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## **The Continued Dumping and Subsidy Offset Act ("Byrd Amendment")**

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# The Continued Dumping and Subsidy Offset Act ("Byrd Amendment")

## Summary

The Continued Dumping and Subsidy Offset Act (CDSOA), commonly known as the "Byrd Amendment," is a U.S. law providing for the distribution of import duties collected as a result of antidumping (AD) or countervailing duty (CVD) orders to petitioners and other interested parties in the investigations that resulted in the orders. CDSOA disbursements amounted to \$231 million in FY2001, \$330 million in FY2002, \$190 million in FY2003 (with an additional \$50 million held in reserve pending the outcome of a legal challenge), and \$284 million in FY2004. The CDSOA was successfully challenged in a World Trade Organization (WTO) dispute proceeding brought by 11 WTO Members including Canada, the European Union, and Japan. In late 2004 eight of the complaining parties were authorized to "suspend concessions" (retaliate) until the United States complies, most readily by repealing the law. Canada and the European Union began retaliating on May 2, 2005, by placing a 15% additional import duty on selected U.S. exports. Mexico imposed higher tariffs on U.S. milk products, wine, and chewing gum as of August 18 and Japan placed an additional tariff of 15% on 15 steel and industrial products as of September 1. Canada is particularly concerned that well over \$3 billion in AD and CV duty deposits on softwood lumber may eventually be available for distribution to U.S. lumber producers under the CDSOA.

Despite strong congressional support for the measure in both chambers, a provision seeking to repeal the CDSOA was included in the conference report to S. 1932, the Deficit Reduction Act of 2005. The House passed the conference report on December 19, 2005, by a vote of 212-206. Two proposals related to the CDSOA were offered by Senator Grassley on September 9, 2005, as amendments to H.R. 2862, the Department of Commerce and Justice, Science, and Related Agencies Appropriations Act, 2006, but were not voted on during Senate consideration of the bill; S.Amdt. 1680 would have limited implementation of the CDSOA, while S.Amdt 1681 would have struck a provision in the Senate-reported bill requiring WTO negotiations aimed at preserving the CDSOA. Additionally, H.R. 1121 (Ramstad), a bill to repeal the statute, has been suggested for possible inclusion in House miscellaneous duty suspension legislation.

Controversy over the CDSOA is part of a larger ongoing debate in Congress, and in the country as a whole, on the future direction of U.S. trade policy. Proponents of the CDSOA argue that U.S. producers are facing an uneven playing field due to price discrimination and artificial competitive advantage brought about by unfairly dumped or subsidized imports. Opponents believe that the CDSOA may encourage additional AD or CVD actions, thus introducing a greater level of economic inefficiency into the trading system. Trade remedy issues are expected to receive continued attention in second session of the 109<sup>th</sup> Congress. This report will be updated as events warrant.

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# The Continued Dumping and Subsidy Offset Act (“Byrd Amendment”)

## Introduction

The Continued Dumping and Subsidy Offset Act (CDSOA, 19 U.S.C. 1675c),<sup>1</sup> commonly known as the “Byrd Amendment,” requires that duties collected due to antidumping or countervailing duty orders must be distributed to petitioners and interested parties in the investigations that resulted in the imposition of the orders.

Eight countries successfully challenged the CDSOA in a World Trade Organization (WTO) dispute settlement proceeding, and in August 2004 a WTO arbitrator determined the level of “suspension of concessions” (retaliation) that the co-complainants may claim until the United States complies with the WTO ruling. In late November 2004, the European Union, Japan, Korea, India, Brazil, Mexico, Canada, and Chile received formal authorization to retaliate. After warnings by the co-complainants of unified retaliation by July 2005, four have or are about to impose increased tariffs on selected U.S. goods. The European Union and Canada have imposed tariff surcharges since May 2, 2005, and Mexico began doing so on August 18, 2005; Japan introduced its measures effective September 1, 2005.<sup>2</sup>

Congressional action is required in order for the United States to comply with the WTO determinations, and several efforts to repeal or amend the measure have been introduced in the 109th Congress. Most recently, repeal of the CDSOA was included in the House Ways and Means-approved Entitlement Reconciliation Recommendations for Fiscal Year 2006 Act, as amended (October 26, 2005, approved by vote of 22-17). Second, in mid-September 2005, two amendments to H.R. 2862 (included appropriations for the Office of the United States Trade Representative) offered by Senator Grassley would have, respectively, limited implementation of the CDSOA (S.Amdt. 1680) and removed a negotiation requirement in the Senate-reported bill aimed at preserving the statute (S.Amdt. 1681); neither was voted upon, however. Third, H.R. 1121 (Ramstad), a bill also seeking to repeal the measure, has been proposed for inclusion in a larger miscellaneous duty suspension bill expected to be considered later this session. In any case, the CSDOA measure has strong congressional support in both chambers and any proposal to repeal it is expected to face intense opposition in the Senate where more than 70 Senators have indicated their support for retaining current law.<sup>3</sup>

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<sup>1</sup> P.L. 106-387 (Title X, § 1002), 114 Stat. 1549.

<sup>2</sup> See *infra* notes 54-60 and accompanying text.

<sup>3</sup> See *infra* note 76 and accompanying text.

In Congress, the controversy over the Byrd Amendment is one component of a larger debate over the future direction of U.S. trade policy. Although many in Congress acknowledge that benefits are received through liberalizing trade, there is sometimes disagreement over the proper balance between these benefits and the costs incurred to domestic industries, firms, and workers by the resulting increase in global competition — especially if unfair foreign competition is perceived or found to be the cause of job losses and plant closings. An overall assessment of the United States' WTO membership, including issues of U.S. compliance with certain WTO dispute settlement rulings deemed controversial by some, has already received significant attention in the 109th Congress.

This report discusses the controversy over the CDSOA in three parts. First, it covers briefly the background of the law, its effects, and the WTO dispute settlement case. Second, it discusses the congressional debate on the pros and cons of repealing the measure. Third, options for Congress are discussed.

## Background

Antidumping (AD) and countervailing duty (CVD) investigations are triggered by a petition filed by an interested party on behalf of an industry<sup>4</sup> alleging that the industry is injured or threatened with material injury by reason of imports that are, respectively, sold in the U.S. market at less than fair value (dumped), or subsidized. In order for the industry to obtain relief, two things must happen: (1) the International Trade Administration (ITA), an agency of the Department of Commerce, must find dumping or subsidization and (2) the International Trade Commission (ITC) must find that the domestic industry is materially injured or threatened with material injury due to the dumped or subsidized imports. These agencies conduct preliminary and final investigations in a detailed administrative process with specific time lines.<sup>5</sup>

According to the findings in the CDSOA, the legislative intent of the act is to address the issue of foreign products which *continue* to be dumped or subsidized sales to the U.S. market after an AD or CV duty has already been assessed, and, in so doing, to strengthen the remedial purpose of antidumping and countervailing duty laws. One of the findings underlying the law stated that continued dumping or actionable subsidies “can frustrate the remedial purpose of the [trade remedy] laws by preventing market prices from returning to fair levels” which can lead to domestic producers' reluctance to rehire employees or otherwise invest in the business in order to remain competitive.<sup>6</sup>

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<sup>4</sup> Defined in 19 U.S.C. 1677(9)(C)-(G) as manufacturers, producers, wholesalers, certified union or group of workers representative of an industry, trade or business association, or producers and growers.

<sup>5</sup> For a more thorough discussion of U.S. antidumping and countervailing duty laws and administrative procedures, see CRS Report RL32371, *Trade Remedies: A Primer*, by Vivian C. Jones.

<sup>6</sup> 19 U.S.C. 1675c note.

The CDSOA is also somewhat unique as a trade policy concept because it holds that “the revenue from unfair trade should be used to help those hurt by trade.”<sup>7</sup> Prior to its enactment, revenue collected as a result of AD or CVD orders was deposited in the General Fund of the U.S. Treasury. Instead, the CDSOA directs the Bureau of Customs and Border Protection of the Department of Homeland Security (CBP) to disburse these duties directly to petitioners and interested parties in the investigations that resulted in the orders. Many find the measure controversial, therefore, because they believe that it adds a level of “protection” on subject U.S. products *in addition to* the ameliorative action afforded by trade remedies.

Some also find the measure controversial because it was enacted without committee or floor amendment in either House. The measure was inserted into the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act 2001 (P.L. 106-387) by Senator Robert Byrd, a conferee to the appropriations bill. Similar legislation had been introduced in the 105th Congress (H.R. 2509, Regula; S. 2281, DeWine) and the 106th Congress (H.R. 842, Regula; S. 61, DeWine), but these bills died in committee. When President Clinton signed the appropriations measure, he noted the insertion of the amendment, saying “this bill will provide select U.S. industries with a subsidy above and beyond the protection level needed to counteract foreign subsidies,” and called on Congress to repeal or amend the provision.<sup>8</sup>

## CDSOA Procedure

The CDSOA requires CBP to distribute all duties collected pursuant to AD or CVD orders to “affected domestic producers,” defined in the act as any manufacturer, producer, farmer, rancher, or worker representative (including associations of these individuals) that was (1) a petitioner or interested party in support of a petition that resulted in an AD or CVD order, and (2) remains in operation.<sup>9</sup>

Distributions under the act may be used to offset “qualifying expenditures” within the following categories that the domestic producer incurred between the issuing of an AD or CVD order and its termination: (1) manufacturing facilities; (2) equipment, (3) research and development; (4) personnel training; (5) acquisition of technology; (6) health care benefits for employees paid by the employer; (7) pension benefits for employees paid by the employer; (8) environmental equipment, training, or technology; (9) acquisition of raw materials and other inputs; or (10) working capital or other funds needed to maintain production.<sup>10</sup>

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<sup>7</sup> Snowe, Olympia. Remarks in the Senate. *Congressional Record*, Daily Edition, vol. 149, June 19, 2003, p. S8234.

<sup>8</sup> Statement on Signing the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001. *Public Papers of the Presidents*, William J. Clinton — 2000, Vol. 3, pp. 2359-2361.

<sup>9</sup> 19 U.S.C. 1675c(b)(1).

<sup>10</sup> 19 U.S.C. 1675c(b)(4).

