

# **2023 Developments in International Procurement**



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**Dalston Press**

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**Djaghe, LLC**

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## INTRODUCTION

In 2023, the liberalization of procurement markets generally outpaced domestic protectionism with some worrisome signs.

Evidence of liberalization was seen in the WTO Government Procurement Agreement (GPA), which added its first new member in four years and welcomed its first accession application from Central America. Yet, this progress was undermined by other actions. For instance, Brazil—a major hope for expansion of the agreement—withdrew its market access offer and indicated it may not reengage without further concessions. The negotiations with China, the most significant candidate, marked their 16th year with no end in sight.

The European Union (EU) made some progress on its FTA negotiating agenda, signing two FTAs that it had concluded in 2022. However, it ended the year with several unfinished negotiations, most notably with Australia and Mercosur. It faces pressures to conclude the outstanding negotiations before the European Parliament elections in June 2024.

The Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) added the United Kingdom (UK) as its 12th member and began considering how to handle the applications of other would-be members, especially China and Chinese Taipei (Taiwan).

The United Arab Emirates' (UAE) ambitious pursuit of bilateral trade agreements is a bright spot on the bilateral map. Over the past two years, it launched negotiations and concluded bilateral agreements with four countries, implementing three in 2023, following one in 2022. Of particular significance is that neither the UAE nor three of its partners are GPA parties. These agreements include a wide range of procurement provisions, with two providing market access commitments and one providing robust procurement procedures, though no new market opening. The fourth one only recognizes the significance of cooperation on procurement with the possibility of future procurement negotiations. The UAE also completed talks on an agreement with South Korea. In addition, the Gulf Cooperation Council (GCC) concluded FTAs with South Korea and Pakistan.

The UK continued its negotiations of trade and investment cooperation arrangements with United States (US) states. The US also concluded an agreement with 13 countries in the Indo-Pacific region with procurement provisions limited to anti-corruption but no market access commitments.

Against these expansions of international procurement were efforts to protect domestic procurement. The US continued implementation of its most far-reaching domestic preference for infrastructure projects receiving federal funds. Moreover, the US extended its domestic preferences outside of procurement, most prominently in the Inflation Reduction Act, and to federally funded research and development (R&D).

The EU leaned toward protectionism with two unilateral trade measures that provide for public procurement penalties if its interests are threatened.

Somewhat apart from the conflict between liberalization and protectionism are the issues related to the climate crisis. Countries are advancing the debate over how governmental purchasing power may be harnessed to reduce carbon emissions, and some countries have adopted climate-related measures. But they have yet to find a clear, common path forward. The US and EU have undertaken a green public procurement initiative. The US is also considering climate-related rules. Likewise, the G7 has agreed to lead by example, while the WTO Secretariat identified procurement as a tool for climate action.

On a final note, the WTO procurement committee has at last overcome one party's blockage of the selection of a new chair.

## **1. WTO Government Procurement Agreement**

After a nearly two-year impasse, work resumed under the GPA, and it added a new member. The WTO procurement committee also increased the transparency of its work.

### **1.1 WTO Procurement Committee**

#### *Committee Resumes Work after Two-Year Hiatus*

For nearly two years—from July 2021 until May 2023—the WTO Government Procurement Committee (Committee), the committee that oversees the GPA, was unable to meet because the parties could not agree on a chair. After its last leader—from Canada—stepped down, the parties were unable to agree on a replacement. In detailing its efforts to select a new chair, the Committee reported that in February 2021, the EU and Taiwan had each submitted a nomination for the chair. After the EU withdrew its candidate in May of that year, all but one party was prepared to join a consensus to select Taiwan's candidate (WTO Committee 2022, para. 2.1). The impasse finally ended on May 17, 2023, when the parties selected a new chair from Switzerland (Martin Zbinden), and the Committee's was able to resume its work (Grier 2023e).

In December, the US and the EU publicly criticized Hong Kong, China (HKC) for its role in the impasse over the selection of the Committee chair. In the WTO Trade Policy Review of HKC, the US and the EU cited it as the party that blocked the appointment of a new chair in setting out their concerns with HKC's lack of autonomy from China (Monicken 2023). The EU criticized HKC's blockage of the candidate preferred by all other GPA parties as putting "enormous stress on the functioning of the WTO" and emphasizing that "[t]his organization cannot operate if Members instrumentalise its procedural provisions for political ends" (EU Mission to the WTO 2023).

To avoid a similar impasse in the future, the Committee adopted rules of procedure for selecting a chair (WTO Committee 2023a). Of particular importance is the provision on action to be taken when the parties cannot agree on a new chair that prevents the Committee from fulfilling its obligation to meet at least annually. In such a situation, the Committee "may appoint, by consensus, an interim Chairperson from among the candidates, or alternatively invite the Party that provided the previous Chairperson, to temporarily facilitate the meetings of the Committee until such time as a Chairperson can be appointed."

### *Committee Opens Negotiating Files*

After it resumed its operations, the Committee significantly advanced the transparency of its work by opening the files on the negotiations of the 2012 revision of the GPA. At its November 2023 meeting, the Committee removed the restrictions on access to the documents relating to the negotiations of the current GPA (WTO Committee 2023e). Prior to that decision, the documentation of the negotiations had been kept out of the public domain. As of November 8, 2023, the public can access documents on negotiations of both the revisions of the GPA text and the expansion of procurement commitments (Grier 2023o).

The first set of (more than 100) documents, listed in Table 1 of the Committee's decision, are informal notes prepared by the WTO Secretariat relating to the text negotiations. They include (with relevant years) Checklists of Issues raised in informal consultations (1997–99), suggested drafting changes (1999–2002), revisions of the 1994 GPA text (2003–11), Side-by-Side Texts (2004–06), Verifications of the Linguistic Consistency of the English, French, and Spanish versions of the revised GPA (2007–10), and draft decisions and submissions relating to the Committee's Agreed Work Programs (2010–11).

The second set of documents (115), listed in Table 2 of the decision, are the official documents comprising the market access negotiations submitted by the 16 GPA parties between the initiation of the negotiations in 2004 and their conclusion in 2012. Those negotiations were based on a framework, *Modalities for the Negotiations on Extension of Coverage and Elimination of Discriminatory Measures and Practices*, adopted by the Committee in July 2004 (WTO Committee 2004). It called for the parties to first exchange requests for improvements in coverage and then market access offers. Those documents had been circulated as restricted documents not available to the public. With the Committee's removal of those restrictions, parties' requests for improvements in other parties' coverage, market access offers, and exchanges of questions and responses relating to the offer are now public.

The newly released documents provide insights into the development of the revision of the GPA text and expansion of market access commitments. For example, a comparison of the requests for improvements and final offers of coverage illustrates the differences in the parties' ambitions and illuminates why the market access negotiations did not conclude until 2012 (Grier 2023o). (For a discussion of the outcome of the negotiations of the revision of the GPA, see Grier 2022a, Chs. 1 and 2.)

## **1.2 GPA Accession Developments**

### *North Macedonia's Accession*

In June 2023, the Committee approved North Macedonia's accession to the GPA, the first new party since Australia joined in 2019 (WTO Committee 2023b). North Macedonia ratified the agreement in accordance with its internal ratification process and submitted its instrument of accession to the WTO at the end of September. Its accession became effective 30 days later, on October 30, 2023, making it the 22nd GPA party and the 49th WTO member to apply the GPA (WTO Committee 2023c). The accession fulfills a commitment by North Macedonia (then the former Yugoslav Republic of Macedonia)—to seek GPA membership—when it became a WTO member in 2002. It applied for accession in 2017.

In negotiating its accession, North Macedonia tailored its procurement commitments to the coverage offered by the EU as it is a candidate for Union membership. Once it joins the European bloc (not expected for several years), its coverage will have to correspond to that of the other EU member states (Grier 2023f). (The EU launched accession negotiations with it in July 2022.)

North Macedonia opened the procurement of 103 central government entities to participation by the other parties. Its coverage of subcentral entities and other entities followed the EU approach of listing categories of entities and utilities and providing indicative—not definitive—lists of the covered entities. It also incorporated the reciprocal restrictions found in the EU schedules (GPA Committee 2023b). However, the GPA parties have not permitted North Macedonia to apply those restrictions until it becomes an EU member state. (In contrast, when Montenegro—also an EU accession candidate—became a GPA party in 2015, it was allowed to apply the reciprocal restrictions without waiting for EU membership.) With respect to the services that North Macedonia opened under the agreement, it provides access to listed services and only allows parties to participate in the procurement of a service if the party opens the same service. While it opens all construction services on a reciprocal basis, it limits access to its works concessions, as does the EU (Grier 2023m).

