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\*1 GATT and the European Community: A Formula for Peaceful Coexistence

Frederick M. Abbott [\[FN1\]](#)

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## INTRODUCTION

In a dark corner of the GATT Uruguay Round negotiations lurks a fundamental issue of international trade relations unlikely to find a peaceful resolution either at the completion of the Round or soon thereafter. It is clear that through the middle of 1990 scant attention was paid to the relationship which would exist between the GATT and the European Community ("EC"), or the GATT and any other regional group, subsequent to the incorporation of the so-called "new areas" into the GATT regime, and with respect to the scope of preferential arrangements or discriminations that these regional trading arrangements ("RTAs") might be allowed. [\[FN1\]](#) Yet as the Community completes its much-heralded 1992 plan [\[FN2\]](#) and the Heads of State of the \*2 Western Hemisphere become increasingly enamored of the free trade area as a solution to stagnant economic development, [\[FN3\]](#) some light might well be shined into this dark corner lest the concept of the liberal international trading system embodied in the GATT be inadvertently annihilated.

The current round of international trade negotiations under GATT [\[FN4\]](#) auspices is designed in large measure to bring trade in services, investment measures and intellectual property rights protection within the framework of GATT regulation. [\[FN5\]](#) Developments in the international economy make the GATT somewhat anachronistic in that it concerns itself only with the trade of goods, while a large portion of international economic flows are made up of services, the sale and transfer of intangible technologies and direct investment. [\[FN6\]](#) Many years \*3 and much effort have been spent to reconcile the GATT with international trade reality, and there are good prospects for at least limited success. Moreover, even if the Uruguay Round negotiations should fail as a whole (crashing on the shoals of agricultural subsidies perhaps), the major international trading powers may well reach an accommodation on the problem of liberalizing cross-border trade in services. [\[FN7\]](#)

This article addresses the relationship between the GATT, the European Community and other RTAs as and when trade in services and other "new areas" are incorporated into the GATT framework. The article first discusses the conceptual justifications for RTAs (as an alternative to utopian global free trade) in order to provide background for considering whether the privileges accorded RTAs under the existing GATT framework should be extended to new areas and, if so, how far. It is observed that "state of the art" tools of economic analysis do not provide adequate guidance as to the global welfare costs or benefits of RTAs so as to enable trade policy-makers to determine in advance their impact on global welfare, and that more subjective modes of analysis must be looked to for answers. The article then describes the GATT's historic tolerance of RTAs and how that tolerance is legislatively embodied in the General Agreement. It is noted that the existing (and controversial) formula providing a limited waiver for RTAs with respect to the GATT Most Favored Nation ("MFN") principle (and trade in goods) cannot be readily transported and applied to the National Treatment principle and trade in services (with which the Uruguay Round negotiations are concerned). The EC's proposal for a new RTA waiver in its draft GATT Services Code proposal is analyzed and is found to be both unworkable and unwise. This article proposes a new formula for a GATT waiver or exemption which would be applicable to the EC and other RTAs. The new formula would rely on the concept of "necessity" as a basis for the evaluation of RTA conduct which derogates from the general rules of the GATT. While certain guideposts may be provided to decision-\*4 makers with respect to the application of the proposed RTA waiver formula, it is clear that the myriad of contexts in which RTA derogations may arise will require the development of a new body (or common law) of interpretive decisions concerning RTA derogations - some of

which, such as RTA measures designed for the primary purpose of providing unfair comparative advantages to local industry, will involve bright lines distinguishing the “necessary” from the “merely convenient,” and others of which will involve careful balancings of interests.

This article then focuses specifically on the telecommunications sector of the services trade to provide a concrete reference point or “case study” of potential RTA discriminations. Attention is focused on a particular RTA - the European Community - and its actions both with respect to liberalizing its internal telecommunications sector and its position in the GATT services/telecommunications negotiations. An attempt is made to apply both the EC's proposed RTA waiver and the formula proposed in this article to prospective EC conduct in its telecommunications sector. The results of this application illustrate the difficulties inherent in the EC formula as well as the elements of subjectivity inherent in the formula proposed in this article. Whatever waiver formula is adopted in the Uruguay Round negotiations, the discussion in this article will hopefully serve to illuminate the consideration of RTA actions within the new GATT framework as the new formula is implemented.

Succinctly stated, the central issue in this article is whether RTAs should be permitted to adopt rules which derogate from the National Treatment principle of the GATT in the application of new agreements covering trade in services and other “new areas,” and therefore be allowed to discriminate in favor of member country enterprises for reasons having to do with the formation or maintenance of the RTAs. If so, by what legal standard should such derogations be evaluated? As the article will make clear, this issue is not a mere abstraction. The EC clearly has in mind that it will be enabled to liberalize its internal market for the benefit of domestic service providers without extending the benefits of that liberalization directly to non-Member State enterprises. [\[FN8\]](#) Such discrimination would necessarily involve derogations \*5 from the National Treatment principle to which parties to a new GATT Services Code would otherwise be subject. [\[FN9\]](#)

## I. REGIONAL TRADING ARRANGEMENTS AT THE CONCEPTUAL LEVEL

### A. Politics

A waiver permitting the formation of RTAs and condoning certain RTA discriminatory practices [\[FN10\]](#) was incorporated in the GATT General Agreement in 1949 because of a belief that RTAs might be economically desirable, [\[FN11\]](#) and because of post-war perceptions of the potential advantages for regional political stability which might be achieved through economic integration. There was then and remains a strong political/military motivation for encouraging European integration\*6 in particular. [\[FN12\]](#) Then and now, these political/military motivations may outweigh all but the most compelling economic arguments against an RTA like the EC. [\[FN13\]](#)

### B. Economics

Economists, on the other hand, have not been able to provide a definitive perspective on the welfare benefits and costs of RTAs because of their enormous complexity and dynamism. In 1950 economist Jacob Viner described the basic economic impact of the RTA, [\[FN14\]](#) and his observations remain at the core of RTA economic analysis. Viner observed that RTAs may both create trade among RTA members by shifting production and imports from higher-cost RTA members to lower-cost RTA members, and divert trade by shifting production and imports from non-RTA member country exporters (with former cost advantages) to member country producers/exporters awarded cost advantages by new preferences. Whether an RTA would produce an economic welfare benefit would depend upon whether its trade creating (i.e., new trade between the member countries) or trade diverting (i.e., member country trade which is substituted\*7 for third-country trade) forces were predominant. Though not so assumed by Viner, [\[FN15\]](#) Dam (among others) concluded after Viner's observations on RTA effects were published that it would be possible to predict whether a particular RTA would, as a whole, be trade creating or trade diverting and therefore beneficial or detrimental to global economic welfare. [\[FN16\]](#)

Forty years following Viner's pathfinding work there seems to be some consensus that predicting or even determining after the fact the trade creating/trade diverting impact of an entire RTA is no easy matter and, moreover, that the determination of the so-called "welfare effects" of the RTA should involve an analysis of factors other than trade effects. A recent Note prepared by the GATT Secretariat which reviews the literature on the trade creation and trade diversion effects of RTAs suggests that as economic analysis has become increasingly sophisticated and the dynamic effects of market manipulating mechanisms have become better understood, the complex effects of trade barrier adjustment on local production and consumption, external production and consumption, employment, social welfare, monetary policy (including balance of payments effects), etc. challenge the most sophisticated empirical and modeling capacities of the economist. Beyond\*8 that, an evaluation of RTAs involves "public choice" issues which are not answerable by economic modeling alone. [\[FN17\]](#)

Following a thorough review of economic studies with respect to the economic impact of RTAs (including the EC) and an identification of the more prudent and realistic of these studies, the Note observes, inter alia, a "considerable variation" in the estimated trade creation and trade diversion effects of the EC. [\[FN18\]](#) The Secretariat adds that "with few often striking exceptions . . . most studies of customs unions have produced estimates of substantial absolute values for TC, net TC and/or welfare gains, which nevertheless are extremely small as percentages of national income or GNP," [\[FN19\]](#) and that the difficulties encountered by leading economists in estimating after the fact the impact of the creation of an RTA "underlines the limits in the logic and practice of ex ante prediction of TC-TD trade creation-trade diversion ." [\[FN20\]](#)

The GATT Secretariat's survey of the global economic welfare effects of RTAs suggests that there are no conclusive answers to these key questions: (a) from a global economic welfare standpoint, are RTAs as a general proposition good or bad? (b) from a global economic welfare standpoint, are particular RTAs good or bad? While there are opinions on all sides of these questions, the economic costs and benefits of RTAs appear to remain largely indeterminate at present. There does appear to be some consensus that the tools of economic analysis are not yet sufficiently developed to permit conclusive predictions about the welfare effects of prospective RTAs.

#### \*9 C. Arguments Against RTAs

There are a wide range of additional perspectives as to the merits of RTAs beyond those founded on political/military stabilization or pure analytic economics. The concerns of those who believe that global economic welfare is best served by an open trading system as embodied in the GATT, and who are concerned that a preoccupation with regional arrangements will undermine the open system, are articulated by Professor Riesenfeld:

Let me remind you that the basic blueprint of a new world order designed at Bretton Woods was that of a peaceful, nondiscriminating, and open system of economic and trade relations of global dimensions and that both bilateralism and regionalism were viewed, at best, as an exception and transitional phase in the realization of the ultimate goal. Thus the General Agreement on Tariffs and Trade (GATT), which survived as the remnant of the idea of the International Trade Organization planned in Havana, was instituted as the instrument governing worldwide liberalized, if not free, trade.

It was clear from the beginning of that system that the building of a free global trade system would not be easy and would take a sequence of negotiating rounds. For that reason and to accommodate perceived benefits of customs unions and free trade areas, Article XXIV of GATT excepted arrangements of that type from the sweep of the most favored nation treatment requirement which is the central provision of the system.

...

Regional cooperation in trade and resource conservation and sharing is both necessary and desirable. Nevertheless, regionalism should not be at the expense of a global perspective of the ultimate needs of mankind. [\[FN21\]](#)

Those who believe that world economic welfare is maximized by the broadest opening of national markets, giving the widest room for the functioning of the laws of comparative advantage, naturally view RTAs with suspicion. RTAs by their very nature distort international markets because they create preferences for intra-regional

trade. It is only second-best to argue that comparative advantage is at least extended beyond narrow national borders into a region when the best alternative of extending comparative advantage on a global basis is available.

Second, countries which form RTAs are often geographically contiguous and at relatively comparable stages of economic development. If regional preferences are granted among a group of countries at an advanced stage of economic development, this may only widen the schism between more and less developed countries by permitting those with existing advantages to enhance their status without extending the \*10 benefits of expanded trade opportunities to the less developed. In this sense RTAs may function to widen the gap between rich and poor. [\[FN22\]](#)

Third, smaller countries which are not part of a natural alignment in a geographic region or which are part of a region in which their particular attributes are not rewarded are threatened by RTAs. This threat may be of a political nature, as when a particular country finds that it lacks the leverage necessary to secure equitable treatment from the regional partners with which it finds itself aligned. Some countries may, by virtue of geography or political incompatibility, be excluded from whatever benefits RTAs have to offer.

Fourth, transnational business enterprises are concerned that regional trade preferences will inhibit their access to markets. Protectionist policies intended to foster the development of regionally-based industries are a threat to the global enterprise, which thrives in the open market. Much of the adverse effect which protectionist policies may have on transnational enterprises may be ameliorated by extending to them the right to establish themselves and take on a local character within the RTA. [\[FN23\]](#)

Individuals, either as consumers or employees, certainly have interests in the question whether RTAs create global welfare benefits. If the U.S.-Canada Free Trade Agreement and the EC experience are illustrative, the most significant individual concerns with respect to the establishment of RTAs are expressed by employees whose job security is threatened by the liberalization of markets and regional operation of comparative advantage. More abstract concerns about whether RTA comparative advantage or global comparative advantage is the better alternative for economic prosperity are left for senior government officials to ponder. [\[FN24\]](#)

Finally, it is easy to be concerned that a marked trend toward the solution of economic problems on a regional level will undercut efforts to resolve economic problems on a global level. A form of regional \*11 isolationism could emerge and diminish the authority of global institutions such as the GATT. Even if regional groups at the outset express a commitment to long-term participation in an open global trading system, enthusiasm for that system might well be undermined by a preoccupation with more immediate regional concerns. [\[FN25\]](#)

#### D. Arguments For RTAs

There are forceful arguments in favor of RTAs. First, if it were true that the global economic system functioned as the harmonious interplay of 160 sovereign States negotiating the progressive liberalization of trade barriers to the ultimate benefit of all mankind, it might be difficult to promote the RTA concept. However, the world trade community is not functioning in this utopian sense, [\[FN26\]](#) leaving RTA proponents to argue that the best road to the eventual utopia is through the formation of RTAs, whose members gain experience in economic cooperation through the formation of regional institutions, the intra-regional reduction of trade barriers, and the creation and operation of effective dispute resolution bodies. By demonstrating the advantages of market liberalization on a smaller scale, the RTAs promote liberalization on a larger, universal scale. [\[FN27\]](#) If the current system can be portrayed as one in which cooperation is difficult because of widely divergent national interests which are difficult to resolve on a country-to-country basis, the better idea may be to encourage the formation of a dozen regional groups which will thereafter negotiate on the basis of regional interests in a less fragmented environment. The EC can be pointed to as an example of regional cooperation in the formation of institutions, removal of barriers, creation of dispute mechanisms and \*12 promotion of a common trade policy which makes the Community easier to deal

with than twelve independently negotiating European nations. Whether the EC experience can be replicated in other regions is an interesting and difficult question. Other RTAs have not been nearly so successful. [FN28] A particularly significant feature of the EC that may provide a model for other regional arrangements, and, ultimately, the global trading system, is the direct applicability of Community law to the individual and the extension to the individual of direct access to the judiciary for the purpose of challenging Community regulation.

Second, RTAs can be viewed as the engines which will drive global economic development. [FN29] If it is true that a regional group of economically advanced countries will accelerate intra-group development beyond that achievable by a more economically disparate and geographically diverse universe of countries, it may be preferable to encourage this advancement which can then be used to improve the lot of the less economically fortunate. Just how this economic bootstrapping will occur remains to be seen, but mechanisms surely are conceivable.

Finally, RTAs are a reality. Although the EC is evolving at a rapid pace and both its immediate and longer-term structural futures are unclear, it would be somewhat disingenuous to propose the dismantling of the EC because RTAs are not a demonstrated virtue. Even a cautionary message to the Heads of State of the Western Hemisphere who seem to have collectively concluded that bilateral and regional free trade areas will further their collective interests would be unlikely to turn the tide of history. The more limited ambition of this article is to attempt to define a rule or rules which will help to constrain the post-Uruguay Round policies of RTAs within limits which are reasonably consistent with the concept of a liberal global trading system, and thus are less likely to lead to a disintegration of that system.

#### \*13 II. RTAS IN THE EXISTING GATT FRAMEWORK

The General Agreement is tolerant of the formation of RTAs. [FN30] Provided that the members of a prospective RTA notify the GATT Contracting Parties and meet a requirement that their formation measures will involve “substantially all the trade” among them, [FN31] they are permitted under article XXIV of the General Agreement to ignore the GATT’s Most Favored Nation treatment principle and grant each other tariff preferences which need not be extended to non-RTA members (as well as, in the case of a “customs union,” to form a common tariff wall). [FN32] The incidence of tariffs affecting non-members of a customs union is not to exceed “on the whole” the tariffs which were applicable to them prior to the formation of the RTA. Tariffs affecting non-members of a free trade area (“FTA”) should be no higher than those applied to them by each member of the FTA prior to its formation. The GATT Contracting Parties have never refused an article XXIV waiver to a prospective RTA. [FN33]

#### \*14 Most Favored Nation and National Treatment Derogations

##### 1. The MFN Principle

Article XXIV permits discriminatory preferences with respect to “duties and other regulations of commerce” maintained in each of the constituent territories of an RTA. Though article XXIV is decidedly vague, this reference appears to be directed at permitting only derogations from the GATT MFN principle, specifically as it requires each GATT Contracting Party that grants a tariff benefit to any country to extend immediately and unconditionally the same benefit to all GATT Contracting Parties. [FN34] Under this narrow construction, preferential arrangements under article XXIV are limited to the discriminatory reduction or elimination of intra-RTA tariffs and should not extend to the discriminatory reduction or elimination of non-tariff barriers such as internal sales taxes (e.g., the removal or reduction of taxes only in favor of regionally-produced goods). The latter type of preferential treatment would involve derogation both from the GATT MFN principle (regarding equivalency of treatment for all GATT Contracting Parties) and from the GATT National Treatment principle.

##### 2. The National Treatment Principle

The National Treatment principle is a fundamental tenet of the GATT. Each Contracting Party agrees to treat goods from each other Contracting Party on a level comparable to those produced in its own territory for the purposes of internal sale. [FN35] Article XXIV does not expressly address deviations from the National Treatment principle and there is no good reason to conclude that the drafters of the General Agreement intended that RTAs be permitted to grant internal preferences to locally produced goods. However, on a purely semantic level, a case for an interpretation of article XXIV which permits derogation\*15 from the National Treatment principle can be made, though such interpretation is by no means widely accepted. [FN36] This is not to say that there is absolutely no scholarly support for the proposition that article XXIV permits derogations from provisions of the GATT other than the MFN principle as it applies to tariffs and related charges and regulations, [FN37] or that the EC (for example) has not from time to time adopted and been challenged for adopting regional internal discriminations with respect to locally-produced goods. [FN38]

#### \*16 3. Application of Article XXIV to Services

Assuming that article XXIV is intended only to permit exceptions to an RTA's MFN obligation with respect to tariffs, in its current formulation it is not usefully applied to trade in services. In the context of regulating trade in goods, an RTA typically subjects non-member goods to a tariff as they cross its external border. An RTA extends a preference to regionally-produced goods by not imposing a tariff on them. Foreign or external goods are acted upon on the basis of their origin - i.e., coming from outside the RTA's external border. Similarly, "preferred" goods - those which were either produced within the RTA or have already paid the entry fee or tariff - are not acted upon because they are within the tariff wall. In sum, article XXIV permits RTAs to favor local production by removing intra-RTA tariff barriers without eliminating external barriers (and, in the case of a customs union, by erecting a common external wall). [FN39]

The regulation of trade in services is a more complex matter. Because services are routinely provided by persons "at the site," they are generally not subject to "border measures" such as tariffs (although there are border measures affecting services, such as employee visa requirements). External service providers are typically regulated (and discriminated against) both on a national and RTA level by internal regulations such as licensing requirements which establish, either expressly or through their operational effect, different standards of treatment for local (or "national") and foreign (or non-RTA member country) service providers. The trade regulation of "foreign" service providers, then, occurs not necessarily (or even generally) at an RTA's external border, but rather internally where rules and regulations may be either expressly or operationally discriminatory. A local service provider licensing requirement, in order to discriminate against a foreign service provider, need not expressly preclude the foreign service provider from operating locally if such a licensing requirement provides, for example, that the provider must possess certain local academic\*17 credentials which cannot reasonably be obtained by a person seeking to enter the market (and which are not a reasonable requirement for the license). Insurance and banking enterprises might be discriminatorily impaired from providing services across borders as a result of disparate capital or reserve requirements which are arbitrary or unjustified. Thus, trade restrictions based on nationality may be "disguised" in the form of licensing or other regulatory requirements which do not expressly contain reference to nationality. To the extent that such regulatory requirements are arbitrary or unjustified, they are the equivalent, from a trade regulation standpoint, of denial of National Treatment.

