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Memo to Reporters and Editors

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Buy America Brouhaha: What Are the EU and Canada Hollering About? Their WTO Procurement Exceptions Are (Wisely) Much Broader Than U.S. Stimulus Proposal

The hysteria coming from European Union (EU) and Canadian officials about the Buy America and Buy American domestic preferences in the U.S. stimulus bill is particularly odd, given that **both the EU and Canada have wisely excluded considerably broader swaths of their procurement activity from World Trade Organization (WTO) rules (and in the case of Canada also from the North American Free Trade Agreement, or NAFTA) than has the United States. Because of this, the EU and Canada have no obligation to provide U.S. firms with access to a wide array of their government contracts.**

For instance, while the United States safeguards its preferences (only) for domestic iron and steel used in federally funded state transportation projects, Canada carves out steel, motor vehicles and coal *altogether* (for all provinces, for all sectors), and also carves out *all* construction contracts issued by the Departments of Transport. The EU carved out of its WTO procurement obligations contracts awarded by federal governments and sub-federal governments in connection with activities in the areas of drinking water, energy, transport or telecommunications.

These facts make a mockery of the EU and Canadian claims that the United States is acting in an aberrant manner and somehow starting a “trade war.” The EU countries and Canada have excluded in their trade agreement commitments a much wider swath of procurement activity than the Buy America and Buy American provisions in question. And we’re not criticizing them for it; why should decisions by democratically elected parliaments about how to best spend tax dollars on domestic infrastructure be subject to constraints imposed by international *trade* agreements? There is no “protectionism” at issue here.

But it is hypocritical for countries that wisely have taken broad trade-pact exceptions, which ensure that they have no obligation to provide U.S. firms with access to their taxpayer-funded projects, to attack the relatively narrow and modest U.S. domestic preferences. (See excerpts of the WTO and NAFTA texts below for more detail.)

Under the WTO and NAFTA procurement agreements, Canada excludes:

- **All “construction contracts tendered on behalf of the Department of Transport”;**
- **Steel, motor vehicles and coal procurement for all provinces; and**

- **Procurements in respect of “urban rail and urban transportation equipment, systems, components and materials incorporated therein, as well as all project-related materials of iron or steel”.**

Plus, NAFTA procurement rules do not apply to any construction contracts for Canadian provinces.

Under the WTO procurement agreement, the EU actually includes a reciprocity requirement for service-sector contracts and excludes the following measures in its general notes applying to all sectors and annexes:

- **“Contracts awarded by entities in Annexes 1 [federal governments] and 2 [subfederal governments] in connection with activities in the fields of drinking water, energy, transport or telecommunications”;**
- **Contracts for U.S. firms with airport, water and urban transportation authorities;**
- **Sector-specific exclusions for the United States in respect of all EU states’ subfederal governments’ service-sector procurement until and unless the U.S. offers similar commitments; and**
- **Country-specific exceptions for Austria, Finland and Sweden.**

The reciprocity agreement excludes commitments from U.S. service providers seeking procurement contracts in sectors (and with levels of government) that the United States has not reciprocally offered to the European Union.

Finally, the notion that these Buy America provisions will launch a global trade war is ridiculous. Various interests – including U.S. multinational corporations that have offshored a lot of their production and thus may not qualify under Buy America preferences – have been trying to attack *any* policy that does not suit their self interests as “protectionist.” But at issue is domestic funding for domestic infrastructure projects – not tariff-raising, quota-imposing or any other trade-related activity.

Second, to the extent that “trade” agreements have overreached in setting limits on how governments may spend their tax dollars at home, this is probably not a point that the defenders of these pacts would want to air widely. But the coalition of multinational corporations leading the attack on Buy America have – with outrageously misleading claims that requirements to use U.S. iron and steel when spending U.S. taxpayer money to fund U.S. highway and transit projects violate trade agreements. And the high volume corporate scare campaign that trade agreements limit how Congress can use our tax dollars at home has the public disliking the agreements in question even more.

Of course, there is the legal fact that the U.S. has explicitly carved out from its WTO trade obligations the right to require U.S. iron and steel for federally funded state highway and transit projects. Moreover, 13 U.S. states are outside the WTO procurement rules altogether. And even if this were not the case, it’s hard to claim the Buy America terms in the stimulus package would launch a global dispute given that the United States has procurement agreement commitments only to the 39 countries that have signed the WTO Agreement on Government Procurement and an additional 13 countries that are signatories to U.S free trade agreements. The United States has no trade agreement or other procurement obligations to China, Brazil, India and many other major developing-country industrial powers. And contrary to recent newspaper editorials repeating the hysterical “launching a trade war” tone of the corporate attack on the Buy America provisions, a review report circulated by the WTO’s director general on Jan. 23 concludes that the global economic crisis has so far provoked little “protectionist” reaction from governments in the form of increased tariffs or other barriers to trade.