In the first stage of the CDSOA distribution process, the International Trade Commission sends a list to CBP of petitioners and interested parties in support of each investigation (generally indicated by letter of support for AD or CVD petitions or through affirmative responses to ITC questionnaires). CBP then publishes a notice of intent to distribute the offset, along with a list of affected domestic producers eligible for distributions and the estimated amount available to them at least 30 days prior to the offset distribution date.<sup>11</sup> In order to receive a payment, each company on the list must demonstrate that it is eligible to receive an offset disbursement, and must certify that it has qualifying expenditures incurred for which distributions have not yet been paid.<sup>12</sup>

CBP places all estimated antidumping and countervailing duties that are deposited with CPB directly into “Clearing Accounts.” An account is assigned individually to each antidumping or countervailing duty order under which duties are collected.<sup>13</sup> When the goods are liquidated and the duty is finally paid, the funds are distributed into “Special Accounts,” also identified by the individual AD or CVD orders, from which offset payment to individual claimants are paid. The total amount of offset payments disbursed is limited by the total amount of duties in the Special Account for each case.<sup>14</sup> As a consequence of this limitation, the actual payments made often cover only a minimal portion of each claim involved. For example, in FY2004, more than \$1.9 trillion in claims from certified interested parties were received, while \$284 million, or 0.01% of the total claims, was available for disbursement (see **Table 1**).

**Table 1. Ratio of CDSOA Claims to Amounts Disbursed, FY2001-2004**

Fiscal year	Total certified claims	Total amount disbursed	% disbursed
2001	\$1,189,592,904,866	\$231,201,891	0.02
2002	\$1,416,828,122,356	\$329,871,464	0.02
2003	\$1,187,504,594,797	\$190,247,425	0.02
2004	\$1,948,769,519,521	\$284,044,599	0.01

**Source:** U.S. Department of Homeland Security. Bureau of Customs and Border Protection. *Continued Dumping and Subsidy Offset Act Disbursement Report for FY 2004*.

<sup>11</sup> 19 C.F.R. 159.62.

<sup>12</sup> 19 C.F.R. 159.63.

<sup>13</sup> 19 C.F.R. 159.64(a)(2).

<sup>14</sup> 19 U.S.C. 1675c(d)(3). If the certified net claims exceed the amount available in the corresponding Special Account, the payment will be made on pro rata basis based on each producer’s total certified claim. 19 C.F.R. 159.64(c)(2).

The CBP is required to distribute annual offset payments within 60 days of the first day of the next fiscal year.<sup>15</sup> A final annual report, listing all claims and disbursements, is made available after all payments have been completed for the fiscal year.<sup>16</sup>

## Analysis of Prior CDSOA Distributions

Pursuant to the act, CBP collected and distributed about \$231 million in FY2001, \$330 million in FY2002, \$190 million in FY2003 (an additional \$50 million in FY2003 funds was held in reserve pending resolution of a legal challenge), and \$284 million in FY2004. FY2005 amounts available to distribute per case were published on June 1, 2005.<sup>17</sup>

U.S. industries that received the largest CDSOA disbursements in FY2004 included producers of ball bearings, steel, petroleum wax candles, cement, food products (including pineapple, crawfish, honey, pasta, and mushrooms), computer chips, polyester fiber, pencils, softwood lumber, and industrial belts, representing about 93 percent of total disbursements (see **Table 2**).<sup>18</sup>

**Table 2. CDSOA Disbursements by Top 10 Industry Sectors, FY2004**

Industry sector	Amount disbursed (millions)
Bearings	\$77.2
Steel products	\$58.1
Candles	\$51.3
Cement	\$21.3
Food products	\$16.7
Computer chips	\$12.0
Polyester fiber/film products	\$10.2
Pencils	\$6.7
Softwood lumber	\$5.4
Industrial belts	\$5.4

**Source:** U.S. Department of Homeland Security. Bureau of Customs and Border Protection. *Continued Dumping and Subsidy Offset Act Disbursement Report for FY2004*.

<sup>15</sup> 19 U.S.C. 1675c(c).

<sup>16</sup> 19 C.F.R. 159.64(g). CDSOA Annual Reports are available on the CBP website at [[http://www.cbp.gov/xp/cgov/import/add\\_cvd/cont\\_dump/](http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/)].

<sup>17</sup> See CBP website [[http://www.cbp.gov/xp/cgov/import/add\\_cvd/cont\\_dump/](http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/)].

<sup>18</sup> U.S. Department of Homeland Security, Customs and Border Protection. *Continued Dumping and Subsidy Offset Act, FY2004 Annual Disbursement Report* at [[http://www.cbp.gov/xp/cgov/import/add\\_cvd/cont\\_dump/cdsoa\\_04/fy2004\\_annual/](http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/cdsoa_04/fy2004_annual/)].

Continued dumping of some commodities — bearings and steel products in particular — may indicate that firms who continue to export products subject to AD or CV orders are multinational firms moving factors of production across borders to U.S. affiliates. In any case, in order for U.S. sales of an item to continue to be profitable despite the assessment of additional AD or CV duties, the price of the targeted good or end-use product must still be competitive in the receiving market, and/or there must continue to be demand for the product. These factors may cause the importer to decide to absorb the additional duties as a cost of doing business, as opposed to pursuing other alternatives such as purchasing the similar U.S. product or ordering from a foreign supplier not subject to the AD or CV order.

Individual companies that received disbursements of over \$10 million each in FY2004 were the Timken Company and associated businesses, producers of bearings; Lancaster Colony Corporation, producers of petroleum wax candles; Micron Technology, semiconductor manufacturers; Emerson Power Transmission, bearings manufacturers; and the International Steel Group (see **Table 3**).<sup>19</sup>

**Table 3. Top 10 CDSOA Disbursements by Company, FY2004**

Company	Products	Amount disbursed (millions)
The Timken Company <sup>a</sup>	Bearings	\$65.9
Lancaster Colony Corp.	Candles	\$26.2
Micron Technology	D-RAMS	\$12.0
Emerson Power Transmission Corp.	Bearings	\$11.6
International Steel Group	Steel products	\$10.4
Home Fragrance Holdings	Candles	\$8.4
Wellman, Inc.	Polyester staple fibers	\$7.9
United States Steel Corp.	Steel products	\$7.1
AK Steel	Steel products	\$6.8
Holcim U.S., Inc.	Grey portland cement	\$4.7

**Source:** U.S. Department of Homeland Security. Bureau of Customs and Border Protection. *Continued Dumping and Subsidy Offset Act Disbursement Report for 2004*.

a. Includes Timken US Corporation of CT, Timken Company of OH, and MPB Corporation of NH.

<sup>19</sup> Ibid.

By state, domestic companies in Ohio received the largest amount in CDSOA funds in FY2004,<sup>20</sup> followed by Connecticut, Pennsylvania, New York, Texas, and New Hampshire (see **Table 4**). Some other states received much less; for example, a Vermont received only \$1,130.81, which went to a honey producer. No companies in Nevada or New Mexico received CDSOA offset payments.<sup>21</sup>

**Table 4. Top 10 States Receiving CDSOA Disbursements, FY2004**

State	Amount disbursed (millions)	Major products
Ohio	\$72.8	Bearings, Steel and associated products, Petroleum wax candles, industrial belts
Connecticut	\$33.8	Bearings, steel, paper products
Pennsylvania	\$23.1	Steel and associated products, foundry coke, apple juice concentrate
New York	\$18.7	Bearings, steel and associated products, petroleum wax candles, honey
Texas	\$15.9	Grey portland cement, steel and associated products, petroleum wax candles, softwood lumber, honey
New Hampshire	\$13.2	Bearings, softwood lumber, cast iron pipe fittings
Idaho	\$12.1	Softwood lumber, honey
New Jersey	\$11.6	Steel and associated products, petroleum wax candles, foundry coke, pasta, cased pencils, honey
Louisiana	\$8.5	Crawfish tail meat, steel and associated products, softwood lumber, honey
Illinois	\$7.8	Steel and associated products, softwood lumber, cased pencils, television receivers
California	\$6.1	Steel and associated products, grey portland cement, honey, softwood lumber, preserved mushrooms, fresh garlic

**Source:** U.S. Department of Homeland Security. Bureau of Customs and Border Protection. *Continued Dumping and Subsidy Offset Act Disbursement Report for 2004*.

<sup>20</sup> U.S. Customs and Border Protection. *Disbursement Report for 2004*, March 2005.

<sup>21</sup> U.S. Department of Homeland Security. Bureau of Customs and Border Protection. *CDSOA - Amount Paid by State*.

## Domestic and International Legal Challenges

### Domestic Court Cases

The CDSOA has been subject to challenges in U.S. courts on constitutional grounds as well as on issues of statutory interpretation. A suit alleging that the CDSOA violates the First Amendment is pending in the U.S. Court of International Trade, where the plaintiff is arguing that the statute infringes free speech rights by conditioning eligibility for CDSOA funds on support of the relevant antidumping or countervailing duty investigation, thus placing an unconstitutional condition on the receipt of a government benefit.<sup>22</sup> A claim that the CDSOA turned statutory antidumping provisions into a penal law, thereby granting the plaintiff a Fifth Amendment right to a neutral judicial hearing before antidumping duties could be imposed, was rejected by the U.S. Court of Appeals for the Federal Circuit in March 2003.<sup>23</sup>

In July 2004, the Federal Circuit held that a company that opposed an antidumping investigation may not make CDSOA claims on behalf of an otherwise qualified producer that the company has acquired.<sup>24</sup> At issue was 19 U.S.C. § 1675c(b)(1), which provides that “companies, businesses or persons ... who have been acquired by a company or business that is related to a company that opposed the investigation shall not be an affected domestic producer.” Characterizing the provision as “hardly a model of clarity,”<sup>25</sup> the court nonetheless found that the purpose of the law was “quite clear — to bar opposers of antidumping investigations from securing payments either directly or through the acquisition of supporting parties.”<sup>26</sup> As a result, the court concluded that the provision should be interpreted to “bar claims on behalf of a company that was acquired by a company that opposed the investigation or, broadly, a company acquired by any ‘business’ related to such a company.”<sup>27</sup>

In March 2005, the Federal Circuit held that the CDSOA did not supersede the confidentiality provisions of § 777 of the Tariff Act of 1930, 19 U.S.C. § 1677f, which generally prohibit the ITC from disclosing information deemed business proprietary by the person submitting it without that person’s consent.<sup>28</sup> Plaintiff companies had been denied distributions under the Byrd Amendment based on duties

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<sup>22</sup> PS Chez Sidney, L.L.C. v. U.S. International Trade Commission, No. 02-00635 (Ct. Int’l Trade); “Trade Court Considers Constitutionality of Byrd Law,” *Inside U.S. Trade*, June 6, 2003, at 10.

<sup>23</sup> Huaiyin Foreign Trade Corp. v. United States, 322 F.3d 1369 (Fed. Cir 2003), *aff’g* 201 F.Supp.2d 1351 (Ct. Int’l Trade 2002).

<sup>24</sup> Candle Corp. of America v. U.S. Int’l Trade Comm’n, 374 F.3d 1087 (Fed. Cir. 2004).

<sup>25</sup> *Ibid.* at 1093.

<sup>26</sup> *Ibid.* at 1094.

<sup>27</sup> *Ibid.* at 1093, 1094.

