Decision by the Arbitrator—United States—Continued Dumping and Subsidy Offset Act of 2000: Payback Is for the Byrds; Arbitrator Allows Eight Countries to Sanction the United States for Application of the Byrd Amendment

I. OVERVIEW

The World Trade Organization (WTO) handed down eight arbitration decisions in 2004, which will allow eight member nations to impose sanctions against the United States for failing to bring the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) into conformity with WTO antidumping agreements.[1]

1. Decision by the Arbitrator, *United States—Continued Dumping and Subsidy Offset Act of 2000: Recourse to Arbitration by the United States Under Article 22.6 of the DSU*, WT/DS217/ARB/EEC, WT/DS234/ARB/CAN, WT/DS217/ARB/IND, WT/DS217/ARB/BRA, WT/DS217/ARB/KOR, WT/DS234/ARB/MEX, WT/DS217/ARB/CHL, WT/DS217/ARB/JAP (Aug. 31, 2004), *available at* http://trade-info.cec.eu.int/doclib/html/119060.htm [hereinafter Arbitrator's Decision]. The Eight Requesting Parties (Requesting Parties) were the European Communities (Union), Canada, India, Brazil, Korea, Mexico, Chile, and Japan. The Requests were carried out jointly, and although each Requesting Party was afforded a separate opinion, the decisions were identical and will be discussed as one decision in this Note. *Id.* The eight countries will be referred to throughout this Note as the "Requesting Parties."

The CDSOA, commonly known as the Byrd Amendment, established a system in which remedial duties collected from countries found to be engaged in dumping are funneled directly to domestic producers.[2] On August 23, 2001, a panel was formed to hear the Requesting Parties' complaints.[3] The panel concluded that the CDSOA was a violation of U.S. WTO obligations.[4] The United States appealed to the Appellate Body of the WTO.[5] The Appellate Body agreed with the panel that the CDSOA conflicted with U.S. obligations under the WTO and recommended that the United States bring the CDSOA into conformity with the WTO agreements.[6] The WTO Dispute Settlement Body (DSB) adopted the Report of the Appellate Body, also finding the CDSOA to be in violation of various trade articles of the WTO.[7]

In June 2003, an arbitrator gave the United States eleven months from the date of the decision to bring the CDSOA into conformity with WTO trade agreements.[8] In January 2004, after the expiration of the eleven-month time period, the Requesting Parties asked for authorization to suspend concessions to the United States, in order to force the United States to comply with the WTO decisions.[9] The United States objected to the proposed level of suspension and tariff concessions, and the matter was submitted to arbitration on January 6, 2004.[10]

The arbitrator rejected the Requesting Parties' argument that the level of suspension should be equal to the disbursements made to domestic producers under the General Agreement on Tariffs and Trade (GATT).[11] The arbitrator concluded that an economic model should be used to determine the "trade effect" that the CDSOA imposed on the Requesting Parties.[12] Further, the arbitrator requested that both the United States and the Requesting Parties submit proposed economic

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2. Continued Dumping and Subsidy Offset Act, Pub. L. No. 106-387, 114 Stat. 1549 (2000) (codified at 19 U.S.C.A. § 1675c) (2004) [hereinafter Byrd Amendment].

3. Report of the Panel—Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/R, ¶ 1.4 (Sept.. 16, 2002), *available at* http://www.wto.org/english/tratop_e/dispu_e/217_234r_a_e.pdf [hereinafter Panel Report].

4. *Id.* ¶ 7.66.

5. Appellate Body Report—United States Continued Dumping and Subsidy Offset Act of 2000, WT/DS217 & 234/ AB/R ¶ 7 (Jan. 16, 2003), *available at* http://www.wto.org/english/tratop_e/dispu_e/217_234_abr_e.pdf [hereinafter Appellate Body Report].

6. *Id.* ¶ 319.

7. Arbitrator's Decision, *supra* note 1, ¶¶ 1.1-1.2.

8. *Id.* ¶ 1.3 (giving the United States until December 27, 2003, to conform to the WTO guidelines).

9. *Id.* ¶ 1.4.

10. *Id.* ¶¶ 1.7-1.8.

11. *Id.* ¶¶ 3.17-3.56.

12. *Id.* ¶ 3.80.

models; the arbitrator rejected the U.S. model for its lack of specific data and chose a modified version of the Requesting Parties' model.[13] Lastly, the arbitrator *held* that the trade effect was determined to be seventy-two percent of the duties reallocated to the victims under the CDSOA, and the Requesting Parties were entitled to retaliatory measures for that amount. Decision by the Arbitrator, *United States—Continued Dumping and Subsidy Offset Act of 2000: Recourse to Arbitration by the United States Under Article 22.6 of the DSU*, WT/DS217/ARB/R (Aug. 31, 2004).

II. BACKGROUND

A. Antidumping and Countervailing Duty Laws

Dumping is the selling of undervalued goods in a foreign market.[14] These undervalued goods can adversely affect the foreign importer by creating an artificial competitive advantage.[15] Antidumping laws grew out of the so-called predatory pricing[16] practices that result in "a reduction of profits, a surplus of certain goods in the market, layoffs of employees, and corporate bankruptcy."[17] Unlike antidumping, countervailing duty laws are implemented to prevent governments from subsidizing producers in the hope that they may cut their costs of production and harm competing foreign industries.[18]

The purpose of antidumping laws is to create a "base price" for the sale of goods to eliminate or neutralize unfair advantages that may arise when a foreign producer dumps goods in the domestic market.[19] However, the opponents of these laws allege that they may often be used as a guise to implement "protectionist policies" that favor domestic

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13. *Id.* ¶¶ 3.96, 3.114-3.116.

