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## **International Government-Procurement Obligations of the United States: An Overview**

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# International Government-Procurement Obligations of the United States: An Overview

## **Summary**

This report contains an overview of the major procurement agreements to which the United States is a party, including the World Trade Organization (WTO) Agreement on Government Procurement, the procurement chapter of the North American Free Trade Agreement (NAFTA) and provisions from other free trade agreements. In addition, this report highlights major federal laws that relate to the government-procurement obligations of the United States.

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# International Government-Procurement Obligations of the United States: An Overview

Over the last few decades the United States has played an active role in the development of international trade agreements dealing with government procurement. The most notable agreements are contained in the World Trade Organization (WTO) Agreement on Government Procurement and the procurement chapter of the North American Free Trade Agreement (NAFTA), but many other free trade agreements also include government procurement provisions. Each of these agreements has obligated the United States to perform under specific requirements. The first section of this report will detail the U.S. obligations under these international agreements.

## The WTO Agreement on Government Procurement

**Overview.** The United States' WTO obligations with respect to government procurement are contained in the WTO Agreement on Government Procurement (AGP).<sup>1</sup> Generally, the AGP applies the basic WTO national treatment and most-favored-nation obligations to the area of government procurement. The AGP was negotiated during the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), and took effect in the United States on January 1, 1996.<sup>2</sup> Unlike other provisions of the WTO, which countries must accept as a condition of membership, the AGP is a plurilateral agreement. Therefore, AGP parties are only committed to apply the agreement to other AGP parties. Presently, in addition to the United States, the AGP has been accepted by the European Communities (EC), each of the 25 EC

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<sup>1</sup> Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4B, Article III, Legal Instruments-Results of the Uruguay Round vol. 31, 1915 U.N.T.S. 103 [hereinafter AGP]; *see also* Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. 103-116, 103d Cong. 2d Sess. (1994).

<sup>2</sup> The Uruguay Agreements Act, Pub. L. No 103-465, 108 Stat. 4809 § 101(d)(17) (1994). This act amended the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 236 (1979), which was the existing U.S. law with respect to implementing government procurement obligations. *See* House Committee on Ways and Means, *Overview and Compilation of U.S. Trade Statutes* 188 (2003 ed.) [hereinafter *Overview of Trade Statutes*].

Member countries,<sup>3</sup> Canada, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, and Switzerland.<sup>4</sup>

**General Obligations.** The AGP applies to “any law, regulation, procedure or practice regarding any procurement by entities covered by the Agreement.”<sup>5</sup> This includes central and sub-central governmental entities, as well as other government-related entities that a member Party designates.<sup>6</sup> In addition, the AGP governs “procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.”<sup>7</sup>

Pursuant to Article I, each Party to the AGP must submit an Appendix with Annexes that list the Party’s covered entities, as well as the products and services that it may or may not procure for AGP purposes. The Appendix is divided into five Annexes: Annex I covers central government entities; Annex II, sub-central government entities; Annex III, all other entities which procure in accordance with the AGP; Annex IV, services and; Annex V, construction services.<sup>8</sup>

It is important to note that the AGP does not apply to all procurement contracts, but only to those contracts that are covered by a Party’s specific commitments. Further, of the covered contracts, the AGP only applies to those that are valued at or exceed designated monetary thresholds set forth in each Party’s Annexes in terms of Special Drawing Rights (SDRs).<sup>9</sup> In the United States the thresholds are given official dollar amounts in biennial notices issued by the Office of the United States Trade Representative (USTR).<sup>10</sup> The U.S. Annexes, which set out the scope of U.S. commitments, will be discussed in detail later in this report.<sup>11</sup>

The AGP further provides that where governmental entities, “in the context of” AGP-covered procurement, require non-listed enterprises to award contracts in

<sup>3</sup> These are: 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, and the United Kingdom.

<sup>4</sup> Parties to the AGP are available at [[http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e/](http://www.wto.org/english/tratop_e/gproc_e/memobs_e/)] htm.

<sup>5</sup> AGP, *supra* note 1, at Art. I:1.

<sup>6</sup> *Id.*.

<sup>7</sup> *Id.* at Art. I:2. The term “procurement” is not defined in the AGP, however, the U.S. General Notes contains a list of the types of transactions that the United States does *not* deem to constitute a procurement. *See infra* notes 71-80 and accompanying text.

<sup>8</sup> AGP, *supra* note 1, at Art. I:1, fn. 1.

<sup>9</sup> *Id.* at Art. I:4.

<sup>10</sup> *See* 68 Fed. Reg. 70861 (December 19, 2003) (setting forth the procurement thresholds for the calendar years 2004-2005) [hereinafter USTR Threshold Notice].

<sup>11</sup> *See infra* notes 50-70, and accompanying text.

accordance with particular requirements, Article III obligations regarding national treatment and non-discrimination “apply *mutatis mutandis* to such requirements.”<sup>12</sup> One commentator explains this requirement by stating that “a listed entity could not oblige an independent enterprise to favour national suppliers when purchasing goods on its behalf,” and further notes that “[t]he increasing privatization of public services gives added importance to this rule.”<sup>13</sup>

Consistent with the overall framework of the WTO, the AGP requires national treatment and nondiscrimination in contracting. In addition, the AGP contains obligations regarding tendering procedures, qualification of suppliers, offsets, invitations to participate in procurements, tender and selection procedures, awarding of contracts, transparency, and challenge procedures. Disputes under the Agreement are generally subject to WTO consultation and dispute settlement procedures, although the AGP does establish some special rules. The AGP also contains general exceptions from Agreement obligations, as well as a specific national security exception. A party to the AGP may also make changes to its Schedule, however, the changes are subject to consultations with the WTO and, in the case of significant changes, negotiations with member states on possible compensation.

