
January 2005

FEDERAL PROCUREMENT

International Agreements Result in Waivers of Some U.S. Domestic Source Restrictions





Highlights of GAO-05-188, a report to congressional requesters

January 2005

FEDERAL PROCUREMENT

International Agreements Result in Waivers of Some U.S. Domestic Source Restrictions

Why GAO Did This Study

Congress enacted domestic source restrictions to encourage federal agencies to purchase U.S. goods and services. Congress has also approved international trade agreements that seek to reduce or eliminate restrictions on trade. In addition, the Department of Defense (DOD) has signed defense procurement memoranda of understanding (MOUs) with foreign countries under which the department has agreed to waive certain domestic source restrictions to the extent permitted by law. To provide a better understanding of the relationship between domestic source restrictions and international agreements, GAO was asked to determine the effect these agreements have on the applicability of U.S. domestic source restrictions.

What GAO Recommends

This report contains no recommendations.

What GAO Found

The U.S. is a party to several trade agreements that require each party's goods and services to be given treatment comparable to domestic goods and services in certain government procurements. These agreements include three multilateral trade agreements, four bilateral free-trade agreements, and three recently signed free-trade agreements that now await congressional approval or entry into force. In addition, DOD has signed, with its counterparts in 21 countries, reciprocal defense procurement MOUs that typically call for the removal of barriers to procuring defense supplies.

Together, current trade agreements result in the waiver of the Buy American Act and DOD's Balance of Payments Program for certain products from 45 countries. These waivers are authorized by the Trade Agreements Act of 1979, and are limited to procurements that

- are conducted by the federal entities covered by each agreement,
- exceed dollar thresholds established in each agreement, and
- involve specific categories of products.

For example, the waiver under the World Trade Organization's Government Procurement Agreement, which covers 38 members including the United States, allows eligible products from the other 37 members to compete on a comparable basis with U.S.-made products for covered procurements of 80 U.S. federal agencies without regard to the Buy American Act or the Balance of Payments Program. Likewise, waivers under the other trade agreements allow eligible products from the countries involved to compete in a comparable manner.

The defense procurement MOUs, based on a different legal mechanism, result in the waiver of the Buy American Act and the Balance of Payments Program for products originating in the 21 MOU countries. As with procurements covered by the trade agreements, suppliers of these products compete on a comparable basis with U.S. suppliers in DOD procurements.

Subject to several limited exceptions, neither the trade agreements nor the MOUs affect the remaining domestic source restrictions GAO reviewed, including the Cargo Preference Act of 1954 and those that apply solely to DOD. In general, items covered by these other restrictions are specifically exempted from the trade agreements.

www.gao.gov/cgi-bin/getrpt?GAO-05-188.

To view the full product, including the scope and methodology, click on the link above. For more information, contact William T. Woods at (202) 512-8214 or woodsw@gao.gov.

Contents

Letter		1
Results in Brief		2
Background		3
Numerous International Agreements Have Government Procurement Provisions		4
Trade Agreements and MOUs Result in Waivers of Some Domestic Source Restrictions		8
Agency Comments		10
Appendix I	U.S. Domestic Source Restrictions Included in This Report	11
Appendix II	International Agreements	14
Appendix III	Comments from the Department of Defense	24
<hr/>		
Tables		
Table 1: Countries Covered by Trade Agreements or MOUs Signed with the U.S.		6
Table 2: Members Currently Covered under Agreement		14
Table 3: Members Currently Covered under Agreement		16
Table 4: NAFTA Thresholds		17
Table 5: MOUs Signed between DOD and Its Counterparts in 21 Countries		23

Abbreviations

DOD	Department of Defense
FAR	Federal Acquisition Regulation
FTA	Free Trade Agreement
GPA	Government Procurement Agreement
MOU	memorandum of understanding
OFPP	Office of Federal Procurement Policy
PAN	polyacrylonitrile
TAAs	Trade Agreements Act
USTR	United States Trade Representative
WTO	World Trade Organization

This is a work of the U.S. government and is not subject to copyright protection in the United States. It may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.



United States Government Accountability Office
Washington, DC 20548

January 26, 2005

The Honorable Joseph I. Lieberman
Ranking Minority Member
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Russell D. Feingold
United States Senate

Over the years, Congress has enacted a variety of laws designed to encourage federal agencies to purchase U.S. supplies and services. These laws are commonly referred to as domestic preference laws or domestic source restrictions. Perhaps the best known of these laws is the Buy American Act,¹ a 1933 law that established a statutory preference for U.S. supplies and construction materials. At the same time, Congress has approved a number of international agreements that open certain government procurements to goods and services from countries that are parties to those agreements. In addition, the Department of Defense (DOD) has entered into reciprocal procurement memoranda of understanding (MOUs) with some of its foreign counterparts, under which DOD may procure goods and services from those countries.

You asked us to determine the effect of international agreements on the applicability of U.S. domestic source restrictions. In response, this report (1) identifies the current international trade agreements to which the U.S. is a party that contain government procurement provisions, as well as the reciprocal defense procurement MOUs, and (2) describes how these trade agreements and MOUs affect the applicability of selected domestic source restrictions.

