

HEINONLINE

Citation: 6 Minn. J. Global Trade 67 1997



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Nov 11 17:05:22 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1944-0294](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1944-0294)

Sovereignty under the Agreement on Government Procurement

Paul J. Carrier*

Results of the Uruguay Round of multilateral trade negotiations clearly indicate invigorated efforts to establish a new world order for international trade. First and foremost, the World Trade Organization (WTO) was established¹ despite the failure of the International Trade Organization (ITO) approximately a half century ago.² Furthermore, five of nine plurilateral codes and agreements (for which participation by GATT Contracting Parties was partial) created during the Tokyo Round of multilateral negotiations have now become full WTO disciplines.³ In addition, the WTO framework now includes comprehensive agreements on formerly unchartered territory, including the General Agreement on Trade in Services (GATS),⁴ the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),⁵ and a host of other agreements related to old and new accords managed under the auspices of the WTO. The WTO Members have also agreed to include the Dispute Settlement Understanding (DSU),⁶ which contains a comprehensive set of

* BA, University of Michigan; JD, Detroit College of Law at Michigan State University; LL.M., Georgetown University Law Center. The author is presently teaching international government procurement and GATT/WTO courses at Comenius University School of Law, Slovak Republic, as a Fulbright Fellow.

1. *Marrakesh Agreement Establishing the World Trade Organization*, Dec. 15, 1993, reproduced as amended in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 6 (1995) [hereinafter FINAL RESULTS].

2. ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 9-10, 44 (1975).

3. 1 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 1013 (Terence P. Stewart ed., 1993). The plurilateral accords that remain are the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement. FINAL RESULTS, *supra* note 1, Annex 4, at 438.

4. FINAL RESULTS, *supra* note 1, Annex 1B, at 325.

5. *Id.*, Annex 1C, at 365.

6. *Id.*, Annex 2, at 404. The agreements to which the DSU applies are listed in Appendix 1 of the DSU, with special rules and procedures for certain

procedures and powers, not the least of which is the new "negative consensus" rule for rejecting panel reports and recommendations of Dispute Settlement Bodies (DSBs) formed under the DSU.⁷ Of the four plurilateral trade agreements not yet incorporated as full WTO disciplines, the Agreement on Government Procurement (AGP)⁸ is currently receiving the most attention.

Participation in the AGP by WTO Members is limited to twenty-two countries,⁹ representing slightly less than twenty percent of WTO membership. Since its effective date in 1981, the AGP has added only a handful of new participants.¹⁰ Arguably, the major reason behind this lack of participation is the perceived loss of sovereignty which naturally follows adherence to the strictures of the AGP.¹¹ Even GATT 1947, the only accord to survive the failure of the ITO, specifically excludes government procurements from its coverage.¹² It is difficult to envision a

agreements listed in Appendix 2 or in the agreements themselves. *Id.*, Annex 2, at 429-30.

7. FINAL RESULTS, *supra* note 1, Annex 2, art 16.4, at 417 (panel reports should be adopted absent timely appeal or unanimous consensus of the DSB to refrain from adopting the report); *id.*, art. 17.14, at 419 (requiring unconditional acceptance of an appellate report absent DSB consensus to refrain from adopting an appellate report). Formerly, the adoption of GATT panel reports was done by consensus, which meant that opposition by a single GATT Contracting Party, even the country found to be in error, would prevent the adoption of a report. See JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 65-67 (1990) (describing the evolution of GATT dispute settlement procedures).

8. FINAL RESULTS, *supra* note 1, Annex 4, at 438 [hereinafter AGP].

9. See Amelia Porges, *Introductory Note to the General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, 33 I.L.M. 1125, 1132 (1994).

10. Several countries (e.g., Greece and Spain) were added as the European Community grew; Israel acceded in 1983. GATT B.I.S.D. (30th Supp.) at 35 (1984). Korea was compelled to join as the *quid pro quo* for agreement of certain countries to allow Korea to accede to WTO/GATT. Cf. Don Wallace, Jr., *The Changing World of National Procurement Systems: Global Reformation*, 4 PUB. PROCUREMENT L. REV. 57, 58 (1995) (noting the U.S. requirement of having certain countries accede to the AGP before the U.S. would agree to those countries' accession to the GATT/WTO). Singapore and Hong Kong, signatories of the former version of the AGP, have not yet signed the most recent accord; the former agreement therefore remains in effect as to these signatories. See Porges, *supra* note 9, at 1132.

11. See THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY, *supra* note 3, at 1025-26 (listing reasons for protectionism in government procurement).

12. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT], art. III, ¶ 8(a). GATT Article III:8(a) excludes procurements for government, as opposed to commercial or resale purposes, while subsection 8(b) permits the payment of subsidies to domestic producers from internally collected taxes via government purchases of domestic products. *Id.* at ¶ 8(a)-(b). An early attempt by the United States to include government procurement in the suggested char-

more sovereign, trade-related act than the purchase of goods, supplies, and services by a government with monies collected primarily from its citizens for the purpose of funding government operations and public welfare generally. The relationship between sovereignty and government procurement is an intimate one, and, as one scholar has quipped in relation to domestic protectionism generally, “[d]iscrimination in favor of local products sometimes seems to be one of the basic human urges.”¹³

The purpose of this article is to assess the treatment of sovereignty by the AGP with a view toward explaining the lack of widespread participation, particularly with regard to developing and lesser-developed countries. Proponents of complete WTO Member participation in the AGP ultimately are faced with two avenues. First, they can await the passage of enough time for developing and least-developed countries to strengthen their economic positions, which may alter their perception of gains and losses in international trade. Alternatively, they can reform the AGP, or use more aggressively its exceptions regarding developing and least-developed countries to encourage participation. This article begins with a discussion of sovereignty in the context of government procurement. The second section considers how the various articles of the AGP treat sovereignty. The article concludes by advocating the latter avenue mentioned above in an effort to transform government procurement into a full WTO discipline most rapidly.

I. SOVEREIGNTY, SOVEREIGN IMMUNITY AND GOVERNMENT PROCUREMENT

While an exhaustive analysis of sovereignty is beyond the scope of this article, there are several significant points which help explain national attitudes toward government procurement policy. A basic understanding of these features provides a backdrop with which to comprehend the various approaches to the AGP and, particularly, the notable resistance on behalf of developing and least-developed countries to sign the Agreement. Furthermore, even developed-country resistance to further

ter for an international trade organization was rejected. See UNITED STATES SENATE COMMITTEE ON FINANCE, EXECUTIVE BRANCH GATT STUDIES 1 (Comm. Print 1974).

13. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF THE GATT 274 (1969). See also THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY, *supra* note 3, at 1025 (describing government procurement as one of the most protected areas in international trade).

liberalization of government procurement derives from these same concerns.

The establishment of a framework for understanding sovereignty in the context of government procurement is also necessary. As procurement becomes one of the most important issues in international trade liberalization,¹⁴ future analysis will be aided by highlighting certain distinctions. For this reason the following discussion distinguishes not only between internal and external notions of sovereignty, but also between differing conceptions of internal sovereignty. In turn, an analysis of sovereignty under the two general forms of public administration, civil and common law systems, is required.¹⁵ It is also helpful to delineate the mechanisms by which sovereignty for external purposes is waived or suspended. Finally, implicit throughout the discussion that follows is the differentiation between sovereignty as it relates to government procurement in contrast to other exercises of sovereign power.¹⁶

A. SOVEREIGNTY GENERALLY

Sovereignty is defined as “[t]he supreme, absolute, and uncontrollable power by which any independent state is governed

14. The GATT's avowed purpose was to lower tariffs and quotas on goods moving in international trade. Jonathan T. Fried, *Two Paradigms for the Rule of International Trade Law*, 20 CAN.-U.S. L.J. 39, 42 (1994). In this regard, the GATT has been admirably successful. Tariff rates have fallen from a post-World War II level of approximately forty percent to less than five percent. Michael J. Trebilcock, *On the Virtues of Dreaming Big But Thinking Small: Comments on the World Trading System After the Uruguay Round*, 8 B.U. INT'L L.J. 291, 292 (1990). As these barriers have fallen worldwide, the “stumps and boulders” of other non-tariff barriers, including restrictive government procurement policies, have naturally been accentuated. Peter S. Watson, Chairman of the U.S. International Trade Commission, *The Framework for the New Trade Agenda*, 25 LAW & POL'Y INT'L BUS. 1237, 1241 (1994) (using the tariff lake metaphor). See also JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 16, 37 (1990).

15. *But see* H. Lauterpacht, *The Problem of Jurisdictional Immunity of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 249 (1959) (warning against drawing an artificial distinction between ‘continental’ and ‘Anglo-American’ practices of absolute sovereign immunity in relation to foreign sovereigns); *id.* at 250-72 (providing case examples from a variety of jurisdictions). Lauterpacht notes the growing trend toward judicial recognition of a restrictive theory of sovereign immunity in external relations (*res gestionis* versus *res imperii*) as well as the inconsistent adherence to concepts of absolute sovereign immunity. *Id.* at 220.

16. For example, there exists a wealth of scholarship on sovereign immunity from tort suits and from government appropriations of foreign nationals' property, as opposed to immunity offered for claims brought against the government in the area of public purchasing. See discussion *infra* Part I.A. for explanation of the distinction between sovereignty and sovereign immunity.

. . . [t]he power to do everything in a state without accountability . . ."¹⁷ As will be addressed below, sovereignty is made up of both internal and external components. In earlier times, sovereignty was viewed as a divine right vested in a monarch who in turn acted as the voice and the will of the general populace. By the end of the eighteenth century, several western European countries and the United States had already undergone significant changes in the structure of government by dividing the sovereign power into executive, parliamentary or legislative, and judicial institutions. Although the distinctions with regard to government contracting, and responsibility therefor, are often blurred, all three institutions have roles to play.

Sovereign immunity is defined as “[a] judicial doctrine which precludes bringing suit against the government without its consent,” and is “[f]ounded on the ancient principle that ‘the King can do no wrong.’”¹⁸ Sovereignty is the over arching principle of national self-governance. As noted above, sovereignty is an uncontrollable power which has no equivalents and is therefore beyond censure or control unless it is waived.¹⁹ As views on government responsibility began to change in favor of recognizing a responsibility of the sovereign power to its constituents, the task of reviewing the nature of that responsibility was placed in part on the judiciary.²⁰

The best measure of the supremacy of sovereign power is the extent to which it has been waived, i.e., the degree to which it may be tested and even denied by the judicial branch. The strength of sovereign power, then, in public purchasing or in any other context, is the level of judicial review the sovereign enjoys. Based on this intimate connection, a comprehensive discussion of sovereignty cannot be undertaken without significant reference to judicial review. As is true of the concept of sovereignty, the sovereign immunity doctrine also has internal and external components.

17. BLACK'S LAW DICTIONARY 1396 (6th ed., 1990). See also JAMES R. FOX, DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW 410 (1992) (“the ability of a state to act without external controls on the conduct of its affairs.”). Note that the focus of this definition is an external one.

18. BLACK'S LAW DICTIONARY, *supra* note 17, at 1396; see also Fox, *supra* note 17, at 410.

19. See BLACK'S LAW DICTIONARY, *supra* note 17, at 1396.

20. Also addressed below, and especially in the context of continental government procurement systems, is the fact that countries often vest reviewing authority in administrative bodies attached primarily to executive branches, which dilutes the judiciary's role.