<sup>28</sup> Cathedral Candle Co. v. U.S. Int’l Trade Comm’n, 400 F.3d 1352 (Fed. Cir. 2005).

collected on petroleum wax candles from China in 2000 and 2001 as they had not submitted requests in a timely fashion. The court upheld the ITC's interpretation of the statute, finding that the Commission had properly excluded plaintiffs from its list of "affected domestic producers" for the periods in question because the firms had claimed confidentiality for their support for the petition and had not consented to release of this information for these time frames.

On April 19, 2005, Canada, along with Canadian industry groups, filed suit against the United States in the U.S. Court of International Trade alleging that the CDSOA, as it applies to Canada, is in violation of § 408 of the North American Free Trade Agreement (NAFTA) Implementation Act, P.L. 103-182, 19 U.S.C. § 3438.<sup>29</sup> This provision states, in pertinent part, that "any amendment ... that is made to ... title VII of the Tariff Act of 1930" enacted after the NAFTA entered into force for the United States "shall apply to goods from a NAFTA country only to the extent specified in the amendment." The plaintiffs are arguing that because the CDSOA was enacted as a provision of Title VII and does not specify that it applies to Canadian goods, the United States acted unlawfully when it applied the CDSOA to distribute antidumping and countervailing duties assessed on imports from Canada to U.S. producers.<sup>30</sup>

## WTO Dispute

Eleven WTO Members, the largest group of co-complainants in WTO history, initiated a WTO dispute settlement proceeding against the CDSOA shortly after it was enacted. The statute was found to violate WTO agreements and, absent U.S. action to comply with the WTO rulings by the December 2003 compliance deadline, eight of the Members received authorization to impose retaliatory measures based on a formula determined in an earlier WTO arbitration. The European Union and Canada have been imposing retaliatory tariffs on certain U.S. products as of May 2,

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<sup>29</sup> "Canadian Government, Industry Groups Launch Attacks on Byrd Law," *Inside U.S. Trade*, May 6, 2005, at 5; "Canada, Lumber Groups File Lawsuit Against U.S. for Applying Byrd Amendment," *22 Int'l Trade Rep.* 752 (BNA 2005).

<sup>30</sup> For example, Complaint at 4-5, 8-9, *Government of Canada v. United States*, No. 05-00327 (Ct. Int'l Trade). The United States and various other parties have since filed motions to dismiss the action.

Section 408 of the NAFTA Implementation Act was enacted to implement Article 1902 of the NAFTA, which provides that each NAFTA Party reserves the right to change or modify its antidumping or countervailing duty law, provided that in case of an amendment certain requirements must be met, including that the amendment will apply to goods from another Party only if the amending statute specifically states that it so applies, and that the amendment as it applies to the other Party is "not inconsistent with" specified GATT and now WTO obligations. See NAFTA Statement of Administrative Action, H.Doc. 103-159, vol. 1, at 652.

2005,<sup>31</sup> and Mexico began doing August 18, 2005.<sup>32</sup> Japan has announced that it will increase tariffs on selected items on September 1, 2005.<sup>33</sup>

**WTO Panel and Appellate Body Decisions.** In December 2000, the European Communities (EC), along with Australia, Brazil, Chile, India, Indonesia, Japan, Korea, and Thailand, requested WTO consultations with the United States on the CDSOA, arguing that it violated the WTO Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and other WTO obligations. Canada and Mexico filed a separate complaint in May 2001. The complainants based their argument in part on provisions in the Antidumping and SCM Agreements prohibiting WTO Members from maintaining any “specific action against” dumping and subsidization, as the case may be, except for action taken in accordance with the GATT 1994, as interpreted by the respective Agreement.<sup>34</sup> The complainants also argued that the payments provided “a strong incentive to the domestic producers to file or support petitions for anti-dumping or anti-subsidy measures, thereby distorting the application of the standing requirements” in the Antidumping and SCM Agreements.<sup>35</sup> These provisions require a specified level of domestic industry support for an antidumping or countervailing petition before an investigation may be initiated. Complainants further argued that the CDSOA “makes it more difficult for exporters subject to an antidumping or countervailing duty order to secure an undertaking with the competent authorities [i.e. suspension agreement], since the affected domestic producers will have a vested interest in opposing such undertakings in favor of the collection of anti-dumping or countervailing duties.”<sup>36</sup>

In addition to the arguments just described, Mexico also challenged the statute “as such,” claiming that the payments distributed under the act constituted “specific subsidies” as defined in Article 1 of the SCM Agreement, which may cause “adverse effects” to Mexico’s interests in the form of nullification and impairment of

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<sup>31</sup> See *infra* notes 50-51 and accompanying text.

<sup>32</sup> See *infra* note 55-56 and accompanying text.

<sup>33</sup> See *infra* notes 53-54 and accompanying text.

<sup>34</sup> 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, at 1 (WT/DS217/5)(July 13, 2001). (Hereafter cited as US — Offset Act; Panel Request by Australia, et al.) See also Panel requests by Canada (WT/DS234/12)(August 10, 2001) and Mexico (WT/DS234/13)(August 10, 2004).

Previously, the “no specific action” provision of the Antidumping Agreement (Art. 18.1) had been successfully used by the EC and Japan in challenges filed in 1998 and 1999, respectively, to the U.S. Antidumping Act of 1916, which allowed criminal penalties and a private right of action against dumping (WTO cases DS136/DS162). The act was repealed in late 2004; the repeal was prospective, that is, it does not apply to any suits that were pending on the date of enactment. P.L. 108-429, § 2006.

<sup>35</sup> US — Offset Act; Panel Request by Australia et al., *supra* note 34, at 1-2.

<sup>36</sup> *Ibid.*, at 2. A suspension agreement is an agreement made by administrative authorities to suspend an AD or CV investigation if certain commitments are made by exporters or the exporting country. See 19 U.S.C. 1671c(b),(c), 1673c(b),(c).

benefits.<sup>37</sup> Article 5 of the SCM Agreement allows WTO Members to challenge so-called “actionable” subsidies, that is, subsidies other than those prohibited under the Agreement where the subsidy is shown to be specific to an industry and causes the type of “adverse effects” specified in the Article.<sup>38</sup>

The WTO panel found that the CDSOA did create an impermissible “specific action against” dumping and subsidization, and that it provided a financial incentive for domestic producers to file or support antidumping and countervailing duty petitions, thereby undermining the industry support requirements in the Antidumping and SCM Agreements.<sup>39</sup> At the same time, the panel rejected complainants’ argument that the act would make it more difficult for the United States to enter into suspension agreements, along with Mexico’s claim that the act itself constituted a subsidy.

The Appellate Body upheld the panel’s finding that the statute created a “specific action against” dumping and subsidization not allowed under WTO agreements, but reversed the panel on its conclusion regarding industry support requirements.<sup>40</sup> The Appellate Body concluded that a “specific action against” dumping and subsidization existed for purposes of Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement because the statute fulfilled two basic elements of the above-quoted phrase. First, the CDSOA constituted “specific” action because offset payments were found to be “inextricably linked to, and strongly correlated with a determination of dumping ... or a determination of a subsidy” or, as alternatively characterized by the AB, the payments “can be made only following a determination that the constituent elements of dumping or subsidization are present.”<sup>41</sup> Second, the AB stated that a measure would be considered to be an action “against” dumping or subsidization if it “has the effect of dissuading the practice of dumping or the practice of subsidization, or creates an incentive to terminate such practices.”<sup>42</sup> The AB found that, given its “design and structure,” the CDSOA “effects a transfer of financial resources from the producers/exporters to their

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<sup>37</sup> US — Offset Act; Request for the Establishment of a Panel by Mexico, at 2 (WT/DS234/13)(August 10, 2001).

<sup>38</sup> The SCM Agreement prohibits export subsidies and subsidies contingent on the use of domestic over foreign goods. Where actionable subsidies are alleged, “adverse effects” may take the following forms: (1) injury to the WTO Member’s domestic industry, (2) nullification or impairment of benefits accruing to the Member under the GATT 1994, in particular, benefits accruing from bound tariff concessions, or (3) serious prejudice (e.g., displacement of imports of another WTO Member into the subsidizing Members’ market or an increase in the world market share of the subsidizing Member in a particular primary product or commodity).

<sup>39</sup> US — Offset Act; Report of the Panel (WT/DS217/R)(WT/DS234/R)(September 16, 2002). (Hereafter cited as US — Offset Act; Panel Report.); report at [<http://www.wto.org>].

<sup>40</sup> US — Offset Act; Report of the Appellate Body (WT/DS217/AB/R)(WT/DS234/AB/R) (January 16, 2003). (Hereafter cited as US — Offset Act; AB Report); report at [<http://www.wto.org>].

<sup>41</sup> *Ibid.*, at ¶ 242.

<sup>42</sup> *Ibid.*, at ¶ 254.

domestic competitors” and as a result the requisite incentives are created.<sup>43</sup> Since the CDSOA did not take the form of the responses to dumping or subsidization permitted under WTO agreements, the AB concluded that the statute fell within the scope of the prohibitions in above-cited articles.<sup>44</sup> The Appellate Body recommended only that the United States “bring the CDSOA into conformity with its obligations” under WTO agreements and did not follow the panel’s broader recommendation that the statute be repealed.

The appellate and modified panel reports were adopted January 27, 2003, and the compliance period was subsequently determined by arbitration to expire December 27, 2003. The Arbitrator emphasized that it is for the United States to decide on the manner of implementation, which may be through modification or repeal of the law.<sup>45</sup>

**Request to Suspend Concessions.** Under the WTO Dispute Settlement Understanding, complainants in a dispute proceeding may seek authorization to suspend WTO concessions or other obligations — or retaliate — if the defending Member has not withdrawn its measure by the end of the agreed upon compliance period.<sup>46</sup> Countermeasures, which generally take the form of duty surcharges on products imported from the defending country, may be imposed until the Member has complied or a mutually agreed upon settlement of the dispute has been reached.<sup>47</sup> Since the United States did not comply by the December 2003 deadline, eight complaining Members — Brazil, Chile, EC, India, Japan, Korea, Canada, and Mexico — asked the WTO Dispute Settlement Body (DSB) for authorization to impose retaliatory measures. The United States objected to the requests, sending them to arbitration. The remaining three complainants — Australia, Indonesia, and Thailand — agreed to give the United States until December 27, 2004, to comply.

Under Article 22.4 of the Dispute Settlement Understanding, the level of suspension of concessions or other obligations authorized by the DSB must be equivalent to the level of the nullification or impairment of WTO benefits caused by the infringing measures. Each of the eight Members seeking to retaliate proposed the suspension of concessions or obligations in an amount to be determined each year

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<sup>43</sup> Ibid., at ¶ 256.

