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Acquisition of Technology from a Foreign Government

by Laurence S. Fedak*

I. INTRODUCTION

Technology developed by foreign governments and their domestic firms will play an increasing role in U.S. defense policy. Japan, for example, is aggressively developing advanced technologies for commercial application in the computer science field, and many of their improvements will have significant defense related applications. As other allied nations develop similar capabilities, it will be in our common interest to acquire their technology for defense-related purposes.

One way of obtaining needed non-domestic technology is through an executive agreement1 concluded by the U.S. government with a foreign government acting either on its own behalf, when it has the legal right to transfer the technology, or on behalf of the foreign corporation that owns the technology. The primary emphasis in this paper is on the latter situation, where a non-U.S. business entity owns the technology and is willing to transfer the data, through its government, to the U.S. government in exchange for appropriate compensation.

The discussion of executive agreement transfers of technology will be developed in two separate areas. First, the basic statutory and regulatory underpinning for the executive agreement will be examined. Once the authority for the agreement is established, acquisition issues will be reviewed with special emphasis on audit rights and contractual provisions. The basic theme of this paper is that the executive agreement acquiring foreign technology (or foreign defense supplies or services) must comply with the procedural requirements for concluding an international agreement, and the substantive authority for acquiring such technology arises from the procurement statutes and regulations.

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1. An "executive agreement" is an international agreement concluded by the executive branch of the United States government with a foreign government or international organization without reference to a treaty or act of Congress.
II. INTERNATIONAL AGREEMENTS AND THE USE OF EXECUTIVE AGREEMENTS FOR PROCUREMENT

A. Authority for Executive Agreements

An international agreement may have one of several possible titles, such as treaty, convention, protocol, declaration, agreement, act, covenant, statute, charter, or memorandum of understanding. An executive agreement is a specific authorized representation of the executive branch without Senate ratification.2

When the objective or purpose of an executive agreement is the acquisition or purchase of foreign technology, the agreement will be referred to as an executive agreement acquisition (EAA). An EAA is an international agreement concluded by the executive branch of the U.S. government, as purchaser, with a foreign government, as seller, for the acquisition of non-U.S. technology for use by U.S. defense forces. The actual transferor of the technology will be, in most cases, a subcontractor located in a foreign country.

B. Relationship of an Executive Agreement to Procurement Statutes

One of the basic concepts involved in the purchase of foreign technology through the use of an executive agreement is the necessity for specific legal authority supporting every commitment undertaken in the executive agreement. Consequently, if an executive department wants to purchase technology or some other type of product or service from a foreign source through the use of an EAA, it must have specific legal authority to commit the United States to such a purchase. Executive agreements, however, do not provide the required substantive authority.3

The necessity for establishing substantive legal authority is well recognized by the Department of Defense. For example, prior to concluding an international agreement, the DOD component must request approval of the document. The need for separate legal authority is also clearly reflected in paragraph H of DOD Directive 5530.3, which requires the request for approval to be accompanied by the draft text of the agreement and:

(b) A legal memorandum containing the constitutional, statutory, or other legal authority available to carry out each obligation proposed to be assumed by the United States in the agreement, as well as an explanation of other relevant legal considerations; and

(c) A fiscal memorandum that sets forth the estimated cost of each obligation proposed to be assumed by the Department of De-
fense in the agreement, the source of funds to be obligated or a statement that additional funds for the purpose will be requested for a specified fiscal year(s).

The authority to enter into contracts for the acquisition of defense supplies and services is contained in the basic congressional grants of authority to the Department of Defense, the military departments, and the defense agencies. In addition, the annual authorization and appropriation acts provide congressional approval and funding for the activities of the military departments. The basic procedures used by the Department of Defense to acquire supplies or services are found in The Armed Services Procurement Act of 1947, as amended, Title 10, chapter 137. More specifically, 10 U.S.C. § 2303 states that chapter 137 applies to the "purchase of or contract to purchase property or services for which payment is to be made from appropriated funds." Acquisition of foreign technology falls in this category.

To implement the authority granted to the defense establishment, the Secretary of Defense has been authorized by 10 U.S.C. § 2202 to issue regulations which govern defense procurement. This authority was delegated by the Secretary of Defense, through the Department of Defense Directive 5126.22, dated March 25, 1975, to the Assistant Secretary of Defense (Installations and Logistics) who issues the Defense Acquisition Regulation (formerly known as the Armed Services Procurement Regulation). The Defense Acquisition Regulation (DAR) establishes the detailed policies and procedures utilized by the military departments in acquiring property and services. The DAR, however, was recently replaced by the Federal Acquisition Regulation (FAR) and the DOD FAR Supplement. References in this paper, however, will be to the DAR.

It is reasonably clear that the basic organic statutes creating the departments, the annual congressional authorization and appropriation of funds, and the DAR can provide the specific, substantive legal authority necessary to support procurement obligations and commitments contained in an EAA. Since the procedural requirements contained in chapter 137 apply to the procurement commitments contained in the EAA, then the standard DAR policies and provisions will apply unless deviations are granted by an appropriate authority. As a general proposition, a blanket waiver of all nonstatutory DAR requirements should be considered whenever an EAA must be negotiated with a foreign government.

In addition to basic grants of authority, there may be other statutory authority available to carry out obligations proposed to be assumed by the United States in an EAA. For example, the Air Force is authorized by 10 U.S.C. § 9503 to participate in cooperative research and development projects. That section provides that "the Secretary of the Air Force may conduct and participate in research and development programs relating to the Air Force, and may procure or contract for the use of facilities, supplies, and services that are needed for these programs" (emphasis added).
One of the advantages of using 10 U.S.C. § 9503 as authority for cooperative research and development executive agreements, rather than 10 U.S.C. § 8012(b), is that § 9503 does not require the use of the policies, clauses, and procedures contained in the DAR because there is no procurement of supplies or services. Rather, the Air Force is conducting or participating in research and development programs.

The role played by the Armed Services Procurement Act and the DAR in an EAA is not entirely clear. Some argue that the organic authority of the Secretary to conduct the affairs of the DOD in conjunction with the congressional authorization and appropriation of funds for the project is sufficient authority to conclude an EAA without regard to either 10 U.S.C. § 2301 or the DAR. In the author's opinion, the better view is that the Armed Services Procurement Act, by its own terms, "applies to the purchase, and contract to purchase . . . of all property . . . and all services" by the military department. This would include the purchase of technology via an EAA. Consequently, the Armed Services Procurement Act and the DAR apply to an EAA which is, in reality, a contract for the purchase of supplies or services.

