U.S. Government Procurement and International Trade

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SUMMARY

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U.S. Government Procurement and International Trade

The Coronavirus Disease 2019 (COVID-19) pandemic and the global supply chain issues it brought to light revealed that the U.S. government relies heavily on foreign manufacturers and suppliers when procuring goods in some industrial sectors. Some of these foreign suppliers are based in countries of growing concern, such as the People's Republic of China (PRC or China). These revelations, in turn, have prompted heightened congressional interest in the role of international trade in U.S. government procurement. Some Members of Congress have expressed interest in the extent to which federal agencies procure from foreign suppliers or acquire foreign-made goods; related import trends; and U.S. production capacity in industries deemed essential.

Since the 1970s, the United States has played a prominent role in opening government procurement markets abroad through trade liberalization and the establishment of transparent and nondiscriminatory rules. Successive Congresses and Administrations broadly supported this agenda. At the same time, Congress has sought to incentivize U.S. domestic production by prioritizing the procurement of domestic goods and services or by restricting foreign firms' access to the U.S. government procurement market. Federal agency acquisitions must comply with various domestic sourcing laws ("Buy American" laws) unless these requirements have been waived—for example, to uphold U.S. commitments under various international agreements. Such laws include the Buy American Act of 1933 (BAA), which is distinct from the "Buy *America*" laws, and the Trade Agreements Act of 1979 (TAA). Although both BAA and TAA affect international trade, their respective requirements differ. Whereas BAA operates as a price preference for U.S. products, TAA establishes a prohibition on procuring products and services from nondesignated countries, unless one of TAA's exceptions applies. (TAA also implements several international trade agreements and initiatives.) Both the Trump and Biden Administrations issued executive orders to increase oversight of waivers of these laws that would allow government purchases of foreign goods.

U.S. efforts to strengthen so-called "Buy American" requirements have several implications. They could potentially conflict with U.S. international procurement commitments or require the United States to renegotiate them. "Buy American" laws aim to revitalize and rebuild domestic manufacturing capacity and safeguard national security. They also have some potential to adversely affect some U.S. suppliers and exporters, and some global supply chains. Many U.S. government contractors rely on global supply chains to support their U.S. government contracts, which may include networks of suppliers and manufacturing facilities in the territories of trading partners with which the United States has international agreements that include government procurement commitments. Even when manufactured in the United States, many of the products that U.S. suppliers deliver to federal entities may include components manufactured in a foreign partner's territory. Changes to domestic sourcing requirements could require some U.S. businesses to restructure their supply chains—including, for example, by changing suppliers or relocating facilities. Some observers note that this could be a positive development. Other observers note that this, in turn, could potentially increase some costs, and in some circumstances, risk decreasing U.S. competitiveness *vis-a-vis* other trading partners. If U.S. trading partners adopt similar measures, some U.S. firms could be disqualified from bidding for foreign government contracts.

Congress may consider whether the Biden Administration's government procurement agenda is appropriate, whether or not Congress should seek to shape it, and, if so, how. Congress could consider exercising oversight over the implementation of recent legislative changes to "Buy American" requirements. Congress could also consider whether or not to codify or amend additional changes that the Biden Administration has implemented or proposed. These changes include President Biden's executive orders that modified domestic content rules to prioritize further the procurement of U.S. goods and services; the limitation or elimination of waivers that allow government purchases of foreign goods; and working with allies to modernize trade rules and modify U.S. international commitments regarding government procurement. Given the size of the global government procurement market and the effects of domestic preference policies on trade, some Members of Congress and U.S. businesses have supported opening procurement markets to international competition, subject to certain requirements and reciprocal commitments by trading partners, to ensure greater access for U.S. suppliers and their goods and services.

This report explains when U.S. international trade obligations require federal agencies to allow foreign suppliers to compete for government contracts. It also provides an overview of U.S. multilateral and bilateral efforts to develop rules and trade disciplines on government procurement. The report illustrates how international agreements, such as the World Trade Organization (WTO) Agreement on Government Procurement (GPA) and U.S. free trade agreements (FTAs), require parties

to establish transparent and nondiscriminatory rules for covered procurement and enable U.S. businesses to bid for certain contracts in the markets of other GPA and FTA parties.

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Background

Since the 1970s, the United States has played a prominent role in the development of global trade rules and agreements on government procurement. The most notable of U.S. international agreements addressing procurement and trade are the World Trade Organization's (WTO's) plurilateral Agreement on Government Procurement (GPA) and the procurement chapters in most U.S. free trade agreements (FTAs). The federal government implements these agreements primarily through the Trade Agreements Act of 1979 (TAA, 19 U.S.C. §§2501-2581).

Data limitations and other factors make it difficult to quantify accurately the size of the global government procurement market. The Organization for Economic Cooperation and Development (OECD) estimates that procurement expenditures by its members are, on average, equivalent to 13% and 30% of gross domestic product (GDP) and total general government expenditures, respectively (**Figure 1**).[1] The WTO estimates the size of the procurement market covered by the GPA alone (i.e., areas where the 48 parties to the GPA have chosen to open up their procurement markets) at $1.7 trillion.[2]

The Role of Government Procurement in International Trade

According to the Organization for Economic Cooperation and Development (OECD), government (or public) procurement "refers to the purchase by governments and state-owned enterprises of goods, services and works. The public procurement process is the sequence of activities starting with the assessment of needs through awards to contract management and final payment." Government policies that accord preferences to domestic firms over foreign firms in government procurement contracts are one of the "behind-the-border" measures that affect international trade and efforts toward increased economic integration.

While aimed at boosting the domestic economy and supporting domestic firms, these policies also may introduce some economic inefficiency or market distortions that could limit choice, or increase some prices. Increased competition from foreign suppliers for government procurement contracts may reduce some costs for supplied goods and services, increase some taxpayers' value for money, and encourage economically efficient allocation of resources across the economy.

There are two forms of domestic bias:

- **Explicit:** measures or practices that directly and intentionally reduce or prevent foreign companies' access to a government procurement market, such as explicit market access restrictions, domestic price preferences, or local content requirement policies.
- **Implicit:** measures or practices that do not expressly target foreign bidders, but that may indirectly—or potentially—affect cross-border procurement opportunities. These relate to the conduct of procurement (such as type of tendering), qualification and evaluation criteria, and review and complaints mechanisms.

Lack of reliable and disaggregated international data limits analysts' and policymakers' ability to assess the extent to which government procurement policies distort international trade and investment flows. It may also complicate efforts to design policies that minimize or eliminate these effects.

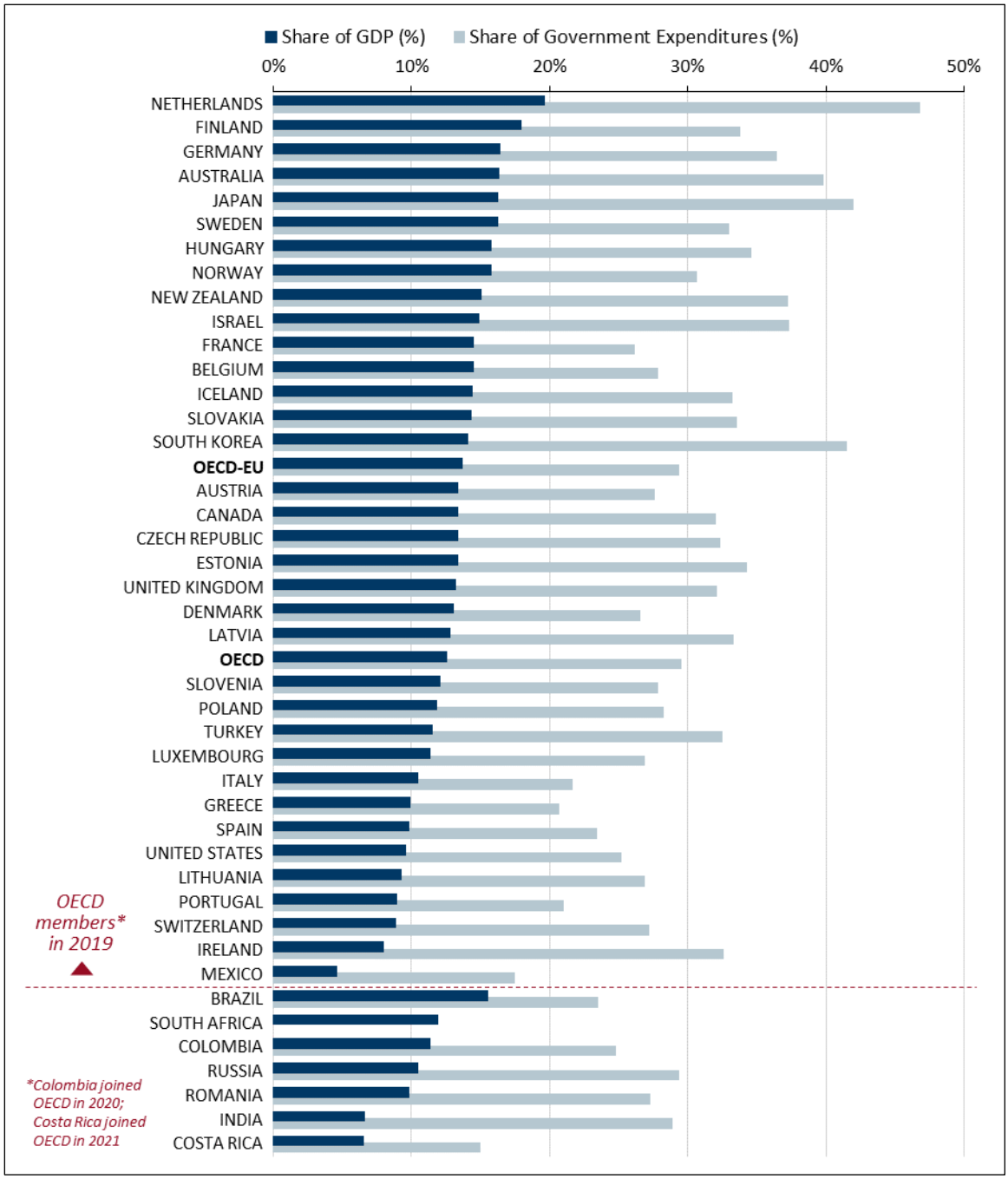
Recognizing the cost inefficiencies that restrictive government procurement can impose on national economies, the United States and major trading partners, working with international economic organizations, have sought for many years to bring government procurement under multilateral trade rules. In parallel, a number of regional and bilateral trade agreements include commitments on procurement.

Source: Adapted from the Organization for Economic Cooperation and Development (OECD), "Government Procurement," Trade Policy Brief, January 2019.

[1] Organization for Economic Cooperation and Development (OECD), National Accounts Statistics (Database). As of January 2023, the OECD's 38 members are: Austria, Australia, Belgium, Canada, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

[2] World Trade Organization (WTO), "Agreement on Government Procurement," Trade Topics.

Figure 1. Government Procurement in 2019: Select Economies



Source: Congressional Research Service (CRS) with data from the Organization for Economic Cooperation and Development (OECD).

Notes: 2019 is the most recent year for which complete data are available. Comparable data are not available for every country, including China.

Because governments spend a large amount of money on procurement each year, they exert influence on market outcomes. This may change the composition of international trade and investment flows and affect the competitiveness of producers and suppliers globally. Governments are often the largest purchasers of goods within their territories. Competing policy

goals may require varying approaches to economic development and national security. Policies that discriminate in favor of domestic products or suppliers may yield some economic, social, and political benefits, but they may also introduce market distortions that, for example, may limit some consumer choice, increase some prices, introduce some economic inefficiency, and affect international trade flows. In particular, by restricting the pool of suppliers, governments may incur higher costs. Procurement policies and practices can also act as barriers to trade and international competition.

Many governments use procurement regimes to achieve a wide range of economic, social, political, and strategic goals. These include safeguarding national security, creating employment opportunities in specific industries or regions, achieving environmental and social sustainability, or improving the international competitiveness of domestic industries. Whether policies are efficient or effective at meeting their stated goals is subject to debate. Ultimately, governments typically weigh the potential adverse effects against the potential benefits of these measures.

International agreements have opened many procurement opportunities around the world to international competition, while also requiring parties to establish transparent and nondiscriminatory rules for certain procurements. However, international regimes on government procurement are not necessarily comprehensive and do not cover every country or sector. For example, the 48 parties bound by the WTO GPA negotiate market access commitments on a reciprocal basis, meaning that procurement coverage in each market varies considerably. A 2017 study by the U.S. Government Accountability Office (GAO) estimates that while the United States opens as much as 80% of its federal contracts to foreign suppliers, South Korea and Japan, for example, may do the same for 13% and 30%, respectively.[3] The United States, while among the world's most open markets overall, maintains restrictions on foreign sourcing under laws such as the Buy American Act of 1933 (BAA, 41 U.S.C. §§8301-8305). In the United States, state and local level governments may also have similar preferential policies.

Recent global economic developments, combined with increasing cross-border trade and supply chain digitization, have raised a number of issues and questions for Members of Congress, Administration officials, and policymakers abroad.[4] These relate to

- **Globalization of supply chains**. As a result of global supply chains, fewer products are sourced and assembled in any one country.[5] Increasingly, some components of U.S. products are sourced abroad and assembled in the United States, or conversely, products composed of U.S. components are assembled elsewhere. Hence, it has become increasingly difficult to determine the origin of products to comply with government procurement regulations or to find sole-sourced U.S. products. To comply with domestic content requirements, companies may segregate their supply chains. This could potentially disrupt existing sourcing patterns and long-standing business relationships. The extent to which this might affect overall efficiency and competitiveness remains an open

[3] U.S. Government Accountability Office (GAO), "Government Procurement: United States Reported Opening More Opportunities to Foreign Firms Than Other Countries, but Better Data Are Needed," February 2017, GAO Report GAO-17-168. The study uses data for 2010 and focuses "on the United States, Japan, and South Korea because only these countries reported detailed data on non-covered central government procurement to the WTO."

[4] See, for example, Knut Alicke, Jürgen Rachor, and Andreas Seyfert, "Supply Chain 4.0—The Next-Generation Digital Supply Chain," McKinsey & Company, October 27, 2016; and CRS Report R46198, *Internet Regimes and WTO E-Commerce Negotiations*, by Rachel F. Fefer.