In approving North Macedonia's accession, the EU, Montenegro, Switzerland, and the UK specified its access to certain of their GPA-covered procurement. The EU gave it the same comprehensive access to its central government entities as Aruba, Iceland, Liechtenstein, Norway, Switzerland, and the UK, based on an indicative list. It also provided the new party with the same access to its works concessions contracts as it affords to its closest trading partners. The UK echoed the EU approach in providing North Macedonia with access to its central government entities and works concessions. Montenegro allowed it to participate in its works concessions, and Switzerland gave it access to the procurement of certain subcentral entities that it only opens to the EU and several other parties (Grier 2023m).

The US Trade Representative (USTR) issued a waiver of discriminatory purchasing requirements with respect to goods and services from North Macedonia in October, in accordance with the Trade Agreements Act of 1979 (USTR 2023a). With the waiver, the domestic purchasing requirements in the Buy American Act of 1933 and the Defense Department's Balance of Payments Program do not apply to North Macedonia in federal procurement covered under the GPA. Based on the waiver, the Federal Acquisition Regulatory Council added North Macedonia as a designated country under the Federal Acquisition Regulation (FAR), effective November 14, 2023 (FAR Council 2023).

### *Brazil's Withdrawal of Market Access Offer*

Brazil dampened hopes for the expansion of the GPA in Latin America when it withdrew its market access offer and stepped back from the negotiations in 2023. Three years ago (in 2020), Brazil's application for accession was applauded as the first Latin American country to pursue membership in the agreement, raising expectations that its accession would generate more interest in the region and beyond. It subsequently submitted three market access offers, labeling its third offer in 2022 as its "final offer." While the parties had not approved that offer, they were actively engaged in negotiations with Brazil. Therefore, it came as a surprise when, on May 30, 2023, Brazil informed the Committee it was withdrawing its market access offer (Grier 2023f).

Brazil's decision to withdraw its offer can be attributed broadly to a change of government, a fear that with accession, it would lose strategic leverage in the negotiations of what it considered more relevant bilateral trade agreements, especially an agreement with the EU. It was also concerned it would lose the ability to use public procurement as a policy tool (Pereira and Schwind 2023, 271).

President Bolsonaro's administration had submitted Brazil's GPA application and three market access offers. When the 2022 elections brought in President Luiz Inácio Lula da Silva, his team reexamined Brazil's offers, and the private sector weighed in with concerns relating to GPA accession. The National Industry Confederation (CNI) released a paper, *Industry Resumption Plan*, in May 2023, with recommendations to the federal government on promoting growth in the industrial sector (CNI 2023). Its recommendations included the recalibration of Brazil's GPA offer "to avoid an excessive opening of Brazil's public procurement market with little or no gain to Brazilian companies" (Pereira and Schwind 2023, 257).

The CNI contended that Brazil's offer caused "potential harm" in a number of ways. They argued that Brazilian companies already have access to the public procurement markets of many GPA parties, and thus, accession would not necessarily result in gains for them. In addition, several parties maintain vast reservations and preferences for local products and suppliers. Another concern was limitations imposed by the GPA on the Brazilian government's use of public procurement to advance public policies, such as protection of small and medium-sized enterprises (SMEs) or establishment of domestic preferences in government purchases. Finally, CNI considered that Brazil could have a greater interest in negotiating the opening of its public procurement market in bilateral trade agreements than in the GPA (Pereira and Schwind 2023, 267). Shortly after the CNI report was released, the Brazilian government announced the withdrawal of its market access offer.

The Brazilian press elaborated on factors that led to Brazil's withdrawal. One was that President Lula's government thought the country had offered too much procurement (including 20 states, the federal district, and 100 state-owned enterprises) to GPA parties, and that would reduce its leverage in negotiating bilateral agreements, especially with the EU. The Lula administration also pointed to US demands for greater opening of Brazil's market while it maintained its Buy American program. The demands of the parties that Brazil open procurement in its health sector were a particular fear. President Lula's government was especially concerned its GPA offer would remove the margin of preference for domestic suppliers of the Unified Health System and eliminate the state's ability to induce national production of equipment like ventilators, syringes, and masks. A further worry was that Brazil would not have been able to use offsets to acquire technology in areas such as defense, security, and health due to the GPA's prohibition of offsets (except for developing countries) (Pereira and Schwind 2023, 268–69; Grier 2023f).

Brazil's withdrawal of its GPA offer represented a significant setback for the expansion of the GPA, both as a developing country and a regional powerhouse. It had been the only WTO member negotiating accession to the GPA on its own initiative. All the others were fulfilling pledges made when they joined the WTO. However, since Brazil has not indicated that it intends to terminate its accession process entirely, "[i]t is reasonable to expect Brazil to submit a fresh coverage offer which is consistent with the concerns expressed at the time of the withdrawal"

(Pereira and Schwind 2023, 267). If it can be persuaded to complete its accession, it would provide a potent example for other former GATT contracting parties (Grier 2023f).

Brazil announced in June 2023 that it would take advantage of the GPA developing country article in any further accession negotiations (Pereira and Schwind 2023, 252). It had not sought such treatment in its first three offers. Its revised position could make new market access discussions more difficult as the GPA parties have permitted only limited use of special measures for developing countries under GPA Article 5.

### *Costa Rica's Application*

Following Brazil's withdrawal of its offer, Costa Rica, also a former GATT contracting party, applied for GPA membership in September 2023 (WTO Committee 2023c). It is the first Central American country to do so since Panama withdrew its application in 2013 (WTO Committee 2013; Grier 2023f; Grier 2022a, Ch. 14.2.2.1). Costa Rica plans to submit its initial offer before the Committee's March 2024 meeting (WTO Committee, 2023g, para. 3.1.1.3).

### *Other Pending Accessions*

Of the other pending accessions, the Committee signaled Albania as making the most progress on its accession in 2023. Albania reactivated its accession negotiations at the end of 2022 after a long delay. It intends to submit its initial market access offer as soon as possible in 2024. Albania applied for accession in 2001 to fulfill a commitment it made when it became a WTO member (WTO Committee 2023g, para. 3.1.1.2).

The other pending accessions made little or no progress over the past year. Of note is China, which tabled its last market access offer (sixth revised offer) in 2019. The Committee reported that China had "expressed its willingness to collaborate with other Parties, with the aim of moving [its] accession forward." It also indicated the parties' interest in receiving another revised market access offer and reference to remaining concerns as well recent legislative developments in China (WTO Committee 2023g, para. 3.1.2.2).

### *Observers*

In 2023, the Dominican Republic became the first observer to the GPA from the Caribbean, bringing the total number of observers to 35.

## **2. EU FTAs**

The EU did not conclude any new FTAs in 2023. It did, however, reach the political conclusion of negotiations on an Economic Partnership Agreement (EPA) with Kenya in June. The EU-Kenya EPA, which is not as comprehensive as an FTA, is intended to boost trade in goods (but not services) and create new economic opportunities. The EU described it as its most ambitious trade deal with a developing country in terms of sustainability provisions, such as climate and environmental protection and labor rights. It is also the EU's first agreement with a developing country to reflect the EU's new approach to trade and sustainable development with strong trade and sustainability commitments. It provides the possibility of adding new areas, such as trade in

services later and transparency in public procurement within five years of entry into force of the agreement (European Commission 2023b).

In 2023, the EU signed two FTAs that it had concluded in 2022. It will be seeking their ratification before the European Parliament elections in June and a new Commission is formed later in 2024. It will also try to complete its FTA negotiations with Australia, Mercosur, Mexico, and India before the Parliament elections.

## 2.1 EU FTAs Signed

### *EU-New Zealand FTA*

The EU-New Zealand FTA was signed by both parties in July. The EU completed its ratification of the FTA in November, with the approval of the Council of the EU, which represents the member states. It had earlier received the consent of the European Parliament. The FTA is expected to enter into force in early 2024 after it is ratified by New Zealand (Council of the EU 2023b).

The EU-New Zealand FTA represents a new generation of EU bilateral agreements. It is the first agreement to fully integrate the EU's new approach to trade and sustainable development "that provides explicitly for trade sanctions for noncompliance with the labour and environment standards as contained in the International Labour Organization's Fundamental Principles and Rights at Work and the Paris Agreement on climate change, respectively" (Heydon 2023). It also includes a sustainable food systems chapter, a trade and gender equality article, and a provision on trade and fossil fuel subsidies reform. It also liberalizes green goods and services (Council of the EU 2023b).

