The Byrd Amendment – A Reasonable Policy That Should Not Be Repealed

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I thank the Commission for the invitation to testify today on this important topic.

The Continued Dumping and Subsidy Offset Act (CDSOA), commonly known as the Byrd Amendment, provides that the revenue collected pursuant to antidumping and countervailing duty orders is to be distributed on an annual basis to certain affected domestic producers for qualifying expenditures. Despite the fact that the WTO Agreements generally do not address what WTO Members can do with revenues collected under antidumping and countervailing duty orders, this statutory provision has been the subject of tremendous controversy, culminating in rulings by a WTO dispute settlement panel in September 2002 and by the WTO Appellate Body in January 2003 that the Byrd Amendment is inconsistent with U.S. obligations under the WTO Agreement on Antidumping ("the Antidumping Agreement") and the WTO Agreement on Subsidies and Countervailing Measures ("the Subsidies Agreement").

As I shall discuss further, the Byrd Amendment is not inconsistent with WTO obligations, is a reasonable policy and its retention is fully warranted. Accordingly, since the United States should not consider itself obligated to repeal the Byrd Amendment as a result of the WTO rulings, the United States should not do so. Instead, the United States should work toward negotiated changes in the Antidumping and Subsidies Agreements that explicitly allow distribution of revenues derived from antidumping duty and countervailing duty orders. Further, the trading partners of the United States that brought the case against the Byrd Amendment should refrain from any retaliation against United States products while this negotiation is taking place. Any threatened retaliation is misguided, wholly unwarranted, and ultimately undermines continued U.S. participation in the WTO.

The Byrd Amendment Is Not Inconsistent With WTO Obligations

The Byrd Amendment creates a program whereby domestic producers that have been injured by dumped and/or subsidized imports may receive monetary compensation drawn from the revenue collected by the U.S. Government under WTO-consistent antidumping and countervailing duty orders. To the extent that one would question the

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WTO-legality of a program of this kind, one would normally begin with a review of the Subsidies Agreement. But the Subsidies Agreement only prohibits a very narrow category of subsidies – those contingent on export performance or on import substitution. All other subsidies are not prohibited, although a particular subsidy may be subject to countervailing duties or action at the WTO if it is "specific" to an industry or a small group of industries and causes material injury or other adverse trade effects.[2] Thus, the program created by the Byrd Amendment does not provide a prohibited subsidy under the WTO rules. Given this framework, it is clear that the WTO Appellate Body erred when it ruled that the Byrd Amendment is prohibited under WTO rules.

Citing Article 18.1 of the Antidumping Agreement and Article 32.1 of the Subsidies Agreement, the Appellate Body ruled that the Byrd Amendment violated WTO rules because it constitutes a "specific action against" dumping and/or a subsidy not permitted under those agreements.[3] Article 18.1 of the Antidumping Agreement states that "no specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."[4] Article 32.1 of the Subsidies Agreement is virtually identical in its wording, except that it refers to "a subsidy" rather than "dumping." Nothing in either text prohibits the grant of a subsidy to a domestic industry. Indeed, as noted above, only export subsidies and import substitution subsidies are specifically prohibited under Article 3.1 of the Subsidies Agreement; all other subsidies are permitted. Yet, despite all this, the Appellate Body concluded that subsidies available only to domestic industries that have been adjudicated to have been injured by unfairly traded dumped and/or subsidized imports are prohibited under WTO rules.

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2 The WTO panel that considered the Byrd Amendment rejected a claim by Mexico that the Byrd Amendment is an actionable subsidy that causes adverse effects under Article 5(b) of the Subsidies Agreement. The panel concluded that Mexico had not shown that the Byrd Amendment is a "specific" subsidy that causes adverse effects. Report of the Panel at para. 7.115 and para. 7.132.

3 It should be noted that the Appellate Body rejected a number of other claims against the Byrd Amendment that had been upheld by the WTO panel below. For example, the Appellate Body overruled the panel's conclusion that the Byrd Amendment violates the standing requirements of the Antidumping and Subsidies Agreements, as well as the panel's conclusion that the United States did not act in good faith with respect to its obligations regarding standing. The Appellate Body also rejected the panel's reasoning that the Byrd Amendment was WTO-illegal because it might facilitate or induce the exercise of the rights to seek antidumping and countervailing duties against injurious dumped and subsidized imports – rights that the Appellate Body noted are WTO-consistent.

4 A footnote notes further that "this is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate." Antidumping Agreement at footnote 24.

The absurdity of this ruling is obvious. A non-prohibited subsidy granted in one country even if it causes injury in another does not contravene WTO rules, but the granting of a non-prohibited subsidy to an injured industry in the importing country is prohibited, under the theory that the Subsidies Agreement and the Antidumping Agreement forbid WTO Member governments from taking steps other than antidumping and countervailing duty actions to help the injured domestic industry, even if these other steps do not have an impact on the subsidized and/or dumped imports and do not violate any other WTO obligations. Nowhere does one find such restrictions in the text of the WTO Agreements.

The Byrd decision is the most egregious example of overreaching by WTO panels, which are legislating obligations where none were agreed by sovereign countries engaged in negotiation of the WTO rules and worse, where no adverse trade effects exist. Repealing the Byrd Amendment would not only remove a wholly legitimate and necessary measure from U.S. laws, it would give further encouragement to the bringing of non-meritorious claims against domestic legislation in the WTO and to a rogue WTO panel process to further expand the ambit of international regulation without the consent of the WTO members afflicted with the new "obligations."

The Byrd Amendment Is A Sound and Reasonable Policy

Beyond the issue of WTO consistency addressed above, the policy justification for maintaining the Byrd Amendment is strong: It permits companies, workers and farmers that have been found to be injured as a result of unfair trade practices to receive some monetary compensation from the proceeds of the antidumping and countervailing duties collected under WTO-sanctioned U.S. trade remedy laws.

In general terms, the Byrd Amendment operates much like trade adjustment assistance ("TAA") programs for workers, although with somewhat different criteria for receiving benefits and with a more circumscribed revenue source. For example, TAA benefits are authorized upon a finding that increased imports of like or directly competitive articles have contributed importantly to a firm's reduced sales or production, and to the separation or threat of separation of workers. In the case of the Byrd Amendment, benefits are authorized only where there have been final determinations of dumping and/or countervailable subsidies by the Commerce Department and of material injury or threat thereof by the International Trade Commission ("ITC"). Moreover, while TAA benefits are derived from general tax revenues, payments under the Byrd Amendment are limited to the proceeds of antidumping and countervailing duty collections for the product in question. These funds only become available if the affected exporters continue to receive subsidies or dump their product in the United States. If an exporter sells at a fair value, or stops receiving a subsidy benefit, no duties are collected. As a result, oftentimes there is little or nothing in the way of duties collected. For example, in fiscal year 2004, the Bureau of Customs and Border Protection ("Customs") monitored imports from 565 antidumping and countervailing duty orders and investigations, including 351 active orders, but liquidation of duties and distribution to domestic producers occurred in only 268 cases (47 percent).

