

THE IMPLEMENTATION OF THE U.S. STIMULUS PACKAGE: A PRELIMINARY ASSESSMENT OF THE CONSEQUENCES FOR INTERNATIONAL COMMERCE

Simon J. Evenett¹
University of St. Gallen and CEPR

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Abstract:

Counter-cyclical fiscal policy has been an important tool used by governments during the current economic downturn. This paper considers the trade- and investment-related implications of one of the largest such stimulus packages, namely, that of the United States. Necessarily our assessment is a tentative one, after all the downturn is not over and only a fraction of the outlays appropriated has been spent. Still, important preliminary findings concerning the potential for discrimination in the design and implementation of stimulus packages can be discerned and their implications for the design of government procurement provisions in trade agreements is discussed.

¹ Affiliation: Professor of International Trade and Economic Development, Department of Economics and Swiss Institute for International Economics and Applied Economic Research (SIAW), University of St. Gallen. Address: Bodanstr 8, 9000 St Gallen, Switzerland. Email: simon.evenett@unisg.ch. Evenett is also Co-Director, International Trade and Regional Economics Programme, Centre for Economic Policy Research (CEPR), London. I thank Gaspar Frontini and other participants in the World Bank-CEPR joint conference on 25-26 May 2009 for their comments on an earlier draft of this paper and on the associated presentation.

Introduction

In terms of macroeconomic policy the response by governments to the current sharp global economic downturn has been markedly more aggressive than that executed during the Great Depression. Monetary and fiscal policies have been substantially relaxed and many governments have borrowed heavily in their attempts to pump aggregate demand into national economies. The so-called stimulus packages that have been enacted over the past year or so are in addition to the built-in fiscal stabilizers that cushion economies during cyclical downturns. Table 1 reproduces a recent summary by the Organisation for Economic Co-operation and Development (OECD) of the magnitude of the fiscal stimulus packages undertaken by its members (OECD 2009). The size of the United States' stimulus package stands out in comparison to its OECD peers, although its scale is on a par with that of China's.

Macroeconomic policymakers and analysts are not the only ones interested in the impact of fiscal stimulus packages. The potential cross-border knock-on effects of government procurement procedures as well as the potential gains to both buyer and seller when foreign firms win government contracts account for trade policymakers and researchers interest in initiatives involving substantial changes in government outlays on goods and services. These considerations have been recognized in many trade accords, both multilateral and regional, where signatories have accepted obligations to open part of their government procurement markets and to limit their choice of state purchasing practices.

At times of considerable macroeconomic strain when governments are desperate to revive national economies, such as now, a tension of interest to trade policymakers arises, namely, that between a government adhering to its international commitments and pursuing fiscal stimuli that seek maximum domestic short-run advantage. These episodes might reveal the extent to which existing international disciplines on government procurement "bite", the manner and extent to which governments attempt to circumvent lawfully their international obligations, and implications of discriminatory state purchasing practices for trade and investment flows.

Three other factors account for current interest in the commerce-related implications of fiscal stimulus packages. First, the scale of these packages represents a substantial injection of demand into national economies, with the potential to shift a greater share of national demand towards domestically-produced goods and services. The question then arises as to whether the short- and longer-term implications for trade flows are substantial and, in turn, whether this is likely to trigger retaliation by trading partners.

Second, in an era of considerable international outsourcing, the manner in which imported parts and components are treated in any revised national procurement regulations could have considerable effects on all along the supply chain, implicating many nations' commerce. In turn this raises the question as to whether domestic firms that have invested considerably in international supply chains will lobby against discriminatory state purchasing rules and whether their opposition is decisive.

Third, the current disciplines in international trade agreements are, to put it mildly, incomplete in terms of government entities covered, product and services covered, and the instruments of procurement policy. Existing disciplines have tended to ban the more transparent forms of discrimination in procurement policy, so the question arises as to whether more murkier means are now being used to favor national firms, however the latter are defined. This in turn raises questions about what information trade policy analysts and ministries need to track as well as for the form, feasibility, and merits of expanding public procurement disciplines in trade accords.

In this paper the implementation of the United States' American Recovery and Reinvestment Act, that was signed into law on 17 February 2009, is considered in some detail. Readers may recall that the enactment of this stimulus package was very controversial both inside and outside the United States. As far as the latter was concerned, many trading partners expressed concerns about the so-called Buy American provisions in the proposed legislation.² The focus in this paper is not on that trading partners' criticism or the U.S. Administration's immediate response, but on the subsequent implementation of the Act. The discussion here, therefore, will seek to shed light on the trade policy ramifications of the implementation of the Act. Particular attention will be given to the manner in which legislative text has been converted into administrative guidance, not just to Federal Departments and Agencies but also to sub-national levels of government. The growing body of qualitative evidence of the impact of this guidance is discussed as well as the very recent retaliation by certain sub-national authorities in Canada.