The use of DAR policy and procedures, which have been designed for use primarily in contracting with commercial concerns, has been a source of considerable irritation between the United States and its allies when engaged in negotiating an EAA for a cooperative weapons procurement program. Notwithstanding these problems, the DAR provisions must be applied unless deviations are approved by an appropriate authority. In the case of statutorily required provisions, there is currently no waiver or deviation authority available. The only exception would be when other statutory authority for the acquisition is available, such as 10 U.S.C. § 9503, or possibly specific congressional action to authorize the acquisition without regard to the statutorily required clauses. An example of a congressional waiver of procurement statutes is the NATO Mutual Support Act, 10 U.S.C. §§ 2321-2331.

The irritations caused by the legal obligation in EAAs to impose statutorily required clauses upon sovereign nations and important allies should be reviewed by Congress. Although these clauses represent important public policy considerations, they may be overshadowed by the importance Congress places on NATO standardization and interoperability. One of the principal goals of the United States and its NATO allies is the standardization and interoperability of weapons systems. Given this goal, appropriate legislative action should be taken to provide the secretaries of the military departments authority to exclude otherwise statutorily required clauses from executive agreement acquisitions when the EAA would enhance progress toward NATO standardization and interoperability.

The following material will cover the acquisition issues in negotiating an EAA under the current statutory scheme, beginning with very basic issues which are
often overlooked or given little consideration by government negotiators. Since
the current law requires the EAA to meet normal procurement standards,
compliance with these areas should be an important part of any negotiated
agreement with a foreign government.

III. Acquisition Issues in the EAA

A. Statutory and Regulatory Requirements for the Acquisition of Defense Supplies
   and Services

A U.S. government negotiator embarking on the acquisition of foreign tech­
nology through an EAA must meet numerous statutory and regulatory obliga­
tions before he or she may properly conclude the arrangement. For example,
there must be an appropriate exception to the statutory requirement to formally
advertise the procurement.\footnote{10 U.S.C. § 2304(a) (1982).} Additionally, there is a requirement to seek competi­tion from the maximum number of qualified sources,\footnote{10 U.S.C. § 2304(g) (1982).} a preference for U.S.
sources,\footnote{41 U.S.C. § lO(a)-(d) (1982).} an obligation to ensure that prices paid are fair and reasonable and
supported by certified cost and pricing data.\footnote{10 U.S.C. § 2306(f) (1982); DAR 3-807.3.} If it is later determined that the
"certified" data was inaccurate, incomplete, or not current, the price will be
reduced by the amount increased by the inaccuracy or incompleteness. More­
over, the act (P.L. 87-653, Truth in Negotiations) contains several exceptions:

\[T\]he requirements of this subsection need not be applied to con­
tracts or subcontracts where the price negotiated is based on ade­
quate price competition, established catalog or market prices of
commercial items sold in substantial quantities to the general public,
prices set by law or regulation, or in exceptional cases where the
head of the agency determines that the requirements of this subsec­
tion may be waived and states in writing his reasons for such deter­
mination.

For purposes of the EAA, the most significant exception involves the determi­
nation of the head of an agency to waive the requirements of the Truth in
Negotiation Act. The DAR 3-807.3(b) specifically waives the requirement for
submission of cost or pricing data in the following manner:

Cost or pricing may be waived in exceptional cases when the Secre­
tary (or, in the case of a contract with a foreign government or agency
thereof, the Head of a Contracting Activity) authorizes such waiver
and states in writing his reasons for such determination (emphasis added).

\footnote{4. 10 U.S.C. § 2304(a) (1982).}
\footnote{5. 10 U.S.C. § 2304(g) (1982).}
\footnote{6. 41 U.S.C. § 10(a)-(d) (1982).}
\footnote{7. 10 U.S.C. § 2306(f) (1982); DAR 3-807.3.}
In the case of an EAA, a waiver of the requirement to provide certified cost and pricing data makes considerable sense. One of the primary reasons for using an EAA to acquire non-domestic equipment is the desire to use the acquisition management system of the foreign government. The use of the foreign government's current procurement practice avoids the disruption associated with overlaying a new, and oftentimes far more complex, U.S. government acquisition system necessary when a foreign firm contracts directly with the United States. Avoiding the requirement for obtaining certified cost and pricing data, U.S. style, is just one of the many areas which may eliminate potential conflict between the DOD and a foreign manufacturer and its government.

Notwithstanding these important administrative and political considerations, the contracting officer must have sufficient information to make a determination that the price is fair and reasonable. Consequently, a significant consideration in choosing the EAA route is the adequacy of the foreign government’s acquisition system, specifically in the area of price determination. Appropriate consideration and analysis of the foreign government’s procurement system, especially its pricing policies, should be made before embarking on an EAA. Particular attention should be given to those pricing policies of the foreign government which may result in a violation of U.S. procurement law, such as the prohibition against cost-plus-a-percentage-of-cost contracting.

Section XV of the DAR establishes contract cost principles and procedures generally used in the negotiation and performance of defense contracts for supplies, services, and research and development. Cost principles provided in DAR 15-205 are used in the pricing of defense contracts whenever cost analysis is performed pursuant to DAR 3-807.2. Deviations from the cost principles must be processed in accordance with DAR 1-109.3, which requires the approval of the DAR Council or the Assistant Secretary of Defense (Installations and Logistics).

Foreign governments do not usually price their defense contracts in the same way that U.S. government contracts are priced. What may be unallowable in a U.S. contract may be a normal cost in a contract between a foreign government and its contractors. Profit ranges often differ. European contracts often have lower profit rates but allow costs, such as entertainment or advertising expenses, that would be generally unallowable on a U.S. contract. Because of the enormous administrative problems associated with using the U.S. cost principles to negotiate defense contracts with foreign governments, applicability of DAR 15-205 should be waived.

Even if a waiver is obtained, some costs remain unallowable in a defense contract. DAR 15-205.1, “Advertising Costs,” generally prohibits advertising

8. DAR 15-102.
9. Id.
10. DAR 15-204(a).
costs and reflects a statutory requirement\textsuperscript{11} that advertising costs be paid out of defense contractor profits. Also, DAR 15-205.37 reflects the statutory policy against the payment of contingent fees,\textsuperscript{12} and it must be observed notwithstanding a blanket waiver of DAR 15-205.

