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BEGGING THY NEIGHBOUR: UNDERSTANDING CANADA'S LIMITED OPTIONS IN RESOLVING 'BUY AMERICA'

Philip G. Turi[†]

After subduing concerns over his campaign promise to re-negotiate the North American Free Trade Agreement (NAFTA),[1] few Canadians would have expected President Barack Obama's landmark stimulus bill to open a new chapter in Canada-United States trade relations. Indeed, tucked away in the lengthy American Recovery and Reinvestment Act of 2009 (ARRA)[2] was an emboldened "Buy America" policy that, for many Canadian exporters, typified depression-era protectionism. In particular, Canadian companies took issue with § 1605 of the ARRA, which restricted the availability of funding appropriated under the legislation to public projects using "iron, steel and manufactured goods" produced exclusively in the United States.[3] While domestic preference rules regarding government procurement were not necessarily new,[4] the breadth and scope of this current provision is a marked departure from past practice. Specifically, eighty percent of ARRA funding for public infrastructure projects is distributed by state agencies and municipalities, the overwhelming majority of which are not covered by any international trade obligations.[5] Under this legislative mandate, subfederal entities are free, and in fact encouraged, to discriminate against Canadian suppliers bidding on government contracts, notwithstanding the many agreements promoting free trade between Canada and the United States.

The following note will examine three principal questions underlying this most recent episode in Canada-United States trade relations. First, was the

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[1] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA]; *see generally* Les Whittington, *Obama Reassures Canada on Trade and Afghanistan*, TORONTO STAR, Feb. 19, 2009, http://www.thestar.com/news/canada/article/589906.

[2] American Recovery and Reinvestment Act of 2009, 26 U.S.C. § 1 (2009) [hereinafter *ARRA*].

[3] *Id.* § 1605.

[4] *See generally* Buy America Act, 41 U.S.C § 10 (a-d) (1933).

[5] Press Release, Embassy of Can., Buy America: Putting Jobs at Risk (June 2009) (on file with author) [hereinafter Embassy of Canada].

"Buy America" clause enacted under the ARRA consistent with United States international legal obligations to Canada given that funding mandated under the legislation emanated from the federal government? Second, what legal options were available to Canada, on behalf of affected companies, in response to "Buy America"? Third, to what extent does the Canada-United States Agreement on Government Procurement (Canada-United States AGP)[6] signed in February 2010 engage the preceding issues and provide a framework for managing future "Buy America" provisions?

This note will begin with a brief overview of the ARRA, itself, and the distinction between § 1605 and other "Buy America" statutes and provisions. Thereafter, it will examine the permissibility of a restrictive procurement policy under NAFTA and the World Trade Organization's (WTO) Agreement on Government Procurement (GPA) as well as examine other international accords covering treaty relations and state responsibility.[7] In addressing question two, the analysis is subdivided into options available to Canada through: (1) the waiver criteria established under § 1605 (b) of the ARRA; (2) executive order; (3) arbitration; and (4) countermeasures permissible under international law.

It will be argued below that prior to the signing of the Canada-United States AGP, the main cause of Canada's difficulty was a lack of coverage under both of its major trade agreements with the United States. With sub-federal entities largely excluded from NAFTA Chapter 10 and the GPA, the United States was not prima facie contravening obligations to Canada under either agreement. Less clear, however, was whether § 1605 undermined United States obligations to Canada under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).[8] While overriding political considerations narrowed the range of legal remedies at Canada's disposal, there was a clear legal basis in the United States for countrywide exemption for Canada under executive order. Other alternatives, such as arbitration on a state-to-state basis, were, although viable, prone to protraction beyond the

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[6] Agreement between the Government of Canada and the Government of the United States on Government Procurement, U.S.-Can., Feb. 16, 2010, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ENG-Canada-USA%20Government%20Procurement%20%28clean%2011%20Feb%202010%20printed%29.pdf [hereinafter Canada-United States AGP]; *see also* Press Release, Office of the U.S. Trade Representative, U.S., Canada Sign Agreement on Government Procurement, (Feb. 2010), http://www.ustr.gov/about-us/press-office/press-releases/2010/february/us-canada-sign-agreement-government-procurement.

[7] Agreement on Government Procurement, April 15, 1994, 1915 U.N.T.S. 31876 [hereinafter GPA].

[8] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 14 (1994), *reprinted in* The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 275 (1999) [hereinafter SCM Agreement].

time-sensitive ARRA's mandate. Furthermore, it is unclear whether enacting countermeasures would have been in the best interest of Canadian companies, especially those with established cross-border supply chains. Finally, while the Canada-United States AGP expands Canada's commitment to liberalizing subfederal procurement markets, it provides only marginal access to remaining ARRA funding and does not prevent the United States from enacting future local content provisions with regards to procurement. Notwithstanding these issues, the Canada-United States AGP sets an important precedent and offers the prospect for further integration of procurement markets in both countries.

1. GENERAL BACKGROUND: § 1605 AND EFFECTS ON CANADA-UNITED STATES TRADE

The goals of the ARRA, as established in § 3(a), include promoting economic recovery, providing investments needed to increase economic efficiency, and investing in infrastructure that will provide long-term economic benefits.[9] The goal of efficiency is reiterated in § 3(b), where it is asserted that expenditures and projects commence "as quickly as possible consistent with prudent management."[10]

Section 1605 of the ARRA attaches domestic content requirements to the United States' $90 billion[11] in infrastructure funding for projects involving the "construction, alteration, maintenance, or repair of a public work or public building."[12] Subsection (b) provides federal agencies involved in administering funds with the ability to waive such requirements in three circumstances: (1) when applying the provision would be inconsistent with the public interest; (2) when domestically produced iron, steel, or relevant manufactured goods are of insufficient quantity or of unsatisfactory quality; or (3) where the inclusion of domestically produced iron, steel, or manufactured goods would serve to increase the cost of the overall project by more than twenty-five percent.[13] In an attempt to forestall the concerns of United States trading partners, subsection (d) provides that § 1605 be applied in a manner consistent with United States international trade obligations.

