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Snipings

With this issue the *World Trade Review* inaugurates another new rubric – 'Snipings'. It is intended for contributions which, while rigorous, are shorter and therefore less extensively developed and documented than our standard length articles. This offers, among other things, an opportunity for early analyses targeting topical policy issues affecting the multilateral trading system. Submissions – which should be in the 2,500 to 4,500 word range – are reviewed by independent referees.

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Killing the *Byrd Amendment* with the right stone

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1. The Appellate Body ruling

On 16 January 2003, the WTO Appellate Body issued its report on *United States – Continued Dumping And Subsidy Offset Act Of 2000* (WTO Doc. WT/DS217 and 234/AB/R). In this report, the Appellate Body condemned the so-called US *Byrd Amendment* by finding that it was inconsistent with the US obligations under the WTO Agreements on Antidumping (AD) and Subsidies and Countervailing Measures (SCM).

The *Byrd Amendment* is a United States legislation whereby the federal state promises to distribute proceeds from (eventually imposed) antidumping and countervailing duties to all US economic operators supporting a domestic petition to impose such duties. Such a petition by the private sector is a necessary procedural prerequisite under the WTO AD and SCM Agreements for the United

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States to lawfully initiate an investigation, which might lead to the eventual imposition of duties.

The Appellate Body condemned the *Byrd Amendment* for essentially a *formal* reason: as it states in §265 of its report, the US legislation at hand is an offset payment which is not a definitive antidumping duty or a price undertaking. Since only these three forms of duties are permissible as specific action against dumping under the WTO AD Agreement, the Appellate Body concluded that the United States violated its obligations under the WTO by introducing a measure to counteract dumping other than the three permissible forms to do so.

By the same token, when used against subsidies, the *Byrd Amendment* is a form of counteracting subsidies other than those permitted under the WTO SCM Agreement; hence, the violation of the WTO contract in this respect as well.

In what follows, we explain why, in our view, although the end-result of the Appellate Body process might be to our liking, we disagree with the path used by the WTO adjudicating body to construct its legal reasoning that ultimately led to a finding of violation. In our view, there is a *substantive* reason why the *Byrd Amendment* violates the WTO contract. The United States, by imposing anti-dumping (and/or countervailing duties) *and* at the same time, transferring funds to (allegedly) injured (through dumping or subsidies) US economic operators, in fact goes *beyond* what is prescribed as the positivist objective function of antidumping/countervailing duties, which is to re-instate a 'level playing field' disturbed through dumping or subsidies. In other words, by over-compensating (allegedly) injured private parties, the United States turns the tables and disturbs the 'level playing field', this time to the advantage of its nationals.

In order to avoid any misunderstandings, we should make it clear that in this paper we take the AD and SCM Agreements as an exogenous legal constraint, imposed by the existing agreements. We do not necessarily accept, indeed we have reservations about, the rationale underlying these agreements.

We should also make it clear that this paper does not purport to address in an exhaustive manner all issues raised during the *Byrd Amendment* litigation process: we focus on the heart of the dispute that is, the function of the substantive provisions of the *Byrd Amendment*.

2. How the *Byrd* (*Amendment*) was hit

The Appellate Body found that the *Byrd Amendment* is inconsistent with Art. 18.1 AD (and 32.1SCM) because it is a specific action against dumping (and subsidy) other than those permitted by the AD and SCM Agreements. Art. 18.1 AD reads in pertinent form:

> No specific action against dumping or exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.

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Art. 32.1 SCM contains the equivalent provision in the context of subsidies.

Formally, the *Byrd Amendment* is not an antidumping duty (definitive or provisional) or a price undertaking. Hence, formally, Art. 18.1 (and for the same reason, Art. 32.1 SCM) are violated.

