



September 2016

# INTERNATIONAL TRADE

Government  
Procurement  
Agreements Contain  
Similar Provisions, but  
Market Access  
Commitments Vary

# GAO Highlights

Highlights of [GAO-16-727](#), a report to congressional requesters

## Why GAO Did This Study

The United States and other countries have made commitments under the WTO's GPA and FTAs that open their government procurement to foreign suppliers. Under these commitments, parties agree to a procedural framework for government procurement with provisions on issues such as transparency and nondiscrimination. These commitments have potentially opened an estimated \$4.4 trillion government procurement market to international firms, providing numerous new opportunities for American businesses in foreign markets and for foreign businesses to compete for U.S. government contracts.

As part of your larger request for information on U.S. participation in international procurement agreements, GAO reviewed commitments made by the United States and trading partners in selected international procurement agreements. This report provides information on (1) the provisions and (2) the market access schedules of the selected international procurement agreements. GAO reviewed the provisions and market access schedules across six agreements involving the largest government procurement markets to identify common features and variations. The agreements are the 1994 GPA and the 2014 revised GPA, NAFTA, the South Korea-FTA, the Colombia-FTA, and the Australia-FTA. GAO analyzed WTO and U.S. documents pertaining to the GPA and U.S. FTAs and interviewed USTR and the Department of Commerce agency officials in Washington, D.C. GAO is not making recommendations in this report.

View [GAO-16-727](#). For more information, contact Kimberly M. Gianopoulos at (202) 512-8612 or [GianopoulosK@gao.gov](mailto:GianopoulosK@gao.gov).

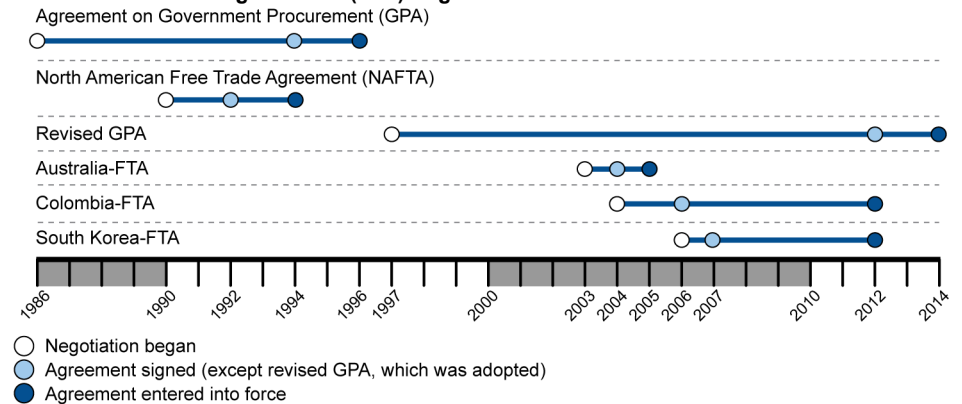
## INTERNATIONAL TRADE

# Government Procurement Agreements Contain Similar Provisions, but Market Access Commitments Vary

## What GAO Found

GAO found that the World Trade Organization's (WTO) Agreement on Government Procurement (GPA) and selected U.S. free trade agreements' (FTA) government procurement chapters that GAO reviewed generally have similarities in text, and commitments, potentially because parties negotiated multiple agreements concurrently (see fig.). Each of the agreements outlines the general method for conducting government procurement, including provisions relating to transparency, procurement procedures, and criteria for procurement decisions. However, differences exist, partially because later agreements reflect new technology.

**Timeline of the World Trade Organization's Agreement on Government Procurement and Selected Free Trade Agreements (FTA) Negotiations**



Source: GAO analysis of agreements. | GAO-16-727

Note: For the FTAs above, the negotiation timeline refers to the negotiation of the entire agreement. This includes the government procurement chapters GAO reviewed.

The 2014 revised GPA generally provides more comprehensive market access than the selected FTAs GAO reviewed. Partners define the degree to which they will open their procurement markets to suppliers from other countries, known as their market access commitments. These commitments outline the entities covered by the agreements, for example, at the central and subcentral government levels (for the United States, these include agencies of the federal government and states), and for what some agreements term "other entities" (which, for the United States, includes utilities). The United States covers 85 central government entities under the revised GPA, but only 53 entities under the North American Free Trade Agreement (NAFTA). Similarly, the United States covers 37 states under its GPA commitments and from no states to 30 in the FTAs GAO reviewed. While all the top five GPA parties GAO reviewed cover some subcentral government entities, Canada, Mexico, and South Korea do not have a subcentral government entity coverage schedule in their FTA commitments. According to the Office of the United States Trade Representative (USTR), parties have certain procurements that they deem sensitive and do not want to open to foreign suppliers, including for social or policy reason. In the agreements GAO reviewed, the U.S.'s trading partners often exclude agriculture, military support, and motor vehicles from their market access commitments.

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**Abbreviation List**

EU	European Union
FTA	Free Trade Agreement
GPA	Agreement on Government Procurement
IMF	International Monetary Fund
NAFTA	North American Free Trade Agreement
SDR	Special Drawing Rights
UN	United Nations
USTR	Office of the United States Trade Representative
WTO	World Trade Organization

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September 27, 2016

The Honorable Jeff Merkley  
Ranking Member  
Subcommittee on Financial Institutions and Consumer Protection  
Committee on Banking, Housing, and Urban Affairs  
United States Senate

The Honorable Tammy Baldwin  
Ranking Member  
Subcommittee on Federal Spending Oversight and Emergency  
Management  
Committee on Homeland Security and Government Affairs  
United States Senate

Government procurement constitutes a significant potential market for international trade, with an estimated annual global size of \$4.4 trillion, and the United States has played a key role in developing trade agreements that partially open government procurement markets, which are often closed to foreign competition, according to officials from the Office of the United States Trade Representative (USTR). Specifically, the United States and other countries have made commitments under the World Trade Organization's (WTO) Agreement on Government Procurement (GPA) and under U.S. free trade agreements (FTA) that open government procurement to foreign suppliers, ensure that the process is conducted transparently and without bias, and provide foreign suppliers with the same rights as domestic ones. In procurements that are covered by these agreements, foreign suppliers are able to compete for certain U.S. government contracts alongside U.S. suppliers, and U.S. suppliers are able to compete for certain foreign government contracts in accordance with the processes established in the agreement. According to USTR, beginning with the Tokyo Round Code on Government Procurement that entered into force in 1981 as part of the General Agreement on Tariffs and Trade, these commitments have potentially opened billions of dollars of procurement to international firms, providing numerous new opportunities for American businesses and government agencies.

As part of your larger request for information on U.S. participation in international procurement agreements, we reviewed commitments made by the United States and trading partners in selected international procurement agreements. This report provides information on the

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commitments made by U.S. trading partners outlined in (1) the provisions and (2) the market access schedules of the selected agreements. This report contains information on the government procurement commitments agreed to by selected parties under the WTO's GPA and U.S. FTAs that have gone into effect since 1994. Specifically, we examined and compared the government procurement commitments of trade partners with the top five WTO's GPA and active U.S. FTA procurement markets.

To review government procurement commitments, we focused on the United States and the trading partners with the top five WTO's GPA procurement markets (the European Union [EU], Japan, Canada, South Korea, and Norway), which together represent over 90 percent of GPA countries' total government procurement. We also focused on the trade partners in FTAs that have come into effect since 1994 with the top five procurement markets (Canada, Australia, South Korea, Mexico, and Colombia) out of all active U.S. FTAs, which together represent over 80 percent of FTA trading partner countries' total procurement.<sup>1</sup> This scope encompasses six agreements: (1) the 1994 GPA and the revised GPA,<sup>2</sup> (2) the government procurement chapters of FTAs covering the top five FTA partner countries (the North American Free Trade Agreement

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<sup>1</sup>The estimated size of government procurement markets is based on GAO's previous work. See GAO, *International Trade: The United States and European Union Are the Two Largest Markets Covered by Key Procurement-Related Agreements*, [GAO-15-717](#) (Washington, D.C.: July 29, 2015).

<sup>2</sup>World Trade Organization Agreement on Government Procurement, 1868 UNTS 194 (1994), available at [https://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_01\\_e.ht](https://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.ht) (accessed June 13, 2016) [hereinafter 1994 GPA]; Revised Agreement on Government Procurement, Annex to the Protocol Amending the Agreement on Government Procurement (Mar. 30, 2012), available at [https://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm) (accessed June 13, 2016) [hereinafter revised GPA].

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[NAFTA],<sup>3</sup> (3) the South Korea-FTA,<sup>4</sup> (4) the Colombia-FTA,<sup>5</sup> and (5) the Australia-FTA.<sup>6</sup> We reviewed and analyzed the text of these six agreements to identify common features and variations in commitments.<sup>7</sup> As we reviewed the commitments of the five largest procurement markets covered by the GPA and the five largest procurement markets among active U.S. FTA trade partners since 1994, our findings may not be applicable to all of the U.S. FTA agreements and do not represent the views of the U.S. government. We also analyzed and compared the market access-related commitments (lists of entities and exclusions) made in the annexes of these agreements that contain coverage schedules.

We conducted this performance audit from August 2015 to September 2016 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions, based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings

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<sup>3</sup>North American Free Trade Agreement (entered into force Jan. 1, 1994), available at <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement> (accessed June 13, 2016) [hereinafter NAFTA].

<sup>4</sup>United States-Korea Free Trade Agreement (entered into force in March 2012), available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> (accessed June 13, 2016) [hereinafter South Korea-FTA].

