

**BY COURIER**

March 29, 2004

Mr. Dean Beyea  
Chief  
Trade in Goods  
Finance Canada  
140 O'Connor Street  
Ottawa, ON K1A 0G5

Dear Mr. Beyea:

**Re: Byrd Amendment: Canadian Proposal to Impose Retaliatory Measures**

**Introduction**

We write in response to Canada's request for authorization to retaliate against the United States for its failure to bring the Byrd Amendment into conformity with its WTO obligations. The Canadian Association of Importers and Exporters (I.E.Canada) is the voice of the Canadian importing community, with more than 700 members representing the entire spectrum of Canadian industry. I.E.Canada shares Canada's goal of eliminating protectionist measures like the Byrd Amendment but believes retaliation to be unhelpful and even counter-productive at this juncture. The harm threatened to Canadian importers, exporters, and consumers by Canada's proposed retaliation is greater than the damage inflicted by the Byrd Amendment itself. Moreover, by pursuing its proposed retaliation, Canada runs two significant risks:

- Canada's proposal is legally vulnerable creating a very real possibility that the WTO will set the permissible level of retaliation at a pointlessly low level, as happened to the EC in the 1916 Dumping Act challenge. Ultimately this harms Canadian exporters and the Canadian importers they rely on, as the low level of retaliation increases U.S. domestic pressures to maintain the Byrd Amendment; and
- Canada's proposal encourages a disturbing trend towards the use of non-tariff barriers by all WTO Members, especially the U.S. As retaliatory measures, they threaten to undermine the WTO's trade liberalization achievements to date. Our importers and exporters will be disproportionately injured by a proliferation of inappropriate non-tariff barriers: our exporters will be harmed by effectively reduced access to target markets and Canadian importers will be doubly hit; first, by the retaliatory measures and second, by reduced demand for Canadian exports that rely on imported inputs.

The net effect of these considerations is that even if the proposed retaliation is authorized, Canada is unlikely to improve its bargaining position in its efforts to secure U.S. compliance with the WTO Byrd Amendment decision. But it will succeed in threatening the livelihood

of many Canadian importers, who rely on both imported inputs and liberal, predictable access to foreign markets, particularly the U.S. market.

### **The Role of Importers and the Harm Retaliation Inflicts**

Importers play a crucial role in Canada's economy, employing thousands of Canadians, contributing millions of dollars in related economic activity, and providing consumers with the products they demand. More importantly, importers play a vital role in Canadian industry, supplying key inputs to products manufactured in Canada for sale domestically and export abroad. Trade agreements like the WTO and NAFTA have facilitated a high degree of economic integration, particularly between Canada and the U.S., which in turn has aided the competitiveness of Canadian industry. In many industries, inputs and intermediate products may cross the border a number of times before becoming a final product. This integration is critical to the success of our members, but its success depends on the confidence our members have that governments will not introduce uncertainty and artificial, trade-restrictive costs except as a last resort.

The impact of retaliatory duties, including dumping duties on Canadian importers resulting from the suspension of an injury test, is immediately apparent. Particularly hard hit are our small- and medium-sized importers who are less well positioned to weather unanticipated artificial cost increases. Our members' supply structures will also be disrupted simply by the listing of products on potential retaliation lists. Similarly, the suspension of injury tests in dumping investigations make all low cost imported inputs potential targets, creating uncertainty for all our members whose success depends on a predictable business environment.

### **Level of Nullification and Impairment Cannot Be Equated With Amount of Subsidy**

Canada's request for authorization proposes that concessions or other obligations to the U.S. will be suspended "in an amount that will be determined every year by the amount of the offset payments made to affected domestic producers in the latest annual distribution under the Continued Dumping and Subsidy Offset Act (CDSOA)." Under Article 22.4 of the DSU, however, the authorized level of suspended concessions or obligations must be set at the level of nullification and impairment actually sustained.