A common criticism of the Byrd Amendment is that the affected domestic producers allegedly receive a double remedy, because they reap the benefits of higher prices in the market due to the imposition of duties on subject imports, plus whatever monetary payments later become available. But this criticism ignores the fact that any antidumping or countervailing duty relief is prospective only, and generally goes into effect only after the affected domestic industry has suffered several years of injury in the form of lost market share, operating losses, and the like. Antidumping and countervailing duty orders are prospective only, offering only potential relief in the future (provided the orders are effective). The orders themselves do nothing to redress the past injury that has already been inflicted on a U.S. industry by the time an order is issued. Thus, the provision of payments under the Byrd Amendment may help to provide some much needed compensation for the prior injury caused by unfairly traded imports – compensation that is simply not available otherwise.

Nonetheless, it should be emphasized that Byrd disbursements are not intended to, and do not, provide full compensation for past injury. Byrd disbursements are made with respect to qualified investments by members of the affected industry. The qualifying expenditures are limited to expenditures incurred after an order is issued, and include categories such as expenditures for manufacturing facilities, equipment, research and development, training, technology acquisition, health care and pension benefits for employees, environmental equipment and training, raw material acquisition, and working capital. All expenses that an industry incurs to obtain relief from dumping and subsidies, including legal fees, are not qualifying expenditures. Byrd disbursements are not simply a pass-through of the duties collected under an order, and even if all of the duties collected were disbursed without limit to only qualified expenditures, the industry could not be made whole for the full amount of the injury.

Another criticism often heard is that the Byrd Amendment creates an inappropriate incentive to bring antidumping and/or countervailing duty cases. There are several responses to this argument: First, one must recognize, as did the WTO Appellate Body,[5] that there is nothing improper about facilitating or encouraging the exercise of rights that are WTO-consistent. Since the founding of the modern world trading system, the rules of both the GATT and its WTO successor have provided that injurious dumping is to be condemned and have authorized the imposition of antidumping and countervailing duties to offset dumping and subsidies that cause or threaten injury. Creating incentives to encourage domestic industries to take advantage of these internationally-recognized rights is not in any way inappropriate.

Second, on a practical level, it would be foolhardy to bring a case just in the hope of getting Byrd Amendment money at some distant point in the future. Antidumping and countervailing duty cases require an enormous effort to litigate, sometimes costing in the millions of dollars in direct outlays not to mention time of company executives and staff. A petition still must prove the existence of dumping and/or countervailable subsidies on the one hand, and material injury or threat of material injury on the other hand, neither of

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[5] Appellate Body Report at para. 258.

which is easily done. In fact, only 37 percent of cases successfully reach order. Even after an antidumping or countervailing duty order is issued, dumping or subsidization would have to continue before a petitioner would receive disbursements, and only after specific entries of the subject merchandise are liquidated. Only then would any funds be available for distribution. This generally means waiting for the completion of administrative reviews to determine final antidumping and/or countervailing duty assessments, as well as the conclusion of any court appeals. Thus, it can easily be and most always will be, several years before any funds are available for distribution under the Byrd Amendment. And even then, not all cases result in duties being assessed. Last year Customs distributed duties in less than half of the cases it monitored. If foreign exporters stop shipping or stop dumping, little or no duties will actually be collected, meaning no funds will be available for distribution.

This is largely the experience of the Byrd Amendment. In four years of Byrd, more than half of all cases received disbursements of less than $18,000 in a given year, a figure that is often split amongst three or more domestic producers. Thus, the risks associated with trade litigation provide a strong check against unwarranted antidumping or countervailing petitions.

Third, empirical evidence indicates that the Byrd Amendment has not encouraged petitions for new trade cases (defined here as antidumping and countervailing duty cases). The attached charts, based on data from the WTO, the U.S. Department of Commerce, and the U.S. International Trade Commission, show that as U.S. imports increased significantly, the number of U.S. trade cases initiated and measures imposed after the Byrd Amendment was enacted remain below historic levels (Charts 1 and 2). In fact, even though the United States is the world's largest importer of merchandise, the United States has one of the lowest ratios of trade measures to imports, and the Byrd Amendment has done nothing to change that fact, despite growing trade deficits (Charts 3, 4 and 5). Indeed, the ratio has declined since Byrd was enacted (Chart 6). Equally significant is that trade measures in foreign countries without a law analogous to the Byrd Amendment have increased in recent years as the number in the United States declined (Chart 7).

The ratio of U.S. trade measures (orders) to imports steadily declined in the four years after the Byrd Amendment became law (2001-2004) compared to the four prior years (1997-2000). The number of U.S. trade measures per trillion dollars in imports fell from 25.5 down to 20.5, a 20 percent decline. Moreover, in 2004, the ratio was at its lowest level since the Commerce Department began administering the trade laws. (Chart 8).

The ratio of trade case <u>initiations</u> to imports has also declined in the post-enactment period compared to the four years before Byrd was enacted. Again, comparing the four years before Byrd to the four years after Byrd, initiations of trade cases declined from 43.5 cases per trillion dollars in imports, down to 38.9 cases per trillion dollars. This post-Byrd ratio is lower than the European Union's average over the period 1996 to 2003, and is remarkably lower than many of our largest trading partners in recent years. For example, looking at available data for 2001 to 2003, the ratio of cases

initiated per trillion dollars of imports was 67.2 for Canada, 56.5 for Mexico, and 69.3 for China.

The evidence does not support a contention that the Byrd Amendment has encouraged either increased petitions or increased initiations of cases. This fact is not surprising, considering that the amount of money disbursed under the Byrd Amendment has been quite modest in the overwhelming majority of cases. For the four fiscal years of 2001 through 2004, the median amount of money disbursed per case for the 37 percent of cases that reached order has been quite low: $11,000, $4,000, $8,000, and $74,000, respectively. Thus, there is no likely windfall of money waiting that would entice domestic producers to bring unwarranted trade cases.

Lastly, I can site the experience of our firm. We represent petitioners far more often than respondents. Our trade practice is one of the largest in the country, if not the world. Indeed, we have participated in litigation involving 59 percent of all U.S. antidumping and countervailing duty cases, by value, since in 1985 ($33 billion of subject imports out of a total of $56 billion). I can say without qualification that the prospect of Byrd monies has never been, to my knowledge, a significant factor in the decision to bring an antidumping or a countervailing duty case. Moreover, we have not recommended and would not recommend that a prospective petitioner base its decision on whether or not to bring a case on the possibility of receiving Byrd revenues. To my knowledge, while there is a knee-jerk reaction against the Byrd Amendment by those who dump and academics who by and large erroneously view antidumping rather than dumping as a trade problem, there is no empirical evidence adduced by critics that the Byrd Amendment has been an important motivation in bringing trade litigation.

