The Ineffectiveness of WTO S&D Provisions: Notes from the Experience of Indonesia in the US - *Byrd Amendment*

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Introduction

The World Trade Organization (WTO) has provided 145 provisions on Special and Differential Treatment (S&D) for developing countries. The S&D provisions refer to special rights and privileges given by the WTO Agreements to developing countries, and are not extended to developed countries. The introduction of the S&D provisions proposes to facilitate the integration of developing countries in the multilateral trading system; and to help developing countries to alleviate difficulties in implementing the WTO agreements. This is in order that their development needs are not hampered and, in turn, these members can implement the agreements fully.

Nevertheless, since the inclusion of the S&D provisions into WTO Agreements, and, in particular, in recent times the effectiveness of the provisions has been doubted, in the sense of whether or not they help developing countries to participate in, and derive significant benefits from, the multilateral trading system. Most developing countries, observers, academics and activists have expressed their views that S&D provisions have been ineffective. The ineffectiveness has been

reflected in, *inter alia*, the case of *US Byrd Amendment*,[1] in which Indonesia has acted as the third party complainant. This article will argue that, despite Indonesia in the case having been prevailed, the case demonstrates such ineffectiveness of S&D provisions, especially in their implementation and enforcement.

After this introduction, this article will, first of all, briefly review the concept of S&D provisions in the WTO. Secondly, the case position of the *US Byrd Amendment* will be described and analysed in the context of Indonesia. Finally, conclusions will be drawn.

The Concept of S&D Provisions: Brief Overview

The S&D as an explicit term is relatively new.[2] It is best known only after the establishment of the WTO. This term can be found in several Covered Agreements of the WTO, such as the Agreement on Agriculture (AA), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), and the Agreement on Subsidies and Countervailing Measures (SCM).

As an implicit term, the S&D can be found both in various provisions of the General Agreement on Tariff and Trade (GATT) and in other WTO Covered Agreements. The S&D is manifested in various terms, used either as the titles of certain provisions or as phrases in the provisions themselves. In some other provisions of the GATT and the WTO agreements, the term S&D cannot be found either as the titles or phrases, but are indicated in the meaning of the provisions themselves as a whole.

Nowadays, the S&D has been commonly known to include the explicit and implicit terms, both in the GATT and WTO Agreements. This is because the GATT has been an integral part of the WTO and, hence, the provisions of the former cannot be separated from those of the latter. Nevertheless, despite the S&D provisions being numerous, no explicit definition can be found in the GATT and WTO Agreements. Some observers, therefore, define the S&D according to their own perspectives. John Whalley, for instance, simply defines the S&D as GATT rights and privileges given to developing countries, but not extended to developed countries.[3] Slightly differing from the above definition, Kiichiro Fukasaku refers to the S&D as special rights and privileges accorded to developing countries, through which the ways they participate in the multilateral trading system are affected.[4] Further, Murray Gibbs states that the S&D is the product of the harmonized political struggle of developing countries, to redress the obvious unfairness of the post-war international trading system, by establishing preferential treatment in their favour across the various international economic relations.[5] Finally, in a more complicated formulation, Ricardo Melendez-Otiz and Ali Dehlavi define the S&D as follow:

> ... the term special and differential treatment (SDT) refers to the set of provisions in trade accords which have been negotiated to grant developing country exports preferential access to markets of developed countries, and operationalise the notion that developing countries taking part in trade negotiations have no obligation to reciprocate fully the concessions they receive. SDT also implies longer timeframes and lower levels of obligations for developing countries for adherence to the rules. It is a fundamental cross cutting issue for developing countries in the Multilateral Trading System (MTS) and is an integral part of the balance of rights and obligations in the Uruguay Round Agreements (URAs).[6]

From the definitions mentioned above, some essential components of the S&D can be derived, including: special rights and privileges; WTO provisions; developing countries; the proposals to redress the inequality; and the several means used. The first component, special rights and

1 *United States Continued Dumping and Subsidy Offset Act of 2000 (US - CDSOA (Byrd Amendment))*; Panel Report, WT/DS217/R, WT/DS234/R, 16 September 2002; Appellate Body Report, WT/DS217/AB/R; WT/DS234/AB/R, 16 January 2003.

