

# Buy America and Buy American: Can Canada Expect a Deal from the Biden Administration?

## *Buy America* et *Buy American*: le Canada peut-il s'attendre à un accord de l'administration Biden?

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### *Abstract*

After US President Joe Biden took office, some believed he would take a different path from that of his predecessor and that the Trump years were over. However, one of President Biden's first moves was to strengthen American protectionism by heightening the United States's "Buy America" and "Buy American" requirements. With this, the American government procurement market started to close off even more, and Canadian suppliers, in turn, grew worried. Given the United States's international procurement commitments and the specificity of the *Buy American Act* and the Buy America Policy, this article explores the pathways to favourable treatment of Canadian suppliers in keeping with applicable international trade rules.

### *Résumé*

Après la prise de fonction du président américain Joe Biden, certains pensaient qu'il prendrait une voie différente de celle de son prédécesseur et que les années Trump étaient terminées. Cependant, l'un des premiers gestes du président Biden a été de renforcer le protectionnisme américain en augmentant les exigences "*Buy America*" et "*Buy American*" des États-Unis. Ainsi, le marché public américain a commencé à se fermer encore plus et les fournisseurs canadiens se sont inquiétés à leur tour. Compte tenu des engagements internationaux des États-Unis en matière de marchés publics, et de la spécificité du *Buy American Act* et des dispositions de la politique *Buy America*, cet article explore les voies d'un traitement favorable des fournisseurs canadiens dans le respect des règles du commerce international.

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## INTRODUCTION

On 25 January 2021, five days after taking office, US President Joe Biden issued the *Executive Order on Ensuring the Future Is Made in All of America by All of America's Workers*.<sup>1</sup> This order strengthens the normative framework of the “Buy America Policy” and the *Buy American Act*.<sup>2</sup> It also creates the Made in America Office as an updated and centralized Made in America Waiver Process, providing for a very strict framework, and this order also appoints a special Buy America representative to oversee and control the application of the programs.<sup>3</sup> Clearly, the Biden administration wanted to protect domestic industries by restricting the participation of foreign firms with this endeavour that heightened “Buy American” and “Buy America” requirements and ensured that the granting of waivers from those requirements would be limited.<sup>4</sup> Indeed, the essential thrust of this endeavour is to impose restrictions on government procurement from non-domestic sources, thus excluding foreign firms.

The executive order necessarily affects Canadian suppliers. Usually, the US federal government spends approximately US \$600 billion per year on

<sup>1</sup> United States, White House Briefing Room, “Executive Order on Ensuring the Future Is Made in All of America by All of America's Workers” (2021), online: *White House* <[www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/](http://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/)> [“Executive Order”].

<sup>2</sup> *Ibid.*, s 2; United States, Department of Transportation, “Buy America Fact Sheet” (2020), online: <<https://www.transit.dot.gov/funding/grants/buy-america-fact-sheet>>; United States, White House Briefing Room, “How Build America, Buy America Guidance Strengthens Made In America Requirements,” Blogs (2022), online: *White House* <[www.whitehouse.gov/omb/briefing-room/2022/04/20/how-build-america-buy-america-guidance-strengthens-made-in-america-requirements/](http://www.whitehouse.gov/omb/briefing-room/2022/04/20/how-build-america-buy-america-guidance-strengthens-made-in-america-requirements/)>; *Buy American Act of 1933*, 41 USC §§ 8301–8303 [*Buy American Act*].

<sup>3</sup> “Executive Order,” *supra* note 1, s 4.

<sup>4</sup> Fernando Mendoza Lopez & Joni Hersch, “Socioeconomic Policies in Public Procurement: What Should We Be Asking of Public Procurement Systems?” (2021) 52:1 U Mem L Rev 155 at 173–75. See also Timothy Meyer, “The Political Economy of WTO Exceptions” (2022) 99:4 Wash UL Rev 1299.

contracts alone.<sup>5</sup> In addition, sub-national governments such as states and cities spend approximately US \$3.3 trillion yearly.<sup>6</sup> Moreover, the American Jobs Plan provides for the injection of US \$2 trillion in the next decade as part of a mega infrastructure package.<sup>7</sup> It is understandable that Canadian industries wish to be able to access these significant contracts. These concerns are echoed in the interim report of the Canadian House of Commons' Special Committee on the Economic Relationship between Canada and the United States.<sup>8</sup> Certain organizations also note that certain components of American-made products are only produced in Canada and that American producers would incur significant costs to custom build the required components themselves.<sup>9</sup> Moreover, small- and medium-sized enterprises often depend on government procurement as it represents approximately 12 percent of the gross domestic product of countries in the Organisation for Economic Co-operation and Development.<sup>10</sup>

Canadian industries have pressed the Canadian government to work with the Biden administration to find a way to exempt Canadian suppliers from the application of Buy America and Buy American restrictions.<sup>11</sup> However, as will be explained later in this article, it is not clear that the US government can legally grant such an exemption. This article analyzes this possibility. Considering the international commitments of the United States in the area of public procurement and taking into account the specificity of the *Buy American Act* and the Buy America Policy, we will see that the gateways for

<sup>5</sup> “Joe Biden renforce le protectionnisme américain avec la Buy American Act” (25 January 2021), online: *Radio-Canada* <[ici.radio-canada.ca/nouvelle/1765622/etats-unis-canada-protectionnisme-biden-buy-american](http://ici.radio-canada.ca/nouvelle/1765622/etats-unis-canada-protectionnisme-biden-buy-american)>. Concerning domestic annual procurement, see Desiree U Klingler, “Fair Pay and Safe Workplaces in Government Contracting: Reassessing Labor Law Benefits in Light of Infrastructure Investments and Buy American” (2021) 39 JREG Bull 69 at 72.