Threat of Foreign Retaliation Should Not Determine U.S. Policy

Eleven countries requested consultations with the United States at the WTO concerning the Byrd Amendment, and eight have been authorized to retaliate against U.S. exports.[6] The retaliation level is quite small. Retaliation is based on Byrd disbursements from the nearly 200 WTO-consistent cases brought by U.S. producers in which the eight complainants continue to subsidize their industry and/or dump their exports in the U.S. market and injure U.S. companies. The U.S. Government position has been that the Byrd Amendment has zero trade effect. At most, the United States suggested to a WTO arbitrator, the Byrd Amendment may affect two million dollars of trade out of roughly $800 billion in exports from the eight countries to the United States. The arbitrator, however, authorized total retaliation in the range of $120 million per year, depending on the level of disbursements, roughly half what was demanded by many of the complainants. Yet in the broad scheme of U.S. trade policy, even this figure is relatively small.

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[6] Brazil, Canada, Chile, European Union, India, Japan, Korea, Mexico, Australia, Indonesia, and Thailand requested consultations. Australia, Indonesia, and Thailand did not request arbitration to retaliate (between Australia and Indonesia, only $48,000 in Byrd funds were distributed to U.S. producers in FY2004).

For fiscal year 2004, the total authorized retaliation represents only 0.027 percent of U.S. exports to the eight countries - one penny for every $3,700 in exports. As a percentage of U.S. imports from the eight countries (having it should be noted a $377 billion trade surplus with the United States last fiscal year) the retaliation is even less - fifteen thousandths of one percent (0.015 percent). Threatened retaliation at this level should not be allowed to result in the United States changing the Byrd Amendment or any other reasonable policy.

As a general matter, the United States is more open to imports than our exports are to the eight countries threatening retaliation. Imports from the eight countries face a weighted average U.S. tariff of 2.6 percent, but our exports to those countries face a weighted average tariff of 3.3 percent.[7] There is something extraordinary in countries with a higher tariff than the U.S. tariff, which have a trade surplus of $377 billion with the United States, and which have been found to be presently violating U.S. trade laws in nearly 200 cases, threatening retaliation over a matter that has no demonstrated trade effects. Something is distinctly wrong with this picture.

Despite the threat of retaliation, U.S. antidumping and countervailing duty orders still provide targeted relief to domestic industries injured by unfair trade practices, without being unduly burdensome on foreign exporters or U.S. consuming industries. Fiscal year 2001 is the only year that Customs has provided data to determine a cumulative trade effect. Overall, the impact on U.S. trade is minimal - affecting less than half of one percent of imports. The trade-weighted average duty was only a reasonable 9.4 percent on subject imports (19.8 percent on imports from China, and 8.3 percent for all other countries). Duties distributed to U.S. industries were also small - less than one fiftieth of one cent per dollar of imports (0.0197 percent).

Increased Trade Cases Against China Are Not Attributable to the Byrd Amendment

While the period after the Byrd Amendment was enacted has seen fewer petitions and initiations of cases compared to total imports compared to prior years, trade cases against China have continued to increase. According to the USITC, at the beginning of this year, the United States was enforcing 351 antidumping and countervailing duty orders, and 60 of those orders, roughly 17 percent, were on products from China. The next most frequent object of our trade laws is Japan, with 29 orders in place, about half of China's total.

It is true that the frequency of cases against merchandise from China seems to be increasing. Of the last 22 products subject to the imposition of a U.S. antidumping duty order, sixteen of those products, more than 70 percent of the cases, were from China.[8]

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[7] Based on the World Bank's World Development Indicators 2004. This analysis assumes each countries' exports are in representative tariff categories.

[8] Under current U.S. practice, China is not subject to countervailing duty investigations.

It is not only in the United States where merchandise from China is receiving prominent attention. According to WTO statistics, WTO members reported 2,537 total antidumping petitions filed from 1995 through June 2004, and China's exports are the leading subject of those petitions, with 386 cases initiated against Chinese merchandise during that period. The next most frequent target, South Korea, had only half as many cases initiated against its trade. Since 2001, nearly one in five new antidumping cases (18 percent) by WTO members have been brought with respect to Chinese merchandise. During the same period, China accounted for just 6 percent of world merchandise exports.

Data from the USITC indicates that the worldwide trend in cases against China is mirrored in the United States. Since the passage of U.S. Permanent Normal Trade Relations ("PNTR") with China in 2000, one-half of the products that U.S. industries have sought antidumping relief from included products from China (48 percent of the products subject to antidumping petitions, fiscal years 2001-2004). Over this same period, imports from China only accounted for 11 percent of total U.S. imports. While U.S. imports from China increased 79 percent since PNTR, U.S. antidumping petitions against Chinese merchandise increased 157 percent over the previous four years. The increased focus of U.S. trade cases on China cannot be attributed to the Byrd Amendment. If the Byrd Amendment actually encouraged new petitions, we should expect to see more cases against all countries, not just China. Additionally, for other WTO members – countries that do not have an analog to the Byrd Amendment – cases against China are also high and rising. Thus, there is no correlation between enactment of the Byrd Amendment and increased trade cases against imports from China.

Yet, even as antidumping duty cases against China are on the rise, the relief provided to domestic petitioner in these cases has been limited. According to statistics from Customs, for every $1 in antidumping duties collected and subsequently distributed in 2004 to domestic producers under the Byrd Amendment, 91 cents went uncollected. Imports from China account for 86 percent of the uncollected duties. This equates to $79.7 million in Byrd disbursements under orders on imports from China, but $224.4 million in uncollected duties under those same orders. The same thing occurred in fiscal year 2003, when Customs distributed $20.5 million in duties collected under orders against China, but $104.5 million in duties went uncollected.

There is some reason to believe that the Byrd Amendment will help in the enforcement of antidumping duty and countervailing duty orders. Prior to enactment of the Byrd Amendment, the effectiveness of the orders and the collection of duties was not easily monitored. Domestic parties had a far lesser stake in the duty collections, and Customs' record-keeping was not as detailed as it has been under the Byrd Amendment. With the enactment of Byrd, domestic parties supporting antidumping and countervailing duty petitions have a cognizable future interest in the duties that are collected, which in turn has led to increased scrutiny of duty collections. Customs has responded by paying more attention to efforts to evade duties. The system is now more transparent, and the potential recipients of collected duties under the Byrd Amendment have played a valuable role by demanding more effective enforcement of antidumping and countervailing duty orders. The increased scrutiny on the collection of antidumping and

countervailing duties encouraged by the Byrd Amendment should support enhanced enforcement of orders on imports from China in the future, thus providing yet another reason why the law should not be repealed.

