



Buy America:

Key to America's Economic Recovery

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Alliance for American Manufacturing



Keeping America Strong



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The U.S. House of Representatives and U.S. Senate have both included provisions in economic recovery legislation that would require the use of U.S. goods in public projects financed by the plans.¹ Opponents of such “Buy American” provisions have laid numerous charges against the requirements, including that such preferences will lead to a trade war with other countries. Critics have even compared these Buy American provisions to trade measures such as the Smoot-Hawley Tariff Act of 1930, asserting that domestic procurement preferences could prolong or worsen the current economic recession.

These serious and alarming allegations are without any legal or factual basis. This report examines and exposes the anti-Buy-American myths put forward in three recent analyses published by Gary Clyde Hufbauer and Jeffrey J. Schott of the Peterson Institute for International Economics, the Third Way Economic Program, and the Progressive Policy Institute.² The report finds that, contrary to opponents' claims:

- Buy American provisions are not a radical departure from existing procurement policy – they simply ensure that current policies will apply to the economic recovery plan.
- Buy American provisions do not violate U.S. trade commitments, and current law ensures the provisions will be administered in compliance with those obligations.
- Many countries already take full advantage of their right to exclude U.S. producers from government contracts – there is no reason to believe they would give up those rights if the U.S. drops Buy American provisions from its economic recovery package.
- Buy American rules ensure taxpayer dollars support domestic job creation to the fullest extent possible, improving the stimulative effect of government spending.

In short, Buy American provisions have been part of U.S. procurement policy for more than seventy years, without provoking trade wars or global depressions. The Buy American provisions in the recovery package are no different. Common myths about Buy American are examined in more detail below.

Myth #1: Buy American requirements violate U.S. obligations under international trade agreements.³

The Facts: The analyses reviewed here were written before the Senate amended the Buy American language in the economic recovery bill to explicitly provide that the requirements would be applied in a manner consistent with the international obligations of the United States.⁴ However, even before the Senate amendment was added, there was no reason to believe that the provisions would violate our international trade commitments.

The United States is party to a number of trade agreements that contain procurement obligations, including the World Trade Organization Agreement on Government Procurement (the GPA, which covers 39 countries in addition to the United States), NAFTA, and various bilateral and regional free trade agreements. Parties to these agreements have negotiated over the extent of their obligations, including which government entities are subject to the agreement, what goods and services are covered, and monetary thresholds for covered contracts. The U.S., for example, did not subject any state level procurement actions to NAFTA, including state procurement financed with federal funds,⁵ and it has specifically excluded federal funds for mass transit and highway projects from all agreements to which it is a party.⁶ Thus, the United States has already negotiated with trading partners

to maintain the right to attach domestic sourcing restrictions to funds for many of the public projects contained in the economic recovery package.

To the extent any of the Buy American provisions in the legislation would not be covered by such exceptions, the United States already has the power to waive such provisions as may be needed to meet our international obligations. Congress created this waiver mechanism the first time the U.S. undertook any international procurement obligations, in the Tokyo Round of GATT negotiations which concluded in 1979. In the Trade Agreements Act of 1979, Congress gave the President the authority to waive national procurement laws to ensure that the U.S. complies with all of its international procurement obligations – both the obligations that existed then and any new obligations undertaken in the future.⁷ The Act provides as follows: “the President may waive, in whole or in part . . . the application of any law, regulation, procedure, or practice regarding Government procurement” to the extent necessary to comply with international obligations.⁸ The executive branch has consistently used this authority to waive Buy American requirements to comply with the GPA and other agreements, updating the waiver as needed to reflect new agreements or changing procurement thresholds.⁹

In addition, the Senate and House bills both include explicit language that permits agencies to waive the Buy American provisions to the extent they are inconsistent with the public interest.¹⁰ Identical public interest language has been invoked in the past to waive Buy American requirements in order to implement international commitments. For example, the Department of Defense uses such public interest provisions to comply with bilateral memoranda of understanding regarding defense procurement.¹¹ Such waivers are also available for non-defense purposes.¹² While Hufbauer and Schott claim that foreign countries would not wait for such waivers before retaliating against the United States,¹³ it is unclear why countries would rush to retaliate against sourcing preferences that would not even apply to them – and they certainly would have no right to do so under agreements such as the GPA.