2 However, the idea of S&D has existed since long time ago in modern legal history. The idea of S&D in the forms of separate rights, preferences, governmental recognition, and benefits for Indian nations have been recognized in federal law of the United States since the founding of the country. Carole Goldberg, 'American Indians and "Preferential" Treatment' (2002) 49 *UCLA Law Review* 943, 944.

3 John Whalley, 'Special and Differential Treatment in the Millennium Round,' (Working Paper No. 30/99, Centre for the Study of Globalisation and Regionalisation, University of Warwick, Coventry, UK, May 1999) 3.

4 Kiichiro Fukasaku, 'Special and Differential Treatment for Developing Countries: Does It Help Those Who Help Themselves,' (Working Paper No. 197 - The United Nations World Institute for Development Economic Research, Helsinki, Finland - September 2000) 1.

5 Murray Gibbs, 'Special and Differential Treatment in the Context of Globalisation' (Note presented to the G15 Sysmposium on Special and Differential Treatment in the WTO Agreements, New Delhi, 10 December 1998) 1.

privileges, here means that the S&D constitutes peculiar claims or titles and benefits, advantages, or favours not enjoyed by others. The second component, WTO provisions, means that the S&D is given legally by the WTO provisions. Thus, the S&D is given effect in legal instruments. Further, the component of developing countries means that the S&D is only given to developing countries, not to developed countries. Furthermore, the component of the proposals to redress the inequality requires that the S&D be proposed to correct the inequality, especially that caused by the different levels of development between developed and developing countries. Finally, by the last component, the several means used, it is aimed that to achieve the purpose mentioned above, several means can be used, such as: the preferential treatment; the non-reciprocity principle, the longer time frames; and the lower levels of obligations for developing countries. In short, the S&D can be defined as special rights and privileges, given to developing countries under the WTO provisions, to redress the inequality of economic development, through several authorized means.

As stated, there are about 145 provisions of the S&D identifiable in the WTO agreements, both substantially and procedurally. They are classified into six categories, including provisions aiming at increasing trade opportunities; those requiring WTO Members to safeguard the interests of developing country Members; those giving flexibility of commitments; those granting transitional time periods; those giving technical assistance; and those specifically assisting least-developed .country Members.[7] It should be noted, however, that there is overlap between these, in the sense that some individual provisions may have more than one of these characteristics.

US *Byrd Amendment*: Case Position

The Measure at Issue

The case of US *Byrd Amendment* came up as a result of the enactment of the Continued Dumping and Subsidy Offset Act of 2000 (the 'CDSOA' or the 'Offset Act', better known as the *Byrd Amendment*) by the United States, on 28 October 2000.[8] The *Byrd Amendment* has been amendment to Title VII of the Tariff Act of 1930.[9] To implement the Act, regulations regarding administrative procedures were issued on 21 September 2001.[10] Under these measures, the revenue collected from anti-dumping actions against foreign companies under the Antidumping Act of 1921 is distributed to affected domestic firms, or to those lodging the complaints for the anti-dumping or countervailing duty investigation.[11]

Claims and Responses

Indonesia, together with Australia, Brazil, Chile, the European Communities, India, Japan, Korea, and Thailand, filed complaints with the WTO, alleging that the *Byrd Amendment* violated certain provisions of the AD Agreement, the SCM Agreement, the GATT, and the Marrakesh Agreement establishing the WTO.[12] The measure was alleged to be inconsistent with the AD Agreement, because, among other reasons, it provides for a prohibited "specific action against dumping."[13] The measure violated the SCM Agreement because, *inter alia*, the distribution of the assessed duties was considered as a contingent subsidy, and an impermissible "specific action against subsidy."[14] By promulgating the Act, the United States also violated the requirement that an application for dumping and subsidy investigations be made "by or on behalf of the domestic industry".[15] Finally, by promulgating the measure, the United States was alleged to have violated the requirement that a Member ensure the conformity of its laws, regulations and

6 Ricardo Melendez-Ortiz and Ali Dehlavi, 'Sustainable Development and Environmental Policy Objectives: A Case for Updating Special and Differential Treatment in the WTO' (paper presented at the CUTS/CITEE Conference on Southern Agenda for the Next Millenium, Bangalore, India, 18-19 August 1999)5.

