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H. CON. RES. 243

Expressing the sense of the Congress regarding dispute settlement proceedings in the World Trade Organization.

IN THE HOUSE OF REPRESENTATIVES

JULY 15, 2003

Mr. LEVIN submitted the following concurrent resolution; which was referred to the Committee on Ways and Means

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CONCURRENT RESOLUTION

Expressing the sense of the Congress regarding dispute settlement proceedings in the World Trade Organization.

Whereas the ability of the United States to apply its unfair trade and trade remedy laws has for more than half a century been a cornerstone of the support of the United States for the multilateral trading system, the General Agreement on Tariffs and Trade, and, since 1995, the World Trade Organization (in this preamble referred to as the ''WTO'');

Whereas remedies for unfair trade have been a fundamental part of rights under the General Agreement on Tariffs and Trade since 1947; Article VI of the GATT 1994 (as defined in section 2 of the Uruguay Round Agreements Act (19 U.S.C. 3501)) authorizes the imposition of duties in response to the unfair international trading practice of

injurious dumping and expressly ''condemns'' this practice;

Whereas to this day, injurious dumping is the only trading practice that is specifically condemned by the GATT;

Whereas Article VI also expressly authorizes the imposition of duties to respond to subsidized imports that cause injury to a United States industry;

Whereas Article XIX of the GATT 1994 authorizes WTO member countries to apply safeguard measures when products are being imported in such increased quantities and under such conditions as to cause or threaten serious injury to a domestic industry;

Whereas during the Uruguay Round of multilateral trade negotiations that concluded in 1994, the United States and other countries negotiated detailed agreements that effectuate and implement these foundation provisions of the GATT 1994;

Whereas the clear and appropriate limits to the review by the WTO of the laws, regulations, administrative decisions, and other actions of the United States were an essential condition of the approval by the Congress of legislation implementing the Uruguay Round Agreements;

Whereas Articles 3.2 and 19.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (in this preamble referred to as the ''Dispute Settlement Understanding'') expressly provide that the Dispute Settlement Body, dispute settlement panels, and the Appellate Body of the WTO ''cannot add to or diminish the rights and obligations'' provided in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (in this preamble referred to as

the ''Antidumping Agreement''), the Agreement on Subsidies and Countervailing Measures, the Agreement on Safeguards, or any of the other Uruguay Round Agreements referred to in section 101(d) of the Uruguay Round Agreements Act;

Whereas notwithstanding those provisions and in direct contravention of them, dispute settlement panels, the Appellate Body, and the Dispute Settlement Body of the WTO have repeatedly diminished the rights of the United States to apply unfair trade laws and trade remedy laws by imposing new obligations on the United States in the application of those laws;

Whereas with regard to unfair trade laws and trade remedies, the President's Statement of Administrative Action (in this preamble referred to as the ''SAA'') accompanying the Uruguay Round Agreements Act (H.R. Doc. No. 316, Vol. 1, 103d Cong., 2d Sess. (1994)) states clearly that explicit limits in the Dispute Settlement Understanding and the standard of review established at Article 17.6 of the Antidumping Agreement are expressly designed to establish clear parameters for dispute settlement panels and the Appellate Body in reviewing decisions of the United States Department of Commerce and the United States International Trade Commission in antidumping and countervailing duty cases;

Whereas the SAA states that ''Article 17.6 [of the Antidumping Agreement] contains a special standard of review, which is analogous to the deferential standard applied by U.S. courts in reviewing actions by the U.S. Department of Commerce and the U.S. International Trade Commission'';

Whereas that standard of review provides that—

(1) a dispute settlement panel may not reevaluate the factual findings of the national authorities if the national authorities' determination was objective and unbiased, even though the panel might have reached a different conclusion; and

(2) where the language of the Antidumping Agreement may be interpreted in more than one way, a dispute settlement panel must confirm a determination by national authorities that conforms to one of the permissible interpretations of the Antidumping Agreement;

