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Buy American Sell-out Giving away Canadian procurement sovereignty

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Overview

As many Canadians are aware, the Conservative government has been waging a high-profile campaign to secure an exemption from the Buy American procurement preferences included in the recent U.S. stimulus legislation.

Despite Canada's hopes for a swift resolution, the prospects for an exemption—which were never more than faint—have now faded away. Unfortunately, the bad news doesn't stop there. The deal now in the works may actually prevent Canadian provincial and municipal governments from preferring local goods or suppliers and from using government purchasing as a policy tool, while leaving Buy American policies in place.

Buy American policies, including those in the American Recovery and Reinvestment Act, have broad popular support within the U.S. Predictably, the Obama administration has turned a cold shoulder to Canada's desire for a special bilateral exemption from these preference policies in return for guaranteed access to Canadian provincial and local procurement markets. Instead, U.S. negotiators have cleverly diverted the talks into a discussion about Canada covering provincial and local government procurement under the WTO Agreement on Government Procurement (WTO-AGP).

While clearly advantageous to U.S. corporate interests, this arrangement would not provide the market access Canadian suppliers have been seeking.

It would leave the Buy American preferences that triggered this dispute almost fully intact. The U.S. has vigilantly excluded these preference programs from its commitments under the WTO-AGP.

Such a deal would, however, permanently bind Canadian provincial and local governments under WTO rules, severely curtailing their use of government procurement as a policy tool. This is not a loss that Canada should take lightly.

It is important to note that, when we refer to government procurement, we are talking about public, taxpayer-funded purchasing. When democratically elected governments spend taxpayers' money, it is perfectly justifiable and appropriate that they seek to get the greatest overall benefits for their own citizens.

While U.S. governments are far more systematic in the use of procurement as a tool for local economic development, here are just a few examples where activist purchasing policies have provided tangible benefits to Canadians:

- Many municipalities have contracting policies that give preference to Canadian suppliers, allowing them to reject the lowest bidder in favour of a Canadian supplier if the local employment and spin-off benefits outweigh the price difference.
- Buy local food policies are becoming increasingly popular with municipal governments across the country. Canada's largest city, Toronto, recently

adopted a purchasing policy that supports local food production, with other major cities such as Vancouver and many smaller Canadian communities considering following suit.

- Both Quebec and Ontario require that, to qualify for generous public subsidies to purchase renewable energy, such as wind and solar, the energy producers must use specific levels of local goods and services. Such policies encourage the transition to renewable energies, while creating green jobs and supporting the local development of green technologies.
- Ontario has ensured that new subway cars for Toronto are produced in Thunder Bay, supporting hundreds of high-skilled, well-paid jobs in a hard-pressed region of northern Ontario.
- Provincial governments across the country save millions of dollars annually through centralized purchasing of pharmaceuticals, restricting tendering by requiring the use of cheaper generic drugs where they are equally effective.
- The deliberate focus of service delivery in a wide range of human services—including health, education, child care, and social services—is on local organizations, often community-based not-for-profits, meeting local needs.
- Finally, communities across Canada have been resisting pressure from corporations, many U.S.-based, to outsource essential public services such as municipal waste, sewage, and water services.

Many of these beneficial policies, and others like them, would be at risk if trade treaty restrictions are imposed on Canadian provinces and municipalities in the vain hope of gaining fleeting access to U.S. stimulus spending. While a few provincial governments are trying to shield some of these measures, American negotiators are demanding more concessions. Everything is on the table.

Remarkably, the Harper government—which is in an extraordinarily weak bargaining position and eager for some kind of face-saving agreement—could well accept the U.S. counter-offer, browbeating Canadian provinces and municipalities into going along with it.

The real question is why would Canada agree to such an unbalanced deal?

The initial Canadian proposal

Section 1605 of the American Recovery and Reinvestment Act (the Recovery Act), which was passed in February 2009, provides (subject to certain exceptions) that “[n]one of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.” Section 1605 further stipulates that the Buy American requirement be applied in a manner consistent with U.S. obligations under international agreements.

Even though similar Buy American laws have been in place for many decades, the Conservative government and Canadian business lobby groups—struggling from the impacts of the global recession—reacted aggressively to the inclusion of these parallel provisions in the Recovery Act.

