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The Trump Administration's Policy Options in International Procurement

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INTERNATIONAL PROCUREMENT DEVELOPMENTS IN 2016—PART I: THE TRUMP ADMINISTRATION'S POLICY OPTIONS IN INTERNATIONAL PROCUREMENT

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I. INTRODUCTION

The year 2016 saw a radical break from the free-market norms that have, to an increasing extent, marked international procurement markets since World War II. In both the United Kingdom, with the Brexit referendum (discussed in an accompanying piece by Michael Bowsher QC), and in the United States with the election of Donald Trump, major electoral shifts meant that international trade in procurement may well face new barriers in the coming years. *See, e.g.,* Sue Arrowsmith, *The Implications of Brexit for Public Procurement Law and Policy in the United Kingdom*, 2017 Pub. Proc. L. Rev. 1; Christopher R. Yukins, *Brexit and Procurement: A U.S. Perspective on the Way Ahead*, 2017 Pub. Proc. L. Rev. 71 (available on Westlaw). At the same time, protectionism on the European continent may be on the rise (see the accompanying piece by Dr. Pascal Friton, of Berlin), even as European states implements new EU procurement directives intended to facilitate cross-border trade (see the accompanying piece from Andrea Sundstrand, of Stockholm University).

The outlook for many international procurement markets is, in sum, grimmer than it has been in many years, although this adversity may bring new hope for alternative means -- such as regulatory cooperation -- to reduce inefficient barriers to trade. *See generally* Christopher R. Yukins & Michael Bowsher QC, *Brexit and the Trump Election: Finding a Way Forward for Transnational Procurement*, 2016 Eur. Proc. & Pub. Priv. Part. L. Rev. 258 (available on Westlaw).

Part II of this piece will review the background to current developments in the United States. Part III will discuss the U.S. elections and the Trump administration's approach to international procurement, Part IV will discuss some of the Trump administration's policy options, and Part V will conclude by summarizing, in a rough matrix of costs and benefits, those options.

II. BACKGROUND: FREE TRADE AND PROCUREMENT

In modern economics, the working presumption for centuries (at least since Adam Smith published *The Wealth of Nations* in 1776) has been that open markets across borders achieve optimal domestic welfare. That presumption drove U.S. policy after World War II, and led to U.S. support for what is today the World Trade Organization (WTO) and a framework of international trade agreements that protect, among other things, free trade in procurement. *See* U.S. Department of State*, Suggested Charter for an International Trade Organization of the United Nations* Art. 9 (1946) (urging international trade arrangements to reduce barriers to procurement markets); Sue Arrowsmith, *Government Procurement in the WTO* 26-27 (2003); Christopher R. Yukins & Steven L. Schooner*, Incrementalism: Eroding the Impediments to a Global Public Procurement Market,* 38 Geo. J. Int'l L. 529, 529 (2007); Robert D. Anderson & Sue Arrowsmith, *The WTO Regime on Government Procurement: Past, Present and Future*, in *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge U. Press 2011); Sati Harutyunyan, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, 45 Pub. Cont. L.J. 449 (2016).

In part as a result of those international agreements, which nurtured common legal norms as they opened procurement markets in the covered nations, procurement systems around the world generally

evolved along parallel tracks, adopting similar solutions to common problems. While the United States, Canada and the European Union were leaders in this evolution (see the accompanying piece from Brenda Swick, on Canada's recent progress), developing nations joined the fold as they agreed to enter plurilateral free trade agreements (such as the WTO's Government Procurement Agreement (GPA)) and bilateral and regional free trade agreements (which typically include chapters on procurement).