The United States Should Use The "Doha Round" To Negotiate Rules Allowing Distribution of Antidumping and Countervailing Duty Collections

As discussed above, the Byrd Amendment was ruled a violation of the Antidumping and Subsidies Agreements because a WTO panel and the Appellate Body found it constitutes "specific action" against dumping/subsidization not authorized under the Agreements. The Byrd Amendment is a payment program. It is neither a prohibited subsidy nor, as the panel correctly found, an actionable subsidy. As the United States itself has stated, the Appellate Body "created a new category of prohibited subsidies that had neither been negotiated nor agreed to by WTO Members."[9] This is of great concern because, as a matter of national sovereignty, WTO Members should be allowed to spend their own monies and provide non-trade distorting subsidies to their domestic industries freely, in accordance with rules that are clearly established in the WTO Agreement. The Appellate Body's decision has muddied the waters in an area where clarity of the obligations is necessary. The Doha Round of negotiations presents an opportunity for the United States to correct this and other erroneous dispute settlement decisions, as well as to achieve other improvements, such as the inclusion of rules to address circumvention of antidumping and countervailing duty orders. The United States should ensure that its right to distribute collected antidumping and countervailing duties is clearly established in the Antidumping and Subsidies Agreements as a result of the Doha Round rules negotiations, as both Congress and the USTR have sought.

Conclusion

In sum, the Byrd Amendment is a legitimate mechanism for providing compensation to domestic producers injured by unfair trade practices long condemned by the international trading system. The Byrd Amendment does not encourage petitions for antidumping and countervailing duty investigations, the law is not inconsistent with WTO rules, and the legal foundation upon which the contrary WTO panel and Appellate Body decisions rest is very weak. The strained legal and policy objections that have been raised against the Byrd Amendment simply do not stand up to scrutiny and certainly do not justify termination of this program. Clearly, there is no compelling reason to repeal the Byrd Amendment. The flaws in the WTO Appellate Body's reasoning in its ruling against the Byrd Amendment do, however, emphasize that the WTO dispute settlement system is in need of reform, and that WTO rules need to be clarified specifically to prevent the WTO rules from being held as preventing WTO members from adopting the kind of domestic programs represented by the Byrd Amendment.

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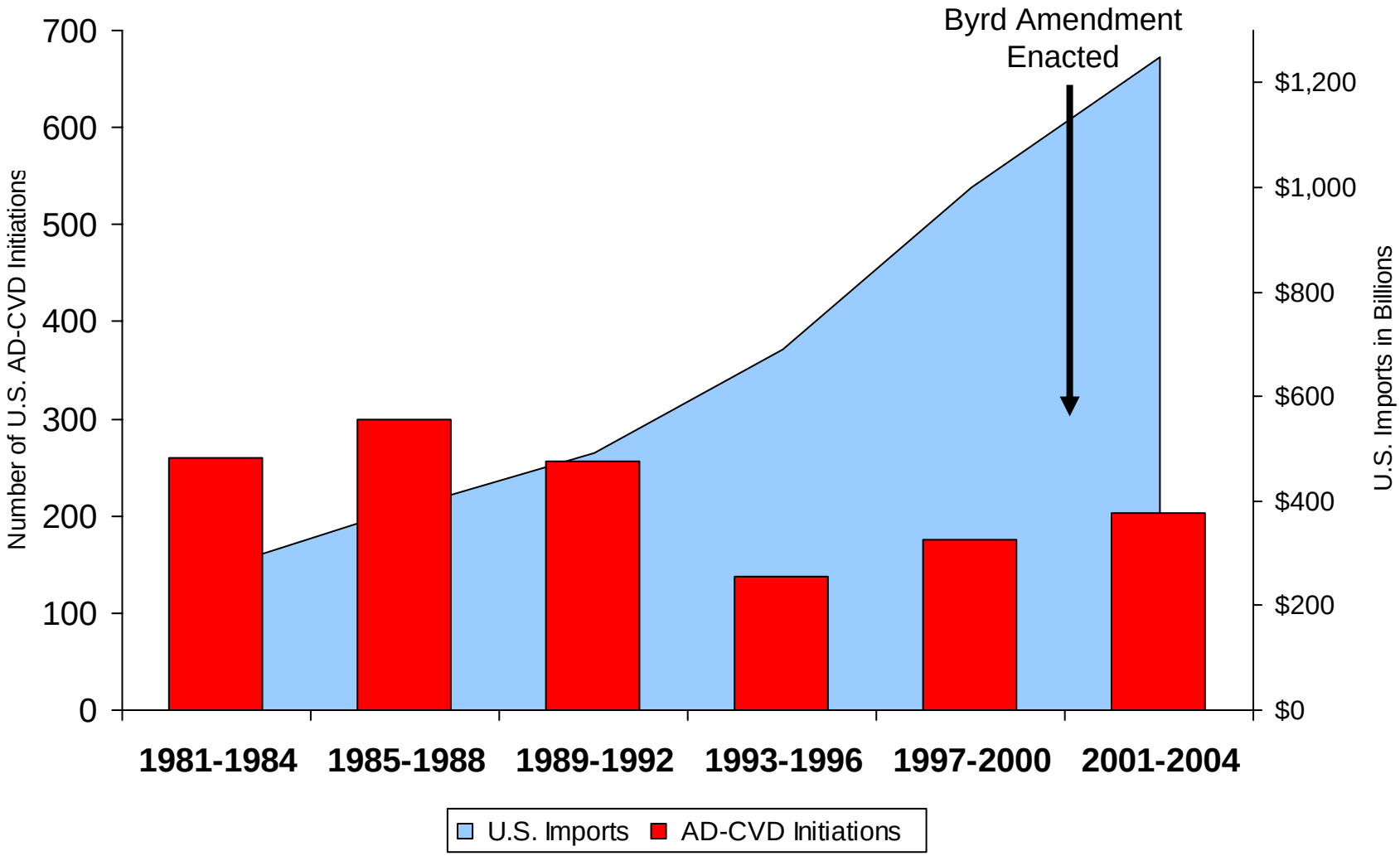
[9] Dispute Settlement Body - Minutes of Meeting - Held in the Centre William Rappard on 27 January 2003, WT/DSB/M/142, para. 55 (March 6, 2003).

