NOTE

Nowhere to Go: International Coalitions and the Stranding of Defense Contractors

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ABSTRACT

In 2010, the Armed Services Board of Contract Appeals (ASBCA) decided the appeal of MAC International FZE ("MAC"), a company attempting to bring a claim under the Contract Disputes Act (CDA) against the Coalition Provisional Authority of Iraq ("Authority") and the United States. The Authority, staffed primarily by United States employees and funded by U.S. appropriations, United Nations contributions, and Iraqi funds, had failed to pay MAC over five million dollars it was owed under contract. The ASBCA found that the Authority, because it was an international coalition, could not be considered an executive agency of the United States and, as such, the CDA did not apply. Therefore, MAC's claim could not be heard.

This Note argues the ASBCA's determination that the Authority was not an agency of the United States highlighted a gap in procurement law. As international coalitions, like the Authority, are not subject to United States procurement law, they are free of all procurement regulation. This situation, which effectively makes coalitions and member states immune from any potential contract action against them, is undesirable. To close this gap, Congress should pass a statute disallowing use of appropriated funds by coalitions that fail to meet a minimum standard of procurement regulation. The pro-

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posed language, which mirrors the World Trade Organization's Government Procurement Agreement, is flexible enough to meet the needs of coalitions while ensuring that contractors have a forum available to hear and decide contract disputes, thereby adequately accounting for the concerns of both coalition member states and the contractors supplying them.

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Introduction

MAC International FZE ("MAC") entered into a contract with the Coalition Provisional Authority ("Authority") of Iraq[1] in April of 2004.[2] Under the contract, MAC was to supply the Authority's forces with vehicles for military and contractor personnel stationed there.[3]

1 The Coalition Provisional Authority governed Iraq following the successful invasion of Baghdad by the "Coalition of the Willing." *See infra* note 67. It was primarily staffed and funded by the United States, but included contributions from the United Nations, the United Kingdom, and other members of the "Coalition of the Willing." *See infra* note 67.

2 MAC Int'l FZE, ASBCA No. 56355, 10-2 B.C.A. ¶ 34,591, 170,511.

3 *Id.* ¶ 170,512–13.

One month later, the Authority unilaterally modified the contract, shifting its contractual obligations to the new Interim Government of Iraq for contracts obligating Iraqi funds and to the Project and Contracting Office for contracts obligating U.S.-appropriated funds.[4] Three years later, MAC still had not received the over $5.6 million that it was owed under the contract.[5]

Although for some contractors $5.6 million would be a drop in the bucket, for MAC, a distribution company with fewer than fifty employees, that amount was within its average annual sales range.[6] MAC sought help from its Administrative Contracting Officer ("CO") and the Iraqi government but still received nothing, even though all parties agreed that MAC was owed the money under the contract.[7] Finally, in 2008, MAC filed a claim with its CO requesting a final decision on its claim for payment.[8] The CO apologetically informed MAC that he lacked the authority to make a final decision and therefore denied MAC's claim.[9]

MAC then went to the Armed Services Board of Contract Appeals ("ASBCA").[10] In October of 2010, six years after the missed payments occurred, the ASBCA held that the Authority was not an instrumentality of the United States and the Contract Disputes Act ("CDA")[11] therefore could not apply.[12] As a result, the ASBCA had no jurisdiction to hear MAC's claim.[13] After six years, continual settlement attempts, and faithful performance of its part of the contract, MAC was awarded nothing.[14]

MAC's story is but one example of the multitude of complaints that arose from the contracting activities undertaken by the Authority and the United States following the invasion of Iraq in 2003.[15] The

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4 *See id.* ¶ 170,514.

5 *See id.*

6 *See Company Page for MAC International FZE*, IRAQI TRADE & BUS.CENTER, http://www.iraqitradecenter.com/companies/?inc=comvw&coid=475 (last visited May 14, 2013).

7 *See MAC Int'l*, 10-2 B.C.A. ¶ 170,514.

8 *Id.*

9 *See id.*

10 *See id.* ¶ 170,515.

11 Contract Disputes Act ("CDA") of 1978, 41 U.S.C. §§ 7101–7109 (2006).

12 *See MAC Int'l*, 10-2 B.C.A. ¶ 170,516–18.

13 *Id.* ¶ 170,519.

14 *See id.*

15 *See* Kellogg Brown & Root Servs., Inc., ASBCA No. 56256, 10-2 B.C.A. ¶ 34,613, 170,590; VALERIE B. GRASSO, CONG. RESEARCH SERV., RL33834, DEFENSE CONTRACTING IN IRAQ: ISSUES AND OPTIONS FOR CONGRESS 11–12 (2007); L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL32370, THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES 20–23 (2004); *Questionable Iraq Reconstruction*

number of complaints, and the variety of sources from which they originated, indicates a far-reaching problem in defense contracts entered into by the Authority.[16] If the contracts issued by the Authority, an international coalition in which the United States was a major participant, were unusual, perhaps this could be written off as a one-time aberration in defense procurement. In fact, however, this is not unusual. The United States has participated as a member of an international coalition engaging in military action for nearly every major conflict since (and including) World War II.[17] The recent NATO action in Libya has made it even more apparent that defense coalitions are not a thing of the past.[18] Not only is it likely that the United States will enter coalitions for purposes of military action in the future, but it is also likely that those coalitions will enter into contracts. Where there are contracts it is likely that there will be contract disputes—examples of such disputes can be found as far back as World War II.[19]

When the ASBCA decided *MAC International FZE* in 2010, it found that contracts with the Authority were outside its jurisdictional bounds because the Authority was an international coalition rather than an entity of the United States government.[20] This Note argues that ASBCA's determination that international coalitions are beyond the bounds of the CDA has highlighted a vacuum in procurement regulation.[21] This vacuum is caused by the inapplicability of United States domestic procurement regulations to international coalitions, in

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Contracts Due to Federal Contracting System Weaknesses, PROJECT ON GOV'T OVERSIGHT (March 11, 2004), http://pogoarchive.pub30.convio.net/pogo-files/alerts/contract-oversight/co-irc-20040311.html.

16 *See supra* note 15.

17 The United States has been a member of international coalitions for warfare purposes in several major conflicts, including World War II, the Vietnam War, the First Gulf War, the War on Terror (on both fronts), and the NATO action in Libya. *See* HALCHIN, CONG. RESEARCH SERV., *supra* note 15, at 1 (Iraq); U.S. GEN. ACCOUNTING OFFICE, GAO-01-13, COALITION WARFARE: GULF WAR ALLIES DIFFERED IN CHEMICAL AND BIOLOGICAL THREATS IDENTIFIED AND IN USE OF DEFENSIVE MEASURES 1 (2001) (the First Gulf War); *Coalition Countries*, U.S. CENTRAL COMMAND, http://www.centcom.mil/en/countries/coalition/ (last visited Nov. 24, 2011) (Afghanistan); Jonathan Colman, *The Challenges of Coalition-Building: The Vietnam Experience, 1964–1969*, ROYAL UNITED SERV. INST. (Mar. 15, 2010), http://www.rusi.org/analysis/commentary/ref:C4B9E799C4B5FF/ (Vietnam); *The Potsdam Conference, 1945*, U.S. DEP'T OF STATE: OFFICE OF THE HISTORIAN, http://history.state.gov/milestones/1937-1945/PotsdamConf (last visited May 11, 2013) (World War II); *NATO and Libya*, N. ATL. TREATY ORG., http://www.nato.int/cps/en/natolive/topics_71652.htm (last updated Oct. 25, 2011) (Libya).

18 *See NATO and Libya*, *supra* note 17.

