

Buy American Act and Trade Agreements Act Overview

Stu Nibley and Amy Hoang
K&L Gates LLP

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OVERVIEW OF BUY AMERICAN POLICIES

CAN I BUY THAT FOREIGN PRODUCT?

- It depends on...
 - Procuring agency
 - Total domestic v. foreign content
 - Where and how end product was manufactured
 - Most importantly: Which domestic preference regime applies

WHAT DOES “BUY AMERICAN” ENCOMPASS?

- Buy American Act of 1933 (BAA): Discourages government purchase of foreign supplies, with limited exceptions
- Trade Agreements Act of 1979 (TAA): Prohibits government purchase of supplies and services from countries other than U.S. trade partners, with limited exceptions
- Berry Amendment: Restricts Department of Defense (DoD) purchase of foreign food, clothing, and fabric
- Specialty Metals Restriction (10 U.S.C. § 2533b) (previously part of the Berry Amendment): Restricts DoD purchase of specialty metal not melted or produced in the United States for certain acquisition types

WHAT DOES “BUY AMERICAN” ENCOMPASS? (CONTINUED)

- Balance of Payments Program: Restricts DoD purchase of supplies and construction for use outside the United States
- Specialty Metals Restriction (10 U.S.C. § 2533b) (previously part of the Berry Amendment): Restricts DoD purchase of specialty metal not melted or produced in the United States for certain acquisition types
- Balance of Payments Program: Restricts DoD purchase of supplies and construction for use outside the United States

DETERMINING WHICH ACT APPLIES: KEY QUESTIONS

- **Q1: What type of contract?**
 - Different restrictions apply depending on whether contract is for supplies, construction, or services
- **Q2: What is contract value?**
 - If over certain dollar thresholds, the TAA applies instead of BAA, with different analysis and restrictions
- **Q3: Who is the acquiring agency?**
 - Certain requirements (Berry Amendment and Balance of Payments Program) apply only to DoD procurements
 - DoD provides an exception for supplies/services from “qualifying countries”

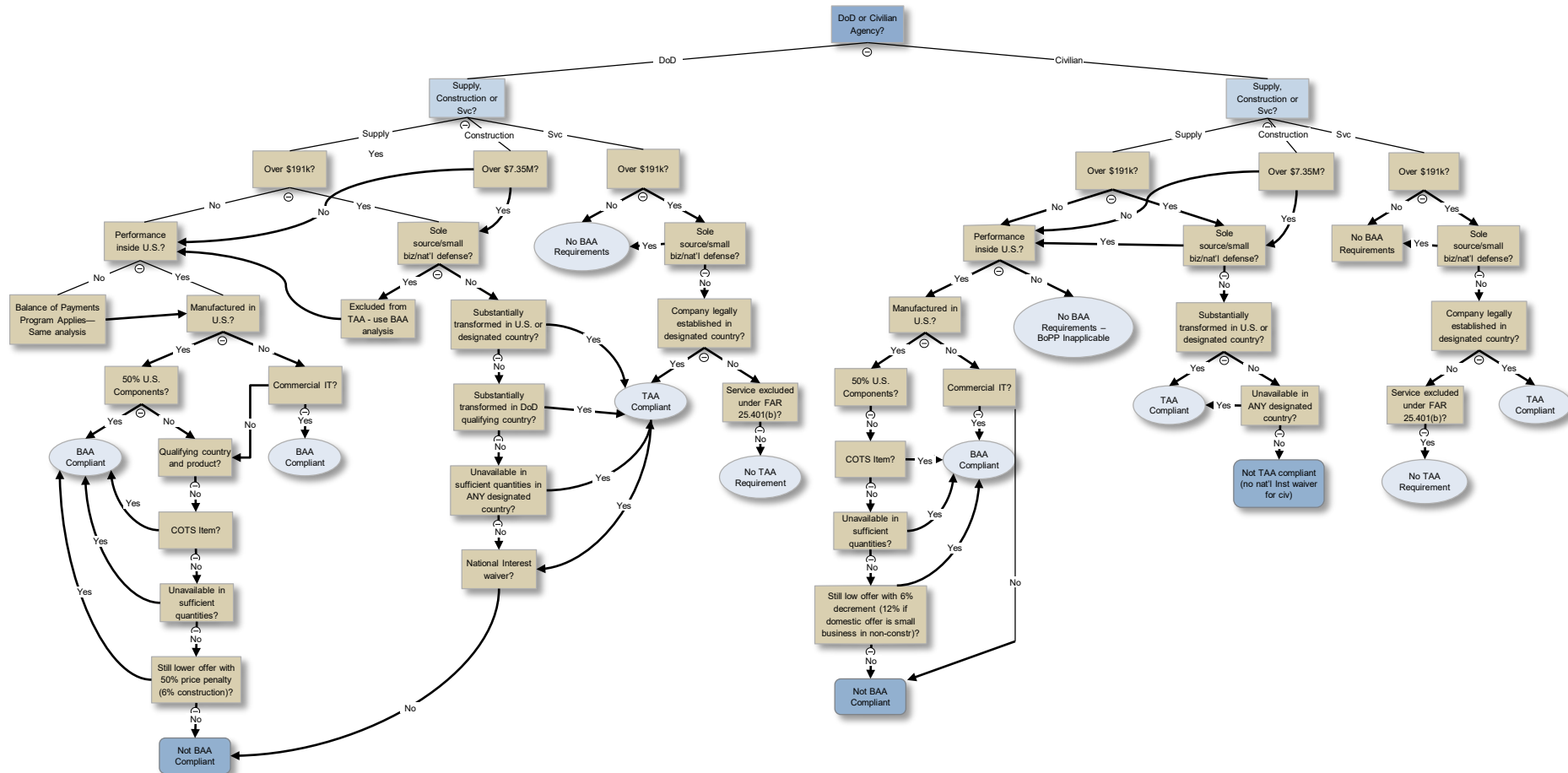
DETERMINING WHICH ACT APPLIES: KEY QUESTIONS (CONTINUED)