We identified trade agreements that contain government procurement provisions and defense procurement MOUs by searching U.S. government and World Trade Organization (WTO) databases and meeting with officials from the Office of the United States Trade Representative (USTR), the Office of Management and Budget's Office of Federal Procurement Policy (OFPP), and DOD to validate the results of our searches. To identify

¹ 41 U.S.C. §§ 10a-10d.

domestic source restrictions, we also reviewed U.S. laws and regulations, including the Federal Acquisition Regulation (FAR) and the Defense FAR Supplement, and corroborated the results of our search with agency officials. We focused our analysis on the following domestic source restrictions: the Buy American Act and the Cargo Preference Act of 1954,² both of which apply governmentwide, as well as the various statutory and nonstatutory domestic source restrictions that apply solely to DOD, the largest purchaser within the U.S. government.³ (See app. I for the list of domestic source restrictions we reviewed.) Our analysis consisted of determining the effect of the agreements and MOUs on the applicability of the domestic source restrictions and is not intended to serve as a detailed legal review of the relevant laws and regulations. We performed the analysis based on our review of the agreements, MOUs, applicable laws and regulations, and executive agency materials, as well as discussions with agency officials. We conducted our work from May to December 2004 in accordance with generally accepted government auditing standards.

Results in Brief

The United States is currently a party to several trade agreements that require each party's goods and services to be given treatment comparable to domestic goods and services in certain government procurements. These agreements include three multilateral trade agreements, four bilateral free-trade agreements, and three recently signed free-trade agreements that now await congressional approval or entry into force. In addition, DOD has signed reciprocal defense procurement MOUs with its counterparts in 21 countries. These MOUs typically call for the signatories to remove barriers to the procurement of defense supplies. Appendix II summarizes the various trade agreements and MOUs.

Together, the current trade agreements result in the waiver of the Buy American Act and a DOD domestic source restriction known as the Balance of Payments Program for 45 countries. This waiver is limited to those procurements in excess of established dollar thresholds and to the categories of products and the federal entities covered by each agreement. For example, eligible products from the countries that are parties to the World Trade Organization's Government Procurement Agreement

² 46 U.S.C. App. § 1241.

³ According to fiscal year 2003 data from the Federal Procurement Data System, DOD contracting represents approximately 70 percent of total federal government-contracting dollars.

(GPA)⁴ compete on a comparable basis with U.S.-made products in certain U.S. procurements without regard to the Buy American Act and the Balance of Payments Program. Similarly, for DOD procurements, the reciprocal defense procurement MOUs result in the waiver of the Buy American Act and the Balance of Payments Program for products originating in the 21 MOU countries.⁵ Subject to several limited exceptions, neither the trade agreements nor the MOUs affect the remaining domestic source restrictions we reviewed, including the Cargo Preference Act of 1954 and those that apply solely to DOD.

Background

The Buy American Act restricts the U.S. government from purchasing nondomestic end products,⁶ unless an exception applies. These exceptions include

- where the cost of the domestic end product would be unreasonable (which is determined by applying an evaluation factor that increases the price of nondomestic offers in certain circumstances);⁷
- where domestic end products are not reasonably available in sufficient commercial quantities of a satisfactory quality;
- where the agency head determines that a domestic preference would be inconsistent with the public interest;
- where the purchases are for use outside of the United States;
- where the purchases are less than the micro purchase threshold; and
- where the purchases are for commissary resale.

⁴ The official title of this agreement is the Agreement on Government Procurement, but in the U.S., it is often referred to as the Government Procurement Agreement.

⁵ DOD may waive the Buy American Act and the Balance of Payments Program, on a case-by-case basis, for acquisitions from two MOU countries, Finland and Austria.

⁶ According to the Federal Acquisition Regulation (FAR), a domestic end product means an unmanufactured end product mined or produced in the United States, or an end product manufactured in the U.S. if the cost of its components that are mined, produced, or manufactured in the U.S. exceeds 50 percent of the cost of all its components.

⁷ The FAR requires contracting officers to apply an upward price adjustment to a nondomestic offer in supply procurements not subject to the Trade Agreements Act. Contracting officers are to apply this adjustment when a nondomestic offer is the lowest offer and a domestic offer is the next lowest offer. Contracting officers apply a 6 percent upward price adjustment where the lowest domestic offer is from a large business and a 12 percent upward price adjustment where the lowest domestic offer is from a small business. For DOD, the nondomestic price is increased by 50 percent regardless of the size of the lowest domestic offeror.

Congress has passed numerous additional domestic source restrictions,⁸ many of which apply to specific categories of procurements or to particular federal agencies. For example, the Berry Amendment, originally enacted in a 1941 defense appropriations act,⁹ requires DOD to procure domestically produced or grown items, including food, clothing, fabrics, specialty metals, and hand or measuring tools. Many of these laws, especially the ones that apply to DOD, were enacted through annual appropriations or authorization acts,¹⁰ although a number of these have since been codified into permanent law. In addition, DOD has established a number of policy-based source restrictions, including the Balance of Payments Program,¹¹ as well as some other policy-based domestic source restrictions. (For a more detailed description of the domestic source restrictions we reviewed in this report, see app. I.)