14. 1 JAMES E. PATTISON, ANTIDUMPING AND COUNTERVAILING DUTY LAWS § 1.2 (2004).

15. BRINK LINDSEY & DANIEL J. IKENSON, ANTIDUMPING EXPOSED: THE DEVILISH DETAILS OF UNFAIR TRADE LAW, at vii (2003).

16. *See* Meredith Schutzman, *Antidumping and The Continued Dumping and Subsidy Offset Act of 2000: A Renewed Debate*, 11 CARDOZO J. INT'L & COMP. L. 1069, 1081 (2004). The practice of predatory pricing takes place when a company attempts to force competitors out of the market by lowering prices drastically. *Id. But see* BRIAN HINDLEY & PATRICK A. MESSERLIN, ANTIDUMPING INDUSTRIAL POLICY: LEGALIZED PROTECTIONISM IN THE WTO AND WHAT TO DO ABOUT IT 18-22 (1996) (arguing that predatory pricing is a "weak basis for antidumping" laws and does not justify them).

17. Hale E. Sheppard, *The Continued Dumping and Subsidy Offset Act (Byrd Amendment): A Defeat Before the WTO May Constitute an Overall Victory for U.S. Trade*, 10 TUL. J. INT'L & COMP. L. 121, 123 (2002) (arguing that the CDSOA benefits a small number of domestic producers at the expense of the American economy as a whole, as well as placing the United States in a precarious situation in their global trade status).

18. PATTISON, *supra* note 14, § 1:6.

19. *See id.*

producers over their foreign counterparts.[20] Despite this criticism, international trade agreements continue to allow antidumping remedies as legitimate national trade policies.

B. Antidumping Laws in the United States

The United States has attempted to curb the dumping of undervalued imports into the domestic market as far back as the Antidumping Act of 1916.[21] The 1916 Act allowed for both criminal and civil penalties to be enforced against "any person importing or assisting in importing any articles from any foreign country into the United States . . . at a price substantially less than the actual market value . . . of such articles."[22] The civil provision of the 1916 Act allowed private parties to file a civil claim against importers involved in dumping.[23] However, this private cause of action was rarely used, and it was not until 2003 that a plaintiff won a fully adjudicated verdict under the 1916 Act.[24] One reason the 1916 Act may have been used so infrequently is the requirement that the act be done "with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States."[25] Its limited jurisdictional scope and its stringent intent requirement made the 1916 Act an inefficient vehicle for litigating dumping claims.[26]

Congress recognized the limits of the 1916 Act and attempted to remedy them by enacting the 1921 Antidumping Act.[27] The 1921

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20. *See id.*

21. Act of Sept. 8, 1916, ch. 463, tit. VII, § 801, 39 Stat. 798-99 (1916) (current version at 15 U.S.C. § 72 (2000 & Supp. II 2004)) [hereinafter 1916 Act]; *see* Report of the Panel, United States—Antidumping Act of 1916, WT/DS136/R, WT/DS136/R/Corr.1 (Mar. 31, 2000, Corrigendum: Apr. 25, 2000) (declaring the 1916 Act violates the WTO agreements in 2000). The United States has not yet repealed it.

22. 1916 Act, *supra* note 21. It is important to note that Congress did not include foreign producers or exporters with those who were subject to sanctions under the 1916 Act. *See* PATTISON, *supra* note 14, § 15:3 ("This limitation can primarily be attributed to the sentiment in the Congress at the time of the law's passage that anticompetitive laws should be drafted restrictively so as to avoid any possibility of an extraterritorial scope.").

23. PATTISON, *supra* note 14, § 1:7; 1916 Act, *supra* note 21.

24. *See* PATTISON, *supra* note 14, § 1:7; Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd., 294 F. Supp. 2d 1027, 1029 (N.D. Iowa 2003) (denying the defendant's motion for summary judgment).

25. 1916 Act, *supra* note 21; *see also* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 251, 260 (E.D. Pa. 1975) (holding that the 1916 Act requires a "specific predatory intent" coupled with an act of dumping in order for a violation to occur).

26. *See* 1916 Act, *supra* note 21; *see also* PATTISON, *supra* note 14, § 15:5 ("The intent standard of the 1916 Act . . . poses a major obstacle to many possible petitioners under that law.").

27. PATTISON, *supra* note 14, § 1:18; 19 U.S.C. §§ 160-173 (1921) (repealed Jan. 1, 1980).

Antidumping Act "established the administrative framework" for current antidumping legislation by requiring that private parties proceed through administrative channels, such as the United States Tariff Commission and the Department of the Treasury, and not through the courts.[28] In order to be actionable, a claim under the 1921 Antidumping Act must have asserted that dumped goods injured the domestic industry of the United States.[29] The 1921 Antidumping Act differed from the 1916 Act by making the "effect" of the dumping, not the intent, the controlling determination.[30] The 1921 Antidumping Act was incorporated into the Tariff Act of 1930, which subsequently became the basis for all U.S. trade law.[31]

The 1930 Tariff Act has two requirements for imposing antidumping duties.[32] The first requirement is that the United States Department of Commerce (DOC) determine that "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value."[33] Once the DOC determines that dumping has occurred, the United States International Trade Commission (ITC) must then ascertain whether the dumping resulted in a material harm, a threatened material harm, or retards the potential growth of a U.S. industry.[34]

An aggrieved party may file a petition with the DOC and the ITC to seek relief from injurious dumping.[35] However, domestic producers who account for "at least 25 percent of domestic production (by volume) must support the petition."[36] After the petition is filed, the DOC begins to investigate to determine if dumping has occurred.[37] If the DOC has a "reasonable basis to believe or suspect" that dumping has occurred and the ITC has a "reasonable indication" that the dumping resulted in a material injury or a threat of material injury to a domestic industry, then

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28. PATTISON, *supra* note 14, § 1.8.