[5] For more detail on global supply (value) chains, see CRS Report R46641, *Global Value Chains: Overview and Issues for Congress*, coordinated by Rachel F. Fefer.

question. Effects vary across businesses and sectors, but such developments could drive up costs for some companies that, in turn, could be passed on to the U.S. federal government.

- **Access to foreign procurement.** The WTO GPA and U.S. FTAs do not cover many of the largest foreign markets (e.g., Brazil, China, and India).[6] Many U.S. businesses would like to access these markets, but they may face resistance from foreign governments when the United States imposes BAA restrictions, for example. U.S. access to these markets would entail establishing U.S. reciprocal commitments to allow these countries' products and suppliers access to the U.S. government procurement market. Such commitments could potentially constrain the U.S. government's current efforts to shift certain supply chains and diversify certain dependencies away from China. Additional restrictions or requirements on U.S. government procurement, even if consistent with U.S. international trade obligations, could prompt other foreign governments to adopt similar policies, possibly to the detriment of U.S. businesses and economic interests.
- **Higher costs.** "Buy national" policies generally allow price preferences for domestic goods up to a certain price differential. The use of price differentials could increase costs to complete some projects, or yield fewer projects undertaken for a given appropriation. In stimulus-related spending, these restrictions may help, in some circumstances, to support wages but in some circumstances may not yield a greater number of jobs.

The following two sections provide a high-level overview of BAA and TAA, and issues of congressional interest with implications for U.S. trade policy.

Buy American Act of 1933

The Buy American Act is the most broadly applicable U.S. domestic preference statute that governs procurement by the federal government. As implemented, it establishes a price preference for federal agencies' purchases of domestic end products to be used in the United States—one that effectively requires agencies to favor domestic end products (**textbox**). It generally does not prohibit a federal agency from purchasing an essentially equivalent foreign product if the agency determines that the foreign product is less costly after a comparative price evaluation test. For civilian agency procurement, the contracting officer typically adds a price preference or evaluation factor (commonly referred to as the price evaluation "penalty") to the lowest foreign offer equal to 20% or 30%, depending on whether the lowest domestic offer is from a large or small business.[7] For U.S. Department of Defense (DOD) procurements, the "penalty" is 50%, regardless of whether the low domestic offeror is a small or large business.[8]

The BAA price evaluation penalty serves as an evaluation tool. If a foreign offer is less expensive even after the application of the "penalty," contracting agencies may generally purchase the foreign product. In such a case, the contracting agency would only pay the proposed price, not the

[6] Brazil and China are currently in negotiations to accede to the WTO GPA and India participates as an observer.

[7] For purposes of the BAA's price evaluation penalty, a "small business" generally refers to an "entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor" (13 C.F.R. Part 121).

[8] Foreign bidders may still outcompete domestic firms. For example, if the low U.S. offer is priced at $20,000 and the low foreign offer is priced at $10,000, the low foreign offer has a lower evaluated price even after the application of any of the possible BAA price evaluation "penalty" percentages (20%, 30%, or 50%).

increased evaluated price. BAA does not apply to contracts for services. However, it may apply to any products purchased under a services contract, such as a notional maintenance contract for U.S. Air Force HH-60G Pave Hawk helicopters that might include both repair services and provision of replacement parts.

Applicability of the Buy American Act (BAA)

APPLICATION	Will the good be procured under a contract with an award value above the micro-purchase threshold (generally $10,000) but below the TAA threshold (generally $183,000)?
COMPLIANCE TEST	• **Manufactured End Product:** Is it "manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States" (41 U.S.C. §8302) AND does the cost of its components mined, produced, or manufactured in the United States exceed 60% of the cost of all its components (48 C.F.R. §25.003)? • **Unmanufactured End Product:** Is it "mined or produced" in the United States (41 U.S.C. §8302)? • **Iron and/or Steel End Product:** Is it manufactured in the United States, does it consist wholly or predominantly of iron and/or steel, AND does the cost of U.S. iron and/or steel constitute more than 95% of the cost of all the components used in the end product (48 C.F.R. §25.003)?
EXCLUSIONS	• Nonavailability (quantity and quality) (48 C.F.R. §25.003(b) and 48 C.F.R. §25.004(a)) • Resale (48 C.F.R. §25.004) • Information technology that is a commercial item (48 C.F.R. §25.103(e))
WAIVERS	• Public interest (48 C.F.R. §25.003(a)) • Unreasonable cost (48 C.F.R. §25.003(c)) • Commercially available off-the-shelf (COTS) items (48 C.F.R. §12.103 and 48 C.F.R. §25.001(c)(1)) • "Qualifying countries" (48 C.F.R. §225.872-1)

Source: Congressional Research Service (CRS), the Buy American Act of 1933 (as amended), and the Code of Federal Regulations (C.F.R.).

Notes: (1) TAA = Trade Agreements Act of 1979. (2) A variety of factors determine applicability. BAA may also apply above the TAA threshold if, among other things, the relevant trade agreement excludes a product or agency from TAA coverage. (3) The U.S. Trade Representative (USTR) establishes TAA thresholds biannually. (4) There is no statutory definition of "manufactured" or "substantially all." Agencies have long construed "substantially all" to mean that the costs of a product's U.S. components exceed 50% of the cost of all its components, but this definition is not set forth in statute. (The threshold was increased to "greater than 55%" in January 2021 and is set to increase further to "greater than 65%" in October 2022.) (5) Commercially available off-the-shelf (COTS) items are exempt from BAA's component cost test. (6) The U.S. Department of Defense (DOD) also treats end products from 28 "qualifying countries"—those with which it has signed reciprocal defense procurement memoranda of understanding (RDP MOUs)—as domestic end products for BAA purposes.

Application

BAA generally applies to supply and construction contracts with an estimated value above the micro-purchase threshold (generally $10,000) and below the TAA threshold, which varies by trade agreement (e.g., for the WTO GPA, the threshold is currently $183,000 for goods and services and $7,032,000 for construction). The TAA threshold is set biannually by the U.S. Trade Representative (USTR) (**Table 1**). In general, contracts with an estimated value in excess of the TAA threshold are exempt from the BAA and are instead subject to the TAA compliance test (see "Trade Agreements Act of 1979").

Table 1. Procurement Thresholds for Implementation of the Trade Agreements Act

January 1, 2022, through December 31, 2023

Trade Agreement	Supply Contract	Service Contract	Construction Contract
WTO Agreement on Government Procurement (2014)	$183,000	$183,000	$7,032,000
Australia Free Trade Agreement*	$92,319	$92,319	$7,032,000
Bahrain Free Trade Agreement	$183,000	$183,000	$12,001,460
Chile Free Trade Agreement	$92,319	$92,319	$7,032,000
Colombia Trade Promotion Agreement	$92,319	$92,319	$7,032,000
Dominican Republic-Central American Free Trade Agreement	$92,319	$92,319	$7,032,000
Israel Free Trade Agreement*	$50,000	N/A	N/A
Jordan Free Trade Agreement	N/A	N/A	N/A
Korea Free Trade Agreement*	$100,000	$100,000	$7,032,000
Morocco Free Trade Agreement	$183,000	$183,000	$7,032,000
Oman Free Trade Agreement	$183,000	$183,000	$12,001,460
Panama Trade Promotion Agreement	$183,000	$183,000	$7,032,000
Peru Trade Promotion Agreement	$183,000	$183,000	$7,032,000
Singapore Free Trade Agreement*	$92,319	$92,319	$7,032,000
U.S.-Mexico-Canada Agreement (with respect to Mexico only)	$92,319	$92,319	$12,001,460

Source: Congressional Research Service (CRS) and the Office of the U.S. Trade Representative (USTR).

Notes: (1) Procurement obligations in USMCA are between the United States and Mexico only. (2) The USTR, pursuant to Executive Order 12260, sets the U.S. dollar thresholds for the WTO Agreement on Government Procurement (GPA) and U.S. free trade agreements (FTAs). U.S. obligations under these agreements apply to covered procurement valued at or above the specified U.S. dollar thresholds. The thresholds are adjusted every two years. For more detail, see 86 FR 67579 (November 26, 2021). * = indicates that the party is also a signatory to the WTO GPA.

Foreign Content and the Micro-Purchase Threshold

Pursuant to the Federal Acquisition Streamlining Act of 1994 (P.L. 103-355), manufactured articles, materials, or supplies procured under any contract that has an award value of less than or equal to the micro-purchase threshold (MPT) are excluded from the application of BAA requirements.[9] As a result, federal agencies may generally procure goods composed in whole or in part of inputs from any country as long as the purchase or contract is below the MPT. Section 806 of the National Defense Authorization Act for Fiscal Year 2018 (P.L. 115-91) increased the MPT from $3,000 to $10,000, effective August 31, 2020.

Certain categories of contracts remain subject to BAA restrictions, regardless of their estimated value. The most common categories include arms, ammunition or war materials, purchases indispensable for national security or defense, and small business set-aside contracts.

[9] 41 U.S.C. §1902(a), "Procedures Applicable to Purchases Below Micro-Purchase Threshold."

Select BAA Definitions

End product: those articles, materials, and supplies to be acquired under the contract for public use.

Component: an article, material, or supply incorporated directly into an end product.

Cost of components: (1) for components purchased by the contractor—the acquisition cost, including transportation costs and any applicable customs duty (tariff), and excluding the contractor's profit margin on manufactured components; and (2) for components manufactured by the contractor—all costs associated with the manufacture of the component, including transportation costs, and allocable overhead costs, and excluding any costs associated with the manufacture of the end product.

Commercially available off-the-shelf (COTS) item: any item of supply (including construction material) that is: (1) a commercial product; (2) sold in substantial quantities in the commercial marketplace; and (3) offered to the U.S. government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace. It does not include bulk cargo, such as agricultural and petroleum products.

Source: Adapted from 48 C.F.R. §52.225-1, "Buy American—Supplies."

Compliance Test

BAA prescribes three different tests for determining whether items qualify as domestic end products, depending on whether they are non-manufactured, manufactured, or made primarily of iron and/or steel.

- A *non-manufactured end product* must be mined or produced in the United States to qualify as domestic.
- A *manufactured end product* is one that is manufactured substantially all from articles, materials, or supplies (i.e., components) mined, produced, or manufactured in the United States. Additionally, domestic components must exceed a certain percentage of the cost of all components.
- An *iron and/or steel end product* is manufactured in the United States if it consists wholly or predominantly of iron and/or steel and the cost of foreign iron and/or steel is less than 5% of the cost of all its components.

There is no statutory definition of "manufactured" or "substantially all."[10] Agencies had long construed "substantially all" to mean that the costs of a product's U.S. components must exceed 50% of the cost of all its components, but this interpretation appears to be solely at the executive branch's discretion. In January 2021, the Trump Administration raised the domestic content threshold to "more than 55%," and the Biden Administration raised it to "more than 60%" in October 2022 (see "Recent Changes to Buy American Regulations").

Subcomponent cost is not considered when procuring end products, and commercially available off-the-shelf (COTS) items are exempt from BAA's component cost test. However, it can be difficult to determine if a particular item is either a component of the end product, or a subcomponent of a component that is incorporated directly into the end product.

Component or Subcomponent? A Simplified Example

A U.S. firm supplies electric-adjustable-height standing desks to a federal agency. The base of the desk is made of metal, wood, plastic hooks, and screws wholly sourced and manufactured in the United States. However, it also has an embedded electric motor manufactured in China, which the firm incorporated into the base during the assembly process performed in the United States. If the motor is treated as a component by itself (because the

[10] For more detail, see CRS Report R46748, *The Buy American Act and Other Federal Procurement Domestic Content Restrictions*, by David H. Carpenter and Brandon J. Murrill.

domestic assembly process of the entire desk was deemed to be too simple to qualify as manufacturing—i.e., the motor was not substantially transformed), it would be considered foreign (Chinese) for BAA purposes. However, if the entire finished base is treated as the component, it would be considered domestic (because the domestic assembly process qualified as manufacturing and the U.S.-made components of the base account for more than 60% of its overall cost, causing the motor to become a subcomponent to the component-level base).

When a supplier is unable to determine the country of origin of certain components used in the end products that it delivers to the U.S. government, the component is presumed to be foreign.

Exemptions

There are a number of specific circumstances under which the BAA permits contractors to supply foreign end products. The most common of these circumstances occurs when a federal agency's purchase of a domestic product would force the government to bear an "unreasonable cost." The unreasonable cost exception is implemented through BAA's price evaluation preference. BAA also permits exceptions when it would not be in the "public interest" to procure a domestic end product; the product is to be used outside the United States or for commissary resale; or the product in question is not produced domestically in sufficient quantities or quality. BAA requirements and restrictions on purchasing foreign end products generally do not apply to the acquisition of "information technology" (IT) that is a "commercial product."[11] Contracts for IT commercial products above the TAA threshold, however, may still be subject to TAA requirements and restrictions.

DOD also treats end products from 28 "qualifying countries"—those with which the United States has signed reciprocal defense procurement and acquisition policy memoranda of understanding (RDP MOUs)—as domestic end products for BAA purposes (see "Reciprocal Defense Procurement Memoranda of Understanding").[12]

"Buy *America*" Laws

A number of domestic content restrictions that have been attached to certain federal funds administered by the Department of Transportation (DOT) are collectively and commonly known as "Buy *America*" (as opposed to Buy American) laws. These funds are awarded through grants to states, localities, and other nonfederal government entities for various transportation projects. Specific sources of funding administered by the Federal Highway Administration, the Federal Aviation Administration, the Federal Transit Administration, the Federal Railroad Administration, and the National Railroad Passenger Corporation (Amtrak) are covered under various "Buy *America*" provisions. Generally, these statutes require applicable agency grant programs and spending to be used to fund projects that include only steel, iron, and/or manufactured products produced in the United States. Each provision includes a series of circumstances under which the agency may issue a nationwide or project-specific waiver to these domestic content requirements. Such exemptions may be based upon a finding that application of the domestic content requirement is not in the public interest, the needed materials are not produced in sufficient quantity and/or quality in the United States, or the cost of using domestic materials is unreasonable, among others. BAA does not apply to DOT-administered grant funds because, while the source of the money is federal, purchases are not made directly by the federal government.

