The Continued Dumping and Subsidy Offset Act (Byrd Amendment): A Defeat Before the WTO May Constitute an Overall Victory for U.S. Trade

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Certain U.S. industries face significant foreign competition. To shelter themselves from commercial rivals that they believe are acting unscrupulously, these domestic industries often rely on U.S. unfair trading laws, including those designed to deal with "dumping" of goods

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by overseas importers and unacceptable subsidization of particular foreign industries. In most cases, seeking protection by utilizing these laws is time-consuming, expensive and offers remedies that some consider insufficient. In order to address these alleged shortcomings primarily for the sake of the U.S. steel industry, the Continued Dumping and Subsidy Offset Act[1] (Byrd Amendment) was recently enacted. The major change introduced by this law is the redeployment of duties paid by foreign importers from the U.S. Treasury to those parties that filed or supported the antidumping or countervailing duty petition. Although disbursements according to the Byrd Amendment have not yet commenced, this law has generated considerable controversy.

Examining the polemical aspects of the Byrd Amendment from a broad perspective, this Article is organized in the following manner. Part I provides a brief explanation of U.S. antidumping and countervailing duty laws. Next, Part II focuses on the Byrd Amendment, describing the relevant provisions of this new legislation, its effects on existing unfair trade law, and the justifications for its enactment. Various general arguments in opposition to the Byrd Amendment are presented in Part III, among them the fact that the Byrd Amendment may violate several provisions under the World Trade Organization (WTO). Based on this analysis, this Article concludes that while the Byrd Amendment may have been promulgated with good intentions, the numerous negative ramifications that it engenders may be ruinous to multilateral trade affairs. Accordingly, a determination that the Byrd Amendment breaches U.S. obligations under the WTO (thereby mandating its repeal) would actually be beneficial to the United States.

I. EXPLANATION OF ANTIDUMPING AND COUNTERVAILING DUTY LAWS

The United States has enacted a number of trade laws and regulations designed to ensure that U.S. industries are not harmed as a result of any artificial advantage enjoyed by foreign industries competing in the same field.[2] Despite the existence of a wide array of unfair trade

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1. The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 19 U.S.C. § 1654 (1999 & Supp. 2002) (Historical & Statutory Notes) [hereinafter Byrd Amendment].

2. *See generally* DAVID SERKO, IMPORT PRACTICE—CUSTOMS AND INTERNATIONAL TRADE LAW 423-585 (2d ed. 1991); 3 JOSEPH E. PATTISON, ANTIDUMPING AND COUNTERVAILING DUTY LAWS § 1.01 (2001); Mark R. Sandstrom et al., *Summary of the U.S. Antidumping Statute*, *in* LAWS OF INT'L TRADE ch. 202 (1998); Judith Hippler Bello & Alan F. Holmer, *The Antidumping and Countervailing Duty Laws: Key Legal and Policy Issues*, 1987 A.B.A. SEC. INT'L L. PRAC.; U.S. INT'L TRADE COMM'N, SUMMARY OF STATUTORY PROVISIONS RELATED TO IMPORT RELIEF, Pub'n 3125 (1998).

laws, due to changing legal requirements and worldwide economic developments, the current trend is for U.S. industries to initiate cases under antidumping and countervailing duty laws. These particular laws "require enormous legal resources, as well as specialized knowledge of accounting, economics, and the industry under review."[3]

With regard to antidumping legislation, "dumping" is the practice of selling goods in U.S. markets at below "home market value" (i.e., the price at which the same goods are sold in the foreign producer's home country) or at a price lower than the cost of production. While there are a number of nonmalevolent reasons for which goods are dumped in the United States, this practice is invariably detrimental to U.S. industry. Dumping leads to a reduction in profits, a surplus of certain goods in the market, layoffs of employees, and corporate bankruptcy.[4] If a U.S. industry suspects that dumping is occurring, "interested parties," such as U.S. producers or wholesalers of a product that is similar to the allegedly-dumped good, file petitions simultaneously with the Department of Commerce (DOC) and the International Trade Commission (ITC). In order to ensure that there is sufficient support for the petition by the U.S. industry, the law requires, among other things, that the petitioners represent at least twenty-five percent of the total U.S. production of the good in question.[5]

Within forty-five days of the filing of the petition, the DOC is required to make a preliminary determination as to whether there is "a reasonable basis to believe or suspect" that dumping has occurred.[6] Likewise, during this same time period, the ITC is charged with determining if there is a "reasonable indication" of a material injury or a threat of material injury to the U.S. industry.[7] The purpose of these preliminary investigations is to eliminate frivolous cases, thereby sparing foreign importers unsubstantiated harassment and conserving the

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3. Jeffrey E. Garten, *American Trade Law in a Changing World Economy*, 29 INT'L LAW. 15, 21 (1995).

4. Terence P. Stewart, *U.S.-Japan Economic Disputes: The Role of Antidumping and Countervailing Duty Laws*, 16 ARIZ. J. INT'L & COMP. L. 689, 697-98 (1999) (explaining that many reasons for dumping are acceptable to the business community, including to take advantage of a protected home market, to increase profits by dumping excess capacity abroad, and profit maximization through cross-product subsidization). Other practices, such as market domination and predatory pricing, are not copasetic. *Id.*

5. 19 U.S.C. § 1673a(c)(4) (1999). The term "industry" means "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." *Id.* § 1677(4).

6. *Id.* §§ 1673a-1673b.

7. *Id.*

financial resources of the U.S. government. If the preliminary determinations are negative, the case is terminated.[8] Conversely, if the preliminary determinations indicate the existence of dumping and a resulting material injury to the U.S. industry, then (1) "liquidation" of the goods in question (i.e., the final assessment by the U.S. Customs Service of the amount of duties owed on foreign imports) is suspended, (2) the foreign producer of the goods is obligated to post a bond or make cash deposits to cover any duties that may be imposed on the goods imported into the United States, and (3) the investigations by the DOC and ITC proceed.[9]

If, after conducting a thorough investigation, the DOC and ITC make a final determination that dumping has occurred and that a U.S. industry has been materially injured, then an antidumping duty order is imposed on the foreign producer equal to the "dumping margin." This amount is calculated by assessing the difference between the "home market value" of the foreign goods and the price at which they were sold in the United States. Since it is corrective instead of punitive in nature, the imposition of the increased customs duties is designed to correct the artificial price differential derived from dumping.

Accordingly, these enhanced duties are applied prospectively, and foreign imports on which duties have already been assessed cannot be altered. These elevated duties, nevertheless, serve to protect the U.S. industry by forcing the foreign producer to (1) raise the selling price of the good in the United States in order to incorporate the heightened duty rate or (2) withdraw from the U.S. market entirely to avoid payment of the new duties. Pursuant to the antidumping law prior to the enactment of the Byrd Amendment, all such duties paid by foreign importers were directed to the U.S. Treasury to cover, inter alia, the enormous costs incurred by the DOC and ITC in conducting a lengthy antidumping investigation and trial.

Unlike dumping, countervailing duty laws address the situation where foreign governments subsidize a product or industry, thereby facilitating the sale of certain goods in the U.S. market at an unfairly low price. As with dumping, the selling of subsidized goods in the United States generates harmful effects for competing U.S. industries, including lost profits, an excess of available goods, layoffs, and bankruptcy. Moreover, the artificial advantages gained from subsidization lead to a misallocation of domestic resources as U.S. businesses enter into, or

8. *Id.* § 1673a(c)(3).
9. *Id.* § 1673b(d).

expand in, a market where accurate data regarding competitiveness (i.e., that without the foreign subsidies) would have revealed the peril in doing so. Examples of foreign "subsidies" include:

(a) a direct rebate by the foreign government to a specific company for items exported,
(b) interest-free or below-market interest rate loans,
(c) cash grants,
(d) loan guarantees,
(e) currency retention schemes,
(f) favorable internal transport and freight charges on export shipments, and
(g) tax exemptions.[10]

Similar to the antidumping investigation procedure, the DOC and ITC conduct lengthy independent investigations to determine whether subsidization occurred and if such subsidization caused a material injury to a U.S. industry. If the final determination of these agencies is affirmative, then the U.S. government imposes a countervailing duty order to compensate for the unfair economic advantage that the foreign industry enjoyed as a result of the subsidy. In justifying these enhanced duties, Congress explains that "actionable subsidies which cause injury to domestic industries must be effectively neutralized."[11] As with the antidumping orders explained above, prior to the passage of the Byrd Amendment any duties paid by foreign producers were directed to the U.S. Treasury in an effort to abate the considerable costs associated with conducting a investigation and trial with respect to the countervailing duty.

II. DESCRIPTION OF THE BYRD AMENDMENT

On October 28, 2000, the Byrd Amendment was enacted as part of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act.[12] In rationalizing the approval of this legislation, which took effect on October 1, 2001, Congress found that (1) the purpose of U.S. unfair trade laws is to restore the conditions of fair trade in order that economic investment and jobs "that should be in the United States" are not lost as a result of disingenuous market signals; (2) the persistent subsidization or dumping after the issuance of countervailing or antidumping orders frustrates the remedial purpose of

10. *Id.* § 1677(5).

11. Byrd Amendment, 19 U.S.C. § 1675c (Historical & Statutory Notes—Findings of Congress Respecting Continued Dumping and Subsidy) (1999 & Supp. 2002).

12. *Id.* § 1654 (Historical & Statutory Notes) (1999 & Supp. 2002).

the laws by preventing market prices from returning to fair levels; and (3) if foreign subsidization or dumping persists despite such orders, U.S. producers will be hesitant to rehire employees that were laid off in order to survive during the dumping or subsidization and may be incapable of maintaining pension or health care benefits.[13] In short, the Byrd Amendment alters current law by redirecting the funds collected pursuant to U.S. antidumping and countervailing duty orders from the U.S. Treasury to certain domestic producers that were petitioners or supporters of the case.

In order to implement the Byrd Amendment, regulations were passed on September 21, 2001.[14] According to these regulations, the "Affected Domestic Producers" that are eligible to receive a portion of the disbursements consist of any U.S. manufacturer, producer, farmer, rancher, or worker representative that was a petitioner or an interested party in support of the antidumping or countervailing duty petition.[15] The regulations provide, moreover, that Affected Domestic Producers may only receive disbursements for "Qualifying Expenditures" incurred *after* the issuance of an antidumping or a countervailing duty order.[16] Examples of Qualifying Expenditures include monies spent on manufacturing facilities, equipment, research and development, personnel training, acquisition of technology, health care benefits for employees, environmental equipment, training or technology, acquisition of raw materials and other inputs, and working capital needed to maintain production.[17]

In terms of identifying and segregating pertinent funds, the Byrd Amendment mandates that the U.S. Customs Service establish a "Special Account" for each antidumping and countervailing duty order into which the funds collected from foreign importers shall be deposited.[18] At least ninety days before the end of the fiscal year, the U.S. Customs Service must publish in the Federal Register a notice of intention to distribute the offsets from the previous year, which includes a detailed list of all

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13. *Id.* § 1675c.

14. Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 19 C.F.R. § 159.61 (2002).

15. *Id.* § 159.61(b). The regulations limit the definition of Affected Domestic Producers by excluding (1) any company that ceased production of a good covered by an antidumping or a countervailing duty order and (2) any company that has been acquired by a company that was related to (i.e., controlled by) a company that opposed the antidumping or countervailing duty investigation that led to the order. *Id.* § 159.61(b)(2).

16. *Id.* § 159.61(c); *see id.* § 159.64(e). The Special Accounts are noninterest bearing unless specified by Congress. *Id.*

17. *Id.* § 159.61(c).