These parallel developments touched both procurement law and trade. As channels of trade and communication opened, procurement regimes around the world assimilated common best practices (such as methods of procurement) and broadly accepted international norms (such as economic integration, sustainability, and anti-corruption). *See, e.g.,* Sue Arrowsmith, *The Implications of Brexit for Public Procurement Law and Policy in the United Kingdom,* 2017 Pub. Proc. L. Rev. 1, 2; Ijeoma Omambala & Nadia Motraghi, *The Implications of Brexit for TUPE in the Area of Public Procurement*, 2017 Pub. Proc. L. Rev. 62; Eleanor Fisher, *The Power of Purchase: Addressing Sustainability Through Public Procurement*, 8 Eur. Pub. Proc. Pub. Priv. L. Rev. 2 (2013). The trade agreements thus facilitated international competition in procurement and advanced other goals, such as respect for the rule of law. Disrupting the trade arrangements that underlie these achievements could therefore have broader political, security, social and legal effects, which could reach far beyond the procurement markets themselves.

III. PRESIDENT TRUMP AND INTERNATIONAL TRADE

During and after the 2016 presidential campaign, Donald Trump made it plain that while he considered himself a "free trader," his administration plans to renegotiate existing trade arrangements in order to further core "Buy American" and "Hire American" policies. Candidate Trump criticized, for example, "China's disastrous entry into the World Trade Organization," and called for higher tariffs to protect U.S. industry. *See* Donald Trump, *Declaring American Economic Independence*, https://assets.donaldjtrump.com/DJT_DeclaringAmericanEconomicIndependence.pdf.

Donald Trump also called for higher U.S. defense spending, including increased spending on nuclear defense. At the same time, however, Trump argued for reducing the costs of specific programs, including the Joint Strike Fighter and Air Force One. *E.g.,* Rowan Scarborough, Wash. Times, Jan. 4, 2017, *Donald Trump Blasts Boeing, Lockheed Martin for Overpriced Weapons*, 2017 WLNR 225822

After the election, President-elect Trump made his views on trade even clearer. As part of a post-election victory rally in Florida, for example, President-elect Trump tweeted: "My Administration will follow two simple rules: BUY AMERICAN and HIRE AMERICAN." https://twitter.com/realDonaldTrump/status/809969373754654721. At another rally, in Iowa, Trump declared: "The American worker built this country and now it's time for American workers to have a government [that] for the first time in decades answers to them." *See* Daniella Diaz, *Trump on Economy: "Buy American, Hire American,"* Cable News Network (CNN) (Dec. 8, 2016), http://www.cnn.com/2016/12/08/politics/donald-trump-terry-branstad-china-des-moines-iowa-rally/.

In the new Administration, the new National Trade Council will be tasked with implementing the Trump administration's aggressive trade policies, including through procurement. *See* The Trump-Pence Transition Team, Press

Release, *President-Elect Donald J. Trump Appoints Dr. Peter Navarro to Head the White House National Trade Council* (Dec. 21,.2016) ("The mission of the National Trade Council will be to advise the President on innovative strategies in trade negotiations, coordinate with other agencies to assess U.S. manufacturing capabilities and the defense industrial base, and help match unemployed American workers with new opportunities in the skilled manufacturing sector. The National Trade Council will also lead the Buy America, Hire America program to ensure the President-elect's promise is fulfilled in government procurement and projects ranging from infrastructure to national defense.")

IV. OPTIONS FOR TRUMP TRADE POLICY IN PROCUREMENT

The Trump administration will have several options to consider, which carry different potential costs and benefits. Most of these options, it should be noted, could be exercised without new legislation. The list of options set forth here is not exhaustive, and it is possible that the Trump administration will consider, and follow, other protective strategies in procurement trade.

- **Pressure Officials to "Buy American:** Because imposing new domestic preferences could run afoul of existing trade obligations (discussed below), the simplest option might be for the Trump administration to admonish federal purchasers to "Buy American." Given the flexibility inherent in the competitive negotiations used for most significant federal procurement, it would be relatively easy to mask a general domestic preference that was not included in formal evaluation criteria. If it became clear that procurement officials were regularly weighing an unstated preference in their evaluations, however, foreign vendors might protest successfully that procurement officials were unlawfully applying an *ad hoc* (and discriminatory) socioeconomic criterion, without explicit statutory or regulatory authority. *See, e.g.,* John Cibinic, Jr., Ralph C. Nash, Jr. & Christopher R. Yukins, *Formation of Government Contracts* 1572 (4th ed. 2011) ("There is a view that collateral policies can be implemented only when authorized by statute. GAO has ruled that an executive agency needs a clear grant of authority from Congress to implement a collateral policy that limits those who are eligible for award of contracts." (citing authorities)). At the same time, a message to federal buyers that they should allow "Buy USA" preferences to override published evaluation criteria would undermine the rule of law in procurement, and could sour future U.S. efforts to open foreign procurement markets, as foreign governments (and purchasers) would be slow to forget perceived federal discrimination against foreign vendors.