While the trade-related questions raised by recent fiscal stimuli are far-reaching, our ability to answer them fully at this time is surely constrained. Modesty is needed in drawing conclusions, especially as only a small fraction of the total outlays associated with most fiscal stimulus plans have actually been spent. Moreover, in some important jurisdictions the procurement rules used to disperse extra outlays have not been finalized. The picture, so to speak, may look much different in 18 months time. At most we hope to identify interesting and significant trends and policy questions, bearing in mind that our provisional findings may need to be revised over time.

The remainder of this paper is organized as follows. A detailed examination of the current U.S. fiscal stimulus package is presented next. After that the reaction of America's trading partners and firms are considered. Implications for policymaking (such as they are, being subject to the caveats mentioned earlier) are presented in the concluding section of the paper.

The implementation of American Recovery and Reinvestment Act 2009 (ARRA).

Many governments, both developing and industrialized, have implemented stimulus packages. Few, however, did so on such a scale as the United States. Nor did the enactment of their stimulus packages generate as much commentary as that of the United States. It may be recalled that, for different reasons, the bills before the U.S. House and the U.S. Senate were widely condemned for their discriminatory ("Buy American") provisions. Several trading partners went so far as to claim that if unamended the enactment of this bills could lead to "trade war." The intervention of President Obama and his administration's officials was said to have reassured the U.S. trading partners that the implementation of these provisions would be consistent with that of the obligations that the U.S. had taken on in international trade agreements relating to government procurement. In this section the implementation of the ARRA is considered in some detail, in part to highlight the many ways in which international commerce can be implicated by a sizeable national stimulus package. In turn this may have implications for conducting analyses of other nations' stimulus packages and for the possible strengthening of government procurement accords in trade agreements.

Coming up with a comprehensive assessment of the impact of this legislation is simply not possible at this time. This may be a disappointment for some readers but there are good reasons for not jumping to conclusions. According to the *Quarterly Report To The President on Progress*

² An excellent contribution to the debate over the merits of the Buy American text proposed in the bills before the U.S. House and Senate is Hufbauer and Schott (2009).

Implementing The American Recovery and Reinvestment Act of 2009, by 5 May 2009 (that is, 77 days after the ARRA was signed into law) just over \$88 billion had been "obligated"³ by U.S. federal agencies. Of that sum, only \$28.5 billion had been actually spent. A further \$15.9 billion of funds covering medical assistance programs had been paid to U.S. states and territories. More recently, according to www.recovery.gov⁴, by 3 July 2009, \$174.91 billion of spending was "available" and \$60.43 billion had been spent. Bearing in mind that not all of these funds were appropriated to spend on goods and services, the actual increase to date the size of the U.S. government procurement market is smaller. Furthermore, as will become clear, the Federal government has not finalized its procurement regulations, including those relating to the controversial Buy American clauses, and so the ultimate degree of discrimination against foreign firms remains cannot be known. Finally, given that the ARRA appropriates a grand total of \$787 billion over many years, for all of these reasons it is premature to draw any strong conclusions about the overall impact of the ARRA on trade and investment flows from the first 150 days or so of its existence.

Given the focus on the potentially discriminatory aspects of the ARRA, it makes sense to start by quoting in full the text referring to the Buy American provisions found in the enacted legislation.

"Sec. 1605. Use of American Iron, Steel, and Manufactured Goods.

(a) None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.

(b) Subsection (a) shall not apply in any case or category of cases in which the head of the Federal department or agency involved finds that--

- (1) applying subsection (a) would be inconsistent with the public interest;
- (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or
- (3) inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project

by more than 25 percent.

(c) If the head of a Federal department or agency determines that it is necessary to waive the application of subsection (a) based on a finding under subsection (b), the head of the department or agency shall publish in the Federal Register a detailed written justification as to why the provision is being waived.

(d) This section shall be applied in a manner consistent with United States obligations under international agreements."

This section leaves many terms undefined, for example, "manufactured goods."⁵ Moreover, it is not particularly clear whether parts, components, or services procurement must adhere to these provisions. In addition, the terms under which the exceptions could be invoked has not been spelt out. The Conference Report produced by the relevant House and Senate members

³ According to this document an "obligation" is "a binding agreement (e.g. a contract) that will result in outlays, immediately or in the future" (page 4, footnote 1).

⁴ A website created by the U.S. Federal Government to monitor and report on the implementation of the ARRA.