There is absolutely no reason to believe this long-standing waiver practice would be abandoned with regard to Buy American provisions in the recovery package. The Senate amendment thus simply reiterates the existing policy of the United States to ensure trade agreement compliance.

Myth #2: Even if the U.S. does ensure Buy American requirements comport with its international obligations, including such restrictions in the recovery package sends the wrong signal to trading partners. Those who are not bound by international procurement obligations will emulate the United States and exclude the U.S. from their own government contracts.¹⁴

The Facts: If the U.S. were to go beyond ensuring compliance with its negotiated obligations to unilaterally surrender the right to attach any domestic sourcing conditions to federal funding for public works, there is absolutely no reason to believe that other countries would respond by voluntarily granting similar rights to the United States in their own public works contracts.

To the contrary, annual reports by the United States Trade Representative reveal that trading partners currently use the flexibility they have under international agreements to maintain a variety of procurement restrictions that exclude American products and services.¹⁵

- ***Canada:*** Though Canada has made commitments on behalf of its federal government under NAFTA and the GPA, it has made no obligations for provincial procurement. A number of Canadian provinces

maintain “Buy Canada” and other policies that put U.S. suppliers at a disadvantage.¹⁶

- **Europe:** Europe is also a member of the GPA. However, Europe has made several reservations to the GPA, and European nations take advantage of those provisions to block U.S. access to government contracts. For example, goods with majority EU content receive preferences over U.S. goods in certain water, transportation, energy, and postal services contracts. Some European countries also use offsets and a lack of transparent procurement procedures to block U.S. access.¹⁷
- **Japan:** Despite being a member of the GPA and other procurement agreements with the U.S., USTR reports that Japan continues to block U.S. access to its procurement market by allowing bid rigging by domestic firms and prescribing technical standards that favor Japanese suppliers.¹⁸
- **China:** Though China committed to work towards joining the GPA when it acceded to the WTO in 2001, it has only recently begun the formal process to become a GPA member. China’s 2002 Government Procurement Law requires government entities at the central and sub-central level to give priority to local goods and services in contracting decisions, with some exceptions. China also uses technical procurement standards to favor domestic suppliers in certain sectors, such as high technology and electronics.¹⁹
- **India:** India’s procurement law has given preferences to goods provided by domestic state-owned enterprises, and USTR reports that foreign firms “rarely” win government contracts. India is not a member of the GPA.²⁰
- **Brazil:** Brazil has not joined the GPA. While its law purports to grant non-discriminatory treatment to foreign bidders for government contracts, the law’s implementing regulations create preferences for certain domestic goods and condition some benefits on the amount of local content.²¹

The U.S. has pushed for GPA members to expand their commitments, and the U.S. has asked other countries to join the GPA so they may enjoy access to the U.S. procurement market in return for reciprocal access to their own markets. Trading partners who want the benefit of access to U.S. procurement contracts know how such access can be obtained – by engaging in reciprocal procurement negotiations with the United States. Emergency economic recovery legislation cannot provide a meaningful forum for such negotiations.

Despite U.S. offers, many countries have so far resisted joining the GPA or expanding their GPA commitments. To conjecture that the unilateral gesture of eliminating Buy American requirements from the recovery package would finally convince such countries to voluntarily open their markets to the U.S., especially when the offer of guaranteed reciprocal access to the U.S. market has not already convinced them to do so, both ignores history and defies logic.