<sup>5</sup>United States-Colombia Trade Promotion Agreement (entered into force in May 2012), available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text> (accessed June 13, 2016) [hereinafter Colombia-FTA]. Although the name of the agreement is the United States-Colombia Trade Promotion Agreement, for the purposes of this report, we refer to it as the Colombia-FTA because the Office of the United States Trade Representative (USTR) lists this agreement as a free trade agreement.

<sup>6</sup>United States-Australia Free Trade Agreement (entered into in force in January 2005), available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text> (accessed June 13, 2016) [hereinafter Australia-FTA].

<sup>7</sup>This analysis does not represent an opinion of the comparative strengths or weaknesses of the agreements. Statements made herein do not represent the position of the U.S. government on the obligations and commitments of parties to the international agreements discussed.

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and conclusions based on our audit objectives. (See app. I for more information on our scope and methodology.)

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## Background

The United States has made commitments related to its procurement market under the WTO's GPA, in its various forms, and through FTAs negotiated with other countries. In both cases, suppliers compete through a procurement process that follows parameters agreed upon by the parties to the trade agreements. USTR negotiates these agreements and monitors and enforces foreign government compliance once they come into force. Officials in the Department of Commerce's (Commerce) International Trade Administration monitor compliance as well as support USTR's activities and provide services to promote U.S. exports.

The GPA is a plurilateral agreement within the framework of the WTO that, according to the WTO, aims to mutually open government procurement markets among its parties, covering government purchasing of goods, services, and construction work.<sup>8</sup> The current GPA (referred to as the revised GPA) entered into force on April 6, 2014, 20 years after a previous agreement (referred to as the 1994 GPA) was signed on April 15, 1994. The two agreements currently co-exist because Switzerland is still in the process of adopting the revised GPA.<sup>9</sup> All other parties to the 1994 GPA have adopted the revised GPA. According to WTO documents, the revised GPA is a result of parties negotiating refinements to the 1994 agreement. The WTO has stated that these include updating the agreement's text and expanding market access commitments. The revised GPA consists of 18 parties (including the EU) and covers 46 WTO members, including the 28 EU member states (countries). Another 28 WTO members are observers. Of these, 8 members are in the process of acceding to the agreement.

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<sup>8</sup>According to the WTO, plurilateral agreements are WTO agreements that have a narrower group of signatories than most WTO agreements, which have all WTO members as signatories.

<sup>9</sup>According to Commerce officials, Switzerland anticipates ratifying the revised GPA by the end of 2016.



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The United States has FTAs with 20 countries,<sup>10</sup> 4 of which (Canada, Israel, Singapore, and South Korea) are also parties to the GPA. Unlike the GPA, which encompasses dozens of parties, most U.S. FTAs are bilateral. Almost all of the FTAs that the United States has in force include provisions covering government procurement, and most contain a separate government procurement chapter that, like the GPA, contains market access commitments that include coverage schedules and threshold amounts for procurement activities to which the agreement applies.<sup>11</sup>

According to USTR, to implement U.S. obligations under the international agreements that cover government procurement, the United States waives preferential purchasing requirements that would otherwise be inconsistent with the international agreement.<sup>12</sup> For example, for contracts

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<sup>10</sup>The United States has FTAs with the following countries: Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Singapore, and South Korea.

<sup>11</sup>According to Commerce officials, the only government procurement commitment in the Jordan-FTA is to “enter into negotiations with regard to Jordan’s accession” to the GPA. Therefore, they noted, the Jordan-FTA government procurement commitment does not include any specific procedural or market access commitments.

<sup>12</sup>The Trade Agreement Act of 1979, as amended, authorizes the President to waive any law, regulation, procedure, or practice for eligible products from certain countries that results in less favorable treatment than that accorded to domestic products and suppliers or than that accorded to eligible products or suppliers of a party to the GPA. 19 U.S.C. § 2511. Such countries include those that have signed an international trade agreement with the United States or that meet certain other criteria such as being a least-developed country. 19 U.S.C. § 2511. The act also defines a least-developed country to be any country on the United Nations (UN) General Assembly list of least-developed countries. 19 U.S.C. § 2518. According to the UN, least-developed countries are defined as low-income countries suffering from structural impediments to sustainable development. For identifying least-developed countries, three criteria are used by the UN’s Committee for Development Policy: gross national income per capita, the Human Assets Index, and the Economic Vulnerability Index.

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covered by the GPA and U.S. FTAs, USTR has waived the Buy American Act and other preferential provisions for eligible products.<sup>13</sup>

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## Selected International Government Procurement Agreements Generally Contain Similar Provisions

Our review of government procurement commitments in agreements between the United States and selected trading partners found that, in general, the text in these agreements contained similar provisions.<sup>14</sup> The revised GPA, the Colombia-FTA, and the Australia-FTA were negotiated concurrently and generally maintain many of the commitments in the 1994 GPA, NAFTA, and the South Korea-FTA while adding explicit language related to nondiscrimination of other parties' suppliers, promotion for the environment, and shorter timelines. We found nine common characteristics across the agreements. We also found that some differences exist, for example because later agreements have reflected new technology.

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## Negotiations of GPA and FTAs Overlapped

USTR negotiated all of the agreements on behalf of the United States, and negotiation timelines often overlapped (see fig. 1). A former trade agreement negotiator told us that the revised GPA reflected an "evolution" from the 1994 GPA, because negotiators focused on streamlining the language and addressing parties' proposed changes. USTR officials stated that recent FTAs, including the Colombia-FTA and the South Korea-FTA, reflect the changes incorporated into the revised GPA. We found that later agreements reflect modernized technology. For instance,

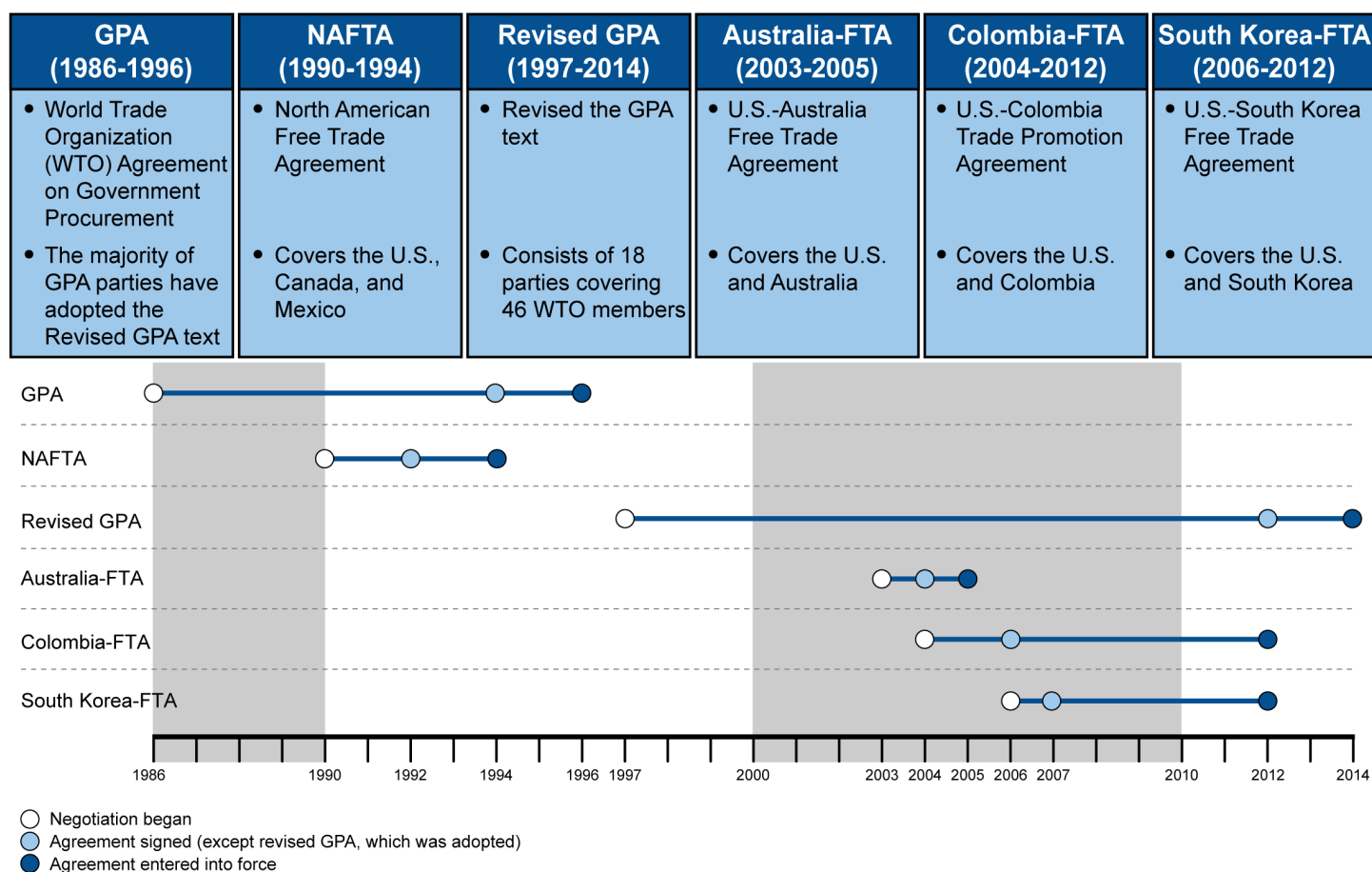
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<sup>13</sup>48 C.F.R. § 25.402(a)(1). The Buy American Act is an example of domestic preference legislation that places conditions on federal government purchases to require that federal agencies procure unmanufactured articles, materials, and supplies that have been domestically produced or mined, and manufactured articles, supplies, and materials that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States for use in the United States, subject to a number of exceptions. 41 U.S.C. §§ 8301 – 8305. The Buy American Act was enacted in 1933 and applies to direct purchases by the federal government of more than a statutorily established level (currently \$3,000). Congress has enacted other forms of domestic preference legislation in the years following that can impose a higher domestic content requirement or apply to indirect purchases.