7 WTO Secretariat, *Concerns Regarding Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WT/COMTD/W/66, 16 February 2000, 1-2.

8 *US Byrd Amendment*, Panel Report, above n 1, [2.1].

9 This appears as a new section 754. Ibid.

10 Ibid, [2.2-2.5].

11 The regulations have been integrated under the *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers* (the "Regulation"). Ibid.

12 Ibid, [3.1-3.7].

13 Inconsistent with Article 18.1 of the AD Agreement, in conjunction with Article VI:2 of the GATT 1994 and Article I of the AD Agreement. Ibid, [4.2-4.9], [4.24-4.28], [4.444], [4.92-4.99], [4.110-4.113],[4.130-4.135].

14 Inconsistent with Article 32.1 of the SCM Agreement, in conjunction with Article VI:3 of the GATT 1994 and Articles 4.10, 7.9 and 10 of the SCM Agreement. Ibid, [4.10-4.15], [4.29], [4.42], [4.100-4.104], [4.136-4.143].

15 Inconsistent with Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement. Ibid, [4.16],[4.32-4.34], [4.43], [4.105-4.109], [4.144-4.150].

administrative procedures with its WTO obligations.[16]

In response, the United States stated that the *Byrd Amendment* did not violate the GATT 1994, the AD Agreement, the SCM Agreement, and the Marrakesh Agreement Establishing the WTO.[17] This was partially because the payments and the distributions, authorized under the *Byrd Amendment*, were not actionable subsidies and were not "action against" dumping or subsidy[18]. The United States also argued that there was no proof that the *Byrd Amendment* had been, or would be, used as such that the determination in anti-dumping and countervailing duty investigations were affected.[19] Finally, the United States also submitted that the complainants did not establish a *prima facie* case of the WTO violation, and hence there were no violations of Article XVI:4 of the Marrakesh Agreement Establishing the WTO, Article 18.4 of the AD Agreement, and Article 32.5 of the SCM Agreement.[20]

Decisions of the Panel and Appellate Body

The Panel found that, the *Byrd Amendment* was a specific action, and that the action taken under the *Byrd Amendment* had an adverse effect on dumping.[21] It concluded, therefore, that the *Byrd Amendment* was a non-permissible specific action against dumping and subsidy, and hence violated Article 18.1 of the AD Agreement and Article 32.1 of the SCM.[22] Consequently, the *Byrd Amendment* was also inconsistent with Article VI.2 and VI.3 of the GATT 1994.[23] The Panel also found that the offset payments had been a financial incentive for domestic producers of like products, which would have resulted in more petitions, and was, hence, inconsistent with Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement.[24] The Panel recommended that the United States bring the *Byrd Amendment* into conformity with its obligations under the AD Agreement, the SCM Agreement, and the GATT 1994, by repealing the *Byrd Amendment*.[25]

The Appellate Body upheld most of the Panel's findings, mainly those related to the ruling that the *Byrd Amendment* was an impermissible specific action against dumping or a subsidy, and, hence, inconsistent with certain provisions of the AD Agreement, the SCM Agreement and the GATT 1994.[26] However, it rejected the Panel's conclusion on the issue of the effect of the *Byrd Amendment* on the domestic industry support, as required by Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement.[27] The Appellate Body considered that, inter alia, these provisions did not deal with the producers' motives in supporting an investigation of dumping or subsidisation.[28] The *Byrd Amendment* did not oblige domestic industries to support an investigation.[29] The Appellate Body recommended that the DSB request the United States bring the *Byrd Amendment* into conformity with its obligation under the AD Agreement, the SCM Agreement, and the GATT 1994[30]. Unfortunately, although the Panel recommended that the United States repeal the *Byrd Amendment*, the Appellate Body did not clearly recommend a procedure for such compliance. Nevertheless, it is difficult to view the Appellate Body's recommendation as anything other than repealing the measure. As such, from an American perspective and practice, such a recommendation, using the polite diplomatic phrases of public international law jargon, could only mean 'to repeal the law'.[31]

