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ARTICLE

PROCURING AMERICAN: CANADA'S NEW SUB-FEDERAL PROCUREMENT  
OBLIGATIONS

Craig Garbe<sup>♦\*</sup>

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*In early 2009 the US government introduced The American Recovery and Reinvestment Act (ARRA), a massive direction of US stimulus spending to kickstart the US economy. The ARRA contained clauses which made some stimulus spending at the sub-federal level conditional on the purchase of US goods and services. While certainly not a novel American response, the restrictive provisions of the ARRA attracted much Canadian attention. This paper examines the current status of Canadian sub-federal procurement law, in light of agreements reached between Canada and the US in response to the ARRA. It argues that the Canadian response to the ARRA is problematic based on the historical and current practice of sub-federal procurement by the Canadian government.*

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<sup>♦</sup> Copyright © 2013 by Craig Garbe

<sup>\*</sup> Former Editor-in-Chief, Osgoode Hall Review of Law & Policy. This article was originally submitted for publication in the November 2010 issue which has since been consolidated with this issue.

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I  
INTRODUCTION

On February 17, 2009, facing an economic crisis of massive proportions, Barack Obama signed the *American Recovery and Reinvestment Act of 2009* (the “ARRA”) into law. The bill, encompassing close to 800 billion dollars in stimulus government spending, was intended to ignite the waning American economy and bring much needed growth to the United States.<sup>1</sup> What it ignited, however, was Canadian sentiment and ire. The ARRA contained several clauses which make stimulus funding conditional on the procurement of US manufactured goods, and these clauses prompted strong objections from Canadian business, media, and government.<sup>2</sup>

The strong Canadian reaction to the provisions of the ARRA extended to all levels of government, prompting meetings of provincial premiers and correspondence from the Canadian Trade Minister to his American counterpart.<sup>3</sup> Eventually, Canada and the United States entered negotiations and, on February 5, 2010, concluded an agreement which promised to alleviate the detrimental Buy American provisions of the ARRA for Canadian businesses, the *Agreement Between The Government of Canada and the Government of the United States of America on Government Procurement* (the “Agreement”)<sup>4</sup>. This paper aims to deconstruct and analyze this agreement.

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<sup>1</sup> Micheal A. Fletcher, “Obama Leaves D.C. to Sign Stimulus Bill” *The Washington Post* (18 February 2009), online: <<http://www.washingtonpost.com/wpdyn/content/article/2009/02/17/AR2009021700221.html>>.

<sup>2</sup> Tonda MacCharles and Les Whittinton, “Obama’s ‘Buy American’ plan blasted” *The Toronto Star* (30 January 2009), online: <<http://www.thestar.com/article/579557>> [MacCharles].

<sup>3</sup> Milos Barutciski and Jesse I. Goldman, *Canadian Government Moves to Counter ‘Buy American’ Protectionism*, (2009) International Trade and Investment Group Update (Bennett Jones LLP), online at: <<http://www.bennettjones.com/Images/Guides/update7464.pdf>> [Barutciski]; Meeting of the Council of the Federation, *Premiers call for new Agreement with the United States*, (Ottawa: 9 June 2009), online: <[http://www.councilofthefederation.ca/pdfs/NewsRelease\\_BuyAmerican.pdf](http://www.councilofthefederation.ca/pdfs/NewsRelease_BuyAmerican.pdf)> [Council June 09].

<sup>4</sup> *Agreement Between The Government of Canada and The Government of the United States of America on Government Procurement*, Canada and United States, 5

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I begin by examining the relevant context of treaties and agreements which already bind the procurement decisions of the various levels of Canadian government. As we will see, sub-federal procurement is conspicuously absent from many of these agreements; this absence calls for an examination of the Canadian policy and platform in relation to such procurement. I also look to the relevant provincial concerns and the business perspective in an attempt to develop an understanding of the implications any agreement on sub-federal procurement will have.

I then turn to examine the recent Buy American controversy, and finally, the text of the Agreement itself. I analyze the reciprocal concessions from the United States and Canada, and, drawing from the perspectives discussed in the first half of the paper, discuss whether or not Canada stands to receive—to borrow the term from the Canadian Foreign Investment Review Agency—a ‘net benefit’ from the Agreement. In the end, my analysis finds that Canada's response was reactionary and undisciplined, especially when contrasted with the historically reserved Canadian position, and that the exemptions realized pale in contrast to the promises given. Furthermore, while the extent of the Canadian promises has yet to be realized, the lion's share of gains to be had from the American concessions are either still restricted from Canadian bidders or already contracted to American companies.

## II

### THE CANADIAN SUB-FEDERAL PROCUREMENT PROCESS

#### i) Sub-Federal Procurement in Canadian FIPAs, NAFTA, and the WTO GPA

Prior to entering the Agreement, Canada's obligations to foreign investors relating to government procurement were already numerous. In many instances, however, exceptions to generally open

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February 2010 (entered into force 16 February 2010), online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ENG-Canada-USA%20Government%20Procurement%20%28clean%2011%20Feb%202010%20printed%29.pdf>> [*Agreement*].

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procurement policies favoured and continue to favour Canadian businesses and production. Understanding the rationale behind government decisions to exclude certain sectors and procurement agents is fundamental to understanding what is at stake in any agreement which overturns those exclusions. In this section I review Canadian policy and look at the current concerns which animate the decision to enter the Agreement.

#### ii) Federal Planning, Policies and Prognostications

Canadian federal policy on FDI has been the subject of contentious debate for decades. It arose as a subject of discussion primarily following the conclusion of the Second World War, when trade integration and multinational private firms were seen as part of the solution to global military catastrophe. Again, a deep evaluation of Canadian FDI policy is beyond the scope of this paper, but several developments that have continued to influence current policy relevant to government procurement warrant consideration. One development was the purposeful study of FDI, which came notably in the form of two studies, conducted in the late 1960s and early 1970s: The Watkins Report and the Gray Report.<sup>5</sup> The Gray Report, the later of the two, highlighted a number of potential benefits that FDI could provide to the recipient nation—skills impartation to Canadians, heightened competitiveness in industry, and new export markets—but tempered these advantages with a careful analysis of the downsides of FDI. Among these were the dangers posed by increased vertical integration or inputs tied to a foreign economy; truncation of key value-added elements of the business chain; worrisome cultural practices or laws which can become *de facto* imported into Canada; and the dangers inherent in sharing technology with nations who may pose a political threat.<sup>6</sup>

The follow up to the Gray Report affirms the caution regarding FDI that characterized Canadian decision makers. Following the publication of the Gray Report, the *Foreign Investment Review Act* (the “FIRA”) was enacted which, among other things,

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<sup>5</sup> A. Edward Safarian, *Foreign Direct Investment: A Survey of Canadian Research*, (Quebec: The Institute for Research on Public Policy, 1985) at 39.

<sup>6</sup> The Honourable Herb Gray, *Foreign Direct Investment in Canada*, (Ottawa, Information Canada, 1972) at 41-45 [Gray].

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created an agency to review foreign mergers and takeovers of Canadian corporations beyond certain threshold limits. This agency, still active today under the *Investment Canada Act*, recently used its power to block foreign acquisition for the first time, prohibiting the American takeover of a Canadian space-focused research and development company.<sup>7</sup>

This historical context indicates that Canada's approach to FDI has been strategic and selective. The federal government approached FDI from a cautious perspective, cognizant of the dangers that a high concentration of foreign ownership could impose. Government procurement, however, is best regarded as a special subset of general FDI. Procurement does not generally entail continued foreign ownership, but rather comprises the contractual agreements for the government's acquisition of goods or provision of services. Granted, the recent boom in public-private partnerships ("P3s") is a procurement phenomenon, but since a discussion of P3s would overwhelm this paper, I focus generally on procurement that fits the above description.<sup>8</sup> As I will show, federal policy towards government procurement has remained strategic and selective, albeit tempered by Canada's acceptance of increasingly restrictive free-trade agreements like NAFTA.