<sup>14</sup>While we reviewed the government procurement chapter in NAFTA, the Australia-FTA, the South Korea-FTA, and the Colombia-FTA to analyze the commitments therein, for the purposes of this report the term "agreement" or "agreements" is used to refer to the government procurement chapters of those free trade agreements, as well as the entirety of the 1994 GPA and the revised GPA.

the 1994 GPA and NAFTA state that tenders (bids) shall normally be submitted in writing directly or by mail while also including provisions regarding the submission of tenders using telex, where permitted. Later agreements, such as the revised GPA and the Australia-FTA, do not specify a common method for submitting tenders and have provisions recognizing the use of electronic means in conducting procurement. Additionally, the 1994 GPA, NAFTA, and the revised GPA all require parties to regularly submit procurement statistics. The revised GPA gives parties the option to publish records to an official website.

**Figure 1: Timeline of the World Trade Organization’s Agreement on Government Procurement (GPA) and Selected U.S. Free Trade Agreement (FTA) Negotiations**



Source: GAO analysis of agreements. | GAO-16-727

Note: For the FTAs above, the negotiation timeline refers to the negotiations of the entire agreement. This includes the government procurement chapters GAO reviewed.

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## Agreements Contain Nine Common Elements, with Some Differences in Specific Commitments

We found that the government procurement agreements we reviewed generally follow the same structure and contain nine common elements that we identified; however, they sometimes differ in their specific commitments. The nine common elements we distilled from our analysis of the text include provisions that relate to transparency, nondiscrimination, defining scope and coverage, exceptions, procurement procedures, criteria for procurement decisions, supplier challenges, ethical standards, and changes and further improvements. The method by which procurement is conducted, such as the processes by which procurement is announced, information is released, and a winning bidder is selected, is contained in many similar provisions across the six agreements we reviewed. However, there are some notable differences, in areas such as statistical monitoring, environmental protection, and the supplier challenge process. U.S. trade officials told us that specific differences usually reflect variations in the trading partners' domestic priorities. Nevertheless, USTR officials told us that differences in the text of provisions in the agreements may not actually result in parties having different obligations with regard to their procurement practices.

Furthermore, USTR stated that parties sometimes take actions not explicitly mentioned in the agreements, but not prohibited either. For example, USTR noted that suppliers that have been convicted of criminal behavior may be excluded from bidding on contracts. USTR further added that later agreements may add language specifically allowing parties to take such actions. For example, the revised GPA and the South Korea-FTA explicitly mention criminal convictions as grounds for excluding a supplier.

## Foster Transparency

A common feature of these agreements is the inclusion of provisions related to transparency in the procurement process. For the GPAs, this reflects one of the six principles that the WTO states are the foundation of the plurilateral trading system, an aim to make trade "predictable and transparent." Parties to these selected agreements commit to publishing information on their laws, regulations, judicial decisions, and specific administrative rulings regarding procurement covered by the agreement. Furthermore, government entities must also release information at various steps of the procurement process, and the requirements for releasing information have similarities. Under the selected agreements, should a government entity wish to undertake procurement under open

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tendering procedures, generally it must publish an invitation for suppliers to submit tenders.<sup>15</sup> Once an award has been made, parties must also publish information on the contract. The Colombia-FTA and the Australia-FTA require this information to be published within 60 days of the award, while the remaining four agreements allow 72 days for publication.<sup>16</sup>

Three of the agreements (the 1994 GPA, the revised GPA, and NAFTA), explicitly require parties to collect procurement statistics. In the two GPAs, parties are to provide the statistics to the committee on a regular basis.<sup>17</sup> In NAFTA, parties are to provide the statistics to the other parties in the agreement on a regular basis. The procurement statistics required to be reported by governments vary among the three agreements. Both the 1994 GPA and the revised GPA require parties to submit statistics on contracts awarded by all entities covered by the agreement. The 1994 GPA provisions relating to such reporting specify when the report is required to contain statistics for both above-and below-threshold-value contracts and when statistics for only above-threshold-value contracts are required. The revised GPA reporting provisions specify that the report is to contain statistics on all contracts covered by the agreement. As a result, procurement that is above the thresholds set in the agreement is required to be reported. The revised GPA does not speak to the reporting of below-threshold-value contracts.<sup>18</sup>

The timing of the statistical reports differs as well. The 1994 GPA requires statistics to be reported “on an annual basis” but does not provide a specific date on which the annual basis is to begin. The revised GPA also

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<sup>15</sup>See 1994 GPA, Art. IX; NAFTA, Art. 1010; revised GPA, Art. VII; Australia-FTA, Art. 15.4; Colombia-FTA, Art. 9.4; and South Korea-FTA, Art. 17.3 for exclusions.

<sup>16</sup>When the United States has inconsistent commitments, officials said they apply the most restrictive. In this case, they stated that the United States would seek to publish the information within 60 days, even though other agreements would allow publication up to 12 days later.

<sup>17</sup>The 1994 GPA and the revised GPA provided for the establishment of a Committee on Government Procurement composed of representatives from each of the parties.

<sup>18</sup>According to Commerce officials, under the revised GPA’s statistical reporting requirements, some uncovered procurement data are reported, because the United States includes statistics on set-asides and derogations (exceptions). These statistics are reported to show what the value of the set-aside and the derogated procurement would be if it were covered by the agreement.

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requires that reports cover 1 year and specifically that they be submitted within 2 years of the end of the reporting period. Similar to the 1994 GPA, NAFTA specifically requires estimates of above-and-below threshold procurement, and statistics on the number and value of contracts awarded above the applicable threshold value, to be presented in annual reports. However, unlike the 1994 and revised GPAs, NAFTA's provision on the collection of statistics states that statistics must be provided "unless the Parties otherwise agree."<sup>19</sup>

#### Promote Nondiscrimination

Each of the agreements includes commitments that parties not discriminate against each other's suppliers. For the GPAs, this reflects another of the six fundamental WTO principles, "nondiscrimination." The text of each of these agreements contains versions of the following provision, taken here from the 1994 GPA: "With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than that accorded to domestic products, services and suppliers; and that accorded to products, services and suppliers of any other Party." While there are some differences, this type of provision in each of the selected agreements speaks to a party treating the suppliers and goods of another party no less favorably than it treats domestic suppliers and goods. Additionally, the agreements contain other provisions that are consistent with this commitment. For example, the agreements all have a provision on determining rules of origin (criteria for deciding the national source of a product) that generally expresses that a party shall apply the rules of origin that it applies in the normal course of trade.

#### Define Scope and Coverage

Each of the agreements we examined contains a section on scope and coverage that defines what is covered by the agreement. All of the agreements generally state that they apply to any measure regarding covered procurement. All of the agreements, except the 1994 GPA, provide some detail as to what transactions to which the government procurement provisions will not apply, such as the acquisition of fiscal

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<sup>19</sup>NAFTA, Art. 1019.7. Article XIX.5 of the 1994 GPA also provides that "the Committee may decide unanimously to modify the requirements."

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agency or depository services, and liquidation and management services for regulated financial institutions.

## Allow Exceptions

The agreements we examined all contain provisions allowing certain exceptions to the commitments made in the agreement. For example, each of the agreements allows for the use of limited tendering. Limited tendering allows an entity to contact one supplier directly<sup>20</sup> rather than to utilize open or selective procedures. Nevertheless, this procurement is still otherwise covered under the agreements, according to USTR officials. Each agreement contains lists of circumstances under which government entities may use limited tendering, with similarities across the agreements. For instance, if the covered procurement is for products that are purchased on a commodity market, or if a government entity has not received any tenders that conform to the essential requirements on a notice of intended procurement,<sup>21</sup> a government entity may opt to use limited tendering procedures. Other examples include procurements that can only be supplied by one particular supplier and where no reasonable alternative or substitute exists because the goods or services are works of art or products protected by patents.

Each of the agreements includes provisions detailing other exceptions to the agreement. According to a former trade agreement negotiator, these exceptions, also known as derogations, identify procurement not covered by the agreement. In general, these provisions state that nothing in the agreement shall prevent parties from taking measures

- necessary to protect public morals, order, or safety;
- necessary to protect human, animal, or plant life or health;
- necessary to protect intellectual property;
- relating to goods or services of handicapped persons;<sup>22</sup>

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<sup>20</sup>Under the 1994 GPA, NAFTA and the Korea-FTA limited tendering is described in the context of a procuring entity contacting suppliers individually, while in the revised GPA, the Australia-FTA and the Colombia-FTA limited tendering refers to a procuring entity contacting a supplier or suppliers of its choice.

<sup>21</sup>Under this circumstance, the entity must also not substantially modify the essential requirements listed in the original notice of intended procurement.

<sup>22</sup>The revised GPA uses the term “persons with disabilities.” See revised GPA, Art. III.2.d.

- 
- relating to goods or services of persons with philanthropic institutions; and
  - relating to goods or services of prison labor.

