

REPEAL OF SECTION 801 OF REVENUE ACT OF 1916

FEBRUARY 6, 2004.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1073]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill
(H.R. 1073) to repeal section 801 of the Revenue Act of 1916, hav-
ing considered the same, reports favorably thereon without amend-
ment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 1073 repeals the Antidumping Act of 1916 as enacted in Section 801 of the Revenue Act of 1916.¹ The 1916 Act has never formed the basis of a final ruling on the merits in any Federal case. Nonetheless, on September 26, 2000, the Dispute Settlement Body (“DSB”) of the World Trade Organization (“WTO”) held that the 1916 Act violated United States obligations under the General Agreement on Tariffs and Trade (“GATT”) 1994, the Antidumping Agreement, and the WTO Agreement.

Decisions by the WTO are not self-executing. As a result, on March 4, 2003, Chairman Sensenbrenner and Committee on Ways and Means Chairman Thomas introduced H.R. 1073 to bring the United States into conformity with these obligations by repealing the 1916 Act. H.R. 1073 does not affect legal claims filed after the WTO decision or pending before enactment of the legislation.² In addition, H.R. 1073 does not disturb other existing antidumping remedies contained in U.S. trade law that were not affected by the WTO ruling. As a result, U.S. industry may continue to utilize the comprehensive and internationally-compliant antidumping remedies enacted by the United States.

BACKGROUND AND NEED FOR THE LEGISLATION

HISTORICAL CONTEXT

The 1916 Act was the first U.S. legislation designed to afford relief against foreign exporters who “dumped” their products into the U.S. market.³ In the aftermath of World War I, the 64th Congress passed the Act in anticipation of discriminatory pricing by foreign industries attempting to restore pre-World War I markets through predatory trade practices.⁴ Because the Act intended to place foreign commercial interests in the same position as domestic manufacturers “with reference to unfair competition,” the 1916 Act is regarded as a hybrid between trade and antitrust law.⁵ This antitrust component forms the basis of the Committee’s jurisdiction over H.R. 1073.

Under the 1916 Act, the importation of an article from a foreign country into the United States constitutes unlawful dumping if three elements are present. First, the price in the United States must be “substantially less” than the “actual market price or wholesale price of such articles . . . in the principal markets of the country of their production.”⁶ Second, the international price discrimination must be “common and systematic.”⁷ Third, the price discrimination must occur “with the intent of destroying or injuring

¹Revenue Act of 1916, ch. 463, § 801, 39 Stat. 756, 798–99 (1916) (codified at 15 U.S.C. § 72 (2003)).

²The Committee is aware of one pending case brought under the Antidumping Act of 1916: *Goss International Corp. v. MAN Roland Druckmaschinen Aktiengesellschaft* No. C00–0035 (N.D. Iowa). On December 4, 2003, a jury awarded Goss damages of \$10.5 million from TKS (Tokyo Kikai Seisakusho), a Japanese printing press manufacturer named in the original suit for an alleged violation of the 1916 Act. TKS has filed motions to reverse the jury verdict and alternatively for a new trial.

³*Antidumping and Countervailing Duty Laws*, 3 Int’l Bus. & Law Series (West) at 15–1 (July, 1998).

⁴*Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190, 1219 (E.D. Pa. 1980).

⁵H.R. REP. NO. 64–922 at 9–10 (1916); see also *Antidumping and Countervailing Duty Laws*, *supra* note 3, at 15–1.

⁶15 U.S.C. § 72 (2002).

⁷*Id.*

an industry in the United States, or preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.”⁸ If any person is held to have violated all three elements, the 1916 Act provides for both criminal and civil penalties, including imprisonment of up to 1 year and treble damages.⁹

SUBSEQUENT ANTIDUMPING LEGISLATION

The significance of the 1916 Act was “eclipsed in large part” by subsequent antidumping legislation.¹⁰ Five years after passing the 1916 Act, Congress enacted the more comprehensive Antidumping Act of 1921 which was repealed by the Trade Agreements Act of 1979.¹¹ Under the 1979 Act, Congress adopted a new antidumping law that now serves as the primary statute for U.S. industry to obtain relief from international price discrimination.¹² These antidumping remedies remain unaffected by the September 26, 2000 WTO decision. As a result, U.S. industry may continue to avail itself of the more comprehensive and internationally-compliant antidumping remedies contained in the 1979 Act.

JUDICIAL CONSIDERATION OF THE 1916 ACT

Judicial consideration of the 1916 Act is quite limited for a statute that has been in existence for nearly 88 years. The relative lack of precedent prompted a Pennsylvania district court in 1980 to note that “this opinion [regarding the 1916 Act] and order not only involve an issue which is of first impression, but also involve an Act which despite its venerable age . . . is virtually a statute of first impression.”¹³ U.S. companies aggrieved by predatory dumping have been reluctant to pursue a cause of action based on the 1916 Act since no plaintiff has ever succeeded with such a claim.¹⁴

In contrast to other antidumping remedies, a plaintiff who seeks relief under the 1916 Act must first demonstrate that the defendant had the requisite intent to destroy, injure, prevent, restrain or monopolize the U.S. market when importing the relevant product.¹⁵ The 1916 Act’s requirement of actual intent—instead of actual injury—permits a defendant to claim that “any price differentials are cost-justified or attributable to other reasonable commercial considerations.”¹⁶ In addition, no *prima facie* standards exist which might shift the burden of proof to the defendant upon the establishment of a threshold case.¹⁷ The elevated standard of proof required to obtain judicial relief under the 1916 Act has greatly limited its application in court.

