Public Citizen
Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

BACKGROUNDER ON INTERNATIONAL TRADE AGREEMENTS' CONSTRAINTS ON STATE GOVERNMENT PROCUREMENT POLICY AUTHORITY AND PRACTICES

Today's international "trade" agreements, such as the North American Free Trade Agreement (NAFTA), the Central America Free Trade Agreement (CAFTA), and the World Trade Organization (WTO), contain many non-trade policy obligations and constraints to which U.S. federal, state and local governments are bound to conform their domestic policies. State laws that conflict with the policy parameters set in the agreements can and have been challenged as illegal "barriers to trade" in the binding dispute resolution systems established by the pacts. Domestic policies successfully challenged in "trade" tribunals must be eliminated or changed or trade sanctions are imposed. The federal government has assumed authority to commit all levels of government to comply with many of these trade agreement provisions, without specific consent by state governments. A general exception has been procurement policy. To date, though extremely limited and biased information has been provided by federal officials to state officials, federal trade officials have given governors a choice regarding whether or not they are willing to bind their states' procurement policy to comply with trade agreement terms.

The fact that federal officials bother to obtain consent of state officials regarding government procurement can be attributed to the fact that procurement – the expenditure of taxpayer money to purchase goods (vehicles, uniforms, food for school lunches, computers) and services (construction, electricity, etc.) – is such an intrinsic function of any sovereign government, whether national, state or local. In democratic nations, citizens who pay taxes to local, state, and national governments traditionally have had the opportunity to influence the procurement policies and decisions of each of these levels of government via democratic processes in Congress, state legislatures, and city councils, so that their tax dollars are utilized in a manner that fulfills their needs and values. Taxpayer dollars are not the same as private consumers' dollars. Because taxpayer dollars are aggregated, no individual consumer or citizen maintains control over how they are spent. Rather, diverse interests must operate through the democratic process to ensure that tax dollars are spent in an agreeable manner.

Government procurement and policies related to it have very important economic, social and even political roles. Controlling the level of expenditure, and directing the expenditures to locally produced materials, is a major macroeconomic instrument, especially during recessionary periods, when tax dollars are injected to stimulate local economies and counter economic downturn. National policies that give preference to local firms, suppliers and contractors help develop the domestic economy. Specifying preferences for certain kinds of goods and services allows procurement activity to further broader policy goals, such as procurement policies that promote energy independence by requiring a certain percentage of renewable energy or sweatfree uniform procurement policies which create market incentives and demand for products manufactured in factories that respect labor rights. Specification that certain groups or communities, especially those that share disproportionately small portions of national income, be given preference is an important policy tool to try to address regional economic difference or discrimination. For instance, preferences for locally produced food in school lunch programs bolsters rural economic activity, while setting aside a portion of spending for certain categories of vendors such as small or minority-owned or women-owned businesses, can work to counter discrimination. Finally, for

procurement or concessions where foreign firms are invited to bid to provide goods or services, being able to give preference to or to exclude firms from particular countries is a commercially powerful international-relations policy tool.

The government procurement rules in international trade agreements such as WTO, NAFTA and CAFTA unnecessarily constrain citizens' rights and lawmakers' policy options because they require that entities covered by the rules (such as state government agencies) bring *existing* procurement policies into compliance with one-size-fits-all rules and prohibit them from adopting conflicting policies in the future. Although there are variations in wording and degree of flexibility preserved, the WTO, NAFTA and CAFTA procurement provisions impose a uniform set of values as superior to taxpaying citizens' likely varying opinions. The specific procurement rules of these "trade" agreements function to require that citizens' tax dollars may only be spent according to a set of rules that is aimed at facilitating the ability of large foreign companies from countries who are signatories to the trade pact to get a chance to profit from our tax payments. This one goal of removing value-oriented requirements (local preferences, sweatfree, living wage, recycled content) and making governments spend tax dollars in the global economy so foreign firms can get a share of the business is imposed by these agreements over other values or priorities we might choose as the taxpayers providing revenue for these purchases.

HISTORY OF TRADE AGREEMENTS AND GOVERNMENT PROCUREMENT

Currently there are six international trade agreements with government procurement provisions that are binding down to the state level: the World Trade Organization's Agreement on Government Procurement (WTO AGP), the U.S.-Chile Free Trade Agreement (FTA), the U.S.-Singapore FTA, the U.S.-Australia FTA, the U.S.-Morocco FTA, and CAFTA. NAFTA includes a Government Procurement chapter, but it does not cover state-level procurement.

The very notion of setting one-size-fits-all global rules on government procurement was so strongly opposed by a majority of the nations involved in the GATT Uruguay Round negotiations, which established the WTO, that the AGP is one of the few "plurilateral" agreements of the WTO. That means that only the countries that have opted in to the WTO AGP are covered, which is why only 38 of the WTO's 148 signatory nations are bound to the AGP.[1] When the WTO AGP was being finalized, the USTR at that time wrote to governors requesting permission to bind their states to comply with the terms of that agreement. Thirty-seven U.S. states currently are listed as obligated to comply with the WTO AGP's rules.[2]