**National Treatment and Non-discrimination (Article III).** AGP national treatment and most-favored nation (MFN) obligations apply with respect to goods, services, and suppliers of goods and services and involve issues related to the country of origin of goods and the degree of foreign affiliation or ownership of locally established service suppliers.

Both the national treatment and MFN obligations are contained in Article III paragraph 1, which provides that

With respect to all laws, regulations, procedure 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.

Article III, paragraph 2 of the AGP prohibits discrimination against locally-established suppliers based on foreign ownership links or foreign supply. The provision states that

With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure:

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<sup>12</sup> AGP, *supra* note 1, at Art. I:3. The Latin phrase *mutatis mutandis* is commonly translated as “with the necessary changes.”

<sup>13</sup> E. McGovern, *International Trade Regulation* § 6.221 (updated 1999)[hereinafter McGovern].

- (a) that its entities shall not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership; and
- (b) that its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a party to the Agreement in accordance with the provisions of Article IV [i.e. provisions regarding rules of origin].<sup>14</sup>

Article III also provides that the obligations stated above do not apply to “customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government procurement covered by this Agreement.”<sup>15</sup>

**Rules of Origin (Article IV).** Rules of Origin are defined in Annex 1A of the WTO as

laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods provided such rules of origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article I of GATT 1994.<sup>16</sup>

While the AGP itself does not contain separate rules of origin, it does provide that a Party may not implement rules of origin regarding the importation or supply of government procured products or services “which are different from the rules of origin applied in the normal course of trade and at the time of the transactions in question to imports of supplies of the same products or services from the Parties.”<sup>17</sup> Article IV, paragraph 2, however, allows this requirement to be amended in light of the results of WTO negotiations on rules of origin for products and services.<sup>18</sup>

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<sup>14</sup> One commentator has observed that the obligation in Art. III:2(a) regarding foreign affiliation “confers a partial right of establishment” and that “[t]he “benefit is extended to all countries, but only parties to the Agreement could enforce the right.” McGovern, *supra* note 13, at § 6.221.

<sup>15</sup> AGP, *supra* note 1, at Art. III:3.

<sup>16</sup> General Agreement on Tariffs and Trade 1994 (GATT 1994), WTO Annex 1A.

<sup>17</sup> AGP, *supra* note 1, at Art. IV:1. The United States sets forth its rule of origin for “eligible products” in § 302(b) of the Trade Agreements Act of 1979. *See* Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 236 (1979), *infra* note 98 and accompanying text. Pursuant to this statute the United States Customs Service issues both final definitions and rulings with respect to country of origin. *See* 19 C.F.R. §§ 177.21 et seq. (2003).

<sup>18</sup> AGP, *supra* note 1, at Art. IV:2.



**Tendering Procedures (Article VII).** Article VII of the AGP establishes the general rules regarding tendering procedures. A tendering procedure is the system through which companies engage in competitive bidding for government and other contracts. Specifically, Parties to the AGP are to ensure that their procedures are “applied in a non-discriminatory manner”<sup>19</sup> and “shall not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition.”<sup>20</sup> Article VII, paragraph 3 defines the three types of tendering procedures governed by the AGP as: (1) open tendering procedures – in which all interested suppliers may bid; (2) selective tendering procedures – under which only those suppliers invited to bid may do so and; (3) limited tendering procedures – where the entity contacts the suppliers individually and requests bids.<sup>21</sup>

**Qualification of Suppliers (Article VIII).** Article VIII requires that AGP Parties not discriminate among suppliers of other Parties, or between domestic suppliers and suppliers of other Parties in the process of drawing up lists of qualifying suppliers.<sup>22</sup> Article VIII also requires qualification procedures to be consistent with eight categories of requirements including that “[a]ny conditions for participation in tendering procedures . . . be limited to those which are essential to ensure the firms’ capability to fulfill the contract in question.”<sup>23</sup>

Article VIII(b) further mandates that participation requirements “be no less favourable to suppliers of other parties than to domestic suppliers and shall not discriminate among suppliers of other parties.” In addition, when evaluating the financial or technical capacity of a potential supplier under Article VIII, both “the supplier’s global business activity as well as . . . its activity in the territory of the procuring entity” shall be taken into account.<sup>24</sup> Moreover, Article VIII provides that nothing in the listed requirements “shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Agreement.”<sup>25</sup>

**Selective Tendering Procedures (Article X).** Article X requires that for every covered procurement, the selection of suppliers be fair, non-discriminatory and that international competition be ensured by “inviting tenders from the maximum number of domestic suppliers and supplier of other parties, consistent with the efficient operation of the procurement system.”<sup>26</sup> As provided in Article VIII, Parties may establish qualification procedures and keep lists of qualified suppliers.

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<sup>19</sup> *Id.* at Art. VII:1.

<sup>20</sup> *Id.* at Art. VII:2.