Numerous International Agreements Have Government Procurement Provisions

Over the years, the United States government has signed numerous trade-related agreements and defense MOUs with foreign countries that call for each party to waive buy-national laws or accord equal treatment among the parties' covered goods and services in certain government procurements. Currently, the U.S. is a party to seven trade agreements that impose mutual nondiscriminatory procurement obligations

- World Trade Organization's Government Procurement Agreement,
- World Trade Organization's Agreement on Trade in Civil Aircraft,
- North American Free Trade Agreement,
- U.S.–Israel Free Trade Agreement,
- U.S.–Chile Free Trade Agreement,

⁸ Many of the domestic preference laws, including the Buy American Act, establish requirements for a product's domestic content and do not establish a separate requirement for the product's source or supplier. Throughout this report, we use the term "domestic source restriction" for all domestic preference laws or regulations, including those that control a product's domestic content.

⁹ The Berry Amendment was subsequently codified into permanent law in 2001. *See* 10 U.S.C. § 2533a.

¹⁰ For example, some DOD domestic source restrictions apply to procurements of buses, chemical weapons antidotes, supercomputers, and ballistic missile research and development.

¹¹ While the Buy American Act applies to U.S. government purchases of supplies and construction materials for use inside the U.S., the Balance of Payments Program applies similar restrictions to DOD purchases of supplies and construction materials for use outside of the U.S.

-
- U.S.–Singapore Free Trade Agreement, and
 - U.S.–Australia Free Trade Agreement.

In addition, there are 21 DOD MOUs that typically require the signatories to remove barriers to procurement of defense supplies or waive their respective buy-national laws and regulations, to the extent permitted by law, for covered defense procurements.

The GPA and the five Free Trade Agreements (FTAs) apply to certain procurements of covered goods and services from the other member countries. Each agreement contains its own list of covered federal entities and establishes its own dollar thresholds. Some federal agencies, such as the Federal Aviation Administration and the Transportation Security Administration, have been excluded from some agreements. The trade agreements are subject to a number of exceptions, including contracts set aside for small businesses, contracts for national defense purposes, and other specifically excluded services, such as telecommunications, transportation, and research and development, as well as certain agency-specific goods. The Agreement on Trade in Civil Aircraft applies to civil aircraft, aircraft components, and ground flight simulators. The defense MOUs apply to all DOD purchases, including military items, unless otherwise excluded for national security purposes. (For a more detailed description of the trade agreements that are or will shortly be in effect and the MOUs, see app. II.)

Table 1 shows the foreign countries that are covered by the trade agreements and MOUs we identified. (An “X” denotes that the country is covered by that agreement.)

Table 1: Countries Covered by Trade Agreements or MOUs Signed with the U.S.

Country	GPA	Civil aircraft	FTAs	MOU
Aruba	X			
Australia			X	X
Austria	X	X		X
Belgium	X	X		X
Bulgaria		X		
Canada	X	X	X	X
Chile				X
Chinese Taipei		X		
Cyprus	X			
Czech Republic	X			
Denmark	X	X		X
Egypt		X		X
Estonia	X	X		
Finland	X			X
France	X	X		X
Georgia		X		
Germany	X	X		X
Greece	X	X		X
Hong Kong China	X			
Hungary	X			
Iceland	X			
Ireland	X	X		
Israel	X		X	X
Italy	X	X		X
Japan	X	X		
Korea	X			
Latvia	X	X		
Liechtenstein	X			
Lithuania	X	X		
Luxembourg	X	X		X
Macau		X		
Malta	X	X		

Country	GPA	Civil aircraft	FTAs	MOU
Mexico			X	
Netherlands	X	X		X
Norway	X	X		X
Poland	X			
Portugal	X	X		X
Romania		X		
Singapore	X		X	
Slovak Republic	X			
Slovenia	X			
Spain	X	X		X
Sweden	X	X		X
Switzerland	X	X		X
Turkey				X
United Kingdom	X	X		X

Source: GAO analysis.

The U.S. has signed three additional free-trade agreements with Morocco, Bahrain, and a group of Central American countries.¹² The agreement with Morocco has been approved by Congress and will go into effect on a future date agreed between the Parties in an exchange of written notifications; the agreements with Bahrain and the Central American countries are awaiting congressional approval. Additional free-trade agreements are under negotiation with Panama, Thailand, and the Andean countries of Colombia, Ecuador, and Peru. Also, the U.S. has announced its intent to negotiate free-trade agreements with the United Arab Emirates and Oman.

¹² The Central American countries are Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua.

Trade Agreements and MOUs Result in Waivers of Some Domestic Source Restrictions

Together, the current trade agreements result in the waiver of the Buy American Act and the Balance of Payments Program for certain products originating in 45 countries. Similarly, the reciprocal defense procurement MOUs result in the waiver of the Buy American Act and the Balance of Payments Program for certain products from the 21 MOU countries. However, the trade agreements and the MOUs rely on different legal bases for these waivers.

