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International Decision: United States--Continued Dumping and Subsidy Offset Act of 2000

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INTERNATIONAL DECISIONS

EDITED BY DAVID D. CARON

Actions against dumping and subsidization—Antidumping and SCM Agreements—United States Continued Dumping and Subsidy Offset Act of 2000 (“Byrd Amendment”)—interest group legislation

UNITED STATES—CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000. WT/DS217 & 234/AB/R. At <http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm>. World Trade Organization Appellate Body, January 16, 2003.

Two World Trade Organization instruments, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement)¹ and the Agreement on Subsidies and Countervailing Measures (SCM Agreement),² limit the actions that members may take in response to dumping and subsidization by other members. On January 16, 2003, the WTO’s Appellate Body ruled that the United States Continued Dumping and Subsidy Offset Act of 2000, popularly known as the “Byrd Amendment,” constitutes an impermissible action against dumping and subsidization under those two agreements.³

The WTO regime generally views dumping—the introduction of a product into the commerce of another country at less than the product’s “normal value”⁴—and government subsidization of a product as unfair trade practices. Under the Antidumping and SCM Agreements, a target country may take a variety of measures in response to such practices. For example, the target country may impose an “antidumping duty” equal to the difference between the price of the dumped import and its “normal value.” Similarly, a target country may impose a “countervailing duty” to offset the effect of the illegal subsidy in the country of export.

The target country has no general license to do whatever it deems appropriate, however. The Antidumping and SCM Agreements restrict the target country’s options to certain specified measures: antidumping or countervailing duties, “provisional measures,” price undertakings, and retaliatory acts approved by the WTO’s Dispute Settlement Body.⁵ Moreover, the Agreements place significant procedural requirements on a member that is considering action against dumping or subsidization. For example, the Agreements generally provide that a member can initiate an investigation to determine the existence of dumping or subsidization only upon an application filed “by or on behalf of” the affected domestic industry.⁶ The Agreements also generally provide that an application shall be considered to have been made by or on behalf of the industry if it is supported by more than 50 percent of the relevant producers.⁷

¹ Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, in WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 168 (1999) [hereinafter THE LEGAL TEXTS].

² Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, in THE LEGAL TEXTS, *supra* note 1, at 264.

³ Appellate Body Report, United States—Continued Dumping and Subsidy Offset Act of 2000, WT/DS217 & 234/AB/R (Jan. 16, 2003) [hereinafter Appellate Body Report].

⁴ Antidumping Agreement, *supra* note 1, Art. 2.1.

⁵ See Appellate Body Report, *supra* note 3, para. 265 (discussing Antidumping Agreement), para. 273 (discussing SCM Agreement).

⁶ See Antidumping Agreement, *supra* note 1, Art. 5.1; SCM Agreement, *supra* note 2, Art. 11.1.

⁷ See Antidumping Agreement, *supra* note 1, Art. 5.4; SCM Agreement, *supra* note 2, Art. 11.4.

Under U.S. law, antidumping and countervailing duties traditionally have found their way, like other government revenues, into the U.S. Treasury. For decades, however, some members of Congress have tried to enact laws that would distribute these duties directly to domestic producers.⁸ These efforts routinely failed until October 2000, when Congress enacted the Byrd Amendment, named for its chief sponsor, West Virginia Senator Robert Byrd. The Byrd Amendment did not go through the regular legislative process. Rather, proponents added the measure to a conference committee report on an unrelated appropriations bill—“slipped” it in, according to Senate Finance Committee chair Charles Grassley—thus avoiding consideration by relevant congressional committees and full debate on the floor.⁹ Rather than hold up passage of the entire appropriations bill, President Clinton signed the measure into law. He noted his objections, however, urging Congress quickly “to override [the Byrd Amendment], or amend it to be acceptable.”¹⁰

