

BUY AMERICAN

Introduction

On November 15, 2008, the Leaders of the G20 issued a statement in Washington, D.C. that included this commitment:

13. We underscore the critical importance of rejecting protectionism and not turning inward in times of financial uncertainty. In this regard, within the next 12 months, we will refrain from raising new barriers to investment or to trade in goods and services ...¹

In a Statement released in Rome on February 14, 2009, G7 Finance Ministers stated that the G7 remains committed to avoiding protectionist measures.²

On April 2, 2009, in London, U.K., the Leaders of the G20 reaffirmed their commitment made in Washington, D.C. Furthermore, each leader promised to rectify promptly any protectionist measure introduced in their own nation between November 15, 2008 and December 31, 2010.³

In Washington, D.C., on April 24, 2009, the G7 Finance Ministers and Central Bank Governors repeated the pledge to refrain from raising new barriers to investment or to trade in goods and services.⁴

On February 17, 2009, President Obama signed the *American Recovery and Reinvestment Act of 2009* ("Recovery Act") in direct contradiction of his nation's international commitment. Section 1605 of the Recovery Act (the Buy American clause) requires that those who spend the money allocated under that act only use manufactured goods "produced in the United States."⁵

The Recovery Act also creates an entirely new domestic content requirement for Department of Homeland Security ("DHS") acquisitions by prohibiting DHS from using any appropriated funds (not just Recovery Act funds) to acquire clothing, individual equipment, and a long list of textile products unless they are made in the United States (it is noteworthy that DHS procurement is not subject to NAFTA⁶).

Proposed Rectification Action by the President of the United States

The President of the United States was a signatory to the G20 Washington Declaration of November 15, 2008 and the reaffirmation Statement in London on April 2, 2009. The President

¹ G20 Declaration, Summit on Financial Markets and the World Economy, November 15, 2008

² Rome, Italy, Statement of G7 Finance Ministers and Central Bank Governors, February 14, 2009

³ London, U.K., G20 Leaders Statement on The Global Plan for Recovery and Reform, April 2, 2009

⁴ Washington D.C., Statement of G7 Finance Ministers and Central Bank Governors, April 24, 2009

⁵ Buy America, Canadian Manufacturers & Exporters, Briefing Document, May 4, 2009

⁶ NAFTA, Chapter Ten, Government Procurement, Annex 1001.1a-1

of the United States must comply with the international commitments of his nation and of his administration.

The President should issue an executive order providing a waiver with respect to all NAFTA originating goods produced in Canada. Under the Recovery Act, the head of a federal department or agency is empowered to do this where a waiver of the application of the Buy American clause would be in the “public interest”. The President could direct an executive order to his federal department and agency heads requiring that they make such a determination with respect to Canada and waive the application of the Buy American clause for NAFTA originating goods from Canada.

The President could also be asked to issue a similar executive order with respect to all other Buy American legislation that restricts the use of Canadian produced NAFTA originating goods in the United States. Finally, the President could be asked to work with Congress to create a bill that extends the influence of the North American Free Trade Agreement (“NAFTA”) to the states and municipalities. Such a bill could provide that any political subdivision that accepts money from the United States Federal Government must abide by the procurement rules in NAFTA. Similar legislation could be passed in the Parliament of Canada.

In the face of this crisis, it is not enough to push back to the status quo prior to February 17, 2009. A clear message of commitment to freer trade is necessary. This requires new legislative initiatives aimed at expanding trade between Canada and the United States.

What is at Stake?

In calendar 2008, the value of total trade between Canada and the United States exceeded 595 billion United States dollars.⁷ The majority of this trade is put at risk by the Buy American clause in the Recovery Act and in similar legislative initiatives.

In terms of jobs, over 17 million American jobs are directly reliant on trade with Canada. Those jobs would be lost in the event of a decline into protectionism. Even more Canadian jobs would be lost. This is a stark contrast with the projected 4 million jobs that would be created or maintained by the Recovery Act according to the current administration.

It is easy to see why trade is so important to the economies of Canada and the United States. Over a dozen of the top 100 businesses in Canada are subsidiaries of American corporations. Their annual sales in Canada exceed \$150 billion.⁸ American employees, pension plans and shareholders directly benefit from this economic activity in Canada. South of the border, 35 states count Canada as their number one export market.

