215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

How Overreaching "Trade" Pact Rules Can Undermine Buy American and Other Domestic Preference Procurement Policies

SUMMARY: Today's "trade" agreements expand far beyond traditional matters, such as cutting tariffs and limiting quotas. One set of "trade" agreement rules even constrain how the public can direct our democratically-elected federal and state governments to spend our tax dollars. These rules set limits on the government procurement policies signatory countries are allowed to implement domestically. Failing to follow these rules can subject a country to trade sanctions under various trade agreements. However, U.S. trade agreement implementing legislation has not altered U.S. procurement law nor *required* a president to waive Buy American and other preferences. Rather, implementing bills for the North American Free Trade Agreement (NAFTA), the World Trade Organization (WTO) and pacts since refer to a 1974 law that provides presidents *discretionary authority* to waive domestic procurement preferences. *This 1974 law also provides a president with unilateral authority to alter the list of countries that obtain such waivers*. While U.S. presidents have wide authority over government procurement policy related to Buy American waivers for foreign goods and contractors, in practice U.S. presidents have systematically added countries to a waiver list. Thus, today, "Buy American" really means that goods and firms from 60 countries obtain the same access to U.S. federal government contracts as U.S. goods and firms.

Products from and Firms in These 60 Countries Get Treated as if They Were U.S. Goods and Firms

Armenia, **Aruba**, ***Australia,*** **Austria**, *Bahrain,* **Belgium**, **Bulgaria**, ***Canada***, *Chile, Colombia*, *Costa Rica*, **Croatia**, **Cyprus**, **Czech Republic**, **Denmark**, *Dominican Republic, El Salvador*, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, *Guatemala, Honduras*, **Hong Kong**, **Hungary**, **Iceland, Ireland**, ***Israel***, **Italy**, **Japan**, **Latvia**, **Liechtenstein**, **Lithuania, Luxemburg**, *Mexico*, **Moldova**, **Malta**, **Montenegro**, *Morocco,* **Netherlands**, **New Zealand**, *Nicaragua*, **Norway**, *Oman, Panama, Peru,* **Poland**, **Portugal**, **Romania**, ***Singapore***, **Slovak Republic**, **Slovenia**, ***South Korea***, **Spain**, **Sweden**, **Switzerland**, **Taiwan**, **Ukraine**, **UK**

Bold = WTO AGP; Italics = FTA

This is a significant problem. The U.S. government has a long tradition of using its contract spending, which added up to almost $600 billion in 2019, to promote national policy goals. For instance, to promote innovation, the U.S. government has set product requirements and created a market that supports firms' investment in meeting the new standards. So, to incentivize U.S. automakers to create more fuel efficient cars, U.S. procurement standards required cars purchased for the U.S. government fleet to meet fuel efficiency requirements so automakers would invest in improvements that were then required for all cars sold in the U.S. under the Corporate Average Fuel Efficiency standards. Similarly, a portion of government contracts must be awarded to small businesses and women- and minority-owned firms and to qualify for government construction projects, firms must agree to pay workers prevailing wages.

How Trade Agreements Impose Limits on Domestic Procurement Policy

Rules in NAFTA, WTO and other pacts require 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 over a certain dollar-value threshold either set in the agreements and/or by regulation. (The thresholds are inflation-adjusted by U.S. regulation.[1]) These rules mean that we cannot apply the Buy American and other procurement policies that either give preferences for or require purchase of American-made goods when the government buys vehicles, computers, furniture, office equipment, and more and that require materials going into government infrastructure construction to be made-in-America. Currently, **companies and products from 60 nations with which the United States has trade pacts must be given the same access to U.S. federal government contracts as U.S. firms and products for all but the lowest-value government contracts. Effectively, these rules offshore our tax dollars rather than investing them to create jobs and innovation at home.**

These limits on procurement policy apply to most U.S. federal purchases, with limits for U.S. defense agencies and some specific products listed in each trade deal. These constraints also apply to some state-procurement, with most U.S. states bound to the WTO terms. (This chart lists what states are bound to what rules.) Over time as policymakers realized what the rules meant, fewer states were willing to be bound to recent FTAs. The rules also limit environmental, labor and other conditions for contracts, like requiring that workers on infrastructure and construction contracts be paid 'prevailing wages' or requiring recycled content in goods or renewable energy. If the U.S. government–or a state–does not conform its policies to these rules, then the other signatory nations can challenge our policies in foreign tribunals that can impose trade sanctions against the United States until the laws are eliminated or changed.

