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Incrementalism: Eroding the Impediments to a Global Public Procurement Market

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INCREMENTALISM: ERODING THE IMPEDIMENTS TO A GLOBAL PUBLIC PROCUREMENT MARKET

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ABSTRACT

Following decades of international negotiations and agreements, the world's multi-trillion-dollar public procurement market appears to be maturing into a free, open international market. To reach that point, nations must lower a broad array of barriers to trade in procurement. As the U.S. experience demonstrates, purchasing agencies, laboring under the constraints of domestic preferences, may effectively seek to promote free trade. At the same time, a variety of international organizations, from the World Trade Organization to Transparency International, have developed tools and instruments—including model codes and explicit nondiscrimination agreements—that ease barriers to trade in procurement. To accelerate the erosion of these barriers, this Article suggests assessing progress in four potentially overlapping steps: nondiscrimination, a political decision; harmonization, an effort to coordinate the international instruments; rationalization, an effort to enhance the efficiency of regimes launched under the international instruments; and, institutionalization, an integration of the evolving international procurement norms into the legal fabric of the nations entering the international free market in procurement.

INTRODUCTION

After centuries of isolationism, the world's public procurement markets are emerging as a progressively integrated, open market. This trend accelerates as nations agree—by treaty, agreement, and practice—to open their respective procurement markets to outside competition. Trade liberalization in this sphere remains controversial,[1] as

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1. Because our focus is limited to public procurement, we do not endeavor here to catalogue the literature favoring free trade. Conversely, we remain cognizant that the free trade literature is

many states, particularly developing nations,[2] fear that opening their markets will expose domestic industries to crushing competition. Experience suggests, however, that by opening their procurement markets, nations serve their own procurement systems and domestic economies by gaining access to a richer and more diverse pool of goods and services, often at more competitive prices. Concomitantly, these states benefit as foreign markets open to their own producers. Opening an increasing number of public procurement markets may be the most important development in procurement today. Although it is an encouraging trend, the process likely will require at least a generation to mature.

As this process unfolds, individual states must identify the barriers to foreign contractor entry posed by domestic procurement rules. Public procurement law—especially the legal regimes that govern public contract formation[3]—often erects a dense, twisted web of rules, which

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not uniformly accepted. *See, e.g.*, David Wessel & Bob Davis, *Pain From Free Trade Spurs Second Thoughts*, WALL ST. J., Mar. 28, 2007, at A1 (noting that a critique of free trade by economist, former Federal Reserve Board vice chairman, and perennial free-trade advocate, Alan S. Blinder "comes as public skepticism about allowing an unfettered flow of goods, services, people and money across borders is intensifying, including some Republicans as well as many Democrats"). Further,

> [Blinder suggests that] a new industrial revolution—communication technology that allows services to be delivered electronically from afar—will put as many as 40 million American jobs at risk of being shipped out of the country in the next decade or two [, and that's] . . . "only the tip of a very big iceberg . . . ." Mr. Blinder's answer is not protectionism . . . . He wants government to do far more for displaced workers . . . [and h]e thinks the U.S. education system must be revamped so it prepares workers for jobs that can't easily go overseas, and is contemplating changes to the tax code that would reward companies that produce jobs that stay in the U.S.

Id.

2. For example, an informative contrast to the prevalent Western free-trade literature can be found in the India-based Consumer Unity & Trust Society Centre for International Trade, Economics & Environment ("CUTS CITEE"). CUTS CITEE's "philosophy is 'liberalisation yes, but with safety nets.'" *See generally* CUTS Centre for International Trade, Economics & Environment, http://www.cuts-citee.org/.

3. In the United States, clear legal and pedagogical lines distinguish between the *formation* and the *performance* (or administration or management) of a government contract. Briefly, the formation process begins with acquisition planning, revolves around the government's solicitation (e.g., invitation for bids, request for proposals, or request for quotations), depends in large part upon the government's evaluation criteria (e.g., lowest price technically acceptable, best value, or proven past performance), and concludes with the selection of a contractor and award of a contract. Typical legal challenges during all phases of this process—whether alleging inequities or ambiguities in the solicitation, restrictions on competition, or award improprieties—are known as

may impede (and frequently intimidates) potential foreign entrants. As international instruments focused on public procurement emerged over the past few decades, most were intended, at least in part, to ease those artificial barriers to entry.

At a broad, conceptual level, this market-opening initiative appears to proceed in four somewhat irregular phases. First, and perhaps most controversially, states must embrace *nondiscrimination* as a policy that will, on balance, benefit those nations that adopt it. This is a highly political calculation, and it may take decades for some nations to acknowledge and accept it. Second, to facilitate market-opening, the instruments for international cooperation on procurement should be *harmonized*. This nascent process appears to be gaining momentum through various international agreements and structures. Harmonization itself reduces barriers to trade because it reduces transaction costs for vendors crossing borders. Simultaneously, harmonization eases the transition to a common procurement market, based on common instruments. Third, as states harmonize their public procurement instruments, rather than using the *lowest common denominator* (typically, corruption control) as a baseline, these instruments should be *rationalized* to ensure *optimal* procurement functions. Doing so will pay dividends through enhanced efficiency and, at a political level, will lend the rationalized instruments more legitimacy as a tool for development.[4] Fourth, the regulatory regimes shaped by the instruments should be *institutionalized,* to integrate the new rules into the fabric of

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bid protests or disappointed offeror litigation. Contrast this with the performance phase, in which the contract, replete with standard remedy-granting clauses intended to anticipate every conceivable contingency, defines the contracting parties' responsibilities to, for example, perform a service or deliver a good in exchange for the payment of money, which fulfills the government's obligation and concludes the relationship. Contract disputes that arise during performance may involve, for example, delays, failure to comply with specifications, and modifications to, or termination of, the contract.

4. Two leading economists put the case for efficient procurement markets this way:

> Efficiency in government procurement is of importance in ensuring that the best value for money is obtained by public entities. Procurement practices also figure prominently in the way that many potential investors and civil society view a country. Ensuring transparency of the procurement process is an important determinant of efficiency insofar as it enhances the contestability of public procurement markets (by giving all qualified potential suppliers a chance to bid). If procurement procedures are opaque and discretionary, the incentive for firms to enter into a market are typically reduced. The same problem arises if it is possible for firms to obtain "preferred status" through bribery of officials and potential entrants do not know how to "play by the rules of the game."

each nation's existing procurement law.

Our aim here is not mere advocacy for open procurement markets, although we favor such a result. The case for open public markets, ultimately, is a simple one for economists, agency procurement officials, and elected officials to make. Rather, our modest goal is to describe the critical legal and practical milestones as the historically chaotic and balkanized collection of protectionist public procurement regimes[5] evolves toward a unified, open, and ultimately global market.

Accordingly, we begin, in Part I, by opining that, despite the never-ending succession of acquisition reform initiatives in the United States and abroad, the most significant development in public procurement today may be the incremental opening of an increasing number of public procurement markets across the globe. Although this nascent trend necessarily will span decades, and no doubt will proceed in fits and starts, we are heartened by what we perceive as increasing momentum. For the trend to accelerate, states must not only identify, but overcome, longstanding and often instinctively erected barriers to entry. Part II discusses the identification of individual states' procurement rules that both explicitly and implicitly serve as barriers to foreign firms' entry into those states' domestic procurement markets. Part III traces the role that certain legal and policy instruments may play in opening world procurement markets. We discuss three types of instruments that, intentionally or fortuitously, may liberalize international procurement markets: (1) model procurement codes or model statements of principle; (2) procurement guidelines imposed by central financial institutions; and (3) binding international agreements or directives that require nondiscrimination. Finally, in Part IV, we offer a rubric or four-stage process through which we expect the global procurement market to pass in order to fully achieve openness. These potentially overlapping stages include: (1) acceptance of nondiscrimination (in lieu of protectionism) as a norm; (2) harmonization of the fundamental aspects of public procurement regimes; (3) rationalization of procurement practices in the pursuit of commonly accepted

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Simon J. Evenett & Bernard M. Hoekman, *International Cooperation and the Reform of Public Procurement Policies* 32 (World Bank Policy Research, Working Paper No. 3720, Sept. 2005), *available at* http://ssrn.com/abstract=821424.

5. Federico Trionfetti, *Discriminatory Public Procurement and International Trade*, 23 WORLD ECONOMY 57, 73 (2000), *available at* http://www.univ-paris13.fr/CEPN/1467_9701_00262.pdf ("[G]overnments exhibit consistently lower import share than the private economy. This evidence supports the hypothesis that government purchases are home biased.").

aspirations for successful procurement regimes, such as achieving value for money, efficiency, and customer satisfaction (rather than, in contrast, wealth distribution); and (4) institutionalization or the incorporation of harmonized, rationalized agreements into the legal fabric of the states that adopt these procurement practices. We optimistically conclude that liberalized procurement markets will enhance the value of money states expend procuring goods and services and, as a result, will provide better service to the constituencies those states ultimately serve.

I. THE IMPORTANCE OF OPENING THE INTERNATIONAL PROCUREMENT MARKET

There are many reasons to open the international procurement market, including, of course, the sheer size of the market and its impact upon both the public and private sectors.[6] The Organisation for Economic Cooperation and Development ("OECD") estimated that total world procurement amounted to approximately $5.5 trillion in 1998.[7] During fiscal year 2007, the United States federal procurement market alone will account for approximately $400 billion,[8] an amount that reflects continued growth on top of the roughly 75 percent increase experienced from FY2000 to FY2005.

As governments increasingly rely upon the private sector to perform governmental functions, we expect this trend of public procurement

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6. "Government procurement ranges from eight to ten percent of the gross domestic product of major OECD countries, and this share is even larger in developing countries." Hiroshi Ohashi, *Effects of Transparency in Procurement Practices on Government Expenditure: A Case Study of Municipal Public Works*, http://www.mfj.gr.jp/lunch_seminar/documents/ohashipaper.pdf. "Government procurement . . . typically accounts for between 12 and 19% of EU Member State's [GDP]." UK Department of Trade & Industry, http://www.dti.gov.uk/europeandtrade/key-trade-issues/procurement/page23706.html; "Such purchases [of goods, works and services] by public bodies represent about 14% of the EU's total [GDP]." International Local Government Association, Public Procurement, http://international.lga.gov.uk/european_work/democracy/public Procurement/index.html.

7. *See* ORG. FOR ECON. COOPERATION AND DEV., THE SIZE OF GOVERNMENT PROCUREMENT MARKETS 25, 34 (2002) [hereinafter OECD REPORT], *available at* http://www.oecd.org/dataoecd/34/14/1845927.pdf.

8. "Each year Federal agencies spend nearly $400 billion for a range of goods and services to meet their mission needs." ACQUISITION ADVISORY PANEL, REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 1 (Draft Final Report, Dec. 2006) [hereinafter AAP DRAFT REPORT], *available at* http://www.acquisition.gov/comp/aap/documents/DraftFinalReport.pdf. Of course, these figures exclude procurement by the fifty States, municipalities, and regional authorities.

U.S. FEDERAL PUBLIC PROCUREMENT FISCAL YEARS 2000-2005[9]

Fiscal Year	Transactions (in millions)	Dollars (in billions)	Percentage increase
2005	10.8	$382	10.2
2004	10.5	$346	13.5
2003	11.5	$305	22.1
2002	8.65	$250	6.5
2001	11.4	$234	7.3
2000	9.8	$218	–

growth to continue.[10]

By necessity, market-opening agreements typically are reciprocal. Thus, a nation's decision to open its domestic market will almost always increase that nation's firms' access to the vast international public procurement market. More robust opportunities in industrialized nations' procurement markets suggest that developing nations have more to gain from reciprocal access to procurement markets in industrialized nations.[11] The alternative—leaving a domestic market closed—may impose significant costs on the protectionist nation, both in terms of paying higher prices to less efficient domestic firms or, more often, foreclosing access to superior goods and services. Moreover, protection-

9. *See* Federal Procurement Data System – Next Generation, https://www.fpds.gov (click on "Trending Analysis Report for the Last 5 Years" link). For more statistical data, see also FedSpending.org, recently created by OMB Watch, at http://www.fedspending.org.

10. The recent draft report from the distinguished Acquisition Advisory Panel chronicled the government's transition, in the span of a single generation, from a purchaser of supplies to a service consumer:

> Services now comprise a greater percentage of the government's acquisition budget. Between 1990 and 1995 the government began spending more on services than goods. Currently, procurement spending on services accounts for more than 60% of total procurement dollars. In FY 2005, DOD obligated more than $141 billion on service contracts, a 72% increase since FY 1999.

AAP DRAFT REPORT, *supra* note 8, at 2-3 (footnotes omitted).

11. *See* OECD REPORT, *supra* note 7, at 23, 25 (noting that in 1998, government expenditures in OECD countries totaled $4.7 trillion versus $0.8 trillion in non-OECD nations); *see also* Bernard M. Hoekman & Petros C. Mavroidis, *The World Trade Organization's Agreement on Government Procurement* 4-5 (World Bank Policy Research, Working Paper No. 1429, Mar. 1995), *available at* http://econ.worldbank.org/external/default/main?ImgPagePK=64202990&entityID=000009265_3970311121546&menuPK=64168175&pagePK=64210502&theSitePK=544849&piPK=64210520.

ist policies ignore the realities of the global marketplace, particularly in the context of commercial items, where firms unavoidably depend upon a global supply chain. While the topic remains unsettled and controversial,[12] past studies have identified welfare losses in those countries with high barriers to procurement trade.[13] Indeed, as the U.S. experience discussed below shows, customer agencies may resist domestic preferences more aggressively than their elected leadership, as they more acutely feel the pinch of those welfare losses.

II. Procurement Rules as (Inherently Unstable) Barriers

Procurement rules serve as explicit and implicit barriers to foreign firms' entry into domestic procurement markets. Professor Sue Arrowsmith's authoritative text, *Government Procurement in the WTO*, describes four relevant categories of procurement rules that serve as barriers to nations' procurement markets. These are: (1) measures to provide domestic industry with a competitive advantage; (2) secondary objectives of a non-economic nature; (3) illegitimate practices including corruption, nepotism, and patronage; and, (4) conventional domestic procurement rules concerned with the "commercial" aspects of procurement and efforts to achieve an efficient domestic procurement process.[14] Drawing on the U.S. experience, we employ this conceptual structure to demonstrate why fissures are emerging in these rules-based barriers.