One of the common tools available to the negotiator/contracting officer in the negotiation of the contract price is the ability to have the Defense Contract Audit Agency audit a contractor's proposal. In addition to the contracting officer's audit authority, the Comptroller General of the United States has very broad power, under 10 U.S.C. § 2313, to examine the books of a government contractor. The foreign government, however, may object to the audit, and the secretaries of the military departments have the authority to waive the audit when the contract is with a foreign government. If the contract is with a foreign contractor, waiver of the audit right requires the concurrence of the Comptroller General.

Several other restrictions must be considered during EAA negotiations. For example, care must be taken to avoid a cost-plus-a-percentage-of-cost contract;\textsuperscript{13} contingent fee arrangements must meet statutory requirements;\textsuperscript{14} cost type contracts require a determination that such a contract is likely to be less costly to the United States;\textsuperscript{15} the fee for performing cost type contracts is limited by law;\textsuperscript{16} and notice of a cost type subcontract or a fixed price subcontract in excess of $25,000 or five per cent of the estimated cost of the prime contract must be given to the contracting officer.\textsuperscript{17} Also, 31 U.S.C. § 203 restricts the assignment of claims against the United States, and 18 U.S.C. § 874 prohibits kickbacks.

Before concluding an EAA, thorough consideration should be given to restrictions contained in the annual DOD Appropriation Act. Coverage of these matters can be found at DAR 6-300. Most significant of these restrictions are the restrictions on the purchase of specialty metals from non-U.S. sources\textsuperscript{18} and contracts with foreign business entities for research and development in connection with any weapon system where there is a U.S. company equally competent to carry out the research and development at a lower cost. There is also a prohibition against the expenditure of appropriated funds for the construction or conversion of any naval vessel in a foreign shipyard. Moreover, in the FY 1984 DOD Appropriation Act,\textsuperscript{19} Congress has mandated "written guarantees" from

\begin{flushleft}
\textsuperscript{14} 10 U.S.C. § 2306(a) (1982).
\textsuperscript{15} 10 U.S.C. § 2306(b) (1982) and DAR 1-505.
\textsuperscript{16} 10 U.S.C. § 2306(c) (1982).
\textsuperscript{17} 10 U.S.C. § 2306(d) (1982).
\textsuperscript{18} 10 U.S.C. § 2306(e) (1982). This requirement may be avoided by the use of a fixed price contract.
\textsuperscript{19} DAR 6-302.
\end{flushleft}
contractors producing "weapon systems." The attorney reviewing the EAA must fully review the appropriation act which provides the funding for the acquisition to determine whether any of the restrictions would affect the proposed acquisition.

Finally, there are four contractural provisions which are required by law and must be placed in the EAA. These provisions are: DAR 7-104.16, *Gratuities*; DAR 7-103.20, *Covenant Against Contingent Fees*; DAR 7-103.19, *Official Not to Benefit*; and DAR 7-104.95, *Preference for U.S. Flag Carriers*.

B. Other Considerations in Negotiating an EAA

In addition to the U.S. procurement process, attention must be given to the other potential negotiating topics peculiar to U.S. allies who are the most likely sources of technology transfer. NATO countries continue as important sources for defense technologies, and an understanding of the NATO system for handling intellectual property can assist U.S. negotiators in achieving technology transfer.

1. Transfer of Intellectual Property

The North Atlantic Treaty Organization (NATO) has established guidelines for balancing the needs of both the purchasers and sellers of intellectual property and reconciling their competing interests. The problem is fairly difficult for NATO, since it must deal with several nations' domestic laws governing rights in intellectual property, as well as differing languages and customs. As noted earlier, one of the principal goals of the United States and its NATO allies is the standardization and interoperability of weapon systems. A free and fair exchange of intellectual property is critical to NATO's achieving that goal.20

Under the NATO guidelines,21 intellectual property has been defined in the following manner:

The term "Intellectual Property" (IP), whether background or foreground, includes inventions, patented or not, trademarks, in-

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20. NATO has taken an active interest in this area and has published the following: *Intellectual Property Principles and Guidelines in the Field of Licensing and Co-production for the Purpose of Armaments Standardization or Interoperability*, NATO Doc. No. AG/94-D/283 (revised September 1979); NATO Agreement on the Communication of Technical Information for Defense Purposes (April 1979); 1 Military Equipment and Industrial Property Legislation (1976). In addition to the NATO publications, see Gapeynski, *NATO Agreement on the Communication of Technical Information for Defense Purposes*, 6 Int'l Law. 559 (1972) (review of NATO Agreement on the Communication of Technical Information for Defense Purposes). This article is useful background information on the subject of NATO technical information.

Industrial designs, copyrights and technical information including software, data, designs, technical know-how, manufacturing information and know-how, techniques, technical data packages, manufacturing data packages and trade secrets.\textsuperscript{22}

This definition lumps together many legal concepts under the term "intellectual property," even though the domestic laws of the parties to an EAA might treat them separately. For example, under U.S. law, infringement of a patent would be treated differently than the misuse of technical know-how.

Other significant definitions in the NATO guidelines are:

"[B]ackground information"... information which is necessary to or useful in achieving the objectives of a specific contract, project, programme or agreement, but which was generated prior to or outside the scope of such arrangements;

..."[F]oreground information"... information which is generated in the course of a specific contract, project, programme or agreement or the like by the parties or their contractors;

the rights to use or have used IP are termed Intellectual Property Rights (IPR) and include rights derived from patents, trademarks, copyrights, industrial designs, contract clauses, disclosure in confidence techniques or other means of control of IP.\textsuperscript{23}

All NATO nations provide patent protection for inventions determined to be a "new method, technique, process, machine[s], apparatus, manufacture, product, composition of matter or a new use or improvement thereof."\textsuperscript{24} As in the United States, scientific discoveries and mathematical theories are not covered by the patent laws of NATO countries.\textsuperscript{25} With the exception of Canada and the United States, a patent is granted to the first applicant in NATO countries.\textsuperscript{26} Generally, an invention should be novel and useful to be patentable. Specific requirements for meeting the novelty requirement, however, differ between nations.

An opposition procedure generally is available in NATO countries. A request for a patent may be opposed because the invention is obvious, lacks novelty or usefulness. Once granted, a patent gives the holder the right to exclude others from making, selling, and using the subject of the invention. In some NATO countries, "any use by others may be an infringement ... while in other countries the use must be commercial, professional or industrial to be an infringement."\textsuperscript{27}

\textsuperscript{22} \textit{id.}
\textsuperscript{23} \textit{id.}
\textsuperscript{24} NATO \textit{WORKING GROUP ON INDUSTRIAL PROPERTY, 1 MILITARY EQUIPMENT AND INDUSTRIAL PROPERTY LEGISLATION 33} (1976).
\textsuperscript{25} \textit{id.} at 9.
\textsuperscript{26} \textit{id.} at 10.
\textsuperscript{27} \textit{id.} at 13.
With the exception of the Federal Republic of Germany and the United States, all NATO countries provide "march in" rights, which permit the granting of a compulsory license if the holder of a patent fails to work a patent "adequately," "suitably," or "conscientiously." Finally, all NATO countries have legislatively protected classified inventions related to defense.