Although it is not entirely clear whether the insertion of provision 1605 was a response to the lobbying efforts of the American steel industry[14] or a

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[9] ARRA § 3(a).

[10] *Id.* § 3(b).

[11] CANADIAN MANUFACTURERS AND EXPORTERS, BUY AMERICAN BRIEFING DOCUMENT (May 25, 2009), *available at* http://www.fairtradeforcanada.ca/files/pdfs/CME_English.pdf.

[12] ARRA § 1605.

[13] *Id.* § 1605 (1), (2), (3).

[14] Lesley Stahl, *Could 'Buy American' Rule Spark Trade War?* CBS NEWS, February 15, 2009, http://www.cbsnews.com/stories/2009/02/13/60minutes/main4801257.shtml.

general protectionist sentiment sweeping Congress, the disruptive effect of the clause on United States trade with Canada was easier to ascertain. In particular, unless a procuring entity interested in using Canadian product received a waiver for such purposes from a Federal agency charged with allotting funding, Canadian companies were practically ineligible from competing on ARRA funded projects.[15] However, nearly one-third of trade between Canada and the United States is "intrafirm," and more than sixty percent of trade occurs within established cross-border supply chains.[16] Accordingly, it is not surprising that by August 2009, with only ten percent of the stimulus funding allocated, the legislation adversely affected approximately 250 Canadian and United States companies supplying state and municipal infrastructure markets.[17] Many of these Canadian companies were asked to sign affidavits verifying where their products were manufactured. Furthermore, United States manufacturers selling directly to local infrastructure markets requested that their Canadian suppliers sign similar affidavits.[18]

At the grassroots level, the Federation of Canadian Municipalities (FCM) responded to the "Buy America" clause by adopting a trade resolution calling for discrimination against goods and suppliers from countries, such as the United States, that had closed "previously open markets to Canadian goods."[19] While the veracity of this resolution was never fully tested, it served as an impetus for the eventual "Buy America" negotiations that ensued in the fall of 2009. Acting as an artificial deadline, the resolution, although never implemented, attracted the attention of policymakers on both sides of the border.[20]

Unlike federal agencies administering their own procurements, most state and municipal governments neither issued nor implemented complex "Buy America"-type provisions in the past. Section 1605's application to subfederal entities thus created significant uncertainty and complications for state and local procurement officers and, as a result, projects funded under the ARRA were stalled or moved forward slowly. With practically no international obligations covering government procurement at the municipal level, and only fractionally at the state level, goods eligible for federal procurement under § 1605 that were substantially transformed in a covered-trade-agreement country, were ineligible for subfederal procurements. This differential application meant that subfederal agencies spending monies under the

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15 "Procuring entity" refers to any state and municipal level agency.

16 Embassy of Canada, *supra* note 5, at 2.

17 Ian Austen, *To the North, Grumbling Over Trade*, N.Y. TIMES, Aug. 8, 2009, at B3, *available at* http://www.nytimes.com/2009/08/08/business/global/08buy.html.

18 GPA, *supra* note 7, at 2.

19 Embassy of Canada, *supra* note 5, at 4.

20 *Id.*

ARRA may have had to pay higher prices for products than those available to federal agencies; these agencies also faced contracting delays and burdens not faced by their federal counterparts.[21] Although the House Committee on Transportation and Infrastructure projected the creation of 110,000 jobs and $20 billion in economic activity, as of May 2009, only six projects worth $15 million had started, creating just seventeen jobs in the United States.[22]

Also, to avoid the administrative burden associated with applying § 1605 and the potential for reprimand if misapplied, some municipalities otherwise eligible to use ARRA funds to update their water and sewage infrastructure, for example, declined stimulus money altogether.[23] The application of §1605 at the subfederal level, with "a limited patchwork of international obligations,"[24] also led to contradictory results. American companies sourcing components from Canada were not able to participate in subfederal procurement projects.[25] Thus, although difficult to quantify, documented evidence suggests that § 1605 generated immediate adverse effects for both Canadian and American companies.

Other 'Buy American' Legislation

Domestic preference requirements appear in other pieces of United States federal legislation. The Buy American Act,[26] originally enacted in 1933, applies to all United States federal government purchases of goods valued above a micro-purchase threshold, excluding services.[27] Under the Act, all goods purchased for public use must be produced in the United States. Manufactured items purchased under the legislation must also be manufactured in the United States from United States materials.[28] Similar to § 1605 of the ARRA, the Act does provide exceptions on the basis of public interest, unreasonable cost, and non-availability. Both NAFTA and the GPA provide exceptions for federal government purchases under the Buy American Act for procurements below the thresholds established in each agreement. Specifically, the GPA covers federal purchases at or above 130,000 special

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[21] Letter from Calman J. Cohen, President, Emergency Committee for American Trade, to Marguerite Pridgen, et. al., Re: Comments on OMB Recovery Act Guidance (June 22, 2009), *available at* http://www.ecattrade.com/uploads/content/0A3661DB1DA947F886D3A1A2F07F12CA.pdf

[22] STAFF OF H. COMM. ON TRANSP. & INFRASTRUCTURE, 111TH CONG., THE AM. RECOVERY & REINVESTMENT ACT OF 2009 TRANSP. & INFRASTRUCTURE PROVISIONS IMPLEMENTATION STATUS AS OF MAY 15, 2009, at 7 (May 21, 2009).

