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THE GATT AGREEMENT ON GOVERNMENT PROCUREMENT IN THEORY AND PRACTICE

Charles Tiefer*

I. INTRODUCTION

The Uruguay Round GATT Agreement on Government Procurement (AGP), which became effective January 1, 1997, appeared at first glance to end the preference barriers against foreign suppliers in procurement by American state and local governments.[1] Such preference barriers are widespread.[2] The United States' main international trading partners objected to these trade barriers in the Uruguay Round of GATT trade negotiations. They refused to open up protected procurement sectors of their own, while the American state government procurement sector remained discriminatory toward them. To bring the Uruguay Round to fruition, American negotiators had to, and did, match foreign concessions with the AGP's bar against in-state procurement preferences. In implementing the AGP, Congress had to, and did, approve this.

Accordingly, as described in this Article's next section, the AGP does extend GATT's principle of "non-discrimination" against foreign enterprise to the sector of state and local procurement. However, as the section further discusses, a closer look at the compromises made in the AGP negotiation and implementation

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1. The Agreement on Government Procurement is reprinted with other useful documents in NATIONAL ASSOCIATION OF STATE PROCUREMENT OFFICERS, WORLD TRADE ORGANIZATION GOVERNMENT PROCUREMENT AGREEMENT: IMPLEMENTATION GUIDELINES AND DIRECTORY OF SOLICITATION ADVERTISING 40-68 (1996) [hereinafter NASPO].

2. *See* James D. Southwick, *Binding the States: A Survey of State Law Conformance with the Standards of the GATT Procurement Code*, 13 U. PA. J. INT'L BUS. L. 57 (1992).

processes at least begins raising questions about just how strongly the AGP acts.

As discussed in the Article's third section, the AGP explicitly limits its own scope of coverage: it only applies to thirty-seven states, and even to those, does not reach excepted sectors; moreover, the AGP creates ambiguity in implementation because it does not render in-state preferences invalid on their face or as applied to out-of-state domestic suppliers, only purporting to except selected foreign suppliers from their application. Most important, Congress's implementation of the AGP limits the remedying of state preferential decisions in major, if unobvious, ways. Congress has precluded, in the GATT implementation act, any private federal judicial remedy under the AGP.

Thus, procedurally, the AGP offers the foreign supplier considerably less than a smooth procedural route to American state contracts. Free-trade supporters may naturally view this as pure bad news. I will argue in the Article's fourth section that the AGP's remedy limitations serve valuable political purposes. In domestic terms, those limitations maintain the political flexibility inherent in the dual sovereignty system of American federalism. At the same time, in international terms, such unobvious limitations in the AGP's remedial implementation enable the United States to successfully move forward in trade negotiations. That is why the Article ends with an optimistic conclusion.

II. PREFERENCES IN STATE PROCUREMENT, AND GATT'S AGP

A. *State Preferences*

For obvious reasons, state and local government procurement often favors domestic suppliers, through a patchwork of formal and informal preferences that work against foreign suppliers. Congress has led the way in having a formal national "Buy America" preference in federal procurement,[3] so, naturally, a number of the states have a similar one in their state procurement.[4] The Congressionally enacted "Buy America" preference primarily serves a national goal to reduce domestic unemployment. It is implemented in each particular procurement by the federal contracting officer adding to each foreign proposal a "Buy America" factor, typically a six percent

3. *See, e.g.*, William H. Lash III, *Some "Buy American" Rules Ease: The 1933 Act Devised to Foster U.S. Industry Keeps Evolving*, NAT'L L. J., July 26, 1993, at 23.

4. *See* Southwick, *supra* note 2, at 57.

differential. Additionally, that central "Buy America" preference, and certain other formal "Buy America" preferences like a fifty percent differential for defense purchases, serve particular purposes in particular procurement sectors, such as the national security purpose of building up our domestic defense supply industry.[5]

The federal "Buy America" regulations embody provisions for exceptions for foreign suppliers whose countries have joined the United States in reciprocal efforts at free trade, generally referred to as "qualified" countries.[6] These exception regulations are implemented in each procurement by the contracting officer deciding whether a particular foreign supplier falls under an exception to the application of the differential and becomes a "BAA qualified" supplier.[7] As a prime example, the federal government implemented GATT's AGP, negotiation of which is discussed below, at the level of federal procurement by regulatory exceptions for suppliers in the GATT nations.[8]

Those federal exception regulations teach an important lesson: it makes a difference how Congress implements international trade arrangements. Congress did not repeal the Buy America Act in favor of free trade. It did not even create some separate procedural system for implementing the GATT AGP. Rather, Congress kept the Buy America Act in effect, with a system for accommodations to free trade agreements on a procurement-by-procurement basis.[9] This substantive and procedural arrangement for making exception decisions in individual procurements reflects how the balance of political forces in this context does not accord completely with either the vision of the purist free trade supporter, who might prefer an