However, each agreement also contains a condition that such measures not be applied in a manner that would constitute a disguised restriction on trade or a means of arbitrary or unjustifiable discrimination between the parties where the same conditions prevail. While all of the selected agreements contain the exceptions listed above, some agreements contain additional language in their provisions on exceptions, resulting in differences in the text. First, all of the agreements except the Australia-FTA and the Colombia-FTA specifically state that nothing in the agreement shall prevent any party from taking any action or not disclosing any information that it considers necessary for the 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. Second, those two agreements extend the exception related to measures necessary to protect human, animal, or plant life or health to include environmental measures necessary for those protections. Third, the Australia-FTA specifically includes “not-for-profit institutions” in its exception related to measures relating to goods and services of persons with philanthropic institutions.

## Outline Procurement Procedures

The agreements we examined contain similarities in the procedures for how procurement is conducted and documented. First, a government entity proposes a procurement. Under the selected agreements, unless other procedures apply, for covered procurements, entities must publish a notice.<sup>23</sup> In general, these notices are required to include information such as a description of the procurement and a final date for receiving tenders. These notices often include technical specifications describing exactly what the government entity anticipates procuring. The agreements prohibit the parties from adopting or applying technical specifications that would create unnecessary obstacles to trade. For example, the

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<sup>23</sup>The 1994 GPA, NAFTA, and the South Korea-FTA require the publishing of an invitation to participate. See 1994 GPA, Art. IX; NAFTA, Art. 1010; and South Korea-FTA, Art. 17.3. The revised GPA, the Australia-FTA, and the Colombia-FTA require the publishing of a notice of intended procurement. See revised GPA, Art. VII; the Australia-FTA, Art. 15.4; and the Colombia-FTA, Art. 9.4. For the purposes of this report, we will use the term “notice” to refer to both a notice of intended procurement and an invitation to participate.



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agreements generally prohibit technical specifications that require particular trademarks or country-specific details.<sup>24</sup> The revised GPA, the Colombia-FTA, the South Korea-FTA and the Australia-FTA add that these rules for technical specifications are not intended to prevent parties from adopting technical specifications for the conservation of natural resources or the promotion of the environment.

If a supplier believes it can meet all of the listed requirements and provide the desired goods or services, it may submit a tender. The agreements vary in the amount of time the parties must allow suppliers to submit tenders once the notice has been released. USTR officials told us that because online procurement systems were more efficient than mailing or faxing tenders, deadlines for tender submission could be shorter. Subject to exceptions, the 1994 GPA, NAFTA, the revised GPA, the South Korea-FTA, and the Colombia-FTA require parties to establish a final submission date for tenders in an open procurement of no less than 40 days from the publication of the notice, and the Australia-FTA requires at least 30 days. One such example of an exception is in the revised GPA, which specifies that if parties incorporate electronic means into the procurement process, they may reduce the deadline by 5 days for each of the three electronic means prescribed.<sup>25</sup> As a result, parties to the revised GPA are capable of reducing this deadline to 25 days.<sup>26</sup> Another example can be found in the Colombia-FTA, which allows parties to reduce the general time limit for the submission of tenders to 30 days if the notice of

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<sup>24</sup>Under each of the agreements, such requirements in technical specifications are prohibited unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as “or equivalent” are included in the tender documentation. See 1994 GPA, Art. VI.3; NAFTA, Art. 1007.3; revised GPA, Art. X.4; Australia-FTA, Art. 15.6.5; South Korea-FTA, Art. 17.3; and Colombia-FTA, Art. 9.6.5.

<sup>25</sup>Specifically, the revised GPA states that the time period for tendering may be reduced by 5 days for each one of the following circumstances: (a) the notice of intended procurement is published by electronic means, (b) all the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement, and (c) the entity accepts tenders by electronic means. Revised GPA, Art. XI.5.

<sup>26</sup>Under the revised GPA, there are additional exceptions which allow for other reductions in the time period for submitting tenders. These exceptions include where a state of urgency duly substantiated by the procuring entity renders the general 40-day time period for tendering impractical or where a procuring entity purchases commercial goods or services. See revised GPA, Art. XI.

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intended procurement is published in an electronic medium and tender documentation is concurrently provided to prospective suppliers electronically.

Clarify Criteria for Procurement Decisions

Once a supplier decides to submit a tender, the agreements each generally require government entities to treat all tenders impartially upon receipt. The agreements set out specific requirements that parties must follow when awarding covered contracts. Generally, to be considered for an award, a tender must have met all of the essential requirements listed in the notice and be from a supplier that complies with the conditions for participation.<sup>27</sup> Furthermore, the procuring entity is then generally required to award the contract to the supplier that is fully capable of undertaking the contract and whose tender meets criteria such as being the lowest cost or the most advantageous. However, a procuring entity need not follow those requirements if the entity decides that it is “not in the public interest” to award the contract.

Provide Dispute Settlement and Supplier Challenges

During the procurement process, procuring governments entities may make decisions that suppliers, including foreign companies, feel are not in compliance with the provisions of one or more of the agreements. All of the agreements we examined outline procedures for resolving challenges raised by suppliers regarding procuring government entities’ implementation of the procurement process, granting suppliers a mechanism by which to resolve these concerns. Most of the agreements require parties to encourage suppliers to attempt to resolve such concerns through consultations with the procuring entity before entering into the formal supplier challenge process.<sup>28</sup> While the specifics vary among the agreements, the parties generally must designate an impartial authority to review supplier challenges. Suppliers must be allowed at least 10 days from the time when the basis of the complaint became known or reasonably should have become known to the supplier to submit a

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<sup>27</sup>Additional criteria may apply. For example, the Colombia-FTA specifies that, to be considered for an award, the tender must be submitted in writing. Colombia-FTA, Art. 9.9.4.

<sup>28</sup>The 1994 GPA, revised GPA, the Australia-FTA, and the South Korea-FTA share this requirement. See 1994 GPA, Art. XX.1; Revised GPA, Art. XVIII.2; Australia-FTA, Art. 15.11.1; and South Korea-FTA, Art. 17.3. NAFTA specifies that a party may encourage a supplier to seek a resolution of any complaint with the entity concerned prior to initiating a bid challenge. NAFTA, Art. 1017.1(b).

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challenge about an awarded contract. Furthermore, though all of the agreements have requirements related to the issuance of a decision by the designated reviewing authority, there are variations in the requirements.<sup>29</sup> Generally, the reviewing authority is also allowed to issue interim measures, which may include suspending the contract award.<sup>30</sup> According to Commerce officials, those interim measures are intended to give the review body time to review the complaint and issue a decision. The revised GPA, the Australia-FTA, and the Colombia-FTA contain a specific provision prohibiting governments from discriminating against a supplier that has an outstanding dispute case on another contract.

Additionally, there may be occasions when a party believes its benefits under the agreement have been nullified or impaired leading to a dispute between member countries. Three GPA related complaints have been brought to the WTO's dispute settlement mechanism. NAFTA and both the 1994 GPA and the revised GPA contain additional, specific procedures for resolving government-to-government procurement disputes. All of the FTAs we reviewed also have government-to-government dispute settlement procedures outside of the government procurement chapter, which apply to the whole agreement, including the government procurement provisions.

## Promote Ethical Standards

According to the WTO's based researchers, one benefit of government procurement agreements is that they can guide countries toward increased integrity and good governance. Each of the agreements we examined includes provisions relating to ethical standards, such as stating that procuring entities may exclude suppliers from the procurement on grounds such as bankruptcy or false declarations. The list of reasons allowing for exclusion of suppliers in each agreement is not exhaustive, and USTR officials told us that parties may exclude suppliers

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<sup>29</sup>For example, NAFTA states that "the reviewing authority shall provide its findings and recommendations respecting bid challenges in writing and in a timely manner, and shall make them available to the Parties and interested persons," whereas the Australia-FTA requires that the reviewing authority provide its decision in writing and in a timely manner, with an explanation for the decision. See NAFTA, Art. 1017.1(n) and Australia-FTA, Art. 15.11.5(d).

<sup>30</sup>NAFTA does not explicitly reference "interim measures." However, NAFTA requires parties to adopt procedures where the reviewing authority may delay the award of the proposed contract pending the resolution of the challenge. NAFTA, Art. 1017.1(j).

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at their own discretion. For instance, the revised GPA, the Australia-FTA, and the South Korea-FTA mention excluding suppliers for significant deficiencies in performance of any substantive requirement or obligation under a prior contract. In addition to these grounds for exclusion, the revised GPA and the South Korea-FTA also cite as grounds for exclusion final judgements in respect of serious crimes or other serious offenses, or failure to pay taxes. The revised GPA also mentions excluding suppliers that have committed “professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier.” According to the WTO, a key goal of the revised GPA was to include additional language to fight corruption. Some agreements contain explicit anticorruption language. For example, the revised GPA states that a procuring entity shall conduct covered procurement in a transparent and impartial manner that prevents corrupt practices. Moreover, the Colombia-FTA requires parties to establish procedures to declare suppliers that have engaged in fraudulent or other illegal actions in relation to procurement ineligible for a party’s procurement.

#### Provide for Changes and Further Improvements

Each international government procurement agreement contains a coverage schedule determining which entities’ procurement falls under the scope of the agreement. The WTO states that the coverage schedule “plays a critical role” in determining whether a procurement is covered. Each of the agreements we examined also includes a mechanism for parties to rectify or modify these market access schedules, and all of the agreements lay out procedures for such instances. For example, under these procedures in the Australia-FTA, parties may make minor revisions to their market access schedule as long as they provide notification and that no other party objects. Some agreements also expressly outline a framework for future negotiations. The 1994 GPA stated that parties must undertake further negotiations within 3 years of the date of entry into force of the agreement, while NAFTA stated that negotiations shall resume on December 31, 1998.