⁵ This is significant as prior Buy American legislation did not cover manufactured goods. It is, therefore, important what goods are now covered by section 1605 that were not covered by the prior legislation.

did shed some light on the Section 1605(d), the all important "concession" that placated the U.S. trading partners. The Conference Report notes on page 516:

"Section 1605 provides for the use of American iron, steel and manufactured goods, except in certain instances. Section 1605(d) is not intended to repeal by implication the President's authority under Title III of the Trade Agreements Act of 1979. The conferees anticipate that the Administration will rely on the authority under 19 U.S.C. 2511(b) to the extent necessary to comply with U.S. obligations under the WTO Agreement on Government Procurement and under U.S. free trade agreements and so that section 1605 will not apply to least developed countries to the same extent that it does not apply to the parties to those international agreements. The conferees also note that waiver authority under section 2511(b)(2) has not been used."

Thus, the conferees for this legislation deliberately put WTO GPA members, signatories of free trade agreements with the U.S. and least developing countries in a privileged position over other U.S. trading partners.

The ARRA also contained two other clearly discriminatory provisions. First, a \$2 billion appropriation was made for advanced batteries and components "produced in the United States." Second, the appropriations made available to the U.S. Department of Homeland Security to acquire a wide range of products and items listed under Section 604(b) cannot be used "if the item is not grown, reprocessed, reused, or produced in the United States."

It fell to various U.S. federal offices to promulgate the regulations that determine the manner in which this legislation is implemented by those undertaking ARRA-funded projects. These offices being the Office of Management and Budget (OMB), the agencies that propose the Federal Acquisition Regulation (FAR), and in so far as certain environmental projects are concerned, the Environmental Protection Agency (EPA). Each is discussed in turn and the question arises is how strictly they interpret the legislative mandate given by Section 1605 of the ARRA and the extent to which the international obligations of the United States are prioritized in the implementing regulations.

On 3 April 2009 The OMB issued *Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009*, updating a previous document issued on 18 February 2009. The *Updated Implementing Guidance* applied "to all Federal departments and agencies involved in or impacted by the Recovery Act or which otherwise perform services for agencies that receive such appropriations" (page 5). Amongst the guidance offered in this document, section 1.6. related to the other policy objectives that a U.S. agency should consider in determining how to use the funds provided for under the ARRA. It is noteworthy that adhering to the international trade obligations of the United States is not listed in this section. One objective that is listed is "promoting local hiring," which is described as follows:

"Departments and agencies should seek to maximize the economic benefits of a Recovery Act-funded investment in a particular community by supporting projects that seek to ensure that the people who live in the local community get the job opportunities that accompany the investment. " (page 5)

It is noteworthy that the focus here is local and not national job creation. Furthermore, the next section of this document refers to "additional responsibilities" of Executive Branch agencies. Here specific mention is made of Section 1605 of the ARRA and the following selective quotation from that section is given

"[n]one of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a

public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States." (page 6)

While it is acknowledged that exceptions to the ban exist, they are not specified. Nor is any mention made of Section 1605(d), whose inclusion did so much to placate international criticism at the time of the enactment of the ARRA legislation.

The Federal Acquisition Regulation has also been amended, on an interim basis, to take account of Section 1605 of the ARRA. The amendment was published in the U.S. Federal Register on 31 March 2009 and specifically relates to "construction materials". With the publication of the interim rule came a request for comments from third parties. The deadline for receipt of comments does not suggest that the final rule will be issued before 1 June 2009, implying that the rules governing the implementation of the Buy American section of the ARRA could be tightened further.

The Interim Rule begins by summarizing in neutral terms the content of Section 1605. In the ensuing discussion of this Section, a number of points are made. First, while the three exceptions to Section 1605 are similar to those in the original Buy American Act, the ARRA requires the publication of a detailed written justification if a federal agency wishes to invoke any of these exceptions. Second, unlike the Buy American Act, the ARRA does not specify that a certain proportion of the components of domestic manufactured construction material be U.S. made too. Consequently, the Interim Rule's definition of domestic manufactured construction material omits any reference to such a sourcing rule. Third, it is acknowledged that unmanufactured construction material is not specifically mentioned in Section 1605 of the ARRA. Yet the authors of the Interim Rule make their position clear but stating immediately thereafter:

"However, the Recovery Act's purpose of creating jobs and stimulating domestic demand is well served by applying the Buy American Act to unmanufactured construction material."⁶

With respect to the use of materials from trading partners mentioned in the Conference Report described above, the Interim Rule confirms their treatment comparable to domestic contractors. However, the Interim Rule goes on to note that some U.S. trading partners that have received forms of preferential market access in other areas will receive such treatment under this Rule:

"In the Recovery Act conference report, Congress expressed its intent that least developed countries be excepted from section 1605 and that they retain their status as designated countries. However, with respect to Caribbean Basin countries, Congress did not express a similar intent. Therefore, Caribbean Basin countries are not included as designated countries with respect to the Recovery Act."⁷

Next, a procedure was established whereby a contractor or potential contractor could request for permission to use foreign construction material. In addition to providing information about the material sought, a "detailed justification" of the reasons for using the material must be provided. Finally, penalties for failing to comply with these regulations were articulated,

⁶ Indeed, in the proposed text for "Subpart 25.6" "Policy 25.602" it is proposed to treat unmanufactured construction material in the same way as it is under the Buy American Act. This is an example of the discretion being used by Federal authorities in a manner that arguably restricts international commerce.