1. Internal Sovereignty

The concept of internal sovereignty encompasses the relationship of citizen to sovereign as opposed to the relationship between nationals of another state and a sovereign or that of sovereign to sovereign. This analysis begins with the historical consideration of sovereign powers as they are exercised internally. Respect should be paid to culturally different conceptions of sovereignty. For example, Confucian China maintained an administrative bureaucracy more than two and one-half millennia ago wherein the rights of the individual were secondary to the individual's duty to be loyal, obedient, and subservient to the state.²¹ There is every indication that this common view of state sovereignty continues to exist, thereby fostering continued acceptance of sovereignty by its people,²² and reinforcing China's conception of external pressure as erosive to sovereignty. The Hindu conception of sovereign power shares with Confucian China's a strong sense of individual duty to the state over individual rights, with the added notion of tarnishing one's next life after reincarnation for the nonacceptance of one's present life and position in it.²³ A more youthful manifestation of sovereign power is demonstrated by the Soviet Union where, earlier this century, the collective good took precedence over consideration of individual rights.²⁴ As for many other countries, "[the] ability to complain [about] . . . maladministration by the state's agents . . . is a process that has not yet arrived in the majority of cultures and political systems, including both modern postindustrial states . . . and traditional developing societies in Asia and Africa."²⁵ It must be recognized, therefore, that discussion of sovereign immunity and its relaxation in the context of government procurement and the AGP is a concept primarily formulated in Western European countries.²⁶ A common feature of all

21. See LEON HURWITZ, THE STATE AS DEFENDANT: GOVERNMENTAL ACCOUNTABILITY AND THE REDRESS OF INDIVIDUAL GRIEVANCES 6-7, 28 n.5 (1981).

22. *Id.* at 7.

23. *Id.* at 7-8.

24. *Id.* at 8-9. The Soviet concept of sovereign immunity, although it now has an independent existence, derives from the czars and the concept of *rex gratia dei*. *Id.* at 9.

25. HURWITZ, *supra* note 21, at 3.

26. See Louis W. Goodman, *Democracy, Sovereignty, and Intervention*, 9 AM. U. J. INT'L L. & POL'Y 27, 27-28 (1993) (attributing the onset of national sovereignty to the decline of the Roman Empire and the Treaty of Westphalia). Of the original signatories to the 1979 AGP, only Japan's culture would be considered "non-European." Historical trading positions and strong export markets explain Japan's willingness to join the AGP. Whether Japan abides by

systems appears to be, at least historically, the unimpeachability of sovereign actions (including public purchasing).

To members of the European Union (and perhaps to the AGP members generally by analogy), the distinction between common law and civil law approaches may be lost because, since 1971, the European Community has undertaken to harmonize national procurement laws to a common standard. As will be noted later, there has been significant activity in this area since the mid- to late- 1980's. It would be a conceit, however, to disregard these distinctions between common and civil law in favor of the more youthful government procurement regimes that have inherited either form as the result of conscious adoption or of colonial imposition. Unlike the European Union, not all countries share in the close geographic proximities and historic alliances between countries such as England, Germany, and France. Furthermore, every system will have its own variations on the civil or common law approach, resulting from historic, regional, and pre- or post- colonial political influences. The variations are too numerous to include here, not to mention the fact that many are nowhere described, whether due to the relative novelty of government procurement as a priority in international trade or to the sensitive nature of this issue which would lead a nation to avoid international scrutiny. It is also important to point out how attenuated the process of instituting judicial review has been under either system as well as the nature of the alterations. Finally, the system adopted by the European Union can be criticized for failing to recognize arguably valid policies of Member States outside the realm of purely economic efficiency.²⁷

a. Common Law Systems²⁸

In the past, sovereign decisions were beyond review by the sovereign's own courts. Under the doctrine of *rex gratia dei*, a king's power was vested by divine right rather than by a general grant of ruling power from the general populace.²⁹ Under this system, which reached its peak during feudal times, there was

Western-thinking trade agreements such as the AGP is a perennial question of countries such as the United States.

27. See JOSE M. FERNANDEZ MARTIN, THE EC PUBLIC PROCUREMENT RULES: A CRITICAL ANALYSIS 89-92 (1996).

28. Common law systems inherited their beginnings from England during the colonial era. This discussion begins with England and then considers common law systems generally.

29. See HURWITZ, *supra* note 21, at 10.

little popular input in the decision-making processes of government.³⁰ Rather, the King was bound by God's law and not man's, which meant that the King could do no wrong and could not be held accountable by any temporal tribunal, i.e., personal immunity.³¹ This personal immunity was naturally extended from the King's person to his household, his agents, and later, to modern bureaucratic apparatus developing out of the sovereign power, and thus developed the concept of sovereign immunity.³²

The doctrine of *rex gratia dei* came under attack in England by scholars such as Thomas Hobbes and John Locke.³³ At roughly the same time, Charles I was executed, and approximately forty years later, the Glorious Revolution took place. The combination of these events eroded the doctrine of *rex gratia dei* and altered the related concept of sovereign immunity.³⁴ In its place arose the concept of *rex gratia populi* and, after Cromwell, a strengthened parliamentary system in England.³⁵ History has demonstrated, however, that sovereign immunity in the majority of common law jurisdictions remains a pervasive and lingering concept in the area of public contracts.

Under the parliamentary system, sovereign powers were distributed among three institutions: those retained by the King (executive), those belonging to Parliament (legislative), and those vested in the judiciary.³⁶ In the modern era, two of these branches are primarily responsible for government procurement in common law jurisdictions, i.e., the Crown (or executive

30. *Id.*

31. *Id.* One interesting feature of this concept is that the Pope crowned kings and emperors and therefore legitimized the application of the *rex gratia dei* doctrine. A sovereign was, however, bound by God's law if not man's, which also changed in certain European countries following the Protestant Reformation, after which the kings themselves could interpret God's law. See *id.* at 10-11. There was an avenue of redress, but its use required consent. See PETER W. HOGG, *LIABILITY OF THE CROWN* 3-4 (1989) (noting that the King could not be sued in his own court but was subject to a petition of right during the Middle Ages); HARRY STREET, *GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY* 1 (1953) (noting that the petitioner had no right of action absent consent of the King even under the petition of right).

32. HURWITZ, *supra* note 21, at 11.

33. *Id.* For a brief synopsis of the theories of government responsibility to the populace of Hobbes, Locke, Austin, Bodin and Salmond in the area of contractual rights, see J.D.B. Mitchell, *A General Theory of Public Contracts*, 63 JURID. REV. 60, 61-70 (1951).

34. HURWITZ, *supra* note 21, at 12-13.

35. *Id.* at 13-14.

36. PAUL LORDON, *CROWN LAW* § 1.4, at 7 (1991).

branch) and the parliament (or legislative branch).³⁷ Contracting for the support of ordinary governmental operations is an executive function for which that office enjoys a general power to contract under the common law.³⁸ The role of the parliament (or the legislature) is twofold: 1) to make the appropriations necessary to support executive functions (including government purchasing),³⁹ and 2) to define the exercise of special powers not within the purview of executive authority.⁴⁰ Historically, the Crown was generally free to spend as it wished

37. See COLIN TURPIN, BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT, CASES AND MATERIALS 137 (2d. ed., 1990) (acknowledging that the concept of "the state" has been replaced by that of "the Crown," and is associated with the idea of executive authority rather than the common interest). Major public powers are vested in the Crown or servants thereof. *Id.*

38. Sue Arrowsmith, *Government Contracts and Public Law*, 10 J. LEGAL STUD. 231, 232-33 (1990).

The United States recognized early on that the Executive has a right to enter into contracts, even where not previously provided for by law. *United States v. Tingey*, 30 U.S. (5 Pet.) 115, 128 (1831). As a general premise, however, the traditional powers of royal prerogative over domestic commercial matters in this country have been vested, in whole or in part, in the Congress. See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 17 (1993). This includes the power over government expenditure, i.e., procurement. Nonetheless, Congress has delegated the majority of purchasing powers to *executive branch* agencies and has allowed these agencies to develop regulations, subject of course to acts of Congress which directly address matters of government procurement. See, e.g., 41 U.S.C. § 252(a) (1994) (legislative delegation of authority over procurement of property and services to *executive* agencies with certain exceptions); *id.* § 404(a) & (b) (creating the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget and conferring power of appointing its Administrator on the President with the advice and consent of the Senate); *id.* § 402(a) (noting that economy, efficiency and effectiveness in the procurement of property and services would be best served by establishing the OFPP, which in turn develops wide-spread procurement policies, regulations, procedures, and forms). Furthermore, the sizeable volume of federal regulations contained in the chapters and sub-chapters of 48 Code of Federal Regulations covering procurement are established by *executive* departments and agencies. 48 C.F.R at v (1995) (Explanation section).

39. HOGG, *supra* note 31, at 164 ("[i]t is a fundamental constitutional principle [in common law jurisdictions] that all expenditures of public funds must be authorized by statute"); STREET, *supra* note 31, at 84 (explaining the legislature's role in England and the United States). See also *id.* at 90 ("[after legislative appropriation of funds] it is legally competent to the Executive to expend that sum at discretion"); Arrowsmith, *Government Contracts and Public Law*, *supra* note 38, at 233 & n.10 (explaining when Parliamentary approval is required).

40. See SUE ARROWSMITH, GOVERNMENT PROCUREMENT AND JUDICIAL REVIEW 120 (1989) (distinguishing between extraordinary powers that would interfere with existing legal rights, and ordinary administrative powers, the former of which would require parliamentary approval); Arrowsmith, *Government Contracts and Public Law*, *supra* note 38, at 233.

under the legal fiction that the Crown was a natural person entitled to the right of freedom of contract⁴¹ once the necessary appropriation was made by Parliament. Administrative tribunals have often been established to address concerns on both a case-by-case and a policy basis, but some review authority may remain with the judicial branch. Judicial reviewability, however, is limited to statutes and to regulations to which administrative bodies are bound to adhere, the latter of which is typically decided as a matter of first instance by review bodies within the administration. The judicial branch is therefore empowered to review administrative decisions as the tribunal of first instance only to the extent that the legislature has created statutes. Such creations themselves may be sparse because of the conflict arising under the notion of separation of powers. As will be discussed later, review over matters of procurement in civil law systems is more direct.

Despite the application of ordinary contract rules to executive-driven government procurements, a special body of public law developed around contracting with the government, which "take[s] into account . . . the special needs and responsibilities of government."⁴² Moreover, common law jurisdictions such as Australia, Canada, and the United States share in this heritage as just described, albeit with some variations in the manifestations of sovereignty and sovereign immunity. In short, consideration of "sovereign discretion" inherent in this special body of law, together with the private nature of government procurement in common law systems, has permitted the subject of government procurement to avoid substantial judicial attention until relatively recently.⁴³

41. HOGG, *supra* note 31, at 163-64; ARROWSMITH, GOVERNMENT PROCUREMENT AND JUDICIAL REVIEW, *supra* note 40, at 113, 132-33 (1988). As one author explains:

[T]he Executive enjoys a general power to contract under the common law. Historically this has arisen from the fact that the Crown, in the sense of the government was (and possibly still is) in legal theory indistinguishable from the person of the Monarch. Because the Crown is a natural person, the courts have reasoned, it must possess the same legal powers as any other natural person, including the power to enter into contracts

Arrowsmith, *Government Contracts and Public Law*, *supra* note 38, at 232-33.

42. ARROWSMITH, GOVERNMENT PROCUREMENT AND JUDICIAL REVIEW, *supra* note 40, at 2. See also *id.* at 4-5 (highlighting jurisdictions that have laws dealing specifically with government contracting); HOGG, *supra* note 31, at 160 (recognizing the distinct body of law regulating government contracts).