- **Q4: What items/services is the agency procuring?**
 - Certain items are exempt from BAA because they have been predetermined as being unavailable in sufficient quantities
 - Certain services are excluded from TAA reciprocity (Services in support of military services overseas, Research & Development, Transportation)
 - A commercial off-the-shelf (COTS) item “semi-exception” under BAA
- **Q5: What is the item made of?**
 - Specialty metal and steel may face additional restrictions

DETERMINING WHICH ACT APPLIES: KEY QUESTIONS (CONTINUED)

- **Q6: Is the contract a sole source, set-aside, the acquisition of arms, ammunition, or war materials, or a purchase indispensable for national security or for national defense purposes?**
 - These contract types are excluded from TAA coverage; BAA will apply even above the trade agreement threshold
- **Q7: Where is the contract being performed?**
 - BAA only applies to contracts within the United States
 - DoD Balance of Payments Program applies to supplies for use outside the United States
 - TAA applies to supplies and services both within the United States and outside the United States

BAA VS. TAA: IT'S SIMPLE!





A CLOSER LOOK AT THE BUY AMERICAN ACT, TRADE AGREEMENTS ACT, AND SPECIALTY METALS RESTRICTION

BUY AMERICAN ACT OVERVIEW

- BAA applies to all procurements over the micro-purchase threshold, though TAA often supersedes BAA requirements above certain thresholds
- “Restricts” use/purchase of foreign supplies and construction by **promoting** purchase of domestic supplies
- Promotes purchase of domestic supplies through a price preference during proposal evaluations
- Not an outright prohibition

WHEN DOES THE BAA APPLY?

- BAA applies to purchases over the micro-purchase threshold and under the TAA threshold for use within the United States
- TAA threshold is established by the U.S. Trade Representative and published at FAR § 25.402(b)

WHEN DOES THE BAA APPLY? (CONTINUED)

- BAA also applies to certain categories of acquisition regardless of price (FAR § 25.401(a)):
 - Small business set-asides
 - Acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes
 - Acquisitions from Federal Prison Industries and Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled
 - Sole source awards

SO HOW DOES IT WORK? THE BAA PRICE PREFERENCE

- Civilian agencies
 - If lowest **domestic** offer is a small business, add 30% price penalty to **foreign** offer
 - If lowest **domestic** offer is a large business, add 20% price penalty to **foreign** offer
- DoD agencies
 - Add 50% price penalty to foreign end products regardless of domestic business size

BOTTOM LINE: BAA ACTS AS A PREFERENCE, NOT A PROHIBITION

- Example:
 - Domestic product offer (U.S. widget): US\$100,000
 - Foreign product offer (Chinese widget): US\$70,000
 - Civilian evaluation: Foreign offer wins (30% penalty = US\$91,000, 20% penalty = US\$84,000)
 - DOD evaluation: Domestic offer wins (50% penalty = US\$105,000)
- In evaluations where price is not determining factor, add in price penalty prior to conducting best value tradeoff
- *Price increase is for evaluation purposes only*

WHAT'S A “DOMESTIC END PRODUCT” UNDER THE BAA?

- Non-manufactured product: must be mined or produced in the United States (FAR § 25.003)
- Manufactured product: two part test—must be:
 - Manufactured in the United States; AND
 - Consist of more than 55% U.S. components (by cost)
- Practice Notes:
 - In calculating cost of components, exclude labor costs
 - Prong 2 of the test is waived for COTS items (FAR §25.101(a)(2))

WHAT CONSTITUTES “MANUFACTURING” FOR BAA PURPOSES?

- “Manufacture” is not defined by the BAA, executive orders implementing the act, or the FAR
- Factors considered by various tribunals:
 - Whether there were “substantial changes in physical character.” See *A. Hirsch, Inc.*, B-237466 (28 February 1990)
 - Whether separate manufacturing stages were involved, or whether there was one continuous process. See *Cincinnati Elec. Corp.*, B-185842 (27 September 1976)
 - Whether the article is completed in the form required by the government. See *Valentec Wells, Inc.*, ASBCA 41659, 91-3 B.C.A. ¶ 24,168 (11 July 1991)

WHAT CONSTITUTES “MANUFACTURING” FOR BAA PURPOSES? (CONTINUED)

- Operations performed after the item has been completed (e.g., packaging, testing) generally are not viewed as manufacturing. See *Marbex, Inc.*, B-225799 (4 May 1987)