S&D Implementation Ineffectual

What can be learnt from US *Byrd Amendment* regarding the implementation of the S&D provisions is that these provisions, especially those aiming at safeguarding the interests of developing countries, as stipulated in Article 15 of the AD Agreement, have not been implemented effectively in practice. The reason is that by issuing the *Byrd Amendment*, the United States did not safeguard the interests of developing countries, including Indonesia. The *Byrd Amendment* can be considered as a market access impediment for products of developing countries, in developed countries' markets, such as the United States. The performance of Indonesia's exports has suffered from anti-dumping measures, and the *Byrd*

16 Inconsistent with, among others, Article XVI of the Marrakesh Agreement Establishing the WTO. Ibid, [4.17], [4.46], [4.121], [4.164-4.165].
17 Ibid, [3.8-3.9].
18 Ibid, [3.8].
19 Ibid, [3.9].
20 Ibid.
21 Ibid, [7.51].
22 Ibid.
23 Ibid.
24 Ibid, [7.62], [7.66]..
25 Ibid, [8.5-8.6].
26 *US Byrd Amendment*, Appellate Body Report, above n 1, [318(a)-(c)].
27 Ibid, [318(d)].
28 Ibid, [291].
29 Ibid, [293].
30 Ibid, [319].
31 See Raj Bhala and David A. Gantz, 'WTO Case Review 2003' (2004) 21 *Arizona Journal of International and Comparative Law* 317, 338.
32 Sukarmi, *Regulasi Antidumping di Bawah Bayang-bayang Pasar Bebas* (1st ed, 2002) 5.

Amendment would even worsen such performance in the market of the United States. Indonesia has already been a frequent target of anti dumping actions by other countries, especially developed countries. According to the Anti Dumping Commission of Indonesia (ADCI), as of September 1996 there were 37 export commodities, produced by national firms, which were subject to dumping petitions in 10 countries.[32] The majority of these petitions (32,4%) did not result in the imposition of antidumping duties.[33] As of March 2002, the dumping petitions against Indonesia increased to be more than 100 cases[34], only 30 of which had been charged with anti-dumping duties.[35] This means that the petitions were largely baseless. Based on the facts, it seems fair to say that there is a tendency to use dumping accusations arbitrarily to protect domestic products, and to set up barriers to block Indonesian products in the markets of the accusing countries, including the United States. Dumping petitions matter because, proven or not, they have serious impacts upon the alleged products and the exporter countries, including Indonesia. The importers of the alleged products stop importing, and the exporters and their governments are forced to negotiate the possibility of applying what are called the Voluntary Export Restraints (VERs). The petitions also require a huge amount of money, especially for exporters and their governments, in order to prove that the allegations are erroneous. Whereas, in fact, developing countries, including Indonesia, neither have enough financial resources, nor the infrastructure, technical and legal capacity to defend themselves effectively.[36] In cases where anti-dumping duties are applied, the impact is more serious, since the products in dispute lose their competitive advantage.

The *Byrd Amendment* could worsen Indonesian export performances in such a way that it would increase the use of dumping petitions by the United States domestic industry. This is because, as Indonesia stated, it provided financial inducement for the United States domestic firms to apply for anti dumping petitions.[37] This might harm trade flows of Indonesian products to the United States and create significant additional problems for Indonesia. The introduction of the *Byrd Amendment* could decrease market access of Indonesian products after the imposition of anti-dumping and countervailing duties. The implication of this is even more serious for Indonesia, because "the introduction of the *Byrd Amendment* serves to detract from the problems of developing countries to participate more fully in international trade."[38]

The introduction of the *Byrd Amendment*, leading to the ineffectiveness of the implementation of the S&D provisions, suggests more significant lessons. First, the *Byrd Amendment* was introduced as a result of interest group pressure. This is understandable if one considers it as special interest legislation.[39] This is because of the fact that this protectionist measure only benefits the domestic producers, which will otherwise be competitively defeated by foreign companies, and injures other domestic industries as well as consumer welfare as a whole.[40] The *Byrd Amendment* "provides a textbook example of the ways in which interest-group machinations can result in legislation that violates international commitments and works to the detriment of domestic welfare."[41] If other interests of the United States were sacrificed by the *Byrd Amendment*, other countries' interests, including those of Indonesia, would be sacrificed as well.