The seven trade agreements require that each party's covered goods and services receive treatment comparable to domestic goods and services in government procurements to which the agreements apply. In order to implement these requirements, the United States has waived, under the authority of the Trade Agreements Act of 1979,¹³ "discriminatory purchasing requirements" that would favor U.S. products over the signatories' products in government procurements subject to the trade agreements. For example, based on the obligations under the GPA, the U.S. has waived the Buy American Act and the Balance of Payments Program for eligible products from the countries that are covered by the agreement. The waiver covers the purchases of eligible products by 80 U.S. federal entities and applies to supply contracts above \$175,000 and construction contracts above \$6,725,000.¹⁴ Similarly, for the six countries that are signatories to the free trade agreements, the U.S. has waived the Buy American Act and the Balance of Payments Program for eligible products purchased by the federal entities specified in those agreements, based on different dollar thresholds negotiated for each of the FTAs. The Agreement on Trade in Civil Aircraft, on the other hand, results in waiver of the Buy American Act for the signatories' government-directed purchases of civil aircraft and components. The effect of these waivers is

¹³ The Trade Agreements Act (TAA) of 1979 (19 U.S.C. §§ 2501-2518) provides the President the authority to waive the Buy American Act and other "discriminatory" provisions for eligible products from countries that have signed an international trade agreement with the United States, or that meet certain other criteria such as being a least developed country. The President does not have the authority to waive any requirement pertaining to a small business or minority business preference. Under the TAA in acquisitions covered by the WTO GPA, agencies may procure only U.S.-made or designated country end products or U.S. or designated country services, unless offers for such end products or services are either not received or are insufficient to fulfill the requirements. This purchase restriction does not apply below the WTO GPA threshold for supplies and services, even if the acquisition is covered by an FTA.

¹⁴ The GPA also applies to certain service contracts above \$175,000. These remain unaffected by the Buy American Act and the Balance of Payments Program waivers, since the Buy American Act and the Balance of Payments Program do not apply to service contracts.

that the eligible products from the member countries compete on comparable footing with U.S.-made products and are not subject to the upward price adjustment during the bid evaluation process based on the Buy American Act and the Balance of Payments Program.

The MOUs are not considered trade agreements as that term is used in the Trade Agreements Act. Therefore, the 21 defense MOUs rely on a different legal mechanism to waive the Buy American Act. That mechanism is the “public interest” exception in the Buy American Act, where the head of the agency may waive the Act when he or she determines that a domestic purchasing preference is not in the public interest. DOD has made such a determination for the MOU countries as well as a comparable determination under the Balance of Payments Program. The effect of these waivers is that the MOU country’s products compete on comparable footing with U.S. products in DOD procurements and are not subject to an upward price adjustment during the bid evaluation process based on the Buy American Act and the Balance of Payments Program. In addition, MOU country components are considered comparable to domestic components for the purpose of determining a manufactured “domestic end product” under the Buy American Act.

On the other hand, other domestic source restrictions, such as the Cargo Preference Acts and those enacted through defense authorization and appropriations acts, are unaffected by the trade agreements because the agreements specifically exclude the items covered by the source restrictions. For example, the specialty metals restricted by the Berry Amendment are expressly excluded from the trade agreements. The other domestic source restrictions also are unaffected by the defense MOUs. This is because the MOUs require DOD to waive buy national laws only to the extent permitted by law, and DOD has no legal authority to waive these other restrictions. The only exception to this is under 10 U.S.C. 2534, which permits DOD to waive the restrictions in that statute on an annual basis for MOU countries. DOD has used this waiver authority for certain items manufactured in the United Kingdom. Other domestic source restrictions contain exceptions¹⁵ or permit waivers on a case-by-case basis independent of any MOU obligations.

¹⁵ While not considered a “waiver,” an exception in the Berry Amendment allows DOD to purchase from MOU countries specialty metals and chemical warfare protective clothing produced outside the U.S.

Agency Comments

We provided a draft of this report to DOD, OFPP, and USTR for review. DOD stated that it has no comments (see DOD response in app. III). OFPP and USTR provided only technical comments, which we incorporated as appropriate.

As arranged with your offices, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after the date of this report. We will then send copies of this report to interested congressional committees; the United States Trade Representative; the Administrator, Office of Federal Procurement Policy; and the Secretary of Defense. We will also make copies available to others upon request. In addition, this report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staffs have any questions regarding this report, please contact me at (202) 512-4841; or John Neumann, Assistant Director, at (202) 512-4645. Major contributors to this report were Shannon Baker-Branstetter, Noah Bleicher, Lisa Simon, and John P.K. Ting.



William T. Woods
Director, Acquisition and Sourcing Management

Appendix I: U.S. Domestic Source Restrictions Included in This Report

We selected the following domestic source restrictions for this report: the Buy American Act and the Cargo Preference Act of 1954, both of which apply governmentwide, as well as various domestic source restrictions that apply solely to DOD.

