

PROCUREMENT AS A TOOL FOR ECONOMIC STIMULUS: THE UNITED STATES' EXPERIENCE, 2008-2010

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ABSTRACT

This paper examines the operation of public procurement as an instrument for economic stimulus focusing on the United States' experience in the "Great Recession" of 2008-2010(?). Federalism as it operates in the United States introduces significant distortions into the effort to combine economic stimulation with a commitment to open and competitive public procurement. Funding for stimulus comes from the federal government, but procurement is carried at the level of state and local government. This state and local public procurement is not subject to the competitive processes and safeguards of the federal regime of public procurement. Moreover, legislation enacted during a political and economic crisis strengthens the interests favoring protectionism over those supporting a commitment to free trade in public procurement. Proponents of free trade were able to limit the Buy American provisions of the US stimulus so as to respect existing international obligations, but could not extend that commitment.

INTRODUCTION

Public procurement assumed a central role in the formulation of the "stimulus package" enacted by the United States Congress in February 2009 in response to the global financial crisis and the ensuing great recession that began in 2008. Indeed, more than a third of an overall stimulus package of \$787 billion US is devoted to the category of contracts grants and loans, which mostly constitutes procurement.¹ This paper examines some key features of that procurement response. In particular I hope to illuminate some of the political and legal dynamics that affected that procurement response. These features may be – in part

-- peculiar to the political context of the United States, but also have significant consequences for the development and maintenance of if a liberalized trade regime in government procurement.

Important among these factors are features of the federal system of governance in the United States, which create a political, legal and economic environment in which funding for augmented public procurement in times of recession comes from the national government, while the bulk of the stimulus-funded procurement is actually carried out at the level of state and local government. Under United States law, the state and local governments face very different and much more confining fiscal constraints than the federal government does, with the former generally required to maintain balanced budgets even in times of recession, while the latter is free to run substantial deficits. It has, of course, been widely noted that the United States lacks automatic countercyclical mechanisms for fiscal stimulus that are as vigorous as those of many European social welfare states. But this observation dramatically understates the practical consequences of this contrast because state and local governments in the United States are in fact forced to dramatically cut their payrolls and other major categories of spending in recessionary times that reduce tax revenues. Accordingly, much of the enhanced federal spending simply offsets or averts reductions in state and local government spending that otherwise would have occurred, with little, if any, net increase in spending. Indeed, it is doubtful that the federal support for state and local spending is sufficient to offset the contraction caused by state and local budget balancing. As a result, the fiscal impact, at the margin, of federal stimulus spending, while positive, is unlikely to produce a substantial expansionary effect. As commentators like Paul Krugman have noted, the result is that the stimulus package of federal spending is likely to be too small to achieve the anti-recessionary effects desired. Indeed, as this piece is finalized in April 2010, proposals have been made for additional federal stimulus funding specifically to avert major layoffs of local government employees, especially teachers, that would otherwise be necessary as state and local governments enter a new fiscal year.

Another significant consequence of the federal pattern of governance in the United States as it relates to procurement as a counter-recessionary tool is the spotty pattern of federal law oversight over the procurement that is funded by the stimulus package. In general, spending done by state and local governments supported by federal stimulus grant money is subject to the procedural requirements of state and local law, not to federal requirements for competition and

transparency. Thus the relatively strong mandates and procedures for open, transparent and competitive procurement that typify the United States' federal government's procurement system are not applicable to the federally subsidized state and local procurement that are funded through the stimulus legislation. On the other hand, the political dynamics of formulating the stimulus package produced strong pressure for protectionism that led to the introduction of the controversial "Buy American" provisions of the Stimulus legislation. A crisis or perceived crisis, such as that represented in the current "Great Recession" presents a significant challenge to the pro-free-trade interests in the interest group calculus that normally plays out to limit, if not to eliminate protectionism in public procurement in the United States, giving a edge to the protectionist camp. The political dynamics that ultimately led to the compromise formulation ultimately embodied in the stimulus legislation are considered below. Although they do show that the Executive Branch, with support from congressional allies, was able to limit the damage done to the United States commitment to free trade in government procurement, the fragility and vulnerability of that commitment was all too apparent.

