**GUARDIANS OF GLOBAL COMPLIANCE**

**THE RISK MANAGERS OF INTERNATIONAL PUBLIC CONTRACTING AND PROCUREMENT**

**OR**

**How I learned to Stop Worrying and Love Risk[[1]](#footnote-1)**

*Ann R. Stravalle-Schmidt,\* Foreign Government Contacting*

*December 16, 2022*

1. **Introduction** ……………………………………………………………................3
   1. **The Need** …………………………………………………………...….…3
2. **Background/Context- All the World is a Stage- The reasons for a GGC**……..4
   1. **Big Complexity Equals Big Money**...........................................................4

**B. Geopolitical Shifts and the Tilting World Economy-**

**Ramping Up the Risk** …………………………………………………….5

**C. The U.S. as a World Player and the Impact of a Global Pandemic - Increased “Protectionism” Hits the International Public Contracting and Procurement Landscape** …………………………………………………6

**III. The GGC as Focal Point for International Public Contracting and Procurement Risk Identification, Mitigation and Management** ……………………………….9

1. **The Interviewees** ………………………………………………………….9
2. **The Take-Aways** .……………………………………………………….....10
3. **The Hot Spots-Risk Areas** ……………………………………………….11
4. **Not to be Forgotten** ………………………………………………………12

**IV. A Deeper Dive-Hot Spots- Key Areas GGC add Value** ………………………..15

**A. The GGC has a Bird’s Eye View of Overall Compliance**

**Obligations** ………………………………………………………………..15

**The GGC sees Supply Chain Issues -Compliance. Accountability and the Need for Resilient Sourcing** …………………………………………..…16

**The GGC and Local Laws** ……………………………………………….18

**Treaties and Trade Agreements-“Oh My**" ………………………….….19

**Hello Protectionism-The Trade Agreements Act and the Buy American -Hard Acts to Follow Follow**……………………………………………..21

**Putting it all Together-Understanding Federal Contracting Framework**

**and Requirements** ……………………………………………………….24

**V. The Globalization and Evolution of General Counsel Supports the Need and Emergence of GGCs**………………………………………………………………………………...25

**A. Hiring Trends- “As the World Turns”** …………………………………26

**B. The New “Must-Haves”** ...……………………………………………….27

**VI. Recommendations** ………………………………….................................................28

**VII. Conclusion** ………………………………………………………………………....29

1. **Introduction**
2. The Need

There is an emerging phenomenon and need for a general or lead counsel who is versed in global public contracting/procurement. The emergence of and the need for a General Counsel of International Public Contracting and Procurement (hereinafter referred to as a “Global GC” or “GGC” for simplicity) is a necessary and a natural evolution of a lead counsel role to successfully manage risk for a U.S. multinational defense contractor (“defense contractor”) that sells to foreign governments and/or purchases from foreign countries to supply their United States Government (“USG”) customers. The international public contracting/procurement arena is notoriously complex with oft times competing tensions. A GGC as the “guardian”, the ‘focal point”, the “conductor”--- the “Maestro”--- if you will, is pivotal for a defense contractor to successfully navigate a landscape that is constrained by U.S. regulations/domestic preferences, the laws of foreign countries, treaty obligations, politics, cultural nuances, the ever changing and increasingly unstable geopolitical landscape, climate change, and global supply chain instability laid bare by COVID-19. Such a world stage necessitates a conduit with a sufficiently broad knowledge base or, at a minimum, a honed ability to spot, identify, manage and minimize risk in the landmine that is the international public contracting and procurement milieu; someone who can pull all the moving parts together to maximize the U.S. defense contractor’s success.

1. **Background/Context- All the World is a Stage- The reasons for a GGC**
2. Big Complexity equals Big Money [[2]](#footnote-2)

The context which informs and defines the international landscape is one of substantial risk and substantial reward. On one hand, a U.S. defense contractor that engages in foreign sales and purchases “must comply with a myriad of statutes and administrative rules and regulations both locally and abroad, many of which directly affect their ability to conduct business or expand their reach.” This is impacted by “regulatory, government affairs and public policy environment [that] is constantly changing—affected by politics, history, legal decisions, interest groups, precedent and news events.” [[3]](#footnote-3) On the other hand, with such complexity comes much reward. Foreign money is becoming a much larger portion of a U.S. defense contractor’s revenues and will, no doubt, only continue to increase over time. U.S. defense exports such as foreign military sales (“FMS”) and direct commercial sales (“DCS”) account for approximately 150 billion USD.[[4]](#footnote-4) Such international transactions are not only important to the defense contractor, but it is also important to the U.S., which has been a vanguard of open trade wielding it as a foreign policy and national security scalpel or blunt instrument as needed.”[[5]](#footnote-5) Foreign trade supports “a domestic workforce in the manufacturing sector”[[6]](#footnote-6), supports U.S. “national security programs”[[7]](#footnote-7), “narrow[s] the U.S. trade deficit gap”[[8]](#footnote-8), and “reduces the costs of procurement for our … [m]ilitary.”[[9]](#footnote-9) Typically, foreign trade equals approximately “10 percent to 15 percent of a country’s GDP.”[[10]](#footnote-10) As of 2020, the U.S. was “the third largest global merchandise exporter, with … **1.43 trillion USD [in total trade],** making up 8.1 percent of the world's total export trade.”[[11]](#footnote-11)

1. Geopolitical Shifts and the Tilting World Economy- Ramping Up the Risk

Economic and geopolitical risks have always existed to one extent or another, but these risks seem more complex and more numerous today. The economic rise of and tension with People’s Republic of China, the insanity of North Korea, Putin’s war on Ukraine, the wide spread kleptocractic corruption in third world countries and in Russia, pervasive money laundering by kleptocrats in first world country economies, the rise of extremism, and the lurching toward right wing violent populism create geopolitical destabilization and exacerbate an already complex international contracting and procurement stage.[[12]](#footnote-12) Add a heavy dose of supply chain disruption, inflation, debt, labor market gaps, protectionism, world educational disparities, climate transition disorder, increased cyber vulnerabilities, greater barriers to international mobility, and divergent economic recoveries[[13]](#footnote-13) and there is almost a “perfect storm” that impacts international investment decisions. Making the appropriate decision would seem nearly impossible without a GGC to synthesize the context and to identify, manage and navigate these risks to support the defense contractor’s business strategy. Throw in the probability of another pandemic, continued inflation and continued liquidity and excess wealth creating a greater ability to borrow and spend, and the hidden debt of countries who now owe resources to China and it becomes a near Herculean task that can only be managed by having consolidated information provided by a position such as a GGC. Let us not ignore EU-UK fighting, crypto currency challenging global dollar dominance as well.[[14]](#footnote-14)

1. The U.S. as a World Player and the Impact of a Global Pandemic - Increased “Protectionism” Hits the International Public Contracting and Procurement Landscape

During the past 50 years, the United States has played a prominent role in creating the international trade rules, most of which include government procurement obligations.”[[15]](#footnote-15) After WW II, the United States and other major trading partners “established the General Agreement on Tariffs and Trade (GATT) in recognition of the economic and political benefits of open, transparent, and nondiscriminatory trade.”[[16]](#footnote-16) The U.S. has been a major proponent trade liberalization and transparent and nondiscriminatory international public contracting and procurement, in tandem with “incentivize[ing] U.S. domestic production by prioritizing the procurement of domestic goods and services or by restricting foreign firms’ access to the U.S. government procurement market.”[[17]](#footnote-17) “The U.S. … limits its domestic defense markets to friendly nations through bilateral or multilateral trade agreements”[[18]](#footnote-18) and imposes limitations or prohibitions on the “use of non-domestic products through such domestic preference statues as the Berry Amendment[[19]](#footnote-19) and the Buy American Act “BAA”[[20]](#footnote-20) because of national security issues.[[21]](#footnote-21) This is the terrain that a U.S. defense contractor has to traverse and it has gotten more complex since 2020.