Starting with the first of now six ministerial summits held since the establishment of the WTO, a small group of nations has tried to reopen the discussion of WTO's procurement rules. These countries have pushed for procurement rules that *all* WTO signatory countries would be bound to follow. The 1996 Singapore WTO Ministerial Declaration included a clause committing WTO member countries to set up a working group to study procurement transparency and, based on this study, to discuss what elements might be considered in an appropriate future WTO procurement agreement covering all WTO signatory nations. But, as with most of these so-called Singapore Issues (which also initially included proposed negotiations on investment and competition policy), there has not been agreement amongst most WTO signatory countries to start negotiations to create new top-down WTO disciplines on any new WTO procurement agreement. After almost a decade of developing country and civil society opposition to a proposed broad expansion of WTO scope and powers, the idea of launching negotiations for a new WTO procurement agreement was taken off the WTO negotiating agenda in July 2004.[3]

However, as the prospects for expanding the reach of government procurement rules at the WTO became less likely, the United States began to negotiate government procurement provisions in bilateral and regional trade agreements. In September 2003, the USTR wrote to governors alerting them to the

administration's intention to include such provisions in *all* new agreements under negotiation, and asking the governors' permission to bind their states.

Since then, state officials have grown increasingly wary of agreeing to binding constraints on their state procurement law via international trade agreements that, once agreements are implemented, are very difficult to amend. On a bipartisan basis, state legislators and others have recognized how the "trade" agreement procurement rules can affect a form of *international pre-emption* of states' rights and authority. With regards to CAFTA, the most recent agreement to be considered by Congress, eight governors (from Iowa, Kansas, Maine, Minnesota, Missouri, New Hampshire, Oregon, and Pennsylvania) rescinded initial commitments offered to federal trade officials to bind their states, and the state legislature in one state (Maryland) voted to rescind the governor's commitment and establish that future commitments on behalf of the state require legislative approval. Many governors explicitly declined to make commitments to bind their state procurement policies to CAFTA's requirements in the first place. All in all, a decade after 37 states subjected their procurement laws to the constraints of the WTO AGP, as state officials have become increasingly aware of the implications, only 19 states agreed to be bound by CAFTA's procurement provisions.[4] Meanwhile, U.S. negotiators have become involved in negotiations in the context of the existing WTO AGP about expanding that agreement.

HOW THE RULES WORK

I. Scope of coverage

The WTO AGP and the government procurement chapters in the bilateral agreements listed above follow the same basic structure: the rules put forth in the agreement apply to all procurement laws, regulations, procedures or practices of a list of "covered entities" listed in an annex or appendix to the agreement. To date, "covered entities" have included almost all federal government agencies that conduct procurement, from the Department of Homeland Security to the Peace Corps. In addition, state government entities are covered, either with a sweeping description of "executive branch agencies" that signifies all state-level procuring entities or a specific listing of government agencies. Some states have even gone so far as to commit the state university system.

The procurement rules of the WTO AGP and bilateral or regional agreements such as CAFTA currently do not cover county or municipal level procurement. However, coverage of local governments has been considered or included in a number of trade agreement procurement pacts. Indeed, the U.S. government actively recruited U.S. cities to sign up to the WTO AGP. Public Citizen has on file dozens of letters sent by then-USTR Mickey Kantor to mayors that extol the virtues of the WTO AGP, but fail to explain the constraints the WTO AGP would place on cities' procurement options. While the U.S. government did not exercise its option to sign up municipal governments to the WTO AGP, the United States did sign up a number of U.S. port authorities and also developed a side agreement on government procurement with the European Union. Seven U.S. cities signed onto that bilateral agreement.

The coverage of state, county and local governments by trade procurement rules has also been proposed by the European Union in the context of the ongoing WTO service-sector negotiations and the proposals to add a government procurement annex to that agreement. Thus, while city and county officials remain unencumbered by trade agreement rules that specify what kinds of procurement policies they may adopt and maintain relative to state officials, they would be wise to stay alert to ongoing negotiations that could impinge on their authority.

Each of these "trade" agreements set different thresholds above which the rules apply. All of the agreements set additional thresholds for construction projects that are higher than those for other goods and services.

II. How government procurement rules constrain state policy options

For federal and state "covered entities," the following rules apply:[5]

a. National treatment and most favored nation: In general, *national treatment* requires countries to treat domestic and foreign goods, services and/or investors the same for regulatory, tax and other purposes (*see* e.g. WTO AGP Article II (a)). When applied to government procurement, *national treatment* means that signatory governments cannot give preference to local firms or domestic firms employing local or U.S. workers when purchasing goods and services (so-called "Buy America" policies), much less forbid the spending of state tax dollars on contracts with companies that offshore the work.[6] *Most favored nation* treatment means that you must provide all of the parties to a trade agreement the best treatment you provide any of them (*see* e.g. WTO AGP Article III (b)). This requirement means a state government would be required to give foreign firms *more favorable* treatment than its domestic laws provide to domestic firms if a state government has given *any* foreign firm preferential treatment.

While proponents sometimes refer to the national treatment requirement as a "non-discrimination" requirement for foreign firms, it is important to remember the difference between private sector dollars and tax dollars spent on government procurement. National, state, and local governments in the United States and elsewhere should be free to adopt policies intended to ensure that government spending policies reflect taxpayers' values and interests, including the use of preferences for domestic goods, services or workers to ensure that tax dollars are recycled back into the local economy. The American people are increasingly concerned about the effect of offshoring on the future of the U.S. middle class and on the vitality of the U.S. economy as declining local wages curtail tax revenues needed to support essential services. Job loss caused by technological developments or by offshoring in the *private* sector is a hard problem to solve given the WTO and other international commercial rules that promote the relocation of private sector investment to lower wage countries to maximize profits. However, governments *can* and indeed are expected to make decisions about how to spend taxpayer dollars to promote domestic economic development and growth. Regrettably, for governments bound to comply with trade agreement procurement terms, the *national treatment* rule restricts policy-makers from doing so effectively, therefore taking away one of the few available policy tools to address the exporting of jobs and livelihoods.