Traditionally, trade pacts did not set rules on procurement. But such terms were included in the WTO's Agreement on Government Procurement (AGP), covering the United States and 46 other countries, and NAFTA and other free trade agreements (FTA) with 14 additional countries. Imposing constraints on procurement policy via "trade" agreements effectively expropriates our tax dollars and transforms them into opportunities for private profit, while eliminating important policy tools for job creation, green economy innovations and the building of demand for preferred business practices such as payment of prevailing wages or use of recycled content or production of renewable-source energy.

Even if the notion of offshoring our tax dollars in exchange for opportunities for individual U.S. firms to have better access to contracts from other nations were a good one, the way it is done in trade pacts is a losing proposition for the United States. A recent GAO report found that the United States opened twice as much procurement to foreign firms as the next five largest AGP signatories *combined* (European Union, Japan, South Korea, Norway and Canada).The U.S. procurement market is much larger than any but that of the European Union. And, U.S. negotiators bound almost all U.S. federal and state procurement activity to trade pact rules, while other countries preserved policy space to use procurement for job creation and other goals, and excluded many aspects of procurement activity from the rules. The result is that in exchange for some U.S. firms getting some opportunities to bid on equal terms with domestic firms on contracts in other nations with much smaller amounts of procurement, almost all U.S. government contracts are made available on terms equal to U.S. firms for all firms operating in 60 other countries. (This even applies to the subsidiaries of firms from nations that have not signed on to the rules and provided reciprocal access if that subsidiary operates in a nation that has signed on to the rules.)

A U.S. president has the authority to withdraw from the WTO's AGP by simply providing 60 days written notice to the WTO Director-General without incurring any liability at the WTO (WTO AGP Art. XXII – 12 Withdrawal). The AGP 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 (WTO AGP Art. XXII(2) — Consultations and Dispute Settlement). The standard WTO enforcement system that allows imposition of "cross sectoral" sanctions does not apply to the AGP.

How Are These Procurement Policy Constraints Enacted Domestically?

The requirement that the goods and services of all firms located in a trade-pact signatory country be treated the same as American 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.

<u>Thus, to change our current practices does not require an act of Congress. Any U.S. president has explicit authority to eliminate or alter the trade-pact waivers of Buy American preferences.</u>

The waiver rules are contained in the Federal Acquisition Regulation 52.225. These regulations implement a provision of the Trade Agreements Act (19 U.S.C. 2501, *et seq.*) that provides 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*. Moreover, Section 2511(c) explicitly gives the president unilateral authority to <u>alter</u> the list of countries that may obtain waivers from Buy American and other domestic procurement preferences: "*The President may modify or withdraw any waiver granted pursuant to subsection (a) or designation made pursuant to subsection (b).*" This waiver authority has been delegated to the U.S. Trade Representative (USTR). USTR's practice is to add new trade-pact countries or countries joining the WTO procurement agreement to a list found at 48 CFR 25.400.

China, Brazil, India, Vietnam and many other major developing-country industrial powers are outside these waiver categories. Thus, unless or until the United States signs an agreement requiring otherwise, U.S. goods can be given preference over purchase of goods from these countries.

U.S. Procurement Policies that Are Forbidden by "Trade" Agreements

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. There also have been initiatives to require that outsourced government work, such as call centers or engineering contracts, be awarded to firms employing U.S. workers.

Among the key federal procurement policies providing preferences or requirements for purchase of raw materials and goods produced domestically are: the Buy American rules Act of 1933 (41 USC 8301-8305); The Buy America rules originally included in the 1982 Surface Transportation Assistance Act[2] (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).