Because of the impact of the COVID-19 pandemic, the U.S. Congress, under both presidents Trump and Biden have sought ways to incentivize U.S.-based production by prioritizing the domestic goods procurement and limiting waivers to statutory domestic preferences.[[22]](#footnote-22) The Trump administration even considered withdrawing from the GPA.[[23]](#footnote-23) Both the Trump and Biden Administrations issued executive orders to increase oversight of waivers that would allow USG purchases of foreign goods. President Biden subsequently issued Executive Order 13881 “Maximizing Use of American-Made Goods, Products, and Materials, which increases the thresholds for contractors subject to the BAA. On January 25, 2021, he signed Executive Order 14005 “Ensuring the Future is Made in All of America by All of America’s Workers” seeking to close loopholes allowing offshore production still qualifying for domestic preferences. This has increased the tension that U.S. defense contractors face --- how to support U.S. commitments under the GPA (and other foreign obligations) yet remain compliant with domestic preferences.

Despite domestic preferences, the USG, nonetheless, relies heavily on foreign manufacturers and suppliers and the disruptions caused by the pandemic and China have prompted heightened congressional interest in the role of international trade in USG procurement, more closely examining government procurement from “foreign suppliers or acquisition foreign made goods; import trends; and U.S. production capacity in industries deemed essential.”[[24]](#footnote-24) With the increased focus on domestic preference programs and recent White House initiatives it seems clear that the Biden Administration will also ramp up enforcement the Foreign Corrupt Practices Act (“FCPA”), export controls, and the economic sanctions creating even greater scrutiny of compliance requirements and waivers associated with government contracting.[[25]](#footnote-25) This presents an additional challenges for U.S. defense contractors and a more urgent need for a GGC.

1. **The GGC- A Focal Point for International Public Contracting and Procurement Risk Identification, Mitigation and Management- The Interviews**
2. The Interviewees

There is an abundance of literature on the qualities of a good General Counsel, on international contracting and procurement issues and risks, and legal tomes on various U.S. and international legal requirements. However, there is a dearth of research or literature directly on point on the emergence of and need for such a creature as a GGC. Although there is nothing on GGCs specifically, circumstantially it stands to reason that given the interconnectedness of global businesses, the rise of complex supply chains, the increased data and national security issues, increased anticorruption enforcement, the U.S. Procurement Collusion Strike Force, the use of FMS, Foreign Military Financing (“FMF”) and DCS, the intersection of FAR/DFARS with the requirements foreign legal regimes, the tension between World Trade Organization (“WTO”) Government Procurement Agreement (“GPA”) obligations, U.S. domestic preferences and bilateral agreements, and the ever present geopolitical changes that there a should one point of contact to oversee and coordinate these risk areas especially in the context of the uncertainties of foreign legal regimes. Not only is the global public contracting and procurement world rapidly changing and becoming more complex, but appears to be more easily disrupted due to climate change and geopolitical tensions. The GGC would act as a beacon and anchor point necessary to ensure that companies playing in international marketplace know the risks and know how mitigate those risks while maximizing profit and opportunities.

Since there is no data on the emerging phenomenon of or need for a GGC, eight (8) professionals in the field were interviewed to substantiate or negate the hypothesis emerging phenomenon and need for general or lead counsel who is versed in international issues particularly in global contracting/procurements. The eight (8) individuals were interviewed over a two month period for approximately 30-45 minutes each. All eight (8) interviewees are professionals involved in various aspects of USG contracting and procurement --one (1) person from an USG agency; one (1) academic; three (3) partners from prominent U.S. law firms specializing in USG contracting and foreign government contracting; two (2) high ranking counsels in traditional defense contractors (procurement and direct commercial and FMS contracting); and one (1) partner from a global public sector consulting firm. They were all asked the same general questions with leeway to expand on their particular experiences and their practice area or specialty. All information has been anonymized.

The general areas of inquiry in the context of their respective backgrounds and experience were: Whether they saw a need for such a role, if so, why? What would be the top areas of concern, risk and opportunity the GGC should have knowledge of and manage? How does such a role add value? What personal/professional characteristics would be necessary for such a role? And, finally, how would law schools prepare students for such roles?

1. The Take-Aways

All interviewees agreed that there is a need for a position similar to a GGC as a focal point because of the complexities of international contracting and procurement and all were sensitive to the geopolitical and economic risks, increased tensions, complexities of competing requirements, the need to balance compliance with USG requirements and local laws; and the tensions U.S. preferences with WTO and treat obligations. The interviewees were cognizant of lucrative nature of international contracting and procurement, the importance of generating foreign revenue as an integral part of a multinational’s game plan, and the pressure to maintain an adequate compliance program that keeps pace with evolving regulation.

The consensus was that a GGC adds value for the very reason that they would be the conductor, weaving all the disparate parts together, and able to more readily to identify risk and opportunity in the midst of change, assess the impact of those risks on, realign the function’s structure as necessary, and ensure that their legal, regulatory, and compliance teams (if they are in a large corporation) have the diverse set of competencies, backgrounds, cultural awareness, and experiences necessary. All of the interviewees agreed that a GGC needed to have an understanding of and a respect for cultural differences.

1. The Hot-Spots-Risk Areas

When asked what would be the top areas of concern, risk and/or opportunity the GGC should have knowledge of and manage, the responses were personal to their experience, but converged on same knowledge bases and risk areas. In various different ways, all interviewees touched on the mission of a GGC would be institute best practices with an acute awareness of transparency issues such as data privacy, data transfer and national security. The majority of interviewees noted that a GGC would need a “compliance mind” set to bring all the moving parts together; a strong ability to identify, mitigate and manage compliance, financial and reputational risk; an appreciation of and sensitivity to other cultures, laws and norms; and strong understanding of FAR, DFARS contractual requirements and the contract mission. The GGC would need knowledge of trade agreements and treaty obligations, domestic preferences, and the ability to balance the competing tensions. A GGC would also need to have an understanding of supply chain issues, import/trade sanctions, export compliance requirements (ITAR, EAR), FMS and DCS requirements, offset issues, and national security/data transfer concerns. Of the numerous areas of competencies the interviewees’ answers coalesced around five (5) key areas-“hot-spots” of risk: 1) Overall compliance; 2). Supply chain compliance and flow downs; 3) Understanding local laws; 4) Balancing treaty and trade agreement obligations and domestic preferences; and 5) Understanding USG FAR/DFARS contracting. Further, one interviewee pointed out the if the GGC is in a small Legal Department then they need to be able to issue spot and have a strong understanding of the “hot spots”, especially the mechanics of USG contracting and procurement, and know when to bring into outside counsel. In a more mature and larger defense contractor legal department, the GGC would focus on the hot spots and create operational model across different areas within legal department organized by region, sub-regions with working group specialists in export, trade compliance (EAR, ITAR, teaming agreements, licensing), FMS/DCS and so forth.

