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**BEFORE THE UNITED STATES DEPARTMENT OF COMMERCE AND UNITED STATES
TRADE REPRESENTATIVE
Docket Number ITA-2017-0006**

**COMMENTS CONCERNING THE COSTS AND BENEFITS TO U.S. INDUSTRY OF U.S.
INTERNATIONAL GOVERNMENT PROCUREMENT OBLIGATIONS**

**Public Citizen
September 18, 2017**

Public Citizen welcomes the opportunity to submit comments to the U.S. Department of Commerce and the Office of the U.S. Trade Representative (USTR) on U.S. government procurement obligations in trade agreements. Public Citizen is a nonprofit consumer group with more than 400,000 members. A mission of Public Citizen is to ensure that in this era of globalization, a majority can enjoy economic security; a clean environment; safe food, medicines and products; access to quality affordable services; and the exercise of democratic decision-making about the matters that affect their lives.

In the context of a creeping expansion of the scope of “trade” agreements negotiated behind closed doors with hundreds of official corporate advisors, Americans across the political spectrum have become aware and upset about the ways in which today’s “trade” pacts conflict with their goals and values. As agreements have expanded far beyond traditional matters such as cutting tariffs and limiting quotas, more Americans have become engaged in demanding a new approach. As a result, the status quo U.S. trade policy model now faces unprecedented crises politically, economically and socially.

Thus, a review of trade-pact procurement terms is timely. These terms constrain how the public can direct our federal and state officials to spend our tax dollars. The rules require firms operating in trade partner countries to be treated like U.S. firms – and foreign goods to be treated as if they were made in America – with respect to many types of government contracts over a set dollar-value threshold, with some limits for U.S. defense agencies and some products. **Effectively, these rules offshore our tax dollars rather than investing them to create jobs and innovation at home. As a result, currently “Buy American” now actually means companies and products from 60 countries¹ must be given the same access to U.S. government contracts as U.S. firms and products for all but the lowest-value contracts.** And 37 U.S. states are bound to such rules with respect to the 45 signatory countries of the World Trade Organization (WTO) Agreement on Government Procurement (GPA).

These terms also eliminate a reason that U.S. businesses profiting from U.S. government contracts choose to produce domestically. Such firms advocate for the current trade pact procurement rules because they allow them to relocate production to low-wage countries with U.S. trade pacts – profiting from leaving their U.S. workers behind and often also avoiding U.S. tax obligations – and still obtain lucrative taxpayer-funded contracts. **Fifty-six percent of the top 50 U.S. government federal contractors in FY 2016 were certified under just one narrow U.S. government program as having engaged in offshoring, and 41 percent of the top 100 FY 2016 contractors were certified**

as having offshored American jobs.² More than a third of total U.S. government contract spending in FY 2016 went to firms certified as having offshored jobs. This totaled \$176 billion in U.S. federal government contracts in 2016. As a candidate, President Donald Trump pledged to punish firms that offshore American jobs. However, in 2017 the flow of federal contract awards to major offshorers has continued, with United Technologies, for instance, receiving 15 new awards despite offshoring 1,200 of its 2,000 Carriers job to Mexico, and notorious offshorer General Electric obtaining scores more. As described in this submission, a U.S. president has the unilateral authority to reverse the waivers to Buy American policies that facilitate this business conduct.

In addition to supporting job offshoring, the current trade pact rules on government procurement also limit the criteria governments can use to describe the goods and services they seek and what conditions may be imposed on bidders. The terms reflect the interests of U.S. corporate trade advisors interested in acquiring access to procurement opportunities in other countries and thus limiting the conditions and terms governments may require of them. But the rules apply reciprocally, meaning that they also severely constrain the ability for U.S. citizens and our elected officials to use procurement as an important policy tool. If the federal government – or a state – does not conform its policies to these constraints, then countries that are part of the agreement can challenge our policies in foreign tribunals that can impose trade sanctions against the United States until our laws are eliminated or changed.

Given that total U.S. government procurement activity is \$1.7 trillion, the implications are significant. **When able to set criteria on government purchases, the U.S. federal government and our state governments have the capacity to spur innovation and further other policy goals by creating demand for specified goods and services or those produced under specified conditions. However, currently, the trade agreements with procurement terms to which the United States is a signatory impose constraints on the federal government and, to differing degrees, the 37 U.S. states now bound to comply with some of these trade pact terms.** It is worth noting that in the early 1990s, when U.S. states were asked to opt in to being bound to the WTO's GPA, few governors or state legislatures recognized that doing so would result in a form of international pre-emption that would severely limit their policymaking. As states became more aware of the threats posed, fewer and fewer were willing to become bound to these terms. By the mid-2000s, fewer than a dozen states opted in to these policy constraints in the last Free Trade Agreements (FTA) negotiated by the George W. Bush administration. Reflecting this reality, the Trans-Pacific Partnership did not cover state procurement. However, 37 U.S. states remain bound to WTO procurement policy constraints.

As this submission enumerates, the current procurement terms in U.S. trade pacts represent bad economics and limit domestic policy space, and must be eliminated. Even if the underlying notion of offshoring our tax dollars and imposing one-size-fits-all policies about how taxpayer funds may be expended was a good one in general, doing so is a losing proposition for the United States. **The U.S. procurement market is much larger than any but that of the European Union. Thus in exchange for some U.S. firms obtaining some contracts in significantly smaller procurement markets, access on equal terms to U.S. firms is provided to the entire massive U.S. procurement market for any firm *operating* in a trade partner nation or for goods *produced* in such a nation, including with respect to firms from nations that provide no reciprocal access, such as China.**³ Improved statistical reporting and information exchange is essential to track the exact impact of such terms.

Notably, a U.S. president has the authority to unilaterally exit the WTO GPA by providing 60 days written notice to the WTO Director-General and thus eliminate U.S. obligations with respect to 41 of the 45 WTO GPA parties with which we do not have FTAs. WTO rules do not provide for penalties in

response to such an action. The procurement provisions of various FTAs can be eliminated or altered through renegotiation. With respect to U.S. law effectuating these international law obligations, a U.S. president also has unilateral authority to eliminate the waiver for trade pact partners of domestic procurement preferences. This element of our trade agreements is implemented by regulation, rather than in the trade agreement implementing legislation. The economic and social benefits of overhauling the U.S. approach to trade pact procurement terms are sizable.