43. See ARROWSMITH, GOVERNMENT PROCUREMENT AND JUDICIAL REVIEW, *supra* note 40, at 5.

While under the notion that procuring entities of the government⁴⁴ are free to contract much the same as are private individuals, a decision to procure, once the proper appropriations have been made, may nonetheless be governed by rules in the form of laws, administrative procedures, and regulations. Regulations, as opposed to legislation, are created under executive authority and attempt to ensure proper supervision and control, to prevent corruption, to ensure procurement of the right items at the right prices, and to further political and social objectives.⁴⁵ Outside of any parameters laid down by statutes, regulations, etc., procurement decisions are not typically subjected to judicial review.⁴⁶ Judicial hesitation to address bidder complaints over contract award procedures is systemic and deeply rooted in notions of sovereignty; the more loosely procedures for award are included and defined in legislative or administrative form, the more discretion procuring entities enjoy which is effectively shielded from judicial review.⁴⁷ Moreover, regulations (as opposed to legislation) are created not by the voting public but by executive agencies which may be afforded a high degree of discretion for any perceived special expertise. Determination of bidders' rights during the bidding process up to the contract award are limited to specific bidding procedures contained in statutes and regulations. The operative question becomes whether a procuring entity, when making an award, has acted within the parameters of statutory or administrative rules.

44. Although the term "government" could include all three branches mentioned above, it is used herein to describe administrative or executive purchasing, or "public" authority. See *supra* note 37.

45. See HOGG, *supra* note 31, at 160.

46. See TURPIN, *supra* note 37, at 414 ("[t]here is no *appeal* against the decision of a minister or other public authority except in those cases where statute has provided one"); LORDON, *supra* note 36, § 2.2, at 120-21 (explaining that except for British Columbia and Prince Edward Island, which require specific disclaimer of Crown liability, the presumption of non-applicability of any statutes has been codified in all Canadian jurisdictions and is only negated by specific reference).

47. See KENNETH W. DAM, THE GATT: LAW AND ECONOMIC ORGANIZATION 204-05 (1970) (noting that the vesting of discretion in procurement officials to make an award on criteria other than price is the most effective method for discrimination in procurement). See also, e.g., *Regina v. The Lord Chancellor, Ex parte Hibbit and Saunders (a Firm) and Another*, The Times, March 12, 1993, p. 42 (Queen's Bench Divisional Court March 11, 1993) (accepting amended bids from several but not all bidders on contract for court reporting services not entitled to judicial review for insufficient public law element, i.e., no statutory framework).

Only those exercises of authority that are *ultra vires* are actionable.⁴⁸

In regard to changing perceptions about government responsibility in the context of government procurement during the post-award phase, there is a continuing notion that the government should not be subjected to disputes on an internal level. Judicial hesitation to hold the government accountable for contractual obligations is also apparent. The theoretical underpinnings of this notion were considered more than forty years ago by one scholar who ultimately found support for the notion that governmental agencies take on a special character requiring special treatment for contractual matters.⁴⁹ For this reason, common law countries have been slow to place government contracts within the reach of their courts.⁵⁰ As the United States Supreme Court ruled almost a century ago:

48. TURPIN, *supra* note 37, at 415-16.

49. Mitchell, *supra* note 33, at 81. *But see* Lauterpacht, *supra* note 15, at 236-41 (advocating abolition of many uses of the sovereign immunity doctrine).

50. Statutory reform placing the English government within the jurisdiction of the courts for suits in contract and tort came about in 1947 with the Crown Proceedings Act. STREET, *supra* note 31, at 6. Australia passed legislation in 1900 and 1903 to permit judicial review of government actions, New Zealand passed similar legislation in 1950, South Africa passed the Crown Liabilities Act in 1910, and Canada took some preliminary steps in 1927. *Id.* at 6-7.

The United States Constitution in art. III, § 2 extends federal judicial jurisdiction to "controversies . . . between a State and citizens of another State . . ." This was altered by the Eleventh Amendment, however, which removed the right of a citizen to sue his own state or another state without its consent, and proscribed suits of a state or citizen against the United States. For a brief discussion, see HURWITZ, *supra* note 21, at 20-21. However, the Tucker Act of 1887 authorized suits against the government, though judicial proceedings were limited to the Federal Court of Claims rather than to all courts generally. See generally STREET, *supra* note 31, at 81. Claims Court jurisdiction over contract claims against the United States "founded either upon . . . any Act of Congress or any regulation of an executive department, or upon any express or implied contract . . ." is codified at 28 U.S.C. § 1491(a)(1) (1994). It should also be mentioned, however, that government contract disputes are subject to an administrative framework in the post-award phase. See 41 U.S.C. § 601-07 (1994). A claim first goes to the contracting officer for decision, *id.* § 605(a), unless it involves the Tennessee Valley Authority, *id.* § 602(b), or if it involves a foreign government or agency, international organization or subsidiary thereof, and if the head of the agency involved determines that application of the Contract Disputes Act would not be in the public interest. *Id.* § 602(c) (emphasis added). Appeal may be taken to an agency's board of contract appeals, *id.* § 606, with final appeal possible before the United States Court of Appeals for the Federal Circuit. *Id.* § 607. The policy of preventing alternative dispute resolution in this area may be in the process of change, however. See Paul J. Carrier, *New Policy Regarding Arbitration of Government Procurement Disputes in*

It is elemental, of course, that the state or sovereign cannot be sued in its own courts without its consent; and this is as applicable to a dependent state or sovereignty as to one which has no suzerain or overlord. The political entity which makes laws and creates tribunals for their enforcement, which creates judicial remedies and legislates as to how, when, and under what conditions rights may be litigated and remedies enforced, manifestly cannot be sued in the courts of its creation except by its own consent and legislative provision. In the other case, such political entity would be subordinate to its own creatures.⁵¹

The sovereign acts doctrine developed in the United States illustrates the precarious balance between sovereign immunity on one side, and obligations undertaken via contract in the post-award phase on the other.⁵² The doctrine applies to cases where a sovereign act prevents fulfillment of the government's responsibility under a pre-existing contract. On one hand are notions of responsibility for obligations created by the free exercise of the government's right to contract. On the other are notions of its responsibility to the public as the sovereign unrelated to the contract in dispute. While obligations arise under the former, notions of sovereign immunity advocate a finding of no liability in accord with the latter concern. This led to the notion of the dual capacity of the government to act as the sovereign as well as a private participant in commerce.⁵³ Especially in cases where the sovereign as market participant is unaware of legislation that could affect its obligations under a pre-existing contract, the successful contractor bears the risk of future legislation which impedes or terminates the contract.

The number of laws and regulations affecting how government purchasing is to be conducted in common law systems has increased significantly during the last few decades. While it is clear that new laws and special administrative guidelines and procedures (i.e., public law) have been developed, lingering notions of sovereign immunity and the private right of freedom to contract remain, blurring the distinction between public and pri-

the United States, 5 PUB. PROCUREMENT L. REV. CS 74 (1996) (current survey article).

51. *Kawanananakoa v. Polyblank*, 205 U.S. 349, 351 (1907).

52. For a highly comprehensive discussion of the sovereign acts doctrine, see Ronald G. Morgan, *Identifying Protected Government Acts under the Sovereign Acts Doctrine: A Question of Acts and Actors*, 22 PUB. CONTRACT L.J. 223 (1993). The doctrine was first announced by the U.S. Court of Claims in 1865. *See id.* (citing *Deming v. United States*, 1 Ct. Cl. 190 (1865) and *Jones v. United States*, 1 Ct. Cl. 383 (1865)).

England, Canada, and Australia have a similar convention preventing the fettering of statutory powers. *See Hogg, supra* note 31, at 170 & n.55.

53. Morgan, *supra* note 52, at 226-27.

vate contractual rights and responsibilities. *Ad hoc* legislation and regulations, characteristic of common law systems, complicate matters and make comprehension of procurement regimes on the part of foreign bidders difficult, as do difficulties of either internal revision or revisions made in response to multilateral accords.⁵⁴

b. Civil Law Systems⁵⁵

Prior to the late eighteenth century, government contracting in civil law jurisdictions was conducted in much the same fashion as in common law systems.⁵⁶ The modern continental (civil) law system of government procurement arises from ancient Roman law and the ideas behind the French Revolu-

54. As an example, a 1972 study identified more than four thousand federal laws related to United States government procurement. 1 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 10 (1972). One of the dangers of such a high degree of regulation, albeit intended to prevent graft, is that "there might result so much 'red tape' that higher bids and less competition would be an injury to the public as grave as fraud." STREET, *supra* note 31, at 97 (*citing* H.G. JAMES, THE PROTECTION OF THE PUBLIC INTERESTS IN PUBLIC CONTRACTS (1946)). Moreover, there are more than 80,000 government bodies empowered to spend public funds. DAVID N. BURT & RICHARD L. PINKERTON, A PURCHASING MANAGER'S GUIDE TO STRATEGIC PROACTIVE PROCUREMENT 16 (1996). While all of these bodies are required to adhere to the major statutory procedures and regulations, the various individual bodies will certainly develop an immense number of administrative policies and practices that complicate the bidding process. As another example, England did not pass any comprehensive national procurement legislation or code until its adaptation to the EC Directives on Procurement. INTERNATIONAL TRADE CENTER UNCTAD/GATT, IMPROVING PUBLIC PROCUREMENT SYSTEMS: GUIDE No. 23, at 21 & n.19 (1993) (technical paper).

55. Like France, Continental European countries such as Belgium, Holland, West Germany, Italy, Luxembourg, Spain, Portugal, Greece, and Turkey have created separate systems of administration that include a system of review. ZAIM M. NEDJATI, J.E. TRICE & A.A. DASHWOOD, ENGLISH AND CONTINENTAL SYSTEMS OF ADMINISTRATIVE LAW 35 (1978). Continental systems have their origins in the French system established around the time of the French Revolution. *Id.* at 36. Discussion in this section focuses on the French archetype, with reference to differences in other continental systems where appropriate. For a brief discussion of some of these systems as they were formed and as they exist in the modern era, see *id.* at 36-44 (France), 45-51 (West Germany), 51-52 (Belgium), 52-53 (Italy), 53-54 (Greece), 54-55 (Turkey); L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 252-53 (generally), 253-54 (Belgium), 254-56 (the Netherlands), 257-58 (Italy), 258-60 (Germany), 261-62 (Greece) (1993).

56. Medieval France is said to have epitomized the *rex gratia dei* principle and the concept of sovereign immunity. HURWITZ, *supra* note 21, at 23. An exception was the Holy Roman Empire, which established an administrative code long before other continental systems developed their own codes.

tion.⁵⁷ Beginning with France, civil law countries have divorced government contracts from notions of private law in favor of creating an administrative system.⁵⁸ A distinctive feature of the French system is the development of two institutions: a separate body of law governing competence of administrative authorities and their relationship with each other and private individuals (*droit administratif*, and particularly, the concept of *contrats administratifs*), and a separate system of administrative courts having jurisdiction over disputes in this field to the primary exclusion of judicial courts.⁵⁹

Under what is known as the *Ancien Régime*, there existed a system of courts (*Parlements*) charged with handling administrative disputes.⁶⁰ Around the time of the French Revolution, these *Parlements* became unpopular for their costliness and lack of speedy resolution.⁶¹ These factors, coupled with the King's power to remove disputes from these courts in favor of decision by his council, and disputes over authority between the King's representatives and the *Parlements* led to their ultimate demise.⁶² France too had a champion of the separation of powers in Montesquieu and his *Esprit des Lois*.⁶³ In 1790, a law was passed preventing judicial courts from interfering in administrative matters under penalty of forfeiting their offices.⁶⁴ Authority over administrative disputes was vested in the administrators themselves the very same year.⁶⁵

57. GOSTA WESTRING, INTERNATIONAL PROCUREMENT: A TRAINING MANUAL 39 (rev. 1990). Countries such as Francophone Africa inherited the French system during the colonial era, while much of Europe modelled national systems after that of the French. *Id.*

58. William Rohkam, Jr., *The Annulment of Administrative Acts for Excess of Power, with Special Reference to the Doctrine of Detournement de Pouvoir*, in WILLIAM ROHKAM, JR. & ORVILLE C. PRATT IV, STUDIES IN FRENCH ADMINISTRATIVE LAW 11, 13 (1947).

