# "Buy American"

## Prelude to Armageddon or tempest in a teapot?

AS THE OBAMA Administration and the United States Congress grapple with legislation intended to stimulate the moribund American economy, an unlikely issue has arisen which is dominating domestic and international debate and virtually monopolizing editorial comment. That issue is the "Buy American" preference. The versions of the American Recovery and Reinvestment Act of 2009 being considered by the US House of Representatives and the US Senate contain a "Buy American" provision which requires the use of iron and steel produced in the United States for projects funded by the legislation. This "domestic preference" provision has generated impassioned pleas for assistance by US steel mills, other manufacturers, and their many Congressional allies, while at the same time it has ignited vociferous criticism from trading partners, multinational corporations, and the editorial boards of The New York Times and The Washington Post.

On the one hand, the chairmen of domestic steel companies have enthusiastically endorsed "Buy American" preferences for iron and steel products in the stimulus legislation. They see such set-asides as essential to re-invigorate a US industry which is operating at less than 50 percent of capacity. They have been joined by the Alliance for American Manufacturing and other like-minded producers and unions in the metals and related industries. Congressional support for "Buy American" has likewise been vocal and overwhelming.

On the other hand, the European Union's Ambassador to the United States has denounced the provision as protectionist and contrary to the rules of the World Trade Organization (WTO), while the Canadian government claims that, if the United States adopts "Buy American" preferences in the stimulus legislation, it will "lose moral authority to pressure others not to introduce protectionist policies." A coalition of American multinationals and trade associations, including, remarkably, the National Association of Manufacturers, have warned the Congressional leadership that "Buy American" will "backfire on the United States" by harming US exporters, undermining "US global engagement" and resulting in mirror-image trade restrictions overseas.

**If the "Buy American" provision is not a departure from the past practice of the US, why the fuss?**

In order to understand both the nature and extent of the proposed "Buy American" provisions, it may be beneficial to exit this debate and examine the legislative language itself.

The House version provides that, with certain exceptions, no funds may be used 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." The initial Senate bill contains a somewhat more expansive "Buy American" provision which requires, with the same exceptions as the House bill, that "all of the iron, steel, and manufactured goods used in the project are produced in the United States." In both versions, the "Buy American" preference will not apply if (a) its application would be "inconsistent with the public interest"; (b) the iron, steel, or manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (c) application of the provision will increase the cost of the overall project by more than 25 percent. Finally, the Senate version also states that the "Buy American" provision will be implemented in a manner consistent with US obligations under international trade agreements.

So, does the "Buy American" clause in the stimulus package represent a departure from the practice of the United States – and its trading partners – in formulating governmental procurement policies? The answer is no. Domestic preferences are nothing new, and "Buy America" and "Buy American" provisions have been around since the 1930s. In fact, the "Buy American" provision in the stimulus legislation is virtually identical to the "Buy American" provisions in every infrastructure bill enacted by the US Congress for the past 20 years. Republican and Democratic presidents since Ronald Reagan have signed Surface Transportation Acts and federal Mass

Transit Acts which contain this preference with almost exactly the same language. The only difference is that the current legislation covers publicly-financed buildings, water treatment facilities, and similar projects as well as roads, bridges, dams, canals, and public transportation systems.

The US Department of Transportation has administered previous "Buy American" preferences through the liberal use of waivers that permitted, under appropriate circumstances, the use of foreign-sourced materials in federal programs. It is noteworthy that there has never been a successful WTO challenge by any of our trading partners to the US government's implementation of the "Buy American" preference in other legislation.

In addition, only those countries which – like the United States – have acceded to the WTO Agreement on Government Procurement are eligible to benefit from US purchases of goods and services for public projects. These countries include the members of the European Union, Australia, Canada, Hong Kong, Iceland, Israel, Japan, Korea, Norway, Singapore and Switzerland. Thus, if the United States chose to do so, it could, for example, legally prohibit the purchase of Chinese products using federal funds and remain consistent with its obligations under the WTO. Of course, no one has suggested that the legislation should specifically exclude the procurement of products from individual countries.

In the international arena, many other countries – including some of those most critical of the "Buy American" provision – have adopted programs which favor national suppliers and exclude foreign producers. For example, members of the European Union reserve sectors of their public expenditures to EU companies. Canada favors local suppliers for defense procurements and shipbuilding, and it excludes imported steel, coal, and motor vehicles from purchases by all ten of its provinces. A centerpiece of China's stimulus program is investment in the country's railway network, and China has reserved all steel purchases for this massive infrastructure development to its domestic industry. The European Union, India, and Russia – among others – maintain quotas or elevated duties on imports of steel products, which effectively provide preferences to their domestic industries.

There is little doubt that the final version of the stimulus bill which President Obama will sign will contain a "Buy American" preference that is similar, if not identical, to the language already in the House and Senate versions. There is overwhelming Congressional support for the provision – the House Committee with relevant jurisdiction voted 55 to 0 in its favor, and the Senate defeated an attempt to eliminate the "Buy American" clause from the final legislation by a vote of more than two to one. Opinion polls show that over 80 percent of the American public supports this provision, an overwhelming and unprecedented majority for a trade-related issue.

Therefore, two questions remain. First, what will be the effect of a "Buy American" provision in the US government's stimulus program? There will probably be some benefit to the US steel industry, but there is unlikely to be much adverse response from the international community. Although the critics of "Buy America" claim that its implementation will provide only a limited advantage to the US steel industry, even the procurement of a few billion dollars worth of steel or steel-intensive products cannot but help an industry that is operating at anemic capacity utilization rates. Some small manufacturers may be able to weather the economic storm through one or two federal or state procurements of their products. On the other hand, because we expect that the "Buy American" preference will be administered in conformity with US trade obligations, formal WTO challenges from America's trading partners seem unlikely. Since most countries already maintain national preference programs, it is unlikely that their own stimulus programs will be much affected by what the United States does.

The other question is the more intriguing. If, as we have shown, the "Buy American" provision in the US stimulus bill is not a departure from the past practice of the United States and if it is not inconsistent with WTO and other obligations, why the fuss from trading partners and US multinationals? We do not know their motives, but it is fascinating that the $700 billion financial bailout – with is limited only to US banking institutions – did not trigger the same reaction. Could the current furor be an attempt to influence the new Administration's overall approach to international trade? After all, during the presidential campaign, Senator Obama made critical comments about the Bush Administration's free trade orientation and stated that he wanted to re-negotiate a number of free trade agreements. He was also heavily supported by American labor unions which have been skeptical of the benefits of free trade policies. Could the firestorm over "Buy American" be an attempt to cajole or persuade the Obama Administration to take a more free trade approach in the future?

Frederick P. Waite and
Kimberly R. Young
Vorys, Sater, Seymour and Pease LLP
(Washington, DC)