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# Why Did the Byrd Amendment Not Fly with the WTO?

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Since its passage in 2000, the Byrd Amendment has been the focal point of ongoing disputes over the acceptable scope of antidumping laws and fair protection of domestic industry. Most countries possess antidumping laws that allow for duties to be placed on imported dumped goods. The Byrd Amendment seeks to extend such policies by mandating the redistribution of collected antidumping duties to "affected domestic producers" in the form of "offset" payments. The United States was immediately taken to the WTO by 11 countries who contend that the Byrd Amendment constitutes an unfair "double protection" of domestic industry. This article reviews the history of the dispute, negotiations between the parties, the arguments put forth by each party to the WTO, the WTO's findings and rulings, and retaliations taken by the affected countries. Further, this study shows that the effects of dumping are effectively neutralized by the antidumping duties, and that the payment of offsets introduced by the Byrd Amendment is an unnecessary double protection of U.S. domestic industry.

Keywords: Byrd Amendment, dumping, offset payments, subsidies, WTO

## Passage of the Byrd Amendment

The Continued Dumping and Subsidy Offset Act (CDSOA) of 2000 – or the Byrd Amendment, as it has come to be known – was signed into law by the U.S. administration on 28 October 2000 as part of the Agricultural Appropriations Act of 2001 (Canada, 2005). The CDSOA amends current U.S. trade law by adding the stipulation that revenues generated by antidumping (AD) or countervailing duty (CVD) orders be distributed to domestic producers in the form of "offset" payments – the disbursements or payments to domestic producers outlined in the Byrd Amendment (Agriculture, Rural Development …, 2000). The United States, like most countries, has laws against the dumping of products on their markets. "Dumping" occurs when a country sells a commodity in foreign markets at a price below its domestic price or cost of production (Houck, 1986; Reed, 2001). The World Trade Organization also acknowledges the right of a country to impose antidumping measures if dumping is damaging domestic industry (WTO, b).

The underlying motivation for passing the Byrd Amendment is that, in the eyes of many U.S. lawmakers, dumping is a problem that has not been effectively dealt with by current trade policies: countries continue to engage in illegal dumping tactics in spite of current U.S. laws against dumping; such prolonged dumping is damaging U.S. domestic producers; and thus the United States needs to finally take action in a way that will ensure that these repeat offenders will feel the repercussions enough to deter them from further violations. It was in this spirit of overzealous retaliation that the Byrd Amendment was hatched.

Other reasons for passing the Byrd Amendment are the long, drawn-out WTO dispute settlement process and the ineffective enforcement of its rulings. While the WTO places a great deal of value on its dispute settlement capabilities, the problem lies in enforcement. The goal of the WTO dispute settlement system is – provided some wrong has been done – to restore the market to its original, pre-violation state. Once the Dispute Settlement Body (DSB) has handed down a decision, implementation is expected within a reasonable – though not specifically defined – period of time (WTO, b). Finally, should the perpetrating party not implement change within this time period, the WTO has the power to authorize retaliation. Herein lies the catch – the dispute settlement process often drags out over several years, after which there are grace periods and appeals, and countries engage in many delay tactics to stall the process. The Byrd Amendment is a perfect example: the case was brought to the WTO in July 2001 and it has taken nearly three and a half years for the WTO to reach the point of authorizing retaliation. So countries can abuse international trade

law for quite some time with little or no threat of any sort of serious retaliation at the end. While, in the grand scheme of things, three and a half years may be a short time period, these sorts of tactics may drag out over entire terms in office; to many U.S. lawmakers such actions constitute a flagrant and intolerable breach of trade law and trust that not only must be corrected, but also must be subjected to measures that ensure they will never happen again. Perhaps it was with this perspective that the Byrd Amendment was drafted to make reparations for *continuing* violations of antidumping laws:

> Duties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures. Such expenditures shall be known as the "continued dumping and subsidy offset" (Agriculture, Rural Development …, 2000).

At the time of the legislation of the Byrd Amendment, the protection of certain commodities was of particular interest to lawmakers. Steel is one of the primary industries in West Virginia, the home state of Robert Byrd – the author of the Byrd Amendment. At the end of 2000, when the amendment was passed, U.S. steel imports were approaching record highs and steel prices were near record lows, while U.S. steel mills were operating below 74 percent of capacity (Odessey, 2000). Thus, steel was one of the primary commodities targeted to receive benefits from the offset payments. Table 1 shows that commodities that particularly benefited in the first year of the Byrd Amendment's existence include steel and bearings, as well as pasta, petroleum wax candles, computer and television equipment, and industrial belts (USCBP, 2002).