Background on Trade Agreement Procurement Rules and U.S. Federal Procurement Policy

Since the Roosevelt administration, when the Buy American Act was passed, the U.S. government and many states have enacted policies that give domestic goods and domestic bidders preference for government contracts and that set criteria for goods, services and bidders designed to promote various policy goals.⁴ There also have been initiatives to require that outsourced government work, such as call centers or data processing contracts, be awarded to firms employing U.S. workers.

Trade agreements did not touch on procurement policy until 28 countries initially agreed to a limited-scope General Agreement on Tariffs and Trade (GATT) Tokyo Round “Code on Government Procurement” that went into force in 1981. However, even as large economies such as China and Brazil have refused to be bound to such terms, over the past few decades U.S. “trade” pacts have been used to impose limits on the U.S. federal and state governments with respect to procurement policy. Common to all such agreements are “national treatment” rules that forbid preferences for domestic goods and firms and constraints on the criteria governments can use to describe the goods and services they seek and what conditions may be imposed on bidders. Effectively, only descriptions of desired goods and services related to end-use are permitted. The conditions that may be required of a bidder to participate are also limited to only those related to the financial, legal and technical capacity to perform the contract. Thus, regardless of the desires of American voters – who polling shows overwhelmingly support Buy American and Buy Local policies – or the will of Congress or state legislatures, our trade pacts forbid such local preference or requirements that U.S. workers perform service contracts outsourced from governments and expose to trade-pact challenge federal and state procurement rules that exclude firms based in countries with terrible human or labor rights records, or that ban sweatshop-made goods, among other criteria.

The international law requirement in trade pacts that U.S. government procurement policy afford the firms located in trade-pact signatory countries and the goods and services they produce the same treatment as American firms, goods and services is enacted through a waiver of Buy American and other domestic procurement preference policies. That waiver is achieved through regulation, not by statute. The waiver rules are contained in the Federal Acquisition Regulation 52.225. The relevant elements implement terms in the Trade Agreements Act (19 U.S.C. 2501, *et seq.*) in which Congress provided authority for the president (Section 2511) to waive the Buy American Act and other domestic procurement preferences a) that are above a set threshold, and b) that involve countries that have signed an international trade agreement with the United States or are otherwise “designated countries.”

The Trade Agreements Act gives the president discretionary authority to waive domestic procurement preferences, *but does not require a waiver*. This waiver authority has been delegated to the USTR. USTR’s practice has been to add new U.S. trade-agreement-signatory countries or countries joining the WTO GPA to a list found at 48 CFR 25.400. Currently, this waiver requires that the 45 other signatories to the WTO GPA, 15 non-GPA-signatory countries with U.S. FTAs, 47 least developed

countries (LDCs)⁵ and 20 Caribbean Basin countries⁶ be treated as if they were American firms and goods produced by them as if they were U.S.-made for procurement occurring in amounts over thresholds set in the agreements and/or by regulation. (The thresholds are inflation-adjusted.⁷)

Problems With Current Trade Pact Procurement Obligations

Bad Economics

Trade-pact procurement terms promote the offshoring of U.S. tax dollars instead of re-investing them to create business opportunities and jobs at home. This feature of the current rules is especially problematic at a time when strengthening U.S. manufacturing and expanding manufacturing employment is a policy goal widely shared by the U.S. public and policymakers across the political spectrum. Indeed, trade-pact investment and procurement terms that provide offshoring incentives are among the leading causes of public antipathy to our current trade agreements. This is not surprising given that since the implementation of the North American Free Trade Agreement (NAFTA) and the WTO, the United States has lost approximately 4.5 million manufacturing jobs nationwide.⁸ Some states, such as California and Florida, have lost a fifth of their manufacturing jobs while other states, such as North Carolina and New York, have lost nearly half, according to data from the Bureau of Labor Statistics.⁹ This is a massive hit to American workers: the 4.5 million jobs at the 2016 average annual manufacturing wage level¹⁰ is a loss of \$243 billion in wages, larger than the entire GDP of Finland or Portugal.¹¹

The loss of U.S. manufacturing jobs pushed down wages economy-wide. Proponents of the trade status quo often state that jobs in export industries pay higher wages. That is not because of some miraculous connection between exporting and higher wages. Rather, the jobs in question are largely in manufacturing sectors, which pay higher wages than the service sector jobs available for the 58 percent of the American workforce that does not hold college degrees.¹² As a result, the loss of manufacturing jobs resulting when U.S. tax dollars are used to purchase imported goods rather than those made in America also has a disproportionate negative wage impact.

According to the U.S. Bureau of Labor Statistics, two out of every five displaced manufacturing workers rehired in 2016 experienced a wage reduction, with one out of four taking a cut of greater than 20 percent. For the average manufacturing worker earning more than \$38,000 per year, this meant an annual loss of at least \$7,700.¹³ And as these workers joined the glut of those already competing for non-offshorable service sector jobs, wages in these growing service sectors, such as hospitality and food service, were also pushed down.¹⁴ The Center for Economic and Policy Research has calculated that trade-related losses in wages outweigh the gains provided by access to cheaper imported goods for the vast majority of U.S. workers.¹⁵ Manufacturing job-loss and related downward pressure on wages have exacerbated income inequality to levels not seen since the Great Depression. Even proponents of NAFTA admit that trade pressures have contributed to today's historic degree of inequality. The only contested question is the degree. The pro-NAFTA Peterson Institute has estimated that 39 percent of observed growth in U.S. wage inequality is attributable to trade trends.¹⁶

