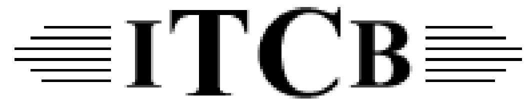

The Complications and Opportunities of U.S. Legislative Accomplishments on Trade

Presentation to the International Textiles and Clothing Bureau
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It has been a big year for trade legislation in the United States, after many years in which moving trade legislation through the U.S. Congress proved to be too difficult a task. But while the U.S. has enacted some significant new trade provisions, some of which we have hailed, not all of it is good. Further, a substantial portion may not pass muster here in Geneva, before the WTO. At the very least, these accomplishments open the door to some negotiations toward increased liberalization where there has thus far been total resistance by the United States. At worst, the enactment of similar provisions could provoke even greater controversy.

I am going to focus my remarks today on two particular new laws in the United States. One USA-ITA worked hard to bring about, the Trade and Development Act of 2000, and one that caught us all by surprise and may be difficult to undo, the Continued Dumping and Subsidy Offset Act, which is better known as the Byrd Amendment. Ironically, the Trade and Development Act is arguably more vulnerable to attack under WTO rules than the Byrd Amendment, even though the latter received far less scrutiny before its enactment. On the other hand, the Trade and Development Act offers more opportunity for diplomatic trade-offs.

Trade and Development Act

Titles I and II of the Trade and Development Act of 2000 provide enhanced benefits for Sub-Saharan Africa and the Caribbean Basin countries.

I won't spend time detailing all the provisions. Briefly, under this law, duty-free and quota-free access will be available for apparel products (and textile luggage in the case of qualifying CBI countries) which have been either cut and assembled or only assembled in a participating beneficiary country in sub-Saharan Africa or in the Caribbean Basin, from fabric formed in the U.S. from yarns spun in the U.S.

For both the CBI and Africa, there is also duty-free, quota-free access for apparel made from certain fabrics in short supply in the United States and certified handmade and

folklore articles. The CBI also is provided with tariff rate quotas for certain apparel made in the region from regionally made fabrics from U.S. yarn.

For Africa, there will also be duty-free access for some sweaters knit to shape from cashmere or fine merino wool of any origin and duty-free, quota-free access for specified quantities of apparel made from regional or, for certain African countries, third-country, yarns and fabrics.

The law also includes the extension of GSP eligibility to products previously excluded from this program by the U.S. for products of designated Sub-Saharan African countries. For the CBI, these products now have duty treatment comparable to the more favorable rates under the NAFTA.

In addition, new conditionalities on benefits have been inserted in this new law. For the African countries to be designated as eligible for benefits under AGOA, they each must meet the criteria for designation as a GSP beneficiary plus new criteria, such as progress toward establishing a market-based system that respects private property rights, the rule of law and elimination of barriers to U.S. trade and investment, and combating corruption.

To designate a Caribbean Basin country as eligible for benefits under Title II of Trade and Development Act of 2000, the President must certify that the country meets all the criteria in the Caribbean Basin Economic Recovery Act of 1983, will undertake WTO obligations on or ahead of schedule, and will participate in the Free Trade Area of the Americas negotiations. The President must also state the extent to which the country provides TRIPS-consistent intellectual property rights protection, provides internationally recognized worker rights, meets counter-narcotics certification criteria, has taken steps to become a party to the Inter-American Convention Against Corruption, applies transparent and non-discriminatory government procurement procedures, and contributes to international fora on transparency in government procurement.

While both the pre-existing CBI program and the U.S. GSP program have been the subject of GATT waivers, there are a number of aspects of the new law's provisions that do not fit within these waivers. I can think of at least three: Articles I, III, and XIII.

The CBI and Africa benefits are a discriminatory tariff measure inconsistent with Article I of the GATT. The GATT's "Enabling Clause" provides essentially a permanent waiver for tariff preferences inconsistent with GATT Article I (the MFN clause for tariffs), but only for *generalized* and *non-reciprocal* schemes, not for schemes that select only some developing countries. Here, the tariff preference with respect to these products is extended only to some developing countries and not to all developing countries.