First, the policies of the Treasury Board of Canada Secretariat ("TBCS"), responsible for implementing Cabinet-approved programs and securing the resources necessary to implement executive decisions are indicative of how Canada manages its procurement needs. The TBCS, acting pursuant to the *Financial Administration Act*, has the authority to determine contracting policy within Canada and, as such, has influential control over the scope and management of federal procurement.<sup>9</sup> The TBCS's Contracting Policy, in particular, lays out specific policy guidelines for all government purchasing and contracting. The Board's stated objective is to "acquire goods and services and to carry out construction in a manner that enhances

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<sup>7</sup> See Denis Gascon, *Canada Uses Investment Canada Act to Block Acquisition of MDA by Alliant Techsystems*, (2008) Competition/Antitrust Information (Ogilvy Renault LLP), online: <<http://www.ogilvyrenault.com/files/510-e.PDF>>.

<sup>8</sup> For an overview of recent P3 developments within Canada, see Mario Iacobacci, "Dispelling the Myths: A Pan-Canadian Assessment of Public-Private Partnerships for Infrastructure Investments", *Conference Board of Canada* (2010).

<sup>9</sup> *Financial Administration Act*, R.S.C. 1985, c. F-11 s.7.

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access, competition and fairness and results in best value or, if appropriate, the optimal balance of overall benefits to the Crown and the Canadian people.”<sup>10</sup> The policy’s mention of “fairness” and “competition” is, in part, a response to the sponsorship scandal that implicated the Canadian Liberal government in 2004.<sup>11</sup> However, the final part of the stated objective contemplates an assessment of overall Canadian benefit upon consideration of decisions. This type of assessment tracks, to an extent, the wording of the *Investment Canada Act*. This act makes decisions about foreign ownership based on an assessment of “net benefit” to Canada. It appears that there is a connection between policy-based evaluations of FDI in general and procurement decisions specifically.<sup>12</sup>

Further support for the position that the Canadian government manages federal procurement strategically is found in the Contracting Policy Notice of 2007 (published by the TBCS). This Notice states that the Contracting Policy objective is purposefully broad in order to “[permit the] government to use procurement to complement other government priorities”.<sup>13</sup> These “other government priorities” include “long-term industrial and regional development and other appropriate national objectives, including aboriginal economic development.”<sup>14</sup>

Aboriginal economic development is an area of special concern to Canadian federal officials, and is an interesting example of how the Canadian government has managed tensions between international obligations and domestic policy. The Procurement Strategy for Aboriginal Businesses (“PSAB”) is an initiative undertaken by the federal government in an effort to foster aboriginal

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<sup>10</sup> Treasury Board of Canada Secretariat, *Contracting Policy*, online: <<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494>> at para 1 [*Contracting Policy*].

<sup>11</sup> For a detailed discussion of the scandal, see the summary of the report “Who is Responsible”, drafted after the extensive hearings of the Gomery Commission. The report is available from Publishing and Depository Services, Public Works and Government Services of Canada, online: <[http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-03-06/www.gomery.ca/en/phase1report/summary/es\\_full\\_v01.pdf](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-03-06/www.gomery.ca/en/phase1report/summary/es_full_v01.pdf)>.

<sup>12</sup> *Investment Canada Act*, R.S.C., 1985, (1st Supp.) c. 28, s.16(1).

<sup>13</sup> Treasury Board of Canada Secretariat, *Contracting Policy Notice 2007-04 - Non-Competitive Contracting*, online: <[http://www.tbs-sct.gc.ca/pubs\\_pol/dcgpubs/contpolnotices/2007/0920-eng.asp](http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/contpolnotices/2007/0920-eng.asp)> [*Policy Notice Sept 2007*].

<sup>14</sup> *Contracting Policy*, *supra* note 17, at para 2.

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development and support socio-economic growth in First Nations communities. It accomplishes its mandate by restricting bidding on government contracts for goods and services which “primarily benefit Aboriginal people” with a value of over \$5000 to Aboriginal businesses through a set-aside process.<sup>15</sup> The PSAB is able to restrict federal procurement contracts in this manner because it operates under an exclusion clause in NAFTA that allows set-asides for small and minority businesses.<sup>16</sup>

This small example illustrates how the Canadian federal government, while committing itself to a high level of foreign competition through the agreements discussed in the first section of this paper, attempts to maintain a level of discretion and control over its procurement decisions. Exceptions (such as the PSAB) are critically important for Canada to maintain control over the way its procurement decisions affect uniquely Canadian domestic issues. But what about uniquely Canadian issues which are not exempt from the provisions of NAFTA and the GPA? Concerns over troubled Canadian industries beg a strategic approach beyond small NAFTA exemptions and, until recently, the absence of sub-federal procurement within international obligations has given Canada a mechanism by which to maintain strategic control. It is possible to view the government as being in a contest with its own international obligations. Federal goals such as “support[ing] Canadian industries in difficulty...and protect[ing] the families and communities who depend on those jobs” may be frustrated by agreements which mandate foreign competition.<sup>17</sup> The government’s own Policy Notice admits that “Canada’s Trade Agreements remove some flexibility on how government may use the procurement system for other needs.”<sup>18</sup> Examined against this background, the incentive of the federal government to push for provincial procurement commitments (outside of negotiations mandated by NAFTA and the GPA<sup>19</sup>) seems

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<sup>15</sup> Minister of Indian Affairs and Northern Development, Canada, *Procurement Strategy for Aboriginal Business*, Performance Report 2004 (Ottawa: Minister of Public Works and Government Services Canada, 2006) [PSAB].

<sup>16</sup> NAFTA, *supra* note 8 at Annex 1001.2b(d).

<sup>17</sup> Canada, Governor General, *Speech from the Throne*, 40th Parl. 2nd sess., (26 January 2009).

<sup>18</sup> *Policy Notice Sept 2007*, *supra* note 20.

<sup>19</sup> GPA, *supra* note 9 at Article XXIV:7(b); NAFTA, *supra* note 8 at Article 1024.

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limited, and may explain why sub-federal obligations were absent for so long.

Finally, federal pressure on sub-federal procurement may have been limited because of negotiation tactics during WTO meetings on the GPA. In a response to questions about sub-federal procurement from a WTO committee, Canadian delegates responded that:

Canada is prepared to table an offer at the sub-central level if, and only if, members are prepared: (1) to include sectors of priority 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 this committee.<sup>20</sup>

Collins argues that, during these negotiations, Canada was basically using provincial procurement as a bargaining chip to try to extract beneficial treatment for Canadian industries with other WTO member states (a strategy that was unsuccessful in the WTO negotiations).<sup>21</sup> The Agreement, then, can be viewed as a continuation of this strategy: an exchange of Canadian provincial procurement for reciprocal access in the American market. But is the Agreement as beneficial for Canada as WTO concessions would have been, had the Canadian delegation been successful in negotiating them in the 1990s? I will return to this question in the latter half of this paper. Before doing so, I examine provincial motivation for retaining control over their respective procurement decisions.

### iii) Provincial Concerns & Hesitations

Provincial motivations, combined with the division of powers in Canadian federalism, may have played a role in keeping sub-federal procurement obligations out of the GPA and NAFTA. While the federal government under international law has the sole right to

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<sup>20</sup> EC, *Review of National Implementing Legislation – Canada*, World Trade Organization Doc. GPA/51 (18 June 2001).

<sup>21</sup> *Collins, supra* note 11 at 16.

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negotiate treaties, Canadian domestic law requires international agreements that expend public funds or change domestic law to be ratified in Canada before they have force or effect.<sup>22</sup> Yet, as per the *Constitution Act 1867*, the federal government has no power to ratify legislation for issues over which the provinces have jurisdiction. These issues include matters such as “local works and undertakings”, which Section 92 deems to be under provincial authority.<sup>23</sup> Thus, any attempt to mandate provincial acceptance of international procurement obligations is subject to provincial approval. Note that this differs from the procedure in the United States, where the federal government has the power to compel state performance with federally implemented international treaty obligations.<sup>24</sup> In the US, any failure to compel state compliance is generally due to political relations between federal and state governments, rather than constitutional issues.<sup>25</sup>

So have the provinces been eager to give their approval of international procurement obligations? It is my position that, much like the federal government, the provinces have historically seen more to be gained from maintaining autonomous control and flexibility in their procurement policy rather than increased trade restrictions. There are a number of reasons for this.