<sup>21</sup> *Id.* at Art. VII:3(a)-(c).

<sup>22</sup> *Id.* at Art. VIII.

<sup>23</sup> *Id.* at Art. VIII(b)

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at Art. VIII(h)

<sup>26</sup> *Id.* at Art. X:1.

However, in cases where there is sufficient time to complete the qualification procedures, suppliers requesting participation “shall be permitted to submit a tender and be considered.”<sup>27</sup> The only exclusionary principle is the efficient operation of the procurement system. In other words, additional suppliers who meet the qualification procedures must be permitted until the admission of additional suppliers would make the operation of the procurement system inefficient.

**Limited Tendering Procedures (Article XV).** Parties may use limited tendering procedures as provided for in Article VII if they are “not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other Parties or protection to domestic producers or suppliers.”<sup>28</sup> Article XV provides numerous situations where limited tender provisions are appropriate.<sup>29</sup> The situations include:

- The absence of tenders under open or selective procedures.
- When the tenders received are collusive.
- When the tenders received are not in conformity with the essential requirements of the tender.
- When the tenders received are from suppliers who do not comply with the conditions for participation established in accordance with the AGP.
- When the products or services can only be supplied by a particular supplier and no reasonable alternative or substitute exists, such as in the case of art work or other exclusive rights arrangements (i.e., patents or copyrights).
- When the products or services can not be obtained in time by means of an open or selective tendering procedure.<sup>30</sup>
- In the case of additional deliveries, (i.e., replacement parts for existing supplies or installations) by the original supplier, or in situations where a change in supplier would require the purchase of equipment or services that are not interchangeable with existing supply.
- In the case of prototypes, first products or services that are developed in the course of contracts for research, experiment, study or original development.

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<sup>27</sup> *Id.* at Art. X:3.

<sup>28</sup> *Id.* at Art. XV:1.

<sup>29</sup> *Id.* at Art. XV:1(a)-(j).

<sup>30</sup> This exception is limited to “reasons of extreme urgency brought about by events unforeseeable by the entity.” *Id.* at Art. XV:1(c)

- Where additional construction, within the objectives of the original tender, are necessary to complete the terms of the original tender.<sup>31</sup>
- New construction services that are the repetition of similar construction services for which an initial contract was awarded under open or selective tender procedures.
- Products purchased on the commodities market.
- Purchases made under exceptionally advantageous conditions arising in the very short term.<sup>32</sup>
- Contracts awarded to the winners of design contests, provided the contest is consistent with the principles of the AGP.

**Offsets (Article XVI).** Pursuant to the AGP, governmental entities may not impose, seek, or consider offsets either in qualifying and selecting suppliers, products, or services, or in evaluating tenders and awarding contracts.<sup>33</sup> Offsets are defined in the AGP as “measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements.”<sup>34</sup> At the same time a developing country, may, subject to certain limitations, negotiate conditions for the use of offsets. For example, at the time of accession to the AGP, a developing country may bargain to obtain “requirements for incorporating domestic content.”<sup>35</sup>

**Challenge Procedures (Article XX).** In addition to the possibility of party-to-party dispute settlement under the general WTO dispute resolution procedures, the AGP requires that suppliers have access to separate challenge procedures for alleged breaches in the context of government procurement. In the event that a supplier complains of a breach, each Party must initially encourage the supplier to seek resolution of its complaint in consultations with the procuring entity.<sup>36</sup> The procuring entity is then committed to “accord[ing] impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures

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<sup>31</sup> This exception is limited to situations where “the total value of the contracts awarded for the additional construction services may not exceed 50 per cent of the amount of the main contract.” *Id.* at Art. XV:1(f).

<sup>32</sup> This exception specifically provides that it is “not intended to cover routine purchases from regular suppliers.” *Id.* at Art. XV:1(i).

<sup>33</sup> *Id.* at Art. XVI:1.

<sup>34</sup> *Id.* at note 7.

<sup>35</sup> *Id.* at Art. XVI:2.

<sup>36</sup> *Id.* at Art. XX:1.

under the challenge system.”<sup>37</sup> The AGP then sets forth requirements for the challenge procedures themselves, generally requiring that they be “non-discriminatory, timely, transparent and effective.”<sup>38</sup>

**Dispute Settlement (Article XXII).** The WTO Dispute Settlement Understanding (DSU) applies to consultations and dispute settlement involving the AGP with certain exceptions.<sup>39</sup> For example, only AGP Parties may participate in decisions or actions by the DSU in AGP disputes.<sup>40</sup> Also, cross-retaliation is not available with respect to the AGP.<sup>41</sup> As such, WTO Members may not suspend AGP benefits as a countermeasure in a dispute arising under a separate WTO agreement.<sup>42</sup>

**Exceptions (Article XXIII).** The AGP contains a national security exception, which is generally patterned after Article XXI of the 1994 GATT.<sup>43</sup> The exception states that:

Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interest relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes.<sup>44</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at Art. XX:2-8.

<sup>39</sup> *Id.* at Art. XXII:1; *see also* CRS Report RS20088, *Dispute Settlement in the World Trade Organization: An Overview*, by J. Grimm (providing an overview of the WTO Dispute Settlement procedures and requirements).

<sup>40</sup> AGP, *supra* note 1, at Art. XXII:3.

<sup>41</sup> *Id.* at Art. XXII:7.