18. *Id.* § 159.64(a)(1).

potential Affected Domestic Producers.[19] In order to obtain the appropriate portion of the annual distribution, an Affected Domestic Producer must submit a sworn certification indicating that it desires to receive the offset and demonstrating that it has incurred certain Qualifying Expenditures.[20] Based on these certifications, the U.S. Customs Service is required to distribute the funds within sixty days of the end of the fiscal year.[21] In the event that the net claims for Qualified Expenditures exceed the amount of funds in a Special Account, the money will be distributed on a pro rata basis to each Affected Domestic Producer.[22]

From the perspective of legislators and legal advocates who championed the Byrd Amendment, altering the unfair trade laws to redistribute the antidumping and countervailing duties to Affected Domestic Producers is merely a matter of equity and righteousness. For instance, they claim that "[t]hese penalties assessed against foreign companies would be made available to the American industry and to the workers who were cheated out of profits and paychecks by unfair trade practices. This is a case of *justice*."[23] Similarly, other supporters argue that channeling the money from the U.S. Treasury to the private industries directly affected by dumping and/or foreign subsidies is simply a question of fairness. Alluding to Affected Domestic Producers, Byrd Amendment advocates reduce the argument to its simplest form: "they're hurt, they deserve the money."[24] Still others argue that, in the absence of the direct financial reimbursements provided for in the Byrd Amendment, antidumping and countervailing duty laws offer insufficient protection to vulnerable U.S. industries. They claim that a victory under the former unfair trade laws was "hollow" because, even if a business managed to survive until the dumping or countervailing duty claim was proven, it was deprived of the capital necessary to recapture its former

19. *Id.* § 159.62(a). Customs develops its list based on the names supplied to it by the International Trade Commission. *Id.*

20. *Id.* § 159.63.

21. *Id.* § 159.64(b)(1)(i). In accordance with these time guidelines, Customs published its inaugural list of eligible Affected Domestic Producers in August 2001. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 35 Cust. B. & Dec. No. 33, at 26-80 (Aug. 15, 2001).

22. 19 C.F.R. § 159.64(c)(2).

23. Naomi Koppel, *WTO to Explore Legality of U.S. Unfair Pricing Law*, CHATTANOOGA TIMES, Aug. 24, 2001, at C2, *available at* LEXIS, News Library, Chattanooga Times/Chattanooga Free Press File (emphasis added).

24. Louis Jacobson, *From the K Street Corridor—Emptying the Penalty Box*, NAT'L J., Jan. 6, 2001, at 44.

market position.[25] This incomplete recuperation, it is argued, constitutes a gross "injustice" to domestic producers.[26]

Taking this equity argument one step further, those who back the Byrd Amendment claim that this legislation will permit small- and medium-sized businesses to defend their rights in a game normally dominated by prosperous entities. As mentioned earlier, the costs associated with a typical antidumping or countervailing duty case have traditionally been sizable; so as the price of participation continues to increase, small and incipient industries find themselves unable to gather sufficient resources to defend their market share. Insofar as this lack of defense is attributable to insufficient resources instead of a factual and/or legal basis, "it reflects poorly on the laws involved."[27]

Finally, while those politicians who introduced the Byrd Amendment are cognizant of the fact that this controversial legislation will inevitably annoy U.S. trading partners—consumer organizations, special interest groups, and others—their conviction is such that they fail to publicly acknowledge even the most apparent shortcomings. Senator Robert Byrd explained, "'I see nothing wrong with helping American apple growers, cattlemen, steel producers and others to get some compensation for the harm done to them by countries benefiting from illegal trade practices.'"[28] Attempting to further fortify his position, the West Virginia congressman holds responsible for this harm the very nations that are susceptible to paying dumping or subsidization fines to U.S. industries. According to Senator Byrd, "'[i]f our trading partners . . . play by the rules, the provision will never be implemented . . . . But if

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25. *E.g.*, Adam C. Hawkins, *Antidumping Beyond the GATT 1994: Supporting International Enactment of Legislation Providing Supplemental Remedies*, 10 IND. INT'L & COMP. L. REV. 149, 167 (1999).

26. *Id.* at 167-68. It is argued, in particular, that given the time frame in which unfair trade cases are decided, "the money could come too late to help companies already on the brink" of financial ruin as a result of dumping by a foreign entity. Karin Fischer, *Steel Act May Put Snag in Trade Plan; Byrd Stands by Law as Bush Talks Free Trade Zone*, CHARLESTON DAILY MAIL, Apr. 20, 2001, at P1A, *available at* LEXIS, News Library, Charleston Daily Mail File (concurring with the opinion that the partial recovery possible under the former unfair trade laws is inherently detrimental to certain U.S. businesses, this article explains that payment to injured industries must be done swiftly to be effective).

27. Paul C. Rosenthal & Robert T.C. Vermylen, *The WTO Antidumping and Subsidies Agreements: Did the United States Achieve Its Objectives During the Uruguay Round?*, 31 LAW & POL'Y INT'L BUS. 871, 886-87 (2000).

28. R.G. Edmonson, *An Incentive for Protectionism*, J. COM., Oct. 30, 2000, at 36, *available at* LEXIS, News Library, J. of Commerce File (citation omitted).

they break the rules, my amendment is a simple step to level the playing field.'"[29]

III. ARGUMENTS IN OPPOSITION TO THE BYRD AMENDMENT

At first glance, the modification of the United States unfair trade laws encompassed by the Byrd Amendment (i.e., redirecting the antidumping and countervailing duties collected from foreign importers from the U.S. Treasury to Affected Domestic Producers) would not appear to be especially significant. True to the adage, however, looks can be deceiving. This new legislation has already generated negative ramifications that will affect the U.S. trade scheme in general. Presented below are the principal arguments in opposition to the Byrd Amendment.

A. The Byrd Amendment Provides an Incentive to Increase Trade Litigation

Acting as a petitioner in an antidumping or a countervailing duty case is quite costly. In fact, according to experts in this field, unfair trade cases require "enormous legal resources," as well as hefty payments to accountants, policy analysts, industry experts and economic advisors, all of whom are integral players in the process.[30] As explained above, the Byrd Amendment is designed primarily to mitigate these costs to a certain extent. Contrary to detailed provisions describing the criteria necessary to become an Affected Domestic Producer, or to be eligible for Qualifying Expenditures, the Byrd Amendment fails to expressly mandate how the disbursements are to be used by recipients. This omission was deliberate, as evidenced by the official agency comments which state that "[t]here is no statutory requirement [in the Byrd Amendment] as to how a disbursement to an affected domestic producer is to be spent, and, absent statutory authority, Customs may not impose such a requirement."[31] This latitude regarding expenditures may serve as an incentive for U.S. producers and their attorneys to initiate additional antidumping and countervailing duty actions, both unfounded and meritorious.

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29. Karin Fischer, *Byrd Steel Measure Won't Be Overturned*, CHARLESTON DAILY MAIL, Jan. 11, 2001, at 2C (citation omitted). From Senator Byrd's perspective, complaints by foreign governments regarding the legality of the Byrd Amendment do not represent legitimate points of contention. Rather, it is argued that such posturing is simply evidence of other nations' desire for "carte blanche" to violate the U.S. trade laws. *See* Paul J. Nyden, *Byrd Asks Trade Rep to Defend Law to Protect Steel Companies*, CHARLESTON GAZETTE, Aug. 25, 2001, at 7B.

30. Garten, *supra* note 3, at 21.

31. 66 Fed. Reg. 48,549 (Sept. 21, 2000).

Attorneys specializing in the representation of U.S. industries who bring actions under unfair trade laws refute this assertion. They argue that the potential for Affected Domestic Producers to recuperate funds pursuant to the Byrd Amendment and their ability to spend such funds without restriction will not serve as an enticement to file additional lawsuits. It is suggested, for instance, that additional and/or frivolous lawsuits will not be sparked by the Byrd Amendment because (1) in making their respective "preliminary determinations," the DOC and the ITC already exclude any dubious claims or parties; (2) the enormous amount of time and expense required to prepare and file an unfair trade lawsuit serves as a natural deterrent; and (3) companies are unlikely to support a case in order to acquire partial relief (i.e., the money received for Qualifying Expenditures under the Byrd Amendment) when they currently will not champion a case where they may confidently obtain full relief (i.e., cessation of dumping or subsidization under current laws).[32] For these supporters of the Byrd Amendment, claims of increased lawsuits are "laughable" and simply represent "an effort to inflame the debate," since envisioning a scenario under which additional claims will be brought is virtually impossible.[33] These views, however, are suspect since those espousing them (i.e., the attorneys representing petitioners in unfair trade actions) are among the few that stand to gain economically from the passage of the Byrd Amendment.

Notwithstanding the self-serving arguments mentioned above, logic dictates that the Byrd Amendment will trigger increased unfair trade actions for numerous reasons. First, the opportunity to recuperate funds spent on Qualifying Expenditures will create an incentive for U.S. firms

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32. Terence P. Stewart, The Byrd Amendment: The Debate (comments presented at the Conference Sponsored by the Association of Women in International Trade, Washington, D.C. (Jan. 17, 2001)).

33. *Id.* In the opinion of Terence Stewart, a renowned Washington trade expert who represents many U.S. industries as petitioners in antidumping and countervailing duty actions, the following scenario is the only one that would validate the claim of increased cases being filed as a result of the Byrd Amendment:

> [C]ompanies would file cases that wouldn't otherwise be filed, knowing their chances of success are at best 50-50 and in the hope that the unfair trade practice that would justify an action would not stop, prices would not fully recover, and that eventually (somewhere between 3–7 years hence) some unknown amount of money would be assessed and distributed making the action worthwhile! It is difficult to believe that anyone actually puts this scenario forward as being likely to encourage industries to expend the substantial resources of time and money to prepare a case.

Id.; *see also* Fischer, *supra* note 26, at P1A; Rossella Brevetti, Byrd Amendment May Violate NAFTA If Applied to Mexico, Canada, Lawyers Says, 18 Int'l Trade Rep. (BNA), No. 4, at 146-47 (Jan. 25, 2001).

to seek additional trade protections.[34] Under the Byrd Amendment, U.S. industries will be encouraged to file additional lawsuits because of the "double protection" afforded by the legislation: less competition from foreign imports and income from increased tariffs.[35] Moreover, the reimbursement of Qualifying Expenditures under the Byrd Amendment will induce certain U.S. industries to file lawsuits in less egregious instances of dumping or subsidization due to the likelihood of economic gain from such an effort.[36] As summarized by one trade lobbyist, "'[n]ow there's the potential of monetary gain [which] . . . changes the dynamics of these cases.'"[37] Second, the possibility of recuperating money for Qualifying Expenditures will cause more companies to join an antidumping or countervailing petition, thereby satisfying the "U.S. industry" threshold. As explained earlier, the unfair trade laws require that U.S. producers supporting a petition account for at least twenty-five percent of the total domestic production of the goods in question.[38] Traditionally, fragmented industries experienced difficulties reaching this

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34. AARON SCHAVEY, AVOID A TRADE WAR OVER U.S. ANTIDUMPING MEASURE 2 (Heritage Found., Executive Memorandum No. 713, 2001). Confident in this prediction, one commentator stated: "I can tell you that the Byrd amendment will hurt us by creating a financial incentive for U.S. steel producers to seek more punitive duties on imports." Jon E. Jenson, *Trouble with Steel*, WASH. POST, Nov. 3, 2000, at A32. The Consuming Industries Trade Action Coalition (CITAC) described the Byrd Amendment as a "windfall" for West Virginia steel producers who tend to initiate many antidumping actions, CITAC admonishes that "[i]f this measure becomes law, it will provide a tremendous financial incentive for all industries to seek dumping duties on imports. This spells disaster for the thousands of U.S. companies that rely on imports." *See* Press Release, Consuming Industries Trade Action Coalition, Byrd Dumping Amendment Means Multi-Million Dollar Subsidy for West Virginia Company, Disaster for U.S. Trade Policy (Oct. 17, 2000), *at* http://www.citac-trade.org/latest/10172000.html; *see also Ag Bill Amendment Angers Importers*, J. COM., Oct. 17, 2000, *at* http://www.joc.com (last visited July 12, 2001); Elizabeth Olson, *U.S. Law on Trade Fines Is Challenged Overseas*, N.Y. TIMES, July 14, 2001, at C2 (explaining that the European Union alleges that the Byrd Amendment creates "a perverse incentive system" to reward U.S. producers for bringing suits).