Since 2001, several commodities have continued to be major beneficiaries of Byrd Amendment payments, including steel and bearings, petroleum wax candles, computer chips, and industrial belts. Other commodities are now starting to become primary recipients, including softwood lumber, cement, pineapple, and crawfish tail meat. Commodities that have reaped significant benefits over the first four years of the Byrd Amendment's existence – receiving payments in excess of US$25 million each – include steel and bearings, pasta, petroleum wax candles, crawfish tail meat, and television and computer parts and equipment. So far, disbursements under the Byrd Amendment have totaled over US$230 million in 2001 (USCBP, 2002), nearly US$330 million in 2002 (USCBP, 2003), over US$240 million in 2003 (USCBP, 2004), and nearly US$240 million in 2004 (USCBP, 2005).

**Table 1** Key Distributions under the Byrd Amendment: 2001-04

| Case no. | Commodity/origin | 2001 | 2002 | 2003* | 2004 | Totals |
|---|---|---|---|---|---|---|
| A-122-838 | Softwood lumber/Canada | -- | -- | $ 24,016 | $ 5,306,436 | **$ 5,330,452** |
| A-201-802 | Gray portland cement and clinker/Mexico | $ 3,253,895 | $ 3,564 | 2,122 | 21,293,059 | **24,552,639** |
| A-201-822 | Stainless steel sheet and strip/Mexico | 34,034 | 5,240,895 | 3,376,035 | 5,805,231 | **14,456,195** |
| A-421-805 | Aramid fiber/Netherlands | -- | 7,121,070 | (153,560) | (7,943) | **6,959,567** |
| A-428-201 | Ball bearings/Germany | 7,506,014 | 23,499,893 | 6,394,952 | 4,613,618 | **42,014,477** |
| A-428-203 | Cylindrical roller bearings/Germany | 7,225,640 | 9,951,095 | 3,567,701 | 4,592,228 | **25,336,663** |
| A-475-818 | Pasta/Italy | 17,533,483 | 4,674,035 | 1,792,345 | 1,549,947 | **25,549,810** |
| A-549-813 | Canned pineapple/Thailand | 1,792,483 | 530,693 | 5,394,993 | 1,658,695 | **9,376,864** |
| A-559-201 | Ball bearings/Singapore | 6,871,336 | 50,988 | 61,580 | -- | **6,983,905** |
| A-570-504 | Petroleum wax candles/China | 18,317,982 | 69,536,244 | 3,325,043 | 51,391,920 | **142,571,189** |
| A-570-840 | Manganese metal/China | -- | 6,274,365 | -- | -- | **6,274,365** |
| A-570-848 | Crawfish tail meat/China | -- | 7,468,892 | 9,763,987 | 8,183,566 | **25,416,445** |
| A-580-809 | Circular welded nonalloy steel pipe/Korea | 2,730,659 | 2,269,488 | 464,129 | 5,982,092 | **11,446,368** |
| A-580-812 | DRAMs of 1 megabit and above/Korea | 5,117,438 | 14,413,121 | 1,823,572 | 11,946,020 | **33,300,150** |
| A-588-015 | Television receivers/Japan | 24,311,452 | 9,016,052 | (111,534) | 197,019 | **33,412,989** |
| A-588-054 | Tapered roller bearings <= 4 inches/Japan | 731,926 | 7,894,347 | 18,188,461 | 1,874,270 | **28,689,004** |
| A-588-201 | Ball bearings/Japan | 51,447,879 | 55,266,544 | 39,419,202 | 35,358,173 | **181,491,799** |
| A-588-604 | Tapered roller bearings over 4 inches/Japan | 5,176,911 | 14,378,990 | 33,740,298 | 15,695,328 | **68,991,527** |
| A-588-807 | Industrial belts/Japan | 7,525,799 | 2,710,171 | 601,579 | 5,118,547 | **15,956,096** |
| A-588-835 | Oil country tubular goods/Japan | -- | 7,130,662 | 1,699,066 | 1,167,223 | **9,996,951** |
| A-588-845 | Stainless steel sheet and strip/Japan | 6,636,053 | 19,694 | 4,697,297 | 3,945,532 | **15,298,576** |
| | **Yearly totals** | **$231,201,891** | **$329,871,464** | **$190,247,425** | **$284,044,599** | |

*An additional US$50 million pending distribution as of 1 March 2004.