<sup>44</sup> Ibid., at ¶¶ 264-274. The AB stated that three responses to dumping were allowed under Article VI of the GATT and the Antidumping Agreement: definitive antidumping duties; provisional measures (i.e., a provisional duty or security imposed in the event of a preliminary affirmative dumping determination); and price undertakings (suspension agreements). Ibid., at ¶ 264. The AB found that four responses to a countervailable subsidy were permitted under GATT Article VI and the SCM Agreement: definitive countervailing duties; provisional measures; price undertakings; and multilaterally-sanctioned countermeasures under the WTO dispute settlement system. Ibid., at ¶ 269.

<sup>45</sup> US — Offset Act; Award of the Arbitrator, at ¶ 50 (WT/DS217/14)(WT/DS234/22)(June 13, 2003).

<sup>46</sup> WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO Dispute Settlement Understanding), Art. 22.1.

<sup>47</sup> Ibid., at Art. 22.8.

that was equal to: (1) the amount of offset payments attributable to antidumping and countervailing duties collected on the Member's products and (2) except for Chile, a proportionate amount of the balance of offset payments less those attributed to the products of the other Members authorized to retaliate.<sup>48</sup> The United States contested the requests on the ground that the proposed retaliation was not based on actual harm to the complainants' exports and noted as particularly troublesome the use of the amount of duties imposed on goods of countries that were not party to the WTO proceeding as a basis for determining the amount of permissible retaliation.<sup>49</sup>

**Retaliation Authorized.** In awards issued August 31, 2004, the WTO Arbitrator (a panel of three) determined that each of the eight Members could impose countermeasures on an annual basis in an amount equal to 72% of the CDSOA disbursements for the most recent year for which official data are available relating to antidumping and countervailing duties paid on imports from the Member at that time.<sup>50</sup> The Arbitrator stated that the disbursements "operate, in economic terms, as subsidies that may generate import substitution production" and used an economic model to determine the level of nullification or impairment of benefits, or what the Arbitrator characterized as "a value of trade" affected by application of the CDSOA.<sup>51</sup> The Arbitrator also made clear that each Member would need to ensure that the total value of U.S. trade subject to the proposed duty increase did not exceed the total value of trade determined to constitute the level of nullification or impairment, or else propose other forms of suspending concessions to the DSB that were less likely to have trade effects exceeding this level in terms of value of U.S. exports to the country involved. For example, of the \$190 million collected in FY2003, about \$121 million was collected (and distributed pursuant to the CDSOA) in duties on imports of the co-complainants. Based on the formula determined by the Arbitrator, \$87.12 million in FY2003 funds was available to be distributed among the eight parties.<sup>52</sup>

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<sup>48</sup> Regarding the measures the complainants intended to take, Brazil, Chile, the EC, India, Japan, and Korea each stated that retaliation would take the form of additional import duties on a final list of U.S. products (see WTO documents WT/DS217/20 through WT/DS217/25). Canada stated that it intended either to place additional import duties on U.S. products or to suspend the application of specified obligations under the WTO Antidumping Agreement and the WTO SCM Agreement "to determine that the effect of dumping or subsidization of products from the United States is to cause or threaten material injury to an established domestic industry [*sic*], or is to retard materially the establishment of a domestic industry," or to do both (WTO/DS234/25). Mexico requested authorization to "to suspend the application to the United States of obligations in the trade in goods sector" (WT/DS234/26).

<sup>49</sup> WTO Dispute Settlement Body, Minutes of Meeting, January 26, 2004, at ¶ 23 (WT/DSB/M/164)(March 12, 2004); "U.S. Initiates WTO Arbitration on Byrd Sanctions, Hits Out at Trading Partners," 21 *Int'l Trade. Rep.* 204 (BNA 2004).

<sup>50</sup> See, e.g., US — Offset Act (Original Complaint by the European Communities), Recourse to Arbitration by the United States under Article 22.6 of the DSU; Decision by the Arbitrator, at ¶¶ 5.1-5.2 (WT/DS217/ARB/EEC)(August 31, 2004).

<sup>51</sup> *Id.* at ¶¶ 3.41, 3.72, 3.80-3.151, 4.7.

<sup>52</sup> U.S. Customs and Border Protection CDSOA FY2004 Annual Disbursement (continued...)

Seven of the complainants — the European Union, India, Japan, Korea, Brazil, Canada, and Mexico — requested and received formal authorization to impose retaliatory measures in late November 2004; Chile was authorized to retaliate in December 2004. In contrast, Thailand, Indonesia, and Australia have entered into agreements with the United States under which they will not seek authorization to suspend concessions at this time, but retain the right to pursue retaliation in the future.<sup>53</sup>

**Actions to Implement Authorized Retaliation.** On April 25, 2005, the Council of the European Union adopted a Council Regulation establishing additional customs duties of 15 percent on certain products from the United States. As of May 1, 2005, these duties applied to U.S. exports of certain apparel, binders and notebooks, crane trucks, sweet corn, and wire spectacle frames from the United States.<sup>54</sup> On May 5, 2005, the Canadian government issued a final order implementing a 15% surtax on live swine, ornamental fish, oysters, certain cigarettes, and certain fish items, effective May 1, 2005.<sup>55</sup>

On June 3, 2005, representatives of all eight complaining parties met with the Deputy United States Trade Representative (USTR) to express concerns about the statute and, in a memorandum to the USTR, conveyed their view of “the urgency of the repeal of the CDSOA.” They noted that the six remaining members were contemplating the imposition of retaliatory measures by July 2005 and that as a result “a broad range of U.S. industries will be subject to increased duties by major U.S. trading partners.”<sup>56</sup>

On August 1, 2005, Japan announced that it would impose additional tariffs of 15% on 15 categories of U.S. goods beginning September 1, 2005; the imposition of tariffs was approved by the Prime Minister’s cabinet on August 12.<sup>57</sup> According to

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<sup>52</sup> (...continued)

Report, [[http://www.cbp.gov/xp/cgov/import/add\\_cvd/cont\\_dump/cdsoa\\_04/fy2004\\_annual/](http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/cdsoa_04/fy2004_annual/)].

<sup>53</sup> “Australia, Indonesia, Thailand Delay Seeking Sanctions on U.S. Imports in Byrd Dispute,” *22 Int’l Trade Rep.* 42 (BNA 2005); “U.S. Strikes Byrd Retaliation Agreement with Three WTO Members,” *Inside U.S. Trade*, January 14, 2005, at 7.

<sup>54</sup> Council of the European Union. Council Regulation (EC) No. 63/2005 of 25 April 2005 Establishing Additional Customs Duties on Imports of Certain Products Originating in the United States of America. *Official Journal*, L110, 30/04/2005, pp. 0001-0005.

<sup>55</sup> Government of Canada. Order Suspending the Application of Concessions on Imports of Certain Products Originating in the United States. *Canada Gazette*, 139:9, May 4, 2005.

<sup>56</sup> Embassies of Brazil, Canada, Chile, India, Japan, Korea, Mexico, and Delegation of the European Commission. “Aide Memoire on Behalf of Brazil, Canada, Chile, the European Union, India, Japan, Korea, and Mexico.” June 3, 2005.

<sup>57</sup> US — Offset Act; Communication from Japan (WT/DS217/48)(August 19, 2005); Japan, Ministry of Economy, Trade and Industry, “US Byrd Amendment: Japan Decides to Start Retaliation,” Press Release, August 1, 2005, at [<http://www.meti.go.jp/english/information/data/WTOByrd050801e.html>]. (Hereafter cited as METI Press Release.); “Japan OKs (continued...)”

Japan, the level of retaliation would not exceed \$52 million, which, it stated, is the amount authorized by the WTO based on the amount of CDSOA disbursements involving Japanese goods in fiscal 2004.<sup>58</sup> The products that will be subject to the tariff are: seven types of ball bearings, three types of flat-rolled steel products; navigational instruments; machinery accessories; printing machines; forklift trucks; and industrial belts.

In addition, Mexico has announced that it is imposing \$20.9 million in retaliatory tariffs effective August 18, 2005; specifically, it is placing a tariff of 30% on certain prepared milk products, 20% on wine, and 9% on chewing gum.<sup>59</sup> The official Mexican Government notice states that the tariff decree will remain in effect for 12 months, and that it will no longer apply when the Ministry of the Economy places a notice in the *Diario Oficial* that the United States has complied with the WTO decision, at which time tariffs will return to their original rates.<sup>60</sup>

## The CDSOA and the U.S.-Canada Softwood Lumber Dispute

For Canada, the CDSOA is also tied to the longstanding U.S.-Canadian dispute over trade in softwood lumber, which itself has resulted in WTO and NAFTA complaints by Canada challenging U.S. agency actions. The dispute has also been the subject of negotiations between the two countries.<sup>61</sup> The United States has been imposing antidumping and countervailing duties on imports of softwood lumber from Canada since May 2002, with almost \$3 billion in estimated duties having been deposited with Customs and Border Protection as of October 1, 2004,<sup>62</sup> and additional duty deposits accumulating since. Canada has contested the final Department of Commerce dumping and subsidy determinations and the final International Trade Commission (ITC) threat of injury determination in WTO dispute settlement proceedings and before binational panels established under Chapter

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<sup>57</sup> (...continued)

Countervailing Duties on 15 U.S. Products Because of Byrd Amendment,” 22 *International Trade Reporter* 1344 (BNA 2005).

<sup>58</sup> METI Press Release, *supra* note 57.

<sup>59</sup> “Decreto por el que se modifica temporalmente el artículo 1 del Decreto por el que se establece la Tasa Aplicable durante 2003, del Impuesto General de Importación, para las mercancías originarias de América del Norte, publicado el 31 de diciembre de 2002, por lo que respecta a las mercancías originarias de América del Norte, publicado el 31 de diciembre de 2002, por lo que respecta a las mercancías originarias de EE.UU.,” *Diario Oficial*, 17 de agosto de 2005, as printed in [<http://www.insidetrade.com>][hereinafter cited as Decreto]; “Mexico Announces \$20.9 Million in Byrd Retaliation Against U.S. Exports,” *Inside U.S. Trade*, August 19, 2005, at 1.

<sup>60</sup> Decreto, *supra* note 59, “Transitorios.”

<sup>61</sup> For further information on the dispute, including Canada’s trade complaints, see CRS Issue Brief IB10081, *Softwood Lumber Imports from Canada: Issues and Events*, by Ross Gorte and Jeanne J. Grimmett.

<sup>62</sup> See Clearing Account Balances as of October 1, 2004, in U.S. Customs and Border Protection, CDSOA FY2004 Annual Report, Section III, at [[http://www.cbp.gov/xp/cgov/import/add\\_cvd/cont\\_dump/cdsoa\\_04/fy2004\\_annual/](http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/cdsoa_04/fy2004_annual/)].