Whereas the SAA further states that—

(1) ''Article 17.6 ensures that WTO panels will not second-guess the factual conclusions of the agencies, even in situations where the panel might have reached a conclusion different from that of the agency. In addition, article 17.6 ensures that panels will not be able to rewrite, under the guise of legal interpretation, the provisions of the Agreement, many of which were deliberately drafted to accommodate a variety of methodologies''; and

(2) ''A Ministerial Declaration accompanying the Uruguay Round Agreements provides for the 'consistent resolution' of disputes arising from the imposition of antidumping and countervailing duty measures through the application of the article 17.6 standard of review to both types of disputes'';

Whereas dispute settlement panels and the Appellate Body of the WTO have undermined the rights of the United States and imposed new obligations on the United States—

(1) by failing repeatedly to follow the clearly stated obligation in Article 17.6(i) of the Antidumping Agreement to find that an antidumping measure is inconsistent

with that provision of the Antidumping Agreement only if the establishment of the facts was not proper or the evaluation was not unbiased and objective;

(2) by failing repeatedly to follow the clearly stated obligation in Article 17.6(ii) of the Antidumping Agreement that there may be more than one permissible interpretation of that agreement and panels or the Appellate Body may find an action inconsistent with that provision of the Antidumping Agreement only if the decision does not follow one of those permissible interpretations;

(3) by repeatedly disregarding the Ministerial Declaration of the WTO by not applying the juridical parameters set out in Article 17.6 of the Antidumping Agreement to decisions under the Agreement on Subsidies and Countervailing Measures to fulfill ''the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures'';

(4) by repeatedly inventing new obligations regarding how a WTO member may or may not address the impact of government subsidization of a government-owned corporation that has been privatized;

(5) by inventing new obligations for when a country may impose a safeguard measure to remedy or prevent injury caused by a surge of imports, including obligations concerning the causal relationship between increased imports and serious injury to the domestic industry, and the ''non-attribution'' of other factors;

(6) by imposing the new causation and non-arbitration obligations under the Agreement on Safeguards to antidumping proceedings;

(7) by creating new mandatory guidelines for the use of facts available in antidumping investigations;

(8) by imposing an evidentiary standard with regard to pricing of government provision of goods and services that is inconsistent with the Uruguay Round Agreements by prohibiting in all cases the use of evidence of prices from comparable external sales, properly adjusted to reflect the home market conditions, even when a home market is shown to be nonexistent or heavily distorted by the government subsidy;

(9) by attempting to impose a narrow definition of an indirect subsidy that does not reflect any legal obligation under the Agreement on Subsidies and Countervailing Measures, by insisting that a government must explicitly order a private party to subsidize (without any other option) rather than simply to ''entrust or direct'' the private party to subsidize;

(10) by deciding cases prematurely when the United States has taken no action that violates the substantive provisions of the Uruguay Round Agreements;

(11) by imposing new obligations on the ways in which the United States may spend its revenues, obligations the United States never agreed to accept and which Congress never would have accepted, and setting a dangerous precedent of and interference by the WTO into the spending decisions of the United States Government;

(12) by creating a requirement that a showing of ''unforeseen developments'' is a prerequisite for imposing a safeguard measure;

(13) by creating a ''parallelism'' requirement requiring a WTO member to make additional findings and conclusions before it can exercise its right under a free trade agreement to exclude from a safeguard measure imports from other members of the free trade agreement; and

(14) by creating restrictions on the form and level of safeguard measures that may be imposed;

(15) by repeatedly conducting de novo reviews of the decisions of WTO members in antidumping, countervailing duty, and safeguards cases by considering additional facts and interpretations of facts never presented before the decisionmaking authorities of WTO members;

(16) by indicating in another WTO member's case that the practice of zeroing negative product-specific antidumping margins in the course of calculating a weighted-average antidumping margin across all product categories violates the Antidumping Agreement;

Whereas these new obligations created by dispute settlement panels and the Appellate Body were not agreed to by the United States or by any other country and are not reflected in the text, negotiating history, or interpretative history of the pertinent agreement;