The Panel however, in its report, went a bit further. The report, *inter alia*, found against the *Byrd Amendment* because in its view, it

> has a specific adverse impact on the competitive relationship between domestic products and dumped [or subsidized] products. (see WTO Doc. WT/DS217 and 234/R of 16 September 2002 at §7.39)

The Panel unfortunately did not elaborate on this point. More specifically, the Panel did not explain at all how precisely the *Byrd Amendment* adversely impacted on the competitive relationship between domestic and foreign products. The Panel, it seems to us (as we elaborate in Section 4) had the right intuition but it simply did not go all the way: it suspected that the US scheme was probably overshooting but failed to explain in what exactly the overshooting consisted and why a WTO inconsistency was thus established. At any rate, as shown in what immediately follows, this point was overturned by the Appellate Body.

The Appellate Body first reproduced this passage from the Panel's report on the *Byrd Amendment* (the official name of which is CDSOA) in the following terms:

> The Panel found that the CDSOA is a measure against dumping or a subsidy because it 'has a specific adverse impact on the competitive relationship between domestic products and dumped [or subsidized] imports'. (Panel Report, §7.39) According to the Panel, the CDSOA is against dumping or a subsidy because it affects competition between, on the one hand, dumped or subsidized products, and, on the other hand, domestic products, to the detriment of the imported products. (footnote 194 of the Panel Report, §7.39)

The Appellate Body then dismissed the Panel's approach in this respect in the following terms:

> We note that the United States challenges what it views as the Panel's incorporation of a 'conditions of competition test' in Article 18.1 of the *Anti-Dumping Agreement* and in Article 32.1 of the *SCM Agreement*. In our view, in order to determine whether the CDSOA is 'against' dumping or subsidization, **it was not necessary, nor relevant, for the Panel to examine the conditions of competition under which domestic products and dumped/subsidized imports compete, and to assess the impact of the measure on the competitive relationship between them**. An analysis of the term 'against', in our view, is more appropriately centred on the design and structure of the measure; such an analysis does not mandate an economic assessment of the implications of the measure on the conditions of competition under which domestic product and dumped/subsidized imports compete. (§257 of the Panel Report, italics in the original, bold added)

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This passage reflects the heart of our disagreement with the approach privileged by the Appellate Body. Contrary to the Appellate Body's assertion,[1] we believe that it is quite relevant for the adjudicating body to look into the effects of the measure in order to reach an informed judgment on what is wrong with the *Byrd Amendment* (and here we agree with the Panel's intuition). The Appellate Body limited its judicial review to the letter of the AD (and SCM) Agreements without paying any attention to the context (in the sense of Art. 31 of the Vienna Convention on the Law of Treaties) of the particular legal provisions it was called to interpret.

Words however, are not invariances. They are context-dependent. The appropriate way to understand what is wrong with the *Byrd Amendment*, we believe, is to view the term 'specific action against dumping' figuring in Art. 18.1 AD (and specific action against subsidies figuring in Art. 32.1 SCM) in their context. It is the legal context that will enable us to understand the objective function of the instrument (be it the AD or the SCM Agreement). We turn to this question in what immediately follows.

3. What does the *Byrd Amendment* actually do?

What does the term specific action against (dumping or subsidy) amount to when viewed in the context of the AD (or the SCM) Agreement?

The context of the Agreement, legally speaking, is (at least) the rest of the Agreement. The most important provision to understand the function of the AD Agreement is Art. 3.1 AD (Art. 5 and Art. 15.1 SCM). There it is clearly stated that WTO Members are allowed to counteract dumping (or subsidies) provided that they can demonstrate that their domestic industry producing the like (to the dumped or subsidized) product has suffered injury as a result of dumping (or subsidy). The AD and SCM Agreements 'punish' dumping (that is a price differential) and/or subsidies to the extent that an injury has been caused to the domestic industry producing the like product as a result by either dumping or subsidization.