A third area of importance for scholars of comparative procurement is the impetus that the recession –and the resulting aggravated shortfall of capital funding for state and local government infrastructure—has given to the expansion of public-private partnerships in the area of infrastructure provision in the United States. In the federal system of the United States state and local governments have been far more receptive to the use of these PPPs than has the national government. In large measure this is due to the legal constraints on deficit spending that apply to state and local governments, but not to the national government of the United States. Thus, the development and use of PPPs, in which the United States has tended to lag behind much of the industrialized world, has received a significant boost, albeit still only at the levels of state and local government. Certainly there is a new willingness to entertain use of PPPs in connection with a broader range of governmental functions and a political willingness to consider such alternatives in local jurisdictions that had not previously been reception to such methods.

More generally, examination of a series of "crises" that have affected United States federal government public spending on procurement in the last decade confirms that there is a strong pattern of political opportunism. Both commitments to free trade liberalization in the public procurement sector and to open, competitive public

procurement generally were undermined by the advent of major crises, including the procurement response to Hurricane Katrina, the U.S. government procurement to meet the needs of the 2003 Iraq invasion, and its aftermath, and the world financial crisis and recession of 2008-2009.

1. FEDERALISM AND PUBLIC PROCUREMENT IN THE UNITED STATES POLITICAL AND LEGAL SYSTEM

Several basic factors must be appreciated to understand the peculiar relationship between governance and public procurement in the United States that affects the use of public procurement as an instrument for fiscal stimulus. First, the national (or “federal”) government of the United States does not do most of the public procurement in the United States. Although federal government procurement spending reached a level of over \$500 billion in fiscal year 2008, and includes the very large amounts spent on national defense and security -- primarily by the federal government, that total still is equal to only roughly half of the total public procurement in the United States. The remainder is carried out by the 50 state governments and the thousands of municipalities of the United States. Thus most of the support for public procurement incorporated in the stimulus legislation takes the form of federal grants for state and local government procurement, rather than direct spending by the national government of the United States.

Second, the law that governs public procurement by the states and municipalities consists primarily of the separate bodies of procurement law maintained by the 50 states and the District of Columbia within this federal system, rather than a national body of law prescribed by the legislative and administrative instrumentalities of the federal government. Political realities that favor devolution and a national political tradition privileging state and local government are a powerful force in the United States. Moreover there are traditional and constitutional limitations on the power of the national government to supplant the state law that governs public procurement. For instance, even with respect to international commitments, such as adherence to the Government Procurement Agreement, the national government of the United States cannot compel state and local governments’ participation. Thus for reasons that are a hybrid of law and powerful political custom, federal law has little to say about the procurement practices and procedures of state and local government—which do much of the public procurement in the United States.

There are some significant exceptions, of course. For instance, federal constitutional law extends freedom of speech protection to state and local government contractors, who generally cannot be denied public contracts because of their exercise of their free speech rights to criticize the conduct of governmental affairs.² Similarly, the due process clause of the Fourteenth Amendment to the United States Constitution is likely to mandate certain fair hearing procedures—if not already mandated by state law—if a city or state sought to debar a particular contractor from future participation in public procurement.³ Still, these are the exceptional requirements: the basic framework of public procurement law that is applicable to federal government procurement is not applicable to state and local government procurement, including that procurement paid for with federal grant funds under the stimulus legislation. For instance, the basic requirement that procurement be done through mechanisms of “full and open competition” is a mandate of federal statutory law applicable only to agencies of the federal government. Similarly, the general availability of a bid protest procedures to challenge the award of a government contract to a competitor, is likewise prescribed by federal law only for federal government contracts. So these key protections for transparent, competitive public procurement do not apply to procurement done at the levels of state or local government that are federally funded by the stimulus legislation.