- **Ignore Free Trade Obligations Under Reciprocal Defense Procurement Agreements:** Another strategy, related to the first, would be to admonish Pentagon buyers to "Buy American" despite the United States' commitment under reciprocal defense procurement agreements not to discriminate when buying defense materiel from the U.S. allies that have entered into these special agreements. (In 2016, Japan, Estonia and Slovenia joined the list of allies that have signed these memoranda of understanding between the U.S. Defense Department and its counterpart ministries of defense. *See, e.g.,* http://www.acq.osd.mil/dpap/cpic/ic/reciprocal_procurement_memoranda_of_understanding.html.)

A strategy of dismantling the reciprocal defense procurement agreements could raise a thicket of legal, political and national security issues, however. While these reciprocal agreements (unlike the GPA and other free

trade agreements) do not explicitly afford foreign vendors rights to protest, and instead anticipate that nations will simply leave the agreements if they suffer discrimination, *see, e.g.,* 41 U.S.C. § 8304; Drew B. Miller, *Is It Time to Reform Reciprocal Defense Procurement Agreements?*, 39 Pub. Cont. L.J. 93 (2009), affected foreign vendors from U.S. allies that suffered discrimination might try to protest under the implementing rules set forth in the Defense Federal Acquisition Regulation Supplement, DFARS Subpart 225.4. Undercutting the reciprocal defense procurement agreements also could hurt U.S. firms by shutting off foreign defense markets, which generally are not opened by traditional trade agreements and which are important for U.S. exporters. *See, e.g.,* U.S. Department of Commerce, Int'l Trade Admin., *Defense Markets Report*, at 9 (June 2016), http://trade.gov/topmarkets/pdf/Defense_Top_Markets_Report.pdf). Moreover, reciprocal defense procurement agreements are explicitly meant to nurture other foreign policy and national security goals, such as interoperability and mutual cooperation. Triggering a "trade war" in defense procurement thus could prove deeply counterproductive, both economically and for purposes of national security. Moreover, if the Trump administration hopes to make U.S. defense spending more efficient while at the same time strengthening U.S. national security, competition from allies' vendors may prove essential. Thus, a strategy of abandoning the reciprocal defense agreements (explicitly or implicitly), although relatively easy to implement, could raise serious costs and risks.

- **Including "Buy American" Preferences with New Infrastructure Spending:** A more likely course would be to include "Buy American" requirements in legislation authorizing new infrastructure spending -- which was another important element of the Trump campaign. Infrastructure funding legislation regularly includes "Buy American" requirements for procurement done by grantees and federal agencies using the new funds; the American Recovery and Reinvestment Act (the "Recovery Act"), Pub. L. No. 5, 111th Cong., 1st Sess., 123 Stat. 115 (2009), was a leading example of this type of requirements.

The Recovery Act was also a good example of how a domestic preference embedded in infrastructure spending could be reconciled with standing international trade agreements. While Section 1605 of the Recovery Act called for the use of U.S. iron, steel and manufactured goods on projects funded by the Act, Section 1605 also explicitly stated that this preference would be applied "in a manner consistent with United States obligations under international agreements." *See, e.g.,* Thomas D. Blanford, Note, *Navigating the Recovery Act's Buy American Rule in State and Local Government Construction,* 46 Proc. Law. 3 (Fall 2010).

