The Byrd Amendent Ruling Needs Careful Review

By Steve Charnovitz

On 27 January, WTO Members adopted an Appellate Body report, which upheld the original panel finding that the 'Byrd Amendment' is inconsistent with the WTO's anti-dumping and subsidy/countervailing rules. The US government is currently considering its response to the ruling (see page 7). This article and the one opposite – written before the Appellate Body' verdict – provide different perspectives on the precedent-setting case.

In the view of most trade analysts, the Appellate Body should have an easy time upholding the victory of the eleven complaining governments. Nevertheless, one should expect a more complex legal proceeding that will consider whether the WTO panel engaged in judicial overreaching.

The Byrd Amendment is a US law that provides cash to affected domestic producers who petition for or support a successful antidumping or countervailing duty petition. Two economic instruments can be envisioned for a government to help an industry injured by dumping. One is to impose an antidumping duty on the dumped product that will either prevent importation or lower the price advantage over the competing domestic product. The other is to make a compensatory payment to the domestic industry. As far as I am aware, until the Byrd Amendment was enacted in 2000, no government had sought to use the compensatory instrument.

If the Byrd Amendment had substituted a compensatory payment for an antidumping duty, either in whole or part, that would have been a commendable trade policy experiment. A payment to an industry that is a victim of dumping would be less trade distortive and inefficient than the antidumping duty permitted by WTO rules.

Instead, the Byrd Amendment adds the payment on top of the antidumping duty. This can have the effect of improving the competitive position of the victim industry, which acquires government funding plus the protective benefit of the antidumping duty. Thus, the WTO panel was perhaps right in characterizing the Byrd Amendment as providing 'a double remedy'.

Although this overshooting may be an unwise policy, that is a different matter from whether it violates international trade law. In general, WTO rules allow governments a high degree of freedom in granting domestic subsidies not contingent upon export performance. The panel's thesis that governments contracted away that freedom in negotiating the WTO Anti-dumping Agreement is a shaky assumption unsupported by the text of the Agreement or by its negotiating history.

Boiling down the panel's 335-page report, the crux of the judgment is that the United States is violating the provision of the Anti-dumping Agreement stating that "[n]o specific action against dumping of exports from another [WTO] Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." Thus, the key issue in the case is whether the payment to victims of dumping is a 'specific action' against dumping.

According to the panel, whether a government action is "against dumping" depends on whether it has an "adverse bearing on dumping." The panel explains that the combination of the antidumping duty plus the Byrd payment transfers competitive advantage to the victims of dumping and has a dissuasive effect on dumping.

Even assuming that the panel is right that the law inhibits dumping, it is a leap to conclude that the governmental aid therefore violates WTO rules. Government policies may dissuade dumping without being either a specific action against the companies that dump or the products being dumped. A strong argument can be made that a special fund for victims of dumping is well outside the purview of the WTO's Anti-dumping rules.

By the panel's logic, it would be a WTO violation for the US Secretary of Commerce to give a 'Good Trade Citizen' award to successful anti-dumping petitioners.

The other major violation found by the panel arises from the so-called rule of 'standing' that a government take up a private antidumping petition only when it is supported by domestic companies who produce more than 50 percent of the affected output. The Byrd Amendment has triggered concerns because the payments are made only to companies that voice support for investigation.

According to the panel, the Byrd eligibility rule violates the WTO because it gives a financial incentive to file and support petitions. That the Byrd programme gives such an incentive is clear. But if a financial incentive itself is a WTO violation, then even a revised, neutral Byrd Amendment extending eligibility to all affected domestic producers could still remain WTO-illegal. That's because the Byrd payment cannot occur unless the domestic industry supports the investigation, and then dumping is verified.

The panel declares that the Byrd Amendment violates trade rules because it will induce more investigations, and thereby "disrupt the trading environment for foreign producers/exporters that may be engaged in dumping."

This holding is questionable because the panel seems to be saying that WTO Members have barred themselves from encouraging victims of dumping to file petitions. By the panel's logic, it would be a WTO violation for the US Secretary of Commerce to give a 'Good Trade Citizen' award to successful anti-dumping petitioners. It seems doubtful that the panel would characterize that hypothetical as being WTO-illegal, yet if not, then the panel has failed to draw a meaningful line.