The primary reason for a provincial protectionist attitude is financial gain. Cooper discusses this position from the American perspective, noting that if states lose their ability to discriminate in favour of local businesses, overall national gains may be realized, but at the expense of state prosperity.<sup>26</sup> The same can be said in the Canadian context. A procurement contract for rail infrastructure in Manitoba, for example, might have the effect of increasing productivity in neighbouring Ontario; however, if the lowest bidder is an Ohio corporation, then the Manitoba construction industry may lose out. In Canada, the provinces are already somewhat committed to their provincial neighbours by the Agreement on Internal Trade

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<sup>22</sup> *Francis v. The Queen*, [1956] SCR 618 at 625.

<sup>23</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5. s. 92.

<sup>24</sup> U.S. Const. art. I, § 8, cl.3.

<sup>25</sup> K Cooper, “To Compel or Encourage: Seeking Compliance With International Trade Agreements at the State Level” (1993) 2 Minn. J. Global Trade 143 at 144 [*Cooper*].

<sup>26</sup> *Ibid*, at 166.

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(“AIT”). This agreement, signed by First Ministers in 1994, prevents provincial trade barriers in key areas, and works to reduce existing trade barriers.<sup>27</sup> For the provinces, already limited in their procurement decisions by the AIT, further liberalization at the hands of international obligations may be regarded as severely limiting and, potentially, economically harmful. In addition, provincial premiers will undoubtedly consider the political ramifications of procurement liberalization. Since the premiers have already lost the ability to discriminate between local and Canadian businesses, losing that power with respect to foreign businesses could cost them significant voter support. Where provinces do not have domestic industry of a size that can compete in the international market, it will be difficult to realize a net benefit.

Another possible reason the provinces did not take proactive steps to include themselves in the GPA is the difficulty that comes with reviewing disputes over public procurement or negotiating a position in the first place. Just as implementation and negotiation costs caused Australia and New Zealand to shy away from the GPA, so these costs could have served as a barrier for provincial entities.<sup>28</sup> Especially for the smaller Eastern provinces with fewer government support staff, the looming spectre of compliance with broad international obligations can be daunting.

Finally, provincial hesitation may have been due, in part, to regionalism and reluctance to bargain with the federal government. Canadian federal-provincial relations are rife with regional tensions, and in recent decades, phenomenons like ‘western alienation’ have complicated matters of provincial-federal comity.<sup>29</sup> Further, public perception of procurement markets may lean more towards protectionism than liberalization. Indeed, unlike international tariffs, procurement spending could be viewed more as an internal issue where government patronage should play a stronger role.<sup>30</sup>

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<sup>27</sup> *Agreement on Internal Trade Implementation Act*, S.C. 1996, c.17.

<sup>28</sup> M Dischendorfer, “The Existence and Development of Multilateral Rules on Government Procurement Under the Framework of the WTO” (2000) 9 *Public Procurement Law Review* 1 at 28.

<sup>29</sup> *Collins*, *supra* note 11 at 20.

<sup>30</sup> Christopher McCrudden, “International economic law and the pursuit of human rights: A framework for discussion of the legality of ‘selective purchasing’ laws under the WTO Government procurement agreement” (1999) 2 *J. Int’l Econ. L.* 3 at 11-12.

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There are reasons, however, for provincial acceptance of binding procurement obligations. “Market access” is foremost among these. With a large resource pool and relatively small population, Canada has always depended on market access for its exports in order to remain competitive in its industry and service sectors. This is especially true in the context of Canada’s relation to the United States (Canada’s largest trading partner in both imports and exports). It is well within the power of the provinces to cripple their domestic industry by engaging in overly protectionist policies with respect to government spending, if beneficial reciprocal deals are available with trading partners. Failure to accept reciprocal procurement agreements, however, is not necessarily protectionist on its face, but could simply mean that the available agreements are not beneficial. Any deal entered, therefore, must stand up to scrutiny on an economic perspective as well as a political one.

There is also an argument to be made that market efficiency is best served by placing domestic firms in more direct competition with foreign counterparts. By favouring domestic business through sheltered procurement processes, provincial governments are tacitly providing a form of subsidy which discourages technological innovation and efficiency gains. Again, this argument must be reconciled with the need to shelter and protect fledgling domestic industries that may struggle in the face of larger foreign counterparts wielding economies of scale.

Collins argues that opening up provincial procurement would also allow foreign firms with Canadian outward FDI to do more business with Canadian provinces, which would in turn further benefit Canadian FDI investors.<sup>31</sup> This argument presupposes that Canadian provinces do not or cannot currently favour firms with Canadian FDI, which is not necessarily the case. It is well within the current ability of the provinces to accept procurement bids from foreign competitors. Assuming that the provinces could politically and economically justify the decision to accept a foreign bid (based on Canadian FDI investment or ownership), nothing stands in their way. There is no reason to assume that provincial inclusion in the GPA would foster greater provincial support for Canadian FDI in foreign corporations.

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<sup>31</sup> *Collins, supra* note 11 at 20.

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Canadian provinces may also want to agree to open their procurement purchasing to foreign competition in a gesture of good-faith to the international community. The international trend seems to be moving towards increased sub-federal procurement comity, as evidenced by China's recent commitment of sub-central government entities in its WTO membership negotiations.<sup>32</sup> Like the Chinese, Canada could at least commit partial sub-federal coverage, and continue to make concessions as the commitments of other nations increase, rather than completely excluding sub-federal procurement. But this strategy may be too naïve for Canada. China's inclusion of sub-central entities in the WTO was mainly an attempt to access the American procurement markets which have been made available. Canada should ensure that it acts cautiously and with appropriate strategy towards these two global entities, rather than quickly following suit because of an apparent emerging trend.

Evaluating the various reasons for and against procurement liberalization, it is not difficult to see why the provinces have been reluctant to commit themselves internationally. While it may be true, as Collins argues, that GPA commitments from the provinces could have economic advantages, Canada and its provinces need to carefully regulate their commitments as they have done in the past with FDI. Just as Chang and Green found that developed western nations benefited from strategic control of FDI in the past, and that a failure to be strategic now could cripple developing nations,<sup>33</sup> so should Canada continue to be selective in its procurement commitments.

#### iv) The Business Perspective, the ARRA, and the Buy American Hype

To this point, I have shown the federal and provincial governments' propensity for selective engagement with FDI—including foreign bids on government procurement—and advocated for a continuation of that policy. I now turn to examine the

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<sup>32</sup> T Xinchao, "Chinese Procurement Law: Current Legal Framework and a Transition to the WTO GPA" (2003) 17 *Temple Int'l & Comp. L.J.* 139 at 167.

<sup>33</sup> Ha Joon Chang and Duncan Green, "The Northern WTO Agenda on Investment: Do as we Say, Not as we Did" (2003) Research report for the South Centre, Intergovernmental Policy Think Tank of Developing Countries, online: <[http://www.southcentre.org/index.php?option=com\\_docman&task=doc\\_download&gid=238&Itemid=&lang=en](http://www.southcentre.org/index.php?option=com_docman&task=doc_download&gid=238&Itemid=&lang=en)> [*Chang*].

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controversy over the Buy American provisions of the ARRA. My aim is to distil the effects that these provisions might have had if the Agreement had not been. I look first to the scope of American and Canadian procurement markets.