<sup>6</sup> “State and Local Expenditures,” online: *Urban Institute* <[www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures](http://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures)>.

<sup>7</sup> United States, White House Briefing Room, “Fact Sheet: The American Jobs Plan,” Statements and Releases (2021), online: *White House* <[www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/](http://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/)>.

<sup>8</sup> House of Commons, “*Buy America*” Procurement Policies: An Interim Report (June 2021) (Chair: Raj Saini), online: <[www.ourcommons.ca/Content/Committee/432/CAAM/Reports/RP11424292/caamrpo2/caamrpo2-e.pdf](http://www.ourcommons.ca/Content/Committee/432/CAAM/Reports/RP11424292/caamrpo2/caamrpo2-e.pdf)>. Concerning “Buy American” provisions costing more for Americans, see Eric Boehm, “Americans Overpay for Biden’s ‘Buy American’ Plan” (2022) 53:1 Reason 14.

<sup>9</sup> House of Commons, *supra* note 8 at 8.

<sup>10</sup> Organisation for Economic Co-operation and Development (OECD), *SMEs in Public Procurement: Practices and Strategies for Shared Benefits* (Paris: OECD Publishing, 2018) at 30.

<sup>11</sup> House of Commons, *supra* note 8 at 10.

favourable treatment of Canadian suppliers are very limited. In this sense, the Canadian government must absolutely take certain actions.

#### THE CANADA – UNITED STATES PROCUREMENT RELATIONSHIP IN LIGHT OF THEIR INTERNATIONAL OBLIGATIONS

In 1994, the World Trade Organization's (WTO) *Agreement on Government Procurement (GPA)* was concluded.<sup>12</sup> Considered as a plurilateral agreement of the WTO, it is only binding on those states that have agreed to be party to it, and both Canada and the United States have joined. This agreement was revised over the course of 2011 and 2012, and the new agreement went into force in 2014.<sup>13</sup> With forty-eight WTO members as parties, it aims to "mutually open government procurement markets among its parties."<sup>14</sup> Parties modulate the scope of their commitments under the agreement by specifying, for example, thresholds for their applicability or the nature of goods or entities covered.<sup>15</sup> For example, Canada has established a list of federal and provincial governmental entities that are subject to the agreement and has defined different thresholds for central government entities and sub-central government entities.<sup>16</sup>

The United States has agreed to include a majority of its federal entities, but it has, however, only included thirty-seven states, to various degrees.<sup>17</sup> No US city is subject to the *GPA* requirements. Further, the United States has set certain thresholds.<sup>18</sup> The US federal government requires that procurements under US \$250,000 be set aside for small American businesses if it is expected that at least two are interested and qualified to bid on the procure-

<sup>12</sup> *Agreement on Government Procurement*, 15 April 1994, 1915 UNTS 103 (entered into force 1 January 1996).

<sup>13</sup> *Ibid*, as amended by the *Protocol Amending the Agreement on Government Procurement*, 30 March 2012, 3003 UNTS 49 (entered into force 6 April 2014) [*GPA*].

<sup>14</sup> "Agreement on Government Procurement," online: WTO <[www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)>.

<sup>15</sup> *GPA*, *supra* note 13, art II(4).

<sup>16</sup> Central entities refer to federal departments and agencies, and sub-central entities refer to departments and agencies at the state or provincial levels. See "Government Procurement Agreement Appendix 1: Coverage Schedules," Canada, Annex 1 and 2, online: WTO <[www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_app\\_agree\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm)> ["Coverage Schedules"].

<sup>17</sup> *Ibid*, United States, Annex 1 and 2. Here is the list of US states subject to the *GPA*: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.

<sup>18</sup> *Ibid*, United States, Annex 1 and 2.

ment.<sup>19</sup> This excludes Canadian suppliers unless these suppliers enter into joint ventures with or are subcontractors of American businesses, but only up to 50 percent of the value of the contract can be spent on external suppliers.<sup>20</sup> The US thresholds can also be quite high. For example, the United States has set its threshold for construction services at over US \$7 million.<sup>21</sup>

Under the *GPA*, in principle, tenders above the thresholds set by each party are subject to free trade rules. When the *GPA* is applicable, the non-discrimination principle applies.<sup>22</sup> Therefore, states may not give preference to their national suppliers (under the principle of national treatment), and they similarly may not give preference to another state's suppliers without granting these privileges to the suppliers of all parties to the agreement (most favoured nation (MFN) treatment).<sup>23</sup> However, there are, of course, several exemptions. In fact, parties can give preference to their domestic suppliers if they provided for such when they became a party to the *GPA*.<sup>24</sup> The United States has indeed modulated its obligations by declaring many domestic exemptions, which shows its willingness to continue to give preference to its domestic suppliers.<sup>25</sup> Further, parties may also give preference to certain states if they are party to the same free trade agreement.<sup>26</sup>