<sup>42</sup> *Id.* Conversely, WTO Members may not suspend benefits under other WTO agreements in a dispute arising under the AGP. *Id.*

<sup>43</sup> *Id.* at Article XXIII:1.

<sup>44</sup> *Id.* This exception contains the same “self-judging” language as Article XXI of the GATT, namely, the exception states that the action that the Party may take is one that “it considers necessary for the protection of its essential security interest” relating to the described procurement. *Id.* (emphasis added). The United States has consistently treated national security determinations as falling outside the jurisdiction of any WTO dispute settlement panel. *See* GATT Analytical Index, Guide to GATT Law and Practice 603-04 (6th Ed. 1995); Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. Int’l L. 365, 375-78 (2003); *see also* David E. Sanger, *U.S. Won’t Offer Trade Testimony on Cuba Embargo*, N.Y. TIMES, Feb. 21, 1997 at A1; Paul Blustein and Anne Swardon, *U.S. Vows to Boycott WTO Panel; Move Escalates Fight with European Union over Cuba Sanctions*, WASH. POST., Feb. 21, 1997 at A1. This position, however, has never been adjudicated by an international tribunal. Under current WTO dispute procedures, it is possible that a panel could be established to consider a claim under the AGP, notwithstanding an announced Article XXIII:1 defense, only to determine that it has no jurisdiction in the case.

In addition to the national security exemption, the AGP also contains a number of general exceptions, which are to some extent modeled on the general exceptions contained in Article XX of the GATT 1994.<sup>45</sup> Examples of exemptions include, but are not limited to, public morals, order or safety, intellectual property and philanthropic institutions.

**Rectifications and Possible Compensation (Article. XXIV).** A Party to the AGP has an opportunity to make rectifications to its Appendix, to transfer an entity from one Annex to another, and “in exceptional cases” to make “other modifications” by notifying the WTO Committee on Government Procurement.<sup>46</sup> A WTO Member seeking such action must also provide information as to the likely consequences of the change for the “mutually agreed coverage of the Agreement.”<sup>47</sup> If these changes are of a “purely formal or minor nature,” they will become effective if there is no objection within 30 days of notification.<sup>48</sup> In other cases, the Chairman of the Committee is required to promptly convene a Committee meeting, where proposals and claims for “compensatory adjustments” will be considered. Consideration of proposals and claims is to be done “with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Agreement prior to such notification.”<sup>49</sup> If an agreement is not reached, Parties are then free to pursue the matter under WTO consultation and dispute settlement procedures.

**The United States Appendix to the AGP.** To fully understand the scope of U.S. obligations, it is essential to examine the U.S. Appendix to the Agreement, which includes the U.S. government and quasi-government agencies covered by the AGP, the U.S. threshold for procurement contracts, and various exceptions that the U.S. has taken to AGP obligations.<sup>50</sup>

**Federal agencies (Annex I).** Subject to monetary threshold requirements,<sup>51</sup> the AGP applies to all federal (including legislative and judicial branch) agencies, except the Federal Aviation Administration.<sup>52</sup> While the Department of Defense

<sup>45</sup> AGP, *supra* note 1, at Art. XXIII:2.

<sup>46</sup> *Id.* at Art. XXIV:6(a).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at Art. XXVI:6(b).

<sup>49</sup> *Id.* at Art. XXVI:7(b).

<sup>50</sup> *See generally*, U.S. Appendix to the AGP, WT/Let/330, March 1, 2000, as amended October 16, 2002 (WT/Let/431), *available at* [[http://www.wto.org/english/tratop\\_e/gproc\\_e/apend\\_e.htm#us](http://www.wto.org/english/tratop_e/gproc_e/apend_e.htm#us)] [hereinafter U.S. Appendix]. For example, some restrictions include purchases under minority and small business preference programs, as well as Berry Amendment-type restrictions for DOD textile purchases. *Id.*

<sup>51</sup> The current U.S. thresholds for procurements by central government entities, as specified by the USTR are \$175,000 for goods and services and \$6,725,000 for construction services. *See* USTR Threshold Notice, *supra* note 10.

<sup>52</sup> U.S. Annex I lists 87 executive branch agencies that are covered by the AGP. As  
(continued...)

(DOD) is a listed entity, the Agreement does not apply to specified DOD purchases, such as textiles and specialty metals.<sup>53</sup> Furthermore, DOD purchases in 14 Federal Supply Classification (FSC) categories are generally not covered by the AGP for national security reasons.<sup>54</sup> Moreover, the United States Department of Agriculture listing does not include procurement of agricultural products made in furtherance of agricultural support or human feeding programs.<sup>55</sup> Finally, the U.S. Agency for International Development is not covered with respect to procurement for the direct purpose of providing foreign assistance.<sup>56</sup>

The United States has invoked the Article XXIII national security exception for various federal procurements. Specifically, regarding the Department of Transportation, the Annex states that “pursuant to Article XXIII, the national security considerations applicable to the Department of Defense are equally applicable to the Coast Guard, a military unit of the United States.”<sup>57</sup> With respect to the Department of Energy, the Annex states that “pursuant to Article XXIII, national security exceptions include procurements made in support of safeguarding nuclear materials or technology and entered into under the authority of the Atomic Energy Act, and oil purchases related to the Strategic Petroleum Reserve.”<sup>58</sup> The United States has also provided that 14 FSC categories “are not generally covered” with respect to DOD procurements “due to the application of Article XXIII, paragraph 1.”<sup>59</sup> Finally, the

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<sup>52</sup> (...continued)

explained in the Uruguay Round Statement of Administrative Action, the FAA was not included “since other Code signatories were not willing to extend comprehensive coverage to the purchase of air traffic control equipment.” U.S. Appendix, *supra* note 50 at Annex 1. On Jan. 15, 2004, the United States notified WTO members that procurements by the Department of Homeland Security, except those of the Transportation Security Administration, would also be subject to the terms of the AGP. *See U.S. Tells WTO That Homeland Agency Now Covered Under Procurement Act*, Daily Rep. for Executives (BNA) No. 11, at A-5 (Jan. 20, 2004).