59. *Id.* at 11.

60. *Id.* at 13. See also NEDJATI, TRICE & DASHWOOD, *supra* note 55, at 36.

61. Rohkam, *supra* note 58, at 13.

62. *Id.* at 13-14.

63. *Id.* at 14.

64. *Id.*; see also NEDJATI, TRICE & DASHWOOD, *supra* note 55, at 36 (describing conditions that led to the establishment of statutes mandating separation of judicial and administrative matters). The separation of powers and functions is also attributable in part to Napoleon, then First Consul, who favored restrictions on legislative and judicial jurisdiction in favor of a strongly centralized autocracy over which control of administrators was retained by the executive branch. See BROWN & BELL, *supra* note 55, at 23.

65. Rohkam, *supra* note 58, at 14. As discussed earlier, courts in common law systems are hesitant to decide matters which would conflict with administrative authority and tend to do so only by clear legislative or regulatory direc-

In 1800, the Conseil d'Etat was created by constitutional provision to settle difficulties arising in administrative matters, which now includes government purchasing.⁶⁶ Civil courts were also established to supervise the legal relationship between individuals, and now include review of contract disputes between private citizens and the State where their nature is essentially private rather than administrative.⁶⁷ In 1937, the National Tender Board was established as an administrative tribunal enabled to review and approve government procurement contracts, although its role has changed to a more advisory one over time.⁶⁸ Not only were the supervising authorities over ordinary civil and administrative matters separate and distinct,⁶⁹ but separate governing bodies of law also developed.⁷⁰ Although French government procurements must adhere to several major requirements of ordinary contract law (civil), most of the procedures, practices, and rules are found in the *Code des marchés publiques* and in administrative circulars.⁷¹

While both common law and continental procurement systems treat public purchasing as an administrative or quasi-administrative function, continental systems, and especially that of France, are typically more comprehensive than those of their common law counterparts for their codifications and separate

tive. Placing review authority over executive (administrative) decisions with that branch itself avoids problems surrounding separation-of-powers concerns.

66. *Id.* at 15. The Conseils de Préfecture (now called *Tribunaux administratif*), which resolve disputes between citizens and contractors not arising from "administrative" acts, were established during the same year. Marie-Aimee de Latournerie, *The Law of France, in GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY* 200 & n.3 (J. Bell & A.W. Bradley eds., 1991); see also BERNARD SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* 42 (1954). Twenty years later, the Conseils de Préfecture were permitted by the Conseil d'Etat to adjudicate claims against the Administration, Latournerie, *supra* at 201, which are now the courts of first instance for review of public purchasing disputes. For a general discussion of the maturation of the Conseil d'Etat, see BROWN & BELL, *supra* note 55, at 43-46; Rohkam, *supra* note 58, at 16-20.

67. See NEDJATI, TRICE & DASHWOOD, *supra* note 55, at 76-77.

68. INTERNATIONAL TRADE CENTER UNCTAD/GATT, GUIDE No. 23, *supra* note 54, at 37. Many of the African countries adopting a form of the French system have established central, regional, and local tender boards to oversee government purchases.

69. See ANDRE DE LAUBADERE, JEAN-CLAUDE VENEZIA & YVES GAUDEMEL, *MANUEL DE DROIT ADMINISTRATIF* 16 (1992) (noting that the union of *droit administratif* and *jurisdiction administrative* constitutes a "*regime administratif*"); cf. *supra* note 65.

70. See Claude Goldman, *An Introduction to the French Law of Government Procurement*, 20 GEO. WASH. J. INT'L L. & ECON. 461, 461-62 (1987).

71. Goldman, *supra* note 70, at 461-62.

tribunals. Ironically, much of the guidance found in the French system comes from case decisions interpreting codes and administrative regulations,⁷² which is akin to the operation of case precedent in common law systems. Furthermore, the French system regards administrative contracts as essentially an arrangement between unequal parties,⁷³ which leads to a more refined concept of government responsibility and legality of action more protective of private interests than its common law counterparts.⁷⁴

As was true of common law systems, however, the traditional rule was that acts of the French Government were exempt from recourse for excess of power,⁷⁵ which includes public purchasing decisions. Today, parties attempting to contract with the government may seek annulment of a contract award (*recours de annulation*) if made outside the scope of administrative authority.⁷⁶ In the post-award phase, parties having contracted with the government *may* be entitled to compensation for extra costs arising from unforeseen, supervening circumstances (*imprevision*), and more certainly for costs added by modification of contract terms by an administrative body (*supervision*).⁷⁷ Similar to common law systems, however, a party having contracted with the government is not necessarily enti-

72. See Brown & Bell, *supra* note 55, at 2-3 (noting this phenomenon for administrative law generally); cf. NEDJATI, TRICE & DASHWOOD, *supra* note 55, at 35 (noting that jurisdiction of the administrative courts and tribunals was developed primarily by case law at first).

73. BROWN & BELL, *supra* note 55, at 192 & n.26. This contrasts with the common law notion that the sovereign is free to contract like an ordinary individual, which connotes placing the government on an equal contractual footing. See *supra* note 41 and accompanying text.

74. BROWN & BELL, *supra* note 55, at 202. For a general discussion of the rise in administrative responsibility in both France and Italy, see Jacques van Compernolle & G. Closset-Marchal, *La Responsibilite du Fait des Acts du Service Public de la Justice: Elements de Droit Compare et Perspectives de <<Lege Ferenda>>*, in LA RESPONSIBILITE DE POUVOIRS PUBLICS, Titre III, Ch. III, 413, 413-26 (France) and 427-31 (Italy) (Actes du Colloque Interuniversitaire Organise les 14 et 15 Mars 1991 par la Faculte de Droit de l'Universite Catholique de Louvain et la Faculte de Droit de l'Universite Libre de Bruxelles, 1991).

75. Rohkam, *supra* note 58, at 22 & n.9. For a general discussion of the "excess of power" doctrine in France, see *id.* at 32-56.

76. NEDJATI, TRICE & DASHWOOD, *supra* note 55, at 76-77. The petition is called *recours pour excess de pouvoir* (recourse for actions exceeding an administrative body's authorized powers). SCHWARTZ, *supra* note 66, at 200. This is a manifestation of the *ultra vires* doctrine, *id.*, and may be filed for, among other reasons, a failure to observe procedures required by law or for an abuse of power. *Id.* at 203.

77. NEDJATI, TRICE & DASHWOOD, *supra* note 55, at 170.

tled to indemnity where the administration passes legislation affecting all citizens generally (*fait du prince*).⁷⁸

Although the French system, and to varying degrees, systems based on the French civil law tradition, suspend notions of sovereignty to a greater extent than is true with common law systems, this does not necessarily apply to bidders of other countries on government procurement contracts.⁷⁹ The high degree of discretion afforded to procuring agents in civil law systems (as provided in administrative regulations) is perhaps the most effective and least challengeable method of protecting domestic bidders in government procurement.⁸⁰ This fact is undoubtedly the reason behind a controversy between the United States and Germany over implementation of the European Union's Public Utilities Directive⁸¹ and with the European Union as well,⁸² which treats bids within a three percent margin of the lowest-cost bid as "equivalent."⁸³ The three percent provision is suspended in cases where the EU has entered into an international agreement via the same subsection and therefore would presumably not conflict with AGP obligations.

2. External Sovereignty and Inducement

While internal sovereignty concerns the relationship of a governmental purchasing entity to its nationals, external sovereignty concerns the relationship between the contracting sovereign to the nationals (including corporations and enterprises) of other countries. In such cases, there is an extra consideration related to sovereignty, i.e., how any acts or decisions possibly involving external suppliers of goods, supplies and services af-

78. *Id.*; cf. *supra* note 52 and accompanying text (common law act of state doctrine).

79. See, e.g., Friedl Weiss, *Public Procurement Law in the EC Internal Market 1992: The Second Coming of the European Champion*, 37 THE ANTITRUST BULL. 307, 312 (1992) (describing the continental European practice of favoring "national champions" in contract awards).

80. See, e.g., DAM, *supra* note 47, at 204 (characterizing discretionary authority as the "most effective method for discriminating against foreign suppliers" in government procurement). Denial of reviewability under the common law system would be for lack of a sufficient public element, i.e., a law or binding regulation. See *Regina v. The Lord Chancellor*, *supra* note 47. A finding of unreviewability in a civil law system would likely be based on deference paid to the administrative tribunal for its special expertise.

81. *U.S. Lifts Sanctions Against Germany Imposed Over EU Procurement Directive*, 11 Int'l Trade Rptr. (BNA) 434 (Mar. 16, 1994).

82. *U.S., EU Try to Resolve Their Dispute Over Procurement, Agree to More Talks*, 11 Int'l Trade Rptr. (BNA) 564 (Apr. 13, 1994).

83. 1993 O.J. (L 199) 84, art. 36(3).

fect the interests of the country and its nationals. It is no secret that procurement policy takes into consideration national employment levels,⁸⁴ money flows related to balance-of-payments concerns,⁸⁵ industrial development policy,⁸⁶ national security,⁸⁷ and even the return of expenditures to the government by way of national taxation schemes.⁸⁸ Pressure from external sources to liberalize procurement policies is all the more poignant for the fact that it sometimes appears to run counter to the sovereign's (i.e., executive and legislative branches) avowed purpose of fulfilling its trust to its constituency.

Historically, sovereign power, when exercised entirely within the nation's own boundaries, is inviolable against any external challenge not undertaken within the country being challenged.⁸⁹ The sovereign immunity doctrine is one of judicial restraint and dictates that a sovereign cannot be brought before the courts of another nation for acts committed entirely within its boundaries unless the sovereign consents to that exercise of jurisdiction.⁹⁰ While inroads have been made for adoption of a

84. DAM, *supra* note 47, at 200 (protection of local industry). The rise in use of this justification for protectionist procurement policy may be attributed in significant degree to the theory of unemployment developed by John Maynard Keynes in the 1930's, which held that immovable unemployment levels could be stimulated by changes in government expenditure where the economy was not producing at full capacity. See generally JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY (1936).

85. *Id.*

86. *Id.* While industrial policy would affect employment levels generally, it could also be used to change the nature of an economy from, for example, agrarian to industrial.

87. *Id.*

88. See, e.g., 111 CONG. REC. 8607 (1965) (statement of Rep. Saylor) ("[It] has recently been estimated that at least 30 percent of every dollar spent from the sale of the product involved [in a government purchase] eventually goes - through corporate, personal, property, and sales taxes - to Federal, State, and local taxing bodies.") Of course, sales to a government by external concerns would also be subjected to taxation, but the level of taxation of monies in the hands of non-nationals outside the taxing country is arguably more limited, especially where there exists a liberal scheme for repatriation of profits by foreign recipients.