Domestic procurement preferences were designed to promote investment, economic growth and job creation. A report by the Congressional Research Service using estimates from the American Iron and Steel Institute showed that if Buy America requirements spurred demand for steel by about 1 percent, an additional 1,000 jobs would be created in the steel industry. Moreover, these extra 1,000 jobs pay well: the average steel mill worker earned \$81,396 in 2014¹⁷, much higher than the average annual

wage of \$42,000 in the United States.¹⁸ When procurement activity increases U.S. employment, the U.S. Department of Treasury recoups some of its procurement expenditures by collecting income taxes from U.S. workers and firms. On the other hand, waiving domestic content requirements may lead to more imports. Steel industry experts have found that the U.S. government forgoes an estimated \$9 million in personal income tax revenue for each 1.5 million tons of steel imported into the United States.¹⁹

Steel is not unique. Stronger domestic content provisions are job creators across industries. For example, a recent study found that “on average, when manufacturers fully source the components and subcomponents of their vehicles domestically they create at least 26 percent more jobs than manufacturers that only meet the 60 percent Buy America requirement.”²⁰

According to the Bureau of Economic Analysis (BEA), for every \$1 spent in manufacturing, another \$1.48 is added to the U.S. economy, a higher multiplier than in any other industry.²¹ And this actually could be a low estimate. Recent research done shows that the manufacturing multiplier might be as large as \$3.60 when incorporating both upstream and downstream sales.²² This study also shows each job in manufacturing dedicated to producing value for final demand creates 3.4 jobs in nonmanufacturing industries.

Thus, U.S. government procurement with strong domestic content requirements supports U.S. jobs in high wage industries like manufacturing, has a strong multiplier effect on other industry sectors, and can get recouped partly by the U.S. Treasury Department in the form of income taxes on higher business revenue and wages of the newly employed. These productivity, job-multiplier and tax recoupment factors are essential to consider in the context of the standard claim by interests opposing domestic procurement preferences who seek to expand trade-pact procurement rules. Namely, they claim that U.S. taxpayers are hurt if the government purchases American-made goods that may be more expensive than foreign-made goods. Yet, the research shows that additional costs incurred by using domestic suppliers can be more than recouped by the economic activity and U.S. tax revenues created.

Consider this back of the envelope calculation. At a contract size of \$5 million, the additional cost allowed before the current “unreasonable cost” exception would be triggered under Buy American policies with respect to selecting a higher-cost domestic supplier is \$600,000.²³ But using BEA’s manufacturing multiplier, this same \$5 million purchase of American-manufactured goods turns into an additional \$7.4 million of economic activity. This is an economic benefit over 12 times the additional cost of using the higher cost domestic supplier, and potentially much greater if we were to use a multiplier that accounted for all upstream and downstream activities. That means that not only are more American jobs supported, but the additional contract cost is likely paid for in tax revenue from this new economic activity that supports American manufacturing jobs.

One often overlooked feature of the U.S. manufacturing industry supported by domestic procurement preferences is that it is critical for rural areas, perhaps even more so than for cities. The manufacturing sector accounts for 15 percent of earnings in rural areas in 2014, compared to nine percent in urban areas.²⁴ This distribution represents crucial non-farm income for farming families, as well as good paying jobs for Americans in small communities nationwide. Similar to urban areas, manufacturing jobs in rural areas tend to pay more than jobs in other sectors. This means rural areas have been among the hardest hit by manufacturing job loss due to trade. This, in addition to the economic downturn

related to the global financial crisis, has resulted in a sharp decline in median household income and a substantially higher poverty rate in manufacturing-dependent communities.

In addition to U.S. job loss and downward pressure on wages, a weakened manufacturing sector has negative long-term effects on competitiveness and innovation. The Brookings Institution found that manufacturers conduct more than two-thirds of U.S. private sector research and development. Also, 22 percent of manufacturers introduce new business processes to boost productivity compared to just 8 percent of non-manufacturers. This increased innovation helps spur service sector growth and productivity, boosting the entire U.S. economy.²⁵

No Reciprocity in What the U.S. Economy Loses Versus What Specific U.S. Firms Could Gain

The current trade pact model requires companies operating in a trade partner country to be treated like U.S. firms – and foreign goods to be treated as if they were made in America with respect to many types of U.S. government contracts. Even if the underlying notion of offshoring our tax dollars was a good one, for the United States it is a losing proposition given that our procurement market (\$1.7 trillion) is so much larger than any individual GPA or U.S. FTA signatory nation's market and only comparable to that of the *entire* European Union (\$1.6 trillion). This would inherently be the case *unless* the U.S. limits the market access it offers to other countries to a set dollar amount that reflects what could be on offer from the partner country.

As a practical matter, what the trade pact rules do is give some U.S. firms better prospects to obtain more contracts in significantly smaller procurement markets in exchange for providing access on equal terms to U.S. firms to the entire massive U.S. procurement market for any firm *operating* in a trade partner country or goods *produced* in such a country. The rules apply with respect to firms from countries that provide no reciprocal access such as China, as long as the goods meet the relevant rules of origin. (Indeed, the notion that the many Chinese state-owned enterprises in Vietnam would obtain access to U.S. government contracts on a national treatment basis via the TPP became a strong argument against that pact.) U.S. trade pacts should not be in the business of providing individual U.S. firms opportunities to the detriment of the wider U.S. economy and all Americans' job opportunities and wage levels and access to the public service supported by our tax base.