[23] Embassy of Canada, *supra* note 5.

[24] *Id.* at 13.

[25] *Id.*

[26] Buy American Act, 41 U.S.C. § 10 (a-d) (1933).

[27] *Id.*

[28] *Id.*

drawing rights (SDRs) for supplies and services and 5 million SDRs for construction.[29] NAFTA Chapter 10, which covers government procurement, only applies to federal purchases at or above $50,000 for goods and services and $6.5 million for construction projects.[30]

The Buy American Act is distinguishable from the Buy America Act;[31] it applies to transit-related procurement valued at over $100,000, the funding for which includes grants administered by the Federal Transit Authority (FTA) and the Federal Highway Administration (FHWA).[32] Projects funded by the FTA and FHWA require one hundred percent United States content for iron, steel, and manufactured goods used.[33] These two agencies fund most large transportation contracts in the United States; however, state and local governments administer the contracts.

Although subfederal exemptions under NAFTA and the GPA will be examined in more detail below, it is worth noting that § 1605 of the ARRA greatly expanded the domestic preference regimes established in the aforementioned Acts. Specifically, § 1605 attached "Buy American" rules to federal funding for infrastructure projects that would otherwise be covered under NAFTA Chapter 10 and the GPA if not administered by subfederal entities. In other words, by requiring states and municipalities to administer federal funds for infrastructure projects, Congress effectively nullified any "national treatment" protection afforded to Canadian companies bidding on infrastructure contracts, even above the stated thresholds in the GPA and NAFTA Chapter 10. In this respect, § 1605 was a new barrier to trade.

2. DID THE UNITED STATES CONTRAVENE ITS INTERNATIONAL OBLIGATIONS TO CANADA BY ENACTING § 1605 OF THE ARRA?

In order to adequately assess whether the United States breached its international obligations to Canada by passing § 1605 of the ARRA, it is necessary to engage in a more detailed analysis of the relevant treaties governing trade relations between the two nations.

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[29] *See* World Trade Organization, Appendixes and Annexes to the GPA, United States Annex 1, http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#taipei (last visited Aug. 29, 2010) (Converted, these values represent approximately $210,000 and $8.06 million respectively as of December 1, 2009).

[30] *See* NAFTA, *supra* note 1, art. 1001 (c)(i).

[31] *See* Buy America Act, 49 U.S.C. § 5323 (1982).

[32] *See* Department of Foreign Affairs and International Trade Canada, The Buy American and Buy America Acts, http://www.canadainternational.gc.ca/sell2usgov-vendreaugouvusa/procurement-marches/buyamerica.aspx?lang=eng (last visited Dec. 10, 2010).

[33] *Id.*

NAFTA Chapter 10 & 11

NAFTA Chapter 10 addresses government procurement among member States. One of its core principles is Article 1003, or the "national treatment" clause. Under Article 1003, each Party to NAFTA must accord, to the suppliers of goods and services of another Party, treatment no less favorable than that applied to domestic suppliers.[34] The protection afforded under Article 1003 applies to federal government entities, government enterprises, and state and provincial governments listed in Annex 1001.1a-3 over specified thresholds. While most federal government entities are listed, Article 1024 indicates that the listing of state and provincial entities is subject to negotiations which, to date, have not yet materialized.[35] Accordingly, subfederal entities in all three countries are not covered by the national treatment criteria established under Article 1003.

Chapter 11, which governs investment, accords national treatment and most-favored-nation protection to investors from member states under Article 1102 and 1103, respectively.[36] While Canadian companies adversely affected by § 1605 of the ARRA could take recourse under Chapter 11's investor-to-State dispute settlement mechanism, a number of issues restrict the viability of this course of action. In *ADF Group Inc. v. United States*,[37] a Canadian company, ADF Group Inc. (ADF), filed a claim under the International Centre for Settlement of Investment Disputes (ICSID) arbitral regime for damages resulting from the 1982 Buy America Act. ADF argued that the "Buy America" rules under the Act prevented it from producing steel in Canada for a highway project in Virginia, thus violating NAFTA Chapter 11.[38] In its ruling, the tribunal highlighted, among other things, that NAFTA parties brought only federal-level procurement by certain federal government entities under the coverage of Chapter 10. In addition, disputes arising with respect to procurement fall within the ambit of State-to-State dispute resolution under NAFTA Chapter 20, or outside the investor-to-State dispute settlement framework set up in Chapter 11.[39] In the context of § 1605, the tribunal's decision effectively precludes affected Canadian investors from asserting national treatment protection under NAFTA Chapter 11 through the investor-to-State dispute resolution regime.

In holding the "Buy America" provision in the Act as consistent with NAFTA Article 1102, the tribunal highlighted the fact that the "procure-

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[34] *See* NAFTA, *supra* note 1, art. 1003.

[35] *Id.* art. 1024.

[36] *Id.* art. 1102, 1103.

[37] ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1 (Jan. 9, 2003), http://www.state.gov/documents/organization/16586.pdf [hereinafter ADF Group Inc.].

[38] *Id.* at para. 61.

[39] *Id.* at para. 95.

ment" in question was administered at the state level. The United States was entitled to the benefit of NAFTA Article 1108(8)(b), which essentially rendered the provisions of Article 1106(1)(b) and (c) inapplicable in the case of procurement by a member.[40] Article 1106(1)(b) and (c) prohibits signatories from imposing or enforcing domestic content requirements and preferential treatment for domestic suppliers. Article 1108, which covers exceptions, establishes at subsection (8)(b), that the protections provided under Article 1106(1)(b) and (c) do not apply to "procurement by a Party or state enterprise."[41] In addition, subsection (7) of Article 1108 holds that national treatment protection afforded to investors under Article 1102 does not apply to procurement by a Party.[42] Given these exceptions, and their consideration in *ADF Group, Inc.*, the United States was not prima facie contravening the national treatment provisions included in Chapter 11 of the NAFTA by enacting domestic preference rules for government procurement under the ARRA.