If the new law contained only duty benefits, a simple waiver of Article I would provide sufficient legal cover. When the United States originally provided duty-free treatment to the products of Caribbean Basin countries in the 1983 Caribbean Basin Initiative legislation, the United States sought a GATT waiver of Article I because the

geographically-limited CBI preferences were not legally covered by the Enabling Clause. During the GATT examination of the proposed CBI waiver, questions were raised concerning the *quid pro quo* implied by the criteria for designation as a CBI beneficiary country, and similar questions could be raised again, but with the strong support of the beneficiary countries, the U.S. was successful in gaining a waiver of Article I in 1984.

However, the quota-free provisions and the tariff-rate quotas involve discrimination under Article XIII, which states that:

> No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party . . . unless the importation of the like product of all third countries . . . is similarly prohibited or restricted.

The United States will therefore need to request a waiver of Article XIII for the discriminatory quota-free access for African and CBI products.

I also have to note that the special access under the Trade and Development Act of 2000 provides duty-free and quota-free import access only if the goods imported have some level of U.S. content. This could be viewed as a national treatment violation under GATT Article III:4. In fact, the duty-free access could be viewed as a prohibited export subsidy and/or domestic content subsidy under Article 3.1 of the SCM Agreement. The remission of duties is a "financial contribution" in the form of revenue forgone, the duty remission confers a benefit on the U.S. yarn and textile industries whose goods are purchased, and this benefit is conditional on export, because in order to receive the benefit, the U.S. textiles must be exported to the CBI or Africa. It is also conditional on U.S. content in the imported goods. (Quota-free access is not a "subsidy" under SCM Article 1 because it involves no "financial contribution by a government.")

However, the same point could be made about *any* re-import program. Still, re-import programs have been an unchallenged fact for many years. Indeed, Article 6.6 of the Multi-Fiber Agreement and Article 6.6(d) of the WTO Agreement on Textiles and Clothing ("ATC") both explicitly recognize the existence of re-import programs and call for more favorable treatment for re-imports.

Re-import programs such as HS 9802 have never been challenged under the GATT or the WTO as such. Re-import programs generally are in a legal grey zone under the WTO Agreement. They could be viewed as simply re-imports of domestic products, or as an export incentive for the inputs assembled abroad, or as a bonus for domestic content. However, if this aspect of the new law can be challenged, so can other outward processing programs.

There is little question that the tariff and quota benefits require a waiver from the WTO. The Clinton Administration has stated that it intends to obtain a waiver for both the African and Caribbean Basin access provisions of the Trade and Development Act of 2000. However, some seven months after enactment, all indications are that there has

been no concrete thought about how a waiver will be framed or what WTO provisions would need to be waived.

When a WTO Member seeks a waiver, it confirms for other Members that a measure (proposed or in effect) is not consistent with its WTO obligations. For that reason, the United States may not seek a waiver from all the potentially relevant WTO provisions with respect to the Trade and Development Act of 2000. Obviously, the U.S. recognizes that it might be pressed to "pay" for its waiver in the form of additional trade concessions. Alternatively, if the U.S. seeks but does not obtain a waiver, then it will be in a weaker position than when it had started. It will have conceded certain legal inconsistencies and left itself without any meaningful legal protection from challenge.

Nevertheless, experience has shown that where waivers provide benefits to developing countries, the beneficiaries are willing to actively support a WTO waiver. In this instance in particular, where countries that have been left out are looking at how to get in, the discussions in these waivers arguably provide an opening we have not had since the ATC went into effect. Particularly with the waiver approval process generally relying upon consensus, there is much room for negotiation and accommodation on the way to a deal.

Not only does Bangladesh, as a least developed country, want benefits comparable to those provided to the least developed African countries, many other countries are looking for flexibility with respect to their merchandise under quota. The U.S. has thus far consistently argued that it cannot provide liberalization beyond that already specifically established, and until now, the exporting countries have been limited in their leverage to counter this argument. Especially in light of the preparations for the next Ministerial Conference in mid-2001, this new opening to provide a new U.S. administration with a basis for liberalization is significant and one that we hope to capitalize upon.