A recent Gatt Panel Report, which involves a claim by the EC against the United States arising out of the discriminatory impact of section 337 of the Tariff Act of 1930, makes clear that compliance with the National Treatment principle is not to be confined by reference to the language of rules or regulations. An inquiry into the application (or potential application) of the rules or regulations is appropriate. [FN40] An analysis of legal rules should not be confined to instances of their application, but should take into account their "potential impact" as well. [FN41]

If foreign services (and service providers) were regulated/dutied by individual countries or RTAs only when they literally crossed borders, much foreign or external trade would go unregulated because it would in fact be

provided locally. [FN42] In the services context, differential treatment must to some extent be based (expressly or by operational effect) on the nationality of the service provider, and any such differential will involve the National Treatment principle.

#### 4. The Need to Modify Article XXIV

If RTAs are to be permitted to discriminate in favor of services of \*18 local/regional origin, such permission must therefore be couched at least partially in terms of derogation from the National Treatment principle. An amended form of article XXIV will therefore be needed in a GATT agreement on services to incorporate the concept of derogation from the National Treatment principle (in addition to derogation from the MFN principle) if certain RTA discriminations in the services sector are to be permitted. [FN43] This article is concerned with the conceptual underpinnings to and the potential form of such an amended provision. [FN44] Moreover, it is a premise of this article that the adoption in a GATT services agreement (or other “new area” agreement) of a new formula for evaluating RTA discriminations will not put an end to debate over the appropriate limits of that formula. Because of the innumerable potential mechanisms of non-tariff barrier trade discrimination and the wide array of services, investment mechanisms, etc., it is difficult to imagine that any formula will permit a neat evaluation of all potentially discriminatory measures which RTAs might adopt. [FN45]

#### \*19 III. SERVICES LIBERALIZATION WITHIN THE GATT

Both the United States [FN46] and the EC [FN47] have prepared and submitted to the GATT Negotiating Group on Trade in Services a specific proposal for an agreement on trade in services. These proposals followed the adoption by the Contracting Parties of a services Framework Agreement at the Uruguay Round Mid-Term Review. [FN48] The U.S. and EC proposals demonstrate much more clearly than the very general Framework Agreement the type of commitments more likely to emerge from the services negotiations. Both the United States and the EC submitted their proposals in the form of a separate GATT agreement or Code rather than an amendment to the General Agreement, reflecting an assumption that, with respect to services, the two-thirds majority of the Contracting Parties necessary for an amendment to the General Agreement itself will not be forthcoming at the conclusion of the Uruguay Round. [FN49] Both Code proposals envisage that separate “Annexes” will be adopted to add specificity to, clarify or modify the Code with respect to the regulation of trade in specific sectors such as financial services and telecommunications. [FN50]

Regardless of the ultimate outcome of the negotiations, the U.S. and EC proposals are of comparative interest from the standpoint both of their points of convergence and their points of divergence. Both would incorporate the fundamental principle of National Treatment as a litmus test of liberalization. [FN51] Thus, each party to a Services Code would agree, under both proposals, to grant to service providers of other Code parties treatment equivalent to that of their own nationals. Application of the National Treatment principle assumes, of course, that service providers are effectively enabled to enter the local market (i.e. are granted market access) in the first place. [FN52] Both proposals \*20 envisage that Code party governments will, in spite of the National Treatment provisions, retain the right to apply different regulations to foreign service providers than to domestic providers when such regulations are required for public policy reasons, [FN53] but each would in its own way preclude the application of differential regulations intended as artificial barriers to liberalization. [FN54] Both proposals would permit derogation from the National Treatment principle in the area of government procurement (not intended for resale), [FN55] a matter which presumably will be further dealt with in revisions to the Government Procurement Code.

Both proposals would incorporate a Most Favored Nation provision, so that benefits granted to any party to the Services Code will be made available to all other parties to the Code. [FN56] The U.S. and EC proposals each take a different approach to the question of derogations from the MFN obligation with respect to liberalization commitments beyond those initially agreed to, though these differences appear to be more a matter of form than substance. Under each proposal, it appears to be envisaged that each Code party's initial schedule of liberalization commitments will apply to all other parties to the Code. [FN57] The U.S. proposal seems to suggest that additional

benefits provided by each party under the Code will be the subject of separate Protocols (for added liberalization to covered sectors) or Special Agreements (for non-Code-covered sectors). [\[FN58\]](#) The EC proposal appears to contemplate progressive rounds of multilateral liberalization negotiations and agreements [\[FN59\]](#) pursuant to which any party entering into a liberalization commitment beyond that to which it was previously subject may choose not to extend that commitment to another party “when it \*21 considers that the level of commitment of the other party is not in keeping with the particular characteristics of that party's market and its degree of liberalization.” [\[FN60\]](#)

The United States and the EC follow somewhat different approaches to establishing the universe of services to be liberalized under the Code, although both are variations of a so-called “negative” listing approach. Under the U.S. proposal there will be a collectively agreed-to list of service sectors covered by the Code, to which each party may independently adopt its own exclusions. [\[FN61\]](#) Under the EC proposal the assumption is made that all traded services will be covered by the Code, [\[FN62\]](#) except those that each party independently elects to reserve through enumeration on a separate schedule. [\[FN63\]](#) Under a “positive” listing approach (used by neither the United States or EC), parties would be expected to liberalize only those sectors which they individually designated. A positive approach would presumably result in a lesser degree of overall liberalization.

One of the major differences between the U.S. and EC proposals concerns recognition of the “right of establishment.” The U.S. proposal would specifically require each Code party to agree that persons of other parties could establish or expand a commercial presence on the territory of that party on a basis no less favorable than that of the party's national persons. [\[FN64\]](#) The EC proposal makes a reference to measures affecting “commercial or professional presence” as being subject to the Code, [\[FN65\]](#) but does not otherwise specifically address the right of establishment. This difference could be read merely as one of shading, or nuance, since the general National Treatment provision in each Code proposal could be construed so as to require the equivalent treatment of applications for establishment. If such is the intended construction, the EC might be faulted for subtlety or the United States criticized for overconscientious specificity. Further supporting the “mere nuance” hypothesis is the fact that the U.S. National Treatment provision is directed at service providers “whenever market access has been achieved,” [\[FN66\]](#) while the EC National Treatment provision more broadly refers to “service providers of other parties.” [\[FN67\]](#) However, \*22 since National Treatment can only truly become meaningful to a service provider which is able to enter a market, and since the right of establishment in an RTA like the Community is of paramount importance to foreign providers, the absence of specific mention of this right in the EC proposal may understandably give rise to questions of intention from participants in the negotiating process.

Both Code proposals envision transparency of regulations, [\[FN68\]](#) equivalent treatment by government monopolies, [\[FN69\]](#) balance of payments measures, [\[FN70\]](#) freedom of currency movement [\[FN71\]](#) and (at least temporary) mobility of key labor [\[FN72\]](#) as elements of an eventual Services Code. Both proposals make specific provision against harmful subsidies, [\[FN73\]](#) and the EC proposal also envisages antidumping procedures and makes allowance for restrictive business practices regulation. [\[FN74\]](#) In addition, both proposals would permit the imposition of measures relating to such matters as public morals and health, protection of privacy and the prevention of deceptive practices. [\[FN75\]](#)

Although it is not apparent whether the proposed provisions are intended to supplant or merely supplement those provided in the Technical Standards Code (and this requires clarification from the Community), [\[FN76\]](#) the EC proposal addresses (certainly in more detail than the U.S. proposal) the topic of “rules, standards and qualifications.” [\[FN77\]](#) The EC proposal permits the adoption of standards based on \*23 public policy considerations as well as objective requirements, using international standards where appropriate. According to the proposal, the standards adopted should not render inoperative a commitment to grant market access. Standards requirements may be waived where the rules of the provider's home territory guarantee equivalent regulatory conditions. The proposal also emphasizes that measures should be formulated in a transparent, uniform, impartial and reasonable manner, and neither the formulation nor administration of such measures should constitute an arbitrary or unjustifiable discrimination or a disguised restriction on trade in services. Interestingly, the EC Code proposal takes note of an interrelationship between its general provision on standards and the EC's draft RTA

waiver. [\[FN78\]](#) The Community appears to envisage that it will have the right, pursuant to its RTA waiver, to conclude intra-Community standards agreements under the conditions of the RTA waiver, and not the generally applicable provisions of the Services Code.

#### IV. THE EC'S PROPOSAL FOR AN RTA WAIVER

Article III(1) of the EC Services Code proposal states:

Subject to the conditions [sic] that the resulting regime is on the whole no more restrictive than that resulting from previous commitments set out in its schedule, this Agreement shall not prevent any party from being a party to an agreement aiming at a higher degree of liberalization of trade in services in the framework of a customs union or free-trade area \*24 within the meaning of Article XXIV paragraph 8 of the GATT, or to adopt an interim agreement leading to the formation of a customs union or free-trade area whose scope would include trade in services.

The EC's RTA waiver proposal permits individual member countries of an RTA to enter into agreements among themselves "aiming at a higher degree of liberalization." [\[FN79\]](#) In the context of the Services Code, this involves a right of derogation from both the Most Favored Nation and National Treatment principles. First, comparable to article XXIV of the General Agreement regarding tariff barriers applicable to trade in goods, the member countries of an RTA will be entitled to grant more liberal service trade terms to each other without immediately and unconditionally extending these benefits to each non-RTA party to the Services Code - that is, the MFN principle will be waived. Second, because the "liberalization" commitments of parties to the Services Code will distinctly involve the grant of National Treatment rights to other Code parties, the waiver permitting RTA members to adopt more liberalizing agreements among themselves (without extending these agreements to other Code parties on an MFN basis) means that they will also not be granting equivalent - i.e., National - treatment to non-members. [\[FN80\]](#) It is the right to derogate from the National Treatment principle which is of great concern because it involves a significant departure from prior GATT law. As discussed previously, the article XXIV waiver concerns only the right to grant intra-RTA tariff preferences on a non-MFN basis. While a waiver of the obligation to apply the National Treatment principle is not expressly stated in the EC proposal, it is necessarily implicit in it. If it were to be assumed, conversely, that National Treatment would remain a constant governing principle regardless of the waiver proposal,\*25 there would be no apparent point to the waiver, since the benefits of internal liberalizing measures ("higher" or otherwise) would automatically be passed on to non-RTA members by virtue of the principle.

In the EC proposal there appear to be only two limitations on the rights of the RTA to derogate from the National Treatment principle. The first is that the intra-RTA agreement must be "aiming at a higher degree of liberalization." This is only to say that the RTA member countries may not enter into a more restrictive, i.e., de-liberalizing, agreement among themselves in derogation of their obligations under the Code. Reasons why RTA members might want to inhibit their own internal trade (while perhaps extending more liberal trade terms to non-RTA members) might be postulated, but it seems sufficient here to note that the EC concedes that RTA members will not be permitted to do so. The second limitation is established by the first clause of the proposal, which subjects the waiver to the condition that the "resulting regime is on the whole no more restrictive than that resulting from previous commitments set out in its [each member's] schedule." This clause appears to be directed at establishing a condition that while an individual RTA member may, by virtue of an intra-RTA "liberalization" agreement, adopt measures which are in fact more restrictive than its commitments as set out in its Code schedule, the sum of RTA member liberalizing measures will be as favorable to non-RTA members as would have been the separate member country commitments under the Code. The reference to "previous commitments set out in its schedule" [\[FN81\]](#) must be viewed as limiting each individual country's more generalized National Treatment commitment to those specific commitments set forth in its schedule. If this were not the case, a right extended to RTA members to enter into more highly liberalizing agreements would not be meaningful, since the benefits of such agreements would automatically be extended to non-RTA members.

The "on the whole" language in the EC's draft waiver is borrowed from the basic article XXIV exemption

which says that an RTA (customs union) external tariff wall may not “on the whole” exceed the tariff wall of each member state prior to the formation of the common \*26 external tariff wall. [FN82] When the EC first erected its common tariff wall, much controversy arose with respect to how multiple Member State tariff walls should be aggregated to determine a common “on the whole” tariff barrier involving a myriad of products crossing a multiplicity of boundaries. [FN83] In the context of a Services Code, the potential practical application of the “on the whole” test staggers the imagination. There appears to be an underlying assumption that it is possible to determine what the existing economic impact of service barriers are and, in addition, to determine on an objective basis what the effect of eliminating these barriers would be. This is not the case. Professor Jackson employs an element of understatement in his recent book when he observes that “scholars have tried to estimate the ‘tariff-equivalent’ effect of the various non-tariff measures, but have found this to be no easy task.” [FN84]

It is clear that the most sophisticated analytic tools are unable to describe with accuracy either the current effect of non-tariff barriers (“NTBs”) on trade in services or the impact of removing these barriers. [FN85] The United States Trade Representative (“USTR”), with tremendous incentive to quantify foreign NTBs affecting trade in services, is perhaps the most articulate spokesperson for the impracticability\*27 of the task. [FN86] In its 1990 Foreign Trade Barriers Report, following a lengthy discussion of the difficulties inherent in attempting to estimate the impact of NTBs on U.S. exports of goods, [FN87] the USTR states:

The same limitations that affect the ability to estimate the impact of foreign barriers upon U.S. goods exports apply to U.S. services exports. Furthermore, the trade data on services exports are extremely limited and of questionable reliability. For these reasons, estimates of the impact of foreign barriers on trade in services are also difficult to compute. [FN88]

Starting with the understanding that the quantitative impact of NTBs on trade in services are not presently determinable and that there is no reason to believe that this situation will be remedied in the near future, it does not require an immense leap of logic to conclude that it is impracticable to evaluate the impact of the NTBs of each RTA member in order to determine whether an RTA's non-tariff barriers “on the whole” are no more restrictive than the individual commitments of its member states. For this reason the EC's proposal is unworkable.

Even if it were possible to calculate in some manner the Community's “on the whole” services barriers and thereby establish an objective minimum level of service liberalization which the EC would agree to extend to non-Member countries, allowing the Community as a regional entity to liberalize its internal market without any apparent limitation on the extent to which it may refuse to pass this liberalization on to non-Members - except that the EC must “on the whole” meet its specific minimum Services Code commitments - raises important questions: Why should the United States (with an internal market roughly comparable to that of the EC) liberalize its market for the benefit of Community service providers beyond the United States' “on the whole” commitment in its Services Code schedule if the United States could get by with the minimum commitment set forth in its schedule? Why should Japan? If the international trading system is based on reciprocity, would not the United States and Japan be acting reasonably in refusing the EC National Treatment beyond that level committed in the Services Code so long as the EC based its participation on an “on the whole” commitment?

\*28 There is a sharp distinction between the RTA exemption when applied to the trade of goods and when applied to the trade of services. When article XXIV permitted the EC to remove internal tariff barriers while erecting a common tariff wall, the goods of the United States and Japan were affected only to the extent that they were subject to a one-time entry fee into the internal market (payable at the border) to which goods produced within the EC were not subject. [FN89] Goods produced in the EC achieved a cost advantage only to the extent that they moved between Member countries in a manner that they had not previously, while goods produced for consumption within a particular Community Member and consumed there obtained no new advantage. A foreign producer shipping goods into a discrete Community Member State was affected little if at all by the change to a common tariff wall; it was disadvantaged only to the extent that its intra-Member State competitors were able to achieve better economies of scale in their intra-Community export operations. Once a foreign producer had paid the common external tariff and its goods had entered a Community Member State, that producer and its goods enjoyed the

benefits of tariff-free transit throughout the Community and was subject to no additional disadvantage.

Failure to grant National Treatment in the context of the services market means something entirely different. If National Treatment is not provided in the Community country in which services are introduced from abroad, this will give rise to an immediate disadvantage in that market, equivalent to an immediate common external tariff disadvantage. Moreover, the immediate entry barrier disadvantage will not necessarily be compensated for by unrestricted access on a National Treatment basis to “transshipment” markets elsewhere in the Community. If the National Treatment requirement is not adhered to, external service providers might be treated in a discriminatory manner on a continuing basis for the duration of their presence in the Community, both within their country-of-entry and in other Member States, and therefore achieve no particular advantage from having entered the market. The continuing impact would not likely be measurable by an objective yardstick, such as the percentage duty imposed by an external wall tariff charge. It might instead be composed of innumerable and hardly measurable intangibles such as subjection to prolonged licensing procedures, inability to obtain Community-wide licensing, \*29 lack of access to leased telecommunications lines on an equivalent basis, continuing higher public telecommunications rate charges and other factors. An RTA waiver formula which permits the EC to adopt additional liberalizing measures with no limitation on the extent to which such measures may discriminate in favor of local enterprises may lead to a significant actual or perceived imbalance between the benefits and obligations pertaining to RTA members and those pertaining to non-RTA members.

A perception by the United States, Japan and other EC trading partners that the Community is refusing to grant access to its liberalized market beyond the strict terms of the Services Code, based on the RTA waiver in article III of its proposal, would lead most likely to a reversion to strict reciprocity as a basis for future services liberalization concessions. Both the United States and Japan would abide by their strict commitments in the Code, but refuse to grant external parties access to further liberalized markets without reciprocal concessions. While such a result would not spell the end of the GATT trading system (which involves a high degree of dependence on “global reciprocity”), it would certainly slow the process of global liberalization. Each country undertaking a liberalization of its internal market would find itself negotiating with each of its trading partners to determine the overall new balance of reciprocal concessions. An alternative formula for evaluating discriminatory RTA measures is required.