In a July 20 letter from Canadian Trade Minister Stockwell Day to his counterpart, U.S. Trade Representative Ron Kirk, Ottawa proposed a two-stage deal to address Canadian concerns over the Buy American rules.¹ During the first stage, the federal government would guarantee U.S. suppliers full and immediate access to most Canadian provincial and municipal government procurement. In return, Canada requested that the Obama administration grant Canada an immediate exemption (or “waiver”) from the Buy American provisions of the U.S. stimulus bill. This would allow Canadian suppliers to compete on an equal basis with U.S. firms for federally-funded stimulus projects, including procurements at the state and local level. This part of the plan, backed by provincial premiers, would be temporary, lasting only until all the U.S. (and Canadian) stimulus money had been spent.

For the second stage, Canada proposed that the two countries negotiate long-term commitments that would permanently bind sub-federal procurement under international trade treaty rules. Currently, NAFTA’s procurement rules apply only to federal-level procurement, not to sub-federal purchasing. Likewise, Canada has not made any commitments at

the sub-federal level under the WTO Agreement on Government Procurement (WTO-AGP). Thirty-seven U.S. states have made some commitments under the WTO-AGP, although these vary considerably by state, and key local preference programs are excluded. Moreover, U.S. municipal procurement and purchasing by sub-federal utilities are not covered by NAFTA or the WTO-AGP.

The Canadian offer, which remains confidential, reportedly contains detailed and specific pledges to cover most provincial procurement, with limited exceptions such as purchasing by some provincial utilities (including Quebec Hydro and Ontario's electricity utilities). Canada has also offered to cover purchasing by all Canadian cities and towns with populations over 50,000. The Canadian proposal covers goods, construction and services, although some "sensitive services" are reportedly excluded, as is purchasing by schools and hospitals. It also includes a binding bid protest procedure that could be used by U.S. suppliers that felt they have been unfairly excluded from any provincial or municipal procurement contract. This offer goes far beyond Canadian commitments under any existing international treaties. U.S. government sources have acknowledged that it is "meaty," but are now pressing for further Canadian concessions.²

Negotiators from the two countries have been talking informally since the summer. The first formal negotiating session began in Washington on October 1. Canadian officials and businesses expressed hope for a swift response from the U.S. government that would allow Canadian suppliers to compete on the numerous U.S. infrastructure projects now being funded. But the talks are continuing, with no prospect of a legitimate exemption in sight. In the meantime, contracts and grants funded by the U.S. stimulus bill are moving ahead under the current rules.³

The U.S. response to the Canadian proposal

The Canadian media have paid considerable attention to the Canadian offer, with some editorialists even suggesting the provinces must "lift their skirts higher" to entice the U.S. to engage. But there has been almost no critical analysis about what, if anything, the Obama administration is prepared to offer in return.

The impending deal is often uncritically portrayed as including an "exemption" for Canada from the Buy American provisions in the stimulus package. A genuine exemption would permit Canadian suppliers to compete on the same terms as U.S. suppliers for stimulus-funded procurement. This would be a boon for some Canadian companies, although their gains would not necessarily justify the high price of such an exemption, were it even achievable.

The resulting trade-off could permanently eliminate the use of procurement as an economic development tool within Canada and, quite possibly, expose a swath of public services to for-profit competition from U.S.-based service corporations. Conservative U.S. trade analysts are already deriding Ontario's provincial government because "it isn't willing to put university procurement, textbooks, and health care procurement on to the table."⁴

In any event, a legitimate exemption is not a realistic possibility. Such a move would surely antagonize key Congressional interests at a time when President Obama is fighting to gain support for vital domestic policy initiatives such as health care reform. The Obama administration has responded frostily to the proposal for equal treatment of Canadian suppliers. The reasons for this stance are fairly obvious.