<sup>53</sup> *See* U.S. Appendix, *supra* note 50 at Annex 1. In addition to the DOD exemptions, the U.S. has recently notified WTO members that the same exemptions will apply to the United States Coast Guard, which is currently under the authority of the Department of Homeland Security. *See U.S. Tells WTO That Homeland Agency Now Covered Under Procurement Act*, Daily Rep. for Executives (BNA) No. 11, at A-5 (Jan. 20, 2004).

<sup>54</sup> *See infra* note 60 and accompanying text.

<sup>55</sup> U.S. Appendix, *supra* note 50, at Annex I.

<sup>56</sup> *Id.*

<sup>57</sup> U.S. Appendix, *supra* note 50, at Annex I.

<sup>58</sup> *Id.*

<sup>59</sup> These categories, with their FSC group numbers are: weapons (10); fire control equipment (12); ammunition and explosives (13); guided missiles (14); aircraft and airframe structural components (15); aircraft components and accessories (16); aircraft launching, landing, and ground handling equipment (17); ships, smallcraft, pontoons, and floating docks (19); ship and marine equipment (20); engines, turbines, and components (28); bearings (31); communication, detection, and coherent radiation equipment (58); electrical and electronic equipment components (59), and metal bars, sheets, and shapes (95).

United States has reserved the right to invoke Article XXIII, paragraph 1 with respect to purchases by all covered federal entities in 56 FSC categories.

**State agencies (Annex II).** Thirty-seven states and their covered agencies are currently listed in the U.S. Annex II.<sup>60</sup> Commitments regarding state procurement are subject to the U.S. General Notes, any exceptions listed for a particular state, and the following Annex II general exceptions:

- for specified states the AGP does not apply to the procurement of construction-grade steel (including requirements on subcontracts), motor vehicles and coal;
- the AGP does not apply to preferences or restrictions associated with programs promoting the development of distressed areas and businesses owned by minorities, disabled veterans and women;
- Annex II may not be construed to prevent any state entity from applying restrictions that promote the general environmental quality in the state, as long as the restrictions are not disguised barriers to trade;
- the AGP does not apply to any procurement made by a covered entity on behalf of non-covered entities at a different level of government (e.g., a county or city); and
- the AGP does not apply to restrictions attached to Federal funds for mass transit and highway projects.<sup>61</sup>

**“All other entities” (Annex III).** This Annex covers procurement by the following entities: Tennessee Valley Authority (TVA); the Power Marketing Administrations (PMAs) of the Department of Energy; the Port Authority of New York and New Jersey; the Port of Baltimore; the New York Power Authority; and, Rural Electrification Administration Financing.<sup>62</sup> Procurements by some of these entities are subject to specific exceptions stated in the Annex as well as the General Notes. In addition, the AGP does not apply to restrictions attached to federal funds for airport projects with respect to all of the listed entities.

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<sup>60</sup> The current U.S. thresholds for state procurement contracts are \$ 477,000 for procurement of goods and services, and \$6,725,000 for construction contracts. See USTR Threshold Notice, *supra* note 10.

<sup>61</sup> U.S. Appendix, *supra* note 50, at Annex II.

<sup>62</sup> *Id.* at Annex III. The PMAs include the Bonneville Power Administration and the St. Lawrence Seaway Development Corporation. *Id.* The current thresholds for Annex III entities, except for supplies and services contracts for the TVA and the PMAs, are \$538,000 for procurement of goods and services, and \$6,725,000 for procurement of construction services. See USTR Threshold Notice, *supra* note 10. The threshold for supplies and services for the TVA and PMAs is \$250,000. *Id.*

**Services (Annex IV).** Annex IV includes only those services that are not covered by AGP obligations. The U.S. Annex states that the following services from the Universal List of Services,<sup>63</sup> are excluded:

- all transportation services, including launching services, and transportation services where incidental to a contract for the procurement of supplies;
- dredging;
- all services purchased in support of military forces located overseas;
- management and operation contracts of certain government or privately-owned facilities used for government purposes, including federally-funded research and development centers;
- public utilities services, including telecommunication and ADP-related telecommunication services except enhanced (i.e. value-added) telecommunications services;
- research and development and;
- printing services (for Annex II entities only).<sup>64</sup>

Also applicable to the Annex are the U.S. General Notes. For example, General Note 8 contains the U.S. reciprocity requirement for services that is explained in the Statement of Administrative Action submitted to Congress along with the Uruguay Round agreements. The Administration described this requirement as follows:

Most countries limited their coverage of services to those sectors in which they were willing to make market access commitments under the General Agreement on Trade in Services. The United States offered coverage of services procurement in all but seven services sectors, but only on the basis of reciprocal access from other signatories. Most Code members were willing to apply the 1996 Code to procurement of key services, such as computer, environmental, and value-added telecommunications services.<sup>65</sup>

**Construction services (Annex V).** Annex V defines a construction services contract as “a contract which has as its objective the realization by whatever means of civil or building works, in the sense of Division 51 of the Central Product

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<sup>63</sup> The Universal List of Services is contained in document MTN.GNS/W/120, *available at*, [[http://www.wto.org/english/tratop\\_e/serv\\_e/mtn\\_gns\\_w\\_120\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc)].