Parentheses indicate refunds to importers.

Sources: 2001 – USCBP, 2002; 2002 – USCBP, 2003; 2003 – USCBP, 2004; 2004 – USCBP, 2005.

## Negotiations between the Affected Countries and the United States

On 21 December 2000 – less than two months after the passage of the Byrd Amendment – Australia, Brazil, Chile, the European Union, India, Indonesia, Japan, Korea, and Thailand officially requested consultations with the United States to discuss the disbursement of "offsets". These countries noted that the Byrd Amendment violated Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT), articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement or ADA), and articles 7.1 and 30 of the Agreement on Subsidies and Countervailing

Measures (ASCM). In qualifying their claim, these countries pointed out that disbursements constitute mandatory specific subsidies, and are subject to dispute settlement. They claimed that the "offsets" in question are not contemplated in nor supported by the GATT, the ADA, or the ASCM. In addition, the amendment encourages moral hazard by providing a strong incentive for U.S. domestic producers to file complaints just to collect payments and also to oppose the settlement of trade disputes, running contrary to the WTO's mission of promoting the least restrictive trade measures (WTO, 2001a). In effect, these countries argue that the United States, by subsidizing its domestic producers, is engaging in exactly the same illegal practices that are being used as the justification for the countervailing duties (CVD).

By the end of January 2001, Argentina, Canada, and Mexico had also joined the negotiations. In addition, Canada and Mexico filed a separate request for negotiations on 21 May 2001 (WTO, 2001b). Hereinafter, the countries challenging the Byrd Amendment to the WTO will be denoted as the petitioners, complainants, claimants, or ROW (the rest of the world) and these terms will be used interchangeably. On 6 February 2001, the United States held consultations with some of the petitioners. The sides could not reach an agreement on the legality of the Byrd Amendment and the alleged damage it caused. On 12 July 2001 the complaining countries petitioned the WTO to set up a panel with the DSB to settle the case (WTO, 2001c). Canada and Mexico held separate – but also ineffective – negotiations with the United States on 29 July 2001 and then, on 10 August 2001, also requested the establishment of a panel with the DSB to examine the validity of the Byrd Amendment (WTO, 2001d/e).

## WTO Investigations

In compliance with the requests of the petitioners, the WTO DSB established a panel in August/September 2001 to review the complaints against the Byrd Amendment. The arguments put forth by the ROW and the United States encompass both legal and economic issues. Our discussion here will cover both the legal and economic arguments posed in opposition to and in support of the Byrd Amendment.

### *Arguments against the Byrd Amendment by the ROW*

According to Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement, the following are acceptable antidumping (AD) measures: countervailing duties, provisional measures, or voluntary undertakings given by the subsidizing government or the foreign exporter. The offset payments distributed under the Byrd Amendment will be administered only if the following specific criteria are met:

- an antidumping or countervailing duty order has been issued,
- to the "affected" domestic producers,

- from monies collected by the antidumping or countervailing duty order, and
- for compensation of injuries caused by dumping or subsidization.

Harkening back to the Antidumping Agreement and the SCM Agreement, however, the type of subsidy payments outlined in the Byrd Amendment do not qualify as an acceptable response to dumping under WTO agreements (WTO, 2002).

In addition, the complainants point out that the structure of the Byrd Amendment provides domestic producers with a financial incentive to file for the imposition of antidumping and countervailing measures. These incentives interfere with the ability of U.S. authorities to conduct an objective investigation of the facts regarding such claims – some of which they rely on domestic producers to provide. Through the promise of offset payments, the U.S. government is unduly influencing the facts that authorities must use to make AD/CVD decisions. The complainants hold that this is clearly an attempt to manipulate the outcome of such investigations. This manipulation frustrates the purpose of the process, which is to ascertain when injurious dumping is *truly* harming an industry (WTO, 2002). The complainants further assert that U.S. producers may not be considered as truly filing application or supporting antidumping and countervailing measures; instead, U.S. producers may be acting with the true motive of sharing in the distribution of offsets. The express purpose of the WTO is "to ensure that trade flows as smoothly, predictably and *freely* as possible"; but the Byrd Amendment – by providing incentives for U.S. producers to file antidumping and countervailing duty cases – creates a policy that intensifies the imposition of trade restrictions and thwarts the express purpose of the WTO to encourage and use the least-trade-restrictive measures possible (WTO, a).