⁷ Specific text in the implementing text for the Interim Rule is proposed to this effect.

including defaulting the contract, debarment, and where fraud is suspected for potential criminal investigation.

The ARRA also provided funds for the U.S. states to undertake investments in clean water and drinking water. This scheme is to be implemented at the federal level by the EPA and on 28 April 2009 it issued regulations concerning assistance received under the Clean Water State Revolving Loan Fund and the Drinking Water State Revolving Fund. (The ARRA authorized \$4 billion and \$2 billion for these two funds, respectively.) In its implementing guidance, having stated its "foremost expectation" is that recipients of these funds use American iron, steel, and manufactured goods, the EPA does mention the available exceptions and allowing purchases from GPA signatories, free trade agreement partners of the U.S., and least developed countries.

The EPA also proposed a procedure whereby a waiver from the Section 1605 restrictions can be obtained. Considerable amounts of information must be provided by a party seeking a waiver, as was the case with the Interim Rule. In addition, the EPA issued an extensive worksheet through which officials can evaluate waiver requests. It should be noted that these requirements must be met by all firms seeking a waiver, irrespective of nationality. Whether it is easier for U.S. firms to assemble the information necessary to meet the standards of a waiver remains to be seen.

The EPA further proposes that a clause relating to Section 1605 requirements be added to each contract signed for a ARRA-funded project. The EPA is recommending that each contractor attests to (a) reviewing and understanding the Buy American requirements in the ARRA, (b) that all of the iron, steel, or manufactured goods used in the contract have or will come from the United States, have been produced in the U.S. according to Buy American standards, or a waiver was obtained, and (c) that the contractor will provide any "verified information, certification, or assurance of compliance" with this clause. A similar detailed text is suggested for bidders for the funds under these two water-related schemes. As will become clear below, there is already evidence from firms that these statements have been used to discourage bidding by foreign firms for these ARRA-funded projects.

It is important to appreciate that the above guidance from the EPA is directed towards non-federal government officials and those firms seeking to supply goods to an ARRA-funded project even if it is implemented by a state or city government.

Overall, the U.S. federal agencies tasked with implementing the procurement rules for the ARRA Act have, with few exceptions, employed their discretion in a way that adds to the burdens of those firms seeking waivers. Those firms, in the United States and elsewhere, that have outsourced abroad the purchase of covered products are presented with a strong incentive to source from home, unless the firm in question believes the cost of providing the information necessary to get a waiver is small.

One might view the ARRA and its implementing text as an aberration. However, recently the U.S. House of Representatives passed the Water Quality Improvement Act which did not explicitly mention Buy American requirements, instead it included the following section:

SEC. 608. REQUIREMENTS FOR USE OF AMERICAN MATERIALS.

(a) In General- Notwithstanding any other provision of law, none of the funds made available by a State water pollution control revolving fund as authorized under this title may be used for the construction of treatment works unless the steel, iron, and manufactured goods used in such treatment works are produced in the United States.

(b) Exceptions- Subsection (a) shall not apply in any case in which the Administrator (in consultation with the Governor of the State) finds that--

- (1) applying subsection (a) would be inconsistent with the public interest;
- (2) steel, iron, and manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or
- (3) inclusion of steel, iron, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

(c) Public Notification and Written Justification for Waiver- If the Administrator determines that it is necessary to waive the application of subsection (a) based on a finding under subsection (b), the Administrator shall--

- (1) not less than 15 days prior to waiving application of subsection (a), provide public notice and the opportunity to comment on the Administrator's intent to issue such waiver; and
- (2) upon issuing such waiver, publish in the Federal Register a detailed written justification as to why the provision is being waived.

(d) Consistency With International Agreements- This section shall be applied in a manner consistent with United States obligations under international agreements.'

This piece of legislation seeks to appropriate over \$15 billion over five years for investment projects in improving water quality.⁸ The passage of this bill by the House after the ARRA suggests that Buy American provisions need not carry that label.⁹ By contrast, the Omnibus Appropriations Act, 2009 reverts back to citing the pre-ARRA Buy American legislation.

