

Intelligence MEMOS



From: Jon Johnson
To: President Joe Biden
Date: March 23, 2021
Re: **AT THE CROSSROADS WITH GOVERNMENT PROCUREMENT**

On March 15 you received a [letter](#) from 13 Democratic Party senators urging you to toughen Buy American legislation by suspending trade-pact waivers with friendly nations, including Canada.

These waivers exempt Canada from the requirement that materials acquired for public use be mined, produced or manufactured in the US.

These requirements are inconsistent with US obligations under the WTO Agreement on Government Procurement (GPA). Accordingly, the *Trade Agreements Act of 1979* allows the president to waive Buy American requirements so that the US can comply with the GPA. As noted in the letter, 60 countries currently qualify for waivers.

The letter – signatories included Democrat luminaries Bernie Sanders and Elizabeth Warren – seeks a temporary suspension of those waivers before contracts are awarded under the American Rescue Plan and other legislation addressing the COVID-19 pandemic emergency. You are also asked to “commit” US trading partners to renegotiate “as quickly as possible.”

Suspension would occur first and renegotiation afterwards, which flies in the face of trade rules.

And there are rules: Each GPA party, including the US, has assumed obligations respecting procurement by specified government departments, agencies and other government entities. The GPA recognizes that a party may wish to renegotiate its commitments and Article XIX sets out procedures for modifying coverage. Under these procedures, the US would first notify the Committee on Government Procurement of its proposed modifications. Other parties have 45 days following notification to object. The US would then be obliged to resolve objections with objecting parties through consultations.

The US would be able to proceed with its modifications only if no party objects, or if all objections have been withdrawn, or if 150 days have elapsed since the proposed modifications were circulated. If proposed modifications do become effective after the 150 days, any objecting party may withdraw substantially equivalent coverage. Article XIX sets out an arbitration procedure to resolve disputes over this process.

As I [pointed out](#) last month, your administration is committed to Buy American and, unlike the Obama administration respecting the *American Recovery and Reinvestment Act of 2009*, your executive order does not mention having to comply with international obligations such as the GPA. At least the letter recognizes that there are waivers to Buy American and, by extension, that the US is bound by international obligations respecting government procurement. Unfortunately, the prescription in the letter is to run roughshod over these obligations. Shoot first and negotiate afterwards.

Your new trade representative has [stated](#) that while needing modernization, the “WTO is a great idea” and “has done really important things.” A recent Congressional Research Service [article](#) outlines how the US benefits in being party to the GPA.

The senatorial letter maintains that the GPA is tilted against the US. This position is hard to maintain respecting Canada. For example, the US GPA Annexes list procurements by specified departments and entities of only 37 of the 50 states, while Canada’s schedules cover procurement by departments and entities of all 10 provinces plus the three territories.

As a result of the Canada-US Free Trade Agreement, NAFTA, and now CUSMA, the Canadian and US economies are highly integrated, with producers in both countries complying with mutually agreed rules of origin to secure duty free access and sourcing many inputs from producers in the other country.

You should seriously consider whether forcing producers on both sides of the Canada/US border to comply with different content requirements for goods destined for consumption by certain US public entities is really in the US public interest. If the US ignores its GPA obligations, US firms (as the CRS noted) may be unable to bid for government contracts in the markets of other GPA parties and thereby find themselves at a competitive disadvantage, having to cede “opportunities to competitors from other countries.”

You should also consider the overall damage to the international trading system, which the US has had a major role in creating and a major interest in preserving, if you heed this misguided request.

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