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5. *See* David W. Burgett, *Protectionism and Internationalization in Defense Procurement: The Section 800 Panel Recommendations on Defense Trade and Cooperation*, 40 FED. B. NEWS & J. 448 (1993).
6. *See* Bruce S. Ramo et al., *Free and Open?: Preferences for Domestic Products in U.S. and International Public Procurements*, CONT. MGMT., June 1991, at 40.
7. *See id.*
8. *See* Martin J. Golub & Sandra Lee Fenske, *U.S. Government Procurement: Opportunities and Obstacles for Foreign Contractors*, 20 GEO. WASH. J. INT'L L. & ECON. 567, 575-77 (1987).
9. When disputes occur as to whether contracting officers have given those exceptions proper effect, those disputes get resolved on an individual basis through the regular federal administrative and judicial system for resolving contractor procurement disputes. *See, e.g.*, Charles W. Clanton, *John C. Grimberg Co. v. United States: Has the Federal Circuit Eased the Restrictions of the Buy American Act?*, 15 N.C. J. INT'L L. & COM. REG. 115 (1990).

outright repeal of the Buy America Act, or that of domestic preference supporters, who regret any incursion into the Buy America Act's operation. Rather, the system reflects Congress's delicate political balance between a willingness to match foreign trade concessions and a desire to continue favoring domestic employment.

A second formal state rule has no matching federal counterpart. Many of the states have formal in-state preferences, that favor the state's own suppliers over out-of-state ones, both domestic and foreign. Some particular state legislatures simply declare that the state's procurement officers should favor suppliers of that state. Alternatively, some state legislatures specify particular differentials favoring suppliers within that state over outsiders. Often the preference concerns particular sectors, like western states with in-state preferences for their own beef. Given the small fraction of commerce in America that comes from overseas, such in-state preferences presumably operate primarily against other domestic suppliers rather than foreign ones.

States may also discriminate in favor of in-state suppliers by informal means. It stands to reason that the same political factors leading to the many "Buy America" and in-state preferences enacted formally as state legislation[10] also lead to informal preferences by state administrators. Like state legislators, the state governors and their administrations are accountable to their state's public and their state's particular interest groups. Just as the local political support for favoring local suppliers influences state legislators, it may influence state administrations.

Both formal and informal in-state preferences can have two types of goals, just like the national "Buy America" goals: general favoring of state employment, and some particular interest regarding a particular procurement sector. At the state level, the particular interest would not be national defense, of course, or relief of some special political concern regarding that particular sector, much like a subsidy program meant to draw or to retain particular business for that state.

B. *The Background of the AGP*

Behind the negotiation and approval of the Uruguay Round's AGP lies a significant political history. The original modern impetus to establish international trade agreements goes back to the post-

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10. *See* Southwick, *supra* note 2, at 57.

Depression reaction against the history of high tariffs and their destructive effects on trade.[11] As Congress evolved various mechanisms for domestic effectuation of GATT trade agreements, it ultimately adopted the Trade Act of 1974,[12] carried forward, with modifications, by the Trade Agreement Act of 1979[13] and by modifying and renewing legislation in 1984[14] and 1988.[15] The 1974 Act created a system by which the President negotiates agreements always anticipating a need to obtain Congressional approval, and then submits implementing bills for the trade agreements to Congress. Congress, in turn, binds itself procedurally to move the implementing bills, in the form submitted by the President, along an internal "Fast Track" free both from floor amendments, and from excessive delays.[16] This "Fast Track" mechanism has produced a series of legislative struggles and legislative successes over the years, culminating in the 1990s in the Clinton Administration's success in securing approval of implementing bills for two controversial agreements, the NAFTA and the GATT Uruguay Round agreements.[17]

C. *Negotiation and Approval of the AGP*

Focusing on the particular subject of GATT agreements regarding government procurement, while the original GATT did not cover government procurement at all, in 1979, the Tokyo Round of GATT negotiations produced a limited Agreement on Government Procurement.[18] However, the 1979 agreement did not apply to procurement by states and cities ("subfederal" entities). When Uruguay Round negotiations started in 1988,[19] participating countries hoped to expand the coverage of the 1979 agreement. Their preliminary

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11. *See* John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249 (1967).
12. Pub. L. No. 93-618, 88 Stat. 1978 (1975); *see also* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 141-42 (1995).
13. Pub. L. No. 96-39, 93 Stat. 144 (1979); *see also* Jackson et al., *supra* note 12, at 143-47.
14. *See* Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984).
15. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988); *see also* Edmund W. Sim, *Derailing the Fast Track for International Trade Agreements*, 5 FLA. J. INT'L L. 471 (1992).
16. 19 U.S.C.A. §§ 2191-93 (West, WESTLAW through May 15, 1997).
17. The NAFTA Implementation Act is Pub. L. No. 103-182 (1994).
18. *See* Golub & Feske, *supra* note 8, at 567.
19. *See* JACKSON ET AL., *supra* note 12, at 147.

agreement envisaged a code drafted to apply to some sphere of coverage of state and local procurement and government-owned enterprises, with the actual sphere of coverage to be set out for each signatory country in schedules, or annexes, to the agreement that would be collectively negotiated but would be adapted to the situation of each signatory.

