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The Byrd Amendment Battle: American Trade Politics at the WTO

By Claire Hervey*

The Continued Dumping and Subsidy Offset Act of 2000 (CDSOA or the Byrd Amendment) has been controversial in both domestic U.S. politics and in international trade law since its enactment. In the United States, the controversy surrounds the questionable method of its enactment. In the international sphere, the controversy surrounds its validity under the world's strongest supranational legal regime. While domestic legal challenges to the Byrd Amendment have been fruitless, international litigation in the World Trade Organization (WTO) has declared the act illegal under international law. In the largest joint dispute resolution action in the history of the WTO, thirty countries challenged the Byrd Amendment as a violation of the ban on governmental subsidies, and won. Despite its defeat, however, the Byrd Amendment remains in force. The most important implication of the WTO decision, therefore, is not the propriety of America's legislation but rather the power of the WTO to act as an effective supranational legal institution.

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3. WTO Appellate Body Report, United States—Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) at 1 [hereinafter Appellate Body Report]. The complaint was brought by eleven WTO members: Australia, Brazil, Canada, Chile, the European Communities (representing fifteen western European countries), India, Indonesia, Japan, Mexico, South Korea and Thailand. Joining as third-parties were Argentina, Costa Rica, Hong Kong,
The Byrd Amendment provides a novel approach to duties and tariffs. A duty or tariff is essentially a tax placed on an import. The rationale behind an antidumping or countervailing duty is to "level the playing field" in the domestic market by guarding against unfair or anticompetitive foreign trade practices which might lead to "predatory" (i.e. monopoly-creating) trade practices. The imposition of a tariff prevents predatory practices by raising the artificially depressed price of dumped or subsidized imported goods to reflect "fair value," thereby protecting domestic companies. Hence the term "protectionism" often refers to tariff-raising measures.

Under the Byrd Amendment, U.S. companies that file antidumping petitions receive the duty proceeds from tariffs imposed on foreign goods dumped in the U.S. market. Companies may also petition for and receive the proceeds of countervailing duties imposed on subsidized imports. Traditionally, this tariff revenue has been directed to the U.S. Treasury's general fund. Under the Byrd Amendment, however, the tariff revenue is only temporarily held by the Treasury, before being redirected or channeled to the complaining U.S. companies as an "offset" for "qualifying expenses."

The complainants in the WTO case argued that the Treasury's distribution of tariff proceeds to domestic manufacturers seeking protection from anticompetitive practices constitutes an anticompetitive practice itself, by ostensibly subsidizing the domestic industry. The Byrd Amendment is seen by its opponents as double trade protection—a duty plus a subsidy—resulting in a retaliatory imbalance in favor of U.S. industries.

The United States denied that CDSOA violated the WTO, arguing that the distribution of money to affected domestic producers was an "exercise of the intrinsic right of a WTO Member to provide subsidies." The trigger for a company to receive funds under the law was its status as an "affected domestic producer," the offset payments being a restorative response to the producer's injury due to dumping or subsidization. This action was defended as materially distinct from the WTO-prohibited imposition of measures on the dumped or

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Israel and Norway. The total number of complaining countries represented was thirty. Id.


6. Id.
subsidized products themselves, or on the products’ foreign producers or exporters. The complainants disagreed with this characterization.

The WTO’s Dispute Resolution Panel (the Panel) found for the complainants in fall of 2002, and the United States appealed to the WTO Appellate Body. On January 16, 2003, the Appellate Body affirmed the core findings of the Panel, recommending that the United States change or repeal the law in order to comply with its WTO obligations. An arbitration decision issued in June 2003 directed the United States to comply with this ruling by withdrawing or amending the Byrd Amendment by December 27, 2003, or face authorized retaliatory sanctions. The U.S. Congress has failed to comply with the arbitral ruling (as well as with several other decisions of the WTO), deepening the rift between America and its largest trading partners during the important Doha Round negotiations, and threatening the U.S. economy by creating the specter of authorized economic retaliation in the billions of dollars.

Part One of this note will provide an overview of the applicable trade laws and their rationale and of the dispute resolution procedure in the WTO. Part Two will dissect the WTO’s analysis and adjudication of the matter and will discuss its legal and practical effects. Part Three will trace CDSOA’s controversial origin and effects and examine the various political and economic consequences of this decision in the United States.

I. "Unfair" Trade Practices and Their Legal Remedies

Trade barriers are controversial, but not universally disallowed. In fact, the WTO allows countries to impose temporary import restraints when certain products, imported under otherwise fair conditions, enter the United States fast enough to cause, or threaten

7. Id. ¶ 16.
10. Appellate Body Report, supra note 3.
11. WTO Award of the Arbitrator, United States—Continued Dumping and Subsidy Offset Act (Byrd Amendment)—Arbitration under Article 21.3(c) of the DSU, WT/DS217/14, WT/DS234/22 (June 13, 2003).
to cause, serious injury to a particular domestic industry. This "safeguard" or "escape-clause" mechanism allows specific domestic companies or sectors a temporary period to adjust to the "fair" foreign competition. However, this period of protection must be limited in time (usually less than three years) and to certain industries.

In response to "unfair" foreign competition, the rules are different. Unfair competition usually takes the form of dumping or subsidization.

**Dumping**

Dumping occurs when the price of a good is lower in an export market than in its home market. In a normal market economy, pricing is determined by the costs of production, allowing competition on the basis of efficiency. Although dumping is often inadvertent (due to exchange rate fluctuations or accounting practices), it may also be purposeful. Intentional dumping may be permissible when it is used in order to liquidate surplus or perishable inventory, or to compensate for a domestic recession. These cases are the result of temporary market conditions, and therefore the dumping is short-term and minimally injurious.