It is surely ironic that one of the rare instances in which federal statutes imposed requirements on state and local procurement is the “Buy American” provisions included in the Stimulus legislation that required state and local grantees of federal stimulus funding to “buy American” with respect to certain goods to be acquired with the assistance of stimulus funding. The political dynamics that render commitments to trade liberalization in government procurement vulnerable in times of perceived political or economic crisis are addressed in part 4 of this paper.

On the other hand, the insulation of state and local government public procurement from most of the law applicable to federal public procurement has certain effects that may actually be viewed as indirectly liberalizing. Specifically, the strongly “exceptionalist” body of United States law applicable to the *performance* of public contracts, is also not applicable to these state and local government contracts (Schwartz 2010). That is, the United States enjoys exceptional authority unilaterally to modify or terminate its own contracts without incurring the ordinary liability for breach of contract that a similarly situated private party

would incur upon breach of its contract obligations. Because these exceptional immunities and authorities are not routinely available to state and local government authorities, principles of private contract law are more likely to govern disputes about the performance of public contracts entered into with federal stimulus funds.

Third, powerful political traditions in the United States support a effective subsidiarity principle, under which public expenditure on procurement, outside of the defense sector, tends to be done at the least centralized level of government possible. That is, public expenditures on roads, bridges, water systems, and sewage treatment systems and the like is normally undertaken at the level of state or local government, even when the funding derives from the federal government. It is important to recognize the operation of this dynamic in the development of the stimulus package legislation enacted by the United States Congress. Specifically, political resistance to increased public spending, and disabling disagreements about the policy to govern such spending were generally minimized by delegating spending authority to the instrumentalities of state and local government. That, in turn, however, meant that the comprehensive principles that govern formation of most federal government contracts, assuring competition and transparency were not brought into play by federal funding of this state and local procurement for stimulus purposes. By the same token, much --roughly half -- of the stimulus expenditure took the form of tax relief for individuals and businesses. This may be viewed, in one sense, as the ultimate in subsidiarity: affording the stimulus at the level of the individual taxpayer.

2. FISCAL LAW AND PUBLIC PROCUREMENT IN THE UNITED STATES: THE AUTOMATIC DEFLATIONARY BIAS

Much attention has been paid to the substantial public procurement component of the stimulus package legislation adopted in the United States in response to the global financial crisis and ensuing recession. Nevertheless, outside the United States, and even in the United States, the deflationary bias built into public spending in the United States is too little understood. Even with the large boost given to public procurement by the stimulus, the net effect of the recession will be to significantly reduce public spending.

State and local governments are required by state constitutions and state law to balance their budgets—it is only the United States federal government that is permitted to engage in deficit spending. Thus

the Keynesian weapon of fiscal stimulus is only available to the federal government. More importantly, in times of recession, tax collections for state and local government are significantly reduced. Thus, precisely when expansionary spending would be warranted as a matter of fiscal policy the states, as are engaging in what economist Paul Krugman has labeled “savage budget cuts” (Krugman 2009). One significant component of the federal stimulus was in fact designed to provide transitional aid to state and local governments to cushion the budget cuts that they are required to institute, the size of this aid is simply insufficient to eliminate the deflationary effect on public spending.

Much of the budget cuts that are forced upon state and local governments by the requirements for annual balanced budgets will be experienced in the area of payroll—forcing cuts of teachers, policemen, and other municipal workers. Federal stimulus funds do include funds to reduce the level of layoffs in these areas but are insufficient to entirely eliminate the reduction in state and local government spending in these areas. As we come up on the second anniversary of the recession, another round of stimulus is contemplated specifically to avert another round of local budget cuts aimed at public employment of teachers and public safety workers.