In the procurement chapter, both parties expanded their GPA coverage. For example, New Zealand offered 88 subcentral entities (70 more than under the GPA), limiting the commitments of the newly covered city, district, and regional councils to transport projects funded by the New Zealand Transport Agency. It also expanded its coverage of other entities from 19 under the GPA to 82, covering all public authorities whose procurement is regulated by the New Zealand Procurement Rules. The EU covered the procurement of health-related goods by regional government entities and the procurement of ports and airports (Grier 2022d).

### *EU-Chile Upgraded FTA*

The EU and Chile signed an Advanced Framework Agreement and an Interim Trade Agreement (ITA) on December 13, 2023 (European Commission 2023g). They had concluded negotiations of the agreements, which modernized a 2002 Association Agreement, including an FTA, in 2022 (European Commission 2022). With the Advanced Framework Agreement, Chile became the first country in Latin America to conclude a next-generation agreement with the EU, which includes substantive commitments on climate action, human rights, sustainable trade, and gender equality (European Commission 2023g).

Under the upgraded FTA, the EU and Chile exchanged improved access to their government procurement markets, including works concessions (European Commission 2022). Chile agreed to lower its thresholds for purchases of goods and services by central government entities to 95,000 special drawing rights (SDRs) (from 130,000 SDRs) and for other entities to 220,000

SDRs (from 400,000 SDRs). The EU maintained the higher thresholds. Chile also offered comprehensive coverage of its subcentral entities, covering all municipalities (*municipalidades*), in contrast to the listing of entities in the earlier agreement. Both parties confirmed coverage of their ports and airports and opened their public works concession contracts. In modernizing their 20-year agreement, the EU and Chile agreed to align their government procurement rules with the GPA, even though Chile is not a party to the plurilateral agreement (Grier 2023a).

The ITA needs to be ratified by the European Parliament and the Council of the EU, but not individual EU member states. However, the Advanced Framework Agreement will need to be ratified by all relevant national legislatures in the EU. Like other EU FTAs (Grier 2022a, Ch. 11), the modernized agreement had been separated into two parallel legal instruments: the Interim FTA, covering the trade and investment liberalization parts of the agreement, and the Advanced Framework Agreement, including cooperation and investment provisions that require ratification by all EU member states. This separation is based on a 2017 European Court of Justice ruling that the EU had exclusive competence over trade and investment market access and investment protection rules, but it had to share authority for investment dispute settlement and portfolio investment with the member states (Grier 2022a, Ch. 11.2).

## 2.2 Ongoing EU FTA Negotiations

### *EU-Australia FTA Negotiations*

The EU and Australia suspended their FTA negotiations on October 29, 2023, after more than five years and 15 rounds of negotiations. The EU had launched FTA negotiations with Australia in 2018 at the same time it began negotiations with New Zealand. Both negotiations proceeded largely in parallel until the Australian negotiations broke down in 2021 due to a fallout between the two trading partners. The breakdown resulted from Australia's cancellation of a multibillion contract for French-made submarines and entry into a new partnership with the US and UK, known as AUKUS, which drew sharp criticism from the EU (Remeikis 2021).

After resuming talks in 2022, the two sides were moving toward a political agreement when their negotiations collapsed at the end of October 2023. They broke over agricultural market access issues and mainly the size of EU tariff rate quotas for beef, lamb, and sugar (Horseman 2023b). Bruegel's André Sapir attributed the suspension of the EU-Australia FTA to clashing politics, comparative advantages, and critical materials (Sapir 2023).

Officials on both sides have warned that an agreement could be delayed for several years (Horseman 2023b). The negotiations are not likely to resume before 2025, after the European Parliament elections in 2024 and an Australian general election due the following year (Sapir 2023, 1). But ultimately, both have interests that are likely to bring them together once the elections are over. The EU has an interest in allowing access for some Australian beef in exchange for gaining access to its critical raw materials. For its part, Australia wants to depend less on China, its number one export market and source of imports (Sapir 2023, 4).

### *EU-Mercosur FTA Negotiations*

The EU and the Mercosur countries—Argentina, Brazil, Paraguay, and Uruguay—were unable to finalize a trade agreement in 2023, as had been widely expected. Instead, they issued a joint

statement on December 7 that they were “engaged in constructive discussions with a view to finalising the pending issues within the Association Agreement” (European Commission, 2023d). They had concluded negotiations on that agreement in 2019 and its procurement provisions in 2021 (Grier 2022a, Ch. 11.5.3).

Subsequently, they engaged in negotiations on an “additional instrument” on sustainability to be annexed to the Association Agreement. The EU wanted to add further guarantees around sustainability, particularly in the Amazon region. In return, the South American countries sought to negotiate concessions concerning public procurement in the health sector. In July 2023, Brazilian President Lula declared several addenda proposed by the EU “unacceptable” and “singled out for criticism an addendum introducing penalties for nations failing to comply with climate goals and a procurement clause allowing European companies to sell to Brazil’s public sector” (Reuters 2023).

Concluding an agreement before a planned December 7 summit of South American leaders had been complicated by the election in November of a new president of Argentina, Javier Milei, “an anarcho-capitalist outsider,” and the decision of the outgoing president to not make any new commitments in the negotiations. Brazil told the EU that the approval of Argentina’s incoming government would be needed on outstanding issues, such as a policy to curb deforestation. (Von Der Burchard 2023).

#### *EU-Mexico Agreement Negotiations*

Another EU FTA agreement that has stalled is one with Mexico. In 2018, the two partners reached an agreement on an update of the trade part of a 1997 bilateral agreement. That was followed two years later with an agreement on updated procurement commitments, including coverage of half of Mexico’s states (Grier 2022a, Ch. 11.5.2). Since then, the two sides have been trying to sign the updated agreement. The signature was delayed by talks on the architecture of the agreement, including separating the trade provisions from the political cooperation aspects, as with other EU FTAs. In addition, the two sides have been unable to reach an agreement on the energy chapter, with “the Mexican government’s recent heavy-handed interventions in its domestic energy market and its backing of state-owned firms, to the detriment of European renewable energy investments” as the main obstacle (Dreyer 2023b). (The US has also challenged Mexico’s energy policy as contravening the US-Mexico-Canada Agreement.)

#### *EU-India FTA Negotiations*

When the EU and India relaunched negotiations of a comprehensive trade agreement in June 2022, they hoped to complete them by the end of 2023. One of the EU’s aims is to open India’s public procurement (Grier, 2022a, Ch. 11.6). In reporting on its sixth round of negotiations in October 2023, the European Commission noted that only a few elements in the government procurement chapter remained bracketed (unresolved), including domestic review procedures. In addition, each side had indicated improvements they sought in the other’s initial market access offer (European Commission, 2023d). To date India has only opened its procurement under one bilateral agreement—with the UAE in 2022. That agreement covers only central government entities and allows India to apply higher thresholds than the UAE, exclude its health sector, and apply domestic preferences (Grier 2022e).

### *EU-Indonesia FTA Negotiations*

In December 2023, the EU and Indonesia held their 16th round of negotiations on an FTA, negotiations that began in 2016. While some progress was made in the talks in 2023, “discussions remained inconclusive on key outstanding issues, such as government procurement market access and export duties.” Other areas, such as trade and sustainable development, state-owned enterprises, and subsidies, will also require “substantial work” to conclude (European Commission 2023f). On government procurement, the text discussions “focused on the very limited number of provisions that still remain to be agreed upon,” including non-discrimination and application of the dispute settlement regime. However, on market access, where they had just tabled offers, they were far apart in terms of coverage and overall level of ambition. It appears doubtful that the two sides will be able to conclude the negotiations before the European Parliament elections in 2024.

## **2.3 Facilitating Access to Procurement Opportunities**

The EU has the most extensive network of bilateral FTAs of any trading bloc, having notified 45 FTAs to the WTO. It has recognized that as FTAs become increasingly complex, they are often difficult to understand and to make use of, especially for SMEs. In response to requests by EU stakeholders to simplify FTA implementation and ensure that companies can understand their provisions and take advantage of their benefits, the European Commission launched an *Access2Procurement* tool for government procurement opportunities under the GPA and FTAs in September 2021. This online tool assists companies in determining whether they are entitled to participate in a given government procurement outside the EU. It provides user-friendly information on public procurement tenders available to them in Canada and Japan (both GPA and FTA partners of the EU) and the US (as a GPA party), as of July 2023. The EU intends to add other key trading partners in the future (Cernat 2021; European Commission 2023c). While the *Access2Procurement* tool at <https://webgate.ec.europa.eu/procurement/#/country> is designed to facilitate the use of the GPA and FTA procurement opportunities by EU suppliers, it may also be a useful resource for US and other countries’ suppliers.