#### DIFFERENTIATING THE *BUY AMERICAN ACT* AND THE BUY AMERICA POLICY

Before going any further, a better understanding of the US programs relating to government procurement is necessary. The *Buy American Act*<sup>27</sup> and the Buy America Policy<sup>28</sup> are often confused and seen without distinction. In short, the two programs allow the United States to act in a protectionist manner in the field of government procurement in order to favour their domestic suppliers of goods. For example, tenders subject to the *Buy American Act* must include a local purchasing requirement. Goods must be

<sup>19</sup> *Federal Acquisition Regulation*, 48 CFR §§ 2.101, 19.502-2. See also "The Buy American Act and Buy America Requirements" (last modified 2 March 2021), online: *Government of Canada* <[www.tradecommissioner.gc.ca/sell2usgov-vendreaugouvusa/procurement-marches/buyamerica.aspx?lang=eng](http://www.tradecommissioner.gc.ca/sell2usgov-vendreaugouvusa/procurement-marches/buyamerica.aspx?lang=eng)>.

<sup>20</sup> "Buy American Act and Buy America Requirements," *supra* note 19.

<sup>21</sup> "Coverage Schedules," *supra* note 16, United States, Annex 1 and 2.

<sup>22</sup> *GPA*, *supra* note 13, art IV(1).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, art II(4).

<sup>25</sup> "Coverage Schedules," *supra* note 16, United States.

<sup>26</sup> *General Agreement on Tariffs and Trade 1994, Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1869 UNTS 426, arts XVII, XXIV (entered into force 1 January 1995) [*GATT 1994*].

<sup>27</sup> *Buy American Act*, *supra* note 2.

<sup>28</sup> See especially *Buy America Act of 1983*, 41 USC § 5323.

entirely manufactured in the United States, and at least 55 percent of inputs must be of American origin.<sup>29</sup> For iron and steel, this requirement increases to 95 percent.<sup>30</sup> Regarding the Buy America Policy, the requirements vary depending on the agency financing the project. For example, projects financed by the US Environmental Protection Agency are required by the Buy American Policy to use 100 percent American iron and steel.<sup>31</sup>

The *Buy American Act* and the Buy America Policy, however, are distinct protectionist frameworks. The *Buy American Act* only applies to assets purchased by US federal agencies.<sup>32</sup> It is a federal law first enacted in 1933, having evolved many times since. It covers all products and has a threshold of applicability set at US \$10,000.<sup>33</sup> The *Buy American Act*, as previously mentioned, has a local purchasing requirement. There are, however, possible exemptions that may apply, for example, when a good is not produced in sufficient quantities in the United States.<sup>34</sup> Even though the *Buy American Act* does not apply to the purchase of services or the acquisition of goods by states and cities, many of the latter apply these requirements after passing similar laws at the local or state level.<sup>35</sup>

The Buy America Policy, in contrast, refers to a package of administrative or executive measures taken since 1982 relating to federal funding for projects.<sup>36</sup> That is, the Buy America requirements apply when the federal government funds infrastructure projects conducted by federal, state, or municipal departments and agencies.<sup>37</sup> They apply whenever there is federal funding for the project, even when the funding is limited. The policy covers products such as iron and steel, and the threshold for its application

<sup>29</sup> *Federal Acquisition Regulation*, *supra* note 19, § 25.101.

<sup>30</sup> *Ibid.*

<sup>31</sup> “Buy American Act and Buy America Requirements,” *supra* note 19.

<sup>32</sup> *Buy American Act*, *supra* note 2, §§ 8301–8303. See also John R Luckey, “Domestic Content Legislation: The Buy American Act and Complementary Little Buy American Provisions” (2012) at 2, online: *Congressional Research Service* <[commons.cornell.edu/bitstream/handle/1813/77726/CRS\\_Domestic\\_Content\\_Legislation.pdf?sequence=1&isAllowed=y](https://commons.cornell.edu/bitstream/handle/1813/77726/CRS_Domestic_Content_Legislation.pdf?sequence=1&isAllowed=y)>.

<sup>33</sup> *Buy American Act*, *supra* note 2, § 1902.

<sup>34</sup> See e.g. *ibid.*, § 8302. Generally referred to as “public interest,” “unreasonable cost,” and “non-availability” exemptions.

<sup>35</sup> “Buy American Act and Buy America Requirements,” *supra* note 19. See e.g. *Texas Government Code*, 10 TGC § 2252.

<sup>36</sup> “Buy American Act and Buy America Requirements,” *supra* note 19.

<sup>37</sup> *Ibid.* See also Danielle M Conway, “Emerging Trends in International, Federal, and State and Local Government Procurement in an Era of Global Economic Stimulus Funding” (2009) 32:1 U Haw L Rev 29; European Commission, “Trade Barriers: Procurement: Buy American” (last modified 14 January 2022), online: <[trade.ec.europa.eu/access-to-markets/en/barriers/details?isSps=false&barrier\\_id=11190](https://trade.ec.europa.eu/access-to-markets/en/barriers/details?isSps=false&barrier_id=11190)>.

varies depending on the organization being funded.<sup>38</sup> There are also possible exemptions, but these are difficult to obtain.<sup>39</sup>

In short, these are two different programs, each with their own requirements, thresholds, and scope of application. However, it is important to emphasize that, while the *Buy American Act* relates directly to US federal government procurement, the Buy America Policy is a federal funding program for infrastructure projects carried out by federal agencies as well as by states and cities that call for tenders on their own behalf.