1. Not to be Forgotten

Export compliance, FMS/DCS, offsets and anti-boycott laws were mentioned by most of the interviewees, however, none delved in to these subject matters in detail, so these areas will only be discussed briefly, but they are very important and complex areas to be cognizant of for proper risk identification, management and mitigation with serious sanction and penalties for noncompliance. Export issues involve properly complying with the International Traffic in Arms Regulations (ITAR for most military and intelligence-related items, and the Export Administration Regulations (EAR) for dual-use and of lower-level military items.[[26]](#footnote-26) Failure to comply can have serious consequences including loss of export privileges. Criminal and civil penalties and imprisonment.[[27]](#footnote-27)

FMS and DCS are other important areas that a GGC should be aware of and can be a pivotal liaison in navigating if defense items are at issue. The U.S. has been committed to supporting its allies in meeting their defense needs these programs[[28]](#footnote-28) and “arms transfers are foreign policy.”[[29]](#footnote-29) The FMS, overseen by the Department of State’s [Bureau of Political-Military Affairs](https://www.state.gov/bureaus-offices/under-secretary-for-arms-control-and-international-security-affairs/bureau-of-political-military-affairs/), is mostly a “government-to-government arms transfers and commercial export licensing of U.S.-origin defense equipment and technologies”[[30]](#footnote-30) which accounts for billions of dollars annually. The DCS is overseen by the Bureau of Political-Military Affairs’ [Directorate of Defense Trade Controls which](https://www.pmddtc.state.gov/) “provides regulatory approvals for approximately $115 billion per year in sales of defense equipment, services, and related manufacturing technologies controlled under the 21 categories of the [U.S. Munitions List](https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=70e390c181ea17f847fa696c47e3140a&mc=true&r=PART&n=pt22.1.121). [[31]](#footnote-31) These sales are negotiated privately between foreign end-users and U.S. companies.”[[32]](#footnote-32) Export licenses for both FMS and DCS are intensely reviewed and every arms transfer is reviewed on a “case-by-case basis under the Conventional Arms Transfer (CAT) Policy.”[[33]](#footnote-33)

Many times in a sale to a foreign government, offsets are required. “These quid pro quo transactions” are a type of “price cutting”, and are motivated by a foreign government’s “economic incentives ranging from labor market distortions and desires for foreign investment to the need for international financing”[[34]](#footnote-34). As such, offsets are a major part of doing business with a foreign government and a key concession a U.S. defense contractor usually must make to secure the contract.”[[35]](#footnote-35) It is believed that U.S. defense contractors have total “offset commitments, already made or in the pipeline, exceed[ing] $500 billion.”[[36]](#footnote-36) Countries purchasing defense supplies and services usually require offsets and that demand is increasing but in complexity and monetary value.[[37]](#footnote-37) However, offsets present “substantial performance risk, significant financial exposure, and elevated compliance challenges”[[38]](#footnote-38) because they require the transfer of technology, licenses or other authorizations per the EAR and ITAR and are closely scrutinized. GGCs can be invaluable in negotiating offsets making compliance more palatable and less risky for the defense contractor.[[39]](#footnote-39)

Other considerations for a GGC to watch for would be the “use of host country agents, brokers, and consultants” which “may be tightly regulated or even prohibited both under U.S. and local law.”[[40]](#footnote-40) Awareness and compliance with anti-boycott laws is another area in which a GGC can be the perfect gatekeeper. Violations of Anti-boycott laws which restrict contractors from dealing with companies that support/participate boycotts of U.S. friendly countries can result in steep civil and criminal fines, imprisonment, denial of export privileges, and loss of tax benefits.[[41]](#footnote-41)

**IV. A Deeper Dive-Hot Spots- Key Areas GGC add Value**

**A.** The GGC has a Bird’s Eye View of Overall Compliance Obligations

As mentioned, the interviewees stressed the importance of a “compliance mind set”; being aware of the many different aspects that need to be considered. An effective compliance program reinforces a company’s internal controls and helps to detect and to prevent corruption. It is an evolving process, tailored a company’s specific business and risks.”[[42]](#footnote-42) The effectiveness of a compliance program is significant in mitigating and possibly avoiding corporate liability under U.S. Sentencing Guidelines (“USSG”), the DOJ’s Principles of Federal Prosecution of Business Organizations, as well as the FCPA Pilot Program.[[43]](#footnote-43) The anti-corruption aspect of a comprehensive compliance program has recently become more complex and immediate. In 2021, President Biden designated the fight against corruption as a core national security interest[[44]](#footnote-44) intensifying scrutiny of compliance programs.

Compliance obligations, in the context of a multinational defense contractor and its GGC, means much more than an anti-bribery compliance program, although that is pivotal, but compliance with trade regulations, preferences, export control, and all applicable USG procurement requirements (e.g., FAR, DFARs) and all foreign laws impacting international public contracting and procurement. For example, defense contractors must be complaint in with DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident and for those meeting certain requirements, there must be compliance with Combatting Traffic In Persons, FAR 52.222-50 (“CTIPs”). Who better to see all the moving parts than a GGC?

1. The GGC sees Supply Chain Issues -Compliance and Accountability and the Need for Resilient Sourcing

The interviewees who source from foreign countries and entities (for their USG customers or who are obligated to source due to offset obligations) were particularly mindful that global sourcing is a minefield for a U.S. defense contractor and requires due diligence to ensure supplier compliance with anticorruption/anti-kickbacks, child labor practices, and all USG requirements, including mandatory flow downs. Issues of sole sourcing and an unstable supply chain compound the issues.[[45]](#footnote-45) The elements of every compliance plan under the FAR regardless of contract type or value, includes “[p]rocedures to prevent agents and subcontractors at any tier and at any dollar value from engaging in trafficking in persons … and to monitor, detect, and terminate any agents, subcontracts, or subcontractor employees that have engaged in such activities.”[[46]](#footnote-46) Violations could result in, “suspension of contract payments, loss of award fees, termination of the contract, or suspension and debarment”, as well as potential civil liability under the False Claims Act and the Anti-Kickback Act of 1986 … as well criminal liability under the Fraud in Foreign Labor Contracts.”[[47]](#footnote-47) Since the FAR does “not define the ‘due diligence’ required by a contractor prior to certifying compliance with anti-human trafficking rules by either the contractor and its ‘agents, subcontractors, or their agents’” [[48]](#footnote-48)the GGC can be pivotal in supporting the due diligence required in certifying a supplier since “the level of ‘due diligence’ depends on defense contractor’s specific circumstances. A GGC is in the perfect position to coordinate all the requirements and spot the issues with the supply chain and can liaison between contracting and procurement functions to ensure appropriate mandatory flow downs. Failure to ensure flow downs such as Combatting Trafficking in Persons has serious consequences. The movement towards environmental, social, and governance (“ESG”) programs also supports the need for a GGC who can support efforts to prevent suppliers’ human rights violations, unethical employment practices, and environmental harm.[[49]](#footnote-49)

1. The GGC and Local Laws

Paramount, according to the interviewees, is an understanding and appreciation of local laws and customs were unanimously paramount. All of the interviewees stressed the need for an “international mindset”. The ability to be open and appreciative of other cultures and legal regimes and to understand that different legal regimes are neither good nor bad, they just do things differently. This is particularly important because “[d]eclines in US federal spending force US government contractors to compete for fewer domestic opportunities and provide an additional incentive to look abroad. US contractor interest in international procurement remains high, in part, because of the recent period of decline in US federal spending. Growing foreign procurement markets offer significant potential opportunities but also increased risks that US contractors are well advised to identify and manage…..”[[50]](#footnote-50)

Foreign laws, policies, politics and relationships have a large impact on doing business internationally.[[51]](#footnote-51) Although other countries’ procurement systems share “many similar characteristics such as open bidding”, they “vary greatly from nation to nation and reflect political and cultural differences” and “[m]ost …also make exceptions or have different procedures and rules for military and national security contracts.”[[52]](#footnote-52) Many GPA signatories are mirroring the GPA as a benchmark for their procurement systems. When doing business internationally, corporate structure, tax structure and data protection issues must be taken into account, as does foreign currency exchanges and communication barriers.