Second, the adoption of the *Byrd Amendment* also confirms the view of Indonesia as expressed at the informal WTO General Council Meeting, in October 1998. It stated that special regard, as required by Article 15, was seldom accorded to developing country Members in the application of Anti-Dumping measures, and constructive remedies which were also required by the Article were almost unheard of.[42] This further means that, despite the WTO having provided S&D provisions aiming at safeguarding the interests of developing countries, these provisions have not been helpful, where they encounter an unfavourable trade atmosphere in developed countries.

33 Ibid.
34 See Haryajid Ramelan, 'Ketika Dumping Menggebuk Bursa' (2002) 23/VI Kontan.
35 See the statement of Halida Miljani, the Chief of the ADCI <http://www.bakrie-broters.com/ news.php?id=123>.
36 Vermulst identifies three main problems facing developing countries in relation to the application of anti-dumping laws: a lack of expertise, lack of financial resources, and a lack of manpower. Cf Vermulst, 'Adopting and Implementing Anti-Dumping Laws' (1997) 31(2) *Journal of World Trade* 5, 7.
37 *US Byrd Amendment*, Panel Report , above n 25, [4.395].
38 Ibid, [4.397].
39 See e.g. Mark L. Movsesian and David D. Caron (ed), 'International Decision: United States Continued Dumping and Subsidy Offset Act of 2000' (2004) 98 *The American Journal International Law* 150, 154.
40 Ibid.
41 Ibid.
42 Chakravarthi Raghavan, 'Call for Revision of Anti-Dumping, Subsidy Rules,' (1998) 197 Third World Economics <http://www.twnside.org.sg/title/dump-cn.htm>.

Substantial S&D Enforcement: Ineffective

For Indonesia, the issuance of the *Byrd Amendment* not only breached the United States' obligations under several provisions of the AD Agreement and the SCM Agreement, but also undermined the S&D provisions under Article 15 of the AD Agreement. Therefore, in the US *Byrd Amendment*, Indonesia, as a developing country Member, invoked these provisions for enforcement.[43] The Article reads:

> It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

In Indonesia's view, the *Byrd Amendment* was inconsistent with this Article, because the impact of it not only disrespected price-undertakings as a constructive remedy, but also harmed the potential trade negotiations by which the possibilities of constructive remedies other than duties might also be raised.[44] Driven by the motive to receive money from the distribution of duties under the *Byrd Amendment*, petitioners might refuse the proposed undertakings, which, according to the previous Panel proceedings, were a constructive remedy par excellence.[45]

Indonesia argued that Article 15 of the AD Agreement was mandatory, and, hence, the obligation of the United States as a developed country to fulfil it.[46] On the contrary, the United States contended that the article is a "best endeavour effort" commitment, because it only requires developed countries to "explore" constructive remedies before applying anti-dumping duties.[47] In this context, it submitted that, in any case, it fulfils such a commitment and will continue to do so[48]. Further, it stated that there was no evidence that the *Byrd Amendment* would affect the administration of US laws governing undertakings.[49] These arguments were rejected by Indonesia, because the "Doha Decision on Implementation-related issues and concerns" states that the article is a mandatory provision.[50] By implementing the *Byrd Amendment*, the US violated its obligation under this article, because this would lead the domestic firms to object to undertakings, expecting distribution of duties.[51]

In its finding, the Panel departed from the premise that Indonesia considered price undertakings as an important "constructive" alternative to anti-dumping duties, which might be undermined by the *Byrd Amendment*. This was because, under the *Byrd Amendment*, the domestic industry could veto the acceptance of price undertakings by the USDOC. According to the Panel, there was no factual basis for this premise, since the USDOC remained free to accept an undertaking, even if there was domestic industry opposition to such acceptance.[52] In other words, even if the *Byrd Amendment* might cause domestic industry to challenge the acceptance of a proposed price undertaking, this would not necessarily be a reason for the USDOC to abandon such undertakings. The Panel did not give any further consideration to Article 15 of the AD Agreement, based on the reason that the premise had not been substantiated.[53] This attitude of the Panel was unfortunate, because from a legal perspective, such an indecisive statement could create a problem of legal certainty. In this context, whether the invocation of the S&D provisions is rejected or accepted remains open to interpretation. Nevertheless, based on the Panel's reason that the premise had not been substantiated, it can be inferred that the invocation of the S&D provisions, under Article 15 of the AD Agreement, had been rejected by the Panel. This was due to the incapability of Indonesia to submit *prima facie* evidence.