The United States did not set out in these negotiations to enter into an agreement that would apply uniformly and nationally to preempt in-state preferences in all fifty states.[20] Until 1992, this part of the Uruguay Round talks[21] had temporarily stalled. The lead in this matter was being taken by negotiations between the European Union and the United States on a bilateral agreement on government procurement, akin to the U.S.-Canada Free Trade Agreement approved in 1979. These bilateral talks had stalled over the question of the balance between the size of the sectors that the European Union and the United States were each offering to open (their "tenders").[22] The United States objected that European government-owned enterprises, like national telecommunications and utility companies, were not open. Meanwhile, the Europeans complained that more than half of U.S. states applied one form or another of "buy local" policies, as did thirteen out of the twenty-four biggest U.S. cities.[23] Ultimately, the United States was able to improve its offer to thirty-seven states to be bound by the AGP.

For covered procurements, the fundamental principle which the AGP extended to state and local procurements was GATT's basic guarantee of "national treatment and non-discrimination."[24]

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20. The United States was able to offer in its negotiations that its annexes would list coverage of 24 states, meaning that 24 states had voluntarily agreed to let the federal government include them in coverage. *See* Steven S. Diamond & Rosemary Maxwell, *Opening the International Government Marketplace: New Developments on the NAFTA, U.S.-EC, and GATT Fronts*, BNA FED. CONT. REP., July 25, 1994, at n.82.

21. See JACKSON ET AL., *supra* note 12, at 316-18 for an overview of the Uruguay Round.

22. *See* 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 L. 435 (1995).

23. *See id.* at 442 & n.39; *see also* SERVICES OF THE COMMISSION OF THE EUROPEAN COMMUNITIES, REPORT ON UNITED STATES TRADE BARRIERS AND UNFAIR PRACTICES 1991: PROBLEMS OF DOING BUSINESS WITH THE U.S. 53-57 (1991) (listing state procurement preferences).

24. JACKSON ET AL., *supra* note 12, at 436-63.

Under Article II, the parties must provide the products and suppliers of other parties with treatment "no less favorable" than accorded to domestic products and suppliers.[25] Other articles of the AGP impose a variety of procedural obligations for government procurement, frequently described as "transparency" requirements, to prevent discrimination and encourage foreign suppliers. When American enterprises seek to sell to foreign countries, these "transparency" requirements may matter greatly. American enterprises have often declared themselves handicapped by the invisible ways some countries do their government procurement, such as Japan.[26] However, American state procurement already meets most of these "transparency" requirements, like advertisement of procurements and systems for bid protests.[27] While the application of the AGP to state procedures is significant, for purposes of this Article attention may be directed to how the fundamental non-discrimination principle will be applied, and particularly to the procedures for its effectuation.

The Uruguay Round agreements, including the AGP, still had to receive Congressional approval in the form of adoption of an implementing bill. In light of how the "Fast Track" works, both the President and Congress had engaged in intense joint consideration of the agreements even before they were finally concluded in April 1994. Congress had started a series of committee hearings during negotiations. The House Report on the Uruguay Round agreements summarizes the House hearings:

> Following the 120-day advance notice to Congress on December 15, 1993, of the President's intent to enter into the agreements, the full Committee held a hearing on January 26, 1994, followed by four days of comprehensive Subcommittee hearings on February 1, 2, 8 and 22 to review the final results of the Uruguay Round negotiations (Serial No. 103-73). Finally, the full Committee held a hearing on June 10, 1994 on the World Trade Organization and its implications for U.S. sovereignty.[28]

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25. See *id.* at 444-47 for a discussion of the implementation of the nondiscrimination principle in GATT.
26. *See* Jean Heilman Grier, *U.S.-Japan Government Procurement Agreements*, 14 WIS. INT'L L. J. 1 (1995).
27. A guide has been prepared for states to follow. *See* NASPO, *supra* note 1.
28. H.R. REP. NO. 103-826, pt. 1, (1994), *reprinted in* 1994 U.S.C.C.A.N. 3791-92.