The Byrd Amendment

Let me next address the Byrd Amendment. We have long worried that antidumping and countervailing duty measures will replace the comprehensive quota system after its elimination on January 1, 2005. Now this new law is heightening that concern, by providing that any antidumping or countervailing duties collected may be disbursed to the industries and companies that initiated the measures.

The Byrd Amendment was enacted into law in late October, 2000, after being inserted into a House-Senate conference agreement on the Agriculture Appropriations Act, legislation that was essential to ensure funding of the Department of Agriculture and several other government offices for fiscal year 2001, which began October 1, 2000. Under congressional rules, non-germane matters -- such as changes in international trade rules -- are not supposed to be included in appropriations bills. But, there are exceptions sometimes, especially when a powerful and experienced Member of Congress is involved, when it is an election year -- especially, apparently, when it is a Presidential

election year -- and when time is running out, with federal agencies operating through temporary "continuing resolutions" and Members are in a rush to get home.

In this case, Senator Robert C. Byrd, a seven-term Democrat from West Virginia -- steel country -- and renown as a parliamentary procedure expert was involved. The House of Representatives and the Senate had each passed appropriations measures covering the agriculture agencies, but their versions varied, requiring the two bodies to conduct a conference to reach agreement on a single version. During the conference, Sen. Byrd inserted in the legislation language that had originally been introduced in both houses at the very beginning of the 106th Congress (in early 1999) as the Continued Dumping and Subsidy Offset Act, S. 61 in the Senate and H.R. 842 in the House. The list of sponsors in each body was considerable, including 27 senators and 69 congressmen, whose districts and states included steel producers, textile mills, and agricultural interests, all industries that face stiff import competition.

But for almost two years, S. 61 and H.R. 842 had never been acted upon. The bills were the subject of no hearings and no debates. The most likely reason is that the chairmen of the committees with jurisdiction over trade matters -- House Ways and Mean Chairman Bill Archer of Texas and Senate Finance Chairman William Roth of Delaware -- were not supportive and most members of their committees were similarly not inclined to move the measure.

Specifically, the Continued Dumping and Subsidy Offset Act, a/k/a the Byrd Amendment, provides:

- Whenever there is an antidumping or countervailing duty order in place, requiring the Customs Service to collect such duties, the Commissioner of Customs must deposit those duties into a special account rather than merely depositing them into the General Treasury.
- The duties in the special account may then be distributed to "affected domestic producers." These are defined as the manufacturers, producers, farmers, ranchers or worker representatives who were petitioners or interested parties who supported the antidumping or countervailing duty petition that led to the imposition of an order.
- The special account monies may be distributed only for qualified expenditures. These are defined as expenditures on manufacturing facilities, equipment, research and development, personnel training, acquisition of technology, health care and pension benefits, environmental equipment, training or technology, raw material and input costs, and working capital.
- The Customs Service must publish a Federal Register notice identifying the domestic producers eligible to receive the collected duties.
- The identified producers must present a certification to Customs asserting that they are eligible for and desire to receive a portion of the distribution.
- The distribution of the duties is to be based upon each producer's share of total qualifying expenditures.
- The duties collected each fiscal year be distributed 60 days after the first day of the following fiscal year. Federal fiscal years begin each October first.

Once Byrd inserted his amendment in the conference agreement, the dare was on for Members to raise a point of order when the agreement came to the floor for consideration. Doing so would have forced the conferees to return to the negotiating table to work out a new deal. Labor unions and a number of industry interests lobbied hard to ensure that the provision would not be dropped. And with so many Members having signed on as co-sponsors, the presence of this one questionable provision was apparently not enough to compel Members to reject the agreement. Both houses overwhelmingly approved the agreement.