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12. *See, e.g.*, Hoekman & Mavroidis, *supra* note 11; Simon J. Evenett & Bernard Hoekman, The WTO and Government Procurement (2006) (providing a very accessible review of the economic literature on discrimination in procurement); George Deltas & Simon J. Evenett, *Quantitative Estimates of the Effects of Preference Policies* (2000), *reprinted in* Evenett & Hoekman, *supra*, at 302 ("price preference policies generate at best only marginal improvements in social welfare . . . . However, even small price preferences are found to generate substantial increases in the domestic firm's expected profits . . . ."); Vivek Srivastava, *India's Accession to the Government Procurement Agreement: Identifying Costs and Benefits* (2003), *reprinted in* Evenett & Hoekman, *supra*, at 460.

13. *See, e.g.*, OECD Report, *supra* note 7, 15-17 (reviewing literature on costs of domestic preferences); Sue Arrowsmith, Government Procurement in the WTO 8-11 (2003); *see* Robert E. Baldwin & J. David Richardson, *Government Purchasing Policies, Other NTB's, and the International Monetary Crisis* (1972), *reprinted in* Evenett & Hoekman, *supra* note 12, at 235 (economic modeling to show relatively marginal impact of U.S. procurement preferences on overall trade deficit); Aaditya Mattoo, *The Government Procurement Agreement: Implications of Economic Theory* (1996), *reprinted in* Evenett & Hoekman, *supra* note 12, at 276 (predicting that GPA members may be willing to forego nondiscrimination in favor of other transparency and efficiency gains as other nations join GPA).

14. *See* Arrowsmith, *supra* note 13, at 13-19.

A. *Measures to Protect Domestic Industry: Assessing Developments Under the Berry Amendment's Specialty Metals Ban*

One common form of trade barrier is those explicit *measures to provide domestic industry with a competitive advantage over foreign competitors.* Historically, "the United States operated significant overt policies, generally embodied in legislation"—the Buy American Act[15] is the most obvious example—"whilst the policies of many of its major trading partners, including most European states, were more covert."[16] The obvious preferences (and barriers) raised by the Buy American Act have, for the most part, been overtaken by the United States' obligations under the World Trade Organization (WTO) Government Procurement Agreement, discussed below.[17]

Throughout the U.S. procurement system, however, less obvious domestic preferences continue to thrive.[18] Recently, for example, the U.S. Congress made substantial revisions to the Berry Amendment,[19] a decades-old piece of legislation which requires the U.S. Department of Defense to purchase certain items only from U.S. producers, including

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15. *See generally* 48 C.F.R. § 25.100-.105 (citing 41 U.S.C. §§ 10a - 10d and Exec. Order 10582 (Dec. 17, 1954)). Title 48 of the C.F.R. is the Federal Acquisition Regulation (FAR) system, "established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the . . . [FAR], which is the primary document, and agency acquisition regulations that implement or supplement the FAR." 48 C.F.R. § 1.101. The current, official version of the FAR is available online through Acquisition Central, *www.acquisition.gov*, the Federal government's single-point-of-entry for the acquisition community, at http://www.acquisition.gov/far/.

16. ARROWSMITH, *supra* note 13, at 15.

17. See *infra* text accompanying notes 127-31.

18. *See* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROC. L. REV. 103 (2002).

> [W]ealth distribution is merely a subset of the larger phenomenon of burdening the procurement process (or, for that matter, the process of governing) with efforts to promote social policies. These social policies, in addition to those that potentially distribute wealth to domestic manufacturers, essential military suppliers, and small (and small disadvantaged and women-owned) businesses, also mandate drug-free workplaces, occupational safety standards, compliance with labor laws, [and] preferences for environmentally friendly purchasing practices . . . .

Id. at 108 n.28.

19. The so-called Berry Amendment was handled as an amendment to appropriations acts for many years, until Congress passed section 832 of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. 107-107, 115 Stat. 1012, 1019 (codified at 10 U.S.C. § 2533(a) (2007)).

clothing and specialty metals, the subject of recent legislation.[20]

With regard to specialty metals, the Berry Amendment poses enormous compliance challenges for the Department of Defense and its contractors.[21] Titanium and certain alloys, for example, are critical to the sophisticated electronics and weapons systems regularly procured by the U.S. military. Yet these and other specialty metals covered by the current ban are often, according to industry, difficult to access in the domestic U.S. market, and the Defense Department has scrambled to make sense of the Berry Amendment's blanket ban.[22]

1. A Troubling but Informative Anecdote

The Berry Amendment's ban on specialty metals offers an interesting case study in domestic-content requirements for several reasons. First, because it calls for domestic specialty metals in a highly mechanized military, the requirement intrudes into almost every corner and crevice of the defense complex, wherever specialty metals are used—from aircraft to weapons to computers. Unlike other domestic-content requirements that simply lend domestic products a price preference (such as the requirements of the Buy American Act), the Berry Amendment wholly bars the Defense Department from buying any item that contains foreign specialty metals absent exceptional circumstances. Second, the pervasive impact of the absolute bar against foreign specialty metals divides the U.S. specialty metals industry from the Defense Department and its major contractors.[23] Third, the debate shows how a global economy reorders the politics of domestic prefer-

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20. *See* Christopher R. Yukins, Feature Comment, *Procurement Reform in the Defense Authorization Act for Fiscal Year 2007—A Creature of Compromise, Pointing the Way to Future Debates*, 48 GOV'T CONTRACTOR ¶ 367 (2006). *See generally* John W. Chierichella & David S. Gallacher, Feature Comment, *Specialty Metals and the Berry Amendment—Frankenstein's Monster and Bad Domestic Policy*, 46 GOV'T CONTRACTOR ¶ 168 (2004).

21. This is not the first time that aspects of the Berry Amendment have bedeviled the defense procurement process. *See generally* Steven L. Schooner, Feature Comment, *Buying the "Black Beret": Balancing Customer "Needs" and Socio-Economic Policies*, 43 GOV'T CONTRACTOR ¶ 158 (2001) (discussing a congressional mandate involving domestic manufacture of military uniform items).

22. *See, e.g.*, *Air Force Failed to Follow Policy on Berry Amendment Waivers*, 2 INT'L GOV'T CONTRACTOR ¶ 79 (2005).

23. *See* Roxana Tiron, *U.S. Titanium Industry Defending its Territory*, THE HILL, Mar. 16, 2006, *available at* http://www.hillnews.com/thehill/export/TheHill/News/TheExecutive/031606_titanium.html; Roxana Tiron, *Specialty-Metals Industry Clashes with Defense Giants, Pentagon*, THE HILL, May 16, 2006, *available at* http://www.hillnews.com/thehill/export/TheHill/Business/051606_barry.html; Roxana Tiron, *Glint of Steel in Clash over Specialty Metals*, THE HILL, June 13, 2006, *available at* http://www.hillnews.com/thehill/export/TheHill/Business/061306_berry.html.

ences. Traditionally, most domestic-content requirements have left purchasing agencies uneasily allied with domestic industry. The agencies typically have been willing to bear the additional costs of domestic preferences in order to further other social or political goals. Now, as is discussed below, purchasing agencies' new decision to demand flexibility (rather than slavishly adhere to a domestic preference mandate) highlights the internal fissures that undermine traditional domestic preferences. Agencies and contractors, under pressure to utilize the collective strength of a global supply chain, cannot indefinitely abide arbitrary political demands to accommodate self-interested domestic industries.

2. A Tortured History

The Berry Amendment's absolute bar against specialty metals is so severe and disruptive that the Defense Department has shifted to a stance of cautious opposition to the ban.[24] Throughout 2006, while proposed legislation to amend the Berry Amendment remained stalled in Congress, the Defense Department issued a number of guidance documents to its agencies, and to its contractors, as they struggled to comply with the specialty metals ban.

In February 2006, the U.S. Defense Contract Management Agency (DCMA) issued guidance, updated in March, which emphasized that foreign specialty metals would *not* be accepted in items delivered to the Defense Department, but that—in very limited circumstances—items that contained "nonconforming" specialty metals could be accepted "conditionally," with a corresponding reduction in price.[25] In June 2006—after the House had passed proposed expansions to the specialty metals ban—senior leadership in the Defense Department endorsed the earlier DCMA guidance.[26] The Defense Department's statement of position reflected its continuing concern with the Berry Amendment ban. Although the Under Secretary of Defense acknowl-

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24. *See* Office of Mgmt. & Budget, Executive Office of the President, Statement of Administration Policy: S. 2766—National Defense Authorization Act for Fiscal Year 2007, at 2 (2006), *available at* http://www.whitehouse.gov/omb/legislative/sap/109-2/s2766sap-s.pdf (indicating Bush administration support for Section 823 of the Senate defense authorization bill, which would have provided limited authority to waive domestic content requirements).

25. *See* DCMA, Interim Instruction, Noncompliance with the Preference for Specialty Metals Clause, DFARS 252.225-7014 (Feb. 2006/rev. Mar. 10, 2006), *available at* http://guidebook.dcma.mil/225/instructions.htm.

26. *See* Memorandum from U.S. Under Secretary of Defense Kenneth J. Krieg (June 1, 2006), *available at* http://guidebook.dcma.mil/225/dc06-183USD(AT&L).pdf.

edged "that certain specialty metal parts used in the performance of some defense contracts may be non-compliant with the Berry Amendment," he emphasized that "in some cases, the delay that would be caused by immediately pursuing certain remedies may seriously impact our ability to meet military needs."[27] In memoranda dated August 18, 2006 and September 21, 2006,[28] Shay Assad, the Director of Defense Procurement and Acquisition Policy, issued guidance to Defense agencies on accepting items with non-compliant specialty metals. The August 2006 memorandum acknowledged that compliance could lead to higher costs, and the September 2006 memorandum noted that contractors may be unable to trace their supply chains completely, to keep out all "foreign" specialty metals in items delivered to the Defense Department. Taken together, the 2006 guidance made clear the Defense Department's concern that the specialty metals ban was expensive and disruptive.

Indeed, in a May 2006 statement the Bush administration threatened to veto a draft defense authorization bill that would have substantially broadened the Berry Amendment's requirements if the domestic preferences were enhanced, an extraordinary threat to a then-Republican Congress, in a time of war:

> The Administration strongly opposes legislative provisions . . . that would undermine the longstanding U.S. policy—repeatedly affirmed by Congress—to open U.S. procurement markets to suppliers from allied and friendly countries that open their procurement markets to U.S. suppliers. These sections could jeopardize our military readiness when our objective should be to enhance our ability to get the best capability for the warfighter at the best value for the taxpayer. Such provisions would restrict U.S. suppliers' access to foreign markets; would decrease competition; increase costs for U.S. taxpayers; and unnecessarily add red tape to the procurement process. DoD suppliers rely on global supply chains for materials, often without knowing the country of origin. . . . These . . . sections, which would require domestic sources for all critical items, fail to

27. *Id.*

28. *See* Memorandum from Shay D. Assad, Director, Defense Procurement and Acquisition Policy to Commander, U.S. Special Operations (Aug. 18, 2006), *available at* http://www.acq.osd.mil/dpap/policy/policyvault/2006-1445-DPAP.pdf; Memorandum from Shay D. Assad, Director, Defense Procurement and Acquisition Policy to Commander, U.S. Special Operations (Sept. 21, 2006), *available at* http://www.acq.osd.mil/dpap/policy/policyvault/2006-1788-DPAP.pdf.

> recognize that it is acceptable to rely on dependable foreign sources from allied and friendly countries for many critical items. Unwillingness to rely on such dependable foreign sources would undermine future efforts to build coalitions. . . . In addition, Section 1211 would prohibit procurements from any entity that has exported or transferred certain items linked to the U.S. Munitions List to the People's Republic of China, causing irreparable damage to DoD's efforts to implement a strategy of world-wide engagement with allies and friendly nations. *If the President is presented a bill that includes such provisions, his senior advisors will recommend that he veto the bill.*[29]

As the Bush administration's message reflected, practical and political demands pushed the specialty metals ban directly into the colliding paths of domestic preferences and policy. Despite strong congressional support for the domestic specialty metals industry, the Bush administration fought hard to reduce barriers to the U.S. procurement market because of the forces aligned *against* the specialty metals preference: the need for U.S. agencies to access foreign materials; the additional costs and inefficiency that the preference forces on U.S. prime contractors and their international supply chains (costs that ultimately the United States itself must bear, in large part); and, finally, the severe impact that domestic preferences can have on U.S. foreign policy, which increasingly relies on strong international alliances. This "new triumvirate"—U.S. agencies drawing aggressively on foreign suppliers, a globalized U.S. contractor community, and potentially angry foreign allies—make the Berry Amendment's specialty metals preference inherently unstable.

The Defense Department's opposition to the specialty metals ban forced Congress to revisit the requirement. Caught between competing demands from defense suppliers, the specialty metals industry, and the Defense Department itself, Congress compromised. The John Warner National Defense Authorization Act for fiscal year 2007,[30] which President George W. Bush signed into law on October 17, 2006, contained

29. Office of Mgmt. & Budget, Executive Office of the President, Statement of Administration Policy: H.R. 5122—National Defense Authorization Act for Fiscal Year 2007, at 2 (2006) (emphasis in original), *available at* http://www.whitehouse.gov/omb/legislative/sap/109-2/hr5122sap-h.pdf.

30. John Warner National Defense Authorization Act of 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

several measures intended to ease the Berry Amendment's ban.[31]

Specifically, Section 842 of the act established a new specialty metals provision, which "carved out" specialty metals from the other Berry Amendment prohibitions (textiles, etc.).[32] The new statute defined specialty metals in accord with standing Defense Department rules,[33] but left open the possibility that other metals will be added in the future based on studies of critical materials by a special board created in the Department of Defense. The new statute gave the Defense Department authority to waive the specialty metals ban if insufficient domestic specialty metals are available or if contractors could reasonably explain noncompliance. The statute also exempted smaller procurements (under $100,000), purchases of electronic components of "de minimis" value, and sole-source procurements done under "unusual and compelling urgency."[34]

Most importantly from an international trade perspective, the new statute left in place the exemptions created by treaty and agreement for those specialty metals incorporated into defense items in qualifying nations. This is an anomalous and telling exception in a highly-industrialized nation,[35] for it means that the specialty metals ban does *not* impede U.S. trading partners' in exporting *completed defense items* to the United States, even if those items contain foreign specialty metals. Instead, the ban is meant to—and does—impede only transnational trade in a material, *i.e.,* specialty metals.

