



Buy American: Domestic, International Policy Collide

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Law360, New York (September 25, 2009) -- The American Recovery and Reinvestment Act of 2009, the \$787 billion U.S. economic stimulus enacted in February 2009, covers a wide array of projects and benefits. But its Buy American provision has generated reactions that far outweigh the provision's potential short-term impacts.

Any domestic economic impact is likely to be temporary, focused and minimal, and any domestic political consequences, though also short-lived, may eclipse economic impacts.

Buy American's more lasting consequences are international, as it potentially weakens U.S. policy credibility, creates perceptions about differences between the Obama administration's words and actions, and hampers negotiation of commitments that promise major economic benefits.

Buy American: Not a New Approach

The U.S., like most countries, has long protected certain domestic economic sectors. Nations legitimately protect certain industries for national security reasons. Other procurement preferences often define permissible suppliers for government-funded projects.

In the U.S., examples include the "Buy American Act" for certain U.S. government procurements and construction projects, the "Buy America" law mainly for federal transit grants to states and localities, and the "Berry Amendment"[1] for some Department of Defense purchases.

The ARRA Buy American provision is broader than other U.S. procurement restrictions in some respects, but narrower than the public debate might imply. It has three primary objectives:

First, it imposes a 100 percent content requirement for covered project components, which includes the "construction, alteration, maintenance or repair of a public building or public work unless all of the iron, steel and manufactured goods used in the project are produced in the United States." Most procurement and purchasing programs only require a percentage of local content.

Second, waivers can be granted only if: (1) applying the requirement would be inconsistent with the public interest; (2) iron, steel or the relevant manufactured goods are not produced in the U.S. in

sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of the covered U.S. materials and goods will increase overall project cost by more than 25 percent.

Third, it will “be applied in a manner consistent with United States obligations under international agreements.” U.S. obligations exist in the WTO Government Procurement Agreement (“GPA”), a plurilateral agreement signed by 40 countries and designed to create equal opportunity for foreign and domestic goods, services and suppliers in covered federal government procurement contracts.

They also are found in U.S. trade agreements, including regional agreements such as NAFTA and DR-CAFTA, and bilateral agreements with Australia, Bahrain, Chile, Israel, Morocco, Oman, Peru and Singapore.

The domestic economic impacts of the Buy American provision are likely to be limited. Buy American was implemented in a time of economic turmoil, so the impact of any particular initiative will be difficult to isolate.

The service economy continues to dwarf manufacturing. Jobs in the steel and iron industries have been declining for years. Whether Buy American has a substantive economic impact will be argued by supporters and opponents, each with their own facts and figures.

The domestic political impact of Buy American also may be short-lived. The provision may reassure constituencies that are more protectionist or suspicious of the politics of the new Obama administration, such as organized labor, those in Congress opposed to further trade liberalization, or sectors with more international competitors.

In the absence of a comprehensive trade agenda, specific actions such as support for (or lack of opposition to) Buy American can be cited as evidence of a trade policy.

Damaging U.S. Credibility Internationally

Many countries across the globe responded negatively and loudly to the proposed Buy American provision. Those initial reactions provided impetus for the additional language requiring consistency with U.S. obligations under existing international agreements.

But the criticism continued. WTO Director-General Pascal Lamy warned in July 2009, “At a time when the global economy is still fragile worldwide and in face of the unprecedented decline in trade flows, we must send a clear and credible message that protectionism is not the answer.”

John Bruton, the European Union’s Ambassador to the U.S., expressed his dismay in an open letter to U.S. officials:

“The European Commission is particularly concerned about the message such measures would send to the world, at a time when most countries are faced with the same situation of looking for the best means to tackle the crisis. The United States and the European Union should take the lead in keeping the commitments not to introduce protectionist measures taken by the G20 in November 2008.”

Buy American, which has been followed with proposed “buy American” provisions in other U.S. legislation, provides opportunities for other countries to recast the U.S.’s international profile.

Countries can focus on Buy American, while pointing to the U.S. as the genesis of the global financial crisis and deflecting criticisms of their domestic policies.

Buy American also is a vehicle for other countries, some of which have been subject to U.S. criticism for protectionist practices, to justify past actions as well as react with new buy local provisions. Some examples of other countries’ local preference provision reactions and policies include:

- China issued a “Buy Chinese” order as part of its \$586 billion government stimulus package. The order requires government-backed stimulus projects to seek explicit permission before buying foreign goods and services.

China claims the statement merely reiterates existing requirements and is not WTO-inconsistent. It has not yet signed the WTO GPA. Foreign businesses operating in China have complained in recent months that they are being denied fair access to stimulus projects.

- Canada organized a high-profile response to Buy American to illustrate the potential negative impacts of the U.S. legislation and recently offered a two-phased proposal on subnational government procurement opportunities.

Local authorities will distribute more than one-third of ARRA monies. Some U.S. states and Canadian provinces already had reciprocal procurement policies to enhance market access, and 37 U.S. states had made formal government procurement commitments.

The U.S. has reported that Canadian provincial government procurement markets have not been opened and that some provinces maintain “Buy Canada” price preferences and other discriminatory policies that favor Canadian suppliers.

