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OPINION

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PERRY BECHKY AND ANNE MACGREGOR

Under a new provision of U.S. trade law, the so-called "Byrd Amendment", all collected anti-dumping and countervailing duties must be distributed among U.S. companies that successfully petition for the imposition of those duties in the first place. These cases are already one of the most popular means for U.S. companies to obtain protection from international competition. Now, the U.S. Congress has created an economic incentive for these cases to proliferate. Major trading countries have swiftly condemned the new legislation and requested consultations at the World Trade Organisation (WTO).[1] As will be seen, a strong legal case can be made that the Byrd Amendment is inconsistent with WTO rules.

Background

On October 28, 2000 President Clinton signed into law the Continued Dumping and Subsidy Offset Act of 2000,[2] commonly known as the "Byrd Amendment" after the Senator responsible for its introduction. In the century-long history of anti-dumping and countervailing duty legislation around the world, the Byrd Amendment takes the unprecedented step of diverting general treasury funds into the pockets of petitioners.

Specifically, the Byrd Amendment provides for "affected domestic producers" to receive any duties collected pursuant to an anti-dumping or countervailing order if they show "qualifying expenditures".[3] This is supposed to "offset" *continued* dumping and subsidisation, as opposed to the *original* dumping or subsidisation that led to the anti-dumping or countervailing order to begin with. The term "affected domestic producers" means the petitioners and others supporting the petition, unless they have gone out of business, have stopped making the product at issue, or have been acquired by a company that opposed the petition.[3a] Offset payments are available for such a wide range of "qualifying expenditures" that claims may often dwarf the pool of collected duties available for distribution.

Tucked away in the lengthy and essential Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act 2001, the Byrd Amendment exemplifies the power that can be exercised by one well-placed Senator. Mr Byrd served on the "conference committee" responsible for reconciling differences between the two houses of Congress on this "must pass" legislation. He used the leverage created by that position to insist on the inclusion of this unrelated trade amendment—even though it had not been approved by either house. In fact, the Byrd Amendment was not approved by any Congressional committee, nor was it even the subject of hearings. For such a novel development in a contentious field, Congress' failure to deliberate is truly regrettable. Indeed, the hurried passage of the Byrd Amendment is contrary to the spirit of the 1999 E.U.–U.S. "Early Warning Mechanism", which declares that transparency is the "bedrock" for timely prevention of trade problems.

The Clinton Administration unsuccessfully opposed the inclusion of the Byrd Amendment in the agriculture legislation.

1. United States—Continued Dumping and Subsidy Offset Act of 2000: Request for Consultations by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand, WTO Document WT/DS217/1 of January 9, 2001.
2. Public Law (P.L.) 106–387, ss. 1001–1003.
3. "Qualifying expenditures" can be outlays for manufacturing facilities, equipment, research and development, training, technology, employee health care benefits, environmental equipment, training, or technology, acquisition of raw materials and other inputs, and working capital or other funds needed to maintain production. P.L. 106–387, s. 1003(a), adding Tariff Act, s. 754(b)(4).
3a. A list of qualifying domestic parties who may be eligible to receive a disbursement of anti-dumping or countervailing duty assessments under the existing orders was published on the website of the U.S. Customs Service on January 18, 2001, at http://www.customs.ustreas.gov/news/fed-reg/notices/dumping.pdf. 46.3% of the cases in the list concern ferrous products.

Yet, President Clinton signed the final bill—despite a joint request for a veto made by Canada, the E.C., and Japan.[4] Mr Clinton nevertheless criticised the Byrd Amendment in his signing statement and "call[ed] on the Congress to override [it], or amend it to be acceptable ... ".[5]

Early indications are that Congress will not repeal the Byrd Amendment and that the Bush Administration appears receptive to it. The new U.S. Trade Representative Robert Zoellick has indicated he will stand by the law and Secretary of Commerce Donald Evans has publicly stated that it "seems appropriate".[5a] Senator Charles Grassley, who in 2001 has taken over as chairman of the Senate Finance Committee, has expressed the view that the Byrd Amendment is "bad policy" but that it will take a WTO decision that it is in violation of the United States' trade agreements to get Congress to act on it.[5b] Therefore the matter seems set to escalate further into what one European Commission spokesman characterised early on as a "U.S.–Rest of the World Trade Problem".[6]

WTO disciplines

As should be apparent from the very terms "anti-dumping measures" and "countervailing measures", their purpose is to offset injury from dumping and subsidies, respectively. This concept manifests itself in various ways in the WTO regime. For example, Article VI of the General Agreement on Tariffs and Trade (GATT), which is the basic, original treaty provision on the use of anti-dumping and countervailing measures, provides that anti-dumping duties may be levied "in order to *offset* or prevent dumping" and defines a "countervailing duty" as a "special duty levied for the purpose of *offsetting* any bounty or subsidy".[7]