In passing the new statute, however, Congress opted not to treat the Berry Amendment as a blunt tool to enrich the domestic specialty metals industry—that would be difficult to sustain politically, given the disruption it causes defense production—but rather as a means of ensuring U.S. access to specialty metals in a time of war. As an extension of that "supply chain" rationale, Congress created a new board that will assess the strategic imperatives for the specialty metals ban. Congress' new emphasis on sheltering a strategic supply chain, rather than simply protecting U.S. industry, arguably set a new tone in domestic preferences, one that may shape future policy debates. Unfortunately, the legislation also left a number of questions unanswered.

On December 6, 2006, Shay Assad, Director of Defense Procurement

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31. *See generally* Chierichella & Gallacher, *supra* note 20.

32. 10 U.S.C. § 2533(b) (2006).

33. *See* Defense Federal Acquisition Regulation Supplement (DFARS), 48 C.F.R. § 252.225-7014 (2007).

34. *See generally* Yukins, *supra* note 20.

35. *See, e.g.*, Chierichella & Gallacher, *supra* note 20.

and Acquisition Policy, issued guidance to implement the new legislation. This guidance, issued in the form of a class deviation[36] to existing regulations,[37] will remain in place until rescinded or supplanted by a revised regulation.[38] The new guidance resolves several ambiguities in the recent defense authorization act, though it is almost certainly not the last word on this topic.

3. Tiering: Enhanced Complexity Rather Than Optimal Policy?

The December 6, 2006 class deviation created a curious "tiering" of specialty metals compliance, which seems to borrow loosely from other domestic-content regimes. It is reminiscent of the Federal Transit Administration's "Buy American" regulations, for example, which require that all manufactured products used in federally funded projects be manufactured in the United States, and that all *components* of those manufactured products—but not necessarily all *sub*components—also be of U.S. origin.[39] The tiers would apply to contracts in six key categories of contracts: (1) aircraft, (2) missile and space systems, (3) ships, (4) tank and automotive items, (5) weapon systems, and (6) ammunition.[40] The new "tiering" prescription, taken in conjunction with the Alternate I version of a new Defense Federal Acquisition Regulation Supplement (DFARS) clause,[41] to be used in the six key

36. "Class deviations affect more than one contract action. When an agency knows that it will require a class deviation on a permanent basis, it should propose a FAR revision, if appropriate. Civilian agencies, other than NASA, must furnish a copy of each approved class deviation to the FAR Secretariat." FAR 1.404, 48 C.F.R. § 1.404 (2007).

37. *See* Memorandum from Shay D. Assad, Director, Defense Procurement and Acquisition Policy to Commander, U.S. Special Operations, re: DAR Tracking No. 2006-O0004 (Dec. 6, 2006), *available at* http://www.acq.osd.mil/dpap/policy/policyvault/2006-2051-DPAP.pdf.

38. *See, e.g.*, David M. Nadler, Harvey G. Sherzer & Michael C. Mateer, Feature Comment, *New Department of Defense Berry Amendment Guidance—Some Answers and More Questions*, 48 GOV'T CONTRACTOR ¶ 435 (2006).

39. *See* 49 C.F.R. § 661.5(d)(2) (2007).

40. These six categories date back at least to the early 1970s, when then-Secretary of Defense Melvin Laird focused Berry Amendment specialty metals enforcement on these categories because they encompass most of the specialty metals purchased by the Defense Department.

41. DFARS 252.225-7014, 48 C.F.R. § 252.225-7014 (deviation). As is noted further below, the controversy over specialty metals is likely to continue for some time. The Defense Department's December 2006 action was followed by Defense Department "non-availability" determinations that there were not adequate domestic sources of specialty metals for circuit cards and fasteners; those determinations are available at http://guidebook.dcma.mil/225/instructions.htm ("cancel" password). The House Armed Services Committee responded in May 2007 with a number of provisions which seemed specifically intended to constrain the use of foreign specialty metals. *See* National Defense Authorization Act for Fiscal Year 2008, H.R. 1585, 110th Cong., 1st Sess. (as

categories of contracts, mean that the Berry Amendment specialty metals ban will extend only to:

- End products, *i.e.,* supplies delivered under a line item of a contract;
- "First-tier components," defined as "first-tier parts and assemblies that are incorporated directly into the end product"; and
- "Second-tier components," in turn defined as parts and assemblies "that are incorporated directly into a first-tier component."

The Defense Department's "tiering" approach also follows the conceptual structure of the Federal Acquisition Regulation (FAR), which defines "end products" ("articles, materials, and supplies to be acquired for public use") and "components" ("an article, material, or supply incorporated directly into an end product")[42]—though the FAR definition does not seem to contemplate "second-tier" components.

The "tiering" approach adopted by the Defense Department may reflect a practical concern that haunts the Berry Amendment specialty metals requirements: the concern, for example, that a small bolt containing Russian titanium, if installed in an otherwise compliant fighter jet, could disrupt delivery of that aircraft. By applying the Berry Amendment ban only to "end products" and "first- and second-tier" components, the Defense Department's latest guidance avoids that practical concern because the small "noncompliant" bolt in our example presumably would not fall into any of those categories.

Even this simple example of the Russian titanium bolt, however, exposes how hard the Defense Department strained to accommodate dueling demands—legislative protectionism and a global supply chain. The example suggests that the compromise drawn by the Defense Department ultimately may not be sustainable. How is one to determine whether the hypothetical "noncompliant" bolt is a "first-tier" or "second-tier" component? Unlike an "end product," which one assumes would be listed in a contractual schedule of items to be delivered, assigning "tiers" to components is a hugely subjective exercise.

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reported out of the House Armed Services Committee, May 11, 2007), at § 809 (which would "clarify" requirements relating to specialty metals), § 845 (which would "level" the competitive advantage enjoyed by certain foreign users of specialty metals), and § 846 (which would call for formal rulemaking before the DoD exempted contracts from specialty metals requirements on a class basis). The Bush administration threatened to veto the legislation if it passed with these domestic preferences in place. *See* Statement of Administration Policy, H.R. 1585—National Defense Authorization Act for Fiscal Year 2008, at 1 (May 16, 2007), *available at* http://www.whitehouse.gov/omb/legislative/sap/110-1/hr1585sap-h.pdf.

42. 48 C.F.R. § 25.003 (2007).

The examples provided with the December 2006 class deviation indicate that "tiers" do *not* correspond to levels of prime- and subcontractors; thus, per the example provided by the Defense Department, a *prime* contractor may contract for and deliver to the government a "first-tier component." The examples suggest that first- and second-tier components are instead defined *functionally,* rather than by the level of contractor (or subcontractor) supplying the item. The Defense Department guidance states that a first-tier component (a rocket motor, in the example) is incorporated directly into an end product (the rocket), and a second-tier component (a power supply for the rocket motor, in the example) is incorporated directly into a first-tier component. This "functional" approach makes a great deal of sense, for if the Defense Department had taken a "contractor-tier" approach—if, for example, materials from "third-tier" subcontractors automatically qualified as "third-tier" components (and thus fell outside the Berry Amendment ban)—prime contractors would simply fragment the supply chain into many more contractual layers in order to avoid Berry Amendment compliance costs.

On its face, this "functional" approach also seems simple to implement: it merely means identifying "end products" to be delivered under a contract, and then, like unpacking Russian *matryoshka* dolls, determining which "tier" of component may include noncompliant specialty metals. Under the Defense Department class deviation, only the first and second tiers of components will be relevant.

In fact, however, the Defense Department's "tiering" approach leaves a great deal of uncertainty. In a highly complex weapon system, it is often very difficult to determine at what "tier" a specific item falls. Is a "tier" an aircraft door or the aircraft's entire fuselage, for example? This uncertainty will generate substantial costs and inefficiencies as contractors and suppliers haggle over the metaphysics of "tiers" in order to allocate the risks and costs of Berry Amendment compliance.

At the same time, however, the uncertainty in interpretation will leave the Defense Department and its contractors significant flexibility in interpreting the Berry Amendment's specialty metals ban—flexibility that ultimately may allow for narrow interpretations of the ban. The confusion over defining "tiers" of components also means that it will be difficult to punish noncompliance as fraud, a threat which normally cows contractors into strict compliance in the U.S. system. In the end, the Defense Department's decision to inject flexibility into Berry Amendment compliance reflects the internal fissures that undermine traditional domestic preferences: agencies and contractors, under pressure to draw on a global supply chain, are resisting political

demands to accommodate domestic industries.

B. *Secondary, Non-Economic Objectives As Barriers: Assessing Accessibility Requirements in Information Technology*

The next category of rules-based barriers is secondary objectives of a non-economic nature. As Arrowsmith describes them, "[s]econdary policies (or, in United States terminology, 'collateral' policies) are those that do not relate to the main object of the procurement . . . for example, a policy of placing government contracts with disadvantaged ethnic groups to promote racial equality."[43] These "secondary" or "collateral" policies, which typically are used to identify favored contractors, or weigh in the decision to award a contract, can erect substantial barriers to entry to a procurement market. Intentionally or not, these collateral policies may discriminate in favor of domestic industry. Furthermore, when integrated into a complex procurement process, collateral policies almost invariably increase contracting officials' discretion, and thus diminish transparency and increase the threat of corruption.[44]

One intriguing example in this sphere is the collateral (or "secondary") procurement policy of requiring that government agencies generally purchase only information technology that is accessible to persons with disabilities. This requirement, now enshrined in U.S. federal procurement rules,[45] proves particularly relevant because the European Union is considering a similar accessibility requirement for

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43. ARROWSMITH, *supra* note 13, at 15, 325-26.

44. *Id.* at 327; *see also* Schooner, *supra* note 18.

> It is axiomatic that government spending can influence behaviour and infuse growth in communities and economic sectors. Conversely, efforts to redistribute wealth through the procurement system, by their very nature, restrict competition. . .. [A]s various constituencies or special interest groups compete for their perceived "fair share of the pie," others are left wanting.

Schooner, *supra* note 18, at 108-9.

45. *See generally* John J. Pavlick & Rebecca Pearson, *Implementing the New 508 Accessibility Standards for the Disabled*, 36 PROCUREMENT LAW. 1 (Spring 2001); Aaron P. Silberman, *Recent Developments in Section 508 Disabled Access Requirements for IT Procurements*, 40 PROCUREMENT LAW. 19 (Spring 2005); Sheila C. Stark, Feature Comment, *The FAR Rule on EIT Accessibility Under Section 508—Nine Months Later*, 44 GOV'T CONTRACTOR ¶ 149 (2002); Christopher R. Yukins, *Making Federal Information Technology Accessible: A Case Study in Social Policy and Procurement*, 33 PUB. CONT. L.J. 667 (2004).

procurements in its member states.[46]

As in the United States, the goal of the European effort is to leverage government procurement to increase accessibility across the information technology marketplace, both inside and outside government.[47] The European "eAccessibility" initiative, like the accessibility initiative in the U.S. procurement system, is thus a typical "collateral" policy imported into the procurement system: a social goal carried out through the procurement process, but not directly related to the procurement system's core mission. Although the European initiative is several years behind the United States' effort, there is every indication that the European Union will follow much the same path, and promulgate technical standards for accessibility that European agencies will have to follow in purchasing information technology and communications equipment. The U.S. experience is therefore important in predicting the trade impact that a matching regime might have in Europe.

In principle, the U.S. accessibility requirements could have proven terribly discriminatory against foreign suppliers. Unlike the European initiative, which seeks to build on harmonized international accessibility standards,[48] the U.S. accessibility standards-writers did not simply rely on industry standards, but in many instances crafted their own specific standards under Section 508 of the Rehabilitation Act.[49] Foreign vendors thus faced a real risk that their electronics and information technology products, not developed in accordance with the unique U.S. standards under Section 508, would be excluded from the U.S.

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46. *See* Press Release, European Commission, How Information and Communications Technologies Can Be Made More Accessible for EU Citizens: Frequently Asked Questions, EC MEMO/05/320 (Sept. 15, 2005); *Communication from the Commission to the Council, eAccessibility*, at 9-10, COM (2005) 425 final (Sept. 13, 2005), *available at* http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0425en01.pdf.

47. *See, e.g.*, *European Commission Standardisation Mandate to CEN, CENELEC and ETSI in Support of European Accessibility Requirements for Public Procurement of Products and Services in the ICT Domain*, at 2, EC Mandate M376 (Dec. 7, 2005) ("The inclusion of accessibility requirements in public procurement will constitute an incentive for manufacturers to develop and to offer accessible devices, applications and services, which in turn will benefit people with disabilities and older people but also will be to the benefit of other users."), *available at* http://europa.eu.int/information_society/policy/accessibility/deploy/pubproc/eso-m376/a_documents/m376%20en.pdf.

48. *See* European Commission, *eAccessibility*, *supra* note 46, at 10 (European Commission seeks to work with United States and other international partners "on harmonisation of eAccessibility requirements for public procurement"); European Commission, EC Mandate M376, *supra* note 47 (European standards for accessibility will look to international standards).

49. *See* 65 Fed. Reg. 80500, 80510 (Dec. 21, 2001) (codified at 36 C.F.R. pt. 1194).

procurement market.

In practice, however, the U.S. accessibility standards proved less restrictive than expected for both domestic and foreign vendors. The U.S. accessibility standards were overtaken by changes in technology and hampered by their incompatibility with emerging international standards.[50] The accessibility standards left numerous loopholes for agencies and vendors,[51] and in implementing the standards in procurement, agencies have not been aggressive in forcing accessibility.[52] Vendors, for their part, have proven reluctant to challenge agencies or competitors on accessibility through bid protests or otherwise.