Despite the judicial track record of the 1916 Act, U.S. companies have increasingly pursued causes of action under the 1916 Act in the last twenty years. The most recent and heavily publicized cases involve the U.S. steel industry’s pursuit of antidumping relief dur-

⁸ *Id.*

⁹ *Id.*

¹⁰ *Antidumping and Countervailing Duty Laws*, *supra* note 3, at 15–2.

¹¹ *Id.*

¹² Pub. L. No. 96–39, 93 Stat. 144 (1979).

¹³ *Zenith Radio Corp.*, 494 F. Supp. 1190 at 1243.

¹⁴ Note, *Rethinking the 1916 Antidumping Act*, 110 Harv. L. Rev. 1555, 1556 n. 7 (1997).

¹⁵ *Id.* at 1556.

¹⁶ *Antidumping and Countervailing Duty Laws*, *supra* note 3, at 15–9.

¹⁷ *Id.*

ing the 1998 steel import crisis. Wheeling-Pittsburgh Steel Corporation filed a case in 1998 against nine U.S. subsidiaries of European and Japanese steel companies.¹⁸ The case was never fully adjudicated because WHX Corp., the owner of Wheeling-Pitt, “reached out-of-court settlements with several of the European traders” and withdrew all remaining lawsuits.¹⁹ While the 1916 Antidumping Act has yet to be the basis for a final judicial victory, the settlements with WHX Corp. were steep enough to concern the European Union (EU) and Japan about the future use of the 1916 Act as a “potential form of blackmail.”²⁰

WORLD TRADE ORGANIZATION INVOLVEMENT

Primarily in response to the WHX Corp. settlements, the EU and Japan filed separate WTO complaints alleging that the 1916 Act was inconsistent with provisions in GATT 1994, the Antidumping Agreement of the Uruguay Round, and the WTO Agreement.²¹ Two WTO panels held the 1916 Act inconsistent with international trade obligations and the WTO Appellate Body affirmed their findings in a combined decision on August 28, 2000. The Appellate Body’s recommendations and rulings were subsequently adopted by the Dispute Settlement Board of the WTO on September 26, 2000.²²

The WTO concluded that the 1916 Antidumping Act was inconsistent with: Article VI:1 and Article VI:2 of the GATT 1994; Articles 1, 4, 5.1, 5.2, 5.4, 5.5, 18 and 18.4 of the Antidumping Agreement; and Article XVI:4 of the WTO Agreement. Article VI:1 and Article VI:2 of GATT 1994 require that U.S. antidumping laws provide exclusively for the material injury test set forth under Article VI and allow only the implementation of antidumping duties as a remedy for illegal dumping.²³ The WTO panel concluded that the 1916 Act fails to require actual injury and provides for treble damages and potential imprisonment in violation of international obligations. The WTO panel held that the 1916 Act was substantively inconsistent with both the Antidumping Agreement and GATT 1994, and procedurally defective with respect to the Act’s judicial standing and notice provisions. To the extent that the 1916 Act was found to violate any part of GATT 1994, the United States was held to be in violation of Article XVI:4 of the WTO Agreement.²⁴

At the Dispute Settlement Body meeting of October 23, 2000, the United States Trade Representative (“USTR”) stated that the U.S. intended to implement the DSB’s recommendations and rulings. The U.S. also stated that it required a reasonable amount of time for implementation. An arbitrator determined that a “reasonable time” in this case would be until July 26, 2001. However, the DSB extended the “reasonable period” of time until December 31, 2001,

¹⁸Nancy E. Kelly, *WTO Report Challenges 1916 U.S. Act*, AMERICAN METAL MARKET, Dec. 23, 1999, at 1.

¹⁹*Id.*

²⁰*Steel Importer Settles With Wheeling-Pittsburgh in 1916 Case*, INSIDE US TRADE, Feb. 26, 1999, Vol. 17, No. 8 at 17.

²¹*Id.*

²²*United States—Antidumping Act of 1916*, Report of the Appellate Body, WT/DS136/AB/R (Aug. 28, 2000).

²³*Id.*

²⁴*Id.* Specifically, the Panel held that Article VI.2 of GATT 1994 provides that in order to offset or prevent dumping, a WTO Member may levy on any dumped product an antidumping duty not greater in amount than the margin of dumping involved with that product.

or the end of the first session of the 107th Congress, whichever came first.