In 2021, the "Build America, Buy America Act" (BABA, Division G, Title IX of the "Infrastructure Investment and Jobs Act," P.L. 117-58) expanded the application of "Buy *America*" requirements to all federal financial assistance programs for infrastructure. The BABA, however, states that new "Buy *America*" requirements must be applied in a manner consistent with U.S. obligations under international agreements. Therefore, if the World Trade Organization (WTO) Agreement on Government Procurement (GPA) or a U.S. free trade agreement (FTA)

[11] See the Consolidated Appropriations Act, 2004 (P.L. 108-199) and Consolidated Appropriations Act, 2005 (P.L. 108-447). The terms "information technology" and "commercial product" are defined in 40 U.S.C. §11101.

[12] DFAR 252.225-7000(b)(2). For more detail, see 48 C.F.R. §25.103(e) and 48 C.F.R. §2.101.

covers a state agency procurement that is subject to "Buy *America*" requirements, then the state government would be required to waive domestic preferences for goods and suppliers from other GPA and FTA parties.

For more information on "Buy *America*" and other domestic preference requirements, see CRS Report R44266, Effects of Buy America on Transportation Infrastructure and U.S. Manufacturing, by Michaela D. Platzer and William J. Mallett.

Trade Agreements Act of 1979

The Trade Agreements Act implements several international trade agreements that guarantee that the products and services of signatory countries and other eligible countries receive nondiscriminatory treatment for TAA-covered procurements. Specifically, it authorizes the President to waive domestic procurement restrictions and discriminatory provisions (i.e., laws, regulations, procedures, or practices), such as BAA, for eligible or covered products and services from designated-countries.[13] These are countries that

1. are parties to the WTO GPA;
2. have signed an FTA with the United States that provides appropriate reciprocal competitive government procurement opportunities to U.S. products, services, and suppliers; or
3. benefit from U.S. unilateral trade preferences (e.g., Caribbean Basin countries).[14]

The President has delegated TAA's waiver authority to the USTR, who establishes TAA thresholds depending on the agreement and type of contract covered (**Table 1**).

Unlike BAA, which creates only a preference for domestic end products, TAA prohibits supplying products and services from non-TAA-designated countries, such as China and India. If a product or service is from one of these countries, it may not be supplied in connection with TAA-covered procurements without a waiver by the head of an agency or department (e.g., granted due to non-availability or national interest).

When BAA provisions are waived, certain products that are wholly grown, produced, or manufactured in TAA-designated countries, or "substantially transformed" into new and different articles within these foreign jurisdictions, may be treated the same as "domestic" ones for certain U.S. government procurements (**textbox**).

[13] TAA does not authorize the waiver of any small business or minority preference.

[14] 48 C.F.R. §25.405: "Under the Caribbean Basin Trade Initiative, the United States Trade Representative has determined that, for acquisitions covered by the WTO GPA, Caribbean Basin country end products, construction material, and services must be treated as eligible products."

Applicability of Trade Agreements Act (TAA)

APPLICATION	Will the good or service be procured under a contract with an award value at or above the TAA threshold (generally $183,000)?
COMPLIANCE TEST	• **Good**: Is it wholly the growth, product, or manufacture of the United States or a designated country? If no, has it been substantially transformed in the United States or a designated country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed (19 U.S.C. §2518)? • **Service**: Is the firm that is providing it established in the United States or a designated country (48 C.F.R. §25.402)?
EXCLUSIONS	• Acquisitions set aside for small businesses, including minority-owned • Acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes • Acquisitions of end products for resale • Nonavailability or insufficient availability • Contracts for certain services (e.g., research and development, utility services, dredging, and military support services)
DESIGNATED COUNTRIES	• WTO GPA parties • Certain U.S. FTA countries • Least developed countries ("United Nations List") • Caribbean Basin countries

Source: Congressional Research Service (CRS), the Trade Agreements Act of 1979 (as amended), and the Code of Federal Regulations (C.F.R.).

Notes: (1) A variety of factors determine applicability. BAA may apply above the TAA threshold if, among other things, the relevant trade agreement excludes a product or agency from TAA coverage. (2) USTR establishes TAA thresholds biannually. (2) There is no statutory definition of "manufactured" or "substantial transformation." However, these terms have been interpreted by agencies and courts. (3) Designated countries are listed in 48 C.F.R. §52.225-5. End products from designated countries are generally treated the same as U.S.-made products for certain federal acquisitions exceeding specified TAA thresholds.

Application

TAA's nondiscriminatory treatment applies only when the procuring agency and the goods or services being procured are covered by a relevant trade agreement. The value of those goods or services also must meet or exceed certain specified monetary thresholds. The type of procurement must not be one for which the TAA's waiver of BAA is inapplicable (e.g., procurements set aside for small and minority businesses or purchases indispensable for national security).[15]

[15] "Set-aside for small business" is the limiting of an acquisition, in total or in part, for exclusive competitive participation by small business concerns, U.S. Small Business Administration (SBA)'s 8(a) Business Development program participants, SBA's Historically Underutilized Business Zones (HUBZone) program participants, service-disabled veteran-owned small business concerns, and economically disadvantaged women-owned small business (EDWOSB) concerns and women-owned small business (WOSB) concerns eligible under SBA's WOSB Federal Contracting Program exclusively for participation by small business concerns.

Compliance Test

In order to be TAA-compliant, contractors must supply products that either are wholly grown or manufactured in the United States or in a TAA-designated country. In the case of products consisting in whole or in part of materials from a third country, the product must have been substantially transformed in the United States or in a TAA-designated country into a new and different product. TAA, unlike BAA, is expressly applicable to government contracts for services. For services, the contractor must be established in the United States or in a TAA-designated country.[16]

The Berry and Kissell Amendments: U.S. International Commitments

The Berry and Kissell Amendments are two separate but closely related laws requiring that certain goods procured by agencies with national security responsibilities be produced in the United States.

The Berry Amendment (10 U.S.C. §2533a) requires textiles, clothing, food, and hand or measuring tools procured by the U.S. Department of Defense (DOD) to be grown, reprocessed, reused, or produced wholly in the United States. Over the years, Congress has modified the list of products covered by the law, more recently reinstating stainless-steel flatware and adding dinnerware as covered items. While the United States has made binding commitments related to its government procurement market under the World Trade Organization (WTO) Agreement on Government Procurement (GPA) and various U.S. free trade agreements (FTAs), these agreements do not apply to DOD procurements involving these items.

Under the Kissell Amendment (6 U.S.C. §453b), textile, apparel, and footwear products procured by certain agencies under the U.S. Department of Homeland Security (DHS) must be manufactured in the United States with 100% U.S. inputs. In theory, the Kissell Amendment applies to all DHS agencies. However, in practice, its restrictions apply only to the Transportation Security Administration (TSA) and the U.S. Coast Guard. Prior to the Kissell Amendment's enactment in 2009, the United States had committed, under various international trade agreements, to open certain U.S. government procurement opportunities, including from DHS, to products and suppliers from GPA and several U.S. FTA parties. However, provisions in the GPA and FTAs allow the United States to exempt agencies critical to national security from U.S. international procurement obligations. Because the United States has applied this exemption only to those two agencies, the Kissell Amendment generally governs their procurement decisions. Kissell Amendment requirements do not apply to other agencies within DHS, so their procurements are instead generally subject to BAA and TAA requirements.

For more detail, see CRS In Focus IF10609, Defense Primer: The Berry and Kissell Amendments.

BAA or TAA? Procuring Foreign-Made Products

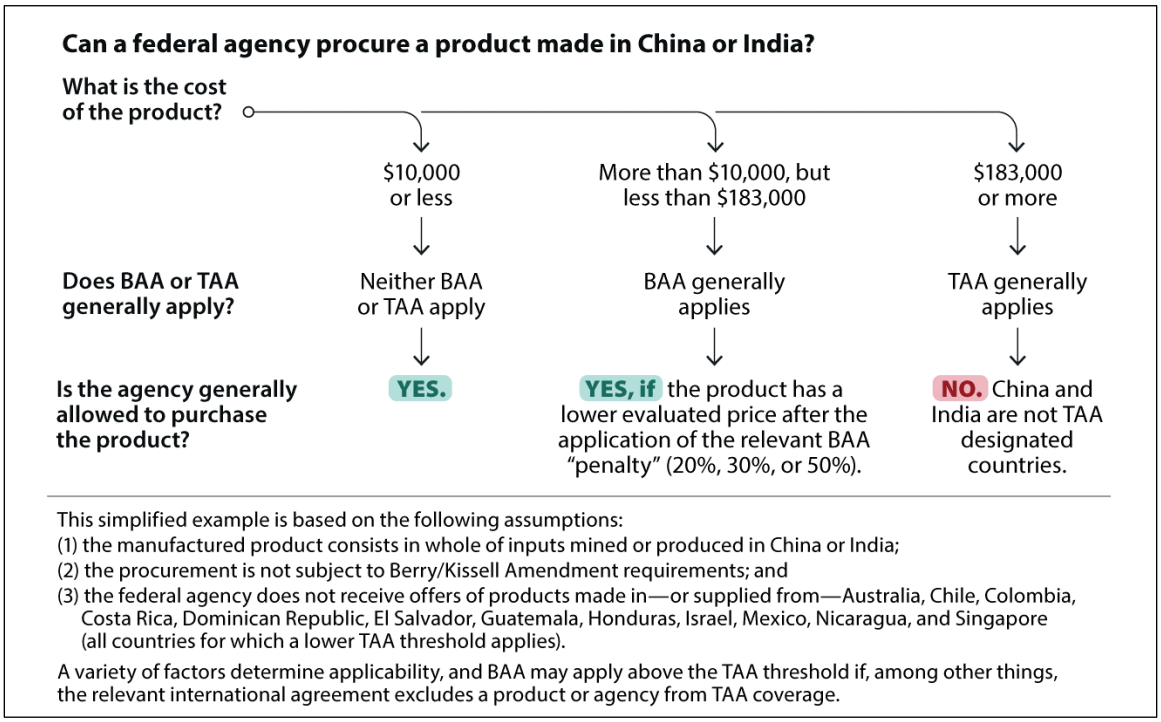
Determining the conditions under which federal agencies must open contracts to foreign suppliers, which legal framework applies in a given procurement decision, or how agencies determine whether goods and services are BAA- or TAA-compliant is a complex task. Determinations are often made on a case-by-case basis, and these decisions depend on a number of factors (e.g., specific agency, product, value, exceptions, and time constraints.). In broad terms, it is possible to divide government procurement decisions into three categories, depending on the award value of the contract or the cost of the product:

1. at or below the micro-purchase threshold (MPT, generally $10,000);
2. above the MPT but below the TAA threshold; and
3. at or above the TAA threshold.

[16] There is no statutory definition of "established." According to the U.S. Government Accountability Office's (GAO's) reading of 48 C.F.R. §25.402(a)(2), "the origin of services is determined based on the country in which the firm providing the service is legally established [or headquartered], not on the location from which the service is ultimately provided." For more detail, see GAO Decision: "Technosource Information Systems, LLC; TrueTandem, LLC," File: "B-405296; B-405296.2; B-405296.3," October 17, 2011.

The simplified example below illustrates how a federal agency might make a determination as to whether or not it can procure a foreign-made product (**Figure 2**).

Figure 2. Simplified Example of Foreign-Made Product Procurement



Source: Congressional Research Service (CRS).

A hypothetical case study also illustrates the challenge of determining country of origin for a product with inputs sourced abroad (**textbox**).

Determining a Pharmaceutical Product's Country of Origin: A Hypothetical Case

A U.S. drug manufacturing company imports active pharmaceutical ingredients (APIs) from China, which it then subjects to a series of processing procedures (e.g., testing and mixing) and then encapsulates the processed API in its U.S. laboratory. The U.S.-made components of the pill account for 61% of its overall cost, while the China-sourced API accounts for the remaining 39%. What is the pill's country of origin? Can the pill generally be procured by a federal agency? The following analysis examines how this scenario could play out under current laws and regulations.

Food and Drug Administration (FDA). Neither the Federal Food, Drug, and Cosmetic Act (P.L. 75-717) nor FDA regulations require drug manufacturers to identify a pill's "country of origin." The FDA requires that each drug label bear the place of business of the manufacturer (defined as one who performs mixing, granulating, milling, molding, lyophilizing, tableting, encapsulating, coating, or sterilizing). In this case study, only the company's U.S. address would be required to be listed on the pill's label.

Customs and Border Protection (CBP). The "substantial transformation" test is what CBP uses to determine how a product should be marked under the Tariff Act of 1930, which requires all imports to be marked with its country of origin.[17] Under CBP regulations, in this case study, the pill would be determined to be a

[17] According to U.S. Customs and Border Protection (CBP), "U.S. non-preferential rules of origin schemes employ the 'substantial transformation' criterion for goods that consist in whole or in part of materials from more than one country. In the majority of the non-preferential schemes, the substantial transformation criterion is applied on a case-by-case

product of China and should be marked accordingly. CBP does not consider processing procedures and encapsulation in the United States a "substantial transformation" of the API. (See, for example, CBP Customs Ruling HQ 561975.[18])

Federal Acquisition Regulation (FAR). FAR defines a "foreign end product" as an article that is wholly grown, produced, or manufactured in a foreign country or that has been substantially transformed into a new product in a foreign country. The FAR definition for a "domestic end product" omits the term "wholly." It is unclear in this case study if the pill would qualify for high-value government contracts (above the TAA threshold) under current FAR guidelines. A February 2020 decision by the U.S. Court of Appeals for the Federal Circuit (Acetris Health, LLC v. United States) suggests that a U.S.-made end product may be partially—not "wholly"—manufactured in the United States for it to be TAA-compliant.[19]

Trade Agreements Act (TAA). The substantial transformation test is also used under the TAA to determine whether a product is made in the United States or a "designated foreign country," and thus eligible for high-value government contracts (above the TAA threshold). In this case study, it would be determined, under the substantial transformation test, that the pill is a product of China—not a TAA-designated country. Therefore, unless it were granted a waiver, the pill could not be placed on a Federal Supply Schedule.

Buy American Act (BAA). The pill in this case study would qualify for sale as a "domestic end product" under lower-value government contracts (above the micro-purchase threshold and below the TAA threshold), as the cost of the components manufactured in the United States exceeds 60% of the cost of all its components.

