

THE SHORT, UNHAPPY LIFE OF THE BYRD AMENDMENT

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In 2000, Congress enacted the Continued Dumping and Subsidy Offset Act (CDSOA), which it then repealed five years later.¹ Dubbed the “Byrd Amendment” after its champion, Senator Robert Byrd of West Virginia, the legislation was designed to “restore the conditions of fair trade” and aid U.S. companies facing foreign competition by diverting tariff revenue from the U.S. Treasury into their bank accounts.² This obscure piece of international trade legislation garnered negative domestic and global attention,³ and despite its seemingly noble goal, the law proved unable to survive an onslaught of criticism from the media,⁴ domestic think tanks,⁵ the executive branch,⁶ and the

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1. See Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-387, §§ 1001–03, 114 Stat. 1549, 1549A-72 to 1549A-75, *repealed by* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154.

2. *Id.*

3. Letter from Rubens A. Barbosa, Brazilian Ambassador to the U.S., to Norman Y. Mineta, U.S. Secretary of Commerce (Oct. 31, 2000) [hereinafter Barbosa Letter], available at http://www.brasilemb.org/trade_investment/trade_embaixador_amendment.shtml; Frank McKenna, Canadian Ambassador to the U.S., Address at the Woodrow Wilson Canadian Centre (Sept. 29, 2005) [hereinafter McKenna Address], available at <http://geo.international.gc.ca/can-am/washington/ambassador/050929-en.asp>; Editorial, *A Solid Trade Policy Now at Risk*, L.A. TIMES, Oct. 27, 2000, at B8; Editorial, *Lobbyist, Senator, Candlestick Maker*, N.Y. TIMES, Oct. 10, 2005, at A18; Editorial, *Dumping Byrd*, FIN. TIMES, Oct. 11, 2000, at 24.

4. *A Solid Trade Policy Now at Risk*, *supra* note 3; *Lobbyist, Senator, Candlestick Maker*, *supra* note 3; Editorial, *Mr. Kerry and Trade*, WASH. POST, Sept. 2, 2004, at A22.

5. Daniel J. Ikenson, *Byrd Boondoggle*, CATO INST., Dec. 13, 2005, http://www.cato.org/pub_display.php?pub_id=5246; Daniella Markheim, *Time to Repeal the Byrd Amendment*, HERITAGE FOUND., Oct. 30, 2005, <http://www.heritage.org/Research/TradeandForeignAid/wm900.cfm>.

6. OFFICE OF MGMT. & BUDGET, MAJOR SAVINGS AND REFORMS IN THE PRESIDENT’S 2006 BUDGET 202 (2005), available at <http://www.gpoaccess.gov/usbudget/fy06/pdf/savings.pdf>.

United States' trading partners.⁷

This Recent Development analyzes the repeal of the Byrd Amendment and concludes that Congress was correct to remove the legislation from the statute books. Part I provides a brief overview of U.S. antidumping and countervailing duty law. Part II discusses the controversy surrounding the Byrd Amendment, including the law's provisions, the circumstances of its enactment, and global reaction to it. Part III describes how Congress came to repeal the Byrd Amendment and summarizes the terms of that repeal. Finally, Part IV argues that Congress was correct to repeal the Byrd Amendment, because (1) the amendment has negatively impacted the U.S. economy, and (2) the amendment's repeal improved the United States' ability to maintain and expand the global trading system in a manner beneficial to its interests.

I.

OVERVIEW OF ANTIDUMPING AND COUNTERVAILING DUTY LAWS

U.S. antidumping and countervailing duty (AD/CVD) law affords protection from import competition to domestic industries⁸ by penalizing certain pricing and subsidy practices of foreign producers and governments.⁹ The duties force foreign producers to either increase their selling price in the U.S. market to incorporate the AD/CVD tariff, or withdraw from the market entirely to avoid payment, thus reducing import competition faced by U.S. industry. Antidumping law provides for the imposition of duties on imports that are “dumped”—sold at too low a price¹⁰—into the U.S. market.¹¹ It does so in order to

7. Barbosa Letter, *supra* note 3; McKenna Address, *supra* note 3. See also Request for Consultations by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/1 (Jan. 9, 2001) [hereinafter Request for Consultations].

8. CONG. BUDGET OFFICE, A REVIEW OF U.S. ANTIDUMPING AND COUNTERVAILING-DUTY LAW AND POLICY 1 (1994), available at <http://www.cbo.gov/ftpdocs/48xx/doc4897/doc27.pdf>.

9. CONG. BUDGET OFFICE, HOW THE GATT AFFECTS U.S. ANTIDUMPING AND COUNTERVAILING-DUTY LAW AND POLICY, at ix (1994), available at <http://www.cbo.gov/ftpdocs/48xx/doc4848/doc44.pdf>.