An explicit reservation regarding international trade obligations is important because, per the Trade Agreements Act, 19 U.S.C. § 2511, the protections of international trade agreements are triggered only by explicit direction of the President or his delegee, and that authority has been exercised only with regard to the Buy American Act and the U.S. Department of Defense Balance of Payments Program. *See* Exec. Order 12260 (1979) (authority delegated by President to U.S. Trade Representative); U.S. Trade Representative, *Government Procurement*, https://ustr.gov/issue-areas/government-procurement; FAR 25.402(a)(1) ("The President has delegated this waiver authority to the U.S. Trade Representative. In acquisitions covered by the WTO GPA, Free Trade Agreements, or the Israeli Trade

Act, the U.S. Trade Representative has waived the Buy American statute and other discriminatory provisions for eligible products. Offers of eligible products receive equal consideration with domestic offers."); Jean Heilman Grier, *Trade Agreements Act of 1979: Broad Authority, Narrow Application* (Apr. 21, 2014), http://trade.djaghe.com/?p=559.

Thus, unless legislation funding new infrastructure spending explicitly reserves the United States' obligations under international trade agreements, an infrastructure bill that contains a "Buy American" limitation may trigger a broader trade battle. If an infrastructure bill launched by the Trump administration is silent with regard to international obligations, and the United States therefore does not follow its trade agreements in the resulting spending, U.S. trading partners (such as the European Union) may argue that the United States' obligations to open its procurement markets were already defined by agreement, and the U.S. statutory structure does not excuse those obligations.

Moreover, *not* reserving those standing obligations in a new "Buy American" provision would mean losing the leverage that the exclusion could bring, with nations *outside* the scope of existing trade agreements. Canada, for example, opened its provincial markets for the first time specifically *because of* Section 1605 of the Recovery Act, as Canada was willing to open its provincial procurement markets in order to access Recovery Act spending. *See* Christopher R. Yukins, *Barriers to International Trade in Procurement After the Economic Crisis -- Part II, Opening International Procurement Markets: Unfinished Business,* 2011 Gov't Contracts Year in Review Briefs 4. Section 1605's exclusion for existing agreements, in other words, both preserved the United States' relationships with its trading partners and created new pressure on a nation that had not yet fully embraced open procurement markets. This history suggests that a Buy American preference in an infrastructure bill, *combined with* an exclusion for existing U.S. obligations, could offer benefits at relatively low risk, though the higher costs and delays caused by the preference would be a continuing concern.

- **Expanding Buy American Act Price Preference:** Another strategy would be to expand the Buy American Act's price preference. The language of the Buy American Act, 41 U.S.C. § 8302, does not stipulate a price preference; instead, it states that, subject to certain exceptions, only "unmanufactured articles, materials, and supplies that have been mined or produced in the United States, and only manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States, shall be acquired for public use unless the head of the department or independent establishment concerned determines their acquisition to be inconsistent with the public interest *or their cost to be unreasonable*." (Emphasis added.) As implemented, the Buy American Act preference therefore turns on the relative unreasonableness of a higher domestic price; if an offered domestic product is unreasonably expensive, the agency is to buy the cheaper foreign product. A general price preference (6 percent) was set by President Eisenhower under Executive Order 10582, *Prescribing Uniform Procedures for Certain Determinations Under the Buy-American Act*, 19 Fed. Reg. 8723 (1954), and current regulations set a higher price preference (12 percent) when the next-lowest-priced item is offered by a small business, FAR 25.105(b)

(2). In the Defense Department, DFARS 225.105 imposes a preference of 50 percent on purchases of defense items. (That much higher preference at the Defense Department is tempered by the reciprocal defense procurement agreements, discussed above, which sweep away Buy American barriers against foreign defense materiel from qualifying countries. *See* DFARS 252.225-7000 (Defense Department purchasers will "evaluate offers of qualifying country end products without regard to the restrictions of the Buy American statute")).