Chart 1

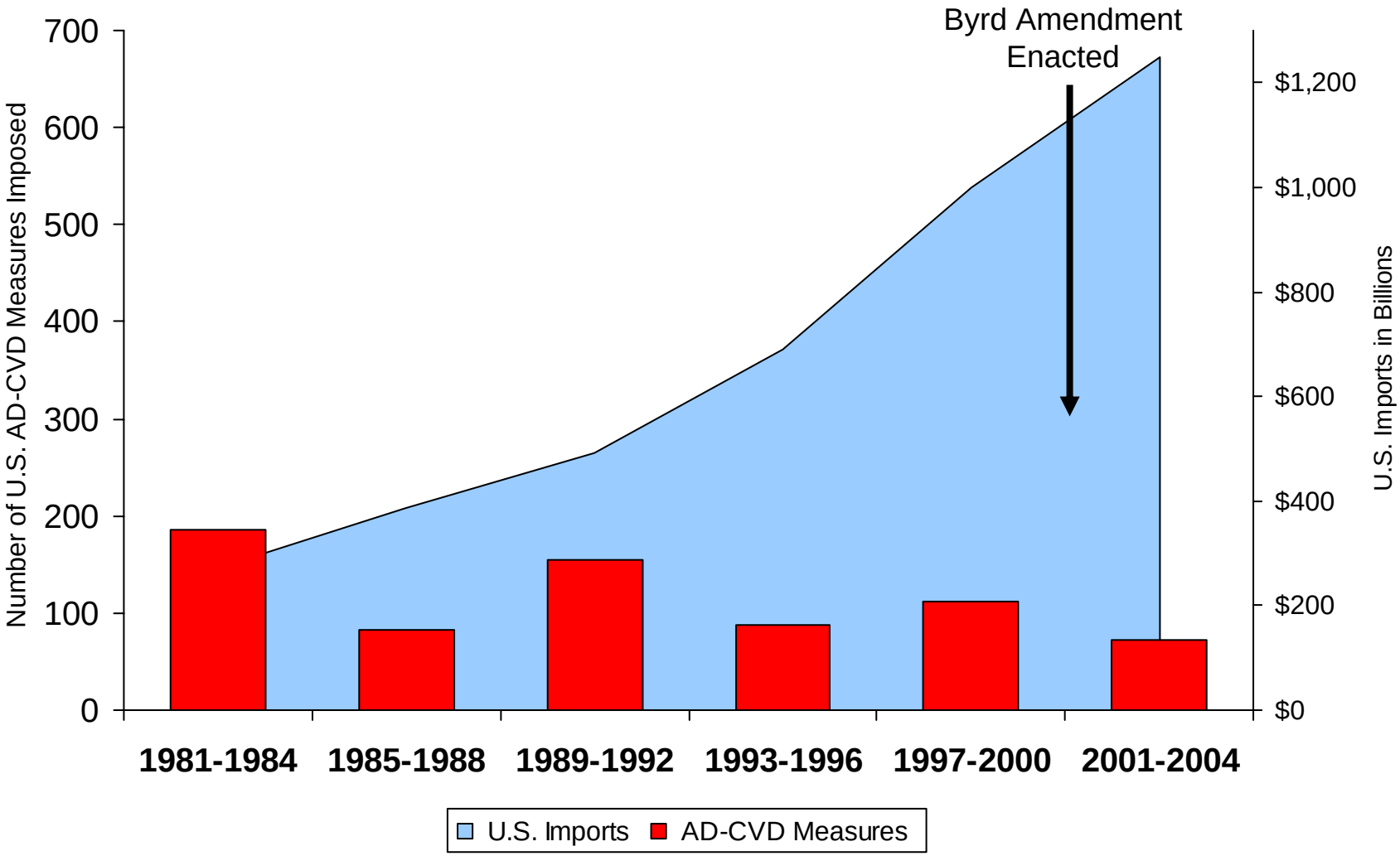
While U.S. Imports Increased Rapidly, the Number of U.S. AD-CVD Initiations Post-Byrd Remains Low



Sources: U.S. Department of Commerce; U.S. International Trade Commission, Dataweb.

Chart 2

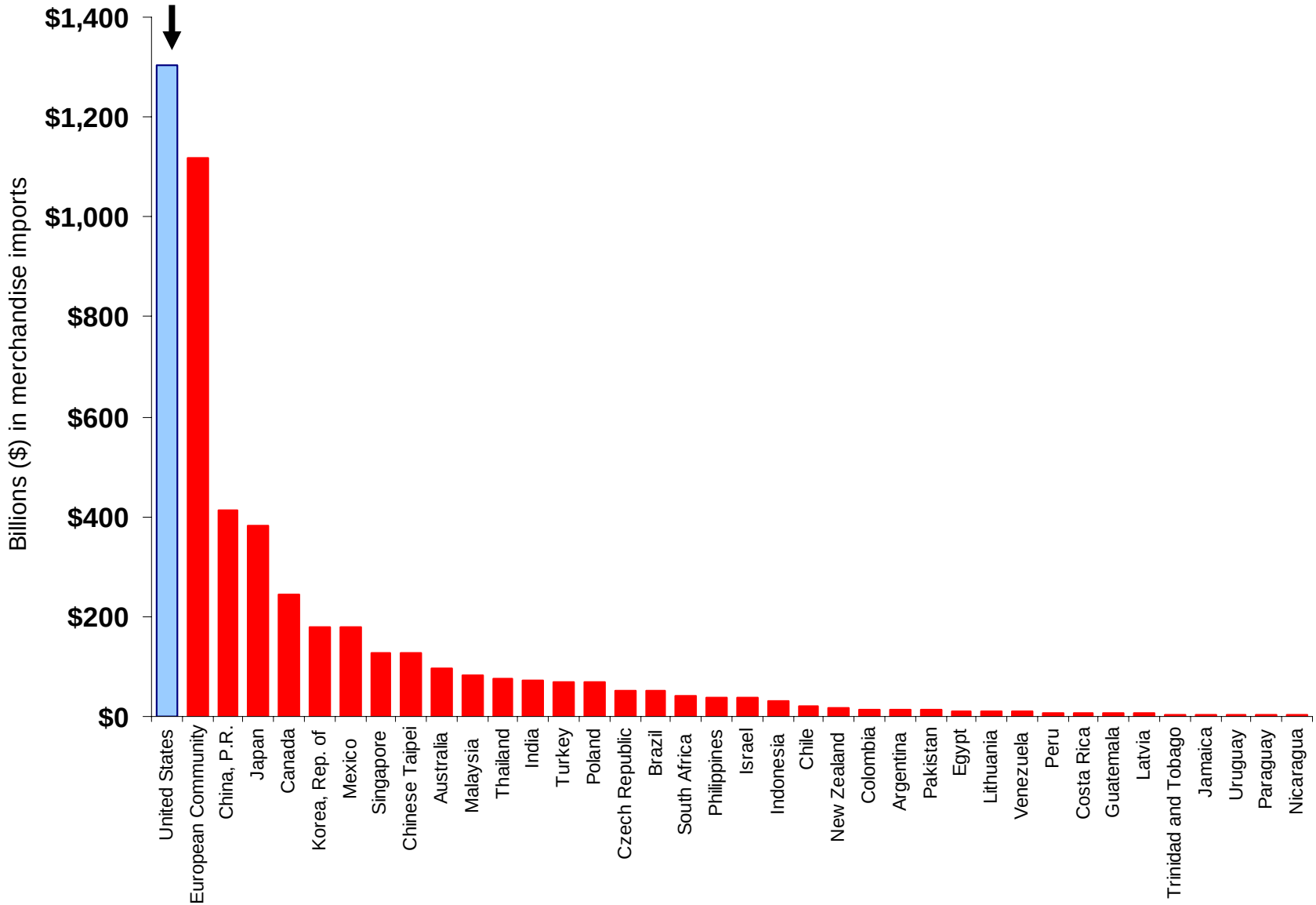
The Number of AD-CVD Measures Post-Byrd, Has Also Remained Low In Light of Increased Imports



Sources: U.S. Department of Commerce; U.S. International Trade Commission, Dataweb.