Article VI also specifically limits the amount of duties that can be imposed to the amount of dumping or subsidy. This rule is reinforced in two implementing agreements that elaborate upon Article VI, the Anti-Dumping ("AD") Agreement and the Subsidies and Countervailing Measures ("SCM") Agreement.[8] A duty set at the rate of dumping or subsidy, as is routine in U.S. cases, is the maximum remedy allowed to offset dumping or subsidy. In fact, both agreements express a preference for lesser duties where that "would be adequate to remove the injury to the domestic industry", although this concept, known as the "lesser duty rule" has not found its way into U.S. domestic practice.[9] Furthermore, the only two final anti-dumping and countervailing measures allowed by WTO rules, duties and undertakings, "shall remain in force *only* as long as and *to the extent necessary to counteract* dumping [or subsidisation] which is causing injury".[10]

The WTO texts establish the only measures that may be taken against dumping or subsidies, providing that "no specific action against dumping of exports from another Member [or against subsidy of another Member] can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."[11]

In light of these WTO disciplines, President Clinton's statement regarding the Byrd Amendment is damning: "this bill will provide select U.S. industries with a subsidy *above and beyond the protection level needed to counteract foreign subsidies*". Thus comes from the President an open (if imprecise) admission that the Byrd Amendment provides a greater remedy than WTO rules allow.[12] Because U.S. duties are routinely set at the maximum rate allowed, any remedy "above and beyond" that point necessarily contravenes WTO rules.

4. "Ambassadors' Letter on Byrd Amendment", *Inside U.S. Trade*, October 27, 2000, at 6.
5. "Also, I note that this bill will 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 to U.S. consumers, who are forced to pay higher prices on industrial inputs or consumer goods as a result of the anti-dumping and countervailing duties.": Statement by the President on signing H.R. 4461, October 28, 2000, at 3.
5a. "U.S. Steel Users urge repeal of Antidumping Law", *Japan Economic Newswire*, February 13, 2001.
5b. "Byrd Steel Measures won't be overturned", *Charleston Daily Mail*, January 11, 2001.
6. Comments by Anthony Gooch, spokesman for European Trade Commissioner Pascal Lamy, reported in *Yahoo Business News*, October 30, 2000.
7. GATT 1994, Art. VI:2 (anti-dumping duties), Art. VI:3 (countervailing duties) (*italics added*).
8. AD Agreement, Art. 9.3; SCM Agreement, Art. 19.4.
9. AD Agreement, Art. 9.1; SCM Agreement, Art. 19.2.
10. AD Agreement, Arts 11.1, 11.2, 11.5; SCM Agreement, Arts 21.1, 21.2, 21.5 (*italics added*).
11. AD Agreement, Art. 18.1; SCM Agreement, Art. 32.1.
12. The extent to which the United States is bound by Mr Clinton's statement may become a significant question before a future WTO panel. In that regard, it is instructive that the Panel in the *1916 Act* case, discussed further below, declined to consider statements by U.S. Administration officials to Congress as "admissions", in part because in general "they were not made at a sufficiently high level compared with the statements considered by the International Court of Justice in the *Nuclear Tests* case, where essentially declarations by a head of State and of members of the French Government were at issue." United States—Anti-Dumping Act of 1916, Report of the Panel (E.C. Complaint), WT/DS136/R, March 31, 2000, at para. 6.63.

Impermissible double protection

Under the Byrd Amendment, if a U.S. industry can show that it has been injured by dumped or subsidised imports, it will receive the traditional remedy: either special duties or undertakings. These measures help an injured domestic industry by reducing the ability of international competitors to compete on price. That is the WTO remedy. But, under the Byrd Amendment, successful U.S. petitioners will also receive another, more direct benefit: cash.

The Byrd Amendment appears to rely on the following theory: WTO rules do not expressly forbid WTO Members from distributing anti-dumping and countervailing duties to petitioners, so such distributions are allowed. Under this same logic, a WTO Member could imprison executives of companies found to be selling dumped or subsidised goods, as that too is not expressly forbidden. Yet, the WTO Appellate Body found recently that the imposition of jail sentences for dumping—or any other remedy not expressly authorised by the AD Agreement—is in fact prohibited.[13] The state of WTO law is thus precisely the opposite of the Byrd Amendment's presumption: WTO rules do not expressly permit WTO Members to distribute anti-dumping and countervailing duties to petitioners, so such distributions are forbidden.

The U.S. Anti-Dumping Act of 1916 (the "1916 Act") provides for two unconventional remedies for dumping: criminal penalties and private lawsuits for civil damages.[14] The 1916 Act was largely ignored for 80 years. Then, in the late 1990s, a few U.S. companies filed civil cases under the 1916 Act. This prompted the E.C. and Japan to begin WTO proceedings, resulting in an Appellate Body decision in August 2000 that the 1916 Act is inconsistent with WTO rules. The United States has committed to bring its law into compliance, and has been given until July 26, 2001 to do so which will probably require the repeal of the 1916 Act.