Whereas these new obligations created by dispute settlement panels and the Appellate Body often reflect changes that WTO members sought but which were not agreed to and in many instances are inconsistent with prior GATT decisions;

Whereas these actions and decisions by dispute settlement panels and the Appellate Body are causing a serious erosion to the respect for the rule of law within the WTO and substantially diminish confidence in the WTO, and, if left uncorrected, will in turn lead to a serious erosion of support for trade liberalization under the WTO;

Whereas the problem of dispute settlement panels and the Appellate Body acting to undermine the rights of the United States and to create new obligations is not limited to decisions involving the Antidumping Agreement, the

Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards;

Whereas in a number of other contexts, dispute settlement panels and the Appellate Body have, without justification, injected new obligations that fill gaps deliberately left open or unclear by negotiators;

Whereas on occasion, dispute settlement panels and the Appellate Body have purported to inject new obligations ostensibly to reflect principles of substantive public international law;

Whereas whatever the reason or motivation, these actions by dispute settlement panels and the Appellate Body to create new rights and obligations under the WTO are expressly prohibited by the Dispute Settlement Understanding and the terms of other Uruguay Round Agreements;

Whereas the United States, together with other WTO members, should take immediate actions to correct these serious misapplications of the rules of the WTO as agreed to by the United States and other WTO members and ensure that no additional misapplication of such rules occurs by dispute settlement panels or the Appellate Body in the future; and

Whereas only these immediate actions can begin to restore a high level of confidence in WTO decisions: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That it is the sense of the Congress that the President should—

(1) ensure that in any proceeding under the World Trade Organization (in this resolution referred to as the ''WTO'') involving the unfair trade and trade remedy laws of the United States, the members of the WTO dispute settlement panel in that proceeding—

(A) have expertise administering the unfair trade and trade remedy law at issue in the proceeding and are currently administrators, or retired administrators, of unfair trade or trade remedy laws in a WTO member country; and

(B) have expertise in the provisions of the Uruguay Round Agreement (as defined in section 2 of the Uruguay Round Agreements Act) that is applicable to the unfair trade or trade remedy law at issue in the proceeding;

(2) with respect to the Appellate Body of the WTO, ensure that 2 or more members of the Appellate Body panel hearing a case have expertise in administering unfair trade or trade remedy laws;

(3) ensure that the members of dispute settlement panels and the Appellate Body referred to in paragraphs (1) and (2)—

(A) understand commonly applied and commonly accepted principles of administrative

law, including that tribunals, panels, courts, and other adjudicatory bodies typically apply an appropriate standard of deference to an expert decisionmaker with regard to issues of fact and law;

(B) expressly understand and accept the central importance of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (in this resolution referred to as the ''Antidumping Agreement'') to the successful completion of the Antidumping Agreement, the Uruguay Round negotiations as a whole, and to the proper and successful interpretation and application of the Antidumping Agreement;

(C) apply the principles embodied in Article 17.6 of the Antidumping Agreement to the Agreement on Subsidies and Countervailing Measures in order to effectuate ''the consistent resolution of disputes arising from anti-dumping and countervailing duty measures'', in particular in compliance with the WTO Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

or Part V of the Agreement on Subsidies and Countervailing Measures; and

(D) apply the principles embodied in Article 17.6 of the Antidumping Agreement to the Agreement on Safeguards in order to effectuate the consistent resolution of disputes arising from trade remedy measures;

(4) reaffirm, in ongoing negotiations under the auspices of the WTO, the importance of the correct application of Article 17.6 of the Antidumping Agreement and the need for dispute settlement panels and the Appellate Body of the WTO to follow that provision strictly in both antidumping and countervailing duty cases; and

(5) reaffirm, in ongoing negotiations under the auspices of the WTO, the importance of allowing private parties who have an interest in, and are supportive of, the United States position in international disputes, to observe, have access to, and participate in WTO proceedings, to the maximum extent permissible under current WTO rules and practices.

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