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## More Comprehensive Market Access Coverage Generally Found in the Revised GPA than in Selected FTAs

Our analysis found that the revised GPA provides generally more comprehensive market access coverage of central (e.g., federal), sub central (e.g., state), and other government entities (e.g., authorities) than the 1994 GPA and the FTAs we reviewed. GPA and FTA parties do not open their entire procurement markets to foreign competition. Instead, the agreements have coverage schedules usually contained in several annexes, which define the party's market access commitments.<sup>31</sup> These market access commitments identify the procuring entities covered by the agreements at the central and subcentral government levels and, in some agreements, by what is termed "other entities," such as utilities.<sup>32</sup> The agreements also identify the goods, services, and construction services covered and exclusions or exceptions are noted by general category or by entity. According to USTR officials, all parties in the agreements we reviewed, including the United States, have certain procurements that they deem sensitive and do not want to open to foreign suppliers, including for social, policy, or national security reasons. These officials stated that, for example, the United States specifies exclusions that include set-asides for small or minority businesses, and trading partners often exclude defense, agriculture, military support, and motor vehicles from their market access commitments. Moreover, the agreements' coverage of procurements is delineated by threshold values below which procurement activities are not covered and foreign access in accordance with the procedures in the agreement is not guaranteed.

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<sup>31</sup>For the purposes of this section of the report, unless otherwise specified, references to the coverage schedules of a party to the GPA are references to its coverage schedules in the revised GPA.

<sup>32</sup>For our analysis on "other government entities": later in this section, we reviewed the GPA annex titled, "Other Entities," the section titled, "Government Enterprises" in NAFTA and the Australia-FTA, and the section titled "Other Covered Entities" in the Colombia-FTA. For convenience, we refer to these coverage schedules as concerning "other government entities".

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## Central Government Entities Covered in Selected Government Procurement Agreements

We found that the United States increased the number of its covered central government entities from 75 under the 1994 GPA to 85 under the revised GPA.<sup>33</sup> (See table 1.) The central government entity coverage schedule of the United States for both the 1994 and the revised GPA includes 15 executive branch departments,<sup>34</sup> such as, the Department of Education, the Department of Justice, and other federal entities, for example, the Farm Credit Administration and the Small Business Administration. Eleven federal entities were added to the revised GPA central government schedule, and one was dropped.<sup>35</sup> The U.S.'s coverage schedule does not list judicial or legislative branch entities in any of the agreements we examined.<sup>36</sup>

We found that the U.S.'s schedules cover fewer central government entities in the FTAs we reviewed than in the revised GPA. While the U.S.'s coverage schedules in the two GPAs and the four FTAs we reviewed include the same 15 executive branch departments, the number of other central government entities covered varies. Over time, the total number of central government entities covered by FTAs increased from 53 under NAFTA to 79 under the South Korea-FTA; however, the FTAs include fewer central government entities than the revised GPA. For

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<sup>33</sup>For a complete list of the U.S.'s covered central government entities in the revised GPA, see [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_app\\_agree\\_e.htm#revisedGPA](https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm#revisedGPA).

<sup>34</sup>The 15 executive branch departments are the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, the Interior, Justice, Labor, State, Transportation, the Treasury, and Veterans Affairs.

<sup>35</sup>The eleven entities that were added are: the Advisory Council on Historic Preservation, the Court Services and Offender Supervision Agency for the District of Columbia, the Federal Energy Regulatory Commission, the Federal Labor Relations Authority, the Millennium Challenge Corporation, the National Assessment Governing Board, the National Endowment for the Arts, the National Endowment for the Humanities, the Social Security Administration, the U.S. Marine Mammal Commission, and the United States Access Board. One entity covered in the 1994 GPA, the Uranium Enrichment Corporation, was privatized and is not covered in the revised GPA.

<sup>36</sup>We compared the coverage schedule to the judicial and legislative branch entities shown in the Government of the United States Organizational Chart in the United States Government Manual.

example, the four FTAs do not cover 11 central government entities covered by the U.S.'s central government schedule in the revised GPA.<sup>37</sup>

**Table 1: U.S. Central Government Entities Covered in the World Trade Organization's (WTO) Agreements on Government Procurement (GPA) and Selected Free Trade Agreements (FTA)**

Trade agreement	Year agreement entered into force	Number of U.S. federal entities covered
Revised GPA	2014	85
South Korea-FTA	2012	79
Colombia-FTA	2012	78
Australia-FTA	2005	78
1994 GPA	1996	75
North American Free Trade Agreement	1994	53

Source: GAO analysis of U.S. schedules in selected international procurement agreements. | GAO-16-727

Note: The U.S.'s central government entities coverage schedules include federal executive branch departments and other federal entities.

As for central government entity coverage for the U.S.'s trading partners in the agreements we reviewed, the top five GPA parties with the largest procurement markets (the EU, South Korea, Canada, Norway, and Japan)<sup>38</sup> can cover executive, judicial, and legislative central government entities in their coverage schedules for the revised GPA. For example, Japan covers 25 central government entities, including ministries, agencies, the legislature, the cabinet, and the Supreme Court. Norway covers all of its existing central government entities and, according to a former trade agreement negotiator, stipulates that it will cover central government entities created in the future. The EU covers EU entities<sup>39</sup> and, to the extent stipulated, the central government contracting

<sup>37</sup>The South Korea-FTA includes the Social Security Administration; therefore, it does not include 10 of the 11 entities. Four entities covered by the Australia, Colombia, and South Korea FTAs (the National Commission on Libraries and Information Science, the Office of Nuclear Waste Negotiator, the Office of Thrift Supervision, and the Advisory Commission on Intergovernmental Relations) are not covered by the revised GPA.

<sup>38</sup>[GAO-15-717](#).

<sup>39</sup>The listed EU entities are the Council of the European Union, the European Commission, and the European External Action Service.

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authorities of EU member states. As compared to its coverage schedule in the 1994 GPA, South Korea added nine new central government entities to the revised GPA, including the Defense Acquisition Program Administration, the Korea Communications Commission, and the Fair Trade Commission. Similarly, other top five U.S. FTA partner countries that are not parties to the GPA (Colombia and Australia) also cover executive, judicial, and legislative government entities in their market access commitments.

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### Subcentral Government Entities Covered in Selected Government Procurement Agreements

Similarly, the United States covers more subcentral level procurement in either GPA than in any of the individual FTAs we reviewed. The number of states covered in the U.S.'s subcentral level commitments has not increased over time, as both the 1994 GPA and the revised GPA cover 37 states. (See fig. 2.) Included are California, New York, and Texas, the three states with the largest procurement markets. The GPA also includes seven states<sup>40</sup> not covered under any FTA we reviewed.

Across the FTAs we reviewed, the United States only includes subcentral government entities in the Colombia-FTA and the Australia-FTA.<sup>41</sup> The United States does not list any state in its coverage schedule in NAFTA or the South Korea-FTA. Nevertheless, Canadian and South Korean suppliers are able to participate in state-level procurement covered under the revised GPA in the same manner as domestic suppliers because those countries are also GPA members. The Colombia-FTA covers eight states<sup>42</sup> that are also included in the revised GPA, as well as Puerto Rico.

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<sup>40</sup>Arizona, Iowa, Massachusetts, Minnesota, Missouri, Montana, and Wisconsin.

<sup>41</sup>Generally, in the government procurement agreements we reviewed, U.S. covered procurement at the state level is detailed in an annex referencing Sub-Central Government Entities. Notwithstanding this generality, coverage of state level procurement in the Australia-FTA is in a section titled "Regional Government Entities." For the purposes of this report, we refer to any coverage schedule that lists states of the United States as a "subcentral government entity coverage schedule." Moreover, all references in this report to subcentral government entities or sub-central government entity procurement in the Australia-FTA should be understood to be references to the regional government entities coverage schedule of that agreement.

<sup>42</sup>Arkansas, Colorado, Florida, Illinois, Mississippi, New York, Texas, and Utah.