89. This is known as the "territoriality" principle, which is closely connected to the concept of sovereign immunity. See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 11 (1991); see also Lauterpacht, *supra* note 15, at 231-32 (attributing the application of the sovereign immunity doctrine in favor of foreign states to its historical, internal applications rather than solely to concepts of comity and the dignity of foreign states).

90. See *supra* notes 18 & 19 and accompanying text. See also CARTER & TRIMBLE, *supra* note 89, at 549-50; Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1 & n.1 (1993). For a general discussion of the ap-

restrictive rather than an absolute prohibition against the exercise of jurisdiction,⁹¹ there remains considerable objection to the

proach of various countries including Spain, Great Britain, Belgium and the United States to sovereign immunity prior to this century, see Sweeney, *The International Law of Sovereign Immunity*, in CARTER & TRIMBLE, *supra* note 89, at 550-53. The seminal case describing the U.S. position of absolute immunity, which prevailed until 1952, is *The Schooner Exchange*, 11 U.S. (7 Cranch) 116 (1812). As was noted in the context of internal notions of sovereignty in the previous section, there is a long history of judicial hesitation against overstepping the boundaries of sovereign power. See *supra* note 43 and accompanying text. The same hesitation applies to judicial exercise of jurisdiction over foreign sovereign acts, with obvious complications due to the fact that a foreign sovereign is involved. In both cases, legislative (or administrative) pronouncement on waiver of sovereign immunity is a prerequisite to jurisdiction where absolute immunity is recognized.

91. Under the concept of absolute immunity, the jurisdiction question centers upon the nature of the organization or enterprise in relation to the sovereign. The policy of restrictive immunity, which appeared prior to World War II and has gained increasing acceptance ever since, focuses upon the nature of the activity in question rather than on the nature of the organization or enterprises. See Lauterpacht, *supra* note 15, at 222-26. Perhaps the most illustrative example, which also has serious implications in the public purchasing context, is the manner in which European national courts treat state trading enterprises that are authorized to make purchases on behalf of the government. In certain cases, these enterprises act more as market participants than government-authorized agents, and modern thinking is therefore beginning to change in favor of denying recognition of the sovereign immunity doctrine. See generally CHRISTOPH H. SCHREUER, STATE IMMUNITY: SOME RECENT DEVELOPMENTS, 110-18 (1988). For a discussion of modern approaches of courts in Germany, France, the Netherlands, Switzerland, and Italy, see *id.* at 105-10. Canada adopted the restrictive theory in 1982. See *The State Immunity Act*, R.S.C., c.S-18 (1985) (as amended); H.L. Molot & M.L. Jewett, *The State Immunity Act of Canada*, 20 CAN. Y.B. INT'L L. 79 (1982).

The United States has also taken steps to establish jurisdiction of its courts over disputes involving another nation under certain circumstances in the Foreign Sovereign Immunities Act of 1976. See 28 U.S.C.A. §§ 1602-07 (1989 and May, 1996 Supp.). For example, § 1605(a)(2) provides for U.S. court jurisdiction over controversies between private individuals and another government for "commercial activity carried on in the United States," "act[s] performed in the United States in connection with a commercial activity of the foreign state elsewhere," and "upon an act outside the territory of the United States . . . [that] causes a direct effect in the United States." Section 1604, however, recognizes the existence of sovereign immunity except for actions listed in §§ 1605-1607. Similarly, U.S. courts recognize the act of state doctrine even where jurisdiction is otherwise established, which is distinguished from sovereign immunity in that it assesses whether the application of any law other than that of a sovereign before the court would be too intrusive such that recourse to diplomatic channels is more appropriate. See PAUL B. STEPHAN, III, DON WALLACE, JR. & JULIE A. ROIN, INTERNATIONAL BUSINESS AND ECONOMICS: LAW AND POLICY 125, 142 (1993); International Assoc. of Machinists v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354, 1357-61 (9th Cir. 1981), *cert. denied* 454 U.S. 1163 (1982).

trend toward relaxation of the prohibition.⁹² Moreover, international liberalization efforts for matters such as public purchasing must begin from within each country in the form of waiver by international agreement or by legislative or administrative enactment.⁹³ A necessary element for success in achieving a waiver of sovereign immunity is some form of inducement.

The issue is primarily an economic one. Countries with strong manufacturing and professional services bases, and therefore in a position to take advantage of export markets, are at the forefront of the movement to liberalize the international government procurement market.⁹⁴ Unrestricted access to procurement markets in countries whose industries could not (or cannot yet) produce goods and services of equivalent price or quality would be facing net cash flows moving out of the country, i.e., trade imbalances and balance-of-payments problems. Furthermore, the ability to direct government procurement funds to poorer areas, to industries targeted for vital development, or even to patrons of the political regime in power for past and future support is hindered by an open, international public purchasing system.⁹⁵ Maintenance of a closed government pro-

92. In response to this trend, Third-World and socialist commentators have sometimes protested against accepting developed-country liberalization of their approaches to sovereign immunity as *general* state practice (that could become the basis of customary international law) in favor of retaining the notion of absolute immunity. SCHREUER, *supra* note 91, at 4 & n.14. At that time when an international norm develops, it could become customary international law, which is binding on all nations. At present, there is insufficient international consensus on any principles related to international government procurement that could take on the status of customary international law. Liberalization must therefore be instigated by international accord, which is addressed briefly in the section that follows. Cf. Grossman & Bradlow, *supra* note 90, at 1 ("Each sovereign state can only be legally bound by those commitments it willingly makes to other sovereign states, and by those few principles which are viewed as binding on all states.").

93. Lauterpacht, *supra* note 15, at 237.

94. The majority of original participants in the Government Procurement Agreement of 1980 had highly-developed manufacturing and/or professional services industries that could only benefit from further market liberalization. These were Austria, Canada, the European Economic Community collectively, Finland, Japan, Norway, Singapore, Sweden, Switzerland, Hong Kong (by the United Kingdom), and the United States. See Committee on Government Procurement, Report (1982) of the Chairman, presented to the CONTRACTING PARTIES at their thirty-eighth session, 1981-1982, GATT B.I.S.D. (38th Supp.) at 39 (1983).

95. A helpful distinction is that between the primary objective of procurement (best possible value for the money) and secondary objectives (social and political motivations). See ARROWSMITH, GOVERNMENT PROCUREMENT AND JUDICIAL REVIEW, *supra* note 40, at 60-81, 81-106 (making this distinction and using Canadian law and practice as the example).

curement market is therefore understandable, and there exists a variety of mechanisms protecting domestic bidders which are demonstrated in all countries to greater and lesser degrees.⁹⁶ At the turn of the century, the United States did not have a legislative scheme in favor of protecting domestic industry in public procurement, but one was created in the 1930's in response to perceived protectionism on the part of other countries.⁹⁷ On the other hand, the U.S. export base in light of its industrial and manufacturing strength, as well as the economic turmoil of World Wars I- & II-era Europe,⁹⁸ illustrates the underlying motivations.

The question then becomes how to convince countries to adopt liberal public purchasing laws which provide opportunity to bidders of other countries. Entreaties from more highly developed economies that have 'had their day in the sun' are, at least at present, not enough. Guarantees of at least equivalent public contract values could ease fears of falling too far behind in the balance of trade, but the AGP calls for roughly equivalent *access* of bidding opportunity, not for equivalent contract *awards* or *values*. The only inducement that appears to work in this context is to require countries to adhere to the AGP as the price for acceptance into other WTO agreements such as GATT,⁹⁹ which was the case for South Korea.¹⁰⁰ A related mechanism is at work in regard to certain central and eastern European countries, which have been advised that ultimate admission into the European Union, or at least a more substantial regional ar-

96. Perhaps the most effective method for discrimination in government procurement is the vesting of substantial purchasing discretion in administrators. See *supra* note 46. Other methods include offset requirements, technical specifications, and licensing requirements, just to name a few.

97. Martin J. Golub & Sandra Lee Fenske, *U.S. Government Procurement: Opportunities and Obstacles For Foreign Contractors*, 20 GEO. WASH. J. INT'L L. & ECON. 567, 573-74 (1987). This is not necessarily to say that actual practice was completely neutral as to the origin of items and services being procured.

98. See generally CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* 4-10 (1949). Of particular note is the fact that the United States shipped roughly a third of the world's exports while consuming only a tenth of world imports at the conclusion of World War II. *Id.* at 10.

99. Wallace, *supra* note 10. See also, e.g., BUREAU OF NATIONAL AFFAIRS, No. 1883, EXPORT SHIPPING MANUAL 114:21 (June 12, 1991) (U.S. encouragement of Morocco to accede to the 1980 version of the Agreement on Government Procurement as part of its accession to the world trade body).

100. South Korea, though not a party to the 1981 Agreement, has signed the new AGP. Sue Arrowsmith, *Third Country Access to E.C. Public Procurement*, 4 PUB. PROCUREMENT L. REV. 1, 27 (1995). The effective date of AGP for South Korea is January, 1997, one year after the effective date for the other signatories.

rangement with the EU, hinges upon approximation of their laws to those of the EU, including those on public purchasing.¹⁰¹

A more effective mechanism is the use of conditions on the grant of World Bank-related loans and grants which require adherence to sound procurement practices for the projects being financed in whole or in part with World Bank funds. This familiarizes procuring entities with sound (and country-neutral) policies, and it may also require amendments to the national procurement regime of a borrowing nation in order to ensure the proper functioning of the project at hand.¹⁰² As inducement for participation, i.e., the surrender of sovereign authority, the borrowing nation receives monies necessary for infrastructure projects and significant aid to make them work.¹⁰³ Use of the World Bank's standard bidding documents for funded projects serves the same basic purposes. The United Nations Commission on International Trade Law has recently published a model

101. See WHITE PAPER: PREPARATION OF THE ASSOCIATED COUNTRIES OF CENTRAL AND EASTERN EUROPE FOR INTEGRATION INTO THE INTERNAL MARKET OF THE UNION, COM(95) 163 final (March 5, 1995). The proposals set forth therein are intended for use by the "associated countries," being the Central European Free Trade Area countries (Poland, Hungary, the Czech Republic, and the Slovak Republic), Bulgaria, and Romania. The EU's policy on procurement is found in the Annex and is not very detailed, but the overall policy is clearly stated in the body of the White Paper:

[E]xplain[] the purpose and development of legislation in each sector, describing the structures that are necessary to ensure its implementation and enforcement and suggesting the sequence in which legislation in each sector might be tackled. The Commission believes that the emphasis on how to ensure that the legislation is made effective is an important message for the associated countries and one which will be helpful to them and ultimately to an enlarged Union in achieving real rather than simply formal alignment.

Id. § 1.16, at 7.

Poland, Hungary, and the Czech Republic have adopted comprehensive new procurement laws in recent years. See, e.g., The Act of June 10th, 1994, on Public Procurement, as amended July 6, 1995 and Ordinance of the Council of Ministers of December 18, 1994, on Applying Domestic Preferences in Conducting Public Procurements, reprinted in Polish Journal of Law Dz. U. No. 140, Item 776 (Poland).

102. See Grossman & Bradlow, *supra* note 90, at 18-19.

103. An interesting comparison arises between the failed ITO Charter and the Bretton Woods Institutions, which include the International Monetary Fund (IMF) and the World Bank. Aspects of the former were related to creating a non-discriminatory, competitive international trading environment. Inducement for participation was the chance at outperforming other members in export markets, at least in certain sectors, in order to maintain or improve a member's trading position. In contrast, IMF grants and World Bank loans ensure funds for important infrastructure development, albeit with certain conditions.

law for the procurement of goods, services, and construction¹⁰⁴ which provides a helpful backdrop for countries undergoing procurement reform, but it too lacks a particularized inducement mechanism.