## **3. Comprehensive and Progressive Trans-Pacific Partnership (CPTPP)**

The 11-party CPTPP Agreement entered into force for Brunei in 2023, completing the implementation of the “gold standard” for trade agreements. It became effective for Australia, Canada, Japan, Mexico, New Zealand, and Singapore in 2018; Vietnam in 2019; Peru in 2021; and Malaysia and Chile in 2022. In 2023, the CPTPP also added its first new party, the UK. In addition, the CPTPP members endorsed the Terms of Reference for a CPTPP General Review, which will be undertaken in 2024. The review will consider the work of bodies established under the agreement, relevant developments in international fora, and input from nongovernmental persons or groups. Its purpose is to support the maximum utilization of the agreement, improve its application, and “consider trade outcomes that support women’s and Indigenous Peoples’ economic empowerment, and sustainable environmental practices” (CPTPP Ministers 2023c).

### **3.1 UK Accession**

The CPTPP parties approved the UK’s accession in July, recognizing it as “a G7 Member, the world’s sixth-largest economy, and an economy committed to high standards and rules-based

trade” (CPTPP Ministers 2023a). The UK is expected to become a CPTPP party in the second half of 2024 after it has ratified the Protocol of Accession, along with each of the CPTPP parties, in accordance with their respective domestic processes. If all the parties have not completed the ratification process within 15 months of the signature of the Protocol (i.e., by mid-October 2024), the UK’s accession will come into force 60 days after it and at least six CPTPP members complete their ratification (Protocol, art. 21.2). The UK’s process “involves ratification of the protocol via the Constitutional Reform and Governance Act—the standard process by which the UK ratifies international treaties” (Horseman 2023a). Japan was the only party to ratify the UK’s accession in 2023.

The UK already has FTAs with all but two of the CPTPP members (Brunei and Malaysia). Five are also GPA parties (Australia, Canada, Japan, New Zealand, and Singapore). The UK’s coverage of procurement closely follows its commitments under the GPA. It applies the same thresholds and covers the same central government entities and comparable, if not the same, subcentral entities and other entities, as in the GPA. Its subcentral coverage includes all regional or local government contracting authorities that are unitary authorities with populations of over 150,000, county councils, combined authorities, and the Greater London Authority, as well as successor regional or local government contracting authorities of substantively equivalent population sizes. The UK provides indicative lists of entities in each category. (Britain’s differing descriptions of its subcentral coverage in the CPTPP and GPA render comparisons difficult.) As in the GPA, the UK relies on a positive list to specify its coverage of services. It allows participation in its works concessions by all parties, except Malaysia and Mexico, which do not offer access to such procurement.

Under the Protocol, Australia offered the UK coverage of its subcentral entities, which it had accorded to only five CPTPP parties: Canada, Chile, Japan, Mexico, and Peru. In addition, Mexico agreed not to apply its transitional measures to the UK. (It had also excluded Canada and Japan from those measures.) (For a discussion of the development of the CPTPP and its procurement chapter, see Grier 2022a, Ch. 10.)

### 3.2 Pending Applications

Six economies have applied for accession to the CPTPP: China, Taiwan, Costa Rica, Ecuador, Ukraine, and Uruguay. As a geopolitical rival of many of the CPTPP members, China’s bid has divided the CPTPP membership. Malaysia, Singapore, and Vietnam have signaled support, while Australia and Japan have taken significantly more cautious positions (Horseman 2023a).

In approving the UK’s accession, the CPTPP ministers noted it “will illuminate the path” for others seeking to join the pact, thus demonstrating the strength and value of the agreement (CPTPP Ministers 2023b). They reaffirmed that “the CPTPP is open to accession requests by economies that are ready to meet the high standards of the Agreement and with a demonstrated pattern of complying with their trade commitments.” In November, the ministers noted that since July, “they had been gathering information on whether aspirant economies can meet CPTPP’s high standards and whether they have a demonstrated pattern of compliance with trade commitments” (CPTPP Ministers 2023c). They are developing “a process for future accessions that is efficient, fair, high quality, attractive to aspirant economies, and informed by lessons learned from the United Kingdom’s accession.” The ministers have not indicated when they expect to start accession negotiations with any of the candidates.

#### 4. UAE Comprehensive Economic Partnership Agreements (CEPAs)

The UAE is increasingly pursuing bilateral trade deals outside of the GCC—a customs union, common market, and negotiating bloc, of which it is a member, as its competition with Saudi Arabia (also a GCC member) “intensifies for economic dominance in the oil-rich region” (Uppal and Barrington 2023). Its ability to quickly negotiate bilateral trade agreements is one of the reasons the UAE has undertaken its own trade agenda (Uppal and Barrington 2023).

The UAE has implemented four Comprehensive Economic Partnership Agreements (CEPAs) with four countries in the past two years: India in 2022 and Indonesia, Israel, and Türkiye in 2023. It launched the first of the negotiations with India in August 2021, followed shortly thereafter with the initiation of talks with Indonesia and Israel, and then with Türkiye the following year. In contrast to most FTA negotiations that take years to negotiate, sign, ratify, and implement, the UAE implemented the last of the four agreements on September 1, 2023 (UAE Ministry of Economy 2023a). In addition, UAE concluded negotiations of an FTA with South Korea in October, after launching them in 2021 (Uppal 2023).

UAE is neither a party nor an observer to the GPA. In contrast, India, Indonesia, and Türkiye are observers, and Israel and South Korea are GPA parties.

##### 4.1 UAE-India CEPA

In May 2022, India and the UAE implemented a bilateral CEPA, the first agreement in which either party undertook government procurement commitments (UAE Ministry of Economy 2022a). The FTA echoes the GPA in recognizing the importance of conducting procurement in a transparent and impartial manner and avoiding conflicts of interest and corrupt practices. Yet, unlike the GPA, the bilateral agreement recognizes government procurement as a tool in the expansion of domestic production and trade. It also emphasizes the need for flexibility of commitments “to accommodate the specific circumstances and needs of each Party” (Grier 2022e).

The UAE-India CEPA only covers the procurement of listed central government entities (34 for India and 41 for the UAE), with neither covering its defense ministry. It allows India to apply higher thresholds than the UAE. The agreement permits also both parties to apply domestic preferences: for India, preferences authorized by government orders, and for the UAE, a 10% price preference for domestic green suppliers and green domestic goods. In addition, both countries exclude construction projects and the procurement of medicines or drugs. India goes further in excluding the whole health care sector (Grier 2022e).

##### 4.2 UAE-Israel CEPA

The UAE’s second CEPA was with Israel. The UAE-Israel CEPA was signed in May 2022, ratified in December 2022, and entered into force on April 1, 2023 (UAE Ministry of Economy 2022b). The government procurement chapter closely follows the GPA, with certain exceptions, such as time periods, which are specified in the parties’ market access schedules. Israel applies its GPA time periods, while the UAE employs lower minimum tendering periods, which vary by the value

of the procurement. As in other UAE CEPAs, the agreement requires parties to maintain measures to address corruption and avoid conflicts of interest.

Like the India CEPA, the agreement specifies covered procurement, which is limited to central government entities. Israel applies the same thresholds as in the GPA, and the UAE has slightly higher thresholds. CEPA permits both parties to impose offsets. Israel applies offsets in procurement above the threshold of three million SDRs by its listed entities up to 35% of the contract. For its offsets, the UAE applies a “Unified In-Country Value percentage” in evaluating bids. In addition, it applies two types of domestic preferences. One is a 10% preference for SMEs. The other is a 10% price preference for domestic green suppliers and green goods of domestic origin.

#### **4.3 UAE-Indonesia CEPA**

The UAE-Indonesia CEPA was signed on July 1, 2022, and entered into force on September 1, 2023 (UAE Ministry of Economy 2022c). Its government procurement chapter generally aligns with the GPA in terms of procedures and basic obligations with several important differences. For example, it does not require national treatment, domestic review, or dispute settlement, nor does it specify time periods for tendering. The scope of its coverage is also limited to government procurement that is “expressly open to international competition.” It does, however, provide for further negotiations if one party offers a non-party any advantages in access to its procurement market. The agreement also requires parties to maintain criminal or administrative measures to address corruption in its government procurement and “policies and procedures to eliminate to the extent possible or manage any potential conflict of interest on the part of those engaged in or having influence over a procurement.” The CEPA also specifies measures to facilitate participation by SMEs and requires any preference measure for SMEs to be transparent, extending the requirement to criteria for eligibility. The parties will review the procurement chapter three years after entry into force of the CEPA.

