec has described this distinction in terms of the following:

"...governments have been hesitant about making difficult decisions relating to their compliance with the rules without some further assurance that the rules will in fact be brought to bear upon other governments... (E)xperience has suggested that when governments are left to judge compliance among themselves, the pressures for compliance tend to vary according to the relative power of the governments involved, creating an inequitable situation in which the rules bind the weak but not the strong."[273]

Much of the last chapter was devoted to discussion of institutional ' lessons" emanating from the integration of European government procurement markets; the evolution of the Union's procurement regime was traced so as to illustrate the contribution positive policy disciplines have made to the realisation of "supplier equality before the administration". In a similar way, this chapter will argue that the nature of the obligations engendered by transnational Agreements like the EU's "Public Sector Directives" and the 1994 WTO Procurement Agreement generate important constraints that subsequently guide enforcement. Such issues have been given considerable attention in the context of discussions concerning the "effectiveness" of the EU's 1989 Compliance Directive. Continuing to respect the "relative, dynamic and fora-specific nature" of the economic integration process, insights from this work will be used to structure the chapter's review of the major institutional innovations associated with the 1994 WTO GPR.

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[273] Hudec, R. "Adjudication of International Trade Disputes", *Thames Essay No. 6*, 1977, as quoted in D.V. Anthony and C.K. Hagerty's "Cautious Optimism as a Guide to Foreign Government Procurement", *Law and Policy in International Business*, Vol. 11, 1979.

**Benefits and Obligations Arising from a Treaty**

Because there is no formal international legislative organ, the matter of sources in international law has been what Nicholas Onuf termed, "the source of great confusion"[274] Most writers nevertheless agree, he said, that there are "two primary sources" of such law, custom and treaties. Legal instruments of the latter nature operate as a kind of liaison between two or more separate, national legal orders; they generally function by creating obligations for signatories to make their municipal law conform to whatever undertakings have been made under a given accord.[275] Max Sørensen has described processes relating to the national application of treaty norms in terms of the following "established principle"

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[274] Onuf, N.G. "Global Law-Making and Legal Thought" in *Law-Making in the Global Community*, edited by N.G. Onuf. Durham: Carolina Academic Press, 1982, p. 14.

[275] The word "generally" merits further comment here, especially given the way in which this paper has sought to derive insights from the integration of EU public purchasing markets for the liberalisation process that is underway in the multilateral context of the WTO Government Procurement Agreement. In many ways, EU diplomacy has to be viewed as an exception to traditional diplomacy, namely the kind based on inter-governmental relations: Although the EU's rule-making process is treaty-governed, as an institution, it possesses an "international parliament", as well as politically autonomous decision-making organs, eg. the Commission. Many of the rights and duties engendered by the Treaty of Rome and subsequent integrative instruments, in turn, are directly effective *and* emanate from norms that take a higher status than national ones; they create a separate, supranational legal order. See R. Dehousse and R. Weiler's "The legal dimension", in *The Dynamics of European Integration*, edited by W Wallace. London: Pinter Publishers, 1992, pp. 249-253.

The EU enjoys "exclusive competence" in the policy fields under discussion in this paper. Directly applicable Union norms establish the regulatory framework in which all Member States conduct their public procurement. WTO norms - including those that govern government procurement - on the other hand, are more voluntary in nature. Differences in national "constitutional landscapes" may cloud this distinction, but, on the whole, the rights and duties arising in this institutional context are only indirectly binding; implementing legislation at the national level is required in order to make them operational. This is a technical point, but, as will be seen, it is of substantial political importance. Because of the EU's unusual legal pedigree, the issue will be effectively "black boxed" throughout the discussion of the enforcement of the EU procurement regime that follows. Problems relating to the domestic application of the multilateral rules, however, will be addressed in some detail at the end of this chapter. See below, pp. 193 - 207.

of international law, emanating from a 1925 advisory opinion of the Permanent Court of International Justice:

"...(A) State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken... (I)n the relations between Powers who are contracting Parties to a treaty the provisions of municipal law cannot prevail over those of the treaty... (Nor can a State) adduce, as against another State, its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force".[276]

The purpose of Sørensen's paper was to query "whether international law imposes any more specific obligations concerning the procedure to be followed or the techniques to be adopted" when implementing treaty obligations. To this end, he identified four general types of treaties, each having different implications for signatories' domestic law, and, ultimately, the interpretation of obligations arising from a treaty. John Jackson has summarised Sørensen's typology in the following manner:

"(There are) 1)treaties with purpose and substance outside the sphere of national law, such as alliances, peaceful settlement of international disputes; 2)treaties affecting the administrative sphere of rights and duties of various public authorities, and not relating to individuals; 3)treaties relevant to relations between public authorities and individuals; and 4)treaties concerned with relations between individuals or other subjects of private law."[277]

Sørensen's is an important distinction because of its relationship to questions concerning the kind of political obligations a nation state party to a treaty assumes, namely what government entity is ultimately going to be subject to the disciplines it engenders, who

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[276] Sørenson, M. "Obligations of a State Party to a Treaty as regards its municipal law" in A.H. Robertson's *Human Rights in National and International Law*. Manchester: Manchester University Press, 1968, p. 12.

[277] Jackson, J.H. "Status of Treaties in Domestic Legal Systems: A Policy Analysis". *The American Journal of International Law*, Vol. 86, p. 318.

will benefit from any rights arising from these duties, and whether an act of the national legislature is required in order to implement a given obligation. The distribution of these rights and duties, in turn and in conjunction with the "national constitutional landscapes" outlined in Chapter 1.2, dictates what might be described as parameters for implementation and enforcement. If, for example, governmental decisions that are illegal under a certain provision of a treaty affect individual trading interests and rights, an international dispute settlement system that is designed to resolve differences of opinion between government entities may be inadequate, or insufficient on its own as a mechanism for securing these interests. In addition, an act of each of the signatories' national legislatures may be required in order to "guarantee to the individual a judicial or administrative means of challenging the legality of measures which affect him".[278]

Negative policy disciplines, as has been described in preceding chapters, seek to contain formal, or legislatively-implemented discrimination. They operate by limiting national legislative prerogative, or powers. Such limits, in turn, govern relations between public authorities and individuals. In Sørenson's words, they "define the scope of citizen's rights and duties in relation to the State of which he is a national, or the relations between the State and individual without regard to nationality".[279] Arnold McNair, speaking at the Graduate Institute for International Studies in Geneva in the early 1930s, described measures of this nature as "constitutional international law".[280] Such law, he said, creates

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[278] op. cit., Sørensen, p. 25.

[279] ibid., p. 22.

[280] McNair, A.D. "The Functions and Differing Legal Character of Treaties". *British Yearbook of International Law*. London: Oxford University Press, 1930, p. 112.

a "kind of public law transcending in kind and not merely in degree the ordinary agreements between states". Its purpose is to "settle the political affairs of a group of countries in a particularly solemn and semidictatorial fashion which likens the arrangement to a governmental act imposed from above on the parties affected..." More recently, and, in the specific context of the international economic order, Jan Tumlir has characterised such law as a "constraint" on the re-distributive powers that sovereign states exercise through their economic policy initiatives.[281]

As was illustrated in Chapter 1.3, all states party to the WTO Government Procurement Agreement have assumed what are "traditionally understood" to be negative duties of non-discrimination and national treatment towards the covered goods and services of fellow signatories. Article 3(1) of the 1994 WTO Government Procurement Agreement, however, reads:

"With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, the Parties *shall provide* (emphasis added) immediately and unconditionally to the products, services and suppliers and service providers of other Parties offering products or services of the Parties, treatment no less favourable than:

(a) that accorded to domestic products, services, suppliers and service providers; and

(b) that accorded to products, services, suppliers and service providers of any other Party."[282]

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[281] Tumlir, J. *Protectionism: Trade Policy in Democratic Societies.* Washington: American Enterprise Institute, 1985, PP. 13-16.

[282] GATT document GPR/Spec/77. "Agreement on Government Procurement". Geneva: 15 December 1993, p. 8. It bears mention that negative duties of non-discrimination and national treatment, despite the previously described "traditional GATT understanding", are not, per se, specified in Article III. The third paragraph of the Preamble to the Agreement, however, reads: "Recognizing that laws, regulations, procedures and practices regarding government procurement

The duties it engenders, in other words, would seem to imply what Mavroidis and Hoekman term "obligations of result"; they are what this thesis has identified as *positive* policy obligations. Signatories are not merely obliged not to discriminate between the goods and/or services of various suppliers on the basis of the former's nationality. Rather, they are bound to ensure that the behaviour of their "covered" administrative entities conforms with the Agreement's principles of non-discrimination and national treatment.

Mavroidis and Hoekman assert that the "means of satisfying this (positive) obligation are not spelled out". "Parties," they say, "are free to choose whatever means they deem appropriate to achieve the agreed result". At the same time, they conclude their discussion of Article III with the observation that, "Inaction by signatories, as well as action to the contrary, gives adequate grounds to affected parties for legal proceedings to be initiated".[283] Proceeding from Sørensen's typology of the different kinds treaties and applying the "regulatory logic" of the EU's procurement regime to questions surrounding the extent of Parties' "freedom" in this context, however, suggests that it may be appropriate to take a closer look at how "adequate grounds" arise for the initiation of legal proceedings under

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*should not be* (emphasis added) prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers and services so as to afford protection to domestic products or services or domestic suppliers or services providers and *should not* (emphasis added) discriminate among foreign products or services or among foreign suppliers or service providers;" (Parties to this Agreement... Hereby agree as follows:)

[283] Much of Hoekman and Mavroidis' paper is subsequently devoted to a discussion of *how* the "GPA pays particular attention to ensuring and enhancing transparency". It is important to reiterate here, therefore, that this thesis is concerned with political issues relating to *why* such transparency is important. From this point of view, the apparent discrepancy between the freedom of Parties to "choose whatever means they deem appropriate to achieve the (Agreement's) agreed result(s) whilst, at the same time, their actions can provide "adequate grounds" for the initiation of legal proceedings is particularly interesting. This is a relationship that Hoekman and Mavroidis do not examine.

the Agreement. More specifically, might there not be institutional parallels between the "transparency obligations" incorporated in this Agreement, and the procedural obligations that have been introduced to augment the substantive disciplines embodied in the EU's "liberalisation directives"? Could "common rules" for multilateral public procurement be emerging? If so, how might such rules be related to questions of enforcement that were addressed during the latest round of re-negotiations?

**Institutional "Improvement" and the GPA**

The Tokyo Round Government Procurement Code was designed to be largely self-policing. Article VI, paragraph 5 of Agreement requires that:

"There shall also be procedures for the hearing and reviewing of complaints arising in connexion with any phase of the procurement process, so as to ensure that. to the greatest extent possible, disputes under this Agreement will be equitably and expeditiously resolved between the suppliers and the entities concerned."[284]

Under the terms of this Agreement, however, no criteria were provided for the establishment and operation of such review procedures; Parties were simply obligated to establish some kind of administrative review.[285]

Bob Hudec has suggested that this procedural lacuna is best understood as but one manifestation of the "piecemeal way" in which the Tokyo Round Codes addressed the

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[284] op. cit., GATT, "The Texts of the Tokyo Round Agreements", p. 41.

[285] Article VI, paragraph 5, also requires that "entities shall establish a contact point to provide additional information to any unsuccessful tenderer dissatisfied with the explanation for rejection of his tender or... (having) further questions about the award of the contract". No guidance is provided, however, as regards the way in which this reviewing authority is to function, ibid, p. 41.

institutional problems that had been ailing the GATT since the late 1950s.[286] Earlier sections of this paper have addressed some of the major sources of the "legal malaise" lying at the heart of this institutional dilemma, eg. an expanding membership with divergent stages and systems of economic organisation, etc. Although the "self-standing" Codes were supposed to enable their participants to circumvent many of the political problems that had made it difficult to introduce effective GATT disciplines over NTBs, economically powerful Contracting Parties remained unwilling to cede any meaningful authority to the multilateral trading system for enforcement of the rules that had been agreed.[287] In describing this state of affairs, John Jackson said, "The question of 'rule' versus 'power' diplomacy has been answered with a compromise."[288]

The "compromise" to which Jackson referred provided a "solution" to enforcement-related institutional problems in the form of administrative committees, given the authority to implement Agreement-specific dispute settlement procedures. Jackson portrayed the enforcement role that the committees were designed to play as a manifestation of the economically powerful Contracting Parties' broader efforts to de-centralise GATT decision-making procedures during the Tokyo Round.[289] His analysis proceeded from an outline of GATT rule formation and decision-making processes:

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[286] op. cit., Hudec, pp. 292-297.

[287] In this context, it is interesting to note that, according to Gilbert Winham, the "derogations and/or escape clauses" section of the OECD Draft Code on Government Procurement that the Tokyo Round negotiators "inherited in 1970" was "completely bracketed"; no specific provisions were included under it, indicating an absolute lack of consensus on this issue. See *International Trade and the Tokyo Round Negotiation*, op. cit., p. 140.

[288] op. cit., Jackson's "The Birth of the GATT-MTN System...", p. 46.

[289] ibid., pp. 47-52.

"The GATT decision-making structure is not elaborate... (It) provides that the 'contracting parties shall meet from time to time for the purposes of giving effect to those provisions of (GATT) which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of... (the Agreement).' ... Each contracting party shall have one vote and... on most issues a majority vote shall prevail."

In addition, he said, although the GATT does not generally "use this formal decision-making authority for rulemaking... the waiver power under the GATT allows a special two-thirds majority of the GATT Contracting Parties to waive obligations... (and) some waivers have a certain de facto effect of creating new rules..."

The process of the negotiation of the Tokyo Round Codes was, in Jackson's view, generally consistent, nevertheless, with the realities of the international distribution of economic power. Key country groupings developed during the negotiations and, on some matters, the critical decisions depended only on the US and the EC. The broader "compromise" reflected in the Codes arose from the fact that more basic questions surrounding GATT decision-making processes were "largely ignored" during the negotiations; the Round did not reconcile increasingly glaring "disparities between real economic power and actual voting power in a one-nation, one-vote system". The institutional innovation associated with the independent administrative committees, in any case, came from the fact that they had what Jackson described as a *potential to influence* GATT decision-making processes in meaningful ways. This potential emanated from the following characteristics of the Committees: 1) The power that each was delegated for the administration of the Codes; Jackson saw this as likely to contribute to less centralised GATT decision-making in that it would tacitly reduce the power of the Contracting Parties, the Council and other GATT bodies. 2) The fact that their activities were going to exclude non-members to a given

Code, making it institutionally more difficult for these interests to be heard. 3) The dominance of developed countries in the initial membership of the Codes and the likelihood that they would, therefore, exert greater influence over the activities of the Committees than developing countries, at least until the latter made up a more significant percentage of the membership in a given Code-governed policy area.

The nature of trade in public purchasing markets was an important consideration in the enforcement, or dispute settlement-related role that was envisaged for the Committee on Government Procurement. Government procurement, as has been described, generally involves a process of awarding a contract for the provision of goods or services for public use. Once this process has been completed, the nature of a procuring entity's relationship vis-à-vis the field of potential suppliers, and the winning bidder could be said to change.[290] This "changing relationship" is fundamental to the way in which GATT disciplines governing these markets were structured; the rules embodied in the Code establish

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[290] In a book on the EU's procurement regime, *Remedies for Enforcing the Public Procurement Rules*, Sue Arrowsmith, D. d'Hooghe and others describe this distinction in terms of the "severable acts", or "actes détachables" theory of French legal doctrine. Its basic premise is that the decision to award a contract has an independent existence; the duties of the state that arise in this context may be different than those relating to a concluded contract. See, for example, pp. 59-61, and chapters 2, 4 and 5.

This relationship, in turn, must also be distinguished from the more informal, commercial bond that may exist concurrently between a procuring entity and a supplier. A given supplier, for example, may have been providing an entity with products or services for some time; the fact that both he and that entity have commercially valid reasons for wishing to maintain this relationship in between the letting of new contracts for this business does not technically alter the nature of the formal relationship described above. Nor does a situation in which the product or service in question requires post award delivery of further related services or products not included in the initial contract; the latter may, however, provide grounds for limited tendering under the provisions of Article XV of the 1994 WTO Agreement.

limitations on the activities of procuring entities *prior to* the conclusion of a contract.[291] Although potential suppliers may incur additional costs as a result of a breach of these rules after a contract is concluded, eg. foregone profits, the dispute-settlement responsibilities of the Government Procurement Committee focused on facilitation of the resolution of disputes *during* the procurement process. They were part of a system, in other words, that implicitly sought to resolve differences of opinion with respect to interpretation of the Agreement arising between government entities and aggrieved suppliers, not the respective national entities under whose sovereign jurisdiction each was operating. Morton Pomerantz, a USTR official who participated in the Tokyo Round procurement negotiations, has summarised the Committee's responsibilities in the following terms:

"Given that there is a business premium for resolving disputes during the procurement process, the drafters of the Code contemplated that only a few cases would fail to be resolved in this manner. For those few cases, the Code establishes bilateral consultations between the procuring government and the government of the aggrieved supplier... If the bi-lateral approach fails the Code... establishes a Committee on Government Procurement ... to handle disputes... If the Committee examination does not bring about resolution within three months, either party may request the establishment of an impartial panel of three or five members. The panel will make findings of fact, arrive at conclusions and submit recommendations to the Committee... The only Code guideline for Committee action is that it shall aim at the positive resolution of the matter on the basis of the operative provisions of the Agreement and its objectives..."[292]

**Enforcement-related Objectives of the 1988 Protocol of Amendments**

In describing Parties' objectives for the negotiations that ultimately resulted in the 1988 Protocol of Amendments to the Tokyo Round Agreement, Annet Blank and Gabrielle Marceau said:

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[291] The EU's government procurement regime also reflects this aspect of the "severable acts" doctrine.

[292] ibid., pp. 1286 - 1287.

"Parties generally felt that the Agreement was not implemented in a reciprocal fashion and that this created a credibility gap, which could be overcome by improving the text... (They) also felt that if the positive momentum that had been created by the negotiation of the Agreement was not maintained, or reinvigorated, the risk of protectionism could increase, perhaps even in areas presently covered by the Agreement".[293]

Accordingly, in May of 1985, the Committee on Government Procurement established an Informal Working Group on Negotiations (hereafter IWG), whose mandate, according to Blank and Marceau, initially focused "on the improvement of the text...", despite the fact that Article IX, paragraph 6(b) of the Tokyo Round Code had specifically called for "broadening and expansion as well".[294] In summarising the subsequent achievements of these negotiations, these authors emphasised the way in which discussions had been constrained by disagreements concerning whether it was appropriate to extend the Agreement's coverage when remaining textual problems made it difficult to "make a definitive assessment of the potential and benefits offered by the entities already covered", and, in addition, concurrent negotiations then taking place in other fora involving, inter-alia, the rules that were being developed to govern EC-wide public procurement and the Uruguay Round Services Negotiations that had commenced in 1986.[295] Specific textual improvements contained in the 1988 Protocol were ultimately, as was outlined in Chapter 1, largely procedural in nature, and involved enhanced stringency of the tendering rules that were already in place and the introduction new surveillance and monitoring procedures, including post award notification requirements and new statistical reporting standards.

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[293] op. cit., Blank and Marceau, p. 32.

[294] ibid., p. 34.

[295] ibid., p. 35.

**The Uruguay Round-vintage Negotiations**

Chapter 1.1 also described the way in which Article IX 6(b) of the Protocol called for yet further negotiation of the Agreement. The decision with respect to where such negotiation would take place proved controversial; it would, among other things, determine who was entitled to participate. Questions with respect to broadening and expansion were of particular concern in this respect. As Blank and Marceau explained,

"Certain developing countries (that had been observers to the Agreement)... expressed the view that... continuation of the negotiations... should be done within the framework of the Uruguay Round negotiating group on Negotiations in Goods... and not in an Informal Working Group with limited membership... (They stressed) the need to make the Agreement... more broad-based by facilitating the accession of more developing countries".[296]

At the same time, existing Signatories were particularly concerned about the way in which the principles of MFN and national treatment were to apply to the procurement of services by potentially covered entities. There was a desire, according to Blank and Marceau, "Not to move forward too quickly in the IWG before things were clearer in the GNS (Uruguay Round Group on Negotiations on Services)".[297] In the end, it was decided to continue the negotiations in the existing forum: "The Committee on Government Procurement('s IWG) could contribute to the Uruguay Round by taking into account deliberations and views expressed therein, without having to delay its own work".[298]

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[296] ibid., p. 40.

[297] ibid., p. 41.

[298] ibid., p. 41.

Many of the participating delegations in the initial meetings of the reconvened IWG in late 1988/early 1989, as was described in Chapter 1, were of the opinion that the dispute settlement provisions of the 1988 Agreement, and, in particular, its review provisions, were problematic. The problem, as they saw it, was that the existing review provisions did not provide adequate avenues of appeal for suppliers seeking to do business with procuring entities in the other Parties' territories. Despite this early concern, textual, or improvement-related issues received limited attention during the first couple years of the negotiations. Through 1990, the IWG focused on the establishment of what Blank and Marceau termed, the "structure and criteria for negotiations"; that is, which government entities were to be potentially covered by the Agreement and how concessions with respect to such coverage were going to be exchanged.[299] In June 1991, however, the US informed the Committee on Government Procurement that it had held bi-lateral consultations with Norway under the provisions of Article VII, paragraph 4 of the 1988 Protocol concerning the latter's purchase of an electronic toll collection system for the City of Trondheim. That September, following the failure of these two Parties to reconcile their differences via consultations, the US requested that a panel be established to examine the facts surrounding the procurement in question. The results of this Panel had a significant impact on subsequent IWG activities with respect to "surveillance, monitoring and control".

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[299] op. cit., Blank and Marceau, p. 41.

The basic facts in the Trondheim case, according to the official panel report, were as follows:

"In March 1991, the Norwegian Public Roads Administration announced that the toll ring planned for the City of Trondheim would be based on an electronic and mainly unmanned toll collection system, forming part of an integrated payment system for the city, and that a contract had been concluded with a Norwegian company, Micro Design A.S. (Micro Design), relating to parts of this system. This contract was characterised as a 'research and development" contract... No tender notice was issued for the contract... and no tenders or offers were invited from companies other than Micro Design..."[300]

As described by the same official document, the main points made in each of the parties' arguments concerning this contract consisted of:

"The US argued that, since in its view the procurement was for products and not for research and development, and the contract value exceeded the threshold, the totality of the procurement fell within the scope of the Agreement pursuant to the provisions of Article I. Whether or not the supplier awarded the contract had to create new equipment incorporating and integrating new technologies was not relevant to a determination of coverage by the Agreement."

Norway, on the other hand, contended that,

"...since research and development was not a product and the contract was for research and development, only the part of the procurement concerning prototypes was covered by the Agreement, given the provisions of Article V:16 (e)..."

In turn, the US asked that the GATT Panel,

"find that Norway had violated its obligations under the Agreement... recommend that Norway take the necessary measures to bring its practices into compliance with the Agreement... and negotiate a mutually satisfactory solution with the US that took into account the lost opportunities in the procurement of US companies..."

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[300] GATT. "Report of the Panel. Norway - Procurement of Toll Collection Equipment for the City of Trondheim". Gatt Document No. GPR.DS2/R, dated 28 April 1992.

