



**Public Colloquium  
- Wed., Mar. 30,  
2011**

**The George Washington University Law School Government Procurement Law Program  
and India Studies Project, in cooperation with the  
ABA Section of International Law's International Procurement Committee  
present a special session on:**



**The Foreign Contractor Tax:  
A New Development in Trade and Procurement**

***PROGRAM MATERIALS***

*Panelists:*

*Michael Delaney  
Office of the U.S. Trade Representative  
Executive Office of the President*

*Linda Menghetti  
Vice President  
Emergency Committee for American Trade (ECAT)*

*Christopher Yukins, Associate Professor of Government Contract Law  
Steven Schooner, Nash & Cibinic Professor of Gov. Procurement Law  
Rina Pal, Director, India Studies Center  
The George Washington Law School*

**Wednesday, March 30, 2011, 9:30 - 11:00 a.m. (registration 9:00 a.m.)**

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The George Washington University Law School- Faculty Conference Center, 5<sup>th</sup> Floor, 2000 H Street, N.W., Washington, D.C.

# **BIOGRAPHIES**

## **Michael J. Delaney**

### **Assistant U.S. Trade Representative for South Asia**

#### **Office of the U.S. Trade Representative**

Mr. Delaney was appointed Assistant US Trade Representative for South Asia in September 2008. In this position, he is responsible for development of trade with the countries comprising South Asia -- India, Afghanistan, Pakistan, Bangladesh, Bhutan, Maldives, Nepal, and Sri Lanka - as well as Iraq. Several trade initiatives fall under his purview, including the US proposal for creation of Regional Opportunity Zones (ROZs) in Afghanistan and certain regions of Pakistan.

Mr. Delaney is a commissioned Senior Foreign Service Officer with the U.S. Department of State. Since entering the Foreign Service in 1982, much of his career has been devoted to the development of US trade. In Portugal (1983-85), he helped negotiate various tariff issues related to that country's accession to the European Union. In Brazil (1985-87), he was the lead State officer in several trade issues, including US trade actions involving Brazil's informatics and pharmaceuticals patent policies. In Geneva (1987-1990) with the GATT/WTO, he helped re-negotiate the WTO Government Procurement Code. Mr. Delaney also was a member of the US delegation that implemented the US-Japan Semiconductor Arrangement.

In Korea (1990-93), Mr. Delaney was responsible for managing many bilateral issues, including standards and intellectual property. In Finland (1994-98), he was the chief Embassy officer responsible for tariff negotiations related to that country's accession to the European Union. After serving for a year as Diplomat-in-Residence at the East-West Center in Hawaii, Mr. Delaney was appointed Economic Counselor at the US Embassy in Canberra, Australia, where he worked with Washington agencies in negotiating the US-Australia Free Trade Agreement (1999-2004). He played a similar role as Economic Counselor in Bangkok, Thailand (2004-2006) with the US-Thailand Free Trade Agreement negotiations.

Immediately prior to his appointment at USTR, Mr. Delaney served as US Political Adviser to NATO Southern Regional Command in Kandahar, Afghanistan.

Michael Delaney is a graduate of Emory University (1975) and The University of Chicago (1979).



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## EMERGENCY COMMITTEE FOR AMERICAN TRADE

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### **LINDA MENGHETTI**

Linda Menghetti is Vice President of the Emergency Committee for American Trade (ECAT), an organization of leading U.S. companies that promote economic growth through expansionary trade and investment policies. In that capacity, she advises companies and works with Administration officials and Members of Congress and other business and non-governmental organizations in support of trade and investment policies, agreements and legislation that will expand U.S. access for U.S. manufacturers, service providers and agricultural producers to foreign markets. In particular, she works on trade and investment legislation and policies, including WTO negotiations, bilateral and regional trade and investment agreements, trade preference legislation, and international procurement issues. Ms. Menghetti is noted for her trade and investment policy expertise and leadership of broad coalitions.

Prior to assuming that position, Ms. Menghetti was Chief Minority Trade Counsel and Minority Trade Counsel (1996-2000) for the Senate Finance Committee where she advised the Ranking Member (Senator Daniel Patrick Moynihan (D-NY)) and Members of the Committee on international trade and investment issues. Ms. Menghetti also served as Legislative Assistant to Senator Bill Bradley (Democrat-New Jersey) (1995-96), where she advised on international trade, foreign relations, immigration and other international issues for the Senator.

Prior to her tenure on Capitol Hill, Ms. Menghetti worked as a lawyer in private practice at the law firms of Dewey Ballantine (1992-1995) and McKenna & Cuneo (1990-1992), focusing on international trade law and policy, customs and government procurement issues.

Ms. Menghetti received her law degree from the Boalt Hall School of Law at the University of California at Berkeley (1990) where she was editor-in-chief of the International Tax & Business Lawyer. She received an honors degree from the Pennsylvania State University (B.A., Political Science, Phi Beta Kappa) in 1984. Between 1985 and 1988, she served as a Peace Corps volunteer in Togo, West Africa. Ms. Menghetti is the recipient of an International Affairs Fellowship from the Council on Foreign Relations (1995-96), the Penn State Political Science Outstanding Alumna Award (2005) and the Women in International Trade (WIIT) Woman of the Year Award (2007-08). She is a Member of the Board of Directors for the Washington International Trade Association (WITA) and Treasurer of the Trade Policy Forum (TPF).