During the 107th Congress, House Ways and Means Committee Chairman Thomas introduced H.R. 3557 to repeal the 1916 Act and render it inapplicable to pending and future cases. No further legislative action was taken before the end of the “reasonable time period.” In response to this delay, the EU and Japan requested authorization from the WTO to suspend concessions pursuant to Article 22.2 of the Dispute Settlement Understanding on January 7, 2002. Both parties proposed that the WTO allow them to enact their own legislation mirroring the 1916 Act. Several countries have expressed concern that this retaliatory approach would result in an “arms buildup of protectionist measures.”²⁵ The U.S. objected to the proposal and the DSB again referred the matter to arbitration.

U.S. negotiations with the EU and Japan have led to the suspension of the arbitration process until June 30, 2002. The EU and Japan warned, however, that the arbitration proceeding would reactivate at the request of either party if no substantial progress was made. Since that time, no formal request has been made by either the EU or Japan. However, both the EU and USTR have continued to informally press for action on this measure. In late February of this year, the EU moved closer to retaliating against the United States for not repealing the 1916 Act.²⁶ In congressional testimony on March 5, 2003, USTR Ambassador Zoellick urged Congress to “live up to its obligations under WTO rules” by repealing the 1916 Act.²⁷ On December 18, 2003, the EU Council approved a regulation that bans the recognition and application of decisions taken under the 1916 Act within EU countries. The regulation also allows EU-based companies and citizens to claim damages (with interest) for any penalties associated with its application.²⁸

H.R. 1073— PROSPECTIVE LEGISLATIVE COMPLIANCE

Several factors strongly favor prospective compliance with the WTO’s August 28, 2000 decision. First, WTO decisions are not self-executing. Rather, they require the affirmative assent of Congress. Automatic adherence to WTO decisions undermines the legislative prerogative of Congress and the sovereignty of the United States. Second, the justification for repealing the 1916 Act is to bring the United States into compliance with its present WTO obligations: if WTO compliance does not require retroactive repeal, then conforming legislation should not extend to retroactive repeal. Third, both the Administration and Congress have consistently taken the position that retroactive repeal is not necessary to ensure compliance with our WTO obligations in all cases, particularly those pertaining to U.S. trade remedy laws.

²⁵ *EU, Japan Agree to Give U.S. More Time To Comply With 1916 Act, Copyright Rulings*, DAILY REP. FOR EXEC., Jan. 22, 2002 at A3.

²⁶ Tobias Buch & Guy De Jonquieres, *EU List US Exports for Possible Trade Sanctions*, FIN. TIMES, Feb. 27, 2003 at 11; see also *Lamy Warns Washington on WTO Panels*, EUR. REP., March 12, 2003.

²⁷ *Administration Trade Agenda*, 108th Cong. (2003) (statement of Robert Zoellick, United States Trade Representative).

²⁸ *Aid to European Companies Faced with Complaints from America*, AGENCE EUR., Dec. 18, 2003.

For example, the Joint Report of the U.S. Senate Committee on Finance, Committee on Agriculture, Nutrition, and Forestry, and Committee on Government Affairs which accompanied legislation implementing the Uruguay Round Agreements Act explicitly states that compliance with WTO panels in trade remedy cases applies prospectively only. The Joint Report concludes that prospective application “is consistent with the general principle in the GATT, and in the future WTO, that panel decisions do not have retroactive effect.”²⁹ In addition, Article 19.1 of the WTO Dispute Settlement Understanding states only that “{w}here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that Agreement.”³⁰

HEARINGS

No hearings were held in the Committee on the Judiciary on H.R. 1073.

COMMITTEE CONSIDERATION

On January 21, 2003, the Committee met in open session and ordered favorably reported the bill H.R. 1073 by a voice vote, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of Rule XIII of the Rules of the House of Representatives, the Committee notes that there were no recorded votes during its consideration of H.R. 1073.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of Rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of Rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of Rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to H.R. 1073, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

²⁹ See “Joint Report of the Committee on Finance, Committee on Agriculture, Nutrition and Forestry, and Committee on Governmental Affairs of the United States Senate to accompany the Uruguay Round Agreements Act,” S. 2467, S. Rep. No. 412, 103d Cong., 2d Sess. 225 (1994).

³⁰ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, the Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 5, 2004.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1073, a bill to repeal section 801 of the Revenue Act of 1916.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Annabelle Bartsch, who can be reached at 226-2680.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1073—A bill to repeal section 801 of the Revenue Act of 1916.

H.R. 1073 would repeal section 801 of the Revenue Act of 1916, which prohibits foreign firms from dumping goods in the United States and subjects violators to both civil and criminal penalties. A good is considered to be dumped if a foreign firm sells it for less in the U.S. market than the firm does in its home market. Based on information from the U.S. International Trade Commission, CBO expects that enacting H.R. 1073 would have no effect on Federal revenues or spending. Currently, U.S. industries may seek relief from dumping under legislation enacted subsequent to the 1916 law, so repealing section 801 would affect neither the ability to seek such relief nor the collection of any resulting monetary penalties.

H.R. 1073 contains no private-sector or intergovernmental mandates as defined in the Unfunded Mandates Reform Act, and would impose no costs on State, local, or tribal governments.

This estimate was approved by G. Thomas Woodward, Assistant Director for Tax Analysis, and Robert A. Sunshine, Assistant Director for Budget Analysis. The CBO staff contact for the estimate is Annabelle Bartsch, who may be reached at 226-2680.