The panel's decision can be summed up as holding that the Byrd Amendment is not listed in the WTO treaty as a permissible response to dumping. Yet this runs against the traditional orientation of trade law, which is that government actions are permitted unless they are prohibited. At a time when the WTO dispute system is under criticism for judicial activism, the Appellate Body should give careful consideration to the difficult issues in this case.

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Midterm Review Reveals Development in Peril in Doha Round

DOHA ROUND BRIEFINGS

The International Centre for Trade and Sustainable Development in collaboration with the International Institute on Sustainable Development has prepared a 'midterm review' of the current WTO negotiations consisting of a series of 13 Doha Round Briefings on:

- Agriculture
- Services
- Special and Differential Treatment
- Implementation-related Issues and Concerns
- Intellectual Property Rights
- Market Access for Non Agricultural Products
- Negotiations on WTO Rules
- The Singapore Issues
- Trade and Environment
- Dispute Settlement Rules
- Technical Assistance
- Trade and Transfer of Technology
- Trade, Debt and Finance

The Briefings provide a comprehensive overview of the current status of the negotiations, as well as other mandates arising from the Doha Ministerial Conference. They are available on the ICTSD and IISD websites (www.ictsd.org and www.iisd.ca). Hard copies will be mailed to Bridges subscribers shortly.

This issue of Bridges complements the information in the Briefings with the latest updates in those areas where negotiations have resumed in the WTO.

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Published by the International Centre for Trade and Sustainable Development.

The WTO ended the year 2002 with a sigh rather than a bang. The stocktaking of progress achieved during first of the three years allotted by ministers for concluding the Doha Round revealed an uneven picture consisting of unmet deadlines on key issues, persistent fundamental differences on others, as well as some headway in the less controversial areas. Developing countries' trust in the Round's ability to deliver a meaningful result was particularly shaken by Members' failure to agree by the December 31 deadline on how to proceed with strengthening special and differential treatment provision in existing WTO Agreements or to find a solution to the difficulties faced by countries with insufficient pharmaceutical manufacturing capacity in taking advantage of compulsory licensing.

TRIPs and Public Health

While the Doha Declaration on the TRIPs Agreement and Public Health confirms Members' right to issue compulsory licenses overriding patent rights in certain circumstances, many poor countries and small economies cannot take advantage of that flexibility due to insufficient capacity to manufacture copies of patented medicines. Their only solution is to import such drugs from other countries that have the necessary infrastructure and know-how. This possibility is compromised, however, by TRIPs Article 31(f), which requires production under compulsory licensing to be 'predominantly for the supply of the domestic market of the Member authorising such use'. It was to overcome this limitation that ministers instructed the TRIPs Council to "find an expeditious solution to this problem and to report to the General Council before the end of 2002" (para. 6 of the Declaration on the TRIPs Agreement and Public Health).

Intense discussions in the TRIPs Council broke down just before the General Council's last meeting of the year on 20 December. At that point, all Members except the United States, were ready – if not overly keen – to endorse the latest Chair's draft, which spelled out in considerable detail how the 'expeditious solution' would work. The US ultimately rejected the Chair's text as the scope of diseases that the solution would cover went too far beyond what its pharmaceutical sector was prepared to accept.

While debates in the TRIPs Council since then have shown no signs of a swift conclusion, the General Council agreed on 10 February to give Members another 10 days to break the deadlock (see article on page 3).

Special and Differential Treatment

Fundamental divisions between Members prevented the Committee on Trade and Development (CTD) from presenting 'clear recommendations for action' to the General Council on which special and differential treatment provisions in WTO Agreements should be made mandatory, as well as additional ways in which such provisions could be strengthened, as required by the Decision on Implementation-related Issues and Concerns adopted by ministers in Doha.

The Chair of the CTD negotiations made a short statement to the General Council's 20 December session explaining why the Committee was not in a position to submit a report. Ambassador Ransford Smith (Jamaica) noted that he had identified 22 Agreement-specific proposals on which