Nineteen of the North American Free Trade Agreement (NAFTA), an option available in lieu of judicial review in the United States.

Among other decisions, both the WTO and the NAFTA panels have ruled against the ITC affirmative threat of injury determination, with the NAFTA panel having directed the ITC to issue a “no threat” determination and the ITC doing so, but under protest, in September 2004. The United States appealed the NAFTA panel decision to a NAFTA Extraordinary Challenge Committee (ECC), which upheld the panel decision in an August 10, 2005, ruling.<sup>63</sup> At the same time, the ITC continued to find threat of material injury in response to the WTO decision and, in November 2004, issued a determination to this effect under § 129 of the Uruguay Round Agreements Act.<sup>64</sup> Canada has challenged the § 129 determination in a WTO compliance proceeding,<sup>65</sup> and has requested authorization from the WTO Dispute Settlement Body to impose sanctions against the United States in the amount of \$3.4 billion, an amount based on accumulated softwood duty deposits, if the United States is ultimately found not to have complied.<sup>66</sup> As reported by the press and confirmed by USTR, however, an interim panel report, issued August 29, 2005, has upheld the U.S. threat determination.<sup>67</sup> Either party may appeal a compliance panel report once it is publicly circulated.

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<sup>63</sup> In the Matter of Certain Softwood Lumber from Canada; Opinion and Order of the Extraordinary Challenge Committee (Secretariat File No. ECC-2004-1904-01USA)(August 10, 2005), at [<http://www.nafta-sec-alena.org>].

<sup>64</sup> Section 129 of the Uruguay Round Agreements Act, P.L. 103-465, 19 U.S.C. § 3538, establishes authorities and procedures for the Executive Branch to use in responding to adverse WTO decisions involving agency determinations in antidumping and countervailing duty proceedings.

<sup>65</sup> United States — Investigation of the International Trade Commission in Softwood Lumber from Canada; Recourse to Article 21.5 of the DSU by Canada (WT/DS277/8) (February 15, 2005).

<sup>66</sup> Canada stated in its retaliation request that the proposed retaliation represents the total amount of antidumping and countervailing duty cash deposits collected and not refunded as a result of the United States’ failure to revoke the May 2002 CVD and antidumping duty orders, which Canada views as proper implementation of the WTO ruling in the case. Under Article 22.4 of the WTO Dispute Settlement Understanding, the level of retaliation authorized by the WTO must be “equivalent” to the level of nullification or impairment of benefits suffered by the complaining country. The amount has been sent to arbitration, an action required under WTO rules because the United States has objected to Canada’s proposal. Under an agreement between the parties, however, the arbitration has been suspended until the compliance panel process is concluded. The arbitration may be revived by either party if the United States is ultimately found not to have complied in the case. See the following WTO documents: WT/DS277/9 (February 15, 2005)(Canada’s retaliation request); WT/DS277/10 (February 25, 2005)(U.S. request for arbitration); WT/DS277/11 (February 25, 2005)(U.S.-Canada procedural agreement). See also World Trade Organization, Update of WTO Dispute Settlement Cases, at 50 (WT/DS/OV/24)(June 15, 2005).

<sup>67</sup> Statement of USTR Spokesperson Neena Moorjani Regarding the WTO panel report on Softwood Lumber,” August 30, 2005, at [<http://www.ustr.gov>]; “WTO Compliance Panel Rules in Favor of U.S. on ITC Lumber Duty Determination,” *Daily Report for Executives*, August 31, 2005, at A-19 (BNA).

Canada expects that as a result of the affirmative ECC decision, the United States will have no basis for maintaining the antidumping and countervailing duty orders on softwood lumber and would thus need to revoke them.<sup>68</sup> However, Canada is also concerned that even if the orders are ultimately revoked, the United States will not refund the accumulated duty deposits and instead will make them available for distribution to U.S. lumber producers under the CDSOA.<sup>69</sup> To date, the United States has resisted agreeing to a return of these funds.<sup>70</sup> Moreover, the United States is maintaining that, notwithstanding the ECC decision, the September 2004 “no threat of injury” determination has been superseded by the November 2004 § 129 determination and that, with the latter in place, the United States may continue to collect antidumping and countervailing duties on dumped and subsidized softwood lumber.<sup>71</sup>

Along with the earlier-mentioned judicial challenge to the CDSOA as violative of the NAFTA Implementation Act, Canada and Canadian producers have also filed a suit in the U.S. Court of International Trade (USCIT) in which, in light of the NAFTA panel ruling, they are challenging the United States Trade Representative’s direction to the Department of Commerce to implement the § 129 determination.<sup>72</sup> The latter litigation was stayed pending the outcome of the ECC proceeding<sup>73</sup> and has now been reactivated.<sup>74</sup>

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<sup>68</sup> See Canada, Dep’t of Foreign Affairs and Int’l Trade, “ECC Rules No Justification for Softwood Lumber Duties,” News Release, No. 145, August 10, 2005 at [<http://www.dfait-maeci.gc.ca>].

<sup>69</sup> See, e.g., “Backgrounder: The Byrd Amendment,” as attached to Canada, Dep’t of Foreign Affairs and Int’l Trade, “Byrd Amendment: Canada to Retaliate Against United States,” News Release No. 56, March 31, 2005, at [<http://www.dfait-maeci.gc.ca>]; “U.S., Canada Set to Resume Lumber Talks with NAFTA Decision Looming,” *Inside U.S. Trade*, July 15, 2005, at 1, 17 [hereinafter cited as “Lumber Talks”].

<sup>70</sup> “Lumber Talks,” *supra* note 69, at 17; “U.S. Canada Reengage in Lumber Talks, Industry Meeting Planned,” *Inside U.S. Trade*, April 1, 2005, at 6; “Difficulties Seen with Canada WTO Request for Lumber Sanctions,” *Inside U.S. Trade*, February 11, 2005, at 1; “Aldonas Says U.S. Will Not Return Lumber Duty Deposits Without Deal,” *Inside U.S. Trade*, January 28, 2005, at 1.

<sup>71</sup> Office of the United States Trade Representative, Statements of Spokesperson Neena Moorjani of August 10, 2005, and August 12, 2005, at [<http://www.ustr.gov>].

<sup>72</sup> E.g., Complaint, *Tembec Inc. v. United States*, No. 05-00028 (Ct. Int’l Trade January 19, 2005). Canadian producer Tembec also requested NAFTA binational panel review of the § 129 determination; panel review was stayed as of March 22, 2005, pending the outcome of the Extraordinary Challenge Committee proceeding 70 *Fed Reg.* 5166 (2005); *ibid.* at 20104.

<sup>73</sup> *Tembec Inc. v. United States*, No. 05-00028, slip op. 05-79 (Ct. Int’l Trade July 5, 2005)(mem. order).

<sup>74</sup> The Court has consolidated the three cases into one action with the number 05-00028. Both the Coalition for Fair Lumber Imports, a U.S. industry group, and the U.S. government have recently moved to dismiss the case. Regarding the Coalition’s motion, see “U.S. Lumber Industry Seeks Dismissal of Canadian Challenge in CIT,” 22 *Int’l Trade Rep.* 1774 (2005).

## Administration and Congressional Response

The Bush Administration proposed repeal of the CDSOA in the FY2004-FY2006 budget requests. In addition, then-U.S. Trade Representative (USTR) Robert B. Zoellick notified WTO officials in late 2004 that the United States intends to comply with the WTO ruling, but that “complex issues like these often take time.”<sup>75</sup>

At the same time, there is considerable opposition in Congress to repealing the CDSOA. On February 4, 2003, shortly after the WTO Appellate Body report was released, a letter signed by 70 Senators was sent to the White House urging negotiations with U.S. trading partners to find a positive resolution rather than making any attempt to change the law. The letter said that the CDSOA’s “continued operation is critical to preserve jobs that will be otherwise lost as the result of illegal dumping or unfair subsidies and to maintain the competitiveness of American industry.”<sup>76</sup>

Also, in response to the Bush Administration’s efforts to repeal the law in the FY2004 and 2005 budgets, more than half of the members of the Senate Appropriations Committee, including Senator Byrd, sent letters (dated June 4, 2003 and June 1, 2004, respectively) to the chairman and ranking member of the Senate Transportation, Treasury, and General Government Subcommittee warning them against any attempt to repeal the law.<sup>77</sup>

CDSOA supporters in Congress also inserted provisions in the Consolidated Appropriations Acts, 2004 (P.L. 108-199, signed January 23, 2004) and 2005 (P.L. 108-447, signed December 8, 2004) directing the USTR and the Department of Commerce to initiate WTO negotiations aimed at recognizing the right of WTO members to distribute monies collected from antidumping and countervailing duties.<sup>78</sup> On April 26, 2004, U.S. negotiators complied, in part, by proposing in a submission to the WTO Negotiating Group on Rules that negotiators should consider addressing “the right of WTO members to distribute monies collected from antidumping and countervailing duties” as part of its work in the Doha Round.<sup>79</sup> The agencies were directed to continue negotiations on the issue in their appropriation act

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<sup>75</sup> United States Trade Representative, Press Release, November 10, 2004.

<sup>76</sup> Letter to President George W. Bush, signed by seventy Senators, including Robert C. Byrd, Max Baucus, and Mike DeWine, February 4, 2003.

<sup>77</sup> Letter to Senators Richard C. Shelby and Patty Murray signed by Senators Mike DeWine, Robert C. Byrd, and 13 other members of the Senate Committee on Appropriations, June 4, 2003. Letter to Senators Richard C. Shelby and Patty Murray signed by Senators Mike DeWine, Robert C. Byrd, and 13 other members of the Senate Committee on Appropriations, June 1, 2004.

<sup>78</sup> U.S. Congress, House, *Making Further Appropriations for the Fiscal Year Ending September 30, 2004, and for Other Purposes*, report to accompany H.R. 2673, H.Rept. 108-401, p. 573.

<sup>79</sup> WTO Negotiating Group on Rules, Three Issues Identified for Discussion by the Negotiating Group on Rules; Submission of United States (TN/RL/W/153)(April 26, 2004).

for FY2005, P.L. 108-447.<sup>80</sup> H.R. 2862, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2005), the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, as reported in and passed the Senate, also contains a CDSOA negotiation requirement for USTR and the Department of Commerce for FY2006.<sup>81</sup>

Congressional support for the CDSOA is not unanimous, however. Some Members introduced legislation in the 108th Congress seeking to repeal the measure. S. 1299 (Snowe, introduced June 19, 2003) sought to repeal the CDSOA and use AD and CVD duties to establish a trust fund to aid communities negatively impacted by trade. H.R. 3933 (Ramstad, introduced March 10, 2004) sought to repeal the act and direct that any special accounts established under the law be deposited in the general fund of the U.S. Treasury.