It was not until September 27, 1994, that the President transmitted to Congress H.R. 5220, the implementing bill for the Uruguay Round agreements.[29] The President also submitted a "Statement of Administrative Action."[30] As further clarification, the United States Trade Representative provided a set of answers to questions from the National Association of State Procurement Officers (NASPO).[31] Since Congress enacted, in December 1994, the implementing bill for the Uruguay Round agreements,[32] including the AGP, the next section can appropriately turn to just what the agreements, and the implementation bill, put into effect.

III. LIMITATIONS ON THE EFFECT OF THE AGP ON STATE PREFERENCES

A. *Visible Indications of Limits of the AGP's Effect*

In 1992, a survey of state government procurement legislation found that a majority of the states had "Buy America" or in-state preferences of one kind or another.[33] Reviewing that survey in early 1997, the negotiation and approval of the AGP appears not to have caused any significant number of states to repeal those preferences. Most of them remain on the books; the few changes may well have little or nothing to do with the AGP.

While the in-state preferences that existed in 1992, and persist in 1997, depart from the ideal of free trade, many do not violate the AGP even arguably. Only thirty-seven states agreed to coverage at all by the AGP, and are listed in the United States' annex to the agreement. The other thirteen have a perfect right to disregard the AGP, and ten of them are simply availing themselves of this right by preserving their in-state preferences. Even of the thirty-seven, a mere twenty agreed to coverage of most or all of their executive

29. *See* H.R. REP. NO. 103-826, pt. 2, (1994), *reprinted in* 1994 U.S.C.C.A.N. 4013.
30. Statement of Administrative Action, *reprinted in* 1994 U.S.C.C.A.N. 4040.
31. These answers are reprinted in AMERICAN BAR ASSOCIATION, SECTION OF PUBLIC CONTRACT LAW, RIDING THE WAVE OF CHANGE IN STATE AND LOCAL PROCUREMENT (Feb. 10, 1995)(hereinafter USTR ANSWERS), in the section at the end of Tab E.
32. *See* JACKSON ET AL., *supra* note 12, at 326.
33. *See* Southwick, *supra* note 2, at 57.

branch agencies.[34] Seventeen only agreed to coverage of selected executive branch agencies, or excepted significant sectors.[35] Those seventeen included the large states of Illinois and Texas, and certain states that can have significant levels of political discontent about foreign imports, such as Michigan and New Hampshire. Where the "Buy America" or in-state preferences concern the agencies or sectors excepted by those thirty-seven states, those preferences, even when applied at the expense of would-be foreign suppliers, in no way violate the AGP.

Even those states which accepted coverage of sectors did not agree to leveling their in-state preferences as they apply to domestic out-of-state suppliers. States may strive for the minimum required compliance with the AGP. That is, they may choose to relieve foreign suppliers from the effect of the in-state preference, but not accord such relief to out-of-state domestic suppliers. A state that agreed to comply with the AGP, but wants to have an in-state preference, may treat foreign suppliers from GATT countries as relieved from the effect of the preference, while not according that relief to suppliers in other American states.

This may seem quite an anomaly, like the days of the Articles of Confederation when the thirteen original states felt free to treat imports from each other harshly while welcoming trade with Europe. Yet, that this is legal has been repeatedly verified. During the sensitive period when the Congress had to decide whether to implement the AGP, the NASPO submitted a series of written questions to the United States Trade Representative. The following question and answer were exchanged on this subject:

> Q: Will Code implementation result in the potential for a foreign bidder to be treated more favorably than a domestic bidder not located in the entity conducting the procurement?

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34. The twenty states are Arizona, Arkansas, California, Colorado, Florida, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, New York, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Washington, and Wisconsin. *See* Diamond & Maxwell, *supra* note 20, at n.86.

35. The seventeen states are Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Kentucky, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, Oklahoma, Oregon, South Dakota, Texas, and Wyoming. *See id.* For a state-by-state list of covered agencies and exceptions see NASPO, *supra* note 1, at Appendix A.

> A: The Code says nothing about how domestic bidders are treated, as long as they are treated no more favorably than bidders from other signatories.[36]

Accordingly, when the NASPO published a guide to AGP compliance for the states, it declared:

> Discriminatory procurement laws can continue to be applied to procurements that do not fall within the terms of the agreement or to bidders not located in covered countries. The procurement official must determine that the product or service does not actually originate in a covered country, or the parent firm of the bidder is not located in a covered country.[37]

In other words, a state can decide to retain an in-state preference, denying contracts to firms in other American states while allowing them to foreign firms, a true program for exporting jobs. The situation follows directly from the political logic of the AGP. The United States trade negotiators did not purport to assert or employ the power to preempt state laws to create a better domestic economy, only to solicit state cooperation in order to secure matching foreign concessions. States that choose to lower their in-state preferences only as needed to secure foreign reciprocal concessions, have done as much as the federal government asked.