As was suggested by Morton Pomeranz in his review of the Government Procurement Committee's dispute settlement responsibilities, the formal Article VII enforcement mechanism in the 1998 Protocol, like that contained in Article XXIII of the General Agreement, seeks to resolve differences of opinion between Contracting Parties by making an assessment of the facts of the matter as they relate to the application of the Agreement, and recommending the termination of any measures found to be inconsistent with the Agreement. In practice and in keeping with a 1979 Understanding Regarding Notification, Consultation Dispute Settlement and Surveillance, Contracting Parties to the GATT have had recourse to the dispute settlement procedures of the General Agreement "only when in their view a benefit accruing to them under the General Agreement was being nullified or impaired".[301] In cases where there has been an infringement of the obligations assumed under the General Agreement, the action has been considered to constitute what the Understanding terms a "prima facia case of nullification or impairment", requiring "consideration of whether the circumstances are serious enough to justify the authorisation of suspension of concessions or obligations." A key issue for the Panel in the Trondheim case, given the US request that Norway negotiate a mutually satisfactory solution that took into account the "lost opportunities" in the procurement of US companies, thus involved the question of whether there were reasons that would justify disparities between the practices of a dispute settlement panel under the Procurement Agreement and one under the General Agreement. The US, in other words, was asking for an institutional remedy that the GATT was not structured to provide. According to the aforementioned official Panel report, the adjudicative body concluded:

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[301] GATT. "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance". BISD 26S/210.

"... because benefits accruing under the Agreement were primarily in respect of events (the opportunity to bid), rather than in respect of trade flows, and because government procurement by its very nature left considerable latitude for entities to act inconsistently with obligations under the Agreement in respect of those events even without rules or procedures inconsistent with those required by the Agreement, standard panel recommendations requiring an offending Party to bring its rules and practices into conformity would, in many cases, not by themselves constitute a sufficient remedy and would not provide a sufficient deterrent effect."[302]

Although the Panel ultimately concluded that it would not be appropriate for it to recommend that Norway negotiate the kind of mutually satisfactory solution that the US had requested, it did note that "Considerable trade damage could be caused... by an administrative decision without there necessarily being any GATT inconsistent legislation..."

The Trondheim case underscores the fact that GATT dispute settlement mechanisms, including those contained in Article VII of the Government Procurement Agreement, are targeted at containing discrimination that is effected through protectionist legislation; they are designed to safeguard the rights of states party to the treaty. Rights, in other words, that arise from the negative duties that signatories assume not to discriminate in the application of either their external trade policies, or internal "laws, regulations, procedures and practices" that affect imported goods, or services. When signatories undertake positive "duties of result", however, a breach of these obligations impinges upon private interests. Such interests possess only indirect avenues of appeal under the enforcement provisions of both the GATT and the Government Procurement Agreement. As John Jackson has

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[302] op. cit., Report of the Panel, pp. 22-23.

explained, the GATT has traditionally applied "only to *government* action, and not to the actions of private firms or individuals..."[303]

In his previously-quoted discussion of positive policy integration in a European setting, Willem Molle outlined enforcement-related problems arising from the fact that policy measures designed to ensure national treatment affect private, or individual rights, not public ones. Measures of this nature, he concluded, are problematic in that they leave "ample room for interpretation as to scope and timing".[304] A German legal scholar, anonymously-quoted in a recent *Wall Street Journal* article, was somewhat more cynical on this point, describing these measures as "political law", dispensed like burgers at a "Drive-through McDonald's... If you get the jargon right, they just wave you through-and you get a free Coke as well."[305] The remainder of this chapter reviews steps that have been taken in a European institutional setting to ameliorate this problem; it then concludes with a summary of the enforcement-related institutional innovation that occurred in the context of the negotiation of the 1994 WTO Procurement Agreement.

Before proceeding, however, it may be useful to summarise the accomplishments of the latter half of Part I: The previous chapter identified what Patrick Messerlin termed, "three basic principles" embodied in each of the GATT/WTO Government Procurement Agreements: non-discrimination, national treatment and transparency. It concluded with

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[303] op. cit, Jackson's *The World Trading System*, p. 42 and 103, respectively.

[304] op. cit., Molle, p. 12.

[305] Pressley, J. "EU Antitrust Chief van Miert Seeks to Break Up Borders,". *Wall Street Journal Europe*, 17 October 1995.

a lengthy discussion of the distinction between negative and positive policy disciplines, characterised the WTO Procurement Agreement's "transparency obligations" as instances of the latter, and described why such "obligations of result" have been necessary in order to contain the informal discrimination that has continued to segment European public procurement markets.

The first part of this chapter introduced the idea that different kinds of provisions within a treaty can have differing implications with respect to the kind of political obligations states party to them undertake. The nature of these obligations, in conjunction with what John Jackson has termed "constitutional landscapes", conditions their implementation and interpretation. A review of the way in which the obligations of non-discrimination and national treatment contained in the 1994 WTO Procurement Agreement have "traditionally been understood" as negative, "legal prohibitions" followed. This, in turn, was succeeded by a survey of steps taken in the negotiations leading up to the 1988 Protocol of Amendments and during the early stages of the Uruguay Round-vintage re-negotiations to improve the "credibility" of the disciplines engendered by these prohibitions. The discussion concluded with a summary of the unsatisfactory way in which the Agreement's dispute settlement system reconciled differences of opinion with respect to its interpretation in the Trondheim Panel Case.

**Compliance and the EU's Public Procurement Regime**

Considerable study has been made of the relationship between procuring entities and suppliers, and its implications for dispute settlement in the context of the evolving EU

public procurement regime. In an article entitled, "Enforcing the Public Procurement Rules in Belgium", David O'Hooghe described the process of public procurement as an:

"exercise of administrative authority", involving a "public institution('s)... acting in the general interest and mostly empowered to impose unilateral obligations to attain the purpose for which it has been set up".[306]

While the exercise of such administrative powers is an important element in the regular functioning of a state, he said, it also has the potential to impinge upon fundamental - often constitutionally-guaranteed - rights of the individuals who are contending for a contract, including the right to equality before the law. The essential question for Community rule-makers, O'Hooghe concluded, is increasingly one of "balancing limits on administrative authority" against the "principle of continuity" in the functioning of the public service.

The procedural constraints incorporated in the EU's "coordination directives" introduce limitations on the administrative powers of its Parties' procuring entities by providing what O'Hooghe terms, "general principles of a sound and proper administration". Chapter 1.3 of this thesis traced the institutional evolution of these measures and described their "complementary relationship" to the EU's programme of negative integration. From an enforcement point of view, such "rules" - in conjunction with the equivalent national remedies that are supposed to be guaranteed by the "compliance directive" - play an important role in helping to ensure the consistent application of EU law across various national jurisdictions. Sørensen's forequoted model offers insights with respect to how:

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[306] O'Hooghe, D. "Enforcing the Public Procurement Rules in Belgium", in *Remedies for Enforcing the Public Procurement Rules*, edited by S. Arrowsmith. Winteringham: Earlsgate Press, 1993, pp. 91 - 97.

At first glance, the "common rules" would seem to be characteristic of a treaty whose aim is "related to the unification of the internal law of the contracting States"; the function of the "rules", as the Commission said, is to ensure a minimal "coordination of national contract award procedures".[307] Treaties of this unitary "type", according to Sørensen, are supposed to be "concerned solely with relations between individuals or other subjects of private law". As was discussed at length in the proceeding chapter, however, the "common rules" cannot be understood in isolation from the EU's programme of negative integration, a programme that's firmly based on what has been described as "constitutional international law", or rules governing relations between public authorities and individuals. Pelkmans addressed this issue in his discussion of "regulatory flexibility". The objective of the "common rules", he said, is to "establish an internal market, *and* to ensure that it functions effectively in practice."[308] Harmonisation, even on a minimal basis, is not an end in itself. In this sense then, the "rules" would fundamentally appear to be more consistent with what Sørensen termed a treaty that "define(s) the scope of citizen's rights and duties in relation to the State of which he is a national, or the relations between the State and individual without regard to nationality".[309] They are merely a "means" to the ultimate "end" of non-discrimination; any rights that they engender must ultimately arise from the substantive, negative commitments that Member States assume under the Treaty of Rome and the "liberalisation directives".

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[307] op. cit., Commission of the EC, "The Large Market of 1993 and the Opening-up of Public Procurement", p. 5.

[308] op. cit., Pelkmans and Sun, p. 189.

[309] ibid., p. 22.

Given circumstances of this nature, Sørensen concluded, it is "useless to endeavour to classify treaties according to the criterion under consideration".[310] Rather, an intermediate level of analysis is in order. One that proceeds from what he termed the "recognition that *each* provision of a treaty *separately* may confer rights and obligations on different parties". Before we can understand the kind of political commitments a nation state party to a treaty assumes, in other words, we must first recognise the variety of different kinds of undertakings that may be embodied in any given international accord. Sørensen distinguished five separate kinds of provisions, any one, or combination of which could potentially be included in each of the 4 different "types" of treaties. The domestic implementation of these obligations, in turn, remains a product of local "constitutional landscapes". Significantly, however, it may be their purpose to reinforce these local "landscapes". The 6 categories of "conventional clauses" identified by Sørensen include: those containing the "obligation to refrain", i.e. negative disciplines; provisions "obliging the public authorities to take certain action", or positive policy measures; provisions which, "while enunciating individual rights, are concerned with matters which presuppose that the relevant laws have been introduced by the State"; provisions which "authorise the public authorities to take certain action which they would otherwise not be entitled to take; those which, "in the interest of the individual and in order to guarantee him effective protection, establish a certain division of powers between different public authorities"; and, finally, provisions which "regulate the procedure which the judicial authorities are to follow in the exercise of their functions".[311]

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[310] ibid., p. 24.

[311] ibid., pp. 24-27.

In order to understand the particular obligations and rights associated with the EU's procurement regime, it is helpful to recall that the rules are premised on an assumption that the duties of the state that arise in this context change over the course of the contract award process. Rights are at the heart of this changing relationship; political ones in the case of a yet-to-be-awarded contract and civil ones in post-award situations. As has been mentioned, the EU's "common rules" govern the activities of procuring entities *prior to* the conclusion of a contract. The procedural constraints incorporated in the its "coordination directives" introduce limitations on the administrative powers of its Parties' procuring entities and, in so doing, provide "general principles of a sound and proper administration". When such rules are broken, the detrimental effect of their breach is immediate, that is, the administration has exceeded its authority and impinged upon the political, or constitutional-like rights of contending suppliers. But how, in an institutional universe legally segmented by diverse "constitutional landscapes", are these rights to be secured? A right without a remedy, as some have held, is no right at all.[312]

Thomas Grey, in an article entitled "Constitutionalism: An Analytic Framework", arguably addressed this problem, distinguishing between "political" and "special" enforcement of constitutional norms. He said,

"Constitutional norms are subject to political enforcement if the decision of ordinary lawmaking and law-approving bodies is final on the constitutionality of laws that arguably conflict with them... (Special enforcement, on the other hand, entails enforcement) by institutions that do not have general authority to prevent the enactment of laws they judge to be on the whole undesirable... (W)hen legislatures... are left free to interpret the legal

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[312] Also known as the "Bentham-Austin-Kelsen position", this view was quoted and discussed in Thomas Grey's "Constitutionalism: An Analytic Framework", in *Constitutionalism: NOMOS XX*, edited by J. Pennock and J Chapman. New York: New York University Press, 1979, p .197

norms meant to restrain their own powers, they will naturally have a greater tendency to find justification (for the questionable measure) than might a more independent body".[313]

Grey was, of course, talking about the enforcement of constitutional norms at the national level. Insights from yet another legal scholar, Carlos Vazquez, are necessary if Grey's ideas are to be applied in an institutional setting that transcends national borders. In a recent article, Vazquez said,

"Like other laws, treaties are enforceable in courts only if they impose obligations. Some treaties do not impose obligations, but instead, set forth aspirations... (That such) treaties are not judicially enforceable is neither surprising nor troubling. The role of the courts in our governmental system is to enforce the rights of individuals. If a treaty does not impose an obligation on the defendant to treat the plaintiff in a given way, it does not give the plaintiff a correlative right to be so treated".[314]

In light of the above and returning yet again to Sørensen's model, it seems appropriate to reconsider the way in which the fundamental substantive duty of non-discrimination is operationalised in the EU's procurement regime. The negative duties of non-discrimination that are embodied in the Treaty of Rome and the succeeding "liberalisation" directives are clearly what Sørensen would term "obligations to refrain". Leaving aside - for the moment, at least - technical complications relating to the way in which states implement such "law" domestically, the ultimate beneficiaries of the corresponding claim rights that arise from these duties are individuals; constitutional international law, as has been described, establishes limitations on government powers and, in so doing, controls relations between public entities and individuals. Whether these rights are subsequently

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[313] ibid., p. 197.

[314] Vasquez, C.M. "The Four Doctrines of Self-Executing Treaties". *The American Journal of International Law*, Vol. 89, No. 4, October 1995, p. 712.

to be administered by national courts, or the political branches of government, however, must be treated as a separate question.

According to Eric Stein, a former justice of the European Court of Justice, in order to "ascertain whether a provision of an international treaty gives nationals of the state party a right which national courts must protect, it is necessary to consider... 'the spirit, the general scheme and the wording of these provisions'".[315] From the standpoint of the particular treaties under study and the general issues under discussion, it is significant that the rights engendered by the Treaty of Rome and the succeeding "liberalisation" directives were not sufficiently well specified to provide adequate legal recourse for any individual who might have wished to invoke them. Nor were there adequate procedures to guarantee to this individual a judicial or administrative means of challenging the legality of these measures.[316]

The positive policy disciplines embodied in the EU's "coordination directives" constitute what Sørensen termed obligations for "public authorities to take certain action in certain

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[315] Stein, E. "Lawyers, Judges and the Making of a Transnational Constitution". *The American Journal of International Law*, Vol. 75, No. 1, January 1981, p. 9. Herein it is important to note that Stein contrasts these criteria with those set out by the Permanent Court of International Justice in its 1928 Advisory Opinion on the Jurisdiction of the Courts of Danzig. This opinion, he said, held that "the intention of the two parties in question would be determined from the contents, the wording, and the general tenor of the agreement and from the manner in which it was applied". Stein justifies his departure from this "established principle" with the argument that the reasoning in that case would "hardly fit modern conditions since it arose at a time when government intervention in national economies was still limited, when treaties intended to affect private parties were relatively rare, and agreements designed to harmonise and even integrate national economic and social policies were nonexistent".

[316] The role of political commitment - or what Stein refers to here as "spirit" - in the evolution of increasingly stringent EU public procurement disciplines was described in Chapter 1.3. See above, pp. 136 - 137.

circumstances". As was described in the proceeding chapter, they create a "comprehensive institutional framework" to govern the Union's procurement markets, based on "minimal coordination of national contract award procedures"; it functions by introducing limitations on the administrative powers of its Parties' procuring entities. The "general principles of a sound and proper administration" embodied in these limitations, in turn, serve to clarify the rights of potential suppliers to equality before the administration. In so doing, they play an important role in the allocation of political responsibility for the enforcement of the "common rules".

Vazquez said that treaties are enforceable in courts only if they impose obligations to treat plaintiffs in a "given way".[317] In this context, he outlined a distinction between what lawyers term "political" and "judicial questions", referring to the "normative judgements" that are implicit in decisions about the "role of the judiciary" in a given governmental system. Questions of the latter nature arise from treaty provisions that set forth "sufficiently determinant standards for evaluating the conduct of the parties and their attendant rights and duties", whilst political questions emanate from treaty standards that are "too vague for judicial enforcement...(or are) phrased in broad generalities". Vazquez concluded,

"A treaty provision setting forth a vague standard often leaves the parties with considerable discretion concerning the manner of bringing about the desired objective... (D)etermining how to achieve.... (it, in turn,) is more appropriately a task for the legislative branch".

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[317] op. cit., Vasquez, pp. 712-715. Herein, Vazquez cited the US Supreme Court's opinion with respect to the 1884 Head Money Cases, and subsequent "lower court decisions", including People of Saipan v. US Department of the Interior (9th Circuit, 1974) and Frovola v. USSR (7th Circuit, 1985).

From this perspective then, the private rights that flow from the positive duties of non-discrimination and national treatment embodied in the EU's "coordination directives" serve the political function of contributing to the creation of a judicial task.

As was mentioned before, however, the problem with respect to the enforceability of the rights engendered by the pre-1985 EU procurement regime was fundamentally twofold: the private rights emanating from the Treaty of Rome and the succeeding "liberalisation" directives were not sufficiently well specified to provide adequate legal recourse for any individual who might have wished to invoke them *and* the requisite procedures necessary to guarantee to this individual a judicial or administrative means of challenging the legality of measures affecting him did not exist. Although the "common rules" embodied in the EU's "coordination directives" served to enhance what Friedrich Kratochwil has termed the "mandatory quality and definiteness" of the rights arising from the treaties in question, they did not directly address issues pertaining to who was to resolve disputes with respect to their interpretation and how.[318] Michael Hodges, Stephen Woolcock and K. Schreiber depicted this procedural lacuna in their 1991 publication, *Britain, Germany and 1992: The Limits of De-Regulation*:

"The legal structures governing public purchasing and remedies against illegal practices vary considerably across the EC. Some countries, such as France and Italy, have detailed administrative law and administrative courts. Others, such as Britain and Denmark, have no administrative courts, and redress must be sought either informally via a member of parliament of local councillor or by application to a high court for judicial review. Germany is a special case because its Basic Law is interpreted as requiring public purchasing to be governed by private law and thus precludes any intervention by a public body to enforce

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[318] Kratochwil, F. "The Role of Domestic Courts as Agencies of the International Legal Order", in *International Law: A Contemporary Perspective*, edited by R. Falk, F. Kratochwil and S. Mendlovitz. London: Westview Press, 1985, p. 253.

compliance. In theory, all member-states provide for some form of remedy, but these are seldom, if ever, used"[319]

At about the same time, a High Level Group on the Operation of the Internal Market drew attention to the political and economic importance of institutional shortcomings of this nature in its discussion of problems associated with the post-1992 Internal Market, "The Internal Market After 1992: Meeting the Challenge":

"The expectations of industry must be converted into reality by ensuring that barriers are not recreated. There is a risk of fragmentation of the market arising either from divergent interpretation and enforcement of Community law or from the introduction of national rules, which needlessly segment the market".[320]

In December of 1989, the Council adopted the "Compliance, or Remedies" Directive. According to a summary subsequently offered by Sue Arrowsmith, it was "part of a general drive to improving the efficiency of the open procurement policy following the Commission White Paper of 1985" and was "...concerned mainly to improve the enforcement system at the national level".[321] More specifically, according to testimony given in the 1988 UK

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[319] Hodges, M., S. Woolcock and K. Schreiber. *Britain, Germany and 1992: The Limits of De-Regulation.* London: Pinter Publishers, 1991.

[320] High Level Group on the Operation of the Internal Market. "The Internal Market After 1992: Meeting the Challenge". Brussels: October 1992, pp. 7-8.

[321] Arrowsmith, S. "Enforcing the Public Procurement Rules" in *Remedies for Enforcing the Public Procurement Rules*, edited by S. Arrowsmith. London: Earlsgate Press, 1993, p. 50. As discussed in this paper, the legal remedies that are available to "prevent and redress breaches" of the EU's procurement regime exist at two levels: In addition to the provisions under which an individual can make a claim in the national courts, "(w)hen an institution of a member state is alleged to have infringed an obligation arising under the EEC Treaty, the Treaty provides that the state concerned may be brought before the European Court, either by the Commission, under the procedure laid down in Article 169, or by another member state under Article 170". Given the "slow and cumbersome nature" of Article 169 provisions, the fact that "in practice, the Article 170 procedure has not been important" and the lack of an executive authority comparable to the Commission in the institutional environment surrounding the WTO, however, this paper will limit its focus to the remedies available before the national courts. See Arrowsmith, pp. 3-4 and p. 43.

House of Lords Select Committee on the European Communities Hearings on Compliance with Public Procurement Directives, the Directive sought to reconcile the need for uniformity in the application of the Community's "common rules" with the requirement for "due regard to separate (national) legal traditions and procedures".[322] Proceeding from a principle that national law should retain the authority to determine remedies for breaches of the "rules", the Directive, as characterised in the testimony of H.G. Schermers, essentially "order(ed) the governments to set up a particular legal system", or "court procedure". In outlining this procedure, Schemers made a distinction between the existence of legal supervision over EU directives and the nature of court proceedings in individual Member States. Even though the proceedings for going to court may remain quite different in various national jurisdictions, he concluded, the directives can still effectively be applied in the same way:

"...in the Netherlands you bring these cases normally before the civil court, in France and Belgium you bring them before an administrative court. That means already totally different proceedings and it is hardly possible to harmonise that, because in France they do not belong in a civil court and in Holland they do not fit in an administrative court. In England you have again completely different ways of acting before the courts... (A)s long as you have legal supervision over all the Directives, (however) then... (they) can be applied in the same way. I think that the important thing is that there are procedures available that make it possible for the individual to go to court."[323]

As regards the nature of this "legal supervision", or the "common conditions for remedies" prescribed by the Compliance Directive, Sue Arrowsmith suggested that its provisions fell into three general categories:

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[322] House of Lords Select Committee on the European Communities, Session 1987 - 88. "Hearings on Compliance with Public Procurement Directives". London: Her Majesty's Stationery Office, 19 April 1988, p. 48.

[323] ibid., pp. 52-53.

First they obligate states to "take the measures necessary to ensure that 'decisions taken by contracting authorities may be reviewed effectively and, in particular, as rapidly as possible'... (I)n implementing the requirements of the Directive member states must ensure that the benefit of any rules on remedies which are more favourable than those of domestic law can be used by home contractors as well as those from other EC states. The second category of provisions... require that certain specific forms of relief be made available... (including) interim measures, the setting aside of unlawful decisions and damages. Finally, the Directive lays down a number of rules concerning the forum for review and procedure. It provides for safeguards where a review body is not judicial in character; it provides that decisions shall be capable of being effectively enforced; and it stipulates that review procedures shall be available, in effect, at least to interested contractors".[324]

Earlier sections of this chapter referred to the fact that the nature of trade in public purchasing markets has been an important consideration in the enforcement of both the EU and GATT regimes, and described the two kinds of interests that may be affected by an illegal tendering process, public, or political ones and private, or civil ones. In this context, Arrowsmith addressed an on-going enforcement related debate over whether the Compliance mechanism safeguards public, or private interests:

It should be pointed out that there is some ambiguity in the notion of 'effectiveness': it may refer either to the need for a remedies system which is effective to protect individuals, or to a system which is effective to ensure that a public interest behind a particular rule is upheld by ensuring that rule is enforced. A damages remedy is generally seen as one protecting individuals as such, although the threat of damages may of course play an important role in deterring infringements of the law for the wider interest, and in encouraging legal actions... (T)he requirement of an effective remedies system is one which can and should also be applied to require an effective mechanism for enforcing Community rules in the public interest, and likewise the Court should also be prepared to prescribe specific remedies where necessary for this purpose"[325]

Given the fact that the "common rules" contained in the EU regime must be applied in what this paper has been describing as differing "constitutional landscapes", this

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[324] op. cit., Arrowsmith, pp. 51-52.

[325] ibid., p. 49.

"ambiguity" cannot be resolved definitively; different national legal traditions and procedures, such as those governing court proceedings, dictate a unique answer to this question in *each* Member State. If, as in the Netherlands, for example, the awarding of public contracts is generally considered as an act subject to civil law, suppliers appeal nationally against illegal tendering acts on the basis of their civil rights, not their public ones; to the extent that such appeals are successful, the enforcement mechanism thus serves to protect suppliers' private, or civil rights.