It is also worth noting that the scope of "procurement" annunciated in Article 1001(5) excludes governmental assistance to a public entity or agency engaged in procurement in the form of financing or funding of the procurement activity by providing "grants, loans, equity infusions, guarantees, [and] fiscal incentives."[43] According to the tribunal in *ADF Group, Inc.*, this provision implies that a government entity or agency providing or arranging this type of funding for the purchase of supplies used or to be used in the construction of a government project, is not itself engaged in procurement.[44] This is relevant when considering § 1605 of the ARRA in two respects.

First, a significant portion of the ARRA funds are being dispersed through federal financial assistance vehicles such as grants.[45] Under United States federal procurement law, projects funded by "federal financial assistance" do not constitute "procurement,"[46] and are associated with non-procurement contract agreements, such as grants. As Article 1001(5) excludes grants from its definition of "procurement," this method of project finance is permissible under NAFTA. Second, state and municipal governments are administering nearly eighty percent of funding allocated under the ARRA for infrastructure projects. Thus, even though funding under the ARRA emanates from the federal government, by virtue of its composition mainly in the form of grants

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[40] *Id.* at para. 199.

[41] NAFTA, *supra* note 1, art. 1106 (1)(b), (c).

[42] *Id.* art. 1108 (7).

[43] *Id.* art. 1001 (5)(a).

[44] *See* ADF Group Inc. v. United States, *supra* note 37, at para. 161.

[45] *See* Embassy of Canada, *supra* note 5, at 10; *see generally* Recovery.gov, http://www.recovery.gov/Pages/home.aspx (last visited Dec. 10, 2010).

[46] The Federal Grant and Cooperative Agreement Act, 31 U.S.C §§ 6303-6304 (1982) [hereinafter Federal Grant].

to subfederal entities, the federal government is not engaged in procurement as defined under NAFTA Article 1001(5), and therefore is not in contravention of its provisions.

Intricacies surrounding funding are somewhat obscured under the General Agreement on Tariffs and Trade (GATT)/WTO regime, especially as they pertain to United States obligations under the SCM Agreement.[47]

WTO GPA & the SCM Agreement

In juxtaposition to NAFTA are the United States' procurement obligations to Canada under the WTO and GPA. The GPA includes rules implementing openness, transparency, and non-discrimination with regards to government procurement practices by member States. The Agreement is not part of the WTO "single-undertaking,"[48] and thus only applies to WTO members that have voluntarily acceded to it. Both Canada and the United States are signatories.

The GPA only applies to certain "covered" procurements that are defined in annexes to the Agreement. Coverage is generally grouped into four categories: value of procurement (only contracts exceeding specified value thresholds); identity of the procuring entity (only those listed in the country-specific annexes); types of goods and services procured; and the origin of the goods or services (only from member countries).[49] In certain respects, the GPA responds to GATT Article III: 8(a), which exempts government procurement from GATT national treatment obligations included in Article III: 4.[50] With the exception of entities listed in the country-annexes to the GPA, GATT Article III: 8(a) permits government agencies in WTO member countries to enact domestic preference policies in their government procurement practices. However, for GPA signatories, Article III: 1(b) extends national treatment protection to suppliers from each member state.

Article I of the GPA defines the technical parameters of what constitutes "government procurement" under the Agreement, the contours of which are largely shaped by the voluntary coverage enunciated by each signatory in the country annexes. The United States, for example, included seventy-nine federal agencies[51] as well as select government agencies from thirty-seven

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[47] *See* GPA, *supra* note 7.

[48] *See generally* World Trade Organization, Legal Texts: the WTO Agreements, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm (last visited Dec. 10, 2010).

[49] *See* Canada-United States AGP art. I, note 1.

[50] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 187 (The GATT, with annexes and schedules, is attached to Final Act of the United Nations Conference on Trade and Employment, signed at Geneva, on Oct. 30, 1947).

[51] GPA, *supra* note7, at United States Annex 1.

states.[52] Canada, on the other hand, included eighty-two federal agencies and no provincial level entities. In response to Canada's lack of subfederal commitment, the United States precluded Canada from accessing procurement carried out by listed state-level entities.[53] On the basis of its stated commitment, therefore, the United States could discriminate against Canadian suppliers bidding on subfederal procurement projects, even those executed by covered entities under the GPA.

In its general notes to its Annex, the United States also indicated that it did not consider its procurement coverage to apply to "non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, [and] fiscal incentives."[54] Accordingly, by dispersing "recovery funding" to subfederal entities through federal financial assistance vehicles, such as grants, the United States did not technically breach its stated obligations to GPA Parties, including Canada.

Less clear, however, is whether § 1605 of the ARRA coincides with the United States' trade obligations to Canada under the SCM Agreement. As part of WTO "single undertaking," the SCM Agreement disciplines the use of subsidies and regulates the actions member states can take to counter the effects of subsidies. The definition of "subsidy" under Article 1.1 refers to a financial contribution by a government or "any public body within the territory of the Member...where: (i) the government practice involves the direct transfer of funds (e.g. grants, loans and equity infusions), potential direct transfers of funds or liabilities (e.g. loan guarantees)," and a "benefit is incurred."[55] The inclusion of "any public body within the territory," indicates that the SCM Agreement applies to national as well as subnational governments.[56] In addition, Article 3.1(b) prohibits the awarding of subsidies "contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."[57] In tandem, these provisions seem to prohibit the issuance of federal financial assistance under § 1605 by states and municipalities on the basis of domestic preference criteria. Furthermore, unlike GATT Article III's national treatment obligation, there is no exclusion for government procurement from obligations under the SCM Agreement.