Most NATO countries do not have specific statutory protection for designs. Some protection, however, may be found for designs to the extent that they are covered by copyright law, patent law, or law on unfair competition. All NATO countries provide copyright protection for literary and artistic work. Protection extends to the "novel form or manner of presentation of an idea but not the idea as such." Consequently, an author has the exclusive right to "publish, translate . . . alter, dramatise, perform, print, . . . copy, display, record or perform in public his work." Trademarks are also protected by NATO countries.

Each NATO country provides legal redress for infringement of industrial or intellectual property rights. In some NATO countries, it is possible to bring both civil and criminal actions against a patent infringer. Remedies are generally available to restrain or enjoin the misuse of intellectual property or to compensate the injured party. For example, in "Canada, Germany, Italy, the Netherlands, the United Kingdom and the United States, the court may issue an interim injunction restraining the defendant" from further infringement. As noted, several NATO countries provide for a compulsory licensing arrangement. Notwithstanding this principle, the "failure of a patent owner to work a patented invention" does not excuse an infringement. Moreover, the subsequent grant of a license would not provide protection against earlier infringements.

In negotiating the EAA, it is particularly important to establish the specific types of intellectual property required and obtain rights in that property sufficient for the successful accomplishment of the agreement. The NATO Intellectual Property Group (AC/94 Group) and NATO Industrial Advisory Group, which represent the viewpoint of industry, have established principles and guidelines for licensing and coproduction efforts. These guidelines can form the basis for the section of the EAA that covers the transfer of technical data necessary to operate and maintain the equipment obtained through the EAA.

28. Id. at 14.
29. Id.
30. Id. at 15.
31. Id. at 16.
32. Id.
33. Id. at 20.
34. Id. at 21.
35. Id. at 23.
36. See Guidelines, supra note 20.
The guidelines published by the AC/94 Group are divided into four main areas. First, problem areas associated with intellectual property rights are identified. Second is a general overview of the guidelines. Third, intellectual property principles are established which, if implemented, could overcome the problems identified in part one. Finally, guidelines are developed to assist NATO countries in adjusting their national policies and practices to comply with the principles of the third section.

One of the most significant problem areas in EAAs is the failure to consider the intellectual property rights issue early enough in the negotiation process. For example, the failure to consider the possible delayed entry of participants in a collaborative program may result in an inability to obtain the necessary intellectual property rights from a manufacturer that may have already entered into agreements inconsistent with the collaborative program. Consequently, the EAA should commit the nations to provide for delayed entry in their contracts with their domestic industry. Problems may also occur if the nations desiring a collaborative program have a significant disparity in technical capability. Obligations in an EAA should be consistent with the expected level of technical capability of the respective nations.

Any failure to state clearly intellectual property rights provisions can, and usually does, lead to serious problems during implementation. For example, lack of precision in definitional terms can lead a nation to believe that it has far broader rights in technical information than that intended by the other parties to the EAA. Moreover, rights to use technical data for spin-off benefits in non-defense areas are generally not included in the EAA.

Other issues include restrictions of sales to third parties, recoupment of research and development costs which may make the weapon system too costly, and restrictions limiting licensed production to a country's own needs, thus making it uneconomical to set up a production line. For example, intellectual property may be transferred with the explicit understanding that it may not be used to manufacture equipment which will be sold to a particular country. A manufacturer in country X may transfer technical data for a weapon to a manufacturer in country Y with the agreement that the data cannot be used to produce weapons for country 1. Also, if it appears that the recoupment of research and development costs will make the cost of the weapon system prohibitive, it might be possible to seek either a partial or complete waiver of the recoupment. Some relaxation on limitations against third country sales may be possible if it makes production more economical.

In response to these and other problems, the AC/94 Group prepared a general statement as an introduction to its more detailed principles and guidelines. The

37. Id. at 2.
38. Id. at 5.
39. Id. at 6.
general statement clearly requires an interrelated consideration of the guidelines and establishes several important principles.

Licensing and disclosure of IP/IPR for NATO purposes must be undertaken by or in collaboration with the owner of the IP/IPR.

Governments are not entitled to dispose of IP/IPR in which the rights are owned by industry, unless and to the extent they have the right to do so legally or contractually.

Consistent with paragraphs 3 and 4 above, firms must be assured of appropriate safeguards and fair and reasonable compensation, financial or otherwise, for the use of their IP/IPR.40

Part III of AC/94-D/283 establishes extensive principles focused on promoting the exchange of information between “NATO nations to help reduce unnecessary duplication of effort ... and enhancing the feasibility of future standardization and interoperability.”41 NATO countries are also encouraged by the NATO publication to utilize contractual options to obtain rights in intellectual property which would enable other NATO countries to participate in the program. This would require a provision obligating a contractor owning intellectual property to grant licenses to foreign firms or governments necessary to fulfill any international collaborative arrangement. Payment for such licenses must be on fair and reasonable terms. Moreover, any transfer of intellectual property should be appropriately safeguarded. The licensing arrangements must be sufficiently broad to cover the post-production phase, including technical data necessary for maintenance and repair. Rights to the use of the data should be sufficiently broad so as to permit competitive procurement of repair and maintenance services.

The principles encourage “prompt and appropriate action to seek amendments or waivers to (national) laws, regulations, policies and practices, which prevent or delay implementation of the principles laid down in this paper.”42 To date, the United States has not taken any specific regulatory action to implement the principles. The United States has, however, decided to use the paper as “practical and workable guidance.”43

Finally, Section IV provides guidelines on how the individual nations may adjust their policies to comply with the principles stated in Section III. In order to fulfill the principles, a nation proposing a collaborative program should either own the intellectual property or be able to cause the owner to grant a license to use all necessary technical data on fair and reasonable terms.

40. Id. at 7-8, para. II. 3, 4, and 5.
41. Id. at 8.
42. Id. at 11.
43. Memorandum for the Secretaries of the Military Departments from the Principal Deputy Under Secretary of Defense for Research and Engineering, Intellectual Property Principles and Guidelines in the Field of Licensing and Co-production for the purpose of Armaments Standardization or Interoperability (September 12, 1980).
In summary, NATO working groups have published several documents which are of importance in the negotiation of an EAA. These documents provide information on the legal principles governing the ownership of intellectual property in NATO countries and guidelines and principles to be observed in negotiating a collaborative weapon acquisition.