From this paper's political point of view, however, this problem is not so intransigent as it might appear. In this sense, it is possible to discuss what these laws may be endeavouring to do, outside of the limits that existing legal systems pose with respect to how it is that they can do what it is they seek to do; the analysis is focused on the nature of the political consensus and objectives that the laws reflect, rather than the interpretation of the existing legal rules, per se.[326] This section of the paper, accordingly, has depicted the EU's procurement regime as an instance of international administrative law, designed to safeguard the political rights of suppliers to non-discrimination or, more specifically, equality before the administration. Just as positive policy disciplines were necessary in order to achieve Member State's negative policy commitments, so, too, is the harmonisation

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[326] Hedley Bull addressed this issue in a 1972 paper, "International Law and International Order" observing, "Norms or rules have a central place in international politics, but the study of them falls uneasily between the disciplines of international politics and international law... It is no doubt desirable that students of international law should look beyond the bounds of a narrowly technical exposition of existing legal rules, to consider the social context of these rules, their function or utility in society and the desirability (or otherwise) of adapting them to changing circumstances. It should not be forgotten, however, that the exposition and interpretation of existing legal rules is the distinctive task of the international lawyer... if he loses sight of it, as he ventures into such fields as ethics, the politics or the sociology of international relations, he will have nothing of his own to contribute to the discussion of the subject". See *International Organization*, Vol. 26, No. 3, Summer 1972, pp. 583-585.

of certain remedial procedures - including those that specify minimum conditions for the award of damages - required if these negative commitments are to be effectively protected. Further insights on this process are again provided by Sørensen's model: In addition to treaty provisions that specify negative and positive duties for signatories, he identified ones which "while enunciating individual rights, presuppose the enactment of other laws or regulations", those that "establish a certain division of powers between different public authorities" and, lastly, provisions "regulat(ing) the procedures which the judicial authorities are to follow in the exercise of their functions". The Compliance Directive, in conjunction with the coordination directives, establishes a division of powers for the enforcement of the Community's government procurement regime; the task is primarily assigned to the national judiciaries, rather than the political branches of government.[327] Similarly, both the negative and positive duties engendered by the Treaty of Rome and the subsequent "liberalisation" and "coordination" directives effectively "presuppose the enactment of other laws or regulations". The proceeding chapter showed how the rights arising from these agreements, despite the fact that some of them were supposed to be directly effective, needed to be augmented by positive policy disciplines in order to ensure that the internal market functioned "effectively in practice." This chapter, in turn, has discussed reasons

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[327] In that the judicial branch of government oversees the relationship between individuals and the state, the former, therefore, have important roles to play as agents of enforcement. The availability of damages, as has been mentioned, typically provides an important incentive for individuals to play this role, at least when their civil rights are threatened, eg. in the US, individuals may sue for triple damages when competition laws are violated. The EU procurement regime has operated from the premise that national law should retain the authority to determine the level of damages for breaches of its "common rules". Whether this provides a sufficient incentive for individual suppliers to police Member States' compliance is, however, an open question. The fact that these same individuals are likely to be approaching the offending public entity for further contracts at some time in future certainly provides a strong *dis*incentive for them to fulfill this role. Many European public procurement experts feel that further regulatory "coordination" may be required in this area. It is also, as will be seen, of relevance in a GPA context in that the damages available under Article XX "may be limited to costs (incurred) for tender preparation or protest".

why "common rules" may necessitate "common procedures" for their enforcement. Whereas the coordination directives and the compliance directives jointly create a judicial task for the enforcement of the Community's procurement regime, the latter operate as a series of provisions "regulat(ing) the procedures which the judicial authorities are to follow in the exercise of their functions".[328]

**Enforcement-related Innovation and the 1994 WTO Agreement**

Bringing the discussion back to the multilateral level, the procedural constraints incorporated in the "transparency obligations" of the WTO Procurement Agreement introduce explicit limitations on the administrative powers of its Parties' procuring entities; as was discussed in Chapter 1.3, they provide standards for the assessment of the

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[328] op. cit., pp. 23-27. Herein, it is interesting to note institutional parallels associated with the evolution of the XIVth Amendment to the US Constitution. The due process provisions of this Amendment, along with the positive rights of citizenship that flowed from the Civil Rights Act, protected rights of national citizenship against the discriminatory acts of state governments. The rules in question involved the political rights of blacks; the discussion that follows is based on Kenneth Karst's article, "Foreward: Equal Citizenship Under the Fourteenth Amendment". *Harvard Law Review*, Vol. 91, No. 1, November 1977: The thirteenth amendment to the US Constitution abolished slavery in 1865. "To replace the outlawed Slave Codes, the Southern states (in response) began to enact the Black Codes - laws systematically imposing disabilities on blacks and designed to keep them in a status of inferiority and dependency closely resembling slavery... To abolish this new system of serfdom, Congress adopted the Civil Rights Act of 1866... (providing) All persons born in the US... shall have the same right... to make and enforce contracts, to sue, be parties, and give evidence, to inherit, to purchase, lease, sell, hold and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens..." Whilst the proponents of the Act assumed that Congress had the power to enact it under the thirteenth amendment, President Johnson vetoed the bill; nevertheless, it became law over this veto after Lee's surrender at Appomattox. Subsequently, "(t)he framers of the fourteenth amendment sought to write the principle of equal citizenship, with all its modern implications, into the Constitution... By providing firm constitutional protection for the substantive rights of the 1866 Act, the framers guaranteed that all citizens, including blacks... would share equally the civil rights that seemed significant at that time". In sum, the XIIIth amendment's prohibition of slavery is like the fundamental negative duty of non-discrimination emanating from the Treaty of Rome and the "liberalisation" directives. The positive duties/corresponding "rights of citizenship" embodied in the Civil Rights Act of 1866 are similar to those contained in the "coordination" directives. Finally, the due process provisions of the XIVth Amendment are comparable to the "common conditions for remedies" prescribed by the Compliance Directive.

"commercial reasonableness" of a covered entity's purchasing decisions. The political purpose of these standards is similar to that of the "general principles of a sound and proper administration" embodied in the EU's coordination directives. As the GATT Secretariat's "Practical Guide to the GATT Agreement on Government Procurement" put it, they seek to "ensure the effective application of... (the Agreement's) basic principles".[329]

It will be recalled, however, that Mavroidis and Hoekman said that the means of satisfying the positive obligation of national treatment that is contained in Article III of the 1994 GPR are "not spelled out". Moreover, they referred to the fact that the duty of national treatment in a GATT setting has traditionally been understood in a negative sense. Nation states party to the Agreement, on this view, are prohibited to discriminate between foreign and domestic *sources* in "respect of all laws, regulations, procedures and practices regarding government procurement covered by the Agreement", but they are "free to choose whatever means they deem appropriate to achieve... (this) result". Does a discrepancy exist here? If so, how might it be explained?? Could it have anything to do with the textual changes that were introduced in the 1994 GPR?

Earlier chapters have described the way in which Part II of the GATT forms the basis of what John Jackson has termed a "uniform code of conduct" for its Contracting Parties' commercial policy; it was designed to protect the reciprocal tariff concessions negotiated under Part I of the Agreement. This "code" functions through the obligations of national treatment that it imposes under Article III, and a series of general restrictions on countries'

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[329] GATT Secretariat. "Practical Guide to the GATT Agreement on Government Procurement". Geneva: 1989 Revision, p. 3.

use of NTBs that are contained in Articles IV-XXI. Article III, paragraph 8 of the GATT, as was also discussed, specifically exempts the "laws, regulations and requirements" governing CP's public procurement from the "code's" fundamental duty of national treatment, whilst Article III of the GPA reintroduces a similar obligation for its Member States. Although the disciplines of the latter are significantly less broad in terms of coverage and involve reciprocity-based discrimination, their purpose is comparable to that of Article III of the GATT; they were designed to ensure that domestic laws and practices could not operate as surreptitious forms of protection.

The Article XXII consultations and dispute settlement provisions of the GPA, like those of Articles XXII and XXIII of the GATT, provide for remedies in the case of "nullification and impairment" of the reciprocal benefits expected to flow from the respective Agreements. Earlier sections of this Chapter explained that there need not be an infringement of obligations assumed under either Agreement in order for instances of "prima facia nullification or impairment" to arise; actions of a state that undermine the "reasonable expectations" of fellow contracting parties as regards the reciprocal benefits they have negotiated may be sufficient. Differences of opinion with respect to the interpretation of the national treatment obligation often involve "prima facia nullification or impairment", or non-violation-type questions. It is practically infeasible to have multilateral rules to govern every conceivable domestic measure that may impinge on trade; the number of regulations and practices that could potentially be used as protectionist measures to defeat the purpose of tariff bindings is only limited by the imagination of the lawyers who have to draft the necessary legislation, and that of the politicians/bureaucrats who, subsequently, have to implement it. Nevertheless, as Jackson

has said, "The ingenuity of man in devising import restraints which skirt the formal rules of international trade seems boundless".[330]

This situation has been associated with enforcement-related ambiguities since earliest days of the GATT. As was the case with the previously-discussed EU procurement regime, these difficulties are fundamentally related to the question of who is to administer the rights - if in fact they can accurately be described as rights - that arise from the treaty. In his text on the GATT legal system, *The GATT Legal System and World Trade Diplomacy*, Bob Hudec argued that enforcement-related ambiguity was a distinguishing characteristic of the "diplomat's jurisprudence" that this system embodies.[331] Many of the draftsmen of the both the ITO and the GATT, he said, distrusted "lawyers and what was understood to be the legal method". Nevertheless, they did not counsel a "retreat to the negotiated solutions of the... (prewar) trade agreements model". Rather they proposed a "diplomat's jurisprudence", designed to "blur and soften the more forceful parts of a conventional legal system"; it consisted of a series of clear limitations on what governments could do, combined with a high degree of discretion in the application of these limits. Transgression of the limits, in turn, was to result in moral "chastisement", rather than legal "punishment". In discussing the subject of "rights" in this legal setting, Hudec quoted a memorandum submitted by the British delegation during the 1946 ITO negotiations:

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[330] ibid., p. 203.

[331] op. cit., p. 30. The following summary of the ITO/GATT legal system is extracted from Chapter 3 of this book, pp. 23-36. Herein, the fact that, as Hudec put it, there were "few substantive differences between the GATT and the final ITO Charter" needs to be emphasised. The latter, originally envisaged as an interim agreement that would only be necessary until the ITO was ratified, "assimilated the basic elements of the ITO legal system". Pp. 49 - 52 of Hudec's text address this issue.

"...(T)here are numerous provisions of the charter which require the exercise of discretion and economic judgement rather than precise interpretation of the terms of the Charter... (T)he law of the ITO should be dynamic, and should be open to amendment and addition in the light of experience in this new field of international activity. The making of rulings under the Charter should, therefore, we feel, be the function of the ITO itself and not of an outside body such as the International Court whose proper function is to determine questions of law and not to appraise economic facts".[332]

The efforts to "moderate the force of the ITO('s) legal obligations", however, were to have what Hudec termed a "paradoxical effect" with respect to the interpretation of "non-violation complaints" arising from the GATT. This situation, in turn, was further complicated by the fact that, although the obligations engendered by the latter were substantially the same as those of its "institutional" predecessor, they had only been accepted "provisionally" by GATT CPs, *and, even more significantly*, these states had agreed to bind themselves to the Part II "code" only "to the fullest extent not inconsistent with existing legislation".

Many of the political issues associated with this unusual legal situation were addressed in a 1950 Working Party Decision on Australian Ammonium Sulfate Subsidies.[333] According to the Parties' Report that was adopted by the CPs on 3 April 1950, the dispute arose from the "removal... of nitrate of soda from the pool of nitrogenous fertilizers which... (was) subsidized by the Australian Government..." After determining that this act did

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[332] ibid, p. 29.

[333] "Working Parties" were the institutional predecessors of GATT "Panels"; because of the legally fluid way in which they operated, they were, according to Hudec, an important manifestation of the informal, discretionary way in which disputes arising from the Agreement were to be resolved. See pp. 78-80.

The "Working Party Report on the Australian Subsidy on Ammonium Sulphate" cited later in this paragraph is re-printed in entirety in Appendix D of Hudec's book, pp. 337 - 345.

not conflict with specific obligations Australia had undertaken under the Agreement, the Working Party considered the question of "whether the... measure had nullified or impaired the tariff concession granted by Australia to Chile on nitrate of soda in 1947". In this context, it found itself squarely confronting the "paradox" to which Hudec had referred. At issue, according to a summary of this case offered Professor Hudec's *The GATT Legal System and World Trade Diplomacy*, was the extent of the GATT's authority to judge the consistency of a CP's "otherwise legal conduct" with its obligations under the Agreement's nullification and impairment clause.

According to Hudec, "extra-legal regulatory powers", or "common law possibilities" emanated from the legally unorthodox way in which the GATT was supposed to resolve such differences of opinion. This was the so-called "paradox". As manifested in the Australian Ammonium Sulfate Subsidies Case, it required that the Working Party balance a CP's sovereign "freedom under the Agreement" to support its domestic agricultural producers via a policy mechanism that was not, per se, inconsistent with the obligations of the Agreement, with its concurrent duty not to exercise this "freedom" in a way that would nullify or impair another country's reciprocal benefits. By design, the Working Parties' judgement was to be a political one, not a judicial one; the "nullification and impairment procedures", as Hudec put it, "had virtually no substantive guidelines".[334] In ruling against the Australian subsidy policy, the "adjudicative body" thus effectively exercised law-making powers *over* the Australian Government. The formal Australian response to their decision, according to Hudec, remains institutionally unprecedented in terms of the strength of its rejoinder:

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[334] op. cit., Hudec, p. 39.

"Australia cannot consider it a sound argument that what a country might now say was its *reasonable expectation* three years ago in respect of a particular tariff concession should be the determining factor in establishing the existence of impairment in terms of Article XXIII... The history and practice of tariff negotiations show clearly that if a country seeking a tariff concession on a product desires to assure itself of a certain treatment for that product in a field apart from rates of duty *and to an extent going further than is provided for in the various article of the General Agreement*, the objective sought must be a matter for negotiation in addition to the actual negotiation respecting the rates of duty to be applied. If this were not so, and if an expectation (no matter how reasonable) which has never been expressed, discussed or attached to a tariff agreement as a condition is interpreted in the light of the arguments adduced in the report of the working party, then tariff concessions and the binding of a rate of duty would be extremely hazardous commitments and would only be entered into after an exhaustive survey of the whole field of substitute or competitive products and detailed analyses of probable future needs of a particular economy".[335]

The idea of "freedom under the Agreement" as discussed by the Australian Subsidy Working Party is a fundamental political presumption in the institutional environment that has gradually evolved from the ITO Charter. Whatever parties to the Agreement were not specifically forbidden to do under the terms of the Part II "code", they were generally free to do. This constitutes the notion of negative liberty to which Mavroidis and Hoekman were referring in their discussion of the 1994 WTO GPA; it also, as will be seen in Part II, is characteristic of the way in which political authority is constrained under the unwritten British constitution. Hudec's "paradox" thus explains how CPs can enjoy such "freedom" whilst, at the same time, their "inaction... as well as action to the contrary... (may give) adequate grounds to affected parties for legal proceedings to be initiated"... Formal limitations on CP's domestic "liberty under the Agreement" would not, that is to say, have been consistent with the "diplomat's jurisprudence" on which the systems' "code of commercial conduct" was premised. How, then is this situation specifically related to the institutional changes that are reflected in the 1994 GPA?

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[335] op. cit., Hudec, pp. 344-345.

**Remedying the GPA's "Shadowy" Legal Commitments**

Earlier sections of this chapter described the (Committee on Government Procurement's) IWG participants' dissatisfaction with the dispute settlement provisions of the 1988 Government Procurement Agreement; an outline of the Trondheim Panel case was presented to illustrate how existing enforcement mechanisms protect the rights of states, rather than those of the individuals whose interests might be affected by an illegal tendering process. A lengthy discussion of how and why the GPA primarily impinges upon interests of the latter nature preceded this review. Since the Tokyo Round Government Procurement Code was agreed, many of the textual changes that have been negotiated - including those in the 1994 WTO Agreement - have arguably served to clarify the "individual rights" it indirectly engenders; "lessons" from EU integration would suggest that this change is designed to make them more justiciable. Similarly, "private rights" in this particular institutional context emanate from explicit limitations on Parties' "freedom under the Agreement", or positive requirements that government officials conduct covered tendering activities in accordance with certain procedures. Herein, the "regulatory logic" of the EU's public procurement regime would imply that such disciplines - if they are to be effective - necessitate the introduction of common procedures for their enforcement, as well. The remainder of this chapter "revisits" the textual changes associated with the 1994 GPA, considering them, this time, from the "institutional vantage point" offered by on-going processes of EU integration.

The re-negotiation of the GPA that paralleled the Uruguay Round, as was described at length in Chapter 1.1, was motivated by its Parties' recognition that more of the trade conducted in this context should be brought under GATT disciplines. This quest was

effectively conditioned on enhanced "credibility" of the existing rules and, in particular, those with respect to the resolution of disagreements arising from their implementation. A 1989 communication from the Government of Switzerland to the Uruguay Round Negotiating Group on Dispute Settlement addressed issues of this nature, in general, in a review of enforcement-related problems arising from "illicit governmental decisions affecting... (individual) trading interests and rights".[336] Proceeding from an observation concerning the inadequacies of a dispute settlement system geared solely towards the resolution of conflicts of interest between CPs in a globalising world, this paper called for the opening of a multilateral dialogue concerning the "problem of domestic implementation of trade rules and enforcement of governmental decisions related to international trade". Earlier sections of this chapter have consciously side-stepped this particular issue, "hiding behind" an argument that it would have introduced unnecessary complications that would have made it more difficult to understand fundamental political parallels between the European and WTO public procurement regimes. It was simply noted that the EU rules enjoy "exclusive competence" over the public procurement that is conducted throughout the Union, and that they are part of a separate, supranational legal order that, among other things, creates private rights that transcend national boundaries. The existence of the Treaty of Rome-engendered rights of European suppliers in other Member States were but one instance of this.

It will be recalled that the "directly effective" rights connected with this simplifying assumption were not sufficient in and of themselves to ensure the realisation of a "common"

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[336] Government of Switzerland. "Communication from Switzerland", dated 29 December 1989, and distributed at the IWG Negotiating Group meeting of 18 January 1990, p. 1.

EU procurement market. Positive policy disciplines needed to be introduced in order to help to "de-politicise" processes associated with their interpretation, and "common enforcement procedures" were ultimately required as well so as to guarantee individual suppliers a judicial or administrative means of challenging the legality of national measures impinging upon their interests. Rules governing the implementation of the supranational rules, or, more specifically, allocating the political responsibility for their enforcement, were of critical importance in the achievement of the EU's integrative ends.

The legal order embodied in the GATT, by comparison, has been an exeedingly loose, or voluntary one. As has been discussed, the "code" of commerical behaviour embodied in Part II of the Agreement reflects a commitment to the principles of non-discrimination and national treatment, but it is riddled with exceptions, eg. the "grandfather rights" associated with its longstanding provisional application and the exclusion of government procurement markets from its disciplines. Generally speaking, the rights and duties arising in this institutional context, including those individuals may gain, are only indirectly binding; they are a product of national implementing legislation. Such legislation, in turn, is subject to the vagaries of national "constitutional landscapes". Furthermore, any clashes that may arise between "code" norms and domestic jurisprudence are, by design, supposed to be resolved by political judgements, not judicial ones. Given this institutional setting, what meaningful options would have been open to the IWG negotiators, meeting in late 1988, to "enhance the credibility" of the rules embodied in the GPA?

The previously-mentioned Swiss Communication proposed 3 different "models" for the improvement of domestic enforcement and realization of GATT law, each associated with a "different level of ambition" as regards integration:

1) "The most radical step... would be the introduction of obligations of contracting parties to give full effect within national legal systems to relevant provisions... In accordance with their constitutional relationship of international and national law, countries would choose appropriate techniques to comply with such obligations..."

2) "Another less far reaching proposal might leave contracting parties the choice to pick and choose a qualified number of provisions of said agreements, and have them directly implemented on a reciprocal basis... Private subjects or entities would be entitled to invoke such provisions before the administration or the courts of law of the importing contracting party only to the extent the country of origin equally provides for direct or transformed application of the provision invoked..."

3) "Finally, it is conceivable to reinforce obligations of contracting parties to provide for effective remedies and review of governmental decisions related to international trade, yet without prescribing full effect to substantive GATT rules and disciplines. Such an approach is not new to GATT. It is already contained in Article X:3 of the General Agreement. Contracting parties are under the obligations to administer the law in a uniform, impartial and reasonable manner and to establish judicial review...."[337]

The first option is roughly comparable to the approach that has been applied in an EU context. It basically involves the creation of a supranational legal entity. Earlier chapters have described the important role political commitment plays in such an undertaking; it is clear that such commitment does not exist at this time in a multilateral setting. Nor can it be introduced by means of international obligations.[338] Similarly, the second model, according to the Swiss, "also implies major conceptual shifts of GATT in its relation to domestic law". In that "concepts would have to be designed in order to preserve the unity

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[337] ibid., p. 2.

[338] This is arguably *still* an on-going problem with the EU's public procurement regime. A recent article in the *Wall Street Journal* described the introduction of a common EU procurement "vocabulary", a mechanism apparently designed to counter continuing compliance problems. See *Wall Street Journal Europe*, 5 September 1996.

of the system", the Swiss proposed that "further work (for the time being) should be based on the third and modest level of ambition":

"... (T)he general scope of Article X:3 (of the General Agreement) should be clearly expressed and applied to all areas covered by the General Agreement, including non-tariff barriers... (In this context, it would be) conceivable to introduce, for example the following requirements to be met by national procedures:

- Provisions for fair hearing for all parties substantially affected by administrative or juridicial action related to international trade...

- Obligation to provide, at least upon complaint, a reasoned decision without undue delay.

- Prompt and effective provisional measures in case of pending irreversible damage.

- Prompt and effective administrative or judicial review of administrative action related to international trade. The scope of judicial review may be limited to issues of law, excluding questions of fact and discretionary exercise of authority within the law."[339]

In their discussion of multilateral judicial review-like requirements, the Swiss made a distinction between the substance of trade regulations affecting individual rights and obligations, and the implementation of such measures. As long as it remains politically infeasible to give full effect to the multilateral provisions impinging upon such interests

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[339] The text of GATT Article X:3 reads: (a) "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings... (b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers... (c) The provisions of sub-paragraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement..." See op. cit., GATT, "The Text of the General Agreement on Tariffs and Trade", pp. 16-17.

within national legal systems, the content of individual rights and the obligations of private subjects, in their view, should remain fundamentally in the realm of national law. Nevertheless, the manner in which any "common" regulations are administered *is* rightly a matter for inter-governmental discussion and debate. Minimum procedural standards such as those embodied in the GPA's "transparency obligations" are designed to assure consistent administrative processes, or uniform application of Member States' substantive commitments, eg. to non-discrimination; their purpose is to enhance the predictability of the individual rights and obligations arising from cooperative regulatory measures. Questions pertaining to the interpretation of national regulations affecting individual interests and "whether they cause nullification and impairment by violation of international rights and obligations under GATT", on the other hand, should, according to the Swiss, remain the subject of traditional dispute settlement procedures. This includes disputes arising from alleged violations of the minimum procedural standards.