Source Restrictions Applicable Governmentwide

Buy American Act (41 U.S.C. § 10a-10d)

The Buy American Act was enacted during the Great Depression in order to create and preserve jobs for American workers. The Act covers the acquisition of supplies and construction materials for use in the United States. It requires that federal agencies procure domestically produced, mined, or manufactured articles, supplies, and materials for use in the United States, subject to a number of exceptions. These exceptions include articles that would be unreasonably expensive if purchased domestically; articles that are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities or are not of a satisfactory quality; purchases for which the agency head determines that a domestic preference would be inconsistent with the public interest; purchases that are under the micro purchase threshold; purchases that are for overseas use; or purchases that are for commissary resale.

Cargo Preference Act of 1954 (46 U.S.C. App. § 1241)

The Cargo Preference Act of 1954 requires that the government ship at least 50 percent of the gross tonnage of government-owned, government-financed, or government contractor-owned supplies on U.S. flag vessels. The Act also requires that any officer or employee of the United States who travels on official business overseas or to or from any of the possessions of the United States shall travel and transport his personal effects on U.S. flag ships, where such ships are available, unless the necessity of his or her mission requires the use of a ship under a foreign flag.

Source Restrictions Applicable Solely to DOD

Cargo Preference Act of 1904 (10 U.S.C. § 2631)	The Cargo Preference Act of 1904 requires DOD to use U.S. government ships or U.S.-flag ships when it ships supplies bought by the Army, Navy, Air Force or Marine Corps, subject to a number of exceptions.
Balance of Payments Program	Under the Balance of Payments Program, DOD established a policy to acquire only domestic end products for use outside the U.S. or domestic construction materials for construction to be performed outside the U.S. There are a number of exceptions, including, among others, where the cost of the acquisition is at or below the simplified acquisition threshold; where the acquisition is for certain listed products in FAR 25.104, DFARS 225.104(a)(iii), or DFARS 225.7501; where the contracting officer determines that the requirement can best be filled by a foreign end product or construction material; and where the cost of the domestic construction material would exceed the cost of foreign construction material by more than 50 percent.
Berry Amendment (10 U.S.C. § 2533a)	The Berry Amendment requires DOD to purchase certain items only if they are “grown, reprocessed, reused, or produced in the United States.” Congress first passed the Berry Amendment in 1941 as part of the Fifth Supplemental National Defense Appropriations Act. It was originally enacted to ensure that U.S. troops wore uniforms and consumed food products wholly produced in the U.S. Since 1941, Congress has restricted the purchases of additional commodities through DOD appropriations acts. The Berry Amendment, as codified in 2001, now applies to purchases above the simplified acquisition threshold of food, clothing, tents, fabrics, specialty metals, and hand or measuring tools. The law includes various exceptions that waive the source restrictions in specific circumstances. For example, the Berry Amendment does not apply to procurements in support of combat or contingency operations. Another noteworthy exception in the Berry Amendment allows DOD to purchase from MOU countries specialty metals and chemical warfare protective clothing produced outside the U.S.

10 U.S.C. § 2534

This provision requires DOD to procure various specified items from U.S. and Canadian manufacturers only. Similar to the Berry Amendment, section 2534 includes provisions that permit the Secretary of Defense to waive the source restriction in certain situations. For example, the Secretary of Defense can waive, on an annual basis, the section 2534 source restrictions if they would impede the procurement of defense items under a particular MOU. Under this authority, DOD has issued a waiver for certain items manufactured in the United Kingdom. Items covered under section 2534 include

- buses;
- chemical weapons antidote;
- components for naval vessels (i.e., air circuit breakers, certain anchor and mooring chains, gyrocompasses, electronic navigation chart systems, steering controls, pumps, propulsion and machinery control systems, and totally enclosed lifeboats); and
- ball and roller bearings

**Other Source Restrictions
from Annual DOD
Appropriations and
Authorization Acts**

Annual defense appropriations and authorization acts often restrict certain DOD procurements to items manufactured in the U.S., items manufactured in either the U.S. or Canada, or services performed by U.S. firms. DFARS 225.70 lists items covered by these source restrictions, as well as applicable waivers and exceptions. Items covered under this category include

Restricted Goods

- carbon, alloy, and armor steel plate;
- supercomputers;

Restricted Services

- certain overseas military construction contracts;
- certain overseas architect-engineer service contracts;
- certain research and development contracts in connection with a weapon system or other military equipment; and
- certain research, development, test, and evaluation contracts in connection with the Ballistic Missile Defense Program

**DOD Policy-Based Source
Restrictions**

According to the DFARS, DOD policy currently restricts certain procurements of ship propulsion shafts, periscope tubes, ring forgings for bull gears, and polyacrylonitrile (PAN) carbon fiber.