10. See *infra* notes 22–24 and accompanying text.

11. CONG. BUDGET OFFICE, ECONOMIC ANALYSIS OF THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000, at 1–2 (2004) [hereinafter CBO REPORT], available at <http://www.cbo.gov/ftpdocs/51xx/doc5130/03-02-ThomasLetter.pdf>; STAFF OF H. COMM. ON WAYS & MEANS, 109TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 102 (Comm. Print 2005) [hereinafter H. COMM. OVERVIEW], available at <http://waysandmeans.house.gov/media/pdf/109cong/wmcp/wmcp109-4.pdf>.

prevent foreign companies from engaging in “price discrimination,” the practice of charging lower prices in the United States than in their own domestic market.¹² Price discrimination is a tactic frequently used by businesses to attract new customers, expand market share, or liquidate excess inventory.¹³ Proponents of antidumping laws, however, regard such price discrimination as “unfair trade,”¹⁴ even though domestic firms also engage in similar practices within the U.S. economy,¹⁵ while opponents view these laws as “a form of disguised protectionism.”¹⁶ The other component of AD/CVD law, countervailing duty law, imposes tariffs on imports whose production has been subsidized by a foreign government.¹⁷ Although these foreign subsidies often benefit the U.S. economy by providing consumers with lower-priced products,¹⁸ “many people support countervailing-duty laws because they view subsidized imports as unfair competition for domestic producers and their employees.”¹⁹ Countervailing duty measures are therefore kept in place to “offset any unfair competitive advantage that foreign manufacturers . . . might enjoy over U.S. producers” as a result of such subsidies.²⁰

The Tariff Act of 1930²¹ governs the imposition of both antidumping and countervailing duties. Antidumping duties are imposed upon an import when two conditions are met.²² First, the U.S. Department of Commerce (DOC) must find that “a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value.”²³ An import is being sold at “less than fair value” when its U.S. price is lower than either the price of the same good in the exporter’s home market or the good’s cost of production.²⁴ Second, the U.S. International Trade Commission (ITC) must find that

12. CBO REPORT, *supra* note 11, at 2.

13. *Id.* at 3.

14. ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 244 (2002).

15. CBO REPORT, *supra* note 11, at 2–3 (“Price discrimination . . . by domestic firms . . . is common.”).

16. LOWENFELD, *supra* note 14, at 244 (2002).

17. CBO REPORT, *supra* note 11, at 2; H. COMM. OVERVIEW, *supra* note 11, at 96.

18. WORLD TRADE ORG., WORLD TRADE REPORT 2006: EXPLORING THE LINKS BETWEEN SUBSIDIES, TRADE AND THE WTO 58 (2006), available at http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf (“Producers of competing products will have to compete against the subsidised exporters at the lower price, whereas consumers of the cheaper imports will benefit.”).

19. CBO REPORT, *supra* note 11, at 2.

20. H. COMM. OVERVIEW, *supra* note 11, at 96.

21. 19 U.S.C. §§ 1202–1700 (2000).

22. H. COMM. OVERVIEW, *supra* note 11, at 104.

23. 19 U.S.C. § 1673(1).

24. *See* 19 U.S.C. § 1677b.

that “an industry in the United States” is either “materially injured” or “threatened with material injury,” or that “the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise.”²⁵ In assessing whether “material injury” has occurred, the ITC examines a variety of factors, including the amount of the good being imported into the U.S. market and the effect these imports have on employment and wages in the competing U.S. industry.²⁶ The imposition of countervailing duties under the Tariff Act requires that two similar conditions be met. First, the DOC must determine that a foreign government is subsidizing the manufacture, production, or export of a good “imported, or sold (or likely to be sold) for importation, into the United States.”²⁷ Second, in most cases,²⁸ the ITC must also find the U.S. industry has suffered “material injury” as a result of these subsidies.²⁹

The DOC conducts administrative investigations leading to the imposition of AD/CVD duties on foreign imports when petitioned by U.S. producers of a product similar to the imported good, unions in the affected industry, and other interested parties.³⁰ The DOC can also initiate such investigations itself.³¹ Petitions for the imposition of duties require (1) the support of at least 25% of the entire domestic industry, and (2) the support of at least 50% of that portion of the domestic industry expressing interest either in support for or in opposition against the petition.³² If the DOC finds that the imported good is subsidized or is being dumped into the U.S. market, and the ITC

25. 19 U.S.C. § 1673(2).

26. 19 U.S.C. § 1677(7).

27. 19 U.S.C. § 1671(a)(1).

28. The ITC must find “material injury” if the imports are from: (1) World Trade Organization (WTO) member countries, (2) countries that have undertaken obligations equivalent to those in the WTO Agreement on Subsidies and Countervailing Measures, (3) countries that have a treaty with the United States requiring most favored nation treatment with respect to articles imported into the United States. For imports from countries which do not fall under one of the three categories above, the ITC need not find “material injury” for countervailing duties to be imposed. H. COMM. OVERVIEW, *supra* note 11, at 96.

29. 19 U.S.C. § 1671(a)(2).

30. 19 U.S.C. § 1671a(b); 19 U.S.C. § 1673a(b). Interested parties include: (1) a manufacturer, producer, or wholesaler in the United States of a like product; (2) a certified or recognized union or group of workers which is representative of the affected industry; (3) a trade or business association with a majority of members producing a like product; (4) a coalition of firms, unions, or trade associations that have individual standing; or (5) in cases involving processed agricultural products, a coalition or trade association representative of processors, or processors and growers. 19 U.S.C. § 1677(9).

31. 19 U.S.C. § 1671a(a); 19 U.S.C. § 1673a(a).