#### **4.4 UAE-Türkiye CEPA**

The UAE-Türkiye CEPA was signed on March 3, 2023, and entered into force five months later on September 1 (UAE Ministry of Economy 2023b). This CEPA includes a brief government procurement chapter in which the parties recognize “the importance of cooperation on government procurement. It also provides that two years after the agreement enters into force, the parties may enter discussions to negotiate a new government procurement chapter. The bilateral agreement also includes provisions for promoting trade and investment opportunities for SMEs, including their participation in covered government procurement.

### **5. GCC FTAs**

The GCC, with its six members (UAE, Saudi Arabia, Kuwait, Qatar, Bahrain, and Oman), advanced its negotiating agenda in 2023. In contrast to the UAE’s completion of negotiations, which on average take six months, the GCC negotiations are often more protracted. For example, its negotiations with China that began in 2004 are still ongoing. Some talks can “languish for years as the bloc navigates competing internal priorities and simmering political feuds” (Uppal and Barrington 2023).

The GCC concluded a bilateral FTA with South Korea on December 28. The two sides began their FTA negotiations in 2007 but suspended them in 2010. After a 13-year hiatus, they resumed talks in 2022 (Oh 2023). The newly concluded FTA covers trade in goods, services, government procurement, as well as cooperation among SMEs, customs procedures, and intellectual property (Arab News 2023). As of the end of the year, the text of the FTA had not been made public.

In September, the GCC signed a “preliminary” FTA with Pakistan. They held technical-level talks in 2022 to examine the possibility of signing an FTA to boost Pakistan’s exports to the six-country bloc (Arab News 2023). Earlier in 2023 (July), the GCC restarted talks with Japan (Sambidge 2023). It is also engaged in negotiations with the UK.

## **6. Other Agreements with Procurement Provisions**

### **6.1 IPEF: Anti-corruption in Government Procurement**

In 2023, the Biden administration negotiated one international agreement with a government procurement provision, albeit relating to anti-corruption and not the opening of procurement markets. In place of the comprehensive FTAs that the US negotiated in the past (Grier 2022a, Ch. 5), the administration has pursued various trade initiatives. The most prominent is the Indo-Pacific Economic Framework (IPEF), launched in May 2022, as Biden’s substitute for rejoining the Trans-Pacific Partnership agreement that former President Donald Trump abandoned on his third day in office (Grier, 2022a, Ch. 10.2.2). The IPEF has four pillars: one on trade, Connected Economy, is led by USTR, and the other three—Resilient Economy (supply chains), Clean Economy (decarbonization), and Fair Economy (good governance)—are under the Secretary of Commerce (White House 2022b). The IPEF parties reached initial economic cooperation agreements under the three Commerce-led pillars in 2023. They have yet to reach agreement on the trade pillar, which USTR has made clear is not a traditional FTA and will not include tariff liberalization or other market access provisions.

In November, the 14 IPEF partners (Australia, Brunei Darussalam, Fiji, India, Indonesia, Japan, South Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand, the US, and Vietnam) announced substantial completion of the IPEF Fair Economy Agreement. That agreement includes a government procurement commitment relating to anti-corruption. The partners agreed “to adopt or maintain criminal, civil, or administrative measures to address corruption, fraud, and other illegal acts in government procurement, and promote contracting with suppliers that operate with integrity and use good business practices” (US Department of Commerce 2023). That element of the commitment is similar to provisions found in many US FTAs. When the agreement is finalized, the text will be made public.

### **6.2 UK’s Mini-Pacts with US States**

Over the past two years, the UK has signed nonbinding arrangements on cooperation in trade and investment with seven US states. It signed sign mini-pacts in 2022 with states that are not subject to the GPA: Indiana, North Carolina, and South Carolina. In 2023, it entered arrangements with four states that cover procurement under the GPA (Oklahoma, Utah, Washington, and Florida). Florida is the largest state economically to enter a UK arrangement (UK Department for Business and Trade 2023).

The UK is pursuing the state mini-pacts as part of a “twin-track approach” toward trade with the US while it waits (and hopes) for the administration to reengage in negotiations of a comprehensive FTA. The state arrangements vary in content but generally outline areas and types of cooperation and ways to expand trade between the state and the UK. They are nonbinding and lack enforceable commitments. The UK’s first state-level pact—with Indiana—includes the most concrete promise relating to government procurement. Indiana agreed to actively work toward offering UK suppliers treatment that is no less favorable than Indiana gives to suppliers from a state not bordering Indiana, including state-level preferences (Grier 2023b).

The UK’s pursuit of state-level arrangements is without precedent. However, it may be fruitful if states not covered by the GPA are willing to lift their preferences for UK suppliers, as Indiana indicated it is exploring. The likelihood of the UK gaining rights to participate in state procurement under an FTA or expanded access under the GPA is remote, at best (Grier 2023b). Even if the US were to return to the negotiating table and complete FTA negotiations with the UK, there would be no assurance that the US would include states in its commitments. The last time the US added states was in FTAs with Colombia, Panama, and Peru in the first decade of the twenty-first century (Grier 2022a, Ch. 6.3).

## **7. US Domestic Preferences**

### **7.1 Implementation of BABA Buy America Preference**

In 2023, the Biden administration continued its implementation of the most far-reaching domestic content requirement applied to US infrastructure projects (Grier 2022a, Ch. 12.2.1.3). Its implementation has raised concerns relating to compliance with US obligations under the trade agreement—namely, whether the US is giving its trading partners national treatment in procurement covered by the agreements.

The Build America, Buy America Act (BABA Act), incorporated into the 2021 Infrastructure Investment and Jobs Act (IIJA), Public Law 117-58 (2021), prohibits the use of federal funds on any infrastructure project undertaken by nonfederal entities unless all the iron, steel, manufactured products, and construction materials used in the project are produced in the US. The BABA Act mandated the first-time application of a domestic purchasing requirement to construction materials. Previously, domestic preferences for infrastructure projects had been limited to iron, steel, and manufactured products (Grier 2022c).

In implementing the BABA Act, the Biden administration sought to close what it characterized as a “giant loophole” that had allowed infrastructure projects to be built with products “sourced from anywhere in the world” (White House 2023a). To facilitate implementation of the BABA Act preference, the Office of Management and Budget (OMB) issued three sets of guidance: initial guidance in April 2022 (OMB 2022; Grier 2022b), final guidance in August 2023 (OMB 2023b; Grier 2023j), and supplemental guidance in October 2023 (OMB 2023c; Grier 2023o). With its latest guidance, OMB rescinded and replaced its initial guidance and emphasized that in any conflict between its earlier guidance and its final guidance, the final guidance would prevail.

An issue of particular concern to US trade agreement partners centered on the application of the BABA Act preference to procurement covered by US obligations under trade agreements. The BABA Act (sec. 70914(e)) directs that the ‘Buy America’ requirement be “applied in a manner

consistent with United States obligations under international agreements.” Those agreements—the GPA, FTAs, and a 1995 US-EU bilateral arrangement—require the US to provide national treatment to its partners in procurement it covers under the agreements. That means the domestic preference does not apply to procurement covered by such agreements (Grier 2023c).

In its 2022 initial guidance, OMB acknowledged the BABA Act provision relating to international obligations, noting that if a state has a procurement obligation under the GPA or other trade agreement, “a waiver of a Made in America condition to ensure compliance with such obligations may be in the public interest.” Its use of “may” suggested that it regarded granting such a waiver to be optional (Grier 2023c).

In February 2023, OMB proposed final implementation rules for incorporation into the Code of Federal Regulations as a new part 184 (Buy America Preferences for Infrastructure Projects) and invited public comments on its proposal (OMB 2023a). The proposed rules were silent on the use of foreign products in infrastructure projects covered by international agreements (Grier 2023c). This omission of any reference to the BABA Act’s international agreements provision was of particular concern to foreign governments.

The EU and others sought an explicit clarification that BABA requirements did not apply to government procurement covered by US trade agreements and that foreign products covered by such agreements could be incorporated into an infrastructure project without the need for a waiver. In its comments to OMB, the EU contended “[t]he lack of reference to international obligations in the guidance document could lead to incorrect application of the IIJA by the U.S. public agencies and misunderstandings of the requirements by bidders” (EU Delegation to the US 2023). To remedy this deficiency, the EU recommended the final guidance state explicitly “that ‘Buy America’ requirements do not apply to government procurement covered by the United States’ obligations under international agreements.” Similarly, Canada encouraged the agency to provide further guidance to ensure that the 37 US states covered by the GPA comply with the IIJA’s provision for international agreements (Government of Canada 2023). The UK, among others, raised concerns that the proposed guidance could lead to confusion and barriers to trade. Commenters also pointed out that the waiver process was too onerous (Grier 2023j).

