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'Buy America': A Regrettable Step Toward Protectionism

The ''Buy America'' provision in the $787 billion American Reconstruction and Recovery Act of 2009 (the ''act'') requires that public works projects funded by the Act use domestically produced iron, steel and manufactured goods, subject to certain exceptions. Although Congress tempered this controversial ''Buy America'' provision by requiring that it be implemented in a manner consistent with the United States' international trade commitments, it has cost the United States credibility among our trading partners, may wind up costing more U.S. jobs than it is creates, and has sparked a vigorous debate in Washington and foreign capitals about whether the United States is leading by example or tilting toward the false sanctuary of protectionism.

By Jay L. Eizenstat

In times of economic crisis, it is natural for governments to pursue policies that foster job creation, economic expansion, and enhanced social safety nets. However, measures such as the ''Buy America'' provision threaten to undermine these legitimate objectives by costing American jobs, threatening the rules-based international trading system and damaging U.S. credibility and leadership abroad.

The touted job gains from the ''Buy America'' provision may be illusory. According to a recent study by the Peterson Institute for International Economics, domestic job creation from enforced local sourcing could be offset if American suppliers are precluded from taking advantage of the stimulus-fed growth in government procurement opportunities abroad.

U.S. businesses stand to have fewer opportunities than they would without these restrictions as our trading partners enact their own economic stimulus plans. This is a particular concern for countries that are not parties to the WTO Government Procurement Agreement (''GPA''), including Brazil, China and India, whose procurement practices are not subject to GPA disciplines to provide nondiscriminatory access to their government procurement markets.

Already there are ominous signs that procurement opportunities abroad for American suppliers may be cut off as our trading partners enact their own ''buy national'' stimulus programs.

'Buy China' Provisions.

China has reportedly introduced a ''Buy China'' requirement as part of its economic stimulus program, covering procurements by the National Development and Reform Commission, and the Ministries of Industry and Information, Supervision, Housing, Transport, Railways, Water Resources and Commerce. It was only recently that China castigated the United States for its ''Buy America'' provision.

In Canada, the United States largest two-way trading partner, there are signs of creeping protectionism as well. In response to concerns about the ''Buy America'' provision, the Federation of Canadian Municipalities (''FCM'') adopted a nonbinding resolution favoring procurement policies for local infrastructure projects that give preference to companies in countries that ''do not impose trade restrictions against goods and materials manufactured in Canada''—a thinly veiled swipe at the U.S. ''Buy America'' provision.

While the FCM resolution is nonbinding and its effect is difficult to gauge, it exemplifies one of the greatest perils of the ''Buy America'' provision, namely, that our key trading partners will adopt their own ''buy local'' provisions that will disadvantage American service providers and American-made goods.

In the case of Canada, the adoption of ''Buy Canada'' requirements could, for example, result in up to $3 billion in lost business for U.S. water and wastewater equipment manufacturers; other formal or informal boycotts on U.S. made goods in public works project may follow.

Job Losses in U.S.?

In addition to lost business opportunities abroad, the ''Buy America'' provision risks costing American jobs here at home by restricting the opportunities of U.S. firms with established supply-chain and sourcing arrangements abroad. The most well-publicized case is Duferco Farrell Corp. (a Russian-Swiss joint venture), which took over a bankrupt steel mill near Pittsburgh and employs 600 unionized steel workers. Duferco is at risk of shutting down because its steel coil, which is made using imported steel slab, does not qualify under the ''Buy America'' provision.

As a result Duferco's largest customer, a steel pipe fitter, is cancelling its orders with Duferco, and is instead buying from companies that produce coil from U.S. smelted steel. Duferco has furloughed 80% of its workforce and may be forced into bankruptcy, putting 600 more steelworkers on the unemployment lines.

The Government Accountability Office (''GAO'') estimates that state, municipal and local officials will administer nearly $280 billion in stimulus funds. Many state and local procurements paid for with stimulus funds are inaccessible to foreign suppliers, even those from key U.S. trading partners. Only 37 states have agreed to discipline their procurement practices under the WTO Agreement on Government Procurement (GPA), and 12 of those states (e.g. Florida, Illinois, Michigan, New York, and Pennsylvania, among others) have excluded procurements for construction-grade steel, motor vehicles, and coal.