2. Authorization and Consent

As noted, most NATO countries provide remedies for patent holders for the infringement of their patents. One of the more common remedies is a court order prohibiting the continued infringement of the patent. All NATO nations provide an exception to injunctive relief whenever the patent is infringed by governmental activity. For example, in the United States, the exception is contained in 28 U.S.C. § 1498(a), which states:

Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government shall be construed as use or manufacture for the United States.

Regulatory implementation of the authorization and consent authority is contained at DAR 9-102. Use of this authority is quite common, and there is extensive case law on the matter. One of the leading cases involving the use of this authority on an acquisition pursuant to an EAA is Hughes Aircraft Company v. United States.44 In Hughes, the plaintiff filed suit alleging government infringement of its patent pursuant to a joint U.S. and U.K. defense satellite communications system program. The joint program was the topic of a 1970 Memorandum of Agreement (MOU) between the United States and the United Kingdom in which the United States granted the United Kingdom and its contractors the use of "technical information, design rights, patent rights and licenses vested in the U.S. government."45 Launch vehicles were procured by the United States on behalf of the United Kingdom. The satellite was fabricated in England, using components acquired from a U.S. corporation and shipped to the United King-

44. Hughes Aircraft Co. v. United States, 534 F.2d 889 (Ct. Cl. 1976).
45. Id. at 894.
dom. After Ministry of Defense inspection and acceptance of the satellite, it was shipped to the United States, further tested, and mated to a booster vehicle. Two satellites were acquired in this manner, and both were launched by the United States.

The Department of Justice opposed the jurisdiction of the Court of Claims on the litigation, claiming that 28 U.S.C. § 1498 did not apply since the use by the United States of plaintiff's patents was on behalf of and solely for the benefit of the United Kingdom. Also, the Justice Department claimed that any authorization and consent was given extra-contractually and after the commencement of litigation.\textsuperscript{46}

The court found that the components manufactured by Philco-Ford and Marconi under contracts with the United Kingdom were for the benefit of the United States. In making this finding, the Court of Claims concluded that a letter from a Department of Defense official to his counterpart in the U.K. Ministry of Defense (M.O.D.) was a proper authorization and consent, even though Marconi was under contract with the M.O.D. and not the DOD. An additional factor supporting the court's conclusion was the cooperative nature of the satellite program, which benefited the vital national defense interests of both nations. Consequently, the Marconi-U.K. contract was considered to be "'for' the U.S. government via the cooperative program established by the MOU."\textsuperscript{47}

The Hughes case is an example of the broad scope of authorization and consent within the United States. It also reflects the concerns of the court regarding the status of an EAA between the United States and a foreign ally in defense matters. The significance attached to the MOU was sufficient to expand the contract between a foreign contractor and its government into a contract which was also "for" the United States.

As noted, all NATO governments have either express or implied authority to use or have used on their behalf patented inventions, subject to the payment of reasonable compensation.\textsuperscript{48} There is, however, a broad spectrum of consequences for a non-domestic contractor, who is liable for the unauthorized use of industrial property during the performance of a government contract. A U.S. contractor who has "authorization and consent" authority may infringe a patent, if necessary, to achieve the desired results of the contract. Unauthorized infringements or infringement not necessary for the performance of the contract, however, will result in contractor liability. Moreover, if the U.S. government contract does not include the contractual provision located at DAR 7-104.5, \textit{Patent Indemnity}, the United States will be liable for the infringement under 28

\textsuperscript{46} Id. at 897.
\textsuperscript{47} Id. at 900.
\textsuperscript{48} 1 NATO WORKING GROUP ON INDUSTRIAL PROPERTY, MILITARY EQUIPMENT AND INDUSTRIAL PROPERTY LEGISLATION 33 (1976).
U.S.C. § 1498 and will not receive reimbursement from the infringing contractor, whether foreign or domestic.

In Italy, however, a clause is placed in all contracts requiring the contractor to assume full financial liability for infringement.\(^{49}\) Norway uses a clause which requires contractor indemnification for government costs arising out of infringement actions.\(^{50}\) A Belgian contractor, however, is not responsible for compensation when the government furnishes detailed specifications without providing notice of the potential infringement.\(^{51}\) In short, when negotiating an executive agreement for acquisition of a non-domestic weapon system, the statutory framework and the contractual arrangements between the foreign government and its contractor should be carefully considered. Payment of reasonable compensation for infringement would then be a cost associated with the purchase of the system.


The Freedom of Information Act\(^{52}\) is a matter of considerable concern to governments contemplating an EAA with the United States. As mentioned in the preceding section on the transfer of intellectual property, the purchaser under an EAA will require a considerable amount of data and information concerning the cost and technical capability of the weapon system. At the same time, however, the Freedom of Information Act (F.O.I.A.) appears to permit and, in some situations, to require the release of information provided by the foreign government and its contractors. While an adequate discussion of the F.O.I.A. would require a separate paper, a summary of the exceptions to the general release rule reveals considerable protection for the type of information generally provided by foreign governments during negotiations and performance of an executive agreement acquisition.

DOD Directive 5400.7, Availability to the Public of Department of Defense Information, establishes the general policy to make available the maximum amount of information concerning DOD operations and activities. Exceptions to the general disclosure rule for DOD are identical to those exemptions contained in the F.O.I.A. at 5 U.S.C. §§ 552b(1)-(9).

The exception from mandatory disclosure under 5 U.S.C. § 552(b)(1) generally corresponds to the "state secrets" privilege discussed in United States v. Reynolds.\(^{53}\) This exemption from mandatory release protects against the disclo-

\(^{49}\) Id. at 38.

\(^{50}\) Id.

\(^{51}\) Id. at 39.


sure of information which would harm the national security or conduct of foreign relations by the United States. Under the present exemption, information may be withheld if: "(a) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and (b) in fact properly classified pursuant to such Executive Order."54

Consequently, if the acquiring agency can factually establish that information provided by the foreign government was properly classified as "secret" information under an executive order, the data is not subject to release. Executive Order 11652,55 as amended by Executive Order 11714,56 was the original executive order governing this area. It has been superseded by Executive Order 12065, which meets the statutory requirement for an executive order covering the classification of documents in the interest of national defense or foreign policy. If agency personnel classifying the information are familiar with and apply correctly the standards of the executive order,57 the information will not be subject to mandatory release.

