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"Byrdening" Relations: U.S. Trade Policies Continue to Flout the Rules

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Overview

As 2004 begins U.S. commitment to the rules-based system of trade is uncertain at best. Despite repeal of the steel safeguard tariffs, the United States remains neglectful of its obligations under various World Trade Organization agreements. It has failed to implement several adverse WTO rulings in recent years. One of the more notorious instances of noncompliance concerns the Continued Dumping and Subsidy Offset Act—better known as the Byrd amendment.

The Byrd amendment directs the distribution of antidumping and countervailing duties collected by the U.S. Customs Service (now called U.S. Customs and Border Protection) to special accounts for disbursement to companies that supported the original petitions in these cases. In September 2002 a WTO dispute settlement panel found the Byrd amendment in violation of several provisions of various WTO agreements. Four months later the WTO Appellate Body upheld most of the panel's findings, and an arbitrator subsequently set a deadline of December 27, 2003, for the United States to comply with that ruling.

That date came and went without any steps taken by the Congress or the administration to resolve the issue. Now, trade sanctions by some or all of the 11 WTO complainants against U.S. exporters are likely, if not imminent. Later this month those members who choose to retaliate will make their decisions known to the WTO, and an arbitrator will likely determine the level of retaliation to which each member is entitled.

Why is the Byrd amendment so reviled by U.S. trade partners? Why have U.S. policymakers drawn a line in the sand over this provision? And what are the implications of continued U.S. intransigence on this issue?

How a Bill Became a Law—Redux

The Continued Dumping and Subsidy Offset Act was originally introduced by Sen. Mike DeWine (R-OH) during the first session of the 106th Congress as S.61. When introducing

the bill on January 19, 1999, Sen. DeWine remarked: "It's time we impose a *heavier price* on dumping and subsidization. The Continued Dumping and Subsidization Offset Act would accomplish this goal. It would transfer the duties and fines imposed on foreign producers directly to their U.S. competitors. Under our bill, foreign steel producers would get a *double hit* from dumping: they would have to pay a duty, and in turn, see that duty go directly to aid U.S. steel producers."¹

Although the bill had 26 cosponsors, it never garnered enough support in the Senate Finance Committee to make it to the floor for a vote. Perhaps the Finance Committee—the committee with expertise and jurisdiction on trade matters—was aware that the "heavier price" and "double hit" nature of the bill about which Sen. DeWine boasted constituted violations of the WTO's Antidumping Agreement and Agreement on Subsidies and Countervailing Measures.

Despite the known opposition—or more likely because of it—Sen. Robert Byrd (D-WV) surreptitiously inserted the language from S.61 into a 2001 appropriations bill for agriculture and related programs at the last minute without any debate on the amendment. Hence, it became known as the Byrd amendment.

Since it would have required a vote against the entire appropriations bill to defeat the Byrd amendment, Congress passed the legislation and sent it to the president for his signature. In October 2000 President Clinton signed the bill into law but noted the WTO-inconsistent nature of the Byrd amendment, calling on the Congress "to override this provision, or amend it to be acceptable, before they adjourn." That never happened.²

While disbursements under the Byrd amendment thus far have been relatively modest—\$231 million in fiscal year 2001 and \$330 million in 2002—the number of claims, the number of claimants, the amounts sought, and the average company disbursement have been rising. In 2001 there were 894 separate claims seeking in total \$1.2 trillion! That's right: close to 10 percent of gross U.S. domestic product.

The 894 claims were filed by 155 different companies, and 541 of them (61 percent) were successful in winning some money. The average award per claim granted was \$427,000.

In 2002 the number of claims and the number of claimants receiving money jumped to 1,089 and 731, respectively—a success rate of 67 percent. The number of companies making claims surged to 243—an increase of 57 percent from the previous year. The amount of money sought rose to \$1.4 trillion, and the amount dispersed jumped to \$330 million, for an average award per claim granted of \$451,000.