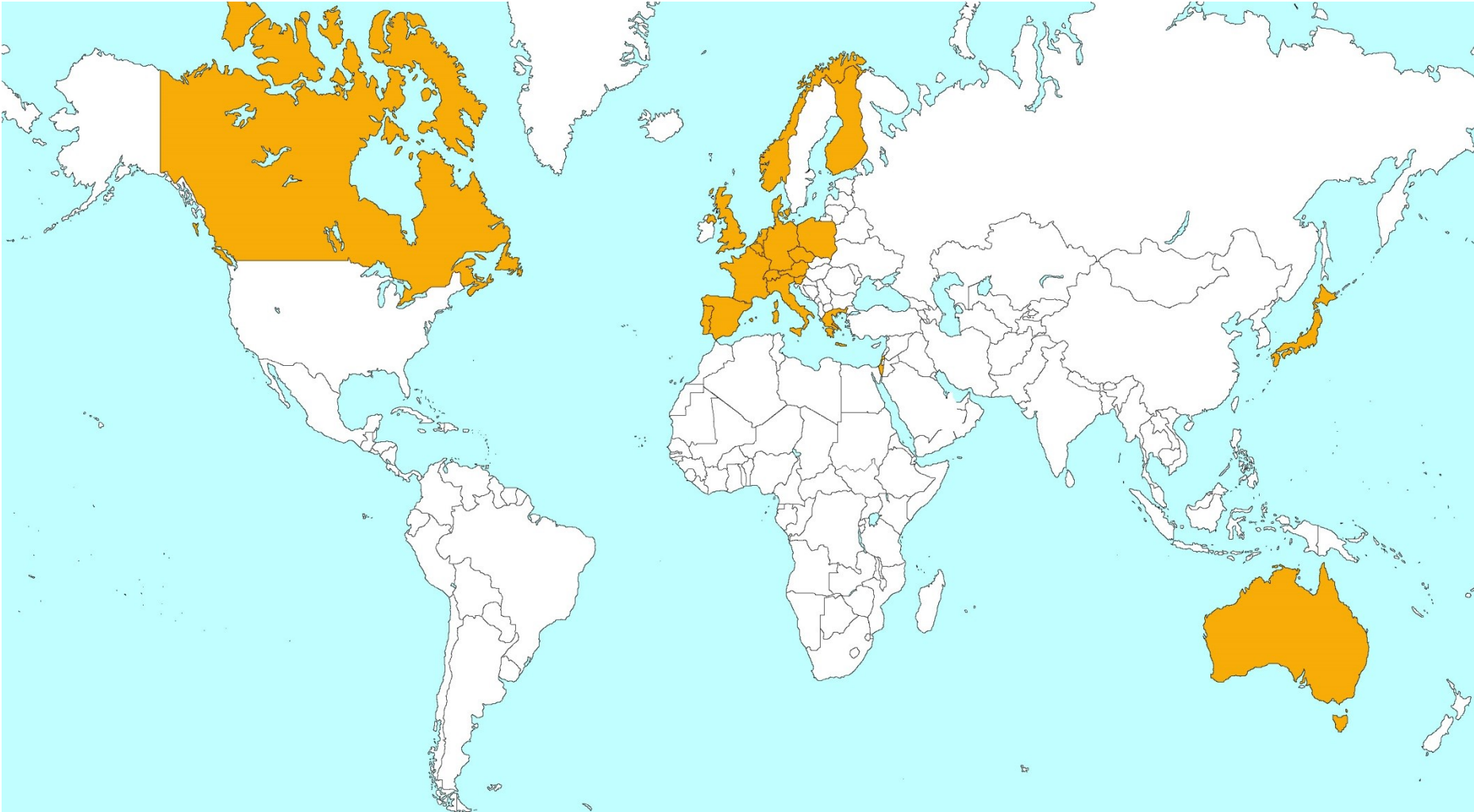
SO...CAN I BUY THAT PART MADE IN CHINA?

- **Example 1:** End product consists of 90% U.S. material, manufactured in China
 - Result: NOT a domestic end product under BAA definition (must be manufactured in the United States)
- **Example 2:** End product consists 90% Chinese parts, manufactured in the United States
 - Result 1: NOT a domestic product under BAA (must be 50% U.S. component)
 - Result 2: IS a domestic product under BAA if end product is a COTS item (Prong 2 waiver for COTS items, so BAA satisfied as long as product is manufactured in the United States)

BUT WHAT IF I REALLY NEED THAT PART MADE IN CHINA? BAA WAIVERS AND EXCEPTIONS

- Public Interest (FAR § 25.103(a))
 - Head of agency makes determination that domestic preference would be inconsistent with public interest
 - Includes DoD “qualifying country” exception - DoD has exempted products/components from the following countries (DFARS § 225.872-1)

DOD QUALIFYING COUNTRIES



BAA WAIVERS AND EXCEPTIONS (CONTINUED)

- Non-availability (FAR § 25.103(b))
 - The Buy American statute does not apply with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind to be acquired, either as end items or components, are not mined, produced, or manufactured in the United States **in sufficient and reasonably available commercial quantities** and of a satisfactory quality
 - Two types of non-availability determinations:
 - Individual determinations (made by head of contracting activity)
 - Class determinations (listed at FAR § 25.104)

BAA WAIVERS AND EXCEPTIONS (CONTINUED)

- Unreasonable cost (FAR § 25.103(c))
 - If the cost of domestic product is unreasonable, agency may procure foreign product
 - Implemented via the price penalty during evaluation of foreign offers—if foreign offer is still low offer after application of price penalty → domestic offer has unreasonable cost
- Commercial item IT (FAR § 25.103(e))

BAA WAIVERS AND EXCEPTIONS (CONTINUED)

- Work performed outside of the United States (FAR § 25.002)
 - BAA generally only restricts purchases of supplies and construction “for use within the United States”
 - BUT DoD’s Balance of Payments Program restricts purchase of foreign end products for use outside the United States (DFARS § 225.7501)
 - Balance of Payments Program is subject to certain exceptions, some of which mirror BAA exceptions (non-availability, unreasonable cost)
- Most significant BAA waiver: Trade Agreements Act of 1979
 - “The restrictions in the Buy American statute **are not applicable in acquisitions subject to certain trade agreements.**” (FAR § 25.001(b))

