

## **INTERNATIONAL PROCUREMENT LAW: KEY DEVELOPMENTS 2020—** **PART I: ASSESSING THE TRADE AGENDA FOR GOVERNMENT** **PROCUREMENT IN THE BIDEN ADMINISTRATION**

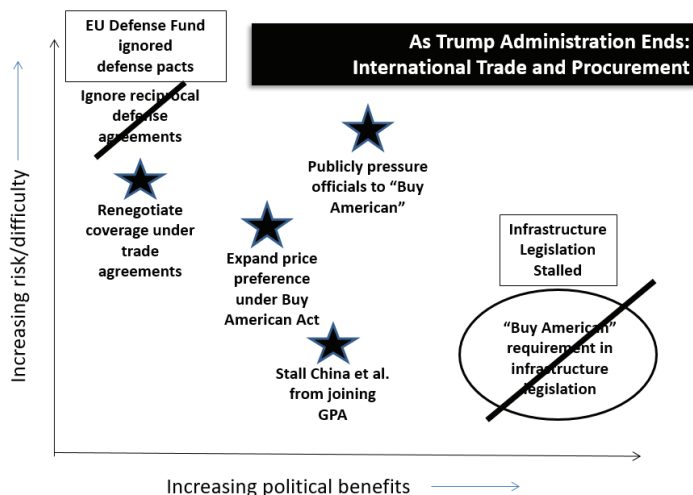
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Most of this past year's major developments in international trade involving U.S. government procurement – including the trade restraints imposed by President Donald Trump during the COVID-19 pandemic, the Trump administration's bellicose threats to depart from the World Trade Organization (WTO) Government Procurement Agreement, and Trump's increases to the Buy American Act's price preferences – were overshadowed by Joe Biden's victory in the November 2020 presidential elections. As in past post-election reports, therefore, this year's review will look more forward than back, and will suggest how the new Biden administration may approach trade issues in public procurement.

This piece will begin, though, with a quick review in Part I of major trade measures in procurement taken during the Trump administration – most of which were predictable from the time Trump was elected. In Part II, we will turn to the major trade challenges that face the Biden administration, in areas as diverse as climate change, cybersecurity and the protectionism in post-Brexit Europe. Part III will discuss *how* the Biden administration might address these challenges, and will focus especially on how the new administration might cooperate on these difficult issues with the United States' allies abroad. Part IV will conclude that the Biden administration's main challenge is restoring confidence abroad in the United States as a responsible trading partner in procurement; once that goal is met, the more technical issues of trade in procurement will be much easier to address.

### **I. TRUMP ADMINISTRATION – EXIT ON TRAJECTORY**

In early 2017, at the dawn of the Trump administration, the author offered a series of predictions regarding the trade measures in procurement that the new Trump administration might take. The predictions identified possible points of change in the existing trade regime, and for each possible point of change assessed the costs (administrative and economic) against the potential political benefits (especially in Trump's conservative base). Those changes with the lowest costs and the greatest benefits were the likeliest to materialize. By 2020 (the last full year of the Trump administration) those predictions had largely come true, *see* Christopher R. Yukins, *International Procurement Law: Key Developments 2019 – Part I: How the Trump Administration May Reshape International Procurement Markets – Defense and Electronic Marketplaces*, 2020 Gov't Contracts Year in Review Briefs 3, and by the end of the Trump administration in early 2021 almost all had been realized, as the chart below shows.



As predicted at the beginning of the Trump administration in early 2017, the Trump administration pursued an aggressive policy of “economic nationalism” by:

- **Renegotiating coverage under trade agreements:** Over the course of four years, the Trump administration pursued a bumpy, uneven strategy regarding trade in procurement.

- *Transpacific Partnership/RCEP:* President Trump first simply abandoned the Transpacific Partnership (TPP), which would have opened access to new procurement markets around the Pacific rim. See David Smith, *Trump Withdraws from Trans-Pacific Partnership Amid Flurry of Orders*, The Guardian, Jan. 23, 2017, <https://www.theguardian.com/us-news/2017/jan/23/donald-trump-first-orders-trans-pacific-partnership-tpp>. The failure of the TPP helped open the door to the Regional Comprehensive Economic Partnership (RCEP), in which China (not the United States) is the leading power, and which provides relatively weak protections for procurement trade, see, e.g., Jean Heilman Grier, *RCEP: Very Modest Procurement Provisions* (Nov. 18, 2020), <https://trade.djaghe.com/?cat=738>.

- *NAFTA/USMCA:* On this side of the Pacific, the Trump administration renegotiated the North American Free Trade Agreement (NAFTA) with Canada and Mexico, but Canada refused to join the procurement chapter in the new U.S.-Mexico-Canada Agreement (USMCA) – which arguably left the United States with *less* access to the Canadian public procurement markets, because U.S. vendors would now have to rely solely on the WTO Government Procurement Agreement to access those Canadian markets. See, e.g., Christopher R. Yukins, *International Procurement Developments in 2018 – Part IV: The United States in International Procurement: Understanding a Pause in the Trump Administration’s Protectionism*, 2019 Gov. Con. Year in Rev. Br. 6.