32. 19 U.S.C. § 1673a(c)(4)(A).

finds “material injury” to the U.S. industry as a result of the import competition, U.S. Customs and Border Protection (Customs) will begin collecting duties from the foreign producer of the imported good at issue.³³ In antidumping cases, the duty collected is equal to the percentage by which the import price is below the home-market price or cost of production.³⁴ In countervailing duty cases, tariff rates are set equal to the rate of the foreign government’s subsidy.³⁵

II.

THE EARLY YEARS OF THE BYRD AMENDMENT

The Byrd Amendment, which was enacted as part of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2001 (Agriculture Appropriations Act),³⁶ changed longstanding practice in AD/CVD law.³⁷ Before its enactment, the proceeds from all of these tariffs were paid into the U.S. Department of the Treasury’s (Treasury) general revenue fund.³⁸ Under the Byrd Amendment, however, the proceeds from these duties are diverted into the bank accounts of the U.S. companies for whose protection the duties are imposed.³⁹ As explained below, this change in the allocation of funds immediately faced vigorous opposition in the domestic and global arena.⁴⁰

33. See H. COMM. OVERVIEW, *supra* note 11, at 113.

34. 19 U.S.C. § 1673e(a)(1).

35. 19 U.S.C. § 1671e(a)(1).

36. The CDSOA forms Title X of the Act. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-387, §§ 1001–03, 114 Stat. 1549, 1549A-72 to 1549A-75, *repealed by* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154; see H. COMM. OVERVIEW, *supra* note 11, at 118.

37. See *id.* at 118–20.

38. U.S. GOV’T ACCOUNTABILITY OFFICE, ISSUES AND EFFECTS OF IMPLEMENTING THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT 1 (2005) [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/d05979.pdf>.

39. *Id.* As discussed in Part IV, *infra*, for fiscal years 2001–2004, a mere five companies received nearly 50% of all Byrd Amendment payments. The Timken Company, a producer of bearings, received \$205 million; the Torrington Company, another bearing producer, received \$135 million; Candle-lite, a candle-maker, received \$57 million; MPB, another maker of bearings, received \$55 million, and Zenith Electronics received \$33 million. GAO REPORT, *supra* note 38, at 29, 55–57 tbl.2. The top thirty-nine companies received 80% of Byrd payments. *Id.*

40. GAO REPORT, *supra* note 38, at 1 (“[S]ince the act’s enactment, various domestic and international interests have opposed its implementation. Some domestic opponents contend, among other things, that CDSOA recipients receive a large, unjustified windfall from the U.S. treasury. Also, several nations lodged a complaint over the law against the United States at the World Trade Organization (WTO) in 2001.”).

A. *The Workings of the Byrd Amendment*

The Byrd Amendment mandated that AD/CVD duties be distributed annually to “affected domestic producers” on the basis of “qualifying expenditures” incurred by these producers.⁴¹ The definition of “affected domestic producers” included “any manufacturer, producer, farmer, rancher, or worker representative” that (1) petitioned the ITC or supported a petition for relief to the ITC that resulted in an AD/CVD duty order and (2) remains in operation.⁴² In contrast, companies, businesses, or persons that (1) opposed the filing of a petition, (2) ceased production of a product covered by the AD/CVD order, or (3) were acquired by a company that opposed a petition were not eligible to receive distributions of AD/CVD duties.⁴³ The term “qualifying expenditures” referred to certain expenses incurred by the domestic firm after the issuance of the AD/CVD order,⁴⁴ including monies spent on manufacturing facilities, equipment, research and development, personnel training, pension and health care benefits for employees, acquisition of technology, environmental equipment, raw materials, and working capital needed to maintain production.⁴⁵

Under the Byrd Amendment, Customs distributed all AD/CVD duties received during the previous fiscal year, as well as interest earned on the duties, within sixty days of the close of that fiscal year.⁴⁶ The monies were divided between the eligible producers based upon the amount of qualifying expenditures they claimed to have incurred.⁴⁷ If the amount collected under an order was inadequate to fully satisfy all the “qualifying expenditures” claims, as was often the case, each claimant received a percentage of the total amount collected equal to its portion of the total “qualifying expenditures” claimed by all eligible companies.⁴⁸ This pro rata system of dividing the spoils created an incentive for companies to claim as much as possible in “qualified expenditures” to make their share of Byrd monies as large as possible. As a result, company claims under the Byrd Amendment

41. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act § 1003 *repealed by* Deficit Reduction Act § 7601.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. H. COMM. OVERVIEW, *supra* note 11, at 119.

47. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act § 1003 *repealed by* Deficit Reduction Act § 7601.

48. GAO REPORT, *supra* note 38, at 16.

approached \$2 trillion in fiscal year 2004.⁴⁹ By comparison, actual Byrd Amendment disbursements in 2004 were a mere \$284 million.⁵⁰

B. *The Byrd Amendment's Troubling Emergence*

According to their statements, the proponents of the Byrd Amendment intended it to “encourage those [foreign companies and governments] engaging in the continued unfair trade practices to trade fairly” by diverting AD/CVD “monies finally assessed [from the Treasury] to the injured industry.”⁵¹ The manner in which the legislation was adopted, however, suggests that they were more concerned with enacting a provision “favored by special interests” than with making sound international trade policy.⁵² No committee with relevant expertise or jurisdiction over international trade issues ever reviewed the contents of the Byrd Amendment or considered its consequences before enactment.⁵³ Instead, Senator Byrd inserted the amendment into the Agricultural Appropriations Act during conference committee negotiations.⁵⁴ Because such negotiations are done in secret, and because once a bill leaves conference committee it must be voted up or down in its entirety without amendment, provisions inserted into conference committee reports are notoriously known for being aimed at aiding special interests.⁵⁵

As soon as the conference committee finished its work, criticism of these closed-door tactics and the amendment's policy consequences emerged.⁵⁶ During debates on the Agricultural Appropriations Act, Senator John McCain called the Byrd Amendment “an almost one-half billion dollar giveaway to U.S. corporations that had not been considered previously by the Senate,” and, predicting that the provision

49. *Id.* at 15–16.