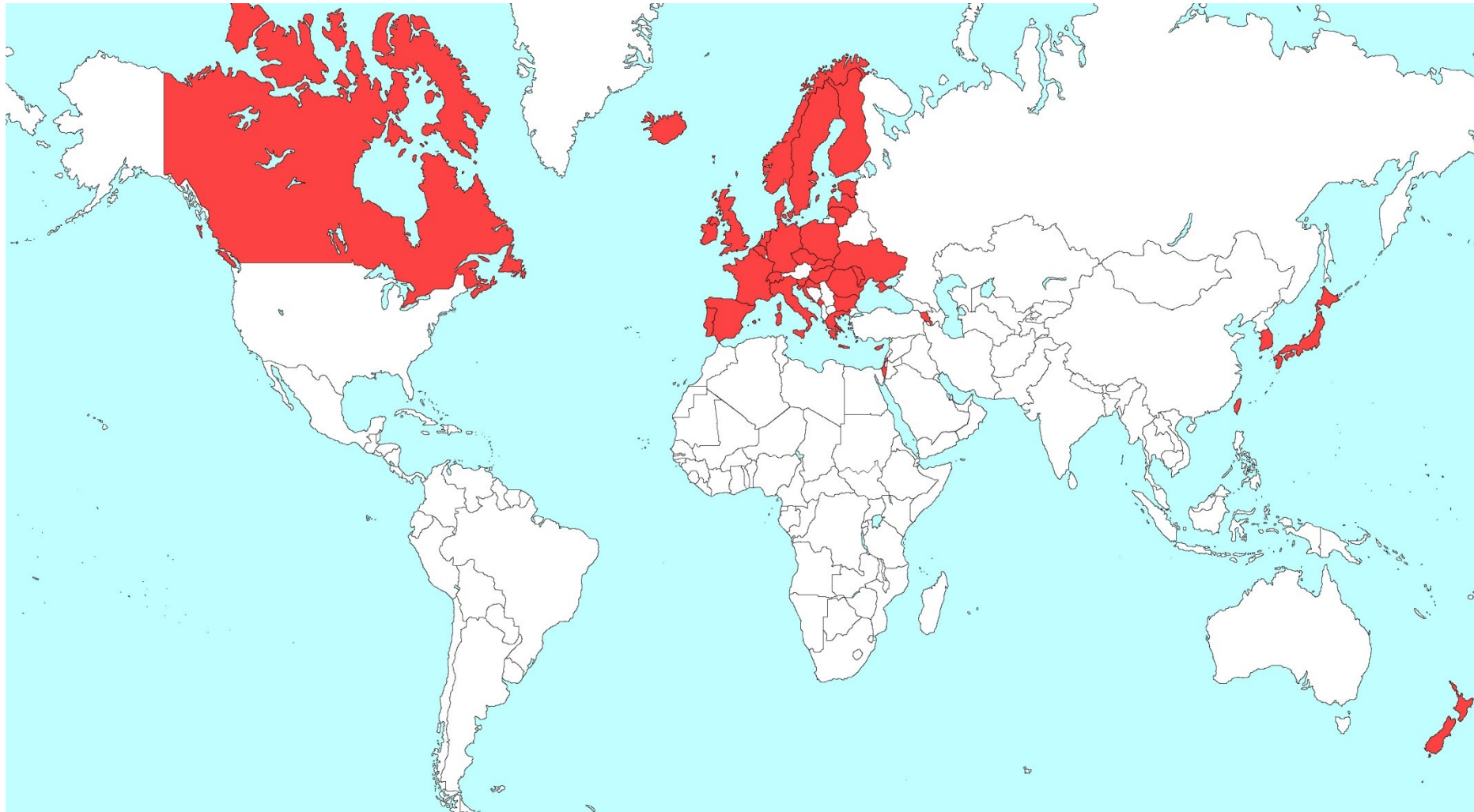
TRADE AGREEMENTS ACT OVERVIEW

- TAA gives the president authority to waive certain domestic preference requirements so that the United States can comply with its obligations under various international trade agreements
- “Supersedes” BAA requirements when TAA applies
- Requires that products and services from select countries (“designated countries”) receive equal consideration with domestic offers
- While BAA invokes a preference for domestic items, TAA invokes a prohibition on procuring end products from non-designated countries

