Buy North America: A Revision to FTA Buy America Requirements

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I. Introduction

This article follows the story of the "Buy America" transit industry protectionism program administered by the Federal Transit Administration (FTA). Buy America dates back to the Depression, an era of massive American unemployment. As the transit industry passed into the public sector in later years, the Buy America program was applied to the transit industry. The passage of the North American Free Trade Agreement (NAFTA) purported to cast aside protectionism in the United States, Canada, and Mexico; yet somehow, Buy America protectionism remained in the transit industry. The continued application of this type of provincial regulation to transit has been detrimental to the transit industry.

This article explains how Buy America is inconsistent with NAFTA. It calls for the elimination of Buy America and urges replacement with a "Buy North America" regulation.

II. Buy America Legislative History (including NAFTA)

A. The 1933 Buy America Act

The first Buy America[1] requirements generally applicable to government procurements were enacted during the Depression.[2] The purpose of Buy America was to require the federal government to spend taxpayers' dollars only on goods produced in the United States.[3] The Buy

1. The original 1933 legislation is popularly referred to as the "Buy American" Act. All subsequent legislation has been referred to as "Buy America." This article will refer to both as "Buy America.".

2. Buy American Act, ch. 212, tit. III, 47 Stat 1489, 1520-21 (1988)(codified as amended at 41 U.S.C. §§ 10(a) *et seq.*) [hereinafter *Buy America Act*]. A prior act applied only to materials purchased by the Department of War. Act of Mar. 3, 1875, ch. 133, § 2, 18 Stat. 454, 455 (1875) (*codified at* 41 U.S.C. § 10, *superseded by* 41 U.S.C. §§ 10(a) *et seq.*).

3. *See Buy American Act, supra* note 2.

America requirements were added as a Senate amendment to a House appropriations bill[4] for the treasury and post office departments.[5]

BUY AMERICA
CHRONOLOGY OF LEGISLATION

YEAR	ACT/LEGISLATION	KEY FEATURES
1933	Buy American Act introduced	• applied to purchases by DOT for its own use
1965	UMTA Funding Program introduced	
1978	Surface Transportation Assistance Act introduced with Buy America Clause	• preference for U.S. products
		• Buy America applicable to contracts over $500,000
1982	Surface Transportation Assistance Act introduced	• $500,000 exemption for applicability of Buy America removed. Four new exemption areas and waivers introduced.
		• 50% domestic content
		• final assembly in U.S.
		• 10% price differential waiver for rolling stock; 25% for all other projects.
1987	Surface Transportation and Uniform Relocation Assistance Act adopted	• domestic content increased to 55% Oct 1/89 and to 60% Oct 1/91
		• sub-components defined and content requirements specified
		• rolling stock price differential waiver increased from 10% to 25%.
1991	Intermodal Surface Transportation Efficiency Act	• same provisions as STURAA of 1987
		• "iron" added to list of materials covered
		• minor wording added re false labeling

Source: Canadian Urban Transit Association

Buy America requirements were added to the bill by Sen. Hiram W. Johnson (R-Cal.).[6] Two parts of Sen. Johnson's bill[7] were the heart of the

4. H.R. 13,520, 72d Cong., 2d Sess. (1933) (enacted).

5. TREASURY AND POST OFFICE DEPARTMENTS APPROPRIATION BILL, Fiscal Year 1934, H.R. REP. No. 1787, 72d Cong., 2d Sess. (1932); S. REP. No. 1021, 72d Cong., 2d Sess. (1933).

6. On January 11, 1933, Sen. Johnson moved to suspend the standing rules of the Senate (Rule XVI, relating to the germaneness of amendments to appropriations bills) in order to propose adding Buy America provisions to the appropriations bill. 76 CONG. REC. 1572. Debate on the rules suspension continued on January 30, 1933. 76 CONG. REC. 2868 (1933). Sen. Thomas P. Gore (D-Okla.) opposed the rules suspension, as he did the entire Buy America provision, explaining it in this way to Sen. Johnson:

legislation.[8] The second section of the bill required that only articles, materials, and supplies mined, produced, or manufactured in the United States could be used for public projects. The restriction would not apply for materials used outside the United States, if the materials would not be available in commercial quantities of satisfactory quality, or if the appropriate department head believed the requirement was inconsistent with the public interest or the cost was unreasonable.[9]

Section three of the bill required all contractors for public construction projects in the United States to use only materials from the United States.[10] If a department head found that a contractor failed to comply with this section, then that contractor would be ineligible for any further government contracts for a period of three years.[11]

Debate on the amendment began on January 31, 1933.[12] Sen. James J. Davis (R-Pa.) recited a long list of reasons to support the amendment.[13] According to his argument, the bill would bring employment to Americans, reduce the influx of foreign competition, and prevent further decline in the earnings of American workers.[14] A reduction in earnings would then lead to the destruction of the American standard of living.[15] Permitting competitive products produced by cheap labor in foreign countries would destroy American markets, diminishing American earning and buying power, and keep American workers "in the breadlines."[16] The federal government, Sen. Davis argued, should not allow the dump-

> I may wish to offer amendments providing that no State shall buy anything that is not produced within the State, and that no county shall buy anything that is produced outside the county, and that no farmer shall be allowed to buy anything at all or sell anything that he grows on his farm, and also to offer a motion that the American eagle shall be displaced as the emblem of the Republic and a terrapin be substituted in its stead—a terrapin closed up in its shell and hermetically sealed. If trade is a curse let us stop it.

Id.

7. Sen. Johnson gave a short explanation of the origins of his amendment. 76 CONG. REC. 3175 (1933). Several manufacturers from California and Pennsylvania explained to him that there was an upcoming bid at Boulder Dam. They were concerned foreign bidders might undercut their bids by just a small amount (from one to five percent). If that were to happen, then roughly $6 million would be paid to a foreign country, which the manufacturers thought was outrageous.

8. 76 CONG. REC. 2869 (1933).

9. *Id.*

10. But the same exemptions listed in § 2 would also apply to contractors, *i.e.*, the restriction would not apply for materials used outside the United States, if the materials would not be available in commercial quantities of satisfactory quality, or if the department head found such requirement to be inconsistent with the public interest, or the cost to be unreasonable.

11. *Id.*

12. 76 CONG. REC. 2985 (1933).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

ing of foreign goods in American markets while Americans remain unemployed.[17] Protection from cheap European and Asian labor of was necessary in order to maintain the American standard of living;[18] no American would want to have the standard of living as low as Europeans or Asians.[19] To Sen. Davis, the United States would be adopting those standards if Americans remained on welfare while foreigners were busy at work dumping cheap products on the United States[20] Sen. Davis observed the purchase of foreign products by American government contractors while Americans remained unemployed and expressed the disappointment that not only was there is no legislation to bar these foreign products completely, but also that the federal government was using tax dollars to purchase these foreign goods while American workers were idle.[21]

Although protectionism schemes could generate ill-will from adversely affected Europeans and Asians, Sen. Davis did not consider those consequences as compelling as the interests in keeping the good will of Americans.[22] He claimed Buy America would protect American jobs and American industry, and if Buy America itself was insufficient (because Americans themselves did not buy American products for their own use), then tariffs would have to be to effectively prohibit foreigners from dumping their goods in the United States.[23]

A response to Sen. Davis came soon. The debate over Buy America continued two days later when Sen. William H. King (D-Utah) outlined the reasons for not supporting it.[24] He said the amendment would destroy American trade and commerce relations with other countries.[25] At the time of the debate, the United States had excess agricultural and industrial products.[26] Sen. King said pursuit of a closed market for foreign imports would likely cause other countries to refuse American exports.[27] He noted that trade was reciprocal: if the United States did not buy from other countries, other countries would not buy from the United States.[28]

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* Sen. Davis went on to describe how foreigners price their goods competitively. Foreign governments overproduce at their factories as a matter of public policy. Although there may have been an insufficient market for their goods, those governments preferred to make up the loss on their factories than to pay for the welfare of the unemployed. *Id.*
24. 76 CONG. REC. 3171-72 (1933).
25. 76 CONG. REC. 3172 (1933).
26. *Id.*
27. *Id.*
28. *Id.* In addition, Sen. King said since Buy America was not germane to the appropria-

Other senators gave their reasons for supporting[29] or not supporting[30] Sen. Johnson's amendment. After the Senate voted to allow the amendments,[31] Sen. Johnson formally offered the Buy America appropriations bill amendment.[32] Debate on the bill continued that day[33] and the next.[34] Sen. Johnson's amendment passed on the night of February 3,

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tions bill, a bill which had to be passed during that session of Congress, the rules should not be suspended. *Id.*

29. Sen. Park Trammell (D-Fla.) claimed there was no legislation of greater benefit than this amendment. *Id.* He characterized American bureaucrats as not caring about American interests, purchasing foreign imports for no good reason. *Id.* Sen. David A. Reed (R-Pa.) observed the Department of War had similar requirements for the purchase of domestic goods which worked well in keeping American dollars within the United States. *Id.* at 3172-73.