Based on the foregoing, it is asserted that the AGP as presently formulated may not bring with it sufficient rewards or assurances for developing and least-developed countries in order to encourage liberalization in national procurement regimes. Before turning to a discussion of sovereignty in the context of the AGP, however, it is necessary to briefly explain how a waiver of sovereign immunity may be accomplished.

B. WAIVER OF SOVEREIGN IMMUNITY IN THE CONTEXT OF INTERNATIONAL GOVERNMENT PROCUREMENT

Because there are no concrete international norms concerning government procurement, sovereigns engaging in public purchasing are only bound to follow open, internationally-oriented procurement practices if they have waived sovereign immunity by international agreement or some form of legislation.¹⁰⁵ In certain cases, nations conducting a truly commercial (rather than a sovereign) function either within, or with direct effects in, another jurisdiction may be found to have waived sovereign immunity if the other jurisdiction follows the restrictive theory of sovereign immunity.¹⁰⁶ On the other hand, most procurements are conducted within the territory of the purchasing government. As a general rule, countries apply their national laws of contract and of procurement to contracts executed in their own territories. Access of foreign bidders to government contracts, as well as protection of successful foreign bidders in the post-award phase, is therefore determined by national laws in the absence of an international accord. Because public opinion is generally in favor of protecting domestic indus-

104. *Official Records of the General Assembly*, U.N. GAOR, 49th Sess., Supp. No. 17, Annex 1, at 58-96, U.N. Doc. A/49/17, reprinted in 34 I.L.M. 718, 721-57 (1995). The UN General Assembly indicated approval of the Model Law and its accompanying guide via Resolution 49/59 of December 9, 1994. Reference is made to the 1994 version which, although similar to a version of 1993, now includes services. The 1993 version and an introductory note are reprinted in 33 I.L.M. 445 (1994).

105. See *supra* note 19 and accompanying text.

106. While a significant number of countries have adopted restrictive immunity theory, others have protested that this is not customary international practice. See *supra* notes 91-92.

try,¹⁰⁷ it is unlikely that a legislature or parliament would of its own accord adopt laws calling for equal treatment of foreign bidders, especially in connection with the *bidding* stages. What is left are international agreements.¹⁰⁸

The best example is the AGP, which requires a defined set of government agencies and departments in each signatory to afford national treatment to bidders of other signatory countries. There are exceptions to this requirement, however, which are addressed below. Most important is the limitation of the AGP's provisions to entities listed in its Annexes, which leaves the majority of public purchasing outside of the AGP framework.¹⁰⁹

Another example is the set of EU Procurement Directives. These directives are also limited: they only bind the members of the EU, a GATT Article XXIV regional arrangement.¹¹⁰ There are now four primary Directives covering procurement of works, services, supplies, and utilities,¹¹¹ together with two Remedies Directives,¹¹² which require EU Members to "bring into force . . .

107. See Weiss, *supra* note 79, at 16-17 ("Public opinion, furthermore, is unflinchingly attached to the popular belief that public expenditure must be used to procure domestic goods and secure domestic employment . . .").

108. Relations with foreign bidders and their governments over access to national procurement markets could be viewed as an issue primarily affecting external relations, which would classify it as matter within the realm of executive rather than the legislative authority. For a brief discussion of the expansion of executive authority in the United States at the expense of legislative authority where the distinction between domestic and international issues is blurred, see Grossman & Bradlow, *supra* note 90, at 7.

109. There are, however, several provisions calling for future liberalization and negotiation. See, e.g., AGP, *supra* note 8, art. XXIV, ¶ 7.

110. See GATT, *supra* note 12, art. XXIV (customs unions and free trade areas provisions).

111. Council Directive 93/37/EEC of 14 June 1993 Concerning the Coordination of Procedures for the Award of Public Contracts, 1993 O.J. (L 199) 54; Council Directive 92/50/EEC of 18 June 1992 Relating to the Coordination of Procedures for the Award of Public Service Contracts, 1992 O.J. (L 209) 1; Council Directive 93/36/EEC of 14 June 1993 Coordinating Procedures for the Award of Public Supply Contracts, 1993 O.J. (L 199) 1; Council Directive 93/38/EEC of 14 June 1993 Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors, 1993 O.J. (L 199) 84. For a general discussion of these Directives, see CHRISTOPHER BRIGHT, PUBLIC PROCUREMENT HANDBOOK 7-82 (1994) (providing an overview of these Directives as well as a sector-by-sector analysis).

112. Council Directive 89/665/EEC of 21 December 1989 on the Coordination of the Laws, Regulations, and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts, 1989 O.J. (L 395) 33; Council Directive 92/13/EEC of 25 February 1992 Coordinating the Laws, Regulations and Administrative Provisions Relating to the Application of Community Rules on the Procurement Proce-

the measures necessary to comply with this Directive . . . [and] communicate to the Commission the texts of the main national laws, regulations and administrative provisions . . ." in regard to earlier versions of the Works and Supplies Directives.¹¹³ The four substantive Directives leave little room for national favoritism above threshold limits contained therein. Moreover, private citizens may pursue actions for breach of these rules under the "direct effects" doctrine if an EU Member fails to implement properly the basic requirements of the Directives such that bidders from other Member countries are not protected by national law.¹¹⁴ In fact, much of the movement toward liberalization in government procurement occurs in Art. XXIV arrangements. For example, Chapter 10 of the NAFTA contains a trilateral procurement regime.¹¹⁵ Even the Central European Free Trade Agreement has a short chapter on procurement, which requires progressive development of regulations by January 1, 2001, in accord with the provisions of the older version of the AGP as amended in 1987.¹¹⁶

dures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors, 1992 O.J. (L 76) 14. See generally PETER-ARMIN TREPTÉ, PUBLIC PROCUREMENT IN THE EC ¶ 701, at 188-200 (1993) (describing the Remedies Directives).

113. Council Directive 89/665/EEC, art. 5, 1989 O.J. (L 395) 33, 35.

114. See generally TREPTÉ, *supra* note 112, ¶ 702, at 190. An EC obligation, such as a directive or regulation, has "direct effect" if "the obligation imposed on member states is clear and precise, unconditional and, in the event of implementing measures, the member states or Community institutions are not given any margin of discretion." *Id.* ¶ 702(b), at 191. See also MARK BREALEY & CONOR QUIGLEY, COMPLETING THE INTERNAL MARKET OF THE EUROPEAN COMMUNITY: 1992 HANDBOOK 107-108 (2d ed. 1991) (describing the means by which one who believes that an EU Member State or public authority has breached its obligations under the Community rules on public procurement may bring a claim). For a discussion of non-EU bidder access to EU procurements generally, see Sue Arrowsmith, *Third Country Access to E.C. Public Procurement: An Analysis of the Legal Framework*, 4 PUB. PROCUREMENT L. REV. 1 (1995).

115. North American Free Trade Agreement, *opened for signature* Dec. 8, 1992, *reprinted in* 32 I.L.M. 289, 613-22 (1993) [hereinafter NAFTA].

116. Central European Free Trade Agreement, Dec. 21, 1992, arts. 1 & 24:2, *reprinted in* 34 I.L.M. 8, 9, 13 (1995). Cf. *infra* note 148 and accompanying text (describing AGP sanction of regional arrangements to encourage economic development of developing and least-developed countries).

II. SOVEREIGNTY UNDER THE AGP

A. STRUCTURAL FRAMEWORK

Unlike GATT 1947 and GATT 1994,¹¹⁷ the focus of participation under the AGP is on the number of procuring agencies and departments contained in each country's schedule of covered entities in Appendix I.¹¹⁸ Covered entities are required to provide national treatment and to follow non-discrimination principles towards bidders of foreign signatory countries.¹¹⁹

By contrast, participation in GATT is defined not in terms of procuring entities, but in terms of trade in goods. Specific GATT obligations arise for all goods contained in each party's Schedules of Commitments,¹²⁰ while general GATT obligations apply to all trade in goods.¹²¹ Although it is more complex, GATS utilizes a unique hybrid of commitments derived from the GATT. The first pillar of GATS provides for general obligations of signatories such as Most-Favored-Nation (MFN) treatment and transparency for all services generally (with the standard litany of exceptions such as national security or balance-of-payments imbalances reasons).¹²² The second provides for a list of negotiated exemptions from MFN coverage necessitated by the belief of many countries that conformity with GATS by its effective date would have been impossible.¹²³ The third aspect of GATS, more like the GATT Schedules of Commitments, positively lists all commitments undertaken *ab initio* for purposes of national treatment and market access.¹²⁴ Comparison of obliga-

117. The starting point for this agreement is GATT 1947. See GATT, *supra* note 12. Annex 1A of the Final Act contains GATT 1994. See FINAL RESULTS, *supra* note 1, at 20. Section 1(a) of GATT 1994 incorporates GATT 1947, while sections 1(b) and 1(c) incorporate changes made to the 1947 version and the new understandings on GATT articles, respectively. GATT 1994 and the Understandings referred to in section 1(c) are reproduced in 33 I.L.M. 1125, 1154 (1994). For ease of reference, citation to articles unaffected by recent changes will not designate the year.

118. AGP, *supra* note 8, art. I, ¶ 1. Each schedule is divided into five Annexes categorized as follows: 1) central governments; 2) sub-central governments; 3) all other entities the signatories choose to list; 4) services to be covered (or not covered) by the agreement; and 5) covered construction services. *Id.* art. I, n.1.

119. *Id.* art. III.

120. GATT, *supra* note 12, art. II.

121. JACKSON, WORLD TRADE, *supra* note 13, § 10.1, at 204.

122. Paul Carrier, *An Assessment of Regional Economic Integration Agreements After the Uruguay Round*, 9 N.Y. INT'L L. REV. 1, 30 (1996).

123. *Id.* at 34.

124. *Id.* at 35-36.

tions found in GATT or GATS to those in the AGP makes clear that the AGP's parameters on trade liberalization are narrower.

The reason behind organizing the AGP around procuring entities rather than the nature of the items procured is not entirely clear. One possibility is that it may be more difficult to define and to list the types of buyers for agreements such as GATT and GATS, whereas it would be simpler to list procuring agencies rather than the myriad of items procured by governments for purposes of the AGP.¹²⁵ Another possibility relates to sovereignty. Three comparisons between the AGP and the GATT and GATS illustrate how the AGP's focus on procuring entities has ramifications for member sovereignty.

First, agreements such as GATT and GATS relate to government intervention in private sector trade.¹²⁶ Their emphasis is on preventing governments from dictating how private enterprises conduct their business rather than on mandating how the government may spend. The very nature of the prohibition is therefore less intrusive on government decision-making powers and sovereignty. In contrast, a finite list of procuring entities which must adhere to the mandates of the AGP permits signatories to choose the level of intrusion. To list goods, supplies, and services instead of procuring entities could more indiscriminately impinge upon sovereignty in government procurement.

Second, the general timbre of GATT, for example, is toward more universal coverage of trade in products. The best example of this is the general obligation of unconditional MFN treatment.¹²⁷ For specific obligations taken under GATT, however, only those contained in the Article II Schedules of Concessions are brought within the purview of GATT.¹²⁸ GATT does not contain any specific duty on the part of signatories to list all goods moving in international trade in the Schedules of Concessions.