1. Treaties and Trade Agreements-“Oh My”

The interviewees agree that to balance business opportunities and risks, a GGC needs to understand the tension between U.S. trade and U.S. preference obligations. The U.S. has obligations to afford non-discriminatory treatment of goods from “participating” foreign countries when it conducts procurements covered by the GPA and U.S. free trade agreements implemented through the TAA implements which in turn limits the BAA’s domestic preference power.

The “most prominent and important international procurement agreement is WTO’s GPA which requires member arties to have transparent and nondiscriminatory procurement practices.[[53]](#footnote-53) U.S. businesses are able to bid on government contracts in other GPA markets and opened public procurement to all GPA members.[[54]](#footnote-54) The “size of the procurement market covered by the GPA is estimated to be $1.7 trillion.” [[55]](#footnote-55)

The WTO GPA (has two major principles nondiscrimination and transparency in contracting. It governs procurement by any contractual means and applies to laws, regulations, and practices regarding any covered procurement. The parties negotiate market access commitments on a reciprocal basis. In its schedule of commitments, each party specifies government entities, as well as categories of goods and services—subject to limitations and monetary thresholds— that are open to procurement bids by companies from other GPA parties.[[56]](#footnote-56) The GPA set out tendering, selection, and awarding requirements, qualification of suppliers, offsets, and challenge procedures and exceptions such as certain defense and national security-related purchases. “The GPA requires parties to accord to the goods, services and suppliers of other GPA parties treatment “no less favorable” than that given to their domestic goods, services and suppliers throughout the procurement process for covered entities.”[[57]](#footnote-57) A GGC must have knowledge of the procedures required by the GPA, its Articles and its coverage schedules. There are also bilateral agreements[[58]](#footnote-58) and U.S. free trade agreements (“FTA”s)[[59]](#footnote-59) which include USG procurement obligations to ensure that U.S. goods, services and suppliers will be given fair and non-discriminatory opportunities to compete in the government procurement of U.S. trading partners which must also be considered.[[60]](#footnote-60)

1. Hello Protectionism-The Trade Agreements Act and the Buy American Act – Hard Acts to Follow

On one hand there are the trade obligations and on the other, there is the BAA and the TAA which protectionist measures to promote American business and U.S. foreign policy. Not only does a defense contractor need to balance the obligations, must determine which legal framework applies, or how to determine if goods are BAA or TAA complaint. The TAA establishes a prohibition on procuring products and services from non-designated countries, unless one of TAA’s exceptions applies. The TAA implements the GPA and trade agreements that guarantee that the products and services of signatory countries and other eligible countries receive nondiscriminatory treatment for TAA covered procurements.”[[61]](#footnote-61) It “authorizes the president to waive domestic procurement restrictions and discriminatory provisions, such as the BAA for eligible or covered products and services from designated-countries.”[[62]](#footnote-62) So ddepending on the circumstances, the U.S. will waive its domestic preference and discriminatory purchasing requirements that would otherwise be inconsistent with the international agreement to implement its international agreement obligations and treat certain foreign-made goods as equivalent to domestic-made goods pursuant to trade agreements.”[[63]](#footnote-63)

The BAA is *the* major domestic preference act and recent changes may very well make it harder to obtain waivers under the TAA.[[64]](#footnote-64) The BAA supports the purchase of domestic goods and services whenever possible, via a price preference, but does not prohibit the USG from purchasing a foreign product if it is less costly after a comparative price evaluation, or if the domestic product is too expensive, of unsatisfactory quality, or if it is not produced in sufficient quantities. [[65]](#footnote-65) The USG adds a price penalty to a low foreign product, usually between 20% to 30 % for civilian agencies and 50% for the DOD.[[66]](#footnote-66) “The BAA uses a two-part test to define a domestic end product: 1. the article must be manufactured in the United States; 2. the cost of domestic components must exceed 60% percent of the cost of all the components.[[67]](#footnote-67) The test appears “easy”, but it is not; and compliance has just become more stringent.

Effective as of October 25, 2022, the DOD, GSA and NASA, effectuating President Biden’s Executive Order (EO) 14005, “Ensuring the Future Is Made in All of America by All of America’s Workers” published the [amendments to the BAA requirements](https://www.federalregister.gov/documents/2022/03/07/2022-04173/federal-acquisition-regulation-amendments-to-the-far-buy-american-act-requirements),[[68]](#footnote-68) which: 1. increased the percentage of U.S. made materials and components that a product has to have; 2. created a fallback position: and 3. increased the price preferences for domestic goods.[[69]](#footnote-69) Under the previous rule “a product is considered American-made if components made, mined, or produced in the U.S. account for 55% or more of the product’s cost.” Now the domestic content threshold would initially increase from 55 percent to 60 percent, then to 65 percent in calendar year 2024 and to 75 percent in calendar year 2029.”[[70]](#footnote-70) This allows for a small grace period for contractors to adjust accordingly since a supplier will be required to comply with each increased threshold for the items in the year of delivery.[[71]](#footnote-71) Ultimately, the domestic content threshold “will increase to 75 percent.”[[72]](#footnote-72) The fallback threshold allows for the use of 55% for one year after the threshold has increased to 75 % “where it is determined that there are no end products that meet the new domestic content threshold or such products are of unreasonable cost …[and the contractor] “indicate[s] which of their foreign end products exceed 55 percent domestic content.”[[73]](#footnote-73) Finally, there is an enhanced evaluation factor (price preference) for a domestic product that is considered a critical item or made up of critical components.”[[74]](#footnote-74)

Nonetheless, U.S. contractors rely on global supply chains and manufacturing facilities in GPA countries to support their USG contracts and the Biden Administration’s protectionist stance could force U.S. defense contractors to restructure their supply chains, as well as disadvantage them in bidding for government contracts in GPA parties’ countries. This is a harbinger of the near future, where a GGC can add value to navigate the stricter domestic preference laws where there is a risk that the products sourced may not meet the new standards resulting in risks of termination or FCA claims or that products may have to be sourced in an unstable market or from U.S. vendors. [[75]](#footnote-75)

1. Putting it all Together-Understanding Federal Contracting Framework and

Requirements

“International government contracts bring to bear more complexity than commercial contracts. Contracting with a foreign government has particular challenges.”[[76]](#footnote-76) A GGC is in the perfect position to guide/oversee the life cycle of international contracting whether it be for buying or selling. Understanding the FAR/DFARs (especially FAR Part 25), is key, combined with an understanding of local law issues and the requirements of doing business in the global public arena. The GGC can help guide decisions of whether there needs to be a representative or consultant, a teaming agreement, a joint venture, a branch, or a subsidiary to effectuate the deal. With their understanding of the FAR/DFARS, local contracting laws and customs, and the economic conditions, a GGC is in a position to advise on appropriate risks allocation and the appropriate contractual clauses (such as limits of liability offset, force majeure, and price renegotiation clauses). Contract performance issues take on an extra dimension in foreign contracting and ambiguities in the scope of work can create an opportunity for a foreign government to take advantage of the situation. [[77]](#footnote-77) A GGC can ensure that clear terms with “precise specifications and standards”[[78]](#footnote-78) are included. Government furnished input also create issues in foreign contracting where there is missing, late or inadequately furnished inputs delaying performance. [[79]](#footnote-79)

**V. The Globalization and Evolution of General Counsel Supports the Need and Emergence of GGCs**

Given the changing multinational stage, the role of a General Counsel (“GC”) has evolved and in that evolution one can see the march towards the emergence and need for a GGC. “Globalization requires general counsel to realign core competencies to navigating a materially changing landscape of legal, regulatory, and reputational risk”[[80]](#footnote-80) in a new paradigm in which the U.S. is “no longer the only center of geopolitical and economic power and emerging nations are privatizing and monetizing their natural resources…..”[[81]](#footnote-81) This creates serious challenges for all U.S. multinational corporations and especially so for defense contractors. Remaining competitive in this “new age” requires a different set of skills. “Effectively anticipating and mitigating legal, regulatory, and reputational risk may draw upon different qualities and skills, and the resume of capable general counsel may look very different from that of his or her predecessor.”[[82]](#footnote-82)