This might be true if in the context of Article 15 of the AD Agreement, the *Byrd Amendment* is interpreted in a purely normative way, in the sense that the latter does not undermine the former. In other words, the USDOC has the choice to accept or reject a proposed price undertaking. However, in practice, such a freedom could not be guaranteed to be effective, since the USDOC would not endure the interest group pressure. Not only has the USDOC been affected by the domestic industry pressure, even the President and the Congress of the United States have been affected as well.

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43 Above n 38, [3.7].
44 Ibid, [4.400].
45 Ibid, [4.1310].
46 Ibid, [4.1311].
47 Ibid, [4.1312], [7.84].
48 Ibid, [7.84].
49 Ibid, [7.84].
50 Ibid, [4.1312].
51 Ibid, [4.1312].
52 Ibid, [7.88].
53 Ibid, [7.88].
54 Ibid, [4.1306].
55 Ibid, [4.1308].
56 Ibid, [4.1309].
57 Ibid, [7.87].
58 *US Byrd Amendment*, Arbitration Report, WT/DS217/14, WT/DS234/22, 13 June 2003, [83].
59 *US Byrd Amendment*, Arbitration Report, WT/DS217/ARB/EEC, 31 August 2004, [5.1-5.5].

Procedural S&D Enforcement: Seemingly Effective

In the present case, other than substantial S&D, Indonesia invoked the procedural S&D, especially Article 12.11 of the DSU. This Article was invoked by Indonesia in relation to its invocation of substantial S&D, under Article 15 of the AD Agreement, in response to the argument of the United States that Article 15 of the AD Agreement was not within the Panel's terms of reference[54]. Article 12.11 reads:

> Where one of the parties is a developing country member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country members that form part of the covered agreements which have been raised by the developing country members in the course of the dispute settlement procedures.

Based on the Article, Indonesia argued that the Panel was obliged to give consideration to the S&D provision in the Covered Agreement invoked by a developing country, although the Panel's terms of reference did not explicitly indicate it.[55] In Indonesia's view, because in the dispute it had already invoked the AD Agreement as a Covered Agreement, Article 15 of the Agreement should be considered by the Panel as "relevant provisions on differential and more favourable treatment," as stated in Article 12.11 of the DSU.[56]

Supporting Indonesia's argument, the Panel stated that, despite not falling within the terms of reference, Article 15 of the AD Agreement had to be considered, because based on Article 12.11 of the DSU, the Panel was bound to do so.[57] This means that the invocation of the procedural S&D provisions by Indonesia seemed to have been effective. However, this was not the case, because, as described above, the invocation of the substantial S&D provisions alone was ineffective.

Apart from dealing with Article 12.11 of the DSU, the present case also involved the procedural S&D provisions, under Articles 21.2, 21.7 and 21.8 of the DSU. This case shows that these provisions had not been enforced, mainly because the United States did not comply with the DSB recommendations.

Based on the Arbitration Report on Implementation Period, the United States had to bring the *Byrd Amendment* into conformity with its obligations under the GATT 1994, the Anti-Dumping Agreement, the SCM Agreement and the WTO Agreement, no later than 27 December 2003.[58] Yet, until this "reasonable period of time" lapsed, there was no sign from the United States of compliance. Therefore, on 16 January 2004, the European Communities, together with the other complainants, except Indonesia, requested authorization from the DSB for retaliation under Article 22.2 of the DSU. On 31 August 2004, the Arbitration decided to authorise the European Communities to suspend the application to the United States of tariff concessions and related obligations under the GATT 1994. This was in an amount to be determined every year by reference to the amount of the offset payments, made to affected domestic producers in the latest annual distribution under the *Byrd Amendment*.[59] Despite this retaliation which authorised about $ 150 million to European Communities and the other 7 complainants it seemed unlikely at that time that the *Byrd Amendment* would be repealed soon, because the United States Congress had opposed it.[60] Indeed, by December 2005, the Congress finally passed what is called the "Deficit Reduction Act of 2005," which repeals, inter alia, the *Byrd Amendment*. However, this Act will enter into force in 30 September 2007.[61] This attitude of the Congress was again, to a large extent, the result of the success of protectionist lobbies. For example, the US shrimp industry had applied for petitions against shrimp imports from six developing countries, in order to receive millions of dollars under the *Byrd Amendment*.[62] It was also the result of the fact that $ 4 billion worth of sanctions had been authorised by the WTO to Europe, because of the United States' failure to comply with foreign sales corporations.[63] In this context, the United States exporters were not concerned about a sanction of only $ 150 million.[64] Such disobedience on the part of the United States reflected that, "once a protectionist measure makes its way into law, it can become quite difficult to remove it."[65]