## **RINA PAL**

Rina Pal is director of the George Washington University Law School's India Studies initiative, managing its operations and guiding its focus on intellectual property law reform, corporate affairs, and anti-corruption matters between India and the United States. This work is critical as the Law School accelerates and broadens its international focus, and as India undergoes significant social, economic, and legal transformation. Ms. Pal frequently speaks and writes on topics including Indian and U.S. patent law reform, FCPA legislation, and health care regulatory matters.

Previously, Ms. Pal worked as a life sciences associate in San Francisco, where she focused on litigation and various aspects of technology transfers.

Ms. Pal earned a B.A. in molecular and cell biology and ethnic studies from the University of California, Berkeley in 2002; an M.S. in criminology and criminal justice from the University of Oxford in 2004; and a J.D. from Arizona State University in 2007, where she was a Willard H. Pedrick Scholar. She is vice-chair of the Patent Committee of the D.C. Bar Association and also serves as general director and counsel on the Board of D.C.'s South Asian Bar Association. She is also a member of the steering member on the ABA International Section, India Committee.

**Steven L. Schooner**

**Nash & Cibinic Professor of Government Procurement Law and Co-Director of the  
Government Procurement Law Program  
George Washington University Law School**

Education

B.A., Rice University; J.D., College of William and Mary; LL.M., George Washington University

Biographical Sketch

Before joining the Law School faculty in 1998, Professor Schooner was the associate administrator for procurement law and legislation at the Office of Federal Procurement Policy in the Office of Management and Budget. He previously served as a trial and appellate attorney in the Commercial Litigation Branch of the Department of Justice. He also practiced with private law firms and, as an active duty Army judge advocate, served as a commissioner at the Armed Services Board of Contract Appeals.

Until his retirement as an Army Reserve officer, he was an adjunct professor in the Contract and Fiscal Law Department of the Judge Advocate General's School of the Army, in Charlottesville, Virginia. His scholarship focuses primarily upon federal government contract law and public procurement policy.

**Christopher R. Yukins**  
**Associate Professor of Government Contracts Law; Co-Director of the Government Procurement Law Program**

Education

B.A., Harvard University; J.D., University of Virginia

Biographical Sketch

Professor Yukins has many years of experience in public procurement law. He was for several years a trial attorney with the U.S. Department of Justice, where he handled trials and appeals involving bid protests and contract claims against the U.S. government.

He teaches on government contract formations and performance issues, bid protests, Contract Disputes Act litigation, and comparative issues in public procurement, and focuses especially on emerging public policy questions in U.S. procurement.

He is an active member of the Public Contract Law Section of the American Bar Association, serves on the steering committee to the International Procurement Committee of the ABA International Law Section, and previously served as the president of the Tysons Corner Chapter of the National Contract Management Association.

He is a faculty advisor to the Public Contract Law Journal, and has contributed pieces on procurement reform, international procurement, electronic commerce and information technology to a broad range of journals, including Washington Technology, Government Contractor, Legal Times, and Federal Computer Week.

He has published on procurement reform in scholarly journals, including the Public Contract Law Journal, Georgetown Journal of International Law, and Public Procurement Law Review (United Kingdom).

Together with Professor Steven Schooner, he runs a popular colloquium series on procurement reform at The George Washington University Law School. In private practice, Professor Yukins has been an associate, partner, and of counsel at leading national firms; he is currently of counsel to the firm of Arnold & Porter LLP. He is an advisor to the U.S. delegation to the working group on reform of the United Nations Commission on International Trade Law (UNCITRAL) Model Procurement Law, and he teaches and speaks often on issues of comparative and international procurement law.

His dispute resolution experience includes service as an arbitrator, mediator, neutral, and ombudsman. Dean Schooner is a fellow of the National Contract Management Association and a certified professional contracts manager (CPCM). He is the faculty adviser to the ABA's Public Contract Law Journal and also serves on the Procurement Round Table and the advisory board of the Government Contractor. He served as senior associate dean for academic affairs of the Law School from 2006 to 2008.

**STATUTE**  
(excerpt from Public Law No. 111-347)

**James Zadroga 9/11 Health and Compensation Act of 2010  
(excerpt)**

TITLE III--REVENUE RELATED PROVISIONS

**SEC. 301. EXCISE TAX ON CERTAIN FOREIGN PROCUREMENT.**

(a) Imposition of Tax-

(1) IN GENERAL- Subtitle D of the Internal Revenue Code of 1986 is amended by adding at the end the following new chapter:

CHAPTER 50--FOREIGN PROCUREMENT

Sec. 5000C. Imposition of tax on certain foreign procurement.

**SEC. 5000C. IMPOSITION OF TAX ON CERTAIN FOREIGN PROCUREMENT.**

(a) Imposition of Tax- There is hereby imposed on any foreign person that receives a specified Federal procurement payment a tax equal to 2 percent of the amount of such specified Federal procurement payment.

(b) Specified Federal Procurement Payment- For purposes of this section, the term 'specified Federal procurement payment' means any payment made pursuant to a contract with the Government of the United States for--

(1) the provision of goods, if such goods are manufactured or produced in any country which is not a party to an international procurement agreement with the United States, or

(2) the provision of services, if such services are provided in any country which is not a party to an international procurement agreement with the United States.

(c) Foreign Person- For purposes of this section, the term 'foreign person' means any person other than a United States person.

(d) Administrative Provisions-

(1) WITHHOLDING- The amount deducted and withheld under chapter 3 shall be increased by the amount of tax imposed by this section on such payment.