However, there is a key procedural consequence for the fact that even the thirty-seven covered states remain free to have formal "Buy America" and in-state preferences. So long as states can retain their old formal preferences on their books and even adopt new ones, it becomes critical just what procedural remedies exist to check what procurement officers do on particular procurements. Moreover, informal preferences may persist, namely, administrative favoritism toward American suppliers even without an explicit state legislative in-state or "Buy America" preference. These two categories make it critical just what procedural remedies will apply in cases of discrimination against GATT signatory suppliers.

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36. USTR ANSWERS, *supra* note 31, at 1. Having answered the question that the AGP does not require any reduction in in-state preferences applied against out-of-state domestic bidders, the answer adds, "The Administration has pledged in its Statement of Administrative Action, which accompanies the implementing legislation, to encourage all covered states to offer nondiscriminatory treatment to suppliers from other covered states." *Id.*
37. NASPO, *supra* note 1, at 5.

B. Limits on the GATT Panel Remedy

The Uruguay Round agreements strengthened the existing public international law remedy for violations: panels. In brief, a GATT signatory nation which considers an American state practice to violate the AGP can file a complaint, which will be referred to a panel. The panel receives written and oral submissions from the other nation and from the United States Trade Representative. While the American state, as a "subfederal entity," does not formally participate as a party, the implementation bill provides for the Trade Representative to consult and involve the state.[38] The Administration submitted a statement elaborating in detail on the requisite consultation.[39] If the panel concludes that the American state's practice violates the AGP, still, as the House report on the implementing bill explains:

> The Uruguay Round Agreements do not automatically "preempt" or invalidate state laws that do not conform to the rules set out in those agreements — even if a dispute settlement panel were to find a state measure inconsistent with such an agreement.[40]

The implementation law provides that after such a panel ruling, "the Trade Representative shall consult with the State concerned in an effort to develop a mutually agreeable response to the report of the panel."[41] The Administration Statement, and legislative history, anticipate that an elaborate "cooperative approach" would be followed.[42]

Section 102(b)(2) of the implementing bill does establish the authority for the United States Attorney General to file an action in federal court to declare a state law invalid as inconsistent with the Uruguay Round agreements.[43] However, both the legislative history and the Administration Statement make clear that "[t]he authority conferred on the United States under this paragraph is intended to be used only as a 'last resort.' "[44] Even if the Attorney General files

38. *See* 19 U.S.C.A. §§ 3512(b)(1)(C)(ii)-(iii) (West, WESTLAW through May 15, 1997).

39. *See* Statement of Administrative Action, *supra* note 30, at 13-14.

40. H.R. REP. NO. 103-826, pt. 2, (1994), *reprinted in* 1994 U.S.C.C.A.N. 4028.

41. 19 U.S.C.A. § 3512(b)(1)(C)(iv) (West, WESTLAW through May 15, 1997).

42. *See* H.R. REP. NO. 103-826, pt. 2, (1994), *reprinted in* 1994 U.S.C.C.A.N. at 4029.

43. *See* 19 U.S.C.A. § 3512(b)(2)(B) (West, WESTLAW through May 15, 1997).

44. H.R. REP. NO. 103-826, pt. 2, (1994), *reprinted in* 1994 U.S.C.C.A.N. at 4029.

such a suit, the implementing law gives the state a fair chance, by explicitly denying binding effect, or even deference, to the panel ruling,[45] and by assigning to the United States the burden of proof.[46] As the legislative history and the Administration Statement explain:

> The United States would base any such proceeding on the provisions of the relevant Uruguay Round Agreement — not a panel report — and the court would thus consider the matter de novo. . . . [T]he court would reach its own, independent interpretation of the relevant provisions [of the Agreement]. . . .[47]

Exciting as it is to contemplate an international panel decision followed by a United States suit against a state, it is not likely to occur often. As the United States Trade Representative said to the NASPO:

> Direct challenge of state procurement practices through formal dispute settlement proceedings are likely to be very rare. In the 13-year history of the Code, there have only been two challenges.[48]

Only one panel ruling under the Tokyo Round AGP appears to have adjudicated the validity of a United States government action. That was a panel, initiated by the European Community, to challenge procurement by the National Science Foundation of a sonar mapping system in 1991, domestically, under a "Buy American" requirement. The panel procedures do not seem to have been very inviting.