- *“On-shoring” Medical Supplies:* Amidst the COVID-19 pandemic, President Trump announced that the United States would be “on-shoring” production and procurement of critical medical supplies, and that as a result those supplies would be removed from coverage (removed from the open market guarantees) under the Government Procurement Agreement. See, e.g., White House, Press Release: *President Donald J. Trump is Ensuring that Essential Medical Supplies are Produced in the United States* (Aug. 6, 2020), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-ensuring-essential-medical-supplies-produced-united-states/>. Removing those critical medical supplies from coverage may prompt a demand from other GPA member nations for offsetting concessions by the United States – either a reduction in the other members’ coverage, or further goods or services added to the U.S. list of items opened to foreign competition. What was surprising was that the Executive Order, E.O. 13944 (Aug. 6, 2020), 85 Fed. Reg. 49929, did not announce that the United States was “on-shoring” medical supplies as a national security or public health measure. Under Article III of the Government Procurement Agreement, national security and public health measures are generally exempt from the Agreement’s obligations, and so “on-shoring” of critical medical supplies on those grounds might not have triggered offsetting demands by other members of the Government Procurement Agreement.

- In a final disturbing move, *after* the November 2020 election and just over 60 days before leaving office – the 60-day period required for notice – the Trump administration again signaled that the United States might withdraw from the WTO Government Procurement Agreement. See, e.g., Doug Palmer,

*Lighthizer Wants U.S. To Reset Government Procurement*, POLITICO, Nov. 23, 2020, <https://www.politico.com/newsletters/weekly-trade/2020/11/23/lighthizer-wants-us-to-reset-government-procurement-agreement-791834>. This threat had been raised earlier in 2020, see, e.g., Robert Anderson & Christopher Yukins, Feature Comment: *Withdrawing the U.S. from the WTO GPA: Assessing Potential Damage to the U.S. and Its Contracting Community*, 62 Gov. Cont. ¶ 35 (Feb. 12, 2020), and ultimately came to naught, but caused frustration across the international trade community, see generally *Colloquium: What Happens If the U.S. Leaves the WTO Government Procurement Agreement* (Feb. 9, 2020), <https://publicprocurementinternational.com/2020/02/09/colloquium-what-happens-if-the-u-s-leaves-the-wto-government-procurement-agreement/>, in no small part because of the United States' decades of work in establishing the GPA.

There were two notable exceptions – points of procurement trade policy on which the Trump administration did *not* take action -- involving the defense trade and infrastructure:

- **Defense Trade:** While the Trump administration left the defense trade largely alone, probably because U.S. defense firms enjoy a robust trade surplus, see, e.g., Statista, *U.S. Arms Exports in 2019, By Country*, <https://www.statista.com/statistics/248552/us-arms-exports-by-country/>, the European Union up-ended U.S. expectations when it launched the “European Defense Fund” and the “Permanent Structured Cooperation” (PESCO) initiatives, which, through government subsidies and procurement preferences, threatened to give European defense firms a special advantage in selling arms to the European Union’s member states. This was arguably a violation of the many reciprocal defense procurement agreements between the United States and its allies in the European Union, which guarantee open markets in defense. See Christopher R. Yukins, Feature Comment: *European Commission Proposes Expanding the European Defence Fund – A Major Potential Barrier to Transatlantic Defense Procurement*, 60 Gov. Cont. ¶ 196 (2018). The European Defense Fund continues to move forward, albeit with reduced funding because of COVID-19 budgetary pressures. See Army Technology, *European Defense Fund to Propel Consolidation of the Industry Despite Budget Cuts: Poll*, Dec. 22, 2020, <https://www.army-technology.com/news/european-defense-fund-to-propel-consolidation-of-the-industry-despite-budget-cuts-poll/>. Furthermore, in October 2020 the European Union’s members reportedly agreed to allow vendors from other countries, such as the United States, to participate in PESCO projects if those countries provide “substantial added value” to the military project and share “the values on which the EU is founded.” See Alexandra Brzozowski, *EU Seals Accord to Let Third Countries Into Future Joint Military Projects*, EURACTIV.com, Nov. 10, 2020, <https://www.euractiv.com/section/defence-and-security/news/eu-seals-accord-to-let-third-countries-join-future-joint-military-projects/>.

- **Infrastructure:** Although President Trump long pressed for major infrastructure legislation to rebuild the United States’ roads and business, ultimately that initiative failed to gain traction. See, e.g., Laura Bliss, *How Trump’s \$1 Trillion Infrastructure Pledge Added Up*, Bloomberg CityLab, Nov. 16, 2020, <https://www.bloomberg.com/news/articles/2020-11-16/what-did-all-those-infrastructure-weeks-add-up-to> (“The Trump administration’s record on infrastructure is marked instead by over-hype and under-delivery.”). Candidate Joe Biden took up this cause in his own election campaign, and himself called for massive infrastructure legislation – and, as President Trump did,

Biden pressed for a strong “Buy American” preference in those construction projects, discussed below.

## II. TRADE CHALLENGES IN PROCUREMENT FOR THE BIDEN ADMINISTRATION

In some ways, predicting how the Biden administration will address trade issues in procurement is more difficult, because the new administration is less likely to be driven by the same simple elements that so clearly drove the Trump administration’s actions – maximum political benefits, with minimal costs. The Biden administration’s trade policies in procurement will need to accommodate many competing voices – the demands of labor unions in Biden’s base (for example) for “Buy American” policies, specific calls for sustainability and security in procurement, and (above all) the need to reestablish the United States as a respected world power, especially after pro-Trump rioters overran the United States Capitol on January 6, 2021.