Two days prior to the February 2, 1933 debate, Great Britain imposed an embargo against products from its colonies with less than 50% domestic content. 76 CONG. REC. 3175 (1933). All public construction orders in Great Britain, between 1920 and 1933, were included this clause. *Id.*

Sen. Hiram Bingham (R-Conn.) said that the only response to this "Buy British" movement was to impose Buy America legislation. *Id.*

30. Sen. Gore noted that in 1932, Japan purchased one-fifth of the United States cotton crop, one-third of the total cotton export, worth $60-70 million. 76 CONG. REC. 3173 (1933). In return, Japan sent electric light bulbs and rubber-soled shoes. *Id.* He said it was short-sighted for the United States to close its doors to foreign trade since Americans would effectively be unable to export cotton. *Id.*

Sen. John J. Blaine (R-Wis.) said the amendment would drive all the midwestern paper mills—half the paper mill industry—out of business because they used imported wood pulp from Canada (it was not economical to transport domestic wood pulp from the Pacific Northwest). 76 CONG. REC. 3174 (1933). He said there would be similar effects on furniture manufacturers. *Id.*

Sen. Edward P. Costigan (D-Colo.) believed the amendment would be nothing more than an increase in tariffs at a time when more liberal trade relations should be established. 76 CONG. REC. 3176 (1933).

Sen. Bingham, however, said the other senators' concerns were misplaced since only a small amount of paper was purchased by the federal government, and so the amendment would not damage the industry. 76 CONG. REC. 3175 (1933). There was also a provision that allowed foreign purchase where materials are not available in sufficient quantity or quality, or where it was impracticable or unreasonable. *Id.* The amendment would not harm the cotton producers, for it only affected government purchases. *Id.*

31. 76 CONG. REC. 3177 (1933).

32. *Id.* at 3178.

33. *Id.* Sen. Gore commented again:

> The enemies of trade have triumphed; the friends of trade have been routed. One of the lingering distinctions between the Democratic and Republican Parties has been this fundamental difference; the Democrats have believed that trade is a blessing, not a curse; the Republicans have believed that trade is a curse and not a blessing. Their doctrine has triumphed on this occasion. Such triumph will but protract this depression, will multiply and aggravate its evils.

76 CONG. REC. 3178 (1933). Sen. Arthur Robinson (R-Ind.) noted that the amendment was the start of a complete embargo against importation of foreign goods. 76 CONG. REC. 3179 (1933). Sen. Costigan added that the amendment failed to provide safeguards against monopolistic pricing. *Id.*

34. The debate on February 3, 1933, focused mostly on the effects of raising trade barriers. 76 CONG. REC. 3249 (1933). Sen. Millard E. Tydings (D-Md.) noted that in 1929, the balance of trade was $1 billion in favor of the United States. *Id.* In 1930, the balance of trade was $800

1933.[35] The House accepted the Johnson amendment.[36] The appropriations bill was enacted on March 3, 1933.

B. The Surface Transportation Assistance Act of 1978

1. *Congress Acts to Place Transit Under Buy America*

The applicability of Buy America regulations to transit procurements was a moot issue in the 1930s because, transit systems were controlled almost exclusively by private companies.[37] Following World War II, the fortunes of the private transit operators changed drastically.[38] The economics of the business were changing and transit was no longer profitable. At the end of World War II, publicly-operated transit systems were carrying 20% of the nation's transit ridership.[39] This number increased to 35% by 1955,[40] and rose to almost 50% by 1960.[41] In 1960, Congress began debating the issue of federal assistance for transit systems.[42] These debates led to the passage of the Urban Mass Transit Act of 1964.[43] This legislation established the Urban Mass Transit Administration (UMTA) to dole out federal assistance for up to 80% of the cost of transit equipment.[44]

By the late 1960s and early 1970s, Congress began to notice the success of foreign transit equipment suppliers in the United States, particularly European and Japanese manufacturers, and how American

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million in favor of the United States. *Id.* Sen. Tydings said there was no need to raise protectionist barriers. *Id.* With foreign trade barriers against the United States, farmers would not be able to sell their excesses in the world market. *Id.* Then, in a domino effect, they would not be able to buy products from American industry. *Id.* at 3249-50.

Finally, Sen. Johnson made his last substantive remarks:

> I say that if an American industry can bring to us goods manufactured in an American factory, and can with American workmen produce those goods for use upon a building being constructed by the United States of America, though its bid may be a dollar or two or five or ten or a hundred dollars higher than the bid for this same sort of thing manufactured abroad by foreign workmen in a foreign factory, I want the bid awarded to the American factory and to the American workmen.

Id. at 3262.

35. 76 Cong. Rec. 3288 (1933).
36. 76 Cong. Rec. 4621 (1933).
37. The most notable exception was the San Francisco Municipal Railway, which began in 1909. David W. Jones, Urban Transit Policy 79 (1985). Seattle followed San Francisco's lead two years later. In 1922, the City of Detroit purchased the privately-operated street railways operating within that city. *Id.*
38. *Id.* at 74.
39. *Id.* at 79.
40. *Id.*
41. *Id.*
42. *Id.* at 81.
43. Urban Mass Transportation Act of 1964 (now known as the Federal Transit Act), Pub. L. No. 88-365, 78 Stat. 302 (codified as amended at 49 U.S.C. § 1601 et al.).
44. Federal Transit Act, §§ 3 & 9, 49 U.S.C. §§ 1602 & 1607a.

companies were having little success in their competitors' markets.[45] The concern of U.S. transit suppliers was high then, and continues to be high today.[46] Congress desired to stop "unfair" foreign competition from coming into the United States, so it implemented the Buy America provision for transit.[47] Like the 1933 act, the 1978 transit version of Buy America would also be established on the belief that American tax dollars should not be spent on goods from countries that neglect certain social goals (*e.g.*, equal opportunity, environmental protection, and worker safety).[48]

Aside from social goals, in considering the Federal-Aid Highway Act of 1978,[49] the Senate Committee on Environment and Public Works noted there had been increasing concern in recent years over the economic impact of foreign imports.[50] Other recent federal acts included requirements for the use of domestically produced goods, including both the Clean Water Act of 1967 and the Public Works Employment Act of 1977.[51] Section 143 of the Federal-Aid Highway bill contained the Buy America provision, and required the use of domestic materials in federal-aid highway projects with a value greater than $1 million.[52]

The House version of the bill was known as the Surface Transportation Assistance Act of 1978, and also included a Buy America provision.[53] The House Committee on Public Works and Transportation considered a requirement similar to the Senate's whereby the Buy America provision would only encompass projects of a minimum value (between $1 million and $5 million).[54] However, the committee found such a limitation would exclude most highway construction projects from the requirement.[55] Therefore, the House bill had no bottom limit on the

45. Cliff Henke, *Bye Bye, Buy America?*, METRO, Sept./Oct. 1994, at A40.

46. *Id.*

47. *Id.*

48. *Id.*

49. Federal-Aid Highway Act of 1978, S. 3073, 95th Cong., 2d Sess. (1978).

50. Federal-Aid Highway Act of 1978, S. REP. No. 833, 95th Cong., 2d Sess. (1978).

51. *Id.*

52. As with the 1933 Buy American provisions, exceptions would be available where the Secretary of Transportation found that the requirement would be inconsistent with the public interest, if the cost of rolling stock was unreasonable, if domestic supplies were not available or were not of satisfactory quality, or if the cost of using domestic materials would increase the cost of the project by more than 10%. As the bill was being considered during the nation's second "energy crisis," it was explicitly stated that the Buy America requirement did not apply to the purchase of petroleum-based products since "domestic supplies are clearly inadequate to meet national demand." *Id.*

53. H.R. 11,733, 95th Cong., 2d Sess. (1978).

54. Surface Transportation Assistance Act of 1978, H.R. REP. No. 1485, 95th Cong., 2d Sess. (1978).

55. *Id.* Only 18% of all highway construction projects were valued at over $1 million (only 2.7% were valued at over $5 million). *Id.*

value of the covered project.