Article VI of the Tokyo Round Code and the 1988 Protocol, as was described in Chapter 1.1, obligated Parties to the Agreement to establish some kind of administrative review; it failed, however, to specify criteria for the establishment and operation of such procedures. The fact that, during the early days of the negotiation of the 1994 GPA, many of the IWG participants were concerned by this procedural lacuna has also been addressed. By mid-1989, both the EC and the US had formally recognised the role that review might play in the integration of regional government procurement markets; a "Bid Protest Mechanism" had been introduced in the Canada-US Free Trade Agreement and the EC's "Compliance

Directive" was scheduled for adoption in December.[340] Supplier-initiated review had moved firmly onto the multilateral negotiating agenda during the June 1989 meeting of the IWG.[341]

The idea for a "bid challenge mechanism" had first been proposed in the IWG by the Nordics in 1985, during the negotiation of the 1988 Protocol.[342] A company-initiated review system had been introduced in the EFTA following the 1967 review of national laws, regulations and practices relating to the award of public contracts described in Chapter 1.2. Experience with that measure had served to reinforce what this thesis has described as a "sea change of philosophical opinion" with respect to the technologies of free trade that was then getting underway. The Scandinavians had, in any case, clearly recognised that substantially more than normative rules were going to be required in order to halt discriminatory practices in public procurement.

Delegates' early concerns with the proposed GPR review mechanism involved: 1) the way in which independent reviewing bodies would inter-relate with national jurisdictional court processes; 2) whether or not such bodies would have investigative powers and; 3) if the proposed system involved the introduction of new guidelines, or obligations for

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[340] See Arrowsmith's forequoted "Enforcing the Public Procurement Rules", p. 50 and "The Canada-US Free Trade Agreement and Government Procurement: An Assessment", published by External Affairs and Supply and Services Canada. Ottawa: 1989, pp. 19-20.

[341] "Secretariat Note Circulated at the IWG Meeting of 13-15 June 1989".

[342] "Informal Nordic Discussion Paper" of 4 October 1988, p. 5.

Parties to the Agreement.[343] Japan and Israel also expressed concern regarding the possibility of "frivolous complaints" under such a system.

Despite these reservations, in October of 1989, the first concrete proposal for an amendment to the 1988 Code on this point was tabled by the US.[344] Discussions within the IWG Negotiating Group on the mechanism continued through 1990. Concern amongst the delegates had, by this time, shifted to the usefulness of such a system relative to its likely cost. In November of 1990, Japan and the 3 developing country participants in the negotiations stated that they would have difficulties in making the proposed procedures legally binding.[345] By 1991, 3 delegations had submitted detailed information to the Group concerning possibilities for such a system within their national legal systems, the EC, the US and Canada.[346] The challenge mechanism that ultimately emerged from these negotiations was substantially the same as the one that had been proposed by the EC in 1989. It was described at length in Chapter 1.1; its objectives, nonetheless, merit re-iteration: The review mechanism was designed to ensure that the Agreement's principles of non-discrimination, national treatment and transparency were respected in an efficient and timely manner; that administrative errors in implementing these principles could be corrected when identified; and, that if such mistakes could not be amended, commercially satisfactory remedies would be available to the injured party.

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[343] GATT Secretariat. "Secretariat document on surveillance and monitoring", dated 11 August 1989.

[344] US Government. "Proposal for Code Bid Protest Mechanism", dated 4 October 1989. See also BISD 37S/304 for further discussion of this proposal.

[345] GATT Secretariat. "Status in the Government Procurement Negotiations Under the Code Committee", dated 26 November 1990.

[346] GATT. BISD 36S/448, Geneva: July 1990.

Chapter 1.1 also referred to the new bid challenge mechanism as being fully consistent with the established, "phased approach" to the resolution of government procurement disputes: Supplier-initiated information and review provisions are contained in Article VI of the Tokyo Round Code and the 1988 Protocol, and Articles XVIII-XX of the 1994 Agreement. Formal state-to-state dispute settlement procedures, on the other hand, are defined in Article VII of the Code and 1988 Agreements, and Article XXII of the 1994 Agreement, combined with the relevant provisions of the Understanding on Rules and procedures Governing the settlement of Disputes. It also addressed the fact that Article XX, paragraph 7 (c) of the 1994 Agreement introduced an important additional element into this process: consideration of damages. Under this provision, Parties' challenge procedures must provide for "correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest."

This chapter has introduced the idea that two different kinds of interests may be affected by a breach of the rules governing the contract award process: public or political rights, and private or civil ones. An argument has been developed that an administration's failure to adhere to both the EU and WTO GPA's "general principles of a sound and proper administration" impinges upon the political rights of contending suppliers. Suppliers who invoke the terms of the Agreement against a particular administrative entity in either institutional context are effectively acting as third party agents of the public interest. Article XX, paragraph 7 (c) of the 1994 GPA, on the other hand, governs what has been described as the "post-award relationship" between suppliers and procuring entities. It requires that Parties to the Agreement offer injured suppliers an opportunity to recover damages at

least sufficient to cover their tendering or bid protest costs. Such costs are directly associated with civil interests affected by a breach of the Agreement.

In discussing the damages provisions of the EU's "Compliance Directive", Sue Arrowsmith, it will be recalled, referred to the difficulties associated with determining whether they function to safeguard public or private interests. "A damages remedy", she said, "is generally seen as one protecting individuals as such, although the threat of damages may, of course play an important role in deterring infringements of the law, and in encouraging legal actions".[347] Like the EU Compliance Directive, the GPA's challenge mechanism is now being implemented in a variety of different national "constitutional landscapes". For this reason, it is similarly problematic to identify the specific legal interest it serves to protect. From this paper's political point of view, however, this is, once again, not really the most interesting question. Rather, what is significant is that the mechanism creates a judicial task, recognises certain political interests in the process of doing so, and assigns responsibility for completion of the task to national court-like entities. The individual interests that are recognised in this process, for reasons that will be examined in the following section, are instrumental to the end of creating and maintaining the public good that is reflected in the wider market created by the rules.

Thinking about some of Sørensen's forequoted ideas with respect to the way in which the provisions of treaties work together to achieve a given end, or ends, sheds further light on the way in which the Article XX bid challenge mechanism is likely to function in a given national jurisdiction. The purpose of the mechanism, as has been described, is to

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[347] op. cit., Arrowsmith's *Remedies for Enforcing the Public Procurement Rules*, p. 49.

create national fora in which individual suppliers have the opportunity to formally question the consistency of Member States' administrative practices with specific procedural obligations that they have assumed under the Agreement. This institution must be capable of performing what has been termed a "judicial task". How has a task of this nature been created? In his discussion of self-executing treaties, Vasquez said, "(C)ourts enforce the rights of individuals... If a treaty does not impose an obligation to treat plaintiff in a given way, it does not give him a correlative right to be so treated..."[348] In discussing such obligations, John Jackson has made a distinction between obligations with "direct application", and those with "invocability".[349] Direct application, he said, pertains to the "treaty's role in domestic law"; it expresses the notion that the international treaty instrument has a 'direct' statutelike role in the domestic legal system. Earlier sections of this chapter have used the European Community's term, "effectiveness", when considering issues of this nature. According to Jackson, these two concepts are not precisely the same; for the political purposes of this thesis, however, their differences are of minor importance. The fact that WTO norms governing government procurement, unlike those embodied in the EU regime, are usually neither directly effective, nor directly applicable, however, is; the former typically require national acts of transformation in order to become binding obligations on the governments implementing them.

Jackson's concept of invocability "refer(s) to a group of concepts, one of which is similar, but not necessarily identical to 'standing'... (It involves a determination with respect to)

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[348] op. cit., Vasquez, p. 712.

[349] op. cit., Jackson's "Status of Treaties in Domestic Legal Systems: a Policy Analysis", p. 310.

who is entitled to invoke or rely on the treaty norms".[350] Policy decisions with respect to a given treaty obligation's invocability, he said, depend on things like, "the precision of the language, definitions of categories of persons, or concepts of justiciability or 'political question'". Before the introduction of the EU's "common rules" for public procurement and "common remedies" for their enforcement, the private rights emanating from the Treaty of Rome and the succeeding "liberalisation directives" were not sufficiently well-specified to provide adequate institutional recourse for *any* individual who might have wished to invoke them. This chapter has traced the way in which the GPA's "transparency obligations" have become increasingly stringent during the lifetime of the multilateral procurement regime. It is posited that this process is related to their invocability. In conjunction with the introduction of the new bid challenge mechanism, the result has been to create invocable, multilateral norms, albeit ones that remain, at least from a technical point of view, voluntary.

To return to the specific issue of damages, the inconsistency of the GPA's damages provision with traditional remedies in the GATT's legal system also bears emphasis. In his discussion of the "diplomat's jurisprudence" that is embodied in this system, Bob Hudec made a distinction between "punishment" and "moral chastisement". The violation of legal obligations, he said, usually results in formal sanctions, or punishment. The GATT's authority to "punish" those who violate its obligations, however, has traditionally extended no further than an "escalated series of normative pressures".[351] Despite the fact that the damages provision allows only for the recovery of costs associated with "tender preparation

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[350] op. cit., Jackson, p. 317.

[351] op. cit., Hudec, p. 35.

or protest", it is an instance of something far more than "moral chastisement" for the breach of multilateral rules.

Enhanced stringency of the procedural obligations and institutionalised avenues of appeal are not the only factors contributing to the justiciablity of the obligations arising from the GPA. Patrick Messerlin, in a text prepared for a 1994 OECD workshop on the "New World Trading System", underscored the fact that the 1994 GPA contains no escape clause, or safeguard provision.[352] This, he contended, is inconsistent with the "GATT's (general) tendency to introduce (opportunities for) contingent protection". At the same time, it would seem to be consistent with the introduction of "hard" legal obligations not to discriminate.

Finally, the manner in which the rights and obligations arising from this plurilateral accord are distributed and subsequently maintained is also, arguably, an important factor in its "legal credibility". In its discussion of the "coverage" of the 1994 GPA, Chapter 1.1 referred to the fact that market access concessions were exchanged on the basis of a quest for bi-lateral "balance", or the relative value of a particular opportunity expressed as a percentage of a Party's national GNP. The benefits of the Agreement, in other words, are only to be enjoyed by those willing to provide equivalent market access privileges. Article XXIV, Paragraph 11 extends this conditionality to the benefits that any Party that may subsequently decide to accede to the Agreement can achieve. It reads:

This Agreement shall not apply as between any two Parties if either of the Parties, at the time either accepts or accedes to this Agreement, does not consent to such application.[353]

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[352] op. cit., Messerlin, p. 66.

[353] op. cit., GATT, "Agreement on Government Procurement", p. 31.

In addition, the reciprocal market access benefits that any given Party to the Agreement may have obtained are safeguarded by the fact that the cross-retaliation that is permitted under Article 22, paragraphs 2 and 3(c) of the Dispute Settlement Understanding is prohibited in a GPA context. If the WTO Dispute Settlement Body (hereafter DSB) authorises a suspension of concessions or other obligations in retaliation for a Member's nullification and impairment of benefits arising from another WTO Agreement, that is to say, the complaining Member may not take such retaliation via the withdrawal of benefits exchanged under the GPA. The relevant sections of the texts in question read:

Paragraph 2:

"If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time... such Member shall... enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation".

Paragraph 3(c):

"If that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concession or other obligations under another covered agreement"[354]

Article XXII, paragraph 7 of the 1994 GPA, on the other hand, states:

"Notwithstanding paragraph 2 of Article 22 of the Dispute Settlement Understanding, any dispute arising under... this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement..."[355]

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[354] WTO Secretariat. "The WTO Dispute Settlement Procedures: A Collection of the Legal Texts". Geneva: August 1995, p. 23.

[355] ibid., p. 92.

The following section of this thesis will take a closer look at the nature of the political obligations associated with this plurilateral Agreement. Whereas this section has established that the GPA represents a departure from the traditional GATT "regulatory methodology" in that its positive disciplines and innovative approach to enforcement offer a way of disciplining Members' domestic policies and practices, Part II will consider the new Agreement's innovations relative to the issue of intervention. The need to respect "inviolable sovereign freedoms" - or, the equal liberty of sovereign states to assess and pursue their citizens' interests - it will be recalled, has, heretofore, made it politically impossible to develop effective multilateral domestic policy disciplines. The thesis' introductory preface, more specifically, has attributed the GATT's traditional, "politicised" approach to the discipline of Contracting Parties' domestic policies to the variety of positive, social welfare-related responsibilities that its otherwise, generally negative Member governments have assumed. In offering an institutional avenue for the resolution to this "regulatory dilemma", the GPA and, in particular, its positive legislative and administrative obligations, interferes with Member States' autonomy. The following section examines *how*.

## Part II - Interventionary Aspects of the GPA

### 2.1 Recapitulation of the institutional "lessons" offered by the GPA

Before entering in to a discussion of the nature of the intervention associated with the GPA's domestic policy disciplines, it is probably a good idea to summarise the lessons that have been gleaned thusfar from its institutional evolution. The thesis' introduction outlined an institutional problem, specifically, the GATT's traditional focus on the reduction of trade barriers between national markets and the political problems that have plagued efforts to develop effective multilateral disciplines to contain non-tariff barriers to trade that may undermine trade policy liberalisation. The "codes approach" that was inaugurated during the Tokyo Round - and, in particular, the 1967 Anti-Dumping Code - was described as an important institutional innovation in that it introduced a politically palatable model for the discipline of discriminatory domestic policies and practices. The problems of negotiating NTBs, it will be recalled, had been characterised on the basis of a series of "operating dilemmas" of liberal international order, including those relating to the fact that the postwar trading system constitutes a public good, but lacks an international authority to oversee its production and distribution. Part I subsequently provided evidence that the GPA offered an innovative approach to the production and maintenance of order as well as the allocation of its costs and benefits, namely: the alternative to one-state, one-vote representation reflected in its rule-making body, the Informal Working Group on Negotiations; the reciprocity-based discriminatory features that govern the distribution of its market access benefits; the review mechanism that enlists national court-like bodies as agents for the enforcement of international order; the damages provisions and, finally; the lack of an escape clause.

Changes in the international political economic context also played an important role in the evolution of the domestic policy disciplines embodied in the GPA, arguably altering Member States' thinking with respect to the relative costs and benefits of "common practices". Chapter 1.2 identified the following as major factors in the weighting of the respective variables in the "cooperative equation" faced by each potential Member: the economic integration that the GATT has facilitated during the first 50 years of its existence, the international deregulation of financial markets, the end of the Cold War, and changes in the relative power of the US, the postwar hegemon. The effect of these changes, in turn, was characterised as an increased awareness of the "opportunity costs" associated with non-cooperation.

The kind of intervention that is involved in the GPA's domestic policy disciplines would appear to be relatively straightforward; its positive policy disciplines, or "transparency obligations", and judicial review-like enforcement mechanism "impinge" upon both sovereign legislative and administrative authority. Article XXIV, paragraph 5 of the Agreement reads, in part:

"Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by the entities contained in its lists annexed hereto, with the provisions of this Agreement".[356]

Similarly, Article XX, paragraph 2 reads:

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[356] op. cit., GATT, "Agreement on Government Procurement", p. 29.

"Parties shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers and services providers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest".[357]

To the extent that a provision in the Agreement governs a particular aspect of the tendering process, Member States are obliged, that is, to 1)implement national procurement rules in conformity with that provision, and; 2)ensure that administrative and judicial, or "court-like" entities have been designated and given the necessary authority to act as agents of enforcement for these rules.

If the lessons of the integration of European public procurement markets are applicable to the regulatory situation governed by the GPA, neither the Agreement's common rules nor its common remedies constitute integrative ends in themselves. Rather they are derivatives of prior integration, designed to facilitate the solidly negative end of non-discrimination. The only shared political commitment that they reflect is one to the integrity of a wider market; supplier equality before the law is a means to this collective end. This suggests a different way of thinking about the intervention that the Agreement's positive policy requirements involve. The introductory section of this thesis defined intervention as "interference with the equal liberty of sovereign states to assess and pursue their citizens' interests". To the extent that GPA Member States have independently determined that wider public procurement markets are consistent with their citizens' interests, there is, in this sense, relatively little intervention involved in this Agreement. Indeed, the GPA's positive policy obligations could be said to reinforce sovereign authority in that they enable Member States to achieve economic ends that, without cooperation,

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[357] ibid., p. 25.

would be unobtainable. The Agreement impinges upon sovereign legislative and administrative authority, in other words, but it does so in a manner that ultimately enhances that authority.

Member States' poor compliance with the GPA's institutional predecessor, the Tokyo Round Government Procurement Code would seem to be consistent with this perspective on intervention. An important objective of the latest round of negotiations, it will be recalled, was improved "effectiveness", or enforcement of the Agreement's existing obligations; extended coverage for the accord was conditioned on reinforcement of the cooperative benefits that it already engendered. Issues that arose in the context of the Trondheim panel case, in particular, were used to illustrate the nature of the political problems created by a formal dispute settlement system that functioned only to safeguard the rights of states party to the treaty. The remainder of this chapter, will take a closer look at GPA obligations relating to enforcement, and, in particular, the second kind of domestic "intervention" associated with the Agreement, ie that involving the behaviour of executive entities, including the review bodies established to hear Article XX complaints. These issues, as will be seen, are related in a fundamental way to the manner in which governments are structured. For this reason, the discussion will proceed from some of the previously described ideas concerning the constitutional function of the international economic order. What, it will ask, is the specific nature of the administrative intervention that is implicit in the new Agreement? How is it related to the legislative duties embodied in the GPA's "transparency obligations"? Is this "intervention" likely to cause political problems that will undermine the integrity of the markets concerned?

## 2.2 "Constitutional Rights" and the Multilateral Trading System

Earlier chapters of this thesis have talked about the constitutional function of the international economic order primarily in terms of democratic "political failures" that are manifest in protectionist trade policies. Such policies, according to the theory that has been cited, emanate from improperly delegated legislative authority. Jan Tumlir, on this subject, said:

> "Properly delegated legislative power must be accompanied by specific instructions and clear standards according to which it is used... (This requirement) sets a standard for the legislative discussion and for the political and electoral process as a whole. It is not enough for the people's representatives to decide that a particular objective is socially desirable; they must also have a view of how it is to be accomplished".[358]

Constitutions, as the Introduction to the thesis explained, define political frameworks, including that within which legislative activities are conducted. The constitutional role of the multilateral trading system, in this sense, is related to the structuring of national trade policy processes. Its purpose is to alleviate "government failures" and political "externalities" that arise in this context through the regulation of trade policy instruments, or the stipulation of "rules for the making of rules". More precisely, the GATT's policy proscriptions and "hierarchy" of policy measures sanction more democratically-balanced domestic trade policy dialogues, whilst facilitating an internationally equitable distribution of the costs and benefits associated with these decisions. They achieve this by discouraging trade policies in which the costs of protection cannot be clearly perceived by the citizens who will ultimately have to bear them, and by prohibiting, or discouraging policies that

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[358] Tumlir, J. "International Economic Order and Democratic Constitutionalism". *ORDO*, Vol. 34, 1983, p. 78.

indirectly discriminate against the interests of third countries. As Frieder Roessler has explained:

"...(T)he essential function of the law of the GATT is... to resolve conflicts of interest within, not between nations... (It) does not prevent its contracting parties from attaining economic policy goals, but merely regulates the use of policy instruments... (T)he fewer unnecessary distortions an instrument introduces in the economy and the more visible its introduction and consequences, the lower the legal barriers to its use under the GATT legal system".[359]

For reasons that will be explained in more detail in the paragraphs that follow, such "constitutional processes" are fully consistent with the GATT's domestic policy doctrine.[360] Indeed, the liberal international order is effectively conditioned upon them; without the GATT's negative trade policy disciplines, the sovereign freedom that Member States enjoy under the Agreement would be considerably less secure. The function of these disciplines might even be compared to the one served by civil law in a national setting. Without law of this nature, there is no individual freedom. As John Mill put it,

"(E)very one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest... As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question of

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[359] Roessler, F. "The Constitutional Function of the Multilateral Trade Order" in *National Constitutions and International Economic Law*, edited by M. Hilf and E. Petersmann. Deventer: Kluwer Law and Taxation Publishers, 1993, pp. 53-54.

[360] This is arguably not the case if these disciplines are viewed, on the other hand, as mechanisms for the discipline of executive discretion exercised in the process of foreign trade policy-making. In this case, they would be more accurately described as a kind of "multilateral administrative law", rather than rules designed to structure legislative processes. That this was not Tumlir's intention, in any case, is suggested by the distinction that he drew between economic issues and traditional "strategic foreign policy" ones: The foreign policy issues amongst democratic countries today, he said, "have become largely economic and economic issues *demand* regulation by law". They should not, in other words, be decided on the basis of executive foreign policy-making prerogatives. See the discussion in "International Economic Order and Democratic Constitutionalism", *ORDO*, Vol. 34, 1983 pp. 80-81.

whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion".[361]

The ultimate purpose of the GATT's trade policy disciplines is thus to facilitate the co-existence of self-governing national societies via the clarification of sovereign freedoms relating to the trade policy process. Such disciplines could be said to represent minimum conditions for states' participation in the "liberal market community" created by the international economic order.

Jan Tumlir's diagnosis of the political problems associated with the structure of national trade policy-making processes pointed to another, closely-related, constitutional function of the multilateral trading system; that of the specification of "constitutional rights", or spheres of individual activity with which governments may not interfere, including the institution of judicial review as an avenue for the appeal of these "rights". The remainder of this chapter examines the national court-like bodies in which the individual rights that flow from the GPA's duty of national treatment can be invoked, these "judicialised" rights' relationship to the negative disciplines on which the international economic order is based, and the nature of the intervention that they entail as regards Member States' domestic policy-making and implementation authority.

## Administrative "Intervention" and the GPA

In the theoretical discussion included in Chapter 1 of this thesis, John Rawls' observation that constitutions, in addition to fixing the structure of government, "dictate when the enactments of a (democratic) majority are to be complied with... and when they can be

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[361] Mill, J.S. *On Liberty*. New York: Appleton-Century-Crofts, 1947, pp. 75 - 76.

rejected" was cited.[362] "Alternate political processes" of the latter nature are necessitated by the inherent fallibility of human institutions, including those of representative government. Through them, societies with constitutions containing such provisions safeguard their fundamental values against "government failures". The process typically proceeds from the specification of "constitutional rights", or spheres of private activity with which the state may not interfere. Such "rights" are practically de-politicised; prior to government, they define minimum parameters of individual or freedom, eg. with respect to life, liberty and property. The legislature is exceeding its authority if it passes a law that impinges upon these rights.

In common law countries with written constitutions, it is usually the job of the judicial branch of government to interpret these fundamental individual rights.[363] Such interpretation, known as the process of constitutional or direct judicial review, is premised on the idea that no one can be deprived of his constitutionally-guaranteed rights without due process for the enforcement of the law. On this view, legislation that is specific and/or retrospective - that is, impinges upon the individual and his existing rights detrimentally - is punishment. Punishment, however, can only be administered through the medium of the courts, or following a fair hearing before a neutral agent of the state, acting "judicially".

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[362] op. cit., Rawls, pp. 195 - 196.

[363] Common law countries with unwritten constitutions and countries with civil, or Roman law systems usually have notions of sovereignty that effectively preclude this role for the judiciary, or, in any case, structure its "political task" differently. For example, judicial review in many Continental European countries is abstract rather than adversary; courts' consideration of constitutional issues need not be confined to particular cases or controversies. Although not strictly germane for the purposes of this general introduction, this issue will receive considerably more attention in the thesis' discussion of the kind of political intervention that the GPA implicitly entails. See below, pp. 251 - 257.