(2) OTHER ADMINISTRATIVE PROVISIONS- For purposes of subtitle F, any tax imposed by this section shall be treated as a tax imposed by subtitle A.'

(2) CLERICAL AMENDMENT- The table of chapters for subtitle D of the Internal Revenue Code of 1986 is amended by adding at the end the following new item:

Chapter 50--Foreign Procurement'.

(3) EFFECTIVE DATE- The amendments made by this subsection shall apply to payments received pursuant to contracts entered into on and after the date of the enactment of this Act.

(b) Prohibition on Reimbursement of Fees-

(1) IN GENERAL- The head of each executive agency shall take any and all measures necessary to ensure that no funds are disbursed to any foreign contractor in order to reimburse the tax imposed under section 5000C of the Internal Revenue Code of 1986.

(2) ANNUAL REVIEW- The Administrator for Federal Procurement Policy shall annually review the contracting activities of each executive agency to monitor compliance with the requirements of paragraph (1).

(3) EXECUTIVE AGENCY- For purposes of this subsection, the term 'executive agency' has the meaning given the term in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403).

(c) Application- This section and the amendments made by this section shall be applied in a manner consistent with United States obligations under international agreements.

**SEC. 302. RENEWAL OF FEES FOR VISA-DEPENDENT EMPLOYERS.**

Subsections (a), (b), and (c) of section 402 of Public Law 111-230 are amended by striking '2014' each place that such appears and inserting '2015'.

# BACKGROUND

## **OPENING INTERNATIONAL PROCUREMENT MARKETS: UNFINISHED BUSINESS**

**Christopher R. Yukins**  
Co-Director of the Government Procurement Law Program  
The George Washington University Law School

### ***[EXCERPT FROM PAPER PRESENTED AT THOMSON REUTERS / WEST GOVERNMENT CONTRACTS YEAR IN REVIEW, FEBRUARY 2011]***

#### **I. INTRODUCTION: PROMISE AND PROBLEMS**

The year 2010 was one in which the international procurement market continued to mature, as cross-border barriers to trade continue to fall. Large developing nations -- including China and, potentially, India -- moved to join the World Trade Organization (WTO) Government Procurement Agreement (GPA), the leading instrument for opening procurement markets. In the United States, while open issues remained regarding how to ensure that the United States meets its own free-trade obligations in procurement, the United States and Canada were able to reach a compromise on U.S. - Canadian procurement purchasing that may open the way for future agreement. That thaw in international procurement markets was in contrast, though, to a new U.S. tax on foreign contractors selling to the U.S. government who fall outside the protection of the GPA and other agreements. More broadly, there was a growing international trend in favor of unified defense-civilian procurement, bolstered by a recent European directive on defense procurement. Freer trade in defense procurement may, however, be affected by efforts to ensure security of supply (including efforts in Europe and the United States) -- an area where comparison between the two systems may be useful, as the debate over protecting "critical materials" in the U.S. system is rapidly advancing.

#### **II. IMPORTANCE OF THE GOVERNMENT PROCUREMENT AGREEMENT**

To understand developments over the past year, it is important to understand the central role that the GPA plays in liberalizing procurement trade. There are a number of different potential pathways to opening international procurement markets:

- **Global Free Trade Agreements:** Of these, the *Government Procurement Agreement*, which is a plurilateral agreement under the World Trade Organization, is by far the most important. Those members of the WTO that have acceded to the GPA -- and generally only the most industrialized nations have joined to date -- agree to open their procurement markets, at least in part, to other members of the GPA, and to comply with certain procedural minima in their procurements. While there are also bilateral and regional free trade agreements which open procurement markets, because of its broad (and growing) base, the GPA is still the leading means of reducing barriers to international procurement.
- **International Models for Common Procurement Codes:** Because differing procurement rules in different systems are themselves barriers to trade, one means of opening international procurement markets would be to harmonize procurement rules. The European nations are doing that successfully under the

European procurement directives. To a much more limited extent, developing nations use common rules when they borrow and build under the multilateral development banks' guidelines for procurement in the banks' funded projects; those guidelines are not, however, comprehensive solutions for harmonization. In the United States, the effort to harmonize across different levels of government remains incomplete, in part because there is no imperative for state or local governments to adopt a common code, such as the American Bar Association's Model Procurement Code. Internationally, though the United Nations Commission on International Trade Law (UNCITRAL) is scheduled to finalize a revised version of its model procurement code in the coming year, the UNCITRAL model, written for developing nations, is an unlikely means of harmonization for the industrialized nations -- where the bulk of procurement dollars are spent.

In sum, taken on balance, the GPA remains the strongest prospective vehicle for reducing barriers to international procurement trade.

The GPA plays an especially important role in opening the U.S. procurement market, because generally U.S. law opens the federal procurement to those nations -- and only those nations -- that have entered into the GPA, are members of free trade agreements with the United States, or are among the least-developed countries. Because of this "walled garden," enforced by the Trade Agreements Act, the GPA is vitally important in opening the U.S. federal procurement market (and reciprocally opening other nations' procurement markets). *See, e.g.,* Steven Schooner & Christopher Yukins, Feature Comment, "Tempering 'Buy American' in the Recovery Act -- Steering Clear of a Trade War," 10 GC ¶ 78 (2009).