<sup>64</sup> U.S. Appendix, *supra* note 50, at Annex IV.

<sup>65</sup> 1994 Statement of Administrative Action submitted to Congress along with the Uruguay Round agreements, H.Doc. 103-316, v.1, at 1038-1039 [hereinafter cited as Uruguay Round SAA]; *see also* the World Trade Organization website, *available at* [<http://www.wto.org/>].



Classification [CPC],”<sup>66</sup> and includes within its AGP commitment all services listed in Division 51 of the CPC. The threshold levels for the procurement of construction services are listed in Annexes I-III.<sup>67</sup> A higher threshold for certain construction services of the Republic of Korea, however, is provided for in the U.S. General Notes.

**General Notes.** The United States has claimed exceptions in its General Notes for set-asides on behalf of small and minority businesses.<sup>68</sup>

The General Notes also state that except as otherwise specified in its Appendix, procurement in terms of U.S. coverage does not include

non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or government authorities not specifically covered under U.S. annexes to this agreement.<sup>69</sup>

In addition, procurement does not include the acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions and sale and distribution services for government debt.<sup>70</sup> Further, for contracts to be awarded by non-covered entities, the AGP may not be construed to cover any goods or service component of that contract.<sup>71</sup>

As noted earlier, the United States has established a reciprocity requirement for services, stating that “[a] service listed in Annex 4 is covered with respect to a particular Party only to the extent that such Party has included that service in its Annex 4.”<sup>72</sup>

The U.S. General Notes also contain several country-specific exclusions:

- Canada: AGP does not apply to procurement of goods and services, including construction, by Annex II and III entities.<sup>73</sup>

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<sup>66</sup> U.S. Appendix, *supra* note 50, at Annex V.

<sup>67</sup> *Id.* at Annex I-III.

<sup>68</sup> U.S. Appendix, *supra* note 50, at Note 1.

<sup>69</sup> *Id.* at Note 2.

<sup>70</sup> *Id.* at Note 3.

<sup>71</sup> *Id.* at Note 4.

<sup>72</sup> *Id.* at Note 8.

<sup>73</sup> *Id.* at Note 5.

- Korea: for construction services, AGP applies only to procurement by Annex II and III entities above a 15 million SDR threshold.<sup>74</sup>
- Japan: AGP does not apply to procurement of goods and services, including construction, by NASA<sup>75</sup>
- Japan: U.S. will not extend AGP benefits regarding the award of contracts by Annex III entities that are responsible for the generation or distribution of electricity.<sup>76</sup>

## The North American Free Trade Agreement (NAFTA)

The North American Free Trade Agreement (NAFTA), as approved and implemented by Congress, entered into force on January 1, 1994.<sup>77</sup> Chapter 10 of NAFTA contains extensive procurement obligations, which generally follow and build upon provisions contained in the 1979 GATT Procurement Code.<sup>78</sup> Since Mexico is not currently a party to the WTO AGP, its procurement obligations with the United States are governed solely by NAFTA. Procurement obligations between the United States and Canada had been, prior to NAFTA, contained in the U.S.-Canada Free Trade Agreement, whose \$25,000 threshold for federal goods contracts has been carried forward into the NAFTA agreement.<sup>79</sup>

In addition to exceptions in individual schedules, NAFTA procurement obligations, like those of the AGP, are subject to national security and general exceptions.<sup>80</sup> Article 1018, paragraph 1 contains the Agreement's national security exemption, stating that:

Nothing in this Chapter shall be construed to prevent a Party from taking any action or not disclosing any information which it considers necessary for the

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<sup>74</sup> *Id.* at Note 6.

<sup>75</sup> *Id.* at Note 7. Bids by Japanese firms were excluded from the NASA commitment "in light of Japan's refusal to cover its National Space Development Agency." Uruguay Round SAA, *supra* note 65, at 1038.

<sup>76</sup> *Id.* at Note 9.

<sup>77</sup> The NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat 2057 (1993).

<sup>78</sup> *See* The North American Free Trade Agreement Statement of Administrative Action, H. Doc. 103-159, v.1, 583-88 (providing background information and a discussion on Chapter 10).

<sup>79</sup> *See Id.* at 584. The NAFTA thresholds as applied to Mexico are generally subject to adjustment for inflation. The thresholds are currently as follows: for federal government entities listed in the U.S. Schedule \$58,550 for goods and services, and \$7,611,532 for construction services; for government enterprises listed in the U.S. Schedule, \$292,751 for goods and services, and \$9,368,478 for construction services. *See* USTR Threshold Notice, *supra* note 10.