It is difficult to estimate just how much money Canadian businesses stand to make or lose based on liberalization of government procurement. Prior to entering the Agreement, DFAIT commissioned two surveys of businesses that sold goods or services to foreign governments in an attempt to elicit concrete figures on business support for reciprocal government procurement access. The results of these surveys provide useful insight into DFAIT's motivation to conclude the Agreement, and also information on how much business is at stake in the government procurement arena. The first survey, concluded in 2001, found, not surprisingly, that the US was the most important procurement market for Canadian businesses. It also found that 65% of Canadian businesses surveyed "would be willing to give up preferred access to Canadian provincial and local government markets on an equal basis with U.S. firms".<sup>34</sup> The survey did not, however, indicate that a reciprocal trade agreement would necessarily be the best solution to difficulties in securing government procurement business. In fact, the top selected barriers to government procurement contracts include "lack of timely information on opportunities" and "failure to have opportunities announced."<sup>35</sup>

A second DFAIT survey, conducted in 2008, focused on government procurement in eight foreign markets other than the US: Brazil, Russia, India, China, UK, France, Germany and Japan. This survey found that 89% of businesses who were not already selling to foreign governments had at least some interest in doing so, and that 72% of businesses surveyed were "not opposed" to opening all levels of Canadian procurement to foreign companies in exchange for reciprocal access.<sup>36</sup> These surveys indicate that there was interest in

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<sup>34</sup> PriceWaterHouseCoopers, "Study of Market Priorities for Canadian Businesses Selling to Foreign Governments: Final Report" Prepared for the Department of Foreign Affairs and International Trade Canada (18 April, 2001) at ii.

<sup>35</sup> *Ibid.*

<sup>36</sup> Phoenix Strategic Perspectives Inc., "Final Report: Business Survey on Government Procurement Market Access Priorities" Prepared for the Department of Foreign Affairs and International Trade Canada (January 2008) at ii and 8.

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foreign procurement markets, but, especially concerning the US, the businesses do not indicate the extent to which a reciprocal agreement would solve their problems. The surveys are far from conclusive evidence that business opinion favoured procurement market liberalization prior to the controversy over the ARRA.

The ARRA controversy, when it came, was sudden and forceful. The ARRA, regarded as a critical tool in the attempt to slow the American recession, was welcomed in the US, but its reception in Canada was not so hospitable. When the bill was first introduced, some industry leaders pegged the ARRA as catastrophic and demanded Canadian political intervention.<sup>37</sup> Michael Wilson, Canadian ambassador to the United States, wrote that the bill could “create a global economic calamity akin to the Great Depression.”<sup>38</sup> The uproar quickly spread to provincial politicians. By June 9, 2009, the premiers were meeting to denounce the provisions of the ARRA, arguing that measures needed to be taken immediately:

Premiers believe the time has come for all orders of Government in Canada and the U.S. to engage in a renewed era of collaboration to ensure open markets between the two countries. Therefore, they support open and inclusive discussion of all means, including the negotiation of a broad, reciprocal procurement liberalization agreement, covering federal, provincial/territorial and state government measures, in order to secure mutually-beneficial market access and to exclude Canada from the negative effects of measures such as *Buy American* provisions<sup>39</sup>

Clearly this was a strong reaction, but just how disastrous were the implications of the ARRA?

The primary objection to the ARRA was Section 1605, which states that “None 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

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<sup>37</sup> See the comments of Canadian Manufacturers and Exporters spokesperson Jean-Michel Laurin, *MacCharles*, *supra* note 2.

<sup>38</sup> Sheldon Alberts, “U.S. protectionism could set off ‘downward spiral,’ Canada warns”, *The National Post* (2 February 2009) online: <<http://www.nationalpost.com/story.html?id=1244646>>.

<sup>39</sup> *Council June 09*, *supra* note 3.

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project are produced in the United States” (emphasis added).<sup>40</sup> This provision made funding contingent on purchasing American value-added goods, with the following exceptions: if doing so would be contrary to the public interest; if the needed goods weren’t available in the needed quantity; or if costs would increase by more than 25% on the project in question. In response to criticism outside of the US, the US Senate also added a clause to Section 1605 which states that the section should be applied in a manner consistent with US obligations under international agreements.<sup>41</sup> Yet this last provision would have had little effect. It may have served to alleviate public tension, but as the US does not have sub-federal obligations to Canada under international agreements, the ramifications of this clause are negligible. Under NAFTA there are no covered sub-federal entities, and under the GPA the US’ Annex 2 specifically exempted Canada (before the conclusion of the Agreement).<sup>42</sup>

The other provision that attracted widespread criticism was Section 604, which applied American production requirements to a broad range of goods purchased by the Department of Homeland Security (“DHS”). This provision was of less concern, given that the DHS is covered by federal procurement obligations to Canada under NAFTA; however, certain agencies within the DHS, like the US Coast Guard, are not explicitly mentioned in NAFTA, other than within national security exemptions.<sup>43</sup> This left agencies like the Coast Guard with a confusing array of obligations to meet, and could have resulted in Canadian suppliers losing contracts as a result of actual or perceived effects of the Section 604. Perceived effects also may have affected Canadian suppliers under Section 1605. According to an update released by Canadian law firm Bennett Jones LLP, there was evidence to suggest that US distributors, eager to stay on the right side of the new law and maintain their contingent funding, chose not to stock

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<sup>40</sup> *American Recovery and Reinvestment Act of 2009*, § 1605(a) (2009).

<sup>41</sup> “US Senate eases ‘trade war’ bill” *BBC News* (5 February 2009), online: BBC News <<http://news.bbc.co.uk/2/hi/business/7871219.stm>>.

<sup>42</sup> As part of the Agreement, the US removed the Canadian exemption from its Annex 2 text. For more detail see the WTO Commitments section of this paper below, explaining how US and Canadian obligations have permanently changed as a result of the Agreement.

<sup>43</sup> *NAFTA*, *supra* note 8, at Annex 1001.1a-1 (US list of Federal Entities).

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Canadian goods in order to avoid confusion when supplying state or municipally funded projects.<sup>44</sup>

The Canadian discomfort towards the ARRA appears even more justified when considered in light of the NAFTA-based dispute *ADF Group Inc v. USA*. At issue in *ADF* was Section 102.05 of a construction contract between a US purchaser and Canadian supplier, which stated that “all iron and steel products (including miscellaneous steel items such as fasteners, nuts, bolts and washers) incorporated for use on this project shall be produced in the United States of America; unless the use of any such items will increase the cost of the overall project by more than 25%” (emphasis added).<sup>45</sup> The tribunal also defined the production process at issue in much the same way as the ARRA, including in ‘production’ any process of altering or transforming raw material into an item or product which differs from the original. The tribunal in *ADF* ultimately found that the investor’s NAFTA claim was not made out because they had not adequately shown that the cost of the project would increase or that alternate products were not available (a troubling precedent for Canadians hoping to make use of the Section 1605 exceptions).

So, with restrictive legislative provisions and exceptions interpreted in a discomfoting fashion, were Canadians right to fear the ARRA? A further look at the economic context suggests that perhaps they were not.

One particular Canadian concern was the \$61 billion dollars earmarked for transportation projects within the ARRA. As the third largest category of allocated funds, next to the Medicaid and Health-Labor-Education categories, transportation funding rightly attracted the attention of competitive Canadian steel and iron manufacturers.<sup>46</sup> This concern, however, was misplaced. It failed to consider the provisions of the *Surface Transportation Assistance Act* (“STAA”), on the books since 1982, which incorporates restrictive Buy-American provisions originally found in the *Buy American Act* of 1933. In fact, the text Section 1605 of the ARRA mirrors almost exactly the provisions of the STAA, which also mandates a preference for US

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<sup>44</sup> *Barutciski, supra* note 3.

<sup>45</sup> *AGF Group Inc. v. USA* (2003) 18 ICSID Rev. 195 at para 58.

<sup>46</sup> Karin Yourish, “A Breakdown of the Final Bill” *The Washington Post*, online: <[http://www.canadainternational.gc.ca/sell2usgov-vendreaugouvusa/assets/pdfs/sell2usgov/breakdown\\_final\\_bill\\_021409.pdf](http://www.canadainternational.gc.ca/sell2usgov-vendreaugouvusa/assets/pdfs/sell2usgov/breakdown_final_bill_021409.pdf)>.