The structural imbalance in the relative size of procurement activity between the United States and other countries is further exacerbated by the fact that the United States has provided more expansive procurement market access in its trade pact commitments than is provided in return by other countries. While other countries, in both the WTO GPA and in FTAs, have preserved their policy space and their ability to use reinvestment of tax dollars to spur domestic jobs and economic development by excluding major elements of government contracting from trade-pact procurement rules, Democratic and Republican presidents alike have bound almost every U.S. government agency outside the defense sector to the pacts' terms. This includes Homeland Security, with a limited exception for uniforms for Transportation Security Administration staff, in the recently revised WTO GPA.²⁶ While U.S. procurement coverage exceptions have been limited to set asides for small and minority businesses and the use of U.S. steel for certain construction contracts, other major developed countries have excluded wide swaths of their construction activity and whole categories of goods. Even when access to procurement opportunities is used to sell a trade pact, for instance with respect to the U.S.-Panama FTA and the Panama Canal improvement project, a close review of the actual schedule of commitments shows that Panama excluded significant elements of its Canal project, by far its largest procurement expenditure, from the pact's procurement obligations.²⁷

A recent U.S. Government Accountability Office (GAO) report found that the United States opened twice as much procurement to foreign firms as the next five largest WTO GPA signatories *combined* (European Union, Japan, South Korea, Norway and Canada). The European Union only opened up 20 percent of its procurement market, providing under \$331 billion in covered procurement, less than half that of the United States. South Korea offered 17 percent of its total procurement market, Norway offered just 12 percent, followed by Japan at 6 percent, and Canada at only 1 percent. This results in an even more uneven playing field where American businesses compete with foreign firms from Japan, all of Europe, Korea, Canada and Norway within a U.S. covered procurement market of \$837 billion but U.S. firms receive only \$381 billion in contract opportunities from these next five biggest GPA signatories.²⁸

Covered Procurement: United States and the Next Five Largest GPA Signatories, 2010

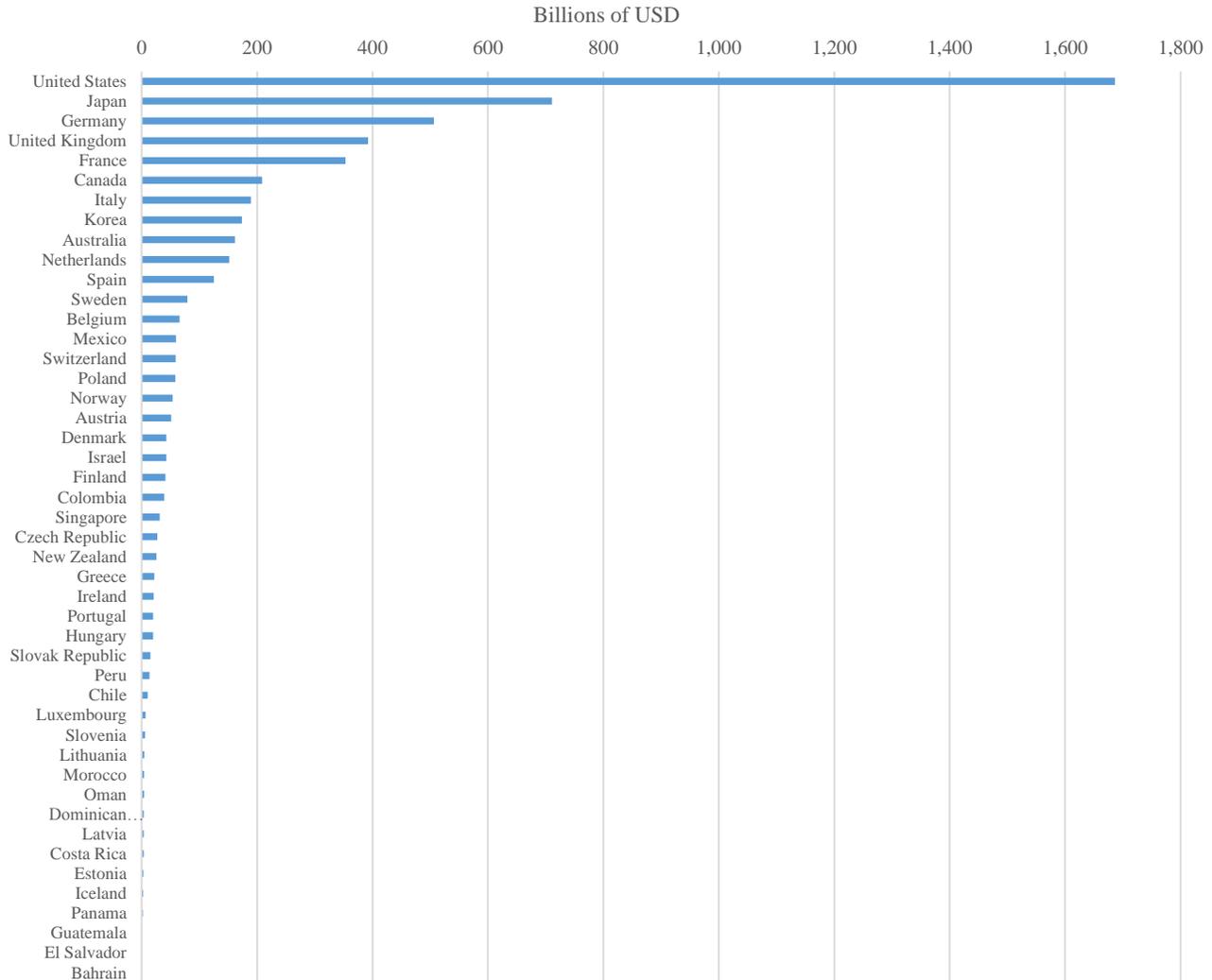
GPA Signatories	Covered Procurement (in \$ million)	Total Procurement (in \$ million)	Covered Procurement as a Share of Total
<i>United States</i>	\$837,462	\$1,735,219	48%
<i>European Union</i>	\$330,589	\$1,627,615	20%
<i>South Korea</i>	\$18,372	\$105,299	17%
<i>Norway</i>	\$5,018	\$41,955	12%
<i>Japan</i>	\$24,981	\$406,500	6%
<i>Canada</i>	\$2,250	\$223,608	1%

Source: Government Accountability Office

The U.S. approach does not only result in disparities in procurement opportunities relating to goods, but also with respect to services. Canada, the European Union, Japan, Norway and South Korea use a positive list approach for designating covered services while the United States uses a negative list approach. In other words, the United States lists only services that *are not* covered by the agreement, while the other countries list only those sectors that *are* covered. The negative list is more “liberal” in coverage because it is not exhaustive and allows for immediate coverage of new services.