The fiscal 2003 figures have not yet been released, but disbursements are projected to skyrocket on account of duties collected on Canadian lumber—a figure that may be over \$5 billion.³

How a Law Became a Dispute

In December 2000 the European Union and eight other countries—Australia, Brazil, Chile, India, Indonesia, Japan, South Korea, and Thailand—sought consultations with the United States over the Byrd amendment. Failing resolution, a WTO dispute settlement panel was appointed to adjudicate the matter. In late 2001 Canada and Mexico joined the matter as the 10th and 11th complainants.

The complainants maintained that the Byrd amendment was in violation of some 16 provisions of various WTO agreements. But the essence of those complaints boiled down to two practical concerns.

First, reimbursement of expenses constitutes a measure beyond the scope of what is permissible under the Antidumping Agreement and the ASCM. Those agreements expressly permit the imposition of definitive duties, provisional duties, or price undertakings (suspension agreements) to offset the effects of dumping or subsidization. No other remedies—including distribution of duties to protection-seeking companies—are allowed. Just as Sen. DeWine said, the effect of the Byrd amendment is that foreign producers are effectively penalized twice—a clear violation of the relevant WTO agreements.

Second, by compensating petitioners and supporters of petitions, the Byrd amendment provides an additional financial incentive to file antidumping and countervailing duty cases. Furthermore, by excluding from compensation those companies or unions not supporting the petitions, the law encourages companies that might otherwise decline to support petitions to do so simply to maintain eligibility for compensation. And this effect undermines the requirement (under Article 5.4 of the Antidumping Agreement and Article 11.4 of the ASCM) that administering authorities determine whether there is sufficient industry-wide support for a petition before initiating an investigation.⁴

Certainly, the possibility of receiving payments for supporting a petition has potential to corrupt the process. If for no other reason, a producer otherwise disinclined to support the petition might choose to support it because the producer would be disadvantaged if its domestic competitors got money for supporting a petition and it did not. This is particularly realistic since there is virtually no economic cost to supporting a petition.

During the dispute settlement process, Canada submitted two letters written by or on behalf of U.S. producers that reveal how the potential of receiving Byrd money taints the equation. One letter, written by John Ragosta, a trade attorney with Dewey Ballantine, seeks support from other producers for a prospective countervailing duty petition. The letter explains the Byrd amendment and states that “if the [CDSOA] is . . . applicable here, the total amount available to US lumber producers could be very large—easily running into hundreds of millions of dollars a year.”⁵ The second letter, written by a U.S. producer, provides an example of how the Byrd amendment influences the process. In it, the producer is changing its position from one of opposition to a petition to one of support “for purposes of qualification for consideration for benefits under the” Byrd amendment.⁶

In September 2002 a dispute settlement panel, concurring with the complainants on their major points, found the Byrd amendment in violation of several WTO provisions⁷ and recommended that the United States bring the law into conformity with those agreements by repealing it.⁸ The United States appealed the decision.

In January 2003 the Appellate Body issued a split ruling.⁹ It upheld the panel’s determination that the Byrd amendment is a measure in excess of what is considered a permissible response to dumping or subsidization, but in a display of deference to U.S. authority, it overturned the panel’s ruling that the amendment undermines the administering authority’s ability to determine whether there is sufficient industry support for a petition. The Appellate Body reasoned that even if support for a petition is motivated by the prospect of receiving Byrd money, the Antidumping Agreements and the ASCM do not require the administering authorities to ascertain the motives behind support. All that matters is whether there is sufficient support.