## V. A NEW FORMULA FOR EVALUATING RTA MEASURES

### A. Premises

This proposal for a new formula by which to evaluate RTA measures involving trade in services (and other GATT regimes not involving trade in goods) is based on certain premises. First, as discussed above, the proposal put forward by the EC in the GATT services negotiating group is both unworkable and unwise. It is unworkable because it would be exceedingly difficult to evaluate the impact of service liberalization regimes in individual RTA members as required to make a determination that the total RTA liberalization package is “on the whole” compatible with each individual RTA member's schedule of commitments. It is unwise because internal barriers to trade in services brought about by derogations from the National Treatment principle may have a far more pervasive impact than derogations from the MFN principle with respect to tariff barriers and trade in goods. The implementation of such derogations, without meaningful limitation, is \*30 likely to cause either an actual or perceived imbalance vis-à-vis the EC's trading partners which would be likely to lead in turn to a system of liberalization based on strict reciprocity. Since strict reciprocity is more easily determined on a bilateral rather than multilateral basis, a liberalization program based on case-by-case reciprocity may result in a shift from the GATT goal of comprehensive global liberalization to one of fragmented country-by-country and region-by-region liberalization. One of the principal goals of and justifications for the GATT system is the avoidance of country-by-country negotiations focusing on narrow interests.

A second premise underlying the evaluation criteria proposed below is that evaluating RTA discriminatory acts in new areas by invoking the classic economic criteria of whether such discrimination is predominantly “trade

creating” or “trade diverting,” while elegant in concept, would be at least as unworkable as the EC proposal. The state of the art in economic analysis simply does not permit an objective “scientific” determination - and certainly not a determination in advance - of the extent to which the imposition either of a discrete non-tariff internal discrimination or a complex system of internal discriminations will affect service providers in the three relevant markets (i.e., the territory in which services are at present locally provided, the RTA territories from which services might be provided if discriminations in the first territory were removed on an intra-RTA basis, and the non-RTA territories from which services into the first territory are currently provided or would be provided but for the preferences granted to providers within the RTA). It is therefore impractical to suggest that RTA discriminatory preferences be approved or disapproved on the basis of a determination of whether their predominant effect will be trade creating or trade diverting.

The third, and perhaps most important, set of premises is that: (a) RTAs will require some measure of flexibility to adopt intra-RTA preferences which are not extended to external territories, and (b) it is preferable to limit RTA internal discrimination in order to preserve the liberal international trading system embodied in the GATT. This set of premises is most important because it is possible to conclude from the foregoing discussion that any RTA derogation from the National Treatment principle is unwarranted. By excluding an RTA waiver provision from its Services Code proposal, the USTR impliedly signalled its adoption of such a conclusion. [\[FN90\]](#) This conclusion, however, may ignore certain legitimate interests of RTAs such as the EC.

\*31 The general principle of the GATT mandating National Treatment for goods of foreign origin is applicable to GATT Contracting Parties, a term which, at least at the formation of the GATT, referred only to individual countries. [\[FN91\]](#) Each of these individual members of the GATT was and is presumed to be competent within its own territory for the implementation of GATT commitments. [\[FN92\]](#) Each member is thus obliged to apply the National Treatment principle throughout its territory, even though this does not (as in the case of the United States) preclude the adoption of internal regulations respecting different subterritories of the “federal” state so long as such disparate treatment applies alike to nationals and non-nationals. For purposes of the GATT, individual countries like the United States are considered unitary actors which have since the inception of the arrangement had the authority and power to liberalize their internal market and to extend National Treatment to foreign countries.

Prospective members of an RTA, on the other hand, are considering the mechanisms by which they may achieve some form of market unification and perhaps some degree of federalization of authority. RTAs do not share the same goals. Some, such as the EC, may envision a centralization of decision-making authority in institutions such as the EC Council and Commission. Others, such as the U.S.-Canada Free Trade Agreement may envision very little in the way of centralized decision-making authority. No RTA, however, prior to its inception, has central authority with the power to mandate unitary regulation through different national territories; and only after the inception of the RTA can its institutions initiate the process (in light of its goals) of unifying the internal market and applying (to the extent contemplated by its members) uniform trade regulation in a manner to which the federal State is accustomed. Thus, during the process of its unification and federalization, an RTA cannot be (and perhaps therefore should not be) considered the precise equivalent of an individual GATT Contracting Party, because its institutions lack the authority \*32 and power to accomplish what the institutions of a separate country may achieve.

As an RTA acts to unify, federalize and liberalize its market, it encounters certain risks. One of these risks, viewed from the internal RTA standpoint, is that enterprises in whose interests the liberalization efforts are primarily made, i.e., those located within the RTA, [\[FN93\]](#) will face immediate competition for shares of a unified internal market from enterprises coming from outside the RTA. A certain anxiety is likely to arise on the part of RTA officials - and this appears to be the case with the EC Commission - that foreign enterprises with greater experience operating in larger domestic markets (as well as international markets) will be able to react to market unification and liberalization measures more quickly than RTA-based enterprises, and may overwhelm existing and emerging RTA enterprises if new internal regulations assume that all enterprises will be treated on an equivalent basis.

It may well be argued that fear of market liberalization and opening - even if reasonable - should not justify an

RTA's derogation from immediate fulfillment of the GATT's National Treatment principle. Each individual GATT Contracting Party has its own anxiety about the impact of market opening, which does not translate into justification for failing to apply the National Treatment principle. The essential question is this: does the global trading system gain an incremental measure of value from the unification and liberalization of a formerly fragmented market such as to justify granting that new union some remedial measure in fulfilling its ultimate GATT obligations?

If the answer is no and the GATT as a whole elects to deny the RTA any temporary measure of special treatment, then the RTA which nevertheless wishes to pursue market unification and trade liberalization policies has three basic alternatives: first, it may follow the generally applicable GATT rules and accept the risk; second, it may withdraw from the GATT framework and concentrate on its own development priorities; and third, it may pretend to accept the GATT rules yet ignore them in practice. Only the first of these outcomes would appear to have any appeal with respect to non-member countries; yet, even if preferable, it may be that such an outcome is not very likely in view of political and economic factors affecting RTA decision-makers.

\*33 On the other hand, if non-member countries perceive a long-term benefit from a unified and liberalized RTA market, then the grant of a temporary waiver from strict adherence to the National Treatment principle may be an acceptable, if not strictly preferred, alternative. In other words, if a group of independent, sovereign countries decides to undertake the "federalization" of its trading system, to expand the size of and liberalize the regulatory environment within its completed market (and these activities will involve significant inter-RTA variations in degree), it may be preferable to permit the group a period during which to undertake these activities with some relief from the external demands to which the GATT Contracting Parties are normally subject. An underlying assumption behind such limited tolerance is that the unification or harmonization of trade regulation is ultimately beneficial to the global trading community as a whole, or is at least not harmful to the community, and that the potential short-term adverse consequences arising from the creation of temporary internal preferences can be kept to a bare minimum by placing strict constraints on discriminatory measures.

A waiver during the period of market unification and federalization must be viewed as a temporary measure, i.e., limited in duration. If the justification for permitting an RTA to derogate from certain fundamental GATT principles is that the RTA is undergoing a positive transformation the benefits of which will ultimately inure to non-RTA members, the justification loses its force as the transformation takes effect. Therefore, in no event should extension of a right to derogate from a principle as central to the GATT as that of National Treatment extend beyond an initial phase of the RTA's formation, after which it would be deemed to be "completed," except with respect to very strictly confined circumstances involving safeguard justifications already recognized by the GATT. Because of the risks to the global trading system associated with creating isolated regions with special and more beneficial rules, derogations must be strictly limited to those which are demonstrated by the RTA to be essential to its completion. It is on the basis of the foregoing premises that the following proposal is made.

#### B. A New Formula

On the surface, the following proposal is quite straightforward. It is suggested that RTA discriminations in new areas such as services and investment measures be evaluated by the criteria of "necessity." An RTA exemption in a new GATT Services Code might read:

Code Parties which are members of customs unions and free trade areas \*34 (within the meaning of paragraph 8 of Article XXIV of the General Agreement) (hereafter "regional trading arrangements") shall be entitled to adopt as between themselves agreements for the purpose of achieving more liberalized internal markets and shall be entitled to implement those agreements by means of laws and regulations when such agreements are necessary to the formation or maintenance of said regional trading arrangements. The benefits of the aforesaid agreements shall be extended (by complete application where possible and otherwise progressively) to Code Parties which are not members of the regional trading arrangements which have adopted them as soon as the necessity for limiting their general application has expired. Liberalization

agreements which have as their predominant purpose the creation of preferences in favor of enterprises established within regional trading arrangements shall be presumed to be not necessary within the meaning of this paragraph.

In addition to the foregoing, a new RTA waiver [\[FN94\]](#) would include: (a) a provision requiring notification of an agreement to the appropriate parties (e.g., parties to the Services Code); (b) an avenue for parties opposed to the agreement to make recommendations addressing objectionable provisions or to refuse a waiver to the agreement; and (c) a dispute settlement procedure afforded either by the Code in question or the GATT General Agreement structure so that issues arising out of adopted but allegedly “unapproved” discriminations could be addressed. [\[FN95\]](#) The policy premise favoring the minimization of RTA derogations from fundamental GATT principles leads to a further recommendation that, within the framework of the selected GATT dispute settlement procedure, the burden of proving the necessity of a specific RTA activity should be placed on the RTA seeking to justify its conduct. [\[FN96\]](#)

\*35 In notifying a “derogating” agreement to the appropriate parties, an RTA should be required to include a binding commitment with respect to the maximum duration of the discriminatory feature(s) of such agreement, beyond which time the agreement would be presumed to violate the RTA's GATT commitments. Such a notification of commitment as to duration might also include a timetable (where feasible) for the progressive elimination of discrimination. [\[FN97\]](#)

### C. Defining Necessity

The proposed formula incorporates the concept of necessity as the test according to which RTA discriminations will be evaluated. [\[FN98\]](#) The word “necessary” is subject to many meanings depending on the context of its use, ranging from “absolutely indispensable” to the accomplishment of a task to “convenient or desirable” in the accomplishment of a task. [\[FN99\]](#) In the context of determining the permissibility of RTA derogations from the rules of a GATT Services Code, “necessary” should be synonymous with “indispensable to the accomplishment of the formation and maintenance of an RTA.” [\[FN100\]](#) However,\*36 even if necessity might generally be defined as constituting an essential or indispensable requirement (evidencing a far more compelling justification than mere desirability), it is obvious that “necessary” will not through this sole clarification become self-defining. Rather, some general guideposts in the form of supplemental legislative history or regulation will be required, and decisions by authoritative decision-makers such as RTA government officials, the Code Parties and GATT panelists should be expected to flesh out the concept. Given the complex nature of the integration process and its relationship to the global trading system, it would be unproductive to attempt to set out in advance and attempt to evaluate all of the types of discrimination in each economic sector in which they might arise. Nevertheless, it may be useful to discuss some general ideas about the areas in which discriminatory acts might be justified as necessary.

First, the effective establishment of RTA political institutions may require regional discriminations directed toward the creation and support of institutions such as parliaments, executive councils, and administrative and judicial bodies which might well be justified as “necessary.” If, for example, the creation of an effective regional central banking administration required that regionally-owned banks be given emergency access to funds that could not reasonably be extended to banks owned by foreign nationals, then discrimination in favor of providing such access only to banks owned by regional nationals might be justified during a transition period in which regional banking stability was to be achieved.

Second, if an RTA were to adopt a common foreign and defense policy, regional discriminations for security reasons would be justified by necessity. For example, service consultants to the common defense establishment might be limited to “regional nationals” for security reasons.

Third, regional preferences established to promote the economic development of impoverished areas or peoples might be justified by necessity. Therefore, certain service industry sectors or contract opportunities in designated impoverished regions might be limited to members of a specific regional class.

Fourth, regional discriminations adopted as emergency safeguard measures for reasons set forth in the EC Services Code proposal, such as the prevention of immediate and severe economic dislocations or the resolution of a balance of payments crisis, might be justified by \*37 necessity. Also, RTA discriminations necessary to remedy abuses of dominant position may be justifiable. [\[FN101\]](#)

Derogations from the National Treatment principle will, virtually by definition, operate in favor of RTA-based enterprises and give them some measure of comparative advantage vis-à-vis non-RTA-based enterprises. With this in mind, it is important and difficult to consider a basis for distinguishing RTA measures which have as their motive a successful completion of the internal market and those which are intended as protectionist. There may be a fine line between measures which legitimately take into account local infrastructure requirements and economic conditions (and which may operate temporarily to facilitate adaptation by locally-based enterprises to a completed internal market), and those measures intended to block foreign enterprises from fair access to the same completed market. Generally speaking, an RTA should be encouraged to use its competition laws to protect local enterprises (and consumers) from abuses of dominant position by foreign enterprises. Competition laws are far preferable to trade laws as a mechanism for protecting local enterprises because competition laws minimize trade distortion by affecting only the oppressive actors. Protectionist trade measures taken in the name of local ownership distort trade and capital flows which should otherwise produce the optimum allocation of global resources. The protection of RTA enterprises from foreign competition should not as a general proposition be a legitimate goal of an RTA waiver. On the other hand, measures which may have as their effect the maintenance of a “level playing field” for an interim period may be tolerated, if not encouraged. With this fine distinction in mind, the proposed RTA waiver formula provides that measures with the predominant purpose of protecting local enterprises will be presumed to be unnecessary. This brief formula will, however, require additional elaboration, perhaps aided by analogy to other trade laws intended to maintain level playing fields, e.g., anti-dumping and subsidy laws. Anti-dumping laws which distinguish “fair” and “unfair” foreign trade necessarily have a protectionist impact vis-à-vis foreign traders seeking to elude the basic laws of competition. In the anti-dumping area, there is a fine line between fair aggressive competition and unfair below market value cut-throat competition. [\[FN102\]](#) With respect to RTA activities permitted by the proposed \*38 waiver, necessity relating to positive attempts to market unification, as opposed to “mere expediency” at the expense of foreign competition, should guide decision-makers in their evaluation of legitimacy. [\[FN103\]](#)

#### D. The EC as a Model

In the balance of this article, discussion will largely focus on the policies of the European Community. [\[FN104\]](#) The EC is by far the most successful model of large-scale regional economic integration. It has developed refined decision-making institutions at the legislative, executive, adjudicatory and administrative levels, developed a coordinated external trade policy, and presented proposals with respect to the post-Uruguay Round treatment of RTAs within the GATT framework. Moreover, there is every indication that the size and influence of the EC will continue to expand. Already far more influential in the sphere of trade policy than its twelve member countries would suggest (by virtue, inter alia, of the EFTA and Lome arrangements), [\[FN105\]](#) the EC figures prominently in the economic plans of the emerging Eastern European economies.

#### E. Telecommunications as a Case

In addition to narrowing the scope of the following discussion to the EC, this article will focus on efforts within the GATT to liberalize the international telecommunications trade and the relationship between that process, the EC telecommunications liberalization process \*39 and non-EC telecommunications sectors. International trade in telecommunications is a useful analytical tool because it involves: (a) trade in both goods and services; (b) an area historically subject to intense government regulation (including outright government ownership); (c) substantial issues of public policy (involving, e.g., employment and security); (d) disparity between developed and developing countries; and (e) an area in which the EC has been implementing significant measures to liberalize its internal

market.

## VI. THE TELECOMMUNICATIONS ISSUES

The establishment of a readily accessible and efficient global telecommunications network would generate obvious benefits for global economic efficiency as well as the distribution (and presumably the creation) of knowledge. [\[FN106\]](#) There can be little doubt that each country in the global community will be better off if its scientists and engineers have ready access to databases in other countries and the capacity to exchange information freely with each other; that global business will be more efficient if enterprises are able to transmit and receive information concerning production and shipping schedules, inventory levels, sources of supply and pricing more rapidly; and that individuals will be more knowledgeable, and perhaps better able to maintain more lasting interpersonal relations, if all are enabled to communicate more freely. A multitude of blessings seem to be inherent in an open and efficient global telecommunications network. [\[FN107\]](#)

Without doubt, not everyone perceives the global network as an unalloyed good and, of course, much depends on who controls the \*40 network and how it is used. [\[FN108\]](#) Certainly there is a “dark side,” in which the efficient telecommunications network becomes the most important tool of “Big Brother.” The potential for mischief points to certain areas where regulation, even in a relatively harmonious world, is to be expected. [\[FN109\]](#) Individuals will want to ensure that they are not listened to by uninvited intruders (be they governmental or otherwise), businesses will wish to avoid the misappropriation of their proprietary knowledge, and, of course, all but a few will wish to avoid the concentration of power to control the global network in the hands of a dominant provider. [\[FN110\]](#)

While some regulation will always be required, the telecommunications sector is one in which the benefits of ultimate global liberalization seem indisputable. The issue is not whether this liberalization is ultimately desirable from a public welfare standpoint, but how it can be achieved within a framework of entrenched interests which include not only government owners, but vast numbers of employees who may be dependent on certain features of the existing regimes. This is certainly true in the EC, where the vast majority of telecommunications providers are government-owned monopolies - PTTs and RTTs, also referred to as telecommunications administrations (“TAs”) - which represent one of the largest single pools of employment in the Community. [\[FN111\]](#)

### A. Basic Structure in the EC

A few basic observations about the structure of the telecommunications industry in the EC are necessary for an understanding of its relationship to the international trade regulatory scheme. The telecommunications market is divided between goods and services. Goods include infrastructure equipment such as telephone cables and switching\*41 equipment, user equipment such as terminals (e.g., telephones) and processing equipment (e.g., computers) which is used both by service providers and users. Services are divided into two primary categories: basic services and value-added services (“VAS”). [\[FN112\]](#) Although the dividing line is not universally agreed upon, it is understood that basic services have at their core voice telephony. [\[FN113\]](#) Basic service providers argue that rudimentary additional services such as voice mail should be included within the definition of basic services. [\[FN114\]](#) Value-added services include everything that is not part of basic service, such as data processing, electronic banking, electronic shopping, and the furnishing of databases.

In the EC until recently, the telecommunications market was virtually the exclusive province of government-owned monopolies. The TAs owned the infrastructure equipment and had a monopoly on the provision of basic services, the supply of terminal equipment and terms of access to third-party VAS providers. In recent years the market has been significantly liberalized. The U.K. government privatized its TA (while continuing to allow it part of a basic services monopoly), and there has been some additional movement toward privatization. [\[FN115\]](#) In 1988, the Commission issued a Directive aimed at fully opening the terminal equipment market to competition, depriving TAs of an important, long-standing equipment monopoly. [\[FN116\]](#) The Commission has decreed that TA

monopolies may extend only to voice telephony [\[FN117\]](#) and that third-party providers must be given equitable access to the \*42 TA networks. [\[FN118\]](#) The Commission has decreed that TA equipment procurement must be open to suppliers throughout the Community. [\[FN119\]](#) At the suggestion of the Commission, the European Technical Standards Institute (“ETSI”) was established (with membership open to members of a variety of European organizations) [\[FN120\]](#) to develop common technical standards for the Community network. These measures, some of which have not been received enthusiastically by the Member States, have as their end the promotion of a more open and efficient EC telecommunications network. [\[FN121\]](#)

The Commission's efforts to liberalize the telecommunications market began with a few general references in the White Paper on Completion of the Internal Market in 1992, [\[FN122\]](#) which were elaborated in great length in its Green Paper on Completion of the Telecommunications Sector. [\[FN123\]](#) The Commission seems determined to create a telecommunications infrastructure in the Community which will enhance the entire process of integration.