The American Chamber of Commerce has recognized other harmful impacts of Buy American rules. On February 2, 2009, the CEO and President of the Chamber warned that the Buy American clause in the Recovery Act will:

1. “drive up costs for U.S. businesses and consumers;’ and

⁷ Trade with Canada: 2008, U.S. Census Bureau, Foreign Trade Division, Data Dissemination Branch

⁸ The Globe and Mail, The Top 1000, 2008 Edition

2. “cause the economy to worsen.”⁹

Extent of the Problem

The adverse impact on Canada arises from three sources in the United States:

1. organizations that are not regulated by the Recovery Act (or similar Buy American rules), but mistakenly believe that discrimination against Canadian made goods is lawful;
2. organizations that deliver goods to both Recovery Act funded projects and other projects and now choose to buy exclusively from American sources so as to avoid mistakes in inventories and shipping that could lead to oppressive fines under the enforcement provisions of the Buy American regulations;
3. organizations that are forced to comply with Buy American rules under the Recovery Act and similar Buy American statutes.

An example of the first group can be found at the Camp Pendleton Military Facility, where the Marine base has ordered the removal of plastic pipe fittings because of the words “Made in Canada”. The fittings had been installed and removal required excavation. This petty example of the enforcement of Buy American is made more offensive by the reality that under NAFTA the U.S. military are prohibited from discriminating against product made in Canada. In this case Buy American does not, as a matter of law, apply to the fittings. Instead, NAFTA requires that the Marines treat the Canadian product as if it was “Made in America”, subject to certain thresholds in the treaty, as it is a federal government procurement subject to the NAFTA rules.¹⁰

The second type of discrimination is impacting virtually all infrastructure suppliers in the United States. Rather than risk Recovery Act penalties, most suppliers are simply refusing to replace inventories with Canadian product. This practice is followed to ensure that there will be no inadvertent violations of the Recovery Act. Unfortunately, it also ensures that the U.S. market for Canadian produced infrastructure inputs will dry up in 2009.

While the third type of discrimination (that mandated by the Recovery Act) may be intended to impact only a small part of infrastructure spending in the United States, the unintended impact will be enormous. Already, there is anecdotal evidence (few businesses are willing to anger the U.S. government and go on the record¹¹) that the following detrimental effects have been realized:

1. Canadian firms operating in the United States and employing American residents have had to lay off those individuals because some of the products marketed in the United States are Canadian in origin;

⁹ Chamber Leads Effort to Beat Back Protectionist Provision, uschamber.com Magazine Article, February 2, 2009

¹⁰ NAFTA, Chapter Ten, Government Procurement, Annex 1001.1a-1

¹¹ See aggressive U.S. Marines denial of the Camp Pendleton excavation incident.

2. American firms operating in Canada have had to shut down production because governments in the United States have refused to accept “Made in Canada” goods;
3. Orders from the United States for infrastructure goods will grind to a halt, impacting thousands of jobs across Canada.

Ironically, some of the Canadian jobs lost are those of individuals who belong to American trade unions, with branches in Canada, while many of the infrastructure contracts transferred from Canadian to American suppliers end up with non-unionized American firms.

Future Threats

It is anticipated that Buy American provisions will be inserted into most new appropriation bills in the United States Congress. One of the first such instances after the Recovery Act is the Water Quality Investment Act passed by the House of Representatives and now before the Senate. It will deliver \$13.4 billion for clean water improvements. Section 608 of that Act repeats the Buy American language found in the Recovery Act.¹²

Historical Roots of Protectionism

The Buy American rules in the Recovery Act find their genesis in the depression era Buy American Act of 1933. That act is still in force in the United States and has been amended on a number of occasions.