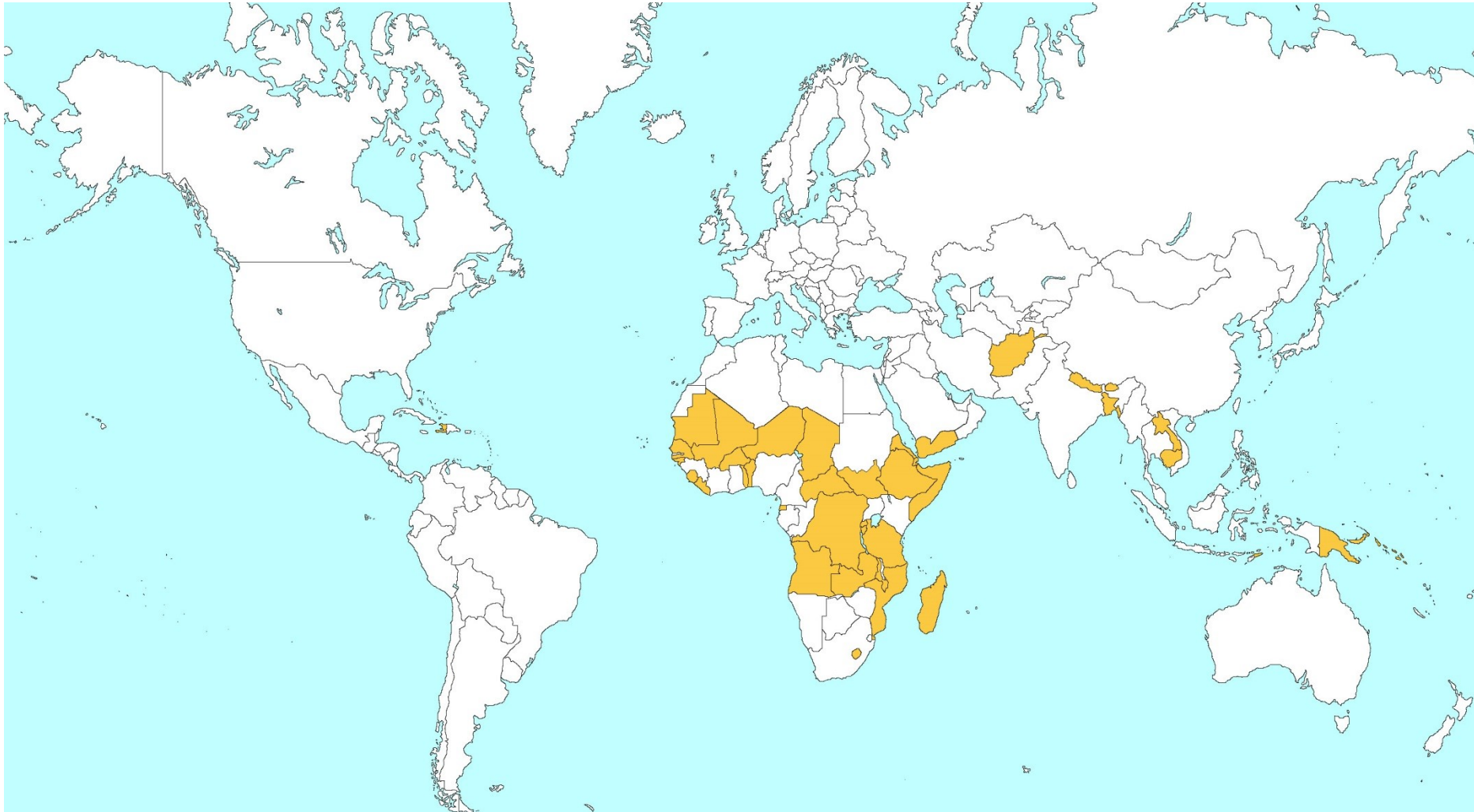
WHAT IS A “DESIGNATED COUNTRY”?

- FAR § 25.003 defines “designated country” as:
 - A World Trade Organization Government Procurement Agreement (WTO GPA) country (currently 45 countries)
 - A Free Trade Agreement (FTA) country (currently 18 countries)
 - A least developed country (current 46 countries)
 - A Caribbean Basin country (currently 21 countries)
- Plus “qualifying country” exception to still apply for DoD procurements, for an (expansive) list of end products. (DFARS § 225.401-70)
- Notable non-designated countries: China, India, Indonesia, Malaysia, Philippines, Thailand, Vietnam, Brazil, and Turkey