Under the Federal Grant and Cooperative Agreement Act, United States legislators define both "grant agreement" and "cooperative agreement" sepa-

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[52] *Id.* at United States Annex 2.

[53] *Id.* at United States, General Notes to Annexes.

[54] *Id.* at 5.

[55] *Id.* art. 1.1 (a), (1)(i) & (b).

[56] *See* World Trade Organization, Subsidies and Countervailing Measures: Overview, http://www.wto.org/english/tratop_e/scm_e/subs_e.htm (last visited Dec. 10, 2010).

[57] GPA, *supra* note 7, art. 3.1 (b).

rately from subsidies, loans, and loan guarantees.[58] Based on this internal definition, the use of grants or cooperative agreements is distinct from the practice of subsidization. While this definition may be dispositive of the United States perspective, it is useful to briefly examine the composite parts of a "subsidy" as referenced in relevant WTO tribunal decisions.

In *Brazil – Aircraft*, the Appellate Body indicated that a "financial contribution" and a "benefit" are two separate legal elements that together determine whether a subsidy exists.[59] With regard to a "financial contribution," the Panel in *US – Export Restraints* found that the inclusion of the term in the text of Article 1 was meant to guarantee that not all government measures that confer benefits would be considered subsidies. Specifically, the Panel opined that "the negotiating history confirms that items (i)-(iii) of that list (Article 1.1) limit these kinds of measures to the transfer of economic resources from a government to a private entity."[60] In terms of timing, the Panel in *Brazil* held that a government need not effectuate such a transfer or potential transfer for a subsidy to exist: "as soon as there is such a practice, a subsidy exists, and the question whether the practice involves a direct transfer of funds or a potential direct transfer of funds is not relevant to the existence of a subsidy."[61] Finally, in considering the meaning of "benefit," the Appellate Body held that a financial contribution will only confer a "benefit" if it is provided "on terms that are more advantageous than those that would have been available to the recipient on the market."[62]

Notwithstanding the United States' declaratory separation of "grant" and "cooperative agreements" from "subsidy" agreements, the nature and scope of ARRA funding, in many respects, meets the Panel criteria established above. In particular, the transfer of economic resources via "federal financial assistance" to state and municipal governments and then to private entities meets the financial contribution criteria. Furthermore, the actual transfer of funds need not eventuate for the subsidy to exist. This addresses the argument that while federal legislators attached domestic preference rules to ARRA money, states and municipal governments need not access or utilize this funding. The fact that accessing ARRA funding is contingent upon its use, in this case on domestic supplies, establishes a "practice" upon which a subsidy is based. It is arguable that the legislative intent of the stimulus funding under the ARRA was meant to provide domestic suppliers with

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[58] Federal Grant § 6302 (1).

[59] Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, ¶¶ 7.12-.14, WT/DS46/AP/R (Aug. 2, 1999) [hereinafter *Brazil*].

[60] Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, ¶¶ 8.65, .73, WT/DS194/R (June 29, 2001).

[61] *Brazil*, *supra* note 59, ¶ 7.13.

[62] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, ¶149, WT/DS70/AB/R (Aug. 4, 2000).

guaranteed access to infrastructure spending, while at the same time artificially squeezing out foreign competitors unable to meet the stringent domestic content requirements. Thus, based on interpretive criteria established in relevant WTO jurisprudence cited above, the United States may be in breach of SCM Agreement Articles 1.1 and 3.1(b) by the enactment of § 1605 of the ARRA.

The Vienna Convention & the International Law Commission's Articles on State Responsibility

The enactment of § 1605 and its administration by subfederal entities also gives rise to a number of customary international law issues. First, Article 26 of the Vienna Convention on the Law of Treaties[63] requires the parties to a binding treaty perform such treaties in good faith. Based on the preceding analysis of United States trade obligations under the NAFTA and the GPA, it is difficult to assert the United States is in breach of Article 26 by enacting a domestic preference provision. However, it is not entirely clear whether the same can be said of United States obligations under Article 1.1 and 3.1(b) of the SCM Agreement. Here one might also consider Article 27 of the Vienna Convention, which prohibits a state from invoking the provisions of its internal law as justification for its failure to perform a treaty.[64] Given this provision, it is difficult for the United States to argue that, because domestic procurement law considers grants and cooperative agreements as distinct from "subsidies," it is technically not in breach of the SCM provisions.

Evidently, this line of dialogue gives rise to a conflict of laws discussion. While Article VI of the United States Constitution places treaties on equal footing with the "supreme law of the land,"[65] the later-in-time rule, which allows subsequent United States statutes to override treaty provisions, suggests otherwise. In *Beard v. Greene*,[66] the Supreme Court invoked the later-in-time principle in denying habeas corpus and certiorari to a Paraguayan national sentenced to death in Virginia. In a per curiam opinion, the Court stated the Vienna Convention on Consular Relations had been overridden by the Anti-terrorism and Effective Death Penalty Act of 1996.[67] With this said, issues pertaining to United States reception of international law are largely muted by the dispute settlement procedures available to Canada under the WTO regime should it wish to address "Buy America" in this manner.