The dumping that is problematic is long-term in nature and considered a "predatory" practice. Under this model, the exporter lowers prices below cost in the U.S. market in order to increase market share and eventually drive U.S. competitors out of business. After obtaining a monopoly in the United States, the foreign dumper drastically raises prices in the market to offset its dumping losses. To guard against this possibility, the United States imposes antidumping duties equal to the margin of dumping.

**Foreign Subsidies and Countervailing Duties**

A subsidy distorts an import's price by reducing the foreign company's costs of production. This is considered an unfair trading
practice because it disadvantages private firms that are trying to compete on a non-subsidized basis. The remedy for a foreign subsidy is called a countervailing duty, and is determined by the estimated impact the subsidy had on the product's price.

The Traditional Process for Determining and Remedying Unfair Trade Practices in the United States

The Tariff Act of 1930 is the basis for U.S. trade remedy law, seeking "the restoration of conditions of fair trade." It requires that two conditions be met to trigger domestic protections. The first requirement is the sale or potential sale of foreign goods in the United States be at "less than fair value," i.e., whether dumping or subsidization, as determined by the U.S. Department of Commerce (DOC) has occurred. Second, the dumping or subsidization must cause potential or actual "material" injury to an existing or emerging U.S. industry, as determined by the U.S. International Trade Commission.

Upon the determination of a materially injurious dumping or subsidization practice, the DOC ascertains the "margin" of dumping or subsidization—usually the difference between a product's normal value in its home market (or without subsidization) and its sale price in the United States. This marginal price is applied to the product as a tariff. The proceeds of the tariff are paid to the U.S. Treasury, and the foreign producer consequently has a higher cost basis, and hence must sell at a more competitive price.

The Byrd Amendment

CDSOA made an important procedural change to the Tariff Act

19. Id. at 170.
20. Id. at 171.
21. Tariff Act of 1930, 19 U.S.C. §§ 1202-1681b (1999 & Supp. 2001). Other trade remedy statutes do exist, but are not relevant to this analysis. The Anti-Dumping Act of 1916 was declared illegal by the WTO in 2000, but the United States has yet to repeal the statute. The Omnibus Trade and Competitiveness Act of 1988 allows the U.S. Trade Representative to initiate actions in other countries, and is not relevant here.
of 1930. CDSOA states: "Duties assessed pursuant to a countervailing duty order, [or] an antidumping duty order . . . shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures. Such distribution shall be known as the 'continued dumping and subsidy offset.'" 25

"Affected domestic producers" are any businesses, farmers, or union members who petition for an antidumping or countervailing duty against a foreign producer. 26 "Qualifying expenditures" are any essentially legitimate business expenses incurred by the producer after filing the petition. 27 Administratively, the duties are collected by the Customs Service and deposited into the U.S. Treasury's Offset Account. Organizations that file petitions are then allocated the monies after the close of the fiscal year. Offset payments are distributed in proportion to the claimed qualifying expenditures, meaning that larger companies usually get a larger share. 28 Despite original congressional forecasts of $39 million in annual disbursements, $231 million were disbursed in 2001. 29 In 2002, the disbursements increased to $329 million. 30

**WTO Dispute Resolution Procedures**

The WTO established a binding dispute resolution procedure under the Uruguay Round in 1994. 31 Under the Dispute Settlement Understanding (DSU), a member country that believes another country's trade policies violate the terms of the WTO may seek resolution in three successive ways. First, the parties are encouraged to resolve their differences by consultation or negotiation. Approximately one-half of all disputes are resolved at this stage. 32 If this process does not succeed in settling the matter, then the dispute is submitted to a Dispute Resolution Panel of three to five members. 33

26. Id.
27. Id.
30. Id.
32. COHEN ET AL., *supra* note 4, at 190.
33. Id.
The decision of the Panel is automatically binding, but issues of law may be appealed to the Appellate Body, which is the final arbiter of the dispute. A decision of the Appellate Body is final and binding, and a decision by it against a member must be implemented within a "reasonable period of time" or else the member will face authorized trade retaliation.

II. CDSOA at the WTO

The case against CDSOA represented the largest number of complainants for any WTO case, with eleven complaining parties (Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand) and five third-party participants (Argentina, Costa Rica, Hong Kong, Israel and Norway). Together, the fifteen parties represent thirty countries, twenty-seven of which are among the top fifty trading partners of the United States.

Suit at WTO Dispute Resolution Panel

Immediately following the Byrd Amendment's passage, many of America's largest trading partners began proceedings to challenge the law at the WTO. The complaining parties argued that CDSOA violated seven different antidumping, subsidy and countervailing duty provisions of the General Agreement on Tariffs and Trade (GATT).

The United States is a party to the WTO and its governing treaty, the GATT. GATT Article VI is the primary provision relating to antidumping and countervailing duties. Supplementing and clarifying Article VI are two important agreements: the

34. Id.
35. Id.
38. The "European Communities" represents the 15 countries of the European Union—Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom.
42. Lopez, supra note 24, at 415, 420.
Agreement on Implementation of Article VI of the GATT (Anti-Dumping Agreement or ADA) and the Agreement on Subsidies and Countervailing Measures (SCM). Both of these agreements are part of the GATT and have the same binding force.

The ADA states: "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by the Agreement." The SCM reads: "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." Except for the references to dumping or subsidization, the articles are the same. Indeed, even the footnotes to each of these provisions are identical: "This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate."