NATIONAL TREATMENT

WTO AGP – Article III
"With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than: (a) that accorded to domestic products, services and suppliers; and (b) that accorded to products, services and suppliers of any other Party."

CAFTA – Article 9.2
"With respect to any measure covered by this Chapter, each Party shall accord to the goods and services of another Party, and to the suppliers of another Party of such goods and services, treatment no less favorable than the most favorable treatment the Party or procuring entity accords to its own goods, services, and suppliers."

TECHNICAL SPECIFICATIONS

WTO AGP – Article VI
"1. Technical specifications…shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. 2. Technical specifications prescribed by procuring entities shall, a) where appropriate, be in terms of performance rather than design or descriptive characteristics…"

CAFTA – Article 9.7
1. A procuring entity shall not prepare, adopt, or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade between the Parties.
2. A procuring entity shall prescribe any technical specifications, where appropriate: (a) in terms of performance requirements rather than design or descriptive characteristics…"

In addition to the "Buy America" and anti-offshoring policies mentioned above, national treatment requirements also conflict with policies that provide aid to employees and unions in bidding for public contracts, laws that require favorable consideration of such in-house bids, and costing requirements that

require private bidders to provide substantial savings over public providers in order to get a public contract, but do not allow savings due to lower wages or benefits to be factored in.

b. Technical specifications: The effect of the agreements' rules on technical specifications go far beyond the relative standard of "non-discrimination" (treating foreign and domestic suppliers the same) and instead place subjective, absolute limitations on the kinds of procurement policies states may or may not maintain or adopt. Translated from the trade jargon, this provision means that governments can only specify how they need a good or service to *perform*. Thus, a government can ask for bids to provide 1000 reams of legal-size paper suitable for copy machines but may not use specifications based on how a good is *made* (for instance, requiring recycled content in paper or other goods to be procured). Similarly, governments can specify that they need X-hours of Y-current electricity delivered to Z locations but cannot specify how a service is *provided* (for instance, requiring a portion of energy be purchased from renewable sources). As well, the trade pacts' tight constraints on what factors governments may require or consider in awarding a procurement contract mean that any qualification that might have the unintended *effect* of creating an obstacle to trade – such as environmental or consumer safety labels or certain packaging requirements – could be subject to challenge before a trade tribunal as violating the strict performance-only standard.

c. Qualification of Suppliers: Trade agreement procurement rules also limit what sorts of qualifications may be required of companies seeking to supply a good or service. Conditions for participation in bidding are limited to "those that are essential to ensure that the supplier has the legal, technical and financial abilities to fulfill the requirements and technical specifications of the procurement."[7] This means that suppliers cannot be disqualified because of companies' labor, human rights or environmental records or practices. Yet, many states condition contracts upon such track records or practices in a number of ways. Under the same provision, "sweatfree" procurement rules that require a company to certify its production does not utilize sweatshop, slave or child labor are forbidden, as is the exclusion of companies based on their international human rights and environmental records.

QUALIFICATION OF SUPPLIERS

WTO AGP – Article VIII
"Qualification procedures shall be consistent with the following…(b) any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question..."

CAFTA – Article 9.8
"Each procuring entity shall: (a) limit any conditions for participation in a procurement to those that are essential to ensure that the supplier has the legal, technical, and financial abilities to fulfill the requirements and technical specifications of the procurement…"

Other certifications or conditions for bidders to qualify also conflict with these rules. For instance, to qualify to submit a bid for construction work, some states require that companies must certify that they will pay the prevailing wage or a living wage. Similarly, requiring project labor agreements (agreements made between unions and developers requiring certain treatment for workers in order to avoid labor disputes in public works projects) for a bidder to qualify for state businesses also runs afoul of these rules.

Finally, trade rules regarding the qualification of suppliers forbid the evaluation of bids for contracts based on the human rights, labor rights or environmental records of the countries in which a company is based or in which it operates.[8] Thus, tools used by governments in the past to demand corporate responsibility in the face of human rights abuses – such as the policies disqualifying procurement from companies doing business in apartheid South Africa – are prohibited. This was the principal argument raised by the European Communities and Japan in 1998 when they filed a complaint regarding Massachusetts' selective preference law that stated that public authorities of Massachusetts were not allowed to procure goods or services from any suppliers that did business with Burma.[9]

3. Exceptions and carve-outs

Every trade pact procurement agreement contains certain exceptions. However, as with all legal instruments, the devil is in the details. There are two kinds of "exceptions" from the otherwise binding procurement rules of trade agreements:

a. **Carve-outs:** Carve-outs list an entire economic sector, industry or topic that is to be removed from coverage under an agreement. A full carve-out essentially serves to narrow the scope of the agreement by declaring some matters off-limits. Carve-outs are listed in each country's specific schedule of commitments which is annexed to the actual text of the agreement. For instance, one broad carve-out provision in CAFTA states: "This Chapter shall not apply to preferences or restrictions associated with programs promoting the development of distressed areas and businesses owned by minorities, disabled veterans, and women."[10] This clause is effective in protecting set-asides and preferences for the types of businesses listed above which is a policy that otherwise would be forbidden under CAFTA procurement rules. Carve-outs commonly taken by the United States for all state governments in procurement agreements include:

- Preferences or restrictions associated with programs promoting the development of distressed areas, or businesses owned by minorities, disabled veterans, or women;
- Restrictions attached to federal funds for mass transit and highway projects;
- Printing services; and
- Transportation services that form a part of, or are incidental to, a procurement contract.