50. *Repeal the “Byrd Amendment”*, CONSUMING INDUS. TRADE ACTION COAL., http://www.citac.info/about/issues/byrd_amendment/winners2004.php.

51. 146 CONG. REC. H9681, H9708 (2000).

52. See Seth Grossman, *Tricameral Legislating: Statutory Interpretation in an Era of Conference Committee Ascendancy*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 251, 281 (2006) (highlighting the increased use of conference committees in the enactment of legislation and making note of the fact “that the increasing tendency to legislate through omnibus measures frequently results in members of Congress being forced to accept legislation that contains controversial provisions favored by special interests.”).

53. 146 CONG. REC. H9681, H9699 (2000) (According to Representative Kolbe, the Byrd Amendment “was not considered by a [] committee in either the House or Senate.”).

54. *Id.*; *Repeal the “Byrd Amendment”*, CONSUMING INDUS. TRADE ACTION COAL., http://www.citac.info/about/issues/byrd_amendment/winners2004.php.

55. See Grossman, *supra* note 52, at 272–81.

56. 146 CONG. REC. H9681, H9699 (2000); 146 CONG. REC. S10,669, S10,672–73 (2000).

would be found to violate the U.S.'s World Trade Organization (WTO) obligations, called for further consideration before passing the amendment into law.⁵⁷ President Clinton, although he signed the law as a whole, also recognized that the Byrd Amendment did nothing more than “provide select U.S. industries with *a subsidy above and beyond the protection level needed*” and called on Congress to “override this provision, or amend it to be acceptable, before they adjourn.”⁵⁸

C. *The Globe Responds*

Only a few months after the passage of the Byrd Amendment, Australia, Brazil, Chile, the European Union, India, Indonesia, Japan, Korea, and Thailand requested consultations with the United States before the WTO regarding the legislation.⁵⁹ The requests alleged that the provisions of the Byrd Amendment violated U.S. obligations under WTO agreements on AD/CVD law.⁶⁰ Though these agreements permit member states to enact measures designed to counter the dumping or subsidization of imported products, they also specify the means through which states can thwart such unfair trade practices.⁶¹ The WTO panel hearing the complaints found that the Byrd Amendment amounted to a measure against dumping and subsidization not permitted under WTO AD/CVD rules and recommended that the amendment

57. 146 CONG. REC. S10,669, S10,672 (2000). Senator McCain also stated that “we should consider the effect of [the Byrd Amendment] very carefully. Instead, we will not consider it at all. No member, except those among the negotiators, will have any say about the effects of this policy.” *Id.*

58. Statement on Signing the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001, 36 WEEKLY COMP. PRES. DOC. 2669, 2670 (Oct. 28, 2000) (emphasis added).

59. Request for Consultations, *supra* note 7. They were also joined by Mexico and Canada in June of 2001. Request for Consultations by Canada and Mexico, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS234/1 (June 1, 2001).

60. See Request for Consultations, *supra* note 7.

61. See generally Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, available at www.wto.org/english/docs_e/legal_e/19-adp.pdf; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, available at http://www.wto.org/english/docs_e/legal_e/24-scm.pdf. See also JEANNE J. GRIMMETT & VIVIAN C. JONES, CONG. RESEARCH SERV., THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT (“BYRD AMENDMENT”) 10–11 (2005) [hereinafter CRS REPORT], available at <http://www.ncseonline.org/NLE/CRSreports/05sep/RL33045.pdf> (explaining the reasoning of the panel and Appellate Body decisions as well as the legal background surrounding their decision).

be repealed.⁶² The United States appealed, but the WTO Appellate Body upheld most of the panel's decision,⁶³ and the United States was granted eleven months to bring the Byrd Amendment into conformity with WTO obligations or risk retaliation by member nations.⁶⁴ When the United States failed to do so, the WTO authorized retaliation from eight complaining WTO members,⁶⁵ giving them the right to impose additional import duties having a total trade value of up to 72% of total Byrd Amendment disbursements.⁶⁶ The authorization gave these members the option to impose up to \$134 million in retaliatory tariffs on U.S. exports in 2005.⁶⁷

III.

THE REPEAL OF THE BYRD AMENDMENT

The WTO Appellate Body's ruling kindled efforts to reform or repeal the Byrd Amendment. Senator Olympia Snowe proposed curing the WTO deficiency by stopping the payment of AD/CVD revenues to corporations and using the funds "to assist communities negatively impacted by trade."⁶⁸ Representative Jim Ramstad took her proposal one step further, introducing legislation that would have repealed the Byrd Amendment and returned AD/CVD duties to the U.S. Treasury.⁶⁹ The Bush Administration also called for the law's repeal in its budget proposal for the fiscal year 2004, labeling it a "corporate subsid[y]" that provided a "benefit to industries that already gain protection from the increased import prices provided by

62. Panel Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶¶ 8.1–8.6, WT/DS217/R, WT/DS234/R (Sept. 16, 2002) (finding "that the CDSOA is inconsistent with AD Articles 5.4, 18.1 and 18.4, SCM Articles 11.4, 32.1 and 32.5, Articles VI:2 and VI:3 of the GATT 1994, and Article XVI:4 of the WTO Agreement.").

63. Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶¶ 318–19 WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003), available at http://trade-info.cec.eu.int/doclib/docs/2003/november/tradoc_114386.pdf.

64. Arbitrator Award, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/ARB/EEC ¶¶ 1.3, 5.1–5.5 (Aug. 31, 2004).

65. Only eight nations—Brazil, Chile, EC, India, Japan, Korea, Canada, and Mexico—requested that the WTO Dispute Settlement Body (DSB) authorize them to enact retaliatory measures. Australia, Indonesia, and Thailand gave the United States further time to comply with the ruling. CRS REPORT, *supra* note 61, at 12–13.

66. GAO REPORT, *supra* note 38, at 42.

67. *Id.*

68. Trade Readjustment and Development Enhancement for America's Communities Act of 2003, S. 1299, 108th Cong. § 2 (2003).

69. H.R. 3933, 108th Cong. (2004).

countervailing duties.”⁷⁰ Though the Bush Administration repeated its request for the law’s repeal in its budget proposals for fiscal years 2005 and 2006,⁷¹ it did little else to pressure Congress to address the issue.⁷²

Many legislators, however, were initially unreceptive to these arguments. Soon after the Administration’s budget proposal was made public, seventy senators sent the President a letter arguing that the Byrd Amendment was “critical” to maintaining high employment and the “competitiveness of American industry.”⁷³ The senators also maintained that “the WTO . . . acted beyond the scope of its mandate by finding violations where none exist[],” and that, rather than reform or repeal the amendment, the United States should press its trading partners to recognize the “right of WTO Members to distribute monies collected from antidumping and countervailing duties.”⁷⁴ This support for the amendment in the Senate resulted from strong opposition to repeal from the U.S. steel industry—which has historically been the largest beneficiary of AD/CVD laws⁷⁵—and from concerns about the economic health of the nation’s manufacturing base. Stating that “[t]o repeal or abandon this trade law would be a travesty,” Senator Byrd urged his fellow legislators to oppose repeal “to save American manufacturing and . . . agricultural producers from wave after wave of unfairly dumped foreign imports.”⁷⁶ Similarly, Republican Senator Mike DeWine argued that the disbursement of Byrd monies had

70. *Bush Budget Proposal Seeks Elimination of Two Steel Programs*, INSIDE U.S. TRADE, Feb. 7, 2003, available at http://www.insidetrade.com/secure/dsply_nl_txt.asp?f=wto2001.ask&dh=114387575.

71. OFFICE OF MGMT. & BUDGET, MAJOR SAVINGS AND REFORMS IN THE PRESIDENT’S 2006 BUDGET 202 (2005), available at <http://www.gpoaccess.gov/usbudget/fy06/pdf/savings.pdf>.

72. Telephone Interview with Stephanie H. Lester, Professional Staffer, Ways & Means Comm., in Washington, D.C. (Aug. 21, 2006) [hereinafter Lester Interview] (according to Lester, the House staffer leading the effort to repeal the Byrd Amendment, the Bush Administration did very little to pressure Congress into repealing the legislation).

73. Letter from Robert Byrd, Senator from West Virginia, et al. to George W. Bush, President of the United States (Feb. 4, 2003), available at http://www.insidetrade.com/secure/dsply_nl_txt.asp?f=wto2001.ask&dh=114250574.

74. *Id.*

75. CBO REPORT, *supra* note 11, at 3. The U.S. steel industry is therefore the industry most likely to benefit from the Byrd Amendment. Several steel industry groups filed statements with the House Committee on Ways and Means expressing their opposition to the Byrd Amendment’s repeal. Jack W. Shilling, Specialty Steel Industry of North America, Statement before the House Committee on Ways and Means (Sept. 2, 2005); American Iron and Steel Institute, Statement before the House Committee on Ways and Means (Sept. 2, 2005).

76. 151 CONG. REC. S13,630 (2005).

helped shore up the financial fortunes of businesses and employees across the country.⁷⁷

Congress did not seriously begin to consider repeal until the WTO compliance deadline had passed and it faced political pressure⁷⁸ from several U.S. industries,⁷⁹ think tanks,⁸⁰ editorial pages,⁸¹ and independent government agencies.⁸² Even after these developments, however, the legislative record suggests that a majority of both representatives and senators still opposed any change in the law.⁸³

Efforts to repeal the Byrd Amendment finally came to fruition with the passage of the Deficit Reduction Act of 2005 (DRA) on February 8, 2006.⁸⁴ As part of this broad drive to reduce the federal deficit, each congressional committee was made responsible for decreasing spending on programs under its control.⁸⁵ Representative Bill Thomas, chairman of the House committee with jurisdiction over international trade issues, championed reducing the deficit through an immediate repeal of the Byrd Amendment and a concurrent return of

77. *Id.*

78. By September 26, 2005, Chairman Bill Thomas of the House Ways and Means Committee was criticizing the Byrd Amendment, saying it “provided windfall subsidies to a handful of large corporations while other U.S. companies are paying the price.” *Ways and Means Passes Byrd Repeal; Senate Status Uncertain*, INSIDE U.S. TRADE, Oct. 28, 2005, available at http://www.insidetrade.com/secure/dsply_nl_txt.asp?f=wto2002.ask&dh=31364250.

