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WHETHER "BUY AMERICAN" COULD BECOME "BYE AMERICA"

Trade Protection in the Stimulus Package

Congress is working toward swift passage of economic stimulus legislation to jolt the U.S. economy out of a downward spiral. Separate bills before the House and Senate contain provisions intended to multiply the job-generating effects of massive government spending. In their most recent forms, the bills contain "Buy American" provisions, which require that the inputs supplied for certain stimulus bill spending projects come from domestic sources. The central argument is that government spending to create jobs ought to create American jobs, not jobs overseas.

H.R. 1, "The American Recovery and Reinvestment Act of 2009," passed by the House, requires that stimulus bill funds for construction and public infrastructure projects use only iron and steel produced in the United States:
SEC. 1110. USE OF AMERICAN IRON AND STEEL

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

(b) EXCEPTIONS. -- Subsection (a) shall not apply in any case in which the head of the Federal department or agency involved find that –

(1) applying subsection (a) would be inconsistent with the public interest;

(2) iron and steel are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(3) inclusion of iron and steel produced in the United States will increase the cost of the overall project by more than 25 percent.

H.R. 1 Section 7006 also contains a program for U.S. textile manufacturers: funds appropriated for the Department of Homeland Security may not be used to purchase clothing, uniforms, tents, tarpaulins, or other textile items unless those items are "grown, preprocessed, reused, or produced in the United States." Legislation proposed in the Senate has similar provisions, but in even broader terms, requiring "all of the iron, steel, *and manufactured goods* used in the project [to be] produced in the United States." S. 336 § 1604.

"Buy National" provisions have long been considered classic forms of protectionism. They are expressly prohibited, although with many exceptions, in the North American Free Trade Agreement and in the Uruguay Round Agreements for the World Trade Organization. They are contrary to "national treatment," the international trade principle that calls on countries to treat products and services from all other countries in the same way, as if they were domestic products.

Global competition requires free trade, and free trade depends upon national treatment because free trade and fair competition require that countries not discriminate against one another. Whoever can make the best product at the best price ought to be able to make it anywhere and sell it anywhere in the world. Such fair competition encourages more competition, the very basis of the American and global economies.

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The free trade and fair competition principles do present political problems. When citizens sacrifice through taxes in order to create jobs for other citizens, they reasonably do not want those jobs to go to people in other countries. Nevertheless, as with many well-intentioned laws, the Buy American provisions of the pending economic stimulus legislation may have unintended, adverse consequences. Whether those consequences are acceptable tradeoffs for the bill's perceived benefits is part of the national debate. Sound business planning during difficult economic times requires full awareness of the policy choices being made.

Business v. Labor

The Buy American provisions in the stimulus legislation are highlighting conflicts between business and labor. Most major American corporations, led by the United States Chamber of Commerce, are actively opposed. Chamber Chairman and Chief Executive Officer Thomas Donohue has complained, "Such provisions would cost American jobs, trigger retaliation from our trading partners, slow economic recovery by delaying shovel-ready infrastructure projects, and cede our leadership role as a longstanding proponent of free and fair trade and global engagement." Leo Gerard, President of the United Steelworkers, has answered: "We need to ensure that our laws are aggressively implemented to ensure that American taxpayer dollars are used to put Americans back to work and help renew our economy." Gerard accused opponents of "economic treason" and saluted the congressional authors of the Buy American provisions as "economic patriots."

Cost efficiencies are important to the success of American businesses (particularly when those businesses may receive taxpayer funds under government stimulus programs), but the quest for higher cost efficiencies in many cases leads to the input of foreign supplies manufactured, sometimes but not always, with cheaper labor. The Buy American provisions for iron and steel in H.R. 1 reflect a policy choice that either procurement contractors or the government's procuring agencies should tolerate up to 25 percent higher costs for iron and steel than what otherwise could be purchased from foreign sources, in order to promote jobs for American workers. The new jobs thus would come at a premium to be paid by businesses and taxpayers who are being asked to pay substantially more in order to protect American production and jobs.

Buy American And International Obligations: WTO

The Buy American provisions raise questions about whether the stimulus legislation would violate U.S. commitments under international law, such as the WTO agreements. Article 3(1) of the WTO Agreement on Government Procurement ("GPA") requires the United States and other countries to provide "immediately and unconditionally" to other GPA signatories "treatment no less favourable than ... that accorded to domestic products, services and suppliers...." Only forty countries, however, are GPA signatories; China and India are not among them. Consequently, neither China nor India has access to government procurement in the United States. To the extent the Buy American provisions are aimed at them, they are entirely unnecessary. The non-signatories have no WTO recourse for government procurement.

The United States also has committed that it "shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied...." GPA Article 3(2). There may be important exceptions to these standards from one case to another, however, depending on whether the procurement is administered by federal or state authorities, which agencies are involved, and the value of the project.