#### GATEWAYS TO FAVOURABLE TREATMENT OF CANADIAN SUPPLIERS

Considering the barriers erected by the Buy America Policy and *Buy American Act*, Canadian suppliers are concerned and wish to access these contracts.<sup>40</sup> This section will look into the different gateways that could allow Canadian suppliers to seek to access this market that the United States continues to close up as protectionism grows. We will see under which conditions the *GPA* could be used to open up American government procurement and how the *Agreement between Canada, the United States of America, and the United Mexican States (CUSMA)*,<sup>41</sup> a waiver for Canadian suppliers, and a sectoral agreement would not offer this same opening.

#### GPA

Could Canada (or any of the other states parties) invoke the WTO's *GPA*? As previously mentioned, the *GPA* provides that no discrimination should be made in government procurement when the agreement applies. However, modulations of this undertaking are possible. Concerning the *Buy American Act*, if we analyze the American commitments, we realize that the United States has not provided for any general modulation of its commitments.<sup>42</sup> Therefore, in principle, US government tenders should not favour domestic content or suppliers. However, it should be recalled that the *GPA* only

<sup>38</sup> "Buy American Act and Buy America Requirements," *supra* note 19.

<sup>39</sup> President Biden's Executive Order aimed, among other things, to complicate the process for obtaining waivers, increase reliance on domestic suppliers, as well as reduce the need for foreign suppliers, therefore limiting the possibility for exemptions. See United States, Executive Office of the President, "Memorandum for Heads of Executive Departments and Agencies" (2021), online: [www.whitehouse.gov/wp-content/uploads/2021/06/M-21-26.pdf](http://www.whitehouse.gov/wp-content/uploads/2021/06/M-21-26.pdf).

<sup>40</sup> House of Commons, *supra* note 8 at 3.

<sup>41</sup> *Agreement between Canada, the United States of America, and the United Mexican States*, 30 November 2018 (entered into force 1 July 2020), online: [www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng) [*CUSMA*].

<sup>42</sup> "Coverage Schedules," *supra* note 16, United States.

applies to contracts above a certain threshold, and this threshold is still much higher than the one implemented in the *Buy American Act*. Indeed, the Act imposes local purchasing on micro-contracts over US \$10,000,<sup>43</sup> whereas the *GPA* is only applicable to contracts exceeding US \$183,000 for federal entities.<sup>44</sup>

On the other hand, the *US Trade Agreements Act* provides that the president of the United States may waive the application of relevant laws, regulations, procedures, and practices if it is determined that their application would discriminate against eligible products.<sup>45</sup> These waivers may be given to designated countries, a category that includes all *GPA* states parties and thus includes Canada.<sup>46</sup> A waiver under these provisions would mean that Canadian bids would be entitled to “receive equal consideration with domestic offers” when the thresholds are met and the *GPA* applies.<sup>47</sup> The president has delegated the authority to waive to the US Trade Representative (USTR), who in turn has waived the application of the *Buy American Act* in respect of *GPA* states parties; the thresholds for these waivers are revised every two years and are now set at US \$183,000 for supply and services contracts and over US \$7 million for construction contracts.<sup>48</sup>

In sum, federal agencies should not discriminate against *GPA* states on the basis of the *Buy American Act* when a contract comes within the scope of the *GPA*. However, this still allows for these agencies to discriminate when the threshold is not met — meaning between US \$10,000 (the *Buy American Act* threshold) and US \$183,000 (the waiver threshold) — or when the *GPA* does not apply because of one of the United States’s numerous exemptions under the latter. Thus, a significant portion of government procurement is still inaccessible to Canadian suppliers, and contracts subject to the *Buy American Act* that fall below the *GPA* thresholds can still legally exclude Canadian suppliers. Indeed, from 2008 to 2012, US government procurement covered by the *GPA* and other similar US commitments only represented one-third of US federal government procurement.<sup>49</sup>

<sup>43</sup> *Buy American Act*, *supra* note 2, § 1902.

<sup>44</sup> “Coverage Schedules,” *supra* note 16, United States, Annex 1.

<sup>45</sup> *Trade Agreements Act*, 19 USC § 2511(a); *Federal Acquisition Regulation*, *supra* note 19, §§ 25.404–25.405.

<sup>46</sup> *Federal Acquisition Regulation*, *supra* note 19, § 25.003.

<sup>47</sup> *Trade Agreements Act*, *supra* note 45, § 2511; *Federal Acquisition Regulation*, *supra* note 19, § 25.402.

<sup>48</sup> *Federal Acquisition Regulation*, *supra* note 19, § 25.402.

<sup>49</sup> Rachel F Fefer & Ian F Fergusson, “Trade Implications of the President’s Buy American Executive Order” (2 May 2017), online: *Federation of American Scientists* <[sgp.fas.org/crs/misc/IN10697.pdf](http://sgp.fas.org/crs/misc/IN10697.pdf)>, citing United States, Government Accountability Office, “Government Procurement: United States Reported Opening More Opportunities to Foreign