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steel, iron, or goods for use in federally funded mass-transit projects.<sup>47</sup> As a result, Canadian investment in this sector of US procurement is already low, and, even if amended or rescinded, Section 1605 of the ARRA isn't likely to change that.

Outside of the transportation sector, the effect of Section 1605 may not have been large in scope either. Prior to the ARRA, US sub-federal governments and agencies were already free to impose restrictions on Canadian businesses; indeed, many were already in the practice of doing so. According to DFAIT, US procurement agencies regularly required more favourable pricing by up to 15% from Canadian suppliers.<sup>48</sup> As a result, Canadian companies doing business at the sub-federal level were well accustomed to restrictive pricing tactics and used competitive tactics to work around such practices. Since the ARRA would only mandate another 10% price reduction from American suppliers before a Canadian supplier could be considered, the effects may not have been as severe as perceived.

Finally, the application of the Section 1605 exceptions may not have been as restrictive as contemplated by the *ADF* precedent. The exception for "unavailable articles" is currently recognized by the US government to apply to a large list of items, including common metals and materials like nickel and rubber.<sup>49</sup> Small exceptions even exist for highly contested Canadian steel products in certain infrastructure products. The Environmental Protection Agency ("EPA"), for example, has granted a nationwide *de minimis* exemption to Canadian steel so long as it comprises less than 5% of the total project.<sup>50</sup> The EPA also secured a 'public interest' exemption from Section 1605 for Clean Drinking Water projects which were

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<sup>47</sup> *Surface Transportation Assistance Act*, 49 U.S.C. § 5323j.

<sup>48</sup> Department of Foreign Affairs and International Trade, *Buy American Primer*, online: <[http://www.canadainternational.gc.ca/sell2usgov-vendreaugouvusa/assets/pdfs/sell2usgov/BAAPrimer\\_eng.pdf](http://www.canadainternational.gc.ca/sell2usgov-vendreaugouvusa/assets/pdfs/sell2usgov/BAAPrimer_eng.pdf)>.

<sup>49</sup> See the current updated list of unavailable articles online: <[https://www.acquisition.gov/far/current/html/Subpart%2025\\_1.html#wp1118883](https://www.acquisition.gov/far/current/html/Subpart%2025_1.html#wp1118883)>.

<sup>50</sup> Micheal H. Shapiro, Acting Assistant Administrator for Water: Environmental Protection Agency, "Notice of nationwide waiver of Section 1605 (Buy American Requirement) of American Recovery and Reinvestment Act of 2009 (ARRA) for de minimis incidental components of projects financed through the Clean or Drinking Water State Revolving Funds using assistance provided under ARRA" (22 May 2009).

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negotiated in the 4 months before the enactment of the ARRA.<sup>51</sup> While these exceptions are far from all-encompassing, they point to the reasonableness of US agencies in their procurement dealings, and indicate that, were such concessions not obviated by the Agreement, more concessions may have been forthcoming in the future.

Nevertheless, the objections to the ARRA continued to come from many sectors in Canada, placing increasing pressure on Canadian politicians to respond.

### III ANALYZING THE AGREEMENT

On February 5, 2010, Canadian Minister of International Trade Peter Van Loan announced that the Canadian and American governments had concluded an agreement that promised Canadian companies the concessions they had been seeking: exemption from Section 1605 of the ARRA. Beyond this exemption, the deal also gave Canadian companies access to the sub-federal American entities in the US GPA Annex and fast-tracked similar future negotiations, “should similar Buy American provisions be applied to future funding programs”—a situation which sounds much more like a ‘when’ than an ‘if’.<sup>52</sup> Whether or not this agreement provides a net benefit to Canada, and is justified given the context in which it was created, is the subject of the remainder of this paper.

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<sup>51</sup> Micheal H. Shapiro, Acting Assistant Administrator for Water: Environmental Protection Agency, “Notice of nationwide waiver of Section 1605 (Buy American Requirement) of American Recovery and Reinvestment Act of 2009 (ARRA) for projects that solicited bids on or after October 1, 2008 and prior to February 17, 2009 that are financed through the Clean or Drinking Water State Revolving Funds using assistance provided under ARRA” (22 May 2009).

<sup>52</sup> Department of Foreign Affairs and International Trade, News Release, 56 “Canada and United States reach agreement on Buy American” (5 February 2010), online: <[http://www.international.gc.ca/media\\_commerce/comm/news-communicues/2010/056.aspx](http://www.international.gc.ca/media_commerce/comm/news-communicues/2010/056.aspx)>.

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i) WTO GPA Commitments

At the outset, it is important to mention that the GPA has been undergoing a series of revisions intended to: make it easier to navigate; account for electronic bidding and procurement tools; and update the review procedures for arbitration processes.<sup>53</sup> As a result, the Agreement between Canada and the US was reached pursuant to the “*Revised Text of the Agreement on Government Procurement (Articles I-XXI) as at 13 November 2007* (WTO Document negs 268 (19 November 2007)).”<sup>54</sup> This revised GPA text is, unfortunately, not available to the public at this time. As a result, I evaluate the Agreement’s changes by reference to the “Revision of the Agreement on Government Procurement as at 8 December 2006”, the most recent provisionally agreed upon text of the GPA.<sup>55</sup> Currently there are mixed reviews of the Revised GPA. Arie Reich, in a detailed comparison of the new text, found it to be a slight improvement over the 1994 GPA, but with serious flaws in the new review and arbitration procedures. Other scholars have given it a more favourable review.<sup>56</sup> Suffice to say, for the purposes of this paper, that both Canada and the US are working within the confines of the Revised GPA, or at least a slightly modified version of the Revised GPA.

i. (a) American Commitments

Article IV of the Agreement outlines the changes made by the American government to its commitments under the GPA. Prior to

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<sup>53</sup> World Trade Organization, “The re-negotiation of the Agreement on Government Procurement (GPA)” online:

<[http://www.wto.org/english/tratop\\_e/gproc\\_e/negotiations\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm)>.

<sup>54</sup> Agreement, at Article II.

<sup>55</sup> Revision of the Agreement on Government Procurement as at 8 December 2006, WTO Document GPA/W/297, (11 December 2006). The full text of the RGPA is available from the WTO website, online: <

<http://docsonline.wto.org/imrd/directdoc.asp?DDFDdocuments/t/PLURI/GPA/W297.doc>>.

<sup>56</sup> Arie Reich, “The New Text of the Agreement on Government Procurement: An Analysis and Assessment” (2009) J. Int’l Econ. L. 989 at pg 1021.

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the conclusion of the Agreement, Note 5 of the General Notes to the US Annexes read:

For goods and services (including construction) of the following countries and suppliers of such goods and services, this Agreement does not apply to procurement by the entities listed in Annexes 2 and 3 or the waiver described in Annex 3:

Canada

The United States is prepared to amend this note at such time as coverage with respect to these annexes can be resolved with a Party listed above.<sup>57</sup>

Article IV of the Agreement requires the US to “delete the reference to Canada with respect to Annex 2”, thus allowing Canada access to all of the sub-federal US entities who procure in accordance with the GPA.<sup>58</sup> While American sub-federal inclusion in the GPA was initially meagre, as a result of federal prompting the US has included a significant number of sub-federal entities in its Annex 2 since as early as 2002. Currently, 37 states are at least partially represented. Generally, the states who have accepted the GPA list their central procurement agency (by its respective name) or the blanket “executive branch agencies” within Annex 2, ensuring that the GPA provisions will apply to most procurement decisions.

The 13 states that remain absent, however, mark a substantial part of the American population. Ohio, Georgia, and North Carolina, for example, three of the top ten most populated states in America, are absent from Annex 2. Annex 2 also includes a number of notable specific exceptions. Procurement of construction-grade steel, motor vehicles, and coal is exempted from the following states: Delaware, Florida, Illinois, Iowa, Maine, Maryland, Michigan, New York, New Hampshire, Oklahoma, Pennsylvania, and Wyoming. In addition, procurement for all of the 37 listed states is exempted from the GPA if the procurement is by way of federally originating funds intended for mass transit or highway projects.<sup>59</sup>

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<sup>57</sup> *GPA*, *supra* note 9 at USA Annex General Notes, Note 5.