3. PUBLIC CHOICE AND PROTECTIONISM IN TIMES OF CRISIS: POLITICAL OPPORTUNISM AND THE POLITICS OF THE “BUY AMERICAN” COMPROMISE IN THE US STIMULUS LEGISLATION

Section 1605 of the Stimulus legislation, the American Recovery and Reinvestment Act of 2009, comprises the so-called “Buy American” provisions of the stimulus legislation. As the name suggests, these provisions are of concern to the trading partners of the United States and all who support liberalized trade in government procurement. What this section does, at first blush, is to forbid the use of funds made available by stimulus bill on works and public building construction, repair or alteration, unless the iron, steel and manufactured goods employed are produced in the United States. However, as finally enacted, in response to the arguments of free trade proponents, the provision was amended in critical respect so as to provide that the “Buy American” provision “shall be applied in a manner consistent with United States obligations under international agreements.”⁴ The net effect of this is that the stimulus legislation neither abrogates existing United States commitments to free trade under existing trade agreements, including the Government

Procurement Agreement, and bilateral and multilateral free trade agreements, nor does it advance the cause of free trade in government procurement. This standoff outcome reflects the political vulnerability of commitments to liberalized trade in government procurement without actually violating the existing United States' commitments to such liberalized procurement. One may well inquire how and why the legislation came to assume this peculiar shape, seeming conceding to protectionist pressures with one hand, while taking away those concessions with the other.

The answer appears to be, at least in part, that the appearance of protectionism was more important than really achieving protectionist effects to the proponents of the Buy American provision. At the same time, proponents of liberalized trade in government procurement were more concerned about the real effects of the legislation and less concerned about the symbolic impact. More precisely, one might say that the two sides of this argument were signaling to different constituencies, and that those constituencies were attuned to different levels of detail. Organized domestic political constituencies, such as labor unions, with a strong focus on trade issues were focused on the symbolic message favoring procurement of United States-made materials. At the same time, the sophisticated trade constituencies in nations that are party to the Government Procurement Agreement or other free trade agreements with the United States could be expected to understand that Section 1605(d) effectively undid the impact on them of the balance of section 1605.

The political support for this peculiar enactment can be understood in light of a public choice theory analysis as applied to free trade issues generally. The interest groups that generally oppose free trade and support protectionism are likely to be well-organized because of the concentrated impact of free trade on specific industries and on the labor unions whose members work in those industries. By contrast, the beneficiaries of trade liberalization are classically the large but diffusely affected groups of consumers that experience lower prices because of trade liberalization. Public choice theory predicts that well-organized interests experiencing concentrated impacts are more likely to be politically effective than larger diffusely affected interests. That said, however, legislative procedures and packages that blur the effects of trade liberalization on specific industries tend to reduce the relative advantages of protectionist interest groups. For instance, so-called "fast-track" legislative procedures that require the consideration of free trade agreements without opportunity for amendments reduce the power of

protectionist interests. For similar reasons, the Executive Branch in the United States government has tended, for many years, to be more receptive to free trade than the legislative branch. Finally, as the consideration of the stimulus package illustrated, the perception of a crisis may re-potentiate the short-run calculus of interests that gives protectionism the upper hand. In the end, however, as it happened, the proponents of trade liberalization in government procurement found a way to preserve the liberalizing requirements of the GPA and other free trade agreements without explicitly removing the protectionist language from Section 1605. They did so by portraying the issue as one of clarification as to how the existing language was to be applied, rather than one of outright amendment.

The challenge that the world financial crisis of 2008-2009 presented to trade liberalization in government procurement parallels developments witnessed in other episodes of economic or political crisis. Elsewhere I have addressed another example of this phenomenon, the restriction of open procurement for reconstruction contracts in Iraq in the wake of the United States' 2003 invasion to overthrow Saddam Hussein's government.⁵ The pattern discerned in that earlier work is also evident here: the political dynamics of a "crisis" situation provide political cover for taking short term action that is less than fully supportive of the national undertaking to support and respect free trade in government procurement. Thus, shortly after the end of the initial phase of "major combat operations" in Iraq, in 2003, United States Deputy Secretary of Defense Paul Wolfowitz issued a set of "Determinations and Findings" that limited competition for a valuable set of relief and reconstruction contracts to contractors from nations that had supported the United States-led invasion. The issuance of this public document, concluding that the public interest required this special limitation on eligibility for these contracts, was necessary under United States national procurement law to support the departure from the "full and open competition" ordinarily mandated by U.S. national procurement law.