The Appellate Body found the Byrd Amendment to be "a non-permissible specific action against dumping or a subsidy, contrary to Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*." However, it does not follow that the level of nullification or impairment is equivalent to the duties disbursed under the law. The Government's calculation of the permissible level of retaliation treats the matter as though it were a prohibited subsidy that must be withdrawn.<sup>1</sup> The Government did not allege, and the Appellate Body did not find, the CDSOA to be a prohibited study.

Article 22.6 arbitrators have consistently found the level of nullification and impairment to be the complaining Member's estimated incremental trade lost by the failure of the responding

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<sup>1</sup> See for example, *Brazil – Export Financing For Aircraft*, Report of the Arbitrators Under DSU Article 22.6, WT/DS46/ARB, 28 August 2000 at 3.41 – 3.60 where the Panel distinguishes between the level of permitted retaliation for a prohibited subsidy violation as distinct from a nullification and impairment violation, finding that prohibited subsidies justify greater retaliation equal to the amount of the subsidy.

Member to bring the measure into conformity. The Article 22.6 panel in *EC-Hormones*<sup>2</sup> in considering the appropriate retaliation level to authorize for the EC's failure to lift its ban on hormone-treated beef by 13 May 1999<sup>3</sup> characterized the question before them as, "what would the annual prospective Canadian exports of hormone-treated beef and beef products to the EC be if the EC had withdrawn the ban on 13 May 1999?" (emphasis in original).<sup>4</sup>

The proposed retaliation goes further than equating the nullification and impairment with the dumping duties distributed to U.S. complainants. It claims that the harm suffered by Canadian exporters also includes a portion of dumping duties paid by business people in other countries. Are we harmed by 3<sup>rd</sup> party dumping duties regardless of the existence of any Canadian interests in the industry involved? It is difficult to imagine how the Government can claim that Canadian business has been harmed by a non-permissible specific action taken against a 3<sup>rd</sup> country.

The amount of funds disbursed under the Byrd Amendment may equal the quantum of subsidy provided, but the U.S. has not been asked to withdraw the subsidy and, indeed, Canada did not challenge the subsidy. Instead, Canada must undertake the difficult task of demonstrating how much trade to the U.S. has been lost not as a result of the imposition of dumping duties, but by the U.S. refusal to bring its law into conformity.

### **Canada Now Proposes Remedies It Has Consistently Opposed**

Another unhelpful aspect of the Government's proposed retaliation is its proposal to use carousel targeting, pioneered by the U.S. but consistently opposed by other WTO Members, including Canada, as an impermissible attempt to amplify the trade distorting effects of retaliation. Not only do retaliatory duties distort trade, the very threat of such duties forces importers to avoid imports from the targeted country to eliminate the uncertainty of relying on such a source a supply. With a carousel approach, a large list of potential targets is prepared, duties are applied to some of the products on that list, and the dutied products are periodically changed. Carousel retaliation multiplies the impact of retaliation because importers will avoid not only the goods presently subject to retaliatory duties, but also those that are listed but not yet dutied. In this manner, the retaliation's scope is effectively extended well beyond the list of products actually subjected to retaliatory duties at any given point in time as importers avoid the uncertainty of any product on the potential target list.

At first blush, using the U.S.'s tactics against the U.S. seems intuitively appropriate but in our members' view this would be shortsighted. Canada is one of the most trade-dependent countries in the world and, consequently, Canadian importers and exporters have benefited disproportionately from the WTO's trade liberalization achievements. The Byrd Amendment evidences a growing protectionist trend that must be countered. Responding in kind will only accelerate that trend with Canadian importers and exporters bearing the worst of the damage.

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<sup>2</sup> WT/DS48/ARB 12 July, 1999.

<sup>3</sup> The end of the reasonable period for implementation of the recommendations.