35. Elizabeth Olson, *U.S. Anti-Dumping Law Challenged at WTO*, INT'L HERALD TRIB., Dec. 23, 2000, at 11, *available at* LEXIS, Nexis Library, Int'l Herald Tribune File. Commentator Achara Pongvutitham claims that the Byrd Amendment constitutes a fundamental change to U.S. unfair trade laws, and predicts that more antidumping and countervailing duties cases will be filed "because plaintiff companies will get double protection by getting a tariff collection and a return payment when the case is finalized." Achara Pongvutitham, *Call to Repeal US "Double Protection*," THE NATION (Thailand), Nov. 14, 2000, *available at* LEXIS, Nexis Library, The Nation (Thailand) File.

36. Frances Williams, *U.S. Law Faces WTO Challenge Anti-Dumping Measure Complaints over Plan to Give Duties to Industry*, FIN. TIMES (London), Dec. 19, 2000, at 16; *see also* Ravi Kanth, *New U.S. Anti-Dumping Law Comes Under Fire in WTO*, BUS. TIMES (Singapore), Nov. 4, 2000, at 12 (suggesting that the Byrd Amendment encourages domestic industries to initiate antidumping investigations "even when there is no dumping because of the likely economic gains" from doing so).

37. Edmonson, *supra* note 28, at 36 (citation omitted).

38. 19 U.S.C. § 1673a(c)(4) (2001).

twenty-five percent plateau since smaller companies, dissuaded by the tremendous time and financial commitment required, were reluctant to join. With the possibility of mitigating such costs under the Byrd Amendment, however, more industries will be able to reach the "industry" standard. In the opinion of experts, "companies that once would have been skeptical will sign on to the suits, since the dumping pot goes only to named plaintiffs."[39] Third, the Byrd Amendment will prompt additional trade lawsuits because attorneys representing potential petitioners will have a vested interest in convincing clients to bring an action since, as discussed above, disbursements for Qualifying Expenditures may be utilized for any purpose, including attorneys' fees.

Opponents of the Byrd Amendment argue that this type of financial liberty (1) encourages attorneys to engage in "ambulance chasing,"[40] (2) creates a new class of personal injury lawyers that specialize in trade law,[41] and (3) risks converting antidumping and countervailing duty proceedings into "a field day for bounty-hunting contingency lawyers" that will distort the cases to the detriment of U.S. consumers and foreign competitors.[42] Furthermore, this increase in unfair trade cases precipitated by the Byrd Amendment will present a significant problem in terms of resources (human and economic) for the DOC and ITC in administering these laws, lead to retaliatory actions by U.S. trading partners, manipulate a system that is designed to act as a shield for U.S.

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39. Chandrani Ghosh, *Trade Lawyers Relief Act*, FORBES, Nov. 13, 2000, at 55.

40. Katherine Rizzo, *Trade Battle Brewing over New Law; Rule Allows Americans Companies to Pocket Foreign Competitors' Fines*, CHARLESTON GAZETTE, May 29, 2001, at P2C, *available at* LEXIS, News Library, The Charleston Gazette File.

41. David H. Phelps, The Byrd Amendment: A Free Trade View (comments presented at the Conference Sponsored by the Association of Women in International Trade, Washington, D.C. (Jan. 21, 2001)).

42. *Dumping Byrd*, FIN. TIMES, Oct. 11, 2000, at 24. Concurring with the correlation between the Byrd Amendment and increase lawsuits, commentator Chandrani Ghosh explains that "[l]ast month two dozen trade lawyers descended on the Senate Finance Committee to lobby for an amendment to the agricultural spending bill that could boost production of one of their most lucrative crops: antidumping lawsuits." Ghosh, *supra* note 39, at 55. Byrd Amendment detractors call the legislation a "giveaway program" and are distraught that the regulations do not impose any requirement on the recipient companies to perform any worthwhile actions with the money. They argue that as a result of this flexibility "at least some of the money will be used to pay lawyers for bringing these cases, much like contingency fees in personal injury litigation." Lewis E. Leibowitz, The Byrd Amendment: The View From Downstream (comments from Conference Sponsored by the Association of Women in International Trade, Washington, D.C. (Jan. 17, 2001)).

industries instead of a sword against foreign competition, and undermine U.S. trade leadership in general.[43]

B. Implementation of the Byrd Amendment Will Lead to Economic Losses for the U.S. Government

As explained above, funds received from antidumping or countervailing duty orders imposed on foreign importers have historically gone into the U.S. Treasury to cover, in large part, the expenses incurred by the U.S. government (e.g., the DOC, ITC, U.S. Customs Service, etc.) in administering the unfair trade laws. Under the Byrd Amendment, however, these funds would be distributed directly to the Affected Domestic Producers. As a result of this change, conservative estimates indicate that the U.S. government will be deprived of up to $200 million annually.[44] This deprivation of funds will force the U.S. government to pass this cost on to the public-at-large.[45] As one trade expert explains, redirecting the funds "would reduce U.S. revenues by several billion dollars over five years, thus creating additional funding problems that the administration would have to make up elsewhere."[46]

C. The World Trade Organization Dispute: A No-Win Situation

On December 22, 2000, approximately two months after the enactment of the Byrd Amendment, nine parties (the European Union, Japan, Australia, Brazil, Chile, India, Indonesia, Korea, and Thailand) filed a joint complaint with the WTO, seeking "consultations" with the

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43. Press Release, Consuming Industries Trade Action Coalition, CITAC, NFTC Remain Opposed to Proposal to Subsidize Companies Filing Trade Remedy Cases (Oct. 6, 2000), *at* http://www.citac-trade.org/latest/10112000.html.

44. Elizabeth Olson, *Group of Countries Protests U.S. Changes in Dumping Law*, N.Y. TIMES, Dec. 22, 2000, at W1. Other groups, estimating that the Byrd Amendment could divest the government of some $500 million per year, sustain that this factor alone justifies a repeal of the Byrd Amendment: "'Given this enormous cost and the bad precedent the amendment would set, the Byrd provision must be struck down.'" Press Release, *supra* note 43 (citation omitted).

45. *Steel Imports: Hearings on H.R. 975, H.R. 1120, S. 61, S. 395, and S. 528 Before the Senate Comm. on Fin.*, 106th Cong. 5, 114-15 (1999) (statement of Hon. Mike DeWine, U.S. Senator from Ohio). Those legislators that championed the Byrd Amendment argue that the public will not be charged with making up this difference because, as a result of this legislation, more U.S. companies will remain in existence and pay taxes. *Id.* at 114. Moreover, in spite of all the evidence and experts indicating that the opportunity to obtain reimbursement for Qualifying Expenditures will generate increased lawsuits, Senator DeWine argues that the Byrd Amendment will decrease the number of suits filed, thereby diminishing the amount of resources that the Department of Commerce and International Trade Commission need. *Id.*

46. Alan F. Holmer et al., *Enacted and Rejected Amendments to the Antidumping Law: In Implementation or Contravention of the Antidumping Agreement?*, 29 INT'L LAW. 483, 511 (1995).

United States regarding this legislation.[47] Pursuant to the dispute resolution procedures of the WTO, a member-nation may request consultations with another party, which must occur within thirty days of such request.[48] If such negotiations fail to resolve the discord within sixty days, the complaining party may request the establishment of a "panel."[49] Although they did not initially join the complaint, North American Free Trade Agreement (NAFTA)[50] partners, Mexico and Canada, later attempted to participate in the consultations since, as the largest destinations of U.S. exports, the Byrd Amendment would substantially affect their trade interests.[51] In a maneuver that undoubtedly served to inflame the situation, the United States, in accordance with WTO rules, excluded these two nations from consultations. To justify this prohibition, the United States argued that neither NAFTA partner had the requisite "substantial interest" in the dispute.[52] Furthermore, referring to article 4(11) of the dispute settlement procedures of the WTO, U.S. representatives claimed that "not only does this provision not require the United States to give a reason for denying third-party rights, . . . none of the countries [that] refused such rights in the Byrd amendment consultations [e.g., Mexico and Canada] asked Washington to explain its decision."[53] Thus, in the absence of these two nations, consultations were held beginning February 2001.[54] Lamentably, the dispute was not resolved at this stage, which, for the nine complaining parties, was basically a foregone conclusion.[55]

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47. Daniel Pruzin, Mexico and Canada to Join WTO Talks on Byrd Amendment, 18 Int'l Trade Rep. (BNA), No. 4, at 148 (Jan. 25, 2001).

48. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 4(3) and (7), Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) Annex 2, 33 I.L.M. 1125, 1128-29 (1994) [hereinafter DSU].

49. *Id.*

50. The North American Free Trade Agreement, Dec. 7, 1992, U.S.-Can.-Mex., 32 I.L.M. 605, 612 (1993) [hereinafter NAFTA].

51. Pruzin, *supra* note 47, at 147-48.

52. *See* DSU, *supra* note 48, art. 4(11), at 1129. This provision establishes that whenever a member-nation considers that it has a "substantial interest" in the consultations, upon request it shall be included in the consultations "provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded." *Id.*

53. Daniel Pruzin, U.S. Criticized for Denying Third-Party Requests on Byrd Consultations at WTO, 18 Int'l Trade Rep. (BNA), No. 8, at 302 (Feb. 22, 2001).

54. Daniel Pruzin, WTO Consultations on Byrd Provision Held; Canada, Mexico, Argentina Denied Seats, 18 Int'l Trade Rep. (BNA), No. 7, at 278 (Feb. 15, 2001).

55. *Id.* The lack of progress at these consultations did not surprise the complainants, who claim that the obligatory discussions pursuant to the WTO have become merely "a pro-forma exercise where the two sides outline their arguments and where little negotiation actually takes place." *Id.*

As a consequence of their earlier rejection, Mexico and Canada filed a joint request for consultations with the United States in mid-May 2001.[56] In doing so, these two countries expressed disbelief as to the applicability of the Byrd Amendment in the face of NAFTA, under which they believed themselves to be exempt.[57] As with the earlier consultations, these yielded no resolution. Accordingly, in July 2001, nine of the participating nations requested the formation of a dispute settlement "panel."[58] In the formal complaint, it is argued that the Byrd Amendment violates the WTO for numerous reasons: (1) the disbursements represent a "specific action" against dumping and subsidization;[59] (2) the legislation will cause an "adverse effect" on other members;[60] (3) the disbursements are "specific subsidies";[61] and (4) it is not in conformity with the laws, regulations, and administrative procedures of the WTO.[62]

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56. Daniel Pruzin, Canada, Mexico Initiate WTO Consultations Against Byrd Amendment to U.S. Tariff Act, 18 Int'l Trade Rep. (BNA), No. 22, at 840 (May 31, 2001).