### A. Biden and “Buy American”

The Biden administration will inherit an administrative process, long expected and finally launched in July 2019 by Executive Order 13881 under President Trump, *see, e.g.*, Steve Masiello, Gale Monahan & Norman Aspis, Feature Comment: *Significant Changes in Government Contracts Domestic Preference Requirements May Be on the Horizon*, 59 Gov. Cont. ¶ 79 (2017), to increase preferences under the Buy American Act. *See* 85 Fed. Reg. 56558 (Sept. 14, 2020) (proposed implementing rule). Preferences under the Buy American Act would tighten, for example by increasing the applicable price preference from 12 percent to 30 percent for small businesses, and from 6 percent to 20 percent for other businesses. 85 Fed. Reg. at 56559. The practical effect of these changes is likely to be limited, however, because per the international agreements implemented under Trade Agreements Act, the Buy American Act’s preferences are waived for larger procurements. *See* Christopher R. Yukins, Feature Comment: *Trump Executive Order Calls for More Aggressive Use of the Buy American Act – An Order Likely to Have More Political Than Practical Effect*, 61 Gov. Cont. ¶ 219 (July 31, 2019). As a result, per Government Accountability Office estimates, fewer than \$10 billion in federal purchases (of a total of approximately \$500 billion per year) are subject to the Buy American Act. *See id.* (citing Government Accountability Office, *Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance* (GAO-19-17), at 4-9 (Dec. 2018), [www.gao.gov/assets/700/696086.pdf](http://www.gao.gov/assets/700/696086.pdf)).

Although President Trump’s efforts to strengthen the Buy American Act will likely have little practical impact, those Trump administration changes fully align with the incoming administration’s agenda. As a candidate, Joe Biden voiced strong support for tightening the rules which implement the Buy American Act. The Biden-Harris campaign website said, for example:

Biden starts with a pretty basic idea – when we spend taxpayer money, we should buy American products and support American jobs. Almost 90 years ago, Congress passed the Buy American Act to advance this basic idea. But we have never fully lived up to it.

*The Biden Plan to Ensure the Future Is “Made in All of America” by All of America’s Workers*, <https://joebiden.com/made-in-america/>.

The much broader question for the new Biden administration, though, will be how it handles “Buy American” policies more generally – in other



words, how it handles protectionism in the wake of the Trump administration's hard-edged economic nationalism, carried out under the slogan "Buy American and Hire American." *See, e.g.,* E.O. 13788, Buy American and Hire American (April 18, 2017); Mitchell A. Bashur, George E. Stewart III, Dominick P. Weinkam, *Current Challenges Facing Contractors Under Recent Changes to Domestic Preference Programs*, Proc. Law. (ABA), Winter 2018, at 3; Stuart B. Nibley, Amy M. Conant & Erica L. Bakies, Feature Comment: *Real Steps Towards "Buy American" Compliance – Part IV: What Comes Next?*, 60 Gov. Contr. ¶ 181 (2018).

Throughout the campaign and the transition to the new presidency, Biden has made it very clear that the new administration will support "Buy American" policies in procurement. Labor unions strongly support these "Buy American" policies, and the unions also have emphasized the pivotal role they played in electing Joe Biden, especially in "swing" states such as Wisconsin, Michigan and Pennsylvania. In a press conference shortly after the election, for example, Richard Trumka, president of the largest federation of unions, the AFL-CIO, said:

Biden's path to the White House ran through America's labor movement. Initial topline from our post-election survey show union members went 58 percent for Joe Biden and Kamala Harris. While the general public supported Biden by three points, our members favored him by 21 points.

Simply put, we got out the vote. In Wisconsin. In Michigan. In Pennsylvania.

Joe Biden's firewall was union made!

Richard Trumka, AFL-CIO President, Press Conference, Nov. 5, 2021, <https://aflcio.org/speeches/trumka-joe-bidens-firewall-was-union-made>. As part of their support for Biden's candidacy, unions argued forcefully for "Buy American" preferences in procurement. *See, e.g.,* David J. Lynch, Jeff Stein, Eli Rosenberg & Andrew Freedman, *Biden to name Rhode Island Gov. Gina Raimondo as commerce secretary, Boston Mayor Marty Walsh for labor*, Wash. Post, Jan. 7, 2021, <https://www.washingtonpost.com/business/2021/01/07/biden-commerce-labor-cabinet/>.

The Biden-Harris campaign embraced this "Buy American" approach, *see, e.g., The Biden Plan to Ensure the Future Is "Made in All of America" by All of America's Workers*, <https://joebiden.com/made-in-america/> -- an approach which has strong popular support in the U.S. public. In a September 2020 online survey of over 1000 respondents, fully 75 percent said "they support Buy American policies requiring the federal government to buy from domestic suppliers whenever possible," and "[n]early half – 48 percent – [said] they 'strongly support' the policy, while just 5 percent of Americans say they are either 'somewhat' or 'strongly' opposed," and "21 percent were 'indifferent.'" Anne Kim, Americans Love to "Buy American" (TradeVistas/Hinrich Foundation, Sept. 24, 2020). The survey data also suggested that the traditional Democratic/Republican divide on issues of domestic preferences – traditionally, Republicans were far more likely to favor free trade policies – apparently flipped during the Trump administration, so that surveyed Republicans that strongly favor "Buy American" procurement policies (70%) substantially outnumbered their Democratic counterparts (48%).