Given that U.S. stimulus package was only enacted 150 days ago, quantitative and representative evidence of its effects is thin on the ground. Evidence is growing across the Canadian border, however, that suggests that some of the implementing regulations for the Section 1605 Buy American requirements are beginning to bite. Recently, one newspaper reported:

"...other Canadian companies doing business with state and local governments in the U.S. report being forced to sign affidavits that all their materials were made in the U.S., or they will not be allowed to do business there"¹⁰

The *Toronto Star* newspaper recently referred to a "plague of protectionist measures in the U.S."

It has also been reported that one Swiss-Russian steel firm, Duferco Farrell Corporation, has introduced "rolling layoffs" for 80 percent of its 600-person workforce in Pittsburgh because its established global supply chain cannot be reconciled with the tougher Buy

⁸ The Canadian Manufacturers and Exporters Association contends that 250 of its members are threatened by this legislation. See "Town retaliating against U.S. protectionism," *The Canadian Press*. 13 May 2009.

⁹ Subsequently more examples of Congress legislating the newer, tougher "Buy American" legislation have come to light. The *Global Trade Alert* attempts to monitor, amongst other trade-affecting state initiatives, "buy local" procurement measures. Readers can review the measures reported for the United States at the following webpage, http://www.globaltradealert.org/measure?page=2&tid=All&tid_1=494&tid_3=All. A number of those reported measures refer to post-ARRA legislation containing Buy America provisions.

¹⁰ "Stimulating Trade Wars," *Investor's Business Daily*, 18 May 2009.

American requirements. It's largest client cancelled orders and is now buying from companies where all of their production meets the new procurement regulations.¹¹

Another case involves a Canadian firm, Hayward Gordon, that manufactures pumps used in water works projects. The President of this company claims he has been told by several towns, including Peru, Indiana, that they can no longer buy Canadian-made products. In another example the company was unable to bid for a contract in Maryland worth \$200,000 because a bid document asked the company to "provide a list of all iron, steel, and manufactured goods 'not' produced in the United States to be precluded from the funding."¹² As a result of incidents such as these, Hayward Gordon is considering moving some manufacturing operations to the United States. More generally, it has been argued that:

"Canadian firms have been surprised to discover that while some contracts are still open to Canadian materials and equipment because of trade treaties, most of those issues issued by state and local governments are not."¹³

Moving production to the U.S. may not be enough for Canadian firms to regain sales. A group of U.S. sewage makers wrote to members of the U.S. House of Representatives in early March to warn that impending legislation could provoke retaliation by trading partners and "immobilize our markets by undermining our member companies' ability to produce in their normal supply chain."¹⁴ Such considerations suggest that the discrimination in the latest Buy American regulations is actually between U.S. firms that have never outsourced and every other firm.

Added to the strict implementing regulations is magnitude of the transfers from the Federal Government to the states and city governments.¹⁵ Earlier in the year a paper by two prominent economists in the U.S. administration estimated that 60 percent of Federal transfers to the states would be spent on goods and services (Romer and Bernstein 2009). The Government Accountability Office estimates that \$280 billion of the stimulus package will be administered by the states; an independent estimate of the size of the transfers to the states is \$214 billion, almost all of which will be spent by 2011 (Cogak, Cwik, Taylor, and Wieland 2009). This implies that \$120-150 billion of spending power in the hands of officials that may not feel minded to follow international trade obligations as much as the U.S. Federal government.

¹¹ "Trade Wars Launched With Ruses, End Runs; Outrage in Canada as U.S. Firms Sever Ties To Obey Stimulus Rules," *Washington Post*, 15 May 2009. Readers may want to note that earlier newspaper accounts asserted that Duferco Farrell Corporation had actually laid off workers. Subsequent corrections noted this company had introduced "rolling layoffs"; alas the distinction between the two states was not made clear.

¹² "Protectionist measures delay recovery; A key lesson from the Great Depression is that protectionism makes everyone worse off," *The Toronto Star*, 26 March 2009. For further details see "Canadian firm cries foul over Buy American provision on state contract," *The Canadian Press*, 10 March 2009. In the latter article the chief executive of the company concerned is quoted as saying "We just spent \$7 million on a brand new factory two years ago that's going to be gutted as a result of this."

¹³ "Trade Wars Launched With Ruses, End Runs; Outrage in Canada as U.S. Firms Sever Ties To Obey Stimulus Rules," *Washington Post*, 15 May 2009. In another news article, the Canadian Trade Minister, Mr. Stockwell Day, is reported to have said that Congressional measures have discouraged municipal and state governments from buying from foreign companies. See "Ottawa warns U.S. of possible retaliation; Trade Minister fears rising tide of protectionism," *Montreal Gazette*, 29 April 2008.

¹⁴ "Despite assurances, Buy American lives; Language restricting foreign supplies showing up in a variety of state and local spending bills; Canadian companies in a "panic"" *The Globe and Mail*, 11 March 2009.