19 *See, e.g.*, Best v. United States, 292 F.2d 274, 274 (Ct. Cl. 1961).

20 MAC Int'l FZE, ASBCA No. 56355, 10-2 B.C.A. ¶ 170,518.

21 *See infra* Part III.

conjunction with the lack of any international law that could bind such coalitions.[22] Furthermore, this Note argues that this situation is unappealing as a matter of policy.[23] In order to correct the negative effects of this legal gap, Congress should pass a statute limiting the use of appropriated funds by coalitions to only those coalitions that comply with language that mirrors the Government Procurement Agreement's ("GPA")[24] framework for challenge procedures.[25] This solution, which takes into account practical constraints and warring policy concerns, would adequately hold both coalitions and contractors accountable.[26]

Part I provides an overview of domestic procurement law, international treaties dealing with procurement law, and the international law regarding contracting by multinational coalitions. Part II examines the composition of the Authority and the determination of the ASBCA that the Authority was not a government entity. Part III analyzes the consequences of the ASBCA's determination in *MAC International*. Part IV contends that, in order to address this legal vacuum, Congress should pass a statute limiting the use of appropriated funds for coalition purposes to only those coalitions meeting minimum requirements for dispute resolution that mirror the requirements of the GPA.

I. Domestic Law, International Law, and Coalitions

To put MAC's case in proper context, it is necessary to provide a brief overview of procurement law. This Part will review domestic procurement statutes and regulations, with special attention paid to the Contract Disputes Act, the statute at issue in *MAC International*. This Part will then examine international law as it may apply to contracts entered into by international coalitions. This legal background will lay the foundation for the later discussion of the practical impact of *MAC International*.

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22 *See infra* Parts I.B–C, III.A.

23 *See infra* Part III.C.

24 Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4, 1915 U.N.T.S. 121 [hereinafter GPA].

25 The GPA does not set out procedures for settling claims disputes, but does set out provisions allowing contractors to challenge contract formations. *See id.* at 141. This Note suggests that the language used by the GPA in reference to contract formation could also be effectively utilized to set a procedural floor in the context of claims disputes involving international coalitions.

26 *See infra* Part IV.A.

A. *Domestic Law Regulating Government Procurement*

To facilitate the expedient hearing and determination of contract-based claims against the United States, and to prevent fraud and wasteful spending, Congress created an extensive set of statutes[27] (and the executive branch an even more extensive set of regulations)[28] to govern both the formation and performance of contracts by, with, and for the federal government.[29] These statutes waive the United States' sovereign immunity in certain contract claims, limit that waiver, and grant jurisdiction to hear disputes to the Government Accountability Office ("GAO"), Court of Federal Claims, and the boards of contract appeals.[30] Except as provided for by statute, a contractor cannot bring a contract claim against the United States.[31]

The CDA grants jurisdiction to the Court of Federal Claims and the boards of contract appeals to hear claims disputes.[32] In order to bring a claim within the CDA's purview, the claim must be brought under an express or implied-in-fact contract with an executive agency[33] for goods or services (other than real property in being).[34] The CDA specifically exempts from its jurisdiction contracts entered into with a foreign government or international entity if the con-

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27 *See, e.g.*, Tucker Act, 28 U.S.C. § 1491 (2006); False Claims Act, 31 U.S.C. §§ 3729–3732 (2006); Contract Disputes Act of 1978, 41 U.S.C. §§ 7101–7109 (Supp. IV 2011); Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1175 (codified in scattered sections of the U.S.C.); Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified in scattered sections of the U.S.C.).

28 FAR 1.101–51.205 (2012).

29 *See, e.g.*, 31 U.S.C. § 3552; 40 U.S.C. § 101 (2006); FAR 1.101.

30 28 U.S.C. § 1491 (waiving sovereign immunity for claims founded on express or implied-in-fact contracts with the government); 31 U.S.C. § 3552 (codifying the jurisdiction of the GAO to hear bid protests); 41 U.S.C. §§ 7102, 7107 (granting jurisdiction to the Court of Federal Claims to hear government contracts disputes and bid protests and to the boards of contract appeals to hear claim disputes). Although the statutes and regulations can be read cohesively, as they will be in this Note, they each apply to a different area of law. The Competition in Contracting Act of 1984, 98 Stat. at 1175, deals only with the solicitation and evaluation procedures for bid protests. The Contract Disputes Act of 1978, 41 U.S.C. §§ 7101–7109, applies to claims disputes (disputes based on contract performance). The Federal Acquisition Regulations, FAR 1.101–51.205, apply to both bid protests and claims disputes.

31 *See, e.g.*, N. Side Lumber Co. v. Block, 753 F.2d 1482, 1485 (9th Cir. 1985); E. Trans-Waste of Md., Inc. v. United States, 27 Fed. Cl. 146, 151 (1992).

32 41 U.S.C. §§ 7102, 7105.

33 41 U.S.C. § 7102(a). The distinction between implied-in-fact and implied-in-law contracts comes from caselaw. *See, e.g.*, Algonac Mfg. Co. v. United States, 428 F.2d 1241, 1255–56 (Ct. Cl. 1970).

34 "Real property in being" includes acquisition of a fee, easement, or other interest in existing buildings and land. *See* Forman v. United States, 767 F.2d 875, 878–79 (Fed. Cir. 1985). It has been held by the Federal Circuit not to include government acquisitions of leases. *Id.* at 879.

tracting agency head determines that application of the CDA would not be in the public interest.[35] Other statutes waiving sovereign immunity and granting jurisdiction to various fora to hear bid protests and claim disputes have similar requirements: there must have been a contract (either already in existence or proposed), that contract must have been with an executive agency of the United States, and the contract cannot have been for real property.[36]

In addition to waiving sovereign immunity and making grants of jurisdiction, the statutes and regulations governing government contracts provide protections for the contracting parties. Protections for contractors include: the government's waiver of immunity;[37] allowance of equitable and monetary relief;[38] and mandated transparent procedures for selecting and awarding contracts, terminating contracts, protesting the government's performance, and suspending and debarring contractors.[39] The regulations also protect the government by allowing for the suspension and debarment of contractors,[40] requiring responsibility determinations,[41] mandating competitive procedures to get the best value and reduce needless spending of taxpayer money,[42] and a deferential standard of review of agency actions.[43] By their own terms, however, these protections will be applied only to contracts with executive agencies.[44] It was this very requirement that the ASBCA found MAC had not met because the Authority was an international coalition, not an executive agency.[45] If the ASBCA was correct in its determination that the Authority fell outside the bounds of domestic procurement law, it is necessary to determine what international law, if any, MAC could have turned to in order to have its claim against the Authority (and by extension, its members) adjudicated.[46]

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35 41 U.S.C. § 7102(c).

36 *See* 28 U.S.C. § 1491 (2006); 31 U.S.C. § 3552 (2006).

37 28 U.S.C. § 1491(a)(1).

38 41 U.S.C. § 7108; 28 U.S.C. § 1491(b)(2).

39 41 U.S.C. § 3306(a)(1)(A) (mandating use of full and open competition for contract awards); FAR ch. 1, subch. B (2012).

40 FAR 9.400(a)(1).

41 *Id.* § 9.103(b).

42 *Id.* § 1.102.

43 *See, e.g.*, 41 U.S.C. § 7107(b)(2) (stating that agency decisions will not be set aside unless they are "fraudulent, arbitrary, or capricious; so grossly erroneous as to necessarily imply bad faith; or not supported by substantial evidence").

44 28 U.S.C. § 1491 (2006); 31 U.S.C. § 3552 (2006).

45 *See* MAC Int'l FZE, ASBCA No. 56355, 10-2 B.C.A. ¶ 34591, 170,516–18.