### B. Basic Structure in the GATT

The telecommunications sector is a peculiar creature in the existing\*43 GATT framework. Moving into the Uruguay Round, trade in services has not been covered by the GATT. [\[FN124\]](#) The GATT has therefore not concerned itself with whether foreign service providers (either basic or value-added) have access on any set of terms to the EC telecommunications market. [\[FN125\]](#) Since the preponderance of EC telecommunications equipment purchases are made by government-owned monopolies, [\[FN126\]](#) such purchases would theoretically be covered by the GATT Government Procurement Code. [\[FN127\]](#) However, the Government\*44 Procurement Code does not cover sectors in countries which have not chosen to list them on an annex, and up until a recent listing by Japan, no country had listed its telecommunications sector in the annex, so that the EC TAs have not been subject to GATT government procurement regulation. [\[FN128\]](#) In theory, the promulgation of technical standards is governed by the GATT Technical Standards Code. [\[FN129\]](#) However, while under that Code the EC (as a “central government”) as well as “regional bodies” within the EC (with respect to technical standards) are covered, [\[FN130\]](#) so-called “non-governmental” bodies are not directly subject to the Code (although the Code parties \*45 are to take reasonable measures to assure the compliance of non-governmental parties). [\[FN131\]](#) It is likely, though the matter is not free from doubt, that the EC's new technical standards body, ETSI, will be considered a non-governmental body and therefore only indirectly subject to the Technical Standards Code. [\[FN132\]](#) Moreover, as currently drafted the Technical Standards Code refers to standards as they affect imported “products,” so that technical standards with respect to the provision of telecommunications services are not covered. [\[FN133\]](#) In sum, while isolated pockets of EC telecommunications activities have been subject to the GATT regulatory scheme prior to the Uruguay Round (the recent coverage of the terminal equipment market stands out), [\[FN134\]](#) for most intents the Uruguay Round effectively represents the potential commencement of GATT coverage of the telecommunications sector.

### C. Equipment in the GATT

Telecommunications equipment constitutes goods which have historically been covered by the GATT and therefore are not a “new area” in the Uruguay Round. All GATT Contracting Parties, the EC included, are required to adhere to the fundamental GATT principles in the regulation of equipment imports. No country or region should \*46 receive treatment more favorable than any other country or region, except that in consequence of article XXIV, the EC countries may apply lower tariffs on imports of telecommunications equipment from Member State territories than they apply to equipment imported from outside the Community. An equipment producer located within the EC, therefore, may have a cost advantage over a producer located outside the EC on the basis of a GATT-authorized measure to promote regional integration. [\[FN135\]](#) As discussed previously, whether this preferential tariff arrangement creates global economic welfare benefits is an open question, but these relatively benign preferences have not to date appeared to do any great harm, and the elimination of regional arrangement tariff preferences is not an issue which will be addressed in this article. [\[FN136\]](#)

A recently adopted EC government procurement Directive permits discrimination in favor of Community-based

telecommunications equipment suppliers. [\[FN137\]](#) This type of discrimination is clearly prohibited by the GATT Government Procurement Code, except that the telecommunications sector is currently not covered by the Code. [\[FN138\]](#) A Commission representative has publicly stated that the local content discriminations are on the bargaining table at the Uruguay Round negotiations and are part of a “negotiating position.” [\[FN139\]](#) Thus, while government procurement-related local content discrimination is \*47 anathema to free trade (and the National Treatment principle), the Commission is within its GATT rights in maintaining such discrimination until the Procurement Code is amended, [\[FN140\]](#) while recognizing the desirability of negotiating away this discrimination in the Uruguay Round. The EC's local content discrimination is based not on a special exemption for RTAs, but on a well-recognized gap in GATT coverage which the Uruguay Round will presumably eliminate. The equipment procurement issue is therefore not of special interest.

#### D. Telecommunications Services Liberalization in the EC

The EC is taking steps to ensure that, insofar as the internal market is concerned, there are a minimum of barriers to the cross-border provision of telecommunications services through, inter alia, the adoption and implementation of the “Council Directive on the Establishment of the Internal Market for Telecommunications Services through the Implementation of the Open Network Provision (“ONP”).” [\[FN141\]](#) The ONP Directive envisages the adoption of harmonized rate structures, usage conditions and technical standards on the Community level. [\[FN142\]](#) Its purpose is to create conditions of “open and efficient” access to the public telecommunications network [\[FN143\]](#) based on conditions guaranteeing equal and nondiscriminatory access, transparency and objectivity. [\[FN144\]](#) Deviations from these conditions will be permitted only for the essential requirements of security of network operations, maintenance of network integrity, interoperability of services and protection of data. [\[FN145\]](#) With the implementation of the ONP Directive, value-added telecommunications service providers will be assured of equivalent treatment in each of the Member States on conditions designed to promote the most efficient exchange of data between the Member States.

The ONP Directive is expressly addressed to affording the benefits of the completed internal market to enterprises established within the Community, [\[FN146\]](#) and explicitly provides that the extension to third-\*48 country providers of the benefits of the internal market will be dependent on reciprocal market opening. [\[FN147\]](#) The Directive states a preference for achieving external market opening through multilateral negotiations in the GATT. [\[FN148\]](#)

The potential adverse impact of the ONP Directive on non-EC countries largely depends, first, on the extent to which the Community acts to deprive third-country service suppliers of equivalent access to the Community telecommunications network. It is, of course, one thing for the Community to reserve the power to discriminate in favor of locally-established enterprises and another thing entirely for the Community to use that power. For example, does the Community actually intend to propose two telecommunications rate structures - one applicable to local service enterprises and another applicable to non-Community service enterprises? To date, there is no indication that such a bifurcated approach might be taken. Second, the impact of the Directive will also largely depend on whether the Community adopts supplemental regulations defining what it considers to be an enterprise “established in the Community.” It is the present perception of the Commission and industry observers that the opening by a foreign telecommunications enterprise of an office within the territory of the Community is adequate to constitute “establishment” for purposes of the telecommunications sector. [\[FN149\]](#) If this is true and remains \*49 so, then the larger players in the telecommunications services sector will not be affected by discrimination against non-Community providers because large players will not find it burdensome to establish a presence in the Community. The impact of a de facto establishment requirement on smaller service suppliers would, of course, be more significant. [\[FN150\]](#)

The area of potential Community discrimination which is most troubling to third-country service (as well as equipment) providers appears to involve Community standards-setting activities. [\[FN151\]](#) Outsiders are concerned that the Community will have the capacity through the exercise of seemingly “objective” and “scientific” powers to

alter the balance of economic power in favor of local/regional industry, at least for a period of time long enough to preclude these external suppliers \*50 from taking advantage of current market leadership. [FN152] By defining technical interface standards which are not those currently used by industry leaders - who are, perhaps coincidentally, not EC-based - the Commission could force major changes to be implemented in the equipment and software of foreign suppliers which may take years to accomplish. Some concern has been expressed that EC-based companies will be given more immediate access to these standards so that they would have an advantage in implementation. [FN153] Even if this proves false, [FN154] merely placing competing companies at the same starting line would represent a substantial gain for the EC telecommunications industry because of the lead currently held by its U.S. - and Japan-based competition. Moreover, if the standards adopted in the EC are not generally accepted international standards, foreign equipment and service providers will lose some of their economy of scale advantage.

A major segment of the U.S. telecommunications industry contends that “market-driven” standards-setting is preferable to government (or government-directed) standards-setting. According to this view, service providers should adopt the standards set by market-leading providers because the development of workable standards has already been accomplished. [FN155] This approach would obviously favor current industry-dominant participants, who would have both a lead in the provision of network services (as well as equipment) and perhaps\*51 be in a position to collect royalties from users of the standards. [FN156] The Commission may well take a dim view of the “market-driven” approach to standards-setting, considering that it might be more appropriately referred to as a “dominant actors” approach. [FN157]

#### E. U.S. and EC Telecommunications Annex Proposals

The draft Telecommunications Annex provisions to the GATT Services Code proposals of both the United States [FN158] and the EC [FN159] do not materially alter the general Services Code proposals. The Annexes state in greater detail the kinds of entities which will be considered “public” (e.g., including private providers acting as common carriers) and indicate that terms of access to the services of these public entities will be nondiscriminatory. [FN160] The definition of “reasonable access” in telecommunications terms is specified: the availability of leased lines at cost-based, flat rate prices. [FN161] There is the widely anticipated provision in each Annex permitting parties to reserve the “basic services” sectors to public entities (including chartered monopolies), [FN162] provided that these basic services are made available in a nondiscriminatory manner. With respect to standards, the U.S. Annex proposal states that no party shall require a customer to “use any mandatory or designated standards or protocols, except as such standards and protocols establish interfaces to public, switched telecommunications transport networks, or as may be required to prevent technical harm to a public telecommunications transport network.” [FN163] The U.S. proposal thus \*52 envisages that each party will be permitted to adopt its own protocols for access to its public “basic services” transmission network, but not to adopt standards for services unrelated to transmission on the public network. The EC Annex provides that standards may be adopted to ensure “network security” and “network integrity, particularly with regard to the normal interworking of all network components and network termination points.” [FN164] Both of these proposals regarding the adoption of telecommunications standards should be read in light of the more general provisions in the U.S. and EC services code proposals that standards or protocols may not be adopted as a disguised restraint on trade. [FN165]

#### F. Evaluating Commission Action under the EC's RTA Waiver Standard and the “Necessary” Formula

This article has analyzed the EC's proposed standard for evaluating whether an RTA will be justified in withholding the benefits of internal market liberalization from non-RTA parties and suggested that the formula is unworkable (and unwise). It may now be illustrative to consider how the EC's waiver formula might work with regard to hypothetical telecommunications sector regulation.

Assume, hypothetically, that in the Services Code telecommunications annex each party agrees to provide non-discriminatory access (which precludes the charging of discriminatory rates) for the basic telecommunications

transport services of public network operators. Assume that this agreement does not extend to providing non-discriminatory access to the transmission services of public cellular telephone networks, which prior to the adoption of the Code are regulated within the EC on a Member State to Member State basis. Assume, further, that existing Member State public cellular system regulation generally permits the adoption of rate structures which discriminate between enterprises based in the regulating Member State and enterprises not based within that Member State (including EC-based enterprises\*53 not based within the regulating Member State). Consider that following the adoption of the Services Code, the EC Commission mandates that all public cellular transmission system operators provide non-discriminatory access to their basic transmission services; but it extends this mandate only to benefit system users that are based in Member States. Public cellular network operators in the EC, which prior to the adoption of the new regulations charged system users different rates depending on whether they were intra-State or external enterprises, adjust their rate structures to apply uniformly within the Community (using the old intra-Member rates), leaving the “old” external rates applicable to non-EC Member State enterprises.

Analyzed under the EC waiver formula, the EC cellular telephone regulations would presumably give rise to a higher degree of liberalization in the Community than was existing prior to their adoption because more competitive conditions in the Community are created, at least as regards EC Member State enterprises. The EC's higher degree of liberalization test does not specify that improvements in the Community may not adversely impact enterprises based outside the Community. The resulting “regime” does not appear to be more restrictive “on the whole” than the Code commitments of each individual Member State, because the Member States did not specifically undertake to establish National Treatment with respect to public cellular telecommunications transport services in their schedules of commitments and, moreover, appear not to have made conditions worse for non-Member State enterprises which remain subject to a previously existing two-tier structure. The above described hypothetical Community measures therefore appear to be permitted by the EC's proposed RTA waiver.

Assume, alternatively, that there are no common technical standards for the telecommunications industry in the EC. Assume also that each Member State of the EC agrees in its schedule to the Services Code that its adoption of technical standards will be based on objective scientific criteria, using international standards where reasonably appropriate. Following the adoption of the Code, at the instigation of the Commission, the European Technical Standards Institute adopts telecommunications interface standards applicable to all public telecommunications network providers in the Community. Assume that in doing so it rejects standards widely adopted in the United States and Japan (and which may generally be considered to be international standards) on the grounds that a majority of Community-based service providers deemed these standards incompatible with European scientific objectives in the development of an integrated Community network. In response to objections from the U.S. and Japanese \*54 governments, the Commission concedes that the international standards would have been adequate, but were nevertheless not wholly consistent with its plans for the integration of the Community telecommunications industry. As a result of the adoption of the new standards, U.S. and Japanese network service providers must reprogram all telecommunications-related software to enable it to interconnect with the EC public network. Have the Community and its Member States derogated from their commitments under the Services Code?

The action instigated or taken by the Commission appears to be “liberalizing” from the Commission's standpoint, since prior to the adoption of new standards there were no standards generally applicable throughout the Community. Intra-Community access to the telecommunications services network is enhanced for EC enterprises which have not developed their own proprietary standards. Each Member State will contend that its actions in adopting the new EC standards are consistent with its Code obligation to adopt international standards where reasonably appropriate and to avoid the unjustifiable adoption of standards as a disguised barrier to trade in services. There is no readily apparent yardstick for determining whether the resulting “regime” is more or less restrictive “on the whole” than if each Member State either pursued its own standards-setting or adopted alternatively available international standards. Pan-EC standards would in most instances appear to be less restrictive than the adoption of separate standards by each member country, and it might be difficult to demonstrate that each Member State should have adopted a particular international standard. The “on the whole” test may therefore provide little guidance in this context. Ultimately, it appears that the RTA waiver formula proposed by the EC will have little to do with

determining whether pan-EC standards are found to be compatible with the obligations of the EC or its Member States under the Services Code. That decision will more likely be based on a determination of whether the EC or its Member States have adopted standards as a disguised barrier to trade in the context of the substantive rules of the Code.

#### G. Application of New Formula to the Telecommunications Sector

From the standpoint of non-Member State service providers, the EC's most important regulatory activities will be undertaken pursuant to the ONP Directive. On its face, the ONP Directive is inconsistent with the National Treatment requirement because the benefits of the Directive are expressly addressed to service providers established \*55 within the Member States. If the Council and Commission did not contemplate that the EC Member States would pursue policies which discriminated in favor of local service providers, they could as easily have drafted the ONP Directive to address its benefits to services enterprises without qualification. Since the Community can readily extend the benefits of the ONP Directive to enterprises established within specific trading partners, the reservation of the right to discriminate in the ONP Directive may be perceived by the EC as a bargaining chip in the Uruguay Round negotiations, or as a long-term discrimination tradeable in reciprocity negotiations. It is assumed by both the United States and the EC that the GATT Services Code will not be adhered to by all GATT members, so the retention by the EC of its discriminatory legislation will not be contrary to its GATT obligations and may, after a Services Code is agreed upon, be amended to reflect its accommodation to parties to the Code. Only by maintenance of its discriminatory characteristics vis-à-vis parties to a GATT Services Code would such EC legislation be subject to evaluation under the test of necessity.

The two hypothetical cases of prospective EC discrimination against non-Member State service providers that were previously considered under the EC's proposed waiver formula might now be examined under the test of necessity.

The adoption by the EC and its Member States of a cellular telephone transmission regulatory structure which maintains rate discrimination as between Member States and third-country providers would not easily be justified as necessary to the formation or maintenance of the EC. A contention that discriminatory rates based on the nationality of service providers (or the country of origin of services) are necessary to the financial viability of the completed internal cellular network would be easily countered by the observation that rates necessary to establish or maintain the network could just as easily be spread over all users of the system regardless of national origin. If the Community could demonstrate that certain costs were incurred only in the provision of access to users based outside the Community, a surcharge might be justified, but the likelihood of such a cost differential appears remote. [FN166](#) Furthermore, discriminatory access charges based on the nationality of the service provider (or country of origin) are unlikely to \*56 be supportable for reasons relating to establishing political institutions, maintaining regional security, providing assistance to impoverished regions or as a safeguard measure.

Evaluation of the adoption of "discriminatory" intra-EC telecommunications standards is likely to be more problematic. In the first place, the EC certainly has the inherent right to adopt (or cause the adoption of) telecommunications standards in order to assure the public welfare and protect regional security interests. The absence of established standards might seriously interfere with the provision of vital government services, in addition to harming the less compelling interests of the private sector. The more difficult question is whether, and to what extent, the Commission should be entitled to ignore existing "market-driven" standards and adopt pan-EC standards developed by ETSI. To some extent, resolution of this issue may depend on the attitude of foreign market players. Currently, many telecommunications network standards are owned by private sector entities. Refusal by these entities to make their standards available to the public at a nominal price might in itself justify the Community in adopting regionally developed standards, because the Community should be under no obligation to adopt regulations which would require local enterprises to make significant payments to private business enterprises, either local or foreign.

Suppose, however, that foreign private industry offered to make its proprietary standards publicly available at nominal cost. If ETSI then elected to adopt pan-EC standards which were not justifiable as a technical advancement over standards widely adopted and available in the private market, the adoption of such standards would not be “necessary” and might well represent a disguised barrier to the market advantages of foreign service providers.

The adoption of technical standards by the EC is likely to become mired in controversy over the “scientific” merits of ETSI technical advances, and even the most sophisticated GATT panel might well have trouble sorting fact from fiction. In these circumstances, the scales of trade justice would be forced to tip either in favor of the inherent right of government to regulate or the promotion of open markets. The right of government to regulate is likely to have the advantage in such a balancing test, if for no other reason than the fact that the balancing test would ultimately be performed by government regulators.

Adopting “necessity” as the test for an RTA waiver from the National Treatment principle and other GATT rules will not provide a ready answer for all questions of whether or not a derogation is appropriate.\*57 In the limited context of considering two prospective EC derogations, one set of facts may seem to present a “bright line” answer and the other a close question. Because the political nature of the GATT favors compromise, close questions are likely to be resolved in favor of taking no action - i.e., in permitting derogation to take place. A formula based on a flexible concept like “necessity” will not be satisfactory to parties looking for clear-cut answers. On the other hand, analyzing barriers to trade in services is no simple matter, and a seemingly simple objective test of permissible RTA derogations that places no meaningful limitation on discriminatory regulations and is unworkable in practice will not promote peacefulcoexistence between the GATT and RTAs. A subjective test, allowing GATT parties to weigh competing interests, is most appropriate in these circumstances. What must be clear, however, is that RTA derogations from the rules generally applicable in the GATT should be limited to those which are indispensable to the formation or maintenance of an RTA, and that are, to the maximum extent feasible, limited in duration. A more liberal standard would threaten to undermine the foundation of the GATT.