<sup>58</sup> *Agreement*, *supra* note 4 at Article IV.

<sup>59</sup> *GPA*, *supra* note 9 at USA Annex 2.

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The US Annex 2 threshold for services and supplies are also among the highest of the WTO parties to the GPA. Much like under NAFTA, the provisions of the GPA apply only to selected entities, and only if the total cost of the procurement in question exceeds a certain threshold. The GPA uses generic threshold figures called Special Drawing Rights (“SDR”) throughout its provision, allowing for revised dollar figures to be submitted by the parties annually instead of requiring a full revised text each year. Currently, one SDR is equal to roughly 1.7 Canadian Dollars, and thus an SDR of 355,000 would equal approximately \$604,500 Canadian.<sup>60</sup> The American Annex 2 threshold is 355,000SDR for supplies and services, and 5 million SDR for construction projects. While the construction threshold is standard, the supplies and services threshold is higher than most GPA signatories by 155,000SDR.<sup>61</sup>

i. (b) Canadian Commitments

Because it did not previously have any entities listed in its Annex 2, Canada's commitment regarding the GPA is much longer than that of the US. Article III of the Agreement commits Canada to submitting a package of revised Annexes (Annexes 2, 4, 5, and General Notes) which mirror Appendix A of the Agreement to the WTO. Currently, these revised Annexes will benefit only the US, as a result of a restrictive note inserted into Canada's new General Notes, although the notes make it clear that Canada is willing to negotiate mutually acceptable agreements with the other WTO parties.<sup>62</sup>

The new Canadian Annex 2 covers all of the provinces and territories (except Nunavut), and applies the provisions of the GPA to almost all of the government departments within those provinces and territories. Like the US, however, there are some exceptions. Alberta and BC exempt the Legislative Assembly from Annex 2, which would

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<sup>60</sup> *The thresholds in appendix I of the agreement as expressed in national currencies for 2010-2011*, WTO Doc GPA/W/309/Add.2 (21 December 2009).

<sup>61</sup> The relative thresholds of each GPA signatory are listed on the WTO website, online: <[http://www.wto.org/english/tratop\\_e/gproc\\_e/thresh\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/thresh_e.htm)>.

<sup>62</sup> *Agreement*, *supra* note 4 at Appendix A, General Note 6, which reads: “With the exception of the United States of America, the offer by Canada with respect to goods and services (including construction) in Annex 2 is subject to negotiation of mutually acceptable commitments (including thresholds) with other Parties.”

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seemingly exempt any procurement ordered directly by provincial legislation. Ontario exempts all “urban rail and transport equipment, systems, components...as well as all project-related materials”. Québec exempts any procurement of construction-grade steel. In addition to these specifics, general exemptions are made for all of the following: highway projects, school boards and academic institution construction procurement (outside of Ontario and Québec), Crown corporations, and procurement of goods purchased for representational or promotional purposes (in a selection of provinces, including Ontario).

Finally, in a vague exception, all “procurement that is intended to contribute to economic development” in the Yukon or Northwest Territories, or Atlantic Canada or Manitoba, is exempt. Use of this exemption, however, would likely be limited to situations where Canada has an established program in place to aid in the development of a disadvantaged region, such as the Atlantic Canada Opportunities Agency.<sup>63</sup> Canada also adopts the US SDR thresholds: 355,000 for goods and services and 5 million for construction services.<sup>64</sup>

#### i. (c) Evaluating the Reciprocal Commitments

Of all the Canadian commitments in the Agreement, Canada’s commitments to the GPA are the least troubling. For one, Canada was under an obligation, as per Article XXIV 7(b) of the GPA, to undertake further negotiations to liberalize the scope of Canadian entities which procured according to WTO guidelines.<sup>65</sup> Canada had shirked this responsibility for a long time. Making the commitments now will undoubtedly elicit support from supporters of free trade as well as other WTO GPA members. In fact, had Canada not made Annex 2 GPA commitments in the Agreement, there is reason to believe that they may have done so without US prompting.

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<sup>63</sup> The ACOA, established over 20 years ago, works to “create opportunities for economic growth in Atlantic Canada by helping businesses become more competitive, innovative and productive, by working with diverse communities to develop and diversify local economies, and by championing the strengths of Atlantic Canada”. See more information online at: <<http://www.acoa.ca/English/Pages/Home.aspx>>.

<sup>64</sup> *Agreement*, *supra* note 4 at Appendix A, Annex 2.

<sup>65</sup> *GPA*, *supra* note 9 at Article XXIV:7(b).

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Notwithstanding pressure from the WTO and other states to include Annex 2 entities, academics have also begun to take notice of Canada's Annex 2 exclusions and call for a response.<sup>66</sup> Even for those who generally oppose increased international trade, the fact that these WTO commitments currently apply only to the US should offer some reassurance. This is not a headlong plunge into uncharted waters. Rather, by making commitments to the US and waiting to negotiate with others, Canada is taking a more sequenced approach.

Nevertheless, Canada's commitments must be weighed against what it was able to achieve in return. It is true that the Canadian exclusions are broad in scope, but some of them merely balance the exclusions maintained by the United States. Exceptions for highway projects and the restrictive SDR threshold, for example, clearly track the American provisions. Québec's steel exemption also appears to save a valued provincial procurement market. When considered in light of the much broader exemption of steel, coal, and motor vehicles in 12 large populated US states, however, it pales in comparison. The Canadian exemptions for Crown corporations, academic or educational facility construction, and "economic development" in selected areas are likely to be the most beneficial as measured by their ability to retain provincial control over procurement. Even so, these must be considered against the backdrop of partial American GPA coverage. Canada has committed all of its provinces and territories (aside from Nunavut) to the GPA, while the US has retained control over procurement in a quarter of its state entities. It could be argued that Canada's "economic development" exemption is an attempt to respond to the absence of 13 US states; but, in order to rely on that exemption, Canada faces an onerous burden of proof. In contrast, the 13 exempted states can simply claim immunity from the provisions of the GPA.

Criticism for the provincial acceptance of GPA responsibilities can also be made on the basis that the provinces are losing valued resource control that is needed for specific development goals. I alluded earlier to the study by Chang and Green which advocates against multilateral investment obligations for the third world, on the basis that surrendering control over these decisions will be

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<sup>66</sup> *Collins, supra* note 11.

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detrimental to development goals.<sup>67</sup> The same concerns are present in debates over procurement obligations. WTO critics like Christopher McCrudden have long expounded the dangerous local consequences of accepting international obligations, and also the possible human rights implications of treaties like the GPA.<sup>68</sup> The GPA itself recognizes these concerns, and gives special rights to developing nations who might otherwise be adversely affected by overbearing procurement commitments.<sup>69</sup> In doing so it acknowledges the potentially damaging effects of trade liberalization where strict control is needed to foster economic development. Though Canada has included the economic development provision, it does not apply to the western provinces, Ontario, or Québec, and as we have seen in recent years, economic downturns can threaten workers across the country, even in otherwise prosperous locations. Thus, any loss of discretion on procurement decisions could increase the strain on troubled Canadian industry.

These lasting provincial GPA commitments are also troubling due to the environment in which they were reached: an emotionally and politically charged flurry of attention. The fact that the provinces had been given the opportunity for 15 years to initiate negotiations with the federal government on GPA commitment, but only chose to do so once they came under pressure for doing nothing about the ARRA, indicates that this agreement was entered hastily rather than thoughtfully to provide the best long-term outcome for Canada. Why were permanent sub-federal commitments even necessary if the main concern was over restrictive ARRA provisions, which are addressed in a separate agreement? Negotiated together, as they were, it seems more likely that these less-than-ideal permanent Canadian commitments were used as a bargaining chip in order to convince the US to allow Canada the exemptions that it sought under the ARRA. If Canada had been negotiating these permanent commitments separately, surely the hype over the ARRA would have put less

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<sup>67</sup> *Chang, supra* note 40.