29. Daniel E. Feld, Annotation, *Construction and Application of Antidumping Act of 1921 (19 U.S.C. §§ 160-173), Preventing Actual or Threatened Injury to Domestic Industry Resulting from Sale in United States of Merchandise at Prices Lower than in Country of Origin*, 42 A.L.R. FED. 821, 826 (1979).

30. J. Michael Finger, *The Origins and Evolution of Antidumping Regulation*, *in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 13, 22 (J. Michael Finger ed., 1993).

31. 19 U.S.C. §§ 1202-1677 (2000).

32. *See id.* § 1673(1)-(2).

33. *Id.* § 1673(1).

34. *Id.* § 1673(2).

35. LINDSEY & IKENSON, *supra* note 15, at 2.

36. *Id.* Another requirement is that the opposition to the petitioners must equal "less than 50 percent of the total output of all producers expressing an opinion one way or the other." *Id.*

37. Sheppard, *supra* note 17, at 123.

an antidumping duty is imposed on the foreign producer.[38] If, however, the ITC is unable to determine from the information offered by the petitioners whether the domestic industry has been harmed or is threatened with a material injury within forty-five days of receipt of the petition, then the case is terminated.[39]

The antidumping duty imposed on the foreign producer is equal to the dumping that occurred; this is determined by the "dumping margin."[40] The dumping margin is usually calculated by comparing the home market prices of the United States with the "net" prices of the foreign goods sold in the United States.[41] The purpose of the duty is to even the playing field by forcing the foreign producer to raise its price "to incorporate the heightened duty rate or . . . withdraw from the U.S. market entirely."[42] Historically, the duties paid by the foreign producer were deposited in the United States Treasury.[43]

C. Worldwide Antidumping

Previously, antidumping laws were the province of rich, industrialized nations; recently, however, the implantation of antidumping laws has become a global phenomenon with many less developed countries following suit.[44] This is evidenced by a significant increase in

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38. *Id.* at 123-24. The dumped goods do not have to be the principal or even a significant cause of the material injury; they simply have to be causally connected to the injury. Peter D. Ehrenhaft, *Remedies Against Unfair International Trade Practices*, *in* GOING INTERNATIONAL: FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS, SJO78 ALI-ABA 217, 229 (2004). This broad interpretation of material injury has been questioned by some courts, who believe the evidence needs to show the harm was caused "by reason of" the dumped goods. *Id.* (quoting Gerald Metals Inc. v. United States, 132 F.3d 716, 722 (Fed. Cir. 1997) (quotations omitted)).

39. J. Michael Finger & Tracy Murray, *Antidumping and Countervailing Duty Enforcement in the United States*, *in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT, *supra* note 30, at 241 ("When the U.S. government turns down a petition for an import restriction, it is almost always because the injury test is negative—the government finds that the imports in question are not causing a serious harm to domestic producers.").

40. LINDSEY & IKENSON, *supra* note 15, at 4.

41. *Id.* at 19. The DOC will employ different methodologies in cases where the domestic producer has not sold in the U.S. market or if "its domestic sales are less than 5 percent of its U.S. sales." *Id.* In such a case, the DOC will compare the net price in a different export market and compare with the home market value of the United States. *Id.*

42. Sheppard, *supra* note 17, at 124.

43. *Id.* However, many Members of Congress have lobbied to have the duties redistributed to the domestic producers. *See* Mark L. Movesian, *Action Against Dumping and Subsidization—Antidumping and SCM Agreement—United States Continued Dumping and Subsidy Offset Act of 2000 "Byrd Amendment"—Interest Group Legislation*, 98 AM. J. INT'L L. 150, 151 (2004).

44. Sheppard, *supra* note 17, at 151 ("Antidumping actions worldwide have increased dramatically over levels in previous decades; in particular, American exports are increasingly

antidumping measures around the world.[45] In response to worldwide antidumping measures, the GATT 1947 carried an article addressing the global concerns of antidumping.[46]

Article VI of GATT 1947 parroted the language of the 1930 Tariff Act, making dumping actionable if it "causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of domestic industry."[47] However, article VI of the GATT 1947 contained a provision that the 1930 Tariff Act did not.[48] Article VI(6)(a) of the GATT 1947 supplied a standard to ascertain whether a material injury had occurred.[49] While the GATT 1947 recognized dumping as a potential problem, "[o]ver GATT's first two decades, antidumping was a minor issue."[50] However, the GATT 1947 was important because it laid the foundation for the framework of the United States' 1979 Trade Agreements Act, which procedurally modified access to antidumping relief in the United States.[51]

D. The WTO

The 1993 Uruguay Round of negotiations established the WTO, which included the 1994 General Agreement on Tariffs and Trade (GATT 1994).[52] The GATT 1994 somewhat revised the GATT 1947, adding

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encountering the same unpredictable, arbitrary, and disruptive obstacles that have long been inflicted on other countries' exports in the United States.").

45. *Id.* at 152.

46. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. VI, *reprinted in* THE LEGAL TEXTS—RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, App. 430 (World Trade Organization 1999) [hereinafter GATT 1947].

47. *Id.* art. VI(1).

48. The 1930 Tariff Act did not contain a material injury provision until the Trade Act of 1974 introduced conforming amendments. William K. Wilcox, *GATT-Based Protectionism and the Definition of a Subsidy*, 16 B.U. INT'L L.J. 129, 134 (1998).