The House bill included the Buy America provision in recognition of the need to protect American manufacturers and suppliers from foreign competition.[56] These foreign imports were often underpriced because of foreign government subsidies, cheap labor, and a strong American dollar, resulting in substantial losses to domestic companies, an increase in the American trade deficit, inflation, American unemployment, and a reduction in productivity.[57]

But America did not completely address foreign underpricing: Rep. Robert W. Edgar (D-Pa.) explained that the then-current Buy America provisions (enacted in 1933) applied only to direct federal procurements, and not to grants-in-aid.[58] Rep. Edgar's amendment would encompass grants-in-aid projects within the Buy America requirement.[59]

He further explained that in recent years UMTA had been pursuing a deliberate policy to entice foreign railcar builders to the United States.[60] This policy was pursued with the expectation of lowering railcar procurement costs through increased competition. However, no consideration was given to the effects on existing domestic railcar builders.[61] Similar UMTA tactics had decreased the likelihood a Philadelphia order will go to a domestic manufacturer.[62] Rep. Edgar said the provision would not preclude foreign bids, but would give work to Americans when the cost is reasonable.[63]

By the time the House and Senate bills arrived at the conference committee, the only difference between the two bills was the Senate pro-

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56. *Id.*

57. *Id.* The entrance and exit of foreign bus manufacturers can be traced to U.S. dollar exchange rates. Letter from Scott A. Mintier, President Transit Bus Division, Nova Bus Corporation (Apr. 6, 1995) (on file with author). Rep. Edgar introduced the Buy America section to the bill during the mark-up session. 124 CONG. REC. 32,311. As written, the requirement would apply only to projects authorized by this particular bill, as well as all ongoing highway and mass transit projects. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* Rep. Edgar gave an example of the UMTA policy. The cities of Baltimore and Miami were in the process of procuring railcars for their new rapid transit systems; the procurement was being conducted jointly for identical cars in order to contain costs. In order to prolong the life of the cars, the two cities specified stainless steal cars. Two potential foreign manufacturers, Hawker-Siddley (Canada) and Société Franco-Belge (France), complained to UMTA that they only produced aluminum cars. Even though all the domestic railcar builders could build stainless steel cars, UMTA ruled in favor of the foreign manufacturers. *Id.* Nevertheless, a domestic manufacturer, Transit America (formerly, The Budd Company), built the cars. JANE'S URBAN TRANSPORT SYSTEMS 31 & 241 (Chris Bushell & Peter Stonham eds., 6th ed. 1987).

62. *Id.* In fact, the order did go to a Japanese manufacturer, Kawasaki. *Id.* at 307.

63. 124 CONG. REC. H. 32,311 1978. Rep. Edgar said the domestic preference given would simply offset the subsidies given by foreign governments to their manufacturers. *Id.*

vision to exempt projects under $1 million from the Buy America requirement.[64] The two houses compromised, and projects with a value of less than $500,000 were exempted from Buy America requirements.[65]

2. *UMTA Administers Buy America for the First Time*

On December 6, 1978, UMTA issued regulations implementing the Surface Transportation Assistance Act of 1978.[66] The regulations implemented by UMTA did not apply to direct federal procurement,[67] but only to UMTA aid recipients.

The regulations adopted by UMTA encompassed all federally-assisted procurements in excess of $500,000; Buy America did not apply to the procurement of services.[68] UMTA required that all federally-funded procurement bid specifications include a Buy America provision.[69] The specification had to include a requirement of the successful bidder to complete a "Buy America Certificate" which certified compliance with the requirement (unless an appropriate waiver is granted).[70] A false Buy America certification was a criminal act.[71]

UMTA defined a "manufactured end product" as domestic if the cost of the domestic components was at least 50% of the total value of all components, and the final assembly of the components took place within the United States.[72] Components were considered entirely domestic or entirely foreign.[73]

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64. H.R. CONF. REP. No. 1797, 95th Cong., 2d Sess. (1978).

65. *Id.* At the time, the cost of a typical bus was $70,000, and the cost of a typical railcar was $600,000. CANADIAN URBAN TRANSIT ASSOCIATION, ASSESSMENT OF THE IMPACT OF BUY AMERICA RESTRICTIONS ON THE CANADIAN TRANSIT SUPPLY SECTOR 7 (1993) [hereinafter *CUTA*].

66. Buy America Requirements, 43 Fed. Reg. 57,144 (1978) (codified at 49 C.F.R. § 660).

67. *Id.* at 49 C.F.R. § 660.11; federal procurements are covered by the 1933 Buy America Act.

68. *Id.* at § 660.11(a).

69. *Id.* at § 660.21(b).

70. *Id.* at § 660.21(b)-(c).

71. *Id.* at § 660.41(a). The successful bidder has the burden of proof if UMTA investigates its compliance with Buy America. If the bidder fails to prove its compliance, it will be required to substitute a sufficient quantity of domestic materials to comply with its original "Buy America Certificate," but without change to any of its original contract terms. The failure to do this is actionable under the terms of the contract and state law. Refusal to comply with certification requirements may result in the bidder being barred from future contracts. *Id.* at §§ 660.42-660.44.

72. *Id.* at § 660.22(2). The transportation cost and applicable duties must be included in calculating component costs. *Id.* at § 660.22(c).

73. *Id.* at § 660.22(b). Foreign components for which a waiver is given will be treated as domestic. *Id.* If the origin of the component is unknown, it will be treated as foreign. *Id.* at § 660.22(b).

UMTA made four types of waivers available:[74]

(1) Public interest;[75]

(2) Unreasonable cost of rolling stock;[76]

(3) Insufficient or unsatisfactory domestic availability of supplies;[77] and

(4) Domestic cost greater than 10% over foreign cost.[78]

Operating assistance grants were automatically waived from Buy America requirements.[79]

C. THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982

1. *The Legislature Updates the 1978 Legislation*

In considering the Surface Transportation Assistance Act of 1982,[80] the House Committee on Public Works and Transportation believed that federal mass transit funds should not be spent in countries where the United States has a trade deficit, and proposed that no projects be funded where a significant portion (*i.e.*, greater than 15%) of the bus or other rolling stock was a product of a country where the United States had such a trade deficit.[81] However, in conference, this provision for exclusion of products from trade-deficit countries was deleted.[82]

In its place, the Surface Transportation Assistance Act of 1982 made several changes in the Buy America provisions for mass transit.[83] The provisions eliminated the $500,000 threshold for the application of the Buy America requirements,[84] but added a requirement that all steel, cement,[85] and manufactured products used in UMTA-funded projects be produced in the United States.[86]

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74. *Id.* at § 660.32.

75. For a public interest waiver, UMTA considers all appropriate factors, including cost, "red tape," and delay. *Id.* at § 660.32(a)(1) & (b).

76. For an unreasonable cost waiver, tax revenues likely to be paid by the domestic manufacturer back to the United States are used to make an appropriate price adjustment. *Id.* at § 660.32(a)(2).

77. For an insufficient or unavailable waiver, it is presumed to be the case if no responsive and responsible bidder replies. *Id.* at § 660.32(d).

78. For a 10% cost waiver, the bid of the lowest responsive and responsible foreign bidder is multiplied by 1.1 and compared to the lowest responsive and responsible domestic bidder. *Id.* at § 660.32(e).

79. *Id.* at § 660.33 (App. A(a)).

80. Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (codified as amended in scattered sections of 23 U.S.C.).

81. H.R. REP. NO. 555, 97th Cong., 2d Sess. 44-45 (1982).

82. *See* H.R. CONF. REP. No. 987, 97th Cong., 2d Sess. (1982).

83. *See* Surface Transportation Assistance Act of 1982, § 165.

84. *Id.*

85. Later, cement was removed.

86. *Id.*

The exceptions to the requirements were also revised.[87] The exception for the consideration of unreasonable cost, after taking into account tax revenues to be returned to the government by domestic manufacturers, was eliminated.[88] The exception allowed when domestic material increased the cost of the project by more than 10% was retained for rolling stock, but increased to a 25% differential for all other projects.[89] The Act codified UMTA's definition[90] of domestic rolling stock: American-made components must represent at least 50% of the total cost of the rolling stock, with final assembly in the United States.[91] Lastly, the act allowed states to adopt more stringent Buy America requirements, although "buy state" or "buy local" requirements could not be imposed.[92]

2. *UMTA Revises Its Buy America Regulations*

UMTA issued revised Buy America regulations consistent with the

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87. *See Id.*
88. *Id.*
89. *Id.*
90. 43 Fed. Reg. 57,144 (1978)(codified at 49 C.F.R. § 660).
91. Surface Transportation Assistance Act of 1982 § 165(b). The act codified the definition through the use of an exception:

> The provisions of . . . this section shall not apply where the Secretary finds . . . that (A) the cost of components which are produced in the United States is more than 50 per centum of the cost of all components of the vehicle or equipment described in this paragraph, and (B) final assembly of the vehicle or equipment described in this paragraph has taken place in the United States. . . .

Id.

92. *Id.* Any such act must be through the legislated law, and not merely administrative. *Id.* In spite of the statute, many American locales impose "buy state" or "buy local" requirements. Letter from Al Cormier, Executive Vice President, Canadian Urban Transit Association, to all Provincial Premiers (June 14, 1994) (on file with author).

The Canadian Urban Transit Association compiled a list of states with "buy state" or "buy local" requirements.