An interesting situation may arise, however, if a foreign government provides classified information which is properly classified as secret under its domestic laws, but does not meet the criteria necessary for classification under Executive Order 12065. To date, no case has been decided with that factual pattern. Section 1-505 of Executive Order 12065 may provide some support for retaining the foreign government's classification with the following language: "Foreign government information shall either retain its original classification designation or be assigned a United States classification designation that shall ensure a degree of protection equivalent to that required by the entity that furnished the information."

As a part of the negotiation process, the foreign government may provide confidential business information received from its contractors. This type of information may be withheld from mandatory disclosure under 5 U.S.C. § 552(b)(3) if the information is "specifically exempted from disclosure by statute." The F.O.I.A. further requires that the statute which requires confidentiality either must permit discretion to release the information or, if there is discretion to release, the statute must establish "particular criteria for withholding or refers to particular types of matters to be withheld."58

Another exemption59 protects private information which relates to confiden-
tial commercial or financial matters of a corporation, association, or private individual. This exemption can be used to protect from release such items as technical and cost proposals provided by the foreign manufacturer to its government for negotiations with the United States. Trade secrets are also protected by this exemption. The inclusion of trade secrets within this exemption has produced years of judicial interpretation and a time-tested definition from the Restatement of Torts: "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it..." 

Protection of trade secrets from release preserves the traditional confidential relationship between government agencies and private individuals who provide information that would not otherwise be revealed to the public. Any general policy requiring the release of this type of information would have a very negative impact upon the government's ability to acquire that type of information in the future.

The basic thrust of the Freedom of Information Act is to encourage the release of information by U.S. government agencies. The Reagan Administration, however, has brought a new view to the release of agency records. In a memorandum dated May 4, 1981, Attorney General William French Smith announced that the "Department's current policy is to defend all suits challenging an agency's decision to deny a request submitted under the F.O.I.A. . . . unless the denial lacks a substantial legal basis" or the "denial presents an unwarranted risk of adverse impact on other agencies' ability to protect important records."

This policy memorandum supersedes former Attorney General Bell's letter of May 5, 1977, which stated that "[t]he government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding." Consequently, the prior Department of Justice policy was to defend suits only when the disclosure was "demonstrably harmful," even though the documents fell within the F.O.I.A. exemptions.

As a result of this significant change in policy, it is very unlikely that a Freedom of Information Act request will result in the release of protectable information concerning the negotiation of an EAA for the acquisition of a non-domestic weapon system. The exemptions from the mandatory release provisions appear adequate to protect the type of information the foreign government and its contractor are most desirous of protecting.

63. Restatement of Torts § 757 (1934).
4. Funding and Payment Provisions in an Executive Agreement Acquisition

One of the major problems between the acquisition policy of the United States and potential foreign government partners in an EAA is in the area of program funding. Currently, the DOD requires the full funding of its procurement program. Potential NATO partners, however, incrementally fund their weapon system programs.

Although there is no statutory requirement for fully funding DOD procurement of major weapon systems, DOD Directive 7200.4, Full Funding of DOD Procurement Programs, provides the following guidance:

Full funding is the term used to describe the principle which has been applied by the Congress in providing funds for the Department of Defense programs which are covered within the Procurement title of the yearly appropriation act. It has no application to any other appropriations (Military Personnel, Operations and Maintenance, and Research, Development, Test and Evaluation) contained in other titles of the act. The objective is to provide funds at the outset for the total estimated cost of a given item so that the Congress and the public can clearly see and have a complete knowledge of the full dimensions and cost when it is first presented for an appropriation. In practice, it means that each annual appropriation request must contain the funds estimated to be required to cover the total cost to be incurred in completing delivery of a given quantity of usable end items, such as aircraft, missiles, ships, vehicles, ammunition and all other items of equipment.

The basic thrust of this policy is to fully disclose the entire cost of a given number of end items (e.g., aircraft, missiles, ships, or tanks) for which funds have been authorized and appropriated in a single fiscal year. The production of a major weapon takes a number of years, however, and numerous components require a significant lead-time. Consequently, the full funding policy recognizes an exception to this general policy and permits the use of the advance procurement concept to acquire long lead-time items, as follows:

**Advance Procurement.** The general policy expressed above is intended to prescribe that funds for the total estimated cost of an item be available in the year in which procurement action is initiated for that item. An extension of this policy would, under certain conditions, permit the procurement of long lead-time components in advance of the fiscal year in which the related end item is to be procured.

* * *

In this regard, long lead-time component procurement will be limited to those components whose lead-times are significantly longer than other components of the same end item. The dollar effect of this principle should be that the cost of the components procured in
advance is relatively low as compared to that portion of the end item costs for which funding is deferred. If an unduly short lead-time is established for an end item as a whole, it would tend to force a relatively large volume of components into the category where they might be considered eligible for advance procurement funding. This could compromise the principle of full funding and create difficulties in overall program management. Therefore, it is important that lead-times be established which are normal and reasonable. It is important, also, that proposals for advance funding be made on a selective basis with full consideration of the applicability of the components to other programs or as spares in the event that the prospective program fails to materialize. This practice has been accepted by the Congress as a means to facilitate certain procurement programs. This Directive permits the continued use of the practice, provided that each case is specifically identified and justified on its merits.

For the acquisition of major weapon systems, the entire DOD planning, programming, and budgeting process and the resulting contractual arrangements are based upon the full funding policy as adjusted by the limited exception for advance procurement. The only significant variation from this arrangement is multi-year contracting. A multi-year contract is a specific type of contract which covers government requirements of more than one year but less than five years. Funds are appropriated annually for the year's requirement, and the contractor is protected against a cancellation loss by a contract provision which allows the reimbursement of unrecovered nonrecurring costs included in prices for cancelled items. A contractor's recovery is limited by a cancellation ceiling which may not exceed $100 million unless Congress is notified. It is significant to note that funds are not obligated to cover the contingent liability for the cancellation ceiling amount.

Most potential European governmental partners, however, do not fully fund their approved weapon system procurement programs. Generally, the European government will approve the entire acquisition of a weapon system and then appropriate funds on an annual basis necessary to accomplish the work during that particular year. Consequently, contractual arrangements with their domestic industries are based upon this method of funding rather than the full funding policy peculiar to the United States. Problems arise when the United States attempts to negotiate an EAA which reflects the full funding policy and the resulting limited commitment, in terms of numbers of systems, with a foreign

64. DOD Directive 7200.4, para. D.
65. DAR 1-322.
66. DAR 1-332.1(b)(4).
67. Id.
government whose contractual arrangements are based upon full authorization of the entire buy and incremental funding of annual work. Consequently, DOD must either waive the full funding policy or lose the benefits associated with using the standard purchasing arrangements between the foreign government and its industry.