How a Dispute Became a Problem

Congress—in particular, the Senate—seems to have drawn a line in the sand over this issue. In February 2003, 69 senators signed a letter to the president urging him to press America’s trading partners into “negotiations on CDSOA prior to any attempt to change our laws.” The letter states that “the WTO has acted beyond the scope of its mandate by finding violations where none exists and where no obligations were negotiated.”¹⁰

Rep. John Spratt (D-SC) said: “This is a clear example of overreaching by the WTO, extending obligations to the United States that do not exist in any trade agreement. This is not the first time the WTO has done this. . . . I think the Bush Administration should serve notice now that this issue is part of the Doha agenda, and we will not close the round until it is resolved to our satisfaction.”¹¹ Rep. Sander Levin (D-MI) said he would oppose any effort to repeal the Byrd amendment, adding that the growing list of adverse rulings is eroding U.S. support for the WTO.¹² Sen. Max Baucus (D-MT), who has been a leading critic of the WTO dispute settlement system, said, “In the end, this decision may not matter much, as I suspect there is little support in Congress for implementing it.”¹³

That is a serious statement. For the highest-ranking Democrat with trade expertise and jurisdiction to suggest that a WTO decision may not be implemented speaks volumes about U.S. commitment to the international trading system. Greg Mastel, a trade adviser for a Washington law firm and former counsel to the Senate Finance Committee, is so convinced that repeal is unlikely that he reportedly went as far as to suggest that the complainants should consider adopting their own versions of the Byrd amendment as an alternative to U.S. repeal.¹⁴

Nevertheless, there have been some attempts by Congress to implement the Appellate Body's decision. Sen. Olympia Snowe (R-ME) introduced legislation in 2003 that would divert the collected duties to special accounts to help communities (rather than companies) that are affected by dumping and subsidization. Whether this would suffice to satisfy the Appellate Body is unclear. What is clear, however, is that the legislation did not inspire much support in Congress during 2003.

Better received was antagonistic legislation, introduced by Sen. Baucus in March 2003, proposing the formation of a panel of judges to review WTO decisions that are adverse to the United States. The implication of this proposal is that there is an anti-American bias in the WTO, and therefore U.S. commitment to that body is tenuous.

The premise here is plain wrong. It ignores important facts. Complainants win overwhelmingly. Since 1995 (the first year of the WTO), complainants have won 88 percent of the cases adjudicated in the dispute settlement system.¹⁵ This is testament to the system's working. Before pursuing dispute settlement and incurring the costs of a case, complainants make certain that they have a sound case.

Since 1995 the United States has been involved (as complainant or defendant) in 155 of the 304 total disputes (51 percent). In 2003 the number of disputes in which the United States was a defendant surpassed the number of disputes in which it was a complainant for the first time. In the first four years of the WTO, the United States was a complainant 51 times and a defendant 27 times. During the most recent four years, the United States was a complainant 15 times and a defendant 42 times.¹⁶

The United States has been playing defense with regularity in recent years, not because of an anti-American bias in the WTO, but because of its own overzealous application of trade restraints and serious flaws in its trade remedy laws.

Implications of Continued U.S. Intransigence

If nothing else, the Bush administration has become adept at making lemonade from its abundance of trade lemons. In response to the Appellate Body report, the Office of the U.S. Trade Representative offered the following statement:

We welcome the findings in today's report that the Act is consistent with the WTO requirements for the initiation of anti-dumping or countervailing duty investigations. We are still reviewing that report, but we note that since the dispute did not involve the

underlying U.S. anti-dumping and countervailing duty laws, the United States will continue to vigorously enforce those laws to ensure that U.S. industries, farmers, and workers are not forced to compete with unfairly traded imports.¹⁷

That statement captures the essence of why this dispute is a big problem for policymakers, and indeed for U.S. trade policy. The Byrd amendment relates to the sacred cow of U.S. trade policy—the trade remedy laws.

Congress seems to have a reflexive, blind commitment to preserving the status quo when it comes to the trade remedy laws—in particular, the antidumping law. Despite the fact that the antidumping law is used predominantly by a handful of U.S. industries to the detriment of large swaths of U.S. import-using industries and exporters, many in Congress are loath to budge on this issue.¹⁸ In the summer of 2002 trade promotion authority legislation was almost sunk by the Senate's inclusion of the so-called Dayton-Craig amendment, which would have denied "fast-track" voting procedures to any trade agreement that dared to include changes to the antidumping law. Under threat of veto by the president, the Senate grudgingly dropped the amendment.