¹⁵ It should be noted that the United States Federal Government is not alone in transferring significant amounts of money to sub-national governments as part of a stimulus package. The Canadian Federal Government has done likewise with the infrastructure component of its stimulus package (in this case with respect to the provinces.)

Another factor to be taken into account is that many sub-federal procurement bodies in the United States appear to have adopted Buy American resolutions or provisions of their own. The United Steel Workers union is encouraging state and city governments to pass "Make Our Future Work" resolutions that include Buy American provisions. The union's website boasts that over 500 states and cities have passed such resolutions. Careful examination of the site¹⁶, however, reveals that 483 resolutions have been passed, including by the legislatures of several large states. A further 542 resolutions are "being pursued" and 33 such resolutions "failed" according to the union. While it would be desirable to verify such data before accepting it at face value, the scale of the campaign does suggest any sub-federal "toughness" in implementing Buy American provisions is not solely due to Federal guidance.

The reaction of the trading partners

The loss of contracts in the U.S. has not gone unnoticed in Canada and elsewhere.¹⁷ It appears that business and political leaders are no longer satisfied that their country's status as a U.S. free trade agreement partner is enough. Indeed, the head of the Canadian Manufacturers and Exporters Association recently warned of the growing pressure to retaliate against U.S. exports. He argued:

"My members are saying 'I'm being locked out of the American market but Americans have unfettered access to Canadian Procurement.' There are growing pressures to have Canadian municipalities impose some reciprocal measures."¹⁸

Canadian diplomats in the United States have mounted a campaign to have the Buy American provisions revised. Canada's Ambassador to the U.S. is on record as arguing:

"Restrictive procurement practices, like 'Buy America', increase costs, complexity, and project timing, slowing down infrastructure spending when it is needed the most...U.S. restrictions on Canadian exports kill American jobs for U.S. suppliers to Canadian companies and retaliatory actions will close markets for Canadian and U.S. exporters around the world."¹⁹

Similar warnings were made to the U.S. Chamber of Commerce by the Canadian Federal Trade Minister at the end of April 2009. In the interim 12 towns and counties in the province of Ontario, with a population of half-a-million people, have introduced some form of

¹⁶ The website in question, http://www.usw.org/media_center/news_articles?id=0238, was checked on 14 July 2009 and the numbers in the text refer to this date. Readers may be interested in knowing that the same website was checked on 25 May 2009 when 341 resolutions had been passed by sub-federal governments and another 766 resolutions were "being pursued" according to the union.

¹⁷ For example, in a speech in Chicago on 9 June 2009, the UK Ambassador to the United States, Mr. Neil Sheinwald, criticised the implementation of the ARRA. Mr. Sheinwald is reported to have said "However, the danger is that some officials interpret the 'buy- American' provisions as simply banning all foreign companies or foreign-made goods" (see "Embassy Row," *Washington Times*, 10 June 2009.) Singapore and Japan are said to have joined Canada and the U.K. in criticising the implementation of the ARRA, see "'Buy American' plan leads to ire, confusion," *Agence France Presse*, 6 June 2009. A file of newspaper clippings of recent U.S. and Canadian reaction to the Buy American provisions is available from the author upon request.

¹⁸ "U.S. stimulus stifling Canada; Buy America rule boils down to protectionism," *National Post*, 30 April 2009.

¹⁹ "Jobs at Risk due to Buy America Restrictions," *States News Service*, 7 June 2009. The same article also points out the extent of Canadian purchases from U.S. companies:

"Canada buys almost four times more as China does from the US. In fact, Canada buys more from the U.S. than the UK, Germany, Japan, and China combined. Trade with Canada supports about 7 million U.S. jobs."

retaliatory or Buy Canadian provision. On 7 June 2009, at the annual meeting of the Federation of Canadian Municipalities, by a narrow margin Canada's mayors voted to introduce discrimination against bidders for Canadian municipal contracts from countries that themselves discriminate against Canadian firms in public procurement if the latter favouritism is not removed within 120 days. It should be noted that this motion is not binding on Canadian municipalities which, according to estimates, spend approximately C\$15 billion on infrastructure projects in 2008.²⁰

Finally, U.S. companies have begun to complain about the implications of the Buy American provisions in the ARRA. For export-oriented firms the threat of retaliation by other countries is a concern. General Electric, Boeing Co., and Caterpillar have been identified as opposing these provisions. Indeed, the Director for Government Affairs of Caterpillar is quoted as saying:

"The ability to sell globally is absolutely critical to our success...The U.S. 'Buy American' package is fostering 'Buy Canadian' status or laws that would directly hurt American exports. With Caterpillar's largest U.S. export market being Canada it's something that concerns us greatly."²¹