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[63] Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.
[64] *Id.* art. 27.
[65] U.S. CONST. art. IV.
[66] 523 U.S. 371, 376 (1998).
[67] *Id.*

The administration of § 1605 by subfederal entities also gives rise to questions concerning state responsibility. In particular, it is a general postulate of customary international law that acts carried out by governmental organs and entities are attributable to the State and that the State, as a subject of international law, is responsible for the acts of all its organs and territorial units. This rule is generally formulated in Article 4 of the International Law Commission's Articles of State Responsibility:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.[68]

When applied to § 1605, Article 4 renders irrelevant which level of government is executing the procurement measure. As the conduct of subnational governments falls under the ambit of State responsibility in this provision, discriminatory procurement practices carried out by a state or municipality may be attributable to the federal government. This greatly diminishes assertions that current United States international obligations may permit "Buy American" rules because they are administered by governmental agencies not covered under the NAFTA or the GPA.

The tribunal considered this argument in the *ADF Group, Inc.* arbitration. In their ruling, the tribunal highlighted the fact that federal and subfederal procurement measures are subject to NAFTA Chapter 10 only if and to the extent that such measures are issued by an entity listed in the negotiated Schedule of a NAFTA Party in Annex 1001.1a-3.[69] In other words, the inclusion of national and subnational procurement measures in NAFTA Chapter 10 is at least an implicit recognition that the signatories deem procurement at each level of government to be separate and distinct. Accordingly, while Article 4 seems to group the conduct of subnational governments under the heading of State responsibility, the voluntary demarcation between levels of government enunciated by NAFTA and GPA members seem to nullify this attribution.

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[68] Int'l Law Comm'n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, art. 4, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001).

[69] ADF Group Inc., *supra* note 37, at 167.

3. (A) WHAT OPTIONS, IN INTERNATIONAL LAW, WERE AVAILABLE TO CANADA IN RESPONSE TO § 1605 OF THE ARRA?

The range of options available to Canada in response to "Buy America" was largely shaped by underlying political considerations. Before considering the option eventually pursued, that being the bilateral negotiations resulting in the Canada-United States AGP, it is informative to analyze the limited nature of other avenues Canada could have taken in combating "Buy America."

'Public Interest' Waiver under § 1605

As discussed earlier, § 1605(b) of the ARRA allows procurement entities to waive the "Buy American" criteria based on non-availability of domestic supplies, unreasonable cost, and inconsistency with the public interest. Although the first two exemptions are largely fact driven, it may be worthwhile to consider how United States courts have examined the definition of "public interest" in the context of procurement by a public entity.

In *C. Sanchez & Son, Inc. v. United States*,[70] the Federal Court of Appeals considered the application of a public interest waiver under the Buy American Act. In its decision, the court generally viewed "public interest" from a cost perspective and utilized a prior executive order[71] on government purchases for guidance. It held that a waiver should be issued on the grounds of public interest when the cost of domestic materials exceeded the price of like foreign materials plus six percent.[72] At the district level, however, United States courts have examined factors other than cost in assessing "public interest." In *Conti Enterprises Inc. v. Southeastern Pennsylvania Transportation Authority,*[73] for example, the court held that, although it would be in the public's fiscal interest to award a public work contract to the lowest bidder, "the Buy America laws were enacted to promote the counterbalancing of public fiscal interest with protecting and creating jobs for American [steel] workers."[74] As the ARRA imbues counterbalancing similar objectives, it is unclear whether Canadian companies would have succeeded in receiving a waiver from § 1605 based on "public interest." Furthermore, discretion to issue a waiver of this kind lies in the hands of federal granting officials and is considered on a case-by-case basis for each project.[75] As highlighted earlier,

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[70] 6 F.3d 1539, 1545-46 (1993).

[71] 41 U.S.C. § 10a-d (1988).

[72] 6 F.3d at 1546.

[73] No. 03-5345, 2003 U.S. Dist. LEXIS 19848 at *28 (E.D. Pa. Oct. 14, 2003).

[74] *Id.* at *27.

[75] *See generally,* JAYSON MYERS, CAN. MFRS. & EXPS., BUY AMERICAN BRIEFING DOCUMENT 9 (2009), http://www.ciph.com/Downloads/advocacyLink/Buy%20American

the lengthy amount of time required for such procedures, coupled with the ARRA's stated mandate of moving projects forward quickly, rendered this option unrealistic for affected Canadian companies, notwithstanding the significant intra-industry trade across the Canada-United States border.[76]

Arbitration

As a party to the WTO, Canada has access to the Organization's dispute settlement process. As highlighted above, it is possible that § 1605 of the ARRA contravenes United States trade obligations to Canada under Article 1.1 and 3.1(b) of the SCM Agreement. "Federal financial assistance" awards based on "Buy America" criteria would fall under the "actionable category," and, if viewed as local content subsidies, would be subject to challenge. Were Canada to succeed in establishing that federal financial assistance constitutes a subsidy as defined in Article 1.1, it would then need to establish an injury to a domestic industry and demonstrate a causal link between the subsidy and the injury.[77] In the context of § 1605, it is arguable whether there was sufficient empirical evidence, from the time of the ARRA's enactment to the eventual signing of the Canada-United States AGP, to demonstrate injury to a Canadian industry. Other than a handful of heavily publicized Canadian companies that were negatively affected by § 1605, data revealing an adverse industry wide impact was not readily apparent in the media.[78]

However, sufficient empirical evidence demonstrating "injury" may not be as much of a stumbling block in light of GATT Article XXIII, which covers a nullification or impairment complaint.[79] This provision describes a right of legal action arising out of circumstances in which there has been no outright inconsistency or breach of a legal obligation.[80] The complaint is designed to deal with the contingency that the standard legal commitments in a trade agreement may fail to preserve the overall balance of concessions reasonably expected when the agreement was negotiated.[81] As an inconsistency is not alleged, the aim of the complaint is not the withdrawal of the

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[76] Embassy of Canada, *supra* note 5.