On a state-by-state basis, some limited sectors and products have been carved out of particular agreements, including: construction-grade steel, motor vehicles, coal, construction services, software, transit-related equipment, paper products, beef, and rubberized asphalt. Carve-outs of this nature are plainly worded and do serve their function of removing for a specific state a specific listed sector or policy area from the threat of a trade challenge.

However, unfortunately the type of straightforward language shown above is not used to carve out most of the other kinds of policies that would be found in violation of the trade pact procurement rules, even when states explicitly have requested this be done. For instance, in a June 17, 2004 letter to USTR, Washington Governor Gary Locke specified that "the following policies are exempted from Washington State's commitments to the government procurement chapters of the agreement with the [South African Customs Union] SACU, CAFTA, and the [Free Trade Area of the Americas] FTAA: measures associated with human rights practices, sweatshops, apprenticeship set-asides, companies that engage in forced labor or the most egregious forms of child labor, and state action to assist displaced workers in competing for state contracts that have been historically and customarily performed by state employees."[11] Rather than including these carve-outs in Washington's list of commitments as was done to carve out "fuel, paper products, boats, ships and vessels," USTR Ambassador Portman replied that he did "not believe it is necessary to alter Washington's exemptions in light of the clarifications in your letter."[12] Thus, these existing or potential Washington state procurement policies are now exposed to challenge. USTR's tendency to discount states' specific requests – and more importantly, the practical impossibility of listing all existing and every potential future area needing a carve-out – is why many states simply have chosen to stay 100% uncommitted and thus free of any restrictions.

b. Exceptions: Exceptions are provisions binding on all signatories to an agreement that are part of the core text and that list the circumstances when a country may be excused for violating a term of the agreement and therefore be allowed to keep a forbidden policy without penalty. Exceptions can *only* be raised in defense of a law that is being challenged in a trade tribunal for violating the procurement rules. That is to say that, unlike the carve-outs detailed above, these exceptions do not carve out certain activity from coverage under the procurement rules, but only may be raised by the federal government defending a state law once a challenge has been lodged.

The actual general exceptions included in the WTO and CAFTA texts are of very limited practical use. In every agreement, the specific exceptions come under a paragraph of nearly identical boilerplate language that set the legal context for when the exceptions can apply to a specific situation. This introductory language, called the *chapeau*, is derived from decades of WTO-GATT jurisprudence. This history defines what the underlying specific exceptions mean in the context of trade law – which is quite different then what they might appear to mean on their face. For instance, the *chapeau* language to the general exceptions in CAFTA requires that even to qualify for an exception, "measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on trade between the Parties…" These words have launched hundreds of pages of trade rulings, which boil down to a set of difficult-to-overcome tests that must be applied before the exceptions listed below can even be considered.[13] Despite scores of attempts, GATT and WTO tribunals have very rarely permitted countries seeking to use these exceptions to proceed past the *chapeau*.

EXCEPTIONS

WTO AGP Article XXIII(2)
"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety; human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour."

CAFTA Article 9.14
"Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on trade between Parties, nothing in this Chapter shall be construed to prevent a Party from adopting or maintaining measures: a) necessary to protect public morals, order or safety; b) necessary to protect human, animal, or plant life or health; c)necessary to protect intellectual property; or d) relating to the goods or services of handicapped persons, of philanthropic institutions, or of prison labor."

Assuming a challenged state procurement policy can get past the *chapeau* limitations, then it must be proved to be "necessary" to "protect public morals, order or safety" or "necessary" to "protect human, animal or plant life or health." The term "necessary" is also defined by reams of GATT-WTO jurisprudence, which among other things, has been interpreted to require that the defending party must prove that another less-trade-restrictive means to obtaining its public safety or health goal does not exist. It is not surprising that countries seeking to use these "necessity" test exceptions have had a difficult time proving the negative – that another means does not exist – especially since tribunals have not been willing to consider financial, technical or other limits on the feasibility of hypothetical alternatives. The bottom line is that the general exceptions cannot compensate for trade rules that intrude too far into states' policy-making space.[14] The only sure way to safeguard state laws is to ensure they are not bound to meet the trade agreement rules in the first place.