On the next page, we also provide comparisons of the U.S. procurement market with the markets of other members of the GPA that GAO did not include in its analysis and with our relevant FTA partners. Due to data limitations on covered procurement, the only way to compare the U.S. procurement market to these other nations is by looking at total procurement – including both national and subnational entities, such as provinces and municipalities. Using data from the Organization for Economic Co-operation and Development (OECD) and the WTO, Public Citizen compiled the procurement amounts for 46 countries, which represent about 97 percent of the GDP among all parties to the GPA and U.S. FTAs.²⁹ As the graph below shows, the United States’ has the largest total procurement market, more than double any other country.³⁰

Total Procurement Market Size, WTO GPA and FTA Partners, 2015



Sources: Organization for Economic Co-operation and Development, International Monetary Fund, World Trade Organization. Note: All data converted to 2015 U.S. dollars.

In regards to bilateral FTAs, Public Citizen's analysis shows that the total U.S. procurement market is more than two times the size of the procurement markets of *all 20 FTA partners combined*.³¹ This includes the procurement market of Mexico, which is not a signatory to the WTO GPA.

Loss of Policy Space

In addition to forbidding domestic preferences, government procurement rules in trade agreements also limit the criteria governments can use to describe the goods and services they seek and what conditions may be imposed on bidding companies. Effectively, only descriptions of desired goods and services related to end use are permitted. Thus, a government entity can call for a million sheets of A4 paper of a weight that works in copying machines, but cannot require that it have recycled content or be produced in a manner that does not use chlorine. A government can request a certain amount of electricity, but cannot require that the electricity come from renewable sources. A government agency

can order 5,000 extra-long uniforms, but cannot require that they meet sweat-free standards. The conditions governments can set on bidders are also limited to only those related to the financial, legal and technical capacity to perform the contract. This means that had the current agreements been in effect at the time, procurement policies that the United States has employed, such as the prohibition on procurement with companies doing business in or with Apartheid-era South Africa, would be subject to challenge as a violation of trade-pact obligations. This is worth considering in the context of the United States seeking to apply economic pressure on countries doing business with North Korea.

These rules take the following forms:

- *“Technical Specification”*: The WTO procurement policy constraints, for instance, require that “(1) A procuring entity shall not prepare, adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to international trade. (2) In prescribing the technical specifications for the goods or services being procured, a procuring entity shall, where appropriate: set out the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics.”³² This rule means that specifications describing goods or services sought based on how a good is made (sweat-free clothing, sustainably-harvested wood, or recycled content requirements, for instance) or how a service is provided (renewable-source energy) are subject to challenge by the other countries signing the agreement. These challenges are heard by tribunals of trade officials. There is no review of these decisions in U.S. court. If a trade pact tribunal rules against a domestic policy, it can order trade sanctions be imposed against a country until and unless the policy is eliminated.
- *“Conditions for Participation” Rules Prohibit Consideration of Contractors’ Labor or Environmental Track Records or Their Willingness to Do Business With Human-Rights-Violating Countries*: These rules restrict what sorts of conditions and criteria states may employ to specify which bidders may participate. For instance, under WTO rules, procuring entities must “limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement.”³³ Policies that bar contractors based on past environmental, labor rights or worker safety violations or require companies to pay prevailing wages, be green-certified or provide preferences for suppliers with a unionized workforce are thus subject to challenge.³⁴ This rule also forbids state procurement policies that exclude businesses operating in countries with human rights offenses. (And indeed, there was a WTO challenge of Massachusetts’ laws that excluded firms doing business in Burma from state procurement contract bidding.³⁵)

Recommendations

The previous sections outlined the problems with the current trade-pact procurement rules. These issues can only be remedied by reversing the inappropriate expansion of “trade” rules into imposing domestic procurement policy.

The current U.S. international procurement obligations represent a profound missed opportunity to promote economic growth and raise standards at home and abroad. Evidence shows that U.S. taxpayer-funded procurement projects that have strong domestic content requirements support U.S. jobs in high wage industries and have a strong multiplier effect on other industry sectors. These funds can get

recouped by the U.S. Treasury Department in the form of income taxes by the newly employed and taxes on higher business revenue. Not surprisingly, the American public broadly supports requiring tax dollars to be spent on government procurement projects that support U.S. jobs and firms. A recent Rasmussen poll found that 83 percent of Americans believe it is important to Buy American.³⁶

The size of the U.S. procurement market relative to what would be on offer even if other countries opening their entire procurement activities to U.S. firms on a national treatment basis means simply negotiating for better access to foreign procurement markets cannot remedy a significant imbalance. Given the administration has declared “Buy American, Hire American” as a tenet, eliminating the national treatment provisions from trade agreement procurement rules seems the obvious course of action. Absent that, a means to remedy the structural imbalance would be to provide reciprocal national treatment for a set amount of procurement activity that reflects the limited opportunities in each prospective trade agreement partners’ procurement markets and the history of the amount of contracts actually obtained by U.S. firms. Effectively, this would mean capping the covered government procurement amount at a maximum value of goods and services on offer to foreign firms. With the improvements we recommend to implement more reliable reporting on foreign procurement activity and country-of-origin, countries could be provided notice when this ceiling is reached in any given year. However, that approach conflicts with the administration’s overarching commitment to Buy American procurement.

Reversing trade-pact limitations on the federal and state governments’ abilities to set standards for goods, services and bidders is needed to restore the availability of policy tools that already have been proved effective to achieve various policy goals. Doing so is also essential to the principle and practice of democratic governance. There is nothing about government procurement policy that distinguishes it from other government decisions about how to best expend taxpayer funds. Rather, the undue influence in setting “trade” agreement policy by commercial interests with pecuniary interests in procurement policy has resulted in an important element of public policymaking being appropriate and transfigured into opportunity for their private profit – often to the detriment of the broad public interest.