When OMB issued its final guidance, it acknowledged that commenters had raised concerns with the lack of any reference relating to the application of the Buy America preference to procurement covered under international agreements and had questioned how its implementation would interact with US trade obligations. Despite those comments, OMB found no reason to address this issue in the final guidance. Instead, it relied on its 2022 initial guidance’s requirement that a public interest waiver would be needed to purchase foreign goods covered by an international agreement (OMB 2023b).

Yet two months later, in October 2023, OMB issued supplemental guidance that rescinded its 2022 initial guidance and addressed the concern raised by the EU, Canada, and others. It included a section on “Consistency with International Agreements” that provides: “[p]ursuant to Section 70914(e) of BABA, this guidance must be applied in a manner consistent with the obligations of the United States under international agreements.” In the latest guidance, OMB maintained that “[i]f a recipient is a State that has assumed procurement obligations pursuant to the Government Procurement Agreement or any other trade agreement, a waiver of a Made in America condition to ensure compliance with such obligations may be in the public interest”

(OMB 2023c). Nonetheless, the agency continued to insist that a public interest waiver is needed for a sub-federal entity to purchase a foreign product covered by an international agreement. OMB's latest guidance provided no assurance that a public interest waiver will be issued for goods covered by an agreement (Grier 2023n).

Finally, there is the waiver process itself. The granting of a waiver is not a simple or straightforward procedure, as detailed in the guidance. It requires a recipient of federal funds to request a waiver from the federal awarding agency, in accordance with that agency's instructions. The burden will be on the foreign supplier to demonstrate that a particular project is covered by a trade agreement and persuade the sub-federal entity undertaking the project to seek a public interest waiver from its federal granting agency. If the nonfederal entity agrees to request a waiver, and the federal agency agrees to propose such a waiver, the federal agency must prepare a detailed written explanation for the proposed waiver, post the proposed waiver and an explanation on a designated website, and allow at least 15 calendar days for public comments on it. Finally, if after the comment period, it decides to proceed with the waiver request, it then must submit its proposed waiver determination to OMB's Made in America office for review and a determination of whether it is consistent with applicable law and policy (Grier 2023j).

It remains to be seen whether the requirement of public interest waivers will be effective in enabling the US to comply with its international obligations. The test will be the extent to which suppliers from trade agreement partners are able to persuade nonfederal entities undertaking infrastructure projects, federal agencies, and the final arbiter—OMB's Made in America Office—that an infrastructure project is covered by the agreement and are granted public interest waivers (Grier 2023n).

The White House's implementation of the international obligation provision in the BABA Act contrasted starkly with the Obama administration's approach to a similar domestic preference under the American Recovery and Reinvestment Act of 2009 (ARRA). ARRA imposed a Buy America requirement on all infrastructure projects that it funded, and like the BABA Act, did not apply to projects subject to international obligations. In that case, OMB developed rules that provided for implementing the domestic preference in a manner that would honor the US's obligations under agreements. It included incorporating an appendix in the CFR detailing the procurement covered under trade agreements (Grier 2023c).

At the November 2023 meeting of the WTO Committee, GPA parties, led by the EU and echoed by Australia, Canada, Switzerland, and the UK, criticized the US implementation of the BABA Act (WTO Committee 2023f). Their criticism focused on whether the US was complying with its GPA obligations in its application of the Buy America preference to federally funded infrastructure projects. In responding that the US is applying the preference consistent with its international obligations, the US representative pointed to OMB's supplementary guidance. Yet, OMB's implementation guidance has failed to assuage concerns. Uncertainty remains as to how the US will ensure compliance with the GPA in applying the domestic preference (Grier 2023n).

## **7.2 Pending US Procurement Rules**

In 2023, the US continued to deliberate on the preparation of procurement rules that could affect access of foreign firms to US procurement.

### *Enhanced Price Preferences for Critical Products*

To implement Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America's Workers*, in 2022, the Federal Acquisition Regulatory Council (FAR Council) created a framework for applying higher (or enhanced) price preferences to critical products and construction materials and critical components. While it defined “critical items” as domestic construction material or domestic end products and critical components deemed critical to US supply chain resiliency, it deferred the identification of such items and their associated higher or enhanced price preferences to a subsequent rulemaking (FAR Council 2022a). Although it initiated the rulemaking process in March 2022, it had not issued a proposed rule by the end of 2023.

### *Domestically Nonavailable Articles*

Another delayed rulemaking procedure is the implementation of the requirement in FAR 104(b) to publish the list of domestically nonavailable articles in the Federal Register for public comment at least once every five years. Since 2020, the FAR administrators have been engaged in preparing a response to that requirement. The preparation of a draft proposed FAR rule, initially due in 2020, has been extended repeatedly. As of the close of 2023, a proposed rule had not been issued.

## **7.3 Domestic Preferences outside Procurement**

More than any recent president, President Biden has turned to industrial policy to advance his agenda. The Infrastructure Act together with the Inflation Reduction Act and the Creating Helpful Incentives to Produce Semiconductors and Science Act (CHIPS and Science Act) form the core of his industrial policy. Through a combination of domestic preferences, direct subsidies, tax incentives, and support for research and innovation, these laws seek to restructure the American economy and boost US manufacturing (Sutton and Williams 2023). The Inflation Reduction Act extended ‘Buy America’ requirements into non-procurement areas with its provision of tax credits for purchases of electric vehicles that contain critical minerals from the US or FTA partners and that are assembled in North America. The CHIPS and Science Act provides funding to boost domestic R&D and manufacturing of semiconductors in the US. It includes subsidies for chips manufactured in the US and funds for semiconductor research and workforce training, with the primary aim of countering China (White House 2022b).

The White House also extended domestic preferences to R&D funded by the federal government in July 2023, when President Biden signed an *Executive Order on Federal Research and Development in Support of Domestic Manufacturing and United States Jobs* (White House 2023d). It sets out the administration’s policy that new technologies and products developed with US government support “will be manufactured in the United States whenever feasible and consistent with applicable law.” The order seeks to boost the incentive to manufacture inventions developed with federal funds in the US.

The White House outlined four core objectives of the R&D funding order:

- improve transparency, cut red tape, and streamline reporting requirements in the federal R&D process to better track progress toward domestic manufacturing goals,

- boost the incentive to manufacture in the US new inventions developed using federal funds,
- encourage the expansion of domestic production for critical industries while maintaining flexibility to build strong international R&D partnerships, and
- improve the domestic manufacturing waiver process, including when production is not commercially feasible (White House 2023e).

The order encourages agencies to factor domestic manufacturing of inventions into their R&D award solicitations and consider using the broad range of their authorities to purchase or invest in cutting-edge technologies to support domestic production. In addition, to emphasize the importance of domestic manufacturing and encourage potential federal funding recipients to build that consideration in planning to commercialize inventions, the White House will seek to add domestic manufacturing to the government's technology R&D roadmaps (White House 2023d).

With the order, the White House also sought to remedy the limited scope of the domestic manufacturing requirement in the Bayh-Dole Act of 1980, a mechanism established by Congress to encourage the commercialization of technology and research resulting from the use of federal funds. When federal contractors license federally funded inventions to private businesses for commercialization, the Bayh-Dole Act imposes a US manufacturing preference. It prohibits contractors from licensing the exclusive right to use or sell a covered invention in the US unless the licensee agrees it will be “manufactured substantially” in the US. Federal agencies may waive the requirement when domestic manufacture is not commercially feasible (US Library of Congress, Congressional Research Service 2022). The Biden administration was concerned that the Bayh-Dole requirement does not extend to organizations with a nonexclusive license, federal funding awardees, or organizations that take an invention developed with US federal funding to market to sell solely overseas (White House 2023e). To remedy that deficiency, the order encourages agencies to expand the domestic manufacturing requirement beyond exclusive licensees for critical and emerging technologies. This latest iteration of Biden's Buy America policies is a softer requirement than the broad mandate in the Infrastructure Act and the requirements in the Inflation Reduction Act (Grier 2023k).

## **8. EU Trade Defense Measures**

In 2023, the EU implemented two trade defense measures relating to public procurement: a Foreign Subsidies Regulation and an Anti-coercion Instrument. These measures, together with an International Procurement Instrument (IPI) implemented in 2022, are “defensive trade and investment instruments enacted by the EU against perceived encroachments against the integrity of its single market” (Dreyer 2023a). Furthermore, they illustrate the value of access to the large EU procurement market and the hope and expectation that threats of loss of such access will alter the actions of third countries (Grier 2023i). The IPI provides leverage for the EU to negotiate the opening of public procurement markets in third countries by authorizing the European Commission to penalize or block tenders from countries that restrict EU participation in their home procurement markets and are unwilling to negotiate an opening of their procurement (Grier 2022a, Ch. 12.4.1).