The agencies' slow implementation of accessibility requirements may be due to the sheer complexity of the standards, but is also likely due, in part, to agencies' resistance to "collateral" policies that distract from the agencies' core missions.[53] For many of the same reasons that agencies resist traditional domestic preferences such as the Berry Amendment's specialty metals ban—agencies' reluctance to incur additional costs, suffer delay, or lose focus in procuring best value—agencies are likely to resist collateral (or "secondary") policies in procurement. This is not, of course, to argue that collateral policies are not important in procurement, or to suggest that they will not work, in practice, to discriminate against foreign suppliers, which are generally less familiar with how those policies are implemented in procurement systems. The point instead is that the protectionist impact of these discriminatory collateral policies—and the impulse to accommodate them in the first place—will likely be muted by agencies' stubborn reluctance to implement preferences and policies that are not, at bottom, the agencies' own.

C. *"Illegitimate Practices" as a Barrier to Entry: The Boeing-Druyun Debacle*

The third category of barriers to procurement markets stems from "illegitimate practices." This category, Arrowsmith argues, "consists of corruption, nepotism and patronage (the use of procurement to

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50. *See* Wade-Hahn Chan, *Advisory Committee Faces Major Hurdles with Section 508 Revision*, FED. COMPUTER WK., Nov. 15, 2006, *available at* http://www.fcw.com/article96831-11-15-06-Web.

51. *See, e.g.*, Yukins, *supra* note 45, at 704-8.

52. *See, e.g.*, Randall Edwards, *Fed Sites Lack Accessibility*, FED. COMPUTER WK., Oct. 21, 2003, *available at* http://www.fcw.com/article81271-10-21-03-Web; William Matthews, *One Year and Counting: Section 508*, FED. COMPUTER WK., June 24, 2002, *available at* http://www.fcw.com/article77009.

53. *See* Margaret A.T. Reed, *Agencies Still on the Learning Curve*, FED. COMPUTER WK., Aug. 11, 2003, *available at* http://www.fcw.com/article80520-08-11-03-Print.

reward political supporters)." Most of these practices are patently illegal and unethical, which sets them apart from the generally legal discriminatory practices discussed above, such as traditional domestic-content requirements and "collateral" socioeconomic policies. Corruption, in contrast, is clearly illegal. Patronage, however, makes a harder case; Arrowsmith points out "in the case of patronage the line between the legitimate and the illegitimate uses of procurement may be difficult to draw and is different in different national systems."[54]

The corruption of Darleen Druyun, a senior U.S. Air Force procurement official, captured the attention of the U.S. procurement community[55] and prominently illustrated discriminatory illegitimate practices.[56] Ms. Druyun was the senior civilian procurement official in the Air Force, and had accumulated extraordinary powers over the decades she spent in its procurement system.[57] As part of a broader investigation into an Air Force procurement involving a potential lease of refueling tankers—driven, in part, by Senator John McCain's (R-AZ) concern for apparent waste in the procurement—it emerged that Ms. Druyun had negotiated her later employment with the Boeing Com-

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54. ARROWSMITH, *supra* note 13, at 16.

55. *See, e.g.*, Jeffrey Branstetter, *Darleen Druyun: An Evolving Case Study in Corruption, Power, and Procurement*, 34 PUB. CONT. L.J. 443 (2005); *see, e.g.*, *Lockheed Martin Corp.*, Comp. Gen. B-295402, 2005 Comp. Gen. Proc. Dec. ¶ 24 (Feb. 18, 2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=295402.pdf&directory=/diskb/wais/data/gao_comptroller_general.

56. Sadly, the Druyun scandal proved a mere harbinger for, among others, Representative Randy "Duke" Cunningham, who:

> demanded, sought, and received at least $2.4 million in illicit payments and benefits . . . including cash, checks, meals, travel, lodging, furnishings, antiques, rugs, yacht club fees, boat repairs and improvements, moving expenses, cars, and boats; . . . used his public office and took other official action to pressure and influence [DoD] personnel to award and execute government contracts in a manner that would benefit [his coconspirators] . . . because of his receipt of the above-described payments and benefits, and not because using [these firms] was in the best interest of the country[.]

Plea Agreement for Defendant Randall Harold Cunningham, *United States v. Cunningham*, Crim. No. 05cr2137-LAB (S.D. Cal. Nov. 23, 2005), *available at* http://news.findlaw.com/wp/docs/crim/uscnnghm112805plea.pdf. Even before it became clear that the sensational Cunningham allegations were true, it was apparent that a strong message regarding the importance of integrity was not emanating from the highest levels of government. *See, e.g.*, Steven L. Schooner, Viewpoint, *Procurement Proper*, 37 GOV'T EXEC. 70 (Aug. 15, 2005), http://www.govexec.com/features/0805-15/0805-15advp.htm.

57. *See, e.g.*, Leslie Wayne, *The Scandal of the Pentagon's "Dragon Lady,"* INT'L HERALD TRIB., Oct. 9, 2004, at 16.

pany at the same time she was negotiating with Boeing on the tanker procurement, in violation of 18 U.S.C. § 208. She pleaded guilty and served nine months in federal prison. Boeing ultimately paid a record fine of $615 million to resolve various allegations stemming from procurement improprieties, including its dealings with Ms. Druyun.[58]

For our purposes here, the Druyun case is interesting because she improperly and corruptly favored Boeing, a domestic supplier, over a foreign supplier, European Aeronautic Defense and Space Company (EADS).[59] But it was not discrimination against a foreign supplier that landed Ms. Druyun in prison. Rather, it was the *corruption*, *her personal self-dealing*, that triggered the discrimination and landed Ms. Druyun in jail. Indeed, any discriminatory favoritism Ms. Druyun afforded Boeing would have been against a backdrop of fervent domestic support for Boeing, a leading U.S. manufacturer.[60] What the Druyun case illustrates is that an anti-corruption legal regime—even one as strong and mature as that of the United States'—can attack only corruption, and can do little (if anything) to dissipate anti-foreign discrimination that can, in effect, block access to a procurement market.[61] The good news,

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58. *See, e.g.*, Press Release, U.S. Dep't of Justice, Boeing to Pay United States Record $615 Million to Resolve Fraud Allegations (June 30, 2006), http://www.usdoj.gov/opa/pr/2006/June/06_civ_412.html; Tony Capaccio & Robert Schmidt, *Boeing to Pay Record Settlement*, S. FLA. SUN-SENTINEL, July 1, 2006, at 14B.

59. *See* Supplemental Statement of Facts, *United States v. Druyun*, Crim. No. 04-150-A, at 2-3 (E.D. Va. 2004), *available at* http://www.govexec.com/pdfs/druyunpostpleaadmission.pdf. According to this document,

> In negotiations with Boeing concerning the lease agreement for 100 Boeing KC 767A tanker aircraft, the defendant agreed to a higher price for the aircraft than she believed was appropriate. The defendant did so, in her view, as a "parting gift to Boeing" and because of her desire to ingratiate herself with Boeing, her future employer. The defendant also now acknowledges providing to Boeing during the negotiations what at the time she considered to be proprietary pricing data supplied by another aircraft manufacturer [presumably EADS].

Id.; George Cahlink, *Ex-Pentagon Procurement Executive Gets Jail Time*, GOV'T EXEC., Oct. 1, 2004, *available at* http://www.govexec.com/dailyfed/1004/100104g1.htm.

60. *See* James Wallace, *Tanker Wars: Boeing Challenged*, SEATTLE POST-INTELLIGENCER, June 1, 2006, at A1, *available at* http://seattlepi.nwsource.com/business/272243_tankers01.html.

61. European aerospace executives and trade proponents must have been troubled, for example, when Senator John McCain released a number of e-mails related to the Boeing tanker-lease deal, including this April 16, 2003 exchange. Michael W. Wynne, then-Under Secretary of Defense for Acquisition, wrote: "They [Airbus] came in a couple of weeks ago and offered to build the majority [of the tankers] here in America . . . . I am not sure where this will lead, but the benefits of competition may be revealing." The Secretary of the Air Force, John

however, is that an effective anti-corruption regime, such as that in the United States,[62] can help tamp down discrimination (and thus help open a domestic procurement market) by deterring corruption that would otherwise fuel the fires of discrimination; that, in turn, can yield substantial welfare benefits for the purchasing nation.[63]

D. *Restrictions Directed to Agencies' Procurement Objectives: Framework Agreements and Interagency Contracting*

The fourth category of barriers stems from measures "concerned with the 'commercial' aspects of procurement. . .and an efficient procurement process." Arrowsmith cautions that these measures, while ostensibly intended only to improve the procurement system, may, in practice, have deep discriminatory effects.[64]

In the U.S. procurement market, the best current example of this type of indirect barrier is framework contracting.[65] In the U.S. federal arena, framework agreements are known as "indefinite delivery/ indefinite quantity" (IDIQ) contracts, "government-wide acquisition contracts" (GWACs), or "Multiple Award Schedules" (MAS) contracts, depending on the agency or context in which they arise. For purposes of common understanding, however, this Article uses the more descriptive European term, "framework agreements."[66]

Roche, replied: "Mike, you must be out of your mind!!! . . . We won't be happy with your doing this!" 150 CONG. REC. S11776, S11780 (Nov. 20, 2004). This is an important reminder that, as at least one post-scandal review panel concluded, procurement rules alone are insufficient; leadership plays a critical role in implementing policy. *See generally* DEF. SCI. BD., REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON MANAGEMENT OVERSIGHT IN ACQUISITION ORGANIZATIONS (March 2005), *available at* http://www.acq.osd.mil/dsb/reports/2005-03-MOAO_Report_Final.pdf.

62. This is not to suggest that the current oversight regime in the United States is fully effective. Failure to invest in appropriate personnel to staff the U.S. procurement regime has led to an increasingly distressing string of scandals and failures that, we expect, will result in congressional action (and potential over-reaction) for the foreseeable future. *See generally* Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 550 n.3, 557-61 (2005).

63. *See, e.g.*, Simon J. Evenett & Bernard M. Hoekman, *Government Procurement: Market Access, Transparency, and Multilateral Trade Rules* 18-19 (World Bank Policy Research, Working Paper No. 3195, Jan. 2004), *available at* http://ssrn.com/abstract=342380 (analyzing theoretical economic impact of gains in transparency).

64. *See* ARROWSMITH, *supra* note 13, at 17-18.

65. This review of framework contracting draws on discussion papers presented by Christopher Yukins at The George Washington University Law School (Sept. 2005) and at the conference of the Federal Circuit Bar Association (Washington, D.C., May 2006).

66. *See, e.g.*, Sue Arrowsmith, *The Past and Future Evolution of EC Procurement Law: From Framework to Common Code*, 35 PUB. CONT. L.J. 337, 348-49, 362 (2006) (discussing regulation of

Under framework contracting, a procuring agency (often a centralized purchasing agency) generally will compete and award multiple standing contracts, or "framework" agreements. To win those contracts, vendors typically propose unit prices for specific goods or services; at the time of award, however, there is no certainty as to the actual number of items or hours that will be ordered.

As requirements arise, a customer agency—which may not be the agency that actually holds the contract, for that may be a centralized purchasing agency—will actually issue a task or delivery order against a standing contract. That order may be competed among the various holders of the standing contracts; the extent of competition varies enormously, depending on the applicable rules and agency procedures. There may be no effective competition at all (the worst-case scenario). Further, there may be little to no transparency to the order: in many cases, the requirement is never announced, the competition (if any) is held privately among the standing contract holders, and the order is issued with no public disclosure.

In theory, these types of contracts should provide more competition because framework agreements, as noted, are *presumptively* awarded to multiple suppliers at initial award, and U.S. regulations require that, after initial award, each of these multiple suppliers must be afforded a "fair opportunity" to compete for subsequent orders awarded under the framework agreements. In practice, however, too often suppliers are denied that fair opportunity to compete, even if they hold standing contracts.[67]

Agencies can avoid competition—and thus deny suppliers the "fair opportunity to compete"—by abusing certain exceptions authorized by the Federal Acquisition Regulation (FAR). Furthermore, the Government Accountability Office (GAO) has found that even if multiple-award contractors are theoretically given a fair opportunity to compete, practical considerations often make it impossible for non-incumbent contractors to respond in time to be eligible for award.[68]

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framework agreement under new European procurement directives); Sue Arrowsmith, *Framework Purchasing and Qualification Lists under the European Procurement Directives (Parts I & II)*, 8 PUB. PROC. L. REV. 115, 161, 168 (1999).

67. *See, e.g.*, Thomas F. Burke & Stanley C. Dees, Feature Comment, *The Impact of Multiple-Award Contracts on the Underlying Values of the Federal Procurement System*, 44 GOV. CONTRACTOR ¶ 431 (Nov. 6, 2002) (citing U.S. DEP'T OF DEF., OFFICE OF INSPECTOR GEN., MULTIPLE AWARD CONTRACTS FOR SERVICES, REPORT NO. D-2001-189 (Sept. 30, 2001) [hereinafter MULTIPLE AWARD CONTRACTS]).

68. *See* U.S. GEN. ACCOUNTING OFFICE, REPORT NO. GAO/NSIAD-00-56, FEW COMPETING PROPOSALS FOR LARGE DOD INFORMATION TECHNOLOGY ORDERS 10 (Mar. 2000), *available at* http://www.gao.gov (search "Keyword or Report #" for "NSIAD-00-56").

Collusion, or at least calculation, seems to play a part in this loss of competition. A report from the Defense Department's Inspector General showed that multiple-award framework agreements had been used on at least one occasion to create an illusion of competition, when in reality the customer agency had already selected a preferred contractor or knew that two contractors had agreed not to compete against each other. The audit report revealed that two-thirds of the contracting organizations reviewed "awarded task orders on a directed-source basis because the program offices preferred to work with a specific contractor."[69]

A number of reports have suggested why agency officials collude to reduce competition under task-order contracts. Centralized purchasing agencies, which establish the framework agreements in the first instance, will feel pressure to accommodate customer agencies by allowing tasks to be awarded to those customer agencies' favored contractors. To ease award to a favored contractor—often the incumbent contractor—the contracting agency may (1) fail to notify other vendors (other framework agreement holders) of an available task, (2) provide inadequate notice, (3) fail to provide useful specifications, (4) impose biased technical requirements, (5) allow a slanted evaluation of offers, (6) inadequately assess the reasonableness of the favored vendor's proffered price,[70] or (7) ignore the many other rules meant to ensure vigorous, transparent competition.[71]

These failures in competition are compounded, and shrouded, by a lack of transparency and accountability. As an example, although traditionally all federal business opportunities over $25,000 had to be advertised,[72] neither requirements nor awards under U.S. framework agreements must be published.[73]

Indeed, even the *existence* of task-order contracts is not currently published. Although FAR Subpart 5.6 requires publication of a list of

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69. MULTIPLE AWARD CONTRACTS, *supra* note 67, at 10.

70. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT NO. GAO-05-229, OPPORTUNITIES TO IMPROVE PRICING OF GSA MULTIPLE AWARD SCHEDULES CONTRACTS 15-16 (Feb. 2005) (criticizing drop in effective pre-award audits); *see also* Patience Wait, *GSA Urged to Resume Post-Award Audits of Vendors*, WASH. TECH., July 29, 2005, *available at* http://www.washingtontechnology.com/news/1_1/daily_news/26666-1.html (discussing congressional criticism of failure to hold pre- and post-award audits on GSA contracts).

71. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 70, at 15-16; *see also* Wait, *supra* note 70.

72. *See* FAR, 48 C.F.R. §§ 5.101, 5.203 (2007).

73. *See, e.g.*, FAR, 48 C.F.R. § 16.505(a)(1) (2007) (a "contracting officer does not synopsize orders under indefinite-delivery contracts").

interagency framework agreements, as of February 1, 2006 that list, which is to be published at www.contractdirectory.gov, had been disabled. Customer agencies instead must rely on vendors and centralized purchasing agencies to search out these contracting vehicles in an all-too-invisible marketplace that relies on relationships more than on competition, and which raises obvious dangers of corruption.[74] Nor are there effective institutional checks on this marketplace of relationships, for many orders under task-order contracts are exempt from protest.[75]

These failures in transparency and competition have prompted many calls for reform of task-order contracts,[76] and Congress and the agencies have responded with a number of incremental efforts at reform.[77] The Acquisition Advisory Panel, a blue-ribbon panel launched in 2003, recently issued a nearly 500-page draft report, much of which focused on problems (and possible solutions) regarding these types of contracts.[78] Despite these efforts, however, the core problems with task-order contracting in the United States—minimal transparency, diluted competition, and inadequate review—remain unresolved.

The framework agreements and their associated problems are not unique to the United States. As the discussion above notes, in the federal system in the United States, orders under a master framework agreement need not be publicized for competition or award. Similarly, under the recent European Union procurement directives, once a framework agreement is in place, the "mini-competitions" between multiple awardees for the follow-on contracts need not be publicized.[79] Guidance published by the U.K. Office of Government Commerce

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74. *See* Christopher R. Yukins, *Ethics in Procurement: New Challenges After a Decade of Reform*, 38 PROCUREMENT LAW. 3 (2003).

75. *See* FAR, 48 C.F.R. § 16.505(a)(6) (2007).

76. *See, e.g.*, Steven L. Schooner, Feature Comment, *Risky Business: Managing Interagency Acquisition*, 47 GOV'T CONTRACTOR ¶ 156 (2005) (applauding the GAO for adding the management of interagency contracting to its "high risk" list and suggesting that interagency acquisition has evolved from "the poster child for the flexible, streamlined, businesslike approach of the 1990's acquisition reform movement" into the federal procurement system's "Achilles heel").

77. *See, e.g.*, 70 Fed. Reg. 43,578 (July 27, 2005) (noting that the rule would require special justification if fewer than three master agreement holders will be solicited for opportunity under the GSA schedule contracts).

78. *See* AAP DRAFT REPORT, *supra* note 8, at 3 (30-44).

79. *See, e.g.*, EUR. DEV. BANK FOR RECONSTRUCTION & DEV., PROCUREMENT POLICIES AND RULES 8 (2000), *available at* http://www.ebrd.com/about/policies/procure/ppr.pdf; *see also* EBRD—Policies, http://www.ebrd.com/about/policies/procure/index.htm ("The EBRD's Procurement Policies and Rules are based on the fundamental principles of non-discrimination, fairness and transparency. They are designed to promote efficiency and effectiveness and to minimise credit risk in the implementation of the Bank's lending and investment operations.").

indicates that, if the original agreement is publicized in the *Official Journal of the European Communities*, subsequent contracts competed under that agreement need not be advertised.[80] Unlike the U.S. system, the European directive contemplates an initial "framework agreement" and then a series of "contracts," to be issued under the framework agreement.[81]

There are subtle distinctions in terminology, but not necessarily in substance, between the U.S. and European rules systems.[82] As in the United States, requirements need only be competed among the standing awardees under the EU framework agreements.[83] Indeed, under the EU system there may be even less competition. While U.S. rules on competition contemplate affording all the master contract holders a "fair opportunity to compete" for individual orders,[84] the EU directive countenances award of an order (a "contract") without further competition among the standing framework contractors, if it is possible to make an award per the terms already "laid down in the [original] framework agreement."[85]

All of the problems presented by framework contracting—the loss of transparency and competition, and the profound incentives (and opportunities) for favoritism and corruption—raise serious potential barriers to foreign vendors. As a threshold matter, a foreign vendor

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80. *See* U.K. Office of Gov't Commerce, *Framework Agreements and EC Developments* ¶ 9 (2004), *available at* http://www/ogc.gov/documents/Framework_Agreements_and_EC_Developments.doc ("It is far better, therefore, to advertise the framework itself, so that there is no need to consider the need for advertising as each call-off comes up."); *cf.* FAR, 48 C.F.R. § 16.505(b)(4) (record required only in contract file). *See generally* Sue Arrowsmith, *Framework Agreements under the UK Procurement Regulations: Denfleet v. NHS Purchasing and Supply Agency*, 14 PUB. PROC. L. REV. NA86 (2005); Arrowsmith, *Framework Purchasing*, *supra* note 66, at 123 (attributing an increasing use of electronic media and electronic ordering to the increased importance of framework agreements).

81. *See* Council Directive 2004/18, On the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, art. 32, 2004 O.J. (L 134) 114 [hereinafter Public Works Directive], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:NOT. See generally Steven L. Schooner & Christopher R. Yukins, *Emerging Policy and Practice Issues*, a paper presented at the West-Thomson Government Contracts Year in Review Conference in February, 2005, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=663464.

82. In the United States' federal system, as noted, the initial award is for a competitive "contract," but then task and delivery *orders*—*not* contracts—are issued against that master contract. *See* FAR, 48 C.F.R. §§ 16.501, 16.505 (2007). Thus, there is a subtle difference in nomenclature: U.S. agencies issue "task orders" under a master contract, while European agencies will issue "contracts" under a master framework agreement.

83. *See* Public Works Directive, *supra* note 81, art. 12.

84. *See* FAR, 48 C.F.R. § 16.505(b)(1) (2007).

85. *See* Public Works Directive, *supra* note 81, art. 32, ¶ 4.

new to the market must learn of the framework agreements' importance. Because opportunities and awards under framework agreements are not publicized, however, it is difficult for any newcomer to discern their importance. Notably, even seasoned U.S. observers were surprised when the Acquisition Advisory Panel, an independent commission, reported that fully forty percent of the nearly-$400 billion U.S. procurement market are handled through interagency framework agreements.[86]

Once a foreign vendor does finally appreciate the importance of framework agreements, the vendor faces a practical problem of actually joining one. Most framework arrangements in the United States are "closed" once the initial contracts are awarded, typically for terms of up to five to ten years. An exception is the General Services Administration's Multiple Award Schedules (MAS) contracts, which are always "open": a vendor willing to submit to the three- to six-month negotiation process may always submit an offer to join the MAS contracts. There is no true "competition," in the strictest sense, to join the GSA MAS arrangement; instead, the vendor must disclose its commercial pricing, and generally must commit to keep its MAS prices at a level below its commercial prices over the term of the MAS contract, which may be extended up to twenty years (through five-year options). As a result of this "open" approach, literally thousands of vendors have joined the GSA MAS system.

The "open" system used by the GSA MAS contracts eliminates one barrier to entry for foreign vendors—the problem of arriving too late, after the standing agreements are in place—but raises other, far less obvious barriers to the naïve foreign vendor. Over decades of practice, the MAS negotiation process has evolved into an arcane and highly sophisticated art form. Because the MAS vehicle is always "open," and there is no real competition *between* vendors to join, a vendor's commercial pricing is the key benchmark for the vendor's MAS pricing. As a result, in negotiating prices under MAS contracts, vendors must struggle artfully to distinguish their commercial discounts, both before and after award. Otherwise, low commercial prices may "choke" the prices allowed under the MAS contract; at the same time, vendors must be concerned that the MAS pricing structure (in essence, a "most favored nation" pricing structure) will restrict their ability to lower their commercial prices. In sum, therefore, the arcane rules of pricing under the GSA MAS contracts raise their own, maddening barrier to foreign

86. *See* AAP DRAFT REPORT, *supra* note 8, at 3.

vendors that seek to enter the U.S. market.

Even if a foreign vendor has discovered framework contracting, has identified a viable framework arrangement to join, and has passed through the contracting process, the vendor must still survive in the brutal and shadowy world of "call-off" competitions. As noted, agencies are *not* required to publicize opportunities to be let through standing contracts. Depending on the applicable rules and circumstances, the customer agencies *may* solicit competition from those that hold standing framework agreements; in some cases, however, the agency may not. When the competition for an order is held, the agency may keep its stated criteria for award to a breezy minimum, and, because debriefings and protests often are not required, the agency's discretionary award decision may be completely immune from challenge or review. To add insult to injury, the data on the award may be spotty, and the terms used—because the standing contracts are generically crafted with little particularity—may well favor a savvy, incumbent contractor.

In both principle and practice, therefore, framework agreements pose a very real barrier to international trade.[87] More broadly, they show how pernicious these types of rules-based barriers can be: where agencies are enticed by "efficiency" (or other gains), customer agencies (and their central purchasing cohorts) may well embrace a procurement device that is, in practice, grotesquely discriminatory. The agencies will *not,* in this instance, serve as a counterweight to discrimination. Unlike other categories of barriers to procurement across borders—classic domestic-content requirements, collateral socioeconomic requirements, or illegitimate practices—here there is no institutional resistance to the barrier: the government agencies, normally natural proponents of reducing barriers, will instead *foster* the barriers in their eagerness to grasp some other institutional goal, such as efficiency. For these types of barriers, therefore, the pressure for reform—and for reducing the barriers to trade—probably must come from outside the procurement system's own institutions.

III. Instruments to Open the International Procurement Market

Having described the potential of an open international procurement market, and the obstacles to achieving it, we turn now to the various types of instruments that might be used to open that market. Public procurement policymakers might recoil at the menu we offer to

87. *Cf.* Arrowsmith, *supra* note 13, at 271-75 (discussing framework purchasing under the GPA).

the extent that none of these vehicles is a typical tool used to effectuate public procurement policy. For example, in the United States, procurement policy and practice are, *inter alia*, framed by legislation both authorizing action and appropriating money to pursue objectives, implemented by regulation, clarified and embellished upon in policy documents, interpreted through adjudicatory actions (*e.g.*, bid protests, contract disputes, and criminal indictments and prosecutions, some of which produce publicly available precedential opinions), and commented upon by scholars and practitioners in books, journal articles, and in the trade press. But experience suggests that in the United States, as in other nations, procurement policy and law tend to be grudgingly reconciled with, rather than driven by, norm-creating global procurement instruments.

For our purposes here, there are at least three basic types of instruments that may help liberalize international procurement markets:

- *Model procurement codes, or model statements of principle or best practices*, that discourage discrimination, either explicitly or by discouraging indirect barriers to trade. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services falls within this category. Less obvious models include the Organisation for Economic Cooperation and Development (OECD) procurement assessment tool, and the "Integrity Pacts" fostered by Transparency International.
- *Procurement guidelines imposed by central financial institutions.* Procurement guidelines issued by the World Bank or the regional development banks are examples of this category.
- *Binding international agreements or directives that require nondiscrimination*, both explicitly and implicitly by barring various recognized indirect barriers to international procurement. These include, of course, the World Trade Organization (WTO)'s Government Procurement Agreement.

We will address each of these only briefly, with due regard for the extensive literature already available regarding many of these instruments. Of course, our list is not exhaustive. In his 2005 essay, *The Global Procurement Harmonisation Initiative*,[88] Attila Kovacs canvassed many of these instruments in his effort to chart a path forward for harmoniza-

88. Attila Kovacs, *The Global Procurement Harmonisation Initiative*, 14 PUB. PROC. L. REV. 15 (2005).

tion of procurement codes worldwide. Frankly, Kovacs' vision is far more ambitious than ours. Where he aspires to a form of global uniformity, through thoroughly harmonized global procurement codes, we do not share his optimism.[89] Rather, we merely seek to identify an instrument or instruments that could be used, much like a constitution, to shape individual nations' procurement codes in a common fashion in order to open markets and reduce discrimination. In the end, Kovacs is right to press for more thorough harmonization, because dissonance between countries' procurement codes is inefficient and poses barriers to entry. Arrowsmith calls these inefficiencies "structural restrictions," which raise practical barriers to entry as foreign vendors run headlong into dense and alien procurement regimes.[90] As a practical and political matter, however, we sense that any semblance of true procurement code harmonization is at least a generation away. For now, therefore, progress will stem from instruments that impose common norms on hugely disparate procurement regimes.

A. *Model Codes and Principles*

Internationally, the most commonly recognized model procurement code is the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services.[91] According to UNCITRAL, at least seventeen nations have modeled at least some part of their procurement

89. Our cynicism stems not only from the vagaries of global cooperation and convergence, but also from domestic experience. More than two decades have passed since the putatively uniform U.S. Federal Acquisition Regulation (FAR) system first became effective, on April 1, 1984. *See generally* JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING, Ch. 22, "The Modern Era: A Sea of Paperwork" (1992) (discussing the evolution of the uniform regulation system). Since then, Balkanization has reigned. For example, the mid-1990's witnessed a tsunami of procurement reforms intended to make the procurement system less bureaucratic and more businesslike. Wide-reaching reform statutes, such as the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243, the Federal Acquisition Reform Act of 1996 (FARA), Pub. L. No. 104-106, Division D, §§ 4001-4402, 110 Stat. 642, and the Information Technology Management Reform Act of 1995 (ITMRA), Pub. L. No. 104-106, Division E, §§ 5001-5703, 110 Stat. 679 (1996) (FARA and ITMRA are now jointly known as the Clinger-Cohen Act), were implemented by new and revised regulations, dramatically altering the Federal procurement landscape. And the calls for reform continue unabated.