PERFORMANCE GOALS AND OBJECTIVES

H.R. 1073 does not authorize funding. Therefore, clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives is inapplicable.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of Rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Repeal of Antidumping Provisions Under the Act of September 8, 1916

This section repeals the Antidumping Act of 1916 (Section 801 of the Act of September 9, 1916) which allows both criminal and civil penalties for persons importing articles into the United States at a price substantially less than actual market price and with the predatory intent to injure U.S. industry.

Section 1(b). Effective Date.

This section states that the repeal of section 801 of the Act of September 9, 1916 shall not affect any legal action commenced before or pending on the date of enactment of this bill.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets):

SECTION 801 OF THE ACT OF SEPTEMBER 8, 1916

CHAP. 463.—AN ACT to increase the revenue, and for other purposes.

[SEC. 801. That it shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported, after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

[Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

[Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

【The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.】

MARKUP TRANSCRIPT
BUSINESS MEETING
WEDNESDAY, JANUARY 28, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

Pursuant to notice, I now call up the bill H.R. 1073, “to repeal Section 801 of the Revenue Act of 1916” for purposes of markup, and move its favorable recommendation to the House. Without objection, the bill will be considered as read and open for amendment at any point.

[The bill, H.R. 1073, follows:]

108TH CONGRESS
1ST SESSION

H. R. 1073

To repeal section 801 of the Revenue Act of 1916.

IN THE HOUSE OF REPRESENTATIVES

MARCH 4, 2003

Mr. SENSENBRENNER (for himself and Mr. THOMAS) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To repeal section 801 of the Revenue Act of 1916.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. REPEAL OF ANTIDUMPING PROVISION OF REV-**
4 **ENUE ACT OF 1916.**

5 (a) REPEAL.—Section 801 of the Act entitled “An
6 Act to increase the revenue, and for other purposes”, ap-
7 proved September 8, 1916 (15 U.S.C. 72), is repealed.

8 (b) EFFECT OF REPEAL.—The repeal made by sub-
9 section (a) shall not affect any action under section 801
10 of the Act referred to in subsection (a) that was com-

11

2

1 menced before the date of the enactment of this Act and

2 is pending on such date.

○

Chairman SENSENBRENNER. I have a lengthy statement which I will summarize; and without objection, all Members will be able to include opening statements in the record.

This bill repeals a provision of the Revenue Act that was declared by the World Trade Organization appellate body to be in violation of United States international trade agreements. It is important to note that this law, which was passed in 1916, has never been utilized to obtain a final judgment on the merits in any Federal court. I will stress that this legislation, in no way, affects the ability of American industry to seek anti-dumping relief under anti-dumping laws contained in more comprehensive anti-dumping legislation, such as the Trade Act of 1979. So it does allow U.S. litigants to continue to utilize their existing anti-dumping remedies. The bill also is only applicable prospectively, so anyone that does have a cause of action under the Revenue Act of 1916 as of the date of enactment of this bill will continue to have that cause of action preserved.

I yield back the balance of my time, and recognize the gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman, and my colleagues.

This is a measure which we have not had the benefit of a hearing; it has not been through any Subcommittee, nor has the full Committee ever discussed it before now, and so you would have to assume that this is a very trivial matter before us that does not warrant the regular process. But I view our responsibility to more carefully examine the measures that lie within our jurisdiction.

Now, the measure we are talking about is a law that has been in existence since 1916 and has had numerous judicial interpretations. And so if what we are doing here today is considering its repeal, it would seem that there at least ought to be a hearing to give some of us who may not hold themselves out as experts on this subject the ability to understand what it is we are doing and why. So, I would hope that—well, maybe there is some reason that we have to operate so expeditiously. If there is, I have not heard that, either. Well, we are just starting the hearing. Maybe it will come out in a little while. So somewhere along the line I am going to—since we are trying to get to the floor, we ought to figure out how and what, under what circumstances we can take this matter more thoroughly under consideration. Our schedules aren't awfully heavy in January or February, so I guess the bottom line is, what is the rush?

Now, the repeal of this law. Question: Will it have a detrimental effect on American jobs, or will it have a beneficial effect upon American jobs? If anybody can help me with that. I just raise it as a question, I have not researched this, so I would be happy to yield to anybody for some enlightenment about that. Jobs happens to be one of the big issues in the year 2004 in which we have national elections, because the economy is the second most important issue, according to the polls examining what the American people think is important, and how they will be judging those of us and candidates in other races.

So I ask the question, is it helpful or hurtful? What we are purporting to do here is to empower companies to bring private anti-trust suits against foreign companies that import their goods into our country at below-market prices. And, as a matter of fact, the

law has been used on several occasions recently that have resulted in large settlements and judgments favoring the United States and our workers. Now, if we take away the ability to bring these actions, what does that signal?

Chairman SENSENBRENNER. The gentleman's time has expired. Without objection, all Members may insert opening statements into the record. At this point, are there amendments? If there are no amendments, a reporting quorum is not present. Without objection, the previous question is ordered on the motion to report the bill, and a vote will be taken once a reporting quorum is present.