On October 28, a little more than a week before the Presidential election, President Clinton signed the agricultural appropriations measure into law. He did so even though the Administration said it viewed the Byrd Amendment as unnecessary and expressed concern about its "administrative feasibility and consistency with [U.S.] trade policy objectives, including the potential for trade partners to adopt similar mechanisms." In his message to the Congress, the President indicated that he believed the Byrd Amendment should be repealed in the next Congress. Specifically, Clinton stated:

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

Some members of the business community mounted an attempt to repeal the measure in the closing days of the 106th Congress, but they faced an uphill battle. Members were in no mood to take on such a controversial issue, especially in a lame duck session after the elections. Prospects for repeal in the 107th Congress may not be much better, with House Republicans holding only a slim majority and the Senate dealing with an unusual 50-50 split in party affiliations. Many members are already thinking about the tough mid-term elections that will take place in 2002, which could provide Democrats with their first opportunity in years to control at least one and possibly both houses of Congress.

The European Union and Japan have already denounced the U.S. over the measure and it is apparent that a number of other countries are prepared to join in the effort through a WTO challenge, including NAFTA partner Canada, with whom the U.S. already has a number of dumping disputes.

The argument is that the Byrd Amendment violates WTO rules by providing a remedy not contemplated, in violation of Article 18.1 of the Antidumping (AD) Agreement. It is essentially a second layer of protection that actually serves as a subsidy to the domestic industry. In that regard, the payment of collected dumping and countervailing duties to members of the affected domestic industry would clearly constitute a subsidy within the meaning of the Subsidies and Countervailing Measures (SCM) Agreement.

Antidumping duties and countervailing duties are intended to offset the advantage a foreign producer or importer has when imported goods are sold below their home market price or when government subsidies undermine market factors. In the all-too-familiar terms of international trade practitioners, the duties are supposed to "level the playing field." By turning those duties over to the petitioners or supporters of an antidumping or countervailing duty case, the domestic industry instead gains an advantage, tipping the field toward domestic producers rather than merely leveling it. A measure that makes domestic industries more competitive arguably is not a permissible response under the AD Agreement and the SCM Agreement.

Certainly, the new measure will provide an incentive for domestic industries to initiate new dumping and countervailing duty cases. Even though the law prevents domestic industries from using the money directly for bringing dumping cases and lobbying Congress and the Administration, it frees up money for that purpose. The potential of collecting monies for equipment and research and development will make industries more willing to spend monies on lawyers because they won't be sacrificing investments in their companies. For that reason, it could be argued that the Byrd Amendment violates Article 5.4 of the AD Agreement because it distorts the "standing" determination, by improperly encouraging members of the domestic industry to support a petition. (Article 5.4 states that an investigation shall not be initiated unless the petition is made "by or on behalf of the domestic industry." Article 5.4 contains strict threshold requirements regarding the percentage of the domestic industry that must support a petition before an investigation may be initiated, the "standing" requirement.)

We also worry that while a number of governments contemplate the merits of a WTO challenge, they also are facing increased pressure from their industries to enact similar provisions. That pressure would likely magnify if a WTO dispute settlement panel concluded that the Byrd Amendment does not violate WTO rules.

We are now trying to warn that if in fact other countries simply follow the U.S.'s bad example, the mimicking may sound far less sweet to domestic industries than the original song of the Byrd Amendment. Many countries rely upon investigation and decision-making procedures that differ from U.S. procedures and are less open and transparent than U.S. procedures. And the fact is that almost 80 investigations worldwide have been against U.S. goods. Frustration over the Byrd Amendment could inspire foreign firms to focus more on U.S. companies in the future.

The U.S. Customs Service still has to issue regulations indicating exactly how it will implement the Byrd Amendment, a truly difficult task. Agency officials indicate that draft rules will not be issued before the end of January, even though the new law has an October 2000 effective date and covers all orders in place since January 1, 1999. Customs has lots of questions to deal with, including how to distribute monies when a court appeal is still pending or when annual administrative reviews have not yet been completed by the time the antidumping or subsidy offset is required to be distributed to affected domestic producers. There is also some question regarding the allocation of the

monies, with the Byrd Amendment seeming to favor larger firms over smaller ones, even though that may not reflect which companies are most harmed by unfair trading practices.

As a result, companies hoping to line their nests with the collected antidumping and countervailing duties may have a long wait. In the meanwhile, pending an actual Dispute Settlement Body decision on its WTO compatibility, perhaps this measure too provides some opportunity for negotiation here in Geneva.