Next the petitioners argue that actions taken against foreign subsidization may not be imposed cumulatively (WTO, 2002). As per the SCM Agreement, imposition of tariffs or CVDs is one response to dumping that can be used to restore domestic prices to their pre-dumping levels; another response is subsidies to domestic producers to compensate for the depressed market prices caused by the dumping. In the case of the Byrd Amendment, the petitioners contend that the United States is imposing both methods, with a cumulative effect in excess of what is necessary or appropriate. Verification of this assertion is quite simply proven in the structure of the Byrd Amendment, whereby offset payments are provided *only* when CVDs have already been collected for the specific commodity (WTO, 2002).

Perhaps the most compelling of the arguments posed by the petitioners – the one that will become the primary focus of this discussion – is that the Byrd Amendment is just plain bad economics. The petitioners allege that the Byrd Amendment is based on

the fallacious theoretical position that the imposition of antidumping and countervailing duties is not sufficient to counteract the effects of dumping and subsidization, because the practices *continue* after such measures have been imposed. The logic laid out in the Byrd Amendment suggests that *continued* dumping after the imposition of AD/CVDs causes injuries that are not sufficiently remedied by those orders. That theory, the petitioners claim, is not only unfounded, but also unsound. The Byrd Amendment allows for the distribution of offsets after antidumping or countervailing duties have been collected, but simply with the collection of these duties and the congruent punishment of foreign exporters, the United States has effectively remedied the effects of dumping and subsidization. Therefore, distribution of offset payments in addition to levying antidumping and countervailing duties provides compensation for a problem that has already been remedied – it effectively provides U.S. producers *double protection* from dumping and subsidization (WTO, 2002).

### *Arguments for the Byrd Amendment by the United States*

According to the United States, the complainants' argument that WTO members cannot distribute revenue from AD/CVD to any recipient other than the national treasury is not valid because this issue is never addressed or even mentioned in any part of the WTO Agreement. The United States holds that WTO members retain their right to control their own national treasury and that a member's sovereign right to lawfully appropriate and distribute duties cannot be restricted by the WTO (WTO, 2002).

The United States further argues that the subsidies granted under the Byrd Amendment are neither *de jure* specific – they do not specifically limit access for certain enterprises, industries, or groups – nor *de facto* specific – payments are available to all producers and all industries. As the subsidies are not "specific", they cannot be challenged under Article 5 of the SCM Agreement (WTO, 2002).

The next issue taken up by the United States is the assertion of the alleged effects of the Byrd Amendment. While the complainants cite the damaging effects and impairment of benefits from the overprotection of U.S. industries, the United States points out that the petitioners do not show any actual damage that the Byrd Amendment has caused to their domestic industries (the grounds required to make claims based on Article 5 of the SCM Agreement); rather they cite the per se adverse effects of the Byrd Amendment. The United States argues that presumption and speculation are not enough to make a subsidy actionable without real proof of adverse effects. The petitioners' reasoning falls especially flat when one considers what might be allowed if such per se arguments were to be acceptable: it would render the proof-

of-damage requirement totally meaningless and immediately incriminate a variety of protective policies – even without evidence of damage (WTO, 2002).

The United States also takes exception to the complainants' holding that the Byrd Amendment constitutes a specific action against dumping or subsidization. The offset payments specified in the Byrd Amendment are based on the applicant's qualification as an "affected domestic producer" who incurred "qualifying expenditures" (WTO, 2002). Payments are in no way associated with damages incurred from dumping or subsidization and have nothing to do with measuring the effects of dumping or subsidization and recouping producers for their losses. In fact, the United States argues that, based on the ordinary meaning of the word, for a policy to be "against" something, it must be "in hostile opposition to" and "come into contact with" its target. In order for this to be the case, action would have to be taken specifically against the imported goods or the importers, like an import tariff. The Byrd Amendment, however, has nothing to do with importers or imported goods and, as such, can hardly be found to be "against" them. Thus, Article VI of the GATT 1994, articles 1 and 18 of the Antidumping Agreement, and articles 10 and 32 of the SCM Agreement cannot be relevantly claimed as objections to the Byrd Amendment (WTO, 2002). The United States further argues that Article XVI of the GATT 1994 recognizes the acceptability of non-export subsidies provided they do not cause serious injury to the interests of other members, as is the case in the present dispute since, as noted above, the complainants do not even attempt to establish a case of serious harm caused by the Byrd Amendment (WTO, 2002).