46 For a discussion of the correctness of the ASBCA's determination in *MAC International*, see *infra* Part II.C.

B. International Procurement Treaties

Although the United States is a party to two notable international treaties that regulate government procurement, neither regulates procurements made by international coalitions. The first, the World Trade Organization ("WTO") Government Procurement Agreement ("GPA"),[47] is the only binding agreement in the WTO dealing with government procurement.[48] The GPA is based on policy goals similar to those underlying U.S. procurement law: transparency, "fair, prompt, and effective enforcement," and protection of government financial needs.[49] The GPA mandates that member states provide transparent solicitation and awarding of contracts and that contractors be able to bring suit against the government in the event of a dispute. This, in turn, requires that member states' own procurement laws meet the minimum standards set by the treaty.[50] The language of the GPA, which sets minimum procedural floors for the resolution of bid protests but does not tell member states how those floors must be implemented, is flexible enough to accommodate the various signatories to the agreement.[51] The GPA applies to any contract entered into by a government of one of the party states above a minimum value threshold.[52] As it only applies to parties to the agreement, however, it cannot be applied to entities that are not members of the WTO.[53] Because the Authority was not a signatory of the GPA,[54] this treaty could not be applied to MAC's case. Similarly, the GPA would also be inapplicable to contracts issued by future coalitions.

The second major procurement-related treaty to which the United States is a signatory is the North American Free Trade Agreement ("NAFTA").[55] Like the GPA, NAFTA mandates that its mem-

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47 GPA, *supra* note 24, 1915 U.N.T.S. at 121.

48 *See id.*

49 *See id.* at 121; *see also supra* Part I.A.

50 GPA, *supra* note 24, at 127–141. Taken in combination, the Competition in Contracting Act and the CDA meet the requirements of the GPA. *See supra* Part I.A (describing the provisions of the Competition in Contracting Act and the CDA).

51 *See* GPA, *supra* note 24, 1915 U.N.T.S. at 139–41.

52 *Id.* at 122 (indicating that the Agreement applies subject to the relevant threshold in Appendix I of the agreement); *Appendices and Annexes to the GPA*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#appendixI (last visited May 14, 2013) (Appendix I defines the obligations of each signatory to the agreement).

53 *See* GPA, *supra* note 24, 1915 U.N.T.S. at 121.

54 *Id.* at 478.

55 North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 612 (1993) [hereinafter NAFTA].

ber states have in place procedures for the solicitation and awarding of contracts.[56] Additionally, as with the GPA, NAFTA applies only to the parties to the treaty—i.e., the United States, Canada, and Mexico.[57] The United States has also entered several smaller scale (bilateral rather than multilateral) treaties that are very similar to NAFTA.[58] Those treaties, like the GPA and NAFTA, apply only to those countries that are signatories.[59] Because the Authority was not a signatory to any of these treaties, these agreements also could not be applied in MAC's case.

C. Customary International Law of Government Procurement

As treaties are unavailable as a source of law for governing procurement by international coalitions, it is useful to look to customary international law:

> [T]o be a norm of international law the legal standard must satisfy three criteria: (1) no state condones the activity in question and there is a recognizable 'universal' consensus prohibiting this act; (2) sufficient criteria exist so as to determine when a specific act violates this consensus; and (3) the prohibition against the act in question is nonderogable and therefore binding at all times against all actors.[60]

In the case of defense procurement, the second two criteria need not even be addressed, as there is no overarching "universal" consensus. Although the current trend of states is to regulate government procurement (both military and civilian), there is no internationally recognized "right" way to do so. The United States' and the European Union's procurement schemes, on which most developing systems in other countries are based, have fundamental differences.[61] Other

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56 NAFTA, *supra* note 55, 32 I.L.M. at 614–19. Like the GPA, NAFTA's requirements are fulfilled by each country's domestic procurement laws rather than creating a separate body of law. *Id.* at 613. Similarly, NAFTA also does not set procedural requirements for the settlement of claims disputes but requires that contracting parties be able to avail themselves of domestic law governing such disputes. *Id.* at 619.

57 *Id.* at 613.

58 *See Free Trade Agreements*, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements (last visited May 14, 2013).

59 *See, e.g.*, Israel Free Trade Agreement, U.S.-Isr., art. I, Apr. 22, 1985, 24 I.L.M. 653.

60 2 VED P. NANDA & DAVID K. PANSIUS, *Sources of Customary International Law*, *in* LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 9.2 (2011).

61 Dae-In Kim, Comparative Defense Procurement in Law and Development Context 1, 3–4 (September 2006) (unpublished conference paper), *available at* http://www.ippa.org/IPPC4/Proceedings/10LegalIssue%20inPublicProcurement/Paper10-1.pdf. The biggest differences are in the use of pre-qualification (common in the EU but not in the United States), use of competitive negotiation (common in the United States but rare in the EU), and how "best value" is

states, which have opted to pick and choose which components from the U.S. and European systems best fit their own countries, are more different still.[62]

With no applicable customary law due to the lack of widely adhered to custom among nations and no applicable positive international law, defense procurement by international coalitions is currently beyond the reach of international law.[63] If contractors like MAC who are engaged in disputes with coalitions in which the United States is a member are to have any hope of recovery, they would have to turn to U.S. domestic procurement law.[64] In order to determine if current U.S. law grants such contractors any relief, it is necessary to address the composition of the Authority and whether it fits into the CDA's jurisdictional limitation to executive agencies.

II. The Authority and "Public Entities" of the United States

The CDA applies only to "any express or implied contract . . . made by an executive agency."[65] It was the ASBCA's determination that the Authority was not an executive agency that precluded MAC from filing a claim under the CDA, effectively preventing any United States forum from hearing MAC's claim.[66] The question, then, for contractors involved in international defense contracting, is whether the ASBCA was correct when it determined that international coalitions like the Authority are not "executive agencies."

A. The Coalition Provisional Authority of Iraq

The Authority was established in the spring of 2003 following the takeover of Baghdad by the United States and the other members of the "Coalition of the Willing."[67] It is unclear whether the Authority

determined. *See* Fed. Highway Admin., U.S. Dep't Transp., Rep. No. FWHA-PL-02-0xx, Contract Administration: Technology and Practice in Europe 12 (2002), *available at* http://international.fhwa.dot.gov/contractadmin/contractadmin.pdf.

62 Kim, *supra* note 61, at 3–4.

63 *See supra* Part I.B–C.

64 *See supra* Part I.A.

65 41 U.S.C. § 7102(a) (Supp. IV 2011).

66 *See* MAC Int'l FZE, ASBCA No. 56355, 10-2 B.C.A. ¶ 34,591; *infra* Part III.A .