Under the Byrd Amendment, the U.S. Customs commissioner must annually distribute antidumping and countervailing duties to “affected domestic producers” that have made certain “qualifying expenditures.”¹¹ The measure defines an “affected domestic producer” as “any manufacturer, producer, farmer, rancher, or worker representative,” or association of such persons, that has filed or supported a petition that has resulted in the imposition of antidumping or countervailing duties.¹² “Qualifying expenditure[s],” in turn, are defined as those that the domestic producer has made, subsequent to the imposition of antidumping or countervailing duties, with respect to several wide-ranging categories, including expenditures on manufacturing facilities, research and development, personnel training, and even employee health-care and pension benefits.¹³ The expenditures must relate to the production of the product that is the subject of the relevant antidumping or countervailing duty order.¹⁴

In order to receive distributions under the Byrd Amendment, domestic producers must file certifications of eligibility with the commissioner.¹⁵ On the basis of these certifications, the commissioner distributes all funds (including interest) received from antidumping and countervailing duties assessed in the preceding fiscal year.¹⁶ The commissioner makes the distributions on a *pro rata* basis, depending on the filer’s share of qualifying expenditures.¹⁷ Interestingly, there is no restriction on how a domestic producer ultimately uses the funds that it receives under the Byrd Amendment.¹⁸ Producers may spend, or refrain from spending, the distributions in any way that they see fit.

Eleven WTO members—Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico, and Thailand—filed a challenge to the Byrd Amendment in the summer of 2001. A WTO dispute settlement panel, agreeing with the complaining parties, made two major findings. First, the panel concluded that the Byrd Amendment constitutes an impermissible specific action against dumping and subsidization under the Antidumping

⁸ See Hale E. Sheppard, *The Continued Dumping and Subsidy Offset Act (Byrd Amendment): A Defeat Before the WTO May Constitute an Overall Victory for U.S. Trade*, 10 TUL. J. INT’L & COMP. L. 121, 138–39 (2002).

⁹ Daniel Pruzin & Gary Yerkey, *Dumping, Countervailing Duties: Appellate Panel Upholds WTO Decision Against Byrd Amendment; EU Seeks Repeal*, BNA Int’l Trade Rep. (Jan. 23, 2003) (quoting Grassley); see Sheppard, *supra* note 8, at 139–40.

¹⁰ *Statement by the President: H.R. 4461, The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act for FY 2001* (Oct. 28, 2000), at <<http://www.useu.be/ISSUES/clin1028.html>>; see Sheppard, *supra* note 8, at 140 (discussing President Clinton’s signing statement).

¹¹ 19 U.S.C.A. §1675c(a) (2003).

¹² *Id.* §1675c(b)(1). The affected domestic producer must also be one that “remains in operation.” *Id.*

¹³ *Id.* §1675c(b)(4).

¹⁴ 19 C.F.R. §159.61(c) (2003). Expenses incurred by associations must relate to a specific case. *Id.*

¹⁵ 19 U.S.C. §1675c(d)(2).

¹⁶ *Id.* §1675c(d)(3).

¹⁷ *Id.*

¹⁸ Appellate Body Report, *supra* note 3, para. 14.

and SCM Agreements.¹⁹ Second, the panel concluded that the Byrd Amendment is inconsistent with the Agreements' requirement that investigations of dumping and subsidization have the support of a domestic industry. The panel reasoned that many firms might file or support applications for relief from dumping and subsidization, even if they were not really affected by import competition, simply in order to qualify for Byrd Amendment distributions. The United States might thus initiate an investigation even though actual support in domestic industry was lacking.²⁰

On appeal, the Appellate Body upheld the panel's holding that the Byrd Amendment constitutes an impermissible action against dumping or subsidization, but reversed the panel's holding on the industry-support question. With respect to the first issue, the Appellate Body noted that the Antidumping and SCM Agreements provide that "[n]o specific action against" dumping or subsidization may be taken by a member except as authorized by WTO rules.²¹ The Appellate Body easily concluded that the Byrd Amendment constitutes a "specific action" for these purposes. Payments under the Byrd Amendment, it explained, "are inextricably linked to, and strongly correlated with," a determination of dumping or subsidization.²² Without a determination of dumping or subsidization, there would be no antidumping or countervailing duties to distribute.