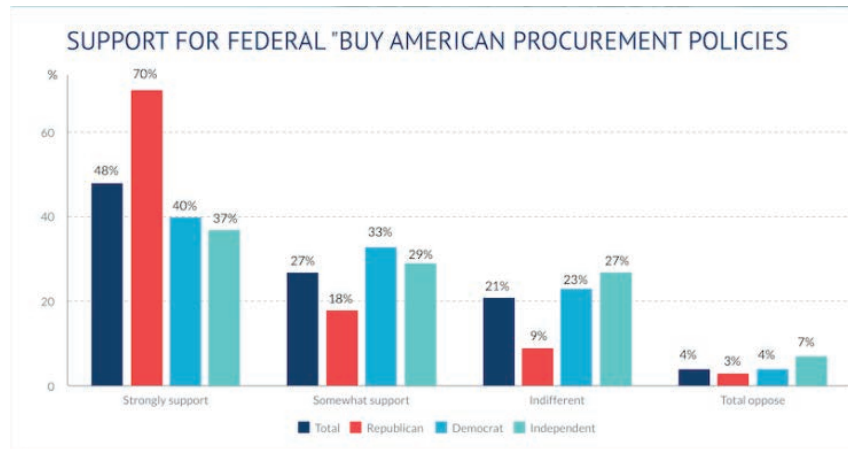


Chart: TradeVistas/Hinrich Foundation (based upon survey by Lincoln Park Strategies, results available at <https://34t9wx3d3efh36333w49fxon-wpengine.netdna-ssl.com/wp-content/uploads/National-Omnibus-MQ-Sept-2020-Trade-Vistas.pdf>).

In supporting domestic preferences and broader unionization, the Biden campaign platform argued that federal infrastructure projects should encourage unionization and provide generous pay and benefits to workers, and should use U.S.-manufactured products:

Biden will ensure these investments create good, union jobs that expand the middle class. American workers should build American infrastructure and manufacture the materials that go into it, and all of these workers must have the choice to join a union and collectively bargain. . . . Biden will require that companies receiving procurement contracts are using taxpayer dollars to support good American jobs, including a commitment to pay at least \$15 per hour, provide paid leave, maintain fair overtime and scheduling practices, and guarantee a choice to join a union and bargain collectively.

Biden-Harris Campaign, *The Biden Plan to Build a Modern, Sustainable Infrastructure and an Equitable Clean Energy Future*, <https://joebiden.com/clean-energy/>.

The challenge for the incoming Biden administration, then, will be to balance these protectionist policies with its efforts to rebuild the United States' standing with its allies – and to honor the United States' many trade agreements which open foreign access to U.S. procurement markets. The person who may stand at the center of this policy debate is Katherine Tai, a widely respected trade expert from the House Ways & Means Committee staff who President-elect Biden announced will be nominated to serve as the new U.S. Trade Representative, see Ana Swanson, *Biden Picks Katherine Tai as Trade Representative*, N.Y. Times, Dec. 9, 2020, <https://www.nytimes.com/2020/12/09/business/economy/katherine-tai-us-trade-representative.html>. Katherine Tai has promised to make trade “a force for good,” see Gavin Bade & Doug Palmer, *USTR Pick Tai Aims to Make Trade “A Force for Good,”* POLITICO, Dec. 14, 2020, <https://www.politico.com/newsletters/weekly-trade/2020/12/14/ustr-pick-tai-aims-to-make-trade-a-force-for-good-792253>, which in procurement will mean reconciling any protectionist measures (in infrastructure legislation, for example) with the United States' international commitments.

One ready means of honoring existing trade agreements would be to carve those international commitments out of any new infrastructure-funding

legislation, much as Congress did with Section 1605 of the American Recovery and Reinvestment Act (ARRA) in 2009. Failing to honor the existing trade agreements could invite retaliation from trading partners such as the European Union (see the accompanying piece in this volume by Pascal Friton); accommodating those international obligations, in contrast, will make it easier for the Biden administration to cooperate with other nations to address two of the most difficult issues in trade and procurement, global warming and cybersecurity.

## B. Addressing Global Warming Through Procurement

As a successful candidate transitioning to the White House, President-Elect Joe Biden has made clear that climate change also will be a core priority of his administration. *See, e.g.,* Jim Tankersley & Lisa Friedman, *For Biden's Economic Team, an Early Focus on Climate*, N.Y. Times, Dec. 9, 2020, <https://www.nytimes.com/2020/12/11/business/biden-global-warming-economic-team.html>. After the election, Biden announced that former Secretary of State John Kerry (who was himself once the Democratic nominee for president) will serve as the new administration's lead on climate change issues. *E.g.,* Rebecca Beitsch, *Biden Names John Kerry as "Climate Czar" in New Administration*, The Hill, Nov. 23, 2020, <https://thehill.com/policy/energy-environment/527189-biden-selects-john-kerry-for-climate-czar>.