International Agreements and U.S. Application

The United States has played a prominent role in the development of international trade rules on government procurement—multilaterally under the General Agreement on Tariffs and Trade (GATT)/WTO and other international economic institutions and bilaterally through FTAs (**textbox**). As noted previously, international agreements addressing government procurement and trade have opened many procurement opportunities around the world to international competition, worth trillions of U.S. dollars annually, while also requiring parties to establish transparent and nondiscriminatory rules on government procurement. In particular, the agreements enable U.S. businesses to bid for government contracts in the markets of other GPA and FTA parties. Likewise, such agreements allow foreign businesses to bid for federal and state government contracts in situations where these governments have chosen to open up their procurement markets.

International Economic Institutions and Government Procurement

International economic institutions have shaped international rules and principles for government procurement, especially with regard to transparency, openness, and nondiscrimination. Leading institutions in this area include the World Trade Organization (WTO), Organization for Economic Cooperation and Development (OECD), United Nations Commission on International Trade Law (UNCITRAL), World Bank, and regional development banks. The WTO Agreement on Government Procurement (GPA), in particular, provides signatories with a multilateral rules-based framework for the procurement of goods and services.

UNCITRAL's Model Law on Procurement of Goods and Services also "contains procedures and principles aimed at achieving value for money and avoiding abuses in the procurement process. The text promotes objectivity,

basis, and it is based on a change in name/character/use method (i.e., an article that consists in whole or in part of materials from more than one country is a product of the country in which it has been substantially transformed into a new and different article of commerce with a name, character, and use distinct from that of the article or articles from which i[t] was so transformed)." For more detail, see CBP, "What Every Member of the Trade Community Should Know About: Rules of Origin," updated February 26, 2020.

[18] U.S. Customs and Border Protection, "561975: Country of Origin Marking for the Anesthetic Drug Sevoflurane," Customs Rulings Online Search System (CROSS), April 3, 2002.

[19] *Acetris Health, LLC v. United States*, No. 2018-2399 (Fed. Cir. Feb. 10, 2020).

fairness, participation and competition and integrity toward these goals. Transparency is also a key principle, allowing visible compliance with the [procurement laws and] procedures."[20] Additionally, the OECD Recommendation on Public Procurement is a "guiding principle that promotes the strategic and holistic use of public procurement. It is a reference for modernizing procurement systems and can be applied across all levels of government and state-owned enterprises."[21]

The adoption of best practices and frameworks endorsed by international economic institutions have arguably led to a more efficient and effective allocation of resources and increased competition in the procurement markets of certain countries. For example, they have increased trade and strengthened economic integration among OECD and EU member states. Yet, the influence of these principles remains limited. Most countries around the world are not signatories to the GPA, and many have only partially reformed their government procurement regimes.

Since the outbreak of the COVID-19 pandemic and the global supply chain issues that it brought to light, Congress' interest in the role of international trade in U.S. government procurement has intensified. In particular, some Members have sought ways to incentivize U.S. domestic production by prioritizing the procurement of domestic goods and services and strengthening government procurement requirements. At the same time, some Members have raised questions regarding how, when, and to whom the United States extends nondiscriminatory treatment in procurements by federal agencies.

Through various international agreements and programs, the United States extends nondiscriminatory treatment in certain government procurements to 129 countries and territories (**Table 2**). (**Figure 3** depicts formal, reciprocal agreements affecting the application of Buy American requirements by country.) As noted earlier, data limitations and other factors, however, make it difficult to quantify accurately the size of the government procurement market covered by these agreements and programs, as well as the extent to which governments procure from suppliers in—and acquire goods and services from—these countries and territories.

Table 2. Economies to Which the United States Extends Nondiscriminatory Treatment in Certain U.S. Government Procurement Activities

WTO GPA	U.S. FTAs	DOD MOUs	LDCs	Caribbean Basin
• Armenia • Aruba (NLD) • Australia • Austria • Belgium • Bulgaria • Canada • Croatia • Cyprus • Czech Rep. • Denmark • Estonia • European Union • Finland • France • Germany	• Australia • Bahrain • Chile • Colombia • Costa Rica • Dominican Rep. • El Salvador • Guatemala • Honduras • Israel • Mexico • Morocco • Nicaragua • Oman • Panama • Peru • Singapore	• Australia • Austria • Belgium • Canada • Czech Rep. • Denmark • Egypt • Estonia • Finland • France • Germany • Greece • Israel • Italy • Japan • Latvia • Lithuania	• Afghanistan • Angola • Bangladesh • Benin • Bhutan • Burkina Faso • Burundi • Cambodia • Central African Rep. • Chad • Comoros • Congo [DRC] • Djibouti • Equatorial Guinea • Eritrea • Ethiopia	• Antigua and Barbuda • Aruba (NLD) • Bahamas • Barbados • Belize • Bonaire (NLD) • British Virgin Islands (GBR) • Curacao (NLD) • Dominica • Grenada • Guyana • Haiti • Jamaica • Montserrat (GBR) • Saba (NLD) • St. Kitts and Nevis • St. Lucia

[20] United Nations Commission on International Trade Law (UNCITRAL), "UNCITRAL Model Law on Public Procurement (2011)," Text and Status: Procurement and Public-Private Partnerships, July 1, 2011.

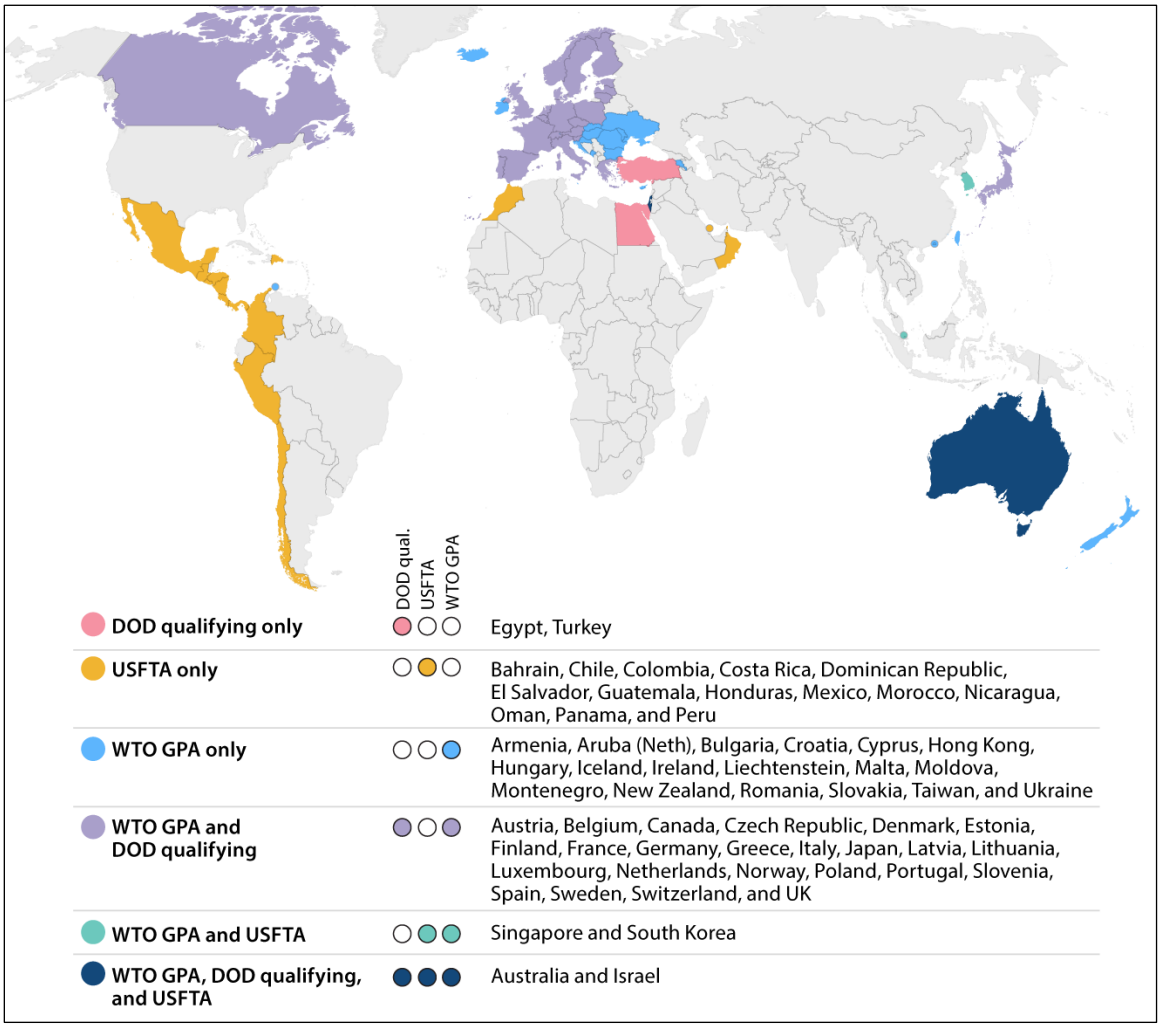
[21] Organization for Economic Cooperation and Development (OECD), "Public Procurement Recommendation," Directorate for Public Governance.

WTO GPA	U.S. FTAs	DOD MOUs	LDCs	Caribbean Basin
• Greece • Hong Kong • Hungary • Iceland • Ireland • Israel • Italy • Japan • Latvia • Liechtenstein • Lithuania • Luxembourg • Malta • Moldova • Montenegro • Netherlands • New Zealand • Norway • Poland • Portugal • Romania • Singapore • Slovakia • Slovenia • South Korea • Spain • Sweden • Switzerland • Taiwan • Ukraine • United Kingdom	• South Korea	• Luxembourg • Netherlands • Norway • Poland • Portugal • Slovenia • Spain • Sweden • Switzerland • Turkey • United Kingdom	• Gambia • Guinea • Guinea-Bissau • Haiti • Kiribati • Laos • Lesotho • Liberia • Madagascar • Malawi • Mauritania • Mozambique • Nepal • Niger • Rwanda • Samoa • Sao Tome and Principe • Senegal • Sierra Leone • Solomon Islands • Somalia • South Sudan • Tanzania • Timor-Leste • Togo • Tuvalu • Uganda • Vanuatu • Yemen • Zambia	• St. Vincent and the Grenadines • Sint Eustatius (NLD) • Sint Maarten (NLD) • Trinidad and Tobago

Source: Congressional Research Service (CRS).

Notes: (1) FTA = free trade agreement; MOU = memorandum of understanding; LDCs = least developed countries. (2) The U.S.-Jordan FTA's only procurement provision is a commitment by the parties to engage in negotiations on Jordan's accession to the WTO Agreement on Government Procurement (GPA). (3) A country or territory may be subject to nondiscriminatory treatment under multiple agreements.

Figure 3. U.S. Reciprocal Agreements Affecting the Application of Buy American Requirements by Country



Source: Congressional Research Service (CRS). Adapted from U.S. Government Accountability Office, "Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance," GAO Report GAO-19-17, December 2018.

WTO Government Procurement Agreement (GPA)

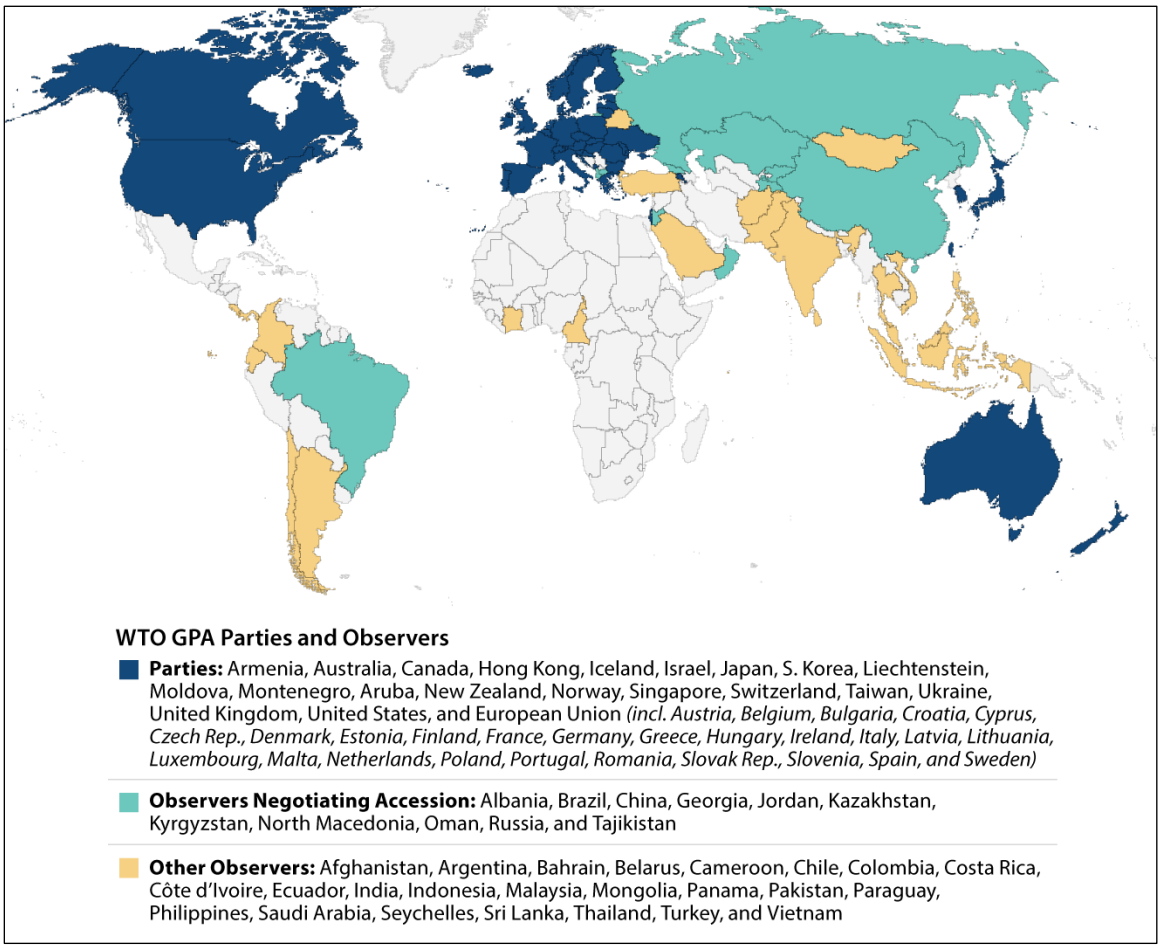
In recognition of the economic and political benefits of open and rules-based trade, the United States and other major trading partners established the General Agreement on Tariffs and Trade (GATT) in the aftermath of World War II.[22] The first seven rounds of GATT trade negotiations dealt primarily with reducing tariffs among the signatory countries. The seventh round—the Tokyo Round (1973-1979)—took an important step in addressing nontariff barriers, such as so-called "buy national" government procurement policies. Negotiators addressed many of these barriers in a series of codes, including the Government Procurement Code, which went into effect in 1981. The Code's chief sponsors, particularly the United States, wanted to open up government procurement markets to foreign contracts in an effort to liberalize international trade. To do so,

[22] For more detail, see CRS Report R45417, *World Trade Organization: Overview and Future Direction*, by Cathleen D. Cimino-Isaacs and Rachel F. Fefer.

the Code imposed a set of rules that Code signatories had to apply in their government procurement procedures and practices.