The Appellate Body also concluded that the Byrd Amendment constitutes an action "against" dumping or subsidization within the meaning of the Agreements. That phrase, the Appellate Body explained, refers to a measure that "has the effect of dissuading" dumping or subsidization, or that "creates an incentive to terminate such practices."²³ In the Appellate Body's view, the Byrd Amendment clearly fell within that definition. Under the Byrd Amendment, antidumping or countervailing duties paid by foreign producers are transferred to their domestic competitors. The domestic competitors are then free to spend the funds in any way that they see fit, including ways that bolster their market position vis-a-vis the foreign producers.²⁴ The transfer of financial resources from foreign producers to their domestic competitors, which the Appellate Body took to be the Byrd Amendment's "essential feature," obviously creates an incentive for foreign producers to cease dumping or exporting subsidized products.²⁵

Interestingly, the Appellate Body rejected the panel's conclusion that the Byrd Amendment constitutes an action against dumping or subsidization because of the incentives that it creates for *domestic* producers. While conceding that the Byrd Amendment creates incentives for domestic firms to file or support petitions for investigations of dumping or subsidization, the Appellate Body did not find the measure problematic on that basis. WTO rules allow domestic firms to petition their governments for relief from unfair trade practices, and a measure could not be considered "against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent."²⁶ The panel's "overly broad" interpretation, the Appellate Body explained, would cast doubt on such innocuous practices as "a legal aid program" designed to help small producers that seek relief from dumping or subsidization under domestic law.²⁷

Having determined that the Byrd Amendment is a specific action against dumping or subsidization within the meaning of the Antidumping and SCM Agreements, the Appellate Body

¹⁹ *Id.*, paras. 224–32 (discussing panel report).

²⁰ *Id.*, paras. 275–80 (discussing panel report).

²¹ *See id.*, paras. 234–35.

²² *Id.*, para. 242.

²³ *Id.*, para. 254.

²⁴ *Id.*, para. 255.

²⁵ *Id.*, para. 259.

²⁶ *Id.*, para. 258.

²⁷ *Id.*

next had to consider whether the Byrd Amendment falls within one of the limited categories of actions that WTO rules allow members to take in response to those practices. With respect to actions against dumping, WTO rules limit the permissible responses to antidumping duties, provisional measures, and price undertakings. With respect to subsidization, WTO rules allow only countervailing duties, provisional measures, price undertakings, and certain multilaterally sanctioned countermeasures. The Appellate Body concluded that the Byrd Amendment does not fall within any of these categories. As a result, the Appellate Body agreed with the panel's determination that the Byrd Amendment is inconsistent with the United States' WTO obligations.²⁸

The Appellate Body rejected the panel's ruling on the industry-support requirement, however. The Appellate Body explained that the Antidumping and SCM Agreements do not require a member, in examining the degree of industry support for an investigation of dumping or subsidization, to ascertain producers' motives. The Agreements require simply that a requisite percentage of an industry endorse an investigation; "it is the 'quantity,' rather than the 'quality,' of support that is the issue."²⁹ Indeed, the Appellate Body noted, "it would be difficult, if not impossible, as a practical matter," for a member to sort out the various reasons why domestic producers had chosen to support an antidumping or countervailing duty investigation.³⁰ Moreover, the Appellate Body rejected the panel's conclusion that the Byrd Amendment effectively obliges domestic producers to support an investigation: the evidence in the record did not bear out the panel's conclusion that the Byrd Amendment "'will result' in more applications having the required level of support from domestic industry than would have been the case without" it.³¹

* * * *

The Appellate Body's ruling is correct as a matter of law and policy. The Byrd Amendment provides a textbook example of the ways in which interest-group machinations can result in legislation that violates international commitments and works to the detriment of domestic welfare.