In sum, taxpayers’ ability to determine how their tax dollars should be used and the related procurement policy space for federal and state governments must not be preempted by locking in one-size-fits-all international rules that are not subject to modification absent consensus by trade partner countries. To the extent that any procurement-related terms are appropriate for inclusion in a trade pact, it would be those limited to requiring transparency in procurement opportunities and application procedures and the provision of procurement-related statistics. Public Citizen recommends three key changes to the current approach to procurement policy in U.S. trade agreements:

1. Exercise presidential authority to withdraw from or renegotiate trade-pact procurement obligations.

Currently 60 nations obtain Buy American waivers thanks to U.S. trade agreements and 37 U.S. states and the federal government are restricted with respect to the ways in which they may use government procurement to achieve various policy goals. Withdrawing from or renegotiating trade pact procurement terms are necessary to remedy this problem and to create policy space to expand domestic procurement preferences.

A U.S. president may withdraw from the WTO's GPA by providing 60 days written notice without incurring any liability via WTO GPA Article XXII – 12 (Withdrawal).³⁷ The GPA text makes explicit that the only penalty that can be imposed against one WTO member by another for any dispute relating to the GPA is to suspend benefits under the GPA.³⁸ The standard WTO enforcement system that allows imposition of “cross sectoral” sanctions does not apply to the GPA. Moreover, the implementing legislation for the WTO does not enact the GPA. Rather as described below, implementation is via regulation and the relevant regulation explicitly grants a president authority to remove countries from the list of nations for which domestic preferences are waived.

As Public Citizen wrote in its recent comment submission on the renegotiations of NAFTA, especially given that the administration has declared “Buy American, Hire American” as a core principle, it should prioritize eliminating NAFTA's national treatment provisions and its constraints on technical specifications and the bidder conditions that the federal government may require. As the administration reviews the additional U.S. FTAs, similar changes with respect to the federal government and bound states should be a priority.

2. Exercise presidential authority to reverse the regulatory waivers for trade pact partners from U.S. domestic procurement preference requirements.

The president currently has authority to alter the list of countries for which U.S. domestic procurement preference policies are waived and should use that authority to reverse the trade-agreement waivers. Because the procurement terms of trade pacts are enacted via a regulatory waiver and not by statute, no act of Congress is necessary. Through the Trade Agreements Act, Congress explicitly provided authority for the president to alter the waiver list: “*The President may modify or withdraw any waiver granted pursuant to subsection (a) or designation made pursuant to subsection (b).*”³⁹

3. Improve data collection and data sharing

Transparency is a stated goal of the WTO GPA and FTA procurement chapters. But, the 2017 U.S. GAO report on trade pact procurement terms was highly critical of statistical reporting practices on procurement, stating that “a lack of timely, complete, and consistent statistical reporting by the parties limits transparency.”⁴⁰

With respect to the WTO, many GPA parties have not provided their annual statistical notifications in a timely manner. This includes the United States, which submitted its most recent notification for fiscal year 2010 in September 2016 and has not submitted notifications for fiscal years 2011 through 2013. While Canada submitted data on central government procurement from 2008 to 2013, the notifications did not include data on procurement by subcentral government or by other government entities. Yet it is at this level that 85 to 90 percent of Canada's government procurement occurs. NAFTA requires its signatories to exchange procurement data annually, but NAFTA partners have nevertheless not done so since 2005.⁴¹

A lack of common understanding of definitions of key terms also plagues reporting. For example, reporting country-of-origin of goods is a 1994 GPA requirement, for which Japan reports the suppliers' nationality, which may differ from the origin of the product or services. And, the GPA reporting requirements are trending in the wrong direction. Among GPA parties, the 2014 revised GPA requirements make comparisons *more* difficult, according to the GAO. The 2014 GPA eliminates the country-of-origin data requirement on purchased goods and services. The 2014 revision also

eliminated the requirement for parties to report the estimated value of below-threshold contracts awarded for central government procurement and procurement excluded from the agreement. These changes make it impossible to calculate GPA parties' total central government procurement for 2014 and subsequent years, unless governments voluntarily report that data. It also will not be possible to calculate covered procurement as a share of total procurement.⁴²

Currently, the U.S. government's own statistical data collection and reporting lacks "timeliness, accuracy and comparability" according to GAO, and no U.S. agency has taken responsibility for ensuring that these requirements are met. The GAO states that the interagency decision in 2009 to revise the reporting methodology improved the accuracy of the U.S. government data, but introduced delays. The GAO report found inconsistencies in U.S. reporting to the WTO, stated U.S. agencies lack a methodology for reporting state-level covered procurement consistent with GPA requirements and found gaps in collaboration among U.S. agencies.⁴³

A study required by Executive Order 13788 "Buy American and Hire American" issued on April 18, 2017, called for a U.S. government-wide compilation of data on the amount of contracts obtained by foreign firms and the amount of foreign goods. This will provide a snapshot looking back. But even if, as we recommend, the trade pact national treatment obligations and related waivers are reversed, it will be critical to have annual reporting of such data from U.S. agencies to understand where our tax dollars are being spent.

The overall dearth of data on trade pact procurement rules' outcomes has contributed to the lack of review and oversight about how these trade pact terms have functioned in practice. Were the public and policymakers informed about the value of U.S. contracts obtained by foreign firms or filled with foreign-made goods or the balance between such contracts and those for goods U.S. firms employing U.S. workers have filled for other trade-pact signatory countries, the impact of trade-pact procurement terms undoubtedly would have been more central to past trade-pact debates.

Public Citizen puts forth the following recommendations on statistical reporting that are informed by the GAO's analysis on the annual statistical notifications of GPA and FTA parties:

- To the extent that U.S. trade agreements include any procurement provisions, for instance with respect to transparency in procurement opportunities or bidding procedures, then they must also require parties to *publish publicly* data as detailed as what is required under NAFTA and similar provisions in the 1994 GPA. Such terms must eliminate reporting exceptions for subnational government and other entities and require publication, not just exchange data among parties. Among the agreements reviewed by GAO, only NAFTA has a specific statistical reporting requirement, although no requirement to publish data.
- If the United States does not exit the WTO GPA and/or renegotiate FTA procurement terms to eliminate national treatment, agreements must include reporting requirements that ensure that total government procurement and covered government procurement as a share of the total can both be calculated and that there is a consistent methodology among parties, including with respect to uniform, tight rule of origin reporting. As well, parties must be required to submit data within one year of the reporting period and submit data to a central reporting system, rather than bury the required information on individual country websites.