Dumping by itself does not trigger the right to impose antidumping duties (ADs); by the same token, the fact that a WTO Member subsidizes its domestic

1 To be fair to the Appellate Body, it was not presented with a full scale claim that the *Byrd Amendment* was in fact a subsidy. To our knowledge, only Mexico made this argument (and did not pursue to its logical extension) before the Panel. Of course, the Appellate Body, in application of the *non ultra petita* maxim, can respond only to claims made by the parties to the dispute. In this sense we can criticize the Appellate Body for not fully entertaining a discussion on what is the focus of this short paper, that is to what extent the *Byrd Amendment* over-compensates affected US industries beyond the acceptable maximum level provided in the WTO Agreements. It is however hard to explain why the Appellate Body, in the absence of such claims, closed the door to a discussion how competitive conditions are affected by instruments like the *Byrd Amendment*. It seems to us that, through a more narrow response (than the one contained in the quoted §257 of the report), the Appellate Body could simply leave this question un-answered for now and respond to it when presented with a full scale argument to this effect.

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production does not give to another WTO Member the right to impose countervailing duties (CVDs).

Following hence a contextual interpretation, the only plausible interpretation is that the function of ADs and CVDs is to ensure that any competitive advantage that the exporters might have received as a result of either dumping or subsidization will be counteracted through Ads or CVDs.

Grossman and Mavroidis (2003) also follow this line of reasoning when dealing with the interpretation of the term 'benefit' in Article 1.1 of the *SCM Agreement*. They argue that the only understanding of the term consistent with the aims and objectives of those who drafted the Agreement is one that attributes benefit whenever a firm's competitive position is advantaged relative to what it would have been *but for* the government's financial contribution. They view the main objective of the *SCM Agreement* as being to discourage subsidies that threaten harm to competing producers in importing countries. To achieve this objective, it makes, in their line of thinking, no sense to interpret 'benefit' in terms of the financial wealth of the owners of a firm. Rather, the potentially adverse effects of a subsidy on producers in an importing country can be avoided only if a subsidy is deemed to exist whenever a government's financial contribution impacts the competitive situation in an industry.

Following this line of reasoning, the proper way to interpret Art. 3.1 AD (Art. 5 and Art. 15.1 SCM), and the entire Agreement on the subject at hand, seems to require a two-step procedure. First, that the AD margin (or subsidy) be determined by an agreed procedure; and second, that this margin be counteracted, up to but not exceeding the margin so determined, provided that injury is established. In short, once an initial 'distortion' of competitive conditions in the form of either dumping or subsidization has occurred, the margin (of dumping or subsidy) to be determined during an investigation procedure implies an upper cap to the institutional possibility of the defendant to address the 'distortion' of competition. As a matter of what might loosely be called 'proportionality', the determination of a positive margin is a necessary, but not a sufficient, condition for the imposition of counteracting duties.

Second, the investigating authority will have to determine to what extent the positive dumping (or subsidy) margins have caused injury to the domestic industry producing the like product.

There is of course an inter-relationship between step one and step two to which we have already alluded *supra*: the margin found during in step one is the maximum amount of ADs or CVDs that might be eventually imposed. Hence, the two Agreements provide in this respect a *maximum amount of protection* which corresponds to the dumping or subsidization margin established during the investigation. Any protection which extends beyond this maximum amount is not permissible under the two Agreements.

Can we justify this two-step interpretation? Yes, indeed. Take the first step. Two points may be made. First, traditionally, in AD (and subsidy) actions,

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a tremendous effort is undertaken by plaintiffs to increase the size of the determined margin whereas the defendants work equally assiduously to reduce it. If the margin was not the key, indeed the crucial determinant of the counteracting duties that would be legitimated (subject to the injury test, of course), why bother to spend so much time and effort on it? Art. 2 AD, for example, provides very detailed rules as to the quantification of the dumping margin (as evidenced by a thorough reading of the provisions, the founding fathers of the AD Agreement spent so much time and effort trying to establish the methods to be used in order to establish the precise dumping margin).