125. Early in discussions of procurement policy under the auspices of the Organisation of Economic Cooperation and Development (OECD), a sectoral approach suggested by the United States was rejected. See Morton Pomeranz, *Toward a New International Order in Government Procurement*, 11 LAW & POL'Y INT'L BUS. 1263, 1276 (1979). The level of government ownership in various sectors such as telecommunications and utilities varied greatly between countries such that sectoral coverage would lead to disparate obligations. *Id.*

126. Fried, *supra* note 14, at 41-42.

127. Unconditional MFN, which is the form that GATT adopted, applies to all trade in products regardless whether a specific commitment is undertaken thereon. JACKSON, WORLD TRADE, *supra* note 13, §§ 10.1, at 204; see also A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS, § I-2.4(b), at 54 (Walter Sterling Surrey & Don Wallace Jr. eds., 2d ed. 1977).

128. JACKSON, WORLD TRADE, *supra* note 13, § 10.2, at 205.

Moreover, there is no *a priori* limit on the level of protectionism afforded via tariff at the time when an item is listed in the Schedules.¹²⁹ Instead, the tariff level chosen becomes "bound" and is thereafter subject to reduction during subsequent negotiating rounds over trade liberalization.¹³⁰ This initial flexibility of tariff levels, at least with regard to specific commitments, makes the consequences of participation less severe, which would theoretically ease fear of listing virtually all goods in the Schedules.¹³¹ On the other hand, GATT contains a specific commitment of its participants to convert any quantitative restrictions on imports into tariffs.¹³² This "tarification" is not limited to items in the Schedules;¹³³ general tarification of all barriers to international trade greatly facilitates negotiation over inclusion of previously unbound items. As noted in the last paragraph, the structure of the AGP does not entail the same degree of universality of coverage.

A third difference between GATT and the AGP is the lack of MFN treatment in the latter.¹³⁴ The lack of reciprocity in GATT in light of its generalized, unconditional MFN obligation indicates a desire for universality of coverage notwithstanding the

129. See ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 3 (1987).

130. See JACKSON, WORLD TRADE, *supra* note 13, §10.2, at 205; A LAWYER'S GUIDE, *supra* note 127, § I-2.4(a), at 52-53.

131. On the other hand, unconditional MFN does require that any concession undertaken, whether in the Schedules or not, must be extended to all GATT Contracting Parties. While this has the feature of reducing overall trade barriers generally, it could discourage Parties to the Agreement from undertaking any commitments. See A LAWYER'S GUIDE, *supra* note 127, § I-2.4(b), at 54. Allowing for an initial level of tariff preference in a bound concession, however, would reduce fear of giving up too much by participating in GATT.

In regard to government procurement concessions granted to developing and least-developed countries under the AGP, the MFN obligation to other signatories may now be suspended. See *infra* note 156. Otherwise, developed countries would be hesitant to offer a valuable procurement concession to a developing or least-developed country for fear of having to provide the benefits to all AGP signatories.

132. GATT, *supra* note 12, art. XI, ¶ 1.

133. Cf. *supra* notes 127, 128 and accompanying text (explaining that MFN is a general obligation while other obligations are specific, arising only when a specific commitment is listed in the Schedules of Concessions). Article XI nowhere limits coverage to items listed in the Article II Schedules. Rather, Article XI:2 contains a list of exceptions which suspend the obligation either temporarily in order to prevent critical shortages, for reasons related to public safety and general police powers of the government (standards and regulations), or for reasons related to agricultural or fisheries products.

134. See generally Pomeranz, *supra* note 125, at 1276 (discussing negotiations leading up to creation of the AGP in 1979).

losses a participating country could endure in the face of signatories that benefit from concessions made by other countries but fail to grant their own.¹³⁵ Without MFN treatment, the benefits of commitments taken under the AGP accrue only to signatories of the Agreement.¹³⁶ This not only avoids the "free-rider" problem, but it also functions as an inducement for non-signatories to join the AGP. Moreover, participants of the AGP would theoretically be more likely to increase the level of their commitments as the pool of beneficiaries, at least in the short run, is significantly less extensive than is the case for full WTO disciplines with their MFN obligations. Despite these differences, however, participation in the AGP by the signatories themselves has not been particularly encouraging,¹³⁷ and the level of resistance from non-signatories is significant.¹³⁸ In short, the first and best line of defense for the protection of sovereignty in government procurement utilized by non-members is the decision not to participate.¹³⁹

B. SPECIFIC AGP PROVISIONS

An initial indication of the AGP's impact on sovereignty begins in its Preamble, where use of words and phrases such as "should not," "it is desirable," and "at the highest possible level" are used instead of more substantially assertive terms such as

135. One example of how far developed countries would go to ensure universality of coverage, as opposed to country participation, is illustrated by acceptance of "contributions" from developing countries during the Kennedy Round of GATT negotiations in the form of *promises* to bind existing rates of duties against increase rather than of reduced tariff rates of bound items.

136. See Bernard M. Hoekman & Robert M. Stern, *An Assessment of the Tokyo Round Agreements and Arrangements*, in THE MULTILATERAL TRADING SYSTEM: AN ANALYSIS AND OPTIONS FOR CHANGE 63, 83-84 (Robert M. Stern, ed. 1993).

137. Prior to the new AGP, member country participation in the former agreement was said to encompass roughly ten percent of all government procurement. See H.R. REP. NO. 101-989, at 5 (1990). However, it has been estimated that after the new AGP and conclusion of the Uruguay Round, the value of contracts covered has increased tenfold. Gerard de Graaf & Matthew King, *Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round*, 29 INT'L LAW. 435, 436 (1995); Arrowsmith, *Third Country Access*, *supra* note 100, at 27.

138. See Weiss, *supra* note 79, at 312 (noting "dogged" resistance to greater liberalization in public procurement).

139. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM, *supra* note 129, at 26 ("[I]t is always harder for a government to walk out of a negotiation than it is to refuse to join.").

"shall."¹⁴⁰ Another revealing feature of the Preamble is that the intention to avoid domestic protectionism precedes the desirability of transparency of laws, regulations, procedures, and practices.¹⁴¹ The Preamble's fifth general principle is recognition of "the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries."¹⁴²

Following the primary limitations of the AGP as mentioned above, i.e., the scope and coverage provisions in Art. I as applied to entities listed in Appendix I, the first major indication of a limit to the AGP's reach is the denial of application to "customs duties and charges of any kind . . . , the method of levying [them], other import regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices [falling within the purview of the AGP]."¹⁴³ Inclusion of this language is likely a response to concerns over possible overreaching.

Article V contains the major provisions on special and differential treatment for developing and least developed countries. Signatories are directed to "take into account the development, financial and trade needs" of these countries.¹⁴⁴ This consideration is supplemented by a host of provisions common to other WTO Agreements such as GATT. The first consideration for differential treatment is to safeguard balance-of-payments concerns in order to ensure reserves necessary to national economic development programs.¹⁴⁵ The second recognizes the need to promote domestic industries in important sectors of the economy, including small scale and cottage industries in less developed areas of a country.¹⁴⁶ A third situation requiring differential treatment is the support of industrial units wholly or substantially dependent on government procurement.¹⁴⁷ Article V also directs AGP signatories to encourage economic development through regional or global arrangements acceptable to the

140. AGP, *supra* note 8, preamble ¶¶ 2-4.

141. *Id.* ¶¶ 2-3.

142. *Id.* ¶ 5.

143. AGP, *supra* note 8, art. III, ¶ 3.

144. *Id.* art. V, ¶ 1. Article V differentiates between developing and least-developed countries by calling for particular attention to the needs of the latter. *Id.*

145. *Id.* art. V, ¶ 1(a).

146. *Id.* art. V, ¶ 1(b).

147. AGP, *supra* note 8, art. V, ¶ 1(c). It is possible that this provision is intended to facilitate privatization where such would require gradual withdrawal of government support for success.

Ministerial Conference of the WTO.¹⁴⁸ In addition, developed country signatories are instructed to facilitate increased imports from developing and least-developed countries.¹⁴⁹ The two subsections of Art. V containing these five provisions, entitled "Objectives," do not specifically require that the beneficiaries of these policies are parties to the Agreement.

The remaining subsections in Art. V indicate more clearly that they relate to developing and least-developed *parties* to the Agreement.¹⁵⁰ Article V:3 calls for developed countries to take special consideration of the development, financial, and trade needs of developing and least-developed countries when negotiating and preparing their country lists in Appendix I.¹⁵¹ Developed countries are also directed to endeavor to include in their lists those procuring entities tending to purchase products and services of export interest to developing countries.¹⁵² Developing countries may negotiate exclusions to national treatment by agreement with developed countries.¹⁵³ Countries entitled to special treatment may also modify any commitments undertaken in regard to the Agreement.¹⁵⁴ Finally, developing countries are entitled to technical assistance from developed country parties.¹⁵⁵

There is also a distinction in Art. V between developing and least-developed countries. While the first eleven subsections

148. *Id.* art. V, ¶ 1(d). There are two good examples of preferential, regional procurement policy. The first is found in the Association of Southeast Asian Nations (ASEAN), which grants a two and one-half percent price preference to bidders of member countries in government procurement. UNDERSTANDING ASEAN 285 (Alison Broinowski ed., 1982). The second is in an agreement between the Gulf Cooperation Council States. Under this agreement, member bids must be given at least a 10% price priority over non-member bids. See *Council of Ministers' Decision No. 139 Concerning Implementation of Unified Rules For Giving Priority in Government Purchases to National Products and Products of National Origin in the Gulf Council States*, art. 2(a) (Feb. 23, 1987), available in LEXIS, Intlaw Library, Mdeast File.

149. AGP, *supra* note 8, art. V, ¶ 2.

150. *Id.* art. V, ¶¶ 3-15. These subsections make clear that assistance to and consideration of the special needs of developing and least-developed countries is appropriate. They do not, however, describe any specifics regarding obligations or levels of aid, nor do they tend to impose a collective duty on the signatories. *Id.*

151. *Id.* art. V, ¶ 3.

152. *Id.*

153. AGP, *supra* note 8, art. V, ¶ 4.

154. *Id.* art. V, ¶ 5. These modifications must be made according to the requirements of Article XXIV:6 or by special agreement with the Committee on Government Procurement. *Id.*

155. *Id.* art. V, ¶¶ 8-10.

concentrate on developing countries, subsections 12 and 13 specifically address least-developed countries. Subsection 12 calls attention to a GATT 1947 Decision of the Contracting Parties for affording special treatment to least-developed member countries.¹⁵⁶ It also permits signatories to grant AGP benefits to non-member, least-developed countries.¹⁵⁷ Developed country signatories must also provide assistance, including assistance in compliance with technical regulations and standards, to potential bidders from least developed countries upon request.¹⁵⁸

Article V concludes by calling for the Committee on Government Procurement to conduct annual reviews of the operation and effectiveness of the Article,¹⁵⁹ and encouraging developing country signatories to consider the possibility of extending their Appendix I coverage with regard to any changes in their economic, financial, and trade situations.¹⁶⁰

While Article XVI proscribes the use of offsets,¹⁶¹ it does permit developing countries acceding to the Agreement to negotiate offsets under certain conditions: 1) the conditions may only be used for qualification to participate in the procurement process and not as criteria for making the award; 2) the conditions must be objective, clearly defined, and non-discriminatory; and 3) they must be set forth in the country's Appendix.¹⁶²

The AGP's remedy provisions are also of major importance. Award challenges are to be handled by a country court or other impartial and independent review body (i.e., internal review), albeit with qualifications regarding the nature of review as a matter of first instance.¹⁶³ Under Art. XXII, if a bid challenge is not

156. *Id.* art. V, ¶ 12 (referring to Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 203 (1980)). The cited decision mandates that developed countries must "exercise the utmost restraint in seeking any concessions or contributions for commitments [by least-developed countries]." Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) ¶ 6, at 204 (1980). The decision also specifically negates any intention of the developed countries to expect some form of reciprocity in liberalization from developing countries and permits suspension of the MFN obligation otherwise operative when favor is paid to developing countries. *Id.* ¶¶ 5-6, at 204.