For this reason, all laws must, first and foremost, be both general and prospective in their orientation.[364] Judicial review offers an institutional avenue of appeal for minority interests having reason to question the nature and ends of legislation.

A political system that allows for this kind of judicial review is not necessarily one in which there is judicial superiority over legislative power. Rather, this institution is better understood as a particular manifestation of the separation, or counter-balancing of the various powers of government. As Alexander Hamilton explained in the *Federalist (No. 78)*:

"(Judicial review does not) by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former".[365]

Courts are given the political authority to judge the consistency of legislation with the restraints embodied in the Constitution, in other words, to enable the protection of the people from themselves. Legal sovereignty thus lies with the people, per se, not their elected agents.

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[364] According to Edward Corwin, the political philosophy reflected in the institution of judicial review can be traced all the way back to the Ciceronian version of natural law: "There is no one thing so like or so equal to one another as all of us are to one another. And if the corruption of custom and the variation of opinion did not induce an imbecility of minds and turn them aside from the course of nature, no one would more resemble himself than all men would resemble all men..." See the discussion in *Liberty Against Government: The Rise, Flowering and Decline of a Famous Juridical Concept.* Baton Rouge: Louisiana State University Press, 1948, pp. 13 - 20.

[365] As quoted by B.A. Ackerman in "Neo-federalism?" in *Constitutions and Democracy*, edited by J. Elster and R. Slagstad. Cambridge: Cambridge University Press, 1988, p. 172.

Through administrative or public law, and administrative or indirect judicial review, "constitutional rights" also govern the executive's implementation of legislative decisions. Law of this nature regulates the relationship between the individual and the state. According to Stanley de Smith's textbook on the subject, it "relates to the organisation, composition, functions and procedures of public authorities and special statutory tribunals, their impact on the citizen and the legal restraints and liabilities to which they are subject.[366] The basic objective of public law is to confine the discretionary powers of the executive, including those of the administrative officials who conduct the daily business of government on his behalf. In the kind of political system that has been under discussion, this is usually achieved via the specification of detailed administrative procedures that "structure" the exercise of discretion and, in so doing, ensure that it is used both in accordance with the legislature's will as it is expressed in a specific piece of legislation, and a society's "constitutional rights". The procedures are, in turn, operationalised through the judicial branch of government. The judges who possess the authority to set aside legislative decisions that violate individual rights to due process, in other words, may also overrule administrative decisions that do not comply with procedures designed to protect the same interests. The role of the judiciary, in political environments of this nature, might thus be described as an all-purpose "quality control mechanism" governing both the legislative, or representative process, as well as administrative ones.[367]

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[366] De Smith, S. and R. Brazier. *Constitutional and Administrative Law, 7th. edition.* London: Penguin Books, 1994, p. 577.

[367] In describing the role of the judiciary in the US, the prime exemplar of a country with the type of political system under discussion, Robert Yates - better known as "Brutus" - a participant in the US Constitutional debate whose work stimulated publication of the *Federalist*, said: "...(W)e can form but very imperfect ideas of the manner in which this government will work, or the effect it will have in changing the internal police and mode of distributing justice at present subsisting in the respective states, without a thorough investigation of the powers of the

As described by de Smith, administrative law is highly complex, particularly in countries that do not have written constitutions. It is also an area of the law that has grown in relative importance as the duties of the liberal state have changed over the course of the last century. When the state's duties extended no further than those of a "night watchman", or assuring the preservation of peace, punishment of crime and provision of a few general services, there were relatively few administrative activities *to* supervise. The myriad of positive duties the welfare state has assumed since the end of the First World War, on the other hand, have complicated the processes of law-making and administration considerably; during this period, opportunities for the exercise of executive discretion have grown exponentially.[368] "Administrative discretion," as Harold Laski put it more than 70 years ago, "is the essence of the modern State":

"A state built upon *laissez-faire* has been transformed into a positive state. Vast areas of social life are now definitely within the ambit of legislation; and a corresponding increase in the power of the executive has been the inevitable result. For no legislature could hope otherwise to keep pace with the pressure of public business... What, as a consequence has occurred, has been the wholesale transference of control from Parliament to the departments. Legislation by reference and by delegation has taken the place of the older method which regulated with a jealous precision each item of official activity".[369]

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judiciary and the manner in which they will operate. This government is a complete system, not only for the making, but for executing laws. And the courts of law, which will be constituted by it, are not only to decide upon the constitution and the laws made in pursuance of it, but by officers subordinate to them to execute all their decisions". As quoted by E. Corwin in *Court over Constitution: A Study of Judicial Review as an Instrument of Popular Government.* Princeton: Princeton University Press, 1938, pp. 231-232.

[368] David Levitan, in an article entitled, "The Responsibility of Administrative Officials in a Democratic Society" illustrated the magnitude of this change through a comparison of the number of US federal employees in Tocqueville's day, 12,000, to those in his day, 2,500,000. *Political Science Quarterly*, Vol. LXI, No. 4, December 1946, p. 564.

[369] Laski, H.J. "The Growth of Administrative Discretion", in *The Journal of Public Administration*, Vol. 1, 1923, p. 92.

It is beyond the disciplinary scope of this thesis to contemplate the technical nature of the "multilateral administrative law" that governs the relationship between public entities and individual suppliers under the GPA. For the thesis' political purposes, however, two general characteristics of this law are particularly significant. Both are related to what the lawyers would term the "adjudicatory role" played by executive authorities in tendering processes, and a "constitutional right" that is frequently involved in processes of administrative judicial review. Stanley de Smith, in his forequoted text on administrative law, outlined the variety of objectives public law may be seeking to facilitate, eg. obtaining best possible value for money in the public acquisition of goods and services. Whatever substantive principles a given set of administrative laws seeks to safeguard, however, it must be implemented in accordance with standards of natural justice, or what are more commonly known as principles of fairness. Government officials are the subjects of this law and, yet, enjoy privileged positions in processes associated with its application. If the law is to achieve *any* of its objectives, it cannot be implemented in a biased manner.[370] The principles of fairness thus dictate that the first duty of those exercising political discretion is to act 'judicially'. This, according to the common law doctrine of natural justice cited by de Smith, implies two things: Administrative decisions must be unbiased and cannot be taken without giving the party or parties a chance to put their case.

In thinking about this doctrine as it might be manifested in a polylateral procurement context, it is important to recognise that natural justice governs more than administrative

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[370] Lawyers often make a distinction here between general and specific administrative law. The former generally involves administrative procedure and duties of fairness, whereas the latter deals with the regulation of specific policy areas. See the discussion in Jan-Erik Lane's *Constitutions and political theory*, op. cit., pp. 149 - 152.

decisions depriving citizens of existing rights. Its constraints discipline the exercise of discretionary powers that have the potential to seriously impinge upon such rights (usually those of property), as well as the expectations of those who possess them. De Smith, for example, said,

"...(W)hen a citizen has a legitimate expectation that his application for a discretionary benefit such as a license or permit will not be refused without a chance for him to put his case then he is entitled to some sort of hearing".[371]

In a state that has assumed a variety of positive duties vis-à-vis its citizens, this obviously covers a wide class of cases.

Of what then, precisely, do the minimum standards for fair decision-making in public procurement consist? How, in other words, is a judiciary bound to ensure that a tendering process has been conducted in an unbiased manner, with due regard for the affected parties' interests supposed to make its assessment? Before proceeding with an examination of the answer to this question that is embodied in the GPA, a quick survey of a distinction that political philosophers have made between "concepts" and "conceptions" will be offered; this is a comparison that, according to Ronald Dworkin, is necessary in order

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[371] op. cit., De Smith, p. 609. The rights of ownership have, more precisely, been described by A. Honoré in terms of the following: "Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of a thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity". See the discussion in "Ownership", in *Oxford Essays in Jurisprudence*, edited by A.G. Guest. London: Oxford University Press, 1961, p. 113.

to appreciate how due process-type constitutional clauses are designed to work.[372] It is also one that, for reasons that will be described, is not made by legal practitioners.

Constitutional rights are inherently contra-majoritarian.[373] The overt manner in which they violate democratic convention cannot be left without justification. In political systems like the one that has been under discussion, such justification is found in social values; "rights prior to government" are morally grounded in a society's fundamental social beliefs. "Vague" constitutional standards, such as due process-type clauses, represent appeals to these abstract values, eg. fairness. They are, on this view, to be distinguished from constitutional restraints that take the form of precise rules, eg. bans on capital punishment. Their existence is a reflection of the dynamism of society; the appeals that they make to moral concepts could not be made more precise by being more detailed. Indeed, more exacting disciplines would be socially inefficient in that they would inhibit the constitution's ability to accommodate change.

Dworkin explains this institutional paradox by referring to what he calls the "philosopher's distinction" between concepts and conceptions. The "vague" due process clause of the

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[372] The discussion of "vague" constitutional standards that follows draws on pp. 132 - 137 of Dworkin's *Taking Rights Seriously.* Cambridge: Harvard University Press, 1978.

[373] This idea is presented and explored by Alexander Bickel in his book on the US Supreme Court, *The Least Dangerous Branch.* New Haven: Yale University Press, 1962, pp. 16 - 17. Mention should also be made, however, of a debate amongst US Constitutional scholars regarding this subject. Bruce Ackerman, for example, has argued that the Supreme Court is not a "deviant institution" of American democracy. Rather, when it "invokes the Constitution, it appeals to legal enactments that were approved by a whole series of majorities - namely the majorities of those representative bodies that proposed and ratified the original Constitution and its subsequent amendments". "Neo-Federalism?" in *Constitutionalism and Democracy*, op. cit., p. 187. More will be said on this subject in the concluding section of this chapter. See below, pp. 267 - 275.

US Constitution, he says, represents an expression of that society's desire to be guided by the concept of fairness. It does not, however, constitute a moral commitment to any particular conception of fairness. A group has a concept of fairness when they "agree on a great number of standard cases of unfairness and use these as benchmarks against which to test other, more controversial cases". Members appeal to this concept in "moral instruction or argument", but, significantly, may nevertheless "differ over a large number of these controversial cases in a way that each either has or acts on a different theory of *why* the standard cases are acts of unfairness". In such instances, Dworkin concludes, the group's members have different conceptions of fairness. From the point of view of policy, the difference here is critical: When an appeal to the concept of fairness is made, a moral issue is posed. A conception of fairness, on the other hand, is a unique response to this moral question. The problem that lawyers often have in appreciating this distinction, in turn, is related to the fact that "conceptions" are functionally indispensable for the practicing attorney. Jeremy Waldron, in describing the implications of lawyers' particular conceptions of property, said,

> "... (T)he technical lawyer... is concerned most of the time with the law as it is in the society in which he and his clients live, and not with the law as it might be or is anywhere else, he never has occasion to raise his attention above the level of the particular conception of ownership constituted by the property rules of the legal system he is dealing with... The detailed rights, powers, liberties, and so on which his particular client has, or does not have, are all that he need concern himself with. Others, however, who are concerned with questions about the justification of those rules may need to raise their attention to a somewhat higher (more abstract) level."[374]

A first step in thinking about Dworkin's distinction in the context of the international economic order, and more specifically, the GPA, involves recognition of the fact that each

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[374] Waldron, J. *The Right to Private Property*. Oxford: Clarendon Press, 1988, pp. 52-53.

of the national economic systems represented in the WTO potentially reflects different conceptions of property and other social values, including economic justice. The system of administrative law that is usually included in any national legal system, in turn, seeks to facilitate the achievement of these objectives, as well as those that may have motivated any given piece of legislation; in countries with written constitutions and independent judiciaries it often includes enforcement procedures that facilitate the protection of something like a constitutional right to equality before - or due process for the enforcement of - the law. The fundamental objective of the "administrative law" embodied in the GPA, as was described in chapter 1.1, is to promote non-discriminatory liberalisation of Member States' public procurement markets. The Preface to the Agreement, it will be recalled, specifies:

> "Parties to this Agreement... *Recognizing* the need for an effective multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade... (and) Recognizing that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers and services providers so as to afford protection to domestic products and services or domestic suppliers and services providers and should not discriminate among foreign products or services or among foreign suppliers or services suppliers... Hereby agree as follows:"[375]

The individual rights that arise from the duties of national treatment specified in the Agreement's "transparency obligations" are a means to this end. In terms of the constitutional discussion just offered, they might be viewed as manifestations of a particular conception of procedural fairness. They constitute a unique answer, in other words, to the moral question posed by the application of the principles of natural justice in a multilateral public procurement context. This question is itself a product of the Article

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[375] op. cit., GATT, "Text of the Agreement on Government Procurement", p. 6.

XX duty Member States have assumed to ensure that the rights and duties engendered by the Agreement are implemented in a manner generally consistent with due process for the enforcement of the law. The relevant paragraphs of the GPA read, in part:

"Parties shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers and service providers to challenge alleged breaches of the Agreement arising in the context of procurements which they have, or have had, an interest... Challenges shall be heard by a court or by an impartial and independent review body whose members have no interest in the outcome of the procurement and whose members are secure from external influence during the term of appointment".[376]

The proper chronological sequence thus is as follows: GPA Member States have accepted a negative duty not to discriminate amongst suppliers, or goods and services in the conduct of their domestic practices and procedures relating to the tendering of public contracts in markets "covered" by the Agreement. Article XX of this accord reinforces this negative commitment by obliging Members to conduct their associated administrative processes in accordance with principles of natural justice, or procedural fairness. The individual rights that the GPA's procedural, or "transparency obligations" create, in constituting a commonly agreed conception yof fairness, in turn, facilitate both the realisation of Member States' moral obligation and their underlying negative commitment.

**Domestic Intervention and the GPA "Methodology"**

The preceding discussion suggested that the "international administrative law" embodied in the GPA be viewed as an innovative institutional methodology for the reconciliation of different social value assumptions reflected in the domestic policies and practices of WTO Member States. Differing value premises concerning questions of economic justice,

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[376] ibid., pp. 25 - 26.

it will be recalled, were identified in the thesis' introduction as the fundamental obstacle to the development of effective multilateral disciplines for discriminatory domestic policies. Any attempt to reconcile them is politically problematic in that it implicitly raises the issue of intervention. On this point, earlier sections of this chapter have resolved that the positive "transparency obligations" embodied in the GPA are not, per se, interventionary vis-à-vis the legislative authority of Member States; they are voluntary and only "interfere" with national authority in order to enable it to achieve ends it could not otherwise hope to obtain. GPA rules, on the view that has been offered, are best viewed as means to independent sovereign ends.

Similarly, GPA Member States' commitment to fairness in the application of these rules would appear to be another manifestation of multilateral means to independent - albeit necessarily shared - sovereign ends. In accepting the obligation to provide "court-like" avenues for the review of administrative decisions taken under the accord, sovereign signatories to the Agreement have undertaken a moral commitment to conduct their tendering processes fairly. Like the positive policy obligations incorporated in the accord, this responsibility is voluntary. It is also circumscribed by the common conception of fairness to which each Member State has acceded. What could be politically problematic about the GPA? From the point of view of intervention, its political "costs" appear to be negligible and well contained.

Here, again, however, it is necessary to take a closer look at the situation; particularly, the political presumptions that are implicit in the GPA's institutional methodology. The remainder of this section offers an outline of these presumptions and an analysis of their

implications as regards the issue of intervention. It develops an argument that the GPA's disciplinary approach embodies an American vision of the appropriate relationship between property and the state, specifically that there are certain rights associated with property that are prior to the law. This argument is based on 1) the separation of executive and legislative powers that the Agreement obliges its Member States to effect; 2) the limitation of the respective branches of government by law that necessarily follows, and; 3) the role assigned to domestic "court-like entities" in interpreting the allocation of GPA rights and duties. A discussion of how the form of political organisation envisaged by the Agreement differs from that of the "generic" unitary liberal state is central to this argument; any political problems that arise in this context are likely to be related to the fact that the GPA is structured to contain the abuse of executive discretion, whereas the unitary state is faced with a different manifestation of this problem, the perversion of sovereign authority. If the Agreement's approach to the reconciliation of what John Jackson termed differing "constitutional landscapes" is to be successful, on this view, Member States may be obliged to reconsider certain aspects of their existing approaches to the formal distribution of political power.[377]

## 2.3 The "Constitutional Landscape" Envisaged by the GPA

The GPA's most important political connotations are related to the fact that it withdraws certain aspects of the public procurement process from the unequivocal control of national political authorities. The boundary of the "extranational policy area" in question is clearly defined by the common conception of fairness embodied in the Agreement. The fact that

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[377] The term, "constitutional landscapes" comes from Jackson's "Status of Treaties in Domestic Legal Systems: A Policy Analysis", op. cit.

it can be distinguished necessarily implies that executive powers vis-à-vis these administrative activities are not plenary. This presupposes a certain way of thinking about political authority, one that does not rest easily with unitarian conceptions of the nation state. Such conceptions are common amongst GPA Member States; for this reason, this section distinguishes the absolute political power of the sovereign in the unitary state from that of the de facto division of political authority - both amongst Member Governments, and, more importantly, within their component units - that is implicit in the GPA. Starting with a few comments concerning the history of the unitary state and explaining the relationship between it and the feudal political order from which it emerged, the section outlines how political entities in which authority was not concentrated evolved, in some instances, as a "solution" to the autocratic tendencies of certain unitary states. All of this serves as an introduction to the analysis that follows relating to the question of whether the "political re-organisation" that the GPA necessarily engenders is likely to hinder its operation.

Since the Westphalian settlement of 1648, sovereign states have been recognised as the legal "building blocks" of international politics; the state is considered to be the supreme authority within a territorially-defined jurisdiction and the political universe is populated by sovereign states. Inside any given political unit, the sovereign holds a monopoly over the use of force; such control enables it, or its governmental agents to ensure, at a minimum, domestic peace and external security. A sovereign's employment of its powers may be formally structured in a variety of different ways. The traditional Western approach can still be seen in the unitary state of today. European states organised in this manner typically evolved from a reconciliation of the Catholic Church's absolute and transnational claims

to political authority, with the overlapping local jurisdictions of what were known in medieval parlance as "other associations", eg. vassals and kings.[378] The unequivocal authority that had been exercised by the Church was itself a derivative of longstanding Roman practices. This way of thinking about the location of authority - that is, that there could be only one indivisible power overseeing "all and every right" within a given realm - was simply transferred to the territorially-bound state. Power in these entities was, and, is, today, formally concentrated in the hands of the sovereign. J.N. Figgis explained the political theory of the unitary state in the following manner:

"The theory of the Church came from the Roman empire. Neither churchmen nor statesmen believed in two separate social entities, the Church and the State, each composed of the same persons... Popes could never allow that matters of religion and conscience were to be at the mercy of politicians; the Emperors could never allow that the state merely existed on the sufferance of the spiritual power... The great *Leviathan* of Hobbes, the *plenitudo potestatis* of the canonists, the *arcana imperii*, the sovereignty of Austin, are all names for the same thing - the unlimited and illimitable power of the law-giver in the state, deduced from the notion of its unity..."[379]

Hereditary monarchs controlled the exercise of political power in the first sovereign states. Their authority, however, was frequently subject to one important condition: In order to secure the cooperation of the previously-mentioned "other associations" in medieval society and thereby consolidate their power, princely sovereigns had had to recognise consultative parliaments, incorporating members of the nobility, clerics, and property owners.[380] Unlike

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[378] See the discussion in Hedley Bull's *The Anarchical Society: A Study of Order in World Politics*. London: The MacMillan Press, Ltd., 1977, chapter 2 and pp. 254 -255.

[379] Figgis, J.N. "The Great Leviathan", in *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis and H.J. Laski*, edited by P. Hirst. London: Routledge, 1993, pp. 120-121.

[380] The fact that all European monarchies did not possess comparable avenues for the interjection of public opinion into executive decision-making processes, or failed to take cognizance of the public input they received had serious political consequences, eg. in France and Spain. See the discussion in A. Birch's *Representative and Responsible Government: An*

the parliaments of today, however, these bodies were not representative. Rather, they served as forums for political discussion. Parliamentarians of this period could not formally second-guess the sovereign, but they could influence his exercise of authority. On questions of finance, they were particularly influential.[381]

In time, the political duties of parliaments expanded. They became governing bodies in their own rights, albeit ones that, at least initially, represented only limited segments of any given political society. One thing did not change, however. Political power in the unitary state remained functionally concentrated in hands of a single national authority. In some jurisdictions, this authority was formally obliged to respect tenets of social and political custom; nevertheless, he, or it could not, technically, be forced to comply with them. Revolution - at least up until the constitutional changes that followed in the aftermath of the Second World War - was often the only avenue of appeal against the unitary sovereign.

**Structural Characteristics of the Unitary State and International Policy Reconciliation**

The way in which authority is structured in unitary states can present a series of special

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*Essay on the British Constitution.* London: George Allen & Unwin Ltd., 1977, pp. 40 - 44. As this is not an historical exposition of the evolution of democratic government, however, these consequences are beyond the scope of the thesis. The reference to the political functions of early parliamentary bodies seeks only to distinguish their role from that of representative entities in states in which political authority was not concentrated. Whereas in the former, parliaments were effectively agents of democracy, in the latter, they constituted the most obvious threat to it. The final section of this chapter, in describing the role played by the judiciary in a federated political entity, will return to this issue, suggesting that the judiciary may be able to serve a modern day political function in WTO Member States with unitary government comparable to that of the first parliaments. See below, pp. 267 - 280.

[381] See the discussion in Arthur Hadley's *Economic Problems of Democracy.* Cambridge: Cambridge University Press, 1923, pp. 80 - 81,

complications as regards such entities' participation in an international economic order that is "interventionary". The following highlights characteristics of these entities that are likely to differ from those of the political systems discussed in the proceeding section of this thesis: In a unitary state that is parliamentary, there is typically no formal separation of the executive and legislative branches of government and, thus, no inherent rivalry between those making laws and those responsible for their implementation.[382] The executive is merely the leader of the party that controls membership in the legislature. This is not to say that he and his back benchers never have opposing ideas with regard to specific pieces of legislation; rather, the way in which such political systems are structured encourages intra-party compromise and consensus. "Executive discipline" is ultimately assured by the fact that intra-party differences of opinion, if they are too severe, bring down governments.

Parliamentary executives' "coincidence of interest" with MPs who are members of their parties, or coalitions has particularly important implications as regards the application of the law, or administrative processes. First, there are relatively few political incentives for officials to pursue bureaucratic agendas that are inconsistent with the policies and preferences of their parliamentary masters. This means that, at least from the point of view of discouraging overtly partisan behaviour amongst members of the administration, there is no reason to structure the exercise of executive discretion through the specification of formal, detailed administrative procedures. Second, the character of the administrative

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[382] Unitary states are not necessarily parliamentary. Nevertheless, even those that are presidential do not typically adhere to the kind of intra-governmental separation of powers that has been outlined earlier in this chapter, i.e. one in which the legislative will has to be committed to statute in order for the executive to implement it.

corps tends to be professional rather than partisan; indeed, in some countries, it is even viewed as an autonomous branch of government.[383] Administrative processes in a unitary state are relatively de-politicised, generating fewer significant partisan challenges and rewards. The civil service, accordingly, does not offer an especially alluring career path for politically-ambitious individuals. It usually consists of a professional cadre wherein jobs are likely to be allocated on the basis of technical expertise and seniority.