### III. SOME KEY DEVELOPMENTS UNDER THE GPA

**a. China's Potential Accession:** One of the most important developments in this area is China's potential accession to the GPA. China first submitted an application for accession in 2007. In the face of criticism for its limited offer, China submitted a revised proposal in 2010.

China's prospective accession has raised a number of issues. The first stems from the *scope of covered entities*. China reportedly seeks to exclude a number of state-owned enterprises (SOEs) from the scope of coverage. *See, e.g.,* Skye Mathieson, "Accessing China's Public Procurement Market: Which State Influenced Enterprises Should WTO's Government Procurement Agreement Cover?" 40 Pub. Cont. L. J. 233 (2010). China also may seek to *reserve special rights* as it accedes to the GPA, such as the right to discriminate in favor of innovative technology developed in China.

In resolving these issues, it will be important for the United States and the other GPA nations to recognize the unique circumstances at issue. As Professor Zhao Yong, an associate professor in the University of International Relations, Beijing, China, noted:

During China's WTO accession in 2001, it was expected to negotiate [China's GPA] accession "as soon as possible." But China did not begin discussing the GPA at the WTO until December 2007.

During the Strategic and Economic Dialogues between U.S. and China, convened in Washington, D.C. in July, 2009 and in May, 2010, the United States urged China to subscribe to the GPA, and China agreed to submit a revised offer to join the GPA by July 2010, as part of the ongoing dialogue. China fulfilled that commitment, and submitted its revised proposal in July 2010.

Why is China so hesitant to join the GPA, in contrast to its eager desire to join the WTO? It is because that before the GPA negotiations, China's policy-makers are struggling with drafting regulations to optimize the implementation of the government procurement law, streamlining the two government-procurement-related-laws, and understanding how to use government procurement as a tool to help the economy recover from the crisis. The GPA negotiations make the situation too complicated for them to make the decision soon. They are not quite clear about the relationship between opening its government procurement to foreign enterprises and protecting certain areas of economic activity. Nor do they know how to integrate the fragmented domestic procurement system into the GPA.

In December 2010, a joint U.S. - China governmental group, the U.S.-China Joint Commission on Commerce and Trade (JCCT), met to discuss trade issues between China and the United States. The U.S. Department of Commerce issued, on December 15, 2010, a summary of the parties' outcomes on U.S. requests in those talks.

[http://www.export.gov/china/policyadd/JCCT\\_outcomes.asp](http://www.export.gov/china/policyadd/JCCT_outcomes.asp). With regard to China's "indigenous innovation" policies, the U.S. Department of Commerce reported:

#### CHINA'S "INDIGENOUS INNOVATION" POLICIES

##### IPR and Non-Discrimination

China and the United States will not adopt or maintain measures that make the location of the development or ownership of intellectual property a direct or indirect condition for eligibility for government procurement preferences for products and services. China and the United States will continue to discuss whether this principle applies to other government measures.

This suggested that China will not reserve to itself the right to make "domestic innovation" a basis for discrimination under the GPA. On the other hand, the Commerce Department report suggested that this non-discrimination principle may extend only to innovation *developed in China* by foreign vendors:

##### Government Procurement Preferences

The relevant Chinese departments are conducting further modifications to the Implementing Regulations on the Government Procurement Law and will seriously take into account opinions and suggestions from all sides, including from the United States. In government procurement, *China will give equal treatment to all innovation products produced in China by foreign-invested enterprises and Chinese-invested enterprises alike.* (The United States expressed concerns that under Article 9 of China's draft Regulations, product lists could be used to provide government procurement preferences to indigenous innovation products.)

*Id.*

With regard to Chinese government procurement, the Department of Commerce noted, per industry reports, that the Chinese government “has indicated that it procures more than \$88 billion annually for its own use.” (It should be also be noted that U.S. federal procurement spending is currently in excess of \$500 billion annually.) Specifically with regard to the ongoing GPA negotiations, the Commerce Department reported:

China agreed to submit a robust, second revised offer to the WTO Government Procurement Committee before the Committee's final meeting in 2011. Its content and specific timing will be based on relevant departments' consultations with individual sub-central entities and other entities regarding GPA coverage. (Under the GPA, “other entities” include state-owned enterprises.)

*Id.* Thus, a “robust, second revised offer” is expected from China in 2011.

**b. India’s Potential Accession to GPA:** After China, the next major developing nation likely to join the GPA will be India. In February 2010, India joined the WTO’s Government Procurement Agreement as an *observer*, which is the first step towards full accession to the agreement. *See, e.g., “India Joins WTO Procurement Scheme as Observer,” China Daily*, Feb. 22, 2010. Should both China and India -- the major low-cost suppliers in the world -- join the GPA, and thus have free access to the U.S. federal procurement market, this will likely have a significant impact on the market. For procurements covered by the Trade Agreements Act and the GPA, federal agencies will be *required* not to discriminate against Chinese and Indian vendors.

**c. Canadian-U.S. Compromise Over Recovery Act Spending:** The slow progress on China’s potential accession contrasted sharply with the startling progress the United States and Canada were able to make, in opening their respective procurement markets. Historically, while the United States and Canada have opened their markets (including their federal procurement markets) under the North American Free Trade Agreement (NAFTA) and the GPA, Canada has specially exempted its provincial government procurements from those free-trade agreements. The United States has, in turn, reciprocally refused to allow Canadian companies open access to U.S. state procurements -- including procurements in those states that have explicitly joined the GPA.