157. AGP, *supra* note 8, art. V, ¶ 12.

158. *Id.* art. V, ¶ 13.

159. *Id.* art. V, ¶ 14.

160. *Id.* art. V, ¶ 15.

161. *Id.* art. XVI, ¶ 1.

162. AGP, *supra* note 8, art. XVI, ¶ 2.

163. *Id.* art. XX, ¶¶ 2-7. For a discussion of remedies under the AGP, see Mary Footer, *Remedies Under the New GATT Agreement on Government Pro-*

adequately resolved by a tribunal in the procuring country, the dispute may be taken to the WTO's Dispute Settlement Body. The dispute settlement provisions of the AGP are used in conjunction with those of the DSU, but with two differences: they provide for a decision within twenty days of a DSB's establishment,¹⁶⁴ and remedies of national reviewing bodies may be limited to the costs of bid preparation or protest.¹⁶⁵

Other major provisions of the AGP which respect national sovereignty and are applicable to all signatories are contained in Article XXIII. Parties may take action or withhold information for the purpose of protecting essential security interests indispensably related to arms, ammunition, and war materials; to national security; or to national defense.¹⁶⁶ As long as protective measures are not arbitrary, unjustifiably discriminatory, or disguised restrictions on international trade, the signatories may also take special measures for the protection of morals, order or safety, the life and health of humans, animals and plants, intellectual property, or procurements involving handicapped persons, philanthropic institutions, or prison labor.¹⁶⁷ Finally, the parties may deny the application of their obligations under the Agreement to particular countries also members if such intent is manifested either at the time of acceptance of obligations or upon the accession of a new party thereto.¹⁶⁸

curement, 4 PUB. PROCUREMENT L. REV. 80 (1995). A new feature of this bid challenge system is the ability of a private individual, rather than the individual's country, to seek and receive a remedy. Ordinarily, it is the country which brings a challenge to the WTO (and to the GATT Secretariat before the existence of the WTO). See also Bernard M. Hoekman & Petros C. Mavroidis, *The WTO's Agreement on Government Procurement: Expanding Disciplines, Declining Membership?*, 4 PUB. PROCUREMENT L. REV. 63, 69-73 (1995) (describing enforcement mechanisms in the AGP).

164. AGP, *supra* note 8, art. XXII, ¶ 4. The alacrity with which decisions are to be made for purposes of this Article, as well as for those of the national reviewing bodies of Article XX, is based on the nature of government procurement. If a contract is awarded and work begins, it is very difficult to rescind in favor of the frustrated bidder. The successful bidder may have begun performance in reliance on the contract, and in the case of large construction or supply contracts, may have even involved subcontractors with which it has some contractual obligation. Speed is required if an improper bid is to be set aside, to prevent any detrimental reliance thereon.

165. *Id.* art. XX, ¶ 7(c).

166. *Id.* art. XXIII, ¶ 1.

167. *Id.* art. XXIII, ¶ 2.

168. AGP, *supra* note 8, art. XXIV, ¶ 11.

III. ANALYSIS

The AGP contains the several exceptions to coverage for matters of national defense and sensitive public protection concerns. Article V of the AGP contains a list of familiar GATT-styled matters to which developed country signatories are to be sensitive.¹⁶⁹ The AGP does not specifically provide for "secondary" concerns¹⁷⁰ related to matters such as industrial development policy, national employment concerns, and social policies other than those regarding the handicapped, philanthropic institutions, and prison labor. Instead, there are generalized provisions taking into account the "development, financial and trade" needs of developing and least-developed countries¹⁷¹ that impose an individual rather than a collective obligation on developed-country signatories. In short, the AGP does not institutionalize the type of protection afforded the secondary concerns of developing and least-developed countries, in the manner of the GATT. The response of many countries is non-participation; for signatories, it is a reluctance to increase coverage in Appendix I's list of procuring entities subject to AGP provisions. These ongoing problems demonstrate that it may be time to re-think the structure of the AGP.

The inefficacy of the AGP as presently organized is underscored by a recent indication of U.S. policy that increased participation in the AGP by countries that have not yet signed the Agreement is not feasible in the short run.¹⁷² Citing the view

169. *Id.* art. V, ¶ 1. The GATT contains four major suspensions of obligation, known as "safeguard" or "escape" clauses: Article XII (Balance of Payments); Article XIX ("temporary" Emergency Actions on Imports for situations that may cause "serious injury" to domestic products); Article XX (General Exceptions, i.e., protection of life, health and morals provisions); and Article XXI (Security Exceptions). See GATT, *supra* note 12, arts. XII, XIX, XX-XXI. The reason why these provisions are included in the GATT, and the AGP for developing and least-developed countries but *not* for developed-country signatories, is presumably that GATT coverage is intended to be more universal, whereas AGP coverage arises for only the limited number of procuring entities listed. Developed country signatories may obviate the necessity of GATT-styled escape clauses by limiting the number and type of procuring entities contained in Appendix I of the AGP.

170. *See supra* note 95.

171. *See supra* notes 143-49 and accompanying text.

172. *See* United States Trade Representative, *U.S. Nonpaper on WTO Government Procurement*, reprinted in INSIDE U.S. TRADE, Mar. 22, 1996, at 30. *See also* Developing Countries Cool to U.S. WTO Procurement Proposal, INSIDE U.S. TRADE, June 21, 1996, at 1, 34-35 (noting caution of many countries regarding the scope and purpose of such an agreement). United States Trade Representative, *Further Ideas on a WTO Government Procurement Initiative: Second Non-*

that AGP requirements are "too administratively rigid and burdensome,"¹⁷³ the short-term focus is on "transparency, openness and due process," which will in turn facilitate progressive application of the AGP's national treatment and market access obligations.¹⁷⁴ In addition, U.S. Trade Ambassador Michael Kantor recently delivered a speech indicating that the AGP is "excessively rigorous," and stating an intention to promote "transparency and due process in . . . government procurement activities."¹⁷⁵ The fact that transparency was viewed as the "key mechanism" for improvement in international procurement opportunity in the 1979 version of the AGP¹⁷⁶ underscores the lack of significant progress in overall liberalization under the AGP.

The AGP Members and the Committee on Government Procurement should consider creating a side-agreement or new annex to the AGP which permits the use of domestic price preferences by developing and least-developed countries in order to induce increased participation in the Agreement.¹⁷⁷ World Bank institutions generally permit domestic price preferences, which is consistent with their policy of emphasizing the development of infrastructure and competitive capacity rather than pure competition.¹⁷⁸ When members of a new Agreement are in

Paper from the United States Delegation, reprinted in INSIDE U.S. TRADE, June 21, 1996, at 35-36.

173. United States Trade Representative, *U.S. Nonpaper on WTO Government Procurement*, *supra* note 172, at 31.

174. *Id.*

175. Michael Kantor, Remarks Prepared for Delivery, Emergency Committee for American Trade (March 6, 1996) (on file with the MINN. J. GLOBAL TRADE) (focusing on bribery and corruption generally within the context of the United State's international trade position).

176. See, e.g., David V. Anthony & Carol K. Hagerty, *Cautious Optimism as a Guide to Foreign Government Procurement*, 11 LAW & POL'Y INT'L BUS. 1301, 1323-27 (1979).

177. Several authors have already raised the possibility of this option as a way to increase participation in the AGP. See Hoekman & Mavroidis, *supra* note 163, at 76-77; Paul Carrier, *Domestic Price Preferences in Public Purchasing: An Overview and Proposal of Amendment to the Agreement on Government Procurement*, 10 N.Y. INT'L L. REV. (forthcoming 1997).

178. See, e.g., WORLD BANK, *GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS* app. 2, cl. 5 & 7, at 49-50 (1995) (providing for up to a fifteen percent preference for domestic manufactures, and up to seven and one-half percent in cases of works contracts in countries where Gross National Product falls below a specified threshold). An exception is the European Bank for Reconstruction and Development, which does not include any provisions on domestic price preferences. See IBRAHIM F.I. SHIHATA, *THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, A COMPARATIVE ANALYSIS OF THE CONSTITUENT AGREEMENT* 57 & n.19 (1992).

a better competitive position, they or certain of their procuring entities can be graduated to the AGP as presently formulated. No matter how the levels of price preference are set, this would provide countries that have not signed the Agreement with a level of discretion that would ease fears over the complete loss of sovereignty. The benefits to signatories would include the following: 1) more countries would be subject to concerted international efforts toward further liberalization of procurement under the auspices of the AGP and ultimately, of the WTO; 2) more procuring entities of every participant, and eventually, of all WTO Members, would be subjected to AGP-style practices and regulations; 3) the forms of protectionism could be limited to price preferences, to the exclusion of other mechanisms such as offsets and technical specifications, 4) the levels of protectionism would be capped at the levels of preference, thereby permitting the benefits of free trade and specialization to operate above the levels of preference; 5) procurement systems would naturally become more transparent as participation increases; and 6) there would be a more solid, multilateral framework upon which further negotiations would be based. In the long run, international government procurement could more quickly be brought under a truly multilateral structure, which in turn would qualify it as a full WTO discipline.

At first blush, a proposal of this nature may seem radical. To the contrary, this proposal is based on the workings of GATT, where "tariffication" is replaced by the domestic price preference. The GATT system has been tremendously successful: world-wide tariff levels have fallen from a World War II-era forty percent to a current level of approximately five percent,¹⁷⁹ and includes a majority of nations as signatories. Unlike GATT, however, the AGP has only added a handful of new signatories since its inception fifteen years ago. This lack of participation signals a problem. Changes made to the AGP during the Uruguay Round have increased coverage over more government purchasing entities, yet this coverage is between the original cast of players. It could be argued that AGP Art. V:4 may ease fears over the loss of sovereignty by permitting countries to negotiate exceptions to national treatment and to list the derogations in their Appendix. Exclusions of this nature appear to be the exception rather than the rule, however.¹⁸⁰ Initially permitting price preferences generally, with a concomitant obligation

179. THE GATT URUGUAY ROUND, *supra* note 3, at 706 & n.4.

180. *But cf. supra* note 153 and accompanying text.

to lower preference levels during subsequent negotiations, would more adequately address concerns that have kept developing and least-developed countries outside the fold.

CONCLUSION

Despite increased coverage of the AGP over procuring entities in signatory countries, the level of country participation has not increased significantly since inception of the AGP in 1981. Gains are being made in regional arrangements, but it is by no means certain whether they will translate into multilateral improvements under the auspices of the AGP. An amendment to the AGP, allowing a certain degree of protectionism in public purchasing *ab initio*, would result in increased participation by developing and least-developed countries. If successful, the long-term benefits should exceed any short-term difficulties or setbacks. Moreover, the proposed amendment to the AGP would utilize a system with which most countries are familiar: one analogous to the GATT and its system of tariffication. The success of the GATT in lowering tariffs world-wide bodes well for the use of a similar system in government procurement targeting price preferences in lieu of tariff levels. This system could be a workable compromise between the goal of trade liberalization and concerns over sovereignty which have historically prevented participation in the AGP.