57. *Id.*

58. Daniel Pruzin, Countries File Joint Request for Panel Against Byrd Amendment on Dumping Duties, 18 Int'l Trade Rep. (BNA), No. 29, at 1137 (July 19, 2001). Mexico and Canada did not file a request for a panel until early August 2001. Their claims, however, are identical to those of the nine other parties. *See* United States Continued Dumping and Subsidy Offset Act of 2000—Request for the Establishment of a Panel by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand, WT/DS217/5 (July 13, 2001), *at* http://www.wto.org; *see also* United States Continued Dumping and Subsidy Offset Act of 2000—Request for the Establishment of a Panel by Mexico, WT/DS234/13 (Aug. 10, 2001), *at* http://www.wto.org; United States—Continued Dumping and Subsidy Offset Act of 2000—Request for the Establishment of a Panel by Canada, WT/DS234/12 (Aug. 10, 2001), *at* http://www.wto.org.

59. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, art. 32.1, WTO Agreement, Annex 1A, at 231, *reprinted in* WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 265 (1999) [hereinafter SCM Agreement]. Article 32.1 of the Agreement on Subsidies and Countervailing Measures provides that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of the GATT 1994." *Id.*

60. *Id.* art. 5, at 235. Article 5 of the SCM Agreement provides that "[n]o Member should cause, through the use of any subsidy . . . adverse effects to the interests of other Members, i.e., (a) injury to the domestic industry of another Member, (b) nullification or impairment of benefits accruing directly or indirectly to other Members under the GATT 1994 . . . [or] (c) serious prejudice to the interests of another Member." *Id.*

61. *Id.* art. 2.1, at 232. Article 2 of the SCM Agreement provides that a subsidy is "specific" to a particular industry or enterprise (a) if the granting authority or the legislation explicitly limits access to a subsidy to certain enterprises or (b) if, despite any appearance of nonspecificity, there are reasons to believe that the subsidy may in fact be specific, because of (1) use of subsidy program by a limited number of certain enterprises, (2) predominant use by certain enterprises, or (3) the granting of disproportionately large amounts of subsidy to certain enterprises. *Id.*

62. *Id.* art. 32.4, at 265. Article 32.4 of the SCM Agreement provides that "[e]ach [Member] . . . shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the [WTO Agreement] for it, the conformity of its laws,

As with all polemical issues, strong arguments on both sides abound. Those who believe the Byrd Amendment violates the WTO argue that this legislation offers U.S. producers an impermissible "double protection" not contemplated in the WTO.[63] In particular, the Byrd Amendment (1) protects domestic industry by forcing foreign importers to pay increased duties for an extended period of time during which the domestic industry may regain its former position and (2) allows U.S. industry to receive the monetary benefits of the duties.[64] It is argued, furthermore, that the disbursements under the Byrd Amendment are clearly "actionable subsidies" under the WTO because the U.S. government is conferring a direct financial benefit to the recipient.[65] Arguing that the Byrd Amendment essentially creates a private right of action for U.S. industries, others contend that this legislation will be invalidated by the WTO, just as the U.S. Antidumping Act of 1916 was recently struck down by this organization.[66] The most vehement opponents of the Byrd Amendment claim that the mere defense of such a law by the United States will prove highly detrimental. Critics warn, "'[t]his will make us the laughingstock of the WTO, it's so patently illegal [and] . . . [i]t will erode our ability to be a leader in world trade.'"[67]

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regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question." *Id.*

63. Daniel Pruzin, U.S. Blocks Byrd, Canada Complaint Panels, as WTO Sets to Rule on Steel Duties Dispute, 18 Int'l Trade Rep. (BNA), No. 30, at 1176 (July 26, 2001).

64. Rossella Brevetti, EC Official Warns Return of Duties to U.S. Industry Would Violate Trade Rules, 17 Int'l Trade Rep. (BNA), No. 40, at 1572 (Oct. 12, 2000).

65. Leibowitz, *supra* note 42.

66. Daniel Pruzin, WTO Gives United States Until July 26 to Eliminate 1916 Antidumping Act Flaws, 18 Int'l Trade Rep. (BNA), No. 10, at 398 (Mar. 8, 2001). In this case, the European Union and Japan claimed that the U.S. Antidumping Act of 1916 violated the GATT by "failing to require the existence or threat of material injury to a domestic producer as a prerequisite to antidumping measures and by allowing for penalties other than antidumping duties." *Id.* The WTO panel, which was upheld by the WTO appellate body in August 2000, found that the law violated articles 1, 4, and 5 of the Agreement on Antidumping and Countervailing Measures. *See* Press Release, Office of the U.S. Trade Representative, WTO Appellate Body Upholds Panel Ruling Against U.S. Revenue Act of 1916 (Aug. 28, 2000), *at* http://www.ustr.gov/wto/releases.shtml; *see also* Dianne M. Keppler, *The Geneva Steel Co. Decision Raises Concerns in Geneva: Why the 1916 Antidumping Act Violates the WTO Antidumping Agreement*, 32 GEO. WASH. J. INT'L L. & ECON. 293 (1999); *cf.* Mitsuo Matsushita & Douglas E. Rosenthal, Was the WTO Mistaken in Ruling on Antidumping Act of 1916?, 18 Int'l Trade Rep. (BNA), No. 36, at 1450-51 (Sept. 13, 2001) (suggesting that the WTO's assessment of the Byrd Amendment is in direct conflict with "U.S. antitrust enforcement authority").

67. Edmonson, *supra* note 28, at 36. Certain trade groups argue that the violation of the WTO is so egregious and the risk of losing credibility by supporting a bill that was overtly disdained by both the Clinton and Bush administrations are so substantial that the United States should simply concede defeat at the WTO. *See also* Nancy E. Kelly, *Byrd Foes: Concede Defeat at WTO*, AM. METAL MKT., Feb. 19, 2001, at 2.

Despite these arguments, many still contend that the Byrd Amendment is not a violation of the WTO whatsoever. To begin with, it is suggested that this legislation does not create an "actionable subsidy" because, in accordance with article 2 of the Agreement of Subsidies and Countervailing Measures, eligibility for the disbursements is based on objective criteria and, thus, does not favor any particular industry.[68] Moreover, unlike the U.S. Antidumping Law of 1916, which was recently invalidated by the WTO, the Byrd Amendment does not create a private right of action for U.S. producers. Experts explain this distinction, arguing that "a private right of action places a foreign producer or importer at additional risk of liability where harm to a domestic producer is found. Compensation, by contrast, does not increase liability; it merely directs the distribution of funds collected because of continued dumping."[69] It is argued, furthermore, that the Byrd Amendment does not modify the U.S. antidumping and countervailing duty laws in any fashion. Instead, this legislation simply redefines the party to whom the distributions are directed (i.e., from the U.S. Treasury to Affected Domestic Producers).[70] The champion of the legislation, Senator Robert Byrd, describes his view in simpler terms: "These critics are talking through their hats [because] . . . [t]here are no grounds for this provision to be challenged."[71]

The validity of the Byrd Amendment has not yet been resolved by the WTO, and likely will not be for many months as the issue is examined by the panel and subsequent appellate bodies. Thus, the destiny of this legislation is still uncertain. Irrespective of the final determination by the WTO, there are multiple negative repercussions from the WTO process that are already evident. First, by initially excluding Mexico and Canada from consultations, and then asserting the applicability of the Byrd Amendment to these two nations without providing the requisite notice under NAFTA, the United States has unquestionably alienated these two important trading partners. Second, the former U.S. Trade Representative was placed in the awkward position of defending a law that she, as well as multiple presidents, openly

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68. Statement of U.S. Senator Mike DeWine, The Continued Dumping and Subsidy Offset Amendment HR. 4461, The FY01 Agricultural Appropriations Bill (Oct. 18, 2000), *at* http://dewine.senate.gov/statements_103.html.

69. Holmer et al., *supra* note 46, at 510.

70. Stewart, *supra* note 32; *see* Rossella Brevetti, Official Says EU Has Low Expectations for WTO Byrd Amendment Consultations, 18 Int'l Trade Rep. (BNA), No. 4, at 147 (Jan. 25, 2001); *see also* Fischer, *supra* note 26, at P1A.

71. Karin Fischer, *Senator Byrd Meets with U.S. Trade Nominee*, CHARLESTON DAILY MAIL, Jan. 25, 2001, at 5A.

opposed.[72] In reference to the precarious situation in which U.S. trade officials find themselves, experts explain that "'[trade officials] were against the amendment from the beginning, but they have been trapped. It has now become law and they have to be loyal to Congress.'"[73] Third, even if the Byrd Amendment is found not to be a technical breach of the WTO, it surely undermines the "spirit" of the WTO to, inter alia, remove trade barriers and facilitate international trade. Circumventing the essence of the WTO on a technicality would obviously not place the United States in good stead with its trading partners.[74] Upon filing its joint complaint, the trade commissioner of the European Union warned that the Byrd Amendment must be repealed since it "clearly flies in the face of the letter and the *spirit* of WTO law."[75] Fourth, even if the United States wins this battle (i.e., the Byrd Amendment is held not to violate the WTO), it will certainly not win the war. As mentioned earlier, if the panel determines that the Byrd Amendment is valid, other nations will readily adopt identical provisions, thereby commencing a vicious circle.[76] Viewed in this way, it appears that the Byrd Amendment finds itself in a no-win situation.

D. Legislative Maneuvering Creates an Appearance of Impropriety

As discussed above, the Byrd Amendment may violate the WTO and/or NAFTA, thereby making it invalid. Even if this legislation were eventually upheld under the respective rules of these organizations, its legitimacy, especially in the United States, would continue to be questioned due to the skeptical manner in which it was enacted. For

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72. *See* Richard Lawrence, *Zoellick Rising*, J. COM., Mar. 16, 2001, *available at* LEXIS, News Library, J. of Commerce File. The Bush Administration announced that it would stand by Byrd Amendment even though this legislation would contradict the free trade agenda of the president. *Id.*

73. *See* John Zarocostas, *U.S. Trade Law Challenged*, UPI, Dec. 22, 2000, *available at* LEXIS, News Library, UPI File (noting the apparent contradiction that although "'the administration opposed the (Byrd) amendment because we think it is *bad policy*, . . . we are comfortable defending its legitimacy in the WTO'") (emphasis added) (citation omitted).

74. Somporn Thapanachai, *Thai-U.S. Trade: 'Cash Prizes' in New Law Threaten Exports; Antidumping Tool Slipped Past Clinton*, BANGKOK POST, Nov. 14, 2000, *at* http://scoop.bangkokpost.co.th/bkkpost/2000/bp2000_nov/bp20001114/141100_business03.html.

75. Zarocostas, *supra* note 73 (emphasis added). From the perspective of this European trade commissioner, the conflict caused by the Byrd Amendment is broad: the Byrd Amendment "is not a U.S.-EU problem, but a U.S.-rest-of-the-world problem." *Id.*

76. Brenda Jacobs, *Duty Measures on Antidumping, Countervailing Spark Concern*, BOBBIN, Feb. 1, 2001, at 64 (finding that a latent and threatening implication of the Byrd Amendment is the enactment of "copycat provisions"). Alluding to the Byrd Amendment, the EU announced that "the US law set a dangerous precedent as many members would be encouraged to put in place similar provisions." Kanth, *supra* note 36, at 12.

more than two decades, congressional attempts have been made to enact a law that, like the Byrd Amendment, would redirect the antidumping and countervailing duties from the U.S. Treasury to the pertinent domestic producers.[77] Unlike the Byrd Amendment, though, each of these proposed bills was rejected after being subjected to intense congressional and academic scrutiny.[78] In rebuffing these earlier bills, detractors expressed concerns that were strikingly similar to those made of the Byrd Amendment. It was suggested, in particular, that such a redirection of the duties would violate the General Agreement on Tariffs and Trade (the predecessor to the WTO) because it constituted an actionable subsidy or provided the U.S. industries a private right of action.[79] It was also argued that such redeployment of funds would provide a "powerful incentive to domestic industries to harass importers by bringing petitions."[80]

Based on this traditional rejection of similar trade bills, it is presumable that the Byrd Amendment would have been rebuked if it were subjected to the customary legislative process. In contrast to these earlier bills, the Byrd Amendment was not enacted in accordance with standard procedures. Senator Robert Byrd, who has received a myriad of labels from "parliamentary wizard,"[81] to "loose cannon,"[82] to the appreciably less charitable characterization of being "'the best snookerer that ever was,'"[83] managed to get his bill approved without exposure to any significant Congressional debate or analysis. According to trade experts, the idea of transferring revenues from the U.S. Treasury to injured domestic producers is by no means novel. The only unusual aspect of the Byrd Amendment is that it was added to a bill unrelated to trade in conference without a vote in either the House of Representatives

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77. *See, e.g.*, Steven D. Irwin, *Revitalizing a Private Right of Action in Antidumping Cases*, 17 L. & POL'Y INT'L BUS. 847, 850-51 (1985); Roger P. Alford, *Why a Private Right of Action Against Dumping Would Violate GATT*, 66 N.Y.U. L. REV. 696, 696-753 (1991).