The complaining parties challenged the Byrd Amendment primarily on the ground that it violated the ADA and SCM as a "non-permissible specific action against dumping or a subsidy." Four other, related issues were specifically raised at the Appellate Body: 1) whether the United States acted in good faith in enacting CDSOA; 2) whether CDSOA violates the WTO Agreement; 3) whether CDSOA "nullifies or impairs benefits accruing to the complaining parties"; and 4) whether the United States should have received a separate Dispute Resolution Panel report on the claim brought by Mexico.

Issues 2 and 3 on appeal are inextricably tied to the primary claim, in that if CDSOA violates ADA and SCM, then it by definition also violates the WTO Agreement and nullifies or impairs benefits. Therefore, these three items will be examined together, under the aegis of the ADA/SCM issue. Issue 4 on appeal, the right to a separate Mexico report, is resolved as an essentially temporal and practical consideration and will not be discussed here, except to say that the Appellate Body did not find the separate report necessary.

43. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, art. 18.1 [hereinafter ADA].
45. Id. at 1533, n. 56; King, supra note 28.
46. Appellate Body Report, supra note 3, ¶ 223(a).
47. Id. ¶ 223(b).
48. Id. ¶ 223(c).
49. Id. ¶ 223(d).
50. Id. ¶ 223(e).
Issue 1, the good faith issue, is the only portion of the Panel Report that was overturned on appeal, and is explored below.

**CDSOA’s Violation of WTO, ADA and SCM**

This case involves the status of a domestic U.S. law under international treaties. The core issue is whether CDSOA is an “impermissible specific action against dumping or a subsidy” violating the ADA and the SCM, and by extension violating the WTO agreement and nullifying and impairing benefits entitled to countries seeking to enter the U.S. market.

The Appellate Body textually analyzed each part of the phrase “impermissible specific action against dumping or a subsidy,” developing a three-step standard to determine this issue. The three steps, or prongs, are “Specific Action,” “Adverse Bearing,” and “Permissibility.”

The Appellate Body defined the first prong, Specific Action, as “a measure ... taken only in situations presenting the constituent elements of dumping or a subsidy.”51 The second prong, Adverse Bearing, determined the meaning of the clause “acts ‘against’ dumping or a subsidy,” defining it as a measure that “has an adverse bearing on the practice[s] of dumping or ... subsidization.”52 Both of these prongs are necessary, but not sufficient, elements for a finding of a WTO violation.

Finally, if it was determined that CDSOA was both a specific action and had an adverse bearing, then the Panel had to consider whether the act was permissible, i.e., fit under any exceptions to the ADA and SCM. Some specific acts against dumping or subsidies are allowed under the WTO. These exceptions include definitive antidumping or countervailing duties, provisional measures and undertakings, and in the case of subsidies, countermeasures.53 Therefore the final Permissibility prong determines whether CDSOA falls within one of these exceptions. If it does not fall within an exception, then it is impermissible, failing the third prong and violating the WTO.

51. *Id.* ¶ 227.
52. *Id.*
53. *Id.* ¶ 231. See also ADA, *supra* note 43; SCM Agreement, *supra* note 44.
The Specific Action Prong

The complaining parties argued that the term "specific action" as used in the phrase "specific action against dumping" (or against a subsidy), should be interpreted using the test established by the Appellate Body in the US—1916 Act case.\(^5\) In that case, a U.S. law that ostensibly only targeted "predatory pricing" was found to be inconsistent with GATT as a specific action against dumping because the remedial actions were taken in response to any dumping or a subsidy, not just a predatory pricing practice.\(^5\) The Appellate Body reasoned that the remedy was specifically and exclusively linked to the determination of dumping or a subsidy, as evidenced by the text of the law.\(^5\)

The United States argued that unlike the 1916 Act, CDSOA's text did not explicitly refer to the constituent elements of dumping or a subsidy, nor did the determination of dumping or a subsidy trigger application of the law.\(^5\)

The Appellate Body dismissed the U.S. argument, concluding that the test for specificity does not require the explicit use of the constituent elements in the text of the act. The test asks if the constituent elements are present, either explicitly or implicitly, as a specifically necessary condition for taking action under the act.\(^5\) Thus, a specific action is a measure taken only in response to a dumping or subsidy finding. Although it is not explicit in the text of the Byrd Amendment, a dumping or subsidy finding is absolutely necessary for CDSOA to be applied.

The United States further argued that if this definition for "specific action" were used, then any expenditure of the duties, such as for international emergency relief, would be considered a specific action against dumping or a subsidy.\(^5\) The Appellate Body again disagreed with the United States, determining that though the specificity requirement was necessary for an adverse finding on the law, it was nonetheless insufficient. The specific action must also be "against" dumping or a subsidy. International emergency relief

\(^5\) Appellate Body Report, supra note 3, ¶ 239.
\(^5\) Id.
\(^5\) Id. ¶ 243.
\(^5\) Id. ¶ 244.
\(^5\) Id. ¶ 245.
would have absolutely no effect on other countries’ dumping or subsidy practices, and therefore could not operate “against” dumping or a subsidy. This distinction brought the court to the next analytical prong: adverse bearing.

*The Adverse Bearing Prong*

The term “against” as used in the phrase “specific action against dumping” or a subsidy, was interpreted by the Appellate Body to mean “having an adverse bearing” on dumping or subsidization practices.

Relying on the Oxford English Dictionary, the United States argued that the meaning of “against” should include “in contact with.” This would have supported the U.S. case because the CDSOA duties do not “operate directly” on the imported good or its producer, but instead on the “practice of dumping,” and because the funds were indirectly channeled back to the petitioning domestic producers, not directly transferred from the foreign company to the domestic petitioner. The Appellate Body found that definition to be inappropriate and irrelevant, as it referred to physical contact and not the idea of opposition, which was the plain meaning of the word in the trade context.