79. “Byrd Amendment” Disbursements to U.S. Companies Show Need to End WTO-Inconsistent Payments, CONSUMING INDUS. TRADE ACTION COAL., http://www.citac.info/press/release/2003/02_24.php; Jeff Levin, *Byrd Amendment Repeal Now the Law of the Land*, ASS’N OF FOOD INDUS., http://afi.mytradeassociation.org/4/8_6/free-trade-agreements-act-43.shtml; *GMA Applauds Repeal of Ill-Conceived Byrd Amendment*, ASS’N OF FOOD, BEVERAGE & CONSUMER PRODS. COS., <http://www.gmabrands.com/news/docs/NewsRelease.cfm?DocID=1608>.

80. Markheim, *supra* note 5; Ikenson, *supra* note 5.

81. *Lobbyist, Senator, Candlestick Maker*, *supra* note 3; *Mr. Kerry and Trade*, *supra* note 4; Editorial, *Getting the Byrd: The US Needs to Start Showing More Respect for WTO Rulings*, FIN. TIMES, Sept. 7, 2004, at 20; Editorial, *The Byrd Lottery*, CHI. TRIB., Dec. 2, 2005, at C18.

82. See generally GAO REPORT, *supra* note 38; see also CBO REPORT, *supra* note 11.

83. The House and Senate both passed motions to instruct their conferees to the Deficit Reduction Act of 2005 conference not to support language in the House version of the bill (language that would repeal the Byrd Amendment). See 151 CONG. REC. S13,630–32 (2005); 151 CONG. REC. H11,959–67 (2005); *Senate Tells Conferrees to Reject Byrd Repeal Language in 72-19 Vote*, INSIDE U.S. TRADE, Dec. 16, 2005, available at http://www.insidetrade.com/secure/dsply_nl_txt.asp?f=wto2002.ask&dh=36416254; Letter from John M. Spratt, Jr., Ranking Member of House Budget Comm., to House Democrats (Jan. 17, 2006), available at http://www.house.gov/budget_democrats/analyses/07_dc_reconciliation.pdf.

84. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154.

85. Lester Interview, *supra* note 72.

AD/CVD duties to the U.S. Treasury.⁸⁶ Though the House adopted Representative Thomas's position, the Senate did not.⁸⁷ After much debate on reconciling the bills, Representative Thomas was able to broker a compromise in conference committee:⁸⁸ the Byrd Amendment would be repealed immediately, but all AD/CVD "duties on entries of goods made and filed before October 1, 2007," would be distributed as if there had been no repeal.⁸⁹ Once out of committee, the DRA passed by extremely slim margins in both houses of Congress.⁹⁰

IV.

CONGRESS WAS CORRECT TO REPEAL THE BYRD AMENDMENT

The Byrd Amendment's modification of U.S. AD/CVD law has had a variety of negative consequences for the United States. In addition to the drawdown of over a billion dollars from the federal coffers, the legislation has harmed the domestic economy and damaged the United States' international interests. As a result, Congress's repeal of the provision was a step in the right direction, although an immediate and total repeal would have been preferable to the compromise agreement reached.

A. *The Domestic Economic Impact*

Far from meeting its goal of "restor[ing] conditions of fair trade" for American producers,⁹¹ the Byrd Amendment turned out to be little more than a wasteful drain on the federal budget and a windfall for a concentrated set of companies and industries.⁹² From fiscal year 2001 to fiscal year 2004, Customs distributed over \$1 billion in Byrd Amendment payments to a seemingly broad array of U.S. producers⁹³—770 companies, including producers of steel, cement, pasta,

86. *Id.*

87. *Compare* H.R. 4241, 109th Cong. § 8701 (2005) (containing provision for the immediate repeal of the Byrd Amendment) *with* S. 1932, 109th Cong. (2005) (containing no provisions regarding the Byrd Amendment).

88. Lester Interview, *supra* note 72.

89. Deficit Reduction Act § 7601.

90. The DRA passed the Senate 51-50, with the Vice President casting a tie-breaking vote. 151 CONG. REC. S14,202, S14,221 (2005). The DRA passed the House 216-214. 152 CONG. REC. H68, H68 (2006).

91. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-387, § 1002, 114 Stat. 1549, 1549A-72.

92. Ikenson, *supra* note 5.

93. GAO REPORT, *supra* note 38, at 28.

candles, and pencils, as well as crawfish and pineapple processors, applied for and received Byrd Amendment funds.⁹⁴ Despite this apparent breadth, almost half of the payments went to only five companies, and one company, the Timken Company, received approximately 20% of the duties, amounting to \$205 million.⁹⁵ Similarly, approximately two-thirds of total payments went to just three industry product groups: bearings, candles, and iron and steel mills.⁹⁶ When Congress repealed the amendment, it returned these funds to the Treasury at a time of high public deficits⁹⁷ and simultaneously ended a corporate-welfare program that benefited only a handful of U.S. businesses and did little to “restore the conditions of fair trade.”