67 Halchin, *supra* note 15, at 1. The "Coalition of the Willing" included Afghanistan, Albania, Australia, Azerbaijan, Bulgaria, Colombia, the Czech Republic, Denmark, El Salvador, Eritrea, Estonia, Ethiopia, Georgia, Hungary, Italy, Japan, South Korea, Latvia, Lithuania, Macedonia, the Netherlands, Nicaragua, the Philippines, Poland, Romania, Slovakia, Spain, Turkey, the United Kingdom and Uzbekistan. Steve Schifferes, *U.S. Names 'Coalition of the Willing,'* BBC News (Mar. 18, 2003, 9:38 PM), http://news.bbc.co.uk/2/hi/americas/2862343.stm.

government was established by President George W. Bush or pursuant to United Nations Security Council ("UNSC") Resolution 1483.[68] A letter from the United States to the United Nations ("U.N.") informing the U.N. that the United States and coalition partners had created the Authority, however, indicates (at the very least) a high level of U.S. involvement in the Authority's creation.[69]

President Bush appointed Ambassador L. Paul Bremer III as Presidential Envoy to Iraq, where he acted as senior leader of the Authority.[70] He reported to Secretary of Defense Donald Rumsfeld and the President.[71] Ambassador Bremer's salary was provided by the U.S. Army.[72] Serving under Ambassador Bremer as his deputies were Ambassador Richard Henry Jones (the U.S. ambassador to Kuwait) and Sir Jeremy Greenstock (the United Kingdom's Special Representative in Iraq).[73] Other high-ranking Coalition officials were drawn primarily from the U.S. Department of Defense and the Senior Executive Service.[74] Some of these key personnel were appointed by Ambassador Bremer, while others were appointed by the Secretaries of State or Defense.[75]

Approximately 558 U.S. government employees were detailed to the Authority.[76] These employees included ambassadors, members of the Foreign Service, and members of the Senior Executive Service.[77]

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68 *See* S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003); *see also* HALCHIN, *supra* note 15, at 4. This lack of knowledge can be attributed to mixed messages. At different times, in various circumstances, the Bush administration argued both that the Authority was a government entity and that it was not. With neither the administration nor the UNSC "claiming" the Authority as its own, its roots remain unclear. HALCHIN, *supra* note 15, at 6–9.

69 Letter from Jeremy Greenstock, Permanent Representative of the U.K., and John D. Negroponte, Permanent Representative of the U.S., to the President of the U.N. Sec. Council (May 8, 2003), *available at* http://www.globalpolicy.org/component/content/article/168/36083.html; *see also* HALCHIN, *supra* note 15, at 5–6.

70 HALCHIN, *supra* note 15, at 2.

71 *Id.*

72 *Id.* at 11.

73 *Id.* at 3.

74 *See id* at 4. These personnel included Rear Admiral David Nash (U.S. Navy), Major General Ronald L. Johnson (U.S. Army), Lawrence Crandall (U.S. Agency for International Development), Stuart W. Bowen Jr. (U.S. citizen and Inspector General of the Coalition), and Rear Admiral Larry L. Poe (U.S. Navy). *Id.*

75 *See id.* at 4, 14. Notably, the Inspector General for the Coalition was appointed by a joint decision of the Secretaries of State and Defense. *Id.* at 14.

76 *Id.* at 11. These employees came from the Department of Defense, Department of State, Department of Transportation, Department of the Treasury, Naval Criminal Investigative Service, Office of Personnel Management, and Department of the Navy. *Id.*

77 *Id.* The Foreign Service is a civilian diplomatic arm of the Department of State. *See Foreign Service Officer*, U.S. DEP'T OF STATE, http://careers.state.gov/officer (last visited May 15, 2013). The Senior Executive Service is comprised of executive branch employees that are classi-

All civilian employees were transferred to the U.S. Army's payroll.[78] Employees detailed to the Authority included agency contracting officers, and the Secretary of the Army was given the responsibility and authority to support the Authority's acquisition and procurement program.[79]

Funding for the Authority came from several sources. The Authority received funds via congressional appropriations in the 2003 and 2004 fiscal years.[80] Additionally, the Authority had access to Iraqi funds: proceeds from the seizure and forfeiture of Iraqi property, funds in the Development Fund for Iraq (created by the U.N.), and all other funds available that did not come from appropriations of member states.[81] Money from both appropriations and Iraqi funds was utilized in the Authority's procurement activities.[82]

Contracts awarded dealt with procurement for civilian infrastructure and for defense for both the Authority (primarily staffed by the United States) and the new Iraqi Army.[83] The Authority entered contracts both through its own actions and through actions by the Department of Defense.[84] Proposals for such contracts had to be sent to the Iraq Reconstruction Contracting Office in Alexandria, Virginia rather than to any of the Authority's offices in Iraq itself.[85] Thus, the United States retained a great deal of control over the contracting activities of the Authority during the reconstruction of Iraq.

The Authority engaged in activities that, if carried out by executive agencies, would be within the bounds of government contract statutes and regulations,[86] and at times it seemed to be operating under the United States' control. It solicited contract proposals, entered contracts, and administered those contracts through the actions of contracting officers.[87] These are the very actions that are carefully regulated in the domestic procurement context by the Competition in

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fied above General Schedule 15 or the equivalent, which is the level immediately below Presidential appointees. *See Senior Executive Service: Overview & History*, U.S. OFF. PERSONNEL MGMT., http://www.opm.gov/ses/about_ses/index.asp (last visited May 15, 2013).

78 HALCHIN, *supra* note 15, at 11.

79 *Id.* at 11–12.

80 *Id.* at 15.

81 *Id.* at 19.

82 *See id.* at 17–18.

83 *Id.* at 20–22.

84 *Id.* at 15–16.

85 *Id.* at 16.

86 *See generally* FAR 2.101 (2012).

87 HALCHIN, *supra* note 15, at 15–23.

Contracting Act ("CICA")[88] and the Federal Acquisition Regulations ("FAR")[89] and enforced under the CICA and the CDA.[90] Thus, if the Authority had been considered an executive agency, its actions would have been regulated by United States government procurement law.

B. Precedent and the "Public Entity" Framework

In order to determine if the Authority, as described above, could be considered an "executive agency" within the meaning of the CDA, it is useful to look to precedent. Military action and reconstruction coalitions date back to World War II; thus, relevant caselaw dates back to that period as well.[91] Following the allied victory over Germany, the United States became a member of the Allied High Commission, charged with administering and reconstructing West Germany.[92] During this time, the U.S. Army solicited bids and entered into a contract with Josef Best.[93] The contract utilized traditional Army contract forms and language.[94] Best performed his part of the contract, but did not feel he was adequately compensated and brought suit against the United States in the Court of Claims.[95]

In *Best v. United States*, the Court of Claims found that U.S. procurement regulations did not apply to the contract, and therefore Best was not entitled to relief.[96] According to the court, the Army had been acting as an agent of the Allied High Commission, something that a contractor in Germany at the time should have known.[97] Furthermore, the court found that the Allied High Commission was an international body, and therefore could not be sued.[98] This holding has come to be understood in subsequent constitutional tort cases to mean that, regardless of the amount of control the United States might exercise over a multinational coalition, acts of a coalition cannot be understood as an exercise of United States sovereignty.[99] In

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88 Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1175 (codified in scattered sections of the U.S.C.).

89 FAR 1.101–51.205.

90 *See, e.g.*, 31 U.S.C. § 3552 (2006); 40 U.S.C. § 101 (2006); FAR 1.101.

91 *See, e.g.*, Best v. United States, 292 F.2d 274, 274 (Ct. Cl. 1961).

92 *See id.* at 276–77 (describing the functions of the Allied High Commission).

93 *See id.* at 274–75.

94 *Id.* at 277.

95 *Id.* at 275. The Court of Claims was the predecessor to the modern Court of Federal Claims.

96 *See id.* at 278–79.

97 *Id.*

98 *Id.* at 279.

99 *See* Doe v. United States, 95 Fed. Cl. 546, 571 (2010) ("Plaintiff cannot escape the real-

short, if there are other countries involved, the United States is not liable.[100] This alone might provide enough background to assess the question of whether the Authority, or any future coalition, could be considered an executive agency of the United States; however, there are differences between the cases that followed *Best* and international procurement cases. The cases following *Best* dealt with torts, purely unappropriated funding, or third (domestic) parties.[101] By contrast, the Authority's contracts directly involved a multinational coalition using U.S.-appropriated funds. Finally, the CDA came into force over a decade after *Best* was decided.[102] As such, further analysis is necessary to understand what constitutes an "executive agency" under the CDA.