For U.S. firms attempting to compete for ARRA-funded projects another concern has arisen, namely, confusion over the content and interpretation of the Buy American rules. The President of the Water and Wastewater Equipment Manufacturers Association, Dawn Champney, has been quoted as saying:

"It is causing utter frustration for U.S. companies...The Buy American clause has just put the market at a halt while these rules are being implemented, guidance is being issued and people are trying to make legal sense of it."²²

Similarly, the Chief Executive Officer of Atlanta-based Mueller Water Products, a manufacturer of water and waste water treatment products, is reported to have said "Municipal spending has been paralyzed...primarily due to confusion over certain provisions, especially the Buy American clause."²³ The delays²⁴ that appear to have been created by the Buy American provisions must surely compromise the Obama Administration's stated goal of funding "shovel ready" (that is, quick to implement) projects that will speed-up the recovery of the United States economy.

²⁰ "Canadian cities fire back at Buy American policy; U.S. bidders may be shut out from municipal tendering processes under agreement reached at weekend meeting in Whistler," *Vancouver Sun*, 8 June 2009.

²¹ "Buy America trade limits cause Canadian businesses to look south, companies say," *The Canadian Press*, 10 June 2009.

²² "Buy American under fire from U.S. firms," *Canwest News Service*, 9 June 2009.

²³ "Buy American under fire from U.S. firms," *Canwest News Service*, 9 June 2009.

²⁴ Some have argued that the conditions imposed in the ARRA Act have created a "stimulus chill," postponing the funding of projects and leading to requests for waivers from the Buy American provisions. Indeed, in the case of ARRA funds for broadband projects, the U.S. agencies responsible have been "received more than 1,600 comments about how to craft the grant rules and Commerce Department officials were inundated with meetings by companies asking the agency to waive "Buy American" rules on the grants. Both agencies now say they will waive "Buy American" rules for applicants, saying the restrictions would slow down the process of awarding broadband stimulus grants"; see "A 'Stimulus Chill' Hits Companies' Broadband Spending," *Wall Street Journal*, 30 June 2009. See also "Construction Employment Declines in Virtually Every Metropolitan Area Over the Past Year, New AGC Analysis Finds," *Targeted News Service*, 3 June 2009, and "Buy America puzzles construction industry," *The Daily Reporter*, 25 June 2009.

With this information on the implementation of the ARRA and the reaction of the private sector, on both sides of the U.S.-Canadian border, attention now turns to the implications for trade policymaking.

Conclusions and implications for trade policymaking

Making specific reference to the implementation of one of the largest fiscal stimulus packages undertaken during the current global economic downturn, the purpose of this paper has been to identify the factors that are likely to affect the impact of such packages on the world trading system. While the impact on cross-border trade and investment is naturally of interest, trade policymakers and analysts may also be keen to learn what are the implications for designing procurement provisions for inclusion in international trade accords.

To highlight what is at stake a detailed analysis of the implementation of the United States' American Recovery and Reinvestment Act, that was signed into law on 17 February 2009, was undertaken. While the total value of this package was US \$787 billion, a fraction will be spent on public procurement (some have estimated that approximately a third of a trillion U.S. dollars will be spent on goods and services.) Readers may recall that the enactment of this stimulus package was very controversial both inside and outside the United States. Many trading partners expressed concerns about the so-called Buy American provisions in the proposed legislation, in particular the expansion of the products that must be sourced nationally to include "manufacturing goods" (a very broad category). The focus of this paper, however, is not on that trading partners' criticism or the U.S. Administration's immediate response, but on the subsequent implementation of the Act.

Even so, readers are cautioned that it is premature to come to any final conclusions concerning the overall impact of recent stimulus packages. The package being implemented in the United States, for example, was enacted around 150 days ago and is expected to influence government spending over at least the next three years. It is too soon to come to make sweeping statements about the overall impact of these stimulus packages. The implications of this argument cut both ways. Those who fear that such stimulus packages will distort international commerce need to recognize that the regulations implementing the U.S. stimulus package could be revised, possibly taking account of trading partners' concerns. Those who believe that this global downturn has not resulted in widespread protectionism should bear in mind both the scale of several nations' stimulus packages and the fact that to date only a small fraction of the monies appropriated have been spent to date.

A key finding of this paper is that the assurance offered to the U.S. trading partners at the time of enactment, namely to implement the stimulus package in line with the U.S. international trade commitments, has by and large not found its way into the implementing guidance given by federal agencies to those spending the funds. Indeed, one federal agency has suggested that U.S. cities and states seek assurances from each firm that bids for stimulus package-funded projects that 100 percent of all their parts, components and manufactured goods are U.S. made. Little or no mention is made of the fact that waivers can be sought for supplies from the least developed countries, the countries the U.S. has free trade agreements with, or the members of the World Trade Organization's Agreement on Government Procurement.