49. *See* GATT 1947, *supra* note 46, art. VI(6)(a). "The United States and several other GATT parties had no, or minimal injury standards. Those minimal standards that did exist were far less stringent than the material injury standard of article VI of the GATT." PATTISON, *supra* note 14, § 1:13.

50. Finger, *supra* note 30, at 25.

51. PATTISON, *supra* note 14, § 1:14.

52. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, *reprinted in* THE LEGAL TEXTS—RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 5 (World Trade Organization 1999) [hereinafter WTO Agreement].

many important changes.[53] The most important change was put in place to deal with the enforcement of WTO panel decisions.[54]

The WTO Dispute Settlement Understanding (DSU) outlines the entire dispute resolution procedures of the WTO.[55] The DSU established the Dispute Settlement Body (DSB) as the arbiter of the rules of the WTO, but continues to place an emphasis on multinational "consultations" as a way of settling disputes amicably.[56] "Dispute settlement begins with a formal request for consultations…to enable the parties to gather relevant, and correct, information."[57] This promotes dispute resolution and facilitates the presentation of a full, factually accurate record, should formal proceedings take place.[58] A complaining party may request a panel if consultations do not settle the dispute within sixty days after the request for consultations was made.[59]

A panel is usually composed of three persons, who "often are present or former members of non-party delegations to the WTO, or academics."[60] The panel is not limited by rules governing proceedings, or the production or evaluation of evidence.[61] Two weeks after the initial review of the panel has taken place, the panel must issue a final report with its findings and rationale.[62] The panel report becomes binding only after the DSB adopts it.[63] The DSB will circulate the report of the panel to its members for adoption.[64] Adoption takes place between twenty and

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53. STEPHEN D. COHEN ET AL., FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY: ECONOMICS, POLITICS, LAWS, AND ISSUES 272 (1996) ("When it formally came into existence at the beginning of 1995, the WTO was in effect superimposed on top of the existing GATT machinery, as amended by the Uruguay Round.").

54. *See* WTO Agreement, *supra* note 52, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes.

55. The dispute resolution consists of five stages: "1) Consultation; 2) Panel Establishment, investigation and report; 3) Appellate Review of the panel report; 4) Adoption of the panel and appellate decision; and 5) Implementation of the decision adopted." 1 RALPH H. FOLSOM, INTERNATIONAL BUSINESS TRANSACTIONS § 9.6 (2d ed. 2004 Supp.). Prior to the WTO agreement international trade was governed by "self-discipline" or "retaliation." *See* GARY CLYDE HUFBAUER & JOANNA SHELTON ERB, SUBSIDIES IN INTERNATIONAL TRADE 13 (1984).

56. *See* WTO Agreement, *supra* note 52, Annex 2: Understanding on the Rules and Procedures Governing the Settlement of Disputes, art. 4.

57. DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 86 (2d ed. 2004).

58. *Id.*

59. *Id.* at 93.

60. *Id.* at 105.

61. *Id.* at 116.

62. *Id.* at 168.

63. A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 61 (Secretariat 2004).

64. *Id.* at 63-64.

sixty days following circulation, and a party seeking to appeal the panel report must do so before the panel report is adopted.[65]

If the panel report is appealed, the Appellate Body will review only the legal issues decided by the panel.[66] The Appellate Body is made up of seven members, "three of whom serve on any particular case."[67] The Appellate Body will issue a decision within sixty days of the appeal, and the report will be adopted by the DSB between twenty and sixty days following the Appellate Body report.[68]

If either the panel or the Appellate Body determines that a member has failed to meet the obligations of the WTO, "the Member concerned is called upon to bring the measure into conformity."[69] The complaining party determines the level of suspension, and if there is a disagreement, then the "issue is referred to arbitration under Article 22.6."[70] The job of the arbitrator is simply to determine how the member nation can be brought into conformity with the Appellate Body report.

E. The Continued Dumping and Subsidy Offset Act of 2000

In October 2000, the United States Congress enacted the CDSOA.[71] The CDSOA acts as a form of relief for the domestic producers who have been directly harmed because of dumping by foreign producers. The affected domestic producers that file petitions are then allocated the monies collected from the duties after the Customs Service deposits them in the United States Treasury's Offset Account.[72] The CDSOA has resulted in more than $850 million in antidumping and countervailing duties dispersed to affected domestic producers through 2003.[73] While never codified, it was always the practice of the United States to deposit the antidumping and countervailing duties directly in the Treasury. The CDSOA broke from this tradition and now seeks to filter the monies back to domestic producers.[74]

The CDSOA provides: "Duties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the

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65. *Id.*
66. *Id.* at 66.
67. PALMETER & MAVROIDIS, *supra* note 57, at 210.
68. *Id.* at 224.
69. *Id.* at 103.
70. *Id.*
71. Byrd Amendment, *supra* note 2, § 1675(c)(a).
72. Clarie Hervey, *The Byrd Amendment Battle: American Trade Politics at the WTO*, 27 HASTINGS INT'L & COMP. L. REV. 131, 136 (2004).
73. Ehrenhaft, *supra* note 38, at 251 n.1 (citations omitted).
74. Movesian, *supra* note 43, at 151.

Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures."[75] "Affected domestic producers" are defined in the amendment as

> [a]ny manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that—was a petitioner or interested party in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and remains in operation.[76]

There are ten classes of qualifying expenditures for which the "affected domestic producers" qualify: (1) manufacturing facilities; (2) equipment; (3) research and development; (4) personnel training; (5) acquiring technology; (6) employee health care benefits; (7) employee pensions; (8) environmental equipment, training, or technology; (9) acquisition of raw materials and other inputs; and (10) capital or funds necessary to maintain production.[77] The qualifying expenditures also must relate to the production of the same product that was being dumped into the market by the foreign exporter.[78]

In order to distribute the CDSOA "relief," a "Special Account" is created by the United States Customs Service and all the monies collected from antidumping violations is deposited into the account.[79] The United States Customs Service then publishes a list with all the "potential Affected Domestic Producers," who must then certify their "desire[] to receive the offset and demonstrate that [they have] incurred certain qualifying expenditures."[80] The money is then distributed "on a pro rata basis to each Affected Domestic Producer."[81]

The WTO received numerous complaints from member nations regarding the CDSOA.[82] The purpose of antidumping duties is to level the playing field;[83] however, many foreign trading partners argue that the CDSOA is equal to a "double protection" against foreign producers'

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75. Byrd Amendment, *supra* note 2, § 1675c(a).
76. *Id.* § 1675c(b)(1)(A)-(B).
77. *Id.* § 1675c(b)(4).
78. This requirement means that the domestic producer cannot use the capital from antidumping or countervailing duties to produce product B, when product A was being dumped by the foreign producer. 19 C.F.R. § 159.61(c) (2004).
79. Sheppard, *supra* note 17, at 126.
80. *Id.* at 126-27.
81. *Id.* at 127.
82. Hervey, *supra* note 72, at 137.
83. Sheppard, *supra* note 17, at 124.

dumping goods into the domestic market.[84] The double protection exists, they argue, because foreign producers are being forced to pay duties that are awarded to domestic producers who can use this "subsidy" to enhance their market advantage by spending it as they wish.[85] The U.S. producers, on the other hand, respond that "relief" under the CDSOA is only fair and reasonable.

F. The World's Response

In January 2001, nine members of the WTO—Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea, and Thailand—requested consultations[86] with the United States regarding the legality of the CDSOA.[87] The consultations failed, and the nine members requested that the DSB establish a panel.[88]

The complaining parties argued that the "offsets" from the CDSOA constitute a specific action against dumping and subsidization that is not contemplated in the GATT, the Antidumping Agreement (AD Agreement), or the Subsidies and Countervailing Measures Agreement (SCM Agreement).[89] The panel held that the CDSOA was inconsistent with articles 5.4, 18.1, and 18.4 of the AD Agreement; articles 11.4, 32.1, and 32.5 of the SCM Agreement; articles VI:2 and VI:3 of the GATT 1994; and article XVI:4 of the WTO Agreement.[90] Since the CDSOA was deemed to be inconsistent with these agreements, a prima facie

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84. Raj Bhala & David A. Gantz, *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317, 336 (2004). There are also many arguments that the CDSOA adversely affects the U.S. economy. *See also* Daniel Ikenson, *This Byrd Won't Fly*, WALL ST. J., Sept. 13, 2004, *available at* 2004 WL-WSJ 56940411 (arguing that failure to repeal the "Byrd Amendment" may result in dissolution of the WTO).

85. Movesian, *supra* note 43, at 151 ("[P]roducers may spend, or refrain from spending, the distributions in any way that they see fit.").

86. Consultations are a vehicle by which members of the WTO may resolve differences in a nonadversarial setting. WTO Agreement, *supra* note 52, Annex 2, art. 4. Members are encouraged to use the consultations to "attempt to obtain satisfactory adjustment of the matter." *Id.*

87. Schutzman, *supra* note 16, at 1088.

88. *Id.* Canada and Mexico joined the original complainants to push the total to eleven countries.

89. Panel Report, *supra* note 3, ¶¶ 3.2-3.3. The Agreement on Subsidies and Countervailing Measures (SCM Agreement) defines "subsidy," outlines the procedures and standards for showing injury from subsidies, and discusses remedies from harmful subsides. WTO Agreement, *supra* note 52, at Annex 1A: Agreement on Subsidies and Countervailing Measures. The SCM Agreement also lists three criteria to determine if a subsidy is "actionable": "injury to the domestic industry of another Member; nullification or impairment of benefits accruing directly or indirectly to other members; [and] serious prejudice to the interests of another member." *Id.* pt. III, art. 5(a)-(c).

90. Panel Report, *supra* note 3, ¶ 8.1.

showing of nullification or impairment of benefits was established, and the panel ordered the United States to conform the CDSOA to these international agreements.[91]

G. The Appellate Body Report

The United States appealed the panel's ruling, arguing that the CDSOA "is a permissible, specific relief action against dumping or subsidization, and is thus consistent with Article 18.1 of the ADA and Article 32.1 of the SCM."[92] The United States further argued that the CDSOA is consistent with both article 18.1 of the AD Agreement and article 32.1 of the SCM Agreement.[93] The Appellate Body established a two-part test that must be met in order to fall under either article 18.1 of the AD Agreement or 32.1 of the SCM Agreement.[94] The first prong is that the action or measure must be "'specific' to dumping or subsidization."[95] Second, the measure must be "'against' dumping or subsidization."[96]

The Appellate Body relied upon the Panel Decision in the 1916 Act, which held that predatory pricing controls bore the constituent elements of a "specific action against dumping" because they were "built into" the elements of the 1916 Act.[97] The Appellate Body found that that the CDSOA offset payments "strongly correlated with, a determination of dumping . . . [and] subsidy, as defined in the [WTO agreements]."[98]

Having established that the CDSOA constituted an "impermissible" specific action pertaining to dumping and subsidization, the Appellate Body then asked whether the CDSOA was a specific action "against"

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91. *Id.* ¶¶ 8.4-8.6.