That impasse ended, however, as a result of a series of actions triggered by the American Recovery & Reinvestment Act (the “Recover Act”). The Recovery Act required that “all iron, steel and manufactured goods” used in the construction and repair of “public works and public buildings” funded by the *Recovery Act* be produced in the United States. Although the Recovery Act was made explicitly subject to U.S. international agreements regarding open procurement markets, because there were *no* international agreements assuring Canadian access to U.S. state procurements, and billions of dollars in Recovery Act funding flowed through state procurements, Canadian vendors were effectively excluded from billions of dollars in potential state procurements.

To resolve this, on February 12, 2010 the Canadian and U.S. governments signed a U.S.-Canada agreement on government procurement. *See, e.g., “U.S., Canada Reach Buy American Agreement,” 52 GC ¶ 59* (Feb. 18, 2010); “Critics Denounce Canada-U.S. Trade Deal,” *52 GC ¶ 72* (Feb. 25, 2010) (Canadian critics argued that Canada gained far too little in deal with United

States, and opened its provincial markets too much). The new agreement affords U.S. companies with “permanent . . . access to Canadian provincial and territorial procurement contracts in accordance with the World Trade Organization (WTO) Government Procurement Agreement (GPA).” Office of the U.S. Trade Representative, “U.S.-Canada Agreement on Government Procurement,” <http://www.ustr.gov/countries-regions/americas/canada>. The agreement also allows U.S. companies “to compete for Canadian provincial and municipal construction contracts not covered by the GPA through September 2011,” while the United States “will provide reciprocal access for Canadian companies to 37 states already covered by the GPA and a limited number of Recovery Act programs.” *Id.*

The U.S.-Canada agreement was described as follows by the Canadian Ministry of Foreign Affairs and International Trade:

- U.S. suppliers will now have guaranteed access to Canada's sub-federal markets for all provinces and territories, except Nunavut, in accordance with Canadian undertakings under the GPA in exchange for Canadian access to U.S. sub-federal markets under the U.S.' GPA commitments;
- U.S. exemptions for Canada from the Buy American provisions of the Recovery Act for seven (7) programs of interest, in exchange for temporary Canadian procurement commitments for construction projects for many provincial/territorial agencies not included in the WTO GPA including for Canadian municipalities; and
- A commitment by both governments to explore the scope for a long term government procurement agreement between Canada and the U.S., within the next 12 months, to deepen, on a reciprocal basis, procurement commitments beyond those in the WTO GPA and NAFTA.

[www.international.gc.ca/trade-agreements-accords-commerciaux/fo/information\\_reenseignements.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/information_reenseignements.aspx?lang=eng). The agreement, which is available at the U.S. Trade Representative website at [http://www.ustr.gov/webfm\\_send/1638](http://www.ustr.gov/webfm_send/1638), notably still reserved a number of Canadian provincial procurements from the free trade obligations, including Canadian highway projects. *See* U.S.-Canada Agreement, *supra*, Note 1 to Annex 2. The agreement was also specially notable because it rested upon the text of the 2007 version of the GPA -- which remains unadopted. In essence, the United States and Canada agreed to comply with an updated version of the GPA which has not been finally approved within the WTO structure.

In commenting on the agreement, Brenda Swick and other attorneys in the Canadian firm of McCarthy Tetrault noted that the new agreement will open a number of opportunities, as follows:

Just as the agreement presents Canadian companies with new opportunities in US procurement markets, US suppliers of goods and services (and possibly suppliers from other jurisdictions) will see significant benefits from having access to provincial government procurement subject to the disciplines of the WTO's GPA, including new mechanisms for challenging provincial tender decisions.

As always in these situations, "the devil is in the details," and the business community should be carefully monitoring . . . developments, in particular the

details in the text . . . of Canada's listing in its Appendix to the GPA of provincial entities to be covered.

The Canada-US deal may also bode well for ongoing negotiations between Canada and the European Union towards a Comprehensive Economic Trade Agreement, paving the way for sub-federal procurement commitments to be negotiated in that forum as well.

"US and Canada Reach Agreement on "Buy America" and Provincial Government Procurement" (Feb. 5, 2010), [http://www.mccarthy.ca/article\\_detail.aspx?id=4844](http://www.mccarthy.ca/article_detail.aspx?id=4844) (Feb. 5, 2010).

**d. Special 2 Percent Tax on Foreign Contractors Outside International**

**Agreements:** The importance of the GPA and other international procurement agreements was made manifest at the end of 2010, when Congress passed, and on January 2, 2011 President Obama signed, the James Zadroga 9/11 Health and Compensation Act of 2010. The Act creates a fund to support and compensate emergency responders and recovery and cleanup workers who responded to the September 11, 2001 terrorist attacks. That fund will, in turn, be supported in part by a tax, imposed only on foreign persons (including businesses), "equal to 2% of the amount of . . . any payment made pursuant to a contract with the Government of the United States for" the provision of goods or services, if such goods "are manufactured or produced in any country," or such services are "provided in any country," which is "not a party to an international procurement agreement with the United States." The new law further provides that agencies are to "take any and all measures necessary to ensure that no funds are disbursed to any foreign contractor in order to reimburse the tax imposed" under the new law -- to ensure, in other words, that the tax is not reimbursed as a cost item on federal contracts.

Because the new law is explicitly to be "applied in a manner consistent with United States obligations under international agreements," presumably this discriminatory provision will *not* be applicable to foreign contractors covered by the Government Procurement Agreement, NAFTA, and other international free trade agreements that include protections against discrimination in federal procurement.