In the 109<sup>th</sup> Congress, on July 25, 2005, H.R. 1121 (Ramstad, introduced March 3, 2005, co-sponsored by Ways and Means Trade Subcommittee Chairman Clay Shaw), a bill seeking to repeal the CDSOA, was included in a long list of bills that may be included in a miscellaneous duty suspension and technical corrections trade package proposed by the Ways and Means Trade Subcommittee.<sup>82</sup>

In addition, on September 9, 2005, Senate Finance Committee Chairman Grassley introduced two amendments to the Senate version of H.R. 2862 related to the CDSOA. S.Amdt. 1680 would have directed the USTR to determine and report to Congress as to whether distribution of CDSOA funds is consistent with U.S. WTO obligations, and, if found not to be, would prohibit the distribution of CDSOA funds unless USTR later found and reported that changed circumstances rendered such distributions not inconsistent with these obligations.<sup>83</sup> S.Amdt. 1681 would have struck the CDSOA negotiation requirement in Senate-reported H.R. 2862 noted above.<sup>84</sup> Neither amendment was voted upon during Senate consideration of the underlying bill.

**Budget Reconciliation Bill.** On October 26, 2005, repeal of the CDSOA was included in a House Ways and Means Committee-approved budget reconciliation resolution.<sup>85</sup> The Entitlement Reconciliation Recommendations for Fiscal Year 2006 (approved, as amended, by a vote of 22-17) was referred to the House Budget Committee and subsequently included in H.R. 4241, the Deficit Reduction Act of 2005 (Nussle, introduced November 7, 2005). Since the measure

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<sup>80</sup> See H.Rept. 108-792, pp. 65, 67-68, 780, 782. See also S.Rept. 108-344, pp. 70, 73.

<sup>81</sup> 151 *Cong. Rec.* S9762 (daily ed. September 8, 2005).

<sup>82</sup> U.S. Congress, Committee on Ways and Means, Subcommittee on Trade, *Shaw Announces Request for Written Comments on Technical Corrections to U.S. Trade Laws and Miscellaneous Duty Suspension Bills*, Advisory No. TR-3, July 25, 2005.

<sup>83</sup> 151 *Cong. Rec.* S9887 (daily ed. September 9, 2005).

<sup>84</sup> *Ibid.*

<sup>85</sup> Subtitle G, Section 8701 of the Chairman's Amendment in the Nature of a Substitute to Entitlement Reconciliation Recommendations for Fiscal Year 2006, [<http://waysandmeans.house.gov/Media/pdf/109cong/reconciliation2006.pdf>].

provides that any remaining money in AD and CVD accounts and all future duties will be deposited in the general fund of the Treasury, the Congressional Budget Office (CBO) estimated that CDSOA repeal would save the government \$3.2 billion over five years.<sup>86</sup>

S. 1932, the Senate version of the budget reconciliation bill, passed on November 3, 2005. The Senate bill did not include a CDSOA repeal, and the move to include the measure in the House version faced swift opposition in the Senate. In a letter to Senate Majority Leader Bill Frist, 25 Senators expressed that “we do not believe that the budget reconciliation process should be used to substantively change U.S. trade law.”<sup>87</sup> An additional letter, signed by Senators Baucus, Byrd, Conrad, and Inouye (ranking members of the Senate Finance, Appropriations, Budget, and Commerce committees, respectively), asked Senator Frist to “make certain that the Senate not accede to any provision to repeal or modify CDSOA that may be unwisely included by the House in its reconciliation package.”<sup>88</sup> Senator Grassley, in favor of repeal, stated that the budget reconciliation package is the only possible vehicle in the Senate for repealing the CDSOA. Although most senators support the law, he predicted that they are not likely to vote down the entire budget reconciliation bill over that one provision.<sup>89</sup>

On November 18, 2005, the House inserted the text of H.R. 4241 into S. 1932, and passed the amended version of S. 1932 — including the CDSOA repeal measure, by a vote of 217-215 (recorded vote number 601). Despite a motion to instruct the Senate conferees to insist that CDSOA repeal not be included in the conference report to S. 1932,<sup>90</sup> a provision seeking to repeal the CDSOA and deposit collected AD and CVD duties into general fund of the Treasury is included in the conference report to S. 1932.<sup>91</sup> At the same time, the measure provides a phase-out of disbursements to affected domestic producers on all entries of goods before October 1, 2007. On December 19, 2005, the House passed the conference report by a vote of 212-206 (roll no. 670).

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<sup>86</sup> Congressional Budget Office. “Estimated Budgetary Impact of House Reconciliation Recommendations (H.R. 4241)” [<http://www.cbo.gov/publications/collections/reconciliation.cfm>].

<sup>87</sup> Letter to Senate Majority Leader Bill Frist signed by Senators Mike DeWine, Larry E. Craig, and 24 others, November 4, 2005.

<sup>88</sup> Letter to Senate Majority Leader Bill Frist signed by Senators Max Baucus, Robert E. Byrd, Kent Conrad, and Daniel K. Inouye, November 4, 2005.

<sup>89</sup> “‘Byrd’ — To Continue to Be or Not,” *Washington Trade Daily*, November 9, 2005, p. 5.

<sup>90</sup> Motion was sponsored by Senator DeWine. See Congressional Record, December 14, 2005, page S13523.

<sup>91</sup> House Report 109-362.

## Debate on Pros and Cons of Repeal

The Byrd Amendment controversy is one component of a larger debate in Congress concerning the overall direction of U.S. trade policy. Although many Members acknowledge that there are benefits received by liberalizing trade flows, there is sometimes disagreement on the proper balance between these benefits and the transition costs incurred to domestic industries, firms, and workers by increased global competition. Because the added welfare from trade tends to be diffused over the population as a whole, while losses fall disproportionately on import-competing industries and regions, Members' perceptions of free market policies differ. With regard to the CDSOA, supporters maintain that the measure helps level the playing field by compensating U.S. producers adversely affected by unfair trading practices. Now that some co-complainants have assessed WTO-authorized retaliatory duties on U.S. exports, however, Congress may later face as much pressure to repeal the measure from U.S. exporters as it does from the domestic producers who benefit from the measure.

The debate over CDSOA compliance is also related to the issue of differing viewpoints in Congress on the merits of WTO membership, a topic which has also been addressed in the 109th Congress.<sup>92</sup> As an international organization designed to ensure that global trade flows more easily, predictably and freely, the WTO serves as a forum for multilateral trade negotiations and the settlement of disputes.<sup>93</sup> Questions may arise as to the overall benefit of WTO dispute settlement, which the United States has used to ensure that U.S. exporters receive open access and fair treatment in foreign markets,<sup>94</sup> but which has also resulted in rulings that various U.S. laws, regulations, and regulatory actions, particularly in the trade remedy area, are violative of WTO agreements.<sup>95</sup>

U.S. trade policy is also inextricably related to U.S. foreign policy interests. Some observers are concerned that U.S. leadership in this arena could be

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<sup>92</sup> Section 125 of the Uruguay Round Agreements Act, P.L. 103-465, requires the U.S. Trade Representative to present to Congress a report that includes an analysis of the costs and benefits of U.S. participation in the WTO beginning March 1, 2000, and every five years thereafter. Congress may also vote on a joint resolution disapproving U.S. participation in the WTO at this time. See CRS Report RL32700, *Seeking Withdrawal of Congressional Approval of the WTO Agreement: Background, Legislative Procedure, and Practical Consequences*, by Vladimir Pregelj; and CRS Report RL32918, *World Trade Organization (WTO): Issues in the Debate on U.S. Participation*, by Ian F. Fergusson and Lenore Sek. Withdrawal Resolution H.J.Res 27, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess, (2005), was defeated in the House on June 9, 2005.

<sup>93</sup> CRS Report 98-928, *The World Trade Organization: Background and Issues*, by Lenore Sek.

<sup>94</sup> See, e.g., Office of the United States Trade Representative, *2005 Trade Policy Agenda and 2004 Annual Report*, 101-110 (2005), at [[http://www.ustr.gov/Document\\_Library/Reports\\_Publications/2005/2005\\_Trade\\_Policy\\_Agenda/Section\\_Index.html](http://www.ustr.gov/Document_Library/Reports_Publications/2005/2005_Trade_Policy_Agenda/Section_Index.html)].

<sup>95</sup> For a discussion of recent WTO cases with rulings adverse to the United States, see CRS Report RL32014, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, by Jeanne J. Grimmett.

compromised by U.S. noncompliance with certain WTO obligations and may cause strains in U.S. relations with nations that are essential for achieving other foreign policy objectives.

This section provides an analysis of issues Congress is likely to consider as it debates the pros and cons of repealing the CDSOA from these perspectives.

## **Economic Considerations**

Trade remedy actions in general are a source of controversy among economists and other policy makers. Some believe that the CDSOA increases the level of economic inefficiency brought about by these actions, while others assert that the small amount of inefficiency brought about by the measure is worth the cost of preserving U.S. industries and jobs adversely affected by unfair trading practices. What follows is an analysis of the economic arguments by both supporters and opponents of the CDSOA.

**Opposing Viewpoints.** Most economists support the most efficient allocation of resources in an economy. Therefore, they believe that trade liberalization provides for optimal domestic and global economic welfare because nations are able to specialize in the production and export of products in which they have a comparative advantage in terms of costs and resources, and buy or import products for which they do not have an advantage. Economic theory indicates that these benefits accrue even if a country unilaterally lowers its barriers to trade, and that countries that impose trade barriers are the ones that are harmed the most economically.<sup>96</sup>

Therefore, most economists believe that trade remedy actions (the vast majority of which are AD or CVD cases) in and of themselves introduce inefficiencies in both domestic and international economies that result in decreased economic welfare. Some economists hold that if other countries and firms decide to subsidize or dump goods at lower cost in the U.S. market, it amounts to an additional benefit to the U.S. economy in the long run, especially if the practice continues over time.

Most analysts, however, acknowledge that allowances for a certain amount of inefficiency resulting from trade remedies must be made in order to maintain public support for trade liberalization. Others argue that efficiency is secondary when preserving industries considered critical to U.S. national and economic security interests. However, opponents of the CDSOA assert that the measure provides a type of “double” remedy to domestic producers, thus enhancing the economic inefficiency of AD and CVD actions.