## 8.1 EU Foreign Subsidies Regulation

The EU implemented the Foreign Subsidies Regulation (FSR) in 2023 to address distortions caused by foreign subsidies in EU public procurement. It empowers the Commission to prevent state-subsidized companies from bidding on public procurement contracts in the EU if it determines they have received distorting subsidies (EU 2022). (It also applies to mergers and acquisitions and joint ventures.) The FSR requires companies participating in large EU public tenders (value of the procurement is at least €250 million) to submit notifications of financial contributions that they received from foreign governments during the prior three years. The FSR entered into force on January 12, 2023, and became directly applicable across the EU in July. Its notification requirement applied from October 12, 2023.

The EU adopted the Regulation out of concern that foreign subsidies could provide foreign firms with an unfair advantage in EU procurement by enabling foreign-subsidized bidders to win contracts with bids below market price or below cost to the disadvantage of European firms (Grier 2023d). The FSR's broad definition of financial contributions might apply to US companies receiving subsidies under the Inflation Reduction Act (Grier 2023d). (For a discussion of the background and development of the FSR, see Grier 2022a, Ch. 12.4.2.)

One of the issues raised by the FSR is its consistency with the EU's obligations under the GPA. The FSR broadly addresses EU compliance with international agreements but does not make any specific reference to the GPA. Commentators have questioned whether the FSR is consistent with the GPA's nondiscrimination article that stipulates a locally established supplier must not be treated less favorably than another locally established supplier based on the degree of foreign affiliation or ownership. This raises questions, such as whether requiring a US subsidiary in an EU member state to notify its foreign financial contributions and face potential exclusion from a procurement meets this requirement when its European competitors are not subject to it (Grier 2023d).

The European Commission identified another article of the GPA that may be even more relevant to the FSR's compliance with the GPA. When it initially proposed regulating foreign subsidies in a 2020 white paper, it acknowledged that the exclusion of bidders would have to be compatible with the EU's commitments under international agreements, citing the GPA's article on Conditions for Participation and similar FTA provisions. These provisions direct procuring entities to limit the conditions that suppliers may be required to meet in order to participate in a procurement to those "essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement." The plurilateral agreement also requires entities to limit their assessment of whether a supplier satisfies participation conditions to those specified in advance in notices or tender documentation. A question to be considered is whether the application of the FSR's notification requirements would be in accord with these restrictions (Grier 2023d).

The GPA allows suppliers to be excluded from participation in a procurement under certain conditions. Rather than providing a definitive list of conditions for exclusion, it lists illustrative grounds for exclusion, such as false declarations, significant or persistent deficiencies in performance under a prior contract, and acts that adversely reflect on the supplier's commercial integrity. The GPA parties could consider whether the exclusion of a foreign supplier because it has received a foreign subsidy considered distortive fits within these parameters (Grier 2023d).

## 8.2 Anti-coercion Instrument

In 2023, the EU adopted an Anti-coercion Instrument (ACI), the EU's third trade defense instrument relating to procurement, in response to third countries' targeting deliberate economic pressure against the EU and its member states (European Commission 2023a). While the EU did not indicate that the new measure was directed at any specific country, *Borderlex* labeled China's blockade of trade with Lithuania in response to its opening of a Taiwan representative office in its capital, Vilnius, as "a perfect scene-setter" for the regulation (Dreyer 2021).

The development of the ACI began with a European Commission proposal in 2021 (European Commission 2021a). In June 2023, the EU's co-legislative institutions reached a political agreement on the instrument (European Commission 2023a). In October 2023, the anti-coercion regulation was approved by the European Parliament and adopted by the Council (Council of the EU 2023a). It was published in the Official Journal of the EU on December 7 and entered into force on December 27 (European Union 2023; European Commission 2023h).

According to the EU, the ACI is "first and foremost" a deterrent" against economic coercion, defined as "a situation where a third country attempts to pressure the EU or a Member State into making a particular choice by applying, or threatening to apply, measures affecting trade or investment against the EU or a Member State" (European Commission 2023a). If the new regulation does not deter coercion, it provides a means for dealing with the coercion. The Union may formally identify instances of economic coercion and respond, first through dialogue and engagement with the coercing country. If that is not successful, the EU can retaliate against it.

The ACI authorizes the adoption of a variety of anti-coercion measures. The Commission can place restrictions on access to the EU public procurement market, the import and export of goods and services, intellectual property rights, and foreign direct investment. Moreover, it could also remove market authorizations for chemicals and food products under the EU's sanitary and phytosanitary rules (European Commission 2021b).

If the Commission invokes the procurement remedy, it may suspend any international obligations providing for participation in EU procurement and exclude the goods, services, or suppliers of the coercing country or tenders with more than a specified percentage of goods or services from that country from its procurement. It may also impose a mandatory price evaluation weighting penalty on the third country's tenders, thus increasing the price of its goods or services.

## 9. Climate-Related Developments

### 9.1 Green Public Procurement Report

An important 2023 report emphasized the potential role of green public procurement (GPP) policies in addressing the climate crisis. The report, *Priming the Pump: The Importance of Green Public Procurement in Decarbonizing Industry and Creating a Clean Energy Economy*, stressed the important role the G7 countries could play "in harnessing the power of public procurement to reduce emissions." It was published by Climate Advisers as the Secretariat of the Consortium for Climate-Aligned Trade in October 2023 (Climate Advisers 2023).

In the report, Climate Advisers described various GPP policies that can create and accelerate markets for clean technologies. It also pointed out how G7 countries can “continue to lead by example in transitioning to a green, low-carbon global economy” through their own public procurement practices that would send a strong signal to global markets. In addition, they outlined pathways for the G7 to adopt GPP policies, with recommendations “that can help prime the pump of the global green economy through procurement.” Its recommendations included:

- seek GPP commitments at the federal or central government levels,
- set a time-bound goal to create a mutually supportive and rules-based framework by 2030 that aligns procurement goals with climate policies,
- require suppliers participating in central government procurement to disclose greenhouse gas (GHG) emissions in their goods and services and require government entities to give preferences to products with lower GHG emissions when awarding contracts, and
- support and collaborate on GPP with key initiatives, such as the Clean Energy Ministerial Industrial Deep Decarbonisation Initiative, focusing on data and technical issues (Climate Advisers 2023).

## 9.2 G7 and Green Procurement

When the G7 leaders met in May 2023 in Hiroshima, Japan, they adopted the *G7 Clean Energy Economy Action Plan* to address the climate crisis and accelerate the global clean energy transition. In promoting clean energy technologies, they promised to “lead by example through public procurement to catalyze sustainable supply chains” (White House 2023b). The 2023 Climate Advisers’ report highlighted major developments relating to government procurement among G7 countries in recent years (Climate Advisers 2023).

## 9.3 US-EU Green Public Procurement Initiative

The US and the EU undertook a GPP initiative in 2023. As two leading parties to the GPA, their joint action could have a significant motivating effect on stalled work on sustainability in the WTO procurement committee (Grier 2023g).

The US-EU Trade and Technology Council (TTC) adopted a work program to advance their Transatlantic Initiative on Sustainable Trade in May of 2023 (White House 2023c). That Initiative, adopted in December 2022, covers government procurement and a range of other practices that could impact the environment. The work program includes two GPP commitments. First, the two trading partners agreed to publish a catalog of best practices on green procurement with the aim of exchanging experiences and promoting a shared understanding of sustainability considerations in public procurement across contracting authorities. They sought “to pave the way for better policies and practices for environmental considerations in government procurement that can make a substantive positive impact” on achieving their common environmental goals. While they indicated the catalog could be published as soon as the summer of 2023, it had not been published by the end of the year.

The second procurement commitment was to launch a joint EU-US initiative on GPP policies at the fifth meeting of the TCC. It was to be based on the joint catalog of best practices (and following stakeholder consultations). It was intended to deepen the shared aims of the US and EU’s public procurement approaches to help achieve their climate ambitions (Grier 2023g). The

goals of the fifth TTC ministerial include rolling out a work program for the Trans-Atlantic Initiative for Sustainable Trade. A date for that meeting had not been announced by the end of 2023 (Spiegelman 2023).

Joint action by the US and the EU on green procurement could provide a major impetus for the WTO Committee's work program on sustainable procurement practices, established in 2014. The mandate for the work program required the Committee to examine the objectives of sustainable procurement, the integration of that concept into national and subnational procurement policies, and how it can be practiced consistently with the "best value for money" principle and international trade obligations. It also directed the Committee to prepare a report on best practices. As of December 2023, it had not issued any report or recommendations (Grier 2023g).