Even if the strengthened panel procedures of the Uruguay Round proved more inviting than the old panel procedures,[49] the practical problems for the foreign supplier considering its invocation loom large. The foreign supplier cannot use this remedy itself; the remedy belongs only to nations, not private entities. Hence, the supplier must persuade its national government to make a challenge. For many reasons including the potential for challenges to its own practices, a nation may not wish to pursue the claim. One can

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45. *See* 19 U.S.C.A. § 3512(b)(2)(B)(i) (West, WESTLAW through May 15, 1997).
46. *See* 19 U.S.C.A. § 3512(b)(2)(B)(ii) (West, WESTLAW through May 15, 1997).
47. H.R. REP. NO. 103-826, pt. 2, (1994), *reprinted in* 1994 U.S.C.C.A.N. at 4030.
48. USTR ANSWERS, *supra* note 31, at 9.
49. *See* Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477 (1994).

readily imagine a period when for diplomatic reasons one nation, say France, might be eager to file challenges against the United States but Japan might not, yet the foreign suppliers who run into challengeable state barriers in California might well only be Japanese, not French.

Of course, a nation could decide to challenge state barriers even without any aggrieved suppliers, as part of its goal of clearing a path for its commercial interests. This might be more likely if the issues tended to be blatant, clear-cut state "nullification" legislation. However, as discussed above, the mere existence on the books of an in-state preference is not a blatant, clear-cut violation of the AGP, since the state can take the position that its procurement officers should, and will, only apply the preference to domestic out-of-state suppliers, not to GATT signatory suppliers. Hence, the most likely issues need not be blatant. They could be procurement-specific, such as when a state procurement officer applies an in-state preference to a GATT signatory supplier. They could be even more fact-specific, such as when a state procurement officer uses some pretextual reason to reject a foreign supplier. Such procurement-specific, fact-specific situations lend themselves little to anticipatory challenges by foreign nations without actual aggrieved suppliers.

C. *Limits on Administrative and Judicial Remedies*

Assuming that the most promising challenges to state practices occur in procurement-specific, fact-specific situations, those familiar with how all current challenges to state procurements occur may well ask why the aggrieved foreign suppliers would not simply proceed with their own administrative and judicial actions. After all, if a Florida grower finds a California ordinance bars his oranges from sale in California, she does not currently ask the State of Florida to sue the State of California under the original jurisdiction of the Supreme Court of the United States. If a New Jersey firm bids and loses on a New York state contract now on a basis it considers illegal, it does not ask the State of New Jersey to file an action against the State of New York. The Florida grower files a federal suit under Commerce Clause principles to invalidate the California barrier. The New Jersey firm protests the contract award, starting in whatever administrative forum the New York procuring agency provides, then through New York judicial channels. Cannot aggrieved foreign suppliers do the same?

At the outset, it appears that Congress has closed the federal courthouse doors to such challenges. Section 102(c) of the implementation law bars private causes of action or defenses based on the Uruguay Round agreements.[50] It precludes any private suit against any state on the ground that the state has taken a procurement action inconsistent with the agreements.[51] The act has calculatedly made a suit by the United State the only kind of suit a federal court can entertain.

The Administration and Congress thus deliberately took away from aggrieved foreign suppliers the Commerce Clause-based federal action against a state that discriminates, taking away what has historically been the most powerful tool in breaking down state discrimination (in regulatory, not procurement contexts) against out-of-state business. Together with the cumbersome nature of the panel remedy, this represents a deliberate decision to all but preclude sweeping or aggressive foreign campaigns to break down in-state preferences. So long as states do not go out spoiling for a fight with foreign countries, they can not only have in-state preferences on their legislative books, but they can choose in at least some of their procurements to disfavor foreign suppliers. At least, they need have very little fear of federal court actions as a result, and not overmuch concern about the rare foreign nation's direct challenge.

That still leaves the aggrieved foreign supplier the same remedy as aggrieved domestic suppliers use against allegedly illegal state procurement actions: the state's own administrative and judicial remedies. The extent to which a foreign supplier can raise the AGP in a state forum poses one of the most interesting current questions. On the one hand, it can be argued that even a state forum is not to entertain the AGP issue. The Uruguay Round implementation law declares that there are no private causes of action, that no state law may be declared invalid as inconsistent with the AGP except in an action brought by the United States.[52] Congress and the President equally supported those limitations. Congress went out of its way to say in the implementation law its "intent" to preclude raising of the AGP:

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50. *See* 19 U.S.C. § 3511(c)(1)(A) (West, WESTLAW through May 15, 1997).
51. *See* 19 U.S.C. § 3511(c)(1)(B) (West, WESTLAW through May 15, 1997).
52. H.R. REP. NO. 103-826, pt. 2, (1994), *reprinted in* 1994 U.S.C.C.A.N. 4028.

> INTENT OF CONGRESS—It is the intention of the Congress through paragraph (1) to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action against any State or political subdivision thereof or raising any defense to the application of State law under or in connection with any of the Uruguay Round Agreements. . . .[53]

Nothing about this emphatically stated intent addresses solely actions in federal court; the words of text, and of Administrative intent, and of legislative history alike apply equally to actions in state forums as well. As the Administration explained, keeping these issues out of court involved conscious foreign affairs goals.[54] Surely, Congress and the President together have the power, in negotiating and approving an international agreement, to keep it from being raised in any administrative or judicial forum, including state ones.