The Byrd Amendment cannot be reconciled with the 1916 Act decision. In defence of the 1916 Act, the United States argued before the Appellate Body that "Members may also choose to impose other types of anti-dumping measures [besides those listed in the AD Agreement], in which case they are not bound by the rules of Article VI." The Appellate Body rejected this argument, finding that the AD Agreement defines the universe of "permissible responses to dumping".[15] Because "offset payments" are not one of the "permissible responses" to dumping or subsidy in the WTO's comprehensive regime, the Byrd Amendment is inconsistent with the United States' WTO obligations.[16]

Put another way, the WTO Agreements contemplate that the collection of duties is the complete and exclusive remedy for dumping or subsidisation. The Byrd Amendment, by contrast, proceeds from the incompatible assumption that duty collection is an incomplete remedy that needs to be "strengthened" with cash payments.[17] The Byrd Amendment therefore provides for *two* remedies —collection of duties and distribution thereof to petitioners—where the WTO only allows for *one* remedy. This is double protection—two remedies for one injury—and it violates WTO disciplines on the use of anti-dumping and countervailing measures.

Other WTO violations

The Byrd Amendment excludes from its payment scheme U.S. companies that opposed the underlying petition and their affiliates. This ignores the fact that trade protection measures must inure to

13. United States—Anti-Dumping Act of 1916, Report of the Appellate Body August 28, 2000, at para. 137. This decision also disposes of another issue that might otherwise have arisen in connection with the Byrd Amendment: Members may challenge trade remedy legislation as such (and not only as applied in a particular case); *ibid.*, at para. 83.

14. United States Revenue Act of 1916, Title VIII, 39 Stat. 798 (1916), 15 U.S. C. s. 72.

15. Article VI [of GATT 1994], and, in particular, Article VI:2, read in conjunction with the Anti-Dumping Agreement, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertaking." United States—Anti-Dumping Act of 1916, Report of the Appellate Body, August 28, 2000, at para. 137. Neither "provisional measures" (such as U.S. preliminary duties) nor "price undertakings" (such as U.S. suspension agreements) are implicated by the Byrd Amendment.

16. The *1916 Act* decision did not address countervailing duties, but there is every expectation that a WTO panel would find that the same logic applies in this context as well.

17. P.L. 106-387, s. 1002(5).

the benefit of an *entire* domestic industry.[18] Moreover, making eligibility for funding depend on support of a petition threatens to distort "standing" calculations by enticing companies to support a petition they might otherwise be inclined to oppose. The filing and initiation of trade protection cases could proliferate.

Finally, one should not lose sight of the irony that the Byrd Amendment "strengthen[s]" U.S. laws to countervail foreign subsidies by giving subsidies—which are themselves subject to WTO disciplines. The payments do not appear to be "red light" subsidies, but depending on the facts a particular subsidy may nevertheless be found to be a prohibited "amber light" subsidy under Article 7.1 of the SCM Agreement.

No defence

As its formal name suggests, the Byrd Amendment pretends that its payments are available to redress a different injury than that remedied by the collection of duties: not to remedy injury from the original dumping or subsidy that led to an order, but only to offset injury from "continued" dumping or subsidy after the order is in effect. This pretence must fail. As a matter of U.S. law, anti-dumping and countervailing duties are only liquidated on the basis of dumping and subsidisation that occurs after the order is in effect. Thus, Byrd Amendment payments truly would be a remedy for the same dumping or subsidisation that is already being remedied by the imposition of the duties themselves.

In any event, the fact remains that the payments are a "specific action" against dumping or subsidy, which is not one of the permissible remedies in the WTO Agreements. They are therefore prohibited regardless of whether they purport to redress "original" or "continued" dumping or subsidy.

Conclusion

The Byrd Amendment requires the U.S. Government to dole out state funds for the subsidisation of companies already receiving protection from dumped or subsidised imports, and thus encourages U.S. companies to file even more disruptive trade cases. A proliferation of trade cases will exact a price on the U.S. economy when, as President Clinton said, downstream U.S. industries and consumers "are forced to pay higher prices on industrial inputs or consumer goods as a result of the anti-dumping and countervailing duties."[19]

This is the wrong legislation at the wrong time. Anti-dumping and countervailing measures have never resulted in true economic efficiency; WTO law allows them for reasons of political necessity —within carefully defined boundaries. When Members impose such measures outside those limited boundaries, they jeopardise the WTO's open trading regime. Because anti-dumping and countervailing measures have been used excessively and improperly, they have become one of the prime irritants in international trade. In the past year, WTO panels have found anti-dumping or countervailing duties imposed by five Members to violate WTO norms, with many more challenges in the pipeline.[20] At least some of the blame for the failure in Seattle to launch a new round of global trade negotiations is due to these duties. In this environment, which calls for greater discipline and restraint, Congress' unconsidered and untimely decision to promote trade cases and expand trade remedies in unheard of directions was simply irresponsible.

18. Subject to limited exceptions, such as "regional industries": AD Agreement, Art. 4.2; SCM Agreement Art. 16.3.
19. Statement by the President on signing H.R. 4461, October 28, 2000, at 3.
20. One of these, the case against the United States on anti-dumping measures on certain hot-rolled steel products from Japan, may still be appealed, following the panel report of February 28, 2001, "Overview of the State-of-Play of WTO Disputes", March 23, 2001.

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