First, Congressional and public support for Buy American rules, especially among Obama's Democratic supporters, is very high. Indeed, there is strong bipartisan political support for Buy American policies. On February 4, the Senate, by a lopsided vote of 65-31, rejected an amendment by Sen. John McCain (R-AZ) to strip the Buy American provisions from the Recovery Act. Nine Republican senators voted against the McCain amendment, a rare bipartisan moment in a fractious Congress. Reacting to criticism by foreign governments and U.S.-based multinationals of Buy American policies, Massachusetts Congressman Barney Frank, chairman of the influential House Financial Services Committee, candidly remarked that: "People need to understand their chances of talking the American public out of this kind of attitude are zero."⁵

A secondary concern in Washington is the sense that swapping reciprocal market access guarantees with Canada is simply not worth the trouble it would cause the administration in Congress. Even on a proportional

basis, the U.S. stimulus package is significantly larger than Canada's, and in strict dollar terms dwarfs it.⁶ Moreover, despite media reports to the contrary, local preference policies in Canada are the exception rather than the rule as in the U.S. From the U.S. perspective, why bother paying for access to a market that is already largely open to U.S. suppliers? A resolution passed this summer by the Federation of Canadian Municipalities, pledging retaliation if the Buy American policies are not withdrawn, has had negligible impact on Washington's stance.⁷

Last, but not least, the primary purpose of the stimulus legislation is to spend large amounts of U.S. taxpayer dollars to stimulate the U.S. economy. Even though manufacturing in certain key sectors is highly integrated between Canada and the U.S., the majority of American politicians, including President Obama, reject Prime Minister Harper's premise that the long-standing and highly popular Buy American provisions pose a threat to overall trade relations between the two countries. Moreover, if the substantial U.S. stimulus package successfully reinvigorates the U.S. economy, Canadians will benefit. The gains from being a close neighbour and the largest trading partner should overshadow any negative impacts of the Buy American policy.

Although the U.S. has rebuffed Canada's proposal for a special exemption, it has not walked away from the table or the ample Canadian offer. Instead, it has steered the talks towards what President Obama has termed a potential "multilateral solution." U.S. government officials have suggested that, if Canada signed up its provinces and local governments to the WTO-AGP, this would help Canadian suppliers' concerns, by allowing them to more fully engage in the U.S. market.

Under this scenario, the U.S. administration could use its waiver authority to grant suppliers from Canada, perhaps on a provisional basis, the same status as those from nations that have committed their sub-federal procurement under the WTO-AGP. In return, Canada would guarantee the U.S. access to almost all provincial and municipal government procurement, matters which have previously been fully excluded from coverage under international procurement agreements.

This step should not be portrayed as an exemption from Buy American policies. The U.S. has excluded a wide range of its buy-local policies from its commitments under the WTO-AGP. The bulk of its spending under the stimulus program is carved out, leaving it free to continue to apply its buy-local preferences. Such a deal would provide few benefits for Canadian exporters, and definitely would not be worth the price being demanded by U.S. negotiators.

Even if Canada signed up its provinces and local governments to the AGP, the main policies powering U.S. procurement preferences would remain fully intact and continue to apply to projects funded under the Recovery Act. Since the U.S. has exempted its key buy-local procurement preferences under the WTO-AGP, Canadian suppliers would still be shut out.

No doubt such a deal would also include a U.S. commitment to ongoing negotiations to discuss lowering the market access barriers stemming from Buy American and other local preference programs. These barriers currently affect suppliers from all foreign countries—including those that have signed up to the WTO-AGP—although they impact Canada disproportionately because of our high export dependence on the U.S. market. It is a safe bet, however, that these negotiations will fail to yield further meaningful concessions from the U.S., especially since Canada has spent all its bargaining chips at the outset.

Such a deal—and the faint hope of U.S. concessions down the road—would be neither fair nor reciprocal. Canadian provinces and local governments would make sweeping concessions, while the U.S. would simply maintain the status quo. To misrepresent this astonishingly lopsided arrangement as a "Canadian exemption" from the Buy American provisions is absurd.

To understand precisely why the WTO-AGP would not provide reciprocal market access, it is necessary to review the range of U.S. procurement policy preferences and how they have been carved out of the U.S. commitments under the WTO-AGP.

Buy American preference policies

Buy American policies, and many other local preference procurement programs, have been in place in the U.S.

for decades. Even if Canada fully committed its sub-federal procurements under the WTO AGP, Canadian suppliers would continue to be blocked by these laws from competing on a wide range of procurement contracts. Suppliers from other countries, such as those of the European Union, that have already fully signed on to the WTO-AGP are also barred, because, for the most part, the U.S. has exempted these buy-local programs from its commitments under international trade treaties.