Arizona	5% preference for in-state suppliers.
Indiana	Buy Indiana policy, though not supported by state law, has been in effect for many years; state agencies are required to justify any award to an out-of-state firm.
Kansas	Tie bias preference to in-state firms.
Louisiana	Preference to steel rolled in-state.
Massachusetts	All other factors equal, preference for Massachusetts products, then American products; also to goods from American labor-depressed areas. For commodities, Massachusetts preference if all other factors are equal; otherwise low bidder wins.
Michigan	Some legislation favoring Michigan companies has recently been considered, but not supported sufficiently to pass.
New Mexico	5% preference for New Mexico-based firms. Requires use of timber grown in state is the species required is available.
Oklahoma	5% preference for Oklahoma supplies.
Utah	Reciprocal bias—*e.g.*, a firm based in a state that favors its own companies by 5% will be at a 5% disadvantage when bidding on a Utah state contract.
Virginia	Preference on tie bids; reciprocal bias as in Utah.

CUTA, supra note 65, at 11.

Surface Transportation Assistance Act of 1982.[93]

During the next few years, UMTA had several opportunities to apply the waivers allowed in the legislation. In one instance, UMTA allowed Canadian passenger vans to be purchased under a public interest waiver since there was only one American manufacturer of these types of vans.[94] The issuance of such a waiver, however, was discretionary, not compulsory.[95]

D. The Surface Transportation and Relocation Assistance Act of 1987

The House version of the 1982 transportation authorization bill[96] was co-authored by Rep. Bud Shuster (R-Pa.),[97] who desired that the American content requirement of mass transit projects be increased from 50% to 85%.[98] However, he did recognize that a number of foreign manufacturers had come to the United States, and were manufacturing mass transit equipment using both American and foreign components.[99] He noted that an increase to 85% would be unfair to these foreign companies which came and invested money in the United States.[100] Some Congress-

93. Buy America Requirements, 48 Fed. Reg. 41,562 (1983) (codified at 49 C.F.R. § 661).

94. Some grant recipients were reporting difficulties in the purchase of 15-passenger vans. Exemption From Buy America Requirements, 49 Fed. Reg. 4062 (1984). These vans were often used in programs designed for elderly and handicapped persons, as well as in rural transit programs. Only two companies manufactured these vans: Ford Motor Company and Chrysler Corporation. The vehicles manufactured by Chrysler did not qualify under Buy America since their final assembly was in Canada. However, 74% of the components of the vans, by cost, were produced in the United States.

Several states and Chrysler petitioned UMTA for a public interest waiver. Without a waiver, only Ford could have supplied these vans, and there would be no competition.

Effective February 27, 1984, UMTA granted a public interest waiver to Chrysler with regard to final assembly. 49 Fed. Reg. 13,944 (1984).

95. *See* General Motors of Canada Ltd., 1983 U.S. Comp. Gen. LEXIS 399 (1983).

96. H.R. 2, 100th Cong., 1st Sess. (1987).

97. *See* 2 Cong. Index 28,339 H. 3702 (CCH 1981-1982).

98. In 1985, the Transport Workers Union of America noted that the American transit bus market had declined from 91% in 1978 to 60% in 1985, resulting in the loss of many American jobs to foreign producers. *Transport Workers Union Protests Purchase of Foreign-Made Vehicles With Federal Funds*, PR Newswire, Oct. 4, 1985. The union claimed the 50% American content requirement was "woefully inadequate," and called upon Congress to raise the domestic content requirement to 85%. *Id.*

99. *See* 133 Cong. Rec. 1705 (1987).

100. *See Id.* Rep. Bruce Morrison (D-Conn.) expanded on Rep. Shuster's concerns. He cited Saab-Scania as a company that had established a plant in his state with the understanding that only a 50% domestic content requirement needed to be met. *Id.* at 1710. The amount of capital investment required to meet an 85% content could not be justified by the American transit market size. This would have forced Saab out of the American market. *Id.* at 1710-11. Other companies, including Bus Industries of America, Bombardier Corp., Knorr Brake Corp., and M.A.N. Truck & Bus Corp. would have been similarly affected. *Id.* Rep. Willie Hefner (D-

men, however, repeated arguments used previously in support of Buy America provisions advocating the stronger provision requiring 85% American content.[101]

The Senate, in its version of the bill, reestablished a $500,000 threshold for Buy America requirements.[102] This threshold, it was held, would help to reduce the administrative burdens imposed on small projects, and lower their costs.[103]

By the time the bills reached the conference committee, the house bill had both a proposal to increase domestic content from 50% to 85%, and to increase the project cost differential for rolling stock from 10% to 25%, thereby matching the differential used for all other purchases.[104] The conference committee compromised on the domestic content, proposing that the 50% content be raised to 55% in two years, *i.e.*, as of October 1, 1989, and from 55% to 60% two more years later on October 1, 1991.[105] The committee also accepted the house provision for a uniform 25% price differential.[106] Finally, the committee added a small provision that "subcomponents" were included with "components."[107] The bill was enacted, amending section 165 of the Surface Transportation Assistance Act of 1982, essentially unchanged from the conference committee's proposal.[108]

N.C.) explained that such an increase would close the doors on M.A.N., a bus manufacturer in his state, and put 600 people out of work. *Id.*

The 85% American content requirement would have also been a heavy burden on Canadian transit suppliers. Canadian manufacturers building transit vehicles for Canadian markets typically included 55% Canadian content. *CUTA*, *supra* note 65, at 35. Approximately 40% of the content was American, consisting of major components, *e.g.*, drive-train/motors, axles/trucks, air conditioning, etc. When building buses for American markets, at least 60% American content had to be included (typically, there was 65% American content). If the Buy America content requirement were to be raised from 60% to 65% or 70%, there would have been serious doubts as to whether any production could possibly have remained in Canada, and this could have resulted in the exit of all transit manufacturers from Canada. *Id.*

101. Rep. Helen Bentley (R-Md.) stated that stronger Buy America provisions were necessary in order to keep taxpayer money in the United States. The Buy America provision would help to achieve a stronger American industrial base. *Id.*

102. *See* 133 Cong. Rec. 2035 (1987).

103. *Id.* Sen. Arlen Spector (R-Pa.) opposed this threshold because it would subvert what he saw to be a successful Buy America policy. *Id.* However, the senator concentrated on the effects of the highway industry, not mass transit. *Id.*

104. *See* H.R. Conf. Rep. No. 27, 100th Cong., 1st Sess. (1987).

105. *Id.*

106. *Id.*

107. *Id.* This would mean that an American subcomponent shipped out of the country to be used as part of a foreign component will be considered "domestic." *See Id.*

108. *See* Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17, tit. III, § 337, 101 Stat. 132, 241 (tit. III, also known as the Federal Mass Transportation Act of 1987).

E. The Intermodal Surface Transportation Efficiency Act of 1991

1. Legislative Action.

In 1991, the Congress again amended section 165 of the Surface Transportation Assistance Act of 1982.[109] The amendments made were slight.[110] In addition, the Urban Mass Transportation Administration's name was changed to the Federal Transit Administration (FTA). Subsequently, Congress finally codified the Buy America requirements.[111]

2. FTA Action.

In recognition of the excessive burden imposed by Buy America for "micro-purchases," FTA used its authority to exempt FTA-funded purchases of less than $2,500, as of March 15, 1995.[112] As of July 24, 1995 this waiver was then expanded to purchases of up to $100,000.[113] The Executive Vice President of the American Public Transit Association, Jack R. Gilstrap, said that these waivers were established to reflect Congress' intent to apply Buy America only to large purchases, such as buses and trains.[114]

F. The North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) negotiations were based largely on the U.S.-Canada Free Trade Agreement (CFTA).[115] Although the CFTA expanded on the General Agreement on Tariffs and Trade (GATT) provisions regarding government procurements exceeding $25,000, it did not eliminate Buy America.[116] Federally-

109. *See* Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240, tit.I, § 1048, 105 Stat. 1914, 1999-2000.

110. Iron was added to the list of products covered by the requirement. *See Id.* A penalty was established for persons who falsely placed "Made in America" labels on goods that were not made in America; such person would become ineligible to receive any future contracts under the act. *See Id.*

111. *See* Pub. L. No. 103-272, 108 Stat 745 (codified at 49 U.S.C. § 5323(j)).

112. *See* Buy America Requirements, 60 Fed. Reg. 14,174 (to be codified at 49 C.F.R. § 661).

113. *See* Buy America Requirements, 60 Fed. Reg. 37,930 (to be codified at 49 C.F.R. § 661).

114. *Buy America Rules Waived For Purchases Under $100,000*, Passenger Transport, July 31, 1995, at 1.