78. *See* Irwin, *supra* note 77, at 851.

79. *See* Alford, *supra* note 77, at 713.

80. JOE COBB, HOW SPECIAL INTERESTS WANT TO AMEND ANTIDUMPING LAWS 5 (Heritage Found., Backgrounder Update No. 229, 1994), *at* http://www.heritage.org/library/categories/trade/bguzza.html.

81. R.G. Edmonson, *Senate Poised to Vote on Byrd Amendment Report*, J. COM., Oct. 18, 2000, *available at* LEXIS, News Library, J. of Commerce File.

82. *For the Byrds*, ECONOMIST, Oct. 21, 2000, at 88.

83. William New, *Byrd Amendment Would Have Little Impact on High Tech*, NAT'L J. TECH. DAILY, Oct. 12, 2000, *available at* LEXIS, News Library, Nat'l J. Tech. Daily File (citation omitted). In reference to the Byrd Amendment, counsel for the Consuming Industries Trade Action Coalition explained that "[t]his thing snuck up on us, and we've been snookered by the best snookerer that ever was and we haven't been able to get it out of this bill." *Id.*

or the Senate.[84] Rapid approval of the Byrd Amendment, it is argued, was facilitated by confusion and a multiplicity of political agendas. Politicians failed to understand the true implications of the bill, lobbying groups simply "saw easy money up for grabs," and President Clinton was hesitant to delay the bill because it contained a significant number of other spending provisions that were essential for the nation.[85]

With regard to the presidential disapproval of the Byrd Amendment, upon signing the bill into law, President Clinton acknowledged that the Byrd Amendment would

> provide select U.S. industries with a subsidy above and beyond the protection level needed to counteract foreign subsidies, while providing no comparable subsidy to other U.S. industries or to U.S. consumers, who are forced to pay higher prices on industrial inputs or consumer goods as a result of the anti-dumping and countervailing duties.[86]

Accordingly, Clinton urged Congress to override the provision before the adjournment of that congressional session.[87] The U.S. Trade Representative, likewise, did not hide her disdain for the Byrd Amendment, calling it simply a "bad idea."[88]

Irrespective of the validity of the content of the Byrd Amendment, it was adopted in a manner that intentionally circumvented standard congressional procedures.[89] For this reason, it is arguable that the Byrd Amendment will always be viewed as flawed trade policy because "it was born in secrecy . . . slipped into an agriculture appropriations bill in the dead of night behind closed doors."[90] As evidence of this inherent

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84. The Byrd Amendment was introduced as a subsection of the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act of 2001. *See* Edmonson, *supra* note 81.

85. *For the Byrds*, *supra* note 82, at 89.

86. *Clinton Signs Agriculture Spending Bill*, USIS Washington File (Oct. 30, 2000), *at* http://www.usis-australia.gov/hyper/2000/1030/epf103.htm (last visited Feb. 16, 2002). Upon signing the Byrd Amendment, President Clinton justified the need to approve this legislation with which he did not agree. He explained, in particular, that "'I decided on balance this bill advances the interests of the American people . . . . That's why I signed it, and that's how progress is made, when we work together and have honorable compromise. No one gets everything he or she wants.'" Rosella Brevetti et al., EU, Japan Weighing WTO Challenge to Byrd Amendment Dumping Provision, 17 Int'l Trade Rep. (BNA), No. 43, at 1682 (Nov. 2, 2000) (citation omitted).

87. Daniel Pruzin, WTO Members Prepare to Initiate Proceedings Against Byrd Amendment, 17 Int'l Trade Rep. (BNA), No. 48, at 1873 (Dec. 7, 2000).

88. *Id.*

89. Press Release, *supra* note 43; *see also* Letter from Jon E. Jenson, on behalf of the Consuming Industries Trade Action Coalition, to Senator Trent Lott (Oct. 27, 2000), *at* http://www.citac-trade.org/latest/10272000.html.

90. Consuming Industries Trade Action Coalition, Position Paper: The Continued Dumping and Subsidy Offset Act ("Byrd Amendment"), *at* http://www.citac-trade.org/latest/byrdfactsheet.htm. According to David Phelps, President of American Institute for International

distrust of legislation passed without open debate and discussion, even those that support the theory behind the Byrd Amendment have been overtly critical of the tricky methodology employed by Senator Byrd to obtain its approval. It is suggested, in particular, that "the idea makes sense but there would have been no need to add a trade provision to a spending bill had there been hearings and a House vote."[91] Thus, although the Byrd Amendment managed to become law, the legislative maneuvering employed in doing so may have created an irremediable appearance of impropriety, a taint that will undermine its legitimacy both in the United States and internationally.[92]

E. U.S. Trade Relations Will Be Debilitated

Even if it is determined that the Byrd Amendment does not violate the WTO and/or NAFTA, this law will nonetheless outrage important U.S. trading partners and undermine this nation's legitimacy as a free trader. Since its inception, the Bush Administration has touted itself as a free-trade advocate. For example, in April 2001, President Bush emphasized the benefits for the United States in aggressively participating in the multilateral trade system.[93] He explained, in particular, that open trade fuels overall economic growth, creates new jobs, spurs the process of economic and legal reform, dismantles protectionist bureaucracies that invite corruption, and helps sustain democracy in the long run.[94] Based on these positive aspects, the Bush Administration has repeatedly announced its intention of assuming a

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Steel, due to its lack of popular support, the Byrd Amendment could only have passed in the absence of debate in either house. Mr. Phelps states, in particular, that "'[t]his was stealth legislation on the part of Sen. Byrd. It had to be, because the idea would have been laughed out of Congress.'" Edmonson, *supra* note 28, at 36 (citation omitted).

91. Stephen Norton, *Hill Trade Leaders Challenge Barshefsky Fast Track View*, NAT'L J. CONGRESS DAILY, Oct. 12, 2000, *available at* LEXIS, News Library, Nat'l J. Congress Daily File.

92. It is ironic and somewhat contradictory that Senator Robert Byrd, the legislator who managed to obtain approval of the Byrd Amendment without congressional debate, has harshly criticized his contemporaries for actions almost identical to his own. For instance, Senator Byrd recently assailed his colleagues for "avoiding debate on serious issues in what he called an excessive effort to seem united after the Sept. 11 terrorist attacks." Adam Clymer, *Senator Byrd Scolds Colleagues for Lack of Debate After Attack*, N.Y. TIMES, Oct. 2, 2001, at A16. While Byrd claimed to understand the urgent need to pass legislation, he sustained nevertheless that "'a speedy response should not be used as an excuse to trample full and free debate.'" *Id.* (citation omitted).

93. Press Release, World Trade Organization, Trade Policy Reviews: First Press Release, Secretariat and Government Summaries, United States: September 17, 2001 (Sept. 17, 2001), *at* http://www.wto.org/english/tratop_e/tpr_e/tp172_e.htm.

94. *Id.*

leadership role in fomenting, among other things, free trade.[95] In doing so, the current government clearly understands that one must lead by example. In the words of the U.S. Trade Representative, "'[i]f the U.S., with all of its advantages, is unwilling to liberalize trade, what can we expect from other nations?'"[96]

It is evident, however, that the enactment of the Byrd Amendment will incense other nations and cause them to question the authenticity of this free-trade rhetoric. The U.S. Congress has a "well established habit of slipping through ill-conceived trade legislation just before elections,"[97] which has traditionally created lasting problems for U.S. trade relations. The Byrd Amendment, commentators argue, is just the latest example of such imprudent trade legislation, which "risks perverting U.S. trade policy and needlessly antagonizing the European Union, Japan and many developing countries."[98] Other experts agree with this assessment, warning that the Byrd Amendment will likely generate a multitude of negative ramifications for U.S. trade relations. It is suggested, for instance, that this law will (1) "lead to confrontation with our trading partners,"[99] (2) "spin out of control and lead to further divisions between the U.S. and the European Union,"[100] (3) "'aggravate already-raw trade relations between the United States and our trading partners,'"[101] (4) undermine the Bush Administration's efforts to promote free trade,[102] (5) further strain relations with important allies and weaken the United State's position as the "foremost advocate of free trade,"[103] (6) invite a

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95. U.S. Trade Representative Robert B. Zoellick, Remarks at the Council of the Americas, Washington, D.C. (May 7, 2001), *at* http://www.ustr.gov/speech-test/zoellick/index.shtml. In a speech given by the new U.S. Trade Representative, he stated that "[i]t is up to us [the United States] to champion the values of openness and freedom, to honor the vital linkages among economic liberty, *free trade*, open societies, successful democracies, individual opportunity, and peaceful security." *Id.* (emphasis added).

96. Paul Magnusson, *The New Trade Rep Won't Get Much Sleep*, BUS. WK., Jan. 29, 2001, at 38 (citation omitted).

97. *Dumping Byrd*, *supra* note 42, at 24.

98. *Id.*

99. Press Release, *supra* note 43.

100. R.G. Edmonson, *President of American Association of Exporters and Importers Is Familiar with the Washington Scene*, J. COM., Dec. 25, 2000, at 8, *available at* LEXIS, News Library, J. of Commerce File. This author analogizes the Byrd Amendment to modern weaponry: "'It is like an AK-47. It's cheap and easy to make, but it's immensely lethal.'" *Id.* (citation omitted).