While the current dispute was triggered by outcry over the Buy American clause in the stimulus bill, similar U.S. local-preference procurement laws have been in effect since the 1930s, though their application ebbs and flows. In the media and the public discourse, “Buy American” has become synonymous with all U.S. buy-local preference programs, but in legislative terms it is just one part of the web of buy-local policies. There are literally hundreds of local-preference programs applied by state, local and federal governments in the United States.⁸

There are three key policy instruments for non-military procurement. The Buy American Act (1933) applies to procurement by federal government departments and agencies and spells out requirements to purchase U.S.-made goods. Minority and small set-asides are contracts that are reserved exclusively for U.S. small and minority-owned businesses. Buy America clauses, found in many pieces of U.S. federal legislation, are requirements to purchase American goods and construction services that the federal government attaches when it transfers funding for infrastructure and other projects to state and local governments. All three policies are legislatively mandated requirements, although each permits limited exceptions.

The federal Buy American Act (1933)

The Buy American Act, enacted in 1933, applies to direct purchasing by the U.S. federal government and its agencies. It requires federal departments and agencies to purchase American-made goods, unless U.S. materials are unavailable or the price difference is unreasonable, and to use U.S.-made construction materials in federal construction projects. The Act and its regulations apply a two-part test to define a U.S. good: 1) the product must be manufactured (i.e., “substantially transformed”) in the U.S., and 2) foreign-made components must make up less than 50% of the

final product. The Act also gives the administration the authority to waive the Buy American preferences when applying them would be “inconsistent with the public interest.”

Most *direct* U.S. federal purchases, including those funded under the Recovery Act, are covered by NAFTA’s procurement chapter.⁹ Consequently, these federal Buy American laws generally do not apply to Canadian goods or suppliers, for covered purchases. They have already been waived under the authority granted to the president by the 1979 Trade Agreements Act. For federal contracts over the NAFTA thresholds (\$25,000 US for goods, \$56,000 US for services and \$7.3 million US for construction contracts), Canadian goods are treated the same as American goods. Even for those federal purchases under the thresholds, Canadian goods are not completely excluded. They may comprise up to 50% of purchased materials, provided the final manufacturing occurs in the U.S.

Canadian suppliers that have been successful in U.S. procurement markets have already adapted to these restrictions. The Recovery Act explicitly stipulates that its Buy American clause must be implemented consistently with U.S. international trade obligations. In relation to direct federal government purchases, the Recovery Act has had no new adverse impact on Canadian suppliers.¹⁰ If anything, the injection of stimulus funding has created new market opportunities for Canadian businesses.

Minority and small-business set-asides

A more significant market access barrier from the standpoint of Canadian suppliers is the application of “minority and small-business set-asides.” Again, this is a long-standing bilateral issue, preceding the Recovery Act by decades.

An executive order under the Buy American Act, first issued in 1954, authorizes federal agencies to “set aside” contracts, reserving them exclusively for small or minority-owned business. The U.S. has blanket exemptions for such “set-asides” under both the NAFTA and the WTO-AGP. These trade treaty exemptions give it complete latitude to apply these programs as it sees fit.

The use of set-asides is substantial and has been growing in recent years. By law, 23% of U.S. federal

government procurement dollars must go to U.S. small and minority-owned businesses. Federal departments and agencies consistently meet this target. For example, federal government departments and agencies reported 6,675,895 small-business “eligible actions” in 2007, with a value of over \$378.5 U.S. billion, 22% of total eligible federal procurement spending.¹¹

American procurement law “requires that a small business be established in the United States to be eligible for set-aside contracts and preference programs.”¹² Suppliers located in Canada are ineligible.

Set-aside programs are also commonplace at the state level. For example, President Obama’s home state of Illinois requires that a “fair proportion” of all state procurement contracts be set aside for Illinois small businesses. In the case of construction, a fair proportion is defined as between 25 and 40 per cent of total contracts.¹³

Such programs are very popular in the U.S. and, despite persistent demands from its trading partners, the U.S. has shown no inclination to limit them. Even if Canada fully committed its provincial and municipal procurement under the WTO-AGP, it would not have the slightest impact on the U.S. use of set-asides at either the federal or state level.