The next issue addressed by the United States is the claim that the Byrd Amendment acts as a moral hazard and compromises the ability of U.S. authorities to make objective judgments in AD/CVD cases. Here, once again, the complainants are relying on speculation rather than objective facts or any real evidence. Even if it did act as a moral hazard, there is no WTO mandate that authorities must conduct subjective analyses on the motives of domestic companies. The only obligation the domestic authorities have is to determine whether or not certain *quantitative* requirements have been met, which indicates that the process is designed to be objective and empirical, not some sort of sketchy, subjective motive assessment. Further, any requirement to test the underlying motives of petitioners would be totally unworkable. It is preposterous to think that any credible evidence could be shown to support the argument that, but for the distributions, domestic producers would not have petitioned for or supported an investigation; thus, the moral hazard issue is negated (WTO, 2002).

Finally, the United States addresses the complaint that offset payments will motivate producers to oppose negotiated agreements between the United States and its trading partners. The United States replies that, under articles 8 and 18 of the SCM Agreement, there is no obligation for a country to comply in negotiations. According to the United States, it is at the complete discretion of the administering authority to decide whether or not it wants to accept a negotiated offer. As such, even if it were more difficult to secure negotiated agreements under the Byrd Amendment, there is no violation because there is no WTO-mandated obligation to comply in negotiations (WTO, 2002).

### *Response by the ROW*

The petitioners challenge the U.S. claim that the Byrd Amendment is not an action "against" dumping, positing that the U.S. argument is nothing more than a manipulation of the word and its common meaning. The complainants, citing the Appellate Body, hold that the term "against" has been clearly defined to mean action taken in *situations presenting the elements of* dumping. The Byrd Amendment subsidy payments are only enacted when dumping has occurred, i.e., in situations where dumping has been deemed to be present (WTO, 2002).

The complainants also take exception to the U.S. contention that, because no evidence of actual damage has been shown, no claims can be made. They argue that the Byrd Amendment upsets the competitive conditions for foreign producers and impairs the accrual of benefits to U.S. trading partners, and statistical evidence need not be shown to claim damages. Citing *EEC – Oilseeds I,*[1] the complainants contend that they are entitled to base their arguments on the *assumption* that subsidies will have a negative effect on the exporters. In addition, subsidies to U.S. producers will boost their competitive edge with foreign producers. Whether or not data exist at the moment, based on the structure and design of the Byrd Amendment there is a clear correlation between the offset payments and the *expected* negative effects on the competitive relationships (WTO, 2002).

The petitioners' final response concerns the U.S. argument that the Byrd Amendment is not an actionable subsidy, i.e., subsidies are open to, theoretically, any producer in any industry. Rather, the complainants argue, each offset is a separate and distinct subsidy because of the separate accounts – clearly linked to specific products – that fund each subsidy, with access to each subsidy clearly limited to certain industries and producers. While the United States considers such separate subsidies as not actionable, this tenet cannot be used, as the universalizing of it would allow any WTO member to avoid penalties for illegal subsidization by administering blanket administration (like the Byrd Amendment) (WTO, 2002).

### Response by the United States

The first point redressed by the United States was the continuing claim that the Byrd Amendment constitutes an actionable subsidy. Under Article 2.1 of the SCM Agreement, "specificity" means that a subsidy is limited to one particular enterprise, industry, or group of enterprises or industries. The Byrd Amendment, however, is available to *all* producers that meet the objective set of criteria. To be actionable, there must also be evidence of the adverse effects the subsidy has caused – something the complainants have continually failed to establish. The complainants' reference to *EEC – Oilseeds I* is a misrepresentation of the actual findings in that case, where the panel upheld the claim of damages because it *was shown* that the subsidy had *actually upset* the competitive relationship, unlike the petitioners in this case who can only claim theoretical damages. Had there been any real evidence of harm caused by the Byrd Amendment, these complaints would have been filed under SCM Agreement Article 5(c) – even the nature of the holding filed by the complainants points to their clear lack of any factual data or evidence to support their claims (WTO, 2002).