In addition, several US states have adopted similar policies, and the thresholds for their application are even higher.<sup>50</sup> We should also remember that the *GPA* does not apply to every agency and every US state, which means that Canadian suppliers are missing out on a whole range of contracts that are subject to the *Buy American Act* and not to the *GPA*.<sup>51</sup> With respect to the Buy America Policy, upon becoming a party to the *GPA*, the United States provided for several exclusions that allow it to implement its protectionist policies with respect to the financing of government contracts.<sup>52</sup> For example, the United States excluded all set-asides for small businesses, which allows them to favour American businesses by setting aside contracts for small businesses.<sup>53</sup> Another example is that the United States excluded the application of the *GPA* to state contracts relating to construction-grade steel, motor vehicles, and coal.<sup>54</sup> Therefore, many tenders subject to the Buy America Policy are able to favour US products or suppliers without violating the *GPA*. Finally, at the city level, the United States has not made any *GPA* commitments. Cities can therefore apply local purchasing measures without the *GPA* being invoked. This represents billions of dollars in contracts annually.<sup>55</sup>

Above all, it is important not to overlook the fact that invoking the *GPA* requires a detailed knowledge of the law. One must go to the annexes, read the notes, and dig into American law. In short, it is not easy for small- and medium-size Canadian businesses to invoke an irregularity under WTO law, bring a case before one of the competent US tribunals,<sup>56</sup> or convince the Canadian government to file a complaint at the WTO against the United States. Thus, the *GPA* may appear to be a solution, but it is a very limited one because the United States has listed a significant number of exemptions to its obligations and because finding a loophole in US policies requires a significant level of expertise that few companies possess.

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Firms Than Other Countries, but Better Data Are Needed" (2017), online: <[www.gao.gov/products/gao-17-168](http://www.gao.gov/products/gao-17-168)>.

<sup>50</sup> See e.g. *Texas Government Code*, supra note 35, § 2252.907 (in which the threshold is set at US \$1 million).

<sup>51</sup> "Coverage Schedules," supra note 16, United States, Annex 1 and 2.

<sup>52</sup> See e.g. *ibid*, United States, Annex 2, n 1 and n 5; Annex 3, n 5; Annex 7 at para 1.

<sup>53</sup> *Ibid*, United States, Annex 7 at para 1.

<sup>54</sup> *Ibid*, United States, Annex 2, n 1.

<sup>55</sup> "State and Local Expenditures," supra note 6.

<sup>56</sup> Different courts may have jurisdiction. For example, at the federal level, the US Court of Federal Claims has jurisdiction over government contracts and bid protests. See United States, Office of the United States Trade Representative, "Additional Information on U.S. Procurement," online: <[ustr.gov/issue-areas/government-procurement/additional-information-on-US-Procurement](http://ustr.gov/issue-areas/government-procurement/additional-information-on-US-Procurement)>.

*CUSMA*

A chapter on government procurement in a free trade agreement would provide a legal basis for preferential treatment of the parties' suppliers. In fact, under the *North American Free Trade Agreement (NAFTA)*, there was an entire chapter on government procurement that applied to all parties.<sup>57</sup> These *NAFTA* provisions allowed Canadian suppliers to avoid the protectionist measures of the *Buy American Act*, especially with respect to trade in services within the construction field.<sup>58</sup> However, under *CUSMA*, while a chapter on government procurement is still present, it only applies between Mexico and the United States.<sup>59</sup> We recall that the Trump administration had demanded a dollar-for-dollar policy from Canada, which the latter categorically refused.<sup>60</sup> This means that Canada and the United States were not able to agree on more favourable terms than that of the *GPA*.<sup>61</sup> Therefore, Canada cannot invoke *CUSMA* to gain privileged access to US government procurement for its suppliers.

## WAIVER FOR CANADIAN SUPPLIERS

A possible workaround to the issue of access to the US government's procurement market would be for the United States to grant a waiver, or an exemption, in respect of Canadian suppliers. However, this possibility raises concerns regarding the legality of such a waiver considering the MFN treatment clause contained in the *GPA*. The answer to these concerns is complex and twofold. Indeed, the analysis must be split between, first, the *Buy American Act* and, second, the Buy America Policy.

Regarding the *Buy American Act*, it seems rather unlikely that Canada would obtain an agreement waiver. In fact, under the *GPA*, according to the MFN clause, if the United States gives Canadian suppliers preferential access to government procurement, it must extend that preference to the other forty-six *GPA* states.<sup>62</sup> As previously mentioned, there is an exception

<sup>57</sup> *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, (1993) 32 ILM 289, ch 10 (entered into force 1 January 1994) [*NAFTA*].

<sup>58</sup> Nathalie Belley, "Les marchés publics: étude des obligations internationales du Canada, du GATT à l'ALENA" (1995) 36:2 C de D 503 at 531–32.

<sup>59</sup> *CUSMA*, *supra* note 41, art 13.2(3).

<sup>60</sup> United States, Office of the United States Trade Representative, "Summary of Objectives for the NAFTA Renegotiation" (17 July 2017) at 15, online: <[ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf](https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf)>.

<sup>61</sup> Sandra G Hamilton, "Public Procurement: Price-taker or Market-shaper" (2022) 18:4 *Critical Perspectives Intl Bus* 574 at 581.

<sup>62</sup> *GPA*, *supra* note 13, art IV(1).

to the MFN clause, and that is in the case of a free trade agreement.<sup>63</sup> In other words, if states conclude a free trade agreement, they can give each other preferences. Indeed, the objective of such an agreement is to extend preferences to one state without having to extend these preferences to other states. However, in order for this exception to apply, there must be a formal free trade agreement in force.