Buy America requirements

The third key local preference tool is the requirement to purchase American goods and construction services that the federal government attaches when it transfers funding for infrastructure and other projects to state and local governments. Such conditions, referred to as Buy America requirements, have been inserted into many pieces of federal legislation, notably laws funding transportation, mass transit, and airport and highway construction.¹⁴

Typically, Buy America rules stipulate that the domestic content for construction materials must be 60% and that iron and steel used in construction projects must be 100% U.S.-produced. If a state or local government project is even partially funded by a federal grant, any Buy America conditions must be met.

Procurement by state and local governments is not covered by NAFTA. As already noted, thirty-seven U.S.

states have made some commitments under the WTO-AGP.¹⁵ Because Canada did not make any commitments at the provincial level, the U.S. applies “reciprocity provisions” that prevent Canadian suppliers from taking advantage of the U.S. state-level commitments under the AGP.

This state-level coverage and the reciprocity provisions are central to the U.S. proposition that Canadian commitments under the AGP can resolve Canadian concerns over access to U.S. stimulus projects. In return for guaranteed access to Canadian provinces’ and local governments’ procurement, the U.S. is offering to waive the reciprocity requirements. But this argument does not stand up to scrutiny.

While giving Canadians the same rights as other AGP signatories could improve access to a portion of routine state purchasing (for example, administrative purchasing of office equipment and other supplies by state departments), most big-ticket items, and particularly the types of projects funded through the Recovery Act, would remain off limits to Canadian suppliers.

Even in those states bound by the AGP, there are numerous state-level exemptions (for example, purchases of motor vehicles, coal, printing, construction-grade steel). In the words of the European Union—itsself an AGP signatory—these exemptions “seriously limit the procurement opportunities open to foreigners.”¹⁶ Moreover, procurements that benefit from specific types of federal funding, such as mass transit and highway construction, are *fully excluded*.¹⁷ Public utilities services, including telecommunications, are excluded.¹⁸ Set-asides by state governments are also fully exempted, without limit. This means that state governments are free to set aside any procurement contract, without foreign suppliers having any recourse under WTO rules.

Importantly, U.S. local governments—including all the major cities in the U.S., where much of the stimulus infrastructure spending will be disbursed—are not bound by U.S. commitments under the WTO. Nor are state-level utilities, such as public water, telecommunications and electricity utilities. As the U.S. government recently explained at the WTO in Geneva: “The US General Note 2 of the GPA provides that: ‘Except as specified otherwise in this Appendix, procurement in terms of US coverage

does not include non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives...'. This exclusion applies to all the government entities covered by the Agreement. That means that where a state that is listed in an international agreement provides grants, loans or other types of financial assistance to a local government entity, it would not be considered procurement by the state government, but rather would be considered a procurement by the local entity undertaking the procurement."¹⁹

Remove highway, mass transit, municipal infrastructure, utility spending—and in many states steel, motor vehicles, coal and printing—from the procurement pie, then cut out set-asides, the 13 states that have no commitments, and all municipal procurement on top of this, and it is easy to see that the U.S. offer is largely without substance. Even if Canada fully signed on to the WTO-AGP, Canadian suppliers would remain excluded from the bulk of U.S. sub-federal, stimulus-funded projects.

Previous Canada-U.S. procurement negotiations

This plethora of gaps and exclusions in the U.S. AGP commitments is the very reason that Canada refused to cover the provinces under the WTO-AGP. During the WTO negotiations in Geneva in the mid-1990s, Canada did offer to cover provincial procurement. In return, it demanded that the U.S. address the problems being experienced by Canadian suppliers, who were even then excluded from procurement opportunities in the U.S., mainly because of Buy America preferences and set-asides for small and minority businesses. The U.S. government refused to address Canadian concerns about buy-local preferences, and the talks ended in failure.