A detailed examination of the implementation of the U.S. American Recovery and Reinvestment Act points to several implications for trade policymaking. This examination identified factors that may be relevant when evaluating other nation's stimulus packages, if so the following observations may be of more general interest. The first implication of U.S. experience is that it highlights the incomplete nature of the current set of international trade disciplines on public procurement matters. Arguably recent U.S. experience demonstrates the

folly of confining trade obligations to the expenditures of a government body and not to the transfers from that body to another body which is ultimately responsible for buying goods and services. The present arrangements merely encourage those seeking to prevent stimulus package monies being spent on foreign items to transfer funds from the central government to a government level or state body less or unconstrained by international trade accords.

Second, given the widespread apparent adoption of Buy American resolutions by sub-federal authorities, there is a strong case for expanding trade disciplines against discrimination to them and making this a priority for future trade negotiations. For sure, certain sub-federal authorities in the U.S. and elsewhere may resist such obligations. If a trading partner is unwilling to take on such additional obligations, then recent experience suggests that any public procurement-related commitments concerning the central government of that trading partner probably need to be discounted. Considerable thought is needed to examine how the discretion of those agencies responsible for setting procurement rules can be curbed so that any enacted mandates dictating nondiscrimination against foreign bidders, even if qualified, is given the profile intended.

A third implication is that "buy national" policies tend to spur retaliation by trading partners. Already several Canadian townships and cities are taking action to discourage purchases of U.S. products. A sub-national government in Australia has just introduced a "Local Jobs First" program. Perhaps, more significantly, at the beginning of June 2009 the Chinese government is said to have issued new "buy national" regulations to its cities, provinces, and central government departments, although whether this represents a major change in policy is contested by Beijing.

Fourth, the fact that the implementing regulations for stimulus packages can change over time suggests that eternal vigilance on the part of trading partners is needed. Merely seeking assurances at the time of enactment from trading partners that their stimulus packages will respect international obligations looks, in retrospect, naive. Fifth, by excluding developing countries (but not the least developed countries) from potential preferential treatment in implementing Buy American provisions in its stimulus package, the United States has strengthened the incentive of developing countries to request the launch of negotiations towards a free trade agreement. Thus one form of discrimination (procurement discrimination) may beget another form of discrimination (tariff preferences).

Sixth, steps should be taken to limit the informational burdens necessary to obtain waivers from Buy American legislation and counterparts in other jurisdictions. Given that outsourcing and international supply chains are pervasive, perhaps a model waiver could be developed. Finally, legislative provisions demanding that all iron, steel, and manufactured goods be produced in the United States effectively discriminates between those firms, both U.S. and foreign, that participate in international supply chains and those that do not. Thus the current implementing regulations for the U.S. stimulus package seeks to discourage one of the modern innovations in international corporate practice, effectively promoting the entire repatriation of associated production to the United States.

The Buy American provisions in the U.S. stimulus package, which themselves have been repackaged in other legislation that is currently working its way through the U.S. Congress, could therefore have far-reaching implications for corporate strategy, international investment flows, as well as trade flows. The contrast between this outcome and the apparently innocuous language included in the American Recovery and Reinvestment Act emphasizes the important fact that when it comes to recent procurement discrimination the devil is in details and that another form of murky protectionism has been spawned.

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Table 1. The absolute size of fiscal packages (revenue and spending measures) 2008-2010, in absolute USD million.

United States	804,070
Germany	107,789
Japan	99,992
Canada	61,551
Spain	56,754
Australia	45,673
Korea	42,667
United Kingdom	38,003
France	18,568
Netherlands	13,367
Sweden	13,109
Denmark	8,668
Finland	8,575
Belgium	8,016
Czech Republic	6,500
New Zealand	5,404
Poland	5,145
Austria	4,600
Switzerland	2,486
Luxembourg	1,968
Portugal	1,963
Slovak Republic	35

Note from original source (OECD 2009, Table 1): "This information is based on information up until 24 March 2009. The figures include only discretionary fiscal measures in response to the financial crisis. Estimates provided here do not include the potential impact on fiscal balances of recapitalisation, guarantees or other financial operations. They also exclude the impact of a change in the timing of payment of tax liabilities and/or government procurement, a popular measure in several countries. When applying the accrual principle, such measures are not reflected as part of the stimulus packages. Still, they affect fiscal balances measures on a cash basis and may have an impact on the economy.

"These data capture the impact of fiscal packages and may not reflect all the measures introduced to boost activity. In particular, recapitalisation operations and increases in public enterprises' investment are not included. For further details on how the stimulus packages have been identified, see the OECD *Interim Economic Outlook*, March 2009."