We recall that the United States had granted a general waiver in favour of Canada in 2010 following the Obama administration's massive investment plan.<sup>64</sup> However, the legal context has since changed. In 2009, when Canada negotiated with the Obama administration to allow Canadian suppliers to participate in tenders reserved for American companies, it was *NAFTA* that allowed Canada to have a preferential agreement with the United States on government procurement as *NAFTA* contained provisions on government procurement.<sup>65</sup> Today, *CUSMA* has replaced *NAFTA*, and this new agreement does not contain any rules on government procurement governing the relations between Canada and the United States. Thus, such an exemption could not be given to Canadian suppliers alone. The absence of a chapter on government procurement in *CUSMA* therefore has a direct consequence for the possibility of obtaining a waiver in favour of Canadian suppliers. In summary, concerning the *Buy American Act*, the United States must respect the *GPA*'s MFN clause. If it gives an advantage to Canada, this MFN clause requires it to give that advantage to the other forty-six states parties to the *GPA* and, since *CUSMA* does not cover government procurement, the United States cannot use the free trade agreement exception to give an advantage only to Canada.

Regarding the Buy America Policy, the analysis could differ. It has been argued by Canadian officials that Buy America is not a procurement program but, rather, a program for funding states and cities that engage in procurement.<sup>66</sup> Indeed, the *GPA* does not apply to "non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives."<sup>67</sup> Consequently, according to the Canadian argument, since Buy America only regulates federal grants to sub-state entities that award government contracts, the *GPA* would not apply to Buy America. Therefore,

<sup>63</sup> *GATT 1994*, *supra* note 26, arts XVII, XXIV.

<sup>64</sup> Government of Canada, "Canada – U.S. Agreement on Government Procurement" (last modified 25 January 2017), online: <[www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/other-autre/us-eu.aspx?lang=eng&\\_ga=2.125469194.18695084.1657034480-1844916328.1657034480](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/other-autre/us-eu.aspx?lang=eng&_ga=2.125469194.18695084.1657034480-1844916328.1657034480)>.

<sup>65</sup> *NAFTA*, *supra* note 57.

<sup>66</sup> House of Commons, *supra* note 8 at 11.

<sup>67</sup> *GPA*, *supra* note 13, art II(3).

the United States would not be bound by the MFN principle contained in the *GPA* and could enter into a preferential agreement with Canada.

However, this seems to be a dubious interpretation that does not take the broader context into account. Indeed, the United States itself provided for Buy America exemptions when it became a party to the *GPA*.<sup>68</sup> This suggests that the United States considered that legislation implementing the Buy America Policy may be subject to *GPA* commitments. Moreover, the *GPA* stipulates that it “applies to *any* measures *regarding* covered procurement.”<sup>69</sup> Its scope of application is therefore quite broad. The Canadian interpretation also ignores WTO law in general. If government procurement law does not apply, then general WTO law applies. Buy America measures could be challenged, for example, under the MFN clause of the *General Agreement on Tariffs and Trade 1994* because they would be considered regulation affecting international trade.<sup>70</sup> Above all, Canada is not the only one to suffer from the protectionist policies of the United States, and it is safe to assume that suppliers from other countries would put pressure on their governments to challenge the United States on this point.<sup>71</sup>

For all these reasons, the US government is unlikely to exclude the Buy America Policy from the scope of government procurement simply to enter into a preferential agreement with Canada. After all, government procurement rules are the most permissive in the commercial normative landscape. In short, international law does not appear to permit the United States simply to grant an exemption to Canadian suppliers, at least not without renegotiating *CUSMA*. This will be discussed further in a later section.

#### SECTORAL AGREEMENT

Since January 2021, many have raised the possibility that Canada and the United States could enter into a sectoral agreement on government procurement.<sup>72</sup> However, this is simply not possible as, under WTO rules, governments can enter into preferential agreements but only through formal preferential agreements that must cover “substantially all trade”

<sup>68</sup> “Coverage Schedules,” *supra* note 16, United States.

<sup>69</sup> *GPA*, *supra* note 13, art II(1) [emphasis added].

<sup>70</sup> *GATT 1994*, *supra* note 26, art I.

<sup>71</sup> For example, European Union member states and China suffer from American protectionist policies. See European Commission, *supra* note 37; Nicole A Salisbury, “Informed Compliance? How the CPB’s Rules of Origin Determinations Impact Foreign Importers” (2021) 30 Fed Cir BJ 267 at 268–69.

<sup>72</sup> Stéphane Parent, “Politique ‘Buy American’ de Biden: exemption pour le secteur vert canadien?” (4 March 2021), online: *Radio Canada International* <[www.rcinet.ca/fr/2021/03/04/politique-buy-american-de-biden-exemption-pour-le-secteur-vert-canadien/](http://www.rcinet.ca/fr/2021/03/04/politique-buy-american-de-biden-exemption-pour-le-secteur-vert-canadien/)>.

between the states parties.<sup>73</sup> A sectoral agreement that would cover only public procurement would therefore not be compliant with WTO rules.

#### WHAT OPTIONS FOR CANADA?

Considering these limitations, Canada and its suppliers are faced with very few options. In fact, four scenarios are possible. First, there is the scenario of the status quo. In this case, Canada would simply accept the situation without any waivers, and Canadian goods and services suppliers would not be able to bid on a significant portion of major infrastructure projects in the United States. In fact, they would be able to bid on some projects that fall within the scope of the *GPA*, as previously mentioned, but ascertaining which ones is a highly technical exercise and would require each company wishing to bid to undertake an often complex analysis of the limits and conditions set by the United States under the *GPA*. For contracts that are not covered by the *GPA*, Canadian and American companies, in a joint venture, could apply to specific agencies for waivers on a case-by-case basis, but this is a very complex mechanism that does not ensure any predictability for Canadian companies.