[77] *Id.*

[78] *See generally* Les Whittington, *Canadians Cry Foul as Buy American Policy hits home,* Toronto Star, Nov. 13, 2009, http://www.thestar.com/news/canada/article/725301--america-s-steel-curtain-thwarts-canada.

[79] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Art. XXIII, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter *GATT 1994*].

[80] Allen J. Hertz, *Shaping the Trident: Intellectual Property Under NAFTA, Investment Protection Agreements and [sic] at the World Trade Organization*, 23 CAN.-U.S. L.J. 261 (1997).

[81] *Id.*

impugned measure, but rather to give the successful complainant "a compensatory adjustment to restore the balance of interests."[82] In order to establish a nullification claim, however, the complainant would have to sufficiently demonstrate that the defendant's new measures impair benefits which had been reasonably anticipated when the negotiations were concluded.[83]

In Canada's case, Article XXIII provides an avenue through which it can circumvent having to demonstrate actual injury to domestic suppliers. This being said, Canada would still need to establish that § 1605 of the ARRA impairs the benefit it anticipated receiving when it negotiated the SCM Agreement and, in particular, Article 3.1 (b). Given Canada's voluntary accession to the GPA after the negotiation of the SCM Agreement, it would be difficult to assert that Canada expected to receive national treatment protection in the procurement markets of other Members. It is worth mentioning that in *Japan – Film*, the Panel held that the nullification remedy should be treated as an exceptional concept, and highlighted the fact that it has only been considered eight times by arbitral tribunals.[84] In clarifying, the Panel opined that "the reason for this caution is straightforward... Members negotiate the rules that they agree to follow and only exceptionally would they expect to be challenged for actions not in contravention of those rules."[85]

Countermeasures Permissible Under International Law

Were Canada to succeed in demonstrating a violation of a benefit accruing under GATT Article XXIII, an Arbitral Panel could authorize the suspension of trade concessions enjoyed by the United States.[86] Furthermore, under Article 7.9 of the SCM Agreement, an Appellate Panel could authorize countermeasures, "commensurate with the degree and nature of the adverse effects determined to exist, unless the dispute settlement body ("DSB") decides by consensus to reject the request."[87]

Customary international law similarly entitles Canada to a proportionate response to "Buy America." Under Article 49 of the ILC's Articles on State Responsibility, countermeasures against the United States for injuries incurred by Canadian suppliers are permitted in order to induce the United

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[82] *Id.*

[83] *Id.*

[84] Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, (Mar. 31,1998).

[85] *Id.*

[86] Hertz, *supra* note 80.

[87] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Art. 7.9, 1867 U.N.T.S. 14 (1994), *reprinted in* The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 275 (1999).

States to comply with its obligations under the SCM Agreement (assuming a successful claim could be established).[88] However, countermeasures, such as the enactment of a "Buy Canadian" policy with respect to subnational government procurement, should be fashioned in a manner so as to permit the resumption of United States obligations under the SCM Agreement.[89]

Thus, while technically there was little preventing Canada from enacting a domestic preference criteria in response to § 1605 of the ARRA, the necessity of such a response had to be weighed against (1) the fact that Canada had yet to liberalize subfederal procurement markets under the GPA, and (2) the likelihood of successfully establishing that § 1605 contravenes Articles 1.1 and 3.1(b) of the SCM Agreement.

A General Exemption for Canada

Given the limited and uncertain nature of the aforementioned options Canada could have pursued in an attempt to remedy injuries arising from §1605, pursuing bilateral negotiations became the most realistic alternative for policymakers. At the center of such negotiations was a general exemption for Canada from "Buy America." For the Americans, however, reciprocal access to Canadian procurement markets was the primary objective driving their negotiators.[90]

Aside from the obvious political considerations pervading this course of action, it is worth noting that the President holds the constitutional authority to waive the "Buy America" rules under the ARRA as they apply to Canada. The statutory basis for such an exemption is § 2511 of the Trade Agreements Act of 1979,[91] which permits the President to:

> waive, in whole or in part, with respect to eligible products [and suppliers of such products] from any foreign country . . . the application of any law, procedure, or practice regarding Government procurement that would, if applied . . . result in treatment less favorable than that accorded to United States products and suppliers of such products.[92]

Furthermore, under subsection (b), the President can designate an eligible country for exemption if that country becomes part of NAFTA (which Cana-

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[88] Int'l Law Comm'n, *supra* note 68, art. 49.

[89] *Id.* art. 49.3.

[90] *See generally* Andrew Mayeda, *U.S. Accepts 'Premise' of Buy American Exemption for Canada*, FIN. POST, Oct. 19, 2009, http://www.financialpost.com/accepts+premise+American+exemption+Canada/2120915/story.html.

[91] 19 U.S.C. 13 § 2511 (1979).

[92] *Id.* § 2511 (a).

da is) and will provide "appropriate reciprocal competitive government opportunities to United States products and suppliers of such products."[93]

3. (B) TO WHAT EXTENT DOES THE CANADA-UNITED STATES AGP ADDRESS CANADA'S DIFFICULTIES ARISING FROM § 1605 OF THE ARRA AND PROVIDE A FRAMEWORK FOR MANAGING FUTURE 'BUY AMERICA' PROVISIONS?