IV. Enforcement

The overarching obligation in "trade" agreements like WTO, NAFTA, and CAFTA is that countries "shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided" in the agreements' rules.[15] When the U.S. Congress approves a trade agreement such as the WTO AGP or CAFTA, it adopts implementing legislation that contains both the language of the

agreement in question followed by any foreseeable changes needed to bring existing federal law into compliance with the terms of the pact. Future federal policies are also expected to conform. A striking example regarding the implementation of the "trade" agreement procurement rules is a 1999 Executive Order 32383 by President Clinton: the order prohibits the acquisition by U.S. government agencies of products produced with the most egregious forms of forced child labor, but the Executive Order explicitly excuses from this standard all goods coming from any country that is party to the WTO AGP or NAFTA.[16]

Regarding state and local law, the trade agreements impose an obligation on the signatory – the national government – to ensure conformity to the terms on the state level. For example, CAFTA states that "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state governments."[17] In addition, many chapters of these agreements explicitly reference the requirement that the federal government make state and local governments conform. CAFTA's procurement chapter says that "Each Party [i.e. the U.S. federal government] shall ensure that its procuring entities [e.g. state governments] comply with this Chapter in conducting any covered procurement."[18]

What does it mean practically that the U.S. federal government has this obligation in trade pacts? First, under WTO and other trade agreements' rules, other nations can challenge U.S. law for not meeting the agreements' obligations, including state laws, in closed-door trade tribunals. If such a trade tribunal rules against a country's law or regulation, it must be eliminated or changed, or the country whose laws are ruled noncompliant faces perpetual trade sanctions until the law is eliminated or changed. State officials have no right even to participate in the defense when a trade tribunal hears a challenge against a state or local law, unless specifically invited by the federal government. As a result, a federal government that may oppose a specific state policy would have to be relied upon to defend it behind closed doors at an international trade tribunal.

If such a "trade" tribunal rules against a state or local policy, the federal government then is obliged to take all "constitutionally available" steps to force the state or locality into compliance. A past trade tribunal ruling in a challenge of state alcohol taxation has clarified such measures as including the federal government signatory to a trade agreement suing state governments, enacting preemptive legislation, or withholding federal funding until the state changes or eliminates nonconforming policies.[19] Failure of the federal government to exhaust fully all such options and the continued presence of the state policy deemed illegal by the tribunal result in trade sanctions being applied against the national government.

Challenges to state laws as "barriers to trade" are a real and disturbing possibility, yet to date have been relatively rare because of the diplomatic sensitivities involved in bringing a dispute. However, there is an increasingly insidious way that trade rules are being enforced absent a direct challenge filed at the WTO or in the dispute settlement systems of bilateral agreements. Frequently, state and local officials are being chilled from taking policy initiatives regarding a broad array of non-trade policy matters in the first place because of pressure from federal officials, business interests, or other opponents of a particular policy not to violate "trade" rules. For example, when the Maryland General Assembly was considering a bill barring the state from contracting with suppliers doing business in Nigeria shortly after the European Union and Japan filed their WTO complaint regarding Massachusetts' law, State Department officials descended on Annapolis to lobby against the initiative, which was speeding through the legislature. It narrowly was defeated. This instance is just one of the many examples of the "chilling effect" that actions short of a formal trade challenge can have on innovative state policies.

CURRENT PUSH BY FEDERAL TRADE NEGOTIATORS TO EXPAND COVERAGE

As mentioned above, the idea of negotiating comprehensive rules on government procurement that would apply to all WTO countries is a non-starter for most developing countries. However, U.S. trade negotiators are pursuing other avenues to expand the reach of existing provisions, therefore expanding the risk of a trade challenge to state procurement laws that violate the rules.

I. Expansion of countries eligible to challenge state laws via bilateral and regional agreements

U.S. trade negotiators are continuing to pursue a string of bilateral and regional agreements based on the NAFTA/CAFTA model with government procurement chapters, including the Andean Free Trade Agreement (AFTA) with Columbia, Ecuador, and Peru and a proposed hemisphere-wide NAFTA expansion to 31 countries called the Free Trade Area of the Americas (FTAA) as well as bilateral pacts with Panama, Thailand, and the South African Customs Union (SACU), which includes South Africa, Botswana, Lesotho, Namibia and Swaziland. For states that commit to have their current and future procurement policies bound by these agreements, the risk of a trade challenge to non-conforming state procurement laws will be increased as additional countries are added to the list of those who can second-guess a state law at the behest of an interested company.

In addition, by enshrining government procurement rules in bilateral and regional trade agreements, the possibility of reclaiming the policy space circumscribed by these agreements is diminished, as requirements for getting out from under the rules are more onerous than those in the WTO AGP. Under both the WTO AGP and existing bilateral and regional agreements, once an agreement goes into effect, state governments must rely on the federal government to make changes to state commitments on their behalf. Changes to the U.S. list of covered entities – such as the withdrawal of a state or other covered entity – are subject to rules regarding Modifications and Rectifications to Coverage. For example, CAFTA stipulates that "A Party may modify its coverage under this Chapter provided that it: (a) notifies the other Parties in writing and no other Party objects in writing within 30 days after the notification; and (b) except as provided in paragraph 3, offers within 30 days after notifying the other Parties acceptable compensatory adjustments to the other Parties to maintain a level of coverage comparable to that existing before the modification."[20] Adjustments are certainly possible, but the federal government as party to the agreement controls the modification process and must compensate other countries for a state to withdraw. The reality of this dynamic is yet another reason why state officials increasingly are steering clear of making additional commitments on behalf of their states.

One difference between bilateral and regional agreements such as CAFTA and the WTO AGP is the ease with which the United States as a whole could change its commitments. Under the WTO AGP, because of its plurilateral structure (i.e. countries' participation is voluntary, not a requirement of WTO membership), any party (the federal government) may withdraw from the agreement without penalty upon 60 days notice. In other words, removing a block of states from the WTO AGP would require compensatory adjustments, but the United States could get out from under the procurement rules altogether simply by giving notice to the other Parties to the agreement. In contrast, in the procurement chapters that form part of bilateral and regional agreements, there is no such mechanism for withdrawal.