Furthermore, both the episode of Iraq reconstruction contracting and the Buy American provision of the stimulus bill also illustrate an important recurring feature of the characteristic response to procurement in a wide range of crisis circumstances: a strongly opportunistic political response which tends to justify measures that may not have any strong relationship (or any relationship at all) with the factors that caused the crisis or which are strictly relevant to its resolution. Thus, for instance, the political response, in the United States, to the procurement needs experienced in the wake of Hurricane Katrina, in 2005, sought to further

relax existing procurement rules. This was done even though existing mechanisms, such as comprehensive use of framework contracting, for pre-selecting and pre-positioning suppliers for the goods and services needed to address a natural emergency of this kind had not been used effectively in advance of the Hurricane. Any fair assessment of the political response to the procurement challenges of Hurricane Katrina must acknowledge that the failure to effectively use existing contracting mechanisms was made an excuse for unjustified deregulatory changes in procurement practices.

The pattern appears to be that the advent of a crisis is taken as license by interest groups and political factions to seek the policy changes that they favored all along. In the case of the global financial crisis, U.S. proponents of protectionism saw an opportunity to add political force to the protectionist positions that they held all along, implicitly daring the proponents of free trade to defend the commitment to trade liberalization in the face of difficult economic conditions. This suggests that expanded public procurement in times of fiscal crisis is an less than promising situation in which to press for either free trade in public procurement or, more generally, for transparent competitive procurement.

4. OPENING THE DOOR TO PPPS: FLEXIBILITY BORNE OF NECESSITY

Another likely impact of the global financial crisis and the ensuing recession is that it may open the door to broader use of public-private partnerships than has previously been accepted in the United States. PPPs have had, to date, a very limited role in public procurement in the United States, but a significant difference exists with respect to this practice between state and local governments on the one hand and the national government on the other. The limited fiscal resources of state and local governments have encouraged a number of state highway departments to explore and undertake use of public-private partnerships as a mechanism for developing, maintaining and operating toll roads and related facilities in the last decade where the responsible governmental entity lacked the budgetary resources to undertake such expensive capital projects. At the same time, public-private partnerships scarcely appear to exist within the purview of the United States' federal procurement regulatory system.

As the United States begins to confront the need to address its growing long term structural deficit (Chan 2010), the likelihood that use

of PPPs would become more attractive and more widely employed at the federal level increased significantly. Advocates of market-based solutions, have noted that “[d]espite the unprecedented commitment of federal taxpayer dollars in the American Recovery and Reinvestment Act of 2009 (ARRA)” and other recent legislative proposals “the nation’s infrastructure will remain dramatically underfunded as long as we continue to rely exclusively on federal taxpayer funding.”⁶ Not only does the aggregate amount of spending on infrastructure fall far short of actual needs, the federal support for infrastructure spending spreads these insufficient funds over a too broad array of projects, with insufficient support for most, and is unable to prioritize infrastructure projects in accordance with their economic benefits or demand for services. (Huffman 2009). Accordingly, these scholars and advocates have urged that the federal government follow the example of a number of state and local governments by moving in the direction of public-private partnerships as a means for investing in infrastructure. (Huffman 2009).