Instead, the Appellate Body ruled that the “against” test should focus on whether a measure undermines the practice of dumping or subsidization, as the ADA and SCM pose no requirement that the measure act against the product or its manufacturer. The Appellate Body ruled that in determining whether CDSOA was against dumping or subsidization, “it is necessary to assess whether the design and structure of a measure is such that the measure is ‘opposed to’, has an adverse bearing on, or, more specifically, has the effect of dissuading the practice of dumping or the practice of subsidization, or creates an incentive to terminate such practices.”

Four elements of the Byrd Amendment’s design and structure
demonstrate that its effect is to transfer money from foreign producers of dumped or subsidized goods to their American competitors: the offset payments are financed from the duties paid by the foreign producers, 68 the "affected domestic producers" who receive offset payments are necessarily competitors of the duty-paying foreign producers, 69 the "qualifying expenditures" for which domestic producers are ostensibly reimbursed must be related to the production of the competitive product, 70 and finally, there are no requirements as to how an offset payment is to be spent. 71

These four elements show that CDSOA has an adverse bearing on foreign exporters by not only subjecting them to antidumping or countervailing duties, but also by forcing them to finance their own competitors, thereby creating a double penalty for exporting dumped or subsidized products. 72 For these reasons, the Appellate Body ruled that CDSOA was "undoubtedly" an action "against" dumping or a subsidy. 73 Having satisfied the necessary Specific Action and Adverse Bearing prongs, the analysis continued to the final consideration of whether the Byrd Amendment would fit into a permissible exception under the WTO.

**The Permissibility Prong**

In order to be permissible, a specific action against dumping or a subsidy must be in accordance with the WTO agreement. That is, it must be among the permissible responses considered in GATT 1994 as interpreted by the ADA or the SCM, 74 and it may only constitute one form of relief. 75

Under the rationale of *US-1916 Act*, WTO-permissible responses to dumping are definitive antidumping duties, provisional measures and price undertakings. 76 Similarly, the permissible responses to a countervailable subsidy are definitive countervailing duties, provisional measures, price undertakings and multilaterally-

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68. *Id.* ¶ 255.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* ¶ 256.
73. *Id.*
74. *Id.* ¶ 263.
75. *Id.* ¶ 270.
76. *Id.* ¶ 265.
sanctioned countermeasures under the dispute settlement system.\textsuperscript{77} In any case, the invoking party may only apply one remedy.\textsuperscript{78}

The U.S. argued that because the \textit{US-1916 Act} decision only referred to dumping, and because of certain textual differences between the agreements, the ADA rationale should not be extended to subsidies.\textsuperscript{79} The Appellate Body dismissed this argument, noting that the structure of the ADA and the SCM were identical and should be treated similarly.\textsuperscript{80}

CDSOA’s payments to affected producers fit none of the WTO-sanctioned categories. Although the duties imposed on the foreign dumped or subsidized products are independently allowable under the WTO, the affiliated offset payments to domestic competitors do not fit any permissible category. Moreover, if they were permissible, they would still constitute a double-remedy, and hence, violate the WTO limit of one form of relief.

The Byrd Amendment was therefore found to be an impermissible specific action against dumping or a subsidy,\textsuperscript{81} and the Appellate Body recommended that the United States bring the Byrd Amendment into conformity with its obligations under WTO, ADA and SCM.\textsuperscript{82}

\textit{Financial Incentive/Bad Faith Determination Overturned}

The Dispute Resolution Panel noted in its report that the Byrd Amendment “provides a financial incentive for domestic producers to file or support applications... because offset payments are made only to producers that file or support such applications.”\textsuperscript{83} The Panel determined that this violated ADA Article 5.4 and SCM Article 11.4. These provisions require that antidumping or countervailing duty investigations only be initiated when an application is supported by producers accounting for more than 25 percent of domestic production.\textsuperscript{84} The purpose of these rules is to ensure that the claim of injury is a legitimate industry-wide concern, not just an

\begin{itemize}
\item \textsuperscript{77} \textit{Id.} \textsuperscript{\textsection} 269.
\item \textsuperscript{78} \textit{Id.} \textsuperscript{\textsection} 270.
\item \textsuperscript{79} \textit{Id.} \textsuperscript{\textsection} 267.
\item \textsuperscript{80} \textit{Id.} \textsuperscript{\textsection} 268.
\item \textsuperscript{81} \textit{Id.} \textsuperscript{\textsection} 318(a).
\item \textsuperscript{82} \textit{Id.} \textsuperscript{\textsection} 319.
\item \textsuperscript{83} \textit{Id.} \textsuperscript{\textsection} 277.
\item \textsuperscript{84} \textit{Id.} \textsuperscript{\textsection} 281.
\end{itemize}
unsubstantiated attempt by an unrepresentative minority to get protection.\textsuperscript{85}

The Panel ruled that domestic producers’ motivation to support a petition was relevant to whether the petition was legitimately made on behalf of an entire industry.\textsuperscript{86} The Panel found that the Byrd Amendment inappropriately encouraged producers to support a petition to ensure that they received a share of the spoils, rather than because of a commercial threat of unfairly traded products.\textsuperscript{87} The Byrd Amendment’s petition policy promotes specific action by companies, which is different from protecting an entire industry from an unfair trade threat. When only petitioning companies receive offset payments, they obtain a competitive advantage over non-petitioning domestic companies, as a kind of selective subsidy. This encourages all domestic producers of a petitioned product to support the petition, so as not to be at a competitive disadvantage if and when offset payments are doled out.