The CDA defines the term "executive agency" as an executive department as defined in 5 U.S.C. § 101, an independent establishment as defined by 5 U.S.C. § 104 (except that it shall not include the GAO), a military department as defined by 5 U.S.C. § 102, and a wholly owned Government corporation as defined by 31 U.S.C. § 9101(3).[103] In short, the CDA applies to instrumentalities of the United States.

After the enactment of the CDA, courts grappled with the question of when a non-government entity can be considered an instrumentality of the government. For example, *Motor Coach Industries,*

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ity that, while the CPA indeed may have exercised governmental and administrative functions, that role does not translate into an exercise of sovereignty because the CPA was a multinational organization.").

100 *See id.*

101 *See, e.g.*, *id.*; Edison Sault Elec. Co. v. United States, 552 F.2d 326, 336 (1977) (holding that a claim cannot be brought against the United States for the acts of non-government third parties).

102 *Best* was decided in 1961; the CDA was passed in 1978. Contract Disputes Act ("CDA") of 1978, 41 U.S.C. §§ 7101–7109 (2006); *Best*, 292 F.2d at 274.

103 41 U.S.C. § 7101(8). Title 5, section 101 lists the executive departments as the Department of State, the Department of the Treasury, the Department of Defense, the Department of Justice, the Department of Homeland Security, the Department of the Interior, the Department of Agriculture, the Department of Labor, the Department of Commerce, the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of Transportation, the Department of Education, the Department of Energy, and the Department of Veterans Affairs. 5 U.S.C. § 101 (2006). The military departments are the departments of the Army, Navy, and Air Force. *Id.* § 102. An independent establishment is "an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment . . . ." *Id.* § 104(1). Wholly-owned government corporations include the Commodity Credit Corporation, the Community Development Financial Institutions Fund, the Panama Canal Commission, and the Tennessee Valley Authority. 31 U.S.C. § 9101(3) (2006).

Inc. v. Dole[104] arose when the Federal Aviation Administration attempted to circumvent procurement regulation by establishing a "private" trust.[105] This presented the Fourth Circuit with the question of at what point a purportedly non-government, or "private," entity became an instrumentality of the government and thus within the reach of government procurement regulations.[106] The court found that there was no single way to determine at what point an entity became an instrumentality of the government, but rather the courts should consider the totality of circumstances.[107]

The relevant factors courts have used to determine when an entity is an instrumentality of the government, and thus subject to U.S. procurement law, have included: (1) the purposes behind creating the entity; (2) the character of the agency spearheading the entity's creation; (3) the identity of those who benefit from the entity; (4) the identity of the entity's administrators; (5) the degree of control exercised by a government agency over expenditures and other details of administration; and (6) the method by which the entity is funded.[108] Again, no one factor is dispositive—whether an entity is an instrumentality of the government is determined by the totality of circumstances.[109]

C. The "Public Entity" Framework and the Authority

If the analysis from *Best* still applies—which is unclear given that it predates the CDA—the Authority cannot be considered an executive agency within the meaning of the CDA.[110] Like the Allied High Command (the coalition at issue in *Best*) the Authority was a multinational coalition developed to reconstruct a country after military action had ceased.[111] In such a situation, contractors in the reconstruction zone would be aware that they were actually contracting with the coalition rather than the United States.[112] In fact, MAC's case would be an even more clear-cut decision than Best's under this rationale. MAC explicitly entered into a contract with the Authority, a multinational coalition, whereas Best's contract was with

104 Motor Coach Indus., Inc. v. Dole, 725 F.2d 958 (4th Cir. 1984).

105 *Id.* at 960–62.

106 *Id.* at 964.

107 *Id.* at 964–65.

108 *Id.*

109 *Id.* at 964.

110 *Cf.* Best v. United States, 292 F.2d 274 (Ct. Cl. 1961).

111 *Compare id.* at 276–78, *with* Doe v. United States, 95 Fed. Cl. 546, 569–71 (2010).

112 *See Best*, 292 F.2d at 278–79.

the United States Army.[113] A reasonable contractor in post-war Germany should perhaps have been aware that this was really a contract with the Allied High Command, but MAC's contract was far more straightforward. Indeed, the analysis in *MAC International* was very similar to that in *Best*.[114] Although the decision in *MAC International* did not cite to *Best* directly, the ASBCA did state that a reasonable contractor should have realized it was contracting with the Authority rather than with an entity of the United States.[115]

Because *Best* was decided before the CDA was passed, however, and *MAC International* did not explicitly rest on that precedent, perhaps the *Motor Coach* analysis, which came after the CDA, is the more appropriate precedent.[116] Nevertheless, even under the *Motor Coach* totality of circumstances analysis—which, although not explicitly invoked in *MAC International*, could be seen in its language[117]—the Authority would likely still fall outside of the CDA's purview. Unlike in *Motor Coach*, the Authority was not solely funded or administered by the United States, and the spearheading entities were multiple nations, rather than a single U.S. agency.[118] This favors a finding that the Authority was not an instrumentality of the U.S. government. Furthermore, although it is true that the United States at times appeared to exercise a great deal of control over the Authority, at other times the Authority acted quite independently.[119] This also indicates that the Authority was not acting as an agent of the United

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113 *Compare id.* at 278, *with* MAC Int'l FZE, ASBCA No. 56355, 10-2 B.C.A. ¶ 34,591, 170,511, 170,515.

114 *MAC Int'l*, 10-2 B.C.A. ¶ 170,516. The ASBCA placed substantial emphasis on the fact that the Authority was a multinational coalition, receiving funding, personnel, and equipment from participants other than the United States. *Id.*

115 *Id.*

116 *Best* was decided in 1961, the CDA was passed in 1978, and *Motor Coach* was decided in 1984.

117 Although the ASBCA, in deciding *MAC International*, did not explicitly apply the factor-based *Motor Coach* approach, its in-depth analysis of the control exercised over the Authority by the United States can be understood in that context:

> A further significant weakness in MAC's argument that its contract was with an executive agency of the U.S. government is that it completely ignores the well-documented participation and contributions of funding, personnel, equipment and services by the other coalition partners. MAC's position ignores the United Nations Security Council's recognition of the CPA as an international entity established under international law and the laws and usages of war. MAC's position also ignores the important role of Iraqis and other coalition partners and nations in CPA contracting decisions and the funding of those contracts.

MAC Int'l, 10-2 B.C.A. ¶ 170,516 (internal citations omitted).

118 *See id.* ¶ 170,510.

119 *See id.* ¶¶ 170,507–08.

States government. Finally, there are two additional differences between *Motor Coach* and *MAC International* that tip the scales even further in favor of finding that the Authority was not an executive agency: (1) the beneficiaries of the formation of the Authority were those individuals living in Iraq during the occupation, rather than the agency alleged to have entered into the contract; and (2) there does not appear to have been any attempt by the coalition members to intentionally use the Authority to circumvent procurement laws.[120] With five of the suggested *Motor Coach* factors lining up on one side, the totality of circumstances approach favors a finding that the Authority was not an executive agency.[121]

With both the *Best* rationale and the *Motor Coach* totality of circumstances factor analysis favoring its conclusion, the ASBCA's determination that the Authority was not an executive agency for purposes of the CDA was likely correct. Approximately eighty-seven percent of the Authority's personnel were United States employees and the Authority at times leaned quite heavily on the United States; yet the Authority still was not an executive agency within the meaning of the CDA.[122] Thus, it is unlikely that any future international coalition would be found to be an executive agency subject to the CDA.