Given the breadth of the Buy American Act's language, the Trump administration might, for example, seek to increase the price preferences imposed under the Buy American Act regulations. Notably, the FAR already affords agencies the authority to set, by regulation, higher price preferences under the Act. FAR 25.105(a); *see* Kate M. Manuel, *The Buy American Act -- Preferences for "Domestic" Supplies: In Brief*, Cong. Res. Serv. Rep. R43140, at 2 & n.13 (Apr. 26, 2016), https://fas.org/sgp/crs/misc/R43140.pdf.

While increasing the Buy American Act's price preference might gain political points, its economic benefits would be relatively unfocused across the market, and it would raise costs in the procurement system, *see, e.g.,* Keith A. Hirschman, *The Costs and Benefits of Maintaining the Buy American Act* 57-61 (Naval Postgraduate School 1998) (reviewing literature on costs of Act's price preference), http://www.dtic.mil/dtic/tr/fulltext/u2/a350159.pdf -- something that candidate Trump said he did *not* want to do. Moreover, a more expansive interpretation of the Buy American Act generally would still apply only to smaller procurements, up to the thresholds (typically $191,000 for supplies, and $7.3 million for construction) above which trade agreements in effect override the Buy American Act. *See* FAR 25.402(b) (thresholds); FAR 25.001(b) ("The restrictions in the Buy American statute are not applicable in acquisitions subject to certain trade agreements."). In practice, therefore, increasing the price preference under the Buy American Act probably would create more market opportunities for the small U.S. businesses. that tend to focus on smaller, below-threshold procurements.

- **Renegotiating Coverage Under Trade Agreements:** It is unlikely that the Trump administration would decide to withdraw entirely from the Government Procurement Agreement under Article XX of the agreement, since leaving the GPA could close off valuable market access abroad for U.S. exporters. Another option would be to try to reduce the scope of the U.S. procurement market available under the GPA. Were the Trump administration to reduce coverage, however, it would likely trigger protracted negotiations under Article IX of the GPA, and, if those negotiations proved unsuccessful, a challenge and potentially reciprocal reductions of access by other nations could follow -- a slowly unfolding "trade war" in procurement, in other words.

- **Stalling Accessions to the GPA and Other Free Trade Agreements:** A final option would be to slow the accession of China and other low-cost producers to the GPA, because by joining the GPA those countries would gain broad access to the U.S. procurement market. While delaying Chinese accession would not, in itself, reap significant political benefits for the Trump administration, since China's accession process has already been pending for nearly a decade, *see, e.g.,* Jean Heilman Grier, *What are the prospects for*

concluding work on China's GPA accession in 2015?, 2015 Pub. Proc. L. Rev. 221, the flip -- allowing China to join -- could be seen as a serious reversal for the Trump administration.

Some of the options discussed above raise risks of challenge under current trade agreements, either through a bid protest brought by a foreign vendor or through a government-to-government dispute brought under the GPA. Although the GPA explicitly provides for bid protests by vendors to enforce the agreement's requirements, potential vendor bid protests on those grounds in the U.S. system were affected by a recent series of decisions before the Government Accountability Office (GAO), *Per Aarsleff a/s et al.*, Comp. Gen. B-410782 (Feb. 18, 2015), and then the Court of Federal Claims, *Per Aarsleff A/S v. United States*, 121 Fed. Cl. 603, 621 (2015), *rev'd*, 829 F.3d 1303 (Fed. Cir. 2016), and on appeal before the U.S. Court of Appeals for the Federal Circuit. *See, e.g.,* Ralph Nash, Jr., *Preproposal Protests: When Are They Mandatory?,* 30 Nash & Cibinic Rep. NL ¶ 43 (2016); *Fed. Cir. Reverses COFC On Eligibility Protest*, 58 No. 27 GC ¶ 255 (2016).

