

# Intelligence MEMOS



From: Jon Johnson

To: President Joe Biden

Date: February 2, 2021

Re: **AT THE CROSSROADS: BUY AMERICAN AND THE US COMMITMENT TO THE WTO**

On January 25, you issued an [Executive Order](#) respecting application of “Buy American” and other laws requiring a preference in US public procurement for the purchase of goods produced in the US.

As described in my August 5 [Memo](#), Canada had concerns with Buy American provisions in the *American Recovery and Reinvestment Act of 2009* (“Recovery Act”) enacted by the Obama Administration. These issues were resolved through negotiation, the end result of which was expanded coverage of both Canadian and US obligations under the *WTO Agreement on Government Procurement* (WTO GPA).

The Obama Administration (in which you played a major role) made it clear that the Recovery Act was not intended to undermine the WTO. The Recovery Act Buy American provisions are subject to the requirement that they be applied in a manner consistent with US obligations under international agreements, which include the WTO GPA.

The Executive Order guarded its language, frequently using “should” rather than “shall,” such as in Section 1 that states that the US Government “should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products and materials produced in, and services offered in, the United States.”

The Executive Order creates a “Made in America Office” headed by a “Made in America Director” within the Office of Management and Budget. The Executive Order establishes steps for determining whether a waiver from Buy American requirements would be consistent with the policy set out in Section 1.

The Executive Order makes frequent reference to actions being “consistent with applicable law,” but, unlike the Recovery Act, it makes no mention of applying its provisions consistently with US obligations under international agreements.

To send a clear message that your administration supports the WTO, the legislation or other legal instrument implementing the Executive Order should (like the Recovery Act) expressly require that its provisions be applied in a manner consistent with US obligations under international agreements. If your administration has issues with the WTO GPA, these should be resolved through negotiation as occurred with Canada respecting the Recovery Act. (As a result of those talks, extensive procurement commitments by every Canadian province and territory were made, which have been carried forward into the WTO GPA, which remains binding even though CUSMA, unlike NAFTA, does not set out procurement obligations between Canada and the US.)

Unlike most of the WTO agreements, the WTO GPA is plurilateral rather than multilateral, meaning that it binds only those WTO members that have agreed to be bound rather than all WTO members. What this means is that the US can withdraw from the WTO GPA without withdrawing from the WTO.

However, what would withdrawing from the WTO GPA achieve for the US? The WTO GPA ensures that the US has preferred access to government procurement opportunities from most of the world’s major economies, including all the member states of the European Union, Canada, the United Kingdom, Japan, the Republic of Korea, Australia, New Zealand and Taiwan.

If the US withdraws, the only countries with which the US has agreements providing assurance respecting government procurement include Mexico (the CUSMA government procurement obligations apply only between the US and Mexico), South Korea, Australia, Chile, Bahrain, Israel, Morocco, Oman, Central American nations and the Dominican Republic, and a few smaller countries. These agreements provide nowhere near the range of opportunities that exist under the WTO GPA and some of these (e.g., with South Korea) assume that the US will continue to be a party to the WTO GPA.

The US cannot have it both ways, namely by implementing the Executive Order without regard to US obligations under the WTO GPA and yet continue to enjoy the procurement opportunities that the WTO GPA ensures. Your administration must choose one path or the other.

*Jon Johnson is a former advisor to the Canadian government during NAFTA negotiations and is a Senior Fellow at the C.D. Howe Institute.*

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