<sup>68</sup> McCrudden has argued that the United States has used procurement purchasing power through state legislation to influence the human rights policies of states such as Myanmar (Burma). See Christopher McCrudden, "International economic law and the pursuit of human rights: A framework for discussion of the legality of 'selective purchasing' laws under the WTO Government procurement agreement" (1999) 2 J. Int'l Econ. L. 48.

<sup>69</sup> *GPA, supra* note 9 at Article V.

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pressure on the negotiators to reach a settlement, and the inequalities of the reciprocal provisions here would have been more apparent.

This leads to another important basis for criticism of the permanent commitments: reciprocity. Reciprocity, though an ambiguous term, generally encompasses the giving and receiving of equivalent rights and obligations.<sup>70</sup> The difficulty comes in evaluating an 'equivalent value', especially in negotiations such as these over government procurement. Canada and the US are not nations of equal size or stature. With a population almost ten times that of Canada, the US stands to have far more firms operating in any given field. Thus when Canada opens a section of its market to the US, the chances of US firms noticing and posting bids to opportunities in that market is greater than the chance of Canadian firms doing the same towards an equal sized US market opening. While it is true that in any given sector Canada may have fewer opportunities on which to bid, the likelihood of each Canadian opportunity receiving a US bid is greater than each US opportunity receiving a Canadian bid. For this reason one might generally expect Canada to open a comparably smaller portion of its provincial procurement market, proportional to the amount of business Canadian companies can roughly expect to bid on in the US. Yet in this deal we see a greater scope of Canadian coverage. The effect could be to leave the US market (while admittedly 'open' to Canadian bids) relatively free from Canadian business, while the Canadian market is receiving American bids for every opportunity it advertises. Surely a better arrangement was possible.

#### ii) ARRA Exemptions and Commitments

In addition to permanent GPA changes, both Canada and the US have agreed on several specific, temporary measures to facilitate a more open system of government procurement. These measures are effective from February 17, 2010 until September 30, 2011. It is these temporary measures, breaking new and open ground in the field of procurement purchasing, which are the most contentious of the Agreement.

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<sup>70</sup> Robert O. Keohane, "Reciprocity in International Relations" (1986) 40 International Organization 1 at 8.

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ii. (a) American Commitments

The first commitment from the US is not actually a temporary commitment, but, due to the temporary nature of the ARRA, it tacitly functions as one. In Article V of the Agreement, the US agrees to “take the necessary administrative steps to ensure that section 1605(a) of the [ARRA] shall not be applied to Canadian iron, steel, or manufactured goods in procurement covered by Annex 2 of the 1994 GPA.”<sup>71</sup> The key part of this article is the mention of “administrative steps”. Since, with the new GPA commitments, a Canadian investor who feels slighted by the ARRA now has the ability to file a dispute under the GPA, this provision is designed to alleviate concerns that businesses will have to follow through a lengthy dispute process. It attempts to put the responsibility on the US government to ensure that the new GPA commitments are honoured and that the ARRA does not intrude, rather than leave the complaining to the Canadian investor. However, this applies only to procurement covered by the new Annex 2.

The real temporary measures committed to by the US come in Article VII. The US chose to implement its GPA commitments by modifying its Annex 3 with a list of programs for which it will not apply Section 1605(a) of the ARRA. The exempted US programs are:

- U.S. Department of Agriculture, Rural Utilities Services, Water and Waste Disposal Programs
- U.S. Department of Agriculture, Rural Housing Services, Community Facilities Program
- U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Energy Efficiency and Conservation Block Grants
- U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, State Energy Program
- U.S. Department of Housing and Urban Development, Office of Community Planning and Development, Community Development Block Grants Recovery
- U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Public Housing Capital Fund

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<sup>71</sup> *Agreement, supra* note 4 at Article V.

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- U.S. Environmental Protection Agency, Clean Water and Drinking Water State Revolving Funds, for projects funded by reallocated ARRA Funds where the contracts are signed after February 17, 2010.<sup>72</sup>

Since the only exemption applied to these programs is Section 1605(a) of the ARRA, only construction contracts will be affected by these temporary measures, and construction contracts are still subject to the Annex 3 threshold, currently valued at 5million SDR (or 8.5million Canadian dollars). Also, there are no exemptions from Section 604 of the ARRA; as a result, procurement from certain agencies within the DHS could still face restrictive Buy American provisions.

#### ii. (b) Canadian Commitments

Canada chose to implement its temporary measures by creating an entirely new agreement in Appendix C of the Agreement (which functions almost as a mini-GPA). This strategy makes the most practical sense, since Canada does not have a specific list of programs to exempt, and would otherwise have had to draft an agreement which selectively applied only specific parts of the GPA, in order to constrain its agreement to construction services. This tactic also allowed Canada to include some general exceptions to its otherwise broad commitment that would not have been covered under the GPA. One such exemption is for entities operating sporting or convention facilities who are complying with commercial contracts, thus allowing any Vancouver Olympic procurement to continue as planned.<sup>73</sup>

Beyond some minor differences in exemptions, such as the one mentioned above, Canada's Appendix C basically tracks the Articles of the GPA, although with slightly simplified bidding and tendering rules. The domestic review requirements of Appendix C are similar to the GPA, with some noticeable elements removed from the administrative rules of a reviewing body, including the right for all parties to be heard prior to a decision being made on a challenge by

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<sup>72</sup> *Agreement, supra* note 4 at Appendix B, USA Annex 3, List C.

<sup>73</sup> *Agreement, supra* note 4 at Appendix C, para 2(a)(ii).

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an investor.<sup>74</sup> This modification allows a simpler review procedure, and less input from the aggrieved US investor, should Canada be the subject of a dispute.

Canada's commitment is realized at the end of Appendix C, where the covered entities and municipalities are listed. As with the US, these temporary measures apply only over an \$8.5 million (Canadian dollar) threshold, but the list of Canadian entities that is covered is staggering. All major Canadian municipalities are covered, including all cities in British Columbia, Calgary, Edmonton, Winnipeg, Toronto, Halifax, Montréal, Hamilton, London, Québec City, and Ottawa. A large number of Crown corporations are covered, with notable exceptions generally made for energy producing Crown corporations such as Ontario Power Generation and Régie de l'énergie. Exceptions are also made for mass-transit and highway projects in both Ontario and Québec (at Québec's discretion). Beyond these exclusions, though, Canada's commitment is broad.<sup>75</sup>

#### ii. (c) Evaluating the Reciprocal Commitments

The only reason for Canada to commit its municipalities and other entities as listed in Annex 3 was to give Canadian businesses a chance to share in the spoils of the money allocated by the ARRA. Thus, the evaluation of Canada's temporary commitments under the Agreement faces tougher scrutiny.

Most of this evaluation turns on how much of the ARRA funding Canadian contractors are able to bid on. Of the 787 billion dollars the ARRA promised to allocate, 275 billion is earmarked for contract, grant, and loan funding which would be open to Canadian bids. The rest is dispersed through tax benefits and entitlement funding such as increased social service payouts. The problem is that, by the time the Agreement was reached, most of those 275 billion dollars had already been spent. According to data compiled by the US government in the reporting period from February 17, 2009 (when the ARRA was passed) until December 31, 2009, 182 billion dollars of

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<sup>74</sup> *Agreement*, *supra* note 4 at Appendix C, para 21.

<sup>75</sup> *Agreement*, *supra* note 4 at Appendix C, Part B.