One can hardly see the Byrd Amendment—a measure that transfers antidumping and countervailing duties from the foreign producers who pay them to the producers' domestic competitors—as anything other than a "specific action against" dumping and subsidization that is prohibited by the Antidumping and SCM Agreements. Despite predictable complaints within the United States that the ruling poses a threat to national spending decisions in general, the Appellate Body's reasoning is, in fact, quite narrow. Indeed, the Appellate Body emphasized that its ruling does not generally restrict the ways in which national governments can spend antidumping and countervailing duties; it pointed out, for example, in response to one of the United States' arguments, that members could still donate antidumping and countervailing duties for the purposes of "international emergency relief."³² The Appellate Body simply held that, under WTO rules, members cannot spend antidumping or countervailing duties in ways that themselves have the effect of dissuading the prohibited practices.

The Appellate Body's ruling also reflects a sound understanding of the politics of protectionism. Under a public choice analysis, nations adopt protectionist measures because of interest group pressure.³³ Even though protectionist measures injure consumer welfare as a

²⁸ *Id.*, paras. 263–74.

²⁹ *Id.*, para. 283.

³⁰ *Id.*, para. 291.

³¹ *Id.*, para. 292.

³² *Id.*, para. 245.

³³ See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 523–25 (2000) (discussing interest group theory of trade restrictions).

whole, they provide great benefits to those domestic producers that otherwise would lose out in competition with foreign firms. The domestic producers thus have strong incentives to lobby for protectionist measures. Because they are typically small in number and highly motivated, producers can achieve great success in this regard. Such producers also have incentives to disguise their work when possible:³⁴ better to obtain protection quietly than attract the attention of other groups—for example, domestic firms that need imports for their own manufactures—that might resist measures that increase the cost of foreign products.

The Byrd Amendment represents a notable success for this sort of interest group strategy. It is impossible to see the Byrd Amendment as anything other than special interest legislation. Unlike some environmental or public health measures, for example, which incidentally burden trade in the pursuit of some other social value, the Byrd Amendment simply transfers financial resources from some firms to others, all at the expense of American consumers. Indeed, the Byrd Amendment allows domestic producers to double dip. Not only do the producers get to impose costs on their competitors in the form of customs duties, they also get to keep the proceeds.

Moreover, the Byrd Amendment's proponents acted with the secrecy that public choice theory predicts. Rather than submit the measure to normal legislative scrutiny, proponents quietly added the Byrd Amendment to a conference committee report on an unrelated appropriations bill. By the time most people understood what was going on, it was too late to halt the measure's enactment. Given political realities, President Clinton was not about to veto an entire appropriations bill simply because it contained a problematic provision on customs duties.

The WTO has given the United States until the end of 2003 to comply with the Appellate Body's ruling, presumably by repealing the Byrd Amendment.³⁵ At this writing, compliance seems very unlikely. Roughly two-thirds of the Senate responded to the Appellate Body's ruling by signing a letter voicing support for the Byrd Amendment, demonstrating yet again that, once a protectionist measure makes its way into law, it can become quite difficult to remove it.³⁶ Moreover, although President Bush has called for the measure's repeal, he is unlikely to force the matter. The Byrd Amendment enjoys substantial support in steel-producing states, and these states are likely to be crucial in the 2004 election. True, President Bush recently removed tariffs on steel imports in response to the WTO's ruling in the *Steel Safeguards* dispute,³⁷ but in that case his action had the strong support of certain steel-consuming industries, like automobile parts manufacturers, that benefit from lower prices on imported steel.³⁸ Because the Byrd Amendment merely reroutes duties that U.S. Customs already has collected, its repeal would not directly lower prices on imports. There are consequently somewhat weaker incentives, in this particular instance, for domestic constituencies to lobby for compliance with the WTO's ruling. Besides, having already angered the steel industry in the *Steel Safeguards* case, President Bush is unlikely to pick another fight.

It remains unclear whether any of the complaining parties will seek WTO authorization to retaliate against the United States once the deadline for compliance has passed. Ironically, the Appellate Body's decision poses an obstacle to any member that does seek authority to retaliate. Under WTO rules, retaliation must be "equivalent" to the loss that an offending

³⁴ Cf. John O. McGinnis, *The Bar Against Challenges to Employment Discrimination Consent Decrees: A Public Choice Perspective*, 54 LA. L. REV. 1507, 1530–31 (1994) (discussing strategy of increasing information costs of opponents of legislation).