- Brazil’s Foreign Minister suggested that Brazil may challenge Buy American’s WTO-consistency, beginning with WTO discussions and bilateral consultations.

According to the 2009 USTR Trade Barriers report, Brazil allows foreign firms to bid to provide

technical services to state enterprises only when no qualified Brazilian firms are available; regulations provide a preference to Brazilian goods and services when two equally qualified vendors are considered for government procurements.

- Australia initially resisted calls from steel and manufacturing industries to include a "Buy Australian" clause in its economic stimulus package, but eventually established a council to support local suppliers on Australian projects.

The \$19 million plan would help Australian companies obtain business opportunities in Australia and overseas, appoint a "supplier advocate" to champion Australian industry in the public service procurement market, and require federal government tenderers to submit "Australian industry participation plans" that give local businesses a chance at winning major Commonwealth contracts.

- Indian officials voiced concerns with Buy American provisions, even though services are the majority of U.S.-India trade. In the past, the U.S. has criticized India's procurement processes as lacking transparency, noting the foreign firms rarely win Indian government contracts because of a preference afforded to state-owned enterprises.

- Japan recently reiterated concern about "Buy American" provisions, this time as a provision in new House-approved legislation that limits use of new funds for vehicles made by Ford, GM or Chrysler.

The U.S. has criticized Japan's procurement policies and thresholds in areas such as construction and design, aerospace and government information technology. It continues discussions on measures to broaden measures to combat bid rigging.

Whether the U.S.'s voice will be a less effective external constraint on other countries' stimulus measures[2] or in challenging other similar domestic practices in the future remains an open question. But Buy American becomes a tool in countries' arsenals when questioning the U.S. in the international arena.

New Administration's Policy Ambiguity

The Obama administration launched its international vision using language of "dialogue," "engagement" and "listening."

The U.S. joined other G-20 countries on April 2, 2009, pledging to refrain from raising new protectionist barriers, which built on a November 2008 G-20 commitment to "refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions or implementing World Trade Organization inconsistent measures to stimulate exports."

In July, the G-8 countries rejected protectionism "of any kind." Buy America, enacted in February

2009, calls into question the seriousness of the U.S.'s commitments.

Buy American was one of the administration's first high-profile international trade actions.

President Obama has said that the ARRA needed to be enacted quickly, even though he does not believe Buy American was necessary and has, since then, maintained that it is WTO-compliant. But subsequent statements of both anti-protectionism and support for Buy American have been echoed by other U.S. officials.

After the Asia-Pacific Economic Cooperation countries in July extended at least until 2010 their commitment to not raise new trade barriers, U.S. Trade Representative Ron Kirk reiterated that Buy American does not violate President Obama's earlier G-20 pledge.

Statements of support for North American trade in August co-exist with the new administration's failure to comply with U.S.'s NAFTA obligations on cross-border trucking.

Buy American thus can become shorthand to characterize incongruities between the new administration's rhetoric and its actions.

Hamstringing U.S. Ability to Negotiate Commitments that Produce Economic Benefits

Buy American provides fodder for those who question the policy and effectiveness of trade agreements.

Oft-touted benefits of trade agreements include certainty for investments and external constraints on domestic political and economic actions that negatively affect international business.

This rationale is undermined if new local preference requirements are consistent with pre-existing market access obligations. And as trade agreements do not provide preventative or injunctive remedies, any remedy for a violation would be authorized only years after preferences were imposed.

Buy American also may reduce the U.S.'s effectiveness in advocating reduction of trade barriers in future discussions. The U.S. has actively prodded other countries to open their markets to U.S. goods and services.

The U.S.'s current regional and bilateral trade agreements do not yet include important markets such as the growing economic powers of the BRICs (Brazil, Russia, India and China).

Buy American offers the "glass houses" adage, as it allows other countries to resist U.S. market access efforts by questioning U.S. interpretations of its trade commitments. It also may be a

catalyst for alliances of convenience among other countries.

Of course, Buy American alone will not undermine the U.S.'s credibility and effectiveness in trade negotiations. The U.S. economy remains one of the most powerful and open in the world. But Buy American reactions can shift, or complicate, the debate and the authority with which the U.S. can speak.

Conclusion

The Buy American provision may be remembered more for the messages it sent than the impacts it caused.

Every country responds to domestic interests, but when the U.S. does so the international consequences may not disappear even when replaced by new domestic pressures. Specific actions can be generalized and stored in the collective international consciousness.

The economies of other countries overall are not likely to be fundamentally affected by this iteration of "Buy American" and broad trade wars will not materialize.

This administration will have other opportunities to enhance its international credibility and advance U.S. economic goals through international agreements. The task, however, is made more difficult when domestic and international messages collide.

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[1] Procurement preferences for domestically produced, manufactured, or home grown products, notably food, clothing, fabrics, and specialty metals. See CRS Report for Congress, RL31236, April 21, 2005.

[2] See The Global Financial Crisis: Analysis and Policy Implications, Congressional Research Service, Report RL34742, July 10, 2009, Appendix B (country list of economic stimulus measures adopted or proposed).