Thirteen states, including Georgia, Ohio, New Jersey and Virginia, have not agreed to subject their procurement practices to GPA disciplines, and thus the international agreement limitation on the ''Buy America'' provision has no effect there. These 13 states may exclude foreign suppliers from their procurements paid for with stimulus funds, and that discrimination is not inconsistent with U.S. obligations under the GPA.

Complex Interplay of Programs.

There is also well-founded concern that the complex interplay between the ''Buy America'' provision, the U.S. GPA commitments, state obligations and exceptions under the GPA, and the detailed interim regulations issued by the Office of Management and Budget will spur confusion among contracting officers at all levels, resulting in eligible bids by foreign provider being excluded from consideration. Recent complaints by the Canadian government about Canadian companies being unfairly excluded from eligible state, municipal, and local procurements suggest this may already be occurring.

This potential for confusion among contracting officers underscores the need for uniform implementation of the ''Buy America'' provisions at the federal, state and local level, as has been suggested by the U.S. Chamber of Commerce.

Less obvious, but possibly important, is the cost to states, many of which have heretofore not seen any reason to prefer domestically produced goods or services in their procurements. The ''Buy America'' provision will obligate such states to establish new procurement procedures to accomplish the required discrimination, in a legal setting that otherwise bases procurement decisions on common criteria such as the highest quality for the lowest cost. The affected states will comply, in order to access the act's funds, but the waste associated with developing discrimination mechanisms (and possibly later defending them on appeal) could be substantial.

A further risk: Other countries could follow the U.S. stimulus bill's example by taking other types of WTO-consistent-yet-protectionist measures, such as raising tariffs from lower ''applied'' rates to higher ''bound'' rates. It is not uncommon for countries to increase their applied tariff rates as a means of advantaging domestically produced goods, but it is hardly helpful for the U.S. Congress to have given them moral cover for doing so.

They could also adopt new standards, regulations and other non-tariff barriers disadvantaging imports, which, while possibly WTO-inconsistent, could take years to litigate. Only time will tell whether Congress has opened a Pandora's Box here.

Leadership on Trade?

Most troubling of all is the potential damage to U.S. standing in the international trade community. In times of crisis—including the current unprecedented economic and financial crisis—the world looks to the United States for leadership. Unfortunately, it took an outcry from the export-oriented segments of the U.S. business community, the threat of litigation by our trading partners, and a welcome warning from President

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Obama, in order for Congress to insert language into the ‘‘Buy America’’ provision aimed at ensuring that it is implemented in a manner that respects our international obligations. It was indeed a positive sign that President Obama clearly and unequivocally signaled his opposition to a ‘‘Buy America’’ provision that would be inconsistent with our trade obligations.

But, with or without the international agreement compliance language, some damage has unquestionably been done, and a line seems to have been crossed in our domestic politics as well. Congress has followed up with similar ‘‘Buy America’’-type provisions contained in pending legislation on water, wastewater treatment, school construction, and in the climate change bill, providing for government aid to develop plug-in electric cars only if they are developed and produced in the United States.

Meanwhile, hundreds of municipalities and some state legislatures have endorsed a Buy America resolution authored by the United Steelworkers. Individually these developments are troubling enough; collectively, they suggest that protectionism is unquestionably on the rise.

Far from affirming the April G-20 commitment to ‘‘refrain from raising new barriers to investment or trade in good and services, imposing new export restrictions or implementing World Trade Organization inconsistent measures to stimulate exports,’’ Buy America is not in the spirit of the G-20 commitment, and sent the wrong message to our trading partners with whom we need to collaborate on the faltering Doha Round negotiations, on global financial industry reform, and international macroeconomic policy in order to resolve the global financial and economic crisis. And now China, one of our most important trading partners, is pursuing a ‘‘buy national’’ economic stimulus program that could exclude U.S.-made goods, potentially costing U.S. jobs as well. The race to the bottom seems to be picking up pace.

The United States cannot emerge from this economic crisis by walling itself off from trading partners and foreign suppliers. Providing robust domestic economic stimulus and showing leadership internationally by adhering to the letter and spirit of our international commitments are complementary, not mutually exclusive.

In this unprecedented global crisis, the path to U.S. and global economic recovery lies not in the false-hope of protectionism—no matter how well disguised—but in policies that open markets, break down barriers to trade in goods, services and investment and respect our international commitments.

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