³⁵ Arbitral Award, United States—Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/14 & WT/DS234/22, para. 83 (June 13, 2003).

³⁶ See Daniel Pruzin, *Dumping: WTO Gives U.S. Dec. 27 Deadline to Comply with Ruling Striking Down Byrd Amendment*, Int'l Trade Rep. (BNA) (June 19, 2003).

³⁷ Appellate Body Report, United States—Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248, 249, 251–254, 258, & 259/AB/R (Nov. 10, 2003).

³⁸ See Jonathan Weisman, *Bush Rescinds Tariffs on Steel; Trade War Averted; Industry Angry*, WASH. POST, at A01 (Dec. 5, 2003).

measure has caused a complaining member.³⁹ If, as the Appellate Body suggested, the evidence does not support the view that the Byrd Amendment has resulted in the filing of more petitions than would have been the case without it, it is hard to see how the measure would have caused a complainant any compensable loss. It will be interesting to see how the complainants try to surmount this difficult problem.

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Arbitration—NAFTA Chapter 11—relationship of arbitral tribunals to domestic courts—court judgments as measures—denial of justice—requirement of judicial finality—requirement of continuous nationality—lack of retrospective effect

LOEWEN GROUP, INC. V. UNITED STATES. ICSID Case No. ARB(AF)/98/3. 42 ILM 811 (2003).
At <<http://www.state.gov/documents/organization/22094.pdf>>.
NAFTA Chapter 11 Arbitral Tribunal, June 26, 2003.

MONDEV INTERNATIONAL LTD. V. UNITED STATES. ICSID Case No. ARB(AF)/99/2. 42 ILM 85 (2003). At <<http://www.state.gov/documents/organization/14442.pdf>>.
NAFTA Chapter 11 Arbitral Tribunal, October 11, 2002.

In two recent awards, *Loewen Group, Inc. v. United States* and *Mondev International Ltd. v. United States*, arbitral tribunals rejected claims that U.S. court decisions violated Chapter 11 of the North American Free Trade Agreement (NAFTA).¹ These awards not only articulate standards for “denial of justice” claims under NAFTA, but also address difficult questions regarding the relationship between Chapter 11 tribunals and domestic courts.

Loewen Group, Inc. v. United States

The claim in *Loewen*² grew out of a business dispute between Jeremiah O’Keefe, the owner of a funeral home in Mississippi, and the Loewen Group, Inc. (LG), a Canadian chain of funeral homes that was expanding its operations in the United States. After attempts to reach a settlement failed, O’Keefe’s contract, tort, and state-law antitrust claims went to trial before a Mississippi jury, which awarded O’Keefe \$500 million dollars in damages, including \$75 million for emotional distress and \$400 million in punitive damages. Mississippi law requires a 125% bond to stay execution of a judgment pending appeal. When the Mississippi Supreme Court refused to reduce the required bond, LG settled the case for \$175 million. LG and its owner, Raymond Loewen, then brought claims against the United States under NAFTA Chapter 11, arguing that the trial court violated Article 1102 (national treatment) and Article 1105 (minimum standard of treatment) by allowing prejudicial comments about nationality, racial attitudes, and economic class, that the \$500 million verdict and the bond requirement were denials of justice in violation of Article 1105, and that the end result was an expropriation under Article 1110.

³⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Art. 22.4, MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, Annex 2, in THE LEGAL TEXTS, *supra* note 1, at 354.

¹ North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 ILM 289 & 605 (1993) [hereinafter NAFTA].

² *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3 (NAFTA Ch. 11 Arb. Trib. June 26, 2003), 42 ILM 811, at <<http://www.state.gov/documents/organization/22094.pdf>> [hereinafter *Loewen award* (merits)]. Publicly released documents on all NAFTA disputes are available online at <<http://www.naftalaw.org>>.