From the minutes of the WTO negotiating group, here is how the Canadian representative explained the reasons for Canada's decision not to cover sub-federal procurement:

"Canada was prepared to table an offer at the sub-central level if, and only if, members were prepared (1) to include sectors of priority interest to Canadian suppliers, for example, in the steel and transportation areas; and (2) to agree to

circumscribe the use of small business and other set-asides in a manner that, while not precluding their use, would provide an acceptable security of access to suppliers from all members of the Interim Committee. It was Canada's position that, in providing increased and secure market access to its trading partners, it was not unreasonable to expect the same degree of reciprocal market access in return. In the context of the present offers, this circumstance simply did not exist."²⁰

In short, the U.S. offer was riddled with exceptions and did not provide meaningful access. The Canadian negotiators concluded that, without reciprocity, there could be no deal. While misguided media analysts have pilloried Canada and the provinces for this decision, it was fully justified. Nothing has changed in the current U.S. position to support a different decision today.

Conclusion

Despite strenuous diplomatic efforts, there is virtually no chance that Washington will agree either to scrap the Buy American rules or to exempt Canadian suppliers from them. With the initial Canadian proposal for a meaningful exemption sidelined, Canada is now negotiating in a fog and a panic.

At U.S. insistence, the negotiations are increasingly focussed on the mechanics of Canada covering its provinces and municipal governments under the WTO-AGP. Yet, as we have seen, even if Canada fully committed provinces and municipal governments under the AGP, it would not significantly increase Canadian suppliers' access to U.S. markets.

Such a deal would, however, severely curtail the democratic authority of provincial and local governments to maintain and adopt purchasing policies that benefit their citizens. If Canadian negotiators give up too much ground, it could well pry open Canadian public services to U.S. for-profit corporations.

Instead of tilting at the windmill of an unattainable exemption, our governments should emulate what is best in the U.S. buy-local procurement policies and employ them to benefit Canadians. This stance would undoubtedly irk certain American interests, but they could hardly cry foul. The Canadian government would

simply be creating a more level playing field which would both benefit and protect its citizens.

Notes

1. An access-to-information request for the July 20 letter, which had already been leaked to the Canadian media, was refused for reasons of "national security."
2. Paul Vieira and John Ivison, "Deal on 'Buy American' still in the works," *Financial Post* September 29, 2009.
3. By the end of August the U.S. government had already spent an estimated 73% of the non-tax stimulus outlays for 2009. Spending as "outlays" from Executive Office of the President Council of Economic Advisors, *The Impact of the American Recovery and Reinvestment Act: First Quarterly Report*, September 10, 2009, pg. 5. Estimates of aggregate non-tax stimulus spending for 2009 including Division A Outlays and Division B Outlays from Congressional Budget Office, *Estimated Cost of the Conference Agreement for H.R.1*, February 13, 2009, Pg 3. See Canadian Centre for Policy Alternatives, *The Harper Economic Report Card*, forthcoming.
4. "Canada-U.S. analyst Chris Sands [from the conservative Hudson Institute] says because it may take up to a year before Canada realizes any concrete progress in the talks, and only if provinces are willing to put long-cherished exclusions on the table. 'The question is, is Canada willing to concede everything we want?,' he said. 'Ontario has been the biggest barrier ... it isn't willing to put university procurement, textbooks and health care procurement on to the table. For the U.S., it's not just about roads.'" "Deal on Buy American not close, and not certain, says Stockwell Day," Julian Beltrame, *Canadian Press*, October 18, 2009.
5. "People need to understand their chances of talking the American public out of this kind of attitude are zero," Rep. Barney Frank, D-Mass., chairman of the influential House Financial Services Committee, told reporters Tuesday. "There is now a deeply rooted anger on the part of the average American at what he or she thinks is a very unfair set of arrangements." Quoted in Kevin G. Hall, "Buy American isn't new, but is it really a good idea," *McClatchy Newspapers*, Feb. 3, 2009, available at <http://www.mcclatchydc.com/politics/v-print/story/61428.html>. accessed October 22, 2009.
6. The International Monetary Fund estimates the value of the U.S. stimulus program at 4.9% of US GDP (over three years) and the Canadian program at 3.6 % of Canadian GDP (over two years).
7. The FCM subsequently suspended its October 4 deadline for retaliation, to give Canadian federal negotiators more time to reach a successful conclusion.
8. As a service to suppliers, the Canadian embassy in Washington maintains a list of state-level preference programs. The current list is 181 pages long. The document is available at: http://www.canadainternational.gc.ca/sell2usgov-vendreaugouvusa/opportunities-opportunités/procu-pass_marche.aspx?lang=eng.
9. Direct federal purchases are also covered by U.S. commitments under the WTO-AGP, but because the NAFTA procurement chapter thresholds are lower, NAFTA provides Canadian goods and suppliers more favourable treatment than that extended to other U.S. trading partners under AGP rules.
10. There is some evidence that the publicity generated over the Buy American clause in the Recovery Act has led to more vigorous enforcement of exclusions, such as for purchases under the thresholds. For example, the U.S. Forestry Service purchased Canadian shingles for two Recovery Act-funded renovation projects, valued at \$500,000 U.S. and \$175,000 U.S. Department of Agriculture auditors noted that, because these contracts were under the NAFTA thresholds for construction, that either U.S. shingles should have been purchased or a waiver obtained. See http://www.recovery.gov/Accountability/inspectors/Documents/USDA_OIG_Forest_Service_Report_on_Buy_American_Act_Requirements.pdf .
11. U.S. Small Business Administration, *Small Business Goaling Report*, Fiscal year 2007, available at http://www.sba.gov/idc/groups/public/documents/sba_homepage/fy2007sbgr.html, accessed October 21, 2009.
12. See Canada, Department of Foreign Affairs and International Trade "Frequently Asked Questions on Small-business set asides," <http://www.canadainternational.gc.ca/sell2usgov-vendreaugouvusa/procurement-marches/faq.aspx?lang=eng#1>. Accessed October 18, 2009.