90. *See* ARROWSMITH, *supra* note 13, at 18.

91. UNCITRAL, UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES WITH GUIDE TO ENACTMENT (1994), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html. Christopher Yukins serves as an expert to the current initiative to revise and update the UNCITRAL model law.

codes on its model law.[92] The UNCITRAL model law, currently being updated,[93] is regularly cited as a template for reform.[94]

The UNCITRAL model law is not necessarily a tool for opening international procurement markets, as it contemplates domestic preferences.[95] But because it offers a comprehensive set of rules to frame an efficient procurement process, the UNCITRAL model is an important tool for harmonizing nations' procurement codes.[96] Harmonization is, itself, a significant step forward in opening markets because consistency between procurement regimes reduces costs for vendors that seek to compete across borders, and for nations trying to improve their own procurement systems.

There are other interesting models for procurement emerging internationally. The first is an initiative coordinated by the OECD to foster better practices in procurement, as part of the OECD's broader effort to encourage development and sound governance. The OECD is made up of industrialized donor nations, and the assessment tools it is creating are intended, at least in part, to ensure that developing nations use development funds in a sound, transparent manner.[97] The OECD *Methodology for Assessment of National Procurement Systems*[98] is not directed primarily to opening procurement markets: the OECD methodology only discourages (and does *not* bar) discrimination,[99] and the purpose of the tool is to help developing nations build capacity for

92. *See* UNCITRAL, Status: 1994—Model Law on Procurement of Goods, Construction and Services, http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html (citing Albania, Azerbaijan, Croatia, Estonia, Gambia, Kazakhstan, Kenya, Kyrgyzstan, Malawi, Mauritius, Mongolia, Poland, Moldova, Romania, Slovakia, Tanzania, Uganda, and Uzbekistan).

93. *See, e.g.*, Sandra M. Rocks & Kate A. Sawyer, *International Commercial Law: 2005 Developments*, 61 BUS. LAW. 1633, 1633-34 (2006); Christopher Yukins, Don Wallace, Jr., Jason Matechak & Jeffrey Marburg-Goodman, *International Legal Development in Review: 2005 Corporate—International Procurement*, 40 INT'L LAW. 337, 337-43 (2006).

94. *See, e.g.*, Sue Arrowsmith, *Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard*, 53 INT'L & COMP. L.Q. 17, 20-22 (2004) (noting other national procurement regimes that have looked to UNCITRAL model law).

95. *See* UNCITRAL MODEL LAW, *supra* note 91, art. 8(1) & Guide to Enactment ¶ 25.

96. *See, e.g.*, John Linarelli, *The WTO Agreement on Government Procurement and the UNCITRAL Model Procurement Law*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 317 (2006).

97. *See* OECD, New Common Benchmarking and Assessment Tool for Public Procurement Systems (Version 4), http://www.oecd.org/document/40/0,2340,en_2649_19101395_37130152_1_1_1_1,00.html.

98. *See* OECD, METHODOLOGY FOR ASSESSMENT OF NATIONAL PROCUREMENT SYSTEMS (2006), *available at* http://www.oecd.org/dataoecd/1/36/37130136.pdf.

99. *See id.* at 11-12.

development,[100] not necessarily to open markets.

Another interesting model for harmonization is the "Integrity Pacts" being sponsored by Transparency International, a leading international organization battling corruption.[101] Transparency International's Integrity Pacts include agreements to be entered into by the purchasing agency and all bidders. Per those agreements, none of the parties is to engage in bribery or collude with competitors during formation or administration of the subject contract, and a monitoring system is to be put in place to ensure compliance.[102] These Integrity Pacts, however, are focused primarily on ensuring integrity, are limited to specific projects or procurements rather than state-wide regimes, and are not likely to serve as ready instruments to open international markets.

B. *Procurement Guidelines of Development Banks*

Another source of guidance and potential liberalization for procurement regimes worldwide derives from the guidelines from the World Bank and the regional development banks,[103] to which borrower nations generally must conform in order to qualify for financing.[104]

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100. *See id.* at 2.

101. *See* Transparency International, http://www.transparency.org (last visited Apr. 5, 2007).

102. *See* Transparency International, Integrity Pacts, http://www.transparency.org/global_priorities/public_contracting/integrity_pacts (last visited Apr. 5, 2007).

103. *See* African Development Bank, http://www.afdb.org (last visited Apr. 5, 2007); Asian Development Bank, Procurement Guidelines, http://www.adb.org/Documents/Guidelines/Procurement (last visited Apr. 5, 2007); Eur. Dev. Bank for Reconstruction & Dev., Procurement Policies and Rules, *supra* note 79; Inter-American Development Bank, Procurement Procedures, http://www.iadb.org/exr/english/BUSINESS_OPP/bus_opp_procurem_procedurs.htm (last visited Apr. 5, 2007); North American Development Bank, http://www.nadbank.org (last visited Apr. 5, 2007).

104. *See, e.g.*, World Bank, Information for Borrowers, http://www.worldbank.org (follow "Projects & Operations" hyperlink; then follow "Procurement / Tender" hyperlink; then follow "Information for Borrowers" hyperlink) (last visited Apr. 5, 2007).

> When the World Bank provides financing to its member countries for investment projects, each project is governed by a legal agreement between the World Bank and the government agency who receives the funds. One of the key obligations in the 'loan agreement' is that governments abide by the Bank's procurement policies as detailed in the *Guidelines: Procurement under IBRD Loans and IDA Credits* and the *Guidelines: Selection and Employment of Consultants by World Bank Borrowers.*

Id. See also Juan Rovira, *Trade Agreements, Intellectual Property, and the Role of the World Bank in Improving Access to Medicines in Developing Countries*, 4 YALE J. HEALTH POL'Y L. & ETHICS 401 (2004)

Development banks routinely impose minimum procurement rules to ensure transparency, competition, and integrity in the projects they fund.

The World Bank's guidelines, for example, help open procurement markets by requiring that vendors from all nations be allowed an opportunity to provide goods and services,[105] though the guidelines also allow for certain domestic preferences for goods from borrower nations.[106] Moreover, the World Bank's procurement guidelines apply, by their terms, only to the contracts supported with World Bank funding.[107] Because they simultaneously stipulate open markets but allow for some measure of domestic protectionism to help economies recover, the procurement guidelines promulgated by the World Bank and the other banks, while an important means of opening international procurement markets, are not likely to bring about worldwide reform. The purpose of the various banks' guidelines is simply to ensure that the banks' funds are well spent—not to force open the procurement process of reluctant borrower nations.[108] The development banks' guidelines are not, therefore, necessarily the shortest path to an international open market in procurement.

C. *Treaties and Directives: International and Regional*

As neither model codes nor the procurement guidelines of international development banks will likely bring about open international

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(providing a list of procurement methods permitted under the World Bank's procurement guidelines); David A. Levy, *BOT and Public Procurement: A Conceptual Framework*, 7 IND. INT'L & COMP. L. REV. 95 (1996) (arguing that the World Bank's procurement guidelines have contradictory tenets that undermine its stated preference for open procurement markets); J.M. Migai Akech, *Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid*, 37 N.Y.U. J. INT'L L. & POL. 829 (2005) (arguing that the World Bank's tying of the aid given to developing countries to the requirement of compliance with its international procurement guidelines is both inefficient and works against the efforts of recipient nations to gain a foothold in international trade); Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 400 (2000) (describing the World Bank's procurement guidelines as its major vehicle used to combat corruption).

105. *See*, WORLD BANK, GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS ¶ 1.6 (revised Oct. 1, 2006), *available at* http://siteresources.worldbank.org/INTPROCUREMENT/Resources/ProcGuid-10-06-ev1.doc.

106. *Id.* ¶ 2.55.

107. *Id.* ¶ 1.5.

108. *See, e.g.*, EBRD—Policies, *supra* note 79 ("The EBRD's Procurement Policies and Rules are based on the fundamental principles of non-discrimination, fairness and transparency. They are designed to promote efficiency and effectiveness and to minimise credit risk in the implementation of the Bank's lending and investment operations.").

public procurement markets, we look now to treaties and similar international instruments directed specifically to opening regional or international spheres of free trade in procurement to affect this desired outcome.

The central example of this type of agreement is the World Trade Organization's Agreement on Government Procurement (GPA).[109] The GPA is a plurilateral agreement that binds only member nations.[110] Per Article III of the agreement, the two basic principles at the core of the GPA are *non-discrimination* (no discrimination amongst covered foreign suppliers, goods or services) and *national treatment* (foreign suppliers, goods and services are to receive treatment no less favorable than that accorded locals).[111] The substantive provisions of the GPA—those that prescribe procurement rules to root out discrimination rather than those that describe the agencies, goods and services covered—were recently revised, and the proposed text of the revised GPA was published in December 2006.[112]

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109. Although the agreement's technical name in the WTO is the "Agreement on Government Procurement," in the United States, the GPA is commonly referred to as the "Government Procurement Agreement," *see, e.g.*, FAR, 48 C.F.R. 25.400(a)(1), and for consistency's sake we will use the common acronym "GPA"—also used by the WTO—here. For a comparative discussion of the GPA and other initiatives in international agreements on procurement trade, see Simon J. Evenett, *Is There a Case for New Multilateral Rules on Transparency in Government Procurement?* (2003), *reprinted in* EVENETT & HOEKMAN, *supra* note 12, at 147. For histories of the GPA and its predecessor agreements, see Robert D. Anderson, *Policy and Legal Frameworks for Open Procurement Markets: The Role of the WTO* (paper for presentation at the West/Thomson Government Contracts Year in Review Conference, Washington, D.C., Feb. 2007) (copy on file with authors); Annet Blank & Gabrielle Marceau, *The History of the Government Procurement Negotiations Since 1945* (1996), *reprinted in* EVENETT & HOEKMAN, *supra* note 12, at 3; ARROWSMITH, *supra* note 13, at 25-47; 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 (1995); Michael T. Janik, *A U.S. Perspective on the GATT Agreement on Government Procurement*, 20 GEO. WASH. J. INT'L L. & ECON. 491 (1987).

110. These currently include Canada, the European Communities (including its 25 member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, and the United Kingdom), Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, Switzerland, and the United States.

111. *See, e.g.*, Hoekman & Mavroidis, *supra* note 11, at 4-5. Here, we use the term "nondiscrimination" more broadly, to describe a general policy of not discriminating against foreign suppliers in procurement.

112. *See, e.g.*, *Greater Clarity is Focus of Updated WTO GPA*, 3 INT'L GOV. CONTRACTOR ¶ 102 (Dec. 2006). For a discussion of proposed areas of reform in the GPA, see Sue Arrowsmith, *Reviewing the GPA: the Role and Development of the Plurilateral Agreement after Doha*, 5 J. INT'L ECON. L. 761 (2002).

In parallel with the GPA, the United States and other states have entered into bilateral and multilateral free trade agreements (FTAs) which include commitments to open procurement markets.[113] While these types of bilateral and multilateral agreements typically provide for nondiscrimination and may spur broader liberalization,[114] the agreements, by their terms, are limited in scope and cannot create a truly international open procurement market.

Another model of a market-opening international accord is the European procurement directives; indeed, many aspects of the GPA originally came from earlier European directives.[115] As Arrowsmith noted, the European directives, like the WTO's Agreement on Government Procurement, offer a "skeletal" set of requirements for member states' procurement systems; these minimum requirements are designed to eliminate barriers between the European member states' procurement markets. Over time, the European directives have become more prescriptive. Given additional force by interpretive rulings from the European Court of Justice, the European directives have evolved into something much closer to a common code for the European member states.[116] This evolution toward a common, harmonized code has been driven, in important part, by a continuing desire in the European central institutions to eliminate discriminatory procurement rules that impede trade between member states.[117]

Another example of a regional directive is that of the Common Market for Eastern and Southern Africa (COMESA). With support from the African Development Bank, COMESA has been developing its

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113. *See, e.g.*, Jean Heilman Grier, *Recent Developments in International Trade Agreements Covering Government Procurement*, 35 PUB. CONT. L.J. 385 (2006) (discussing FTAs in place or under negotiation); Robert C. Taylor & Lisa M. Bolton, *Overview of Canadian Government Procurement Law*, 42 PROCUREMENT LAW. 14 (Fall 2006) (discussing role of North America Free Trade Agreement (NAFTA) in Canadian procurement regime); Laura Eyester, *NAFTA and the Barriers to Federal Procurement Opportunities in the United States*, 31 PUB. CONT. L.J. 695 (2002); Donald P. Arnavas & Nick Seddon, *The U.S.-Australia Free Trade Agreement—Focus on Government Procurement*, 3 INT'L GOV. CONTRACTOR ¶ 58 (July 2006); Tsai-yu Lin, *Regional Procurement Arrangements in East Asia: Some Reflections for the WTO Rules*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 343, 357-59 (2006) (discussing interplay between East Asian free trade arrangements and GPA); Locknie Hsu, *Government Procurement: A View from Asia*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 379 (2006) (reviewing regional agreements).

114. *See* Tsai-yu Lin, *supra* note 113, at 356-60.

115. *See* De Graaf & King, *supra* note 109, at 437. *See generally* Arrowsmith, *Evolution*, *supra* note 66, at 340; Jean-Jacques Verdeaux, *Public Procurement in the European Union and in the United States: a Comparative Study*, 32 PUB. CONT. L.J. 713 (2003).

116. *See* Arrowsmith, *Evolution*, *supra* note 66, at 350-54.

117. *See id.* at 339.

own procurement directives to facilitate procurement in and among its member states.[118] While that effort remains in process, it illustrates both promise and risk: it shows the hoped-for benefit of harmonized procurement schemes outside the highly industrialized world, but it also raises a risk of a balkanized international patchwork of regional procurement regions. We will return, below, to the question of harmonization.