1. Hiring Trends- “As the World Turns”

Looking at Fortune 500 GC hiring trends from the 1990’s to the present show a change in the requisite skills and experience[[83]](#footnote-83) and this true for a GGC as well. In the mid to late 1990’s, during the dot.com boom, M&A and IPOs were the vogue and the GC hired were “the prototypical Wall Street or Silicon Valley M&A lawyers who had prior experience at the table with investment bankers.”[[84]](#footnote-84) In the early 2000’s, due to Enron, Tyco, and other imploding companies and the subsequent passage of the Sarbanes-Oxley Act (SOX), regulatory skill was *de rigueur* especially experience with the Securities and Exchange Commission (“SEC”), anti-money-laundering laws, and the FCPA. Attorneys from the “SEC, Justice, Treasury, or a similar high-profile federal agency, in addition to a world-class law firm”[[85]](#footnote-85) where the go to for GC spots.[[86]](#footnote-86)

Now, with the impact of globalization “experience in London, Hong Kong, or Dubai may soon replace experience in Washington as the *sine qua none* for the next generation of general counsel.”[[87]](#footnote-87) This is analogous to the emergence of and the need for a GGC in this climate to support defense contractors in international public contracting and procurement. In the 2020’s, as with the new GC, the GGC “ will possess a multicultural perspective looking to fill general counsel positions are asking for candidates who not only have the traditional regulatory agency experience, but significant international experience as well.”[[88]](#footnote-88)

1. The New “Must-Haves”

Some of the “must-haves” for general counsel now include a working knowledge of differences in laws and regulations across countries; a working knowledge of “hot buttons” “where local business custom and the extraterritorial reach of U.S. law may clash (e.g., “know your customer” rules in anti-money-laundering programs, gift-giving and perks relative to extra-territorial reach of U.S. laws under the FCPA”; personal knowledge of non-U.S. regulators; a multicultural perspective; experience living and working in countries and “[e]xceptional communication skills, particularly with non-native English speakers.[[89]](#footnote-89) This could not be truer than for a GGC.

The core traits and competencies that distinguish an effective GGC (or any top attorney) remain unchanged- impeccable ethics and integrity, the ability to act as a trusted advisor, courage, confidence, and independent judgment, the ability to lead and manage the in-house legal and compliance functions; and credibility with stakeholders, regulators, and business partners.[[90]](#footnote-90) As the “the role of an effective general counsel … continues to evolve and realign itself to the shifting paradigm of geopolitical power and the strategic priorities of CEOs” [[91]](#footnote-91) so does the need for a GGC. What can be said about the evolution of a General Counsel applies doubly for the emergence and need for a GGC because global complexities and changes are even more so and more nuanced for a GGC of a multinational defense contractor. A GGC will need to proactively navigate global barriers in “a rapidly evolving landscape of global enterprise risk.”[[92]](#footnote-92) As with a GC, a GGC adds “the value of judgment, honed by core competencies and experiences that align with the corporation’s objectives and strategy”[[93]](#footnote-93), but with an overlay of the USG requirement.

1. **Recommendations**

How does an attorney obtain the experience and exposure necessary to take on the role of a GGC? Broad legal experience, a USG procurement experience, and an open mind to other cultures would be necessary. When the interviewees were asked what law schools could do to prepare students and practitioners to be GGCs or what training they wished they had, the resounding answer was some type of internship or apprenticeship in a foreign country or in handling international public contracting/procurement issues. A foundational course such Foreign Contracting would be a solid start.

1. **Conclusion**

There is too much complexity, too many moving parts, too many intertwined areas of the law and too much risk with serious consequences and too much money at stake not to have a “Maestro” as the dedicated guardian of all things international public contracting and procurement, who can act as a conduit to ensure compliance obligations are met, risks are managed or minimized, and business opportunities are successfully pursued.

***Academic Integrity Pledge***

*On my honor, I submit this work in good faith and pledge that I have neither given nor received improper aid in its completion. /s/* ***Ann R. Stravalle-Schmidt***

1. Ann R. Stravalle-Schmidt is an LLM candidate in The George Washington University School of Law Government Procurement program.