Public Citizen will closely monitor the developments in the trade-pact procurement policy space, particularly as related to renegotiation of NAFTA, where a precedent for what to do with other bilateral agreements will be set. We will ensure the public is apprised of how new procurement terms will affect peoples' jobs, wages, health and safety, and the environment. We will fight fiercely for the trade-pact changes relating to procurement for which we have long advocated and against any modification that reinforces the current failed system.

ANNEX 1

U.S. States Bound 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	U.S.- Peru FTA	<i>U.S.- Colombia and Panama FTAs</i>
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	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								

	WTO AGP	U.S.- Singapore FTA	U.S.- Chile FTA	U.S.- Australia FTA	U.S.- Morocco FTA	CAFTA	U.S.- Peru FTA	U.S.- Colombia and Panama FTAs
New Mexico								
New York	X	X	X	X	X	X	X	X
North Carolina								
North Dakota								
Ohio								
Oklahoma	X	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								
South Dakota	X	X	X	X	X	X		
Tennessee	X	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.

ENDNOTES

¹ In addition to the United States, the 45 other parties to the GPA are Armenia, Aruba, Canada, European Union (28 member states), Hong Kong, Iceland, Israel, Japan, South Korea, Liechtenstein, Moldova, Montenegro, New Zealand, Norway, Singapore, Switzerland, Taiwan, and Ukraine. (Among these GPA parties, four are U.S. FTA partners: Canada, Israel, South Korea, and Singapore.) The 15 non-GPA U.S. FTA partners with procurement chapters are Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Panama, and Peru.

² Public Citizen, Good Jobs Nation, “Trump’s First One Hundred Days” Federal Contracting with Corporate Offshorers Continues,” April 25, 2017, at 1. Available at <https://www.citizen.org/sites/default/files/gjn-gtw-report-federal-contracting-with-corporate-offshorers-continues-final.pdf> The study combines data from www.usaspending.gov, which lists the firms that obtain federal contracts and the dollar value of those contracts, with “shift in production” petitions certified by the Trade Adjustment Assistance (TAA) program of the U.S. Department of Labor (DOL) since 1994. TAA is a relatively narrow program administered by the DOL that provides extended unemployment benefits and retraining funds to certain categories of American workers that the DOL finds to have lost their jobs to offshoring or increased imports. The study only included firms that were certified by the DOL under the “shift in production” category, which is TAA’s terminology for job losses caused by the offshoring of work to non-U.S. locations.

³ See eg. Revised WTO GPA Agreement, Art. IV(2): “With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not: a. treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or b. discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.”

⁴ Among the dozens of federal procurement policies providing preferences or requirements for purchase of raw materials and goods produced domestically are: the Buy American Act of 1933 (41 USC 8301-8305); The Buy America rules originally included in the 1982 Surface Transportation Assistance Act. (The original “Buy America” legislation was part of the Surface Transportation Assistance Act of 1982, which adapted requirements from the Surface Transportation Assistance Act of 1978, and was amended in 1987, 1991, 1998 and 2005.); (23 U.S.C § 103 (3)(4) and 49 U.S.C. § 5323(j)); the Federal Public Transportation Act of 2015 (49 USC 5323(j)); the Passenger Rail Investment and Improvement Act of 2008 (49 USC 24305(f) and 24405(a)); the Federal Aviation Administration Authorization Act of 1994 (49 USC 50101); the Berry Amendment (10 USC 2533a); the Federal Water Pollution Control Act, as amended (33 USC 1388); and the Water Infrastructure Finance and Innovation Act of 2014 (33 USC 3914).

⁵ Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome & Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen and Zambia.

⁶ Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent & the Grenadines, Saint Eustatius, Saint Maarten and Trinidad & Tobago. Haiti is an LDC and a Caribbean Basin country, so is not double counted.

⁷ For the current thresholds, see page 25.4-3 of the Federal Acquisition Regulation, available at:

<https://www.acquisition.gov/far/current/pdf/FAR.pdf>.

⁸ Bureau of Labor Statistics, Current Employment Statistics survey, series ID CES3000000001, accessed Sept. 12, 2017.

⁹ Bureau of Labor Statistics, Quarterly Census of Employment and Wages, accessed Aug. 1, 2017.

¹⁰ Bureau of Labor Statistics, Current Employment Statistics survey, series ID CES3000000003, accessed Sept. 12, 2017.

¹¹ International Monetary Fund, World Economic Outlook Database, accessed Sept. 12, 2017. Available at

<https://www.imf.org/external/pubs/ft/weo/2017/01/weodata/index.aspx>.

¹² U.S. Census Bureau, “Educational Attainment in the United States: Table 2. Educational Attainment of the Population 25 Years and Over, by Selected Characteristics: 2015,” Dec. 2016. Available at:

<http://www.census.gov/hhes/socdemo/education/data/cps/2015/tables.html>.

¹³ U.S. Bureau of Labor Statistics, “May 2012 National Industry-Specific Occupational Employment and Wage Estimates: Sectors 31, 32, and 33 – Manufacturing,” Occupational Employment Statistics, U.S. Department of Labor, accessed Dec. 23, 2016. Available at: http://www.bls.gov/oes/current/naics2_31-33.htm#00-0000.

¹⁴ U.S. Bureau of Labor Statistics, Current Employment Statistics survey, series ID CEU7072000003, accommodation and food services industry, U.S. Department of Labor, extracted Dec. 23, 2016. Available at: <http://www.bls.gov/ces/>.

¹⁵ Dean Baker and Mark Weisbrot, “Will New Trade Gains Make Us Rich?” Center for Economic and Policy Research Paper, Oct. 2001. Available at: http://www.cepr.net/documents/publications/trade_2001_10_03.pdf.

¹⁶ William R. Cline, Trade and Income Distribution (Washington, D.C.: Institute for International Economics, 1997).