IV. ACHIEVING A GLOBAL PROCUREMENT MARKET: FOUR STEPS

Having reviewed the barriers to international procurement, and the instruments available to reduce them, we turn now to four critical steps needed for the global procurement market to fully achieve openness. While it might prove convenient for this process to proceed in an orderly, linear fashion, it is more likely that passage through the four stages will be irregular, overlapping, disorderly, and perhaps even chaotic. Nonetheless, we sense that all four steps are necessary for a global procurement regime to enjoy credibility at home and abroad, to provide customer satisfaction, and to produce value for money in an efficient and consistent manner.

The first step, logically, is the political decision to embrace value-based outcomes, reject domestic preferences, and ultimately accept nondiscrimination as a norm, or as a universally accepted procurement "best practice". Of course, such a decision must overcome deep native protectionism. The second step is harmonization, because uniformity (in vocabulary and practice) generates efficiencies not only for buyers but for sellers. To be clear, as pragmatists, we neither expect nor

118. *See generally* Press Release, COMESA, Public Procurement Rules and Regulations Harmonised (June 4, 2004), http://www.comesa.int/trade/issues/procurement/MS-Office-Document.2004-06-04.5502/view; COMESA, Public Procurement Information System, http://simba.comesa.int:90/cpis/index.php?sz=1024&lang=english (last visited Apr. 5, 2007); COMESA, REPORT OF THE FIRST STAKEHOLDERS FORUM FOR THE COMESA PUBLIC PROCUREMENT REFORM PROJECT (Dec. 2002), *available at* http://simba.comesa.int:90/cpis/uploads/reports/Report%20of%20First%20Stakeholders%20Forum.doc (describing scope and purpose of project to develop COMESA directives); STEPHEN KARANGIZI, COMESA, REGIONAL PROCUREMENT REFORM INITIATIVE (Dec. 2002), http://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/karangizi1_e.doc (describing projected steps in development of the COMESA procurement directives and institutional structure); Press Release, EVD, Afrika: Multinational/COMESA—Proposal for an ADF Grant of UA 5,660,000 to Finance the Enhancing Procurement Reforms and Capacity Project (July 20, 2006), http://www.evd.nl (describing COMESA project and next steps); Press Release, African Development Bank, COMESA—US$ 8 Million Grant in Support of Public Procurement (Aug. 14, 2006), http://www.afdb.org (announcing a grant to continue COMESA initiative).

advocate for standardization or harmonization of entire procurement codes. Rather, we anticipate continuing harmonization of central agreements—such as the WTO's Agreement on Government Procurement—which in turn shape individual nations' procurement codes. The third step is rationalization, the process of ensuring that the instruments being relied upon by individual states to open markets do, in fact, produce a legislative and regulatory template for procurement procedures which are fundamentally sound (*e.g.*, reflect best practices) and which produce efficient, value-based results. The final step we envision is institutionalization, the process of transitioning harmonized, rationalized agreements from empty rhetoric (or toothless legal regimes) into properly-implemented policies and practices that become integrated into the fabric of the states that join those agreements.

We recognize that, to some extent, each of the four stages could serve to reinforce another. For example, we assume that, if a state affirmatively embraces harmonization, we expect that rationalization and institutionalization might (but need not necessarily) naturally follow. At the same time, we concede that, for a number of reasons, the process might implode during any of the four stages.

A. *Intermezzo: Of Political Will and Stakeholders*

Any discussion of political decision-making must begin with, and in large part depends upon, an understanding of, or at least familiarity with, the various affected interest groups or stakeholders. We have long perceived that this fundamental issue—identifying and understanding the interests and priorities of the various stakeholders in public procurement—is a critical yet under-explored piece of the public procurement policy puzzle. Unfortunately, this topic is beyond the scope of this article. Nonetheless, we pause here to catalogue some of the major players, because it is axiomatic that the political decision-making process will be influenced, nay, skewed, as constituencies exert effort to further their own interests.

From the perspective of contract law, it seems logical to begin by identifying the interested parties; there are *buyers*—here, governments, agencies, ministries, or purchasing officials—and *sellers*—contractors, vendors, or suppliers, publicly traded or closely held, whether for profit (which represents the lion's share) or not for profit. Within the seller or contractor community, we tend to distinguish truly *commercial firms* from those primarily *non-commercial* firms that sell exclusively to, and thus entirely depend upon, the government; and further, particularly

for this purpose, *domestic* from *foreign* firms.[119] On the buyer side, the government's interest may vary as we focus upon the interests of the *end user* (e.g., the pilot of a military aircraft, a judge working in a federal court house), the *source of funds* (whether the *head of agency*, tasked with achieving specific missions or mandates, or the legislative appropriator) seeking to allocate scarce resources among unlimited demands for government services, or various *accountability organizations* (such as audit or oversight instrumentalities tasked with protecting the public fisc).[120] The nature of public procurement requires inclusion of the *public* or *citizens* (individually or collectively), as *taxpayers* (whose funds are being spent) or as *consumers* (or recipients of government services), in the roster of relevant parties.

Further, particularly in an open, democratic society, *special interests* play a key role as they compete for their "piece of the procurement pie." In the United States, a short list of these interests might include small businesses, women-owned businesses, minority-owned firms, service-disabled veteran-owned firms, commercial firms, domestic producers, labor unions, firms located in areas of high unemployment, and environmentally-friendly procurement advocates.[121] Finally, for our

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119. Experience suggests further subdivision to the extent that, for some purposes, the distinction between domestic and foreign firms may depend upon, for example, ownership or location of the corporate headquarters or, in other circumstances, where the work is performed. *See generally* 48 C.F.R. § 25.003 (2007) ("'Domestic end product' means—(1) An unmanufactured end product mined or produced in the United States; or (2) An end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. . . .").

120. A simple anecdote offers a window into the range of competing interests. A legislator responsible for defense appropriations must make difficult decisions relating to, for example, air superiority; the legislator must balance the number of aircraft to buy and the amount of resources to be invested in maximizing a given aircraft's speed, agility, range, or ability to carry armaments. A legislator might reasonably conclude that a greater number of less potent aircraft would increase the likelihood of mission success (and taxpayers, as a whole, may or may not agree). Contrast this with a customer satisfaction model focused upon the government's end user, the fighter pilot (or wing commander) who would typically (for obvious reasons) express a strong preference for the maximum amount of speed, agility, range, and ability to carry armaments without regard for price. Of course, these considerations could become increasingly hypothetical as the military increases its reliance upon U.A.V.'s or unmanned aerial vehicles. *See, e.g.*, Charles Duhigg, *The Pilotless Plane That Only Looks Like Child's Play*, N.Y. TIMES, Apr. 15, 2007, at BU1 ("For years, . . . U.A.V.'s, . . . were pariahs within the military industry, [which . . .] saw them as threats to the status quo . . . . 'For a long time, the only thing most generals could agree on was that they didn't want any unmanned vehicles,' says Senator John W. Warner, the Virginia Republican who is a member of the Senate Armed Services Committee. 'Now everyone wants as many as they can get.'").

121. See, e.g., the discussion of wealth distribution in Schooner, *supra* note 18.

purposes, this discussion could not be complete without recognition of the facilitators of transparency, the *media* outlets (print, electronic, audio, visual, etc.) that not only educate the public (taxpayers and vendors alike) but perform a valuable third-party oversight role in the procurement process.

B. *Nondiscrimination*

The first and most political step is to embrace nondiscrimination by deciding to open a state's domestic procurement market to international competition. Practically speaking, there is no way in a modern, globalized economy to seal off any domestic procurement system completely; any modern government relies, to some extent, on foreign vendors for goods or services.[122] The decision is one of degree, then, but the experience of most nations—including the United States—is that opening a domestic procurement market can be politically wrenching and difficult, with considerations that carry well beyond the procurement rules themselves.[123]

As the discussion of the U.S. experience above reflected, market opening can be driven by unexpected proponents in the agencies themselves. Agency personnel—the customers affected by market barriers—may push to reduce domestic preferences because of the difficulty of compliance,[124] because of annoyed indifference to a collateral social goal that is impeding trade,[125] or simply because trade-impeding corruption will be prosecuted and destroyed as matter of course.

Some benefits weighing in favor of an open domestic procurement market were discussed above. But, for less obvious reasons, joining a liberalizing international regime may prove very useful for regimes with a procurement system riddled with inefficient standards and

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122. *Cf.* Manickam Supperamaniam, *Asian Perspective on Government Procurement Matters*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 291, 292-93 (2006) (Malaysia requires that local sources be used, unless requirement cannot be filled by local sources).

123. *See, e.g.*, ARROWSMITH, *supra* note 13, at 11-12 (reviewing political constraints on achieving free trade); De Graaf & King, *supra* note 109, at 442-43 (describing respective negotiation objectives of EU and United States in entering into 1994 GPA); Margaret Liang, *Government Procurement at the GATT/WTO: 25 Years of Plurilateral Framework*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 277, 282-84 (2006) (reviewing costs and benefits to developing nations); Bernard Hoekman, *Using International Institutions to Improve Public Procurement*, 13 WORLD BANK RES. OBSERVER 249 (1998), *available at* http://www.worldbank.org/research/journals/wbro/obsaug98/pdf/article6.pdf (reviewing economics literature regarding costs and benefits of nondiscrimination).

124. *See* Berry Amendment discussion, *supra* Part II.A.

125. *See* Accessibility Requirements discussion, *supra* Part II.B.

requirements. Opening and subjecting domestic markets to international standards for sound procurement may incidentally clear away those inefficient domestic procurement practices.[126]

The costs of opening procurement markets are usually highly specific to individual nations because those nations are typically using protectionist procurement policies to shelter strategic domestic industries. What is common across the globe, however, is that the nondiscrimination decision to open a domestic procurement market can typically be highly centralized and made by a few key decisionmakers. That is not always true, of course; the debate over whether to discriminate against foreign specialty metals has drawn in many hundreds of stakeholders across the U.S. procurement market. In principle, however, nondiscrimination can be tightly controlled by a political elite, unlike harmonization, rationalization, and institutionalization, discussed below.

C. *Harmonization*

The next step is to harmonize international instruments for opening markets.[127] Harmonization need not be overly specific, but requires a common set of carefully defined "bounding" rules or a "constitution," such as the GPA or the EU Directives.

Harmonization may seem, to some, a radical idea. If the goal of these instruments is simply to open markets which are at very different stages of development, one might argue that harmonizing the instruments—aligning the WTO GPA and the COMESA procurement directives, for

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126. *See* Victor Mosoti, *The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?*, 25 U. PA. J. INT'L ECON. L. 593 (2004). Mosoti notes:

> What is distressing, however, is that some of the poorer countries' decision not to sign the WTO GPA seems guided by priorities that are defeated by other factors inherent in these countries, and have nothing to do with a careful and honest assessment of what the nations really stand to gain or lose by signing. In offering the explanation that they would like to shield their domestic suppliers from external competition for government tenders, and nurture various strategic sectors, these countries are deliberately missing the point. They are being bled to ruination by terribly warped procurement laws and policies.

Id. at 596.

127. *See, e.g.*, Arrowsmith, *supra* note 94, at 23-24 (discussing need for harmonization); Sue Arrowsmith, *Transparency in Government Procurement* (2003), *reprinted in* EVENETT & HOEKMAN, *supra* note 12, at 126, 137 (discussing lack of transparency in rules as an independent barrier to foreign vendors).

example—is beside the point. Harmonization is essential, though, if progress is to continue in opening world procurement markets.[128] At the broadest level, harmonization will help to transfer lessons learned between different systems which are now relying on different integrative instruments. At the same time, and through the same process, harmonization will help to highlight the nagging problems buried in those instruments; this will be the first step towards "rationalization," discussed below.

If, as seems likely, harmonization centers on the WTO Government Procurement Agreement, harmonization will afford additional benefits. Integrating strands of many international procurement instruments through a revised GPA will help to win over those who fear that the GPA is merely a hegemonic instrument for opening markets, and not a tool for improving procurement systems in the developing world.

Realistically, harmonization (as suggested above) is likely to occur through the WTO Government Procurement Agreement, in part for purely practical reasons: the United States' federal procurement market is by far the largest national procurement market in the world, and under U.S. law, the GPA in essence creates a "walled garden" excluding those *outside* the GPA. Under U.S. law, generally only GPA members and those nations with bilateral arrangements with the United States may trade freely into the U.S. procurement market. Thus, under the Trade Agreements Act,[129] as implemented by the Federal Acquisition Regulation,[130] U.S. government contracting personnel may (subject to certain exceptions) purchase goods and services *only* from nations that are members of the GPA or have joined the United States in regional or bilateral arrangements, such as the North American Free Trade Agreement (NAFTA). This legal "walled garden" which generally affords non-discrimination only to those nations *inside* the GPA (or inside other, typically bilateral, U.S. agreements) is explicitly designed to encourage other nations to join agreements with the United States to open their procurement markets.[131]

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128. *Cf.* 19 U.S.C. § 2514(a) (President is to press for harmonization to encourage broader opportunities in international procurement trade).

129. *See generally* 19 U.S.C. §§ 2511-2518. *See also* 19 U.S.C. § 2511(a), (b); 19 U.S.C. § 2512.

130. *See* FAR, 48 C.F.R. § 25.403(c) (2007).

131. *See* 19 U.S.C. § 2512; Angela B. Styles, Robert K. Huffman & Lara Covington, *GSA Trade Agreements Certification: an Ambush for Commercial Providers*, 41 PROCUREMENT LAW. 1 (2006) (discussing serious potential fraud liability for vendors that provide goods from non-GPA nations); John A. Howell, *The Trade Agreements Act of 1979 Versus the Buy American Act: The Irresistible Force Meets the Immovable Object*, 35 PUB. CONT. L.J. 495 (2006); Thomas C. Lowinger, *Discrimination*

In order to access the U.S. procurement market developing nations will either need to join a bilateral free trade agreement with the United States (which is growing increasingly difficult, because the President will likely soon lose his "fast-track" negotiation authority), or—more likely—to join the GPA. The opportunity offered by the huge U.S. procurement market thus makes it more likely that developing nations will, over time, be drawn to the GPA; on balance, therefore, harmonization in public procurement is more likely to progress under the GPA.