<sup>4</sup> *Ibid*, at para 37. Similarly, in *European Communities - Regime For The Importation, Sale And Distribution Of Bananas - Recourse To Arbitration By The European Communities Under Article 22.6 Of The DSU*, WT/DS27/ARB, 9 April 1999 the Panel, at paragraph 6.12 considered that "the benchmark for the calculation of nullification or impairment of US trade flows should be losses in US exports of goods to the European Communities and losses by US service suppliers in services supply in or to the European Communities." (emphasis added)

Our members are particularly vulnerable to such ‘beggar thy neighbour’ policies because of our dependence on U.S. trade; identical protectionist measures adopted by Canada and the U.S. will harm Canadian traders far more than their U.S. counterparts. The proposed retaliation may entrench the Byrd Amendment in the U.S. and encourage the imposition of similar protectionist barriers, further reducing access to the U.S. while our retaliatory measures restrict access into Canada. Unlike the U.S. situation, the smaller size of the Canadian economy means our industry must have access to foreign markets and any changes in that level of access will have a significant impact.

### **As A Major Trading Nation Canada Should Discourage, Not Escalate Non-Tariff Barrier Retaliation**

One of the greatest achievements of the WTO, and the GATT before it, has been the reduction of non-tariff barriers. Non-tariff barriers can distort trade and deny access to markets as effectively as tariffs but are more insidious because they lack transparency and quantifying their precise impact is difficult. Their presence can make market access commitments illusory and frustrate the goal of further trade liberalization by preventing members from knowing the real value of the market access concessions they are offered. The GATT and the WTO sought to compel the tariffication of non-tariff barriers and in large part it has been successful. The transparency and certainty achieved, in turn, encouraged further trade liberalization.

Measures such as the Byrd Amendment and Canada’s proposed retaliation seek to reverse this trend that has been a hallmark of GATT and WTO trade liberalization efforts. The Byrd Amendment creates a non-tariff barrier to advantage U.S. industry not through the imposition of additional duties but by using collected duties to subsidize complainants. By suspending the injury test in dumping investigations and the use of carousel rotation, the proposed retaliation similarly creates non-tariff barriers that are difficult to quantify. The difficulty in measuring the precise impact of these barriers makes them difficult to remedy through WTO mechanisms, thereby undermining trade liberalization achievements to date.

This trend is worrying when observed in other WTO Members, but is startling to witness in Canada’s actions; few countries are as dependent on international trade or have benefited as greatly from trade liberalization as Canada.

### **U.S. Situation**

Canada’s response to the Byrd Amendment must take account of current political sensitivities surrounding the Byrd Amendment. A recently introduced Bill seeks to repeal the Byrd Amendment and U.S. Trade Representative Robert Zoellick has indicated<sup>5</sup> the Administration’s desire to repeal the law saying that the U.S. must not be a “scofflaw” by continuing to ignore adverse WTO rulings. Canada’s leverage with the U.S. will not be improved by the authorization of a large retaliation level, particularly given that the U.S. Administration has repeatedly acknowledged the need to remove the law to protect its own interests in its WTO dealings with other nations. A large retaliation level may in fact

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<sup>5</sup> Comments to the Senate Finance Committee on March 9 and the House Ways & Means Committee on March 11 as reported in *Inside U.S. Trade, Zoellick Urges Congress To Act On WTO Rulings, Including Byrd*, March 12, 2004.

encourage anti-free trade forces to characterize the ruling as evidence that the WTO takes jobs from Americans and compromises U.S. sovereignty. A low level of retaliation would undercut the Administration's efforts to repeal the Byrd Amendment and encourages U.S. domestic pressure to maintain the law.

### **Conclusion**

Canadian importers employ thousands of Canadians and contribute millions of dollars to the Canadian economy. Canada's success in the global marketplace is inextricably linked to the success of our members. Our members' future however is being threatened not only by protectionist measures like the Byrd Amendment, but also by Canada's proposed retaliation.

We urge the Government to do a deep and serious rethink of its WTO strategy by looking to alternative, constructive solutions to effectively secure the Byrd Amendment's repeal without sacrificing our members' livelihood.

Yours truly,

**I.E.Canada**

Per: Robert Armstrong  
President & CEO

cc: Honourable James Scott Peterson,  
Minister for International Trade  
Foreign Affairs and International Trade

Guy Boileau  
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