115. Judith H. Bello and Alan F. Holmer, *The NAFTA: Its Overarching Implications*, 27 Int'l Law. 589-93 (1993).

116. Anita C. Jenke, *U.S., Canada Firms Weather Free Trade*, Metalworking News, May 21, 1990, at 1. As UMTA explained:

> Finally, it should be noted that the U.S.-Canada Free Trade Agreement does not exempt Canadian-made products from the UMTA Buy America requirements. Products manufactured in Canada are considered foreign goods, and are entitled to no special treatment under the UMTA Buy America provisions.

Buy America Requirements, 56 Fed. Reg. 926 (1991).

funded projects of provincial, state, or local governments remained unaffected.[117]

NAFTA was enacted into law in 1993, and became effective on January 1, 1994.[118] Several economic objectives were achieved with NAFTA. The agreement was to expand sales opportunities between American, Canadian, and Mexican companies exporting to each other.[119] Another goal of the agreement was to enhance North American international competitiveness by permitting companies to set up operations where it would be most profitable economically, without the distortions caused by trade or investment barriers,[120] and to send a strong and encouraging signal throughout the hemisphere regarding the U.S. commitment to freer trade and open markets.[121] Finally, NAFTA was to eliminate tariffs and quotas within North America.[122]

But, even with these goals of opening the North American market to free trade, the Buy America barriers to the free trade of transit equipment still exist.[123]

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117. *CUTA*, *supra* note 65, at 13.

118. North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (1993).

119. Bello, *supra* note 115, at 589. Transit construction projects in Mexico have flourished with the passage of NAFTA. A consortium composed of Bombardier (a Canadian railcar builder) and three Mexican firms has won an 18-year franchise to build and operate a US $ 685 million, 27-kilometer light rail line in Mexico City, expected to be completed in 1997. Julian Wolinsky and N.A. Eames, 57 LIGHT RAIL AND MODERN TRAMWAY 106 (1994). Bombardier has won a contract from the *Sistema de Transportes Colectivos del Distrito Federal* worth $ 64 million (Canadian) to refurbish 234 Mexico City subway cars. Julian Wolinsky, 56 LIGHT RAIL AND MODERN TRAMWAY 301 (1993). Thirty-two articulated cars from Bombardier will be operated on new line 2 of the Guadalajara light rail system—*Sistema de Tren Electrico Urbano*. Steve J. Morgan, 57 LIGHT RAIL AND MODERN TRAMWAY 79 (1994). The 25 original articulated cars in the Monterrey system from Concarril are being supplemented with an additional 23 units from Bombardier. *North America's Expanding Urban Rail Systems*, RAILWAY AGE, Feb. 1994, at G22. There are also many opportunities for the construction of new rail lines in Mexico. Construction of line 3 of the Guadalajara light rail system will begin in March 1995. Steve J. Morgan, 56 LIGHT RAIL AND MODERN TRAMWAY 301 (1993). Tunneling has started on line 2 of the Monterrey light rail system—*Sistema de Transporte Colectivo Metrorrey*; revenue service is expected to start near the beginning of 1995. Steve J. Morgan, 57 LIGHT RAIL AND MODERN TRAMWAY 79 (1994). Mexico City has the largest subway system in North America based on ridership—1.6 billion annually. The current system has 9 lines with 109 route-miles. The system is being expanded to include 21 lines with 196 route-miles. *North America's Expanding Urban Rail Systems*, *supra*.

120. Bello, *supra* note 115.

121. *Id.*

122. *Id.*

123. Brian Cudahy, an FTA spokesman, said, "Our rules do not agree with general tariff rules, they are not the same as the North American auto compact or NAFTA. We require U.S. parts and assembly here if tax dollars are used to purchase the buses or railcars." Michael Levy, *Canada-Made Buses Marked "Made in USA"*, BUFFALO NEWS, Jan. 26, 1994.

III. Buy America's Inconsistency with NAFTA

Government procurement is covered within NAFTA at chapter 10.[124] The basic requirements of government procurement are specified in article 1003 ("National Treatment and Non-Discrimination"). The article requires that:

> 1. With respect to measures covered by this Chapter, each Party shall accord to goods of another Party, to the suppliers of such goods and to service suppliers of another Party, treatment no less favorable than the most favorable treatment that the Party accords to:
>   (a) its own goods and suppliers; and
>   (b) goods and suppliers of another Party.
>
> 2. With respect to measures covered by this Chapter, no Party may:
>   (a) treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership; or
>   (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for the particular procurement are goods or services of another Party.[125]

Article 1003, therefore, says that the general principle of chapter 10 of NAFTA is to establish a level playing field for government procurement throughout North America. That is, any goods which are produced within Canada or Mexico ought to be treated equally with American goods when being considered as part of a governmental procurement.

But, NAFTA has further provisions regarding governmental procurements. Article 1001 ("Scope and Coverage") relates important limitations of the scope of the agreement.[126] The agreement only covers specified federal government entities and specified government enterprises.[127] It says state and provincial government procurements are covered in accordance with Article 1024.[128]

Turning to Article 1024 ("Further Negotiations"), NAFTA says that no later than December 21, 1998, the parties are to commence further negotiations.[129] Prior to these negotiations, "the Parties shall endeavor to consult with their state and provincial governments with a view to obtaining commitments, on a voluntary and reciprocal basis, to include within this Chapter procurement by state and provincial government enti-

124. North American Free Trade Agreement, Dec. 19, 1992, U.S.-Can.-Mex., 107 Stat. 2057.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*

ties and enterprises."[130]

The exclusion of state and local government procurement in NAFTA is consistent with international trade rules.[131] In most cases, the article is fair because state and local procurements are made by local communities, based on local values and local funding. The United States government does not control most state and local funding, and cannot enter into a trade agreement with other nations that would restrict state and local governments in their means of procurement.

Since FTA-funded transit procurements are made by state and local governments, Buy America rules have continued to be applied.[132] However, the procurement of transit equipment by state and local governments is unlike the other state and local procurements for which Article 1024 was written. In the United States, the FTA assists transit systems with capital funding of 80% under the discretionary and formula capital programs.[133] Only 20% of the cost is paid for by the state or local government.

The classification of transit equipment purchases as state and local government procurements is nothing more than a legal fiction and a sham; transit equipment purchases are constructively federal procurements. Since 1964 the federal government had been paying nearly the full cost of transit equipment.[134] It was because of the federal government's near full funding of transit equipment Congress felt the need to expand Buy America to transit procurement in 1978.

If transit procurement is indeed a state and local function, then the 1978 Buy America provisions are inappropriate. Both the 1933 Buy America debate and the 1978 Buy America debate focused on the need of the United States government to purchase its goods within the United States. If transit is really a state or local purchase, then it ought to be up to the state or local government to impose its values on its procedures as to whether to impose Buy America (or "buy state" or "buy local") requirements or not.

But, as is more likely, if transit procurement is considered a federal purchase, then Buy America cannot coexist with NAFTA. Federal

130. *Id.* If, however, negotiations pursuant to Article IX:6(b) of the GATT on Government Procurement are completed prior to this date, then the parties shall immediately begin their consultations with their state and provincial governments. *Id.*

131. Under international-trade rules, when government grant money is doled out to various commissions or public authorities, conditions such as Buy America may be attached. Peter Hadekel, *North American Trade Deal Opens Up New Markets for Canadian Firms*, THE GAZETTE (Montréal), Apr. 9, 1994, at C1.

132. *CUTA*, *supra* note 65, at 14. The Canadian Urban Transit Association notes that this is particularly unfair since there are no comparable "Buy Canada" rules in place. *Id.*

133. There is no federal funding of transit in Canada. *Id.* at 4.

134. *See supra* notes 43-44 and accompanying text.

procurements are clearly covered under Article 1001 of NAFTA.[135] Therefore, Article 1003 applies: the United States may not treat Mexican and Canadian transit suppliers any less favorably than American transit suppliers.

The United States has taken a position which is inconsistent with Buy America and NAFTA. It has said transit procurement is a federal, not a state or local, function, so Buy America may be applied;[136] and transit procurement is a state or local, not federal, function, so NAFTA does not apply.[137]

Not only is the FTA position inconsistent, but it is unfair, economically damaging to the other NAFTA signatories, particularly Canada, and contrary to the spirit of NAFTA. It may prevent a transit agency from being able to purchase the best product available.[138] With no Buy Canadian requirements, American manufacturers have expanded to the Canadian market.[139] This trend will continue under NAFTA.[140] Prior to NAFTA's passage, FTA Administrator Gordon Linton said, "We can stay the way we are and go the way of the dinosaur, or we can really participate in the global market."[141] Linton said President Clinton was in favor of NAFTA because it would allow U.S. manufacturers to expand to Canada and Mexico.[142] He added this could increase the American market by 30 to 35 percent which would more than make up for a shrinking American market.[143] Yet, Linton says the Buy America mandate will not change under NAFTA.[144] Thus, contrary to the spirit of NAFTA, Linton has taken an aggressive and predatory stance by advising American manufacturers to go expand and exploit the Canadian and Mexican markets, and to refuse manufacturers in those countries to sell to the United States.