92. Bhala & Gantz, *supra* note 84, at 337.

93. Appellate Body Report, *supra* note 5, ¶ 15. Article 18.1 of the AD Agreement reads as follows: "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." WTO Agreement, *supra* note 52, Annex 1A: Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade: 1994, pt. III, art. 18.1. Article 32.1 of the SCM reads as follows: "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." *Id.* Annex 1A: Agreement on Subsidies and Countervailing Measures, pt. XI, art. 32.1.

94. Appellate Body Report, *supra* note 5, ¶ 236.

95. *Id.*

96. *Id.*

97. *Id.* ¶ 239. The Appellate Body applied the two-pronged test to both articles 18.1 of AD Agreement and 32.1 of SCM Agreement, because of their identicalness, except for the term "dumping" in the former and "subsidy" in the latter. *Id.* ¶ 237.

98. *Id.* ¶ 242 ("[W]e agree with the Panel that 'there is a clear, direct and unavoidable connection between the determination of dumping and the CDSOA offset payments,' and we believe the same to be true for subsidization.").

dumping and subsidization. The Appellate Body interpreted "against" as meaning "'opposed to,' [having] an adverse bearing on, or, more specifically, [having] the effect of dissuading the practice of dumping or the practice of subsidization, or creat[ing] an incentive to terminate such practices."[99] The Appellate Body found that the CDSOA funnels antidumping and countervailing duties from foreign producers to their domestic competitors; therefore, it has an "adverse bearing on" dumping and subsidization.[100]

Once the Appellate Body had determined that the CDSOA was a "'specific action against' dumping or a subsidy," it looked to see if the action was one of the clearly defined antidumping or countervailing duty actions.[101] The only permissible responses to dumping are "definitive anti-dumping duties, provisional measures and price undertakings"; however, the CDSOA failed to fit into any of those categories.[102]

The Appellate Body did find that the panel erred in finding the CDSOA violated article 5.4 of the AD Agreement and article 11.4 of the SCM Agreement.[103] Both articles are identical except for the use of the word "dumping" in the former and "subsidy" in the latter.[104] Both the AD Agreement and the SCM Agreement state that an investigation cannot be initiated unless domestic producers accounting for fifty percent of the industry output support or oppose the application to initiate an investigation.[105] The panel had earlier held that the CDSOA created an incentive for members of the domestic industry to support investigations, resulting in frivolous investigations instigated by disingenuous domestic producers.[106] The Appellate Body disagreed, reading the articles instead as merely requiring a majority of the industry to be involved to an investigation being commenced.[107] However, the Appellate Body found

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99. *Id.* ¶ 254.

100. *Id.* ¶¶ 255-256.

101. *Id.* ¶ 263.

102. *Id.* ¶ 265. The Appellate Body transposed the permissible actions against dumping under the AD Agreement onto the SCM Agreement, as well as adding "multilaterally-sanctioned counter measures under the dispute settlement system" as a fourth permissible action against a countervailing subsidy. *Id.* ¶ 269.

103. *Id.* ¶¶ 285-286.

104. WTO Agreement, *supra* note 52, Annex 1A: Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade: 1994, ¶ 5.4; *id.* Annex 1A: Agreement on Subsidies and Countervailing Measures, ¶ 11.4.

105. *Id.*

106. Hervey, *supra* note 72, at 144.

107. Movesian, *supra* note 43, at 153 ("It is the quantity, rather than the quality, of support that is the issue." (citations and quotations omitted)).

the CDSOA violated the WTO agreements, and it ordered the United States to either repeal or conform the CDSOA.[108]

III. THE DECISION BY THE ARBITRATOR

The Dispute Settlement Body (DSB) adopted the report of the panel as modified by the Appellate Body, on January 27, 2003.[109] The United States was granted eleven months to bring the CDSOA into conformity with its WTO obligations, or risk retaliation by member nations.[110] The eleven-month window passed, and the United States had made no effort to repeal or conform the CDSOA.

In January 2004, eight member nations petitioned the DSB to suspend tariff concessions and "related obligations under GATT 1994" totaling "the amount of the offset payments made to affected domestic producers . . . under the CDSOA."[111] The United States objected to this level of retaliation and, pursuant to Article 22.2 of the Dispute Settlement Understanding (DSU), petitioned for arbitration to determine the correct level of suspensions for failure to conform the CDSOA.[112] The U.S. objection was referred to arbitration at the DSB meeting of January 26, 2004, and the Arbitrator issued the final decision on August 31, 2004.

A. Minimum Specificity

The arbitrator first addressed the United States' contention that the Requesting Parties' proposed level of sanctions did not contain the degree of specificity required under article 22.2 of the DSU.[113] The Requesting Parties argued that a "trade effect" test was not required under article 22.2 of the DSU, and that the level of nullification or impairment is clearly specified in the United States Code as the amount of disbursements made under the CDSOA.[114] The arbitrator found that while the Requesting Parties' request for suspensions could have been "more informative," it met the minimum specificity requirement under article 22.6 of the DSU.[115]

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108. Appellate Body Report, *supra* note 5, ¶ 319.
109. Arbitrator's Decision, *supra* note 1, ¶ 1.1
110. *Id.* ¶ 1.3.
111. *Id.* ¶ 1.4.
112. *Id.* ¶¶ 1.7-1.8.
113. *Id.* ¶ 2.13.
114. *Id.* ¶¶ 2.16-2.17.
115. *Id.* ¶ 2.22.