* * * * *

A reporting quorum being present, the question now is on the motion to report the bill H.R. 1073 favorably. All in favor will say aye. Opposed no. The ayes appear to have it. The ayes have it. And the motion to report favorably is agreed to. Without objection, the Chairman is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes, that all Members will be given 2 days as provided by the rules in which to submit additional dissenting, supplemental, or minority views.

DISSENTING VIEWS

We cannot support this effort to repeal the 1916 Antidumping Act,¹ which empowers companies to bring private antitrust suits against foreign companies that import their goods at below-market prices. We object to repealing a law that has been on the books for over 85 years in the absence of a single hearing—either legislative or oversight. We object to repealing a law that protects U.S. jobs and trade at a time when job growth continues to lag and our trade deficit expands. We object to acting as a rubber stamp for the World Trade Organization, setting bad precedent that sends a signal to other nations that they can harass the United States with frivolous cases. And we object to the hypocrisy of hastily repealing this law when there are other laws on our books that have been held in violation of our WTO obligations that we have not tried to repeal.

I. BACKGROUND

H.R. 1073 repeals the Antidumping Act of 1916 as enacted in Section 801 of the Act of 1916. The Antidumping Act allows both criminal and civil penalties for persons importing articles into the United States at a price substantially less than actual market price and with the predatory intent to injure American industry. On September 26, 2000, the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) held that the Antidumping Act of 1916 violated United States obligations under the General Agreement on Tariffs and Trade (GATT) 1994, the Antidumping Agreement, and the WTO Agreement.

The 1916 Antidumping Act was the first piece of U.S. legislation designed to afford relief against foreign exporters who dumped their products into the U.S. market.² In the aftermath of World War I, Congress passed the Act in anticipation of discriminatory pricing by foreign industries attempting to restore pre-WWI markets.³ The Act intended to place foreign competitors in the same position as domestic manufacturers “with reference to unfair competition.”⁴ In this regard, the Act is interpreted as a hybrid between trade and antitrust law.⁵

Under the Antidumping Act of 1916, the importation of an article from a foreign country into the United States constitutes unlawful dumping if three elements are met. First, the price in the United States must be “substantially less” than the “actual market price or wholesale price of such articles . . . in the principal markets of

¹Revenue Act of 1916, ch. 463, § 801, 39 Stat. 756, 798–99 (1916) (codified at 15 U.S.C. § 72 (2002)).

²*Antidumping and Countervailing Duty Laws*, 3 Int'l Bus. & Law Series (West) at 15–1 (July, 1998).

³*Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190, 1219 (E.D. Pa. 1980).

⁴H.R. Rep. No. 64–922 at 9–10 (1916).

⁵*Antidumping and Countervailing Duty Laws*, *supra* note 3, at 15–1.

the country of their production.”⁶ Second, the international price discrimination must be “common and systematic.”⁷ Third, the price discrimination must occur with the intent of destroying, injuring, preventing, restraining, or monopolizing “any part of trade and commerce in such articles in the United States.”⁸ If any person is held to have violated all three elements, the 1916 Antidumping Act allows for the implementation of both criminal and civil penalties, including imprisonment and treble damages.⁹

Five years after passage of the original legislation, Congress passed the more comprehensive Antidumping Act of 1921, which later was repealed by the Trade Agreements Act of 1979.¹⁰ Under the 1979 Act, Congress adopted a new antidumping law, 19 U.S.C. § 1673, that now serves as the primary statute under which U.S. industry obtains relief from international price discrimination. The Act used today does not contain a “predatory intent” standard; if it is shown that goods are sold below normal value and there is injury to an industry, penalty duties are assessed at the border. However, unlike the 1916 Act, there is no private right of action. Rather, the entire domestic industry that claims to be harmed by the dumping files a petition with the International Trade Commission and the Commerce Department. If both entities reach an affirmative decision that dumping has occurred, an order is issued for the penalties.

The major obstacle for success under the 1916 Act has been the burden of proving the injurious intent of the defendant importer.¹¹ Plaintiffs have historically had a difficult time establishing that the defendants had the requisite intent to destroy, injure, prevent, restrain or monopolize the U.S. market with regards to the imported product. A requirement of actual intent—instead of actual injury—allows an importer the defense that “any price differentials are cost justified or attributable to other reasonable commercial considerations.”¹² In addition, no *prima facie* standards exist which might shift the burden of proof to the defendant upon the establishment of a threshold case.¹³

Despite its judicial track record, U.S. companies have increasingly pursued causes of action under the 1916 Act in the last twenty years. The most recent and heavily publicized cases involve the U.S. steel industry’s pursuit of antidumping relief during the 1998 steel import crisis. Wheeling-Pittsburgh Steel Corporation filed a case in 1998 against nine U.S. subsidiaries of European and Japanese steel companies.¹⁴ The case was never fully adjudicated because WHX Corp., the owner of Wheeling-Pitt, “reached out-of-court settlements with several of the European traders” and withdrew all remaining lawsuits.¹⁵

⁶ 15 U.S.C. § 72 (2002).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 1556.