On the other hand, both Art. 9.1 AD (and Art. 19.2 SCM) reflect the so-called 'lesser duty rule': WTO members can impose ADs or CVDs that are less than the determined margin, if they decide that by doing so, they will produce enough relief for the plaintiff firms. *Nowhere* does the Agreement say, however, that this determined margin can be *exceeded* if that is required, in the judgment of the country whose firms are the plaintiffs, to bring relief. And these provisions underscore the point that the purpose of ADs and CVDs is indeed to restore the balance of competitive conditions that would have existed *but for* the dumping or subsidization that occurred in the case at hand.

Hence, the Agreements (especially the AD Agreement) provide very precise rules as to the quantification of dumping margins and also make it clear that protection cannot exceed the dumping margins established through recourse to the relevant provisions of the Agreement.

Next, in practice, this proves to be the highlight of an investigation: for centrally planned economies, for example, the name of the game has always been to use very dirty but acceptable tricks in the book to arrive at the margins that would justify and trigger corresponding counteracting duties!

So, the notion that the margin is somehow not the Prince in *Hamlet* is wholly implausible.

Now, the Agreement also makes a nod in the direction of interests other than those of the competitors participating in the same relevant product market. Thus, it states that the effects of dumping on competition might or might not be taken into account. The AD contains an optional (best endeavours) 'public interest clause' (Art. 6.2 AD) and so does the SCM Agreement (Art. 12.2 SCM): WTO Members do not have to, but may look into other (probably beneficial) effects of dumping on consumer welfare (either final consumer or, in case the dumped item is an input to a final product, on producer welfare when such producers *use* the particular 'dumped' input in their process of production). As stated however, WTO Members do not have to look into such effects; to impose AD duties, they are obliged to look into the effects of dumping on producer welfare, i.e. on competitors, only.

Consequently, it is reasonable to conclude that the AD and SCM Agreements in force today imply that AD duties (and CVDs as well) are meant to re-establish a 'level playing field' between domestic and foreign competitors, by allowing

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affected WTO Members to impose import duties that can go up to, but not beyond, the determined margin of dumping (or subsidy), thereby raising the prices of imported 'dumped' (or subsidized) goods up to the level where they should have been had no dumping ever occurred.

We believe that this is the key in understanding what is substantively wrong with the *Byrd Amendment*. For, as we will try to demonstrate in what follows, the *Byrd Amendment* ends up going beyond the restoration of the 'level playing field': it distorts competitive conditions in favour of the US companies which are beneficiaries of *Byrd* payments.

4. The *Byrd Amendment* tops the margin

In what follows, we will try to demonstrate that the fundamental WTO-illegality of the *Byrd Amendment* consists in violating the rule, justified by the AD and SCM Agreements, that the determined margin of protection cannot be exceeded.

The way the *Byrd Amendment* does this is by allowing the proceeds from the counteracting import duties to be redirected to the petitioning firms. At the same time however, the firms at hand are protected by the AD or CVD duties in place (that is, the 'level playing field' has been restored). But that means that, on top of the duties which have countervailed the determined margin, the US firms at hand also get the revenue proceeds as a subsidy!

One might argue that this is not a necessary outcome if the 'lesser duty' option is taken and the antidumping (or counteracting) duty applied is below the determined margin. This is not the case in US practice however: while the EU has sometimes used the 'lesser duty' option, the US Government does not. In fact, under US law, the Department of Commerce has no such discretion. The duty margin found is the duty margin assessed. So, the *Byrd Amendment* unmistakeably, and unambiguously, exceeds the cap provided by the determined margin. That makes it WTO-illegal if our contention about the illegality of exceeding the maximum margin of protection is accepted.

5. The Feenstra–Bhagwati alternative

But it is possible to amend the *Byrd Amendment* so that it is both WTO-legal and a superior alternative, in economic terms, to the current practice and Agreements. Writing in 1982, I and my then student, now a most distinguished trade theorist, Robert Feenstra proposed (Feenstra and Bhagwati, 1982) what they called an 'Efficient Tariff' where the revenue proceeds from the tariff imposed because of successful lobbying would be used to bribe the same lobby into a lower duty, while keeping the same level of support. So, as *per* Bhagwati and Ramaswami (1963), the lobby would be as well off as with the higher tariff; but the economy would be better off because a tariff implies, whereas a production subsidy does not, a gratuitous cost to consumers: a lesson which is at the heart of the revolution in

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the post-war theory of commercial policy starting in the 1960s, as explained in Bhagwati (2002).