## CONCLUSION

Political leaders appear to be wedded to the concept of regional economic integration. Agreements to lower regional trade barriers provide an easy and highly visible answer to economic problems. Regional arrangements such as the EC provide political and military stability which may outweigh all but the most severely adverse economic effects they create for non-RTA members. Nevertheless, while such arrangements may accelerate development on a regional basis, yield political benefits and provide models for future global economic institutions, they also pose risks to the liberal global trading system.

RTA discriminations in new areas such as services will create effects which are presently incapable of measurement. As such discriminations will be continuing measures based on the nationality of service providers as opposed to one-time border measures, their effect is likely to be greater than that of border measures (e.g., tariffs). Such measures should be limited to the extent feasible in order to prevent the global trading system from reverting to a reliance on bilateral reciprocity determinations. Narrow reciprocity as a basis for trade liberalization is inimical to the most fundamental principles of the GATT, such as Most Favored Nation and National Treatment, which appear to have played a substantial role in the expansion of world trade in the late twentieth century. This article proposes a formula for evaluating RTA discriminations which should minimize their use.

\*58 Liberalization of trade within regional groups without extending the benefits of this activity to the global trading system as a whole would reflect a movement toward isolationism and protectionism - both of which tendencies have had ill effect when practiced on a national level. Regional liberalization as a transition to global liberalization may produce certain economic benefits and may aid in the development of valuable “prototype” trading systems. Regional development, particularly in the industrialized countries, must not be allowed to become a substitute for global development. It is in the enlightened self-interest of the industrialized countries to aggressively promote economic development throughout the world. Regional systems narrowly promoting local interests should

not become substitutes for national policies of protectionism. Regional preferences in “new areas” of trade regulation should be adopted and implemented with the greatest restraint.

[FN<sub>a</sub>] Assistant Professor of Law, IIT Chicago-Kent College of Law. University of California, Berkeley, B.A. (1974); Yale Law School, J.D. (1977); University of California, Berkeley, LL.M. (1989).

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[FN<sub>1</sub>]. As will be elaborated in this article, considerable scholarly attention has been paid to regional trading arrangements in the GATT framework with respect to the GATT's historic role in regulating world trade in goods. See Dam, *Regional Economic Arrangements and the GATT: The Legacy of a Misconception*, 30 U. CHI. L. REV. 615 (1963); R. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 211-26 (2d ed. 1990); J. JACKSON, *THE WORLD TRADING SYSTEM* 141-43 (1989); J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 575-623 (1969) [hereinafter *LAW OF GATT*]; *FREE TRADE AREAS AND U.S. TRADE POLICY* (J. Schott ed. 1989). Particularly with respect to the pre-Uruguay Round relationship between the European Community and the GATT, see *THE EUROPEAN COMMUNITY AND GATT* (M. Hilf, F. Jacobs & E. Petersmann eds. 1986) [hereinafter *EC AND GATT*]. An excellent critique of the GATT treatment of regional trading arrangements which suggests reexamining the existing legal mechanism is in Cottier, *Die Bedeutung des GATT im Prozeß der europäischen Integration*, *EGRECHT UND SCHWEIZERISCHE RECHTSORDNUNG* (O. Jacot-Guillarmod, D. Schindler & T. Cottier eds. 1990).

[FN<sub>2</sub>]. With respect to the implementation of the EC's 1992 plan to complete the internal market, see, e.g., [Ninth Annual Symposium on International Legal Practice, Europe: 1992](#), 13 *HASTINGS INT'L & COMP. L. REV.* 371 (1990); Stein, *Panel Discussion: Europe 1992*, 11 *MICH. J. INT'L L.* 525 (1990); 1992: *THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION* (Bi-Weekly News for Business and Government).

[FN<sub>3</sub>]. Reported proposals range from the modest bilateral free trade area between the United States and Mexico or Chile, to a North American FTA including the United States, Canada and Mexico, to an arrangement incorporating the entire hemisphere (see, e.g., *President Announces Plan for More Latin Debt Relief*, *N.Y. Times*, June 28, 1990, at D1, col. 1 (President Bush proposes creation of free trade zone for hemisphere); *U.S. and Mexico Cautiously Back Free-Trade Area*, *N.Y. Times*, June 12, 1990, at A1, col. 3 (U.S.-Mexico agreement in principle to negotiate comprehensive free trade agreement); *Chile and U.S. to Begin Talks on Freeing Trade*, *N.Y. Times*, July 9, 1990, at D8, col. 5 (United States and Chile to open negotiations to establish free trade area); [Canada-U.S. Subsidy Talks, Uruguay Round Doomed to Failure, Canadian Negotiator Says](#), 7 *Int'l Trade Rep. (BNA)* 481 (Apr. 4, 1990) (Canadian Prime Minister Mulroney hints that Mexico could soon be added to U.S.-Canada FTA)).

[FN<sub>4</sub>]. *General Agreement on Tariffs and Trade*, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. The “GATT” is commonly used to refer both to an international organization [hereinafter “GATT”] and to the *General Agreement on Tariffs and Trade* [hereinafter “General Agreement”], which is its charter document. The history of the GATT is so well-chronicled and its operations so extensively analyzed that these undertakings will not be repeated in this article except as specifically relevant to its subject matter. Primary sources for description and analysis of the GATT are R. HUDEC, *supra* note 1, J. JACKSON, *supra* note 1, *LAW OF GATT*, *supra* note 1 and *EC AND GATT*, *supra* note 1; K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970); J. JACKSON, J. LOUIS & M. MATSUSHITA, *IMPLEMENTING THE*

TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES (1984); O. LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM (1985).

[FN5]. For a general discussion of the issues under negotiation in the Uruguay Round, see THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS (E. Petersmann & M. Hilf eds. 1988) [hereinafter NEW GATT ROUND]; THE URUGUAY ROUND: A HANDBOOK FOR THE MULTILATERAL TRADE NEGOTIATIONS (J. Finger & A. Olechowski eds. 1987). On trade in services (or GATS), see Krommenacker, Multilateral Services Negotiations: From Interest-Lateralism to Reasoned Multilateralism in the Context of the Servicization of the Economy, in NEW GATT ROUND, supra, at 455. On trade-related investment measures (or TRIMS), see Ellis, Trade-Related Investment Measures in the Uruguay Round, in CONFLICT AND RESOLUTION IN US-EC TRADE RELATIONS 273 (S. Rubin & M. Jones eds. 1989). On trade-related aspects of intellectual property rights ("TRIPS"), see Abbott, Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework, 22 VAND. J. TRANSNAT'L L. 689 (1989).

[FN6]. The motivating factors behind the Uruguay Round of negotiations are varied and complex. This article will focus on certain substantive aspects of these negotiations specifically related to trade in services and the telecommunications sector for reasons elaborated infra at text accompanying note 105. A thorough discussion of the many complex issues involved in the Uruguay Round appears in the references cited at note 5, supra.

[FN7]. As of this writing, the U.S. government is taking the very firm position that if the European Community does not make significant concessions on the elimination of agricultural subsidies, the Uruguay Round talks will fail because the United States and/or the developing countries will not find the result worthwhile (see, e.g., Trade Talks Stalemated After U.S.-Europe Clash, N.Y. Times, May 31, 1990, at D2, col. 5). The interest of the U.S. service industries in the liberalization of major overseas markets is quite strong, on the other hand, and it seems reasonable to conclude that the Executive branch will attempt to negotiate a services liberalization agreement in the GATT (or some other multilateral forum) regardless of the outcome of the Round as a whole, in order to promote U.S. services exports.

[FN8]. As discussed in detail infra at text accompanying notes 48-52, the following draft clause is taken from the EC's proposal for a GATT Services Code:

Subject to the conditions [sic] that the resulting regime is on the whole no more restrictive than that resulting from previous commitments set out in its schedule, this Agreement shall not prevent any party from being a party to an agreement aiming at a higher degree of liberalisation of trade in services in the framework of a customs union or free-trade area within the meaning of Article XXIV paragraph 8 of the GATT, or to adopt an interim agreement leading to the formation of a customs union or free-trade area whose scope would include trade in services.

Proposal by the EC: A Draft, General Agreement on Trade in Services, art. III(1), GATT Doc. MTN.GNS/W/105 (June 18, 1990) [hereinafter EC Services Proposal].

[FN9]. To further illustrate the Community's preoccupation with the RTA waiver issue, note that the following clause appeared in the EC's proposal for a GATT Intellectual Property Rights agreement:

Contracting parties which constitute a customs union or free trade area within the meaning of Article XXIV of the General Agreement may apply to one another measures relating to the protection of intellectual property rights without extending them to other contracting parties, in order to facilitate trade between their territories.

Draft Agreement on Trade-Related Aspects of Intellectual Property Rights, art. IV, GATT Doc. MTN.GNG/NG11/W/68 (Mar. 29, 1990), pt. 1. EC officials have explained that the foregoing clause was directed at covering their so-called "exhaustion" concept with regard to patents, and that perhaps the inclusion of the broad clause set forth above was unnecessary. It is nevertheless illustrative of the Community's mind-set that such a clause would have been included in a draft intellectual property rights agreement in which the reasonable grant of

discriminatory preferences is difficult to envisage.

[FN10]. The RTA exemption, article XXIV of the General Agreement, is discussed *infra* at text accompanying notes 30-33.

[FN11]. Jackson notes that the United States officially supported the RTA exception on the grounds that such arrangements are desirable, with the proviso that they do “not cause any disadvantage to outside countries, in comparison with their trade before the customs union [was] effected.” LAW OF GATT, *supra* note 1, at 577. Dam states that the drafters of the General Agreement were faced with a conflict between the goals of multilateral tariff reduction and regional discrimination, which they sought to solve by use of a legal formula that would countenance only those RTAs which did not attempt to raise barriers to non-member trade. Dam, *supra* note 1, at 622. Dam's general conclusion concerning the General Agreement's RTA waiver provision, article XXIV, is worth repeating here:

If a single adjective were to be chosen to describe article XXIV, that adjective would be ‘deceptive.’ First, the standards established are deceptively concrete and precise; any attempt to apply the standards to a specific situation reveals ambiguities which, to use an irresistible metaphor, go to the heart of the matter. Second, while the rule appears to be carefully conceived, the principles enunciated make little economic sense. Third, the dismaying experience of the Contracting Parties has been that no customs union or free-trade area agreement presented for review has complied with article XXIV and yet every such agreement has been approved by a tacit or explicit waiver.

*Id.* at 619.

[FN12]. It has been observed that:

The idea of the ‘United States of Europe’ . . . which would be a faithful partner of the United States of America, could be seen behind the Marshall Plan, the American decision to take part in the defense of Europe (the Vandenberg Resolution), and U.S. support for the process of neofunctional integration after 1950.

Elazar & Greilsammer, *Federal Democracy: The U.S.A. and Europe Compared, A Political Science Perspective*, in 1 INTEGRATION THROUGH LAW 71, 88 (M. Cappelletti, M. Seccombe & J. Weiler eds. 1986). The FIRST REPORT OF THE EUROPEAN CUSTOMS UNION STUDY GROUP (Mar. 1948), prepared by 14 European countries considering the formation of a customs union (with the United States and several other countries participating as observers), concluded that it was not practicable to pronounce definitely on the advantages and disadvantages of such a union. *Id.* at 91, para. 217. However, the report observed:

Europe today, as a result of the upheavals caused by crises and wars, is a mosaic of different economic systems whose dissimilarities impede the achievement of equilibrium. Internal differences have been accentuated by the existence of traditional bonds between certain European and overseas countries or territories and, from a very different angle, by the distortion of European trade produced by the need to acquire hard currencies. . . .

Nevertheless, there exists between many European countries a close interdependence which might form the basis of an organic community.

*Id.* at 89, paras. 212-13. See also LAW OF GATT, *supra* note 1, at 580; Haight, *Customs Unions and Free Trade Areas under GATT, A Reappraisal*, 6 J. WORLD TR. L. 391, 392 (1972).

[FN13]. The editors of INTEGRATION THROUGH LAW make the following observation about the thinking prevalent at the formation of the Community which seems to retain its vitality today: “[T]he trauma of World War II - which was the immediate and powerful mobilizing vehicle for the integration movement - created, especially in the generation of the ‘Founding Fathers,’ a strong commitment to European integration as a meta-value in itself above any mundane cost-benefit analysis.” Cappelletti, Seccombe and Weiler, *Integration Through Law: Europe and the American Federal Experience, A General Introduction*, in 1 INTEGRATION THROUGH LAW, *supra* note 12, at 6.

[FN14]. J. VINER, THE CUSTOMS UNION ISSUE 41-81 (1950).

[FN15]. Viner wrote with respect to trade creating (“TC”) and trade diverting (“TD”) effects:

None of these questions [of effect] can be answered a priori, and the correct answers will depend on just how the customs union operates in practice. All that a priori analysis can do, is to demonstrate, within limits, how the customs union must operate, if it is to have specific types of consequences.

Id. at 42-43.

[FN16]. It followed from this conclusion that the best legal formula for evaluating a prospective RTA would employ at its core a determination whether the RTA was likely to generate a preponderance of trade creating or trade diverting effects. The central thesis of Dam's article on RTAs and the GATT was that rather than using the seriously flawed tests for an RTA waiver provided for in article XXIV, it would be more sensible to evaluate RTAs for their trade creating/trade diverting (TC/TD) effects and to make a determination “whether these effects are on balance favorable or unfavorable for the world as a whole.” Dam, *supra* note 1, at 627. In Dam's optimum international economy, the prices paid by consumers are the prices received by producers and the prices charged by producers are the prices paid by consumers - there is no distortion in the pricing mechanism as the result of barriers such as tariffs. Dam subdivided trade creation and trade diversion into the categories of favorable production, unfavorable production, favorable consumption and unfavorable consumption effects, and proposed certain gauges by which such effects could be predicted (e.g., with respect to production effects, Dam suggested that higher pre-union, inter-member tariffs would be likely to lead to more favorable production effects upon the formation of the union). Id. at 627-28. The proposed short-form rules for predicting the global welfare benefits of RTAs now appear to leave too much out of the integration effects equation to be used as standards against which to evaluate them. Certain economists have suggested somewhat more elaborate versions of Dam's short-form rules as RTA evaluation criteria. See, e.g., Wannacott & Lutz, *Is There a Case for Free Trade Areas?*, in *FREE TRADE AREAS AND U.S. TRADE POLICY*, *supra* note 1, at 59. As discussed in the text and the following notes, however, the passage of time seems to more realistically give rise to the sanguine conclusion that the trade creation/trade diversion effects of RTAs are a priori indeterminate under the current state of the economic art, and that TC/TD effects are not the appropriate end of inquiry.

[FN17]. A Brief Review of the Literature on Trade Creation and Trade Diversion Effects of Regional Arrangements, Group of Negotiations on Goods (GATT), Negotiating Group on GATT Articles (June 6, 1989) [hereinafter Note of GATT Secretariat]. An extensive bibliography is appended to the Note. The Note states that the major extensions in customs union theory have “sought to broaden the focus of Viner's analysis” by including assessment of the additional effects referred to in the text. Id. at 6, para. 11. However, the Note adds that studies of the trade effects of tariff changes involving trade creation and trade diversion “reaffirm the feasibility of the underlying calculus that a [Customs Union] will increase overall world welfare if it created more trade than it diverted.” Id. at 11, para 20.

[FN18]. Id. at 13, para. 24.

[FN19]. Id. The Note refers to one economist's conclusion that because of certain studies which exceptionally suggested a large trade creation effect for the EC/EFTA (European Free Trade Association), “a persistent bias has emerged which underestimated TD [trade diversion].” Id. at 12-13, para. 23.

[FN20]. Id. at 12, para. 23. See also Balassa, *Trade Creation and Trade Diversion in the European Common Market*, 77 *ECON. J.* 1 (1967), in which the conclusion about predicting the impact of RTAs is reinforced: “[W]hile a number of criteria have been put forward for appraising the chances of trade creation and trade diversion in a union, it seems to be generally agreed that an a priori judgment regarding the net effect of a customs union on trade flows cannot be made.” Id.

[FN21]. Riesenfeld, Pacific Ocean Resources: The New Regionalism and the Global System, 16 ECOLOGY L.Q. 355-56, 359 (1989).

[FN22]. The concerns of developing countries with respect both to the schism which may be exacerbated between rich and poor and to the potential for isolation from compatible RTAs were articulated on March 27, 1990, by the Hon. Ambassador Tommy T.B. Koh of Singapore at the "Around the Uruguay Round Conference" sponsored by the American Society of International Law, in cooperation with Oceana Group (Wash., D.C., Mar. 27-28, 1990). Oceana Group will publish these proceedings.

[FN23]. For a discussion of right of establishment, see *infra* text accompanying notes 64-67, 149.

[FN24]. See, e.g., Canada Girds for Action on Trade Bill, N.Y. Times, Nov. 24, 1988, at A3, col. 1; Canada Begins Final Battle Over Trade Pact, N.Y. Times, Dec. 18, 1988, at A10, col. 1. Concern over the employment effects of the U.S.-Canada FTA has by no means diminished more than a year after its implementation. See, e.g., [Conflicting Reports of Success, Failure, Follow First Year of Bilateral Free Trade](#), 7 Int'l Trade Rep. (BNA) 53 (Jan. 10, 1990); [Economic Insecurity Resulting from FTA Is Damaging to Canada, Report Concludes](#), 7 Int'l Trade Rep. (BNA) 737 (May 23, 1990).

[FN25]. See generally Riesenfeld, *supra* note 21. Cottier points out that the advantages which the EC may gain in the short run from adopting discriminatory regulations may well plague the EC in the long run as it becomes subject to equivalent treatment by other RTAs, to which the EC will be hard-pressed to deny the same discriminatory privileges. Cottier, *supra* note 1, at 164. As Hudec has pointed out, in the absence of a political compromise, the formation of the EC could well have led the world community into making a choice between the GATT and the EC, as it was apparent that the proposed EC structure (in the agricultural area, for example) was inconsistent with GATT rules. R. HUDEC, *supra* note 1, at 211-12; see also O. LONG, *supra* note 4, at 69-71. Whether future choices between regional and global interests can be resolved without threatening to undermine the global system remains, of course, to be seen.