The exceptions, when it comes to government procurement, tend to devour the rule. They include emergencies (protecting the safety or health of human, animal or plant life); defense and national security; funds for small and minority businesses, and federal funds for mass transit and highway projects. Government assistance in the forms of grants, loans, and equity infusions are exempt, raising the question of whether federal and state procurements funded by such assistance also would be exempt. There are financial thresholds that have to be satisfied in order for GPA obligations to apply: approximately \$7.5 million for construction projects, and smaller thresholds for federal and state purchases of supplies and services.

There are dozens of even narrower exceptions applicable to specific federal agencies and states. For example, the GPA does not apply to NASA procurement insofar as goods or services from Japan might be involved; Arkansas's Office of Fish and Game is exempt; and in Washington State, procurements of fuel, paper products, boats, ships and vessels are not covered. The state and local government exceptions are critical because those governments are responsible for much of the spending on public infrastructure.

The legal significance of whether the Buy American provisions in the stimulus legislation violate WTO agreements in a given case is debatable. Some would say that it would be more bother than benefit for most foreign countries to pursue retaliatory compensation through WTO dispute settlement proceedings. The process is slow, the results strictly prospective, whereas the stimulus is meant to be swift, with funds quickly expended. Moreover, the utility of resorting to a WTO proceeding depends on whether the protesting country is a significant market for U.S. exports overall, or even specific sectors of U.S. exports, because WTO remedies are limited to meaningful compensation, which could be taken

effectively only in the form of retaliation against American exports. Even Canada, the leading export market for the United States, would have difficulty fashioning a useful remedy from a WTO victory in a possible battle over the Buy American provisions of the stimulus.

Still, the WTO can, in some circumstances, be productive. The European Union threatened to put the "squeeze" on its imports from Florida orange producers prior to the 2004 Presidential elections, thereby persuading President Bush to lift steel tariffs that the WTO found were inconsistent with international agreements. Threats of nominal retaliatory tariffs for economically insignificant industries, however, do little to change policies in conflict with WTO principles.

Buy American And International Obligations: NAFTA

The Buy American provisions also raise questions about violations of NAFTA. NAFTA's Chapter 10 requires the three member states' central governments to provide suppliers of another NAFTA country "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 [NAFTA] Party." Art. 1003(1). The governments may not discriminate among domestic suppliers on the basis that they use foreign goods. NAFTA Article 1003(2). Again, there are important exceptions for state and local procurement, and for certain agencies.

NAFTA's remedies are more promising than the remedies provided by the WTO. Like the WTO, the remedies are strictly for the governments, not private parties, but Chapter 10 requires the United States, Canada and Mexico to notify each other when they restrict foreign opportunities for procurement (beyond the established exceptions), and in some cases to provide compensation to the affected government. NAFTA Article 1022.

Buy American: The Real Danger

What may be legal may not be good or right, and what is not susceptible to effective legal remedy may be particularly hazardous to the public good. Because there are so many exceptions to national treatment in government procurement within the established terms of international rules and already in U.S. law, the Buy American provisions in the stimulus package may not change very much. However, they seem to be sending, even in draft, a powerful and dangerous signal. Around the globe foreign governments have been threatening to restrict their stimulus packages to domestic workers and providers, triggering reciprocal protectionism of the very kind that helped produce the Great Depression of the 1930s. It is not so much, therefore, what the new provisions might actually do, but what other countries likely will do, following the American lead, in response to them.

Looking at the economic impact of retaliatory restraints on foreign procurement, the Peterson Institute for International Economics has calculated that a one percent decline in exports associated with government procurement abroad could lead to the elimination of 6,500 U.S. jobs; a ten percent decline could eliminate 65,000 jobs, potentially far more than the number of U.S. jobs that the Buy American provisions might create.^[1] With these concerns in mind, President Obama is giving the Buy American provisions in the economic stimulus bills a second look. In a recent network news interview, he stated, "We need to make sure that any provisions that are in there are not going to trigger a trade war."

It may be one of those times when clients must take sides. For those relying on exports and on access to development projects abroad, it may be important to speak out against the Buy American provisions, lest they occasion restrictions on American exports and participation in foreign economies. Or it may be prudent to seek waivers from the President for goods from Canada, Europe or other GPA signatories on grounds that it would be "inconsistent with the public interest" to apply the trade restrictive measures to countries adhering to the same GPA standards. For those manufacturing materials and equipment used for infrastructure, the Buy American provisions may represent a unique opportunity to restrict competition. But all concerned need to appreciate and understand that there may be more recrimination than recourse as the legislation unfolds and is implemented.

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[1] Hufbauer and Schott, "Buy American: Bad for Jobs, Worse for Reputation," *Petersen Institute for International Economics Policy Brief*, February 2009 at 3-4.