Myth #3: If foreign countries retaliate by attaching domestic sourcing requirements to their own stimulus programs, the job opportunities lost by American workers will outnumber any jobs created by Buy American requirements.²²

The Facts: This argument fails in large part because it is based on the flawed premises examined above. For example, Hufbauer and Schott assume that foreign governments currently purchase U.S. goods at the same rate as private market actors in their countries.²³ This inflates their estimate of the potential value of procurement

contracts that may be lost if foreign governments retaliate against the United States. The procurement markets included in their estimates of what is “at risk” are markets that U.S. producers could otherwise access in theory only – as explained above, significant portions of these markets are already off-limits to U.S. producers due to foreign governments’ existing procurement restrictions.

Moreover, these arguments rely on highly questionable numbers to estimate the jobs that might be created if our trading partners were more open to U.S. suppliers. The Hufbauer and Schott analysis, for example, presumes that countries may retaliate by excluding the U.S. from at least a portion of their general government purchases of goods and services.²⁴ It is unclear why countries would retaliate against the inclusion of Buy American provisions for manufactured goods in a temporary U.S. recovery package by excluding purchases of U.S. goods and services under their general budget. It is especially difficult to understand why countries would only do so now, given that the U.S. has applied Buy American requirements to its federal contracts for seventy-five years.²⁵

Hufbauer and Schott also assert without any support whatsoever that the job losses from this hypothetical retaliation would be “spread across the entire manufacturing sector,” while jobs created in the economic recovery package would be “concentrated in iron and steel and a few other industries.”²⁶ Again, it is difficult to understand why the U.S. should give up its negotiated rights regarding the application of Buy American requirements out of fear that trading partners would react in a completely imbalanced manner by applying such disproportionate measures.

PPI attempts to avoid some of these pitfalls by focusing its arguments on the stimulus spending expected from trading partners, not their general government budgets.²⁷ PPI tallies \$1.1 trillion in foreign stimulus packages, raising the specter of U.S. producers losing access to more than a trillion dollars in foreign government spending. Of course, foreign packages are likely to rely upon a mixture of tax cuts and spending just as the U.S. package does, so counting all of these foreign dollars as lost contract opportunities is highly misleading. In addition, as noted above, these contentions rely on the baseless assumption that the U.S. currently has any significant access to foreign procurement markets that would be at risk if other countries “retaliated.” The majority of the foreign stimulus in PPI’s tally is made up of \$614 billion being spent by countries that have no procurement obligations towards the United States and that already apply domestic procurement preferences (principally China, but also India and Brazil). As for the other countries included in PPI’s tally, they, like the U.S., are members of procurement agreements and are bound by their reciprocal obligations.

Myth #4: Even if the risk of retaliation is low, it outweighs the benefit of including Buy American provisions in the recovery plan. Buy American will create few additional jobs, because the amount of foreign goods purchased in U.S. government contracts is already small.²⁸

The Facts: The recovery package will create an estimated 3,675,000 jobs, 408,000 of which will be in manufacturing.²⁹ Buy American provisions will maximize the number of recovery program jobs that are created in America, kick starting domestic demand and economic growth here at home. A recent analysis found that application of Buy American requirements to recovery projects would raise the number of jobs created by such projects by as much as 33 percent.³⁰

It is important to note that the Hufbauer and Schott estimate of additional manufacturing jobs created directly by the inclusion of Buy American provisions in the recovery legislation is based on the understanding that, absent the inclusion of such provisions in the legislation, domestic preferences already in existing legislation would apply to economic recovery spending.³¹ Thus, their estimates only measure the additional jobs created

due to including Buy American language in the recovery legislation itself, not the number of jobs owed to the application of any Buy American rules at all.

In addition, Hufbauer and Schott omit any positive indirect effects of domestic job creation from their estimates.³² While Hufbauer and Schott are correct that workers who directly gain new jobs due to the application of Buy American provisions would not themselves necessarily spend all of their new income on U.S. goods and U.S. job creation, certainly some of their additional income would be spent domestically and have positive indirect employment effects. Hufbauer and Schott exclude any such indirect effects from their model.