Later, as a part of the GATT's Uruguay Round of trade negotiations, which resulted in the creation of the WTO in 1995, Code signatories negotiated a new agreement, the WTO Agreement on Government Procurement (GPA) (**Figure 4**). It entered into force in 1996. Although the GPA extended the scope of the 1981 Code to include additional entities, services, and construction services, it shared the Code's plurilateral nature. This means that, unlike most of the other agreements of the WTO, which countries must accept as a condition of membership, GPA parties are only committed to apply the agreement to other GPA parties. Signatories agreed to enter into negotiations to expand GPA's membership and coverage three years after the agreement entered into force.

Figure 4. WTO GPA Parties and Observers



Source: Congressional Research Service (CRS) and the World Trade Organization (WTO).

In 2012, after more than a decade of negotiations, the GPA parties adopted a revision to the 1996 GPA agreement, which entered into force in 2014. The revised agreement reflects new procurement practices, clarified obligations, and a further expansion of the types of procurement covered by the 1996 GPA. In particular, it added new government entities and included new services and other areas of government procurement activities to the scope of the GPA. Australia is the newest party to the GPA, to which it has been bound since 2019. Switzerland was the last

GPA party to submit its "instrument of acceptance" to the WTO in December 2020.[23] Accordingly, as of January 2021, the revised GPA is in force for all 48 GPA parties.[24] In addition, since its withdrawal from the EU in January 2021 ("Brexit"), the UK takes part in the GPA in its own right—and not as part of the EU. Several WTO members, including China, are currently in negotiations to accede to the GPA and others participate as observers (**textbox**).[25]

2021 USTR Report to Congress on China's WTO Compliance: Government Procurement

"In its WTO accession agreement, China made a commitment to accede to the WTO Agreement on Government Procurement (GPA) and to open up its vast government procurement market to the United States and other GPA parties. To date, however, the United States, the EU and other GPA parties have viewed China's offers as highly disappointing in scope and coverage. China submitted its sixth revised offer in October 2019. This offer showed progress in a number of areas, including thresholds, coverage at the sub-central level of government, entity coverage and services coverage. Nonetheless, it fell short of U.S. expectations and remains far from acceptable to the United States and other GPA parties as significant deficiencies remain in a number of critical areas, including thresholds, entity coverage, services coverage and exclusions. Although China has since stated that it will 'speed up the process of joining' the GPA, it has not submitted a new offer since October 2019. China's most recent submission, made in June 2021, was only an update of its checklist of issues, which informs GPA parties of changes to China's existing government procurement regime since its last update."

Source: Office of the U.S. Trade Representative (USTR), *2021 Report to Congress on China's WTO Compliance*, February 2022.

The GPA, like the GATT-era 1981 Code, is implemented in U.S. law by the TAA. TAA prohibits procurements from countries—other than least developed and Caribbean Basin countries—that do not provide reciprocal nondiscriminatory treatment to the United States. Thus, only trading partners that are party to the GPA (or a U.S. FTA with comparable provisions) are eligible for nondiscriminatory treatment with respect to certain U.S. federal government procurement above specified thresholds. Title III of the TAA authorizes the President to waive some, but not all, domestic purchasing requirements (e.g., BAA) for goods and suppliers from GPA parties (and certain U.S. FTA signatories). The USTR establishes U.S. thresholds biannually (**Table 1**).

General Obligations under the GPA

The GPA governs procurement by any contractual means and applies to laws, regulations, and practices regarding any procurement by entities covered by the agreement.[26] This could include central (federal) and sub-central (state) government entities, as well as utilities and other government enterprises that a party designates. The GPA, however, does not cover every country or sector. The 48 parties bound by the GPA negotiate market access commitments on a reciprocal basis. In its market access schedule of commitments (i.e., the Appendix), each party specifies government entities and goods and services—with limitations and monetary thresholds—that are

[23] World Trade Organization (WTO), "UK and Switzerland Confirm Participation in Revised Government Procurement Pact," December 2, 2020.

[24] Technically, the WTO GPA consists of 21 parties: 47 WTO members (counting the European Union [EU] and its 27 member states as one party) and Aruba (or "Netherlands with respect to Aruba"). The EU is a WTO member in its own right as are each of its member states. Aruba is not a WTO member in its own right.

[25] WTO members that are not parties to the GPA may generally follow the proceedings of the Committee on Government Procurement in an observer capacity. Four international organizations participate in the committee as observers: (1) International Monetary Fund (IMF), (2) Organisation for Economic Cooperation and Development (OECD), (3) United Nations Conference on Trade and Development (UNCTAD), and (4) International Trade Centre.

[26] For more detail, see World Trade Organization (WTO), "Agreement on Government Procurement 2012 and Related WTO Legal Texts," March 30, 2012.

open to procurement bids by firms from other GPA parties. For example, the U.S. Appendix covers 85 federal-level entities, as well as voluntary commitments by 37 states (see **textbox**).[27]

U.S. Appendix to the WTO GPA

The U.S. Appendix to the GPA is divided into seven annexes. It includes central (federal) and sub-central (state) agencies that have agreed to be covered by the agreement, the U.S. thresholds for procurement contracts, and various exceptions that the United States has taken to GPA obligations.

Federal Agencies (Annex 1). Subject to monetary threshold requirements, the GPA generally covers all federal agencies listed in Annex 1. The GPA, however, does not apply to certain categories of goods and services procured by the U.S. Agency for International Development (USAID), General Services Administration, and Departments of Agriculture, Defense, Energy, Homeland Security, and Transportation.

State Agencies (Annex 2). Thirty-seven states and their covered agencies are currently listed in U.S. Annex 2. Commitments regarding state procurement are subject to the General Notes (Annex 7) and any exceptions listed for a particular state. General exemptions allow states, for example, to exclude the procurement of certain goods and services (e.g., construction-grade steel and printing services) and to apply preferences or restrictions associated with programs promoting the development of distressed areas.

Other Entities (Annex 3). The GPA covers 10 quasigovernmental agencies, including the Tennessee Valley Authority and the Port of Baltimore. Procurements by some of these entities are subject to specific exceptions stated in Annex 3, as well as in the General Notes (Annex 7). In addition, the GPA does not apply to restrictions attached to federal funds for airport projects with respect to all listed entities.

Goods (Annex 4) and Services (Annex 5). Unless otherwise specified, the GPA covers all goods and services procured by entities included in Annexes 1, 2, and 3. Excluded services listed in Annex 5 include transportation services, public utilities services, and research and development (R&D) services.

Construction (Annex 6). Construction services covered by the agreement (e.g., those listed in Division 51 of the Central Product Classification) are specified in Annex 6. The threshold levels for the procurement of construction services are listed in Annexes 1, 2, and 3. (A higher threshold for certain construction services from South Korea, however, is provided for in Annex 7.)

General Notes (Annex 7). The United States specifies a number of general exclusions in Annex 7, including set-asides for small and minority-owned businesses. A set-aside may include any form of preference, such as the exclusive right to provide a good or service, or a price preference.

Consistent with the overall framework of the WTO, the GPA requires nondiscrimination and transparency in contracting—the two cornerstone principles of the agreement, as well as of the WTO in general (see below). In addition, the GPA contains obligations regarding tendering and selection requirements, qualification of suppliers, offsets, invitations to participate in procurements (solicitations), awarding of contracts, and bid challenge procedures. Disputes under the GPA are generally subject to the procedures of the WTO Dispute Settlement Understanding (DSU), although there are additional special rules given the plurilateral nature of the agreement. The agreement also allows for general exceptions from GPA obligations. For example, countries typically exclude defense and national security purchases from the agreement, and in the case of the United States, set-asides for small and minority-owned businesses are excluded. Finally, a party to the GPA may also make changes to its schedule of commitments. However, changes are subject to consultations and, in the case of significant changes, negotiations with—and potentially compensation to—other parties to the agreement.

In negotiating reciprocal procurement commitments under the GPA, the United States has not required that markets all be open to foreign competition in the same nominal amounts. Rather, its

[27] Under the GPA, 37 U.S. states voluntarily agreed to be covered under the GPA and their covered agencies are currently listed in U.S. Annex 2: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming.

aim has been to gain access to generally comparable procurement opportunities in other parties' markets.

Nondiscrimination

The first cornerstone principle of the GPA is a non-obligation that requires parties to accord to the goods, services and suppliers of other GPA parties treatment "no less favorable" than that given to their domestic goods, services and suppliers throughout the procurement process. In other words, parties can neither favor domestic goods, services, or suppliers over those of GPA parties (i.e., national treatment), nor can they treat the goods, services or suppliers of one GPA party more favorably those of another GPA party (i.e., most-favored nation [MFN] treatment).

Transparency

The second cornerstone principle of the GPA is transparency. The GPA requires each party to publish information on its procurement system, including laws, regulations, and judicial decisions regarding covered procurement, in an officially designated medium that is widely disseminated and accessible to the public. Parties are also required to collect and report to the WTO Committee on Government Procurement statistics on its contracts covered by the agreement. Finally, on request of any other party, a party must provide any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with the agreement.

Rules of Origin

The GPA itself does not contain separate rules of origin from those of the WTO. However, it prohibits parties from implementing rules regarding the importation or supply of government procured goods or services that are different from those that it applies in the normal course of trade to imports or supplies of the same goods or services from the same party.

Conduct of Procurement

A procuring entity must conduct procurement in a transparent manner that is consistent with the GPA, avoids conflict of interest, and prevents corrupt practices. Additionally, parties are to ensure that their procedures are not applied on a discriminatory basis and do not preclude competition or create unnecessary obstacles to international trade. The GPA also establishes general rules regarding the systems through which suppliers engage in competitive bidding for government contracts (i.e., open, selective, and limited tendering procedures).

Tendering Procedures

The GPA establishes general rules regarding tendering procedures. A tendering procedure is the system through which suppliers engage in competitive bidding for government and other contracts. Specifically, parties to the GPA are to ensure that their procedures are applied in a nondiscriminatory manner and do not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition. There are three types of tendering procedures governed by the GPA:

1. open tendering procedures (in which all interested suppliers may bid);
2. selective tendering procedures (under which only those suppliers invited to bid may do so); and
3. limited tendering procedures (where the entity contacts the suppliers individually and requests bids).

Qualifications and Treatment of Suppliers

The GPA requires that parties not discriminate among suppliers of other parties—that is, between domestic suppliers and suppliers of other GPA parties—in the process of drawing up lists of qualifying suppliers. It also requires that any conditions for participation in tendering procedures be limited to those which are essential to ensure the firms' capability to fulfill the contract in question and not create unnecessary obstacles to the participation of suppliers of another party.

Offsets

Pursuant to the GPA, government entities may not impose, seek, or consider offsets either in qualifying and selecting suppliers, products, or services, or in evaluating tenders and awarding contracts for covered procurement. Offsets are defined in the GPA as "any condition or undertaking that encourages local development or improves a party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement."

Dispute Settlement

The WTO Dispute Settlement Understanding (DSU) applies—with certain exceptions—to consultations and dispute settlement involving the GPA. For example, only GPA parties may participate in decisions or actions by the DSU in GPA disputes. In addition, cross-retaliation is not allowed with respect to the GPA. As such, GPA parties may not suspend GPA benefits or concessions as a countermeasure in a dispute arising under a separate WTO agreement.

Bid Challenge Procedures

In addition to the possibility of party-to-party dispute settlement under the general WTO dispute resolution procedures, the GPA requires that suppliers have access to separate challenge procedures for alleged breaches in the context of government procurement. In the event that a supplier complains of a breach, each party must initially encourage the supplier to seek resolution of its complaint in consultations with the procuring entity. The procuring entity is then committed to accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system. The GPA then sets forth requirements for the challenge procedures themselves, generally requiring that they be nondiscriminatory, timely, transparent and effective.

Modifications

A GPA party generally cannot modify the procurement that it covers in its Appendix without the consent of—or absence of objections from—the other parties. To make changes, it must first notify the WTO Committee on Government Procurement and provide information as to the likely consequences of the change for the mutually agreed coverage of the agreement. In some cases, changes may become effective if there is no objection from any of the GPA parties within 45 days of notification. In others, the modifying party may have to offer compensatory adjustments for modifications, "with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided" in the GPA.

If parties are unable to reach an agreement over the proposed modifications, the modifying party may be able to implement the change 150 days after its notification. However, any objecting party may withdraw substantially equivalent coverage. Parties are also free to pursue the matter under WTO consultation and dispute settlement procedures, and they must abide by arbitration rulings.

In cases in which the modifying party does not comply with the results of the arbitration procedures, any objecting party may withdraw substantially equivalent coverage, provided that any such withdrawal is consistent with the result of such procedures.

Accession Negotiations

Any WTO member may accede to the GPA on terms agreed between that member and GPA parties. Since the GPA entered into force in 1996, its membership has grown from 23 to 48 parties. The GPA accession process is based on negotiations with the acceding member on the procurement that it will cover under the agreement and a determination by the GPA parties that its procurement system complies with the GPA. Many of the members that have joined the WTO since 1995 have committed to seek GPA membership as part of their terms for accession; these members include China and Russia—both of which have been engaged in GPA accession negotiations. Most recently, in May 2020, Brazil formally submitted its application for accession to the GPA.

National Security and General Exceptions

The GPA contains a national security exception, which is broadly in line with Article XXI of the GATT 1994. The exception states that parties are allowed to take "any action or not [disclose] any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes."