If an antidumping or countervailing duty is raised on imports, then the entire domestic industry benefits from higher barriers to competition. However, if monies are disbursed based on specific protesting companies, then the squeaky wheels are the only ones to receive grease.

As an example, consider F, a foreign producer of widgets, and X and Y, domestic producers of widgets. Assume that an Fwidget’s home country value is $10. F is dumping Fwidgets in the United States at $1 less than its home country value ($10 - $1 = $9). This creates a margin of dumping of $1 per Fwidget. X petitions the government for an antidumping duty against F. Y does not support the petition. The United States imposes a $1 per Fwidget antidumping duty, which is paid by F to customs ($9 + $1 = $10). If 100 widgets enter the United States, F will pay $100 in antidumping duties. X and Y will both benefit because their products now compete with a more expensive (i.e. “fairly priced”) foreign product.

Under the Byrd Amendment, X, as the only petitioner, will also receive $100, reducing X’s costs of production by $100 and thereby lowering the price of Xwidgets. Y, though benefited by the higher-priced Fwidgets, is nonetheless disadvantaged by having to compete with lower priced Xwidgets. If both X and Y join the petition

\textsuperscript{85} Id. ¶ 279.
\textsuperscript{86} Id.
\textsuperscript{87} Id. ¶ 277.
(assuming they have equal market share) the $100 will be distributed $50 to X and $50 to Y, equally reducing their production costs, and creating no domestic advantages. The prudent company will therefore always join a petition, so that it can share the offsets. The Panel determined that this financial incentive to support petitions violated the purpose and intent of the ADA and SCM, concluding that the United States did not act in good faith when enacting the amendment.88

Table: Effect of Byrd Amendment on Widget Price

<table>
<thead>
<tr>
<th>Trade Regime</th>
<th>Market Price of Widgets in U.S.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>F dumping foreign producer</td>
</tr>
<tr>
<td>(Assume a widget cost of $10)</td>
<td>$9</td>
</tr>
<tr>
<td>No Trade Rules</td>
<td>+ $1 = $10</td>
</tr>
<tr>
<td>WTO Trade Law</td>
<td>+ $1 = $10</td>
</tr>
<tr>
<td>Byrd Amendment: only X petitions</td>
<td>+ $1 = $10</td>
</tr>
<tr>
<td>Byrd Amendment: both X and Y petition</td>
<td>+ $1 = $10</td>
</tr>
</tbody>
</table>

The Appellate Body overruled the Panel on this motive issue, declaring that the degree of support, and not its nature, was at issue.89 The Appellate Body further ruled that while good faith was relevant, the mere violation of a substantive treaty provision was insufficient evidence to prove bad faith.90

III. The Political and Historical Context

Distinguishing free traders from protectionists is hard to do

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88. _Id._ ¶ 295.
89. _Id._ ¶ 283.
90. _Id._ ¶ 298.
based on partisan, regional, or ethnic lines. The debate between the
two factions invariably revolves around issues of equity and
economics. In the end, however, a great deal of U.S. trade policy—
and the Byrd Amendment in particular—does nothing to further the
goals of equity or efficiency. In fact, the Byrd Amendment is just one
example of America’s long line of politically-motivated trade
provisions. Though trade laws are presented with a veneer of
economic or equity rationale, the true secret of their success is in the
naked electoral politicking of the American officials who vote or sign
these pieces of legislation. Despite the Washington maxim that
“[t]rade issues are to be kept on the back burner in election years,”91
even-numbered and especially presidential election years provide
particularly fertile ground for interest groups on both sides of the
debate to lobby their narrow positions, distorting the economic and
equity considerations. In the past, these interest groups had
everything to gain and nothing to lose by lobbying for these trade
preferences in exchange for votes. However, the WTO’s dispute
resolution process and clever tactical decisions by affected trade
partners (especially Europe) may allow politicians to insulate
themselves from interest group pressure, repeal the Byrd
Amendment and other WTO-inconsistent laws, and preserve the
WTO.

**Legislative History: Pork-Barrel Politics**

The Continued Dumping and Subsidy Offset Act of 2000 was
enacted as a part of the Agriculture Appropriations bill,92 passed by
Congress and signed by President Clinton just prior to the 2000
presidential election. Its passage was a result of questionable
parliamentary practices by the dean of the Senate, West Virginia
Senator Robert Byrd. Inserted into the bill at the eleventh-hour of
conference negotiations, the Byrd Amendment never received
committee consideration in either house.93 Indeed:

Mr. Byrd secured passage of the provision . . . by attaching it to the
conference report of a $70 billion agriculture appropriations bill

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92. The Agriculture, Rural Development, Food and Drug Administration, and
93. WILLIAM H. COOPER, CONG. RESEARCH SERV., TRADE REMEDY LAW
REFORM IN THE 107TH CONGRESS, <www.ncseonline.org/NLE/CRS/> (visited Oct. 2,
2003).
through deft after-hours parliamentary maneuvering. After several Republicans left the conference committee room, Mr. Byrd whisked it through by a one-vote margin. After an effort by committee chairmen, the House leadership and the Clinton administration to excise the Byrd amendment from the bill, it became law with President Clinton's signature.\textsuperscript{94}

In his signature statement, President Clinton urged the 106th Congress "to override this provision [the Byrd Amendment], or amend it to be acceptable" before Congress adjourned for the year.\textsuperscript{95} The President's statement noted that the provision would provide select U.S. industries with a subsidy above and beyond the protection level needed to counteract foreign subsidies, while providing no comparable subsidy to other U.S. industries or U.S. consumers, who are forced to pay higher prices on industrial inputs or consumer goods as a result of the antidumping and countervailing duties.\textsuperscript{96}