This foreign contractor tax was not included in the version of the bill originally passed by the House of Representatives in July 2010; this provision was added relatively late in the legislative process, as part of a replacement bill introduced as an amendment on the Senate floor on December 22, 2010. 156 Cong. Rec. S11039, S11051 (Dec. 22, 2010). That amendment was introduced, and the legislation passed the Senate, without any substantive debate. *Id.* at S10980-81. On the same day, the bill, as amended by the Senate to add the new tax on foreign contractors, was taken up by the House and passed by an overwhelming margin, in important part because of the strong public support for first responders injured in the wake of the September 11 terrorist attacks. 156 Cong. Rec. at H8965 (Dec. 22, 2010).

The only substantive discussion of the new tax came during the House debate, which was very limited. Representative Kevin Brady (R-Texas) raised doubts about the new tax, and suggested that the tax may be applicable to foreign goods and services provided abroad by U.S. prime contractors, through local subsidiaries:

Mr. BRADY of Texas. Madam Speaker, I too support the goal of ensuring that the brave men and women that acted as first responders at the World Trade Center attack are fairly

treated and compensated. But I rise today to oppose the troubling provisions the majority has attached to pay for this bill.

This measure would impose a 2 percent tax on goods and services that are produced or provided in certain foreign countries from firms that are based in foreign countries that are not parties to certain treaties or international agreements. It sounds complicated. But some analysis suggests that a significant majority of this tax, at least two-thirds, if not more, would be raised by taxing contracts that support American troops stationed in the Afghan and Iraqi theaters. Even more incredible, this tax could apply to American companies that are providing goods and services to our troops through local subsidiaries. Levying additional taxes on companies that support American troops is both illogical and dangerous.

In addition, there is no reason that other countries wouldn't copy this tax and impose it on our U.S. companies that are competing to sell goods and services overseas. This would hurt our U.S. economic recovery efforts and efforts to boost U.S. sales abroad and create American jobs here at home. Moreover, I have real concerns that this excise tax could be subject to legal challenge at the World Trade Organization and may be inconsistent with our G-20 commitments to avoid imposing new protectionist measures.

Madam Speaker, I urge a "no" vote because of these provisions. Strangely, the proposed procurement tax doesn't include any of the exceptions included in our standard Buy America legislation, such as non-availability, unreasonable cost and inconsistency with the public interest. As a result, the bill would mandate a tax on the procurement of goods from a foreign producer even when U.S. goods aren't available.

156 Cong. Reg. H8960 (Dec. 22, 2010). Representative Brady offered into the record a letter from leading U.S. business associations in opposition to the foreign contractor tax; that letter read, in part:

The procurement portions of this legislation would undermine U.S. efforts to succeed in the international economy by both inviting non-GPA countries to take reciprocal action against U.S. companies seeking to participate in their procurement markets and by opening the United States to retaliation for violating its WTO obligations. While U.S. companies certainly face significant and discriminatory procurement barriers in China, India, Brazil and other countries that are not part of the WTO procurement agreement, U.S. companies are still selling more into those government procurement markets than the United States is purchasing from those countries. As a result, there would more than likely be net loss for U.S. exports, U.S. companies and U.S. jobs if this provision became a model for foreign governments.

*Id.* at H8963.

In comments during the House debate, and reflecting on how quickly the bill was moving through Congress, Representative Timothy Johnson (R-Illinois) complained that he found "it appalling that a bill of this magnitude was amended in the Senate just hours before the House was asked to vote on it, with no Member having had the chance to review and deliberate on what we were voting on and enacting into law." *Id.* at H8963.

In her comments on the bill during the House debate on December 22, 2010, Representative Carolyn Maloney (D-New York), a leading cosponsor of the bill, suggested that the foreign contractor tax would go beyond paying for the fund for the World Trade Center victims -- that in fact "the procurement payfor will put an estimated \$450 million in extra revenue toward the deficit." *Id.* at H8961.

The new legislation drew immediate criticism from India, *see, e.g.*, "India Protests U.S. Move to Levy Additional Fee on Exports," *The Hindu*, Dec. 25, 2010, which as noted is not a part of the GPA or other international procurement agreements with the United States. *E.g.*, Uttara Choudhury, "Obama Signs 9/11 Health Bill, Sticks India with Paying for It," *Daily News & Analysis*, Jan. 4, 2011. In public reports, however, India's criticism was focused not on the contractor tax, but on a separate revenue provision which will increase fees for visas for foreign workers. *See, e.g.*, Amiti Sen, "India May Drag U.S. to WTO Over H-1B, L-1 Visa Fee Hike," *Econ. Times*, Dec. 29, 2010.

Those in India who specifically complained about the procurement tax voiced pessimism that India would be able to fend off the measure. Although the director general of the Federation of Indian Chambers of Commerce and Industry reportedly termed the legislation "clearly protectionist," and argued that the legislation was contrary to against G-20 agreements not to take any new protectionist measures, the same Indian report quoted an international trade lawyer: "If you are not a signatory to the GPA, you cannot complain if any government follows discriminatory procurement practices.'" "India Objects to New US Bill on Highter Visa Fees," *Mint*, Dec. 23, 2010.

On balance, therefore, the new U.S. legislation, coupled with other initiatives that discourage procurement from India, *see, e.g.*, Alan Johnson, "India Protests Outsourcing Ban," *Columbus Dispatch*, Sept. 18, 2010 (India protested Ohio state ban against procuring outsourcing services from abroad), may encourage India to progress in the GPA accession process.