In addition to the national security exception, the GPA also contains a number of general exceptions, which are to some extent modeled after Article XX of the GATT 1994. Examples of exceptions include, but are not limited to, public morals, order or safety, human, animal, or plant life or health, intellectual property, and philanthropic institutions.

Effects of GPA Membership for the United States

Because significant purchases financed by U.S. taxpayers are normally supposed to be made using competitive tendering procedures, U.S. government procurement is an attractive market for foreign firms. As other countries join the GPA to gain access to U.S. (and other) markets for their own companies, the GPA has the effect of bringing the purchasing procedures of other countries more into line with U.S. standard practice. In addition to greater equity, the agreement offers increased export opportunities for U.S. businesses. Under the GPA, foreign government purchasing restrictions that discriminate against U.S. suppliers—such as local content requirements, prohibitions on awarding contracts to foreigners, or other preference schemes favoring local supplies—are generally eliminated for covered procurement. U.S. suppliers are also provided greater transparency in the purchasing processes of governments in some of the largest U.S. export markets. The right to predictable treatment in selling to foreign signatory governments allows U.S. suppliers and exporters to plan, make investments, and market their products and services abroad more effectively.[28] This, in turn, has the potential to increase U.S. GDP and employment.

According to a 2017 GAO study, from 2008 to 2012, less than one-tenth of total global government expenditures, and approximately one-third of U.S. federal government procurement,

[28] See, for example, International Trade Administration, "WTO Agreement on Government Procurement (GPA)," updated May 17, 2019.

was covered by the GPA or similar commitments in U.S. FTAs.[29] Additionally, U.S. GPA commitments appear to be the most significant in what they offer other GPA parties. The study also found that the amount (based on value) of U.S. procurement available for bidding by companies of other GPA or FTA parties was worth more than double the combined amount reported by the next five largest GPA procurement markets (European Union, Japan, Canada, South Korea, and Norway). The Trump Administration, for example, argued that the United States benefits less from the agreement than do other GPA signatories.[30] However, GAO also found that the U.S. methodology for reporting statistics on procurement to the GPA suffers from deficiencies, which limits detailed analytical comparison and transparency.

U.S. Free Trade Agreements

Since concluding the U.S.-Israel FTA in 1985 and the North American Free Trade Agreement (NAFTA) in 1994, the United States has sought to include government procurement chapters in bilateral and regional FTAs that it negotiates with other countries (**Table 3**). For a country that is not a party to the WTO GPA, the government procurement chapter in the FTA generally introduces GPA-like disciplines on a country's procurement practices and provides a list of procuring entities that will be covered. For a country that is a party to the GPA, the government procurement chapter may list additional covered entities of each party that may not appear in the schedules of the GPA. Particularly since the 2000s and until the enactment of the United States-Mexico-Canada Agreement (USMCA), the government procurement chapters in U.S. FTAs tended to reaffirm the provisions of the GPA with respect to all FTA parties. They may also clarify definitions or details of procurement procedures.

Table 3. Links to Government Procurement Provisions in U.S. FTAs

AGREEMENT	CHAPTERS/ARTICLES
Australia Free Trade Agreement	Chapter 15 (Articles 15.1-15.15) Annex 15-A
Bahrain Free Trade Agreement	Chapter 9 (Articles 9.1-9.15) Annex 9-A
Chile Free Trade Agreement	Chapter 9 (Articles 9.1-9.20) Annex 9.1
Colombia Trade Promotion Agreement	Chapter 9 (Articles 9.1-9.16) Annex 9.1 Side Letter on 30-Day Tendering Side Letter Regarding Interim Measures
Dominican Republic-Central American Free Trade Agreement	Chapter 9 (Articles 9.1-9.17) Annex 9.1.2(b)(i) Annex 9.1.2(b)(ii) Annex 9.1.2(b)(iii)

[29] U.S. Government Accountability Office (GAO), "Government Procurement: United States Reported Opening More Opportunities to Foreign Firms Than Other Countries, but Better Data Are Needed," February 2017, GAO Report GAO-17-168. See also, GAO, "International Trade: Foreign Sourcing in Government Procurement," May 2019, GAO Report GAO-19-414.

[30] Bryce Baschuk, "Trump Sights In WTO Procurement Pact for Leverage on U.K., EU," *Bloomberg*, February 5, 2020.

AGREEMENT	CHAPTERS/ARTICLES
Israel Free Trade Agreement	Article 15
Jordan Free Trade Agreement	Article 9
Korea Free Trade Agreement	Chapter 17 (Articles 17.1-17.11) Annex 17-A
Morocco Free Trade Agreement	Chapter 9 (Articles 9.1-9.16) Annexes: Central Level Government Entities Side Letter on Services
Oman Free Trade Agreement	Chapter 9 (Articles 9.1-9.15) Annex 9: Terms and Conditions of Coverage Side Letter on Impartial Authority Side Letter on State-Owned Enterprises
Panama Trade Promotion Agreement	Chapter 9 (Articles 9.1-9.17) Annex 9.1
Peru Trade Promotion Agreement	Chapter 9 (Article 9.1-9.16) Annex 9.1
Singapore Free Trade Agreement	Chapter 13 (Articles 13.1-13.6) Annex 13A
U.S.-Mexico-Canada Agreement (with respect to Mexico only)	Chapter 13 (Articles 13.1-13.21) Appendix 13-A

Source: Congressional Research Service (CRS) and Office of the U.S. Trade Representative (USTR).

The procurement chapters in U.S. FTAs vary in their respective coverage and details, but they all have several provisions in common. These include exemptions for certain DOD procurements, threshold requirements, and obligations regarding tendering and selection requirements, qualification of suppliers, and offsets. Many of the "second generation" U.S. FTAs, such as those concluded with Chile, Singapore, Morocco, and Australia, contain procurement provisions that closely track the GPA. Some of the more recent U.S. FTAs, however, contain monetary thresholds that are lower than those specified under the GPA, opening a greater percentage of the U.S. procurement market to the FTA partner.

The U.S.-Jordan FTA is the only U.S. FTA without substantive procurement obligations. Its only procurement provision is a commitment by the parties to enter into negotiations with regards to Jordan's accession to the GPA. Jordan applied for GPA membership in 2000 but has yet to complete its accession.

Formerly, the government procurement chapter in NAFTA included standards and parameters for purchases of certain goods and services made by governments in all three NAFTA parties—the United States, Mexico, and Canada. The USMCA, however, only applies to procurement between the United States and Mexico.[31] It carries over much of the NAFTA government procurement chapter's coverage for U.S.-Mexico procurement. Procurement opportunities between the United States and Canada continue to be governed by the WTO GPA, as long as both countries remain members of that agreement, while those between Canada and Mexico are now governed by the

[31] For more detail, see CRS Report R44981, *The United States-Mexico-Canada Agreement (USMCA)*, by M. Angeles Villarreal.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP or TPP-11). Notably, Mexico is not a member of the GPA.

Reciprocal Defense Procurement Memoranda of Understanding

DOD has concluded Reciprocal Defense Procurement Memoranda of Understanding (RDP MOUs) with 28 "qualifying" countries.[32] Under these memoranda, countries agree to remove discriminatory barriers to purchases of supplies produced—or services performed—by sources in each other's territories. For the purposes of BAA and the Balance of Payments Program,[33] supplies and components produced in qualifying countries are treated as the same as supplies and components produced in the United States.[34] The purpose of RDP MOUs is to promote rationalization, standardization, and interoperability of conventional defense equipment with allies and other close partners. These agreements provide a framework for ongoing communication regarding market access and procurement matters that enhance effective defense cooperation.

The countries that are currently designated as qualifying countries under RDP MOUs are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Israel, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.[35]

RDP MOUs generally include language by which the parties agree that their defense procurements will be conducted in a transparent manner and in accordance with certain implementing procedures (e.g., publication of notices of proposed purchases, the content and availability of solicitations for proposed purchases, etc.).[36] Under these MOUs, each country also affords the other certain benefits on a reciprocal basis consistent with national laws and regulations. While each MOU is different, the United States (i.e., DOD), for example, evaluates offers of qualifying country end products or components without applying the price evaluation "penalty" otherwise required by BAA and the Balance of Payments Program. The United States may also waive tariffs and other import duties for these products and components.

RDP MOUs are not trade agreements. Given their underlying political and operational/technical objectives, they are primarily national security agreements. However, they have economic and industrial objectives with trade implications. Moreover, they are rooted in authorities that are

[32] DOD has also entered into agreements with six countries regarding "Reciprocal Quality Assurance" in support of the procurement of defense products and services. These countries are the Czech Republic, Finland, South Korea, Poland, Romania, and Slovakia. See also CRS In Focus IF10548, *Defense Primer: U.S. Defense Industrial Base*, by Heidi M. Peters.

[33] The Balance of Payments Program was established in the early 1960s to provide a preference for U.S. end products and services for overseas use. It now applies only to Department of Defense (DOD) procurements above a certain threshold and for certain items. Program restrictions and exemptions are similar to those of the Buy American Act, which are generally limited to products procured for domestic use. For more detail, see Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 225.75.

[34] Defense Federal Acquisition Regulation Supplement (DFARS) 252.225-7000(b)(2): "Buy American—Balance of Payments Program Certificate."

[35] Currently, Belgium, Canada, Czech Republic, Denmark, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Turkey, and the United Kingdom are members of the North Atlantic Treaty Organization (NATO).

[36] There is no authoritative definition of defense procurement within the scope of these agreements. Widely defined, it could include any procurement carried out by government agencies in the field of defense. Narrowly defined, it could include only the goods and services manufactured or intended to be used only for military purposes.

connected to the conduct of trade, particularly under TAA. They may seek to facilitate trade in defense goods and establish procedures that enhance access to the defense procurement markets of U.S. allies or close partners by reducing or removing discriminatory barriers such as buy national laws.

Unlike the WTO GPA and FTAs, whose scope is generally narrow, most defense procurement is, in theory, covered by RDP MOUs. However, these MOUs lack substantial procedural requirements to ensure national treatment.[37] In particular, they lack specificity and generally are not enforceable. While the GPA and FTAs require parties to establish transparent and nondiscriminatory rules for procurement, the primary requirement of RDP MOUs is that procurement activities be conducted according to—or consistent with—the laws of each party. As noted above, these agreements operate on the principle of reciprocity and mutual commitment to not discriminate against the other party. However, parties are not specifically obligated, for instance, to waive tariffs and domestic content requirements if doing so conflicts with their domestic laws.

There is no corresponding preferential treatment for qualifying country end products in acquisitions by non-DOD federal agencies, unless these countries are parties to the GPA or a U.S. FTA and the procurement is covered by the relevant agreement.

U.S. States and Cities Covered by International Agreements

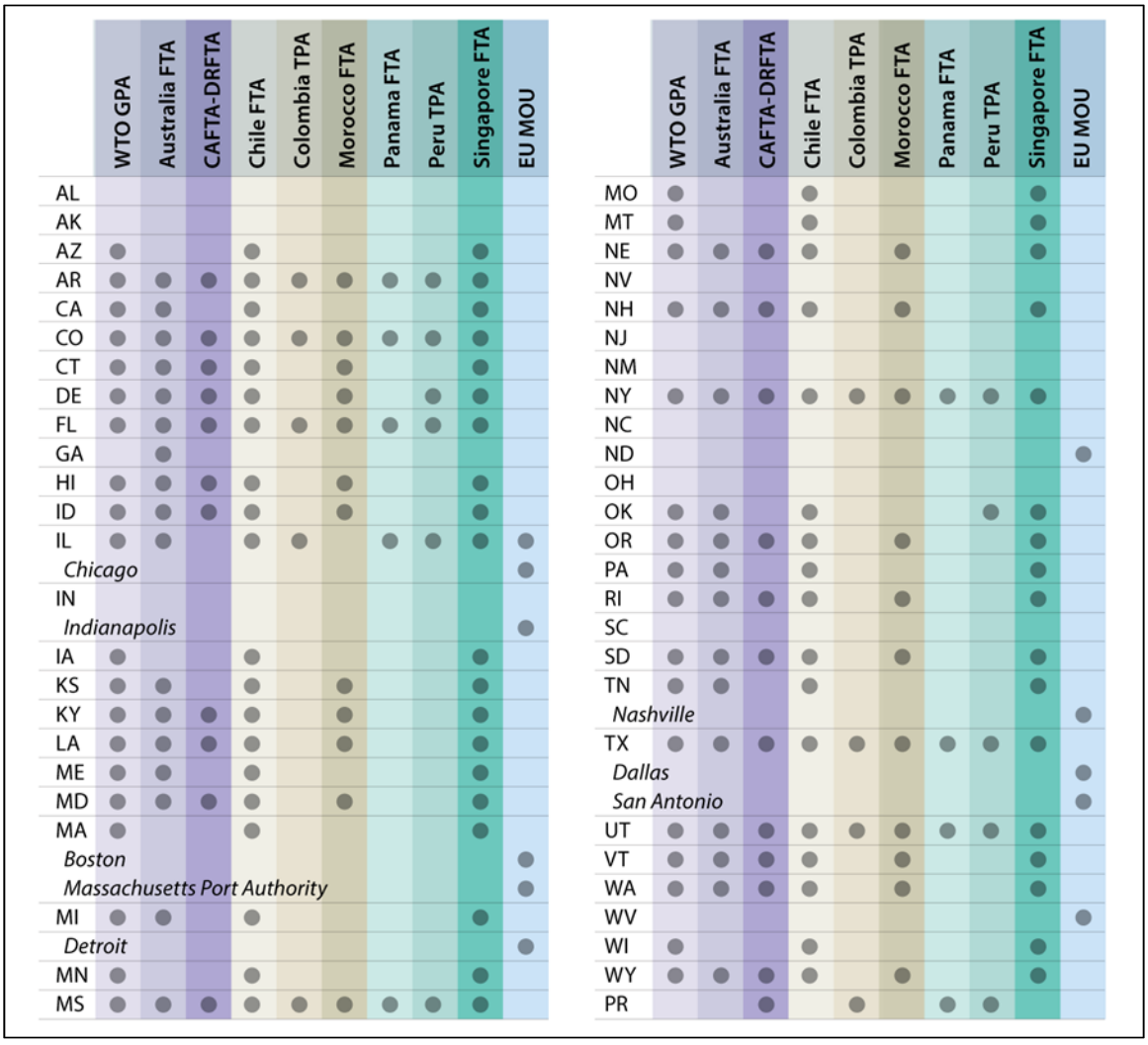
Forty U.S. states allow foreign businesses to bid for contracts tendered by state entities in situations and areas where state and local governments have chosen to open up their procurement markets (**Figure 5**). There are 37 states with voluntary procurement commitments under the WTO GPA and the U.S.-Chile and U.S.-Singapore FTAs. The U.S. state of Georgia is the only state with commitments under an FTA (the U.S.-Australia FTA) but not the GPA. Similarly, Puerto Rico does not participate in the GPA, but the unincorporated, organized U.S. territory has opened certain procurement opportunities to products and suppliers from Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Panama, and Peru.