Myth #5: Insisting on the use of domestic goods will reduce the effectiveness of the recovery plan by imposing unreasonable requirements where U.S. goods are unavailable or prohibitively expensive.³³

The Facts: This assertion ignores the language of the recovery bills and U.S. experience applying similar provisions in the past. First, both the House and Senate versions of the Act allow domestic sourcing requirements to be waived where the relevant goods “are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.”³⁴ This waiver provision is also included in the Buy American Act,³⁵ and data relied upon by Hufbauer and Schott indicate that such non-availability waivers were necessary to permit foreign sourcing for only 0.29 percent of all federal contract dollars spent in 2007.³⁶

Moreover, the House and Senate bills permit domestic sourcing requirements to be waived where their application would increase the cost of the overall project by more than 25 percent.³⁷ The 25 percent threshold reflects cost competitiveness standards that currently apply in Buy America requirements attached to federal highway and mass transit funds.³⁸ Similar cost waivers are available for direct federal contracting under the Buy American Act, though they have been set at different levels administratively.³⁹ Such cost waivers were needed to justify 0.20 percent of the federal government’s spending on foreign manufactures for domestic use in 2007 – a mere 0.01 percent of all federal contracting dollars spent.⁴⁰

Clearly, unavailability and cost differences present obstacles to domestic purchasing in only a tiny portion of contracts, and, where such issues do arise, procurement officials are able to use their waiver authority to address them. The same will be true under the economic recovery plan.

Myth #6: Buy American provisions could lead to a dangerous trade war, similar to that which occurred in the 1930s, which many economists believe contributed to deepening and prolonging the Great Depression.⁴¹

The Facts: The United States is the most open major economy in the world, and it has long worked with trading partners to make their markets as open to U.S. exports as America is to imports from their nations. Nothing in the recovery legislation would change that. The bills simply provide an affirmation of decades-old policies to use U.S. taxpayer dollars to support U.S. industries and workers.⁴² These policies are implemented in full compliance with global trading obligations, and that will remain the case when the recovery plan is enacted. There is simply no factual or legal basis to claim that the plan would provoke a trade war.

The “trade war” myth is based on several false premises explored above. First, the myth reveals a misunderstanding of U.S. procurement obligations under international trade agreements and the manner in which they are implemented, leading to the mistaken conclusion that Buy American provisions in the recovery plans would violate our international commitments and justify retaliation by our trading partners. Second,

the myth is founded on the untenable contention that many countries, after fighting to maintain their own discriminatory procurement policies and resisting efforts to negotiate reciprocal market opening with the U.S., would voluntarily open their procurement markets to the U.S. if Buy American provisions are eliminated from the recovery program. Finally, claims regarding the relative costs and benefits of Buy American provisions rely on erroneous data and highly questionable assumptions.

Conclusion

Critics of Buy American have perpetrated a number of myths based on bad data, faulty legal reasoning, and a failure to comprehend the reality facing U.S. producers and workers. The facts reveal what policymakers and the American public have known for years, that targeting government spending to domestic production creates good jobs for American workers and ensures effective use of taxpayer dollars. Moreover, application of Buy American requirements is fully consistent with the international obligations of the U.S., and will not lead to retaliation or dangerous “trade wars.” There is no reason to abandon this decades-long practice in the economic recovery package, especially when jobs are hemorrhaging and industrial production is at historic lows. Once these myths are exposed, the truth is obvious: keeping Buy American policies in place makes just as much sense now as it ever has, if not more.

(Endnotes)

1 ¹ See The American Recovery and Reinvestment Act of 2009, H.R. 1 at Sec. 1110, S. 336 at Sec. 1604. The House bill covers purchases of iron and steel, while the Senate bill adds purchases of manufactured goods. Section 1604 of the Senate bill is titled “Buy American,” and that term is used to refer to the provisions in this report.