A U.S. negotiator faced with a mismatch between the U.S. funding procedure and the normal procurement policy of the foreign government still has some options available. These generally involve waiver of the full funding policy. In addition, there are several recent legislative initiatives which expand the current DAR multi-year contracting concept to the point where it is now useful in acquiring a major weapon system.

Under current law, the first option is the waiver of the full funding policy. A waiver of DOD Directive 7200.4, however, is not lightly granted. The full funding policy reflects an accommodation between the executive and legislative branches of government. Two important congressional concerns are protected by the policy. First, Congress retains its control over the "purse strings" of government through the annual authorization and appropriation procedure. Massive, long term commitments to particular weapon systems would reduce that control. Second, incremental funding of major programs would clearly commit a future Congress to the programs selected by an earlier Congress. Thus, waivers of full funding are difficult to obtain.

While these concerns are understandable and accurately reflect appropriate congressional responses to executive branch abuses in earlier times, the time necessary to conduct research, development, and quantity production of major weapon systems has increased dramatically. It is no longer possible, if it ever was, to change direction drastically on a major weapons program. If the need for high performance fighter aircraft continues, then the only real option for the Air Force is the F-15. It would take far too long to conduct the research and development necessary to field an aircraft superior to the F-15. As a result, the annual question is not whether to purchase the aircraft, but rather how many will the United States buy. Unfortunately, the entire planning, programming, and budgeting process, and the resulting contractual arrangements, are based upon the annual funding concept, which permits Congress to revisit the F-15 program every year. The cost of maintaining flexibility to stop a program and receive completed end items is enormous. This is especially true when such flexibility is not needed because, as a general rule, the only changes made are slight variations in quantity.

A possible solution would be to include, in the EAA, a series of priced option provisions for completion of end items during the successive fiscal years of the

program. This option provision would also be included in the contract with the non-domestic manufacturer. For example, if funds for the following fiscal year are not appropriated, then the clause limiting the government's obligation would operate and delivery of the parts and materials would occur. If, however, the United States desired delivery of some end items, then an option could be funded and exercised for those items without authorizing and funding unnecessary future fiscal years of the program. The significant advantage of this arrangement would be that it gives the United States an opportunity to end a program without paying the now matured multi-year contingent liabilities. Moreover, if completed end items are necessary, then funding for the option provision can be provided to continue production of the completed end items required by the United States.

All of these funding arrangements must be considered when negotiating the EAA. The negotiator should understand fully the procurement policies and procedures of the foreign government so there may be an appropriate match between the U.S. authorization and appropriation procedure, the commitments made in the executive agreement, and the foreign government's ability to implement the executive agreement by using its standard procurement procedures.

5. Potential Anti-Deficiency Act Violation when Payment is in a Foreign Currency

Since one of the basic purposes for using an EAA as an acquisition vehicle is to use the foreign government's procurement system, payment will probably be made in foreign currency. A major risk associated with entering into a commitment for payment in foreign currency is the possibility of adverse currency fluctuations resulting in the amount of U.S. dollars authorized and appropriated being insufficient for the purchase of the amount of required foreign currency. An inability to meet the financial obligations under the executive agreement would be a violation of the Anti-Deficiency Act.70

Title III of the Fiscal Year 1979 DOD Appropriation Act71 established a "Foreign Currency Fluctuation — Defense Account" to meet this problem. The account eliminates substantial gains and losses to appropriations caused by fluctuations in foreign currency exchange rates by requiring transfers to the account when the exchange rate becomes more favorable and permitting transfers from the account when the rate becomes unfavorable. A base exchange rate is set at the time of budget submission, and variations from this rate determine the amount transferred to or from the account. Consequently, the correct use of this account should eliminate the possibility of an Anti-Deficiency Act violation.

6. Department of the Treasury Directives

Funds transfers between the United States and a foreign government are made by the Department of the Treasury. Treasury has issued guidelines and principles for negotiators of EAAs "which require the outlay of U.S. dollars for foreign currencies, the inflow of funds from foreign countries, or the exchange of U.S. dollars and foreign currencies."\(^7\) DOD has indicated, in DOD Instruction 7360.9, *Use of United States-Owned Foreign Currencies*, that the Treasury guidelines will be implemented.

Several significant policy issues are addressed in the Treasury guidelines. First, Treasury guidelines do not permit the withdrawal of U.S. dollars prior to an immediate funding requirement. Consequently, an EAA calling for advance payments\(^7\) would be contrary to the Treasury cash management policies. Second, interest earned on U.S. payments deposited in foreign banks may not be credited against U.S. obligations. Treasury is trying to keep an agency from reducing the amount of its payment obligation by paying early and receiving a price reduction. Their point is well taken, since an early payment scheme would transfer some of the program costs to the Treasury in the form of additional borrowing of money by the Treasury on the open market. With regard to currency exchange, Treasury suggests that agency holdings of foreign currency should not exceed immediate working requirements, no forward contracts for currency should be made, and the agencies should avoid any appearance of currency speculation.

7. Indemnification by the United States of the Foreign Government

One of the standard provisions in a foreign military sales letter of offer and acceptance is a statement that the foreign purchaser will reimburse the United States for all costs associated with the sale. In the negotiation of an EAA, termed by some as a reverse FMS (Foreign Munitions Sale), foreign governments often desire the same type of broad commitment from the United States.

This type of broad, essentially unbounded, commitment to indemnify can only be made by the Department of Defense under the provisions of Public Law 85-804 and only when the risk indemnified is "unusually hazardous or nuclear in nature."\(^7\) Since most acquisitions from a foreign source do not generally involve unusually hazardous or nuclear risks, an agency may agree only to pay such costs "subject to the authorization and appropriation of funds" or "subject to the availability of funds." An EAA containing this type of language, however, may be

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\(^7\) Letter from Mr. Paul H. Taylor, Fiscal Assistant Secretary of the Treasury, to Mr. Fred Wacker, Assistant Secretary of Defense (Comptroller) (December 13, 1979).
\(^7\) DAR Appendix E-400 et seq.
subject to criticism from the General Accounting Office (GAO) as being a coercive Anti-Deficiency violation.