<sup>80</sup> *See* The North American Free Trade Agreement, Art. 1018, *available at*, [[http://www.nafta-sec-alena.org/DefaultSite/legal/index\\_e.aspx?articleid=138#A1018](http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?articleid=138#A1018)].

protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes.<sup>81</sup>

The NAFTA general exception, set forth in Article 1018 paragraph 2, states:

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 international trade between the Parties, nothing in this Chapter shall be construed to prevent any 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 products or services of handicapped persons, of philanthropic institutions or of prison labor.<sup>82</sup>

## Procurement Obligations Under Other Free Trade Agreements

In addition to the WTO and NAFTA, many of the other Free Trade Agreements (FTAs) that the United States has in effect contain provisions with respect to government procurement. The agreements vary in their respective details, but all share provisions in common, including, but not limited to, exemptions for certain Department of Defense procurements and threshold requirements. For example, the U.S.– Israel FTA contains provisions for the waiver of any buy national provisions for contracts with a value greater than \$50,000.<sup>83</sup> Moreover, our most recent FTAs such as the U.S.– Chile FTA, U.S.– Singapore FTA, U.S.– Morocco FTA and the U.S.– Australia FTA<sup>84</sup> each contain procurement provisions that closely track those provided for by the AGP.<sup>85</sup> With respect to threshold requirements, however, some of the newer FTAs contain thresholds that are much lower compared to the AGP.<sup>86</sup>

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<sup>81</sup> *Id.* at Art. 1018:1.

<sup>82</sup> *Id.* at Art. 1018:2.

<sup>83</sup> U.S. – Israel Free Trade Agreement, *available at* [[http://www.us-israel.org/jsource/US-Israel/FTA\\_Text.html](http://www.us-israel.org/jsource/US-Israel/FTA_Text.html)].

<sup>84</sup> Due to the fact that neither Chile, Morocco, or Australia are a party to the WTO AGP, the FTAs will be the main source of U.S. government procurement obligations with respect to these countries.

<sup>85</sup> *See* 68 Fed. Reg. 70859 (Dec. 19, 2003) (implementing the U.S.–Chile FTA); *see also* 68 Fed. Reg. 70860 (Dec. 19, 2003) (implementing the U.S.–Singapore FTA).

<sup>86</sup> *See* Annex 13A of the U.S.-Singapore Free Trade Agreement, *available at* [<http://www.ustr.gov/new/fta/Singapore/final/text%20final.pdf>.]; *see also* Annex 9.1, Sec. A of the U.S.– Chile Free Trade Agreement, *available at* [<http://www.ustr.gov/new/>] (continued...)

It is also important to note that while there are “essential security” provisions in the agreements with both Chile and Singapore,<sup>87</sup> currently, neither the Morocco or Australia agreements contain a national security exception specifically applicable to government procurement obligations. Furthermore, the proposed Dominican Republic-Central American Free Trade Agreement (DR-CAFTA) also contains provisions relating to government procurement that are similar to those contained in the U.S.- Morocco and U.S.-Australia FTAs (i.e., without a national security exception).<sup>88</sup>

## United States Statutes that Effect International Government-Procurement Obligations

**Buy American Act.**<sup>89</sup> Initially adopted in 1933, the Buy American Act is the major domestic preference statute that governs procurement by the federal government.<sup>90</sup> The Buy American Act requires that the government buy domestic “articles, materials, and supplies” when they are acquired for public use unless a specific exception applies.<sup>91</sup>

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<sup>86</sup> (...continued)

[fta/Chile/final/09.procurement.pdf](#).

<sup>87</sup> The U.S.– Chile FTA contains a general national security exception at Art. 23.2, which provides, *inter alia*, that nothing in the FTA may be construed, *inter alia*, “to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or ... to preclude a party from applying measures that it considers necessary for ... the protection of its own essential security interests.” *See* Annex 9.1, Sec. A of the U.S.–Chile FTA, *available at* [<http://www.ustr.gov/new/fta/Chile/final/09.procurement.pdf>]. Although not expressly stated, a national security exception specific to procurement appears to be alluded to in Annex 9.1, Section A of the U.S.– Chile Free Trade Agreement, regarding generally exempt Defense Department purchases. *See Id.*

The U.S.–Singapore FTA contains an “essential security” exception at Article 21.2, which provides, *inter alia*, that nothing in the FTA may be construed, *inter alia*, “to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or ... to preclude a party from applying measures that it considers necessary for .. the protection of its own essential security interests.” *See generally*, U.S. – Singapore FTA, *available at* [<http://www.ustr.gov/new/fta/Singapore/final.htm>]. Also, the U.S. Appendixes and Annexes that are incorporated or referenced in the FTA, however, invoke the AGP national security exception with respect to certain procurements. *Id.*

<sup>88</sup> *See* Chapter 9 of the Final Text of DR-CAFTA, *available at* [[http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/CAFTA/CAFTA-DR\\_Final\\_Texts/asset\\_upload\\_file766\\_3926.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file766_3926.pdf)].

<sup>89</sup> *See generally*, CRS Report 97-765A *The Buy American Act: Requiring Government Procurements to Come From Domestic Sources*, by J. Luckey (containing a much more detailed discussion of the Buy American Act).

<sup>90</sup> 41 U.S.C. §§ 10a - 10d. (2000).

<sup>91</sup> 41 U.S.C. §§ 10a & 10b (2000).