II. WTO Agreement on Government Procurement negotiations reopened to expand coverage

As noted above, negotiations have been reopened on the WTO AGP itself among the Parties to the agreement to expand the reach of the agreement. These negotiations are not tied to the "single undertaking" of the Doha Round, meaning they are independent of negotiations on agriculture, services,

or other issues. Negotiators started working in 2004 and the Committee on Government Procurement is meeting periodically to review rules and exchange "requests" and "offers" to expand market access. Given that the United States committed most federal procurement and the bulk of state government procurement at the inception of the WTO AGP, there are limited ways that market access could be expanded: binding the remaining 13 states, extending coverage down to the county or municipal level, lowering the contract threshold, or eliminating carve-outs for sensitive sectors and programs. Thus, WTO negotiations to expand the WTO AGP can mean only these things to state and local authority.

III. WTO services agreement proposed as backdoor venue for additional procurement negotiations

In the context of the negotiations on the WTO's General Agreement on Trade in Services, as part of the Doha Round, the European Union has been pushing for negotiations regarding new rules on government procurement in services under GATS Article XIII. While the Working Party on GATS Rules is far from reaching consensus on this issue, negotiators from the European Union continue to push for inclusion of procurement in the GATS at every opportunity.

State officials concerned about the encroachment of international trade agreement rules on their sovereignty and decision-making authority need to remain attentive to the federal government's expansion agenda detailed above.

For more information or sample materials, contact Saerom Park at Public Citizen's Global Trade Watch: (202) 454-5127 or spark@citizen.org.

ANNEX I: COUNTRIES PARTY TO THE WORLD TRADE ORGANIZATION AGREEMENT ON GOVERNMENT PROCUREMENT

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

Negotiating accession
Albania, Bulgaria, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman, Panama, Chinese Taipei

Observer governments
Albania, Argentina, Australia, Bulgaria, Cameroon, Chile, China, Colombia, Croatia, Georgia, Jordan, Kyrgyz Republic, Moldova, Mongolia, Oman, Panama, Republic of Armenia, Sri Lanka, Chinese Taipei, Turkey

ANNEX II: COMMITMENTS OF U.S. STATES TO INTERNATIONAL TRADE AGREEMENT GOVERNMENT PROCUREMENT PROVISIONS

	WTO AGP	**U.S.-Singapore FTA**	**U.S.-Chile FTA**	**U.S.-Australia FTA**	**U.S.-Morocco FTA**	**CAFTA**	***AFTA****	***U.S.-Panama FTA****
Alabama								
Alaska								
Arizona	**X**	**X**	**X**					
Arkansas	**X**	**X**	**X**	**X**	**X**	**X**	**X**	**X**
California	**X**	**X**	**X**	**X**				
Colorado	**X**	**X**	**X**	**X**	**X**	**X**	**X**	**X**
Connecticut	**X**	**X**	**X**	**X**	**X**	**X**		
Delaware	**X**	**X**	**X**	**X**	**X**	**X**		
Florida	**X**	**X**	**X**	**X**	**X**	**X**	**X**	**X**
Georgia				**X**				
Hawaii	**X**	**X**	**X**	**X**	**X**	**X**		
Idaho	**X**	**X**	**X**	**X**	**X**	**X**		
Illinois	**X**	**X**	**X**				**X**	**X**
Indiana								
Iowa	**X**	**X**	**X**					
Kansas	**X**	**X**	**X**	**X**	**X**			
Kentucky	**X**	**X**	**X**	**X**	**X**	**X**		
Louisiana	**X**	**X**	**X**	**X**	**X**	**X**		
Maine	**X**	**X**	**X**	**X**				
Maryland	**X**	**X**	**X**	**X**	**X**	**O**		
Massachusetts	**X**	**X**	**X**					
Michigan	**X**	**X**	**X**					
Minnesota	**X**	**X**	**X**					
Mississippi	**X**	**X**	**X**	**X**	**X**	**X**	**X**	**X**
Missouri	**X**	**X**	**X**					
Montana	**X**	**X**	**X**					
Nebraska	**X**	**X**	**X**	**X**	**X**	**X**		
Nevada								
New Hampshire	**X**	**X**	**X**	**X**	**X**	**O**		
New Jersey								
New Mexico								
New York	**X**	**X**	**X**	**X**	**X**	**X**	**X**	**X**
North Carolina								
North Dakota								
Ohio								
Oklahoma	**X**	**X**	**X**					
Oregon	**X**	**X**	**X**	**X**	**X**	**O**		
Pennsylvania	**X**	**X**	**X**	**X**				
Rhode Island	**X**	**X**	**X**	**X**	**X**	**X**		
South Carolina								

	WTO AGP	U.S.-Singapore FTA	U.S.-Chile FTA	U.S.-Australia FTA	U.S.-Morocco FTA	CAFTA	*AFTA**	*U.S.-Panama FTA**
South Dakota	**X**	**X**	**X**	**X**	**X**	**X**		
Tennessee	**X**	**X**	**X**					
Texas	**X**	**X**	**X**	**X**	**X**	**X**	**X**	**X**
Utah	**X**	**X**	**X**	**X**	**X**	**X**	**X**	**X**
Vermont	**X**	**X**	**X**	**X**	**X**	**X**		
Virginia								
Washington	**X**	**X**	**X**	**X**	**X**	**X**		
West Virginia								
Wisconsin	**X**	**X**	**X**					
Wyoming	**X**	**X**	**X**	**X**	**X**	**X**		

X= Bound to government procurement rules.
O= Bound to government procurement rules despite state request to be withdrawn.
*The Andean Free Trade Agreement (AFTA) is a proposed agreement between the United States, Columbia, Ecuador, and Peru. Both AFTA and the U.S.-Panama Free Trade Agreement are under negotiation, and thus the list of states is subject to change. Except for the completed U.S.-Peru and U.S.-Colombia Free Trade Agreements, in which both procurement annexes list all the same states noted here, states with an "X" listed under these two pending agreements are based on letters from governors obtained through a Freedom of Information Act request filled by the U.S. Trade Representative on November 17, 2005. Letters are on file at Public Citizen and available at http://www.tradewatch.org.