Additionally, rather than benefiting from the Byrd Amendment, U.S. exporters suffered the brunt of its negative economic consequences. After the amendment was declared WTO-incompatible, several nations began retaliating against U.S. exports under WTO-mandated guidelines. On May 1, 2005, the EU imposed \$28 million in retaliatory duties on U.S. products, and Canada imposed another \$14 million.⁹⁸ Mexico imposed \$20.9 million in retaliatory tariffs on August 18, 2005, and Japan followed a few weeks later with \$52 million in duties.⁹⁹ Brazil, Chile, India, and Korea could also have imposed retaliatory tariffs on U.S. exports if the amendment remained in place.¹⁰⁰ These increased tariffs affect a wide variety of American industries, including wine, plastic furniture, photocopying machines, ball point pens, live swine, oysters, flat rolled steel, and industrial belts.¹⁰¹ Because Congress chose to effectively delay the Byrd Amendment’s repeal until late 2007, U.S. exporters will continue to suffer from these retaliatory duties for longer than necessary.¹⁰²

94. *Id.* at 28–29.

95. *Id.* at 29.

96. *Id.* at 31.

97. The Congressional Budget Office Estimated in March 2006 that the deficit for the year would be \$336 billion. CONG. BUDGET OFFICE, CURRENT BUDGET PROJECTIONS (2006).

98. H.R. REP. NO. 109-276, at 975 (2005).

99. *Id.*

100. *See supra* note 65 and accompanying text.

101. *Id.* Other exports suffering due to the tariffs included dairy, textiles and apparel, paper products, frozen corn, sports footwear, hand drills, crane lorries, eyeglass frames, prefabricated buildings, mobile homes, chewing gum, certain cigarettes, certain fish, ball bearings, machinery accessories, printing machines, and forklift trucks. *Id.* Since the Byrd Amendment was repealed just six months after other nations started retaliating, there has been no analysis on which industries suffered the most harm.

102. *EU Expands Byrd Retaliation Duties; Canada Undecided on Options*, INSIDE U.S. TRADE, Apr. 28, 2006, available at http://www.insidetrade.com/secure/dsply_

The Byrd Amendment has also harmed the U.S. economy by creating incentives for domestic firms to file and support more AD/CVD petitions, and it will continue to do so until the repeal becomes fully effective in October 2007.¹⁰³ Traditionally, AD/CVD petitions benefited domestic industries simply by leading to price increases on targeted goods.¹⁰⁴ The prospect of directly receiving Byrd disbursements, however, intensified the financial incentive to file and support petitions. As explained *supra* in Part I, 25% of the domestic industry must support the initial petition for DOC and ITC to initiate AD/CVD investigations;¹⁰⁵ the Byrd Amendment's increased incentives have made it more likely that this minimum level of domestic support would be reached.¹⁰⁶ Taxpayers have to fund the government personnel increases needed to process any additional administrative investigations. Furthermore, the general transaction costs of doing business in the United States have increased, in that foreign and domestic firms must divert their resources from generating wealth to hiring lawyers and economic experts to advocate their positions before the government agencies conducting AD/CVD investigations.¹⁰⁷ The amendment's repeal removes the incentive for additional AD/CVD investigations, thus eliminating the administrative and transactions costs associated with the provision.

B. *The Harm to U.S. International Trade Interests*

In addition to negatively impacting the domestic economy, the Byrd Amendment also undermined the United States' ability to reach its international trade policy goals. The United States is the world's largest exporter.¹⁰⁸ Trade in goods and services makes up 27% of the

nl_txt.asp?f=wto2002.ask&dh=48592904 (stating that the EU intends to continue retaliating against U.S. exporters until the Byrd Amendment is phased out in October 2007).

103. CBO REPORT, *supra* note 11, at 5.

104. CRS REPORT, *supra* note 61, at 21.

105. 19 U.S.C. § 1671a(c)(4)(A) (2000); *see also supra* note 32 and accompanying text.

106. CBO REPORT, *supra* note 11, at 5.

107. In AD/CVD investigations, petitioners and opponents of the petition employ lawyers, economists, and lobbyists in making their case before the administrative agencies. An increase in spending for these services is a cost of doing business which, if the Byrd Amendment were not in place, could be allocated to more productive use. *Id.* at 7–8.

108. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2006 TRADE POLICY AGENDA AND 2005 ANNUAL REPORT 2 (2006) [hereinafter TRADE AGENDA], available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Trade_Policy_Agenda/asset_upload_file765_9077.pdf.