WTO GPA COUNTRIES



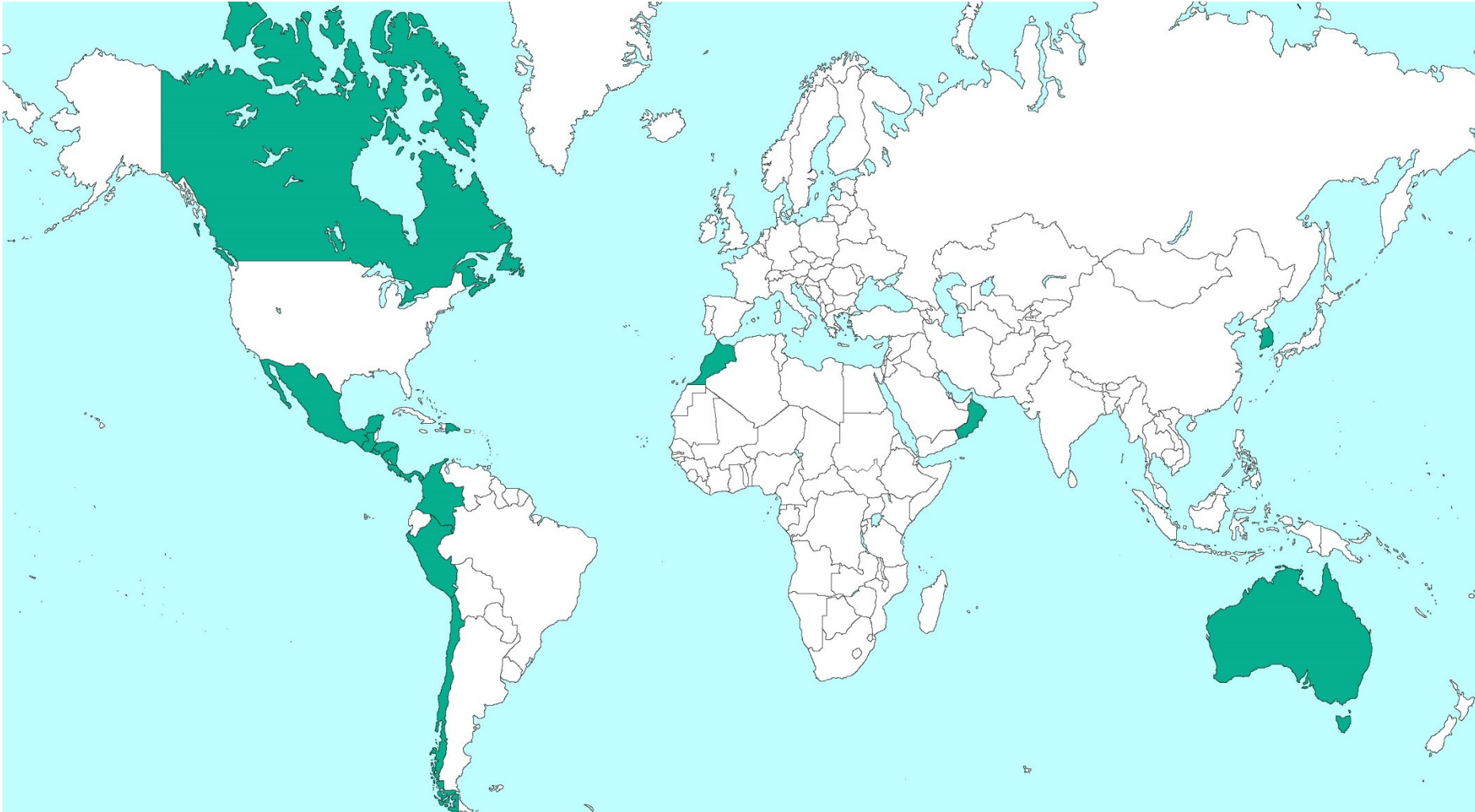
LEAST DEVELOPED COUNTRIES



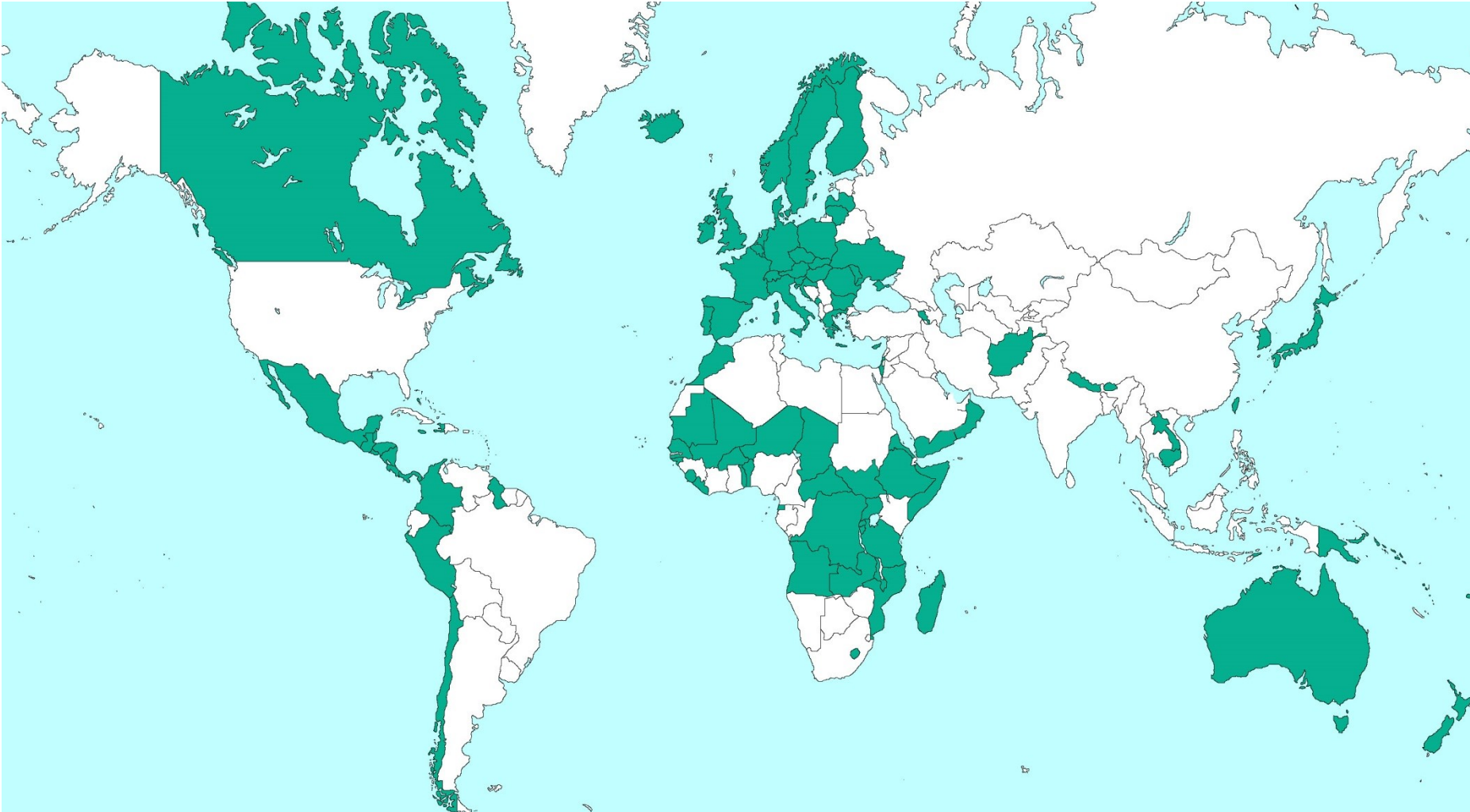
CARIBBEAN BASIN COUNTRY



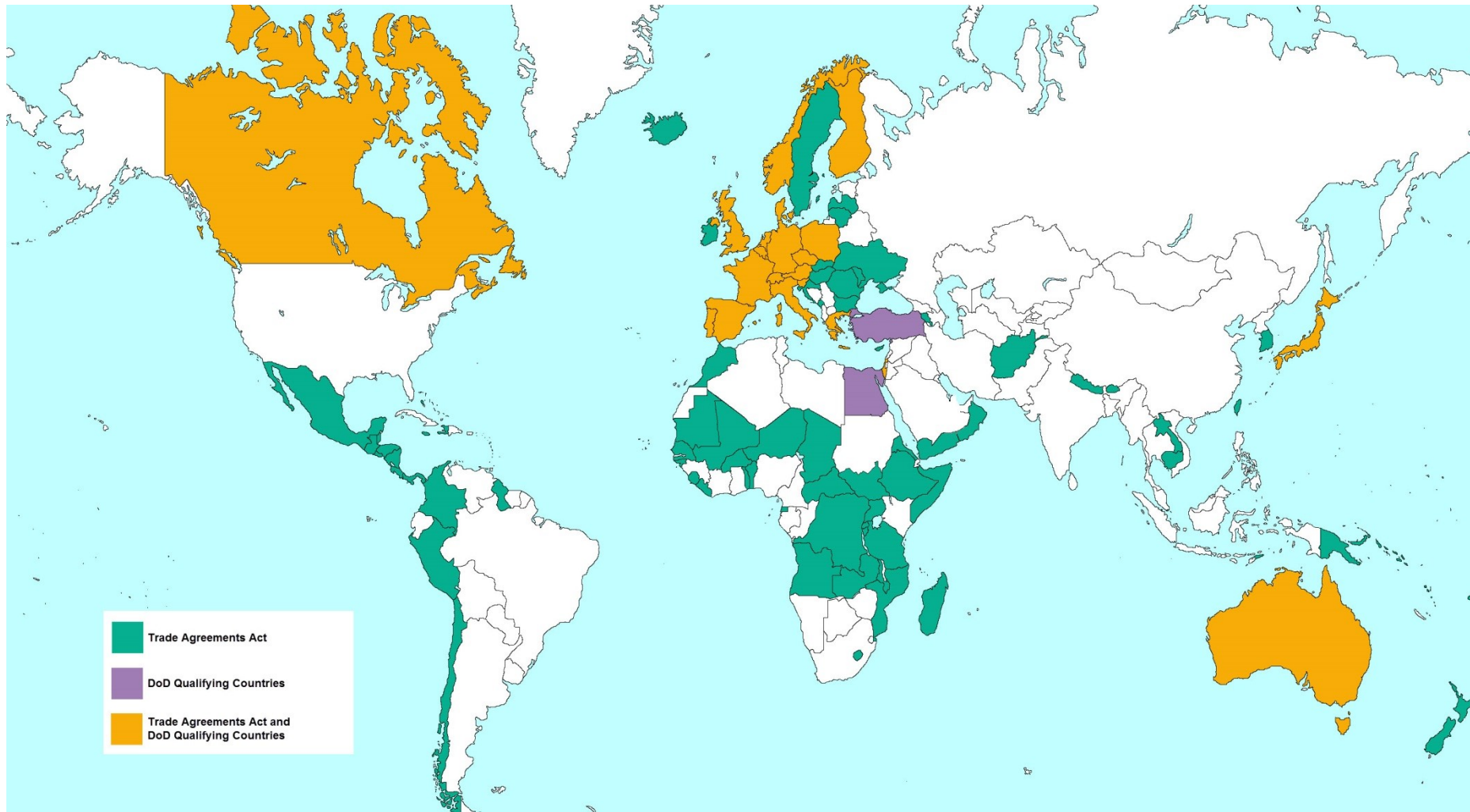
FTA COUNTRIES



ALL DESIGNATED COUNTRIES



DESIGNATED COUNTRIES & DOD QUALIFYING COUNTRIES



WHEN DOES THE TAA APPLY?

- Contracts for supplies, construction, and services over certain dollar thresholds
- Threshold depends on which agreement applies
- FTAs have varying thresholds

EXCLUSIONS FROM TAA

- TAA does not apply to certain categories of procurement (FAR § 25.401(a))
 - Small business set-asides
 - Acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes
 - Acquisitions from Federal Prison Industries and Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled
 - Sole source awards
- TAA does not apply to certain types of services specifically carved out (FAR § 25.401(b))

HOW DOES IT WORK? THE TAA PROHIBITION OF NON-DESIGNATED COUNTRY PRODUCTS

- Requires that end products be either:
 - “Wholly the growth, product or manufacture” of the United States or a designated country,” or
 - “Substantially transformed [in the United States or a designated country] into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.” (FAR 25.003)
- If end product is not produced in or “substantially transformed” in a designated country, it **cannot** be used (unlike BAA, where product may still be acceptable if cheap enough)
 - Policy: to **encourage** trade with certain countries and **discourage** trade with all others