There has been relatively little progress in the Trump administration in environmental sustainability in procurement, *see generally* Webinar -- *Current Challenges and Opportunities for Green Public Procurement* (Sept. 30, 2020), <https://publicprocurementinternational.com/2020/09/09/webinar-green-public-procurement/>, *cf., e.g.,* Katherine M. Urban, *Sustainable Acquisition and the Post-Conflict Environment: Why Adopting a Federal Sustainable Procurement Policy for Post-Conflict Environments That Mirrors Those Adopted by Some Local Governments Would Help Lead to Mission Success*, 44 Pub. Cont. L.J. 261, 269 (2015) (chronicling prior administrations' progress). For the Biden administration, there are at least two likely pathways to address global warming through procurement reforms:

- **Tighten Eco-Label Requirements:** First, and probably most simply, the government could tighten the Federal Acquisition Regulation (FAR)'s existing requirement regarding labels that identify environmentally sound goods and services – “eco-labels,” as they're known internationally. *See generally* Romeo N. Niyongere, *European-Style Green Public Procurement in the American Context: What It Could Look Like*, 49 Pub. Cont. L.J. 785 (2020). The European Union's procurement directives endorse eco-label requirements, where appropriate, *see, e.g.,* European Commission, *Eco-Labels and Green Public Procurement*, <https://ec.europa.eu/environment/ecolabel/ecolabel-and-green-public-procurement.html>, and the FAR similarly calls for agencies to use eco-labels, *see* FAR 23.103, 48 CFR § 23.103. In practice, however, the FAR essentially allows agencies to exempt themselves from the eco-label requirement, because only 95 percent of procurements must use eco-labels – and the FAR does not define the exempt five percent. As a result, under current law it is almost impossible to raise a challenge to a procurement that ignores the eco-label requirement, and notably there are no reported GAO bid protest decisions raising such a challenge. *Cf. Alvarez LLC*, Comp. Gen. B-418367.6 (June 2, 2020) (agency reasonably found eco-label requirement was met). To close this gap in the law and encourage the use of eco-labels, the new administration could require that eco-labels be used in *all* appropriate procurements. A much broader use of eco-labels could

raise trade issues, however, for eco-labels are not uniform the world over; there are hundreds of eco-labels in use globally, *see, e.g.*, Ashleigh Rodriguez, *There Are More Than 450 Meanings Behind “Green” Labels* (Oct. 10, 2015), <https://qz.com/521251/there-are-more-than-450-meanings-behind-green-labels/>, and those in common use in Europe are not necessarily the same as those in the United States. *See, e.g.*, EU Procurement Directive 2014/24/EU, para. 75 (endorsing use of “European Ecolabel”). To reduce these artificial trade barriers, the Biden administration would have several options. The United States could, for example, cooperate with foreign governments to identify common eco-label standards. *See generally* Bogdana Neamtu & Dacian C. Dragos, *Sustainable Public Procurement: The Use of Eco-Labels*, 10 Eur. Proc. & Pub. Priv. Part. L. Rev. 92 (2015). Another approach would be to establish a process, perhaps on a procurement-by-procurement basis, under which foreign vendors could demonstrate that their goods and services met environmental standards equivalent to those established by the FAR. *Cf., e.g.*, DFARS 252.204-7008, Compliance with Safeguarding Covered Defense Information Controls (vendor can show cybersecurity standards it meets are comparable to NIST cybersecurity standards required under clause).

- **Assessing for Environmental Impacts:** While the eco-label puzzle is relatively easy to solve, the probable next step in environmentally sound procurement – a requirement that a purchasing agency weigh, as part of a technical evaluation, the environmental impacts (such as carbon gas emissions) attributable to the good or service under review, in order to encourage sustainability – will be more difficult. *Cf.* Nathan S. Page, *Leading the Charge: Using Green Builder Set-Asides to Expand Sustainable Construction and Design*, 39 Pub. Cont. L.J. 373 (2010) (arguing for use of contractor qualification to further environmental goals). Notably, many states and cities across the United States already assess for sustainability when they procure, *see, e.g.*, Lauren Olmstead, *A Common Taxonomy for Carbon: How States and Cities Use Public Procurement to Combat Climate Change*, 49 Pub. Cont. L.J. 691, 693 (2020) (“State and local governments have now been put in the position to ‘lead by example’ and use their purchasing power to advance the goals of GPP [Green Public Procurement.]”, as does Canada, *see* David M. Attwater, *Promoting Sustainable Development with Canadian Public Procurement*, 44 Pub. Cont. L.J. 79, 86 (2014) (“Under the [Canadian] Green Policy, environmental performance considerations are integrated into procurement processes, instruments, policies, and procedures in the same manner as other value considerations such as cost, performance, quality, availability, after-sales service, and technical support.”). Incorporating “green” procurement goals into assessments for award will mean updating the Obama administration’s 2010 blueprint for environmental sustainability in procurement, *see* U.S. General Services Administration, *Executive Order 13514 Section 13: Recommendations for Vendor and Contractor Emissions* (April 2010), [https://www.gsa.gov/cdnstatic/GSA\\_Section13\\_FinalReport\\_040510\\_v2.pdf](https://www.gsa.gov/cdnstatic/GSA_Section13_FinalReport_040510_v2.pdf), and reaching consensus on how to harness commercial measures of greenhouse gases to reduce global warming. The federal government’s embrace of “green public procurement” would send a profoundly important message across private markets, making clear both the need and the practicability of reducing greenhouse gas emissions through enhanced procurement practices. At the same time, however, the federal government would need to work closely with other governments both in the United States and abroad to ensure that new U.S. technical requirements, though intended to reduce global warming, did not raise inadvertent barriers to global trade.