Chart 3

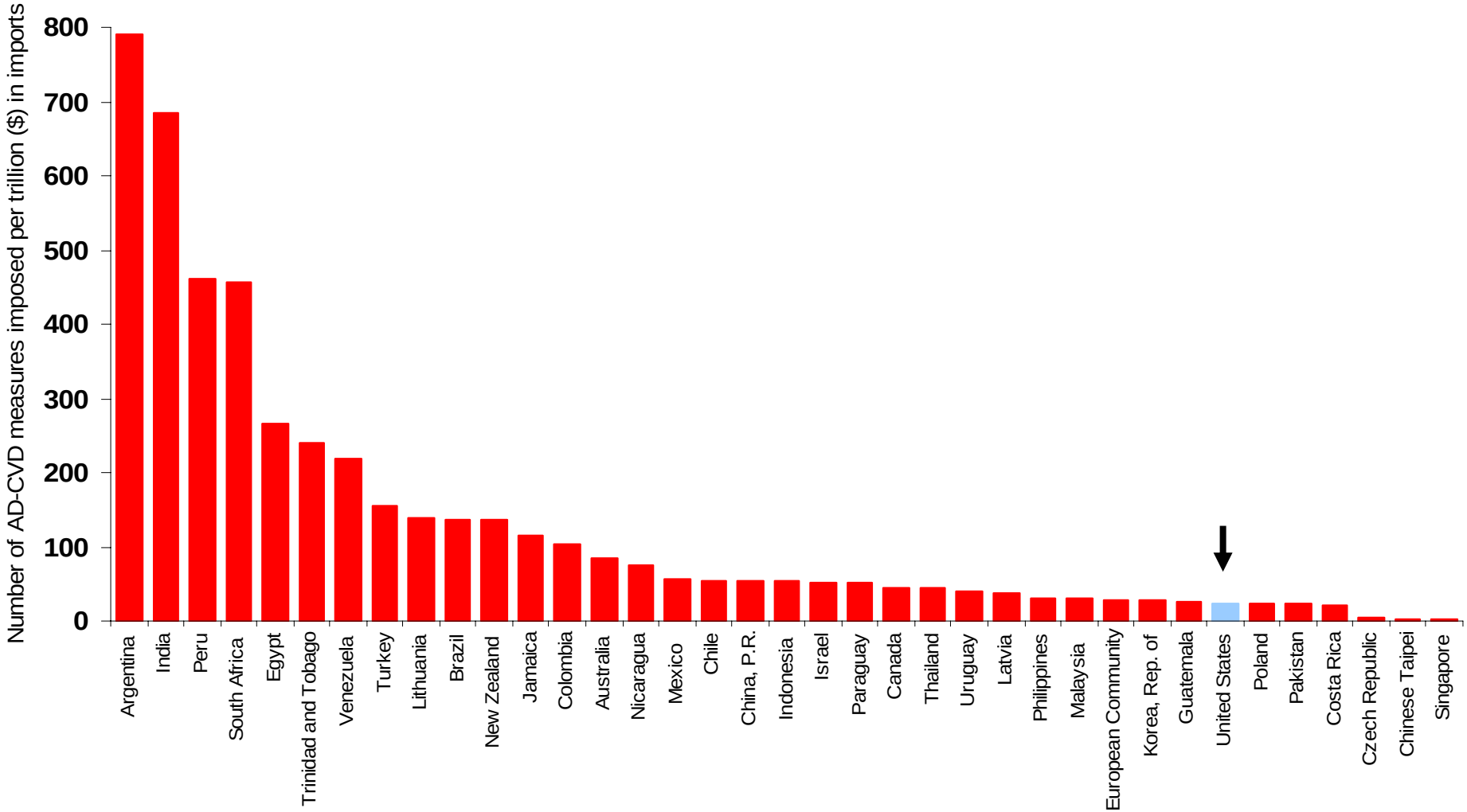
The United States is the World's Largest Importer



Source: WTO. Data for year 2003. Other countries are those reporting the use of AD-CVD measures to the WTO.

Chart 4

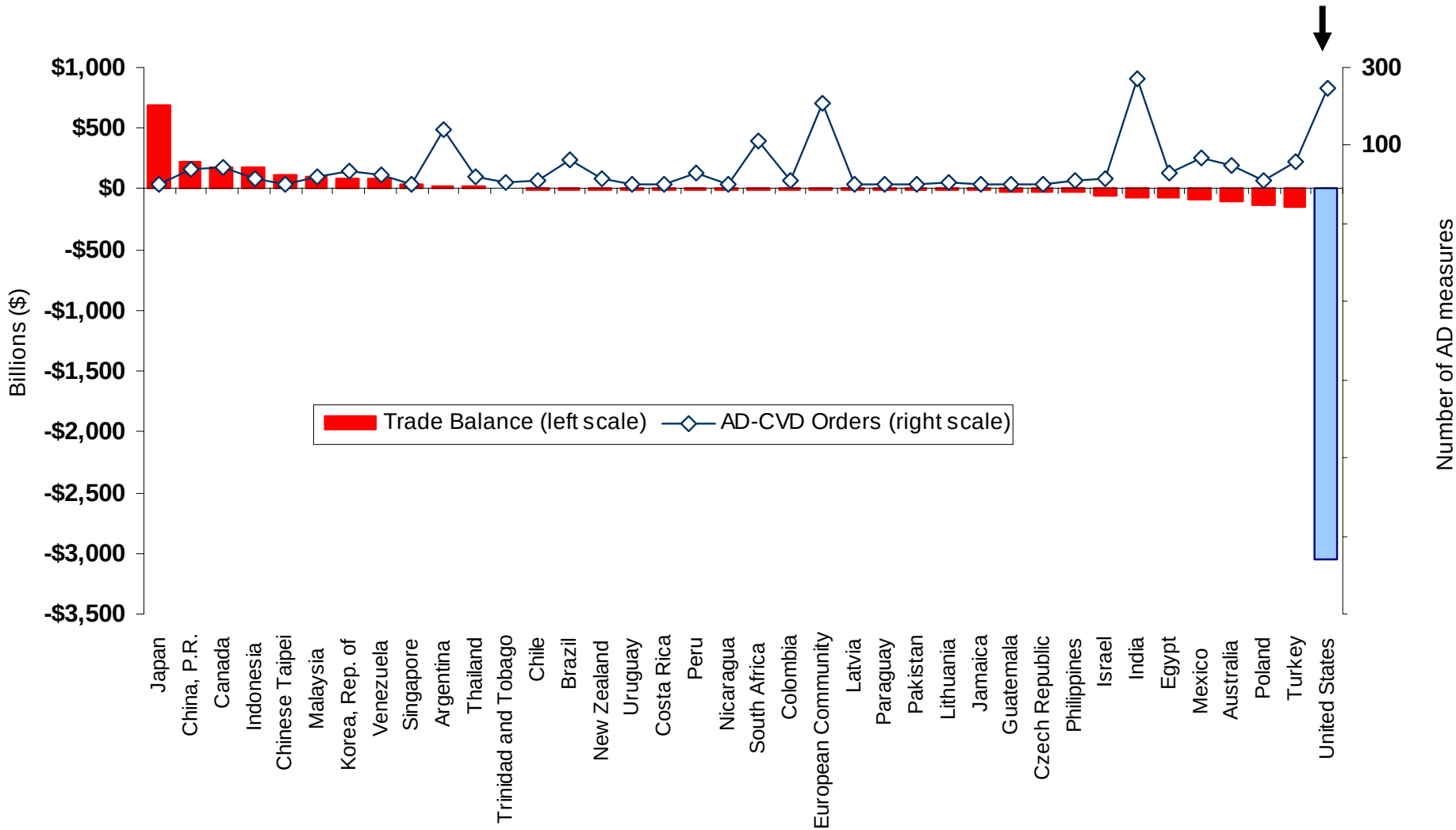
The United States Has a Very Low Ratio of AD-CVD Measures to Imports