Senator Byrd was at that time the Chairman of the Senate Appropriations Committee, the largest committee in the Senate.\textsuperscript{97} It is also one of the most powerful, as it is constitutionally mandated to write the laws that allocate federal funds (together with the House Appropriations Committee).\textsuperscript{98} Senator Byrd has sat on this committee since 1959, and is the longest-serving member of the Senate (eight consecutive terms),\textsuperscript{99} making him one of the most powerful players in the Capitol. Byrd has wielded his power grandly, championing the filibuster and funneling billions of federal funds to


\textsuperscript{96} *Id.*


\textsuperscript{98} U.S. CONST., art. 1, § 9 states: "No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time." U.S. Const. art. 1, § 7, cl. 1 states: "All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with the Amendments as on other bills." U.S. Const. art. 1, § 8 states: "The Congress shall have power to lay and collect ... duties ... [and] to regulate commerce with foreign nations."

his small state. Byrd has made no secret of his pork-barrel politics, famously declaring "I want to be West Virginia's billion-dollar industry." Byrd zealously supports West Virginia's steel manufacturing companies and jobs through protectionist trade policies and industry supports.101

CDSOA was unquestionably an example of Byrd's political skill and intense focus on his constituents' interests, regardless of procedural propriety, international legality or economic soundness. By introducing this spending amendment in conference committee, Byrd violated the Congressional procedure rules that spending bills be considered by each body's appropriate committee of expertise before going to conference. In the case of a trade remedy law, the Senate Finance Committee is the committee of jurisdiction. The Finance Committee chairman, Senator Charles Grassley (R-Iowa), has said that he is "not surprised that a bill that was never considered by the committee of expertise or even the full Senate is found to violate our international commitments. That's why we have committees—to make sure things like this don't happen."102

Byrd's agenda has long included protection of West Virginia's steel and coal industries.103 CDSOA was designed to assist domestic steel producers, and almost half of the antidumping or countervailing duties cases covered by the amendment relate to steel.104 This design proved effective, as "[m]ore than 2,000 American companies are in line to receive fines levied under the Byrd agreement, and 46 percent of those companies that have won dumping complaints are steel

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101. See Senator Byrd's website <www.byrd.senate.gov> for a declaration of this support in his own words.


103. The coal and steel industries are intimately linked, as "[c]oal comprises sixty percent of the energy used to produce steel." Heather A. Steinmiller, Steel Industry Watch Out! The Kyoto Protocol is Lurking, 11 VILL. ENVTL. L.J. 161, 166-67 (2000).

Byrd is not alone in the Congress as a steel advocate—both houses boast of an influential, bipartisan "Steel Caucus." The House's caucus includes 110 members representing districts with steel manufacturers. The Senate's Steel Caucus is powerful enough to have attracted the signatures of sixty-eight senators (a veto-proof number) on a letter to President Bush, urging him to enforce the Byrd Amendment, even after its two-time defeat at the WTO. The Byrd Amendment has impacted a wide swath of industries, though, not just steel; in fact the Amendment's effects can be seen most clearly in unrelated industries such as sparklers, mushroom canning and candle making.

**The Reality of the Byrd Amendment—Some Perverse Anecdotes**

The perverse incentive of the Byrd Amendment is that it encourages non-competitive U.S. companies to remain in, or even enter, the market. Some U.S. companies, driven out of the market by foreign competition, reestablished themselves and began producing again in order to benefit from the offset payments. Certain industries gained widespread publicity for this perversity in the months following the first disbursements in 2001.

Diamond Sparkler is one company that has benefited from the Byrd Amendment. Located in Youngstown, Ohio, Diamond was the only remaining sparkler manufacturer in the United States in 2001, all the others having been driven out of business by foreign competition. China, the world's largest sparkler producing nation, had been found by the ITC and DOC to be dumping sparklers in the United States at below cost. The government responded by imposing a ninety-four percent tariff on the Chinese sparklers. Despite the...
tariff, Chinese sparklers remained cheaper in the U.S. market than Diamond's. After the passage of the Byrd Amendment, Diamond applied for an offset. For 2001, Diamond received $1.6 million, allowing it to operate at a profit for the first time in years. In fiscal year 2002, Diamond received $291,230 in offset payments. The decrease in offset payments was due to lower imports of sparklers (in response to the Amendment's tariff-based price rise) and because Diamond had to share the offset proceeds with a new and former domestic competitor—Elkton.

The Elkton Sparkler Company is a Maryland manufacturer that had been driven out of business in 1999. For the next two years, Elkton ceased production, imported the cheaper Chinese sparklers and focused on reselling in the U.S. market. After the 2001 disbursements, Elkton realized its once-smaller competitor Diamond was now operating at a greater profit due to the Byrd Amendment’s offset payments. Consequently, Elkton resumed operations, and for fiscal year 2002, Elkton received $604,541 in offset payments from the federal government.

The tiny sparkler industry is just one example of the way in which the Byrd Amendment operates in the real world. Other beneficiaries in fiscal year 2002 included the crawfish industry ($7.4 million in offset payments), canned mushroom companies ($3.2 million), candle makers ($69.5 million), pencil manufacturers ($2.7 million), and most impressively, ball bearings producers ($125.4 million). Steel interests were well represented as petitioners, but steel imports did not garner the lion’s share of tariff income under CDSOA, due to a drop in imported steel as a response to the Byrd Amendment and a number of other domestic trade practices aimed at limiting foreign steel, most notably President Bush’s 30 percent tariff on steel imposed in March 2002.