***Injury to Downstream Industries.*** Trade remedy actions often lead to price increases on targeted goods — many of which are industrial inputs used by other domestic industries. To the extent that the CDSOA encourages domestic producers to file additional AD or CVD claims, the measure also contributes to these price

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<sup>96</sup> Baghwati, Jagdish, “Free Trade: Old and New Challenges,” *Economic Journal*, Mar. 1994, p. 231.

increases. Downstream industries (for example, the automobile and housing industries which use steel and lumber to manufacture their products) bear the cost of trade remedies in the form of higher-cost inputs for their products. As a result, these industries may have to raise the price of their goods. At a recent House Small Business Committee hearing, for example, a manufacturer of specialty automotive parts complained that inflated prices for steel inputs, brought about in part by trade remedy actions, caused unintended “collateral damage” which threatened his business.<sup>97</sup>

In addition, since the EU and Canada have already begun retaliating against U.S. exports, products targeted for increased duties may also become uncompetitive in the receiving market. Therefore, many economists contend that the CDSOA, while providing a benefit to many domestic firms injured by dumping or subsidies, may in turn cause injury to U.S. downstream producers, exporters, and ultimately, consumers.

***Distribution of Benefits.*** According to a Congressional Budget Office (CBO) memorandum on the CDSOA, the statute may lead to unequal distribution of benefits within an industry that could give some firms an advantage over domestic, as well as global, competitors.<sup>98</sup>

First, according to the CDSOA, only the firms in support of an AD or CVD petition resulting in an AD or CV duty order are eligible to receive disbursements. Therefore, even though all companies in an industry that producing the targeted product may benefit from the remedial effect of trade remedy action, companies are only eligible for CDSOA payments if they are able to certify that they supported the initial investigation. Those producers within the industry who decide not to support the trade remedy action could be placed at a disadvantage *vis a vis* their domestic competitors.<sup>99</sup>

Additionally, due to the considerable transaction costs involved in filing and supporting trade remedy petitions (estimated to range from \$500,000 for the simplest case to millions of dollars for more complex ones), it is possible that more efficient firms in an industry might be less likely to support a trade remedy petition. Thus, opponents argue the CDSOA mechanism could adversely affect the more efficient firms in a domestic industry, while more inefficient firms receive a benefit.<sup>100</sup>

For these reasons, the decisions of U.S. manufacturers in some industries to pursue AD or CVD investigations have caused intense and vocal debate within the domestic industry as a whole. For example, when some U.S. furniture makers and

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<sup>97</sup> U.S. Congress, House Committee on Small Business, *Trade Fairness Hearing: How We Can Make Our Trade Laws Work for America’s Small Businesses*, Remarks of Mr. Wallace Smith, E & E Manufacturing Company, Inc.

<sup>98</sup> *Economic Analysis of the Continued Dumping and Subsidy Act of 2000*. Congressional Budget Office, March 2, 2004. [<http://www.cbo.gov>].

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

worker unions decided to file a petition on wooden bedroom furniture from China, many larger furniture retailers strongly objected, saying that they would lose jobs and business on the retail side if the petition went forward, while producers maintained that far more manufacturing jobs were being lost than would be lost on the retail side of the business.<sup>101</sup> In this particular case, many U.S. furniture manufacturers in support of the investigation speculated that the cost of lost business from U.S. retailers in retaliation for their support may well exceed the combined benefit of the AD order and CDSOA disbursements.<sup>102</sup>

According to the CBO, CDSOA payments may also reduce the receiving industry's incentive to take the necessary steps to remain competitive, such as changing the product mix or developing more efficient methods of production. Since the affected industry only qualifies for disbursements as long as it manufactures a particular product, firms may decide to produce the good longer than it is efficient to do so, rather than allocating resources to producing alternative products that could help firms return to competitiveness.<sup>103</sup> Because CDSOA payments are also linked to production costs, firms may be encouraged to increase output beyond the levels signaled by market incentives, ultimately driving down the cost of the product.<sup>104</sup>

**Supporting Viewpoints.** Many Members have witnessed the substantial benefits that the CDSOA has conferred on industries and workers in their states and congressional districts. In a February 2005 hearing before the U.S.-China Economic and Security Review Commission, some Members testified that the CDSOA enabled U.S. firms — many of them small, family-run companies — to purchase new machinery, hire more workers, and compete head-to-head with unfairly traded imports from China.<sup>105</sup>

Supporters of the CDSOA believe that U.S. producers are facing an uneven playing field due to price discrimination and artificial competitive advantage brought about by unfairly dumped or subsidized imports. Continued dumping of the targeted merchandise causes U.S. products to remain less competitive, despite additional duties assessed. Therefore, supporters believe that the CDSOA creates an additional disincentive for foreign exporters to continue dumping and compensates domestic producers with financial resources that can be used to maintain competitiveness.

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<sup>101</sup> See *Notice of Amended Final Determination and Antidumping Duty Order: Wooden Bedroom Furniture from the Peoples' Republic of China*, 70 *Fed. Reg.* 329 (2005).

<sup>102</sup> Becker, Denise. "Government Delays Ruling on Tariffs; the Furniture Industry Must Wait Until June 17 for Action, if Any, on China," *Greensboro News and Record*, April 13, 2004.

<sup>103</sup> *Economic Analysis of the Continued Dumping and Subsidy Act of 2000*. Congressional Budget Office, March 2, 2004. [<http://www.cbo.gov>].

<sup>104</sup> *Ibid.*

<sup>105</sup> U.S.-China Economic and Security Review Commission. Hearing on China and the WTO: Assessing and Enforcing Compliance. February 3-4, 2005 [[http://www.uscc.gov/hearings/2005hearings/hr05\\_02\\_3\\_4.htm](http://www.uscc.gov/hearings/2005hearings/hr05_02_3_4.htm)].

Proponents of this view believe that trade remedies, combined with the added benefit provided by the CDSOA, are worth the cost of the economic inefficiency because they promote trade fairness, restore competitive balance, and preserve critical U.S. industries and jobs. Supporters believe that many countries limit outside competition in their economies by creating “sanctuary markets” — limiting both domestic and international competition — thus enabling chosen firms to charge higher prices for goods at home to offset the lower prices charged in the foreign market — at the expense of industries abroad that produce similar merchandise. Therefore, some supporters believe that trade remedy actions, combined with the CDSOA may actually encourage international trade by providing an “interface mechanism” between two radically different economic systems.<sup>106</sup>

Some recent economic research also suggests that the CDSOA could actually lead to higher welfare for the domestic economy, as well as lower overall antidumping duties, if the goal of administrative authorities is to provide affected domestic industries with higher CDSOA payments. According to this theory, since the CDSOA gives the duty revenue to the domestic industry, the affected industry is interested in receiving the proceeds from AD or CVD action as well as profits. If administrative authorities and policy makers are, in turn, concerned about the affected industry, they may actually choose to assess lower AD or CV duties so that imports of the subject merchandise will continue. Thus, greater revenues could be collected by the industry, and lower trade remedy duties could reduce the overall economic inefficiency of the actions.<sup>107</sup> However, since the congressional intent of the CDSOA and trade remedy actions in general seems to be to *discourage*, rather than encourage, continued dumping of subject merchandise, modifications to the existing statutes would be required if increased duty proceeds were desired.

## WTO and Other Trade Concerns

Many policymakers believe that a multilateral, rules-based trading system that enhances predictability and progressively reduces barriers to trade is desirable. Many also believe that the WTO dispute settlement mechanism, of which the United States was a primary architect, is a unique and effective means toward achieving that end, because it helps ensure that WTO members’ trade practices are consistent with their GATT/WTO commitments. Those who share this view believe that U.S. compliance with WTO rulings is an important demonstration of U.S. credibility and leadership in the global economy, and will in turn generate increased confidence in the multilateral trading system.

**Dispute Panels Overreached?** Although CDSOA supporters do not necessarily disagree with the value of the WTO or its dispute settlement mechanism, some believe that in the CDSOA ruling, WTO panels overreached by creating obligations for the United States beyond those agreed to. According to this view, the

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<sup>106</sup> Mastel, Greg, *Antidumping Laws and the U.S. Economy*. Armonk, NY: M.E. Sharpe, 1998, p. 67.

<sup>107</sup> Collie, David R. and Vandenbussche, Hylke. *Antidumping Duties and the Byrd Amendment*. London: Center for Economic Policy Research, Discussion Paper 4780, December 2004 [<http://www.cepr.org/pubs/dps/DP990.asp>].

panels violated Article 3.2 of the WTO Dispute Settlement Understanding (DSU), which states that recommendations and rulings of the Dispute Settlement Body cannot add to or diminish rights and obligations in the covered agreements. These supporters believe that the WTO panels infringed on U.S. sovereignty by mandating an uncalled-for change to U.S. laws, and in addition encroached on the constitutional authority of the U.S. Congress to decide how government revenues should be spent.<sup>108</sup> Moreover, supporters argue that since the complaining parties were unable to demonstrate sufficiently that their economies suffered “nullification or impairment” through CDSOA implementation, the measure should have been found to be in compliance with WTO obligations.<sup>109</sup>

Those who favor CDSOA repeal respond that the United States, along with other WTO members, agreed voluntarily to limit the means by which they would shield affected industries from the effects of import competition (including unfair trade) when they agreed to join the WTO. Furthermore, as the Appellate Body report states, the DSU provides that where a violation of any WTO agreement is found, there is normally a presumption that the violation has an adverse impact on other parties to the agreement. Thus, they say, the panel properly found that the CDSOA nullifies or impairs benefits accruing to the complaining parties even if they could not demonstrate actual economic impairment.<sup>110</sup>

**Discourages Suspension Agreements.** Some who favor CDSOA repeal also believe that the law may discourage administrative authorities from accepting alternative arrangements to trade remedy actions, such as mutually agreed-upon suspension agreements or quantitative restrictions — also called “price undertakings” in the WTO agreements. These observers believe that if the affected industry expects to receive CDSOA disbursements, petitioners might put pressure on administrative authorities not to negotiate or accept suspension agreements.

Such alternative arrangements are favored by many WTO members because they seem to inflict a lesser amount of economic damage on the exporting industry, and by many economists because they may reduce the overall level of economic

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<sup>108</sup> U.S.-China Economic and Security Review Commission. Hearing on China and the WTO: Assessing and Enforcing Compliance. Testimony of Senator Robert Byrd, February 3, 2005.

<sup>109</sup> U.S.-China Economic and Security Review Commission. Hearing on China and the WTO: Assessing and Enforcing Compliance. Testimony of Alan Wolff, February 3, 2005.