Three states, seven cities, and the Massachusetts Port Authority (MPA) also have commitments under a 1995 agreement between the United States and the EU—the European Union Memorandum of Understanding on Public Procurement.[38] In particular, the agreement gives EU suppliers access to certain procurement opportunities in two states not covered by the GPA (North Dakota and West Virginia) and Illinois state procurement that is not covered under the GPA. It also commits Boston, Chicago, Dallas, Detroit, Indianapolis, Nashville and San Antonio—whenever they open their procurement markets to suppliers from outside of their cities—to allow EU suppliers to participate and bid for contracts. Similarly, the MPA does the same when considering non-Massachusetts suppliers. The agreement does not include any EU commitments, entity lists, or monetary thresholds.

[37] National treatment generally refers to the principle of treating foreign and domestic end products and suppliers equally.

[38] Office of the U.S. Trade Representative, "Agreement in the Form of an Exchange of Letters Between the European Community and the United States of America on Government Procurement," May 31, 1995.

Figure 5. U.S. States and Cities Covered by International Agreements



Source: Congressional Research Service (CRS), WTO Agreement on Government Procurement (GPA), U.S. Free Trade Agreements (FTAs), U.S. Trade Promotion Agreements (TPAs), and the U.S.-EU Memorandum of Understanding (MOU) on Public Procurement.

Notes: MPA = Massachusetts Port Authority.

U.S.-EU Procurement Market Issues

Opening U.S. and EU procurement markets has been a major issue in transatlantic trade relations for more than four decades. The WTO GPA governs EU and U.S. firms' access to government procurement markets in the United States and the EU, as there is no bilateral FTA between the partners.[39] The GPA enables U.S.-based businesses to bid for certain government contracts in the

[39] An exchange of letters also exists involving EU access to procurement markets in North Dakota and West Virginia (not covered by the GPA), and Illinois; Massachusetts Port Authority; and the cities of Boston, Chicago, Dallas, Detroit, Indianapolis, Nashville, and San Antonio. Office of the U.S. Trade Representative (USTR), "Agreement in the Form of an Exchange of Letters between the European Community and the United States of America on Government Procurement," May 30, 1995. The United States and the EU began Transatlantic Trade and Investment Partnership (T-

EU and its 27 member states. Likewise, it allows EU-based companies to bid for contracts tendered by certain U.S. procuring entities in areas where federal and state governments have agreed to open up their procurement markets.

Because parties bound by the GPA negotiate market access commitments on a reciprocal basis, procurement coverage in each market varies considerably. Since the 1970s, the United States and the EU have sought to open each other's procurement markets to increase their own exports of goods and services. U.S. and EU procurement expenditures are estimated to have been equivalent to around 10% to 14% of GDP in recent years.[40] As a result, further market access in this sector could be of significant benefit to both partners.

The United States, in particular, has sought to ensure fair, transparent, and predictable rules for government procurement, and nondiscriminatory treatment for U.S. suppliers. According to the USTR, accurate assessment of the current level of U.S. participation in EU government procurement markets is difficult due to the EU's lack of country-of-origin data for winning bids.[41] In contract competitions conducted by EU member state governments, U.S. firms point to concerns over a lack of transparency, including overly narrow definitions of tenders; language and documentation barriers; and implicit biases in favor of local or EU vendors and state-owned enterprises (SOEs).[42]

The EU, on the other hand, has sought to achieve greater access for EU firms to sub-central government procurement markets in the United States—access to which only U.S. states, counties, municipalities, and cities themselves can voluntarily grant.[43] EU officials have also pointed to U.S. laws such as BAA and the Berry and Kissell Amendments—which restrict government purchases of certain items to U.S. suppliers for security reasons—as potentially injurious to EU companies that want to bid for U.S. procurement contracts.[44]

Among other goals, both sides recently announced their intention to explore possibilities for facilitating trade through digital tools and increased cooperation in the area of government procurement. At the second U.S.-EU Trade and Technology Council (TTC) meeting in May 2022, the TTC's Climate and Clean Tech working group announced that the United States and EU had discussed a "joint mapping of policies and a joint catalogue of best practices" related to green government procurement.[45] They also expressed their intention "to work towards a joint U.S.-EU initiative incorporating sustainability considerations" in government procurement approaches.

TIP) negotiations in July 2013, which sought, in part, to expand current U.S. and EU government procurement commitments and market access. However, President Donald Trump suspended T-TIP negotiations in 2017 and President Joe Biden has not announced any plans to restart them.

[40] Organization for Economic Cooperation and Development (OECD), National Accounts Statistics (database).

[41] Office of the U.S. Trade Representative (USTR), *2022 National Trade Estimate Report on Foreign Trade Barriers*, March 31, 2022.

[42] Ibid.

[43] See, for example, Christopher R. Yukins, George Washington University Law School, Testimony Submitted to the European Parliament Committee on the Internal Market and Consumer Protection and the Committee on International Trade, for the Joint Public Hearing on TTIP: Public Procurement—Challenges and Opportunities for the European Union and the United States, European Parliament, Brussels, Belgium, April 20, 2016.

[44] For an overview of EU concerns regarding access to U.S. central and sub-central procurement markets, see European Commission, Directorate General for Trade, Access2Markets, Trade Barriers, United States of America, "Government Procurement" (last updated on January 14, 2022).

[45] White House, "U.S.-EU Joint Statement of the Trade and Technology Council," Annex II: Conclusions on Working Group 2–Climate and Clean Tech, May 16, 2022.

Data Limitations on U.S. Government Procurement

Data limitations relate to both the availability of data and gaps in U.S. and other government reporting, which complicates assessments of the extent of the U.S. government's reliance on foreign goods and U.S. access to foreign government procurement markets. The U.S. General Services Administration's (GSA's) Federal Procurement Data System-Next Generation (FPDS-NG) is where agencies report federal procurement contracts whose estimated value is $10,000 or higher.[46] Data, however, are generally not always fully reliable. Documented quality issues relating to the accuracy, completeness, and timeliness of this data are among the limitations.[47] These concerns have prompted many analysts to rely on these data primarily to identify broad trends and produce rough estimates, or to obtain information about specific contracts. Despite these limitations, the data may provide general information regarding the value, quantity, and types of domestic and foreign-made goods that U.S. government agencies procure. Private research firms, trade associations, think tanks, and the media may also offer information and estimates on domestic sourcing and acquisitions by the federal government.

It is generally not possible fully or accurately to discern vulnerabilities regarding raw materials and inputs procured by the government, such as active pharmaceutical ingredients (APIs) and critical minerals, from official trade and industry data. Tracking these items might be particularly difficult if they originate in one country but are then processed in another, reflecting modern trade patterns and global supply chains. Another complication is the lack of a statutory definition of what qualifies as a "U.S. product" or what is "manufactured" in the United States, which may mask and understate the extent to which the U.S. government relies on foreign inputs.

In early 2022, the Biden Administration took a number of steps to address and remedy some of these issues (see "Recent Changes to Buy American Regulations").

Biden Administration Procurement Policy and Priorities

The Biden Administration has stated that ensuring that the U.S. government procures goods, products, and materials produced—and services offered—in the United States is a key component of its procurement and manufacturing policy agenda. In January 2021, President Biden issued Executive Order (E.O.) 14005 ("Ensuring the Future is Made in All of America by All of America's Workers"). He pledged that his Administration would review past and current actions to ensure that they are consistent with "Made in America Laws" and Administration policy. Specific commitments contained in the E.O. include

- **Reviewing Agency Actions Inconsistent with Administration Policy.** The President directed agencies to suspend, revise, or rescind those agency actions that are inconsistent with Administration policy and to propose any additional measures necessary to enforce it.

[46] GSA's System for Award Management (SAM) is the primary system to manage the federal awards process, and it is where much of the data from suppliers is collected, validated, stored, and made available to government acquisition agencies and the public.

[47] For more information on FPDS-NG data quality issues, see "Appendix A. FPDS Background, Accuracy Issues, and Future Plans" in CRS Report R44010, *Defense Acquisitions: How and Where DOD Spends Its Contracting Dollars*, by John F. Sargent Jr. and Christopher T. Mann.

- **Updating and Centralizing the "Made in America" Waiver Process.** The President directed the Director of the Office of Management and Budget (OMB) to establish within OMB a Made in America Office (MIAO). Before granting a waiver from the requirements to "Buy American," agencies are now required to provide MIAO with a description of a proposed waiver and a detailed justification for the use of goods, products, or materials that have not been mined, produced, or manufactured in the United States.
- **Accounting for Sources of Cost Advantage.** The President directed agencies to assess, when relevant, whether a significant portion of the cost advantage of a foreign-sourced product is the result of the use of dumped or injuriously subsidized steel, iron, or manufactured goods.
- **Promoting Transparency in Federal Procurement.** The President directed the Administrator of General Services to develop a public website that contains information on all proposed waivers and whether those waivers have been granted.
- **Scouting Suppliers.** The President directed agencies to partner with the Hollings Manufacturing Extension Partnership (MEP) to conduct supplier scouting in order to identify U.S. companies, including small- and medium-sized businesses, that are able to produce goods, products, and materials in the United States that meet federal procurement needs.[48]
- **Promoting Enforcement of BAA.** The President directed the Federal Acquisition Regulatory Council (FAR Council) to consider revisions to the applicable provisions in the Federal Acquisition Regulation (FAR) to increase the numerical threshold for domestic content requirements for end products and construction materials, among other things.

Provisions in the "Build America, Buy America Act" (BABA, Division G, Title IX of the "Infrastructure Investment and Jobs Act," P.L. 117-58) affirm and codify many of these commitments (e.g., expanding Buy American requirements, improving the accuracy and transparency in the waiver process, and formally establishing the MIAO within OMB).

Recent Changes to Buy American Regulations

Pursuant to President Biden's January 2021 executive order, the FAR Council, in March 2022, published a final rule revising the BAA requirements applicable to federal procurement.[49] In particular, it amended the FAR to implement three changes: (1) a near-term increase to the domestic content threshold and a schedule for future increases; (2) a fallback threshold that would allow for products meeting a specific lower domestic content threshold to qualify as domestic products under certain circumstances; and (3) a framework for application of an enhanced

[48] For more detail on the MEP Program, see CRS Report R44308, *The Hollings Manufacturing Extension Partnership Program*, by John F. Sargent Jr.

[49] U.S. Department of Defense (DOD), General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA), "Federal Acquisition Regulation; Amendments to the FAR Buy American Act Requirements," 87 *Federal Register* 12780, March 7, 2022. In E.O. 14005, President Biden directed the FAR Council to consider proposing regulations that would replace the "component test" (or "domestic content test") with a test under which domestic content "is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity," rather than the cost of components. While this change was not included in the final rule, the FAR Council and the MIAO may consider the public comments received regarding unaddressed topic areas in the proposed rule, potentially including "the strengths and shortcomings of the 'component test,' as currently structured," as well as "how domestic content might be better calculated to support America's workers and businesses."

evaluation factor for a domestic product that is considered a critical item or consists of critical components. This last change is intended to align federal procurement policy with the Biden Administration's goals of improving supply chain resiliency in six critical sectors: information and communications technology (ICT), energy, agriculture, public health, defense, and transportation.

The domestic content thresholds set forth in the rule will not apply to end products or construction materials that consist wholly or predominantly of iron or steel or a combination of both. Such items are to continue to be classified as domestic for BAA purposes only if the cost of foreign iron and steel constitutes "less than 5% of the cost of all the components used" in the product or construction material. The fallback threshold also is not to apply to such products.

Increase to the Domestic Content Threshold

The rule is to gradually increase the domestic content threshold for non-iron and non-steel products and construction materials over a period of several years. As discussed above, to qualify as a domestic end product presently, a product must be manufactured in the United States and the cost of domestic components must be "more than 60%" of the total cost of all components—effective October 25, 2022 (up from "more than 55%"). The current threshold is to remain in effect until December 31, 2023. The domestic content threshold is to continue increasing according to the following schedule:

- January 1, 2024: to "more than 65%" (for products delivered in calendar years 2024 through 2028)
- January 1, 2029: to "more than 75%" (for products delivered starting in calendar year 2029)

Under the final rule, a supplier holding a contract with a period of performance that spans the schedule of threshold increases will normally be required to comply with each increased threshold for the items in the year of delivery. For example, a supplier awarded a contract in 2023 would have to comply with the "more than 60%" domestic content threshold initially, but in 2024 would have to supply products with "more than 65%" domestic content.

Exception for a Lower Domestic Content Threshold Due to Unavailability or Unreasonable Cost

The rule also creates a "fallback threshold," which allows an agency to make use of the former "more than 55%" domestic content threshold in instances when it has determined that (1) there are no end products or construction materials that meet the new domestic content threshold, or (2) such products are of unreasonable cost. The fallback threshold is set to be available through the end of 2030.

Enhanced Price Preference for "Critical Products" and "Critical Components"

The rule provides for a framework through which procuring federal agencies are to apply higher price preferences to end products and construction material that OMB deems to be "critical" to U.S. supply chains or consist of "critical components" in accordance with E.O. 14017 from February 2021 ("America's Supply Chains"). This change was scheduled to take effect on October 25, 2022. The Defense Acquisition Regulatory Council is now scheduled to draft the

proposed rule by January 11, 2023, originally due July 20, 2022.[50] OMB is set to publish a final rule establishing the list of critical products and components in the FAR—which will be added to the newly designated FAR 25.105—and the level of additional price preference for such items.