¹² *Antidumping and Countervailing Duty Laws*, *supra* note 2, at 15–9.

¹³ *Id.*

¹⁴ Nancy E. Kelly, *WTO Report Challenges 1916 U.S. Act*, *American Metal Market*, Dec. 23, 1999, at 1.

¹⁵ *Id.*

Another case worth noting was brought by AK Steel Corp. in the Southern District of Ohio in 2001. In that suit, AK Steel alleged that Usinor, a French company, illegally interfered with AK Steel's bare and hot dip aluminum coated stainless steel business, which produces products for automotive exhaust systems.¹⁶ While this case was pending in the district court, AK Steel survived a motion to dismiss filed by the defendant, thus indicating the court's determination that AK Steel had pleaded a cause of action under the 1916 Act, including the element of intent. However, that suit settled recently.

The only 1916 Act case now pending is an Iowa case in which a jury found \$10.5 million in actual damages against a Japanese company on December 3, 2003 (since the 1916 Act calls for treble damages, this means an award of \$31.5 million). The company has filed post-trial motions, and is likely to appeal. This is the first jury award or criminal penalty in the 88-year history of the Act.

Primarily in response to the WHX Corp. settlements, the EC and Japan filed separate WTO complaints about the 1916 antidumping law, alleging that it is inconsistent with provisions in GATT 1994, the Antidumping Agreement of the Uruguay Round, and the WTO Agreement.¹⁷ Two WTO panels considered the allegations and the WTO Appellate Body affirmed their findings against the 1916 antidumping law in a combined decision on August 28, 2000. The Appellate Body's recommendations and rulings were subsequently adopted by the Dispute Settlement Board of the WTO on September 26, 2000.

In response, on January 7, 2002, the EC and Japan requested authorization from the WTO to suspend concessions pursuant to Article 22.2 of the Dispute Settlement Understanding. Both parties proposed that the WTO allow them to enact their own legislation mirroring the 1916 Antidumping statute. Several countries expressed their misgivings with the approach taken by the EC and Japan, fearful that such a reaction may result in an "arms buildup of protectionist measures."¹⁸ The U.S. objected to the proposal and DSB referred the matter to arbitration.

On March 4, 2003, Chairman Sensenbrenner introduced H.R. 1073. Senator Grassley introduced a companion bill on the Senate side, S. 1155.¹⁹ The three parties agreed to suspend the arbitration in light of this legislation, to allow the United States to continue to work for the passage of a bill repealing the Act.

The EC (but not Japan) reactivated the arbitration on September 19, 2003. The arbitrator is scheduled to issue its award early in 2004. Assuming the arbitrator concludes that the EC has suffered harm, the EC could retaliate in a manner consistent with the Iowa case jury award once the DSB meets to authorize the retaliation.

¹⁶ Press Release, *AK Steel Files Antitrust Suit Against French Steel Company Usinor, S.A.*, Oct. 19, 2001.

¹⁷ *Id.*

¹⁸ *EU, Japan Agree to Give U.S. More Time To Comply With 1916 Act, Copyright Rulings*, Daily Report for Executives, Jan. 22, 2002 at A3.

¹⁹ S. 1080, introduced in the Senate by Senators Hatch and Leahy, is retroactive. Retroactive repeal is not required by WTO practice or precedent, and it has been argued that it would set a bad precedent for other WTO disputes (like the Foreign Sales Corporation tax dispute, and the Continued Dumping and Subsidy Offset/Byrd Amendment dispute). Apparently, Senators Hatch and Leahy introduced the retroactive bill at the request of the Bush Administration.

On December 15, 2003, the EC Council approved a “blocking” regulation to prevent enforcement of 1916 Act judgments in EC courts. The regulation also provides EC companies with a right to recover any costs incurred in 1916 Act litigation. Conceivably, EC defendants in past 1916 Act litigation, such as the Wisconsin and Ohio cases, could recover attorneys’ fees.

II. PREVIOUS LEGISLATIVE EFFORTS TO AMEND THE 1916 ACT

As recently as 1993 there were several major efforts to strengthen the 1916 Act. This flurry of legislative activity resulted from the fact that recent case law made it somewhat difficult to establish a predatory pricing claim under traditional antitrust law. Although the Supreme Court has not laid down specific guidelines on the appropriate cost standard for determining predatory conduct, in 1975 Professors Areeda and Turner proposed that only prices below “reasonably anticipated marginal cost” be deemed predatory²⁰ (because marginal price is difficult to measure, average variable cost is often used as its surrogate). In its 1992 report on antitrust/trade legislation, the ABA Antitrust Section asserted that most circuits have adopted some close variant of the Areeda & Turner test.