The Domestic and International Battle Ahead

The Byrd Amendment is not good for America. Its economic benefits distort our free market system; its intended boon to the steel

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111. Id.
112. All Things Considered, supra note 108.
114. See King, supra note 28.
116. Id.
industry has not, and will not, materialize; and it has created a precarious relationship with our closest allies and trading partners. While the United States formally lost the case at the WTO, the Byrd Amendment's defeat is actually a win for America's competitive free-market paradigm, its overall industrial and employment concerns and hopefully for its diplomatic and trade relationships with its closest allies.

After battling the Byrd Amendment for more than two years, the complaining parties and free-trade advocates everywhere seemingly had cause to rejoice over the Appellate Body's ruling. The Appellate Body, from which no appeal is available, is, after all, the final arbiter of trade disputes under the WTO. Under the Dispute Settlement Understanding—the greatest achievement of the Uruguay Round negotiations—the case was closed: America had to comply and repeal the Byrd Amendment. Or so one might have thought.

In fact, one might say the battle is only half over. The legal battle was perhaps the easy part. The Byrd Amendment was doomed from the beginning at the WTO—President Clinton admitted as much when signing the bill. But it remains a powerful political tool for both the Congress and for America's trading partners.

The Domestic Response

Within a week of the Appellate Body Report's formal adoption by the WTO, the new political battle began. The trade battle, though, is fought by bizarre coalitions. If politics makes strange bedfellows, then trade politics is an orgy of the bizarre. America's Republican president announced that he would seek the Byrd Amendment's repeal; the Republican Congress dared him to try. Democratic Senator Byrd collected sixty-eight bipartisan senate signatures on a letter to the president asking him to reverse his position and support the amendment.

Although there are specific, vested corporate and labor interests which support protectionist trade policies, there are also many constituencies which benefit from the liberalized trade policies that the WTO promotes. By protecting the domestic steel industry, steel production jobs may be preserved in Ohio, Pennsylvania and West Virginia. However, the increased prices will negatively impact steel-consuming industries, which will pay a higher price. Steel-consuming industries such as car makers, aerospace and construction make up a much larger share of the national employment and are distributed
among every state in the union.\textsuperscript{117} A recent study claims that "[m]ore American workers lost their jobs to higher steel prices in 2002 than the total number employed by the U.S. steel industry itself."\textsuperscript{118}

Steel-consuming industries are not discrete and insular in the same way as the steel-producing industry. For this reason, the consuming industries have a more difficult lobbying challenge to protect their economic interests. The Congress has a difficult time making liberal trade policy choices because of the lobbying disparities between these two groups. The executive branch has an equally hard row to hoe because steel states are typically partisan battlegrounds—where the difference in trade rhetoric can win or lose a national election. For this reason, liberal trade policies need to be somewhat politically insulated in order to prevail. Two ways to politically insulate the debate are to take it to the judicial branch, and to scapegoat internationally binding rules.

Unlike the U.S. Supreme Court, WTO judgments are not automatically enforceable; though, ironically, protectionists have long sounded the battle cry of "lost sovereignty"\textsuperscript{119} when it comes to the WTO. Seemingly, then, one way to avoid the sovereignty problem is to litigate this matter in the U.S. courts. However, the Byrd Amendment was challenged domestically, to no avail. In the case of \textit{Pacific Giant, Inc. v. United States},\textsuperscript{120} decided at the U.S. Court of International Trade in August 2002, the Byrd Amendment was challenged by a Chinese crawfish exporter as a violation of due process rights. Pacific Giant argued that the transfer of funds from the foreign producer to its domestic competitor was a punitive measure, but the court disagreed, saying that "imposition of duties does not constitute the exclusive means of remediation, and Congress has exercised its constitutional powers in choosing to further the goal of remediation through the distribution of collected duties to parties affected by dumping."\textsuperscript{121}

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\item \textsuperscript{118} Id. at 2.
\item \textsuperscript{120} Pac. Giant Inc. v. United States, 223 F. Supp. 2d 1336 (Ct. Int'l Trade 2002).
\item \textsuperscript{121} Id. at 1348-49.
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Perhaps a reconsideration of this case, on appeal, would allow the federal circuit court to apply the appropriate international law as established by the WTO’s appellate body. Under our constitution, a treaty (such as the WTO/GATT) has the same legal status as a domestic statute, so the “later in time” rule would apply—making the Byrd Amendment valid. However, if it were found to be unconstitutional on appeal, or if the federal circuit court chose to apply the WTO’s decision as binding on U.S. courts, the Byrd Amendment could be enjoined from enforcement, providing a solution to the controversy.

The Foreign Response

At the same time that the domestic branches are battling it out, America’s closest allies and trading partners have a hand to play. The Doha Round negotiations on changes to the Dispute Settlement Understanding are underway, and within a week of the CDSOA ruling, Canada circulated a proposal for refunds of Byrd Amendment duties. WTO officials have expressed “increasing concern” that the United States will not be able to comply with the Byrd Amendment ruling, as it is one of several unenforced adverse rulings by the WTO against America. EU Trade Commissioner Pascal Lamy has made a public appeal to America to “play by the rules” and comply immediately. He correctly notes that “noncompliance weakens a system which enforces [America’s] own rights. If we, the elephants of world trade, don’t follow the rules of the road, we weaken our ability to get others to do so.”