<sup>110</sup> US — Offset Act; AB Report, *supra* note 40, at 104; US — Offset Act; Panel Report, *supra* note 39, at ¶¶ 8.1, 8.4. See WTO Dispute Settlement Understanding, Art. 3.8, which states:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

inefficiency in the global trading system.<sup>111</sup> The United States, for example, has in force ten such agreements (known in U.S. law as *suspension agreements*), including alternative measures on hot-rolled steel imports from Brazil and Russia; cut-to-length carbon steel plate from Russia and Ukraine; and tomatoes imported from Mexico.<sup>112</sup>

Some of the complaining parties in the WTO dispute argued that the United States violated this provision in the WTO agreements. However, the dispute settlement panel rejected their arguments on the grounds that both the Antidumping and SCM Agreements stipulate that member countries' acceptance of such alternative measures is strictly voluntary. Additionally, WTO panels found that U.S. law requires the consideration of the interests of all parties, including downstream industries and consumers, before accepting such an agreement.<sup>113</sup>

**Concern of Emulation.** When the CDSOA was enacted, some supporters of trade liberalization predicted that the availability of CDSOA disbursements would provide a direct incentive for U.S. import-competing industries to file AD and CVD petitions in a country that was already one of the most aggressive users of trade remedies.<sup>114</sup> Initially, it seemed as if this prediction might be accurate, as U.S. AD and CVD initiations jumped from 54 in 2000 to 94 in 2001. However, U.S. initiations actually dropped in 2002 to 39, and the number was only slightly higher in 2003 with 41 initiations.<sup>115</sup> Therefore, there is little evidence to suggest that the CDSOA, in itself, has led to an escalation of total U.S. AD or CVD petitions.

One reason that the number of U.S. trade remedy initiations has not increased may be that, for most industries, the transaction costs involved in filing AD and CVD petitions far outweigh the additional benefits received, even if CDSOA payments are factored in. Although a few businesses have received millions of dollars in annual payments (including the roller bearings, steel, seafood, pineapple, and candle industries), the vast percentage of companies received much less. For example, of the more than 500 companies that received CDSOA payments in FY2004, only about 100 received more than \$100,000. A few companies that filed for disbursements in FY2004 found that they had been overpaid in previous years and were liable to pay back the difference.

Some observers have also expressed concern that other countries might follow the U.S. example and establish similar laws, thus exacerbating an already apparent

<sup>111</sup> Increased use of price undertakings is a focal point during discussions of proposals to amend the Antidumping Agreement in the Doha Development Agenda. See WTO Negotiating Group on Rules, *Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules (TN/RL/W/143)*(August 22, 2003), pp. 46-48.

<sup>112</sup> U.S. International Trade Administration. "Suspension Agreements in Effect." [<http://ia.ita.doc.gov/stats/suspensions/index.html>].

<sup>113</sup> US — Offset Act; Panel Report, *supra* note 39, at 318.

<sup>114</sup> *Economic Analysis of the Continued Dumping and Subsidy Act of 2000*. Congressional Budget Office, March 2, 2004, [<http://www.cbo.gov>], p. 5.

<sup>115</sup> For a more complete discussion of AD statistics worldwide, see CRS Report RL32810, *WTO: Antidumping Issues in the Doha Development Agenda*, by Vivian C. Jones.

increase in trade remedy actions worldwide prior to 2001. In this view, such increases could be harmful to U.S. exports and increase the decline in international economic welfare already brought about by trade remedy actions. However, to date, no other WTO member has adopted similar laws, and AD and CVD initiations have declined worldwide, from a total of 393 in 2001, to 319 in 2002, and to 246 in 2003.<sup>116</sup> Some observers believe that the decline in trade remedy actions is only temporary, however, and attribute it to international restraint pending talks on trade remedies in the Doha Round.

**Doha Development Agenda Negotiations.** Some believe that it may be in the U.S. interest to comply with the Byrd Amendment ruling in view of larger U.S. goals in the ongoing Doha round of WTO multilateral negotiations, especially if the United States seeks to fend off major modifications to the Antidumping or SCM Agreements. Since many countries regard trade remedy reform as a “make or break” issue in terms of their acceptance of any final Doha Development Agenda (DDA) agreement, some observers believe that lack of action on CDSOA repeal could weaken the U.S. position in the ongoing trade remedy negotiations. This could be problematic because the gap in negotiating positions between the United States and other WTO countries on trade remedies is large and may be difficult to narrow.

Some in Congress are also concerned about the ability of the USTR to negotiate on trade remedy modifications in a manner favorable to their manufacturing constituents, because they believe that the USTR did not expend very much effort in attempting to keep trade remedy negotiations off the table in the DDA.<sup>117</sup> This perception, combined with the Bush Administration’s repeatedly declared support for CDSOA repeal, may have contributed to increased resistance in of some in Congress toward WTO rulings and proposals that might weaken U.S. trade remedy laws in general, and repeal of the CDSOA in particular.

Many CDSOA supporters favor seeking a negotiated change to the Antidumping Agreement in DDA talks that would permit all WTO members to distribute duties collected pursuant to AD or CVD action.<sup>118</sup> This is the approach Congress instructed the Bush Administration to take as part of the 2004 and 2005 Omnibus Appropriations. Many CDSOA supporters believe that this is the proper approach to follow if there is genuine concern that dispute settlement panels created additional obligations for the United States in the CDSOA ruling.

**Other Trade Agreements and Issues.** The United States has entered into free trade agreements (FTAs) with four of the complaining parties in the CDSOA dispute — Canada, Mexico, Australia, and Chile — and is actively pursuing trade agreements with others, including Thailand. U.S. trade remedy policy in general, and

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<sup>116</sup> World Trade Organization statistics on trade remedy action, [[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm#statistics](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm#statistics)].

<sup>117</sup> “Rockefeller Attacks Zoellick for Doha, Failure to Appear at Markup,” *Inside U.S. Trade*, December 14, 2001.

<sup>118</sup> U.S.-China Economic and Security Review Commission. Hearing on China and the WTO: Assessing and Enforcing Compliance. Testimony of Senator Mike DeWine, February 3, 2005.

the CDSOA in particular, might dampen the economic welfare effects accruing to U.S. businesses, investors, and consumers from these FTAs due to higher costs brought about by the measure (and eventual retaliation), even as these FTAs have led to significant tariff reductions on both sides. With respect to Canada, the possible availability for disbursement to U.S. lumber producers of several billion dollars in antidumping and countervailing duties on Canadian softwood lumber has added complexities to the resolution of the ongoing dispute between the United States and Canada over lumber trade.

Secondly, the Bush Administration has often used access to the U.S. market in general, and trade agreements, in particular, to promote economic growth and development in lesser developed countries. Preferential market access is provided to many countries, including some of the complaining parties in the CDSOA dispute, through the Generalized System of Preferences (GSP) and other programs with a view toward fostering economic and governmental stability. For example, Indonesia and Thailand, both complainants in the CDSOA dispute, are also countries that the 9/11 Commission identified as vulnerable to penetration by anti-American Islamic terrorist groups.<sup>119</sup> Although it is unclear that these or other nations have actually suffered monetary “nullification or impairment” as a result of the CDSOA, the act is seen by some as potentially counterproductive to U.S. economic development goals in some developing nations.

## Conclusion and Options for Congress

The adoption of WTO panel and Appellate Body reports by the WTO Dispute Settlement Body cannot in itself effect a change in U.S. law.<sup>120</sup> In this case a statute has been found to be in violation of WTO agreements. Since the Executive Branch cannot amend or remove the measure under existing statutory authorities, congressional action would be needed to do so. Under WTO rules, withdrawal of a violative measure is ordinarily the main objective of a WTO dispute settlement proceeding. Nevertheless, a defending Member may choose to seek other avenues of resolving a dispute. If the Member does not comply by the end of an established compliance period, however, it may also become subject to sanctions until the measure is removed. According to WTO rules, however, any retaliation must be temporary, lasting only as long as a Member is not in compliance or until a mutually satisfactory arrangement is reached.

If the CDSOA remains in force in its current form, it will continue to be a part of U.S. trade remedy law, and import-competing industries that are parties to successful AD and CVD petitions will continue to receive benefits under the act. However, since two of the complaining parties (accounting for a large percentage of U.S. exports) have already taken steps toward retaliation, U.S. exporters could begin

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<sup>119</sup> *National Commission on Terrorist Attacks Upon the United States*, Final Report, July 22, 2004, pp. 378-379.

<sup>120</sup> For further discussion, see CRS Report RS22154, *WTO Decisions and Their Effect in U.S. Law*, by Jeanne J. Grimmett.

to experience the effects of retaliation in mid-to-late 2005. These exporters may then begin to lobby Congress for CDSOA repeal.

Were the statute to be repealed, the United States would be in compliance with the WTO rulings and any retaliation that has begun would need to cease. At the same time, CDSOA repeal could lead to additional, if temporary, instability to import-competing industries already identified as vulnerable because they may have become dependent on CDSOA disbursements to some degree. Were Congress to consider a gradual reduction of benefits over time, complaining parties may still view the remaining benefits as WTO-inconsistent and may continue to retaliate as long as the amended measure remains in place. However, the Administration might be able to negotiate a mutually satisfactory arrangement with the complaining parties, provided full repeal of the measure were assured at the end of the process. Repeal of the CDSOA itself would do nothing to affect other U.S. AD or CVD laws, procedures or actions, and domestic industries would continue to benefit from these measures.

In the event the CDSOA were repealed, Congress might at the same time establish another program in its place that would deal in some other way with the adverse effects of international trade on firms, workers, and communities in a way that might be considered WTO-compliant. S. 1299 (Snowe), the “TRADE for America’s Communities Act,” introduced in the 108th Congress, sought to repeal the CDSOA and deposit the duties instead into a “Community Trade Readjustment and Development Enhancement Trust Fund” that would assist communities adversely affected by unfair trade. Many CDSOA supporters maintained that this approach (along with similar proposals to expand Trade Adjustment Assistance for firms and workers with AD and CV duties) was not acceptable, however, because protection afforded by the CDSOA could keep firms operating and workers in the jobs they currently have, rather than reacting to job losses and economic dislocation after damage had occurred.

As evident in recent appropriations legislation, Congress has also favored negotiations leading to recognition of the existing right of WTO Members to distribute collected AD and CV duties in a manner similar to the CDSOA. This course of action is favored by many import-competing business associations, according to industry sources.<sup>121</sup> If WTO Members agreed, the United States, along with all other Members, would have the option, expressly supported by the WTO, of disbursing AD or CV duties to affected companies or earmarking them for other uses. Many economists are concerned, however, that replication of the measure by other countries could lead to a multiplication of inefficient trade remedy actions worldwide.

Because the CDSOA has strong congressional support on both sides of the aisle, many observers think that legislation to amend or repeal the measure will probably not be approved in the 109th Congress. However, since CDSOA repeal is supported by both the Chairman of the House Ways and Means Committee and the Chairman of the Senate Finance Committee, the effort may receive a significant amount of

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<sup>121</sup> “White House Quiet on Plans for Complying with WTO Byrd Decision,” *Inside U.S. Trade*, January 14, 2005, at 1.

legislative attention. Furthermore, if exporters begin to feel the adverse effects of retaliation by key U.S. trading partners, it is possible that pressure to seek a legislative or negotiated solution to the measure may intensify.