Appendix II: International Agreements

WTO Government Procurement Agreement

Status

Signed in April 1979 as part of the Tokyo Round of trade negotiations and in force since January 1981; revised and expanded as part of the Uruguay Round negotiations, which led to the formation of the WTO; in force January 1996 as one of the WTO plurilateral agreements.¹

Table 2: Members Currently Covered under Agreement

Aruba	Hong Kong China	Netherlands
Austria	Hungary	Norway
Belgium	Iceland	Poland
Canada	Ireland	Portugal
Cyprus	Israel	Singapore
Czech Republic	Italy	Slovak Republic
Denmark	Japan	Slovenia
Estonia	Korea	Spain
European Community	Latvia	Sweden
Finland	Liechtenstein	Switzerland
France	Lithuania	United Kingdom
Germany	Luxembourg	United States
Greece	Malta	

Source: USTR.

Provision Affecting Source Restrictions

“With respect to [procurements covered by the GPA], 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 favorable than: (a) that accorded to domestic products, services and suppliers; and (b) that accorded to products, services and suppliers of any other Party.”

¹ Unlike most of the WTO Agreements, the Government Procurement Agreement is a plurilateral agreement that allows each signatory to negotiate its own coverage.

The GPA's provisions apply to 56 federal supply classification categories when procured by 80 U.S. federal entities, subject to certain exclusions. These exclusions include small and minority business set-asides, procurements determined to be indispensable for national security or national defense purposes, research and development, operation of certain government or privately owned facilities used for government purposes, public utility services including telecommunications, transportation, dredging, and all services purchased in support of military forces overseas. In addition, the GPA does not apply to certain categories of procurements for some federal entities. Notably, the GPA does not apply to DOD procurements of goods subject to DOD-specific domestic source restrictions.

Implementation of Agreement

The United States has waived "discriminatory purchasing requirements" for eligible products from the current parties to the GPA using the authority of the Trade Agreements Act. FAR 25.4 implements this agreement and further specifies that the Buy American Act is waived for eligible products from parties to the GPA.

Acquisition Values

The GPA applies to supply contracts of \$175,000 or more, service contracts of \$175,000 or more, and construction contracts of \$6,725,000 or more. These thresholds are adjusted approximately every 2 years.

Agreement on Trade in Civil Aircraft

Status

Signed in April 1979 (Tokyo Round); in-force since January 1980.

Table 3: Members Currently Covered under Agreement

Austria	Georgia	Malta
Belgium	Germany	Netherlands
Bulgaria	Greece	Norway
Canada	Ireland	Portugal
Chinese Taipei	Italy	Romania
Denmark	Japan	Spain
Egypt	Latvia	Sweden
Estonia	Lithuania	Switzerland
European Community	Luxembourg	United Kingdom
France	Macau	United States

Source: USTR.

Provision Affecting Source Restrictions	“Signatories shall not require airlines, aircraft manufacturers, or other entities engaged in the purchase of civil aircraft . . . to procure civil aircraft from any particular source, which would create discrimination against suppliers from any Signatory.”
Implementation of Agreement	The United States has waived the application of the Buy American Act for procurement of aircraft and related articles meeting the “substantial transformation” test of the Trade Agreements Act from countries that are parties to the agreement. FAR 25.407 implements this agreement and further specifies that the Buy American Act is waived for civil aircraft and related articles from countries that are parties to the agreement.

North American Free Trade Agreement

Status	Signed in December 1992; in-force since January 1994.
Countries Covered under Agreement	Canada, Mexico, and the United States

Provision Affecting Source Restrictions	<p>“With respect to [procurements covered by NAFTA], each Party shall accord to goods of another Party, to the suppliers of such goods and to service suppliers of another Party, treatment no less favorable than the most favorable treatment that the Party accords to: (a) its own goods and suppliers; and (b) goods and suppliers of another Party.”</p> <p>The NAFTA procurement provisions apply to covered procurements of 53 U.S. federal entities, subject to certain exclusions. These exclusions include small and minority business set-asides; procurements determined to be indispensable for national security or national defense purposes; research and development; information processing and related telecommunications services; ship repair and maintenance; operation of certain government-owned facilities; utilities; transportation and travel services; and dredging. In addition, NAFTA’s procurement provisions do not apply to certain categories of procurements for some federal entities. Notably, NAFTA does not apply to DOD procurements of goods subject to DOD-specific domestic source restrictions.</p>
Implementation of Agreement	<p>The United States has waived “discriminatory purchasing requirements” for eligible products from Canada and Mexico using the authority of the Trade Agreements Act. FAR 25.4 implements this agreement and further specifies that the Buy American Act is waived for eligible products from Canada and Mexico.</p>
Acquisition Values	<p>NAFTA applies to contracts equal to or exceeding the thresholds in table 4. These thresholds are adjusted approximately every 2 years.</p>

Table 4: NAFTA Thresholds

	Threshold for Mexican eligibility	Threshold for Canadian eligibility
Goods	\$58,550	\$25,000
Services	\$58,550	\$58,550
Construction	\$7,611,532	\$7,611,532

Source: Federal Acquisition Regulation.