The second major point the United States wanted to reexamine was the claimants' assertion that the Byrd Amendment is a specific action against dumping and subsidization. After reasserting their earlier arguments, the United States adds that the fact that the offset payments outlined by the Byrd Amendment come from monies collected by AD/CVD duties is legally irrelevant, as there are no references to or restrictions on the uses of collected duties.

With regard to the claim that the CDSOA violates the United States' standing obligations to the WTO by encouraging U.S. industries to petition for AD/CVD orders, the United States reasserts its claim that mere speculation about the *possible* effects of a policy are not a sufficient basis for a claim. Furthermore, the United States argues that it is highly unlikely that the CDSOA has in any way influenced domestic producers, as only about one in three petitions filed result in an AD/CVD order, and liquidation of offset payments may take anywhere from three to ten years to be distributed, hardly the immediate, colossal payday the claimants have suggested (WTO, 2002).

To conclude their defense, the United States reiterates that the complainants have not produced any evidence to suggest the Byrd Amendment has either (1) caused some real damage to foreign industries or (2) led U.S. authorities to handle any AD or CVD investigations in a manner contrary to its obligations to the WTO. In contrast, the complainants argue that allowing the Byrd Amendment to exist will only encourage more CDSOA-type laws to proliferate (WTO, 2002).

## The WTO Panel Ruling

In September 2002 the DSB panel issued its ruling on the Byrd Amendment. The central focus of the panel's discussion surrounds the claim contained in AD Article 18.1 that is often discussed by both sides. The panel rejects the U.S. argument that there are certain required guidelines only for countervailing duties, reaffirming that the three permissible responses to dumping are antidumping duties, provisional measures, and price undertakings. By virtue of Article 18.1, any other "specific action against dumping" is prohibited. Thus the question before the panel is to determine whether or not the CDSOA constitutes a "specific action against dumping" (WTO, 2002).

According to the panel, the first step to determine whether or not the CDSOA can be judged to be a "specific action against dumping" is to determine exactly what constitutes a "specific action against dumping". The first delineation made by the panel is the difference between a "specific action" and a "specific action against". So in order for an action to be classified as *against* dumping it must (1) be an act that is specifically in *response* to dumping *and* (2) have some actual adverse effect on dumping (WTO, 2002).

In order to address the first condition, the next order of business for the panel was to determine whether or not the CDSOA constitutes a "specific action" *in response* to dumping. The panel notes that, *prima facie*, the Byrd Amendment contains no references to the constituent elements of dumping. Furthermore, no elements of dumping are explicitly written into the eligibility requirements for CDSOA offset payments. In spite of this careful attention to detail, however, the panel maintains that it is quite clear that, in order for the offset payments in the CDSOA to occur, dumping must be present. The panel takes this a step further, developing a chain of correlation and causation positing that offset payments directly follow the collection of AD/CVD duties, which directly follow the establishment of AD/CVD orders, which can only follow the determination of the presence and effects of dumping. They summarize by stating that there is a "clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments", which inextricably links the CDSOA with dumping, causing the panel to determine that the CDSOA is a "specific action" *in response* to dumping (WTO, 2002).

Having determined that the first-level criterion was met, it was then up to the panel to determine whether or not the CDSOA was not just a "specific action" *in response* to dumping, but also a "specific action *against* dumping"; in order to rule that the action was *against* dumping, the panel would have to prove the adverse effects on dumping. The panel initially cites that, in order for an action to be *against*,

it does not necessarily have to act against the imported dumped product, nor against specific individuals or groups connected to the dumped product. Instead, they argue, a measure may be deemed *against* dumping if it has an adverse bearing, direct or indirect, on the practice of dumping. The panel contends, based on two major points, that the CDSOA does have an adverse bearing on dumping (WTO, 2002).

The first reason cited is the adverse effect, caused by the Byrd Amendment, on the competitive relationship between dumped goods and "affected domestic producers". The panel cites in particular the structure of the CDSOA – combining offset payments with the collection of AD/CVD duties – which would allow "affected domestic producers" a competitive advantage over dumped imports. The panel points out that, contrary to the assertions of the U.S. Congress, the imposition of AD/CVD duties levels the playing field where dumping is occurring and the combination of AD/CVD duties and offset payments overcompensates for dumping and skews the competitive advantage in favour of the "affected domestic producers" (WTO, 2002).