On the other hand, an aggrieved foreign supplier already has whatever private cause of action the state law provides for a challenge, in an appropriate time and place, to the award of a contract to another bidder. The door of the state courthouse, in contrast to the federal one, is readily open to the aggrieved bidder, foreign and domestic alike, who claims that a state agency rejected its bid without legal authorization to do so. A challenged state agency will find it something of a challenge, when the state must defend its action in court, to keep the AGP out of the discussion. Several times, state courts in pre-Uruguay Round days have proven quite willing to consider state laws "preempted" by GATT, even if a purist might wonder whether Congress had given any such effect.[55]

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53. 19 U.S.C. § 3512(c)(2).

54. With respect to the states, section 102 represents a determination by the Congress and the Administration that private lawsuits are not an appropriate means for ensuring state compliance with the Uruguay Round agreements. Suits of this nature may interfere with the President's conduct of trade and foreign relations and with suitable resolution of disagreement or disputes under those agreements. Statement of Administrative Action, *supra* note 30, *reprinted in* 1994 U.S.C.C.A.N. at 4055.

55. After all, a state court hearing a foreign supplier's challenge would review an agency's decision ostensibly to apply an in-state legislative preference, or to reject the foreign bid for some non-discriminatory reason. It will have before it a state assistant attorney general, or similar state executive lawyer, who will

Hence, the state forums seem neither obviously open, nor definitely closed. Those familiar with state adjudication of challenges on other grounds to contract awards might reach the same result by the shorter result that what happens in such challenges varies from state to state, and sometimes within a state as well. Still, even if the state court listens to invocation of the AGP, that does not ensure a major victory for the protester. The state court may entertain the challenge, but given its particular fact-specific nature and the deference owed to state contracting officers, the state court may reject the challenge on the merits. Even if it rules for the foreign supplier on the merits, it may decide to give a limited remedy; it may not order the contract awarded to the foreign supplier, but just order it recompeted, or just give the foreign supplier its bid preparation costs. Victories of any degree may well be isolated and not readily replicated. A single victory on one contract for one foreign supplier does not end the battle in all states, or even in that state. The path for foreign suppliers may appear long, hard, and uphill.

In sum, the states do not face any need to expect vigorous foreign campaigns to flatten their in-state preferences. More because of the cumbersome procedures and remedial limitations than anything else, state legislatures that wish to continue existing formal or informal in-state preferences, or to create new ones, can do so, and state administrations that choose to apply formal or informal preferences against GATT signatories, if they use some subtlety and have some decent fortune in their own state courts, may find they often succeed in doing so. For these reasons, where the political forces in a particular state, at a particular time, strongly oppose admitting serious foreign competition in particular state procurement sectors, the AGP may not prevent those forces from having their way.

IV. VIEWING THE AGP'S LIMITED EFFECT AS POLITICALLY VALUABLE

A free trade supporter who accepted the foregoing analysis as correct in predicting that local "protectionists" can still have their way might regard this as purely bad news. In economic terms, the

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usually prefer to defend the agency action on those stated grounds. The natural temptation for the state court is to decide the validity of the agency action on its stated terms and the terms of the defending state executive lawyer, not on seemingly exotic grounds about how the state, although it bound itself to the AGP, cannot be asked whether it is obeying the AGP. Who can say what is the status, in state law, of the state governor's action in consenting for that state's inclusion in the AGP annex?

free trade analyst points out that such protection simply means the people of that state hurt themselves, by paying more to buy what their tax dollars could more reasonably buy from out-of-state suppliers. Moreover, to the extent that a still-somewhat-closed United States market comes to the attention of the world, that encourages "protectionist" forces abroad to insist on having their way too. This would rebound against the United States' interests in free trade overseas.

I submit that the AGP's remedy limitations serve valuable political purposes. In domestic terms, those limitations maintain the political flexibility inherent in the dual sovereignty system of American federalism. An appropriate point from which to analyze the special federalism aspects of state procurement would be the Supreme Court's decisions not to apply Commerce Clause principles applicable in other sectors, to the sector of state procurement. The Court had long applied the Commerce Clause principle known as the "dormant" Commerce Clause to prohibit state government use of regulatory power to discriminatorily exclude out-of-state businesses from equal access to that state's commercial markets. In 1976, the Court first enunciated its "market participant" exception to that Commerce Clause principle, by which it said a State government, acting not as a regulator of that state's commercial market but just as a decider of how the state government would handle its own procurement, could "exercis[e] the right to favor its own citizens over others."[56]

The Court further confirmed the doctrine in 1980, explaining two applicable considerations. When a state government buys or sells for itself, the Court said, it exercises

> the long-recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.[57]

Moreover, regarding state procurement, "[r]estraint in this area is also counseled by considerations of state sovereignty, the role of each State 'as guardian and trustee for its people . . . .' "[58]

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56. Hughes v. Alexandria Scrap Crop., 426 U.S. 794, 810 (1976).
57. Reeves, Inc. v. Stake, 447 U.S. 429, 438-39 (1980).
58. *Id.* at 438; *accord* White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 207 & n.3 (1983).