In fact, even American agencies have certain issues with this procedure.<sup>74</sup> The Made in America Office was created in part to ensure a certain level of transparency and consistency across the federal government with respect to the granting of waivers by helping agencies implement the Buy America Policy and *Buy American Act*.<sup>75</sup> These waivers are indeed quite complex and inconsistently given, and US companies would likely not want to take the risk of being refused financing if their product is not considered sufficiently American after the fact. Reluctance to pursue this path could therefore come from American companies collaborating with Canadian bidders. In this context, it is possible that many Canadian companies could react by moving some or all of their operations to the United States.

Second, it might be possible to renegotiate *CUSMA*. This would mean negotiating the addition of a chapter on government procurement applicable to Canada and the United States. Of course, this would mean that Canada would have to offer the United States something in return, and this would probably mean that Mexico would have its say. After years of painful

<sup>73</sup> *GATT 1994*, *supra* note 26, art XXIV.

<sup>74</sup> United States, Government Accountability Office, "Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance" (2018) at 25–27, online: <[www.gao.gov/assets/gao-19-17.pdf](http://www.gao.gov/assets/gao-19-17.pdf)>.

<sup>75</sup> United States, White House Briefing Room, "One Year Anniversary of the Made in America Office" (2022), online: *White House* <[www.whitehouse.gov/omb/briefing-room/2022/01/25/one-year-anniversary-of-the-made-in-america-office/](http://www.whitehouse.gov/omb/briefing-room/2022/01/25/one-year-anniversary-of-the-made-in-america-office/)>.

negotiations,<sup>76</sup> there is no guarantee that the Canadian government would have the appetite for this route, particularly after having already lost so much in the *CUSMA* negotiations<sup>77</sup> and given the protectionist inclinations of the Biden administration. Nevertheless, some consider that it would be one of the best solutions if Canada really wants to have preferential treatment and create a true “Buy North American” zone.<sup>78</sup>

Third, Canada could insist on obtaining a general waiver. However, as previously explained, this waiver would probably violate the *GPA*'s MFN clause. Thus, whether the United States would exercise its discretion to grant such an exemption would probably depend on a risk-benefit analysis in which the United States would balance its economic and political interests. The economic interests would relate to US-Canada supply chains that are so integrated that the United States can hardly deprive itself of Canadian products.<sup>79</sup> At a time when the United States is trying to secure its supply chains in the spirit of “friend-shoring,” a gesture towards Canadian suppliers could be salutary.<sup>80</sup> The political interests here could include the possibility that the United States wants to make a friendly move towards Canada following the presidential term of Donald Trump. However, this option would go against the broader international commitments of the United States and would therefore be risky. Above all, there is no reason at the moment to believe that the United States really wants to make Canada forget the Trump years.<sup>81</sup>

<sup>76</sup> Gilles Vandal, *Donald Trump et la déconstruction de l'Amérique* (Outremont, QB: Athena, 2018); Geneviève Dufour & Delphine Ducasse, “America First and the Return of Economic Isolationism and Nationalism to the United States: A Historic Turning Point for International Trade Law” (2019) 57 *Can YB Intl Law* 223.

<sup>77</sup> Gilbert Gagné & Michèle Rioux, eds, *NAFTA 2.0: From the First NAFTA to the United States – Mexico – Canada Agreement* (Cham, Switzerland: Palgrave Macmillan, 2022).

<sup>78</sup> See e.g. William Alan Reinsch, “The Economic Relationship between Canada and the United States” (8 April 2021), online: *JSTOR* <[www.jstor.org/stable/pdf/resrep37723.pdf](http://www.jstor.org/stable/pdf/resrep37723.pdf)>.

<sup>79</sup> Terrie L Walmsley & Peter J Minor, “Reversing NAFTA: A Supply Chain Perspective” in Peter Dixon, Joseph Francois & Dominique van der Mensbrugge, eds, *Policy Analysis and Modeling of the Global Economy* (Singapore: World Scientific Publishing, 2021) 155; United States, “U.S. — Canada/Canada — U.S. Supply Chains Progress Report” (2022), online: *White House* <[www.whitehouse.gov/wp-content/uploads/2022/06/CANADA-U.S.-SUPPLY-CHAINS-PROGRESS-REPORT.pdf](http://www.whitehouse.gov/wp-content/uploads/2022/06/CANADA-U.S.-SUPPLY-CHAINS-PROGRESS-REPORT.pdf)>.

<sup>80</sup> Mona Paulsen, “Friend-shoring” (21 April 2022), online: *International Economic Law and Policy* <[ielp.worldtradelaw.net/2022/04/friend-shoring.html](http://ielp.worldtradelaw.net/2022/04/friend-shoring.html)>.