The United States argued that no proof exists that the offset payments were actually being used to distort the competitive relationship. They argued that, for all the panel knows, disbursements could be used as "gifts to charity, payment of creditors, additional compensation or early retirement packages for workers, new product development, or new cafeterias" (WTO, 2002). The panel rejects this argument, holding that it may be expected that – because the payments have been made in response to a finding of injury – most payments will be used to advance the companies' competitive advantage or to address the injury caused by the dumping (WTO, 2002).

The panel especially cites the damaging effects the CDSOA has on the specific competitive relationship with non-"affected domestic producers" and foreign producers/exporters. The panel points out that these competitors will not be able to lower prices to meet the new competitive position of the "affected domestic producers" because the antidumping orders will nullify any such attempts to maintain an equal field. By combining the imposition of antidumping duties and the distribution of offset payments, the CDSOA imposes "double protection" for dumping. Furthermore, foreign producers/exporters know that, if they attempt to lower their prices, not only will more antidumping duties be applied, but also collected duties will be distributed to their competitors, further discouraging and disadvantaging foreign producers/exporters. Thus, due to its discouraging and adverse effects on dumping, the panel held that the CDSOA clearly constitutes an action *against* dumping (WTO, 2002).

The second major point addressed by the panel is the financial incentive provided by the CDSOA for domestic producers to file/support AD/CVD applications. Apparently satisfied with the speculative nature of the complainants' claims, the panel maintains that the Byrd Amendment *will likely* and will *in all probability* result in a larger number of AD/CVD applications, findings, and orders. While the United States cites the speculative nature and cost of applications as well as the time lag between application and possible payment as deterrents to any such influx, the panel cites the over US$206 million distributed as of December 2001, i.e., within a one-year period, as ample evidence of motivation for domestic producers to file, in spite of the more than US$1 million cost for application. Such sums, they argue, would be worth waiting for (WTO, 2002).

The greater incentive, according to the panel, is for producers to support applications filed by others. In this scenario, the cost of application does not even factor in because the cost of supporting an application is virtually nonexistent, while the entire payoff potential still exists. Further, producers not even necessarily interested in the "return" from supporting applications will be induced to do so in order not to find themselves at a competitive disadvantage in relation to those who supported it and qualified for the offset payments (WTO, 2002).

In summary, the panel found: first, the CDSOA constitutes a "specific action" taken *in response* to a situation containing all the key elements of dumping; second, the CDSOA – by distorting the competition between imported goods and domestic producers, and by providing a financial incentive for domestic producers to file/support AD/CVD applications – has an adverse bearing on dumping and, as such, may be deemed to be an action *against* dumping. Therefore, the panel determined that the CDSOA is a non-permissible "specific action against dumping" and a violation of AD Article 18.1 and SCM Article 32.1 (WTO, 2002). For a more thorough analysis of the economic implications of the Byrd Amendment, please refer to the technical annex at the end of this article.

## Countries' Responses to the WTO Ruling

In spite of the DSB ruling and the clarity of the economic argument against it, dealing with the aftermath of the Byrd Amendment has been anything but quick, easy, or simple. Having been passed by Congress, the CDSOA has become a part of U.S. trade law and, as such, must be removed in the same manner by which it was enacted – through a vote of Congress. While the U.S. administration has been compliant enough – at least in word – Congress has been anything but accommodating. One outspoken supporter of the Byrd Amendment has been Max

Baucus, the Democratic senator from Montana, who has continued to staunchly defend the Byrd Amendment while lambasting the trade policies of foreign countries and the anti-U.S. sentiment that pervades the WTO.

Although the U.S. administration defended the Byrd Amendment before the WTO, they have agreed to comply with the WTO ruling. In his budget proposal for fiscal year 2004, President Bush called the CDSOA a corporate subsidy that provides U.S. industry with extra, unnecessary, and unfair benefits over and above the elevated market prices created by the AD and CVD duties. The president has repeatedly asked Congress to repeal the Byrd Amendment and bring U.S. trade law into compliance with WTO agreements (USEU, 2003).

Sentiment against the Byrd Amendment has not been waning and while its supporters remain vocal, momentum is building to repeal the amendment. Whether out of desire to comply with the WTO, or in response to the current threats of retaliation by trading partners, Congress is finally beginning to address the issue. During the current legislative session, representatives Jim Ramstad (R-MN) and Clay Shaw (R-FL) introduced HR 1121 to repeal the Byrd Amendment. Although no such legislation yet exists in the Senate, its introduction there is expected in the near future as well (CITAC, 2005a).