HOW CAN I DETERMINE WHETHER MY CHINESE PARTS HAVE UNDERGONE SUBSTANTIAL TRANSFORMATION?

- Customs and Border Protection (CBP) issues rulings on substantial transformation. CBP has considered factors such as:
 - Number of components and subassemblies
 - Whether the parts lose their identity and become an integral part of the new article—does customization or programming define the product?
 - The extent of the processing: minimal or simple v. complex or meaningful
 - Whether processing renders a product with a new name, character, and use

HOW CAN I DETERMINE WHETHER MY CHINESE PARTS HAVE UNDERGONE SUBSTANTIAL TRANSFORMATION? (CONTINUED)

- The worker skill required during the actual manufacturing process
- The overall importance of the imported article to the finished product
- Whether the imported article is functionally necessary to the operation of the finished article, or whether it is an accessory that retains its independent function

KEY DIFFERENCES BETWEEN TAA AND BAA ANALYSES

- BAA uses a two part test to define “domestic end product”: (1) manufactured in the United States; **and** (2) domestic components exceed 50% of component cost
 - Origin of component parts is a significant factor in the analysis
- TAA uses “substantial transformation:” whether component parts have been transformed into a new or different article of commerce
 - Country of origin of the underlying components that are ultimately incorporated into an end product is largely irrelevant

SO UNDER THE TAA...CAN I BUY THAT PART MADE IN CHINA?