Specific Trade Pact Rules Forbidding or Exposing Procurement Policy To Challenge

The rules limiting procurement policies added to "trade" agreements forbid preferences for domestic goods and firms *and 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 X amount of electricity but cannot require that electricity come from renewable sources. A government can order 5,000 extra-long uniforms, but cannot require that they meet sweat-free standards. Bidder qualifications are also limited to only those related to the financial, legal and technical capacity to perform the contract. Thus, our "trade" pact partners could challenge rules excluding firms that refuse to meet prevailing wage requirements or that are based in countries with terrible human or labor rights records. Each trade agreement lists what government agencies are covered. For instance, U.S. Appendix I to the WTO GPA lists various exceptions, notes which U.S. states are exempt from the rules, and sets monetary thresholds. (i.e. projects below these funding thresholds are exempt from trade-pact procurement rules).

The "Non-Discrimination" Rule Prohibits Anti-Offshoring Laws and Buy American Policies: These rules require the same or more favorable treatment be given to goods and service and firms operating in countries that have signed "trade" pacts relative to what is provided to domestic firms, goods and services. (This applies to firms merely operating in a trade-pact nation: A Chinese state-owned enterprise operating in Panama obtains these rights.) Domestic preferences are explicitly banned. The non-discrimination rule also forbids anti-offshoring policies that require outsourced government work be done by U.S. workers.

"Technical Specification" Rules Strictly Limit Criteria that Can Be Used to Describe Desired Goods and Services: The WTO procurement policy constraints, for instance, requires that "*technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labeling...shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade...and that technical specifications prescribed by procuring entities shall, where appropriate, be in terms of performance rather than design or descriptive characteristics*." 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) is subject to challenge by the other countries signing the agreement. These challenges are heard by tribunals of trade officials. If they rule against a domestic policy, they can order trade sanctions by imposed against a country until and unless the policy is eliminated.

"Supplier Qualification" 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 qualifications and criteria states may employ to choose suppliers of goods and services. For instance, under WTO rules, procuring entities must limit supplier-participation conditions in procurement "*to those which are essential to ensure the firm's capability to fulfill the contract in question*." 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. 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's laws that excluded firms doing business in Burma from state procurement contract bidding.)

"Buy Ameri<u>can</u>" and "Buy Ameri<u>ca</u>" Acts

The 1933 **Buy American Act** was passed applies to <u>all</u> U.S. federal agency purchases of goods valued over the micro-purchase threshold (currently $3,000). All goods for public use (articles, materials or supplies) must be produced in the United States. Manufactured items must be manufactured here from U.S. materials unless an exception applies. The law applies to goods (vehicles, office supplies, etc.), and to contracts for the construction materials used in the alteration or repair of any public building or work. Domestic construction materials are defined as: an unmanufactured construction material mined or produced in the United States, or a manufactured product when the cost of domestic components exceeds 50 percent of the cost of all components. Buy American has three exceptions: the public-interest exception; the non-availability exception (articles, materials or supplies are not mined, produced or manufactured here in sufficient and reasonably available commercial quantities); and the unreasonable cost exception (the price differential between the domestic product and an identical foreign-sourced product exceeds a certain percentage of the price offered by a foreign supplier).

Buy America sets conditions for federal grants to state, municipal or other entities, including transit authorities. It applies to procurements valued at more than $100,000 from grants administered by the Federal Transit Authority (FTA) or Federal Highway Administration (FHWA). Buy America requires 100 percent U.S. content for iron/steel and manufactured products, although "manufactured" products have been narrowly defined to limit many goods. (The law also used to cover cement.) The FHWA requires all projects it funds to use 100 percent U.S.-manufactured iron and steel products and coatings. The FTA requires all projects it funds to use 100 percent U.S.-manufactured steel and to use manufactured products with 100 percent U.S. content**.** Rolling stock (trains, buses, ferries, trollies) components must have 60 percent U.S. content, with final assembly occurring here. Similar conditions pertain for contracts for airport projects that receive funds from the Federal Aviation Administration under the Airport and Airways Facilities Improvement Act. Such projects require all steel and manufactured products have 60 percent U.S. content and that final assembly occur in the United States.

ENDNOTES

[1] 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.

[2] 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.