The characteristics of administrative law in a unitary state outlined thusfar are, in fact, manifestations of an approach to public law that differs substantially from that of sovereign entities in which there is an institutional division of labour between the law-making and implementation processes, ie. those discussed in the proceeding section regarding the GPA's institutional *modus operandi*. The reasons why are related to the location of authority, evidenced in disparities between the political prerogatives and responsibilities of the unitary sovereign, and the legally-delimited rights and duties on which US-style presidential political entities are premised. Each of the respective political systems is based on a contrasting fiction as regards the source of authority, or the location of sovereignty. Furthermore, historically speaking, some presidential entities, as was

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[383] Whether members of this "autonomous branch of government" are truly independent, however, raises another question. The ideas of sovereignty on which unitary states are premised would seem to preclude complete autonomy. As Martin Shapiro has explained, "The administrative courts of most European countries form a separate hierarchy with local or regional courts and a central court in the capital... Nonetheless, the Conseil d'état and most of the (other) administrative court(s)... consist of one set of elite administrators watching the rest of the administration... While the form and often the substance are protection of individual legal rights against the state, the ultimate purpose is the improvement and autonomy of the administrative machinery of the state... Like England... the Continent has basically been dominated by notions of parliamentary sovereignty that preclude review". *Courts: A Comparative and Political Analysis*. London: The University of Chicago Press, 1981, pp. 154 - 155.

mentioned before, represented a conscious and revolutionary attempt to moderate "autocratic tendencies" of a unitary state.

The political power marshalled by the unitary state is a product of the sovereign's historical role as "defender of the realm". The military origins of sovereignty in early, post-medieval states have been intimated; hereditary monarchs were ultimately able to consolidate their authority on the basis of the security that they could offer to property owners and other conservative interests within their realms.[384] Unity in the face of threat was critical. The idea of this authority's being a conscious institutional creation, resulting from its individual subjects' eminently rational desire to escape what Hobbes termed a "brutal state of nature", however, does not follow. This notion is rather what C.B. MacPherson has termed a "logical hypothesis", designed to rationalise the democratic imperfections of these early sovereign entities. In reality, they were little more than the products of conquest; war, in other words, had provided the basis for state formation. Sovereignty "by institution", on the other hand, was, as Hobbes explained, a fiction that was necessary if men were to move themselves, ultimately, to "more perfectly" sovereign states.[385] MacPherson, on this point, said:

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[384] Arthur Hadley traced this system to the military tenures that had prevailed during the Middle Ages, contrasting it with the capitalist, or industrial basis of political power that subsequently prevailed in the New World: "Down to the thirteenth century the system of land tenure in every country of Europe was a feudal one. It was based on military service. A man held a larger or smaller estate on account of his larger or smaller amount of fighting efficiency... The majority of those who wanted to cultivate the soil were unable to protect themselves from spoliation. In the absence of an efficient protector or overlord no industry was productive and no large accumulation of capital was possible... It was the military chieftain, therefore, who enjoyed the largest measure of respect socially, and the strongest position politically". See the discussion in *Undercurrents in American Politics.* London: Oxford University Press, 1915, p. 34.

[385] MacPherson, C.B. *The Political Theory of Possessive Individualism: Hobbes to Locke.* Oxford: Oxford University Press, 1962, p. 20.

"It made no difference which way the sovereignty was established, as long as the sovereignty was acknowledged by all the citizens... It was enough if they acknowledged a *de facto* ruler or ruling assembly, and gave to it the full measure of obedience they would logically be obliged to give if they had voluntarily transferred to it the natural rights which they would have had in a hypothetical state of nature".[386]

With movement to parliamentary sovereignty, extension of the franchise and the evolution of administrative law, the democratic "fiction" that lies at the heart of the unitary state has grown closer to reality. The unitary sovereign, to borrow Hobbes' terminology, has come a long way towards "perfection". Nevertheless, the issue of individual, or minority interests vis-à-vis the state remains inherently problematic in institutional contexts of this nature; unitary state notions of sovereignty are typically based on majoritarianism. If there is an avenue of appeal against a unitary government's commands, it is usually one designed to safeguard the interests of the collective; individual freedom "comes from being a member of a political community that determines its own fate... (not from being a) bearer of rights that guarantee ... immunity from certain majority decisions". Unitary state notions of sovereignty are, in this sense, premised on a vision of citizen's interests that sees them as being largely homogeneous.

Political systems in which authority is divided, on the other hand, were, in some instances, a revolutionary response to such notions of sovereignty. The American revolt against British colonial control provides a good illustration of the alternate political theory from which they proceed: From the time of the previously discussed Westphalian Settlement in 1648, the international political environment had been largely populated by a number of perennially competing, unitary sovereign states. Just as with any one of these entities,

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[386] ibid., pp. 20 - 21.

national security was also an important issue in the consolidation of US sovereign authority. The Americans, as Daniel Deudney put it, played "the sovereign recognition game as it had been established by the Europeans"[387] Similarly, the federation that was envisaged in the US Constitution of 1787 found moral justification on the basis of a variation on the Hobbesian idea of a "consent" of the governed. Significantly, however, the American republic was not a sovereign state whose existence necessarily precluded the continued institutional tenure of the separate political entities that had agreed to its creation. Furthermore, the notion of consent on which it was premised was instrumental in a different, more literal way; initially, the authority of the central government was only legitimate to the extent that it enabled cooperating state entities to achieve their independent ends. Ultimately, this changed as institutional mechanisms were introduced that were designed to ensure that the rights of national citizenship were equally enjoyed by all. In addition, the sovereign people of the American republic, in agreeing to the Constitution, retained a right to revolution.

In order to appreciate the implications of these differences and understand the way in which they are ultimately of relevance in the context of the GPA, it is helpful to view them as products of difficulties in the operationalisation of a political theory that tacitly assumes a homogeneity of citizen interests across a broader geographic terrain. It is also useful to consider a distinction that Felix Morley has made between "directive" and "supervisory" states, the US being a prominent example of the latter.[388] According to Morley, "directive" states are distinguished by the fact that they operate through "exertion by an elite on behalf

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[387] op. cit., Deudney, p. 203.

[388] Morley, F. *Freedom and Federalism.* Indianapolis: Liberty Press, 1959, p. 13.

of the masses"; activities of the latter, therein, are always subject to the will of the former. "Supervisory" states, on the other hand, "keep power in the people", encouraging the individual to exertion for his own sake. In them, the government's role is basically that of an umpire, ensuring peaceful reconciliation of competing individual interests. Whether one or the other approach to the distribution of political authority exists within a given national realm is largely a question of historical contingency.[389] British problems in controlling the American colonies, in these terms, might be explained as a product of the failure of their "directive" approach to rule in a political environment that was growing increasingly heterogeneous.

A directive state, in order to operate, requires that a distinction be made between the masses and an elite charged with responsibility for their rule.[390] At the time of American Revolution, the elite in Great Britain was represented by the "King in Parliament". The King was George III. Parliament consisted of a legislative House of Commons and an aristocratic House of Lords, the latter possessing the authority to veto a decision of the former. Representation in the House of Commons, in turn, was apportioned on the basis

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[389] It should also be mentioned that the distinction being developed here - that between popular and unitary, or absolute sovereignty - is not necessarily synonymous with that between a federated entity and a unitary one. Authority in a non-federated sovereign entity can, for example, be based on popular sovereignty. At the same time, federated entities necessarily entail a sharing of political power; for this reason, they are difficult to reconcile with absolute notions of sovereignty.

[390] Britain differs from the "generic" unitary state that has been under discussion in this thesis in important ways, starting with the fact that every citizen, including public officials, is equal before the common law. Later sections of this chapter will describe these differences in more detail, explaining how Britain can be a unitary state and, at the same time, one that operates on the basis of liberty and individualism. See footnote 407 below, p. 246. The discussion of the organisation of the British Government during the late 18th century that follows, in any case, draws on A.H. Birch's *Representative and Responsible Government: An Essay on the British Constitution*. London: George Allen and Unwin Ltd., 1977, chapter 2.

of community and economic interests within the so-called masses.[391] The extent of the franchise was not regarded as important, for all citizens were thought to be "virtually represented" through this system. Problems arose with the American colonists because they did not feel that their interests, as English citizens, were properly accommodated in the rule-making process.[392] More specifically, American concerns emanated from the fact that they were liable for taxes levied by the British Parliament and subject to the latter's regulatory decrees. The British Constitution guaranteed equality before this, and all common law. Englishmen in England were represented in the parliamentary processes that had produced the controversial policies. Although the British contended that the Americans were "virtually represented" in the House of Commons, as well, the Americans did not agree. Their position was that the King's laws were unjust in that they reflected an unconstitutional inequality in the rights and obligations of citizenship.

Gradually, the colonists' grounds for their complaint against the British Government shifted. The Declaration of Independence that was proclaimed in 1776 represented a culmination of this process. Closely reflecting the political and economic foment and change then underway in Europe, it made revolution inevitable. It also set the stage for a new kind of representative government, reading in part:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form

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[391] Rule-making authority had, of course, originally been one of the King's prerogatives. See the discussion on pp. 226 - 229 above.

[392] See the discussion in J. Ely's *Democracy and Distrust: A Theory of Judicial Review*. London: Harvard University Press, 1980, p. 89.

of government becomes destructive of these ends, it is the right of the people to alter or abolish it..."[393]

The revolutionary character of this proclamation was associated with its assumptions regarding the rights of man; that is, its "self-evident truths" that there were certain inalienable, individual rights prior to organised government. This doctrine, better known as that of natural rights, was inconsistent with British notions of sovereignty. In England, the "King in Parliament" was sovereign; individuals had rights, but only to the extent that they emanated from the common law made by this unitary entity. The common law, furthermore, could be changed by Parliament at any time. As J.N. Figgis explained:

"All and every right is the creation of the one and indivisible sovereign; whether this sovereign be a monarch or an assembly is not material. No prescription, no conscience, no corporate life can be pleaded against its authority, which is without legal limitation. In every state there must be some power entirely above the law. To talk of rights as against it is to talk nonsense".[394]

Natural rights alter the basis of political association. Earlier parts of this chapter have described the military origins of the post-medieval state, referring to the "fiction" of the social contract that came to be employed to justify the unitary sovereign's authority. This "fiction" had, in fact, been necessitated by the incongruence of such entities with the principles of natural rights; if men possessed certain fundamental rights, their willingness to subject themselves to political authority - and whatever that implied for individual autonomy - had to be explained. The version of popular sovereignty reflected in the

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[393] As quoted in *An Outline of American History*. US Information Agency. Washington: US Government Printing Service, p. 38.

[394] Figgis, J.N. "The Great Leviathan", in *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis and H.J. Laski*, edited by P. Hirst. London: Routledge, 1989, p. 123.

American government after the Revolutionary War constituted an attempt to turn this "fiction" into a more literal reality.

Government that proceeds from the recognition of rights prior to the state is, inherently, limited government. It is premised on the idea that men "sacrifice" the individual sovereignty that they enjoy in a "state of nature" only as means to the end of safeguarding personal "prerogatives". A state's powers, on this view, extend no further than those necessary for it to perform its function of protecting these individual rights; it is, in other words, what Morley referred to as a "supervisory" state. Compared to the "generic" unitary state that has been under discussion and for the purposes of the argument that the thesis is developing relating to the political theory implicit in the GPA, it is particularly significant that sovereign entities of this nature: 1) proceed from recognition of a fundamental heterogeneity of individual interests and; 2) entail a basic notion of reciprocity in the reconciliation of competing interests.[395] Citizens of supervisory states give up a measure of their personal autonomy as the "price" of political association, but they also invariably gain something as well. If they do not, their ultimate recourse, at least in the US, is constitutionally-sanctioned revolution.

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[395] The "generic" unitary state does not, of course, exist. Many of the European states whose historical development is generally consistent with that which has been attributed to it, for example, now possess written constitutions that recognise individual rights that are prior to government, or participate in supranational legal orders that effectively achieve the same thing. The private rights that flow from the Treaty of Rome provide a prime example of this. What is significant here, however, is the fact that the existence of such rights has not changed the basic notions of sovereignty upon which these states and their institutions are built. Unitary states have assumed the duties that written constitutions entail and have grown more liberal in the process of doing so, but this has not changed the basis on which their power is exercised. There remains, in other words, a difference between a state that is growing more liberal and one based on popular sovereignty.

**The Role of Law in a State Based on Popular Sovereignty**

The authority of "supervisory" states is circumscribed by law. In the US, more expressly, the basic political idea is that power is controlled by being dispersed, and law governs its allocation and exercise. As Cecelia Kenyon explained:

> "The Founding Fathers were eclectic in their political thinking, and as a result, their ideas fit together with varying degrees of harmony and emerge with varying degrees of clarity. Their cardinal principle (however) is absolutely clear: good government requires a written constitution to secure the liberty and welfare of the people and especially to guard against... a 'strong Byass of human Nature to Tyranny and Despotism'".[396]

Because of the central role of law in this political system, politics in the US effectively revolves around the legislative process. Indeed, for this thesis' purposes, the major difference between unitary and supervisory states can be seen in the function of their respective law-making institutions. In states organised in the former fashion, parliament has typically been the primary agent of democracy; "consultative" parliaments, as has been explained, originally acted as a defacto "check" on the absolute powers of the monarch. With devolution of hereditary rulers' executive and legislative powers to these representative assemblies and the gradual extension of the franchise, they became "agents

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[396] Kenyon, C. "Constitutionalism in Revolutionary America" in *NOMOS XX: Constitutionalism*, edited by J. Pennock and J. Chapman. New York: New York University Press, 1979, p. 117.

of democracy" in their own rights.[397] Ones that, among other things, retained formal responsibility for the direction of the economic life of the nation.

Supervisory republics, on the other hand, are premised on an assumption that representative assemblies are a kind of second-best democratic institution. Direct democracy is infeasible in a political setting whose size exceeds that of a city-state; for this reason, in such entities, government by law replaces that of "virtuous men".[398] Written constitutions preside over this process. As was mentioned earlier in this chapter, in addition to fixing the structure of government, they "dictate when the enactments of a (democratic) majority are to be complied with... and when they can be rejected".[399]

Under the US constitution, there are a number of ways in which representative authority is disciplined. Two are particularly significant for this thesis' purposes: the separation of powers both within and between state and federal authorities, and constitutional rights, safeguarded by the institution of judicial review. These institutions are the Founding Fathers' remedies for two weaknesses in the "natural conditions of men", both of which

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[397] The relationship between this process and contextual developments - specifically the industrial revolution and the corresponding movement away from traditional, agriculturally-oriented forms of social organisation - bears re-iteration. As the introduction to the thesis explained, the King's prerogative had to be constrained if burgeoning market mechanisms were to work; capitalism was conditioned on a degree of predictability in sovereign-subject relations. Under the influence of the "dangerous doctrine of natural rights", a new perspective regarding the nature of authority emerged. This perspective found reflection in the liberal, or negative state. It also, as is about to be explained, contributed to the development of the "supervisory" state.

[398] This expression, according to Edward Corwin, was that of James Harrington. See the discussion in *The 'Higher Law' Background of American Constitutional Law*. Ithaca: Cornell University Press, 1955, p. 8.

[399] op. cit., Rawls, pp. 195 - 196.

need to be contained if "the mortal diseases under which popular governments have everywhere perished" were to be avoided.[400] Such "diseases" arise from man's susceptibility to the "spirit of faction", or "common impulses of passion... adverse to the rights of other citizens, or to the permanent and aggregate interests of the community", and manifest *in*equalities in the individual faculties of men.[401]

The American variation on the separation of political powers is aimed primarily at controlling the problem of faction. Commonly attributed to Montesquieu and his famous misunderstanding of the structure of government under the British constitution, this doctrine entails the allocation of the functions and powers of government to discrete branches of government, typically a legislature, responsible for the making of laws, an executive charged with enforcing them, and a judiciary with responsibility for their interpretation.[402] As manifested in the US, it was, in fact, an institutional retort to the British Government's approach to the exercise of colonial authority; the Americans, for reasons that have been described, had come to fear the state as a potential agent of oppression. The idea of dividing its various powers was to create a kind of intra-governmental competition for their use; one that would increase the probability that they would be exercised in a manner

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[400] Madison, J. *The Federalist Papers, Number 10*, as quoted by Wilfrid Rumble in "James Madison on the Value of Bills of Rights", in *NOMOS XX: Constitutionalism*, op. cit., p. 141.

[401] Madison, J. *The Federalist, Number 10*, as quoted by William Carpenter in *Democracy and Representation*. Princeton: Princeton University Press, 1925, pp. 19 -20.

[402] In Britain, political authority is balanced between the monarch, and the Houses of Lords and Commons; there is not, however, a distinct division of labour relating to the law-making and implementation processes amongst these entities. See Dicey's discussion of the origins of the doctrine of the separation of powers in his *Introduction to the Study of the Law of the Constitution*. Indianapolis: Liberty Classics, 1915 (re-print of 8th edition), pp. 219 - 229.

that was consistent with the interests of the "sovereign people" by making it particularly difficult for special interests to capture the legislative process.

Constitutional rights theoretically work to contain the problem of faction as well. Such rights, as earlier sections of this thesis have explained, are reflections of a society's fundamental social values, and subject to what Joseph Raz termed "special institutional treatment" in that they are not governed by ordinary legislative and administrative processes; they operate to remove their objects from the political process.[403] Their fulfillment serves to discipline law-making in that - along with the institution of judicial review that has also been discussed - they allow individuals to formally question the consistency of a given piece of legislation with the "sovereign will" embodied in the constitution. The availability of this avenue of appeal operates to give the legislative process a qualified political significance. As Arthur Hadley, in contrasting the British legislative process with that in the US, explained:

"An act of the British Parliament is authoritative. It is law, *ipso facto*, as soon as it is regularly passed. It cannot be resisted except by revolution. But an act of the United States Congress or of a state legislature is not law except as it lies within the limits allowed by the Constitution. Whether it transgresses these limits is a matter for the courts to decide".[404]

The reason why constitutional rights help to contain factions is related to a particular problem that the representative process has in gauging the popular interest. This problem,

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[403] op. cit., Raz, pp. 257.

[404] Hadley, A.T. *Undercurrents in American Politics*. London: Oxford University Press, 1915, p. 42. A similar kind of "conditionality" exists in countries with systems of abstract review. Significantly, however, the role played by individuals in assuring the constitutional consistency of a given piece of legislation is different. The nature of these differences will be examined in Part III of the thesis. See below, especially pp. 273 - 275.

endemic within any democratic system, arises from inequalities in the individual faculties of the men such processes are set-up to represent. These diverging natural capacities mean that on any distributional questions that arise within the system, there is a corresponding tendency for individual interests to splinter. "Sinister interests", or "common impulses of passion... adverse to the rights of other citizens" arise when any subset of the voting population large enough to form a majority determines that maintenance of whatever allocational procedures have been instutionalised is no longer consonant with its interests.[405] If these "passions" are not, in turn, calmed by reason, virtue, tradition or institutions, the results can be literally revolutionary.

Factions - and, in particular, those arising from situations such as the one described in the proceeding paragraph - constitute what might be characterised as an abiding dilemma of representative government. The "solution" proffered by the US Constitution recognises this dilemma as irreconcilable; it is the role of constitutional rights to keep the conflicts it inevitably engenders from destroying the political system in which they arise. The individual's right to invoke constitutional safeguards against legislative decisions taken by a majority imparts a conservative bias on the operation of the latter institution. Although the judicial processes he evokes interfere with the representative system's ability to accommodate change rapidly, they are the foundation on which this variation of popular democracy is constructed.

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[405] The term "sinister interests", according to Cecilia Kenyon, was that of Samuel Willard, a Massachusetts clergyman. See the discussion in "Constitutionalism in Revolutionary America", op. cit., pp. 88 - 89.

The right to property contained in the Fifth Amendment to the US Constitution, as well as the Fourteenth Amendment's provisions ensuring due process for the enforcement of law as against the individual states are of particular relevance for this thesis' analysis of the GPA. They serve as what Jennifer Nedelsky has described as "primary limits", on the scope of government authority in the US:

"The protection of vested (property) rights from the encroachments of democratic legislatures was the central issue on which the courts asserted their power to protect individual rights from democratic attack. The inviolability of property was invoked to show that both the Constitution and natural rights required judicially enforced limits to the power of the majority. The Court became the guarantor and mediator of the basic tension of the system - a tension which held property rights at its center".[406]

Earlier sections of this chapter have suggested that the American approach to political organisation was a product of the "economic and political foment" of its times. This foment, as the introduction to the thesis explained, was tied to the advent of the self-regulating market economy in Europe, and, in particular, the Industrial Revolution in England. Capitalism was starting to replace authoritarian and traditional approaches to the management of man's "economic problem" with those of the market; in doing so, it was also altering the face of political authority. The evolution of these changes, however, was not consistent across sovereign jurisdictions. The response to them that came to be embodied in the US Constitution, in particular, diverged from that of the European states in which there was a tradition of military-based political authority. For this reason, one final, general feature of the "constitutional landscapes" in which the GPA is to be applied

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[406] Nedelsky, J. "American Constitutionalism and Private Property" in op. cit., *Constitutionalism and Democracy*, edited by Jon Elster and R. Slagstad, p. 255 and 247, respectively.

must be mapped; that relating to differences between what might be described as states' scopes and scales.

**Diverging Scope and Scale of Liberal States: Internal Security and the "Dangerous Doctrine" of Individual Rights**

The political economists' "minimal state" was designed to facilitate the functioning of civil society within a state, whilst reducing the number of potential circumstances in which conflict between sovereigns might arise. Relative to the mercantilist doctrine it succeeded, it entailed a drastic reduction in the scope of states' official duties. Significantly, however, it did not substantially alter the state's powers relative to the individual. The introduction of positive law to enable the recognition and exchange of private property did not entail a corresponding emancipation of the individual within civil society. The scale of government, in other words, remained unchanged; political power continued to be concentrated in the hands of the sovereign, despite the fact that opportunities to use it had been curtailed.

The reasons why the negative state emerged in this way are tied to the defense-related "institutional ambiguities" described in earlier sections of this thesis. The international problem with which they have come to be associated is, in turn, basically one of diverging paths to liberalism. The first "path", that of the unitary sovereign, has just been described; it proceeds from a communitarian notion of the social contract. In states of this nature, liberalisation "flows downward", from the collective to the individual. It is typically driven by the "public interest" - as defined by the sovereign - and a commitment to greater individual equality. Sovereign authority in political settings of this nature remains, by comparison with that of popular sovereigns, relatively absolute; "liberalism from above"

does not diverge materially from the "institutional itinerary" proposed by the classical political economists. The second "approach" to liberalisation, that of popular democracies like the US, on the other hand, proceeds, from the micro to the macro, or the individual to the collective; its guiding values are liberty and individualism.[407] The liberal state that is associated with this process is effectively a foregone conclusion; any other kind of collective entity would be difficult to reconcile with the individualist social contract on which it is postulated.