III. CONSEQUENCES OF *MAC INTERNATIONAL FZE*

A. Applying MAC International *Outside the CDA*

Although *MAC International* only addressed the applicability of the CDA,[123] the ASBCA's determination that international coalitions cannot be executive agencies under the CDA has repercussions beyond that statute. The CDA, which grants jurisdiction to both the Court of Federal Claims and the boards of contract appeals, requires that the contract be with an "executive agency," as defined above.[124] Finding that international coalitions cannot be instrumentalities of the United States certainly removes such coalitions from the jurisdiction of the CDA.[125] Other statutes and regulations governing procurement have similar requirements that the contract at issue must be with an agency of the United States.[126]

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120 *Compare* Motor Coach Indus., Inc. v. Dole, 725 F.2d 958 (4th Cir. 1984), *with MAC Int'l*, 10-2 B.C.A. ¶ 34,591.

121 *See Motor Coach*, 725 F.2d at 964–65.

122 *See MAC Int'l*, 10-2 B.C.A. ¶¶ 170,508, 170,518.

123 *See id.* ¶¶ 170,517–18.

124 *See supra* note 103 and accompanying text. *See also* 41 U.S.C. § 7101(8) (2006).

125 *See* 41 U.S.C. § 7102.

126 *See, e.g.*, 10 U.S.C. § 2304 (2006); 31 U.S.C. §§ 3553, 3729 (2006); 40 U.S.C. § 101 (2006).

The CICA grants jurisdiction to the Court of Federal Claims and the GAO to hear bid protests, sets the requirements for agency solicitations, and is the basis of the U.S. government's "full and open competition" requirement in awarding contracts.[127] Like the CDA, the CICA applies only to government agencies.[128] The CICA specifically addresses proposed contracts with "federal agencies," defined as an "executive department or independent establishment in the executive branch . . . or an establishment in the legislative or judicial branch of the Government."[129] This language is virtually indistinguishable from that used in the CDA.[130] The only difference of note is that the CICA's definition of "federal agency" extends to the legislative and judicial branches.[131] It seems unlikely, however, that the judicial or legislative branches' relationships to the Authority, or to any similar coalition, would be so much more commanding than the Executive's that a coalition which is not an executive agency could be found to be an agency of the Legislature or Judiciary. As the Authority and coalitions like it could not be legislative or judicial agencies, and cannot be considered executive agencies either,[132] the finding in *MAC International* has also removed international coalitions from the reach of the CICA.

The FAR's language regarding the parties to which it applies tracks the language in the CDA more closely than the CICA's language does.[133] The FAR defines an executive agency as "an executive department, a military department, or any independent establishment within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively," and a federal agency as "any executive agency or any independent establishment in the legislative or judicial branch of the Government."[134] These are the same sections used by the CDA to define the meaning of "executive agency."[135] Thus, finding that an entity is not an "executive agency" for purposes of the CDA has also removed that entity from the purview of the FAR. This multinational coalition exemption from the FAR is immense. The FAR gives meaning to both the

127 *See* 41 U.S.C. § 3306(a)(1)(A).

128 *See* 31 U.S.C. § 3553; 41 U.S.C. § 7102.

129 *See* 31 U.S.C. § 3551(3); 40 U.S.C. § 102(4)–(5).

130 *Compare* 40 U.S.C. § 102(4)–(5), *with* 41 U.S.C. § 7101(8).

131 *See supra* notes 127–28 and accompanying text.

132 *See* MAC Int'l FZE, ASBCA No. 56355, 10-2 B.C.A. ¶ 34,591, 170,518 (holding that the Authority was not an executive agency).

133 *See* FAR 2.101 (2012).

134 *Id.*

135 41 U.S.C. § 7101(8). Unlike the FAR, however, the CDA expressly excludes the GAO from the definition of an executive agency. *Id.*

Armed Services Procurement Act ("ASPA")[136] and the Federal Property and Administrative Services Act ("FPASA").[137] It defines for each and every agency what its contracting officers can and cannot do, the clauses that must be included in each government contract, how agencies are to implement the competition mandate of the CICA, and the procedures by which to engage in suspension and debarment, among other things.[138]

Aside from the CDA, CICA, and the FAR there is very little domestic procurement regulation. As the CDA and CICA are the statutes that grant jurisdiction to the fora that hear government procurement disputes—the Court of Federal Claims (bid protests and claim disputes), the Government Accountability Office (bid protests), and the boards of contract appeals (claim disputes)—it is fair to say that there would be no U.S. forum available to a contractor wishing to state a claim against an international coalition (or, in the alternative, to bring a claim against the United States for breaches by coalitions in which it is a member state).[139] Thus, if the Authority could not be an executive agency for purposes of the CDA, the CICA and the FAR are likewise inapplicable and there is nearly no domestic law left to govern the Authority's contracts.[140]

B. MAC International *and* Custer Battles

Removing international coalitions from the CDA, CICA, and FAR would, as stated, remove those coalitions from nearly all domestic procurement regulation.[141] A recent line of cases following *United States ex rel. DRC, Inc. v. Custer Battles, LLC*,[142] however, has made it apparent that, although no other procurement law applied to contracts with the Authority, the False Claims Act ("FCA") did.[143] The FCA creates criminal and civil liability for fraud by contractors against the government and allows for relators to bring those suits in qui tam actions on the United States' behalf.[144] Unlike the CDA, CICA, and

136 10 U.S.C. §§ 2301–2337 (2006).

137 Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified in scattered sections of the U.S.C.).

138 *See generally* FAR 1.101–51.205.

139 *See* 31 U.S.C. § 3552 (2006); 41 U.S.C. § 7104.

140 Without the CDA and CICA there is no forum in which bid protests or claims disputes can be heard, and the FAR is what gives life to the FPASA and ASPA. *Cf.* 10 U.S.C. § 2304; 31 U.S.C. § 3552; 40 U.S.C. § 101 (2006); 41 U.S.C. § 7107.

141 *See supra* Part III.A.

142 United States *ex rel.* DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295 (4th Cir. 2009).

143 31 U.S.C. §§ 3729–3732; *see also Custer Battles*, 562 F.3d at 305.

144 31 U.S.C. § 3729. A qui tam action, for purposes of the FCA, is a civil fraud action

FAR, which protect both the government and its contractors,[145] the FCA only works to the benefit of the United States (and relators in civil suits).[146] The FCA forbids contractors from presenting fraudulent claims to an officer, employee, or agent of the United States or to a contractor, grantee, or other recipient of money provided by the United States.[147]

Custer Battles involved a case brought by relators on behalf of the United States under the FCA.[148] The relators claimed that Custer Battles had presented fraudulent claims to the Authority for contracts it had been awarded.[149] Custer Battles argued that the FCA could not be applied to contracts between a contractor and an international coalition such as the Authority because coalition employees were not officers, employees, or agents of the United States and because the contracts were paid for with unappropriated funds.[150] The Fourth Circuit, however, held that Custer Battles was liable under the FCA, finding that the Authority was a "grantee" of funds that had been provided by the United States.[151]

The combination of *MAC International* and *Custer Battles* has thus led to a contracting situation that appears unbalanced: the Authority and coalitions like it cannot be held accountable to contractors, but those contractors are liable if they defraud the coalition.[152] The Authority may have had some protection from MAC, but MAC, without law to rely on or a forum to hear its claim, was stranded.

C. The Practical Impact of International Coalitions Existing Outside Procurement Regulation

Cases like *MAC International* have highlighted a gap in procurement law.[153] International coalitions cannot be governed by interna-

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brought by a private citizen on behalf of the United States against a government contractor. *Id.* § 3730(b)–(d).

145 *See supra* Part I.A.

146 *See* 31 U.S.C. § 3729. Relators may receive a portion of civil judgments paid under the FCA.

147 *See* 31 U.S.C. § 3729(a)(1), (b)(2).