NAFTA No Help

Some American commentators have suggested that NAFTA may cover the expenditure of federal funds by sub-federal political entities such as states, provinces and municipalities:

NAFTA Chapter 10 does not cover state and provincial government entities. Therefore, some argue that federal funds given to state and local governments for infrastructure projects would not violate the procurement obligations under the NAFTA. This is too clever. If the federal government provided a block grant with no conditions to the states – which then decided what to spend it on – it would clearly be state procurement. However, when the federal government hands money to the states to be used in ways that are spelled out in detail – including Buy American provisions – it is a different story. In a state-to-state arbitration proceeding under NAFTA, impartial arbitrators would very likely conclude that it is federal procurement and that NAFTA obligations apply.¹³

¹² Buy America, Canadian Manufacturers & Exporters, Briefing Document, May 4, 2009

¹³ “Buy American: Bad for Jobs, Worse for Reputation”, Policy Brief, Peterson Institute for International Economics, February 2009

In fact, a legal argument can be made that NAFTA has application in the circumstances of the Recovery Act, given that the funds are tied to specific federally mandated and controlled projects¹⁴. However, what is not debatable is that there is significant government procurement that is not covered by NAFTA¹⁵. Here is how one of the most vocal U.S. interests in favour of protectionism has put it:

For example, one manufacturer of foreign products has claimed that, under an exception requiring that the Stimulus Act be enforced consistently with international trade agreements, “under NAFTA, products manufactured in Mexico, Canada and the United States must be accorded equal procurement status.” This unqualified claim is incorrect. NAFTA only affords equal procurement status to goods and services at or above specified threshold values, for instance, \$8.8 million for construction services contracts by the Federal Government. Even more importantly, most of the stimulus funds will be disbursed by the Federal Government as grants to state and local entities. Stimulus Act contracts for goods and services at the state and local levels, even if funded by federal grants, are not entitled to equal treatment under NAFTA. Thus, *federal contracts valued at less than \$8.8 million, and state, municipal or other non-federal projects may not use Mexican or Canadian products.*

The Stimulus Act will likely impose strict compliance certification requirements on suppliers and contractors related to domestic content. Making a false statement in such a certification could result in serious consequences, even to the point of criminal liability.¹⁶

Provincial Responsibility

NAFTA required the three countries to commence negotiations to include provincial and state entities in the government procurement rules of NAFTA by December 31, 1998. Unfortunately, those negotiations have gone nowhere. Some have blamed the provinces in Canada. However, the public record does not support such accusations. Many American states have faced intense local pressure to refrain from signing on to NAFTA. Furthermore, the lack of progress in negotiations, according to the Canadian Foreign Affairs website, is a result of American failures:

Chapter 10 covers procurement by federal entities listed by each Party in NAFTA Annex 1001(1)(a), which includes nearly all such entities in the three countries. No provincial or municipal government organizations are listed and no procurement by provincial or municipal government is included. Article 1024(3)

¹⁴ See Miller Thomson Memorandum of May 5, 2009 in Appendix 1

¹⁵ *Ibid*

¹⁶ Tyler Union, April 8, 2009 Notice to Valued Customers: Clarification on *American Recovery and Reinvestment Act of 2009*

provides that the Parties will consult with their provincial and state governments with a view to obtaining commitments, on a voluntary and reciprocal basis, to include procurement by provincial and state entities, with negotiations among the NAFTA Parties to commence by December 31, 1998. No progress has been made with these negotiations. Canada's position remains that significant improvement in U.S. coverage at the federal government level, including removal of exceptions for small business set-asides and Buy American, will be needed before any further coverage could be considered by Canada.¹⁷

Recommendation

I. The United States Must Comply With G20 And G7 Declarations

The United States must comply with its written commitment of April 2, 2009 to rectify promptly any protectionist measure. The inclusion of Buy American clauses in U.S. legislation is a protectionist measure.

II. The President Must Grant A Waiver Immediately

The President must grant specific and full inclusion of Canadian produced NAFTA originating goods within any Buy American rules. The President has the power to direct federal department and agency heads to apply the public interest exception expressly provided for in the Recovery Act. The President has a similar power under the Trade Agreements Act of 1979 (19 U.S.C. § 2511(a)):

the President may waive, in whole or in part, with respect to eligible products of any foreign country ... the application of any law, procedure, or practice regarding Government procurement... .

The President has an international duty to provide waivers for Canadian goods promptly.

Respectively submitted this 13th day of May, 2009.

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¹⁷ Canada's Free Trade Agreements and Negotiations: An Overview, Department of Foreign Affairs and International Trade, 2005