Why are there these differences in unitary and non-unitary states' "technologies" of liberalism? What is their relationship to questions of domestic security and stability? More importantly, how are they of relevance in a GPA context? The remainder of this section considers these questions, concluding that any liberal representative government must contend with the previously described "weaknesses in the natural conditions of men", or, that is, their tendencies to submit to the "intellectual charms" of faction, coupled with glaring inequalities in their individual abilities. If an institutional solution to this "dilemma of representative government" cannot be found, "sinister interests" are likely to undermine established political institutions. The American solution to this "dilemma" differs from that of the democratic unitary state in that the US never had to contend with an existing distribution of property that reflected a feudal legacy of ownership. Furthermore, initially, the country was relatively unsettled. Individual rights, in an American political setting,

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[407] Britain, as has been mentioned before, is an exception to the "generic" unitary state being described here in that its liberalisation, like that of the US, has been driven by the values of liberty and individualism. In order to maintain the unitary authority of the British sovereign, however, the English "technology" of liberalisation differed from that of the popular sovereigns in that it proceeded from a stratified theory of society. For reasons that are about to be explained, English liberty was, at least initially, conditioned on social position. See, as well, the discussion in George Sabine's "The Two Democratic Traditions", op. cit., pp. 454 - 460.

did not represent a "danger" to established authority in their own right. Indeed, for the most part, they actually served to reinforce it.

Previous sections have outlined the way in which a sovereign's security-related obligations complicate its management of the economy, focusing on external aspects of the problem. Individuals' rational planning with respect to the exercise of their property rights could not, it will be recalled, take place in the face of "irrational belligerency" between or amongst sovereigns. The internal "face" of this institutional quandary might be described as a derivative of diverging natural capacities in the individual faculties of men. Historically, these differences have tended to make individual rights, starting with the right to vote, a "dangerous proposition" for unitary sovereigns. In Britain, for example, they explain the fact that five Parliamentary Reform Acts - those of 1832, 1867, 1884, 1918 and 1928 - were necessary before the national franchise included virtually all adult subjects.[408] They also account for "detours" that many of these states took along an alternate political path, that of socialism. The reason why is associated with the fact that concentrated political authority at some point has usually implied concentrated representative authority, as well.[409] For the purposes of understanding rights' relevance in the context of the GPA, in any case, a useful first step is to re-consider the various ways in which majoritarian government

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[408] op. cit., Morley, p. 27.

[409] On the subject of socialism and democracy, Karl Polyani, in his classic study of the political implications of liberalism, *The Great Transformation: the political and economic origins of our time*, said: "Socialism is, essentially, the tendency inherent in an industrial civilization to transcend the self-regulating market by consciously subordinating it to a democratic society. It is the solution natural to the industrial workers who see no reason why production should not be regulated directly and why markets should be more than a useful but subordinate trait in a free society..." *The Great Transformation: the political and economic origins of our time*. Boston: Beacon Hill Press, 1957, p. 234.

is constrained under the US Constitution. In this political economic context, "anti-democratic mechanisms", consisting of the separation of political powers, the use of law to confine these powers, and constitutional rights are all employed. Each of these, it will be recalled, was a considered response to the inherent vulnerability of democratic republics to the problem of faction. Furthermore, because of the so-called "natural weaknesses" of men, the Founding Fathers saw this problem as being particularly acute in the context of property. The safeguards for private property that came to be reflected in the American political system reflect an implicit assumption that capitalism cannot be sustained in a purely representative democracy.

The unitary state's diverging path to liberalism, on this view, is a product of its approach to the distribution of political authority. Power has always been institutionally concentrated in the unitary sovereign; rights against the state - including those of property - have been antithetic, at least until fairly recently. As the liberal unitary state has gradually grown more democratic during the past two hundred years, the political consequences of this form of organisation have been, at times, forbidding, at least from an establishment perspective. A unitary state is premised on a vision of citizen interests that assumes that they are homogeneous. When the results of its democratic processes indicate otherwise, suggesting, for example, that a majority of the population may not be in favour of the continuation of the existing distribution of property, what happens?

First, it should be underscored that if inequalities in the abilities of men are assumed, differences of political opinion amongst them are probable. When such controversies arise in the context of distributional questions, it is not unlikely, furthermore, that they

will be particularly impassioned.[410] Great strides have been made in resolving man's "economic problem"; nevertheless, it is still the central one in most individuals' existences today.[411] This situation clearly has the potential to pose a serious threat to the established order. Given these circumstances, how has the unitary state been able to maintain domestic peace and security? The answer, as one might expect, has often been collective in nature. It has also, in keeping with the unitary state's "top-down" approach to political authority, entailed appeasement of the relatively-unpropertied majority. Employing terminology used earlier in this thesis, the "solution" has often consisted of "positive" duties for the negative state, or re-distributive state initiatives, designed to "smooth" the inevitable social inequalities generated by the market. So as to maintain domestic security and stability, in other words, the omnipotent unitary sovereign has assumed responsibility for the correction of certain "social evils" that might befall hapless citizens.[412]

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[410] It is, of course, also assumed that men have not become significantly more virtuous during the 200-plus years in which the liberal state has existed.

[411] Whether this is true across sovereign jurisdictions raises interesting questions, albeit ones that are beyond the scope of this thesis. In 1930, John Keynes wrote an article in which he argued that the "economic problem" was not the "permanent problem of the human race". Increasingly, he said, "...man will be faced with his real permanent problem - how to use his freedom from pressing economic cares, how to occupy the leisure, which science and compound interest will have won for him, to live wisely and agreeably and well..." "Economic Possibilities For Our Grandchildren", in *The Collected Writings of John Maynard Keynes: Volume IX, Essays in Persuasion*, edited by the Royal Economic Society. London: MacMillan, 1972, p. 328.

[412] Positive economic policies were, of course, also introduced by non-unitary sovereigns. According to Sidney Fine, however, these typically differed from those of unitary sovereigns in that "... they were not conceived... in terms of certain specific functions of government, such as social security or the maintenance of full employment... (Rather, they reflected an assumption) that government could promote the public interest by appropriate positive action and that its authority should therefore be invoked whenever the circumstances indicated that such action would further the common weal..." The state, on this view, was seen "as servant rather than as master..." *Laissez-Faire and the General-Welfare State: A Study of Conflict in American Thought 1865 - 1901*. Ann Arbor: The University of Michigan Press, 1956, p. 375.

Previous sections of this thesis have also described how the positive policies of the liberal state evolved earlier this century, highlighting their potential relationship to a society's values, the manner in which they came to be institutionalised in the post-war trading system and the influential role John Keynes played in this process. The 50 years that have passed since the GATT came into existence have not changed the "natural conditions" and weaknesses of men. What has changed, and changed dramatically, however, is the scope of the market. The section that follows returns to the GPA as a mechanism for the reconciliation of diverging domestic policies. The GPA, that is, as an institutional methodology for resolving political problems stemming, ultimately, from the fact that different civil societies underlie each of the markets that are amalgamated under the accord. It illustrates how the disciplines embodied in the Agreement are structured around an American vision regarding the appropriate relationship between property and political authority, contending that this, finally, is the most important kind of "intervention" associated with the accord. A concluding section, examining the political implications of such an institutional approach follows. Focusing on the "public good" that is represented by international order, the inherently heterogeneous nature of the interests that the latter must accommodate, the way in which reciprocity facilitates the factoring of local values and preferences into this cooperative proposition, as well as the fact that every obligation that Member States have assumed under the GPA is voluntary, it resolves that the Agreement should be viewed as the best solution available, given the fact that the nation state remains the central focus of social order. "Constitutionalisation" of the rights arising from the international economic order is a means to the end of safeguarding the "public good" it represents.

## 2.4 Balancing Collectivism and Individualism: The GPA as a Reflection of the American Vision of Property

Although the individual rights arising from the GPA are generally indirect and, furthermore, require that Member States take positive legislative steps if they are to take precedence over national rules with which they may be in conflict, their purpose is to judicialise the domestic application of the accord. The political significance of this process lies in the fact that it involves a screening of certain areas of individual activity from the unequivocal control of national governments: The Agreement's "transparency obligations" first create corresponding individual rights of national treatment. Operating in conjunction with the due process-like review mechanism, these "common rules" and their corresponding rights define a "transnational policy terrain". It is administered by the executive officials of Member States, acting as "agents" on behalf of international order. Individual property rights exercised within this domain are shielded from domestic political processes to the extent that they fall within the jurisdiction of the "common rules".

In thinking about practical difficulties that may be related to GPA implementation and normative questions surrounding the "intervention" that the Agreement entails, it is useful to consider precisely how its regulatory logic is aligned with the political theory that is embodied in the popular sovereign, and, more particularly, that of the US. There are three primary areas in which the GPA's "technology of liberalisation" parallels that of the Americans. They include its: 1) approach to rule-making and enforcement that entails a separation of political powers, combined with recognition of the judicial branch of government as arbitrator on questions concerning the boundaries of power; 2) use of law

to define and discipline these powers and; 3) tacit assumption that there are individual rights prior to government and that the powers of the latter are inherently limited.

Earlier sections of this thesis have described the political function of the institution of the separation of powers. Political authority is divided amongst different branches of government to stimulate intra-governmental competition for its use. In this way, "democratic dangers" associated with concentrated state power are eased. A legalised political community, as will be explained in the next section, is also engendered in that the separation of powers is realised through law. Indeed, there can be no political division of labour such as that existing between the three branches of American government without a definitive way of allocating the rights and duties of authority, and a neutral entity for resolving differences of opinion regarding the distribution of authority.

The GPA structures the exercise of executive authority by obliging its Member States to institute formal procedures to govern administrative activities that take place in the context of public procurement. This "structuring process" establishes a division of labour between the legislative and executive branches of participating Governments, relating, specifically, to the administration of the "common rules" embodied in the treaty. In most Member jurisdictions, this separation develops along the following lines: Operating under its foreign policy prerogative, the executive has negotiated the treaty on a Government's behalf and signed the accord. Subsequently, the National legislature has accepted the treaty's obligations as binding and introduced any implementing legislation that may be required in order to realise them. The new legislation, in keeping with the parameters of the treaty, specifies detailed, procedural duties for the executive administrators who

are going to be charged with its implementation. These duties circumscribe administrative discretion; in doing so, they "ring-fence" the job of the executive. If an official subsequently fails to respect the rules, he is exceeding the executive authority that has been delegated to him. The court-like avenues which Member States must provide for the review of administrative compliance with the accord, in turn, create an arbitrator's role for the judicial branches of their governments. Courts are charged with resolving questions relating to the allocation of authority under the Agreement; they, accordingly, possess the authority to define the boundary that the rules have created between law and politics in this context.[413]

For reasons that have been described earlier in this chapter, if there were no American-style separation of political powers under the GPA, there would be no need for its detailed tendering procedures. From the "constitutional perspective" of any of its individual unitary state members, parliamentary interests and those of administrative officials are generally aligned; executive administrators have few political incentives not to act in accordance with Parliamentary will. Formal tendering procedures are largely superfluous, at least from a national perspective. Indeed, because of the way in which political authority is structured in the unitary state, "democratic dangers" to the domestic order usually come under a different guise entirely. Earlier chapters have referred to the differing historical roles of the legislative branch of government in unitary and popular sovereigns; the latter

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[413] The potential political significance of this role has been described by Jennifer Nedelsky in "Confining Democratic Politics: The Anti-Federalists, Federalists and the Constitution". *Harvard Law Review*, Vol. 96, No. 2, December 1982, p. 354 - 355. The basic idea is one of defining politics and law as "distinct spheres", and "insulating within the latter" a society's most fundamental issues and threatened values. Designating an issue to be legal rather than political, in this sense, defines the terms in which it will be considered, and thus replaces what Nedelsky terms "far-reaching debate" with the "fine points of rule application".

are structured around a premise that it constitutes the greatest potential threat to democracy, whereas, in the former, parliaments have been the primary agents of democracy. Since the beginnning of this century, these positions have been converging. Postwar economic, political and legal integration, in particular, have been associated with a growing prevalence of constitutional disciplines to formally control the exercise of representative authority. To this day, however, there remain fundamental differences between the way in which unitary and popular sovereigns apply such "higher order" law. Many Continental European states, for example, practice forms of abstract judicial review that need not even involve individuals in the invoking of constitutional norms. In keeping with the two, contrasting democratic traditions that were introduced at the outset of this thesis, the very purpose of these disciplines is different. In the unitary state, their objective is most commonly to correct representative failures, and thereby maintain the vitality of the self-governing, national political community. The American approach, on the other hand, privileges the interests of the individual over the collective, and undertakes judicial review primarily to safeguard the former from the latter. As Allan Brewer-Carías has explained:

"European continental countries adopted the review of the constitutionality of laws following a different path from that of the system in the United States. The European phenomenon occurred less in response to a problem of legal logic than to political logic. It was the fear of oppression by a parliamentary majority, which was decisive in the change of the position of the continental European countries regarding their review of the constitutionality of laws... the myth of representativeness of the general will as expressed by those elected... (had) broken down..."[414]

The second way in which the GPA is consistent with a programme of "liberalism from below" is related to the fact that, in "structuring the exercise of executive discretion, the Agreement inevitably "legalises" the processes of public procurement that it governs.

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[414] op. cit., Brewer-Carías, p. 115.

The separation of political powers that the Agreement facilitates also serves the broader purpose of defining these powers and disciplining them. This process proceeds from Member States' assumption of the fundamental duty embodied in the GPA. Negative in nature, it involves an obligation not to discriminate "among foreign products or services or among foreign suppliers or service providers".[415] The effect of this duty is to limit government powers exercised in the context of public procurement. For reasons that were outlined in chapter 1.4, it is, however, more of a "political aspiration" than a legal obligation. Treaties, like other laws, are enforceable in courts only if they impose duties sufficiently well-specified to be judiciable. Treaty-engendered "aspirations", on the other hand, are for the political branches of government to assess. In this sense, the indirect "private rights" that flow from the GPA's positive "transparency duties", coupled with the new national court-like avenues in which they can be invoked, are a means to the end of judicialising the rights and obligations that arise from this Agreement. Such rights clarify the obligations stemming from Member States' negative duty of non-discrimination. They are necessary because each state has a different conception of property, and, thus, differing rights and privileges of ownership. The "common rules", in this sense, embody minimum international rights of ownership and identify the parties that possess them. In conjunction with the "challenge mechanism" through which they can be invoked, they serve to legalise and, thus, "de-politicise" the application of this treaty.

One further important parallel exists between the institutional methodology of the GPA and the relationship between private parties and the state under the US Constitution. Related to the "process of legalisation" described in the proceeding paragraph, it involves

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[415] op. cit., GATT, "Agreement on Government Procurement", p. 6.

the fact that the accord effectively recognises certain closely circumscribed individual rights that are prior to the law, specifically those of ownership defined by the "common rules", as well as a right to equality before the law, or "due process" for its enforcement. The GPA, in this sense, is consistent with a political philosophy that proceeds from an assumption that power resides ultimately in the hands of the people, and that the authority of government is inherently limited.

Proceeding paragraphs have described how the GPA's "common rules" define a series of international rights and privileges of ownership. Although, as has been explained, these rights are indirect and do not automatically take precedence over national rules with which they may be in conflict, they operate, in conjunction with the GPA's review-like enforcement mechanism, in a constitutional manner nonetheless. That is, as if they were rights and privileges prior to the law, or "limiting values" conditioning the exercise of representative authority. The purpose of the GPA, more particularly, is to ensure "fair" administrative processes, whilst facilitating liberalisation and growth. The obligation that Member States have assumed under Article XX of the treaty is central to this objective; it amounts to a moral commitment to ensure that administrative decisions taken under the Agreement will not be biased and/or taken without giving the party or parties a chance to put their case. A "vague" constitution-like duty, it creates a corresponding individual right to equality before the law, or due process for the enforcement of the law. This duty is designed to discipline the national application of the law, whatever it may be. In an international setting, the application of vague constitution-like standards is problematic in that there is no "common conception" on which to assess Member States' compliance with them. The "common rules" embodied in the GPA, in defining minimum international

rights and privileges of property, reconcile this problem. If the individual rights to national treatment that they engender are violated, a state has breached its duty to respect suppliers' equality before the law. To the extent that a violation impinges upon the minimum rights and privileges of property embodied in the rights to national treatment, in other words, it is inconsistent with a supplier's right to due process for the enforcement of the law. In this sense, then, there are two, distinct "constitutionalised rights" emanating from this treaty: a closely-circumscribed right to property, as well as one to equality before the law, or "due process" for its enforcement.

## Part III - Intervention and the GPA: Why Have Parties' Accepted these Disciplines? Can the Agreement be Effective?

Earlier sections of this thesis have justified the legislative and administrative intervention associated with the GPA on the basis of the fact that all of the duties arising from the treaty are voluntary, closely circumscribed and, most importantly, enable Member States to achieve self-determined ends that they could not otherwise hope to attain. This conclusion was reinforced by the role that reciprocity has played in the exchange of market access concessions under the Agreement, and the way in which its new enforcement mechanism - and absence of an escape clause - ensure that the benefits it engenders are credible. How, then, does the more political, or "constitutional intervention" embodied in the Agreement's overall regulatory methodology affect this assessment? In particular, do the fundamental individual rights recognised by the accord - despite their indirect status and "self-determined hierarchical ranking" vis-à-vis domestic law - represent a more serious "assault" on the unitary sovereign's authority? If so, *why* have Member States been prepared to accept this?

The answer to the first of these questions is a qualified one: Yes, the "rights" engendered by the GPA do tend to subvert the structure of a unitary sovereign's authority, but, in a globalising world, this is ultimately inevitable if the latter process is to continue, and, furthermore, "subversion" of this nature is not new.[416] In addition, the GPA's particular "institutional methodology" strictly confines the intervention that takes place in a given sovereign jurisdiction. Member States' discretionary control over their procurement

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[416] The "intervention" associated with the Treaty of Rome, as has been explained, provides an extreme, but apt example. See footnote 275 above, p. 155.

processes, as has been demonstrated, remains virtually complete; only the particular administrative activities that fall under the jurisdiction of the "quasi-legal" common rules are subject to the voluntary constraints. The reasons why these sovereign entities have been willing to accept such discipline, in turn, are fundamentally derived from challenges they face in fulfilling what this thesis has described as elementary duties of the negative state, specifically maintaining national security and ensuring the integrity of citizens' civil rights.

National defense constitutes what has been termed the "first duty" of the liberal state. It is a sovereign obligation that exists regardless of the way in which the exercise of authority is structured in any particular national jurisdiction. The problem with which GPA Member State governments are contending, in this respect, has arisen from the fact that globalisation and the extranational division of labour that is following in its wake are making the integrity of the market as a whole a factor of growing importance in each state's assessment of its security interests; national defense, paradoxically, is becoming difficult to maintain independently. Equally bad, if not worse, at least from the point of view of the beleaguered individual sovereign, positive steps that it may wish to take to maintain domestic stability and security can now be foiled by the same external market pressures. For example, the international integration of financial markets means that measures that a government may introduce to stem high rates of unemployment are difficult to sustain if they seriously undermine market perceptions with respect to local macroeconomic fundamentals. A good example of this - albeit one that is undoubtedly most directly related to stringent EMU guidelines for deficit reduction - is provided by the challenge that Alain Jospin's Socialist Government in France recently faced to find

non-deficit sources funding for a youth employment scheme that is going to add roughly 350,000 young people to public payrolls over the coming 5 years.[417] As Mr Jospin, himself, put it at his Party's annual summer meeting when Communist members of his parliamentary coalition were criticising his Government's market "pragmatism", socialists must "emphasize the attention... (given) to the creation of wealth, not its redistribution".[418] Protecting the civil rights of citizens is another fundamental duty of the liberal sovereign; in this context, globalisation is creating a situation in which threats to these rights may arise in a part of the market that lies outside of a sovereign's legal jurisdiction. This situation is particularly problematic for the popular sovereign whose duties relative to the individual citizen - and, certainly, the individual property owner - tend to be clearly delimited.[419] Recent unilateral measures that the US Government has taken to safeguard the property interests of its nationals in foreign jurisdictions such as, for example, the notorious Helms-Burton Act are a reflection of ways in which powerful sovereigns have responded to this contextual challenge. Another illustration is provided by the response of the European Union to the consolidation that is occurring in the US aerospace sector, and, specifically, the recently concluded merger between Boeing and McDonnell Douglas.

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[417] Lavin, D. "Common Ground: French Socialists Swallow a Dose of Economic Reality". *Wall Street Journal Europe*, 3 September 1997, p. 3 and p. 5. Gunnar Myrdal's previously-quoted remarks concerning the way in which political economic phenomena are inevitably connected with other political economic phenomena in the "social flux" probably bear re-iteration here. See above, pp. 113-114. Most importantly, if the French Government were operating in a political economic context over which it exercised complete control, Jospin would certainly not have been forced to contend with the same kind of political challenges when introducing his new "make-work" scheme.

[418] ibid., p. 5.

[419] Sub-federal entities' duties relative to the individual can also be well-specified. Contention arguably relating to this possibility has recently arisen amongst GPA Members in the context of a Massachusetts law that prohibits companies that do business with Burma from obtaining government contracts.

Before this merger could proceed, its partners effectively had to concede to certain conditions posed by the Commission, e.g. Boeing's elimination of its 20-year "sole-supplier" contracts with commercial carriers.[420]

Each of these actions would suggest that an important change in the political economic context in which WTO Member Governments must operate is underway. The GPA can be viewed as a response to this change. From the perspective of any one of its individual Member States, it is an institutional vehicle for augmenting the regulatory "powers" that they, as independent sovereign entities, possess. The political logic that the Agreement embodies is premised on the fact that as market access questions have developed strategic significance, a "common international interest" in the well-being of the market as a social institution has started to emerge amongst WTO participants. This "shared concern" is altering the dynamics of cooperation within the international economic order; strictly competitive association between independent sovereign entities is being replaced by a more cooperative - albeit still fundamentally competitive - variation on the concept. Whereas, previously, the international economic order sought solely to reduce trade barriers between distinct national markets, interdependence is bringing recognition of the fact that the benefits of a wider division of labour can neither be achieved nor sustained without, in addition, a measure of international coordination as regards the positive law that facilitates the realisation of individual ends within any given national market. Just as law of this nature was necessary to facilitate the realisation of such ends within a national setting, in other words, so, too, is a basic framework of rules a prerequisite for the operation

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[420] de Jonquières, G. "Storm over the Atlantic". *The Financial Times*, 22 May 1997.

of a market whose confines are not necessarily conterminous with those of any particular sovereign jurisdiction.

"Lessons" from EU integration, once again, offer additional insights regarding these contextual changes. Ones that relate, more specifically, to the relatively "efficient" regulatory methodology that is embodied in the GPA, and, thus, shed further light on why its Member States may have been willing to accept the kind of political intervention that it entails. Jacques Pelkmans, it will be recalled, described the process of economic integration in Europe on the basis of a quest to find the right balance between regulatory liberalisation and harmonisation. One of the first lessons to be gleaned relating to this "balance" was that a programme of negative liberalisation needed to be complimented by positive regulatory measures designed to facilitate the functioning of integrated parts of an economy. Practically speaking, this "institutional insight" had little impact until the Community changed its strategy of positive policy coordination from one of total "ex ante harmonisation" to one of minimum harmonisation and mutual recognition. The operation of this new strategy, in turn, was facilitated by the introduction of "qualified majority voting", a variation on one-state, one-vote representation in the Council, the political body having the authority to take collective regulatory decisions, and - at least in a procurement context - an enforcement mechanism designed to ensure the uniform application of the minimally harmonised or "common rules". External market pressures, as chapter 1.3 explained, were an important additional factor in generating the political will that was ultimately necessary in order to realise market integration at this level.[421]

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[421] According to Willem Molle's previously-cited text on European integration, the idea of levels, or "stages of economic integration" was originally developed by B. Balassa in his 1961 classic, *The Theory of Economic Integration*. Homewood: Irwin Publishers, Inc. See the

The overall result of these incremental developments was a change in the political dynamics of European economic cooperation. The opportunity costs of non-cooperation, in particular, had become significant factors in the "regulatory equation" needing to be evaluated by each of the Community's participating sovereigns. Active non-cooperation, in the form of contingent protection, furthermore, could no longer be proffered by any one of them on a politically costless basis.