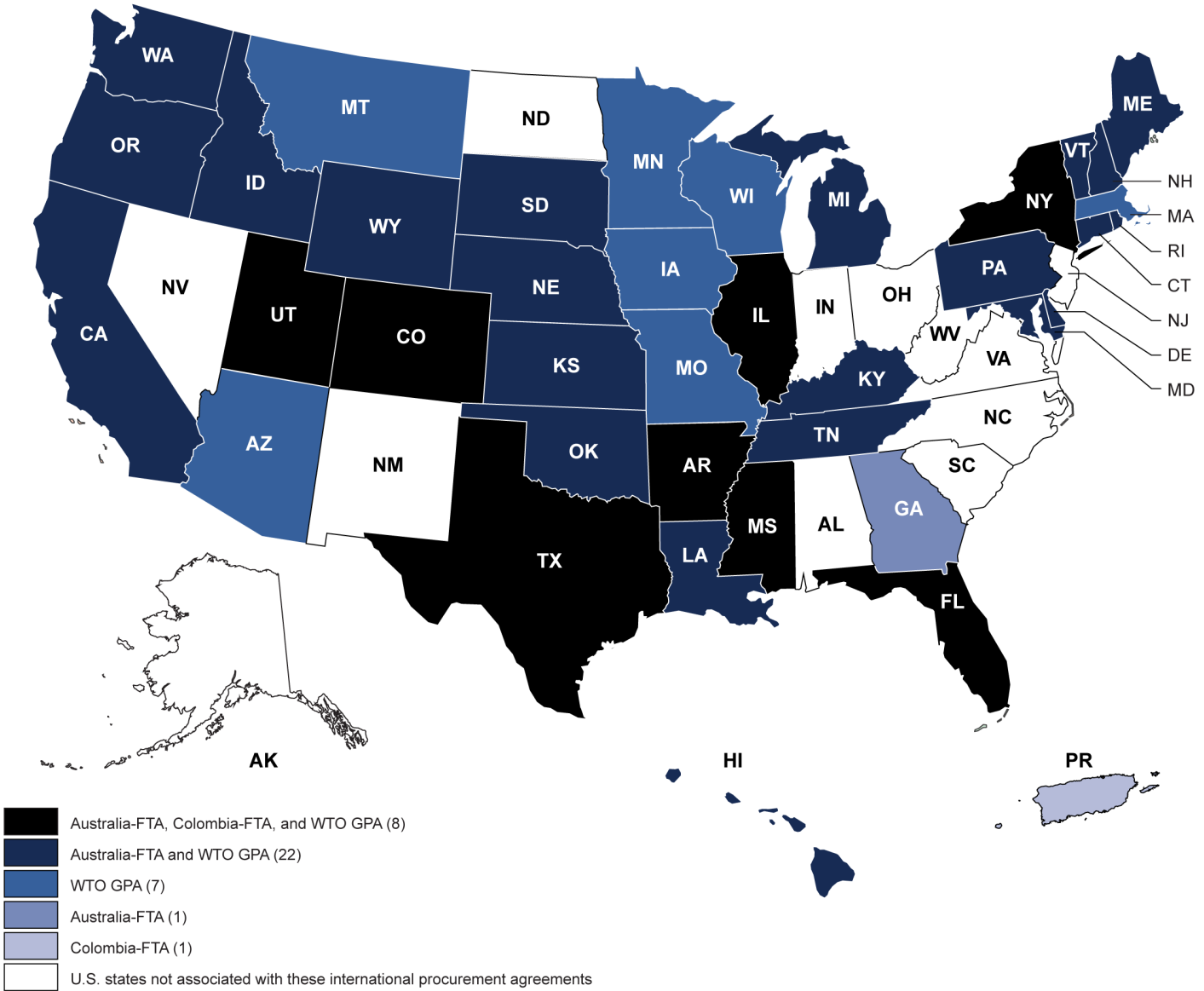
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The Australia-FTA covers 30 states<sup>43</sup> that are also included in the GPA, as well as Georgia; this is the only agreement that we reviewed that covers Georgian procurement.

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<sup>43</sup>Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Nebraska, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and Wyoming.

**Figure 2: U.S. States' and Territory Covered by Selected International Government Procurement Agreements (GPA)**



FTA Free Trade Agreement  
 NAFTA North America Free Trade Agreement  
 Source: GAO analysis of U.S. schedules, Map Resources (map). | GAO-16-727  
 Note: NAFTA and the South Korea-FTA do not include state-level government procurement commitments. Puerto Rico is a U.S. territory, not a U.S. state.

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States whose procurement is not covered under any agreement we reviewed are Alabama, Alaska, Indiana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Virginia, and West Virginia. According to USTR officials, they must obtain state government authorization to cover procurement in a trade agreement on a state-by-state basis, and each state independently determines whether to have its procurement covered under a trade agreement. Officials noted that despite the flexibilities that states have in determining the scope of procurement covered, such as being able to limit coverage to procurement by specified agencies and to exclude purchases of sensitive goods or services, U.S. state participation has not increased over time.

Other countries give U.S. suppliers access to their subcentral government procurement as well. Among the top five GPA parties, there has been an expansion in the number of subcentral government entities covered by the agreement over time between the 1994 and the revised GPA. Canada added a territory to its subcentral government entity coverage schedule in the revised GPA and excluded procurement by the entities listed in the subcentral coverage schedule from Iceland and the Principality of Liechtenstein. Japan added 7 designated cities; it covers all 47 prefectures and 19 designated cities. South Korea increased the number of subcentral government entities covered by adding to its coverage schedule the Ulsan Metropolitan City, and the local government entities in three metropolitan cities: Seoul (25 local governments), Busan (16 local governments), and Incheon (10 local governments). As stated previously, of the FTAs we reviewed, only the Australia-FTA and the Colombia-FTA include subcentral government entities' coverage schedules. In these agreements, Australia includes its six states and two territories, and Colombia includes its 32 Gobernación del Departamento entities in the subcentral government procurement market access commitments.

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### Other Government Entities Covered in Selected Government Procurement Agreements

In addition to central and subcentral government entities, parties to procurement agreements also cover other government entities. According to USTR officials, "other government entities" are not defined and, as a result there is a wide variation among parties to the agreements as to the types of entities covered. Each party's coverage is the result of a variety of factors, including the structure and organization of its government and its market access negotiations with other parties.

Under the GPA, some parties define their coverage of other government entities by listing specific entities that will be covered in the annex. Of the five GPA countries we reviewed, the United States, Canada, Japan, and

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South Korea follow this model. The U.S.' coverage includes electric utilities and ports/port authorities in the agreements we reviewed. Canada's coverage includes federal Crown corporations, such as some museums and a railway corporation; Japan's coverage includes banks, centers, corporations, councils, foundations, funds, institutions, and museums; and South Korea's coverage includes entities such as the Korea Trade-Investment Promotion Agency, the Korea Rail Network Authority, and the Korea Tourism Organization, in addition to a number of banks and corporations. On the other hand, the EU and Norway define their commitments with respect to other government entities by listing activities in specific sectors undertaken by certain classifications of entities rather than by naming specific entities. These sectors include drinking water, electricity, airports, and maritime or inland ports. Under the Australia-FTA and the Colombia-FTA, coverage is limited to only those other government entities listed. Similar to GPA trading partners, these FTA partners also include a variety of entities, such as industry, agencies, and commissions. Canada lists the same other government entities in NAFTA and in the GPA.

The United States covers the same 10 other government entities under the 1994 GPA and in the revised GPA;<sup>44</sup> while under the FTAs we reviewed, the United States only covers some of these entities. (See table 2.)<sup>45</sup>

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<sup>44</sup>The coverage schedule of the United States in the 1994 GPA also covers Entities in addition to these 10.

<sup>45</sup>The U.S.'s coverage schedules in the South Korea-FTA do not list utilities.

**Table 2: Other U.S. Government Entities Covered under the World Trade Organization’s Agreement (WTO) on Government Procurement (GPA), and Selected Free Trade Agreements (FTA)**

Entity	Type	North American			
		Revised GPA	Free Trade Agreement	Australia-FTA	Colombia-FTA
Bonneville Power Authority	Electric utilities	X	X	X	X
Southeastern Power Administration	Electric utilities	X	X	X	X
Southwestern Power Administration	Electric utilities	X	X	X	X
Tennessee Valley Authority	Electric utilities	X	X	X	X
Western Area Power Administration	Electric utilities	X	X	X	X
St. Lawrence Seaway Development Corporation	Government corporation	X	X	X	X
Rural Utilities Service	Government corporation			X	X
New York Power Authority	Electric utilities	X			
Port Authority of New York and New Jersey	Port authority	X			
Port of Baltimore	Port	X			

Source: GAO analysis of U.S. schedules in the revised GPA annex titled, “Other Entities,” the section titled, “Government Enterprises” in NAFTA and the Australia-FTA, and the section titled “Other Covered Entities” in the Colombia-FTA”. | GAO-16-727

Notes: The Port Authority of New York and of New Jersey also covers a number of airports, including Newark, La Guardia, and John F. Kennedy. The U.S. coverage schedules in the South Korea-FTA do not list utilities.

## Coverage and Market Access Exclusions in Selected Government Procurement Agreements

According to officials, the coverage of goods, services, and construction services in international procurement agreements is based on the principle that all procurement above thresholds and by covered entities for these items is covered, unless explicitly excluded. Officials noted that all parties have certain procurements that they deem sensitive and do not want to open to foreign suppliers, for example for social, policy, or national security reasons. Officials also stated that because market access commitments are negotiated on a reciprocal basis, some parties also exclude some types of procurement only from another party, for

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example when they believe they are not receiving enough market access of that particular type. According to the WTO, reciprocity is the foundation of coverage commitments generally. In terms of U.S. and trading partners' exclusions, we found commonalities across the agreements we reviewed.

Provisions describing the exclusion of specified goods, services, and construction services can be found in the general notes sections in the agreements and often in a specific annex to the agreements, at an entity level. In particular, exclusions of specified services are generally identified on a positive or negative list. According to a former trade agreement negotiator, most parties use a positive list; that is, only the services listed are covered by the agreement. Under the GPA, Canada, the EU, Japan, Norway, and South Korea use a positive list. The United States uses a negative list approach — unless listed, any procurement by a covered entity of a service meeting the procurement threshold is covered by the agreement. According to Commerce officials, a negative list approach provides more liberal coverage than a positive list approach because it is not an exhaustive list and allows for coverage of new services.

The United States specifies exclusions in the six agreements we reviewed, and these exclusions apply to the procurements of all entities covered by the agreement, except as specified otherwise. The exclusions include “set-asides” for small or minority businesses.<sup>46</sup> For example, U.S. laws promoting the economic development of small businesses, as defined by the U.S. Small Business Administration, reserve certain contracts for these types of firms, according to a former trade agreement negotiator. Similar to the United States, Canada also excludes set-asides for small and minority businesses. Commerce officials noted that the Australia-FTA, the Colombia-FTA, and the South Korea-FTA all exclude purchases for the direct purpose of providing international assistance from the scope of the government procurement commitments.