U.S. gross domestic product,¹⁰⁹ and the nation's exports account for a major portion of its economic growth (20% in 2005).¹¹⁰ The current health of the U.S. economy therefore depends upon the effective enforcement of trade agreements already entered into; when U.S. trading partners fail to live up to their obligations, the export sector of the U.S. economy suffers. Furthermore, the continued growth of the U.S. economy is in part reliant upon future reductions of foreign trade barriers; without such liberalization, American exporters cannot effectively expand in new overseas markets.¹¹¹ As a result, the U.S. economy benefits from more open markets and from a global trading system which ensures that all nations follow their WTO commitments.¹¹²

The Byrd Amendment's repeal has buttressed the continued existence of such a global trading system. By complying with the WTO, Congress has helped guarantee that other WTO members will comply with the organization's rules when their doing so benefits the United States.¹¹³ In the words of former U.S. Trade Representative Robert Zoellick, "it helps us to get others to follow the rules, if we follow the rules [ourselves]."¹¹⁴ On several occasions, when U.S. negotiators demanded that trading partners repeal or change laws that were WTO-incompatible and harmful to U.S. exporters, such requests were rebuffed on the rationale that the United States had no moral authority to demand compliance while the Byrd Amendment remained in force.¹¹⁵ The Byrd Amendment's repeal was welcomed by the United States' major trading partners¹¹⁶ and has removed this barrier to ensuring

109. *Id.* at Annex I, pt. I.

110. *Id.* at 2.

111. *See id.* at 1 ("With 95 percent of the world's people living outside our borders and hundreds of millions of new potential consumers overseas . . . the United States must be proactive in opening foreign markets to our manufactured goods, services, and agricultural products. Expanding U.S. exports increases U.S. prosperity.").

112. *Id.* at 1, 10; CRS REPORT, *supra* note 61, at 24.

113. CRS REPORT, *supra* note 61, at 24.

114. *Zoellick Urges Congress to Act on WTO Rulings, Including Byrd*, INSIDE U.S. TRADE, Mar. 12, 2004, available at http://www.insidetradetrade.com/secure/dsply_n1_txt.asp?f=wto2001.ask&dh=145612014.

115. Lester Interview, *supra* note 72.

116. EU Trade Commissioner Peter Mandelson "welcome[d] the fact that the US Congress has chosen to bring US law into compliance with its international obligations." He went on to state that while "this is a constructive step . . . I regret that the US has chosen to provide a transition period rather than ending these payments at once." Press Release, European Commission, EU Welcomes Repeal of Byrd Amendment and Regrets Transition Period, (Feb. 2, 2006), available at http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_127327.pdf. Canada also welcomed the Byrd Amendment's repeal. News Release, Foreign Affairs and International Trade Canada, Canada Welcomes Vote By U.S. House of Representatives As Key Step To-

their compliance with WTO law. Additionally, congressional refusal to comply with the WTO's ruling would have reflected badly upon the ability of the WTO Dispute Settlement Body's to ensure compliance;¹¹⁷ in contrast, the repeal enhances the WTO's ability to enforce its rules against U.S. trading partners, which redounds to the benefit of U.S. economic interests.¹¹⁸

Congress's repeal of the Byrd Amendment has also aided the United States' position in ongoing trade negotiations. During the Doha Round of WTO negotiations, which were aimed at further reducing barriers to international trade,¹¹⁹ U.S. non-compliance with the WTO ruling on the Byrd Amendment was used as an excuse to rebuff U.S. negotiating proposals, especially on AD/CVD issues.¹²⁰ Congressional refusal to repeal the Byrd Amendment made the demands of U.S. negotiators seem hypocritical, in that the "scofflaw,"¹²¹ while refusing to dismantle WTO-incompatible subsidies, was urging its trading partners to reduce their subsidy levels and their tariff rates. By coming into compliance with WTO rulings, Congress strengthened the ability of the United States to negotiate for further global trade liberalization within the context of WTO negotiations.¹²²

ward Repeal of Amendment (Nov. 18, 2005), *available at* http://w01.international.gc.ca/minpub/Publication.aspx?publication_id=383437.

117. *See* CRS REPORT, *supra* note 61, at 24.

118. *See id.*

119. *See* WTO, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), *available at* http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.pdf (stating that the purpose of the Doha Round negotiations is to "maintain the process of reform and liberalization of trade policies.").

120. Lester Interview, *supra* note 72. *See also* CRS REPORT, *supra* note 61, at 27 ("[S]ome observers believe that lack of action on CDSOA repeal could weaken the U.S. position in the ongoing [AD/CVD] negotiations. This could be problematic because the gap in negotiating positions between the United States and other WTO countries on [AD/CVD law] is large and may be difficult to narrow."); Bruce Odyssey, *House Panel Approves Repeal of Byrd Amendment After WTO Ruling*, USINFO.STATE.GOV, U.S. DEP'T OF STATE, Oct. 27, 2005, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2005&m=October&x=20051027105439ebyessedo.7776148&t=livefeeds/wf-latest.html> (paraphrasing Ways and Means Chairman Bill Thomas as stating that "not complying with international obligations undercuts the U.S. position in the negotiations by giving other countries 'cheap excuses' not to make adequate offers").

121. *Zoellick Urges Congress to Act on WTO Rulings, Including Byrd*, *supra* note 114.

122. Though currently the WTO Doha Round has been suspended, it is likely that talks will be resuscitated, as was the case with the WTO Uruguay Round in the 1990s. Frances Williams, *US and Brazil Revive Hope for Doha Trade Agreement*, FIN. TIMES, Jul. 31, 2006, at 7.

IV.

CONCLUSION

Congress's repeal of the Byrd Amendment will reduce the current budget deficit and remove incentives for the filing of AD/CVD petitions; it has already benefited U.S. exporters and helped facilitate the implementation of U.S. international trade policy. Though an immediate repeal would have had further economic and international trade policy benefits, the delayed repeal currently is vastly preferable to the legislation's indefinite existence.