<sup>81</sup> Charles-Philippe David, “La politique étrangère américaine est (désormais) la continuation de la politique (intérieure) par d’autres moyens” (2021) 52:1 *Études int* 171; Jin Ling, “Reshaping the US-European Relations: From Alliance to a More Balanced Partnership” (2021) 87 *China Intl Studies* 85 at 100; Alexandra de Hoop Scheffer, “Le ‘retour de l’Amérique’ dans les instances multilatérales: entre trumpisme résiduel et stratégie de ralliement autour des priorités états-uniennes” (2022) 184 *La Découverte* 249 at 257; Tom Ichniowski, “Biden Reworks Buy America” (2021) 286:3 *Engineering News-Record* 4;

Fourth, Canada could move quickly to undertake a comprehensive analysis of the consistency of Buy American and Buy America measures with the *GPA* and other US commitments. It is likely that the Biden administration's plans go beyond what is permitted under the *GPA*. This could provide an opportunity to engage in a documented dialogue to limit the impact of such measures, and, if an agreement is not reached, Canada could initiate a WTO Dispute Settlement Body proceeding.<sup>82</sup> Of course, this would not necessarily lead to swift results, but it could put some pressure on the United States, especially if trading partners such as China, the European Union (EU), or the United Kingdom joined the initiative. On the other hand, pursuing such a path would raise another problem as the functioning of the Appellate Body of the WTO has been blocked by the United States due to concerns it has had with that body for the past sixteen years.<sup>83</sup>

## CONCLUSION

This analysis is not optimistic, but it does shed light on an important aspect of the *NAFTA* renegotiations with the United States. In the face of what were seen as exaggerated American demands, Canada shelved the idea of having a government procurement chapter in *CUSMA*. It may have taken comfort in the fact that, after all, the *GPA* already gave Canadian suppliers access to the American government procurement market. While this is true, it lacks precision, and, more importantly, it fails to acknowledge that this gap now prevents Canadian suppliers from having preferential access to the American government procurement market at the federal, state, and municipal levels.

In the spring of 2022, Canada announced consultations on potential approaches to making its government procurement more reciprocal.<sup>84</sup> The goal would be to open its supply contracts to suppliers from countries

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Samantha L. Clark, Evan R. Sherwood & Michael Wagner, "Government Contracting Insights: Biden Issues New Buy American Directive," *National Defense* (2 March 2021) 42, online: <[www.nationaldefensemagazine.org/articles/2021/3/2/biden-issues-new-buy-american-directive](http://www.nationaldefensemagazine.org/articles/2021/3/2/biden-issues-new-buy-american-directive)>.

<sup>82</sup> In this regard, see the opinion of Simon Lester on the possibility of bringing a non-violation complaint to the Dispute Settlement Body under Article XX (2) (b) of the *GPA*, *supra* note 13. Simon Lester, "Can the Biden Administration's Push for More 'Made in America' Be Challenged under the *GPA*?" (27 October 2021), online: *International Economic Law and Policy* <[ielp.worldtradelaw.net/2021/10/can-the-biden-administrations-push-for-more-made-in-america-be-challenged-under-the-gpa-1.html](http://ielp.worldtradelaw.net/2021/10/can-the-biden-administrations-push-for-more-made-in-america-be-challenged-under-the-gpa-1.html)>.

<sup>83</sup> "Members Continue Push to Commence Appellate Body Appointment Process" (28 March 2022), online: *WTO* <[www.wto.org/english/news\\_e/news22\\_e/dsb\\_28mar22\\_e.htm](http://www.wto.org/english/news_e/news22_e/dsb_28mar22_e.htm)>.

<sup>84</sup> Government of Canada, Global Affairs, "Consultations on Reciprocal Procurement Policies in Canada" (last modified 28 June 2022), online: <[www.international.gc.ca/trade-commerce/consultations/RP-AR/index.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/consultations/RP-AR/index.aspx?lang=eng)>.

that are also open to Canadian suppliers. In this sense, Canada is following the example of the EU, which began considering the institution of such a policy in 2012. It is now a done deal. On 17 June 2022, the EU Council adopted a regulation on the promotion of reciprocity in access to international public contracts.<sup>85</sup> Under this regulation, the European Commission has the power to investigate and impose measures on suppliers from countries that block European suppliers from accessing their procurement contracts. This regulation obviously applies only to contracts that are not subject to the *GPA*. This means that it could theoretically apply to contracts awarded by US states that are not subject to the *GPA* as well as to US municipalities.<sup>86</sup> It would be surprising to see Canada impose this type of drastic measure on its most important economic partner. However, it could be an additional lever in efforts to convince the United States to be more open to Canadian products and suppliers.

Ultimately, Canada must act. It must remain proactive, alert, and adopt an attitude that allows it to position itself advantageously in negotiations on this subject. Unfortunately, the current law does not seem to allow Canadian suppliers better access to the US government procurement market. Therefore, it will be necessary to focus future negotiations on the importance of the integration of supply chains and on the possibility of creating a true “Buy North American” zone.

<sup>85</sup> Council of the European Union, Press Release, “International Procurement Instrument: Council Gives Green Light to New Rules Promoting Reciprocity” (17 June 2022), online: <[www.consilium.europa.eu/en/press/press-releases/2022/06/17/international-procurement-instrument-council-gives-final-go-ahead-to-new-rules-boosting-reciprocity/](http://www.consilium.europa.eu/en/press/press-releases/2022/06/17/international-procurement-instrument-council-gives-final-go-ahead-to-new-rules-boosting-reciprocity/)>.

<sup>86</sup> Jean Heilman Grier, “EU Adopts Procurement Reciprocity Regulation” (13 July 2022), online: *Perspectives on Trade* <[trade.djaghe.com/?p=7371](http://trade.djaghe.com/?p=7371)>.