#### 9.4 WTO Trade Policy Tools for Climate Action

In December, the WTO published *WTO Trade Policy Tools for Climate Action* with a 10-point set of "Trade Policy Tools for Climate Action" to support the 28th United Nations Climate Change Conference's (COP28) spotlight on trade as a lever for climate mitigation and adaptation (WTO 2023). The report stressed the "great economic importance" of government procurement, which accounts for approximately 13% of world GDP (around \$13 trillion) annually and is responsible directly or indirectly for an estimated 15% of GHG emissions. It outlined how this "buying power can be deployed at all levels of government to help mitigate climate change and promote a just transition to a low-carbon economy" (WTO 2023, 17).

The publication, prepared by the WTO Secretariat, outlined the role governments' GPP policies could play in addressing climate issues. They included purchasing low-carbon goods and services, creating markets for new green goods and services, and stimulating innovative solutions to climate change problems by awarding R&D contracts. By serving as "first customers," governments can help emerging technologies take the key step from R&D to market readiness. GPP policies can also help governments reduce their own carbon footprint (WTO 2023, 17–18).

The WTO report suggested actions governments could take to incorporate climate considerations into their procurement. These include revising procurement policies to include climate-sensitive criteria, such as science-based, low-carbon requirements, in tenders and making such criteria mandatory. Currently, domestic government procurement systems usually mandate cost-effectiveness but rarely allow or mandate climate change considerations in their procurement. According to the WTO Environmental Database, WTO members have notified the WTO of at least 77 environment-related government procurement measures since 2009. These measures have a variety of objectives, such as promoting environmental goods and services, energy conservation, climate change mitigation and adaptation, and renewable energy (WTO 2023, 17).

The WTO Secretariat also emphasized that the GPA could "play an important role in ensuring that open government procurement markets are leveraged to support climate objectives." It pointed out that the plurilateral already facilitates climate change mitigation by allowing procuring entities to apply technical specifications aimed at the protection of the environment and using the environmental implications of a good or service as a criterion in evaluating tenders (WTO 2023, 18).

## 9.5 US's Proposed Climate-Related Rules

### *Disclosure of GHG Emissions and Climate-Related Financial Risk*

In a 2021 *Executive Order on Climate-Related Financial Risk* (E.O. 14030), President Biden directed federal agencies to consider revising federal procurement regulations to address climate-related issues. His proposals included requiring major federal suppliers to disclose GHG emissions and climate-related financial risks and set science-based targets to reduce their GHG emissions. He also proposed requiring agencies to take costs of climate change into account in issuing procurement awards and, where appropriate and feasible, to give preferences to suppliers whose goods and services promise lower GHG emissions (Grier 2023h). To implement the president's directive relating to supplier disclosures of GHG emissions and climate-related financial risks, the FAR Council proposed a new rule in November 2022. It would require certain medium and large contractors to register the GHG emissions traceable to their goods and services to be found qualified ("responsible") for a contract award (FAR Council 2022b). The preparation of a report on the public comments and a draft final rule was extended until January 2024.

### *Minimizing Climate Risk in Federal Procurement*

In a rulemaking proceeding to comply with Biden's order to minimize climate risk in federal procurement, in 2021, the FAR Council sought public input on a potential amendment of the FAR, rather than propose a rule (FAR Council 2021). To guide their response to the president's directive, it posed a series of questions on which it sought public input (Grier 2023h). At the end of 2023, the Council was still developing a draft proposed FAR rule. Once a draft rule is prepared, the public would be expected to have an opportunity to comment on it.

## 10. Other Developments

### 10.1 China's Investment Guidelines

In 2023, China published new investment guidelines with procurement provisions. China's State Council (its cabinet) issued new investment guidelines, *Opinions on Further Optimizing the Foreign Investment Environment and Increasing Foreign Investment*, in a bid to attract more foreign capital and improve its foreign investment environment. One of the 24 guidelines addressed government procurement (China State Council 2023). The procurement guideline guarantees national treatment, seeks acceleration of the revision of China's principal procurement law, and urges clarification of "made in China" standards (Grier 2023l).

The August 2023 guidelines lay out six overarching foreign investment goals:

- improve the quality of foreign capital;
- guarantee national treatment for foreign-invested enterprises (FIEs), including for government procurement;
- strengthen protection;
- improve facilitation;
- increase financial and tax support; and
- improve methods of promoting foreign investment.

It particularly encourages investment by foreign firms in R&D centers, advanced manufacturing, and biomedical and digital sectors (Grier 2023l).

The procurement guideline directs entities to guarantee participation by FIEs in government procurement activities in accordance with the law. It follows a similar directive in China's 2020 Foreign Investment Law (Grier 2020). The 2023 guideline appears to be intended to remind government entities of the existing requirements rather than create a new obligation. It also directs government entities to support FIEs in innovating and developing world-leading products through measures such as first-order purchases, which are made before a product has been marketed (Grier 2023l).

Another element of the procurement guideline called for accelerating the revision of China's 2003 Government Procurement Law (GPL), which governs purchasing activities conducted with fiscal funds by entities at all levels of government. The Ministry of Finance proposed two revisions of the GPL, one at the end of 2020 and another in July 2022. The latest proposal would, *inter alia*, extend the scope of the GPL to state-owned enterprises (Grier 2023l).

A third aspect of the procurement guideline was to press for the introduction of relevant policies and measures to further clarify the standards for "made in China." The GPL includes a Buy China mandate that requires government entities to purchase domestic goods, construction works, and services (except when they are not available, cannot be acquired on reasonable commercial terms, or are for use outside the country). This directive could provide the needed impetus for resolving this long-standing issue. In 2010, key Chinese agencies (the Ministry of Finance, National Development Reform Commission, and General Administration of Customs) jointly issued a draft of "Administrative Measures for Government Procurement of Domestic Products" for public comment. The draft measure defined a domestic product as a final product manufactured in China, for which the share of domestic production costs exceeds 50%. Those proposed rules have not been adopted. Finalizing rules that define domestic products or what "made in China" means would provide much-needed clarity for foreign firms (Grier 2023l).

## 10.2 US Procurement Thresholds for 2024 and 2025

Every two years, USTR determines the dollar values of the thresholds according to the formula specified in the GPA and FTAs to adjust for changes in economic conditions. In December, the agency published the US dollar values of the thresholds that will apply in calendar years 2024 and 2025 to US federal and state procurement covered by the GPA and FTAs (USTR 2023b). It also submitted a notification of its adjusted thresholds to the WTO procurement committee. All GPA parties and US FTA partners are obligated to notify adjustments of thresholds in their local currencies.

In accordance with USTR's determination, the FAR Council amended the FAR to incorporate the revised dollar values for goods and services covered under the GPA and FTAs. These thresholds became effective on January 1, 2024.

## ITEMS TO WATCH IN 2024

### LIBERALIZATION OF PROCUREMENT

#### GPA

The GPA may lose its role as the center of the international procurement system unless it is able to expand. That might include:

- Adding Albania or Costa Rica to its roster.
- China tabling a new market access offer in its GPA accession negotiations.
- Brazil reengaging in its GPA accession negotiations.
- Other WTO members applying to join the GPA.

#### Regional and Bilateral Agreements

The regional and bilateral arena may offer the greatest promise for international procurement. That promise may see progress if:

- The EU is able to close its pending FTA negotiations—with Mercosur, Australia, Mexico, and India—before the European Parliament elections in June.
- The CPTPP parties open accession negotiations with one or more applicants.
- The UAE or GCC conclude agreements with additional trading partners.
- Other non-GPA countries negotiate bilateral agreements with substantive procurement commitments.

### PROTECTIONISM

#### United States

- Does the US issue public interest waivers of the BABA Act's domestic preference for goods covered by the GPA, FTAs, or the US-EU bilateral arrangement?
- Does the US adopt or expand Buy America preferences?

#### European Union

- Does the EU apply any of its trade defense tools to procurement?

### CLIMATE AND PROCUREMENT

Evidence that climate change has become an important factor in international procurement may include.

- The WTO procurement committee significantly advancing its work on sustainability.
- The G7 countries adopting concrete GPP measures.
- The US and EU making significant contributions to addressing the climate crisis.

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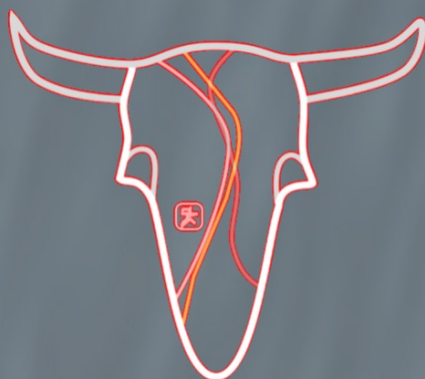
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