[FN26]. Dam noted that each of the four possible TC/TD effects of an RTA he described were "inferior to one in which all foreign sources are free from divergences between prices paid by consumers and prices received by producers - the utopian conditions of world free trade." Dam, *supra* note 1, at 627.

[FN27]. This perspective is largely derived from a June 1990 conversation with Professor Meinhard Hilf of the University of Bielefeld. An excellent analysis of the external effect of Community activities with respect to completion of the internal market, including discussion of a number of the points made in this paragraph, appears in Hilf, *The Single European Act and 1992: Legal Implications for Third Countries*, 1 EUR. J. INT'L L. 94 (1990).

[FN28]. The observation that the EC may be alone in its success not only at building an internal integration structure but in articulating a common external trade policy is derived from a conversation with Professor Stefan Riesenfeld of the University of California at Berkeley in June 1990. See also Note of GATT Secretariat, *supra* note 17, at 4, para. 6, which observes: "Since the early 1970s, growth in the number and incidence of regional trade and economic co-operation arrangements has been little short of phenomenal, even if success rates remain far less impressive."

[FN29]. Viner noted that even if the short-term effects of RTA formation were trade creating, such trade creation would "in the short-run at least" represent a loss to the outside world which could have participated directly in the liberalization of the RTA market. Viner said that the outside world "... can gain in the long-run only as the result of the general diffusion of the increased prosperity of the customs union area." J. VINER, *supra* note 14, at 44.

[FN30]. On the specific subject of the GATT RTA exemption, in addition to the references cited in note 1, *supra*, see Loveday, Article XXIV of the GATT Rules, 11 ECONOMIA INTERNAZIONALE 1 (1958); Haight, *supra* note

12; P. LORTIE, *ECONOMIC INTEGRATION AND THE LAW OF GATT* (1975).

[FN31]. With regard to both customs unions and free trade areas, article XXIV requires that tariffs be eliminated with respect to “substantially all trade” among the constituent territories, in theory precluding reliance on the RTA waiver by a substantially less than all-inclusive arrangement. The “substantially all trade” requirement is intended to preclude GATT parties from entering into relatively non-inclusive reciprocal trade arrangements as an excuse for derogating from their Most Favored Nation obligations. The “substantially all trade” requirement has not played a significant role in GATT deliberations with respect to RTAs because a Contracting Party objecting to the fact that a proposed RTA does not involve “substantially all trade” is in effect asking that additional discriminatory tariff preferences be implemented by the RTA in order to meet the test.

[FN32]. A “customs union,” such as the European Community, involves not only the elimination of intra-RTA tariffs (and other regulations of commerce), but also the formation of a common external tariff wall. A “free trade area” (“FTA”) involves only the elimination of intra-FTA tariffs (and other regulations of commerce). “RTA” is used in this article to apply both to customs unions and FTAs unless the context indicates otherwise. This article focuses primarily on customs unions and, in particular, the EC. The distinction between customs unions and FTAs does not appear to alter either the problems posed or the solutions analyzed or recommended in this article. The ultimate aims of the parties to an RTA in terms of the level of integration they seek to achieve may be material to a determination whether specific discriminatory agreements they enter into are “necessary” in the context of the formula proposed *infra*.

[FN33]. See J. JACKSON, *supra* note 1, at 141. The article XXIV “waiver” process involves in essence a “negative” clearance as opposed to an affirmative act of approval. Pursuant to article XXIV(7), parties to the GATT which intend to join a prospective RTA must notify the Contracting Parties. The latter will study the plan and, if they find it objectionable, make recommendations to the prospective RTA members, which are obliged to modify their proposal in order to secure the waiver.

[FN34]. Dam and Jackson both refer to article XXIV as providing an exception to the MFN principle in the context of its application to tariffs. Dam, *supra* note 1, at 616; J. JACKSON, *supra* note 1, at 141. Hudec's discussion of article XXIV is couched in terms of “discrimination,” but also focuses on the historic use of article XXIV to justify preferential tariff arrangements (including the EC's controversial variable levies). R. HUDEC, *supra* note 1, at 211-26.

It is well worth noting that in 1963, when then-Professor Dam wrote his classic analysis of article XXIV, tariff barriers and quotas were considered the most problematic barriers to international trade. Dam wrote:

While many internal policies and practices both in importing and exporting countries may create other kinds of divergences between prices paid by consumers and costs incurred by producers-monopolies, cartels and local direct and indirect taxes, for example—the primary international barriers to optimization of allocation of world resources are tariffs and quantitative restrictions.

Dam, *supra* note 1, at 624. It is certainly not clear that twenty-seven years later Mr. Dam would reach the same conclusion.

[FN35]. General Agreement, *supra* note 4, at art. III.

[FN36]. Since the article XXIV waiver refers explicitly to “other regulations of commerce,” it might be construed to refer to the National Treatment principle involving, for example, tax regulations. In his 1969 treatise, Jackson reported one instance in which the EC argued that article XXIV(5)(a) of the General Agreement permitted it to impose common quotas for balance of payments purposes when the individual Member States of the EC could not each justify a quota because of the reference to “other regulations.” Most members of the GATT group studying the question objected to this interpretation, arguing, according to Jackson, “that this term [‘regulations’] . . . was meant to apply to such things as customs procedures, grading and marketing requirements, and similar routine controls.” *LAW OF GATT*, *supra* note 1, at 617. Jackson goes on to suggest that since article XXIV(1) and (8)(a) provide that

a customs union will be treated as a Contracting Party by the GATT, “it can be argued that once a customs union is instituted the provisions of GATT apply to that customs union as a whole.” *Id.* at 617. While this might permit the establishment of a common quota, it would seem to follow from this reasoning that the National Treatment principle would apply to an RTA such as the EC as a whole, so that an RTA would be obligated to extend the benefits of its regulatory policies “as a whole” to non-member Contracting Parties.

Another semantic approach to the suggestion that the article XXIV waiver applies to National Treatment would note that article I(1) of the General Agreement, in addressing the matters as to which MFN treatment must be extended (e.g., “customs duties and charges”), requires that “all matters referred to in paragraphs 2 and 4 of Article III” be extended on an unconditional MFN basis. Article III establishes the National Treatment principle and paragraphs 2 and 4 refer to internal taxes and all other regulations affecting internal sale, respectively. It might therefore be argued that an RTA exemption from the MFN principle includes at least a limited exemption from the National Treatment principle, since the MFN provision of the General Agreement operates to extend National Treatment on an MFN basis. However, this argument is not persuasive since, among other reasons, article XXIV does not expressly refer to exemption from article I(1), but instead to the preferential elimination of duties and other regulations of commerce.

[FN37]. The only learned support for a more expansive view of the article XXIV waiver which this author has discovered is a somewhat arcane passage in an article by Petersmann in which he states:

Some of these ‘prohibitive’ rules [of the GATT] (including rules prescribing non-discrimination and national treatment) are subject to exceptions which reserve a margin of discretion (e.g., Art. XII: balance of payments restrictions; Art. XXI: security exceptions; Art. XXIV: free-trade areas and customs unions); hence, the invocation of such an exception clause may have the effect of suspending the direct applicability of the prohibitive rule or of reducing its directly applicable content to a certain normative core.

Petersmann, *The EEC as a GATT Member - Legal Conflicts between GATT Law and European Community Law*, in *EC AND GATT*, supra note 1, at 49.

[FN38]. Petersmann, *id.* at 49-50, discusses a number of GATT dispute settlement proceedings involving claims that the EC violated “prohibitive” GATT rules, including the National Treatment principle. In a case involving a complaint by the United States regarding an alleged violation of article III (National Treatment), the European Court of Justice declared the complained-of discriminatory internal regulations null and void prior to a GATT Council ruling that the EC had violated article III. When Portugal acceded to the EC in 1986, the United States imposed increased duties on EC products alleging, inter alia, that the regulations reserving parts of Portugal's agricultural imports to Member States violated the EC's GATT obligations. See [Bello and Holmer, Significant Recent Developments in Section 301 Unfair Trade Cases, 21 INT'L LAW. 211, 216-18 \(1987\)](#). The parties eventually reached a settlement in this matter.

[FN39]. This is not to suggest that tariffs are the only border measures which affect trade in goods. Goods crossing borders are also subject, for example, to inspections intended to assure compliance with health and safety regulations. These border measures may have effects on foreign exporters disproportionate to the impact which internal RTA regulations relating to health and safety have on their intra-RTA counterparts. The GATT, however, disapproves of such measures when used as disguised restrictions on trade. Moreover, it is important to note that the GATT General Agreement approves the use of tariffs negotiated within the GATT framework, and favors tariffs over other trade restrictive measures such as quotas, in the belief that tariffs are the least trade distorting form of trade regulation. See O. LONG, supra note 4, at 10; *LAW OF GATT*, supra note 1, at 305-16.

[FN40]. United States-Section 337 of the Tariff Act of 1930, Report by the Panel, GATT Doc. L/6439 (Jan. 16, 1989), at 52, para 5.11 [hereinafter Panel Report].

[FN41]. *Id.* at 53, para. 5.13.

[FN42]. To illustrate, an accounting firm in the United States can provide its services to a manufacturing entity in

France in essentially one of two ways. It may either respond to trans-Atlantic telephone calls, or it may open an office in France. If it relies on trans-Atlantic telecommunications, its services will be much like goods passing an external RTA barrier where they can be regulated by tariff. If, on the other hand, it establishes an office in France, the French and the EC have two choices. They can either treat the French office just like any French national's office and therefore not discriminate, or they can impose regulations on the office based on its American (or foreign) character. If they choose to treat the office like any French national's office, they have applied the National Treatment principle. If they choose to have special licensing requirements for the office, they have derogated from the National Treatment principle (although some derogation from pure National Treatment based on public policy considerations is to be expected).

[FN43]. The General Agreement contains a few “safeguard” provisions which permit contracting parties to adopt and enforce measures which derogate from more general GATT obligations when vital national interests are at stake. Safeguard measures include those which permit the adoption of measures to protect public morals and health, and measures to secure compliance with laws not inconsistent with the General Agreement (art. XX); to protect essential (and narrowly defined) security interests (art. XXI); to safeguard the balance of payments (art. XII); and to deal on an emergency basis with imports of particular products (art. XIX). Thus, the General Agreement contemplates derogation from pure National Treatment (as well as Most Favored Nation treatment) in certain circumstances. An RTA might therefore be justified, i.e., at least if all its component member state contracting parties were justified) in adopting and enforcing certain narrowly circumscribed measures derogating from the National Treatment principle even without an amendment to article XXIV, pursuant to the generally applicable safeguard measures incorporated in the General Agreement.

[FN44]. Of course, an MFN provision in a GATT services agreement must also address the nationality of “service providers” as well as the “country of origin” of “services.” In this context, a service provider might be analogized to a mobile producer of goods who carries his/her country of origin with him/her. A services MFN provision would provide that liberalizing regulations applicable to the service providers of any party to the agreement would be extended immediately and unconditionally to the service providers of any other party to the agreement.

[FN45]. Just as National Treatment is not an absolute concept in the General Agreement with respect to goods, it certainly will not be an absolute concept with respect to services. It seems fair to assume that countries will be permitted to discriminate in favor of local service providers with respect to the provision of certain national security-related services. Services Framework Agreement, para. 7(b), reprinted in General Agreement on Tariffs and Trade: Decisions Adopted at the Mid-Term Review of the Uruguay Round (April 8, 1989), [28 I.L.M. 1023, 1036](#) (1989) [hereinafter GATS Framework]. In addition, certain sectors will undoubtedly be liberalized progressively so that for some period of time there will be allowances for various domestic producer preferences. *Id.* at 1037, para. 7(b). Finally, it is virtually certain that concessions will be made in favor of developing countries which will at least temporarily permit differential treatment of domestic and foreign service providers. *Id.* at 1037, paras. 7(b), (f). Thus, within the context of a Uruguay Round agreement on the liberalization of trade in services there will undoubtedly be categories of permissible deviation from a new National Treatment standard.

[FN46]. Communication from the United States: Agreement on Trade in Services, GATT Doc. MTN.GNS/W/75 (Oct. 17, 1989) [hereinafter U.S. Services Proposal].

[FN47]. EC Services Proposal, *supra* note 8.

[FN48]. GATS Framework, *supra* note 45, at 1036.

[FN49]. This author has recently discussed at some length the distinction between an amendment to the General Agreement and a GATT Code. Abbott, *supra* note 5, at 721-32. In that article it was observed that a code arrangement was a much more acceptable outcome for the services sector negotiations than for the GATT

intellectual property rights negotiations, primarily because the utility of services liberalization in the OECD countries (i.e., absent the participation of the developing countries) would be relatively high and therefore justify the effort necessary to conclude such an arrangement. *Id.* at 724.

[FN50]. U.S. Services Proposal, *supra* note 46, at art. 3.1; EC Services Proposal, *supra* note 8, at art. XVIII. Draft Telecommunications Annexes of the United States and EC are discussed *infra* at text accompanying notes 142 and 143.

[FN51]. U.S. Services Proposal, *supra* note 46, at art. 8; EC Services Proposal, *supra* note 8, at art. IV.

[FN52]. The U.S. Services Proposal's National Treatment provision explicitly provides that it will take effect “[w]henever market access has been achieved by a service provider of another Party.” U.S. Services Proposal, *supra* note 46, at art. 8.1.

[FN53]. *Id.* at arts. 8.2., 16.2; EC Services Proposal, *supra* note 8, at arts. V(1)(a), XV.

[FN54]. U.S. Services Proposal, *supra* note 46, at art. 11.1; EC Services Proposal, *supra* note 8, at art. V(1)(b), (3).

[FN55]. U.S. Services Proposal, *supra* note 46, at art. 8.3; EC Services Proposal, *supra* note 8, at art. XIV.

[FN56]. *Id.* at art. 9; EC Services Proposal, *supra* note 8, at art. II.

[FN57]. The initial Schedules provided for in each proposal apparently do not contemplate that any Code party will be entitled to treat other Code parties on different bases. See U.S. Services Proposal, *supra* note 46, at art. 2.2; EC Services Proposal, *supra* note 8, at art. XIX. The U.S. Services Proposal specifically states that reservations to certain provisions (including National Treatment, but not the Schedules) must be on a nondiscriminatory basis. U.S. Services Proposal, *supra* note 46, at art. 22.1. Both proposals, however, would permit parties to refrain from applying the Code as a whole to other parties. *Id.* at art. 28; EC Services Proposal, *supra* note 8, at art. XXII(1).

[FN58]. U.S. Services Proposal, *supra* note 46, at art. 3.2, 3.3.

[FN59]. See EC Services Proposal, *supra* note 8, at art. XX.

[FN60]. *Id.* at art. XXI.

[FN61]. U.S. Services Proposal, *supra* note 46, at art. 2.2.

[FN62]. EC Services Proposal, *supra* note 8, at art. I(2).

[FN63]. *Id.* at art. XIX.

[FN64]. U.S. Services Proposal, *supra* note 46, at art. 4.

[FN65]. EC Services Proposal, *supra* note 8, at art. I(1)(c).

[FN66]. U.S. Services Proposal, *supra* note 46, at art. 8.1. See also *supra* note 52.

[FN67]. EC Services Proposal, *supra* note 8, at art. IV(1). This suggests that the EC assumes that enterprises will be

able to establish themselves, while the United States wishes to point out that a two-step approach is involved: first, establishment and second, National Treatment.

[FN68]. U.S. Services Proposal, *supra* note 46, at art. 12; EC Services Proposal, *supra* note 8, at art. VI.

[FN69]. U.S. Services Proposal, *supra* note 46, at art. 10; EC Services Proposal, *supra* note 8, at art. IX.

[FN70]. U.S. Services Proposal, *supra* note 46, at art. 15; EC Services Proposal, *supra* note 8, at art. XII.

[FN71]. U.S. Services Proposal, *supra* note 46, at art. 14.2; EC Services Proposal, *supra* note 8, at art. XIII(1).

[FN72]. U.S. Services Proposal, *supra* note 46, at art. 6; EC Services Proposal, *supra* note 8, at art. I(1)(d).

[FN73]. U.S. Services Proposal, *supra* note 46, at art. 13; EC Services Proposal, *supra* note 8, at art. VII.

[FN74]. EC Services Proposal, *supra* note 8, at arts. VIII, X.

[FN75]. U.S. Services Proposal, *supra* note 46, at art. 16.2; EC Services Proposal, *supra* note 8, at art. XV.

[FN76]. Although not apparent from the language referred to in note 77, *infra*, it may be that the EC's intent here is to address only those types of standards which are applicable to the provision of professional services (which the U.S. proposal refers to as licensing requirements). This conclusion might be inferred from the fact that the GATT Technical Standards Code, discussed *infra*, concerns itself in some detail with technical standards which, within the GATT framework and according to its terms, has typically affected the production and sale of goods. If the intent is to apply the Technical Standards Code to the services area and to supplement the provisions of that Code, this will also need to be made clear.

[FN77]. U.S. Services Proposal, *supra* note 46, at art. 7 (regarding only licensing and certification); EC Services Proposal, *supra* note 8, at art. V. Because of the importance of standards rules (and lack of discrimination) to effective liberalization of the telecommunications market, portions of the EC proposal with regard to standards may usefully be quoted here:

1.(a) Subject to the provisions of this Agreement, parties shall have the right to regulate the provision of services in accordance with public policy considerations. Rules, standards and qualifications required for the provision of a service within a party's territory shall be based on objective requirements, such as competence or the ability to provide a service. Whenever appropriate, recourse should be made to internationally agreed requirements.

b) Rules, standards and qualifications required shall not be more burdensome than necessary for the attainment of the public policy consideration envisaged, and shall not in any case render inoperative, in any part of the territory and for the entire range of activities concerned, a commitment to grant market access.

....

3.(a) Measures under paragraphs 1 and 2 of this Article shall be formulated in a transparent, reasonable and non-arbitrary manner. Each party shall ensure their transparent, uniform, impartial and reasonable administration.

(b) Neither formulation nor administration of such measures may in effect constitute an arbitrary or unjustifiable discrimination between parties or a disguised restriction on international trade in services.

Id.

[FN78]. The relevant provision reads:

In cases other than those provided in Article III [the RTA waiver provision] parties may negotiate and conclude among themselves or with other countries agreements providing for the harmonisation or mutual recognition of rules, standards and qualifications. Other parties shall be given the opportunity to negotiate accession to such agreements.

EC Services Proposal, *supra* note 8, at art. V(2)(b) (emphasis added).