The Court's analysis applies here as a basis for evaluating the wisdom of the AGP's remedial limitations, not as a question of the boundaries of federal power.[59] Simply following the Court's reasoning as to policy, it makes sense not to push free trade principles as implacably to state procurement than to the commercial market. State procurement involves, as the Court said, "considerations of state sovereignty," for the state governments derive from the independent sources of state constitutions, state tax systems, and state elections both their permanent sovereign budget authority and their electorally-renewed popular fiscal consent. A free-trade supporter may criticize a state's "in-state" preference in economic terms, as a short-sighted or selfish decision. Yet, viewed in federalism terms, leaving state legislatures and state administrations some authority to exercise such a preference renders unto the local Caesar the things that are Caesar's: the authority inherent in the American dual-sovereign system for the populace in particular places, at particular times, to uses its own money as it wishes.

Sophisticated commentary about commercial law has long noted the importance of remedies, and particularly how under-remedying amounts to a partial undoing of substantive legal principles.[60] Yet, what Congress and the President have arranged as limitations on AGP remedy do not amount to some loose, accidental, or even hypocritical partial undoing of its substantive principles. Rather, the implementation law for the AGP has accurately and calculatedly used remedy principles to arrange the provision of flexibility along political rather than legal lines. Had the implementation law allowed aggrieved private foreign suppliers to file suits under the AGP in federal courts, the confrontation of free trade principles with state sovereignty would have occurred in the forum least able to take political factors into account. The cumbersome nature of the GATT panel procedure, and the fact that a panel's action does not itself invalidate or pre-empt a state law, keeps the flash-point of head-on confrontation out of the forums that would most grate on

59. These "market participant" cases concern the "dormant" Commerce Clause context where Congress has not sought to pre-empt state law, and contain no discussion regarding a lack of power in Congress to decide to do so (particularly where Congress would exercise its even greater powers on matters affecting foreign commerce than on matters affecting domestic commerce).

60. *See, e.g.*, John A. Sebert, Jr., *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. Rev. 1565 (1986).

the sensitivities of the population of the state with the in-state or "Buy America" viewpoint.

Instead, two types of filters have been arranged. The challenges of foreign nations can only result in a judgment that forcibly overcomes state recalcitrance only after layers and layers of proceedings and consultations, followed by a political decision, likely to be very rare, by the Attorney General to file a suit. More likely, efforts by aggrieved foreign suppliers on their own can have effect only through persuasion of state administrative officials and possibly — after overcoming the powerful inhibitory factors previously described — through actions in some states by those states' own courts.

Moreover, this buffering of particular sensitivities of state populations has occurred without severe harm to the nation's interest in negotiating reciprocal lowering of international trade barriers. The United States Trade Representative successfully moved forward with the Uruguay Round negotiations without making an offer broader than was acceptable to the consenting thirty-seven states. Conversely, the other negotiators, particularly from the European Union, simply negotiated on the basis that what they would open up to free trade in their own economy, should approximately correspond in scale to what the United States opened up. In fact, when the Europeans saw the American limits on opening, the Europeans cut back their corresponding offer, with some of their governmental entities covered only as to procurement of goods, not works or services.[61]

V. CONCLUSION

On its surface, the AGP appears to promise as a matter of substantive principle the opening of American state procurement on an equal basis to foreign suppliers. Its substantive coverage rules and, more important, the mechanisms of its remedies actually limit considerably its effect. In particular, in those states and at those times that the population strongly desires to favor its own firms in state procurement, the state government has ways of doing so. Correspondingly, foreign suppliers will find it difficult to engage in any kind of across-the-board campaign to pry open all the American state markets.

However this seems as economics, it makes good sense as politics. When the issues concern sensitive questions of federalism, the goals of free trade should not be considered matters of ironclad

61. *See Reeves*, 447 U.S. at 449.

principle. Evolving politics forces and processes, rather than predetermined inflexible legal rules, will determine the pace and avenue of the opening to the world of the American state procurement sector.

At times this may prove an international embarrassment or an economic loss. It may create battle-points in future trade disputes. Yet, one of the main benefits of the American dual sovereignty system is its array of political mechanisms for adjustments between an overall set of national interests and the intense resistance of particular local populations on particular points. The AGP makes wise use of that flexibility to put future conflicts into political channels.