Parties also define specific exclusions of goods, services, and construction services at the entity level. U.S. exclusions of procurements

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<sup>46</sup>Under the 1994 GPA and NAFTA, the agreements do not apply to set-asides on behalf of small and minority businesses.

by central government entities are generally similar across the six agreements we reviewed. (See table 3.)

**Table 3: Selected Procurement Exclusions at the U.S. Central Government Entity level under the World Trade Organization’s (WTO) Agreement on Government Procurement (GPA), and Selected Free Trade Agreements (FTA)**

Agency and exclusion	1994 GPA	North American Free Trade Agreement	Revised GPA	Australia-FTA	Colombia-FTA	South Korea-FTA
<b>Department of Agriculture:</b> Agricultural goods made in furtherance of agricultural support or human feeding programs	X	X	X	X	X	X
<b>Department of Commerce:</b> Related to the shipbuilding activities of the U.S. National Oceanic and Atmospheric Administration.	X		X	X	X	X
<b>Department of Energy:</b> Related to the safeguarding of nuclear materials or technology and procured under the authority of the Atomic Energy Act.	X	X	X	X	X	X
<b>Department of Homeland Security:</b> Procurement by the Transportation Security Administration.	X			X	X	X
<b>Department of Transportation:</b> Federal Aviation Administration.	X		X	X	X	X
<b>General Services Administration:</b> Procurement of hand tools, measuring tools, and cutlery and flatware.	X	X	X	X	X	X
<b>U.S. Agency for International Development:</b> Procurement for the direct purpose of providing foreign assistance. <sup>a</sup>	X		X			

Source: GAO analysis of U.S. market access commitments in selected international procurement agreements. | GAO-16-727

Note: The U.S.’s central government entities coverage schedule include federal executive branch departments and other federal entities.

<sup>a</sup>Commerce officials noted that the Australia-FTA, the Colombia-FTA, and the South Korea-FTA exclude purchases for the direct purpose of providing international assistance from the scope of the U.S. irrespective of entity.

Trading partners also set exclusions at the central entity level. For example, Colombia’s exclusions include the procurement of agricultural raw materials or inputs related to agricultural support programs and food assistance by the Ministerio de Agricultura y Desarrollo Rural; Australia’s exclusions include procurement of ship and marine equipment by the Department of Defence and the Defence Materiel Organisation; and South Korea’s exclusions include certain procurements of agricultural, fishery, and livestock products by covered central government entities. The EU coverage schedule also contains specific exclusions regarding

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the United States under the GPA.<sup>47</sup> According to a former trade agreement negotiator, under the GPA, the EU withholds about 200 central government entities of member states from the United States and not from other countries because, as noted previously, the United States does not cover all federal agencies and does not cover legislative or judicial entities.

At the subcentral level, U.S. states covered in the GPA, the Australia-FTA, and the Colombia-FTA include exclusions to their procurement. As noted previously, the other FTA agreements do not cover U.S. states' procurement. First, these agreements include four exclusions that apply to all state entities outlined in the coverage schedules. Provisions in the agreements do not apply to

- preferences or restrictions associated with programs promoting the development of distressed areas or businesses owned by minorities, disabled veterans, and women;
- any procurement by a covered state entity on behalf of a noncovered entity at a different level of government;
- restrictions attached to federal funds for mass transit and highway transit projects that are undertaken with federal funds; and
- procurement of services excluded by the United States, as well as printing services.<sup>48</sup>

In addition, under the subcentral level procurement covered under the GPA, the Australia-FTA, and the Colombia-FTA, a number of U.S. states have state-specific exclusions related to certain types of procurement, some of which are the same across these three agreements. (See table 4.)

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<sup>47</sup>These exclusions also apply with respect to Canada; Japan; Hong Kong, China; Singapore; Korea; Armenia; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and New Zealand.

<sup>48</sup>This exclusion is not present in the subcentral government entity coverage schedule of the United States for the 1994 GPA.



**Table 4: Specific U.S. Subcentral Government Entity Exclusions under the World Trade Organization's (WTO) Agreement on Government Procurement (GPA) and the Australia Free Trade Agreements (FTA)**

Exclusion	State
Construction-grade steel (including requirements on subcontracts), motor vehicles, coal	Delaware, Florida, Illinois, Iowa, Maine, Maryland, Michigan, New Hampshire, New York, Oklahoma, Pennsylvania, and Wyoming
Construction services	Arkansas, Kansas, Oklahoma, Hawaii, Tennessee
Services	Mississippi, Tennessee
Software developed in state	Hawaii
Automobiles, aircraft	Kansas
Public authorities and public benefit corporations with multistate mandates; transit cars, buses and related equipment	New York
Beef	South Dakota
Boats, automobiles, buses, related equipment	Rhode Island
Fuel, paper products, boats, ships, vessels	Washington
Office of Fish and Game	Arkansas

Source: GAO analysis of U.S. market access commitments in selected international procurement agreements. | GAO-16-727

Notes: Under the Colombia-FTA, the following U.S. states listed on this table are covered: Arkansas, Florida, Illinois, Mississippi, and New York. The U.S.'s subcentral government entities consist of U.S. state-level entities.

In addition, in procurements by the Texas Building and Procurement Commission, Texas excludes preferences for motor vehicles, travel agencies located in the state, and rubberized asphalt paving made from scrap tire by a Texas facility in the Colombia-FTA and the Australia-FTA but not the GPA. Georgia excludes the procurement of beef, compost, and mulch by the Department of Administrative Services and the Georgia Technology Authority in the Australia-FTA.

Of the FTAs we reviewed, only the Australia-FTA and the Colombia-FTA have subcentral government entity coverage schedules. In the Australia-FTA, at the subcentral government entity level, exclusions include health and welfare services, education services, and motor vehicles for procurement by certain entities. Colombia's exclusions include food, agricultural raw materials/inputs, and live animals related to agricultural support programs and food assistance. GPA trading partners exclude specific procurement by listed sub central government entities of suppliers, services, and service providers from the United States. For

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example, the EU excludes the procurement of air traffic control equipment from suppliers and service providers from the United States.<sup>49</sup>

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## Threshold Amounts in Selected Government Procurement Agreements

International procurement agreements we reviewed specify threshold values above which procurement activity is covered. Of the revised GPA coverage schedules that we reviewed, many parties apply similar threshold levels. According to officials, the lower the threshold values, the more access foreign suppliers have to the procurement market. Officials also noted that conversely, foreign suppliers do not benefit from the agreements' coverage with regard to relatively smaller procurements. For the GPA, threshold values are expressed as special drawing rights (SDR) in coverage schedules delineating covered entities.<sup>50</sup>

We found that among the top five WTO GPA procurement markets (the EU, Japan, Canada, South Korea, and Norway) we reviewed, parties set the same threshold levels as at least one other party, with a few exceptions. (See table 5.) In the revised GPA, among the central government entities' coverage schedules we reviewed, the threshold level for goods and services is 130,000 SDRs (approximately \$182,000), and for construction services it is 5 million SDRs (approximately \$7 million) for all parties except for Japan.<sup>51</sup> For subcentral government entities' coverage schedules, four parties set the threshold level for goods and services at 200,000 SDRs<sup>52</sup> (approximately \$279,000), and two parties

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<sup>49</sup>For a complete list of coverage schedules for GPA parties, see [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_app\\_agree\\_e.htm#revisedGPA](https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm#revisedGPA).

<sup>50</sup>An SDR is an international reserve asset created by the International Monetary Fund (IMF) based on four international currencies, each given a weight in the total composition reviewed and determined by the IMF's Executive Board every 5 years. The currency value of SDRs is calculated daily, and on September 6, 2016, the rate was 1 USD = 0.715583 SDR.

<sup>51</sup>Japan's threshold levels for central government entities are 100,000 SDRs for goods and other services; 450,000 SDRs for architectural, engineering, and other technical services; and 4,500,000 SDRs for construction services.

<sup>52</sup>These parties are the EU, Japan, Norway, and South Korea. Japan sets the threshold level for subcentral government entities at 200,000 SDRs for other services and at 1,500,000 SDRs for architectural, engineering and other technical services. Moreover, South Korea splits the subcentral government entities schedule into Group A and Group B. South Korea set the threshold level for goods and services at 200 SDRs for Group A entities and at 400,000 SDRs for Group B entities.

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set the threshold level at 355,000 SDRs<sup>53</sup> (approximately \$496,000). For the procurement of construction services by subcentral government entities, most of the parties set the threshold level at 5 million SDRs (approximately \$7 million).<sup>54</sup> For other entities' coverage schedule, most of the parties set the threshold level for goods and services at 400,000 SDRs<sup>55</sup> (approximately \$559,000) and for construction services at 5 million SDRs<sup>56</sup> (approximately \$7 million). For the United States, for example, the 2016-17 threshold value is set at \$191,000 for procurement of goods and services and \$7.4 million for procurement of construction services for covered central government entities in the revised GPA.<sup>57</sup>

We also found that for the most part, threshold levels for these countries did not change between the 1994 GPA and the revised GPA. For example, only Japan lowered its threshold level for the procurement of goods and certain services by central government entities; changing the threshold level from 130,000 SDRs (approximately \$182,000) to 100,000 SDRs (approximately \$140,000). Additionally, South Korea lowered its threshold level for the procurement of goods by entities listed in its other entities' coverage schedule from 450,000 SDRs (approximately \$628,000) to 400,000 SDRs (approximately \$559,000).