### 3.1 Efficiency and the GPA

The EU's particular pattern of institutional evolution, as Part I intimated, might be characterised on the basis of some of Douglass North's ideas relating to the "efficiency" of institutions and economic performance over time. Institutions, on this view, are man-made constraints that shape human interaction, affecting the costs of production and exchange; they facilitate social cooperation by reducing uncertainty and promoting mutual understanding. Two kinds of institutions exist, formal and informal ones. The latter are "culturally derived" and commonly exercise precedence over the former when the two are at odds; they include things like local or tacit knowledge, values and other social factors that define and limit the economic choices of individuals.[422] Formal institutions, on the other hand, serve the same purpose, but consist of state-enforced, coercive rules that dictate the structure of political authority, the rights of property, and the laws of contract. Significantly, as the scope and scale of economic transactions has increased with economic and technological progress, the social importance of formal institutions has expanded. This is tied to compliance-related problems; the returns on opportunism, cheating and

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discussion in op. cit., pp. 12 - 15.

[422] op. cit., North, p. 45.

the shirking of social obligation - or what this thesis has generally described as "free-riding" on order - have all risen as economic relationships have grown more complex and impersonal.[423]

Amongst institutions, there is a continuum of "efficiency". According to North, efficient institutions are those that minimise the extent to which non-wealth maximising motivations influence the choices of economic actors; they facilitate growth. Those that are formal tend only to evolve when economic actors with the bargaining power to devise new rules determine that such efficiency is consistent with their private interests. In this sense, what has occurred in European context is that a premium has been placed on the development of efficient institutions, both nationally and supranationally. As chapter 1.3 explained, the overall result of the various incremental changes - or the balance that has been struck between regulatory liberalisation and harmonisation - has been the emergence of a context in which positive incentives have been created for firms to lobby their national governments to adopt regulations that indirectly enhance the efficiency of existing, relatively efficient Community institutions by reducing remaining regulatory discrepancies amongst its individual sovereign participants.

A few words must be said, in conclusion, to emphasise the way in which globalisation has affected the behaviour of firms, or what North called "organisations", as well as the

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[423] Recent developments in sectors that are particularly advanced technologically would suggest that this may not be a trend that will continue, eg. the dwindling of the number of suppliers in the automotive sector and the close, informal working relationships that have developed between the former and their clients, particularly as regards the development of new products. This raises interesting regulatory questions; ones, however, that are beyond the scope of this thesis in that they relate more to how an Agreement like the GPA might evolve rather than why the existing Agreement is structured as it is.

sovereigns that regulate their activities. The express purpose of entities of the former nature is to take advantage of the economic opportunities a society's institutions create. In pursuing such purposes, firms play a critically important role in institutional change, at least in sovereign states with formal democratic political institutions; institutions enable *and* constrain them. The first part of this chapter concluded that globalisation has complicated the regulatory job of the state by making it difficult for it achieve its autonomous ends independently. It has also, in a similar way, introduced new pressures on corporate management. Firms in globally competitive sectors are subject to an externally-imposed discipline that comes from greater competition in all of the markets that affect their operations. The existence of world prices for their goods or services, as well as the acquisitive demands of private and public investors are particularly significant in this sense. They are making tacit knowledge and the reduction of uncertainty more important than ever for economic decision-makers.[424] Barring government intervention, in time, it is likely that only adaptively efficient firms will be able to survive in this competitive environment. This situation is causing the "organisations" in question to become proactive advocates of efficient institutions. Such advocacy is, in turn, flowing over borders because of the relentless pressure that these firms are under to augment their profitability. Developed country markets are mature in many sectors; the most significant growth opportunities for individual firms are, thus, often to be found in emerging markets.

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[424] Such pressures also affect a society's informal institutions. For example, the fact that Japan's economy is export-based is making it increasingly impossible for that country to maintain its cultural tradition of lifetime employment. Similarly, heretofore collegial corporate governance in Germany is being revolutionised by increasingly activist shareholders. In a somewhat different, but, altogether related vein, new financial instruments like derivatives are being constantly developed to help firms in the management of risk.

These opportunities are generating strong incentives for such entities to actively support efficient institutional change in societies other than those from which they have emerged.

Assuming these "lessons" from EU integration are more or less applicable to the institutional context in which the GPA has evolved, the WTO Agreement might be described, fundamentally, as a relatively efficient response to the increasingly intense external market pressures to which its Member States and their constituents are exposed. Because of its "quasi-legal" character and the strictly reciprocical way in which its benefits and burdens are distributed, Member states have retained a significant amount of discretion over their participation in this formal institution; nevertheless, the simple fact that an "interventionary" accord of this nature has been agreed would suggest that there is a growing awareness of the opportunity costs associated with non-cooperative regulatory practices. Whereas arguments for multilateral liberalisation have traditionally emphasised the potential gains to be achieved from the reduction of trade barriers, this Agreement, on the other hand, is a manifestation of its Members' desire to stem the costs that are now potentially associated with regulatory independence. The fact that an exceedingly diverse series of national institutional constraints must be accommodated in a WTO setting is arguably related to the various ways in which this Agreement departs from efficiency. Those features of the GPA that differ from the European public procurement regime on which it was largely modelled - like its limited membership and reciprocity-based discriminatory features - are particularly significant in this respect.

## 3.2 Constitutional Implications of the GPA; the Thesis' Contribution

Many of the issues that have been under consideration in this section were considered in the introduction to this thesis in the context of a broader discussion of the constitutional function of the international economic order. That dialogue, it will be recalled, proceeded from an outline of the two major political purposes of constitutions, namely, the structuring of the exercise of political authority, and the privileging of certain individual interests relative to those of the collective; it highlighted the work of Jan Tumlir relating to way in which the postwar trading system has functioned in the former sense, structuring the authority exercised by its Member States in their trade policy-making processes. The fundamental purpose of the economic order, as conceived by the "economic-constitutional analysts", is to facilitate peaceful, international commercial relations by discouraging the use of trade policies with market distorting effects and/or negative international externalities. A few remarks were also offered concerning Tumlir's less-than-fully developed ideas relating to the second constitutional function - that of rights relative to the collective - and how the GATT would need to change in order to fulfill its constitutional role more completely. Particular changes that he felt were appropriate included: the introduction of common, domestic laws based on free market principles; a reinforced, "rigid commitment" to the principles of non-discrimination: review-like domestic institutions, and; a formal departure from the then-to-fore rigid GATT norm of multilateralism. The introduction concluded, finally, that questions of political "cost" had inhibited development of a broader constitutional role for the multilateral trading system. Herein Tumlir's comments relating to the way in which the postwar order has traditionally been viewed as a "painful constraint on economic sovereignty" were cited; the thesis suggested that the GATT's failure to provide effective domestic policy disciplines

was a "particularly vivid" reflection of the institutional "cost structure" associated with Contracting Parties' "inviolable sovereign freedoms". In addition to the inherent threats to sovereign autonomy potentially posed by more cooperative rule-making, a further "costly" complication in this respect stemmed from the difficulty of quantifying the potential benefits likely to be generated by such endeavours.

The domestic policy disciplines embodied in the GPA would suggest that there is now a need to revise some of these ideas regarding the constitutional function of the international economic order. Something, more precisely, has happened to change the cost-related factors that have heretofore inhibited development of a broader constitutional role for the multilateral trading system. The GPA, in addition, corresponds in important ways with each of the remedies that Tumlir proposed for the GATT's constitutional infirmities. This thesis' study of the institutional evolution of this Agreement offers insights as to *what* may have changed, as well as *how* the trading system might assume fuller constitutional responsibilities in future. The remainder of the thesis summarises these "lessons"; they constitute its academic contribution.

What has changed contextually for WTO members, provided the lessons from EU integration generally apply to the cooperation that is manifest in the GPA, is that globalisation is enhancing the political significance of the public good that is represented by the international economic order. This development, as the first part of this chapter explained, is tied to the costs that are now recognised as being potentially associated with regulatory independence. Incentives for cooperation in the provision of order, in turn, are reinforced by the activities of individual economic agents, or what North called

"organisations". These advocates for efficient institutions are well-organised and not necessarily bound to any particular sovereign jurisdiction.

The potential benefits, or, more accurately, forestalled losses associated with regulatory rapprochement across national domains of order, however, still must be balanced against the political costs of not maintaining a more conventional regulatory stance. The fundamental problem with multilateral domestic disciplines has always been and continues to be the fact that states do not share common visions of the "political good", broadly defined, and how it is to be achieved. Each of their economic systems, as earlier sections of this thesis have explained, is theoretically premised on different value judgements relating to how the advantages of social cooperation are to be achieved and distributed; "common rules" and "constitutional rights", such as those embodied in the GPA, can undermine these potentially principled positions. Rights against the state, in particular, are usually justified as means to the end of safeguarding a society's fundamental values. Does this then, therefore, imply that GPA Member States necessarily share similar values with respect to either property, or fairness in the context of their relationships with its owners?

In a word, no. Rather, at a minimum, all that these nation states necessarily have in common is a recognition of the value of the market as a social institution, or decision procedure; the order engendered by the GPA is, first and foremost, instrumental to the integrity of a wider, transnational market. Part II of this thesis, however, showed how the Agreement's "transparency procedures" effectively define minimum international "rights of property" that, in conjunction with the "vague" due process-like obligation of Article

XX of the GPA, operate to secure a "common conception of administrative fairness". This conception clarifies the parameters of a second, corresponding "right" to supplier equality before the law. Parallels between the existence of these two "rights" and the relationship between property and the state under the US Constitution, in turn, were identified, including, most importantly, the GPA's tacit assumption that there are rights prior to government and that the powers of the latter are inherently limited. Is all of this, then, not evidence of at least a shared conception of administrative fairness in the context of public procurement?

The answer to this question is that the instrumental and indirect nature of the rights flowing from the GPA makes it difficult to think of them relative to the kind of value debate that is inherently reflected in any national constitution. Rights are commonly conceived as being in opposition to the demands of the collective, at least as they are expressed through the legislative branches of a democratic government. They are not subject to a sovereign's ordinary legislative and administrative processes because they relate to matters a society has determined should be "above" the law, or left within the realms of individual sovereignty. The relationship between individual freedoms of this nature and a society's political culture, in other words, is such that they must be protected from the vagaries of day-to-day politics. The "constitutional rights" flowing from GPA, on the other hand, have been described as primarily "means" to the end of safeguarding a "collective good". Whilst they privilege the interests of individual suppliers relative to the public under certain closely circumscribed conditions, they do this indirectly and primarily to achieve a collective end, namely non-discriminatory liberalisation of public procurement markets

covered by the Agreement. Is there some kind of crossing of political purposes here? If so, how might such a discrepancy be understood?

The thesis' "gambol through the political theory" of order suggested an alternative way of thinking about the political function of some constitutional rights. That of Joseph Raz, it is premised on the idea that rights are neither inherently independent of collective goods, nor essentially opposed to them. The liberal tradition, according to Raz, has always been "ambivalent on the role and justification of fundamental rights".[425] For this reason, he argued, it is important to remember that "Many rights were advocated and fought for in the name of individual freedom... (but) this was done against a social background which secured collective goods without which those individual goods would not have served their avowed purpose". Rights thus "both depend on and serve collective goods". He proposed, therefore, that some of them be considered as mechanisms for the protection of public goods, via a division of power between the various branches of government. Making a distinction between the basic political culture of a country and its more detailed and transient regulatory arrangements, Raz argued that rights can facilitate the protection of the former; the role that courts are allocated in overseeing them is, in this sense, a way of assuring a society that its political culture will be preserved and that at least a minimum measure of social continuity will be maintained. This, he concluded, does not remove the object of a right from political strife. Rather, it is merely "designed to make it change

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[425] op. cit., Raz, p. 250. The following discussion summarises pp. 250 - 263 of this book.

in response to different social processes from those which determine ordinary political change".[426]

If this perspective on the political function of rights is adopted, those flowing from the GPA might be characterised as being fundamentally instrumental to Member States' collective end of maintaining economic order. The unorthodox institutional methodology that the Agreement employs is, in this sense, essentially an innovative way of securing such order and allocating its costs.[427] One that does not necessarily preclude the existence of common values with respect to property and fairness amongst its Members, but, more importantly, specifies minimum formal perceptions of them as a means of creating a legally-recognisable boundary between policy matters that remain under the jurisdiction of local political processes and those that, on the other hand, are subject to the internationally-agreed rules and enforcement procedures. The purpose of the "rights" of property and equality before the law created by the GPA is, in this sense, to clarify the limits of "sovereign freedom" within this limited polylateral policy context, and grant the judicial branches of Member State governments the authority to determine whether an issue is legal, or political.

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[426] ibid., p. 260. It is interesting to note, in addition, that Raz clearly specifies that his perspective on the political function of rights does not necessarily entail the "existence of written, entrenched bills of rights". Rather, he says, it applies "wherever there is legal tradition which views the defence of civil rights as a special charge of the judiciary... The existence of a formal constitution may contribute to the formation and to the political defence of those traditions. But this depends on its use rather than its existence". See the discussion on pp. 258 - 259.

[427] Another way of looking at this might be in terms of the fact that globalisation has not resolved problems stemming from the fact that there is no international sovereign to pay for and enforce international economic order. In this sense, the purpose of the GPA is to reconcile major political problems - in an international public procurement policy context - caused by the lack of such an entity.

To bring this discussion back to Tumlir's constitutional concepts, it is useful, in conclusion, to distinguish between the objectives of the GPA and its regulatory methodology. Whereas GATT trade policy disciplines supposedly served the "constitutional function" of structuring domestic trade policy processes, the GPA might be described as a restraint on its Members' administration of domestic laws, practices and procedures that have the potential to undermine their fundamental negative commitment to non-discriminatory public procurement. In this sense, just as the GATT's trade policy proscriptions correct the "executive failures" that are implicit in discriminatory trade policies, the GPA remedies "administrative failures" that are manifest in discriminatory tendering practices, structuring the executive discretion that has been delegated to officials responsible for the implementation of public procurement policies and procedures; employing Tumlir's terminology, it serves the purpose of "rigidifying" Member States' commitment to non-discrimination.

This relatively innocuous constitutional objective, however, does not detract from the fact that the methodology that the GPA employs is fundamentally an American one, and, in this sense, potentially interventionary, depending on the particular "constitutional landscape" in which it is to be applied. Part II of this thesis showed how the Agreement's "technology of liberalisation" paralleled that of the US, namely by separating the public procurement-related rule-making, implementation and enforcement activities of its Member States, using law to define and discipline the various powers, and implicitly assuming that there are supplier "rights" prior to government. At the same time, Raz' approach to understanding the political function of constitutional rights would also appear to be consistent with popular sovereignty as it practised by the Americans; the "arbitrators role"

that he envisaged for the judiciary is consistent with that of the courts in a state in which legal sovereignty lies with the people and not their elected agents. Surely, then, this situation presents political problems that may be somewhat more difficult to resolve in a transnational context?

Once again, however, benefits are to be gained by those possessing the patience to take a closer look at an apparent "consistency". The GPA's methodology is consonant with an American approach to order, but, more importantly, it is also not *in*consistent with that of what this thesis has termed the "generic unitary sovereign". In this respect, the nature of the damages available under the provisions of Article XX of this Agreement is particularly significant. Its paragraph 7(c) reads:

"(Challenge procedures shall provide for) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest".[428]

Herein, the fact that a Member State's financial liability for injury to individual supplier interests "may be limited to (the latter's) costs for tender preparation or protest" suggests that the purposes of review under this Agreement can be interpreted as being either to safeguard the specific individual rights exercised or affected by participation in the letting of a government contract, or to protect the more general interests of the collective in fair administrative processes. The fact that the Agreement allows its participants to limit the availability of damages to those sufficient to cover costs incurred by a potential supplier in participating in, or challenging a given tender, more precisely, is fully congruous with the "political logic" that usually underlies the institution of judicial review in a unitary

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[428] op. cit., GATT, "Agreement on Government Procurement", p. 26.

state; it does not, that is, undermine the democratic tradition that favours the equal rights of man as a citizen. Individuals, in this sense, are given legal standing to appeal against administrative decisions because such appeals indirectly benefit the interests of the collective in more just administration of the law. Even though the exercise of political authority is effectively re-structured by the GPA, in other words, the individual "rights" that it engenders neither imply that the power of any one of its Member State sovereigns is inherently limited, nor preclude the continuation of processes of liberalisation "from above".

For similar reasons, there is, in addition, no inherent ideological conflict between the political purposes of the "constitutional rights" engendered by the GPA and the constitutional premises of either the unitary or popular sovereign. Raz talked about rights relative to the division of political powers that they provoke. His theory, however, said nothing about the particular purpose of any given right; specific constitutional rights may protect either individual or collective interests. The role played by individuals in enforcing a right, accordingly, has no implications as regards the nature of their relationship to political authority. Rather, the judicial branch of government is allocated responsibility for the protection of rights because of *their* relationship to a society's political culture; politically speaking, this reflects formal recognition of the inherent fallibility of the representative process, nothing more.

Finally, it is interesting to note how the GPA's "regulatory methodology" parallels - and subsequently departs from - the "constitutional remedy" for the GATT that was proposed by Tumlir in the early 1980s. The common domestic laws, strengthened commitment

to non-discrimination, national review institutions, and departure from multilateralism that he prescribed were, fundamentally, an economist's interpretation of what was then-ailing the international economic order. Despite the fact that this "institutional ordinance" would have 1) applied exclusively to countries at similar stages of development; 2) created only indirectly effective "rights"; and 3) given national courts the authority to conduct the review-like procedures that were proposed, the way in which it was premised on rigid free market principles - to be enacted through common domestic laws - suggests that Tumlir's vision of international order, unlike that manifested in the GPA, was aligned with that of the popular sovereign in a more politically-material sense. Although Tumlir never went so far as to propose that GATT Contracting Parties should be held financially liable for the effect of their discriminatory trade practices on specific individual interests, his common domestic laws were designed as means to the end of "efficient" domestic economic institutions; accordingly, they would have had the practical effect of freeing the individual property owner within any given participating sovereign's national civil society. This, for political reasons that have been explained, is something that the GPA does not do.

Other than the fact that history has shown Tumlir's efficient "institutional remedy" to have been politically infeasible, his proposals were, nonetheless, politically astute; most significantly, they responded to the problem of intervention in that the "rights" to be engendered by his new, institutionally-improved GATT were to be non self-executing, and invocable before national courts. Furthermore, the reinforced, free market disciplines that he advocated were only to be applied in countries with similar political systems and at comparable stages of development. Indeed, one way of looking at today's GPA is as

an intermediate step towards the kind of more efficient international economic institutions that Tumlir envisaged. Politically significant differences between the constitutional vision from which he was operating and that implicit in the GPA, however, are intelligible to the extent that the latter departs from efficiency. In this sense, the GPA's reciprocity-based discriminatory features are of especial importance. Alongside of the Agreement's plurilateral and voluntary character, limited remedies and nationally-centred enforcement procedures, they enhance the political palatability of this Agreement.

The reasons why "philosophically-oriented differences" of this nature are of practical political importance are tied to the way in which globalisation is impinging upon the liberal sovereign's conduct of its "positive", defense-related obligations. The market's transcension of the nation state, as has been explained, is changing the latter's approach to the "collective action problem" and, in the process, redefining the politics of international economic order; to the extent that the integrity of a wider market is a strategic consideration for any given sovereign, national security is becoming difficult to maintain independently. Leaving a veritable "contextual seism" in its wake, this process really took off after the end of the Cold War. To Tumlir's credit, it is a phenomenon that he did not anticipate.[429] Its defense-related implications for order, in any case, have two "faces", an external one and an internal one.

In motivating his economic constitutional theory, Tumlir said that foreign policy issues between developed countries had become economic and that economic issues *demanded*

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[429] Frieder Roessler, a long time colleague of Jan Tumlir at the GATT Secretariat, told the author in conversation that Tumlir had never considered how a process of globalisation might affect his theories.

regulation by law.[430] The ultimate political connotation of this, given the specific regulatory methodology that he was concocting - and its relationship to that embodied in the GPA - is an effective shielding of these issues from local political processes. The defense-related problem that globalisation is engendering in this respect is that it is causing economic issues to be major foreign policy issues for *all* countries, regardless of whether they happen share democratic traditions, and/or relative standards of living. This, in turn, is problematic because, as Robert Gilpin put it, the operation of the international market tends, over time, to produce "profound shifts in the location of economic activities" and affect an "international redistribution of economic and industrial power". The most rewarding prospects for active economic cooperation, in this sense, may also be the least attractive ones from a purely political point of view.

Assuming it is desirable to maintain the democratic traditions and institutions on which the existing order is premised, it is probably premature, at best, to "de-politicise" economic policies internationally through the multilateral introduction of efficient institutions. For this reason, the latitude that is left to individual GPA Member States to determine the specific, sectoral coverage of its market opening - and sustaining - disciplines is critically important politically, as, of course, is the plurilateral nature of this accord. Alongside of the general, defense-related "carve-outs" contained in Article XXIII of this Agreement, these features allow participating sovereigns to maintain a maximum amount of flexibility in determining the extent to which further liberisation - in the specific form of effective

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[430] op. cit., Tumlir's "International Economic Order and Democratic Constitutionalism", p. 80

regulatory harmonisation - is consistent with their short-to-medium term national interests.[431]

The other security-related problem with efficient institutions in a globalising world is that they may be introduced in a manner that is insensitive to the political role that is played by a sovereign's existing, informal or economically "imperfect" institutions. Each nation state, as earlier sections of this thesis have explained, has a unique approach to the balancing of individualism and collectivism. This approach enables it to maintain domestic order and stability, the internal aspect of a sovereign's duties of defense. The GATT's Part II commercial policy disciplines, as has also been discussed, were premised on these national idiosyncrasies. If the separate, nationally-centred, social equilibria that they facilitate are under-mined, the old, abiding dilemma of representative government may once again raise its ugly head. Efficient institutions offer a particular solution to this dilemma, but they do not automatically reconcile problems stemming from its implementation; ideological disjunctures between the principles on which such institutions are premised and any given sovereign's currently prevailing assumptions with respect to the appropriate relationship between the individual and the state may be considerable. These disjunctures, in turn, are likely to be the products of a variety of formal and informal institutions, some of longstanding duration.

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[431] GPA Article XXIII "Exceptions to the Agreement", more specifically, include: those for "essential security interests relating to the procurement of arms, ammunition or war materials... national defense purposes... (or measures) necessary to protect public morals, order or safety, animal or plant life or health, intellectual property, or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour". See the text of the WTO Government Procurement Agreement, op. cit., p. 28.

It might be said, in conclusion, that there is a built-in social governor on the pace of institutional transformation, certainly at the level of social aggregation that has been under consideration in this thesis. New extranational institutions must be constantly reconciled with existing national and sub-national institutions - both formal and otherwise - if change is to be orderly. The political danger that is potentially associated with this situation arises from the possibility that, like a chemical solution, a given domestic system may become saturated with externally engendered change. Whilst the economic growth that is facilitated by efficient institutions can allow for a kind of domestic "institutional super-saturation", further social reorganisation cannot continue apace - peacefully - once this point is transcended. As George Sabine put it, "Ideals that have been imbedded for centuries in a culture are not discarded with impunity".[432]

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[432] op. cit., Sabine, p. 474.

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