Goods qualify as domestic under the statute if they are “such unmanufactured articles, materials, and supplies as have been mined or produced in the United States,” or “such manufactured articles, materials, and supplies as have been manufactured in the United States *substantially all* from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States.”<sup>92</sup> Federal regulations define the term “substantially all” as meaning that the “cost of domestic components must exceed 50 percent of the cost of all the components.”<sup>93</sup>

There are five primary exceptions to the Buy American Act. The act does not apply to procurements where its application would be inconsistent with the public interest or unreasonable in cost.<sup>94</sup> In addition, the act does not apply to procurements of products for use outside the United States, or of products not produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality.<sup>95</sup> Lastly, the act does not apply to procurements under \$2,500.<sup>96</sup>

**Trade Agreements Act of 1979 (TAA).** When Congress approved the GATT Procurement Code in the Trade Agreements Act of 1979, it also authorized the President to waive procurement restrictions such as the Buy American Act in implementation of international obligations.<sup>97</sup> Specifically, the statute permits the President to:

waive, in whole or in part, with respect to the eligible products of any foreign country or instrumentality designated under ... [§ 301](b) ..., and suppliers of such products, the application of any law, regulation, procedure, or practice regarding Government procurement that would, if applied to such products and suppliers, result in treatment less favorable than that accorded –

- (a) to United States products and suppliers of such products; or
- (b) to eligible products of another foreign country or instrumentality which is a party to the [WTO AGP] Agreement and suppliers of such products.

The President may designate a foreign country for purposes of the TAA only if he determines that the country or instrumentality:

- is a party to one of the WTO Agreement on Government Procurement or the NAFTA and will provide appropriate reciprocal

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<sup>92</sup> 41 U.S.C. § 10b (2000) (emphasis added).

<sup>93</sup> 48 C.F.R. § 25.101(a).

<sup>94</sup> 41 U.S.C. § 10a. (2000).

<sup>95</sup> *Id.*

<sup>96</sup> 41 U.S.C. 10a. (2000).

<sup>97</sup> Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 236 § 301(a) (July 26, 1979) (codified as amended at 19 U.S.C. § 2511(a) (2000)).

competitive government procurement opportunities to U.S. products and suppliers of such products;

- is a country or instrumentality, other than a major industrial country, which will otherwise assume WTO procurement obligations and will provide such opportunities to such products and suppliers;
- is a country or instrumentality, other than a major industrial country, which will provide such opportunities to such products and suppliers; or
- is a least developed country.<sup>98</sup>

A provision added in the NAFTA Implementation Act of 1993 makes the waiver authority inapplicable to any small business or minority preference.<sup>99</sup>

To encourage additional countries to join the WTO AGP, and to provide reciprocal competitive government procurement opportunities to U.S. goods and suppliers, the TAA requires the President, with regard to procurement covered by the Agreement, to prohibit procurement of products of a foreign country or instrumentality that has not been designated by the President.<sup>100</sup>

The prohibition does not apply, however, in the case of procurement for which there are no offers of U.S. products or services or of eligible products, or such offers are insufficient to fulfill U.S. Government requirements.<sup>101</sup> As amended by the Uruguay Round Agreements Act, the TAA also authorizes the President to waive the prohibition on procurement of products from a non-Party country or instrumentality where the country has: (1) agreed to apply transparent and competitive procedures to its government procurement equivalent to those in the Agreement and (2) maintains and enforces effective prohibitions on bribery and other corrupt practices in connection with its government procurement. The TAA also permits the President to authorize agency heads to waive the prohibition on a case-by-case basis when in the national interest, and to authorize the Secretary of Defense to waive the prohibition for products of countries or entities that enter into a reciprocal procurement agreement with the Department of Defense.<sup>102</sup>

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<sup>98</sup> 19 U.S.C. § 2511(b). The 1979 Procurement Code was implemented by President Carter in Exec. Order 12260. *See* 46 Fed. Reg. 1653 (December 31, 1980); *see also* 46 Fed. Reg. 1657 (December 31, 1980) (containing lists of designated countries issued by the Office of the USTR at the time); 51 Fed. Reg. 6964 (February 27, 1986) (containing the subsequent waiver for Caribbean Basin Economic Recovery Act countries).

<sup>99</sup> NAFTA Implementation Act of 1993, Pub. L. No. 103-182 § 381(a)(3), 107 Stat. 2128 (1993) (codified as amended at 19 U.S.C. § 2511(e) (2000)).

<sup>100</sup> 19 U.S.C. § 2512(a)(1) (2000).

<sup>101</sup> *Id.* at § 2512(a)(2).

<sup>102</sup> *Id.* at § 2512(b).

Specific amendments to the TAA have been made through the years to implement procurement obligations contained in U.S. FTAs.<sup>103</sup> At this time, however, no statutory changes have been made to implement the procurement chapters of the U.S. FTAs with Jordan, Chile or Singapore.

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<sup>103</sup> See *e.g.*, Uruguay Round Agreements Act, Pub. L. No. 103-465 § 342(f)(2)(A), 108 Stat. 4953 (1994) (codified as amended at 19 U.S.C. § 2518(4)(C)) (implementing the U.S. – Israel FTA); *see also id.* at § 342(f)(2)(B) (codified as amended at 19 U.S.C. § 2518(4)(D)) (implementing NAFTA).