B. Trade Effect Test

Having established that the Requesting Parties had met the minimum degree of specificity, the arbitrator turned to the issue of the level of nullification or impairment.[116] The United States argued that the level of nullification or impairment must be based on "the trade loss suffered directly by each Requesting Party."[117] The Requesting Parties believed that the nullification or impairment was equal to the disbursements made under the CDSOA; in other words, the Requesting Parties contended that they were entitled to the amount the domestic producers had been given under the CDSOA.[118]

The arbitrator first addressed the Requesting Parties' contention that the level of nullification or impairment equaled the disbursements made to domestic producers throughout the life of the CDSOA.[119] The arbitrator found that the Requesting Parties were mistaken in equating nullification or impairment with "violation."[120] Nullification or impairment exists "as a result of" a "violation," so it would be illogical to use them as interchangeable terms.[121] According to article 3.8 of the DSU, a violation is prima facie evidence that a nullification or impairment has taken place. Thus, the violation by the United States creates a presumption that a nullification or impairment has taken place, and under article 3.8, the violating party has an opportunity to rebut the presumption by offering evidence to the contrary.[122] If, as the Requesting Parties argued, the two were the same concept, article 3.8 would be a "theoretical [im]possibility."[123] The arbitrator took pains to provide a foundation that there is a difference between a "violation" and the "effects of the violation," and the Requesting Parties are entitled to sanctions only for the effects of a violation, not for a violation itself.[124]

The arbitrator concluded that previous arbitrations do not stand for the proposition that nullification or impairment of benefits is equal to the violation; rather, article XXIII of the GATT 1994 and the DSU establish that there are two stages to dispute settlement in the WTO: (1) a nullification or impairment must be established. This is aided by article 3.8, which states that a violation is prima facie evidence of a nullification

116. *Id.* ¶ 3.1.
117. *Id.*
118. *Id.* ¶¶ 3.7, 3.10.
119. *Id.* ¶¶ 3.14-3.56
120. *Id.* ¶ 3.20.
121. *Id.*
122. *Id.* ¶¶ 3.21-3.23.
123. *See id.* ¶ 3.23.
124. *Id.* ¶¶ 3.31- 3.34.

or impairment; and (2) an arbitrator will determine the level of nullification or impairment once a violation has occurred.[125]

C. Disbursements Are Inseparable from CDSOA

The arbitrator then turned to the United States' argument that the CDSOA offset payments were outside the scope of the arbitration because they were never specifically examined in either the Panel or Appellate Body Report and therefore cannot be used by the arbitrator to determine the level of nullification.[126] The arbitrator rejected this argument and held that the CDSOA was inseparable from its disbursements and can be used to determine the correct level of nullification or impairment.[127] The fact that various administrative acts took place between the passage of the law and its implementation does not separate the disbursement from the CDSOA.[128]

D. The Arbitrator's Approach: Economic Modeling

The arbitrator cited precedent as the key determinate in applying the "trade effect test" to decide the proper level of nullification or impairment.[129] The arbitrator felt that the development of an economic model was the only objective way to measure the trade effect in order to establish the nullification or impairment.[130] The arbitrator requested that both the Requesting Parties and the United States submit economic models to measure the trade effect; both parties complied.[131] The U.S. model, while sophisticated, was too specific and did not allow for elasticity.[132] The Requesting Parties' model was too general and did not take into account many variables.[133] The arbitrator rejected the U.S. model and applied a modified version of the Requesting Parties' model because of the "lack of available data to implement the United States' model," and the lack of objections from the United States regarding the Requesting Parties' model.[134] The arbitrator's model is expressed as

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125. *Id.* ¶ 3.53.
126. *Id.* ¶ 3.57.
127. *Id.* ¶ 3.63.
128. *Id.* ¶ 3.66.
129. *Id.* ¶¶ 3.71-3.72.
130. *Id.* ¶¶ 3.74-3.79.
131. *Id.* ¶¶ 3.82-3.96.
132. *See id.* ¶¶ 3.105-3.110.
133. Not surprisingly, the U.S. model resulted in zero nullification or impairment, and the Requesting Parties' model resulted in $505 million in nullification or impairment. *Id.* ¶¶ 3.92, 3.103.
134. *Id.* ¶¶ 3.115-3.116.

"Trade Effect = (value of disbursements) * (trade effect coefficient), where the Trade Effect Coefficient = (pass through) * (import penetration) * (elasticity of substitution)."[135] The arbitrator did not extend this model to the total global trade impact and devoted the analysis "to the imports into the United States that are displaced as a result of CDSOA disbursements."[136]

The variable "pass through" is understood to be the effect that the CDSOA disbursements have on domestic prices, and "elasticity of substitution" is the extent that the pass through would cause consumers to switch to domestic products.[137] The trade coefficient was determined to be 0.72, making the final calculation the "[a]mount of disbursements under the CDSOA for the most recent year for which data are available . . . multiplied by 0.72."[138] In other words, the arbitrator decided that the trade effect equaled seventy-two percent of the disbursements made under the CDSOA. This figure is equal to the level of nullification and impairment and thus the level of retaliatory sanctions.

IV. ANALYSIS

While it may not seem like a victory, the United States was successful in convincing the arbitrator that the Requesting Parties were not entitled to the amount of the CDSOA offset payments.[139] This was important because the arbitrator could have shunned precedent and taken a simple approach that would have had the effect of inducing compliance on the part of the United States. The arbitrator established that a violation is not equal to the nullification or impairment of trade relations.[140] The arbitrator was correct in pointing out the logical fallacy of implying from the nullification and impairment language in article 3.8 of the DSU that a violation merely creates a presumption that a nullification or impairment has occurred.[141]

The United States did fail, however, in convincing the arbitrator that the retaliatory sanctions should be equal to the trade loss suffered by each of the parties, which would have amounted to zero.[142] To a layperson, the idea that the Requesting Parties are entitled to sanctions when they have suffered no actual, concrete harm seems counterintuitive. While the

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135. *Id.* ¶¶ 3.117-3.118.
136. *Id.* ¶ 3.118.
137. *Id.* ¶¶ 3.137-3.140.
138. *Id.* ¶ 5.2.
139. *Id.* ¶¶ 3.20, 3.56.
140. *Id.*
141. *Id.* ¶¶ 3.21-3.23.
142. *Id.* ¶¶ 3.82, 3.115.