ANNEX III: MASSACHUSETTS BURMA CASE: BASIC HUMAN-RIGHTS TOOLS ELIMINATED BY WTO PROCUREMENT RULES

The serious human rights violations and the deliberate suppression of democracy perpetrated by the military junta ruling Burma (which the junta has renamed Myanmar) since it came to power in 1988 are well known throughout the world. The International Labor Organization issued a scathing report on the human rights violations of the Burmese dictatorship.[21] The ILO found that the Burmese military dictatorship was systematically violating the basic human rights of Burmese citizens and non-Burmese minorities.[22] It ordered the Burmese dictatorship to reform its laws and practices regarding labor rights. "There is abundant evidence before the Commission showing the pervasive use of forced labor imposed on the civilian population throughout Myanmar by the authorities and the military for portering, the construction, maintenance and servicing of military camps, other work in support of the military, work on agriculture, logging and other production projects undertaken by the authorities or the military, sometimes for the profit of private individuals. ... none of which comes under any of the exceptions of the Convention. ... Forced labor in Myanmar is widely performed by women, children, and elderly persons as well as persons otherwise unfit for work. ... All of the information and evidence before the Commission shows utter disregard by the authorities for the safety and health as well as the basic needs of the people performing forced or compulsory labor."[23]

Burma's pro-democracy movement, led by Nobel Peace Prize holder Aung San Suu Kyi, called for South Africa-style foreign divestment from Burma to financially starve the military dictatorship.[24] Some two dozen U.S. municipal and county governments, and the state government of Massachusetts,[25] acted on this request and terminated purchasing contracts with companies doing business in Burma.[26] The selective purchasing laws were designed to ensure that public money is not used to indirectly support a regime whose conduct taxpayers find repugnant. A goal of such policies was to create incentives to encourage transnational corporations to divest from Burma. The selective purchasing laws were based on the effective divestiture and selective purchasing initiatives that animated the anti-apartheid movement in the U.S. in the 1980s and which are widely credited for helping to facilitate the successful transition to democracy in South Africa.

The attack on the Massachusetts selective purchasing law was two-pronged. Japan and the EU filed a case at the WTO. In parallel, the National Foreign Trade Council (NFTC), a coalition of corporations, challenged the measure in the U.S. District Court in Massachusetts as a violation of the U.S. Constitution. NFTC's law suit was part of a larger campaign by a corporate front group called USA*Engage[27] to eliminate human rights considerations from U.S. international commercial policy.

The EU and Japan challenged the law at the WTO in the summer of 1997. The EU argued that Massachusetts' procurement policy had to conform to the WTO rules and that the Burma law contravened the WTO AGP by imposing conditions that were not essential to fulfill the contract (Art. VIII(b), imposed qualifications based on political instead of economic considerations (Art. X), and allowed contracts to be awarded based on political instead of economic considerations (Art. XIII).[28]

Massachusetts officials were flummoxed to learn they were required to comply with WTO procurement rules that they had never approved. They later learned that a previous governor had sent a letter to the USTR during the Uruguay Round without legislative consultation, much less approval which was the basis for the claim that the state was bound to the WTO procurement rules.

However, the EU and Japan suspended the WTO case pending the outcome of a federal lawsuit filed against that state by the NFTC in U.S. District Court. The NFTC argued that the Massachusetts law "unconstitutionally infringed on the federal foreign affairs power, violated the Foreign Commerce Clause,

and was preempted by the federal Act."[29] The District Court permanently enjoined enforcement of the state law, ruling that it "unconstitutionally impinge[d] on the federal government's exclusive authority to regulate foreign affairs."[30] Massachusetts appealed, but the U.S. Court of Appeals for the First Circuit affirmed the District Court's decision.

Massachusetts appealed to the Supreme Court. Seventy-eight Members of Congress, 38 state and local governments, all eight major state and local government associations, and 66 non-profit organizations filed *amicus curiae* ("friend of the court") briefs supporting the Massachusetts law.[31] Nonetheless, the Supreme Court affirmed the lower courts' decisions, although on narrower grounds, holding that a state or local selective purchasing law sanctioning a nation is preempted only when Congress has passed a corresponding law sanctioning that nation – as Congress had done in the case of Burma – and only when the two laws differ. Current federal law regarding Burma prohibits companies from making new investments in Burma[32] and bans all imports from the country.[33] This leaves the door open for state and local governments to pass several other types of laws.