The Canadian Minister of International Trade, Roy MacLaren, has taken the position that FTA's Buy America provisions are contrary to the intent of NAFTA, and the United States is not acting in the expected spirit of cooperation. In a letter to the Canadian Urban Transit Association, MacLaren wrote,

135. North American Free Trade Agreement, *supra* note 124.

136. *See supra* part II.

137. *See supra* part III.

138. *Buy America Laws Create Problems for U.S. and Canadian Transit*, URBAN TRANSPORT NEWS, June 21, 1995.

139. *Id.* at 47.

140. *Id.*

141. Joe Dougherty, *NAFTA Holds Promise for Mass Transit, Says Linton*, PASSENGER TRANSPORT, Nov. 8, 1993, at 1.

142. *Id.*

143. *Id.*

144. *Id.*

> In my letter . . . of February 18, 1994, I noted that these [Buy America] restrictions are contrary to the principles of free trade between Canada and the United States . . . . [T]he United States was not willing, despite the efforts of other countries, to include government funded programs within the disciplines of either the North American Free Trade Agreement (NAFTA) or the General Agreement on Tariffs and Trade (GATT).[145]

IV. Buy Local Legislation Fails—A Quebec Case Study

The Framers of the British North American Act in the 1860s granted the federal government exclusive jurisdiction over trade and commerce.[146] According to section 121, goods from one province shall be admitted "free" into any other.[147] Canadian courts have narrowly interpreted the jurisdiction of the federal government.[148] As a result, provinces have been able to easily erect barriers, such as preferential procurement policies.[149] This is not the case in the United States where the Supreme Court has a long tradition of striking down local laws and regulations which inhibit interstate commerce.[150]

In Quebec, provincial funding supplies 60% for Quebec-built buses, but only 35% for others.[151] The provincial subsidy applies to buses with at least 20% Quebec content.[152] This 25% differential in funding is a *de facto* "Buy Quebec" requirement for the Quebec market.[153] The only preference given by Quebec is for Quebec-built buses—buses from other provinces are given no preference over buses from other countries.[154]

But protectionism through de facto "Buy Quebec" requirements has not worked. Quebec transit companies are very unhappy with price and quality of Quebec-only. There is only one bus manufacturer and one railcar manufacturer in the province.[155]

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145. Letter from Roy MacLaren, Minister of International Trade (Canada) to Al Cormier, Executive Vice President, Canadian Urban Transit Association (May 11, 1994) (on file with author).

146. John Lorinc, *Brawl in the Family*, Canadian Business, Mar. 1993, at 74.

147. *Id.* However, the section does not mention services or nontariff barriers. *Id.*

148. *Id.*

149. *Id.*

150. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

151. Peter Hadekel, *Guess Who Is Most Protectionist In Bus Sector: Quebec or Ontario?*, The Gazette (Montréal), Oct. 1, 1993, at D1.

152. *Ontario-Quebec Government Talks*, Canada NewsWire, Sept. 1, 1993, *available in* LEXIS, CANADA Library, CNW File.

153. Ontario Bus Industries is the largest bus manufacturer in North America, with sales of $200 million. But, the company was shut out of the Quebec market. The Quebec transit operators bought their buses from Les Autobus MCI. Lorinc, *supra* note 146.

154. When Quebec bought articulated buses a few years ago, it went to a Belgian firm because no Quebec firm built them (even though Manitoba-based New Flyer did build them). *Id.*

155. The failure to address customer dissatisfaction with transit buses has not been limited to Quebec. Letter from Scott A. Mintier, *supra* note 57. This is evidenced by the number of fail-

Quebec had lured the Diesel Division, General Motors of Canada, Ltd. from London, Ontario to St-Eustache, Quebec, in 1977, using a promise of preferential subsidy to Quebec municipalities purchasing Quebec-built buses.[156] The plant was purchased in 1987 by Les Autobus MCI.[157] Unable to make sufficient profits, the Autobus MCI plant was closed at the end of 1992.[158]

However pro-Quebec the province might have been for the purchase of home-built buses, the feelings were not shared by the transit operators themselves in Quebec.[159] Transit officials in Montréal and other major cities in Quebec had spent millions of dollars fixing poorly built buses from Autobus MCI.[160] Critics, including Claude Larose, president of the Quebec Urban Transit Association, and Guy Chartrand, president of Transport 2000, claim the buses are based on outdated technology and designs, and Autobus MCI had failed to invest in research and development.[161] The Société de transport de la Communauté urbaine de Montréal (STCUM) was unhappy with its buses from Autobus MCI, and wanted competitive bidding.[162] The Quebec Association of Transit Commissions, a province-wide buying group, had the same feelings.[163]

After the Autobus MCI plant was closed, Ontario Bus Industries began negotiations with the STCUM for the sale of buses.[164] Ontario Bus Industries had expected to bid on 390 new buses.[165] But then, Autobus MCI was bought out. The Fonds de solidarité des travailleurs du Quebec (the Quebec Federation of Labor venture-capital fund) supplied $12.5 million cash to buy the Autobus MCI plant in partnership with Nova Quintech, a firetruck manufacturer.[166] The Société de Développement Industriel (the province's industrial-development agency) supplied $2.9

ures and changes in ownership of manufacturers throughout North America. *Id.* Nevertheless, the difficulties in Quebec have been exacerbated by the limited option available to transit agencies in the Province, a limitation which would not exist but for the de facto closed market.

156. Hadekel, *supra* note 151.

157. Les Autobus MCI is a subsidiary of Greyhound Lines of Canada (not affiliated with Greyhound Lines in the United States), which in turn is controlled by the Dial Corp.

158. Hadekel, *supra* note 151.

159. Ronald Lebel, *Corrosion Plagues Buses*, THE GAZETTE (Montréal), Nov. 10, 1992, at C1.

160. *Id.*

161. *Id.*

162. Hadekel, *supra* note 151.

163. *Id.* Many customers from outside Quebec, however, have been satisfied with the same buses. Letter from Scott A. Mintier, *supra* note 57; Letter from Raymond Déry c.a., Commerce Officer, Gouvernement du Quebec Ministère de l'Industrie, du Commerce et de la Technologie (Mar. 21, 1995) (on file with author).

164. *Id.*

165. *Id.*

166. *Id.*

million in low-cost financing, and $5 million in loan guarantees.[167] The company became known as Nova Bus.[168]

Ontario Bus Industries had negotiated for the order of 390 buses in Quebec.[169] Its price was $35,000 lower per bus than Nova Bus. Nova Bus later reduced this difference to $10,000 per bus, but still, with the difference in provincial funding, Nova Bus, with the highest price, won the contract.[170] Until 1998, the Quebec government will be protecting Nova Bus by directing its municipalities to buy only from Nova Bus.[171]

Nova Bus now has 100% of the Quebec transit bus market, and 21% of the Ontario market.[172] Ontario Bus Industries has 40% of the North American market, but no share of the Quebec market.[173]

The protectionist provincial funding legislation in Quebec caused other provinces to reexamine their funding policies. Ontario Bus Industries tried to persuade Ontario to retaliate.[174] Norman Larocque, vice president of operations at New Flyer, said, "It was very unfair because a company in Quebec that got preferential treatment was not disallowed from bidding in other provinces."[175] He believes Autobus MCI subsidized bids outside of Quebec with the premium Quebec transit systems must pay to buy Autobus MCI buses.[176]

Talks between Ontario and Quebec over Quebec trade barriers initially failed.[177] Ontario Premier Bob Rae said,

> So far, however, Quebec does not appear to feel much incentive to let go of its unfair practices. Perhaps an element of reciprocal treatment, in which Ontario simply mirrors back to Quebec some of the policies which Quebec has been using against Ontario . . . will prompt Quebec to undertake more productive negotiations. I will now take this matter up with my colleagues in Cabinet, and we will decide exactly what actions to take.[178]

On September 27, 1993, Ontario announced that it would discourage municipalities in Ontario from buying buses made in Quebec.[179] Such moves would likely widen the gaps further between Quebec and the rest

167. *Id.*
168. *Bus Maker Wins Order*, THE GAZETTE (Montréal), July 7, 1993 at D1.
169. Hadekel, *supra* note 151.
170. *Id.*
171. *Ontario-Quebec Government Talks*, *supra* note 152.
172. *Ontario Says Talks on Quebec Trade Barriers Fail*, Reuter Textline, Sept. 1, 1993, *available* in LEXIS, WORLD Library, TXTLNE File.
173. *Id.*
174. Lorinc, *supra* note 146.
175. *Id.*
176. *Id.*
177. *Ontario-Quebec Government Talks*, *supra* note 152.
178. *Id.*
179. *Ontario Should Have Held Its Fire*, THE GAZETTE (Montréal), Sept. 29, 1993, at B2.

of Canada.[180] Meanwhile, Quebec complained that Ontario set up a barrier of its own by requiring low floor buses for easy accessibility.[181] The Nova Bus plant did not manufacture these types of buses.[182]

However, the environment in Quebec is changing. In December, 1993, Quebec and Ontario agreed to open their respective bus markets.[183] Nova Bus has unveiled a new low floor bus, invested millions of dollars into research and development, made significant improvements to the design of its "Classic" bus model, and otherwise undertaken substantial efforts to produce competitive, quality products.[184]

Thus, de facto Buy Quebec legislation caused resentment among the other manufacturers in Canada, while Quebec transit operators suffered with buses perceived to be of poor quality and high cost. Quebec, however, is now making strides to open its markets, while its manufacturing industry works to provide improved products. Maintenance of Buy America in the United States may cause the same types of disputes between American and Canadian manufacturers as had existed between Quebec and Ontario, thereby totally unraveling the spirit and intent of the NAFTA.