101. Fischer, *supra* note 26, at P1A (citation omitted).

102. SCHAVEY, *supra* note 34, at 1.

103. *Id.*; *see also* Fischer, *supra* note 26, at P1A. As Fischer explains, "[l]ike a fire department called late to a blaze, it's the new administration of President George Bush, who has promised a vigorously pro-trade agenda, that must deal with the already-smoldering debate over the Byrd amendment." *Id.*

trade war with major trading partners,[104] and (7) make U.S. trade policy seem entirely schizophrenic.[105] The validity of these admonitions is corroborated by a recent study conducted by the WTO evaluating U.S. trade policy. According to this study, while the United States maintains one of the world's most open and transparent trade and investment regimes, the "active use" of antidumping and countervailing duty measures has "a chilling effect on trade."[106] This report indicates, moreover, that the Byrd Amendment is an example of U.S. policy that thwarts the WTO's goal of liberalizing trade.[107]

F. U.S. Import-Dependent Industries, Consumers and Workers Will Be Injured

Projecting an appearance of impartiality, the Byrd Amendment does not specify which industries may be considered Affected Domestic Producers eligible to obtain reimbursements for all Qualifying Expenditures. In spite of this façade of general applicability, it is clear that the Byrd Amendment was promulgated primarily to mitigate the costs for the U.S. steel industry in bringing unfair trade actions. This conclusion is substantiated by reviewing a number of other bills that Senator Robert Byrd has introduced, which were clearer in their intention of protecting the steel producers that are so prevalent in his home state of West Virginia.[108] Senator Byrd's objective of protecting the local steel industry is also apparent in public statements wherein he claims that "U.S. trade policies have been influenced far too heavily by diplomatic interests and concern for the welfare of our trading partners. Too little consideration has been given to domestic needs and the jobs of Americans. . . . West Virginia is feeling the pinch of ill-conceived trade

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104. Aaron Schavey, *Tilting the Field on World Trade*, WASH. TIMES, Nov. 22, 2000, at A16. According to the author of this article, "[Mr.] Byrd's amendment is already upsetting our foreign trading partners and casting a pall over the future of free trade." *Id.*

105. Susan Kohn Ross, *A Case of Schizophrenia*, J. COM., Aug. 17, 2001, *available at* LEXIS, News Library, J. of Commerce File. From this author's perspective, when you talk about U.S. trade, "you're talking schizophrenia" since this nation continually sends contradictory signals. *Id.* For instance, signs of U.S. support for free trade include the U.S.-Jordan Free Trade Agreement, the U.S.-Singapore Free Trade Agreement, and the admission of China to the WTO. At the same time, however, the Byrd Amendment was enacted. Based on this, the author concludes that "[w]hile these steps suggest that Congress is at least somewhat receptive to free trade, we have an equal amount of backward movement." *Id.*

106. Press Release, *supra* note 93.

107. *Id.* The study explains that if the United States were to remove existing trade barriers, it would thereby lessen distortions in global markets and frictions with trade partners. *Id.*

108. Senator Byrd has introduced, among others, the Stop Illegal Steel Trade Act of 1999, S. 395, 106th Cong. (1st Sess. 1999), and the Trade Fairness Act of 1999, S. 261, 106th Cong. (1st Sess. 1999).

policies."[109] While the Byrd Amendment may have accomplished its objective of benefiting the steel industry, in the process it will surely injure U.S. import-dependent industries, consumers and workers. In fact, upon further review, it appears that the Byrd Amendment violates the principle of utilitarianism, helping a discreet industry (i.e., U.S. steel producers) to the overall detriment of the U.S. economy. In the words of one trade authority, "One cannot reasonably argue that there is some public interest in protecting certain industries [like steel] because the only ones that are protected are a few domestic producers, and they are protected at the expense of the general public."[110]

Taking the steel industry scenario, if the Byrd Amendment triggers additional antidumping and countervailing duty actions, it is foreseeable that a portion of such actions will lead to the imposition of higher duty orders on the steel imports from foreign producers. The U.S. steel industry, of course, would benefit from having less local competition, as well as from utilizing any monies received for Qualifying Expenditures. At the same time, U.S. consumers would be injured due to the elevated prices that they would have to pay for all products made from steel, such as cars, homes, and major household appliances.[111] Supporting this position, experts claim that the Byrd Amendment surely violates the WTO and will cause an international rebuke of U.S. trade policy. If the United States fails to repeal this legislation, then "the system will collapse—while consumers suffer."[112] Concurring with this assessment of Byrd-like legislation, other trade experts claim that actions of this nature serve to sacrifice U.S. consumers in general to favor one particular industry. Knowledge of the true effects on local consumers, therefore, must be a prerequisite to approving this type of law: "[b]efore we allow Congress to *crucify American consumers* on a cross of 'fairness,' we should understand the convoluted, contradictory, and perverse idea of

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109. Press Release, Senator Robert C. Byrd, Free Trade—Fair Trade, Byrd's-Eye View (Feb. 10, 1999) (on file with author). Citing the need to safeguard local industries such as steel, glass, clothing, leather, and apple growers, Byrd explains his rationale for opposing both GATT and NAFTA. In this newsletter, the Byrd's-eye view, Senator Byrd opines, "[t]here is something to be said for free trade. But in my experience, free trade has rarely been fair trade where American manufacturers and American jobs are concerned." *Id.*

110. ROBERT W. MCGEE, SOME ETHICAL ISSUES FOR ACCOUNTANTS IN ANTIDUMPING TRADE CASES: AN EXAMINATION OF RECENT CASE STUDIES WITH EMPHASIS ON LATIN AMERICA 4 (Dumont Inst. Pub. Policy Research Working Paper No. 96.1, Dec. 4, 1996), *at* http://econpapers.hhs.se/paper/wpawuwpit/9805005.htm.

111. Schavey, *supra* note 104, at A16.

112. Dan Ikenson, *Steel's Deal*, NAT'L REV., June 6, 2001, *available at* LEXIS, News Library, Nat'l Rev. File.

fairness that Congress is championing."[113] Finally, the enactment and threat of using the Byrd Amendment may alone be sufficient to injure U.S. consumers because in this scenario many foreign importers simply raise prices or reduce sales.[114]

Additional unfair trade actions also damage U.S. import-dependent industries such as manufacturing, transportation and construction, all of which rely heavily on the availability of foreign steel. When faced with a duty order pursuant to the Byrd Amendment, a foreign producer has two main options: (1) continue to export to the United States while their U.S. competition is supported by the duties that they are paying or (2) cease selling in the U.S. market altogether.[115] Likely, the latter option will be selected, which "hits consuming industries hard" when they lose a valuable source of supplies.[116] In other words, if foreign producers opt to stop selling certain goods or parts in the U.S. market in order to avoid the duties imposed from increased antidumping actions brought pursuant to the Byrd Amendment, downstream industries will face shortages and/or a total lack of special materials that may be available only from foreign sources. The Byrd Amendment, therefore, "will cause significant injury to manufacturers that rely on steel imports because U.S. producers do not make enough steel, or the right kinds of steel, to satisfy domestic demand."[117] In the long run, in addition to suffering from the scarcity of necessary foreign components and materials, the Byrd Amendment could

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113. JAMES BOVARD, OUR TRADE LAWS ARE A NATIONAL DISGRACE 2 (CATO Inst., Policy Analysis No. 91, 1997), *at* http://www.cato.org/pubs/pas/pa091es.html (emphasis added).

114. *Against Anti-Dumping*, ECONOMIST, Nov. 7, 1998, at 18. This article explains that when a government threatens to utilize its antidumping laws, the targeted foreign importers are inclined to raise prices and cut sales. In other words, "companies are being urged to collude at consumers' expense." *Id.*; *see also* Terence P. Stewart & Timothy Brightbill, *Some Heretical Observations on the Interaction of U.S. Trade and Competition Laws: A Defense of U.S. Antidumping and Countervailing Duties*, 4 U.S.-MEX. L.J. 35, 36 (1996). Supporters of the Byrd Amendment reject the "consumer interests" argument because "[t]hose who worship at the holy grail of 'consumer interests' ignore the business realities that there are no free lunches." Stewart & Brightbill, *supra*, at 36. In other words, any temporary benefit enjoyed by one consumer is paid for by another. *Id.* For instance, if products are sold below maximum profit, then those injured are the stockholders of the company that is not maximizing profits. Likewise, in the case of government subsidies, those injured are all of the taxpayers that are involuntarily financing the initiative. *See id.* at 38.

115. Position Paper, *supra* note 90.

116. *Id.*

117. *CITAC Consuming Industries Want Byrd Amendment Repealed*, METAL CTR. NEWS, Mar. 1, 2001, *available at* 2001 WL 11403491; *see also* Leibowitz, *supra* note 42. Leibowitz notes that U.S. companies that depend on foreign steel, agricultural, and other products will suffer from reduced supplies due to the proliferation of antidumping and countervailing duty cases under the Byrd Amendment. According to the author, "[t]he welfare loss from these cases will multiply, costing billions of dollars and thousands of jobs to America's consumers and businesses." Liebowitz, *supra* note 42.

force U.S. import-dependent industries to relocate to other nations, taking with them an incalculable number of job opportunities. As one trade expert explains, it is bad policy for trade remedy laws to impose restrictions without adequately considering whether U.S. businesses will have reasonable alternatives.[118] If such considerations are not sufficiently addressed, then "American businesses just move—to Canada, Mexico, Singapore or elsewhere, so they can get the materials they need. They don't come to Washington to complain; they leave and take their jobs with them."[119]

Besides injuring domestic consumers and import-dependent industries, the Byrd Amendment may also be harmful to U.S. workers. When antidumping or countervailing duties are imposed on foreign raw materials, the price of these items rises, which in turn makes the U.S. industries that utilize them less competitive in the global market. Diminished competitiveness forces such industries to introduce cost-cutting measures, including drastic reductions in staff. In simplified terms, "[t]he less competitive exporters are, the more they need to fire workers to stay afloat."[120] As explained previously, the Byrd Amendment was designed primarily to benefit the U.S. steel industry. The inequity of this legislation is clear upon examining the overall effects to the American workforce. Recent studies indicate that import-dependent industries that utilize foreign steel outnumber the amount of workers in the U.S. steel industry forty to one.[121] Therefore, the protection afforded these steel workers by the Byrd Amendment comes at the expense of the national workforce as a whole. Indignant about this disproportionate protection, various trade analysts have questioned the extent to which certain industries should be assisted: "[d]oes this mean that for every one American who benefits from the law, 40 others must suffer?"[122] A recent study by the U.S. International Trade Commission indicated that the economic costs of antidumping and countervailing duties to the

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118. Leibowitz, *supra* note 42.

119. *Id.*

120. Schavey, *supra* note 104, at A16.

121. *See* SCHAVEY, *supra* note 34, at 2.

122. Schavey, *supra* note 104, at A16; *see Steel Trade Issues: Hearing Before the Subcommittee on Trade of the Committee on Ways and Means House of Representatives*, 106th Cong. 146 (1999) (statement of Jon E. Jenson, President, Precision Metalforming Association, Independence, Ohio); *see also* SCHAVEY, *supra* note 34, at 1 (claiming that the Byrd Amendment will harm U.S. exporters and American consumers by raising prices). Enactment of the Byrd Amendment, it is suggested, demonstrates that the U.S. government is willing to "sacrifice[] the interests of American consumers" and risk a trade war to protect industries such as domestic steel. SCHAVEY, *supra* note 34, at 2.

overall U.S. economy far outweigh the benefits.[123] With regard to repercussions for U.S. workers, citing this study, experts argue that while laws like the Byrd Amendment may protect certain jobs and allow for higher profits for selected industries, "they cost far more overall in higher consumer prices, lower production, and lost jobs in other industries."[124]

G. The Byrd Amendment Fails to Remedy the True Problem

As discussed previously, the Byrd Amendment was primarily designed to aid the steel and metals industry, which accounts for approximately eighty percent of all the antidumping actions in the United States.[125] Although the law itself does not explicitly limit its application to this industry, comments from various companies favored by the Byrd Amendment demonstrate its underlying intentions. According to one company representative, "'[o]nce again, Senator Byrd has come to the aid of industries hard hit by unfair and illegal imports. . . . He understands the crisis the *domestic steel industry* continues to experience and is working to mitigate the impact of financial losses caused by illegal trade.'"[126]

Good intentions notwithstanding, the Byrd Amendment may not constitute a feasible long-term solution for this industry at all. With its cost of production among the highest in the world, the U.S. steel industry faces some formidable competition from abroad. To protect itself, this industry has traditionally requested government intervention in a variety of forms, including the imposition of special quotas, enactment of protective legislation, commencement of antidumping actions, increase in tariffs, etc.[127] Critics of the tactics used by the U.S. steel industry argue

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123. *Steel Trade Issues: Hearing Before the Subcommittee on Trade of the Committee on Ways and Means House of Representatives*, *supra* note 122.