On February 16, 2010, Canada and the United States signed an agreement intended to resolve "Buy America" as it applied to Canada, while at the same time provide greater access to procurement markets in both countries. In particular, under Article 3 of the Agreement, Canada addressed its lack of subfederal procurement commitments under the WTO-GPA by extending to the United States access to procurement by provincial and territorial government agencies for goods and service contracts over 355,000 SDRs, and construction services over 5 million SDRs.[94] In exchange, the United States agreed, under Article 4, to allow Canada access to its subfederal GPA commitments. Furthermore, the United States agreed to exempt Canada from the domestic purchasing requirement under § 1605 for seven federal programs receiving funding under the ARRA.[95]

Other noteworthy provisions include Article 6, which sets out a two-year expiration date for the Agreement. In addition, under Article 9, the Parties pledged to enter into discussions meant to deepen, on a reciprocal basis, existing procurement commitments, as well as engage in expedited consultations on any matter related to government procurement. Article 10 further requires the commencement of consultations between the Parties where disputes arise over interpretation of the Agreement.[96] Finally, under article 14, either Party can withdraw from the Agreement upon written notification.

In assessing the merits of the Agreement, a number of points are illustrative. First, while Canadian companies have access to seven federal programs funded under the ARRA, this access is limited. In particular, ARRA funding for the Clean Water and Drinking Water State Revolving Funds, access to which was provided under the Agreement,[97] had already been allocated by the time the Canada-United States AGP was signed in February. Because all states had allocated their entitlements under these revolving funds by the ARRA mandated deadline of February 17, 2010, none of this funding was

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93 *Id.* § 2511 (b) (1) (A-B).
94 U.S.-Canada GPA, *supra* note 6, art. 3.
95 *Id.* art. 7.
96 *Id.* art. 9, 10.
97 GPA, *supra* note 7, United States Annex 3.

covered by the Agreement.[98] Hence, for Canadian suppliers of water and wastewater technologies, the Canada-United States AGP did little to provide access to projects funded under the ARRA.

Within Canada, the Agreement received mixed reactions. Civil society organizations, for example, took issue with the federal government's failure to seriously consult with municipalities and labor organizations during the early stages of the negotiation process.[99] Such criticisms were furthered by suggestions that Canada offered up far too much for only partial access to ARRA funding and a limited number of state government agencies. However, in a Parliamentary Report on the Canada-United States AGP, International Trade Minister Peter Van Loan responded to such censures by citing the fact that procurement practices at the provincial and municipal levels have long been open:

> The municipalities participating through the Federation of Canadian Municipalities and the provinces all indicated that their procurement processes were unrestricted, by and large. Any restrictions they had were reflected in this agreement in the carve-outs under the WTO procurement agreement provisions. As such, to the extent that they had sensitive sectors they wished to protect within procurement, that was done.[100]

According to Minister Van Loan, therefore, Canadian companies gained a partial exemption from the domestic content requirements under the ARRA in exchange for a formal recognition of preexisting Canadian subfederal procurement policies, including exceptions and carveouts.[101]

In addition to the Minister's comments, it is important to recognize that the Canada-United States AGP, however limited, offers a framework for dealing with future domestic content provisions. This mechanism, loosely established under Article 9, is especially important when considering the fact that trade restrictive language continues to surface in proposed congressional legislation. The American Renewable Energy Jobs Act,[102] for example, ref-

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[98] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, US-CANADA TRADE AGREEMENT AND HOW IT AFFECTS BUY AMERICAN REQUIREMENTS UNDER ARRA (2010), *available at* http://water.epa.gov/aboutow/eparecovery/upload/US-Canada_Agreement_and_BA.pdf.

[99] Council of Canadians, *Divergent Views on 'Buy American' deal with US, but trade committee fails to demand prior consultation in future*, June 4, 2010, http://www.canadians.org/tradeblog/?p=866.

[100] STANDING COMM. ON INT'L TRADE, 40TH PARLIAMENT, REPORT ON CANADA-U.S. AGREEMENT ON GOVERNMENT PROCUREMENT (3rd Sess. May 2010), *available at* http://www.buildingtrades.ca/Files/Documents/403_CIIT_Rpt01-e.aspx.

[101] *Id.*

[102] American Renewable Energy Jobs Act, S. 3069, 111th Congress, (as referred to the

erences § 1605 of the ARRA. Furthermore, the Agreement might also be viewed as an opportunity for both Canada and the United States to move toward liberalizing procurement markets not covered by the "deal" that have traditionally been closed. Mass transit, for example, continues to represent a sizeable procurement market in both countries and yet remains unaffected by this, or any other agreement governing Canada-United States procurement.

CONCLUSION

At the center of Canada's most recent trade dispute with the United States was a lack of coverage under both of its major trade agreements. With sub-federal entities largely excluded from NAFTA Chapter 10 and the WTO-GPA, the United States was not prima facie contravening obligations to Canada under either. Less clear, however, is whether § 1605 undermines United States obligations to Canada under the SCM Agreement. Furthermore, questions abound as to whether the recently signed Canada-United States AGP will live up to its potential for integrating procurement markets in both countries. As stepping stone legislation to a more permanent deal, one might also question whether policymakers on either side of the border have spent all of their political currency in securing it. Especially in the United States, there may be little interest among legislators to begin talks that would penetrate long-standing procurement legislation such as the Buy American Act. Furthermore, without a dispute settlement process built into the Canada-United States AGP, the agreement sits atop goodwill enforcement, and any breach of its terms will result in the withdrawal of the affected party, thereby diminishing the accord's durability.

However, should negotiators succeed in striking a more permanent agreement on government procurement, the deal, however incomplete, offers a tremendous opportunity for moving Canada-United States trade relations in the direction of a single integrated North American market. Furthermore, with Canada being so heavily reliant on export markets, the deal signals to European Union negotiators the seriousness of completing the ongoing Canada-European Union free trade talks. Perhaps in this indirect sense, Canada may end up winning much more from the bilateral deal than was originally expected.

Comm. on Banking, Hous., & Urban Affairs, Mar. 3, 2010).