The dispute over the Byrd amendment is not an isolated event. There are a number of outstanding WTO rulings against U.S. laws and policies—including the Foreign Sales Corporation/Extraterritorial Income Tax provision and the Antidumping Act of 1916—that the United States has yet to implement. This mounting record of noncompliance, or at least foot-dragging, calls into question the commitment of the United States to the rules-based trading system.

Should the United States continue to ignore its obligations, it will forfeit its ability to compel other members to abide by the rules. Meanwhile, with the Doha Round of multilateral trade talks faltering, U.S. delinquency on these matters could hasten the round's collapse. After all, what is the point of negotiating new agreements when those currently in effect are disregarded with such frequency by the world's largest economy?

It is time for policymakers to answer honestly: Are subverting the world trading system and souring international relations for years to come worth the short-term political gains to be won by intransigence?

1. Mike DeWine, Comments in "Statements on Introduced Bills and Joint Resolutions," *Congressional Record*, no. 8, January 19, 1999, p. S497. Emphasis added.

2. White House, Office of the Press Secretary, "Statement by the President: H.R. 4461, The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act for FY 2001," news release, October 28, 2000.

3. Mark Drajem, "U.S. Misses Deadline on Repeal of Tariff Law," *Seattle Times*, December 30, 2003.

4. Under the Antidumping Agreement and the ASCM, an investigation cannot be initiated unless the authorities have determined that the petition requesting relief has been filed "by or on

behalf of the domestic industry.” The petition is considered to have been made “by or on behalf of the domestic industry” if it is supported by those domestic producers whose collective output constitutes more than 50 percent of the total production produced by that portion of the domestic industry expressing either support for or opposition to the petition. In addition, no investigation can be initiated if domestic producers expressly supporting the petition account for less than 25 percent of total domestic production.

5. Report of the Panel on *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R and WT/DS234/R, September 16, 2002, p. 311. Letter from J. Ragosta, Dewey Ballantine, dated January 8, 2001, p. 2, attached to a letter from R. Wood, chairman of the Coalition for Fair Lumber Imports, dated January 8, 2001.

6. *Ibid.*, p. 311. Brief of Fred Tebb & Sons, Inc., dated March 22, 2002.

7. *Ibid.* The panel concluded “that the CDSOA is inconsistent with AD Articles 5.4, 18.1 and 18.4, SCM Articles 11.4, 32.1 and 32.5, Articles VI:2 and VI:3 of the GATT 1994, and Article XVI:4 of the WTO Agreement.”

8. Normally, when a dispute settlement panel rules in favor of the complainant(s), it simply recommends that the defendant bring its law into conformity with the agreement. Here, the recommendation of outright repeal indicated a fairly strong indictment of the Byrd amendment.

9. See Report of the Appellate Body on *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R and WT/DS234/AB/R, January 16, 2003, p. 104.

10. Letter from 69 U.S. senators to President George W. Bush, February 4, 2003.

11. John Spratt, “Spratt Criticizes WTO Decision on Anti-Dumping Remedy, Calls on Administration to Strike Back,” news release, January 16, 2003.

12. “U.S. Faces WTO Pressure to Repeal Trade Measure,” *New York Times*, January 17, 2003.

13. *Ibid.*

14. Attributed to Greg Mastel in “Australia and EU to retaliate against US,” *MSNBC.com*, December 14, 2003.

15. Peter Holmes, Jim Rollo, and Alasdair R. Young, “Emerging Trends in WTO Dispute Settlement: Back to the GATT?” World Bank Policy Research Working Paper 3133, September 2003, Table 11, p. 18.

16. Compiled from statistics on the WTO website, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

17. Statement from the Office of the United States Trade Representative, January 16, 2003.

18. For a more detailed discussion of the costs of the antidumping status quo, see Brink Lindsey and Daniel J. Ikenson, *Antidumping Exposed: The Devilish Details of Unfair Trade Law* (Washington: Cato Institute, 2003).