# **SLIDES**

Slide 1




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Slide 2




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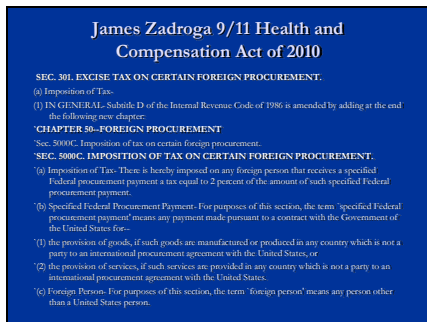
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Slide 3




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Slide 7

**Core Purchase Restriction:  
FAR 25.403(c)**



(c) *Purchase restriction.*  
(1) Under the Trade Agreements Act (19 U.S.C. 2512), in acquisitions covered by the WTO GPA, acquire only U.S.-made or designated country end products or U.S. or designated country services, unless offers for such end products or services are either not received or are insufficient to fulfill the requirements. **This purchase restriction does not apply below the WTO GPA threshold for supplies and services, even if the acquisition is covered by an FTA.**  
(2) This restriction does not apply to purchases of supplies by the Department of Defense from a country with which it has entered into a reciprocal agreement, as provided in departmental regulations.



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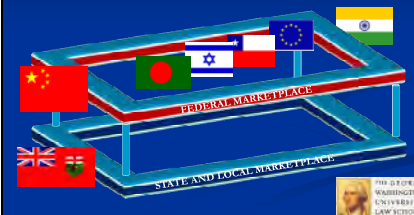
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Slide 8

**New Walled Garden:  
Recovery Act**



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Slide 9

**Conclusion**

Professor Christopher Yukins  
[cyukins@law.gwu.edu](mailto:cyukins@law.gwu.edu)  
Tel. 202-994-9992



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Slide 1

**The Foreign Contractor Tax:  
A New Development in Trade  
and Procurement**

Implications for U.S. International  
Obligations and Commercial Interests

Presented by  
Linda Menghetti  
Vice President

**ECAT** Emergency Committee  
for American Trade

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Slide 2

James Zadroga 9/11 Health  
and Compensation Act of 2010

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**SEC. 301. EXCISE TAX ON CERTAIN FOREIGN  
PROCUREMENT.**

Imposition of Tax-

(1) IN GENERAL- Subtitle D of the Internal Revenue  
Code of 1986 is amended by adding at the end the  
following new chapter:

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Slide 3

James Zadroga 9/11 Health  
and Compensation Act of 2010

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**CHAPTER 50--FOREIGN PROCUREMENT**  
Sec. 5000C. Imposition of tax on certain foreign procurement.

**SEC. 5000C. IMPOSITION OF TAX ON CERTAIN FOREIGN PROCUREMENT.**

(a) Imposition of Tax- There is hereby imposed on any foreign person that  
receives a specified Federal procurement payment a tax equal to 2 percent of  
the amount of such specified Federal procurement payment.

(b) Specified Federal Procurement Payment- For purposes of this section, the  
term "specified Federal procurement payment" means any payment made  
pursuant to a contract with the Government of the United States for--

(1) the provision of goods, if such goods are manufactured or produced in  
any country which is not a party to an international procurement agreement  
with the United States, or

(2) the provision of services, if such services are provided in any country  
which is not a party to an international procurement agreement with the  
United States.

(c) Foreign Person- For purposes of this section, the term "foreign person"  
means any person other than a United States person.

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Slide 4

James Zadroga 9/11 Health and Compensation Act of 2010

(c) Application- This section and the amendments made by this section shall be applied in a manner consistent with United States obligations under international agreements.

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Slide 5

Business Community Reaction  
*December 21, 2010 Letter to Speaker Pelosi and Leaders Reid, Boehner, and McConnell:*

"We are writing to urge you to remove from the proposed amended version of H.R. 847 the Title III revenue raisers related to international government procurement. . . ."

American Association of Exporters and Importers (AAEI)  
Association of Equipment Manufacturers (AEM)  
Business Roundtable  
Emergency Committee for American Trade (ECAT)  
National Foreign Trade Council (NFTC)  
National Retail Federation (NRF)  
Organization for International Investment (OFII)  
TechAmerica  
United States Council for International Business (USCIB)  
U.S. Chamber of Commerce  
US-China Business Council

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Slide 6

Specific Concerns  
*December 21, 2010 Letter to Speaker Pelosi and Leaders Reid, Boehner, and McConnell:*

"The procurement portions of this legislation would undermine U.S. efforts to succeed in the international economy by both inviting non-GPA countries to take reciprocal action against U.S. companies seeking to participate in their procurement markets and by opening the United States to retaliation for violating its WTO obligations. . . . As a result, there would more than likely be net loss for U.S. exports, U.S. companies and U.S. jobs if this provision became a model for foreign governments.

Furthermore, the imposition of this discriminatory tax on foreign companies may also violate U.S. international commitments if implemented. If found to be contrary to U.S. WTO commitments, other countries could end up being authorized to retaliate directly against U.S. exports, further undermining U.S. opportunities overseas."

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Slide 7

Key Legal Issues

- Tax**
  - Provision amends Internal Revenue Code, not Federal Acquisition Regulation – FAR.
- Foreign Person**
  - Applies only to a “foreign person.”