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<sup>53</sup>These parties are the United States and Canada.

<sup>54</sup>These parties are Canada, the EU, Norway, and the United States.

<sup>55</sup>These parties are the EU, Norway, South Korea, and the United States. The United States splits the other entities schedule into List A and List B. For List A entities, the United States expressed the threshold level in dollars and set the threshold level for goods and services at \$250,000; it did not set an SDR level for these entities. The United States set the threshold level for goods and services at 400,000 SDRs for List B entities.

<sup>56</sup>These parties are Canada, the EU, Norway, and the United States.

<sup>57</sup>Procurement Thresholds for Implementation of the Trade Agreements Act of 1979, 80 Fed. Reg. 77,694 (Dec. 15, 2015) (USTR publication of U.S. dollar procurement thresholds for relevant trade agreements for calendar years 2016 and 2017). The United States updates its' threshold levels every 2 years.

**Table 5: Selected Parties' Threshold Levels under the World Trade Organization's (WTO) Revised Agreement on Government Procurement (GPA)**

Approximate dollars in thousands

	Central government entities		Subcentral government entities		Other government entities	
	Goods and services	Construction services	Goods and services	Construction services	Goods and services	Construction services
<b>Canada</b>	\$182	\$6,983	\$496	\$6,983	\$496	\$6,983
<b>EU</b>	\$182	\$6,983	\$279	\$6,983	\$559	\$6,983
<b>Japan</b>	\$140 or \$628 <sup>a</sup>	\$6,285	\$279 or \$2,095 <sup>b</sup>	\$20,950	\$182 or \$628 <sup>c</sup>	\$20,950 (group A) or \$6,285 (Group B and Japan Post in Group A) <sup>d</sup>
<b>South Korea</b>	\$182	\$6,983	\$279 (group A) or \$559 (group B) <sup>e</sup>	\$20,950	\$559	\$20,950
<b>Norway</b>	\$182	\$6,983	\$279	\$6,983	\$559	\$6,983
<b>United States</b>	\$182	\$6,983	\$496	\$6,983	\$250 (list A) or \$559 (list B) <sup>f</sup>	\$6,983

Source: GAO analysis of U.S. schedules in selected international procurement agreements. | GAO-16-727

Notes: Threshold comparison based on amounts listed in each party's revised GPA coverage schedule.

<sup>a</sup>Japan sets the threshold for central government entities' procurement of goods and other services at approximately \$140,000 and for the procurement of technical, architectural, and engineering services at approximately \$628,000.

<sup>b</sup>Japan sets the threshold for subcentral government entities' procurement of goods and other services at approximately \$279,000 and for the procurement of technical, architectural, and engineering services at approximately \$2 million.

<sup>c</sup>Japan sets the threshold for other entities' procurement of goods and other services at approximately \$182,000 and for the procurement of technical, architectural, and engineering services at approximately \$628,000.

<sup>d</sup>Japan lists two groups of other entities and specifies a threshold amount for construction services for each group.

<sup>e</sup>South Korea lists two groups of subcentral entities' and specifies a threshold amount for procurement of goods and services for each group.

<sup>f</sup>The United States lists two sets of other entities and specifies a threshold amount for goods and services for each list.

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For the United States, current threshold levels set in the FTAs we reviewed differ from those set in the GPA.<sup>58</sup> Under NAFTA, the Australia-FTA, and the Colombia-FTA, the United States sets a lower threshold of approximately \$78,000 for the procurement of goods and services by central government entities. Under NAFTA, the U.S. threshold level for the procurement of construction services by entities listed in the federal government entities' coverage schedule and the government enterprises' coverage schedule is set at above \$10,000,000, a higher threshold than the one set for construction services in the GPA.

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## Agency Comments

We provided a draft of this report to the USTR and the Department of Commerce for comment. Both agencies provided technical comments which are incorporated as appropriate.

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We are sending copies of this report to the appropriate congressional committees, the USTR, the Secretary of the Department of Commerce, and other interested parties. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-8612 or [GianopoulosK@gao.gov](mailto:GianopoulosK@gao.gov). Contact points for our Offices of Congressional Relations and of Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix II.



Kimberly M. Gianopoulos  
Director, International Affairs and Trade

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<sup>58</sup>80 Fed. Reg. 77,694.

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# Appendix I: Scope and Methodology

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To review government procurement commitments, we determined which characteristics these agreements share as well as how they differ. We focused on the five largest procurement markets of parties to the World Trade Organization's (WTO) Agreement on Government Procurement (GPA) and the five largest procurement markets among active U.S. free trade agreement (FTA) partners since 1994.<sup>1</sup> This scope encompasses six agreements: the 1994 GPA, the revised GPA, and four U.S. FTAs (the North American Free Trade Agreement [NAFTA], the South Korea-FTA, the Colombia-FTA, and the Australia-FTA). We reviewed agreements that entered into force from 1994 on, beginning with NAFTA.<sup>2</sup> We included the GPAs in our scope because they are multilateral international procurement agreements that cover the most parties and the largest markets. In addition, the FTAs we reviewed correspond to the five largest procurement markets among active U.S. FTAs in our scope. We reviewed 4 out of the 14 active U.S. FTAs. As we reviewed the commitments of the five largest procurement markets covered by the GPA and the five largest procurement markets among active U.S. FTA trade partners since 1994, our findings may not be applicable to all the U.S.'s FTA agreements.

The WTO's GPA and the government procurement chapters of FTAs are very long, complex documents, making direct textual comparisons challenging without an analytical framework. To compare the text, we created a framework to isolate sections of the text to make direct comparison possible and reliable. First, we had four analysts independently read the text of two of the six agreements to identify

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<sup>1</sup>The estimated size of government procurement markets is based on GAO's previous work. See GAO, *International Trade: The United States and European Union Are the Two Largest Markets Covered by Key Procurement-Related Agreements*, [GAO-15-717](#) (Washington, D.C.: July 29, 2015).

<sup>2</sup>The U.S.-Israel FTA possesses the fifth largest procurement market by market size among active U.S. FTAs. The U.S.-Israel FTA entered into force in 1985, and its government procurement chapter contains 369 words. The text lacks many of the sections later agreements include, such as a description of procurement procedures, guidelines for selection criteria and technical specifications, or a supplier challenge system. It is also structured differently from the other five agreements, making a meaningful comparison very difficult. Conversely, Colombia is the sixth largest procurement market among active U.S. FTA partners, and the Colombia-FTA entered into force in 2012. The government procurement chapter of the Colombia-FTA contains a similar structure to the other five agreements in our scope, making a meaningful comparison possible. Department of Commerce (Commerce) officials noted that the Colombia-FTA contained recent, innovative additions that earlier agreements lacked.

overarching themes; broad categories such as “transparency”; and subthemes, specific provisions such as “statistical reporting” found in these agreements. The analysts were instructed to reference the WTO literature, including WTO’s statement of general principles, to help reflect the negotiating parties’ main priorities as presented by the WTO. When all four analysts had finished compiling their lists independently, they met and compared them. The four lists shared broad similarities across themes and subthemes, and through discussion they were combined into one draft list. This draft list was shared with officials from the Office of the United States Trade Representative (USTR) and the Department of Commerce (Commerce), as well as with a former trade official and internally with GAO general counsel staff and a methodologist to ensure consistency. After their feedback was incorporated, the final list contained nine themes and 31 subthemes. Using this final list as a framework, two analysts independently read through the text of all six agreements and sorted pieces of text that corresponded to each subtheme. The pieces of text could be as short as one sentence or as long as multiple pages and were sorted according to the content of the text rather than chapter or section headers. The two analysts independently filled out a spreadsheet, using separate copies of the agreements for referencing to ensure that the integrity of the blind review was not compromised. When they had completed their review, they compared their results and combined them into a master spreadsheet, resolving differences through discussion. For the few instances when agreement could not be reached, the other two analysts who had participated in compiling the draft list of themes were consulted to make a decision. The master spreadsheet was then reviewed by GAO general counsel staff. The master spreadsheet served as a guide and a framework to describe and compare the text and identify similarities and differences across the agreements. This master spreadsheet also assisted us in finding the textual examples contained in the report.

In addition to reviewing the text of the agreements, we also analyzed and compared the market access-related commitments (lists of covered entities and excluded procurements) made in the annexes of these agreements. We identified similarities and differences in coverage and exclusions across these agreements. Specifically, we compared the U.S.’ market access commitments in the 1994 GPA to the revised GPA and to the FTAs in our scope. We also identified market access commitments of selected U.S. trading partners in these agreements. To verify our findings, we reviewed WTO and USTR documentation. In addition, we interviewed USTR and Commerce officials to discuss these similarities and differences in coverage and exclusions.

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We conducted this performance audit from August 2015 to September 2016 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions, based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.



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# Appendix II: GAO Contacts and Staff Acknowledgments

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## GAO Contact

Kimberly M. Gianopoulos, (202) 512-8612, or [GianopoulosK@gao.gov](mailto:GianopoulosK@gao.gov).

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## Staff Acknowledgments

In addition to the contact named above, Adam R. Cowles, Assistant Director; Marisela Perez, Analyst-in-Charge; Chris Cronin, and Grace P. Lui made major contributions to this report. Also, Martin de Alteriis, Gergana T. Danailova-Trainor, Karen Deans, and Neil Doherty provided assistance.

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