Senators Metzenbaum and Grassley introduced S. 99, the “International Fair Competition Act of 1993” on January 21, 1993.²¹ S. 99 would have amended the 1916 Act by codifying the average total cost pricing standard for establishing a predatory pricing antitrust claim against a foreign firm enjoying a protected market. S. 99 was an effort to overcome perceived deficiencies with regard to antitrust actions brought against foreign firms engaged in anticompetitive below-cost pricing. The Senate Judiciary Committee Report on predecessor legislation, S. 2610, noted that when the 1916 Act was adopted, it was intended to serve as a foreign counterpart to the price discrimination prohibitions in the Clayton Act. The report went on to note that the 1916 Act has not proved to be a viable response to unfair foreign competition (in large part because of difficulties in proving intent), nor have the other antitrust laws or the trade laws. The report asserted that deficiencies in our antitrust laws help account for the demise of our domestic electronics industry (as illustrated in the Supreme Court’s *Matsushita*²² decision), and noted that a number of other key U.S. industries are currently exposed to unfair foreign competition. In his testimony before the Subcommittee in a 1993 hearing on international competition in the steel industry, Lloyd Constantine, a renowned antitrust expert, indicated that he had drafted an initial version of S. 99. He argued that the bill’s special antitrust standards were warranted because of unique mechanisms for foreign firms engaging in predatory pricing and price discrimination practices through the use of a closed foreign home market and an open U.S. market.

²⁰ Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975).

²¹ S. 99 was cosponsored by Senators Grassley, Simon and Brown, and was identical to S. 2610, compromise legislation approved by the Senate Judiciary Committee by voice vote on July 30, 1992, and reported September 16, 1992. A similar bill, H.R. 5348, was introduced by Mr. Bryant (and cosponsored by Messrs Fish, Mazzoli, Synar and Glickman) in the 102nd Congress on June 9, 1992.

²² *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Senator Specter introduced S. 332 on February 4, 1993.²³ The legislation would have amended the 1916 Act to create a civil action patterned on the antidumping law. The bill would have permitted injunctive relief (or, in the event such relief is inadequate, a single damage action) against any person who imports or sells within the U.S. an article manufactured or produced in a foreign country where: (i) the article is imported or sold at less than the foreign market value or constructed value of the article (as such terms are defined in the antidumping laws); and (ii) the importation or sale (A) causes or threatens material injury to industry or labor in the U.S. or (B) prevents the establishment or modernization of any industry in the U.S.

S. 332 would also have eased a number of other potential obstacles to litigation under the 1916 Act including, *inter alia* (i) incorporating the 1916 Act within the Clayton Act definition of the anti-trust laws,²⁴ (ii) allowing the plaintiff to use final determinations by the Commerce Department and the ITC in dumping proceedings as *prima facie* evidence of below cost pricing and material injury, (iii) requiring foreign exporters to appoint a U.S. agent for service of process purposes, and (iv) authorizing the court to enjoin imports until the defendant complies with a discovery request. The bill also would have amended the 1916 Act to prohibit the importation of subsidized foreign goods and amended Title 28 of the U.S. Code to create a private right of action for customs fraud.

Finally, legislation introduced by Senator Danforth in 1980²⁵ would have amended the 1916 Act to shift the burden of proof to the defendant once the plaintiff has made a *prima facie* showing that goods are being sold in the U.S. at less than the foreign market value. (A similar statutory shifting of burden of proof is employed for price discrimination actions under Section 2 of the Clayton Act, and was utilized in the Specter bill.)

III. ARGUMENTS

We oppose this legislation for several reasons.

First, we object to repealing the law in the absence of a single legislative hearing. It is our duty and responsibility as legislators to carefully examine and consider the laws within our jurisdiction. Here we have a law that has been on the books since 1916, and has been subject to various legal and judicial interpretations. Surely the Committee on the Judiciary owes it to the American people to do better than to repeal a law under such rushed and expedited conditions.

Second, repeal of this law could well have a detrimental effect on U.S. jobs. The Act empowers companies to bring private antitrust suits against foreign companies that import their goods at below-market prices. As a matter of fact, as noted above, the law has been used on several occasions recently that have resulted in significant settlements and legal judgments favoring U.S. companies

²³ S. 332 was similar to S. 2508, legislation that was favorably reported by the Senate Judiciary Committee by voice vote on August 12, 1992.

²⁴ While cross-referencing the 1916 Act in the Clayton Act may have clarified the applicability of certain aspects of the antitrust laws (such as the availability of injunctive relief and the ability to use governmental judgments and decrees as *prima facie* evidence in private suits), it would also have subjected the 1916 Act to certain defense-oriented antitrust jurisprudence.

²⁵ S. 223, 96th Cong., 2d Sess.

and their workers. If we take away the ability to bring these actions, this sends the signal that foreign companies are free to dump their products without facing the risk of a private lawsuit.

Third, acting in haste to repeal this Act sets a very poor precedent that we are willing to act as a rubber stamp for the World Trade Organization. The mere fact that the WTO says the U.S. is in violation of our WTO obligations does not mean that Congress should ignore its duty to gather the facts and do an analysis of the costs and benefits of having this statute on our books.