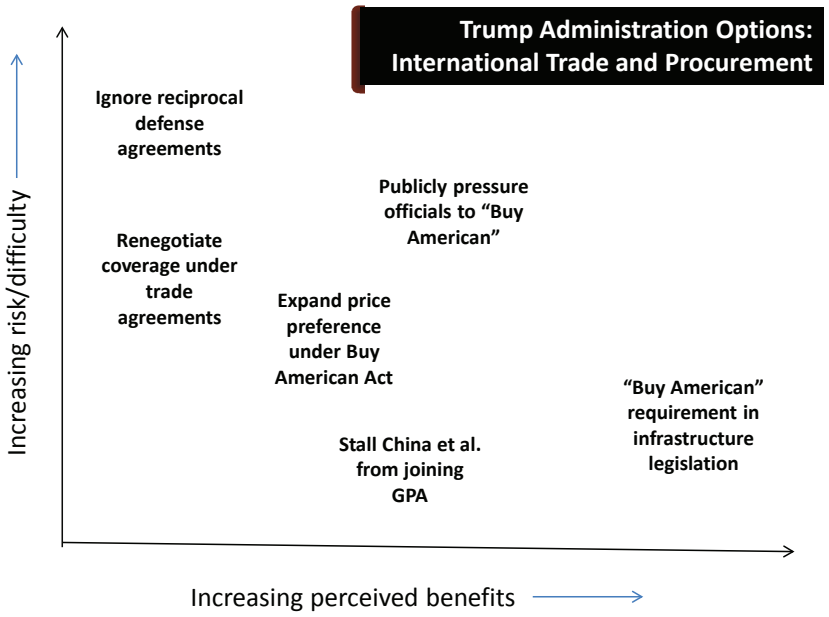
The foreign vendors in the *Per Aarsleff* cases challenged the U.S. government's failure to honor an international agreement which assured Denmark that only Danish or Greenlandic firms would be awarded support contracts at Thule Air Base, in Greenland. The GAO decision explicitly bypassed the issues presented by the international agreement, focusing instead on the terms of the solicitation, *id.* at 7 & n.8, and the Justice Department, in defending the subsequent protest before the U.S. Court of Federal Claims, 121 Fed. Cl. at 621, and on the appeal before the Federal Circuit, *see* Brief for Defendant-Appellant United States, *Per Aarsleff v. United States,* Fed. Cir. No. 2015-5111, at 47 (Sept. 29, 2015), argued that because the Court of Federal Claims is barred by 28 U.S.C. §1502 from hearing "claims" based on "treaties," the Court of Federal Claims is similarly barred from hearing bid protests based upon international executive agreements. (The GPA and other free trade agreements are considered executive agreements. *See, e.g.,* Jane M. Smith *et al.*, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements*, Cong. Res. Serv. Rep. 97-896 (Apr. 15, 2013), https://fas.org/sgp/crs/misc/97-896.pdf. The Court of Federal Claims did not disagree with the government's argument that the court lacks subject matter jurisdiction to hear a bid protest grounded in an international agreement, 121 Fed. Cl. at 622, though the court ultimately ruled on other grounds, and the Federal Circuit did not address the issue.

As a result of the *Per Aarsleff* decisions, foreign vendors may conclude that enforcing an international trade agreement -- fighting discrimination in procurement -- through the standard U.S. bid protest process is simply too difficult. If that happens, questions raised by the Trump administration's trade initiatives in procurement would need to be resolved under the GPA's government-to-government disputes process -- a much more cumbersome process, and one that may further aggravate relations with the United States' allies and trading partners.

V. CONCLUSION: ASSESSING RISKS AND BENEFITS

Taking the various benefits and risks discussed above into account, it appears that the Trump administration faces an array of options, with differing risks and perceived benefits:

NOTES



As the chart reflects, the lowest risk and largest potential benefits probably lie with including a "Buy American" provision in an infrastructure funding bill. Other options, such as attempting to slow the accessions of some countries (such as China) to the GPA, raise larger costs and risks, and some options, such as dismantling the reciprocal defense procurement agreements, present serious collateral risks to foreign policy and national security.

This assessment is not intended to endorse any one option, or indeed any policy of aggressive protectionism. What the assessment is intended to do, however, is to show that some options -- such as a "Buy American" provision included in infrastructure funding legislation like the Recovery Act, with a reservation for standing agreements -- may be easier to pursue, and may carry less risk and cause less collateral damage to the other policy objectives that drive open borders in procurement.