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EXCERPTS FROM EU AND CANADIAN WTO AGREEMENT ON GOVERNMENT PROCUREMENT COMMITMENTS

CANADA

CANADA WTO AGP APPENDIX I GENERAL NOTES

1. Notwithstanding anything in these Annexes, the Agreement does not apply to procurements in respect of:
 - (b) **urban rail and urban transportation equipment, systems, components and materials incorporated therein as well as all project related materials of iron or steel;**

CANADA WTO AGP APPENDIX I ANNEX 5

Construction Services

Canada offers to include in this “Construction Services” Annex, Federal entities listed under Annex 1 and Federal enterprises listed under Annex 3. The inclusion of “Construction Services” for sub-central entities under Annex 2 and sub-central enterprises under Annex 3 are to be specified initially on or before 15 April 1994 with the final list to be provided within eighteen months after the conclusion of the new government procurement agreement.

Definition:

A construction services contract is a contract which has as its objective the realization by whatever means of civil or building works, in the sense of Division 51 of the Central Product Classification. *List of Division 51, CPC:* All services contained in Division 51 CPC.

Notes to Annex 5

1. **Notwithstanding anything in this Agreement, this Agreement does not apply to procurements in respect of:**
 - (a) Dredging; and
 - (b) **Construction contracts tendered on behalf of the Departments of Transport.**
2. The General Notes apply to this Annex.

CANADA WTO AGP APPENDIX I ANNEX 2 [provincial commitments]

Notes to Annex 2 **Exceptions for all Provinces: steel, motor vehicles and coal**

CANADA NAFTA CHAPTER 10 (PROCUREMENT) Annex 1001.2b

General Notes

Schedule of Canada

1. This Chapter does not apply to procurements in respect of:

(a) shipbuilding and repair;

(b) urban rail and urban transportation equipment, systems, components and materials incorporated there in as well as all project related materials of iron or steel;

CANADA NAFTA CHAPTER 10 (PROCUREMENT) Annex 1001.1b-3

Construction Services

Section B - Excluded Coverage

Schedule of Canada

The following services contracts are excluded:

1. Dredging

2. Construction contracts tendered by or on behalf of Department of Transport

CANADA NAFTA CHAPTER 10 (PROCUREMENT) Annex 1001.1b-3

Construction Services

Section A - General Provisions

1. This Chapter applies to all construction services set out in Appendix 1001.1b-3-A, except those listed in Section B, that are procured by the entities listed in Annex 1001.1a-1 and 1001.1a-

[Lori Note: i.e. does NOT apply to states and provinces. Annex 1001.1a-1 is Federal Government Entities and Annex 1001.1a-2 is Government Enterprises, while State and Provincial Government Entities are Annex 1001.1a-3]

EUROPEAN UNION

EU WTO AGP GENERAL NOTES AND DEROGATIONS FROM THE PROVISIONS OF ARTICLE III OF APPENDIX I OF THE EC

General Notes and Derogations from the Provisions of Article III

1. The EC will not extend the benefits of this Agreement:

-- **as regards the award of contracts, other than for supplies, listed in Annex 2 [subfederal entities] to the suppliers and service providers of the USA;**

-- as regards the award of contracts by entities listed in Annex 3 [governmental authorities, such as port authorities]

(a) **(water) to the suppliers and service providers of Canada and the USA,**

(c) **(airports) to the suppliers and service providers of Canada, Korea and the USA,**

(e) **(urban transport) to the suppliers and service providers of Canada, Japan, Korea and the USA;**

until such time as the EC has accepted that the Parties concerned give comparable and effective access for EC undertakings to the relevant markets;

-- **to service providers of Parties which do not include service contracts for the relevant entities in Annexes 1 to 3 and the relevant service category under Annexes 4 and 5 in their own coverage.**

...

6. **Contracts awarded by entities in Annexes 1 [federal governments] and 2 [subfederal governments] in connection with activities in the fields of drinking water, energy, transport or telecommunications, are not included.**

...

10. **The provision of services, including construction services, in the context of procurement procedures according to this Agreement is subject to the conditions and qualifications for market access and national treatment as will be required by Austria in conformity with her commitments under the GATS.**

11. **This Agreement shall not apply to contracts awarded to an entity in Finland which itself is a contracting authority within the meaning of the Public Procurement Act: "Laki julkisista hankinnoista" (1505/92), or in Sweden within the meaning of the "Lag om offentlig upphandling" (1992:1528), on the basis of an exclusive right which it enjoys pursuant to a law, regulation or administrative provision or to contracts of employment in Finland and Sweden.**

12. **When a specific procurement may impair important national policy objectives, the Finnish or Swedish Governments may consider it necessary in singular procurement cases to deviate from the principle of national treatment in the Agreement. A decision to this effect will be taken at Cabinet level. Finland also reserves its position with regard to the application of this Agreement to the Åland Islands (Ahvenanmaa).**