¹⁷ Michaela D. Platzer and William J. Mallett, “Effects of Buy America on Transportation Infrastructure and U.S. Manufacturing: Policy Options,” Congressional Research Service, Nov. 10, 2015. Available at:

<http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R44266.pdf>

¹⁸ Bureau of Labor Statistics, Current Employment Statistics survey, series ID CES0500000012, accessed Sept. 12, 2017.

¹⁹ Philip Bell, Steel Manufacturers Association, Testimony for Section 232 Investigation Public Hearing, May 24, 2017. Available at: www.bis.doc.gov/index.php/232-steel-public-comments/1927-steel-232-investigation-public-hearing-transcript/file.

²⁰ Jeannette Wicks-Lim, “Creating U.S. Manufacturing Jobs: How ‘Buying American’ Can Raise the Job-Creation Potential of Public Transit Investments,” Political Economy Research Institute, Dec. 2013. Available at: https://www.peri.umass.edu/media/k2/attachments/PERI_transit_domestic_content.pdf.

²¹ Stephen Gold, “The Competitive Edge: Manufacturing’s Multiplier Effect -- It’s Bigger Than You Think,” Industry Week. Available at: www.industryweek.com/global-economy/competitive-edge-manufacturings-multiplier-effect-its-bigger-you-think.

²² Dan Meckstroth, “How Important Is U.S. Manufacturing Today?,” Manufacturers Alliance for Productivity and Innovation, Sept. 13, 2016. Available at: <https://www.mapi.net/forecasts-data/how-important-us-manufacturing-today>.

²³ Under the unreasonable cost exception to the Buy American statute, the domestic price preference is six percent (if the lowest domestic offer is from a large business concern) to 12 percent (if the lowest domestic offer is from a small business

concern). See Kate M. Manuel, “The Buy American Act – Preferences for ‘Domestic’ Supplies: In Brief,” Congressional Research Service, Apr. 26, 2016. Available at: <https://fas.org/sgp/crs/misc/R43140.pdf>

²⁴ Economic Research Service, “Rural America at a Glance, 2016 Edition,” United States Department of Agriculture, Nov. 2016. Available at: <https://www.ers.usda.gov/webdocs/publications/80894/eib-162.pdf?v=42684>.

²⁵ Scott Andes and Mark Muro, “Jobs Alone Do not Explain the Importance of Manufacturing,” Brookings, April 3, 2013. Available at: <https://www.brookings.edu/blog/the-avenue/2013/04/03/jobs-alone-do-not-explain-the-importance-of-manufacturing/>.

²⁶ World Trade Organization, “United States of America – Central Government Entities – Annex 1.” Available at: <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=UnitedStates&AnnexNo=1&ContentCulture=en>.

²⁷ Public Citizen, “Red Herring Alert: U.S.-Panama FTA Does NOT Provide Broad Access for U.S. Firms to Panama’s Massive Canal Improvement Project.” Available at: www.citizen.org/sites/default/files/panama_fta_canal_procurement_limits.pdf.

²⁸ Government Accountability Office, “Government Procurement: United States Reported Opening More Opportunities to Foreign Firms Than Other Countries, but Better Data Are Needed,” Feb. 2017. Available at: www.gao.gov/assets/690/682663.pdf.

²⁹ The data for the following countries comes from the OECD’s procurement database: Australia, Austria, Belgium, Canada, Colombia, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, United Kingdom, and the United States. The OECD database provided general government procurement as a percentage of GDP. That percentage was multiplied by each country’s corresponding GDP found in the International Monetary Fund’s World Economic Outlook database. The data for the following countries comes from the WTO’s trade policy reviews: Bahrain, Chile, Dominican Republic, El Salvador, Guatemala, Morocco, Oman, Panama, Peru, and Singapore.

³⁰ All data has been inflation-adjusted to 2015 dollars using the Congressional Budget Office’s Consumer Price Index Research Series. Since no single data source presents directly comparable numbers between all countries, these numbers come from the OECD’s Government at a Glance Database and the WTO.

³¹ This analysis included all U.S. FTA partners that have procurement chapters, except for Honduras and Nicaragua due to data limitations for those countries.

³² Article X(1)and(2) (Technical Specifications and Tender Documentation), Revised Agreement on Government Procurement, World Trade Organization. Available at: https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm#articleVI.

³³ Article VIII(1) (Conditions for Participation), of the Revised Agreement on Government Procurement, World Trade Organization. Available at: https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm#articleVI.

³⁴ See eg. Revised WTO GPA Agreement, Art. VIII(4), which lists the permissible conditions for exclusion. “Where there is supporting evidence, a Party, including its procuring entities, may exclude a supplier on grounds such as: a. bankruptcy; b. false declarations; c. significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts; d. final judgments in respect of serious crimes or other serious offences; e. professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier; or f. failure to pay taxes.

³⁵ WTO, “DS88: United States – Measure Affecting Government Procurement,” June 20, 1997. Available at: www.wto.org/english/tratop_e/dispu_e/cases_e/ds88_e.htm.

³⁶ Rasmussen Reports, “83% Say It’s Important to Buy America,” Jan. 26, 2017. Available at: www.rasmussenreports.com/public_content/business/general_business/january_2017/83_say_important_to_buy_american.

³⁷ WTO GPA Art. XXII-12 (Withdrawal) Available at www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm

“Any Party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of 60 days from the date the Director-General of the WTO receives written notice of the withdrawal. Any Party may, upon such notification, request an immediate meeting of the Committee.”

³⁸ WTO GPA Art. XXII(2) (Consultations and Dispute Settlement). Available at www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm “...(2)The Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, with the exception that, notwithstanding paragraph 3 of Article 22 of the Dispute Settlement Understanding, any dispute arising under any Agreement listed in Appendix 1 to the Dispute Settlement Understanding other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement listed in Appendix 1 of the Dispute Settlement Understanding.”

³⁹ 19 U.S. C. Section 2511(c).

⁴⁰ Government Accountability Office, “Government Procurement,” Feb. 2017. Available at: www.gao.gov/assets/690/682663.pdf.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.