V. Times Have Changed

A. Conditions Favoring Protectionism No Longer Exist

The conditions considered in the passage of the original 1933 Buy America Act, or the Surface Transportation Assistance Act of 1978, no longer apply to transit procurements within North America in the 1990s.

The 1933 act was debated during the great depression, a time when public attention was focused sharply on the need to provide jobs to Americans. When the 1978 act was passed, the country was suffering from the worst economic climate since the depression.[185] Although there continues to be a call for generating American jobs, the need for jobs today is in no way comparable to the conditions of the depression era.

Much was made during the passage of Buy America of the "cheap" imports from Europe and Asia. Today's American bus market is practically limited to manufacturers from the United States, Canada, and Mexico.[186] Buses from Canada are virtually indistinguishable from American

180. *Id.*

181. Hadekel, *supra* note 151.

182. *Id.* However, neither did Ontario Bus Industries manufacture these types of buses—it was just gearing up for production. *Id.*

183. Letter from Raymond Déry c.a., *supra* note 163. As of January 1, 1998, both provinces will treat all Canadian-built buses equally. *Id.*

184. Letter from Scott A. Mintier, *supra* note 57.

185. Henke, *supra* note 45.

186. There is, however, strong international competition in railcar construction from western

buses, with Canada having a nearly identical standard of living to the United States. The largest and most respected Mexican manufacturer of buses uses American-made parts.[187] Hence, contemporary concerns over cheap imports from Canadian and Mexican manufacturers are unfounded.

B. Transit Manufacturing Is a Small Industry (and Getting Smaller)

The transit equipment market is not that large. In the United States, expected transit bus orders in the immediate future will likely average 3,340 buses per year, while 500 buses per year are expected to be ordered in Canada.[188] Meanwhile, there are five U.S. and Canadian manufacturers to serve this market.[189] For railcars, there are likely to be 469 to 594 cars purchased per year in the United States, while in Canada, there is an expected market of 87 cars per year.[190]

In years past, the United States had several reputable bus manufacturers, most notably General Motors and Grumman Flxible. Railcar builders included the Budd Company, Pullman-Standard, and St. Louis

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European and Japanese manufacturers. Within North America, though, there are only two domestically-owned railcar manufacturers—one American, and one Canadian (there had also been a single Mexican manufacturer, but this company was recently absorbed by the Canadian company). Nevertheless, these manufacturers can hardly be accused of supplying cars from "cheap" labor.

187. *Dina: Top Performance South of the Border*, Bus Ride, Jan. 1994, at 46. The Mexican intercity bus market is 44% Dina, 25% Mercedes, and 24% Mexicana de Autobuses; the remaining 7% is smaller body builders. *Id.*

188. *CUTA*, *supra* note 65, at 22.

189. The major bus manufacturers which remain in North America are as follows.

Mexico:	Diesel Nacional ("Dina"—intercity buses only)
Canada:	New Flyer Industries
	Nova Bus
	Motor Coach Industries (intercity buses only)
	Prevost Car (intercity buses only)
U.S.:	Flxible
	Gillig
	Neoplan USA
	Ikarus USA
	Stewart & Stevenson

Three other manufacturers, all European-based, have left the American market within the past ten years (M.A.N. Truck and Bus Corp., Volvo of America Corp., and Saab-Scania). Additionally, neither Ikarus USA nor Stewart & Stevenson have been particularly successful, and may close up shop. *Id.* at 17.

190. The major railcar builders are as follows:

Mexico:	None
Canada:	Bombardier
U.S.:	Morrison Knudson

Ten other foreign car builders are also in the United States. European builders include AEG Westinghouse, Ansaldo, Asea Brown Boveri, Breda, Matra, and Siemens-Duewag; Japanese builders include Kawasaki, Mitsubishi, Nippon Sharyo, and Sumitomo. *Id.* at 17.

Car Company. But by 1977 all the American railcar builders had gone out of business, and it was not until 1982 that there was again an American-owned railcar builder.[191]

Today, American transit manufacturers are in poor shape, and consolidation is the rule. General Motors is out of the bus business. Its successor, Motor Coach Industries, has sold its intercity bus manufacturing business to Mexican interests.[192] Grumman has spun off Flxible, and Flxible has since been trying overcome the poor reputation it acquired under Grumman's ownership.[193] Neither Budd nor Pullman-Standard remain, having been consolidated (along with Mexico's Concarril) in Canada's Bombardier. The only American railcar builder is a relative newcomer, Morrison Knudson.

The transit market is small, and cannot support many manufacturers. In December 1991, Bombardier, a Canadian railcar manufacturer, purchased the other remaining Canadian railcar builder, UTDC.[194] The following year, Bombardier agreed to pay $81 million for Concarril, the state-owned railcar builder in Mexico.[195] Bombardier is the only other North America-owned railcar builder to compete with Morrison Knudson.

Motor Coach Industries, successor to General Motors and once the dominant bus builder in the country, announced it was quitting the transit business, and selling its transit bus manufacturing subsidiary, Transportation Manufacturing Corp. (TMC).[196] According to John R. Nasi, president and CEO of TMC, "It's not a healthy market," adding that significant operating loses were the reason for the sale.[197] He cited low profits, proliferation of specifications by cities, and growing federal mandates such as the Clean Air Act Amendments of 1990.[198]

TMC's transit bus business is being purchased by Nova Bus.[199] At

191. *Id.* at 9. Onerous contracts and subsequent losses put some railcar manufacturers out of business. Letter from Scott A. Mintier, *supra* note 57.

192. *Motor Coach to Mexicans*, N.Y. TIMES, Aug. 9, 1994.

193. At least fifteen American transit systems had removed Grumman Flxible model 870 buses from service. *News & Notes*, MOTOR COACH AGE, Feb. 1985, at 20. The most notable withdrawal was the entire Grumman Flxible fleet from the New York City Transit Authority in 1984. *Id.*

194. Ronald Lebel, *Bombardier to Acquire Mexican Railcar Maker*, THE GAZETTE (Montréal), Apr. 10, 1992, at D1.

195. *Id.*

196. *Motor Coach Industries to Quit Transit Business*, PASSENGER TRANSPORT, Nov. 15, 1993, at 1.

197. *Mexican Firm Could Acquire MCI's Transit Bus Business*, PASSENGER TRANSPORT, Jan. 10, 1994, at 3.

198. *Id.*

199. *NovaBUS Acquires TMC*, PASSENGER TRANSPORT, Dec. 5, 1994, at 1.

the same time, Bombardier is acquiring a 25% interest in Nova Bus,[200] thereby even further consolidating the industry.

In early December 1993, Dina,[201] a Mexican bus manufacturer, announced its intention to purchase the intercity bus business of Motor Coach Industries in a deal worth $336.6 million.[202] The acquisition of Motor Coach Industries by Dina was completed on August 8, 1994.[203] Dina will now be the largest manufacturer of intercity buses in North America.[204]

In February 1994, control of Ontario Bus Industries passed to the Province of Ontario.[205] Although there had been discussions about a possible merger with Nova Bus,[206] an interim agreement was reached for another Canadian company, GFI Control Systems, to manage Ontario Bus Industries.[207] A year later, in April 1995, Western Star Truck Holdings Ltd., also a Canadian company, agreed to purchase Ontario Bus Industries from the Ontario Government for $39 million (Cdn.).[208]

Flxible has initiated discussions with Mexicana de Autobuses of Mexico City for a strategic alliance between the two companies for the manufacturing of intercity and articulated transit buses.[209]

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200. *Id.*

201. In Mexico, until 1988, Dina built American-designed buses under license from Flxible. Ed Stauss, *A Mexican Home for Flxible*, BUS WORLD, Winter 1988-89, at 4. The Mexican market had been essentially closed, and motorcoach operators had no real choice. In 1989, the Mexican government sold off this state-owned company for $232 million. The company which purchased Diesel Nacional, Consorcio G Grupo Dina, is now private and profitable to the tune of $90 million annually. Anthony DePalma, *Mexican Truck Maker Heads to New Destinations*, N.Y. TIMES, Dec. 27, 1993, at D1.