Source: WTO. Data for years 1996-2003. For China, data is only available for years 2001-2003.

Chart 5

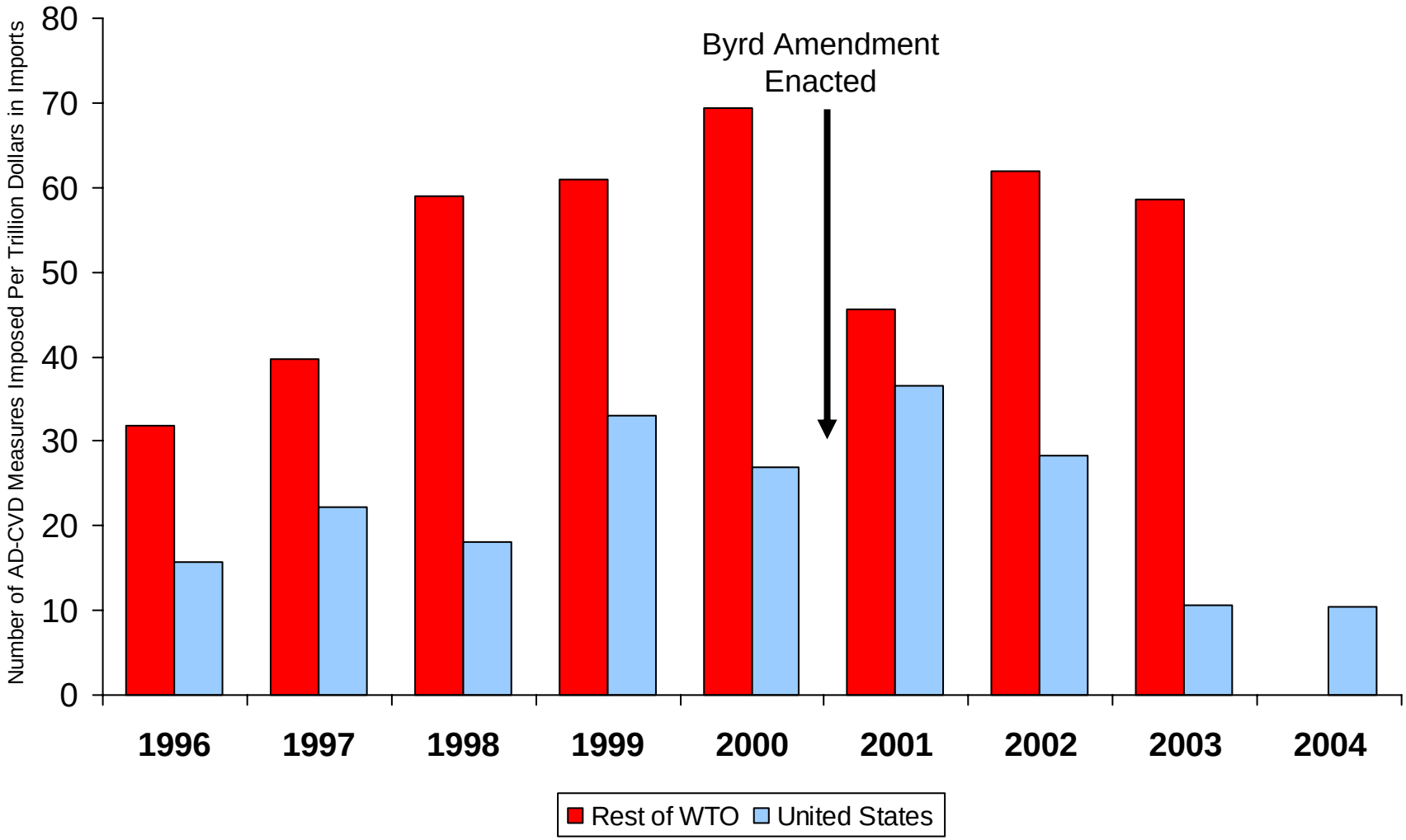
The United States' Use of AD-CVD Measures Is Moderate Compared with U.S. Trade Deficit



Source: WTO. Data for years 1996-2003. Trade balance is the difference between merchandise imports and merchandise exports.