   Nod to Director Stanley Kubrick’s 1964 dark comedy “Dr. Strangelove, or, how I learned to stop worrying and love the bomb.” [↑](#footnote-ref-1)
2. [Top 11 Geopolitical Risks for 2022 | Global Risk Insights](https://globalriskinsights.com/2022/01/top-11-geopolitical-risks-for-2022/) <https://globalriskinsights.com/2022/01/top-11-geopolitical-risks-for-2022/> (last visited October 1, 2022). [↑](#footnote-ref-2)
3. *Id.* [↑](#footnote-ref-3)
4. [Takeaways from Dip in U.S. Foreign Military Sales (nationaldefensemagazine.org)](https://www.nationaldefensemagazine.org/articles/2022/2/18/takeaways-from-dip-in-us-foreign-military-sales) <https://www.nationaldefensemagazine.org/articles/2022/2/18/takeaways-from-dip-in-us-foreign-military-sales> (last visited December 7, 2022). [↑](#footnote-ref-4)
5. Government Procurement | United States Trade Representative (ustr.gov) <https://ustr.gov/issue-areas/government-procurement> (lasted visited September 29, 2022). The U.S. has had a “longstanding trade policy of opening new opportunities for U.S. goods, services and suppliers to compete on a level playing field for foreign government procurement.”). [↑](#footnote-ref-5)
6. [U.S. Arms Sales and Defense Trade - United States Department of State](https://www.state.gov/u-s-arms-sales-and-defense-trade/) https://www.state.gov/u-s-arms-sales-and-defense-trade/ (last visited December 8, 2022). [↑](#footnote-ref-6)
7. *Id*. [↑](#footnote-ref-7)
8. [Foreign Military Sales vs Direct Commercial Sales (ndia.org)](https://www.ndia.org/policy/issues/international/fms-vs-dcs) <https://www.ndia.org/policy/issues/international/fms-vs-dcs> (last visited December 8, 2022). [↑](#footnote-ref-8)
9. [U.S. Arms Sales and Defense Trade - United States Department of State](https://www.state.gov/u-s-arms-sales-and-defense-trade/), supra note 5. [↑](#footnote-ref-9)
10. Government Procurement | United States Trade Representative (ustr.gov) <https://ustr.gov/issue-areas/government-procurement> (lasted visited September 29, 2022). [↑](#footnote-ref-10)
11. [U.S. Trade - Statistics & Facts | Statista](https://www.statista.com/topics/1308/trade-in-the-us/#:~:text=In%202020%2C%20the%20United%20States%20ranked%20as%20the,8.1%20percent%20of%20the%20world%27s%20total%20export%20trade.)https://www.statista.com/topics/1308/trade-in-the-us/#:~:text=In%202020%2C%20the%20United%20States%20ranked%20as%20the,8.1%20percent%20of%20the%20world%27s%20total%20export%20trade.(December 12, 2022). [↑](#footnote-ref-11)
12. *Id. See also* [Top 11 Geopolitical Risks for 2022 | Global Risk Insights](https://globalriskinsights.com/2022/01/top-11-geopolitical-risks-for-2022/) <https://globalriskinsights.com/2022/01/top-11-geopolitical-risks-for-2022/> (last visited October 14, 2022). (Geopolitical risk “is about relations between nations – at the political, economic, military, and cultural/ideological level” and risk occurs s when status quos among nations is threatened.). [↑](#footnote-ref-12)
13. [WEF\_The\_Global\_Risks\_Report\_2022.pdf (weforum.org)](https://www3.weforum.org/docs/WEF_The_Global_Risks_Report_2022.pdf) <https://www3.weforum.org/docs/WEF_The_Global_Risks_Report_2022.pdf> (last visited October 11, 2022). [↑](#footnote-ref-13)
14. [Top 11 Geopolitical Risks for 2022 | Global Risk Insights](https://globalriskinsights.com/2022/01/top-11-geopolitical-risks-for-2022/) https://globalriskinsights.com/2022/01/top-11-geopolitical-risks-for-2022/ [↑](#footnote-ref-14)
15. [WTO Agreement on Government Procurement (GPA) (congress.gov)](https://crsreports.congress.gov/product/pdf/IF/IF11651#:~:text=During%20the%20past%2050%20years%2C%20the%20United%20States,and%20services%20from%20suppliers%20of%20other%20GPA%20parties.) <https://crsreports.congress.gov/product/pdf/IF/IF11651#:~:text=During%20the%20past%2050%20years%2C%20the%20United%20States,and%20services%20from%20suppliers%20of%20other%20GPA%20parties> (last visited October 10, 2022). [↑](#footnote-ref-15)
16. *Id.* [↑](#footnote-ref-16)
17. [WTO Agreement on Government Procurement (GPA) (congress.gov)](https://crsreports.congress.gov/product/pdf/IF/IF11651#:~:text=During%20the%20past%2050%20years%2C%20the%20United%20States,and%20services%20from%20suppliers%20of%20other%20GPA%20parties.), *supra* note 7. [↑](#footnote-ref-17)
18. Allen B. Green, International Government Contract Law §§ 2:3, 2.17 (2011) [↑](#footnote-ref-18)
19. [Berry Amendment - AcqNotes](https://acqnotes.com/acqnote/careerfields/berry-amendment) <https://acqnotes.com/acqnote/careerfields/berry-amendment> (last visited September 30, 2022). (“The Berry Amendment ([USC, Title 10, § 2533a](https://www.law.cornell.edu/uscode/text/10/2533a)), requires the Department of Defense (DoD) to give preference in procurement to domestically produced, manufactured, or homegrown products, most notably food, clothing, fabrics, and specialty metals with exceptions  for the acquisition of food, specialty metals, and hand or measuring tools” in certain circumstances.). [↑](#footnote-ref-19)
20. 41 U.S.C. §§ 8301 – 8305. [↑](#footnote-ref-20)
21. Green, *supra* note 18 ch. 2; *See also* Berry Amendment – AcqNotes, *supra* note 18 (The BAA, 41 U.S.C. § 8301,  “restricts the purchase of supplies that are not domestic end products and applies to all U.S. federal government agency purchases of goods valued over the purchase threshold but does not apply to services. Under the Act, all goods for public use (articles, materials, orsupplies) must be produced in the U.S., and manufactured items must be manufactured in the U.S. from U.S. materials.”). [↑](#footnote-ref-21)
22. [WTO Agreement on Government Procurement (GPA) (congress.gov)](https://crsreports.congress.gov/product/pdf/IF/IF11651#:~:text=During%20the%20past%2050%20years%2C%20the%20United%20States,and%20services%20from%20suppliers%20of%20other%20GPA%20parties.) <https://crsreports.congress.gov/product/pdf/IF/IF11651#:~:text=During%20the%20past%2050%20years%2C%20the%20United%20States,and%20services%20from%20suppliers%20of%20other%20GPA%20parties.(last> visited October 11, 2022). [↑](#footnote-ref-22)
23. *Id.* [↑](#footnote-ref-23)
24. [R47243 (congress.gov)](https://crsreports.congress.gov/product/pdf/R/R47243) <https://crsreports.congress.gov/product/pdf/R/R47243> [↑](#footnote-ref-24)
25. [Addressing U.S. Preference Programs in a Global Economy: Buy America, Buy American, and Trade Agreements Acts kpmg.ushttps://tax.kpmg.us/events/webcasts/2021/buy-america-trade-agreements-act.html](https://tax.kpmg.us/events/webcasts/2021/buy-america-trade-agreements-act.html) (last visited on October 20, 2022). [↑](#footnote-ref-25)
26. The Contractor's Guide to International Procurement ([Erin Felix](https://www.amazon.com/s/ref=dp_byline_sr_book_1?ie=UTF8&field-author=Erin+Felix&text=Erin+Felix&sort=relevancerank&search-alias=books) & [Marques O. Petersen](https://www.amazon.com/s/ref=dp_byline_sr_book_2?ie=UTF8&field-author=Marquest+O.+Petersen&text=Marquest+O.+Petersen&sort=relevancerank&search-alias=books) eds., 2018). [↑](#footnote-ref-26)
27. <https://export-compliance.ku.edu/penalties-export-violations> (last visited December 13, 2022). [↑](#footnote-ref-27)
28. [Conventional Arms Transfer Policy: Agency Processes for Reviewing Direct Commercial Sales and Foreign Military Sales Align with Policy Criteria | U.S. GAO](https://www.gao.gov/products/gao-19-673r#:~:text=The%20United%20States%20uses%20two%20key%20arms%20transfer,and%20a%20foreign%20government%20negotiate%20a%20purchase%20agreement.) <https://www.gao.gov/products/gao-19-673r#:~:text=The%20United%20States%20uses%20two%20key%20arms%20transfer,and%20a%20foreign%20government%20negotiate%20a%20purchase%20agreement (last> visited November 20, 2022) (Both are effectuated through the “Arms Export Control Act and the Foreign Assistance Act, which authorize the transfer of arms from the U.S. government or from U.S. companies to foreign countries.”). *See* Green, *supra* note 18 ch. 3. [↑](#footnote-ref-28)
29. [Foreign Military Sales: Process and Policy - United States Department of State](https://2017-2021.state.gov/foreign-military-sales-process-and-policy/index.html)https://2017-2021.state.gov/foreign-military-sales-process-and-policy/index.html [↑](#footnote-ref-29)
30. [U.S. Arms Sales and Defense Trade - United States Department of State](https://www.state.gov/u-s-arms-sales-and-defense-trade/#:~:text=Under%20DCS%2C%20the%20Bureau%20of%20Political-Military%20Affairs%E2%80%99%20Directorate,21%20categories%20of%20the%20U.S.%20Munitions%20List%20%28USML%29.)https://www.state.gov/u-s-arms-sales-and-defense-trade/#:~:text=Under%20DCS%2C%20the%20Bureau%20of%20Political-Military%20Affairs%E2%80%99%20Directorate,21%20categories%20of%20the%20U.S.%20Munitions%20List%20%28USML%29. [↑](#footnote-ref-30)
31. *Id.* [↑](#footnote-ref-31)
32. *Id.* [↑](#footnote-ref-32)
33. [Foreign Military Sales: Process and Policy - United States Department of State](https://2017-2021.state.gov/foreign-military-sales-process-and-policy/index.html) <https://2017-2021.state.gov/foreign-military-sales-process-and-policy/index.html> (last visited December 13, 2022). [↑](#footnote-ref-33)
34. [The Use of Offsets in Foreign Military Sales (dtic.mil)](https://apps.dtic.mil/sti/pdfs/ADA423713.pdf) <https://apps.dtic.mil/sti/pdfs/ADA423713.pdf> (last visited December 13, 2022). [↑](#footnote-ref-34)
35. # *Id*. Chapter 4. Offsets and Domestic Considerations. *See also* Green, *supra* note 18 ch. 8.