Indeed, increased support for use of public private partnerships is reflected in the websites maintained by federal agencies that provide grant funding for state and local transportation projects. See for instance, the website of the United States Department of Transportation’s Federal Highway Administration, which includes substantial resources to facilitate the use of a variety of creative public-private options for transportation projects. The website concludes that the Highway Administration “encourages the consideration of public-private partnerships (P3s) in the development of transportation improvements.”⁷ It also offers a detailed document outlining policy considerations to be addressed in considering adoption of a PPP.⁸ Although it might be expected that with the election of a Democratic President, enthusiasm for PPPs in the federal government’s executive branch would be diminished, there is at least some evidence that that is not necessarily to be the case. For instance, President Obama’s recent proposals for manned spaceflight programs make heavy use of a kind of public-private partnership. Ironically, response to those proposals has reflected somewhat of a reversal of traditional political party roles in the United States, with a Democratic President proposing increased reliance on the private sector and heavy Republican party criticism of the proposal to rely heavily on private sector initiatives for future low earth orbit launch capacity.

5. ASSESSING PUBLIC PROCUREMENT AS AN INSTRUMENT FOR FISCAL STIMULUS: WAS THERE A MISSED OPPORTUNITY?

The objectives of prompt and effective fiscal stimulus and open and competitive public procurement are in some inherent tension. This tension is manageable under normal circumstances, but the tension is exacerbated by the political dynamics of federalism in the United States, as well as by the political opportunities and challenges of making public policy in the face of a perceived political crisis. The net result is a somewhat somber assessment of the potential for public procurement as a mechanism for fiscal stimulus and of the prospects for fiscal stimulus programs to embody best practices in public procurement. The key point is that the objectives of fiscal stimulation and transparent competitive public procurement may theoretically consistent in the abstract and in the long run, but under the conditions of a perceived political emergency these two agendas tend to pull in different directions.

The objectives of any fiscal stimulus program must include prompt expenditure of public funds to achieve the desired economic stimulus. This creates an inherent tension with the norms of transparent and competitive procurement. Competitive procurement necessarily places an emphasis on affording the broadest possible notice of procurement opportunities and consideration of the broadest range of potential competitors. Moreover, to provide a practical assurance that the potential for transparent competitive procurement is actually achieved in any particular procurement, it is important to afford competitors recourse to the mechanisms of bid protest to an independent authority empowered to provide meaningful relief from procedural and substantive irregularities. Accordingly, extensive use of public procurement in a program of fiscal stimulus is likely to entail a certain amount of compromise between the optimal achievement of the desiderata of prompt stimulus and the procedures for open and competitive procurement. Nevertheless, the need for compromise between desiderata of prompt expenditure and the process-focused norms of best practices in public procurement is not unduly troubling. Indeed, the need for this compromise does not distinguish procurement as an instrument for economic stimulus from the normal challenge to strike an appropriate balance between prompt procurement of the goods and services needed by governmental agencies while achieving open and competitive public procurement.

As embodied in the stimulus program in the United States, the inherent tension between the objectives of fiscal stimulus and of

transparent competitive procurement is, however, significantly exacerbated. First, as we have noted, for both legal and political reasons the bulk of the public procurement funded by the stimulus program is to be carried out at the level of state and local government. These entities are constrained by local law from deficit spending, and are therefore exceptionally beholden to federal funding in times of recession. Second, although these procurement functions are undertaken with federal funds by state and local governments, these procurements are not subject to the highly developed system of United States federal government procurement law. The net result is that an extra layer of process and delay is inserted – delaying the stimulative effect of federal appropriations in support of public procurement. Thus inserting a requirement of compliance with federal law procurement norms would be particularly unwelcome, and would produce significant political resistance.

Superimposed on this situation is the particular political dynamics associated with the perception of a crisis. Although a crisis is sometimes viewed as an opportunity to achieve political objectives that are ordinarily unachievable, this principle may operate in several different ways when public procurement is employed as a mechanism for stimulus in times of recession. On the one hand, public expenditures that would not otherwise be approved may be approved as an exigent mechanism to combat recession. On the other hand, there may be less patience for the procedures that are normally required to provide an assurance that public funds are spent without corruption or favoritism. Thus there may be less political will to insist on full and open competition, less political will to insist on full publicity for procurement opportunities, and less political will to insist on the full array of challenge and bid protest procedures. In effect, times of crisis, or perceived crisis increase the cost of additional procedure.