Chart 6

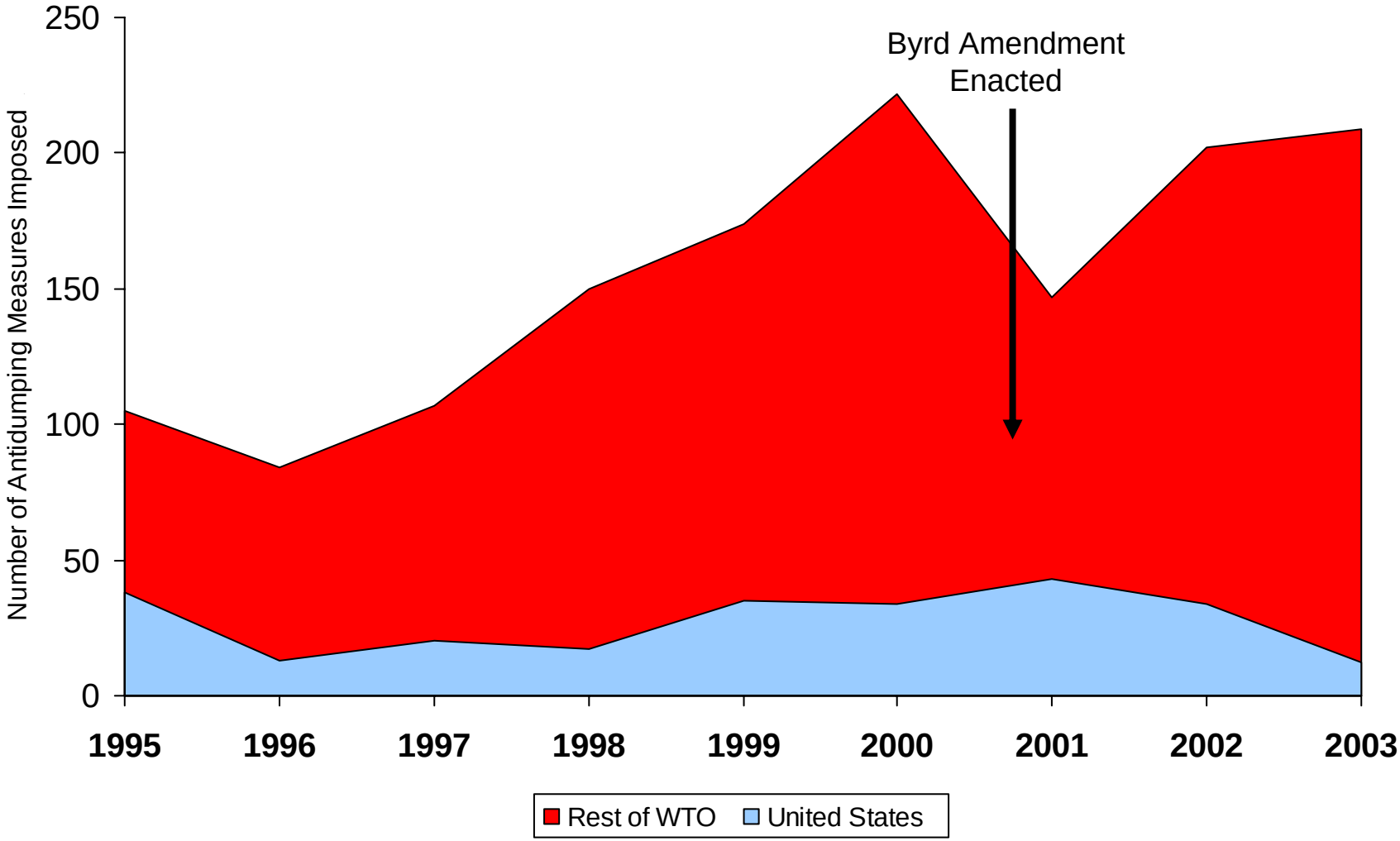
The U.S. Ratio of AD-CVD Measures to Imports Is Below the WTO Average and Is Falling Post-Byrd Amendment



Source: WTO (for 2004, USITC import data was used, similar 2004 data for WTO members is not yet available).

Chart 7

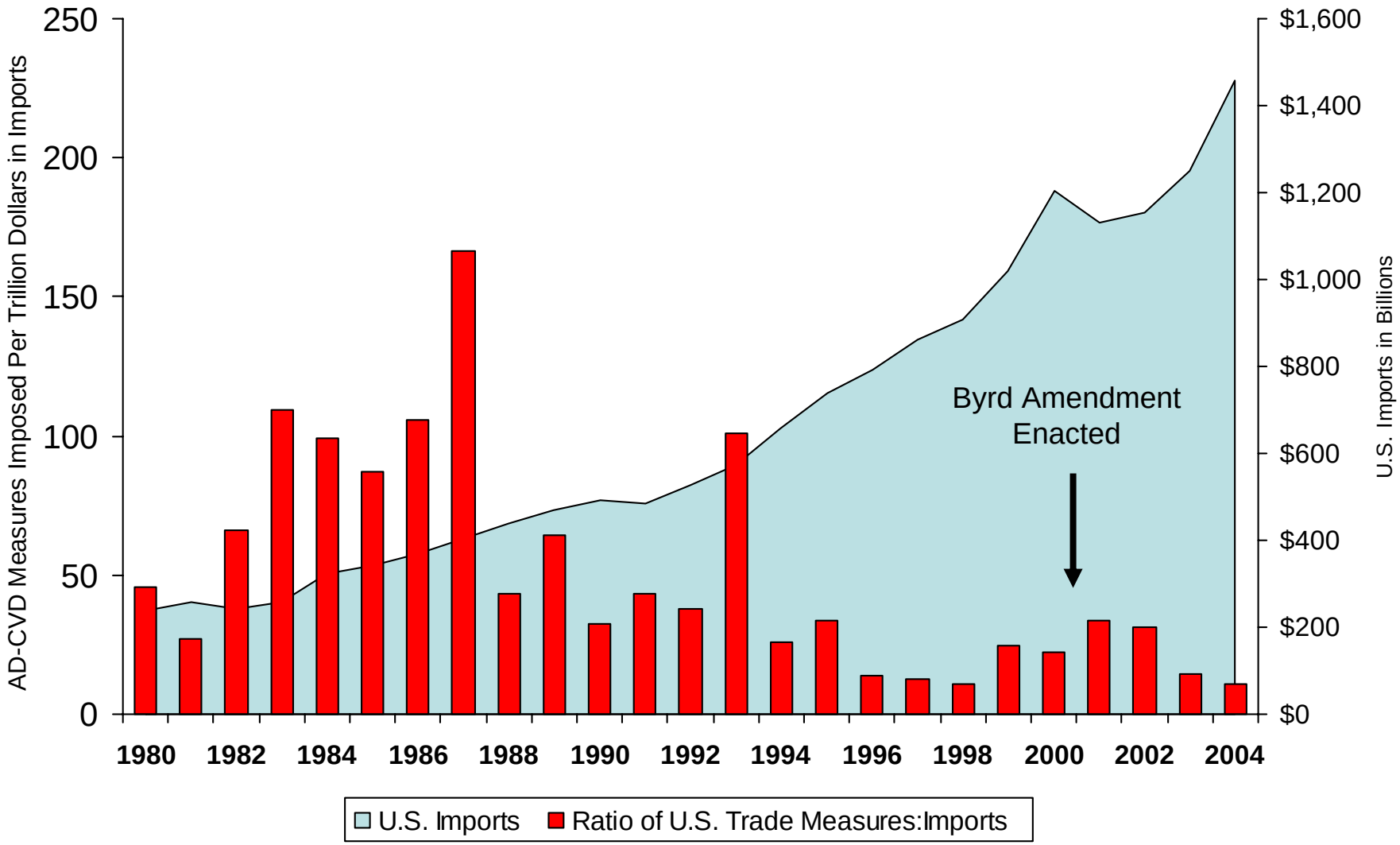
The Number of U.S. AD-CVD Measures Per Year Declined Post-Byrd Amendment



Source: WTO.

Chart 8

The Ratio of U.S. AD-CVD Measures to Imports Is At a Historic Low, Post-Byrd Amendment



Source: U.S. Department of Commerce.