United States may have been guilty of underestimating the economic impact, the Requesting Parties sought a simplistic avenue of relief that would have resulted in a huge windfall for the countries seeking retaliation. This may have also provided the United States with an opportune moment to extract itself completely from the WTO, potentially rendering the institution obsolete.[143]

Faced with these polarizing options, the arbitrator acted in favor of the Requesting Parties and applied an economic model that was less favorable than the model supported by the Requesting Parties but favorable nonetheless. The decision was disguised as a compromise between the two different models, but it was nothing less than an outright defeat for the United States.

The decision also established that the nullification or impairment will be gauged by the effect it has on the trade of the affected parties, and not on the world as a whole.[144] Given the current status of the United States in relation to the WTO, it seems the arbitrator was taking pains to appease the United States in small facets. An astronomical level of retaliation would likely have pushed the United States right out of the WTO. Therefore, it was important that the arbitrator maintained objectivity and stuck to precedent to quell the tensions that have been bubbling beneath the surface since the enactment of the controversial CDSOA. That being said, the seventy-two percent trade effects coefficient was still quite high.

The most groundbreaking aspect of this decision is the use of economic modeling to estimate the trade effect.[145] This has the possibility of becoming the norm in future arbitrations. Economic modeling is purported to be an objective way to assess trade impact; however, in this decision, the arbitrator compared models from both the United States and the Requesting Parties and found the Requesting Parties' model more favorable.[146] In the future, adversaries may clash over which model should be used and how that model should be implemented instead of focusing on interpretation of WTO agreements and past decisions. This may result in Dispute Settlement proceedings becoming highly technical, fact-intensive disputes instead of legal interpretations. This would require an extremely high level of expertise, something for which international trade lawyers must prepare. However, it may also result in the continued application of a favored economic model, which will result

143. Ikenson, *supra* note 84.
144. *Id.* ¶ 3.72.
145. *Id.* ¶¶ 3.77-3.81.
146. *Id.* ¶ 3.115.

in a high degree of consistency that will allow member nations to adapt their conduct accordingly.

V. CONCLUSION

The arbitrator's decision will result in negligible retaliatory tariffs by the Requesting Parties, should the United States fail to bring the CDSOA into compliance by repealing the Byrd Amendment.[147] It is possible that the United States will ignore the tariffs, or possibly implement tariffs of its own in defiance of the WTO. There is a continued trend of international defiance of WTO decisions pulsating through the United States Congress, and the CDSOA continues to remain popular among legislators, mostly due to the amount of relief that could be funneled to domestic industry. However, the Requesting Parties' argument that the CDSOA was a "double protection" levied against foreign producers is nonsensical. The United States acted properly in levying duties against foreign producers in violation of antidumping agreements. The fact that the CDSOA reimburses the victims of the foreign dumping has no bearing on international agreements. The United States did not hand its sovereignty over to the whims of its trading partners. Allocation of remedial duties should not be controlled by foreign trading partners.

The CDSOA may be bad for domestic policy and for foreign relations; however, it is a valid response to an increasingly impotent U.S. foreign trade policy that is attempting to balance out an asymmetrical trading status. Critics argue that it results in money being released from the Treasury; it increases the administrative costs that accompany the increased investigations brought by domestic producers; and it harms U.S. foreign trade relations by exerting overt protectionism in defiance of the WTO. But, the continued existence of the WTO is contingent on reasonable reciprocity and compliance. The U.S. argument that retaliation should be equal to the damage was sound. The distribution to domestic distributors was equal to the legal duties levied against the foreign producers. This is not a double protection so much as relief for

147. The European Union and Canada have announced that they "will begin imposing punitive duties May 1 on several American exports" and that such duties "would be set at 15 percent" and "would affect shipments of U.S.-made paper, clothing and machinery to Europe and shipments of swine, cigarettes and oysters to Canada." Paul Blustein, *E.U., Canada Warn of Tariffs over U.S. Anti-Dumping Law*, WASH. POST, Apr. 1, 2005, at A04, *available at* http://www.washingtonpost.com/wp-dyn/articles/A16917-2005Mar31.html. Canada's Prime Minister, Paul Martin, further stated that "'[Canada is] prepared to retaliate on an increasing level if in fact the Byrd Amendment stays in place,'" although he did not give further details. David Ljunggren, *Canada Ready to Increase Sanctions Against U.S.*, REUTERS.COM, Apr. 18, 2005, *at* http://www.reuters.com/newsArticle.jhtml?type=politicsNews&storyID=8215061.

actual harm. The arbitrator's award of seventy-two percent of the total disbursements was a huge windfall for the Requesting Parties and an attempt to change domestic legislation in the United States, which is clearly immune to international encroachment. Once duties have been levied and deposited in an account, international interference should cease.

Perhaps the United States will repeal the CDSOA, but the current impasses on growing U.S. trade deficits, current account deficits, and an unlevel global playing field make such a move uncertain and hard to predict.

Jesse Klaproth*

* J.D. candidate 2006, Tulane University School of Law. The author would like to thank Brendan J. Klaproth and Michael E. Catania for their support and Professor William Lovett for his advice and guidance.