Evidently, if we were to replace the WTO-illegal *Byrd Amendment*, which uses the subsidy from the tariff proceeds to exceed the cap, with the Feenstra–Bhagwati Amendment, which says use a 'lesser duty', but then used the tariff proceeds to give a subsidy, choosing the lower duty such that the sum of the lower duty and the tariff proceeds adds up to the support allowed by the cap as determined by the margin established, then that would indeed be an improvement.

So, we are not against the use of revenue proceeds to reward the plaintiff firms, as such. If such a subsidy is used in the Feenstra–Bhagwati fashion, retaining the overall support at the determined margin, then that is certainly a step in the right direction. The *Byrd Amendment* is a step backwards; Feenstra–Bhagwati would be, in principle at least, a step forward, from the existing practice and Agreement, which relies on the use of tariffs alone.

6. Further observations

But two concluding observations are in order, concerning the Agreement itself:

(1) That the dumping margin is determined in ways that are both arbitrary and often make little economic sense is well known. But even if it was accurately determined without any protectionism-inspired shenanigans, there is no reason to think that we could sustain the proposition that, if countervailed, this action would result in a restoration of competition in some meaningful economic sense. In other words, we must recognize that, from an economic viewpoint, matching and offsetting with an import duty the estimated dumping margin is not generally speaking a policy that will be 'competition-restoring'.

To see this plainly, consider the following argumentation. We can infer directly from the general theory of non-equivalence of import tariffs and quotas under imperfectly competitive market structures (which are relevant here since a dumping margin will not materialize under perfect competition), developed by Bhagwati (1965) and exposited in the textbook by Bhagwati, Panagariya and Srinivasan (1998, Chapter 13), that to argue that a policy will be 'competition restoring' we must define what precise variable and its value we are restoring, for example, import volume, or domestic production or domestic price. Additionally, in the AD case, we must also define and calculate the value of this chosen variable that we seek to restore that variable to.

It would seem to us that in the AD context one reasonable way to define and calculate the value of, say, domestic production to which we want to shift equilibrium to with our policy intervention, is the following. Let us define and calculate the equilibrium in the industry subject to the requirement that no price discrimination between different markets is to be allowed. This is a 'constrained' equilibrium where the foreign (and, for that matter, the domestic) firms must

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charge a single price: but where the oligopolistic behaviour is left intact. In this equilibrium, there will be calculated values of different variables such as domestic production.

Compare this with an equilibrium where the dumping margin is simply countervailed by an AD duty. Then, recalculate the resulting equilibrium values such as domestic production.

Then, if and only if the value of, say domestic production, is identical to that in the two equilibria, can we say that the AD countervailing duty is 'restoring competition' in the sense that the value of domestic production is identical to what would arise if price discrimination was not allowed.

It is evident, from the literature on non-equivalence, that this will not be the case, generally speaking. Nor will the answer be different if we shift our definition of how the 'original' equilibrium should be defined: for example, that all firms, despite the existence of oligopoly for instance, behave as price-takers.

In short, there is no sound theoretical basis for taking the countervailing AD duty as a policy that, in a proper economic sense, can be considered to be 'competition restoring'.

(2) In contrast, subsidies can be available to both perfectly competitive and imperfectly competitive industries. A margin, calculated as the subsidy given, is an appropriate 'competition restoring' measure in the former case; but not in the latter, for reasons identified in the preceding discussion of AD countervailing duties.

We may then well ask: is not the traditional focus of customary practice and Agreements on the dumping margin (and subsidy) not misplaced, and based on intuition unsupported by proper economic reasoning? We think so. Sophisticated economic analysis, just as we have gotten used to in the case of antitrust practice (which addresses competition-related issues, of course), seems, at the end of the day, to be indispensable.

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