In 1980, the General Accounting Office had the opportunity to review a proposed EAA between the National Oceanic and Atmospheric Administration (NOAA) and the government of Australia for a weather modification program.\(^75\) NOAA had been engaged in a hurricane abatement research program for several years. This cooperative program with Australia involved hurricane seeding far off the Australian coast, with little chance of the storms reaching Australia. The chance of serious damage was remote. Notwithstanding this, the Australian government requested the United States to indemnify Australia for all damages arising from the hurricane seeding experiments.

In a series of questions to the Comptroller General, the Department of State (who was negotiating with the Australian government on behalf of NOAA) noted that a complete indemnification for all damages in an indeterminate amount would violate the Anti-Deficiency Act. The GAO concurred, stating: "This office has long held that, absent specific statutory authority, indemnity provisions in agreements which subject the United States to contingent and undetermined liabilities contravene the Anti-Deficiency Act."\(^76\)

The State Department then posed two alternatives, which involved an agreement by the United States to pay damages, subject to the appropriation of funds by Congress. In response, the Comptroller General stated:

These proposals are subject to essentially the same Anti-Deficiency Act objection as is the full indemnity proposal. While in the proposals embodied in questions 1 and 3, the liability to pay is still contingent and the amount of the damages is still indefinite, it could be argued that no violation would occur should NOAA agree to either indemnification arrangement because no obligation will arise unless or until the Congress makes an adequate appropriation for its fulfillment. We concede that an agreement which makes it clear that the United States is in no way obligated to make future payments should a contingent event occur unless the Congress chooses to appropriate funds for such payments does not violate the letter of the Anti-Deficiency Act. However, we think it violates its spirit.\(^77\)

After discussing and rejecting numerous variations of the State Department's "subject to" theme, the Comptroller General finally accepted an insurance scheme in which the United States and Australia would share equally the cost of an insurance policy covering the risk. The GAO stated:

It is true that the United States Government has a longstanding

\(^75\) Project Stormfury — Australia — Indemnification for Damages, 59 Comp. Gen. 369, B-198206 (1980).
\(^76\) Id. at 3.
\(^77\) Id. at 3-4.
policy that it will insure itself against its own risks. Absent express statutory authority, funds supporting Government activities generally cannot be applied to the purchase of insurance to cover loss of or damage to Government property. 19 Comp. Gen. 798, 800 (1940); 39 id. 145, 147 (1959). Here, however, the insurance is not for the purpose of protecting against a risk to which the United States would be exposed as a result of participating in the project. Rather, it is the price exacted by this Government's partner in an international venture to protect its interests. In this view, the insurance premium, with Australia as a beneficiary, is merely one of the costs of the United States' participation in this project for which any appropriation NOAA receives for this purpose would be available. It should be explicitly provided that the United States' liability under the agreement is limited to its share of the insurance premiums.78

In summary, any indefinite agreement to pay costs or damages "subject to the appropriation of funds" is clearly subject to criticism from the GAO and should be avoided, if at all possible, during negotiations with the foreign government.

8. Resolution of Disputes

Because of the sovereign nature of the parties to an EAA, the normal practice is to include a provision in the agreement stating that disputes under the EAA will not be referred to a third party for arbitration or resolution. Consequently, any ensuing country-to-country disagreements must be resolved by the nations through the negotiation process. DAR 1-314(e) specifically provides that: "A contract with a foreign government or agency thereof, or with an international organization or subsidiary body thereof, may be exempted from the Act and from DAR 1-314 if the Secretary determines that application of the Contract Disputes Act to the contract would not be in the public interest."

Since the United States has no privity of contract with the foreign manufacturer, all disputes must be resolved by the use of the dispute resolution process of the foreign government. Familiarity with the system used by the foreign government will be necessary for those actually administering the EAA.

9. Legislative Initiatives: NATO Standardization and Interoperability

One of the best ways to achieve standardization and interoperability is to use the same basic technology in the development of weapon systems. U.S. policy concerning NATO standardization and interoperability is contained in the "Culver-Nunn" amendment to the FY 1977 DOD Appropriation Authorization Act,79 which provides:

78. Id. at 6-7.
It is the policy of the United States that equipment procured for the use of personnel of the Armed Forces of the United States stationed in Europe under the terms of the North Atlantic Treaty should be standardized or at least interoperable with equipment of other members of the North Atlantic Treaty Organization.

The Secretary of Defense shall, to the maximum feasible extent initiate and carry out procurement procedures that provide for the acquisition of equipment which is standardized or interoperable. Whenever the Secretary of Defense determines that it is necessary in order to carry out this policy to procure equipment manufactured outside the United States, he is authorized to determine for the purpose of [the Buy American Act] that the acquisition of such equipment manufactured in the United States is inconsistent with the public interest.

As the above quotation indicates, the Secretary of Defense may waive the Buy American Act to procure standardized or interoperable equipment. Also, a report to Congress is required on programs which do not further the Amendment's policy. Under this authority, the DOD has entered into numerous general reciprocal procurement memoranda which waive the Buy American Act. DAR 6-1406 contains copies of these memoranda.

The sense of Congress is contained in Section 803 of P.L. 94-361, which encourages weapons development to meet common NATO requirements and the use of negotiated agreements to facilitate the achievement of coordinated arms development and production programs. Congress apparently believes that cooperation with NATO allies in weapon development aids production is a viable means to meet the Soviet challenge.

Even though the Culver-Nunn Amendment is permanent legislation, there is some evidence that it is not well understood by those in the executive branch of government charged with its implementation. As shown by the enactment of the Culver-Nunn Amendment, Congress is clearly on record with its support for cooperative NATO programs. The executive branch, however, has not fully implemented this policy in its current defense programs. The amendment is one of the driving forces behind the movement toward the use of EAAs to achieve standardization and interoperability.

IV. Conclusions

The acquisition of foreign technology by the U.S. government through the use of an EAA may become far more than just another new acquisition method. It is
being used as an important foreign policy tool by the Reagan administration. The purchase of foreign technology benefits both the foreign country, which receives compensation for the information, and the United States, which does not have to develop the acquired technology.

This paper is the first step toward a more complete understanding of the legal and political implications of using an executive agreement to acquire defense related technology. If the Department of Defense desires to use EAAs to acquire technology, it should develop a more standard procedural path for the three services to use. Many of the “lessons learned” during international negotiations are not passed along to the other services in an orderly fashion.

Serious consideration should be given to a separate DAR section covering EAA acquisition and, possibly, to creation of a small, DOD-level organization to negotiate the agreements. This organization would be staffed with personnel from each of the military departments, much like the DAR Council. Close cooperation and a concentration of talent should result in EAAs more beneficial to the United States.