124. BRYAN T. JOHNSON & ROBERT P. O'QUINN, ABOLISH AMERICA'S COSTLY ANTI-DUMPING LAWS 2 (Heritage Found., Backgrounder Update No. 261, 1995), *at* http://www.heritage.org/library/categories/trade/bgup261.html. This study found that the antidumping and countervailing duties caused a net loss of $1.59 billion in the U.S. gross domestic product in 1991, while the U.S. producers receiving such duty protection earned only $659 million more in profits. *Id.* Based on these numbers, the article claims that "the antidumping and countervailing duty cure is far worse than the disease." *Id.*

125. *Unfair Trade*, ECONOMIST, May 5, 2001, at 97.

126. Press Release, Weirton Steel Corp., Byrd Amendment Sending Duties to Injured Industries Included in Report; Headed for House Vote (Oct. 9, 2000), *at* http://www.weirton.com/company/invest/press/press100900b.html (emphasis added) (citation omitted).

127. *See, e.g.*, BRINK LINDSEY ET AL., THE STEEL "CRISIS" AND THE COSTS OF PROTECTIONISM 2 (Cato Inst., Trade Briefing Paper No. 4, 1999), *at* http://www.freetrade.org/pubs/briefs/tpb_004es.html; Claude E. BARFIELD, AM. ENTER. INST., SAFEGUARDS VS.

that, instead of attributing the problems to external sources and relying on "political fixes whenever possible," local industry should assume at least part of the responsibility.[128] Moreover, it is suggested that implementing unconventional measures may be preferable to provoking more antidumping litigation under the Byrd Amendment. It is argued, in particular, that U.S. steel companies should endeavor to "find new ways" to become more competitive and/or ensure that government intervention does not occur to the detriment of the rest of the national economy.[129] Likewise, others contend that while protecting and stabilizing the domestic steel market is an indisputably legitimate concern, trying to cure it with the Byrd Amendment is not a long-lasting solution. Urging the decision-makers in Washington to become more creative in remedying the issue, policy analysts praise earlier methods such as the 1994 government-brokered production cuts in the global aluminium industry despite its lack of overall success.[130] From their perspective, "[t]hese measures may have flaws, but they at least reach beyond the conventional trade law toolbox."[131]

Although debating the best solution to resolve the U.S. steel crisis far exceeds the scope of this Article, it is interesting to note that other methods are currently being examined. The Organization for Economic Cooperation and Development, for example, recently organized a meeting with representatives from over thirty steel-producing nations wherein the goal was to identify novel solutions to avoid the cycle of

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ANTIDUMPING PROTECTION: LESSONS FROM THE STEEL "CRISIS" 1 (1999), *at* http://www.aei.org/oti/oti10590.htm; GARY CLYDE HUFBAUER & BEN GOODRICH, STEEL: BIG PROBLEMS, BETTER SOLUTIONS 5 (Inst. Int'l Econ., Policy Brief No. 01-9, 2001), *at* http://www.iie.com/policybriefs/news01-9.htm; Jenna Greene, *Steeling for Battle*, LEGAL TIMES, Apr. 16, 2001, at 1; Nancy E. Kelly, *Caucus Presses Agenda One More Time*, AM. METAL MKT., Jan. 5, 2001, at 2.

128. Brink Lindsey, *Steel Users Urged to Stand up to Big Steel's Bullying Tactics*, AM. METAL MKT., Oct. 30, 2000, at 8. According to this critic of the U.S. steel industry:

> More than any other industry, it has systematically integrated the quest for competition-stifling trade barriers into its core business strategy. Any time that economic or political circumstances create an opening, the steel lobby pounces—howling about unfair competition, making dire predictions about the impending extinction of the industry and demanding that we 'stand up for steel' while it stiffs the rest of us.
>
> It is a shameful state of affairs.

Id. Other commentators have stated that although the United States is the only steel-producing country in the world that does not have the capacity to meet its needs, domestic producers "'have a hard time accepting [that] they are the problem.'" *Temperature on the Rise in Transatlantic Tariffs Row*, THE ENG'R, July 27, 2001, at 4, *available at* LEXIS, News Library, The Engineer File (citation omitted).

129. Jenson, *supra* note 34, at A32.

130. Andrew Z. Szamosszegi, *To Bolster U.S. Steel Makers, the U.S. Must Get Creative*, BRIDGE NEWS, Jan. 17, 2001, *at* http://www.econstrat.org/bsteel.htm.

131. *Id.*

government intervention and trade policy responses.[132] More recently, the U.S. Trade Representative invoked section 201 of the Trade Act of 1974 and requested that the ITC determine whether the U.S. steel industry has suffered serious injury due to a surge of foreign imports.[133] If the ITC makes an affirmative decision, it will recommend to President Bush the action(s) that it believes will facilitate positive adjustment by the U.S. steel industry to import competition. The President, in turn, may take action by increasing a tariff, imposing a quantitative restriction, negotiating international agreements, auctioning import licenses, or submitting legislative proposals to Congress.[134]

Special interest groups and legislators who support the Byrd Amendment most likely have done so believing that such legislation will benefit, at a minimum, the steel industry, albeit to the detriment of the remainder of the country. However, when one discovers that there are other less divisive, more utilitarian methods to ensure protection of the steel industry, the Byrd Amendment loses its allure.

H. The Byrd Amendment Will Provoke Retaliation in Many Forms

As explained above, the Byrd Amendment will act as an incentive for U.S. industries to file more antidumping and countervailing lawsuits. Due to the fact that simply defending against these claims involves significant interruptions of business, enormous expense and time commitments, those U.S. trading partners named in these suits will be disgruntled. In response to the increase in unfair trade suits, experts predict that these nations will retaliate against the United States in three major ways. First, other countries will simply enact provisions to their domestic laws that are identical to the Byrd Amendment, thereby subjecting various U.S. industries to the same problems. As one expert explains, "Byrd's action won't go unnoticed. When the United States indulges in protectionism, foreign countries respond *in kind*."[135] Other

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132. Janet Plume, *U.S. Steelmakers Seek Import Restrictions*, J. COM., Oct. 1, 2001, *available at* LEXIS, News Library, J. of Commerce File; *see also* Larry Speer, OECD, Developing Nations Launch New Initiative on Steel Industry Difficulties, 18 Int'l Trade Rep. (BNA), No. 37, at 1466 (Sept. 20, 2001).

133. *Steel Industry: A Tricky Business*, ECONOMIST, June 30, 2001, *at* 55; *see* Joseph Kahn, *Bush Moves Against Steel Imports; Trade Tensions Are Likely to Rise*, N.Y. TIMES, June 6, 2001, at A1; *see also* Rossella Brevetti, Steel Imports Rose Slightly in August over July Figures, 18 Int'l Trade Rep. (BNA), No. 38, at 1511 (Sept. 27, 2001).

134. U.S. INT'L TRADE COMM'N, SUMMARY OF STATUTORY PROVISIONS RELATED TO IMPORT RELIEF, Pub'n 3125, at 17-18 (1998).

135. Schavey, *supra* note 104, at A16 (emphasis added). According to a recent study, more than 130 U.S. companies have been investigated by foreign countries for alleged antidumping

trade experts concur, explaining that the most significant issue is whether "copycat provisions" will be passed by other nations. If so, "U.S. firms may find themselves the victims rather than the beneficiaries of the provision."[136] The fact that the validity of the Byrd Amendment is currently under review by the WTO demonstrates that the United States has placed itself in a no-win situation. On one hand, if the WTO declares the Byrd Amendment illegal, then the United States will suffer the embarrassment of losing yet another trade dispute before this organization.[137] On the other hand, if the WTO determines that the Byrd Amendment is valid, other member-nations will rapidly promulgate matching laws. As one commentator explains, while the foreign governments are proceeding with the challenge before the WTO, they face "pressure from their domestic industries to enact similar provisions."[138] And, "pressure would likely magnify if a WTO dispute settlement panel concluded that the Byrd Amendment does not violate WTO rules."[139]

The second manner in which U.S. trading partners will retaliate is by the implementation of antidumping and countervailing laws in general, which will injure virtually all U.S. exporters. For instance, during congressional debate it was determined that imposing higher duties on foreign imports or providing any other special relief to a U.S. industry would occasion "*prompt swift* retaliatory action by our trading partners against *a wide range of U.S. exports*, including farm commodities and manufactured products . . . construction equipment, airplanes, automotive parts, and computers."[140] It is argued, furthermore, that any trade legislation like the Byrd Amendment that tends to rile our

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practices, some of which "were lodged in retaliation for U.S. anti-dumping investigations." *See id.* (citing the Rushford Report).

136. Jacobs, *supra* note 76, at 64.

137. Brevetti, *supra* note 70, at 147. According to this article, the United States has lost nine out of nine cases before the WTO involving trade remedies. Based on this dismal record, the question is posed: "'Do [they] want to add a tenth?'" *Id.* (citation omitted).

138. Jacobs, *supra* note 76, at 64; *see* Kanth, *supra* note 36, at 12. Alluding to the Byrd Amendment, the European Union announced that "the U.S. law sets a dangerous precedent as many members would be encouraged to put in place similar provisions." Kanth, *supra* note 36, at 12; *see also* Stuart Rosen et al., *Free Trade Is the Future*, METRO. CORP. COUNSELOR, May 2001, at 13 (explaining that there is an "unhealthy tendency to resort to protectionism at the first sign of economic difficulties"). Rosen states that the principal problem with this protectionism is that "it tends to be reciprocated by trading partners, leading to a downward economic spiral." Rosen et al., *supra*.

139. Jacobs, *supra* note 76, at 64.

140. *Steel Imports: Hearing on H.R. 975, H.R. 1120, S. 61, S. 395, and S. 528 Before the Senate Comm. on Finance*, *supra* note 45, at 120 (statement of Jack Porter, Chief of Procurement, Caterpillar, Inc., Peoria, Ill., on behalf of the Emergency Committee for American Trade, Washington, D.C.) (emphasis added).

trading partners will "put U.S. exports at risk of retaliation . . . [and] set into motion a spiral of market-closing measures in foreign markets."[141] Merely being accused of dumping can be disastrous for U.S. exporting industries because many opt not to participate in the investigation and, thus, forego the opportunity to sell products in a particular nation. This lack of self-defense, especially in unfair trade actions initiated in developing countries, is attributable to the fact that U.S. exporters (1) conclude that it is not worthwhile to expend the time and money in an investigation where the local government has a phenomenal degree of discretion, and (2) fear that if they were to participate, their confidential price and cost data supplied to foreign government officials would end up in the hands of their competitors.[142]

Finally, the third way that U.S. trading partners will retaliate against the Byrd Amendment is by increasing the frequency of antidumping or countervailing actions against U.S. industries. During the 1980s, more than eighty percent of the unfair trade cases were initiated by the four "traditional users" (i.e., Australia, Canada, European Union, and the United States).[143] Recently, however, developing countries like Mexico have become active, strategic users of these mechanisms.[144] The use of these procedures is so pervasive in these developing nations that, according to experts, "Latin American countries have begun to imitate the pattern of the industrial countries . . . and have become keen, adept, and enthusiastic students of antidumping practice."[145] With regard to Mexico, with its steady increase of pending trade investigations since the mid 1980s, this nation has earned the "dubious distinction" of having the

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141. *Id.*

142. BRINK LINDSEY & DANIEL J. IKENSON, COMING HOME TO ROOST: PROLIFERATING ANTIDUMPING LAWS AND THE GROWING THREAT TO U.S. EXPORTS 15 (Cato Inst., Trade Policy Analysis No. 14, 2001). This article explains that while only the few industrialized nations used antidumping and countervailing mechanisms in the past, developing nations are now becoming avid users, too. Consequently, "the chickens are coming home to roost: U.S. exports are increasingly encountering the same unpredictable, arbitrary, and disruptive obstacles abroad that have long been inflicted on other countries' exports here." *Id.* at 2.