2 Gary Clyde Hufbauer and Jeffrey J. Schott, “Buy American: Bad for Jobs, Worse for Reputation,” Peterson Institute for International Economics, Policy Brief No. PB09-2 (Feb. 2009) (available on-line at <http://www.iie.com/publications/pb/pb09-2.pdf>) (hereinafter “Hufbauer and Schott”); Memorandum to Interested Parties, “The ‘Buy American’ Provisions in the Economic Recovery Package,” The Third Way Economic Program (Feb. 2, 2009) (available on-line at <http://www.thirdway.org/products/190>) (hereinafter “Third Way”); “IMF Goal for Global ‘Stimulus’: Two Percent of World GDP,” Progressive Policy Institute, Trade Fact of the Week (Feb. 4, 2009) (available on-line at <http://www.ppionline.org/ndol/print.cfm?contentid=254895>) (hereinafter “PPI”).

3 See Hufbauer and Schott at 4-7; Third Way at 1; PPI.

4 The Dorgan-Baucus-Brown amendment, passed by the Senate by voice vote on February 4, 2009, added the following provision to Section 1604: “This section shall be applied in a manner consistent with United States obligations under international agreements.” 155 CONG. REC. S1528 (daily ed. Feb. 4, 2009) (statement of Sen. Baucus).

5 Hufbauer and Schott incorrectly assert that NAFTA covers federal block grants to the states, even though the states themselves are not covered. Hufbauer and Schott at 7. The procurement chapter of NAFTA explicitly provides that the agreement does not cover “any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments.” NAFTA, art. 1001(5)(a).

6 See U.S. Appendix to the GPA at Annex 2, note 5. The U.S. has also excluded federal funds for highway and transit projects from all other FTAs to which it is a party that would otherwise cover such funds. The U.S.-Jordan FTA does not contain any procurement commitments on behalf of the United States. In the U.S.-Israel FTA and U.S.-Singapore FTA, the U.S. made procurement commitments only to the extent already undertaken in the GPA, including the exception for highway and transit funding in Note 5 to Annex 2 of the U.S. Appendix to the GPA. In NAFTA and the U.S.-Bahrain FTA, the U.S. did not make specific commitments on behalf of states, thus state procurement of goods with federal funds is not

covered. In all other FTAs signed on to by the U.S., the U.S. noted in its FTA procurement schedule the same exception with regard to transit and highway funds included in the GPA. *See* U.S.-Chile FTA, Annex 9.1, Section B, Schedule of the United States, Note 4; U.S.-Australia FTA, Annex 15-A, Section 2, Schedule of the United States, Note 5; U.S.-Morocco FTA, Annex 9-A-2, Schedule of the United States, Note 5; U.S.-Peru FTA, Annex 9, Section B, Schedule of the United States, Note 5; CAFTA-DR, Annex 9.1.2(b)(i), Section B, Schedule of the United States, Note 5.