It is important to note that there are a group of cases involving statutory provisions that not only fall well within any reasonable interpretation of our WTO obligations but, equally important, have no demonstrable negative trade effects on our trade partners. The most recent spate of cases—including challenges to the 1916 Act and the Byrd Amendment,²⁶ as well as Canada's challenge to the rules for refunding antidumping and countervailing duties—would seem to be an abuse of the dispute settlement system, and may well further weaken support for the WTO. In our view, our allies have little business dragging the United States through time-consuming proceedings to pursue claims about measures that have little if any effect on actual trade. The dispute settlement system exists to help resolve actual commercial problems. The United States limits its use of the DS system on this basis, but other Members do not. The main point is that as a matter of principle, the United States should never simply bow to a decision from Geneva that the very existence of one of our statutes constitutes a breach, without the statute having been applied and applied in violation of America's commitments.

At a minimum, rather than simply agreeing to unilaterally repeal the 1916 Act, we should attempt to receive some offsetting benefit out of it. For example, Senators Baucus and Craig have introduced a bill that would deduct the cost of countervailing duties in dumping cases (S. 219). Why are we not looking at some kind of pro-jobs concession in exchange for considering repeal of the 1916 Act?

Finally, repealing the 1916 Act demonstrates the Administration's hypocrisy with respect to the U.S. trade policy. In addition to the 1916 Act, the WTO has ruled against the U.S. on two other U.S. statutes. In one, the European Commission, on behalf of the Government of Ireland, challenged two related sections of a U.S. copyright provision as a violation of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"). The WTO found that one of the provisions, 17 U.S.C. § 110(5)(B), violates the agreement by allowing certain businesses to play music without compensating songwriters. Section 110(5)(B) says it is not infringement of a copyright on a musical work for retail establishments of a certain size having a certain number of speakers or TV's to rebroadcast non-dramatic radio music unless they charge for it or rebroadcast to a public audience. The end result of the law is that songwriters do not get paid for music they write that is played in

²⁶The Byrd Amendment is a two-year-old trade law, officially known as the Continued Dumping and Subsidy Offset Act of 2000. It directs U.S. Customs to distribute duties collected as a result of antidumping and countervailing duty orders to domestic producers found to be injured by foreign dumping and subsidies.

these businesses. The WTO ruled against the U.S. government on section 110(5)(B) on July 27, 2000. For approximately three years, the WTO and the European Commission have urged the United States to repeal the law but have been unsuccessful.²⁷

The other involves a trademark dispute. In *Havana Club Holdings, S.A. v. Galleon, S.A.*,²⁸ the Second Circuit held that a lawsuit could not go forth because the United States embargo against Cuba prevents marks appropriated by the Cuban government from being recognized.²⁹ The court based its decision on what is commonly known as Section 211 of the 1998 appropriations bill, passed at the behest of then-Senator Connie Mack (R-FL), which states that U.S. courts cannot enforce rights pertaining to appropriated goods from Cuba. The WTO has held that section 211 is in violation of the United States's international obligations under TRIPs. The WTO held that, while a law can say that U.S. courts cannot recognize assets linked to confiscated property, section 211 violates TRIPs because it is limited to assets from Cuba. Despite the fact that section 211 violates our international trade obligations, it has not been repealed.³⁰

²⁷ Aside from repealing the law, there were three options available for the United States to come into compliance with its trade obligations: (1) Compensation: Congress could have complied by amending section 110(5)(B) so that bars and restaurants would have to pay some royalty for the right to invoke it; (2) Trade Concession: instead of complying and altering section 110(5)(B), the United States could have asked the European Commission to accept a trade concession (i.e., the United States could lower tariffs on European goods imported); (3) Unilateral Sanction: the United States could refuse to comply and the EC could invoke unilateral sanctions against the United States. This is what occurred; the United States paid \$3.3 million to the European Commission. The payment was authorized to be made by the U.S. Trade Representative in a supplemental appropriations bill that became public law on April 16, 2003 (H.R. 1559).

²⁸ 203 F.3d 116 (2d Cir. 2000).

²⁹ The lawsuit was a trademark infringement case. During its revolution, Cuba nationalized the Havana Club rum company from the Arechabala family. At the time, "Havana Club" had been registered as a trademark in the United States. Subsequent events led to two separate companies seeking to market Havana Club rum. Pernod Ricard, a French company, entered into a joint venture with the Cuban government to extend the registration of "Havana Club" in 180 countries, including the United States. In 1997, the Arechabala family sold its Havana Club assets to Bacardi, a Bermuda company with U.S. subsidiaries. Thereafter, Bacardi began to sell rum in the United States with the name "Havana Club." Pernod sued Bacardi for trademark infringement.

³⁰ The main reason for this is the political situation associated with recognizing Cuban marks. It is generally understood that section 211 remains in law because of the political issues surrounding trade with Cuba. Another solution would be for Congress to expand the law so it covers assets from every country. This has been rejected by trademark lawyers because it would open up U.S. trademark holders to disparate treatment in every other country.

CONCLUSION

For all these reasons, we cannot support repealing the 1916 Anti-dumping Act. In the 88-year history of the Act, there has been no showing that it has any negative trade effects on our trade partners. In some circumstances it may serve as a useful tool for U.S. companies that are harmed by predatory pricing by foreign companies, or at the very least as a warning to foreign companies that they cannot dump their products in the United States without consequence. Finally, Congress should not simply roll over and rubber stamp the WTO and the Bush Administration without holding even one legislative or oversight hearing.

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