143. THOMAS J. PRUSA, ON THE SPREAD AND IMPACT OF ANTIDUMPING 5 (Nat'l Bureau of Econ. Research, Working Paper No. 7404, 1999), *at* http://www.nber.org/papers/w7404.

144. Edwin Vermulst, *Anti-Dumping and Anti-Subsidy Concerns for Developing Countries in the Millennium Round: Key Areas for Reform*, UNCTAD Workshop on Developments of Positive Agenda 2 (June 1999), *at* www.unctad.org/en/posagen/antidump/document.htm; *see also* Prusa, *supra* note 143, at 6; JOSÉ TAVARES DE ARAUJO JR. ET AL., ANTIDUMPING IN THE AMERICAS, UNITED NATIONS, ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, DIVISION OF INTEGRATION AND INTERNATIONAL TRADE at 5, 9, U.N. Doc. LC/L.1516-P, U.N. Sales No. E.01.II.G.59 (Santiago, Chile, Mar. 2001).

145. J. LUIS GUASH & SARATH RAJAPATIRANA, ANTIDUMPING AND COMPETITION POLICIES IN LATIN AMERICA AND CARIBBEAN: TOTAL STRANGERS OF SOUL MATES? 6 (World Bank, Working Paper No. 1958, 1998).

largest antidumping caseload in the entire world.[146] The enactment of the Byrd Amendment will likely lead to retaliation, especially by Mexico, against U.S. industries for numerous reasons. First, it is well established that nations tend to bring unfair trade cases against their major trading partners. Accordingly, "it is not surprising that a fair proportion of Mexican . . . cases are against imports from the United States."[147] Recent studies indicate, furthermore, that the majority of unfair trade cases are not initiated for "economic motives" (i.e., to level the international playing field by counteracting any artificial advantage afforded one party to the detriment of another); rather, the cases are commenced for "strategic motives" (i.e., retaliation). As a result, the traditional users of unfair trade laws such as the United States "are paying heavily for their past transgressions because they are now being regularly investigated in a retaliatory fashion."[148] This opinion is shared by other experts who suggest, to borrow an idiom, that if the United States lives by the antidumping sword, it will surely die by that same sword.[149] Unfortunately, with the recent economic slowdown, it appears that the situation will continue to deteriorate for the United States. It is argued, in particular, that as "economic gloom" spreads, protectionism in the form of increased antidumping law usage will increase.[150] The most worrisome trend is that developing countries such as Mexico, Argentina, and Brazil have recently launched a sizable number of cases against U.S. industries.[151] In sum, it seems that Congress has backfired by enacting the Byrd Amendment, which will lead to the filing of additional cases both by and against U.S. industries. In other words, "[i]nstead of benefiting the U.S. economy, 'strengthening' the antidumping laws [by

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146. RAJ KRISHNA, ANTIDUMPING IN LAW AND PRACTICE 5 (World Bank, Working Paper on Int'l Econ. Trade, Capital Flows No. 1823, 1997).

147. Terence P. Stewart et al., *Opportunities in the WTO for Increased Liberalization of Goods: Making Sure the Rules Work for All and That Special Needs Are Addressed*, 24 FORDHAM INT'L L.J. 652, 682 (2000).

148. THOMAS J. PRUSA & SUSAN SKEATH, THE ECONOMIC AND STRATEGIC MOTIVES FOR ANTIDUMPING FILINGS 16 (Nat'l Bureau of Econ. Research, Working Paper No. 8424, 2001). This article finds that even though approximately fifty percent of the antidumping actions initiated by traditional users are brought to retaliate, nearly ninety percent of the cases in which these traditional users are investigated have a retaliatory motive. *Id.*

149. Catherine Curtiss & Kathryn Cameron Atkinson, *United States-Latin American Trade Laws*, 21 N.C. J. INT'L L. & COM. REG. 111, 132 (1995). This article explains that "the United States [sic] fondness for these actions has been increasingly mirrored by other countries, including those in Mexico and Latin America. As United States exports to those areas increase, so does the potential for unfair trade actions or safeguard measures against United States products." *Id.*

150. *Unfair Protection*, ECONOMIST, Nov. 7, 1998, at 18.

151. *Id.*

passing the Byrd Amendment] would not only raise costs for American consumers, but also likely would trigger more antidumping cases against U.S. exporters worldwide."[152]

I. The Byrd Amendment May Violate NAFTA

Since the issue is currently under review by the WTO, an action against the Byrd Amendment under NAFTA has not yet been initiated. As demonstrated below, however, if such a complaint were launched, it is likely that this law would be invalidated. Pursuant to article 1902(2)(a) of NAFTA, each party has the right to change or modify its antidumping and/or countervailing duty law with respect to goods imported from any other member of this trade agreement.[153] Such modifications, however, will be valid only on the condition that

(a) the amending statute *specifies* that it applies to goods from the NAFTA parties,
(b) the amending nation *notifies in writing* the parties to which the amendment applies as far in advance as possible of the date of enactment of such statute,
(c) following notification, the amending party *consults* with the potentially affected NAFTA parties prior to the enactment of the amending statute, and
(d) such amendment is not inconsistent with the rules set forth in the GATT or the object and purpose of NAFTA, which is to establish fair and predictable conditions for the progressive liberalization of trade between the parties while maintaining effective and fair disciplines on unfair trade practices.[154]

If the amendment is made without satisfying all of these conditions, then the injured parties have the right to seek resolution by a binational panel.[155]

In the instant case, the Byrd Amendment does not specify that it is applicable to Mexico and Canada, the United States did not notify these

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152. COBB, *supra* note 80, at 2.

153. NAFTA, *supra* note 50, art. 1902(2)(a), at 682 (emphasis added). Some commentators question the purpose of having antidumping laws in the context of a free trade agreement. From their perspective, the existence of such unfair trade laws is "quite peculiar and paradoxical, and an anomaly among free trade areas in general." Guash & Rajapatirana, *supra* note 145, at 13. In comparison, similar arrangements such as the European Free Association, the European Union, and the Australia-New Zealand Closer Economic Relations Trade Agreement, do not allow for antidumping regimes. *Id.* The principle behind free trade arrangements is to integrate markets so that domestic and foreign markets are considered equals. *Id.* This, they contend, "allows for no room for antidumping actions." *Id.*

154. NAFTA, *supra* note 50, art. 1902(2), at 682.

155. *Id.* art. 1903, at 682-83.

countries in writing that this legislation may potentially affect them, no consultations on the issues were conducted between the NAFTA parties, and the potential effects of the Byrd Amendment (i.e., the filing of additional antidumping actions, the enactment of identical laws with retaliatory motives, etc.) are incongruous with NAFTA's purpose of establishing conditions for the progressive liberalization of trade. Accordingly, notwithstanding a certain degree of discord on the issue, it appears that the enactment of the Byrd Amendment is a violation of NAFTA.[156] The obviousness of the transgression was such that Mexico and Canada initially opted not to participate in the WTO complaint, believing that they were indisputably exempt under article 19 of NAFTA. Experts explain, "the two countries were surprised when senior U.S. officials told their representatives during recent talks in Washington that the United States had no intention of excluding Canada and Mexico from Byrd amendment actions, prompting the two to file their joint request for WTO consultations."[157]

In addition to contravening article 19 of NAFTA, the enactment of the Byrd Amendment has exposed the United States to criticism from a variety of sources, both domestic and international. For example, virtually every major newspaper in Mexico is replete with articles regarding dumping, many of which openly disparage this recent legislation.[158] Likewise, antidumping actions and their effects on Mexico

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156. Brevetti, *supra* note 33, at 146. This article claims that Canada and Mexico had no right to receive notifications or demand consultations pursuant to NAFTA because the Byrd Amendment does not fundamentally alter the U.S. antidumping and countervailing duty laws. *Id.* Rather, it is argued, "'[t]his is about the U.S. government . . . deciding what is going to be done with the government revenues.'" *Id.* (citation omitted).

157. Pruzin, *supra* note 57, at 18.

158. *See, e.g.*, José Kermith Zapata, *Denuncian "dumping en llantas*," EL UNIVERSAL, July 17, 2001, *at* http://www.el-universal.com.mx/pls/impreso/noticia_busqueda.html?id_nota=18313&tabla=finan.htm; *see also Estados Unidos hará frente a denuncia de once países por la enmienda Byrd*, EL INFORMADOR, Oct. 9, 2001, *at* http://www.informador.com.mx/informa/08ue92a.htm; *EU podría introducir a México productos a precio de dumping*, EL ECONOMISTA, Sept. 24, 2001, *at* http://www.economista.com.mx/online3.nsf/c08dae3ee379ed28862568ea000e0b0c/becf7f93816a.htm; *La industria acerera de México espera nuevos aranceles contra importaciones*, EL INFORMADOR, Aug. 27, 2001, *at* http://www.informador.com.mx/informa/24ue86i.htm; Héctor Vázquez Tercero, *El antidumping y el campo mexicano*, EL FINANCIERO, Aug. 13, 2001; Lilia González, *Rechaza EU "dumping" en uva de México y Chile*, EL UNIVERSAL, June 12, 2001, *at* http://www.el-universal.com.mx/pls/impreso/noticia_busqueda.html?id_nota=17044&tabla=finan.htm; *Productores de Copra demandaran a industriales, por dumping: CNC*, EL IMPARCIAL, June 2, 2001, *at* http://www.elimparcial.com/notasenlinea/noticias/20010602/182683.asp; Armando Sepulveda Ibarra, *"Improcedente," la Demanda de Dumping Contra México: SE Queja sin Bases y Saturad de Errores*, EXCELSIOR, Aug. 6, 1999, *at* http://www.excelsior.com.mx/9908/990806/nac26.html; Marcela Rubin, *Móviles políticos en Acusaciones de Dumping Contra México: Gutiérrez B.*, EXCELSIOR, July 14, 1999, *at* http://www.excelsior.com.mx/9907/990714/nac29.html.

have been repeatedly discussed in the Mexican congress.[159] Frustrated by what they deem as hypocritical behavior by the United States, certain trade groups have urged the Bush Administration to implement formal review mechanisms to ensure that the United States does not willingly promulgate laws that will, in all likelihood, violate basic U.S. trade obligations, such as those under the WTO and NAFTA. In the opinion of these groups, the enactment of items such as the Byrd Amendment "places a needless burden on existing dispute settlement mechanisms and costs the United States credibility in the trade negotiating arena."[160]

IV. CONCLUSION

As this Article demonstrates, while the Byrd Amendment serves to benefit a particular group (i.e., Affected Domestic Producers such as the U.S. steel industry that establish Qualifying Expenditures), this law will inevitably generate numerous negative repercussions both for the United States and its trading partners. Blocking the passage of the Byrd Amendment would have been the best solution, thereby avoiding an increase in antidumping and countervailing duty litigation, protecting the government from elevated costs associated with administering additional unfair trade investigations, dodging any appearance of legislative impropriety by promulgating a trade law in the absence of congressional debate, eluding retaliatory acts from trading partners, and sheltering U.S. import-dependent industries, consumers and workers from injury. At this juncture, however, congressional disapproval of this law is unfeasible. Accordingly, the second-best alternative would be a determination by the WTO that the Byrd Amendment violates certain U.S. international obligations, thus forcing its repeal. As explained in the Article, the mere act of having the Byrd Amendment under review by the WTO has produced various irreparable consequences. Nevertheless, although it may appear contradictory on first impression, a defeat for the Byrd Amendment at this level would represent an overall victory for the United States.

159. Cámara de Diputados—México, Boletín No. 1326, Mar. 29, 1999.
160. Letter from National Foreign Trade Council, Inc. to George W. Bush. Jan. 19, 2001.