Undaunted by the WTO ruling and the rising tide of sentiment against the Byrd Amendment, Baucus has tackled the issue of duties collected on imports of Canadian softwood lumber that are currently being held in escrow. Montana, the state from which Baucus hails, would stand to benefit greatly from softwood lumber duty offsets. Proposed by Baucus, the so-called Softwood Lumber Duties Liquidation Act of 2004 seeks to procure the liquidation of more than US$3 billion in softwood lumber duties that have been collected but are being held in escrow due to agreements between the United States and Canada (D'Aliesio and Penner, 2004).

The United States has proceeded to drag its feet well past the 27 December 2003 deadline set by the Dispute Settlement Body for correcting the Byrd Amendment, and its trading partners have become impatient with the lack of action. On 15 January 2004, Canada requested that it be allowed to take retaliatory action against the United States in the amount equal to the U.S. offset payments made. The United States objected to the level of action requested, so the matter was referred to arbitration. On 31 August 2004, the arbitrator decided that fair recourse against the Byrd Amendment would amount to total disbursements under the CDSOA for the most recent year multiplied by 0.72 (WTO, 2004e).

In response to the WTO sanctioning of action against the United States, the European Union and Canada have announced plans to impose tariffs on selected

imports from the United States. As of 1 May 2005, the European Union will levy a 15 percent tariff on imports of U.S. clothing, paper products, and sweet corn, while Canada will levy a 15 percent tariff on imports of U.S. cigarettes, hogs, oysters, and fish (Crutsinger, 2005). As per the guidelines established by the WTO DSB, the European Union plans to impose approximately US$28 million in sanctions while Canada plans to impose approximately US$14 million in sanctions (CITAC, 2005b). As of April 2005, five of the complainants – Canada, the European Union, India, Japan, and Korea – had filed lists of products with the WTO that they may impose sanctions against. After the recent actions of Canada and the European Union, it is likely that more countries will follow suit and implement similar tariffs against U.S. exports. A list of these countries and some of the commodities they are threatening to impose sanctions against is included in table 2. While many commodities look likely to suffer from the possible sanctions, initial responses indicate that a few commodities may be in danger of sanctions from multiple countries; these latter commodities include fish/seafood, fruits/vegetables, wood/paper products, clothing/textiles, prefabricated homes/buildings, and sporting goods.

**Table 2** Commodities Threatened by Each Country

| Canada | European Union | India | Japan | Korea |
|---|---|---|---|---|
| live swine | sweet corn | nuts | fish/seafood | glassware |
| fish/seafood | paper products | apples | animal products | fish/seafood |
| legumes | clothing/textiles | raisins | vegetable products | |
| fruits/vegetables | prefabricated homes | soybean oil | paper products | |
| beer/wine/liquor | prefabricated buildings | bulgur wheat | clothing/textiles | |
| tobacco products | | | cars | |
| wood products | | | prefabricated buildings | |
| paper products | | | sporting goods | |
| clothing/textiles | | | | |
| sporting goods | | | | |

Sources: Canada – WTO, 2004e; EU – WTO, 2004a; India – WTO, 2004b; Japan – WTO, 2004c; Korea – WTO, 2004d.

## Conclusion

From its questionable beginnings to its eventual rejection by the WTO, the Continued Dumping and Subsidy Offset Act of 2000 has caused fervent debates over U.S. trade law, production practices in foreign countries, and the role and authority of the WTO to rule on U.S. trade laws. In spite of the impassioned arguments of its supporters and the backing of the U.S. administration, the WTO

determined that the Byrd Amendment oversteps acceptable trade policies by providing domestic producers with compensation in excess of damages caused by dumping and creating an incentive for domestic producers to petition for AD/CVD orders and oppose negotiations with U.S. trading partners. While the U.S. administration has conceded the WTO ruling and urged Congress to repeal the act, supporters of the Byrd Amendment have maintained their vocal support of the amendment and even introduced further legislation to ensure the full liquidation of duties collected. Retaliation from important trading partners including the European Union and Canada should cause the Byrd Amendment to remain a bone of contention for some time to come.

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## Endnotes

1. European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins (EEC – Oilseeds I), adopted on 25 January 1990, BISD 37S/86. Their findings of nullification or impairment were not based on evidence of the specific trade effects of subsidies on imported products, but on evidence pertaining to the design and operation of the measures at issue (WTO 2002).

The technical annex to this paper, pages 245-250 is available as a separate document.