### C. Strengthening Cybersecurity

By necessity, another major task before the Biden administration is to strengthen cybersecurity. In the wake of massive breaches such as the “SolarWinds” hack, *see, e.g.,* Associated Press, *Massive SolarWinds Hack May Have Exposed America’s Biggest Secrets*, Dec. 15, 2020, <https://www.marketwatch.com/story/massive-solarwinds-hack-may-have-exposed-americas-biggest-secrets-01608076875>, the new administration may well impose new cybersecurity requirements on both agencies and their contractors. Those new requirements are likely to address the theft of government and industrial secrets. The measures may go farther, however, as part of a broader effort to exclude certain foreign (such as Chinese) companies in an ongoing geopolitical battle for global technological and economic leadership. While strong (even discriminatory) measures to protect national security are countenanced by the trade agreements, *see, e.g.,* WTO Government Procurement Agreement, Art. III, measures meant merely to further (or preserve) a nation’s standing may be challenged as illegal barriers to trade. *See, e.g.,* Joel P. Trachtman, *The Internet of Things Cybersecurity Challenge to Trade and Investment: Trust and Verify?* (April 18, 2019), <https://ssrn.com/abstract=3374542>.

### D. Emerging Protectionism Abroad

Finally, the Biden administration will need to address nascent protectionism in other nations – often inspired, ironically, by the Trump administration’s own economic nationalism, and its loud support of “America First” protectionism. There are examples from around the world of this new wave of protectionism – the Malaysian *bumiputera* protectionism for ethnic Malays, for example, accepted and incorporated as part of the Transpacific Partnership (TPP), *see* Jean Heilman Grier, *TPP Procurement: Malaysia’s Commitments* (Dec. 11, 2015), <https://trade.djaghe.com/?p=2277>, or the European Union’s “white paper” on “leveling” trading advantages by sanctioning vendors that receive foreign government sanctions (discussed below), *see* European Commission, *Foreign Subsidies*, [https://ec.europa.eu/competition/international/overview/foreign\\_subsidies.html](https://ec.europa.eu/competition/international/overview/foreign_subsidies.html), and the European Defense Fund previously discussed (an indirect preference and subsidy for European defense firms, despite the market-opening commitments under the U.S. reciprocal defense procurement agreements with its allies). This relatively recent wave of protectionist measures complicates the trade picture substantially, and the United States may conclude that a new round of trade negotiations, perhaps under the WTO Government Procurement Agreement, is necessary to reconcile and resolve these new forms of protectionism.

## III. MOVING FORWARD: LEADING INTERNATIONAL TRADE POLICY AND COORDINATION

Taken together, the international procurement trade agenda for the new Biden administration will be both challenging and diverse. The question, then, is how best to tackle this agenda – which agency should take the lead, for example, and what type of international cooperation might work well to reduce trade barriers and enhance best value.

Resolving which federal agency should take the lead on these international trade issues is not easy. While the U.S. Department of State regularly addresses procurement issues in working with other nations, coordinating procurement policies on issues such as cybersecurity and sustainability has never been a core mission for the State Department. The lead U.S. agency on

international trade issues, the Office of the U.S. Trade Representative (USTR), has been focused on the Trump White House's aggressive protectionism. While there are mechanisms for the USTR to pursue international cooperation under existing trade agreements, such as the World Trade Organization (WTO) Government Procurement Agreement's working groups discussed above, *see also* Jean Heilman Grier, *The Government Procurement Agreement Under the World Trade Organization: A Djaqhe Reference Paper*, at 23-25 (Jan. 2020), <https://app.box.com/s/4fh1q5r0nagelp8kudlr1nbnw7e3s6e0>, little public progress has been made through those channels in recent years. The U.S. Commerce Department supports the USTR in trade negotiations, but (aside from the Commerce Department's Commercial Law Development Program, a capacity-building initiative) has not played a significant public role in international procurement issues. The U.S. Trade and Development Agency (USTDA) leads export initiatives abroad, including in government procurement, but does not coordinate international efforts to reduce trade barriers in procurement, such as in environmental sustainability. The Environmental Protection Agency (EPA) has an abiding interest in "green procurement," *see* EPA, *Sustainable Marketplace: Greener Products and Services*, <https://www.epa.gov/greenerproducts>, but plays no sustained role in international affairs regarding procurement. The agency with the most experience in procurement, the Defense Department, coordinates free trade agreements regarding trade in defense materiel and services with U.S. allies (the reciprocal defense procurement agreements referenced above). The Defense Department naturally has a deep understanding of cybersecurity, but plays no regular coordinating role on broader trade issues such as environmental sustainability. The agency with core expertise in procurement, the General Services Administration (GSA), has never played a leading role in international trade issues. That leaves the Office of Federal Procurement Policy (OFPP) in the White House Office of Management and Budget (OMB). During the Trump administration, however, OFPP has remained relatively quiet, and that office has never played a prominent public role in international procurement matters.