- Unlike BAA, does not matter what percentage of the component parts are foreign
- Past example: End product consists of 90% Chinese parts, manufactured in the United States
 - Under BAA → NOT compliant (need 50% domestic components)
 - Under TAA → IS compliant, as long as the manufacturing constitutes a “substantial transformation”
- Plus, under TAA, even if you can't buy that part from China, you **can** buy it from 100+ countries covered by a trade agreement

BUT WHAT IF I REALLY NEED THAT CHINESE PART (AND IT WON'T BE SUBSTANTIALLY TRANSFORMED IN A DESIGNATED COUNTRY)?

- TAA allows several waivers similar to BAA waivers:
 - Non-availability (but has to be unavailable in United States and designated countries)
 - DoD “qualifying country” exception still applies (FAR § 25.403(c)(2))
 - DoD national interest waiver under 19 U.S.C. 2512(b)(2) (DFARS § 225.403(c)(ii))
- No unreasonable cost exception for TAA

SPECIALTY METALS RESTRICTION (10 U.S.C. § 2533B)

- Pursuant to the specialty metals restriction, DOD cannot buy any aircraft, missile and space system, ship, tank and automotive item, weapon system, ammunition, or any components thereof, containing a specialty metal that was not melted or produced in the United States
- Specialty metals include certain types of steel; certain metal alloys made of nickel, iron-nickel, and cobalt; titanium and titanium alloys; and zirconium and zirconium alloys (10 U.S.C. § 2533b(l)(1)-(4))

EXCEPTIONS TO THE SPECIALTY METAL RESTRICTION

- Below simplified acquisition threshold
- Non-availability
- Acquisitions conducted outside of the United States in support of combat or contingency operations
- Acquisitions made on a noncompetitive basis due to compelling urgency

EXCEPTIONS TO THE SPECIALTY METAL RESTRICTION (CONTINUED)

- “Necessary” to the national security interests of the United States
- Acquiring electronic components
- Acquiring certain COTS items, or fasteners that are commercial items purchased under a contract or subcontract with a manufacturer of such items, provided certain conditions are met
- Purchasing items wherein the total weight of noncompliant specialty metals is less than 2% of the total weight of the item’s specialty metals



COMPLIANCE WITH BUY AMERICAN: ENFORCEMENT AND BEST PRACTICES

COMMON ISSUES FOR CONTRACTORS

- Failure to obtain (and archive) Country of Origin (COO) information/certification from suppliers
- Lack of communication between contract production and contract management (e.g., changing supplier)
- Failure to identify or seek clarification regarding inconsistent contract clauses
- Misapplication of “substantial transformation” test
- Failure to properly complete BAA/TAA certifications (failure to check to box/list non-designated country products means the contractor certifies product are United States or designated country end products)

ENFORCEMENT OF DOMESTIC PREFERENCE REQUIREMENTS

- Bid Protests
- Government Accountability Office, Inspector General, and Department of Justice (DOJ) audits/investigations
- False Claims Act liability
- Termination and costs for agency's reprocurement
- Replacement of non-compliant parts at contractor's cost
- Potential mandatory disclosure for credible evidence of noncompliance

EXAMPLES OF ENFORCEMENT

- DOJ, Office of Public Affairs, “Wisconsin Architectural Firm to Plead Guilty and Pay US\$3 Million to Resolve Criminal and Civil Claims” (5 January 2016)
- DOJ, Office of Public Affairs, “Army Reserves Lt. Col. Convicted for Fraudulently Supplying Chinese-made Army Promotional Gear as Made in USA” (26 April 2017)
- *United States ex rel. Louis Scutellaro v. Capitol Supply, Inc.* (D.D.C.) (19 April 2017): Defendant’s failure to retain COO documentation for the products it sold to the government entitled the relator and the government to an adverse inference that the defendant did not comply with the TAA

BEST PRACTICES FOR CONTRACTORS

- Seek clarification on inconsistent clauses
- Bolster supply chain management to ensure proper tracking of COO information for components and end products
- Flow down BAA/TAA requirements in subcontracts
- Increased review for commercial item products often produced in non-designated countries
- Notify agency in advance of changes to supply chain and seek BAA/TAA waivers if necessary



CHANGES ON THE HORIZON

CHANGES ON THE HORIZON

- Executive Order 13788
 - Substance:
 - Ordered federal agencies to enforce and assess compliance with Buy American laws
 - Includes a crackdown on waiving domestic content requirements
Extends to public interest waivers, and federal agencies have been instructed to assess whether the cost advantage of foreign-sourced products is the result of unfair trade practices before granting such waivers
 - What does it mean for contractors?
 - No specific changes, but signals increased surveillance and potential crackdowns by agency
 - Down the road, could mean changes to waiver process

CHANGES ON THE HORIZON (CONTINUED)

- Commitment from Senate Democrats to Strengthen Buy American Policies
 - *In A Better Deal: Taxpayer Dollars Should be Used to Support & Create American Jobs, Not Ship Them Overseas*, Senate Democrats proposed:
 - Eliminating the current National Defense Authorization Act (NDAA) provisions that would weaken buy American laws by eliminating Buy American provisions for a number of products
 - Rolling back the “overseas exemption” to the Buy American Act
 - Increasing transparency by mandating up-to-date reporting on the use of Buy American waivers for specific products
 - Did not make it into Senate NDAA
- North American Free Trade Agreement - negotiations currently underway

K&L GATES