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the available 275 billion had been awarded to successful bidders.<sup>76</sup> This left just 93 billion for allocation in 2010, and even less by February 17, 2010, when Canadian companies were released from the restrictive provisions of the ARRA. This figure also does not take into account that Canadian companies can only bid on programs funded under one of the seven exempted programs under the US Annex 3, which together only encompass a portion of the programs undertaken by four US departments. Moreover, these four departments together concluded only 15% of the contracts awarded pursuant to the ARRA.<sup>77</sup>

Even without exact figures, the deal seems one sided. Canada, albeit with a smaller population and economy, has sacrificed its ability to support Canadian businesses at almost every level of government—federal, provincial, municipal, and through Crown corporations—in exchange for an opportunity at the funding behind seven US procurement programs. As was discovered in the DFAIT commissioned surveys, not all of our construction entities deal with the US government, and many have no plans to do so. Even if they did, much of the funding has already been spent, and sub-contracts have already been designed with the ARRA provisions in mind. In an editorial for the *Toronto Star*, columnist Scott Sinclair estimated that Canadian companies would be able to bid for no more than 4 to 5 billion dollars of the total 275 billion, a dramatically smaller estimation than the hype around the ARRA seems to have contemplated. He also estimated the value of the Canadian municipal procurement market envisioned by Appendix C at 25 billion dollars.<sup>78</sup> Sinclair’s perspective on the deal has been criticized by free-trade supporters, but his figures have not.<sup>79</sup>

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<sup>76</sup> Recovery.gov, online: <<http://www.recovery.gov/Pages/home.aspx>>.

<sup>77</sup> Based on calculations from data as of February 13, 2010 pulled from the Federal Business Opportunities website ([www.fbo.gov](http://www.fbo.gov)), which provides award records for US procurement contracts online:

<<ftp://ftp.fbo.gov/FBORecoveryAwards/FBORecoveryAwards20100213.csv>>.

<sup>78</sup> Scott Sinclair, “Canada gives away the store in return for scraps from the US” *The Toronto Star* (19 February 2010), online:

<<http://www.thestar.com/opinion/article/767780--canada-gives-away-the-store-in-return-for-scraps-from-u-s->>.

<sup>79</sup> Stephen Gordon, “Bad news is when you have to release the hostages too cheaply”, *National Post* 922 February 2010), online:

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Even assuming that the numbers are equal, and that Canada would have temporary access to the same amount of procurement business that the US will have access to in Canada, the deal is subject to criticism. For one, this Agreement contradicts the traditional Canadian approach to FDI, as explained previously, at a time when support for domestic industry is critical. The effects of the 2008 economic slowdown are unfolding in the Canadian economy, and the Canadian stimulus spending (which has helped ease the effects of the recession so far) is drying up. Measures taken under Canada's Economic Action Plan, affecting spending at all three levels of government, are expected to cease funding projects by March 31, 2010.<sup>80</sup> With Canadian stimulus funding nearing its end, it will be even more important over the next year for Canadian construction services to be able to secure contracts for government procurement that are not the product of stimulus spending. This will be increasingly difficult until the expiration of the Agreement. This outcome is akin to the dangers warned of in the Gray Report, where it was cautioned that entry by foreign industry could prevent Canadian companies from developing.<sup>81</sup> The danger is that American businesses could cause the stagnation of Canadian companies that have already developed, by dominating the increasingly small government procurement market.

These temporary commitments are also subject to criticism based on the context in which they were concluded. While Canada may not have had 15 years to begin negotiations regarding the ARRA, it certainly seems as though Canadian politicians reacted to public outcry, rather than attempting to undertake a planned and measured response on the enactment of the ARRA. The August 20, 2009, letter from Canadian Trade Minister Stockwell Day to US Trade Representative Ronald Kirk, making an initial proposal and seeking Canadian exemption, is indicative of this hasty response. For one, the letter came six months after the enactment of the ARRA, instead of prior to or close to February 18, 2009. Also, the tone of the letter indicates the 'on bended knee' approach that Minister Day adopted,

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<<http://network.nationalpost.com/np/blogs/fullcomment/archive/2010/02/22/stephen-gordon-bad-news-is-when-you-have-to-release-the-hostages-too-cheaply.aspx>>.

<sup>80</sup> Canada, Governor General, *Speech from the Throne*, 40th Parl. 3rd sess., (3 March 2010).

<sup>81</sup> *Gray*, *supra* note 13 at 43.

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referring several times to the “ambitious package of sub-federal procurement” which Canada is offering to the US.<sup>82</sup>

Details of the negotiations are not readily available to the public, so the preliminary offer made on August 20<sup>th</sup> is one of the few sources of information we have about how the negotiations were concluded. From an examination of this offer, it seems as though Canada’s negotiating team was not totally without success. In this initial letter, Canada offered to concede municipal and Crown corporation procurement, of not just construction but all goods, and a limited segment of additional services.<sup>83</sup> The narrowing of Canada’s offer is positive, but this must be matched against the US reservations. Initially, Day asked for exemption from all the Buy American requirements in the ARRA and exemption from similar requirements in any future US legislation.<sup>84</sup> What he eventually received was exemption from 7 ARRA programs and an expedited negotiation forum (in which Canada will no doubt be asked to make further procurement concessions) should future Buy American provisions be enacted. Clearly the disparity between the commitments is substantial and in favour of US interests.

Finally, it should be repeated that the exact impact of the ARRA has always been in question. It may well have been within the capacity of Canadian companies already operating in the US procurement sector to work within the confines of a 25% price increase limitation, since most of them were used to functioning in a market where their prices needed to be highly favourable to be competitive. Thus the ARRA might have had a negligible effect on them. As for other companies considering entering this market, I am sceptical that the details and nuances of the Agreement would be made known to them in time for them to submit bids for the few projects left with ARRA funding. Even if they were able to place bids on ARRA funded projects, restrictive Buy American provisions in place under other US legislation, including the STTA, are still in place and will continue to have detrimental effects for Canadian businesses. Canadian negotiators failed to win exclusion from STTA Buy

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<sup>82</sup> Letter from Honourable Stockwell Day to Honorable Ronald Kirk (20 August 2009) [unpublished] [*Day*].

<sup>83</sup> *Ibid* at “Canadian Proposal”, enclosure to Letter from Honourable Stockwell Day to Honorable Ronald Kirk.

<sup>84</sup> *Day, supra* note 89.

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American provisions, and do not even seem to have contemplated doing so, even while creating a ‘mechanism’ to quickly resolve objection to any future Buy American legislation. It appears, rather, that Canada, eager to get any agreement at all, hastily agreed to a lopsided deal to resolve an issue which, in any event, may have had only negligible effects.

#### IV CONCLUSIONS

The dramatic expansion in global trade and international investment in recent decades has placed issues of trade protectionism in the center of public attention. This paper has left aside a detailed discussion of these large, fiercely debated, issues and instead focused on government procurement as a special subset of international trade and FDI. I have shown reason why Canada has strived, not to be protectionist, but to carefully approach its decisions with respect to government procurement, specifically because it is an important way in which to promote growth and development in the domestic economy. While some might argue that the government should strive for lower prices at all costs, I have shown that the Canadian federal and provincial governments have historically taken a more nuanced approach, and I have advocated that this approach continue.

Unfortunately, in response to the *American Recovery and Reinvestment Act*, this nuanced approach became more of a blind reaction to public demands for action. The Canadian government hastily negotiated and concluded an agreement which has left little of its sub-federal government procurement discretion available. This response has overlooked many of the factors that indicate that the ARRA would not have had as serious an impact on Canadian businesses as the media attention seemed to indicate, and committed Canada to permanent and temporary agreements (which may put large sectors of Canadian industry at risk from American competitors). As one National Post writer adroitly observed, “The recent resolution of Canada’s dispute over Buy American provisions in the U.S. stimulus package contributed to the positive tone of the premiers meeting with

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governors at a downtown Washington hotel.”<sup>85</sup> It is not surprising that the governors were in such good spirits while hosting their Canadian counterparts, having just bested them in such crucial negotiations. No doubt the American celebrations will continue as the full effects of the Agreement begin to become apparent. The question is, to what extent will the Canadian lamentations be felt, and what lessons will be learned for Canadian politicians who seek increased liberalization of Canadian procurement markets in the future?

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<sup>85</sup> Sheldon Alberts, “U.S. governors sing the praises of Canada” *The National Post* (21 February 2010), online: <<http://www.nationalpost.com/story.html?id=2594105>>.