

# **THE BORDER ADJUSTMENT TAX AND WORLD TRADE DISORDER**

By Bart S. Fisher\*

The border-adjustment tax that has been proposed by Speaker of the House Paul Ryan should be dead on arrival if it is put forward by the Trump Administration. It is bad trade policy, and would totally undermine the fine fabric of international trade law.

Part of the problem with the proposed border adjustment tax ("BAT") is that different versions have been proposed. In its simplest version revenues from *exports* would be excluded when determining profits for tax purposes, and *imports* would not be deductible as a business expense. The proposed BAT is designed to raise revenues by an estimated \$100 billion in annual revenue, and underwrite an overall reduction in the corporate tax rate from 34% to 20%.

**The exclusion of exports from federal taxation on revenues or profits export sales would be viewed as an unlawful export subsidy under the World Trade Organization agreement on subsidies**, which defines an unlawful export subsidy to include "The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes, or social welfare charges paid or payable by industrial or commercial enterprises." Moreover, the WTO subsidies agreement obligates signatories to not use subsidies to cause serious prejudice to the interests of other signatories, to not nullify or impair the benefits of prior trade concessions granted to other signatories, and to not operate in such a fashion as to gain more than an equitable share of world export trade. The BAT fails the WTO export subsidy test on all counts, and is therefore illegal under the WTO. If the BAT were became law the United States would instantly face a challenge in the WTO dispute settlement system from our trading partners, and would lose in embarrassing fashion.

**The non-deductibility of imports would be a nullification and impairment of prior trade concessions, and amount to the unbinding of prior tariff concessions in the World Trade Organization.** It is the type of protectionism that the WTO was put in place to stop. Once again, the United States would be taken to the WTO, and would lose in a WTO dispute panel proceeding. If the United States were to lose a panel decision our trading partners would be allowed to retaliate lawfully against the United States by increasing duties against the United States. This is called the trade right of compensation.

**The obvious intent of the border adjustment tax scheme is to find a way to raise taxes for revenues needed by the federal government while simultaneously reducing the overall U.S. balance of trade by restricting imports and promoting exports.** The United States is currently running a trade deficit of about \$50 billion per month.

Apart from the fact that **the proposed BAT is unlawful under the rules of the WTO** is the certainty that our trading partners would lawfully retaliate against us, and the descent into the abyss of a trade war would be possible. Under this scenario Donald Trump becomes our version of Herbert Hoover, plunging the United States into a global trade war.

In his address on March 1 to Congress President Trump quoted Abraham Lincoln's defense of protection for U.S. manufacturers. He should have quoted Woodrow Wilson. When Wilson entered office the first priority of his **"New Freedom" was reform of the tariff**. The key evil to be remedied, he said, was "(a) tariff which cuts us off from our proper part in the commerce of the world, violates the just principles of taxation, and makes the government a facile instrument in the hands of private interests."

Wilson's solution was in fact hinted at by Trump in his speech, when he stated that education is the "civil rights issue of our time." Trump was echoing Wilson, who said that we must make our producers "better workers and mechanics than any in the world" by constantly sharpening their skills in competition with foreign producers. Trump complains that we do not have a "level playing field" in trade. The good news is that the existing U.S. foreign trade laws provide ample means to counter unfair foreign trade practices such as dumping, unfair subsidization of exports, and the theft of our intellectual property.

**Trump faces a pivotal moment in his presidency. He can become Herbert Hoover or Woodrow Wilson.** If he chooses to ram the BAT through Congress, with Paul Ryan as his quarterback, he will become our modern-day version of Herbert Hoover. Following an embarrassing series of losses in the WTO dispute settlement process Trump might choose to leave the organization, just as he pulled out of the Trans-Pacific Partnership ("TPP"). If he convinces Congress to pass a BAT he will have succeeded in turning the Republican Party from a champion of free and open trade to the party of protectionism.

It is one thing for Donald Trump to be Herbert Hoover. It is another for Congress and the American people to follow him down this historical rat hole.

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