7 *See* 19 U.S.C. Sec. 2511.
8 19 U.S.C. Sec. 2511(a).
9 *See* 48 C.F.R. Sec. 25.400-.402. For an example of a recent update to the waiver, *see Federal Acquisition Regulation; FAR Case 2007-016, Trade Agreements—New Thresholds*, 73 Fed. Reg. 10,962 (Feb. 28, 2008).
10 H.R. 1 at Sec. 1110(b)(1); S. 336 at Sec. 1604(b)(1).
11 *See* Congressional Research Service, *The Buy American Act: Requiring Government Procurements to Come from Domestic Sources*, CRS 97-765 A (updated Aug. 29, 2008), at 4.
12 *Id.*
13 Hufbauer and Schott at 7.
14 *See id.* at 3-4 and Tables 3-5; Third Way at 1; PPI.
15 United States Trade Representative, *National Trade Estimate Report on Foreign Trade Barriers* (Mar. 28, 2008). Available on-line at <http://www.ustr.gov>.
16 *Id.*, at 63.
17 *Id.* at 214-216.
18 *Id.* at 314-315
19 *Id.* at 134-135.
20 *Id.* at 264.
21 *Id.* at 45.
22 *See generally* Hufbauer and Schott; Third Way; PPI.
23 Hufbauer and Schott at Table 3.
24 *Id.* at Tables 3 and 4.
25 The Buy American Act, which applies to direct federal contracts, was enacted in 1933. 41 U.S.C. Sec. 10a *et seq.*
26 Hufbauer and Schott at 4.
27 PPI.
28 *See, e.g.*, Hufbauer and Schott at 1-2 and Tables 1 and 2.
29 These estimates are from Christina Romer and Jared Bernstein, “The Job Impact of the American Recovery and Reinvestment Plan” at Table 4 (Jan. 9, 2009).
30 *See* James Heintz, Robert Pollin, and Heidi Garrett-Peltier, “How Infrastructure Investments Support the U.S. Economy: Employment, Productivity, and Growth,” Political Economy Research Institute and the Alliance for American Manufacturing (Jan. 2009).
31 Hufbauer and Schott at 8 (“Existing laws already provide Buy American preferences for much of the public procurement authorized in the stimulus bill ...”). The 4 percent baseline figure that Hufbauer and Schott rely upon reflects the application of pre-existing Buy American requirements to federal contracting. *See* 41 U.S.C. Sec. 10a *et seq.* (applying Buy American requirements to federal contracts for the purchase of goods, whether manufactured or unmanufactured). The data set relied upon by Hufbauer and Scott from the Federal Procurement Data System, available at www.fpds.gov (accessed on Feb. 6, 2009), is titled the “Buy American Act Place of Manufacture Report.”
32 Hufbauer and Schott at Table 2, note.
33 *See id.* at 4; Third Way at 1.
34 *See* H.R. 1 at Sec. 1110(b)(2); S. 336 at Sec. 1604(b)(2).
35 *See* 41 U.S.C. Sec. 10a.
36 Buy American Act Place of Manufacture Report (2007), <https://www.fpds.gov> (accessed on Feb. 6, 2009).
37 *See* H.R. 1 at Sec. 1110(b)(3); S. 336 at Sec. 1604(b)(3).
38 *See, e.g.*, “Buy America” requirements attached to federal funds granted to the states for highway projects (23 U.S.C. Sec. 313) and mass transit (49 U.S.C. Secs. 5307(d)(1)(E)(iii), 5323(j)). Similar provisions apply to federal funding for aviation projects (49 U.S.C. Sec. 50101 *et seq.*), rail (49 U.S.C. Sec. 24305(f)), and water treatment works (33 U.S.C. Sec. 1295).
39 *See* 48 C.F.R. Sec. 25.105(b) (6 and 12 percent evaluation factors in Federal Acquisition Regulations); 48 C.F.R. Sec. 255.502(c)(ii)(E), (iii)(A) (50 percent evaluation factor for Defense Department acquisitions).
40 Buy American Act Place of Manufacture Report (2007), <https://www.fpds.gov> (accessed on Feb. 6, 2009).
41 *See, e.g.*, Hufbauer and Schott at 8.
42 *See* discussion of Buy American and Buy America provisions applying to federal contracts and federal highway and transit funds at notes 25, 35, and 38, *supra*.

About The Authors

Terence P. Stewart is the Managing Partner of the Law Offices of Stewart and Stewart. Mr. Stewart's practice focuses on international trade matters (litigation, negotiations, policy) and customs law. He has worked with various industries to solve trade matters in the U.S. and abroad, including representing agricultural, industrial and service groups. He has previously served as Chair of the U.S. Court of International Trade Advisory Committee on Rules, President of the Customs and International Trade Bar Association, and as a Board Member of the Federal Circuit Bar Association. He is currently a member of the Council of Advisors of the U.S. Court of Appeals for the Federal Circuit and a member of the Steering Group of the International Trade Committee of the American Bar Association's International Law Section. Mr. Stewart is also a former member and prior Vice President of the Board of Directors of the U.S.-Africa Chamber of Commerce.

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About AAM

The Alliance for American Manufacturing (AAM) is a unique non-partisan, non-profit partnership forged to strengthen manufacturing in the U.S. AAM brings together a select group of America's leading manufacturers and the United Steelworkers. Our mission is to promote creative policy solutions on priorities such as international trade, energy security, health care, retirement security, currency manipulation, and other issues of mutual concern.

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