In the spring of 2003, the United States and the complaining parties entered into WTO arbitration regarding the timetable and form of implementation of the ruling. The parties disagreed on what constituted a “reasonable period of time” for implementation—

122. Daniel Pruzin, Canada Urges Refund of Illegal Duties as Part of WTO Reform of AD/CV Rules, 20 Int’l Trade Rep. (BNA), No. 6, at 264 (Feb. 6, 2003).
125. Id.
126. Award of the Arbitrator, United States—Offset Act (Byrd Amendment)—Arbitration under Article 21.3(c) of the DSU, WT/DS217/14, WT/DS234/22 (June 13, 2003).
the United States sought a fifteen-month period, whereas the complainants sought a six-month time period, dating from the decision of the Appellate Body on January 27, 2003. The United States argued that because it was a legislative matter, additional time was needed to process the change through America’s constitutionally mandated procedures of bicameralism and presentment. The complaining parties argued that “prompt compliance” was required under the DSU, and that delay of implementation beyond the end of the U.S. fiscal year (September 30, 2003) would irreparably harm the parties because annual disbursements are scheduled to occur within 60 days of the end of the fiscal year. The parties also disagreed on what constituted the appropriate type of implementation—a full repeal of the Byrd Amendment, or just an amendment to its offset distribution section. The arbitrator ruled that the form of compliance was up to the United States, but no matter what its form—repeal or modification—compliance was to be made by December 27, 2003. The deadline came and went; nothing changed.\footnote{U.S. Lets Pass WTO Deadline to End Tariffs, L.A. TIMES, December 30, 2003 at B3; Jeffrey Sparshott, EU Aims Payback at U.S. Trade Law, WASH. TIMES, December 20, 2003 at C11.}

Other WTO verdicts against the United States have yet to be enforced—legal reform has been demanded of the Anti-Dumping Act of 1916, the Copyright/Music Licensing Case and the Extraterritorial Income Tax Exclusion Act (the successor to the Foreign Sales Corporations Act).\footnote{Lamy, supra note 124.} The growing number of unenforced rulings against the United States creates a worrisome and uncertain future for the WTO and for the United States in the world trading system. A recent $4 billion judgment against the United States by the EU has yet to be enforced, pending the Congress’s consideration of repeal of the Foreign Sales Corporation Act. If compliance does not materialize soon, the EU has threatened to use retaliatory trade sanctions. Such sanctions would have disastrous and far-reaching effects on the U.S. economy, which counts the EU bloc as its largest trading partner. It could also have a negative effect on America’s attempt to gain support for its overseas anti-terror efforts.

But these macro issues of the global economy, trade relations and foreign security relations do not figure into the voting calculus of the average American voter. Pocketbook issues, especially employment and wages, are paramount to most voters. Protectionists
have garnered support by insisting that free trade has led to fewer U.S. jobs, and that protectionism will solve the high unemployment faced in many of the swing states by reducing demand for imports and "bringing home" the jobs. Free traders have insisted that liberalized trade policy reduces prices, and promotes higher wage jobs. But in states where unemployment is high, and many manufacturing jobs have been lost over the last few decades, voters are more focused on merely having jobs, making the protectionist message much more politically powerful. Elected officials are more likely to follow this tack, then, in order to provide for their constituencies and stay in power.

Under WTO rules, Europe has deftly figured out a way to make U.S. communities internalize the free trade-protectionist choice. The WTO-authorized retaliatory trade measures, for non-compliance with an appellate body ruling, will be directed at the specific states and specific industries that are most prone to this protectionist voting. For example, beginning March 1, 2004, the EU will impose retaliatory tariffs on the politically sensitive U.S. exports of citrus from Florida and motorcycles from Illinois. Measures like these will force voters to choose between a protectionist policy plus sanctions or a free trade policy. This is, in the end, no choice at all, as the employment result will be the same. This maneuver, in fact, politically insulates the elected official from the employment-trade debate.

**A Political Compromise**

The United States can still save face, comply with the WTO rulings and placate its constituencies. The United States has an established (though informal) trade-policy cycle, in place since the Kennedy Administration, which Fred Bergsten of the Institute for International Economics calls "one step backward, two steps forward." In this cycle, the president seeks new international trade liberalization agreements, but is blocked by specific domestic political interests. By minimally appeasing the interest groups to obtain Congressional authority for trade negotiation, the administration

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130. *Id.* These sanctions are for non-compliance with other, earlier decisions of the Appellate Body. The strategy behind the sanctions, however, may be used for any trade issue.

exchanges "protection that is modest and temporary... for liberalization and international rule-making that is sizeable and permanent." Although the passage of the Byrd Amendment and other steel industry protections were a step back, the passage of Trade Promotion (Fast-Track) Authority in 2002 is a very large step forward, as is the recent repeal of the steel tariffs. The presumptive death of the Doha Round is similarly a step back, but the Byrd Amendment verdict and threat of sanctions will hopefully be another propelling event.

Politicians are always captive to domestic interest groups who vote and contribute money. But voters and donors know that compromises must occur, and those compromises allow voters to identify scapegoats other than their elected officials. Robert Hudec argues that one of the main advantages of an international rule-based regulatory system like the WTO is that it can insulate a country's liberal trade policies from domestic protectionist pressures. Under this theory, domestic lawmakers can make unpopular political decisions without fear of electoral repercussions by throwing up their hands and invoking the WTO rules as the binding scapegoat. In the face of Europe's new targeted sanctioning approach, this is a very real and politically practical strategy for U.S. politicians. For the United States to avoid a massive new trade war, it will hopefully use this strategy to gain a slim majority in Congress to excise the Byrd Amendment from the trade law. Senator Byrd could vote against it, of course, but other senators and congressmen could easily use the WTO and the threat of paralyzing sanctions to placate their constituencies when voting for its removal.

Hopefully the United States will do the right thing, and either shepherd the case through the federal courts to get an injunction on the application of the Byrd Amendment, or devise a political compromise in the Congress to allow a decisive removal of CDSOA from the books. Otherwise, much bigger trouble awaits our economy and our relationship with the world.

132. Id. at 94.