[FN79]. Interpretation of the EC's RTA waiver proposal is made somewhat problematic by its reference to the rights of a "party," giving rise to potentially differing interpretations depending upon whether "party" refers to each member state in an RTA or to the RTA itself. In the context of the draft provision, "party" would appear to refer to individual member state components of an RTA. However, the EC Services Code proposal makes provisions for acceptance by the EC itself (EC Services Proposal, *supra* note 8, at art. XXIX(1)), leaving some room for doubt as to whether the EC intends that it be adopted by its individual member countries, by the EC as a regional organization or by both as a "mixed" agreement. This must be clarified by the EC not only as it impacts its draft RTA waiver, but also as it will impact the negotiation and preparation of the various schedules provided for in its proposal. See Hilf, *The Application of GATT within Member States of the Community, with Special Reference to the FRG, in EC AND GATT*, *supra* note 1, at 153-73, for a discussion of the reasons why the EC and its Member States have concluded GATT undertakings in various configurations. Hilf observes that "the Member States are increasingly urging a 'mixed conclusion' of agreements to preserve their influence on the foreign trade policy of the Community." *Id.* at 165.

[FN80]. RTA members will presumably retain an MFN obligation outside the membership of the RTA. That is, to the extent that a specific level of treatment is extended to one non-RTA member Code party, that level of treatment must immediately and unconditionally be extended to all non-RTA member Code parties.

[FN81]. Under the EC Services Proposal, *supra* note 8, parties to the Code will specify in a schedule their commitments to eliminate measures inconsistent with the National Treatment principle. *Id.* at art. XVII(2). The existing degree of compliance with the National Treatment principle is not to be decreased by the introduction of new measures. *Id.* at art. XVII(3). However, since this requirement is not directly incorporated in a country's "schedule" of commitments, it is not clear that the EC intends this requirement to be a part of each RTA member's commitments for the purpose of evaluating "on the whole" compliance by the RTA.

[FN82]. See discussion of "on the whole" language in article XXIV in text accompanying notes 32 and 33, *supra*.

[FN83]. The history of the EC controversy, which was never resolved, is described by Professor Jackson in *LAW OF GATT*, *supra* note 1, at 610-18. The controversy ultimately boiled down to the question whether the tariffs "applicable" prior to the formation of the RTA meant the "bound" tariff commitments of the Member States in the General Agreement or the actual tariffs in place at the time of formation. Dam points out that quite a few statistical calculation problems which arise in attempting to determine the general incidence of tariffs remain unresolved. *Dam*, *supra* note 1, at 619-22.

[FN84]. J. JACKSON, *supra* note 1, at 130.

[FN85]. Jackson cites two attempts to measure non-tariff barriers affecting trade in goods and to provide a conceptual framework for such measurements. A herculean conceptual study by Deardorff and Stern of the University of Michigan, while tentatively attempting to quantify the impact of NTBs, is carefully worded by the authors to make it clear that much research would be necessary before economic studies of NTBs could be used as a decision-making basis in trade negotiations. Deardorff & Stern, *Methods of Measurement of Non-Tariff Barriers*,

UNCTAD/ST/MD/28, at 46-47 (1985). Likewise, a study by Morici and Megna which attempts to quantify the tariff equivalent impact of U.S. NTBs states:

Estimating the tariff equivalents of NTBs is a difficult and inexact exercise, especially when the objective is to obtain measurements across all of a country's practices and manufacturing industries. Many judgments were necessary, and the authors emphasize that many of the results reported here are order of magnitude estimates of the restrictive effects of many U.S. NTBs. (emphasis in original)

P. MORICI & L. MEGNA, U.S. ECONOMIC POLICIES AFFECTING INDUSTRIAL TRADE 2 (1983). The task of estimating the effect of NTBs on trade in services presents obstacles even more formidable than those considered by the two studies cited above because precise data on trade in services is not available. See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1990 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 3 (1990) [hereinafter USTR FTB REPORT].

[FN86]. See USTR FTB REPORT, supra note 85, at 3-4.

[FN87]. The USTR FTB REPORT, after discussing the difficulties in estimating the impact of tariff barriers, states: "The task of estimating the impact of nontariff measures on U.S. exports is far more difficult since there is no readily available estimate of the additional cost these restrictions impose upon imports." Id. at 4.

[FN88]. Id. With respect to NTBs in general, the Report states: "[I]t is difficult to quantify the impact upon U.S. exports (or commerce) of other foreign practices such as government procurement policies, nontransparent standards, or inadequate intellectual property rights protection." Id. Similar observations were made in the USTR's 1989 FTB Report.

[FN89]. As Professor Jackson has recently observed, current tariff levels under the GATT "arguably constitute more of a 'sales tax', or a nuisance, than an import barrier. Producers who can become sufficiently more efficient can 'hurdle the tariff' by selling at a lower cost to offset the tariff." J. JACKSON, supra note 1, at 117.

[FN90]. U.S. Services Proposal, supra note 46, which contains no reference to special treatment for RTAs.

[FN91]. The EC is technically not a GATT Contracting Party, although it is treated like one for almost all purposes. Petersmann, The EEC as a GATT Member - Legal Conflicts Between GATT Law and European Community Law, in EC AND GATT, supra note 1.

[FN92]. This flows not explicitly from the text of the General Agreement, but rather from fundamental principles of international law which view the State as a unitary actor responsible for its own internal constitutive processes. See E. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW (8th ed. 1955) with respect to the rule that sovereign States as "international persons" are represented by one central political authority (sec. 85), regarding the rights and obligations of the sovereign State within its own territory (secs. 123-25) and the "well-established principle that a State cannot invoke its municipal legislation as a reason for avoiding its international obligations" (sec 155d). Article 27 of the Vienna Convention on the Law of Treaties provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." S. ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986, at app. I (1989).

[FN93]. This observation is intended as a statement of political reality, i.e., that as a general proposition RTA governments act first and foremost with a view toward improving conditions within the market for the benefit of local industry, and not for the benefit of third-country enterprises.

[FN94]. In order to accommodate adoption of the Code by the EC, a definitional provision should be added to the Code which makes it clear that, with respect to the RTA waiver provision, reference should also be had to

agreements made between member states of an RTA which are not independent parties to the Code, and to measures adopted by the RTA as a regional organization (recognizing that the EC and its Members may adopt the Code as a “mixed” agreement).

[FN95]. A number of the Codes negotiated in the Tokyo Round incorporate their own independent dispute settlement mechanisms. See O. LONG, *supra* note 4, at 78-80, 87. For a general discussion of existing GATT dispute settlement procedures, see *id.* at 71-88. For an excellent analysis of the potential for improvement in the GATT dispute settlement system, see Hilf, *Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures*, in EC AND GATT, *supra* note 1, at 285.

[FN96]. Such an allocation of the burden of proof may help to counter any institutional bias in favor of conceding waivers to RTAs. This proposal to place the burden of proof on the party seeking to justify exceptional conduct is also consistent with the Procedure followed by the GATT Panel in the EC/U.S. section 337 dispute (Panel Report, *supra* note 40) which, in considering the GATT-legality of U.S. legislation under the National Treatment standard, said, “[I]t is incumbent on the contracting party applying differential treatment to show that, in spite of such differences, the no less favorable treatment standard of Article III is met.” (emphasis added) *Id.* at 52, para. 5.11.

[FN97]. The proposed formula refers to measures necessary for both the “formation” and “maintenance” of the RTA. Although the vast majority of necessary derogating measures should expire upon completion of a “formation” phase of the RTA, it may be that certain measures (such as those relating to security) will have a more permanent character. Thus there are certain measures for which a binding duration commitment would not be expected.

[FN98]. Judge Koopmans was particularly helpful in developing the author's views with respect to the approach taken by the proposed formula.

[FN99]. BLACK'S LAW DICTIONARY defines “necessary” as follows:

This word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity. It may mean something which in the accomplishment of a given object cannot be dispensed with, or it may mean something reasonably useful or proper, and of greater or lesser benefit or convenience, and its force and meaning must be determined with relation to the particular object sought.

*Id.* at 928 (5th ed. 1979).

[FN100]. The most prominent appearance of the word “necessary” in U.S. jurisprudence is in the “necessary and proper” clause of the U.S. Constitution, which empowers Congress to “make all Laws which shall be necessary and proper for carrying into Execution” both the specific legislative powers granted to Congress in article I, § 8, and “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8. The meaning of the “necessary and proper clause” was the subject of an historic debate between Jefferson and Hamilton, with Jefferson arguing that its meaning should be limited to “absolutely indispensable” and Hamilton arguing in favor of “useful.” While Hamilton's position eventually prevailed in the Supreme Court (in [McCulloch v. Maryland, 17 U.S. \(4 Wheat.\) 316 \(1819\)](#); see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 300-05 (2d ed. 1988)), the context of that debate was entirely different from that under discussion here. With respect to interpreting the “necessary and proper” clause of the U.S. Constitution, the central issue was whether the Congress as the federal legislature would have greater or lesser powers with respect to the state legislatures. In adopting a liberal construction of the clause, the Supreme Court was effectively extending the scope of federal powers. In the context of RTA derogations from the general rules of the GATT, the GATT General Agreement acts as the federal global trade constitution, while the separate RTAs may be analogized to the states. Therefore, liberally construing the “necessary” clause of the proposed RTA exemption would be the equivalent of

extending states' rights at the expense of federal authority.

[FN101]. As indicated in note 37, *supra*, the National Treatment principle in the GATT is not an absolute, and much of what is suggested here may be roughly coincidental with the public policy derogations generally permitted from the National Treatment principle in the General Agreement. This suggests that the justification for RTA derogations may need to be nearly as compelling as derogations by individual Contracting Parties to the GATT.

[FN102]. The analogy to the anti-dumping and subsidy laws does not point to a specific test for the RTA waiver regarding predominant purpose; rather, it illustrates that trade policy-makers have successfully dealt with policy concepts distinguishing conduct taken with trade-enhancing versus trade-destructive intent.

[FN103]. It is doubtful that preservation of cultural identity is a valid justification for RTA discrimination. A recent example of such discrimination is the EC's directive on television programming content. Council Directive on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcast Activities, 32 O.J. EUR. COMM. (No. L 298) 23 (1989); see [Presburger & Tyler, Television without Frontiers: Opportunity and Debate Created by the New European Community Directive](#), 13 HASTINGS INT'L & COMP. L. REV. 495 (1990). All manner of RTA discrimination as well as national discrimination could be justified on "cultural" grounds - including discrimination in favor of Japanese rice growers, German beer brewers, French wine makers and Belgian chocolate makers. No doubt, each country or RTA has an interest in preserving its local character. Preservation achieved by protectionist measures, however, impairs the efficient allocation of global resources, which is the goal of market liberalization. Jackson notes that the choice of a society to pursue "noneconomic" goals is certainly valid - probably desirable - and ponders that perhaps the only demand that outsiders might reasonably make on that society is that it absorb the whole economic cost for that choice. J. JACKSON, *supra* note 1, at 19.

[FN104]. An excellent non-technical survey of the current state of the EC (including its relationships with the EFTA countries) appears in *An Expanding Universe: A Survey of the European Community*, ECONOMIST (July 7, 1990) (insert).

[FN105]. See Riesenfeld, *supra* note 21, at 356. For a report on the upcoming commencement of negotiations between the EC and EFTA toward the creation of a European Economic Space (EES), see 30 E.F.T.A. BULLETIN 1 (Oct. 1989 - Mar. 1990).

[FN106]. Primary sources regarding the telecommunications sector and the liberalization process include J. ARONSON & P. COWHEY, *WHEN COUNTRIES TALK* (1988); H. UNGERER & N. COSTELLO, *TELECOMMUNICATIONS IN EUROPE* (1988); *LEGAL AND ECONOMIC ASPECTS OF TELECOMMUNICATIONS* (S. Schoff ed. 1990); Cowhey, *The International Telecommunications Regime: The Political Roots of Regimes for High Technology*, 44 INT'L ORG. 169 (1990). "Telecommunications in Europe," written by the Division Head of the EC Telecommunications Policy Directorate, is an improved version of the Commission's Green Paper on the telecommunications sector. *Towards a Dynamic European Economy, Green Paper on the Development of the Common Market for Telecommunications Services and Equipment*, E.C. COMM'N DOCS., COM(87) 290 final [hereinafter Green Paper]. While many of the references to "Telecommunications in Europe" could similarly be made to the Green Paper, this article will refer to the former except where a direct reference to the Green Paper is necessary. See also Report by Independent Consultants to DG XIII: *Perspectives for Advanced Communications in Europe*, 1 PACE 89 (1989); *Netting the Future: A Survey of Telecommunications*, ECONOMIST (Mar. 10, 1990) (insert).

[FN107]. The observations in the text concerning the potential benefits of an open global telecommunications network would appear to require little secondary confirmation. However, for a somewhat less rhapsodic but nevertheless compelling perspective on the importance to global welfare of such a network, see J. ARONSON & P.

COWHEY, *supra* note 106, at 4-9. Aronson and Cowhey note that the world market for telecommunications and computer products and services in 1990 is estimated to have a value of \$831 billion, and that the annual worldwide growth rate in that market between 1984 and 1990 has been 11%. *Id.* at 7.

[FN108]. Issues with respect to who has access to information and under what conditions in the context of the international telecommunications sector are generally referred to under the rubric of “transborder data flow” issues. These issues are briefly summarized and citations provided in J. ARONSON AND P. COWHEY, *supra* note 106, at 99-110. There are fundamental tensions among the business and scientific communities which wish to maximize the open flow of data, individuals who wish to secure their privacy and governments which wish to regulate both.

[FN109]. Professor Rigaux presents an excellent discussion of the rules which legal institutions have developed to protect the privacy of individuals and makes some insightful observations about the need for a new balancing of power between the State and the individual in the computer age in Rigaux, *The Protection of Private Life*, in LEGAL AND ECONOMIC ASPECTS OF TELECOMMUNICATIONS, *supra* note 106, at 663.

[FN110]. As discussed *supra* at text accompanying note 102, competition rules will play a vital role in preventing and correcting abuses of a newly-liberalized global telecommunications network.

[FN111]. In 1986, telecommunications administrations in the EC accounted for the combined employment of 922,000 persons. H. UNGERER & N. COSTELLO, *supra* note 106, at 28-29. This figure does not include employment by non-TA telecommunications service providers.

[FN112]. See *id.* at 53-62; J. ARONSON & P. COWHEY, *supra* note 106, at 86, 91-95.

[FN113]. The definitional problem is discussed in Green Paper, *supra* note 106, at 33-36.

[FN114]. *Id.* at 64-74 (fig. 13, para. B). The placement of the boundary line was very important to EC TAs which, according to the Green Paper, were to be permitted to retain monopolies over the provision of basic services in order to assure their financial viability. The Commission eventually limited TA monopolies to voice telephony. See *infra* note 117 and accompanying text. The boundary between basic services and VAS is also of great importance from the standpoint of the GATT services agreement and telecommunications annex (discussed *infra* at text accompanying notes 158-65), which are almost certain to exclude the provision of “basic” services from liberalization requirements.

[FN115]. H. UNGERER & N. COSTELLO, *supra* note 106, at 26-28; Green Paper, *supra* note 106, at 70-72, 1-79 (appendix). In the United Kingdom, the government retains a minority interest in British Telecom; in Spain, the government holds a minority interest in Telefonica. See H. UNGERER & N. COSTELLO, *supra* note 106.

[FN116]. Commission Directive of 16 May 1988 on Competition in the Markets of Telecommunications Terminal Equipment, 31 O.J. EUR. COMM. (No. L 131) 73 (1988), pursuant to which terminal equipment markets are to be completely opened (including the supply of first telephones) by December 31, 1990.

[FN117]. Commission Directive of 28 June 1989 on Competition in the Markets for Telecommunications Services, 33 O.J. EUR. COMM. (No. L 192) 10 (1990), at art. 2. The Commission's authority to issue this sweeping Directive on the basis of its powers under article 90 of the Treaty of Rome (to ensure that Member State monopolies comply with the EC's competition rules) is subject to a challenge by a number of Member States now pending before the European Court of Justice.

[FN118]. Council Directive on the Establishment of the Internal Market for Telecommunications Services through the Implementation of the Open Network Provision (ONP), 33 O.J. EUR. COMM. (No. L 192) 1 (1990) [hereinafter

ONP Directive].

[FN119]. EC Press Release 4827/90 (Presse 19 - G) 22.II.90 (ton/PT/mmk).

[FN120]. The rather complex structure of ETSI is described by its Director, Professor Gagliardi, in Gagliardi, ETSI: The European Standards Body for Telecommunications, in LEGAL AND ECONOMIC ASPECTS OF TELECOMMUNICATIONS, supra note 106, at 547. ETSI's membership is open to European national administrations, public network operators, manufacturers, users (including private service providers offering services to the public) and research bodies. Id. at 550. "Non-European organisations concerned with telecommunications may be invited to participate to [sic] the meetings of the Technical Assembly as observers." Id. at 552.

[FN121]. As discussed supra note 117, a number of Member States have challenged the Commission's authority to issue blanket decrees directed at TA anti-competitive practices.

[FN122]. Completing the Internal Market (White Paper from the Commission to the European Council), E.C. COMM'N DOCS., COM(85) 310 final. The White Paper identified the crucial role of the telecommunications sector in achieving the objectives of the 1992 plan, and emphasized the removal of national barriers on procurement (id. at 24) and the need to establish common European telecommunications standards (both to integrate the industrial infrastructure of the Community and to enhance international competitiveness) (id. at 19). The technical standards area was specifically identified as one in which mutual Member State recognition would not substitute for true harmonization. Id. at 19-20, 30-31.

[FN123]. Green Paper, supra note 106. In the words of the Commission: "The purpose of the Green Paper on telecommunications is to initiate wide-ranging discussions with all those concerned so as to help the Community and its Member States to introduce necessary changes to their systems of regulation." Id. at 1.

The Green Paper discussed the major economic role of the telecommunications sector in the Community. By the year 2000, up to 7% of Community GDP would arise from the telecommunications sector, with more than 60% of employment "dependent" on the sector. Over 500 billion ECU would be invested in the sector. Id. at 1, 4. The Green Paper noted that the EC's trade balance in telecommunications equipment had fallen precipitously vis-à-vis U.S. and Japanese competition. Id. at 158.

[FN124]. See discussion of services proposals, supra at text accompanying notes 46-48. Professor Jackson observed in 1969 that the General Agreement was basically intended to apply only to goods. LAW OF GATT, supra note 1, at 511.