Upcoming Changes

The final rule also preceded changes to BAA regulations stemming from the Infrastructure Investment and Jobs Act of 2021 (IIJA, P.L. 117-58). The IIJA required that, by November 15, 2022, regulations be implemented amending the definitions of "domestic end product" and "domestic construction material" to ensure that iron and steel products are—to the greatest extent possible—made with domestic components and providing a definition for "end product manufactured in the United States." OMB has sought input on a definition for "end product manufactured in the United States."[51] The definition is set to be incorporated into the FAR, as required by the IIJA.

Impact of International Agreements with Procurement Provisions

The Infrastructure Investment and Jobs Act (IIJA) (P.L. 117-58) also directs the executive branch to assess the impact of all international agreements that deal with government procurement and to which the United States is a party. Specifically, Section 70934 directs the Secretary of Commerce, the U.S. Trade Representative (USTR), and the Director of the Office of Management and Budget (OMB) to assess, in a publicly available report, the impact of U.S. free trade agreements (FTAs), the World Trade Organization (WTO) Agreement on Government Procurement (GPA), and federal permitting processes on the operation of "Buy American" laws, including their impacts on the implementation of domestic procurement preferences. The report was due no later than 150 days after the date of the enactment of the IIJA (on or about April 14, 2022). Additionally, Section 70923 of the IIJA directs the Director of the Made in America Office (MIAO) to review U.S. Department of Defense's (DOD's) use of Reciprocal Defense Procurement Memoranda of Understanding (RDP MOUs) and to determine if U.S. suppliers and products have equal and proportional access to the defense procurement markets of MOU parties. The MIAO Director was required to report the findings to the OMB Director and the Secretaries of Defense and State no later than 180 days after the date of the enactment of the IIJA (on or about May 14, 2022). The MIAO Director will also be required to review all future RDP MOUs to assess whether or not U.S. suppliers and products will have equal and proportional access to the defense procurement markets of the other party to the MOU. As of January 9, 2023, these assessments—if completed—have not been made publicly available to CRS's knowledge.

Issues for Congress

The COVID-19 pandemic, including its impact on global supply chains, revealed that some decisionmakers in government and industry in the United States, as well as many consumers, may not have fully appreciated the extent to which domestically-produced goods procured by the federal government rely on foreign inputs. Key questions such as how a federal agency ensures that a procured good is manufactured in the United States from substantially all U.S. components are not easily answered. The lack of clear statutory definitions of various terms (e.g., "manufactured" and "substantially all") and differences in the ways procuring federal agencies apply standards often yield different determinations for the same product.[52] The "substantial

[50] U.S. Department of Defense (DOD), "Open FAR Cases as of 1/6/2023," Defense Acquisition Regulations Systems (accessed January 9, 2023).

[51] Office of Management and Budget (OMB), "Notice of Listening Sessions and Request for Information," 87 *Federal Register* 23888, April 21, 2022, and "Construction Materials Used in Federal Financial Assistance Projects for Infrastructure and End Products Manufactured in the United States Under the Build America, Buy America Act; Request for Information," 87 *Federal Register* 32063, May 26, 2022.

[52] Needs in terms of quantity, quality, and timing, for example, may also affect the extent to which a procuring agency is able to comply with "Buy American" requirements or might require a BAA waiver.

transformation" test used to determine a product's country of origin for trade purposes is complex, fact-specific, and thus frequently applied somewhat subjectively.

U.S. government contractors often rely on global supply chains to support their U.S. government contracts, including networks of suppliers and manufacturing facilities in the territories of other GPA and FTA parties. Even when manufactured in the United States, many of the products that U.S. suppliers deliver to federal and state entities have components from other GPA and FTA parties, which are generally not subject to U.S. preferential purchasing requirements. Therefore, modifications to U.S. commitments under the GPA or FTAs, or U.S. withdrawal from these agreements, could potentially require U.S. businesses to restructure their supply chains—including, for example, by changing suppliers or relocating manufacturing facilities—to comply with domestic sourcing laws.[53] These actions could also disqualify U.S. businesses from selling products to the federal and state governments that contain GPA-party components.

Active participation in the GPA may help U.S. companies' maintain their ability to compete for foreign contracts, and could potentially give the United States leverage to negotiate greater market access and better terms with WTO members in accession negotiations—particularly China. This might be especially so as governments around the world spend higher shares of their budgets on procurement. As countries compete to set global standards (e.g., with respect to 5G technology or electric vehicles), U.S. businesses unable to bid for government contracts may find themselves at a disadvantage, ceding opportunities in key markets to competitors from Europe, Canada, Japan, and China, for example.

Outlook and Policy Options

As Congress continues to review regulations, oversee the implementation of recent legislation, and consider amending legislation to prioritize federal procurement of U.S. goods and services, Members could consider the potential implications of such measures for U.S. businesses (including government contractors) and workers, and their consistency with U.S. obligations under international agreements. Members could engage with the Administration as it seeks to clearly define terms and requirements, and set uniform guidelines regarding foreign sourcing in federal procurement (e.g., by defining "produced" or "manufactured" in the United States pursuant to BABA requirements). This could promote transparency, consistency, and proper application of standards in procurement decisions, thereby helping to ensure that agencies carry out procurement objectives as prescribed by Congress. Additionally, amid debate over renewal of Trade Promotion Authority (TPA) and potential changes to it, Congress could focus on U.S. trade negotiating objectives with respect to government procurement (**textbox**).

Trade Promotion Authority ("Fast Track")

Trade Promotion Authority (TPA)—sometimes called "fast track"—is a time-limited authority that Congress uses to establish trade negotiating objectives, notification, and consultation requirements, and procedures to consider implementing legislation for certain reciprocal trade agreements, provided that they meet certain statutory requirements. The negotiating objectives are definitive statements of U.S. trade policy that Congress expects the Administration to honor if such legislation is to be considered under expedited rules.

[53] The Trump Administration reviewed the benefits of the GPA, and according to one news report, considered withdrawal from the agreement. The Trump Administration stated that the GPA was "imbalanced" and sought to modify U.S. commitments under the agreement by removing certain "essential medicines" from GPA coverage. For more detail, see Bryce Baschuk, "Trump Considers Withdrawing From WTO's $1.7 Trillion Purchasing Pact," *Bloomberg*, February 4, 2020, and Jean Heilman Grier, "U.S. Proposes Removal of Essential Medicines from GPA," *Perspectives on Trade*, December 3, 2020.

TPA was reauthorized in 2015 by the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (P.L. 114-26) and expired on July 1, 2021. Under TPA-2015, two of the principal objectives outlined by Congress touched on government procurement:

> (7) *Regulatory Practices*: "to establish consultative mechanisms and seek other commitments, as appropriate, to improve regulatory practices and promote increased regulatory coherence, including through... transparency in developing guidelines, rules, regulations, and laws for government procurement and other regulatory regimes."
>
> (13) *WTO and Multilateral Trade Agreements*: "to expand country participation in and enhancement of the" WTO Agreement on Government Procurement.

For more detail, see CRS Report R43491, *Trade Promotion Authority (TPA): Frequently Asked Questions*.

The ongoing Russian invasion of Ukraine, like the COVID-19 pandemic, has also accelerated and magnified existing issues in global supply chains and underscored the interconnected nature of the global economy. For many observers, the invasion further highlights the importance of improving the resilience of domestic and global supply chains and potentially limiting trade dependencies on certain countries for products procured by the government. This presents the United States and its allies with new questions about the manner and extent to which government procurement policy can and should alter existing production and supplier arrangements. In particular, Congress could consider the costs and benefits of adopting policies that attempt to reallocate resources within the economy toward developing domestic production of goods currently being procured from certain countries. Congress could also consider whether or not to reinforce U.S. support for global trade arrangements and agreements with like-minded trading partners, whether or not to encourage "reshoring" and "friend-shoring" to select countries, and whether or not to increase incentives for government contractors to utilize a greater diversity of suppliers to increase resilience.

More broadly, Congress may consider some of the following options:

- **Opening up or restricting government procurement markets.** Opening up procurement to foreign firms allows for greater international competition, providing a government agency with greater choice and potentially lower-cost or more-efficient options, while also possibly disadvantaging some U.S. firms and workers. Restricting procurement to domestic sources may support some U.S. firms and workers, but may also reduce competition, which could in turn raise costs for public entities and possibly displace jobs in other sectors. Members of Congress could undertake fact-finding on the impact of these measures on the U.S. economy, including specific sectors, and on trade relations with allies and major trading partners.
- **Changing U.S. content requirements.** The proportion of U.S. content required in a product in order to qualify as domestic may come under additional scrutiny by Members of Congress, U.S. businesses, allies, and WTO GPA and U.S. FTA parties. In March 2022, the FAR Council published a final rule that makes significant changes to the regulations at FAR Part 25, which implements BAA.[54] As part of this final rule, the domestic content requirement increased from "more than 55%" (i.e., the cost of domestic components must exceed 55% of the cost of all the components) to "more than 60%" in October 2022. It is set to continue increasing gradually to "more than 75%" over a period of several years.

[54] U.S. Department of Defense (DOD), General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA), "Federal Acquisition Regulation; Amendments to the FAR Buy American Act Requirements," 87 Federal Register 12780, March 7, 2022.

Members of Congress could consider whether or not to codify in statute domestic content requirements, reverse or accelerate changes proposed by the Biden Administration, or assess their economic impact. The integrated nature of modern industrial supply chains, especially in North America as a result of NAFTA and now USMCA, can make it difficult to determine domestic content. Congress could examine the extent to which domestic producers and suppliers might be able to meet these more stringent Buy American requirements going forward.

- **Assessing foreign market access for U.S. businesses.** By participating in the WTO GPA and through U.S. FTAs, U.S. companies gain access to the government procurement markets of other signatories. Violating the agreement could subject the United States to complaints by other parties under WTO dispute settlement procedures, and withdrawing from the GPA—as some past officials briefly considered—would eliminate these export opportunities for U.S. businesses and workers. In weighing the merits of such a course, Congress could seek a more complete statistical picture of the costs and benefits to the U.S. economy at large of the GPA and FTA-wide government procurement market, and other large procurement markets that could potentially be subject to greater future U.S. access (see below). Doing so would likely entail a whole-of-government approach in which departments and agencies, in a coordinated and systematic way, estimate the share of the procurement market that the United States opens to foreign competition. It would also require engaging with the United States' GPA and FTA partners to determine the shares of their markets that are opened to foreign competition. The GPA and U.S. FTAs generally include provisions on data and transparency that require parties to these agreements to disclose information on their government procurement activities. Potential options in this area may depend on the Biden Administration's assessments of international agreements pursuant to the Infrastructure Investment and Jobs Act (IIJA) (P.L. 117-58).
- **Renegotiating international commitments.** As a result of recent legislation and E.O.s providing for stricter domestic content/waiver issuance requirements, the United States may seek to renegotiate its government procurement commitments under the GPA or U.S. FTAs—or advance new commitments or cooperation, for example, as part of the U.S.-EU Trade and Technology Council (TTC) or the Indo-Pacific Economic Framework for Prosperity (IPEF). This could take the form of terminating or reducing some U.S. commitments, or seeking further access from trading partners for U.S. suppliers. Either way, U.S. trading partners may seek concessions in return. Congress could consider whether or not to renew TPA and establish negotiating objectives to shape the Administration's negotiating stance and may conduct oversight of any negotiations.

Government Procurement Data Collection Options

Without greater visibility into the makeup of products and services procured by the federal government and globally, policymakers might continue to have an incomplete or inaccurate view of existing and potential future vulnerabilities and dependencies, and the means by which to evaluate or address them. U.S. policymakers could seek to improve such visibility in ways that may enable them to advance economic interests more effectively, while at the same time encouraging more transparency by government contractors and suppliers in the United States and designated countries. Such efforts could include

- Collecting, maintaining, and publicizing data that could be used by analysts to develop more accurate assessments of domestic and foreign sourcing in government procurement activities (e.g., either unilaterally or by encouraging or requiring greater disclosure through international economic institutions, such as the OECD). As a first step, Congress could consider prioritizing certain critical sectors for improved data collection, analysis, and dissemination.
- Conducting oversight as executive branch agencies use a whole-of-government approach and develop guidance to evaluate and track the origin of goods and services procured. As part of this effort, Congress could consider whether or not to require or otherwise incentivize the Administration to continue or ramp up efforts to harmonize U.S. programs for gathering information and streamline data centralization. In addition, it could examine the adequacy of data and information recording, collection, disclosure, reporting, and analysis at the U.S. and international levels and recommend necessary improvements.
- Examining ways to improve existing systems and programs tasked with collecting current information related to government procurement by the United States and other countries.
- Examining more closely the activities (particularly those related to data collection) and transparency commitments in various international and regional organizations, including the WTO, OECD, International Monetary Fund (IMF), the World Bank, and United Nations Conference on Trade and Development (UNCTAD) on government procurement to determine if these mechanisms are sufficient and/or are being adhered to. Congress could examine whether or not existing tools are adequate to address emerging data requirements and deficiencies. Congress could consider whether or not a U.S. and/or internationally-coordinated effort is called for, and if so, of what magnitude or scale.
- Considering whether or not to support U.S. and international efforts to provide training courses, workshops, and technical assistance programs for countries to implement international statistical guidelines and improve comparable data compilation and dissemination practices related to government procurement. In particular, Congress could examine how the WTO may or may not be able to play a greater role in enhancing transparency and setting standards for dissemination of procurement data through future reforms to the GPA or new agreements on government procurement.

CRS Resources

- CRS Report RS22536, *Overview of the Federal Procurement Process and Resources*, by L. Elaine Halchin.
- CRS Report R46748, *The Buy American Act and Other Federal Procurement Domestic Content Restrictions*, by David H. Carpenter and Brandon J. Murrill.
- CRS Insight IN11756, *The Buy American Act: Proposed Rules*, by L. Elaine Halchin.
- CRS In Focus IF10548, *Defense Primer: U.S. Defense Industrial Base*, by Heidi M. Peters.

- CRS In Focus IF10605, *Buying American: The Berry and Kissell Amendments*, by Michaela D. Platzer.
- CRS In Focus IF11989, *Congress Expands Buy America Requirements in the Infrastructure Investment and Jobs Act (P.L. 117-58)*, by Christopher D. Watson.
- CRS In Focus IF10628, *Buy America, Transportation Infrastructure, and American Manufacturing*, by Michaela D. Platzer and William J. Mallett.

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