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Slide 8

Key Issues cont.

- Goods**
  - Applies to foreign persons who supply goods from non-agreement countries – so no application to GPA members or countries with a procurement chapter in an FTA
- Services**
  - Applies to services provided by a foreign person “provided in any country which is not a party to an international procurement agreement” potentially even if supplied by a supplier from a GPA member country.
- Final Clause**
  - Final provision requires application to be consistent with U.S. legal obligations.

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Slide 9

U.S. International Obligations

National Treatment, MFN, etc.	Procurement Obligations
<ul style="list-style-type: none"><li>• GATT Articles I and III</li><li>• GATS Articles XVII</li></ul>	<ul style="list-style-type: none"><li>• WTO GPA</li><li>• Procurement chapters of U.S. trade agreements</li></ul>

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Slide 10

GOODS: GATT/WTO  
National Treatment Obligation

Article III:2: "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly to like domestic products."

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Slide 11

GOODS: GATT/WTO  
National Treatment Obligation

Article III:4: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded *treatment no less favourable than that accorded to like products of national origin* in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

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Slide 12

GOODS: GATT/WTO  
Procurement Exception

Article III:8(a): "The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes . . ."

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Slide 13

GOODS: GATT/WTO National Treatment Obligation cont.

<b>Basic Obligation</b>	<b>Procurement Exception</b>
Clear violation: excise tax on foreign, not domestic, goods.	Will Internal Revenue Code provision be found to be a law or requirement "governing" procurement?

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Slide 14

SERVICES: GATS/WTO National Treatment Obligation

Article XVII:1: "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, *treatment no less favourable than it accords its own like services and service suppliers.*"

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Slide 15

SERVICES: GATS/WTO Procurement Exception

Article XIII:1: "Articles II, XVI, and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes . . . ."

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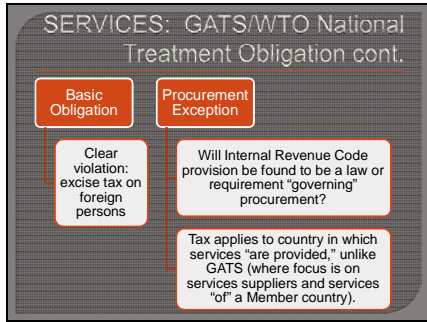
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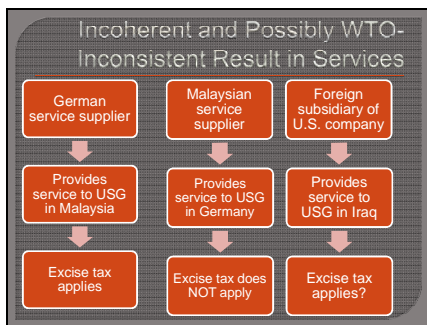
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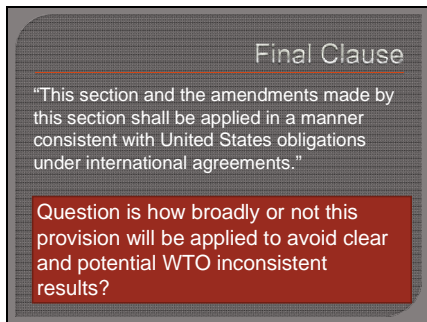
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Slide 18



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Slide 19

**Business Concerns Beyond International "Obligations"**

Domestic Effect	International Effects
<ul style="list-style-type: none"><li>• Will overseas subsidiary of U.S. company be a "foreign person" subject to the tax?</li><li>• Procurement costs</li></ul>	<ul style="list-style-type: none"><li>• Copycat actions</li><li>• Negative effects on U.S. business competitiveness in foreign procurement markets.</li></ul>

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Slide 20

**What's At Stake?**

Many analyses estimate that government-wide procurement of goods and services typically accounts for 10-15% of a country's GDP.

Others have independently valued the worldwide procurement market equal to \$1 or \$1.5 trillion annually.

A 1998 OECD study estimated an annual worldwide value of procurement markets at \$5.66 billion, of which \$2 billion was subject to international competition. At that time, total procurement equaled about 82% of total goods and services exports and contestable procurement equaled about 31% of total goods and services exports. By today's trade numbers (counting only goods), world procurement markets could potentially equal some \$12.8 trillion in total procurements and \$4.6 trillion in contestable procurements.

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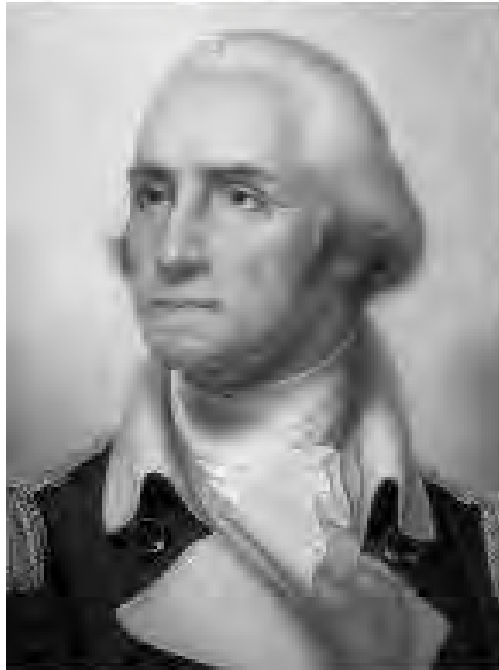
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