[FN125]. This is not intended to suggest that international telecommunications are presently unregulated. The International Telecommunications Union ("ITU"), and in particular its sub-body the International Consultative Committee for Telephones and Telegraphs ("CCITT"), provide a framework for the multilateral negotiation of telecommunications standards and the establishment of rates. See J. ARONSON AND P. COWHEY, supra note 106, at 45-49. However, the ITU framework does not impose on its members an obligation to grant foreign providers access to internal VAS markets on terms equivalent to those accorded national providers. For a detailed description of the international regime governing telecommunications, see Cowhey, supra note 106. In addition to the ITU, international telecommunications issues are routinely negotiated on a bilateral basis. For example, the United States has negotiated a series of bilateral agreements referred to as IVANs (International Value Added Network Agreements) which establish the rights of national enterprises to provide VAS in foreign countries and the regulation to which such enterprises may be subject. The IVANs, which are generally negotiated on the basis of reciprocity, have the primary drawback of creating a tremendously complex and unwieldy global arrangement which impedes the development of an integrated global network. Moreover, while IVANs may be attractive to the OECD countries, there is little incentive for the developing countries to grant reciprocal access to their markets because

they are unlikely to export VAS services. Finally, the dispute settlement mechanisms and procedures both in the ITU and on a bilateral basis are not terribly satisfactory, leading to a strong desire on the part of OECD-based telecommunications services providers to reach a multilateral accord in the GATT.

[FN126]. Total investment by EC TAs on an annual basis as of 1985 was 17 billion ECUs. Green Paper, *supra* note 106, at 48.

It might be noted at this point that the status of a privatized yet State-chartered monopoly such as British Telecom under the GATT is unclear. There is some room to argue that the “state trading enterprise” provision of the GATT (article XVII), which recognizes the right of governments to confer “special privileges” on private enterprises in purchases and sales of imports (e.g. to establish an import monopoly) permits chartered monopolies to discriminate between domestic and foreign suppliers. Notwithstanding language in article XVII which appears to prohibit discrimination by these State enterprises, Professor Jackson has alluded to GATT legislative history which suggests that some discrimination against foreign suppliers may be permitted, and has stated that there is no simple answer to the question, whether article XVII permits a nation to do through a State enterprise what it might not otherwise do under the GATT (i.e., discriminate). LAW OF GATT, *supra* note 1, at 338. Since Jackson was writing well before the adoption of the Government Procurement Code, and since it is doubtful that the drafters of the Code would have intended such a significant loophole to apply to quasi-governmental entities, it seems unlikely that the United Kingdom would succeed in arguing that British Telecom is entitled to discriminate in favor of domestic suppliers under the GATT. British Telecom and other private telecommunications equipment purchasers in the EC are presumably subject to the GATT rules which, arguably at least, preclude the implementation of “buy national” programs (except by regional and local government entities which are not covered by the Procurement Code).

[FN127]. The Government Procurement Code applies to all procurement rules and practices, and covers services incidental to the supply of products. Contracts above a threshold value of 150,000 SDR are covered. Products and suppliers from third countries must be accorded National Treatment and MFN status. Technical specifications may not be used to create artificial barriers to trade. The Code establishes detailed tendering procedures designed to be transparent and nondiscriminatory. Developing countries receive special treatment. GATT, BISD, 26 Supp. 33 (1980). See L. GLICK, MULTILATERAL TRADE NEGOTIATIONS, WORLD TRADE AFTER THE TOKYO ROUND 64-69, 236-58 (1984). The Government Procurement Code was adopted by the EC, but not the Member States individually. See Hilf, The Application of GATT within Member States of the Community, with Special Reference to the FRG, in EC AND GATT, *supra* note 1, at 153, 170-73.

[FN128]. A major issue of the Procurement Code negotiations concerned which governmental bodies would be subject to the Code. The result was a procedure by which lists of covered entities were established for each country and annexed to the Code. L. GLICK, *supra* note 127, at 30, discusses the “offer and request” procedure whereby entities were selected. As of 1984, only Japan (under intense pressure from the United States) had agreed to list its telecommunications body (NTT, which was thereafter privatized) under the Code. *Id.* at 69; Note, The GATT and Services: Quill and Ink in an Age of Word Processors, 10 FORDHAM INT'L L. J. 288, 298 n.57 (1987). Thus, the Commission in its Green Paper indicated that the inclusion of telecommunications equipment under the umbrella of the Procurement Code would be a major issue in the Uruguay Round. Green Paper, *supra* note 106, at 153.

[FN129]. GATT, BISD, 26 Supp. 8 (1980); see L. GLICK, *supra* note 127, at 73-79, 302-26. The EC as well as each of its Member States are parties to the Standards Code. Hilf, *supra* note 127, at 164-65, 168-70.

Leaving aside the critical issue of what bodies its rules are applicable to, the Technical Standards Code establishes the following rules (this discussion does not address conformance testing and certification, which are also covered by the Code):

1. Technical rules and standards cannot be adopted with a view to creating trade barriers. Unless existing or imminent international standards are “inappropriate” for, *inter alia*, national security or public health reasons, the parties are to use such standards. Prior to the adoption of new standards, the parties (at an appropriately early stage) are to publish notice and allow a reasonable time for comments and consultation (to allow such comments to be taken into account). Technical standards must be published.

2. Each party is required to establish an enquiry point(s) from which other parties may obtain information concerning technical standards, including information with respect to regional bodies to which they are parties.

3. A committee on standards is established, as well as procedures for consultation and dispute settlement.

[FN130]. The definitional Annex to the Code provides: “In the case of the European Economic Community the provisions governing central government bodies apply. However, regional bodies or certification systems may be established within the European Economic Community, and in such cases would be subject to the provisions of this Agreement on regional bodies or certification systems.” GATT Technical Standards Code, *supra* note 129, at annex, para. 6 (explanatory note). “Regional bodies” within the EC are covered almost to the same extent as the EC itself and individual country parties. Individual country parties to the Code (including the EC per the definition above) are required only to take reasonable measures to ensure that regional bodies to which they are members comply with the technical standards provisions. However, the individual country parties which are members of the regional bodies must comply with the Code when adopting a regional standard, thereby ensuring coverage - although arguably leaving room for delay in compliance through a dual adoption procedure.

[FN131]. Pursuant to Article 4.1 of the Code:

Parties shall take such reasonable measures as are available to them to ensure that non-governmental bodies within their territories comply with the provisions of Article 2 [covering technical standards] . . . In addition, Parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such non-governmental bodies to act in a manner inconsistent with any of the provisions of Article 2.

In Telecommunications Council of the EC Comm'n, *External Aspects of Telecommunications* (Nov. 7, 1989), the Commission stated: “With regard to technical barriers to trade, the Community is seeking to establish a better balance under the GATT agreement by extending its provisions, in particular to the adoption of international standards and transparency of specifications adopted by sub-national and private standardisation bodies.” *Id.* at 2.

[FN132]. ETSI is not a central, local or regional government body under the terms of the Code and does not appear to be under the direct control of any such body. See GATT Technical Services Code, *supra* note 129, at annex definitions 5-7. Standards adopted by ETSI are to have a “voluntary” character. Gagliardi, *supra* note 120, at 553. It is an independent organization with representatives from a variety of European organizations, including both government-owned TAs and the private sector. ETSI's Technical Assembly will vote by a national weighted voting procedure (*id.* at 552), though this alone would not appear to make it a governmental body.

While it is important to point out that ETSI will not be directly subject to the Code, the “persuasive” language directed to the EC to take reasonable measures cannot be readily ignored. There is little evidence that the EC intends to circumvent the Technical Standards Code, and it is well to point out that most telecommunications standards-setting in the United States is done by non-governmental bodies. Moreover, many technical standards-related concerns of non-EC enterprises appear to focus on what the EC Commission, not ETSI, might choose to do. The EC Commission is clearly covered by the Code.

[FN133]. See GATT Technical Standards Code, *supra* note 129, at, e.g., art. 1.3.

[FN134]. The terminal equipment market became subject to general GATT rules when the TA monopoly over the market was dismantled.

[FN135]. However, the Community's common external tariff “on the whole” shall not exceed the bound tariff

commitments of the individual member states (if not the “applied” tariff commitments) prior to the formation of the RTA.

[FN136]. See Professor Jackson's observation, *supra* note 89, that, generally speaking, current global tariff levels no longer present a significant barrier to exporters of goods.

[FN137]. Important features of the Directive are that it will apply to private as well as public entities (e.g., British Telecom and other private TAs would be covered), and that for the telecommunications sector only contracts below 600,000 ECU will be covered. The Community press release concerning the Directive states:

Special provisions govern the award of supply contracts where the tender involves products originating in third countries with which the Community has not concluded, multilaterally or bilaterally, an agreement ensuring comparable and effective access for Community undertakings to the markets of those third countries.

These provisions allow, *inter alia*, for the possibility of rejecting a tender where the proportion of the products manufactured outside the Community in the total value of the manufactured products constituting the tender exceeds 50%. Preference will also be given to the Community tender if the conditions are equivalent and the price difference does not exceed 3%.

EC Press Release, *supra* note 119.

[FN138]. The Government Procurement Code itself was made necessary (or at least desirable) by an express exception in the GATT General Agreement provision on National Treatment for government purchases not with a view toward resale. General Agreement, *supra* note 4, at art. III.8(a).

[FN139]. Statement by Anna Snow of the EC Commission Delegation to the United States at Deloitte & Touche/Admerca Conference in Washington, D.C. (Feb. 28, 1990), reported in ‘Local Content’ Restrictions Subject to GATT Discussion, Official Says, 56 TELECOMM. REP. (BRP) (No. 9) 22 (Mar. 5, 1990).

[FN140]. Except with respect to privatized TAs, over which the Community has no such rights under the government procurement exemption to the National Treatment principle. See *supra* note 126.

[FN141]. ONP Directive, *supra* note 118.

[FN142]. *Id.* at arts. 2(10), 6.

[FN143]. *Id.* at art. 1.

[FN144]. *Id.* at art. 3(1).

[FN145]. *Id.* at art. 3(2).

[FN146]. Article 1 of the ONP Directive provides in relevant part:

These conditions are designed to facilitate the provision of services using public telecommunications networks and/or public telecommunications services, within and between Member States. This includes in particular the provision of services by companies, firms or natural persons established in a Member State of the Community other than that of the company, firm or natural person for whom the services are intended.

*Id.* at art. 1(2).

[FN147]. Paragraph 28 of the Preamble to the ONP provides:

Whereas the Community attaches major importance to the continued growth of cross-border telecommunications services, to the contribution of telecommunications services provided by companies, firms or natural persons established in a Member State of the Community to the growth of the Community market, and to the increased participation of Community service providers in third country markets; whereas it will therefore be necessary, as detailed Directives are elaborated, to ensure that these objectives are taken into account with a view to reaching a situation where the realization of the more open Community market for telecommunications services will, where appropriate, be accompanied by reciprocal market opening elsewhere. . . .

Id. at preamble, para. 28.

[FN148]. “Whereas this can be achieved preferably through multilateral negotiations in the framework of GATT, or through bilateral negotiations between the Community and third countries.” Id.

[FN149]. Interviews with Ms. Alison Berkett, Legal Staff, EC Comm'n DG XIII (June 1990) and Mr. Steve Billet, Director of Public Affairs, AT&T Europe (June 1990). The Treaty of Rome (article 58(1)) is generally understood to afford the benefits accruing from the right of establishment to non-EC-based enterprises which show a continuous and effective link with the economy of a Member State. See Treaty Establishing the European Community, opened for signature Mar. 25, 1957, art. 58, 298 U.N.T.S. 11, 40. This standard is not intended to preclude the benefits of the right of establishment from accruing to new companies. A company organized under the laws of a Member State and with its principal place of business within the Member State (including a subsidiary of a non-EC company) should, in any event, satisfy the right of establishment requirements of the Treaty of Rome. See [Goldstein, 1992 and the FCN and OECD Obligations of EEC Member States to the United States in the Financial Services Area, 30 VA. J. INT'L L. 189, 218-19 \(1990\)](#). A definition of “service provider of a party” is set forth in the EC Services Proposal, supra note 8, at art. XXVIII(2)(a). The definition is consistent with the understanding of the Treaty of Rome requirements discussed above.

[FN150]. There is considerable debate over whether existing FCN treaties between the United States and individual member countries of the Community effectively bar the Community from adopting discriminatory or burdensome establishment requirements with respect to U.S. providers. See generally Goldstein, supra note 149, at 218-19.

[FN151]. The standards issues affects both equipment and service providers and thus is a hybrid issue within the GATT framework. In order for a telecommunications equipment or service provider to enter the market, the equipment or service must “interconnect” or be compatible with the network. So-called “connectivity” is not a simple matter. Seven levels at which networks interconnect are:

1. The level at which data in the form of electronic signals are transmitted across physical circuits;
2. The level at which the system reduces errors in data arising from physical transmission;
3. The level at which electrical signals are routed and transferred to the appropriate processor or other end-system;
4. The level at which data is transferred between processors or other end-systems;
5. The level at which data is coordinated and synchronized;
6. The level at which electrical data signals are manipulated and converted; and
7. The level of human use of application programs, etc.

See ISO seven-layer reference model in Vervest, Standardization as a Government Policy Tool, in GLOBAL TELECOMMUNICATIONS NETWORKS: STRATEGIC CONSIDERATIONS 44 (G. Muskens & J. Gruppelaar eds. 1988). As any user of a rudimentary word processing program knows, it is not always possible to perform the seemingly simple task of transferring files between two programs unless they have each been written to meet particular format standards - and even apparently compatible file transfers produce garbled results. This compatibility or connectivity problem exists throughout the telecommunications world where the absence of agreed-upon interface standards hinders the establishment of networks.

The "connectivity" problem, by and large, has been resolved in so-called "private networks." A single transnational enterprise and often its major suppliers are connected on a network in which all of the standards are set by the network provider. There are many examples of such systems, which are established at great expense. The difficulties arise at the "public" level - that is, the point at which private networks (or single terminals) attempt to interact with each other, but where there is an absence of agreed-upon standards. The potential for an international Tower of Babel clearly exists, with competing private and public networks unable to interconnect - to the obvious detriment of end users. Participants in the telecommunications industry are acutely aware of the problem, but strongly disagree as to how it should be resolved.

[FN152]. The observation that telecommunications industry participants are perhaps predominantly concerned with the exercise of the EC's standards-setting powers is based on the author's interview with various industry officials. The perspective of U.S. industry and government with respect to EC standards-setting activities is described in Mastromarco, *The European Community Approach to Standardization: A Possible Mechanism for Improved Nonmember State Input*, 15 N.C.J. INT'L & COMM. REG. 47, 49-51 Cullen and Defraigne observe:

In the telecommunications field, government imposed standards are used with the stated intention of protecting the network and more recently, to ensure "interconnectivity" or "interoperability". To what extent all these measures are justified (or consistent with EEC Treaty rules) is beyond the scope of this paper. However, in the economically important telecommunications field there is an obvious temptation for government to impose standards for reasons of industrial policy.

Cullen & Defraigne, *Political and Economic Aspects of Standards*, in LEGAL AND ECONOMIC ASPECTS OF TELECOMMUNICATIONS, *supra* note 106, at 535, 540.

[FN153]. The U.S. government has expressed special concern with respect to access to EC standard-setting bodies. See the comments of U.S. Commerce Department Director of EC Affairs, Charles Ludolph, expressing concern that U.S. telecommunications enterprise could be hust out of the EC standards-setting process, leading to a two- or three-year delay in acquiring knowledge of the standards. [U.S. Firms Won't Need to Be Located in EC by 1992 to Compete, Commerce Officials Says](#), 5 INT'L TRADE REP. (BNA) 1417 (Oct. 26, 1988).

[FN154]. Because U.S. industry representatives are given observer status in ETSI working groups, companies based in EC countries may not have superior access to interface standards. Interview with Jan Guettler, Program Director of Telecommunications Practices, IBM Europe (June 1990).

[FN155]. On the benefits and costs associated with dominant firms/de facto standards, see Cullen and Defraigne, *supra* note 152, at 541-42.

[FN156]. The Commission would probably take the position that if industry-developed standards were to become the "public" standards, they should be made available on a concessionary basis (whether this means transferred into the public domain at no cost or provided for a nominal royalty would remain to be seen). The question of ownership of the new interface standards looms as one of the major intellectual property issues facing the telecommunications industry.

[FN157]. Commission officials note that standards-setting in the U.S. telecommunications industry has historically been accomplished by a few dominant industry enterprises.

[FN158]. Communication from the United States, Annex, Access to and Use of Services of Public Telecommunications Transport Services, GATT Doc. MTN.GNS/2/97 (Mar. 23, 1990) [hereinafter U.S. Annex].

[FN159]. EC Non Paper: Telecommunications Annex to the General Framework on Trade in Services [hereinafter EC Annex] (draft in author's files). This Annex is not yet released. The draft in the author's files is incomplete and certain observations may require modification when the complete draft becomes available.

[FN160]. See, e.g., U.S. Annex, *surpa* note 158, at art. 3.3, 3.5.

[FN161]. See, e.g., *id.* at art. 3.5.1. According to the U.S. proposal: "Access to public telecommunications transport services' means the ability of a customer of any Party to subscribe on reasonable and nondiscriminatory rates, terms and conditions to any such service offered within or into the territory of the Part." *Id.* at art. 3.5.

[FN162]. The U.S. Annex, for example, is drafted in terms of reserving "public telecommunications transport services" (*id.* at art. 2.2.2), which are defined as simple information transmission in real time. *Id.* at 2.1.1 and note 1.

[FN163]. *Id.* at art. 3.7.3.

[FN164]. EC Annex, *supra* note 159, at art. 8. "Network termination point" is defined as "[a]ll physical connections and their technical access specifications which form part of the public telecommunications network and are necessary for access to and efficient communications through that public network." *Id.* at art. 12.3. It would therefore appear that insofar as technical interface standards are concerned, the EC views its rights as extending beyond the U.S. "no harm to the network" standard, and into the somewhat more amorphous realm of ensuring efficient communications through the network. This subtle difference may represent an EC inclination toward the recommendation of pan-EC telecommunications standards; yet this subtle semantic opening would not appear wide enough to justify the adoption of standards inconsistent with those widely in use and perhaps more objectively supportable.

[FN165]. U.S. Services Proposal, *supra* note 46, at art. 11.1; EC Services Proposal, *supra* note 8, at art. V(3).

[FN166]. It may well be that electrical impulses will have certain "national" characteristics, in the form of different technical interface characteristics, if international standards are not adopted. However, if the EC's standards are different from international standards, foreign users of the EC network will doubtless have to convert their signals to interface with the EC network. It is therefore highly unlikely that any cost differential based on foreign access to the system could be justified.