Unlike nondiscrimination, which is typically a political decision made to further carefully calculated political and economic goals, harmonization is a more technical endeavor, as experts work to harmonize different regimes' procurement rules. Harmonization is more technically complex, however, if the goal is not just to harmonize nondiscrimination agreements, but also to create a technically advanced set of procurement rules—if, in other words, harmonization is to evolve naturally into rationalization, the logical next step in this process. If that broader harmonization is to succeed, the harmonization process should be fully transparent, and there must be robust communication between the various organizations developing international standards for procurement.

D. *Rationalization*

Rationalization involves improving international instruments to maximize efficiency in procurement systems. It can enhance domestic welfare and facilitate international trade, but poses a challenge to the GPA and other market-opening instruments. If the goal is only to harmonize international commitments not to discriminate, that can be done in a few paragraphs; harmonization is relatively simple, and no real rationalization is needed, because the states joining the instrument will be agreeing only to foreswear discrimination.

If the goal is broader, though, to agree to reduce irrational barriers to efficient procurement, "rationalization" becomes much more complicated and difficult. It means reopening the international instruments to reduce explicit and hidden barriers to international procurement—and, in the process, to improve the efficiency of procurement

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in Government Procurement of Foreign Goods in the U.S. and Western Europe (1976), *reprinted in* EVENETT & HOEKMAN, *supra* note 12, at 319, 326 (earlier study suggests that GPA and Trade Agreements Act, which came later, had important impact on U.S. procurement in neutralizing discrimination under the Buy American Act, for 1976 study suggested "that the 'Buy American' policy has had a significant impact in curtailing U.S. government procurement of imports").

systems in each of the signatory states. This is a very sophisticated, technical undertaking requiring extensive data on the member nations' existing procurement regimes, on how advanced those procurement systems are, and on the procurement strategies that those member nations should (and should not) rely upon.[132] Drawing a common regulatory thread among the member states—setting a lowest common denominator for fair procurement by international agreement—is difficult,[133] but not impossible.

An example illustrates the promise and perils of rationalization. As noted above, "framework" agreements have emerged as a critical issue in U.S. and European procurement systems. Framework agreements offer enormous promise by allowing agencies (often centralized procurement agencies) to establish standing contracts for commodity goods and services that reduce the time, expense and frustrations normally part of government procurement. Yet absent careful regulation, framework agreements can erode nondiscrimination commitments by quietly destroying the competition and transparency that are vital to a truly open procurement regime. In the United States, framework agreements have swallowed up billions of dollars in largely noncompetitive, nontransparent procurement, creating an invisible "gap" in the U.S. commitment to open its procurement market to its

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132. For example, less developed procurement regimes, in an effort to minimize corruption, maximize competition, and increase transparency, tend to favor publicly disclosed bids or tenders with low price determining contractor success. More advanced regimes tend to employ "alternative means of competitive procurement that are better suited to the production of . . . complex goods and services—competitive negotiation techniques—[that] are more susceptible to subjectivity, bias, favouritism, and corruption." *See generally* Joshua I. Schwartz, *Learning From the United States' Procurement Law Experience: On "Law Transfer" And Its Limitations*, 11 PUB. PROC. L. REV. 115, 119 (2002). Schwartz suggests that:

> [T]he progression . . . from tendering systems in which the primary criterion for award of a contract among the field of competitors is the lowest price, to a best value system in which a much more extensive list of criteria is assessed to evaluate the quality of the goods or services offered, is one that developing procurement systems may be well advised to retrace, rather than race to the (temporary) end-state of best value procurement.

Id. at 121.

133. While corruption control is a common and entirely reasonable metric upon which to judge a procurement regime, Schwartz recognizes "that rigidly controlled procurement often fails to allow procurement officers to achieve good results for the government, especially in a dynamic environment." *Id.* at 120. Moreover, procurement reform always entails a balancing act. *See also* Schooner, *supra* note 18.

trading partners.

A simple international nondiscrimination agreement would not need to address framework agreements; indeed, even the recently revised GPA does not do so. That begs the question, however, of how to resolve framework agreements' potentially corrosive effect on international trade and member nations' own procurement systems. Rationalization of the GPA (or any other international instrument) would require assessing framework agreements' benefits and risks, and setting benchmarks for acceptable standards. By doing so, rationalization would enhance the GPA *and* the procurement systems of its member nations, improving both international trade and domestic efficiency. The GPA would gain legitimacy in the eyes of nonmember nations as a result, no longer viewed as merely as a wedge to open their domestic procurement markets to international vendors, but as a reliable tool for enhancing their own procurement regimes.

E. *Institutionalization*

The last step in opening public procurement markets, after harmonization and rationalization, is what we call here "institutionalization." As international procurement instruments expand their reach and address more complex barriers to trade, the key challenge will be to "institutionalize" the commitments those instruments make by working them into the fabric of member nations' procurement regimes.[134] There are a number of tools to "institutionalize," from training procurement officials and private firms in commonly accepted practices from open, competitive procurement regimes, to building states' institutional capacity to oversee and manage procurement. One of the readiest tools to ensure "institutionalization" would be a remedial means for competitors—prospective contractors—to enforce states' commitments.[135] The United States' experience in this regard shows the value of an effective remedies system in "institutionalization," and the shortcomings in the current treaty structure.

In the United States, concerned vendors may quite easily challenge the terms of a solicitation or award as discriminatory or illegal. There

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134. *See, e.g.*, UNCITRAL MODEL LAW, *supra* note 91, at Guide to Enactment ¶¶ 36-40 (noting suggested steps for implementing UNCITRAL model law).

135. *See generally* Daniel I. Gordon, *Constructing a Bid Protest Process: the Choices that Every Procurement Challenge System Must Make*, 35 PUB. CONT. L. J. 427 (2006); Harvey Gordon, Shane Rimmer & Sue Arrowsmith, *The Economic Impact of the European Union Regime on Public Procurement: Lessons for the WTO* (1998), *reprinted in* EVENETT & HOEKMAN, *supra* note 12, at 431, 453 (arguing for effective remedies regime for enforcement).

are at least three established fora for such challenges, which are known as "bid protests" in the United States: the Government Accountability Office (which hears more than a thousand such challenges each year), the U.S. Court of Federal Claims (which hears far fewer), and the contracting agencies themselves (which generally do not publish statistics on agency-level protests).[136] A vendor may bring a bid protest in any of these fora, and can generally rely on a prompt and objective review of the vendor's concerns with appropriate remedies. Over many decades, the U.S. bid protest system has evolved into an effective means of ensuring competition, transparency, integrity, and accountability in the federal procurement system.[137] By affording a ready enforcement mechanism to vendors when the law is not followed, this mature bid protest system thus "institutionalizes" the procurement rules into the daily workings of the procurement system.

Current international instruments do not necessarily afford vendors (or other stakeholders) the same ready means of protest. The GPA, for example, requires that member states incorporate its requirements into their national laws and establish a forum to hear protests regarding violations of national law ("national challenge procedures"), but does *not* require that vendors be allowed to protest violations of the GPA.[138] Thus, if a member state violates the GPA and there is no corresponding violation of domestic law, the injured vendor's only recourse under the GPA is to complain to the vendor's government, which in turn may seek relief from the discriminating government.[139] The U.S. Commerce Department describes this process on its website by suggesting that government officials can help injured vendors understand their rights under the GPA, ask foreign officials to review the matter, or invoke the WTO dispute settlement process as a last

136. We view this election of forum as a historical oddity, and do not, as a matter of policy, suggest that it is efficient or optimal. Indeed, one of us has criticized the current regime at length. Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714, 755-56, 768-70 (2003); Steven L. Schooner, Feature Comment, *Watching The Sunset: Anticipating GAO's Study Of Concurrent Bid Protest Jurisdiction in the COFC and the District Courts*, 42 GOV'T CONTRACTOR ¶ 108 (2000).

137. Indeed, we view this as a crucial form of third-party oversight of the procurement process. Steven L. Schooner, *Fear of Oversight: the Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 691-93 (2001).

138. *See* ARROWSMITH, *supra* note 13, at 386 (noting that if a member state has failed to incorporate a GPA requirement into domestic law, the injured vendor may in effect have no recourse through "national challenge" procedures based on national law).

139. *Id.* at 358-84 (discussing the process under the WTO Dispute Settlement Mechanism).

resort.[140]

As the Commerce Department's explanation suggests, instead of bringing a direct protest, the vendor must ask its home government to intervene with the offending government, and then, if that fails, to invoke the dispute process under the WTO.[141] It is extremely unlikely, however, that a system this unwieldy will truly institutionalize the GPA. Indeed, in its decade of existence, there have been only three matters brought under the current Government Procurement Agreement,[142] two of which (the consolidated matters relating to United States procurement) ended before decision, when the issue, a Massachusetts boycott against Myanmar, was addressed by the U.S. Supreme Court.[143]

Notably, possibly the most publicized event in the GPA's nondiscrimination regime—the United States' December 2003 announcement[144]

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140. *See* U.S. Dep't of Commerce, Trade Compliance Ctr., Exporter's Guide to WTO Agreement on Government Procurement, http://tcc.export.gov/Trade_Agreements/Exporters_Guides/List_All_Guides/exp_005325.asp.

141. *See generally* Christopher F. Corr & Kristina Zissis, *Convergence and Opportunity: the WTO Government Procurement Agreement and U.S. Procurement Reform*, 18 N.Y.L SCH. J. INT'L & COMP. L. 303 (1999) (discussing vendors' practical difficulty in using cumbersome WTO process).

142. *See* Panel Report, *Korea—Measures Affecting Government Procurement*, WT/DS163/R (May 1, 2000), http://docsonline.wto.org (search "Document Symbol" for "WT/DS163/R); Request for Consultations by the European Communities, *United States—Measure Affecting Government Procurement*, WT/DS88/1 (June 26, 1997), http://docsonline.wto.org (search "Document Symbol" for "WT/DS88/1"); Request for Consultations by Japan, *United States—Measure Affecting Government Procurement*, WT/DS95/1 (July 21, 1997), http://docsonline.wto.org (search "Document Symbol" for "WT/DS95/1").

143. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (declaring Massachusetts' procurement boycott unconstitutional because of preemption by federal law); ARROWSMITH, *supra* note 13, at 327-28 (discussing procedural history); Mitsuo Matsushita, *Major WTO Dispute Cases Concerning Government Procurement*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 299, 300 (2006); *see also* WTO, Disputes Gateway, http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (database of WTO disputes).

144. See Paul Wolfowitz, Deputy Secretary of Defense, Determination and Findings (Dec. 5, 2003), stating, *inter alia*, that "essential security interests of the United States" necessitated that competition for a projected $18.6 billion in contracts to "upgrade and rebuild [Iraq's] electrical sector, public works and water, military courts and borders, building, housing and health, transportation, communications, and oil infrastructure" be limited to firms from the U.S., Iraq, and "coalition partners and force contributing nations." This action was noteworthy, not only because no nation formally challenged it, but also because, as a matter of U.S. law, Deputy Secretary Wolfowitz may have lacked the authority to execute it. See generally 10 U.S.C. § 2304(c)(7), as implemented by 48 C.F.R. § 6.302-7 (2007), indicating that: "*Limitations.* . . . A written determination to use this authority shall be made . . . by . . . The Secretary of Defense . . . or . . . [t]he head of any other executive agency. This authority may not be delegated." See also 48 C.F.R. § 206.302-7, "*Limitations.* For the defense agencies, the written determination to use this authority must be made by the Secretary of Defense." (Emphasis in the original.)

that it would not open prime contracts for Iraqi reconstruction to prime contractors from nations, including GPA member nations, that did not join the coalition that invaded Iraq—was apparently never raised in a WTO proceeding.[145] Political concerns may overwhelm even serious violations of the GPA, and the enforcement mechanism currently in place holds little guarantee of "institutionalizing" the GPA's rules; member states are, for most practical purposes, on their honor to bring their procurement systems into compliance with the GPA. As the international procurement system matures, therefore, and as the GPA's rules become a more central part of states' procurement regimes, it may prove vitally important to expand vendors' ability to bring "challenges" directly under the GPA.

V. Conclusion: A Global Public Procurement Regime?

The barriers that normally impede world procurement trade—classic domestic preferences, distorting and inefficient collateral social policies, corruption, self-serving agency "efficiencies" in procurement, and structural barriers to entry—are slowly eroding in the face of numerous international instruments, including various forms of agreements and guidance that are helping the world procurement market integrate. Although many nations continue to resist liberalization in procurement, a pattern of steps (a plan of action, really, to effect nondiscrimination) is beginning to emerge. To accept nondiscrimination as a norm—the fundamental predicate to a global procurement market—and to permit procurement regimes to operate more smoothly, the instruments used for guiding liberalization should be harmonized, with an eye to rationalizing those instruments to improve efficiency. Unlike the political decision to liberalize, which may be driven by a political elite, harmonization and rationalization require a much broader effort. The effort, in principle, should engage and coordinate the many technical, legal, and trade experts responsible for improving the instruments. Once harmonized and rationalized, the guiding instrument(s) should be institutionalized, through training, capacity building, and, where appropriate, challenge mechanisms. Such institutionalization involves an even broader orbit of technical, legal, and

145. *See, e.g.*, Christian Pitschas, *World Trade Organisation/United States: Award of Prime Contracts for Infrastructure Reconstruction in Iraq—an Assessment under the WTO Agreement on Government Procurement*, 13 Pub. Proc. L. Rev. NA85 (2004); Owen Bonheimer, *The Duty to Prevent Waste of Iraqi Assets During Reconstruction: Taming Temptation Through ICJ Jurisdiction*, 34 Pub. Cont. L.J. 673, 692 (2005).

procurement personnel, as a procurement system at large is recast for an open market. The cycle of improvement can then turn full circle as challenges and other reviews disclose faults in the system that can be improved—both to assure international vendors of the procurement system's integrity and, equally importantly, to ensure that the system evolves towards efficient procedures that will produce optimal outcomes. Thus, opening procurement markets should, at least in principle, both enhance the value of goods and services bought, and strengthen the liberalizing procurement systems themselves.