To resolve which agency(ies) should lead this next phase of international coordination, perhaps it would be useful to identify *what must be done* – what types of international cooperation are necessary to reduce trade barriers and encourage new nations to use best practices, such as in cybersecurity and sustainable procurement. To make sense of that very complicated question, we can look to the different types of potential regulatory cooperation that nations can undertake, as described in several studies published by the Organization for Economic Cooperation and Development (OECD). *See* A. Correia de Brito, C. Kauffmann & J. Pelkmans, *The Contribution of Mutual Recognition to International Regulatory Co-operation* (OECD 2016), <http://dx.doi.org/10.1787/5jm56fqsfxmx-en> (citing OECD, *International Regulatory Co-operation – Addressing Global Challenges*, at 23-25 (2013), <http://dx.doi.org/10.1787/97892642004663-en>). Addressing the relevant modes of regulatory cooperation in turn, beginning with the easiest to achieve:

- **Dialogue/Informal Exchange of Information:** The simplest approach would be to engage in informal dialogues with highly industrialized trading partners, such as the European Union and Canada – though other nations such as Ghana, which is pursuing environmental sustainability in procurement, *see, e.g.,* Akosua Nyantakyi, *Preparing Today for Prosperity Tomorrow: Using Sustainable Public Procurement as a Tool for Development in Ghana*, 48 Pub. Cont. L.J. 377 (2019), might wish to join these discussions

as well. Among many of the industrialized nations, there is already a forum for those types of discussions in public procurement: the established (but so far largely quiescent) “work programmes” established under the World Trade Organization’s Government Procurement Agreement (discussed above), including a work program dedicated to sustainability. [https://www.wto.org/english/tratop\\_e/gproc\\_e/gpa\\_wk\\_prog\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gpa_wk_prog_e.htm). This type of informal international dialogue would be critical as the United States and its allies mapped out measures to take against new cybersecurity threats, and to address global warming.

- **Soft law; principles, guidelines, codes of conduct:** Early discussions would help shape norms and principles for closer cooperation between nations. For cybersecurity issues, for example, it would be important to sort out from the start whether foreign vendors that are not compliant with unique U.S. cybersecurity standards may rely upon parallel cybersecurity standards from abroad. See, e.g., Jayme Selinger, *Protectionism or Perfectionism: Exploring The International Trade Implications of DoD’s Cybersecurity Maturity Model Certification* (draft Jan. 2021), <https://publicprocurementinternational.com/wp-content/uploads/2021/01/Jayme-Selinger-CMMC-and-Trade-Barriers-1.12.2021.pdf>. Non-discriminatory standards (such as eco-labels) will also be important to make environmental sustainability work, and nations will need to decide, early on, whether to rely on commercial standards for measuring greenhouse gas emissions when making public purchases.

- **Recognition and Incorporation of International Standards:** With regard to cybersecurity, the next step in the international discussions would likely be to assess whether the U.S. standards, which are generally written by the National Institute of Standards and Technology (NIST), should be coordinated with internationally recognized cybersecurity standards such as those published by the International Organization for Standardization (ISO). See, e.g., Cyber Consortium, *Comments on Federal Determination of Industry Best Practices*, Docket No. 130208119-3119-01 (April 2013) (suggesting possible strategies for transatlantic cooperation in accommodating common cybersecurity standards, under what was then proposed to be the Transatlantic Trade & Investment Partnership (TTIP)).

- **Formal Requirements to Consider Relevant Frameworks in Other Jurisdictions in the Same Field:** The next step in this continuum of regulatory cooperation would be a formal requirement to consider foreign jurisdictions’ regulatory frameworks. In cybersecurity, the Defense Department already does this for non-classified systems: under DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, for example, a vendor may propose *alternative* cybersecurity protections, which the Defense Department’s Chief Information Officer (CIO) will consider for equivalence. The same sort of flexible (and monitored) reciprocity presumably could be used for environmental sustainability measures, such as eco-labels.

- **Trans-governmental networks of regulators:** Notably, to implement the Defense Department’s CMMC initiative, the Defense Department is already considering the next level of regulatory cooperation – trans-governmental networks of regulators. Because of security concerns, some foreign vendors have objected to any requirement that third-party assessors under the CMMC initiative be allowed to inspect foreign facilities. To resolve this, the U.S. Defense Department may authorize “trans-governmental” regulators – foreign inspectors, approved by the Defense Department – to inspect

vendor facilities in foreign jurisdictions for cybersecurity. *See* U.S. Department of Defense, CMMC Frequently Asked Question (FAQ) 25 (“DoD is working with international partners to coordinate on potential bilateral agreements between CMMC and their respective cybersecurity requirements and assessments”).

To achieve these basic levels of regulatory cooperation, trade negotiators in the Biden administration probably would need to coordinate closely with subject-matter experts in other agencies, and stakeholders outside the government. To proceed farther in the OECD continuum of regulatory cooperation – for example, to enter into mutual recognition agreements, to form regional agreements to address cybersecurity or sustainability, to leverage inter-governmental organizations such as the OECD for cooperation, or to enter into formal regulatory co-operation partnerships (such as the U.S.-Canada Regulatory Cooperation Council, <https://www.trade.gov/rcc>) – probably would require substantial interagency cooperation in the U.S. government, with extensive outreach to industry and other stakeholders.