For example, state and local governments could enact general laws to avoid purchasing goods and services from companies that violate human rights or labor standards as long as the laws do not apply specifically to companies doing business in a country where Congress has adopted *different* sanctions.[34] Thus, states and cities could divest their holdings in companies that do business in Burma or could require companies to disclose whether they do business in Burma as a condition for selling goods or services to the government because these actions do not conflict with the federal Burma law. Under the Supreme Court ruling, state and local governments also could use preferential purchasing policies regarding countries about which Congress has not passed conflicting legislation. Thus, the Supreme Court decision, in contrast to WTO AGP rules, does not rob state and local governments of all their options.

The EU and Japan suspended their WTO challenge pending the outcome of the domestic case, thus the provisions of the WTO AGP were never interpreted.[35] Given the WTO has decreed that labor rights are solely in the jurisdiction of the ILO, it would have been revealing to see how a WTO tribunal treated the ILO's clear position on Burma's labor rights violations.

---

[1] See Annex I for a list of countries party to the WTO AGP.
[2] See Annex II for a list of states' obligations under the government procurement provisions of international trade agreements.
[3] Martin Khor, "Singapore Issues Downgraded at WTO?" *Star*, Feb. 16, 2004.
[4] In the final CAFTA text, 22 U.S. states are listed. However, the governors of Oregon and New Hampshire requested that their states be withdrawn from the text (*See* Governor Ted Kulongoski to Ambassador Robert Zoellick, May 27, 2004, and Governor John Lynch to Ambassador Robert Zoellick, May 11, 2005.) The Maryland General Assembly passed a law requiring legislative approval before binding the state to trade agreement procurement rules and rescinding the governor's previous commitment, but the USTR refused to remove Maryland from the text.
[5] While the specific language varies slightly, these rules are common to all of the agreements.
[6] CAFTA Article 9.2.
[7] CAFTA Article 9.8.
[8] CAFTA Article 9.2.
[9] This WTO action ultimately was preempted by a domestic court challenge which resulted in a narrow U.S. Supreme Court ruling which held that a state or local selective purchasing law sanctioning a nation is preempted only if Congress has passed a corresponding law sanctioning that nation (which Congress had done), and the two laws differ. However, the precedent of foreign governments challenging state procurement policy was set, and had the challenge been carried out, the WTO could have ruled more broadly on the question. For more information on the Massachusetts Burma case, see Annex III.

[10] CAFTA Chapter 9.1.2(b)(i)-30, Notes to the Schedule of the United States.
[11] Governor Gary Locke to Ambassador Robert Zoellick, June 17, 2004.
[12] Ambassador Robert Zoellick to Governor Gary Locke, August 13, 2004.
[13] The GATT-WTO jurisprudence on these terms is outside the scope of this memo, but each element of the *chapeau* has been interpreted to strictly limit which domestic laws might obtain protection from the underlying exceptions.
[14] For more information specific to additional exceptions regarding the environment, *see* Public Citizen's memo "Pending Trade Pacts and the Threat They Pose to Hard-Fought Environmental Policies, and State and Local Sovereignty" to the National Caucus of Environmental Legislators and Other Interested Parties, July 14, 2004.
[15] Agreement Establishing the World Trade Organization, Article XVI(4).
[16] Federal Register, Vol. 64, No. 115, June 16, 1999.
[17] CAFTA Article 1.4.
[18] CAFTA Article 9.1.4.
[19] GATT, United States – Measures Affecting Alcohol and Malt Beverages (DS23/R-39s/206), Report of the Panel, Feb. 7, 1992.
[20] CAFTA Article 9.16.
[21] International Labor Organization, "Forced Labour in Myanmar," July 21, 1998.
[22] International Labor Organization, "Forced Labour in Myanmar," July 21, 1998.
[23] International Labor Organization, "Forced Labour in Myanmar," July 21, 1998.
[24] "Burmese leader in exile welcomes limited U.S. sanctions," Agence France Presse, Sept. 24, 1996.
[25] Act of June 25th, 1996, Chapter 130, 1, 1996, Mass. Acts. 210, codified at Mass. Gen. L. ch. 7. 22G-22M.
[26] Jim Lobe, "Government Opts Out of Court Case on Globalization," InterPress Service, March 11, 1999. Most recently, the Los Angeles City Council voted unanimously in Dec. 1997 to ban companies that do business in Burma from bidding for any city contracts.
[27] Prominent USA*Engage members are: AT&T, Boeing, BP, Calix, Chase Manhattan Bank, Coca-Cola, Dow Chemical, Ericsson, GTE Corporation, IBM, Intel, Monsanto, Siemens, and Union Carbide. For a full list, see http://usaengage.org/background/members.html, on file with Public Citizen.
[28] World Trade Organization, "United States – Measure Affecting Government Procurement, Request for Consultation by the European Communities," WT/DS**/1, GPA/DS2/1, June 26, 1997.
[29] Crosby *et al.* v. National Foreign Trade Council, U.S. Sup. Ct., No. 99-474, June 19, 2000, sec. II.
[30] National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 291 (Mass. 1998).
[31] Robert Stumberg, "No Business in Burma," *Legal Times*, March 20, 2000.
[32] Executive Order 13047, May 20, 1997.
[33] Executive Order 13310, July 28, 2003.
[34] Robert Stumberg and Matthew Porterfield, "Preliminary Analysis of Supreme Court Decision: Impact on Options for Free-Burma Legislation," Harrison Institute for Public Law, Georgetown University Law Center, June 20, 2000.
[35] "EU Suspends WTO Panel on Massachusetts Burma Law," United Press International, Feb. 8, 1999.