13. Sec. 45–45 of the Illinois Procurement Codes states “(a) Set-asides. The chief procurement officer has authority to designate as small business set-asides a fair proportion of construction, supply, and service contracts for award to small businesses in Illinois. Advertisements for bids or offers for those contracts shall specify designation as small business set-asides. In awarding the contracts, only bids or offers from qualified small businesses shall be considered. (c) Fair proportion. For the purpose of subsection (a), for State agencies of the executive branch, a fair proportion of construction contracts shall be no less than 25% nor more than 40% of the annual total contracts for construction.” Available at: http://www.canadainternational.gc.ca/sell2usgov-vendreaugouvusa/opportunities-opportunités/procu-pass_marche.aspx?lang=eng. Accessed October 18, 2009.

14. Section 5323(j) of title 49, United States Code is referred to as the “Buy America requirements.” This section codifies preferences that are found in a range of U.S. statutes, notably those administered by the U.S. federal Department of Transportation, including the Surface Transportation Assistance Act of 1982, the Urban Mass Transportation Act of 1970, the Airport and Airway Improvement Act of 1982 and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005.

15. The 13 U.S. states that have no commitments under the WTO-AGP are: Alabama, Alaska, Georgia, Indiana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Virginia, and West Virginia.

16. “Even in the GPA-bound states, various exemptions (i.e. for purchases of cars, coal, printing and steel and for set-aside) seriously limit the procurement opportunities open to foreigners. Besides, all procurements by States and localities that benefit from particular types of federal funding (e.g. in mass transit and highway projects) are subject to the Buy America Act (BAA).” European Commission, Market Access Database, “Buy American” Available at: http://madb.europa.eu/madb_barriers/barriers_details.htm?barrier_id=960059&version=2. Accessed October 18, 2009.

17. The U.S. WTO-AGP schedule stipulates that “ The Agreement shall not apply to restrictions attached to Federal funds for mass transit and highway projects.” (WTO-AGP, Annex 2 U.S.A), available at: http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm.

18. The WTO AGP schedule, Annex 4, excludes “Public utilities services, including telecommunications and ADP-related telecommunications services except enhanced (i.e., value-added) telecommunications services.” (WTO-AGP, Annex 4 U.S.A), available at: http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm.

19. “Responses of The United States to additional questions of the European Communities regarding the “Buy American” provisions in the US economic stimulus package,” World Trade Organization, GPA/W/307, October 1 2009.

20. World Trade Organization, GPA/IC/M/5, 6 December 1995. “Interim Committee on Government Procurement, Minutes of the meeting held On 25 October 1995.”