This is particularly the case with respect to the commitment to free trade in government procurement. Interest groups that favor protectionism are given an extra argument by the existence of serious unemployment at home: why expend federal funds on procurement that may ultimately benefit providers of goods and services that are not United States nationals? The answers to this claim are the same as they always are: that the long term interests of the United States are on the side of an expanded market with free trade in public procurement. But in times of political and economic crisis this is a harder argument to sell to members of Congress faced with re-election campaigns in the near or immediate future. Thus no one should be surprised that the demand

surfaced during the consideration of the United States stimulus legislation that public procurement funded by the stimulus should be subject to Buy American restrictions. Indeed, the more remarkable fact is that the Buy American provision was held harmless by the addition of language specifying that it should be applied “consistent with United States obligations under international agreements.” This carefully chosen language enabled proponents of free trade to largely neutralize the Buy American language without appearing to deprive the protectionists of their preferred statutory rhetoric.

This series of events can scarcely be portrayed as a victory for liberalized trade in public procurement, but neither should it be perceived as an unalloyed setback. Rather, it is more accurate to view both as a measure of how far we have come, as well as how far we still have to go. The advent of the global financial crisis was inevitably going to present a challenge to national commitments to liberalized trade. This challenge was recognized by the G20 nations when at the beginning of the unfolding of the global crisis they recognized in the Declaration of the Summit on Financial Markets and the World Economy the “critical importance of rejecting protectionism and not turning inward in times of financial uncertainty.”⁹ Measured against this objective the provisions of the United States stimulus legislation are not disappointing, but they can scarcely be considered disappointing. Absent a stronger treaty regime binding participating nations, including the United States, to a free trade regime in government procurement, moments of political and economic crisis are always going to test the resilience of political commitments to free trade. This is not to suggest that existing treaty commitments are useless. Indeed, quite the contrary is true. In the crucible of legislating in a domestic economic and political crisis it was precisely the existing international obligations of the United States that offered a lever that could be effectively employed as a bulwark against short-run political pressure to move toward protectionism.

What this suggests, of course, is that a lesson should be learned from the response to the Great Recession of the past few years. A recession is unlikely ground on which to advance the commitment to liberalized trade in public procurement. Accordingly, as the world economy recovers from the crisis of the past few years it is all the more important to cement commitments to free trade in public procurement into enforceable treaty commitments. When the next crisis occurs, as surely it will, sooner or later, we will be better able to defend those commitments against the potentiated protectionism that will again be experienced in times of recession.

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NOTES

¹ The Stimulus legislation is properly known as the American Recovery and Reinvestment Act of 2009, Pub. L. No 111-5, 123 Stat. 115 (2009).

² Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996).

³ Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980).

⁴ Section 1605(d).

⁵ Schwartz, J.I. (forthcoming 2010). "Procurement in Times of Crisis: Lessons from U.S. Government Procurement in Three Episodes of 'Crisis' in the 21st Century." Forthcoming in R. Anderson & S. Arrowsmith (eds.), *The WTO Regime on Government Procurement: Recent Developments and Challenges Ahead*. Cambridge University Press.

⁶ Huffman (2009), at 122.

⁷ Available at <http://www.fhwa.dot.gov/ipd/p3/index.htm>.

⁸ United States Department of Transportation, Federal Highway Administration, Public Policy Considerations in Public-Private Partnership (PPP) Arrangements (January 2009), available at http://www.fhwa.dot.gov/ipd/pdfs/2009_public_policy_considerations_ppp_arrangements.pdf.

⁹ Declaration of 15 November 2008, Summit on Financial Markets and the World Economy, available at http://www.g20.org/Documents/g20_summit_declaration.pdf.