202. *Id.* Because Motor Coach Industries has operations in Canada, this was one of the first three-country companies formed since NAFTA was signed. *Id.* However, it is expected Dina will continue to operate manufacturing plants in both Mexico and the United States. Craig Lentzsch, Motor Coach Industries' executive vice president, said, "The Mexican company makes a quality product for their market; we make a quality product for our market. I believe that our plans would be to continue to do just that." *MCI Buyout*, BUS WORLD, Spring 1994, at 3.

203. *Motor Coach To Mexicans*, N.Y. TIMES, Aug. 9, 1994.

204. *Id.*

205. Ian Macdonald, *Bad Times at OBI*, TRANSFER POINTS, Aug. 1994, at 8.

206. *Id.*

207. *GFI Takes Over Management of Ontario Bus Industries*, PASSENGER TRANSPORT, Nov. 21, 1994, at 2. GFI is a joint venture between Devtek Corp. and Stewart & Stevenson, the latter having also manufactured a small number of buses in the United States.

208. *Western Star Truck Holdings To Purchase Assets of OBI*, PASSENGER TRANSPORT, Apr. 10, 1995, at 1. The company is now known as Orion Bus Industries, a wholly-owned subsidiary of Western Star. *Western Star Truck Holdings Ltd. Signs Asset Purchase Agreement to Purchase the Assets of Ontario Bus Industries Inc.*, Canada NewsWire, May 12, 1995, *available in* LEXIS, WORLD Library, CNW File.

209. *Flexible Negotiating with Mexican Firm*, PASSENGER TRANSPORT, Sept. 26, 1994, at 12.

C. Inclusion of Canadian and Mexican Firms Necessary to Maintain Competition

Only through the inclusion of all three NAFTA countries will there be sufficient competition to ensure quality products at competitive prices. Maintaining barriers against Canadian and Mexican products will simply cost Americans more money without providing any net gains.[210]

Proponents of free trade argue, notwithstanding short-term dislocations, growth generated in both the United States and Canada will make the North American economy a more formidable counter-balance to the unified European market.[211] "[T]he reduction of barriers on both sides of the border will spur economic integration that should make US firms more competitive globally."[212]

Inclusion of Canadian buses regularly in American transit procurements will not represent a major change. Canadian and American transit equipment is virtually indistinguishable (using shared common designs and company origins) on account of nearly identical operating conditions.[213] Canadian bus designs and some railcar designs were developed by American companies, and produced in Canada under license or by a Canadian subsidiary.[214]

Most intercity buses are not purchased with FTA funds, and so Buy America rules do not apply. Hence, this market is an indicator of what the transit bus industry might be like without Buy America. The marketplace for intercity buses has evolved such that the United States and Canada together comprise a single market.[215] Only two of the major intercity bus manufacturers produce their buses entirely within the United

210. These effects are already evident in Canada. In Quebec, the 390-bus order from Nova Bus will cost the province $58 million in subsidies over the next three years. Hadekel, *supra* note 151. This amount could have been nearly halved by buying from Ontario. *Id.*

> [B]arriers mainly create [an] arbitrary redistribution of income among provincial residents. . . . If B.C. Ferry Corporation pays too much for its equipment, B.C. shipbuilders benefit but B.C. ferry riders—or taxpayers, since ferry rides are subsidized—lose. This is a zero-sum game. . . . The province as a whole just cannot win, though appreciative shipbuilders may become strong supporters of the government that butters their bread.
>
> Politicians' response to this argument is that if provinces are to develop modern economies, there are certain crucial industries that must for a time be encouraged, even if consumers or taxpayers suffer as a result. The trouble is, these infant industries seldom grow up.

Bill Watson, *The Walls Between Us*, Equity, Nov. 25, 1992, § 1 at 37.

211. Jenke, *supra* note 116.

212. Robert B. Zoellick, Statement before the Senate Foreign Relations Committee (Apr. 15, 1991).

213. *CUTA*, *supra* note 65, at 18.

214. *Id.*

215. Larry Plachno, *National Bus Trader's 1994 Coach Trends Survey*, Nat'l Bus Trader, May, 1995, at 4, 6.

States.[216]

Presently, the Canadian share of the American transit bus market is nearly 50%.[217] Canadian manufacturers are able to sell in the United States only because they have a separate facility in the United States for final assembly, and include at least 60% American content.[218] The maintenance of these separate facilities results in inefficiencies and higher costs.[219]

Ontario Bus Industries, for example, maintained a 570-employee plant in New York State in order to comply with Buy America.[220] This plant completed half-assembled buses from the main 670-employee plant in Mississauga, Ontario.[221]

VI. Conclusions

The Canadian market alone cannot support three transit bus manufacturers, nor a single railcar manufacturer.[222] Advancement of the industry through research and development is limited.[223] With Buy America regulations, Canadian companies are unable to make decisions on a commercial basis.[224]

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216. *Id.*

217. *Id.* at 23.

218. *Id.* The Canadian bus manufacturers have established final assembly plants in the northern United States: Nova Bus at Schenectady, N.Y., New Flyer at Grand Forks, N.D., and Ontario Bus Industries at Oriskany, N.Y. *Id.* Bombardier has a final assembly plant in Barre, Vt. *Id.*

219. "Buy America restrictions attached to federal funding are trade-restrictive and result in inefficiencies and higher costs." Letter from Roy MacLaren to Al Cormier, *supra* note 145.

220. Lorinc, *supra* note 146.

221. *Id.* Additionally, the maintenance of two separate manufacturing facilities so close to each other (but in separate countries) leads to temptation to skirt the formalities of the separate facilities, tempting manufacturing companies to "cheat" in order to remain competitive. A customs officer at the Peace Bridge (Buffalo) observed a driver switch a "Made in Canada" plate for a "Made in U.S.A." plate on a new bus. Michael Levy, *Canada-Made Buses Marked "Made in USA"*, Buffalo News, Jan. 26, 1994. The company, Ontario Bus Industries, has already been fined $400,000. *Id.* It may pay another $500,000 in fines, and its president, Donald K. Sheardown, may also be personally fined $100,000 and sentenced to one year in prison. *Id.* Sheardown had sworn out false certificates, as required by 49 C.F.R. § 661.12. *BIA Pleads Guilty*, Bus World, Spring 1994, at 3. The U.S. Justice Department said that Sheardown had knowingly signed the false certifications. *Id.*

222. *CUTA*, *supra* note 65, at 42.

223. The Buy America rules effectively restrict or limit the capability of the Canadian transit industry, with or without government assistance, to invest in R & D for new products because of the limited access to the U.S. market, particularly with respect to the manufacture of components and sub-components. At the same time, these restrictions impact on the American transit industry by limiting them from the benefit of joint product development, free access to the larger Canada-U.S. market competition and rationalization of an excess-capacity and inefficient manufacturing industry.

Id. at 46.

224. Letter from Al Cormier to all Provincial Premiers, *supra* note 92.

Protectionism has not worked.[225] The Surface Transportation Assistance Act of 1978 provided the greatest inflation-adjusted level of funding for transit ever.[226] The influx of dollars and regulation merely postponed the inevitable failure of the Buy America rules.[227] Today, according to data collected by Booz, Allen and Hamilton, the U.S. railcar manufacturers have a lower market share than before the first 1978 Buy America regulation.[228] The same is true with bus manufacturers, though not to nearly the same degree as with railcar manufacturers.[229] All but two of the American bus manufacturers and the American railcar manufacturer are on shaky financial ground.[230]

Buy America provisions for American content and final assembly should be changed to nothing less than "Buy North America." The American and Canadian transit markets are interdependent, and have historically developed together.[231] The reasons for the imposition of Buy America requirements have to do with Europe and Japan, not Canada or Mexico.[232] Development of a common transit market between the United States, Canada, and Mexico is consistent with NAFTA and Buy America principles.[233] Free access by Americans to Canadian markets while Canadians are restricted from American markets is viewed by the industry as unfair and inconsistent with CFTA and NAFTA principles.[234]

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225. Henke, *supra* note 45.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *CUTA*, *supra* note 65, at 49.
232. *Id.*
233. *Id.*
234. *Id.*; Letter from Raymond Déry c.a., *supra* note 163. The Canadian Urban Transit Association (CUTA) has pushed for an exemption to Buy America. *Canadians Want Buy America Removed as a Trade Barrier*, URBAN TRANSPORT NEWS, May 12, 1994. CUTA says the requirements are inconsistent with NAFTA. *Id.* At a minimum, CUTA would like the restoration of a threshold of at least $ 1 million. *Id.* U.S. trade officials have indicated that a $25,000 minimum might be considered. *Id.*