    [↑](#footnote-ref-35)
36. The Contractor's Guide to International Procurement ([Erin Felix](https://www.amazon.com/s/ref=dp_byline_sr_book_1?ie=UTF8&field-author=Erin+Felix&text=Erin+Felix&sort=relevancerank&search-alias=books) & [Marques O. Petersen](https://www.amazon.com/s/ref=dp_byline_sr_book_2?ie=UTF8&field-author=Marquest+O.+Petersen&text=Marquest+O.+Petersen&sort=relevancerank&search-alias=books) eds., 2018) Chapter 4. Offsets and Domestic Considerations [↑](#footnote-ref-36)
37. *Id*. [↑](#footnote-ref-37)
38. *Id*. [↑](#footnote-ref-38)
39. Green, *supra* note 18 §8.7 contractors should always request longer time-periods within which to achieve their offset commitments; seek maximum flexibility in the performance plan through the use of trading companies, third parties, brokers, and so forth; negotiate alternative performance plans; and avoid penalty clauses to the maximum extent practicable [↑](#footnote-ref-39)
40. The Contractor's Guide to International Procurement ([Erin Felix](https://www.amazon.com/s/ref=dp_byline_sr_book_1?ie=UTF8&field-author=Erin+Felix&text=Erin+Felix&sort=relevancerank&search-alias=books) & [Marques O. Petersen](https://www.amazon.com/s/ref=dp_byline_sr_book_2?ie=UTF8&field-author=Marquest+O.+Petersen&text=Marquest+O.+Petersen&sort=relevancerank&search-alias=books) eds., 2018) Chapter 4. Offsets and Domestic Considerations; Green, *supra* note 18 ch 8. [↑](#footnote-ref-40)
41. Felix & Peterson, *supra* note 43 Chapter 7. Compliance with US Anti-Boycott Laws and Regulations. [↑](#footnote-ref-41)
42. *See* A Resource Guide to the U.S. Foreign Corrupt Practices Act. Second Edition. (“The most well-known standard on anti-corruption (anti-bribery) compliance is ISO 37001 – Anti-bribery management systems.”). *See also* Anti-Corruption Ethics and Compliance Handbook -– UNODC – World Bank 2013. U.S. Dep’t of Justice, Criminal Division https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program.(last visited October 24, 2022). [↑](#footnote-ref-42)
43. *See, e.g.,* <https://complianceconcourse.willkie.com/resources/anti-bribery-and-corruption-enforcement-doj-principles-of-federal-prosecution> (last visited October 24, 2022), <https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program.(last> visited October 24, 2022). [↑](#footnote-ref-43)
44. *See*Memorandum on Establish the Fight Against Corruption as a Core United States National Security Interest (June 3, 2021) (<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>United States Strategy on Countering Corruption (December 6, 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/06/fact-sheet-u-s-strategy-on-countering-corruption/> [↑](#footnote-ref-44)
45. [FAR Clauses | FAR Flow Down Clauses to Subcontractors in Federal Government Contract (theodorewatson.com)](https://blog.theodorewatson.com/flow-down-clauses-in-federal-government-contracts/) <https://blog.theodorewatson.com/flow-down-clauses-in-federal-government-contracts/> (last visited November 15, 2022). [↑](#footnote-ref-45)
46. Felix & Peterson, *supra* note 43 Chapter 8. Anti-Human Trafficking Requirements for Federal Contractors. [↑](#footnote-ref-46)
47. *Id.* [↑](#footnote-ref-47)
48. *Id.* [↑](#footnote-ref-48)
49. # Paul O. Hirose, Developing an ESG Supply Chain Compliance Program, Perkins Coie LLP, with Practical Law Commercial Transactions (last visited November 16, 2022).

    [↑](#footnote-ref-49)
50. Felix & Peterson, *supra* note 43 Chapter 8. Anti-Human Trafficking Requirements for Federal Contractors, Chapter 1. Introduction. [↑](#footnote-ref-50)
51. *Id*. § 11:19, § 11:19.2 (“The United States Government is one of the largest customers in any global market, including the public and private sectors. Its rules for doing business with sellers, accordingly, are important for any business or individual involved with international government contracts.”). [↑](#footnote-ref-51)
52. *Id*. [↑](#footnote-ref-52)
53. *Id.* *See also* [Government Procurement | United States Trade Representative (ustr.gov)](https://ustr.gov/issue-areas/government-procurement) <https://ustr.gov/issue-areas/government-procurement> (last visited October 3, 2022). (“The first major government procurement agreement was the 1979 Government Procurement Agreement (GPA), which entered into force in 1981. It was revised and expanded tenfold during the Uruguay Round negotiations that led to the creation of the World Trade Organization (WTO) The GPA entered into force in 1996. In 2012, GPA Parties adopted a revision of the GPA. The revised Agreement entered into force on April 6, 2014.”). [↑](#footnote-ref-53)
54. *Id.* As of 2022 there are 48 member countries. [↑](#footnote-ref-54)
55. [WTO Agreement on Government Procurement (GPA) (congress.gov)](https://crsreports.congress.gov/product/pdf/IF/IF11651#:~:text=During%20the%20past%2050%20years%2C%20the%20United%20States,and%20services%20from%20suppliers%20of%20other%20GPA%20parties.), *supra* note 7. [↑](#footnote-ref-55)
56. [WTO Agreement on Government Procurement (GPA) (congress.gov)](https://crsreports.congress.gov/product/pdf/IF/IF11651#:~:text=During%20the%20past%2050%20years%2C%20the%20United%20States,and%20services%20from%20suppliers%20of%20other%20GPA%20parties.), *supra* note 7.

