

Intelligence MEMOS



From: Jon Johnson

To: Global Affairs Canada

Date: November 23, 2021

Re: **US INFRASTRUCTURE LEGISLATION – MASSIVE BUY AMERICA, SOME ACKNOWLEDGEMENT OF US INTERNATIONAL OBLIGATIONS**

The Biden administration's infrastructure package is now, finally, enacted. Title IX of the legislation, labelled Build America, Buy America, sets out 57 pages of requirements that elaborate on earlier US laws requiring that US federal spending for procurement purposes, or granted as financial assistance, discriminate in favour of US-made goods.

At the same time, the US has incurred extensive obligations under international agreements that impose non-discrimination obligations for public spending on procurement or financial assistance.

Barack Obama's *American Recovery and Reinvestment Act of 2009* dealt with this conflict by requiring that its Buy America requirements be "applied in a manner consistent with United States obligations under international agreements."

Unlike that act, the Biden administration's Executive Order dated January 25, 2021 (the predecessor to Title IX) made no reference to its Buy American requirements being applied consistently with US obligations under international agreements, as I [outlined](#) in an earlier Memo.

The new Infrastructure Act rectifies this serious oversight by inserting the Recovery Act language in several places that could be useful to Canadian businesses seeking to bid on US government procurement opportunities.

As one example, Section 70914 of the new act requires that none of the funds made available for a federal financial assistance program for infrastructure be used unless all of the iron, steel, manufactured products, and construction materials used are produced in the United States. Subsection 70914(e) requires that this section be "applied in a manner consistent with United States obligations under international agreements."

Under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), a government program involving the direct transfer of funds, such as a grant or loan that provides a benefit, is a subsidy. This international agreement, by which the US is bound, prohibits subsidies contingent on the use of domestic over imported goods. To comply with the SCM Agreement, either the requirement that materials used in the project be produced in the US has to be dropped or the financial assistance take the form of a loan on strictly commercial terms.

As a second example, Subtitle B of the Infrastructure Act (Sections 70931 to 70941) requires compliance with Buy American statutes. However, Section 70940 provides that Subtitle B be "applied in a manner consistent with United States obligations under international agreements." The US is a party to the WTO Government Procurement Agreement (GPA). The US federal government and 37 US states have assumed obligations under the GPA covering suppliers from all countries bound by the GPA including Canada. Section 70940 effectively prohibits compliance with a Buy America requirement if to do so would be inconsistent with US obligations assumed under the GPA.

A requirement that a section or a subtitle of the Infrastructure Act be "applied in a manner consistent with United States obligations under international agreements" means as a matter of US law the section or subtitle in question must be applied in such manner. The Canadian government, or an adversely affected Canadian supplier, should be able to complain through the US court system rather than depending on Global Affairs Canada invoking the WTO dispute settlement process, which has been rendered functionally inoperable by the US refusal to consent to the appointment of new Appellate Body members and the US practice of appealing adverse WTO panel decisions to the now non-existent Appellate Body.

Global Affairs Canada will doubtless be working through Title IX to determine the most effective means for Canadian suppliers to take advantage of US procurement opportunities in spite of the considerable roadblocks presented by Build America, Buy America.

Bill H. R. 5376, the Biden administration's other big spending bill, has now been enacted by the House but awaits (by no means certain) Senate confirmation. It contains tax credit provisions respecting plug-in electric vehicles that threaten the integrity of North American supply chains through US domestic assembly and content requirements. While some provisions of Bill H. R. 5376 are subject to "consistent with United States obligations under international agreements," these tax credit provisions are not. More on this to come.

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