Regulatory cooperation might need to go further, to include renegotiated trade agreements which built safe harbors for new initiatives, for example in cybersecurity and environmental sustainability. The Biden-Harris campaign page (<https://joebiden.com/made-in-america/>) said that “Biden will work with allies to modernize international trade rules and associated domestic regulations regarding government procurement to make sure that the U.S. and allies can use their own taxpayer dollars to spur investment in their own countries” – a clear signal that while the Biden administration will honor trade agreements, the new administration stands prepared to revise trade agreements to accommodate changes in domestic preference policies, both in the United States and abroad.

There may be an immediate need to renegotiate trade agreements (or at least to engage with trading partners under those agreements) because of shifts in a post-Brexit European Union. The European Commission has launched an initiative to sanction foreign vendors that receive government “subsidies.” *See generally* Webinar – European Commission “White Paper” on Foreign Government Subsidies (Dec. 1, 2020) (background materials), <https://publicprocurementinternational.com/2020/11/10/webinar-european-commission-white-paper-on-foreign-government-subsidies-december-1-2020/>. While this EU initiative is aimed primarily at China and the departing United Kingdom, *see, e.g.*, UK Parliament, *EU White Paper on the “Level Playing Field”: Addressing Distortions Caused by Foreign Subsidies* (July 22, 2020), <https://publications.parliament.uk/pa/cm5801/cmselect/cmeuleg/229-xiii/22904.htm>, the initiative could affect U.S. companies as well, because of the vague definition of sanctionable government “subsidies.” To shield U.S. contractors from sanctions, the United States may choose to negotiate under the WTO Government Procurement Agreement to make clear that special economic supports afforded U.S. contractors (such as the emergency relief afforded during the COVID-19 pandemic) do not constitute sanctionable government subsidies. *See, e.g.*, Andrea Biondi, Luca Rubini, Michael Bowsher, Christopher Yukins & Gabriele Carovano, *Guest Post: “The EU Gives Foreign Subsidies Its Best Shot”: One Take on White Paper on Levelling the Playing Field as Regards Foreign Subsidies*, Int’l Economic Law & Policy (Oct. 2020), <https://ielp.worldtradelaw.net/2020/10/guest-post-the-eu-gives-foreign-subsidies-its-best-shot-one-take-on-white-paper-on-levelling-the-pla.html>; Christopher Yukins & Kristen Ittig, Feature Comment, *Maximizing Recovery: Contractor*



*Recovery for COVID-19 Paid Leave Under § 3610 of the CARES Act*, 62 GC ¶ 156 (June 10, 2020); Desiree U. Klingler, *Government Purchasing During COVID-19 and Recessions: How Expansionary Legal Policies Can Stimulate the Economy*, 50 Pub. Cont. L.J. 1 (2020).

Rewriting trade agreements would be one of the more serious options along the continuum of cooperation suggested by the OECD. In the key areas involving procurement which will demand international cooperation in the coming years – cybersecurity and environmental sustainability, for example – coordination with other powers is likely to begin with informal dialogue, and then may advance to more serious regulatory cooperation; that, in turn, may require centralized coordination in the Biden administration. While in principle individual agencies, here and abroad, could coordinate on narrow technical issues (much as the U.S. Access Board coordinated accessibility standards with input from European authorities, *see* U.S. General Services Administration, *International Harmonization*, <https://www.section508.gov/manage/laws-and-policies/international>; Zero Project Innovative Policy 2018 on Accessibility, *Harmonization of ICT standards Across the Atlantic*, <https://zeroproject.org/policy/pol183058usaue-factsheet/>), a coordinated approach across government would be more likely to succeed.

During the course of the Biden administration, therefore, an agency with clear authority over procurement and trade – the USTR or the Office of Federal Procurement Policy, perhaps – may take a lead role in coordinating with other nations on procurement trade policy. Having a strong lead agency, vested with authority and with a real understanding of procurement, will be especially important if other issues in procurement – such as transborder exchanges of information to counter corruption – become part of the ongoing discussions among nations.

#### IV. CONCLUSION

Following on the chaos of the Trump administration, the Biden administration will face numerous challenges in international procurement and trade. First, to restore the international community's respect for the United States as a trusted partner, the Biden administration will need to convince the United States' trading partners that U.S. policy will be based on cooperation, not confrontation. In that vein, if the Biden administration intends to apply domestic preferences to public procurement – under a massive infrastructure initiative, for example – the new administration will need to manage those preferences within a framework of existing free trade commitments. The new administration also will need to sort out how best to coordinate procurement policy with other nations on key international initiatives, such as global warming and cybersecurity. To make that work, the Biden administration will need to foresee *how* cooperation may unfold, and decide *who* in government should take the lead in that cooperation. But given the United States' rich history in this area – for most of the years since World War II, the United States has been a leader in reshaping public procurement internationally, *see, e.g.*, Christopher R. Yukins & Steven L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 38 Geo. J. Int'l L. 529, 562 (2007), <https://ssrn.com/abstract=1002446> – the incoming Biden administration has a strong historical foundation for success.