U.S.–Israel Free Trade Agreement

Status	Signed in April 1985; in-force since August 1985.
Countries Covered under Agreement	Israel and the United States
Provision Affecting Source Restrictions	“The United States shall waive all Buy American restrictions with respect to government agency purchases . . . of \$50,000 or more which would be subject to the Agreement on Government Procurement [but for the GPA’s higher threshold].”
Implementation of Agreement	The United States has waived “discriminatory purchasing requirements” for procurements covered by the U.S.–Israel Free Trade Agreement using the authority of the Trade Agreements Act. FAR 25.406 implements this agreement and further specifies that the Buy American Act is waived for procurements covered by this agreement, with the exception of certain listed federal agencies, including DOD.
Acquisition Values	The U.S.–Israel Free Trade Agreement applies to government agency purchases of \$50,000 or more.

U.S.–Singapore Free Trade Agreement

Status	Signed in May 2003; in-force since January 2004.
Countries Covered under Agreement	Singapore and the United States

Provision Affecting Source Restrictions	<p>“The parties shall apply [certain listed provisions] of the GPA to all government procurement.” The GPA provisions referenced in the U.S.-Singapore Agreement relate to mutually comparable treatment in covered government procurements.</p> <p>The procurement provisions of the U.S.-Singapore Free Trade Agreement apply to the 80 U.S. federal entities covered by the GPA. Subject to several minor exceptions, the Agreement applies to procurements of the same goods and services expressed in the GPA and subject to the same exclusions for procurements of certain categories of goods.</p>
Implementation of Agreement	<p>The United States has waived “discriminatory purchasing requirements” for procurements covered by the U.S.-Singapore Free Trade Agreement using the authority of the Trade Agreements Act. FAR 25.4 implements this agreement and further specifies that the Buy American Act is waived for procurements covered by this Agreement.</p>
Acquisition Values	<p>The U.S.-Singapore Free Trade Agreement applies to supply contracts of \$58,550 or more, service contracts of \$58,550 or more, and construction contracts of \$6,725,000 or more. These thresholds are adjusted approximately every 2 years.</p>
<hr/> <h2>U.S.-Chile Free Trade Agreement</h2> <hr/>	
Status	Signed in June 2003; in-force since January 2004.
Countries Covered under Agreement	Chile and the United States
Provision Affecting Source Restrictions	<p>“With respect to any measure governing procurement covered by [the U.S.-Chile Free Trade Agreement], each Party shall accord to the goods and services of the other Party, and to the suppliers of the other Party of such goods and services, treatment no less favorable than the most favorable treatment the Party accords to its own goods, services, and suppliers.”</p>

The procurement provisions of the agreement apply to 79 U.S. federal entities, subject to certain exclusions. These exclusions include small and minority business set-asides, as well as service contracts for research and development, information processing and related telecommunications services, ship repair and maintenance, operation of certain government-owned facilities, utilities, transportation, dredging, and all services purchased in support of military forces overseas. In addition, the agreement does not apply to certain categories of procurements for some federal entities. Notably, it does not apply to DOD procurements of goods subject to DOD-specific domestic source restrictions.

Implementation of Agreement

The United States has waived “discriminatory purchasing requirements” for procurements covered by the U.S.-Chile Free Trade Agreement using the authority of the Trade Agreements Act. FAR 25.4 implements this agreement and further specifies that the Buy American Act is waived for procurements covered by this agreement.

Acquisition Values

The U.S.-Chile Free Trade Agreement applies to supply contracts of \$58,550 or more, service contracts of \$58,550 or more, and construction contracts of \$6,725,000 or more. These thresholds are adjusted approximately every 2 years.

U.S.–Australia Free Trade Agreement

Status

Signed in May 2004; in-force since January 2005.

Countries Covered under Agreement

Australia and the United States

Provision Affecting Source Restrictions

“Each Party and its procuring entities shall accord unconditionally to the goods and services of the other Party and to the suppliers of the other Party offering the goods or services of that Party, treatment no less favourable than the most favourable treatment the Party or the procuring entity accords to domestic goods, services and suppliers.”

The procurement provisions of this agreement apply to 79 U.S. federal entities, subject to certain exclusions. These exclusions include small and minority business set-asides, as well as service contracts for research and development, basic telecommunications network and services, ship repair and maintenance, operation of certain government-owned facilities, utilities, transportation, dredging, and all services purchased in support of military forces overseas. In addition, the agreement does not apply to certain categories of procurements for some federal entities. Notably, it does not apply to DOD procurements of goods subject to DOD-specific domestic source restrictions.

Implementation of Agreement

The United States has waived “discriminatory purchasing requirements” for procurements covered by the U.S.-Australia Free Trade Agreement using the authority of the Trade Agreements Act. FAR 25.4 implements this agreement and further specifies that the Buy American Act is waived for procurements covered by this agreement.

Acquisition Values

The U.S.-Australia Free Trade Agreement applies to supply contracts of \$58,550 or more, service contracts of \$58,550 or more, and construction contracts of \$6,725,000 or more. These thresholds are adjusted approximately every 2 years.

U.S.–Morocco Free Trade Agreement

Status

Signed in June 2004; will enter into force on a date agreed between the Parties in an exchange of written notifications.