    For example, the U.S. Appendix covers 85 federal entities and voluntary commitments by 37 states [↑](#footnote-ref-56)
57. [WTO Agreement on Government Procurement (GPA) (congress.gov)](https://crsreports.congress.gov/product/pdf/IF/IF11651#:~:text=During%20the%20past%2050%20years%2C%20the%20United%20States,and%20services%20from%20suppliers%20of%20other%20GPA%20parties.) https://crsreports.congress.gov/product/pdf/IF/IF11651#:~:text=During%20the%20past%2050%20years%2C%20the%20United%20States,and%20services%20from%20suppliers%20of%20other%20GPA%20parties (last visited October 10, 2022). [↑](#footnote-ref-57)
58. [Bilateral and Regional Trade Agreements - International Law - Oxford Bibliographies](https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0019.xml) https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0019.xml (last visited October 5, 2022). (Bilateral trade agreements (BTAs) and regional trade agreements (RTAs) reinforce trade relations between the members. …. Within the WTO framework, many bilateral and regional trade agreements have been concluded to offer additional trade benefits and privileges to the contracting parties, in line with the broad principles set out in the WTO Agreement.”). [↑](#footnote-ref-58)
59. [What Is the North American Free Trade Agreement (NAFTA)? (investopedia.com)](https://www.investopedia.com/terms/n/nafta.asp) <https://www.investopedia.com/terms/n/nafta.asp> (last visited October 11, 2022) (North American Free Trade Agreement (“NAFTA”) now as of July 2020, replaced by the United States-Mexico-Canada Agreement has reduced or eliminated tariffs on imports and exports between the three participating countries, creating a huge free-trade zone). [↑](#footnote-ref-59)
60. [Government Procurement | United States Trade Representative (ustr.gov)](https://ustr.gov/issue-areas/government-procurement), *supra* note 10. [↑](#footnote-ref-60)
61. [U.S. Government Procurement and International Trade (congress.gov)](https://crsreports.congress.gov/product/pdf/IF/IF11580) <https://crsreports.congress.gov/product/pdf/IF/IF11580> (last visited December 12, 2022). [↑](#footnote-ref-61)
62. [U.S. Government Procurement and International Trade](U.S.%20Government%20Procurement%20and%20International%20Trade%20(fas.org)), *supra* note 58. https://sgp.fas.org/crs/row/IF11580.pdf (last visited December 12, 022). [↑](#footnote-ref-62)
63. Green, *supra* note 18 § 1:9 [↑](#footnote-ref-63)
64. *See* Green, *supra* note 18 § **2**:17 (The DOD has the Berry Amendment. It prohibits the DOD from using appropriated funds on items “not grown, reprocessed, reused, or produced in the United States ….” [10 U.S.C. § 2533a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=10USCAS2533A&originatingDoc=I5f3b0af52c6911e388faf3ccafbf39fc&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=1ade1f32a1cc4c42b0124749a588a62a&contextData=(sc.Category)). Since “the Berry amendment is an appropriations statute there are serious consequences.” “A contractor who delivers a non-compliant product, would, at a minimum, not be paid or reimbursed for the product. The contractor may also be required to absorb the cost of delivering a compliant product.” [↑](#footnote-ref-64)
65. [U.S. Government Procurement and International Trade (congress.gov)](https://crsreports.congress.gov/product/pdf/IF/IF11580) <https://crsreports.congress.gov/product/pdf/IF/IF11580> (last visited December 12, 2022). [↑](#footnote-ref-65)
66. *Id.* [↑](#footnote-ref-66)
67. [Buy American Act (BAA) - AcqNotes](https://acqnotes.com/acqnote/careerfields/buy-american-act)https://acqnotes.com/acqnote/careerfields/buy-american-act (last visited November 23, 2022) [↑](#footnote-ref-67)
68. [Federal Register : Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements](https://www.federalregister.gov/documents/2022/03/07/2022-04173/federal-acquisition-regulation-amendments-to-the-far-buy-american-act-requirements) https://www.federalregister.gov/documents/2022/03/07/2022-04173/federal-acquisition-regulation-amendments-to-the-far-buy-american-act-requirements (November 18, 2022). [↑](#footnote-ref-68)
69. *Id.* [↑](#footnote-ref-69)
70. *See* FAR 25.101(a)(2)(i) and 25.201(b)(2)(i). [↑](#footnote-ref-70)
71. [Federal Register : Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements](https://www.federalregister.gov/documents/2022/03/07/2022-04173/federal-acquisition-regulation-amendments-to-the-far-buy-american-act-requirements) https://www.federalregister.gov/documents/2022/03/07/2022-04173/federal-acquisition-regulation-amendments-to-the-far-buy-american-act-requirements (November 18, 2022). [↑](#footnote-ref-71)
72. [Federal Register : Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements](https://www.federalregister.gov/documents/2022/03/07/2022-04173/federal-acquisition-regulation-amendments-to-the-far-buy-american-act-requirements) https://www.federalregister.gov/documents/2022/03/07/2022-04173/federal-acquisition-regulation-amendments-to-the-far-buy-american-act-requirements (November 18, 2022). [↑](#footnote-ref-72)
73. [Sweeping Changes to the Buy American Act Will Benefit U.S. Businesses (concordlawschool.edu)](https://www.concordlawschool.edu/blog/news/how-buy-american-act-benefits-businesses/#:~:text=The%20requirements%20of%20the%20Buy%20American%20Act%20are,%24193%2C000%2C%20although%20some%20trade%20agreements%20have%20lower%20thresholds.) https://www.concordlawschool.edu/blog/news/how-buy-american-act-benefits-businesses/#:~:text=The%20requirements%20of%20the%20Buy%20American%20Act%20are,%24193%2C000%2C%20although%20some%20trade%20agreements%20have%20lower%20thresholds. See FAR 25.106(b)(2) and (c)(2), and 25.204(b)(1)(ii) and (b)(2). [↑](#footnote-ref-73)
74. *Id*. (“A subsequent rulemaking will establish the definitive list at FAR 25.105 of critical items and critical components in the FAR, along with their associated enhanced price preference(s).). [↑](#footnote-ref-74)
75. [↑](#footnote-ref-75)
76. Green, *supra* note 18 §11:2. [↑](#footnote-ref-76)
77. *See* Green, *supra* note 18 **§** 11. *See also* [Common Issues in Government Procurement and Contracting – Jackson Walker (jw.com)](https://www.jw.com/news/podcast-edwards-stowe-government-contracts-procurement/) <https://www.jw.com/news/podcast-edwards-stowe-government-contracts-procurement/> (last visited October 25, 2022).

    <https://www.state.gov/u-s-arms-sales-and-defense-trade/> (last visited November 21, 2022). [↑](#footnote-ref-77)
78. *See* Green, *supra* note 18 **§** 11. [↑](#footnote-ref-78)
79. *See* Green, *supra* note 18 **§**11.3. [↑](#footnote-ref-79)
80. Globalization and General Counsel - Minority Corporate Counsel Association (mcca.com) <https://mcca.com/mcca-article/globalization-and-general-counsel/#:~:text=Some%20of%20the%20%E2%80%9Cmust-haves%E2%80%9D%20for%20general%20counsel%20in,3%20Personal%20knowledge%20of%20non-U.S.%20regulators%3B%20More%20items> (last visited November 1, 2022). [↑](#footnote-ref-80)
81. *Id.* [↑](#footnote-ref-81)
82. *Id.* [↑](#footnote-ref-82)
83. *Id.* [↑](#footnote-ref-83)
84. *Id.* [↑](#footnote-ref-84)
85. *Id*. [↑](#footnote-ref-85)
86. *Id.* (“Having an ex-regulator or former federal prosecutor as the company’s chief lawyer, it was reasoned, would neutralize potential enforcement issues before crises erupted.” Examples were: Steve Cutler, Gary Lynch, and Dick Walker, all former Directors of Enforcement of the SEC, became general counsel of JPMorgan Chase, Morgan Stanley, and Deutsche Bank, respectively. Larry Thompson, Jim Comey, Jonathan Schwartz, Beth Wilkinson, and Ivan Fong were former Justice Officials who became general counsel of Pepsi, Lockheed Martin, Cablevision, Fannie Mae, and Cardinal Health.). [↑](#footnote-ref-86)
87. *Id*. [↑](#footnote-ref-87)
88. *Id*. [↑](#footnote-ref-88)
89. *Id*. *See also* [Success Factors For An Effective General Counsel: Advice From The C-Suite (mlaglobal.com)](https://www.mlaglobal.com/en/insights/articles/success-factors-for-effective-general-counsel) <https://www.mlaglobal.com/en/insights/articles/success-factors-for-effective-general-counsel> (last visited November 10, 2022). [↑](#footnote-ref-89)
90. *Id.* *See also* [Legal Challenges in International Business | Zegal](https://zegal.com/blog/post/legal-challenges-in-international-business/#:~:text=Some%20legal%20issues%20are%20detailed%20below%3A%201%201.,...%208%208.%20Data%20protection%20...%20More%20items) <https://zegal.com/blog/post/legal-challenges-in-international-business/#:~:text=Some%20legal%20issues%20are%20detailed%20below%3A%201%201.,...%208%208.%20Data%20protection%20...%20More%20items> (last visited November 10, 2022). [↑](#footnote-ref-90)
91. Globalization and General Counsel - Minority Corporate Counsel Association (mcca.com) <https://mcca.com/mcca-article/globalization-and-general-counsel/#:~:text=Some%20of%20the%20%E2%80%9Cmust-haves%E2%80%9D%20for%20general%20counsel%20in,3%20Personal%20knowledge%20of%20non-U.S.%20regulators%3B%20More%20items> (last visited November 1, 2022). [↑](#footnote-ref-91)
92. *Id.* [↑](#footnote-ref-92)
93. *Id.* [↑](#footnote-ref-93)