148 *Custer Battles*, 562 F.3d at 297.

149 *See id.*

150 *Id.* at 297–98.

151 *Id.* at 303–04.

152 *Compare* MAC Int'l FZE, ASBCA No. 56355, 10-2 B.C.A. ¶ 34,591 (finding that a contractor could not bring an action against the Authority under the CDA), *with Custer Battles*, 562 F.3d at 303–04 (finding that a contractor could be liable for fraudulent representations to the Authority under the FCA).

153 *See MAC Int'l*, 10-2 B.C.A. ¶ 34,591; *see also* Kellogg Brown & Root Servs., Inc, ASBCA No. 56256, 10-2 B.C.A. ¶ 34,613.

tional law, as they either could not or did not sign treaties that are binding on them and there is no overarching practice of states that would create customary international law,[154] and international coalitions are also unfettered by United States domestic regulation.[155] Although free reign in coalition contracting might at first glance seem advantageous to the coalitions, the practical effects are negative on the whole.

The most obvious practical impact of the exemption of international coalitions from current U.S. procurement regulations is that contractors with claims against those coalitions have no recourse because there is no forum that can hear their claims.[156] Nor will U.S. courts hear those claims when brought against the United States or its coalition partners. The United States has sovereign immunity from suit unless Congress chooses to specifically waive it.[157] The United States' coalition partners, also sovereign nation-states, are similarly immune absent some sort of waiver.[158] The consequences for contractors are readily apparent. First, there is nothing to legally constrain coalition action in awarding, performing, modifying, or terminating contracts, leaving contractors at the mercy of a coalition which may or may not act in a manner consistent with domestic procurement principles.[159] Second, and perhaps more importantly, there is no incentive for coalitions to settle disputes with contractors when such disputes arise. The coalition cannot, after all, be hauled into court and forced to pay the disputed amount.[160]

The impact of the risks faced by contractors involved in contracts with coalitions is two-fold. First, it reduces the number of contractors who are able to enter into coalition contracts. A major defense contractor, like Boeing or Lockheed-Martin, could withstand a few unresolvable claim disputes, but a small business might not be able to.[161] Reducing the amount of competition for a contract generally increases

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154 *See supra* Parts I.B–C.

155 *See supra* Part III.A.

156 *See supra* Parts I.B–C, III.A.

157 FDIC v. Meyer, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.")

158 *See, e.g.*, Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 HARV. INT'L L.J. 1, 10 (1998).

159 *See, e.g.*, MAC Int'l FZE, ASBCA No. 56355, 10-2 BCA ¶ 34,591; *see also supra* Parts I.B–C, III.A.

160 *See supra* Part III.A.

161 *See, e.g.*, *Who We Are*, LOCKHEED MARTIN, http://www.lockheedmartin.com/us/who-we-are.html (last visited May 15, 2013) (Lockheed-Martin reported 2012 sales of $47.2 billion, a backlog of $82.3 billion, and cash flow from operations of more than $4 billion).

the contract's cost.[162] Second, leaving contractors with no forum in which to bring a claim dispute allocates the majority of the risk to those contractors.[163] As with reduction in competition, contracts that leave the contractor with most of the risk also drive contract prices up.[164]

Contractors are not the only ones negatively impacted by the exemption of international coalitions from procurement regulation—both the coalitions themselves and their member states may also suffer adverse consequences. Inapplicability of domestic regulations, combined with the lack of any overarching international regulation, allows coalitions to contract in contradiction to member states' procurement principles.[165] In the United States, these principles, incorporated in the CICA and FAR, include the idea of "best value" contracting.[166] Failure to adhere to this goal of getting the best quality for the least money, whether intentionally or by mistake, could drive up contract costs.[167]

The exemption of international coalitions from procurement regulation could also increase inefficient contracting. The FAR, which is inapplicable to contracts with international coalitions,[168] governs the suspension and debarment of untrustworthy contractors and the process of determining contractor responsibility.[169] Lack of a system for notifying contracting officers as to which contractors have a history of poor performance, or worse yet, a history of fraud or other crimes of moral turpitude, could lead to contracts with contractors that are unable or unwilling to perform to the standards necessary to achieve the contract's goals.[170]

Finally, because *MAC International* was decided after *Custer Battles*, there is some possibility that the applicability of the FCA to con-

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162 Paul G. Carr, *Investigation of Bid Price Competition Measured Through Prebid Project Estimates, Actual Bid Prices, and Number of Bidders*, 131 J. CONSTRUCTION ENGINEERING & MGMT. 1165, 1170 (2005).

163 *See supra* Part III.B. Contractors, in performing coalition contracts, are risking money, equipment, labor, and time, and, without any dispute procedures, bear the entirety of the risk of a contract breach.

164 *See* CHRIS HENDRICKSON, PROJECT MANAGEMENT FOR CONSTRUCTION: FUNDAMENTAL CONCEPTS FOR OWNERS, ENGINEERS, ARCHITECTS & BUILDERS § 8.3 (1998).

165 *See supra* Part III.A.

166 *See, e.g.*, FAR 6.101 (2012).

167 *See* Carr, *supra* note 162, at 1170.

168 *See supra* Part III.A.

169 *See* FAR 9.100–9.409.

170 *Cf.* FAR 1.102(b)(1)(ii) ("The Federal Acquisition System will . . . us[e] contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform . . . .").

tracts with coalitions will have to be relitigated.[171] At least one major law firm specializing in government contracts has speculated that the decisions by the ASBCA in *MAC International* and the cases that have followed may be capable of insulating contractors from FCA claims.[172]

IV. Filling the Void

A. A Legislative Solution

To fill this gap, Congress should adopt a statute to provide effective challenge procedures for contractors like MAC. The best way to do so would be for Congress to restrict the use of appropriated funds by coalitions that do not comply with a minimum standard of procurement regulation. Such a statute would prevent any coalition from using U.S. appropriated funds unless the coalition provided minimum protections for contractors, including a forum that could hear contract disputes. The simplest method of setting such a floor would be to pass a statute that mimics the language of the GPA, and goes a step beyond the GPA in applying that language to both formation and performance of contracts. The statute should use the following language currently contained in the GPA:

> Challenge
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> 2. Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest.
> 3. Each Party shall provide its challenge procedures in writing and make them generally available.
> 4. Each Party shall ensure that documentation relating to all aspects of the process concerning procurements covered by this Agreement shall be retained for three years.
> 5. The interested supplier may be required to initiate a challenge procedure and notify the procuring entity

171 *MAC International* and *Kellogg Brown* were decided in 2010. MAC Int'l FZE, ASBCA No. 56355, 10-2 B.C.A. ¶ 34,591; Kellogg Brown & Root Servs., Inc, ASBCA No. 56256, 10-2 B.C.A. ¶ 34,613. *Custer Battles* was decided in 2009. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295, 297 (4th Cir. 2009).

172 *ASBCA Lacks Jurisdiction Over Claims Against the Coalition Provisional Authority: Is There a Silver Lining for Reconstruction Contractors?*, McKenna Long & Aldridge LLP (Nov. 20, 2010), http://www.mckennalong.com/news-advisories-2422.html ("While this may be a 'curse,' we see potential 'blessings' for actual or potential fraud defendants . . . . If the government is immune from contract claims because it was not a party to such contracts, it should not be able to pursue fraud claims under such contracts with foreign entities.").

within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than 10 days.

6. Challenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. A review body which is not a court shall either be subject to judicial review or shall have procedures which provide that:
   (a) participants can be heard before an opinion is given or a decision is reached;
   (b) participants can be represented and accompanied;
   (c) participants shall have access to all proceedings;
   (d) proceedings can take place in public;
   (e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;
   (f) witnesses can be presented;
   (g) documents are disclosed to the review body.
7. Challenge procedures shall provide for:
   (a) rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing;
   (b) an assessment and a possibility for a decision on the justification of the challenge;
   (c) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.
8. With a view to the preservation of the commercial and other interests involved, the challenge procedure shall normally be completed in a timely fashion.[173]

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173 GPA, *supra* note 24, 1915 U.N.T.S. at 141–42. These challenge procedures are primarily directed at bid protests, but the language can fit claims disputes as well.

This language, adopted into a statute limiting use of appropriated funds that applied these procedures to bid protests and claims disputes, would force U.S.-funded coalitions to either provide a minimum level of recourse for aggrieved contractors (or defrauded coalitions) or cease contracting with U.S. funds entirely. The latter option would not prevent U.S. participation in coalitions; it would simply require that U.S.-funded contracts be between the contractor and an executive agency of the United States itself, such as the Department of Defense.[174] For a coalition to grant contractors the minimum level of recourse, a coalition could either allow claims to be brought against it in the courts of member states (provided that the member states met the requirements of the challenge procedure language) or create a reviewing body to handle such claims.[175] In either case—coalition-created systems that comply with the challenge procedure language or contracts with the United States government itself—contractors would be able to bring their claims to competent bodies.[176]

Had such a statute been enacted before the creation of the Authority, MAC would have certainly had a forum capable of hearing its claim. Either the Authority would have had an independent body capable of awarding damages to review the claim, or it would have been unable to enter into contracts using appropriated funds.[177] If the Authority had been unable to enter contracts with appropriated funds, the United States could still have contributed the necessary materials by entering into the desired contracts itself. This alternative would have allowed for review of MAC's claim, as the contract would have been governed by the CDA.[178] Although ensuring MAC had a forum available to hear its claim would not guarantee MAC's claim would be successful, it at least would have had an opportunity to be heard. For MAC, this likely would have meant successful recovery of the pay it was owed under its Authority contract given that all parties involved agreed that MAC was owed the money.[179]

This solution is optimal for several reasons. First, holding coalitions to the standard of the GPA's challenge procedure language allows those coalitions the flexibility to fashion, within limits, a system

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174 *See supra* note 50 and accompanying text (stating that U.S. domestic regulation complies with the requirements of the GPA).

175 GPA, *supra* note 24, 1915 U.N.T.S. at 141–42.

176 *See id.*; 10 U.S.C. § 2304 (2006); 28 U.S.C. § 1491(a)(1) (2006); 31 U.S.C. § 3552 (2006); 31 U.S.C. § 3729 (2006); 40 U.S.C. § 101 (2006); 41 U.S.C. § 7107 (Supp. IV 2011).

177 GPA, *supra* note 24, 1915 U.N.T.S. at 141–42.

178 41 U.S.C. §§ 7101–7109.

179 MAC Int'l FZE, ASBCA No. 56355, 10-2 B.C.A. ¶ 34591.

that works best under the circumstances. Flexibility of this type would likely be necessary, as coalitions' needs can vary based on which states are members and what actions are occurring.[180] Second, this solution does not infringe on the sovereignty of the other member states of international coalitions. Neither the United States' procurement regulations nor its trade agreements could be forced upon other nation-states.[181] This solution limits only U.S. action and impacts only U.S. funds. Finally, this solution properly addresses the uncertainty involved in coalition contracting. There is no way of knowing until shortly before the coalition's formation what nations will be involved in any given coalition. Rather than trying to guess what countries will participate in future coalitions alongside the United States by amending already-existing treaties or creating a new one, this statute would be applicable to U.S. spending in any coalition action.

B. Addressing Counterarguments

As the impetus behind this Note was the determination by the ASBCA that international coalitions are not executive agencies within the CDA, the most obvious solution would be an amendment to the CDA that includes international coalitions within the CDA's jurisdiction. However, this response does not fully account for the multinational aspect of regulating procurement by international coalitions. Because coalitions are made up of sovereign nation-states, forcibly applying United States law to international coalitions would be improper—the United States cannot bind, by domestic legislation, other sovereign governments and it cannot obligate other governments' funds.[182]

Since the difficulty in applying domestic law comes from the multinational character of coalitions like the Authority, another tempting route might be to amend an existing treaty or draft a new one. However, because of the transient nature of coalitions like the Authority (which typically are formed in response to a military threat and disbanded once reconstruction is complete), the composition of these coalitions, and the fact that international coalitions are not nation-states, amending existing treaties or creating new ones are not realistic solutions either.[183]

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180 *See* GPA, *supra* note 24, 1915 U.N.T.S. at 141–42.

181 *See, e.g.*, Council Directive 2004/18, 2004 O.J. (L 134) (EC).

182 *See* Ramsey, *supra* note 158, at 87.

183 *See supra* note 18 and accompanying text.

Amending already existing treaties to extend to international coalitions, or creating new treaties to govern future coalitions, is not feasible. First, assuming international coalitions are capable of entering treaties, they would have to become signatories to those treaties regulating procurement.[184] This would have to happen every time a new coalition was formed. Second, there would be no requirement that the coalition enter such treaties and it is unclear what kind of consent would have to be given by the coalition's member states for such a signing to occur. Third, there is no way to know before a coalition is formed which states will necessarily become members. There is no single treaty to which the United States is a party (the United Nations Charter[185] excepted) that includes every country with whom the United States has participated in a coalition.[186] Thus, there is no single treaty that could be amended to apply to all future coalition partners. That same unpredictability also makes it exceptionally difficult to write a new treaty for all future coalition members to sign.

For a treaty to be both legally binding and applicable to each new coalition that arises, the United States would have to enter a new treaty to regulate coalition procurement each time it joins an international coalition.[187] This presents a different problem: treaty formation. Treaties are made by the President with the advice and consent of the Senate.[188] When coalitions are hastily created to address ongoing threats, the process of getting the Senate's advice and consent may be too cumbersome.[189] Because of the nature of the circumstances that lead to the creation of coalitions, requiring the United States to enter a new treaty for each one would be unrealistic. As such, given the multinational character of international coalitions and the circumstances that lead to their creation, a general prohibition on the use of appropriated funds by coalitions that do not comply with standards based on those set by the GPA is the most workable solution.

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184 *See, e.g.*, GPA, *supra* note 24, 1915 U.N.T.S. at 122 (stating that the GPA can be applied only to signatories to the treaty).

185 *See generally* U.N. Charter.

186 Australia, which is not a signatory to the GPA or NAFTA, and is not a member of NATO, is frequently a coalition member alongside the United States. *See, e.g.*, *supra* note 68.

187 This would ensure that each member state was a signatory and would avoid the issue of coalitions themselves becoming treaty signatories.

188 U.S. CONST. art. II, § 2.

189 Each coalition discussed in this Note has been created to combat a military or national security threat: World War II, the Vietnam War, the conflict in Korea, the Gulf War, the War on Terror, and the NATO action in Libya. *See supra* note 17 and accompanying text.

Conclusion

Contract disputes brought as the result of contracts entered by international coalitions in which the United States is a member have highlighted a large gap in procurement regulation. Failing to address that gap allows abuses by coalitions and contractors alike, leading to inefficiencies and driving up contract costs—ultimately costing United States taxpayers money. But by passing a statute that limits the use of appropriated funds to only those coalitions who have met a minimum standard for resolving contract disputes, Congress can address those problems while still respecting the sovereignty of its coalition partners. Closing the gap will protect contractors like MAC, who dutifully perform the contracts that supply the coalition forces and are left stranded by current procurement law, while preserving the flexibility coalitions need to operate in order to fulfill their missions