Countries Covered under Agreement

Morocco and the United States

Provision Affecting Source Restrictions

“With respect to any measure covered by [the U.S.-Morocco Free Trade Agreement], each Party, including its procuring entities, shall accord to the goods and services of the other Party, and to the suppliers of the other Party of such goods and services, treatment no less favorable than the

most favorable treatment the Party accords to its own goods, services, and suppliers.”

The procurement provisions of this agreement will apply to 79 U.S. federal entities, subject to certain exclusions. These exclusions include small and minority business set-asides, as well as service contracts for research and development, basic telecommunications networks and services, ship repair and maintenance, operation of certain government-owned facilities, utilities, transportation, dredging, and all services purchased in support of military forces overseas. In addition, the agreement will not apply to certain categories of procurements for some federal entities. Notably, it will not apply to DOD procurements of goods subject to DOD-specific domestic source restrictions.

Implementation of Agreement

This agreement has been approved by Congress and will enter into force on a date agreed between the Parties in an exchange of written notifications. The government procurement provisions of the agreement are reflected in the FAR by Federal Acquisition Circular 2001-27.²

Acquisition Values

The agreement will apply to supply contracts of \$175,000 or more, service contracts of \$175,000 or more, and construction contracts of \$6,725,000 or more. These thresholds will be adjusted approximately every 2 years.

² FAC 2001-27 indicates that the U.S.-Morocco Free Trade Agreement has entered into force. As of January 14, 2005, the agreement has not yet entered into force. As stated above, this will occur on a date agreed between the Parties in an exchange of written notifications.

Reciprocal Procurement Memoranda of Understanding

Table 5: MOUs Signed between DOD and Its Counterparts in 21 Countries

Australia	France	Norway
Austria	Germany	Portugal
Belgium	Greece	Spain
Canada	Israel	Sweden
Denmark	Italy	Switzerland
Egypt	Luxembourg	Turkey
Finland	Netherlands	United Kingdom

Source: DOD.

Provision Affecting Source Restrictions	Although there is some variation in the scope and coverage of the MOUs, they typically call for the removal of barriers to the mutual procurement of defense articles; the evaluation of proposals of defense items produced in each country without applying price differentials under “buy national laws and regulations” to the extent permitted by law; and the giving of full consideration to all qualified sources in each country.
Implementation of Agreement	According to DFARS 225.872-1, DOD has determined it is inconsistent with the public interest to apply the restrictions of the Buy American Act or the Balance of Payments Program to products from the MOU countries, except for products from Finland and Austria for which the restrictions may be waived on a purchase-by-purchase basis.
Acquisition Values	Only 3 of the 21 MOUs have specified dollar thresholds. They range from \$25,000 to \$100,000.

Appendix III: Comments from the Department of Defense



OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION
TECHNOLOGY
AND LOGISTICS

JAN 07 2005

DPAP/PAIC

Mr. William T. Woods
Director, Acquisition and Sourcing Management
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Woods:

This is the Department of Defense (DOD) response to the GAO draft report, "FEDERAL PROCUREMENT; International Agreements Result in Waiver of Some U.S. Domestic Source Restrictions," dated December 16, 2004 (GAO Code 120349/ GAO-050188).

The GAO report offered no recommendations. The Department appreciates the opportunity to review the draft report and we have no comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Deidre A. Lee".

Deidre A. Lee
Director, Defense Procurement
and Acquisition Policy



GAO's Mission

The Government Accountability Office, the audit, evaluation and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

Obtaining Copies of GAO Reports and Testimony

The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's Web site (www.gao.gov). Each weekday, GAO posts newly released reports, testimony, and correspondence on its Web site. To have GAO e-mail you a list of newly posted products every afternoon, go to www.gao.gov and select "Subscribe to Updates."

Order by Mail or Phone

The first copy of each printed report is free. Additional copies are \$2 each. A check or money order should be made out to the Superintendent of Documents. GAO also accepts VISA and Mastercard. Orders for 100 or more copies mailed to a single address are discounted 25 percent. Orders should be sent to:

U.S. Government Accountability Office
441 G Street NW, Room LM
Washington, D.C. 20548

To order by Phone: Voice: (202) 512-6000
TDD: (202) 512-2537
Fax: (202) 512-6061

To Report Fraud, Waste, and Abuse in Federal Programs

Contact:

Web site: www.gao.gov/fraudnet/fraudnet.htm
E-mail: fraudnet@gao.gov
Automated answering system: (800) 424-5454 or (202) 512-7470

Congressional Relations

Gloria Jarmon, Managing Director, JarmonG@gao.gov (202) 512-4400
U.S. Government Accountability Office, 441 G Street NW, Room 7125
Washington, D.C. 20548

Public Affairs

Susan Becker, Acting Manager, BeckerS@gao.gov (202) 512-4800
U.S. Government Accountability Office, 441 G Street NW, Room 7149
Washington, D.C. 20548

**United States
Government Accountability Office
Washington, D.C. 20548-0001**

**Official Business
Penalty for Private Use \$300**

Address Service Requested

**Presorted Standard
Postage & Fees Paid
GAO
Permit No. GI00**