60 See Dan Ikenson, 'This Byrd Won't Fly', 13 September 2004 <http://www.cato.org/cgi-bin/scripts/printtech.cgi/research/articles/ikenson-040913.html>.
61 See Press Release, 'US Congress Repeals Byrd Amendment But Allows for Transition Period', 20 December 2005 <http://www.eurounion.org/News/press/2005/2005128.htm>.
62 See Pradeep S. Mehta, 'Byrd Amendment Violates Doha Development Agenda' *The Financial Express*, 28 September 2004 <http://www.financialexpress.com/fe_full_story.php?content_id=69912>.
63 *US Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/ARB, 30 August 2002.
64 Dan Ikenson, above n 50.
65 See e.g. Mark L. Movsesian and David D. Caron (ed), above n 41.

From one perspective, it may be true that, legally, it is the right of the United States to comply or not to comply with the WTO recommendations. Such recommendations include those of the Panel, the Appellate Body, the Arbitration, and the DSB. This is because all the procedural steps in the surveillance of the implementation of recommendations and rulings have been exhausted. Yet, from another perspective, this recalcitrant attitude of the United States would mean that some other procedural steps, mainly those related to the S&D provisions, in favour of developing countries, including Indonesia, have been undermined.

Article 21.2 of the DSU states that, in the surveillance of the implementation of recommendations and rulings, particular attention should be paid to matters affecting the interests of developing country Members, with respect to measures which have been subject to dispute settlement. There was no sign that the United States had considered it. In fact, not repealing, or repealing but too late, the *Byrd Amendment* would affect the interests of developing countries, including Indonesia, since they would be continuously threatened by even the frivolous dumping petitions of the United States' domestic firms. This being so, because these firms would be involved in "bounty hunting" at the government's expense, they would have nothing to lose.[66] Through its incentives, the *Byrd Amendment* might help small firms to cope with their difficulties in using trade remedies, because of the high legal costs in bringing a case.[67] Finally, this incentive might adulterate the requirement of domestic industry supports to file a petition, because the firms joined supports for payments in a successful case.[68]

Even though Indonesia did not ask the DSB for authorisation to retaliate against United States' products, this does not mean that this country was not injured by the *Byrd Amendment*. A developing country, such as Indonesia, may find itself a much worse condition if it retaliates against a developed country like the United States. Retaliation may only be a minor irritant for the United States, but a major one for Indonesia. For example, the imposition of high tariffs for certain United States' products, including those of raw materials necessary for certain industries, would cause injury not only to consumers but also to industries. This is because the consumers will have to pay high prices, and the industries will have to increase the cost of production.

Article 21.7 of the DSU requires that the DSB consider what further action it might take which would be appropriate to the circumstances, if the matter is one which has been raised by a developing country Member. In considering what appropriate action might be taken, Article 21.8 of the DSU obliges the DSB to take into account not only the trade coverage of measures complained of, but also their impact on the economies of developing country Members concerned. In relation to the present case, both provisions, taken all together, require the DSB to seek alternative solutions for Indonesia, as a developing country, in case the recommendations of the Panel and Appellate Body are not implemented by the United States. Indeed, by granting authorisation for retaliation through the arbitration award, the DSB has made an effort to force the United States to comply with the WTO Panel and Appellate Body recommendations. The problem is that retaliation is the only action remaining, as the last and maximum recourse acceptable to be imposed on the losing Members. This means that no further action can be feasibly imposed on the United States, in order for the WTO recommendations to be complied with. Unfortunately, as mentioned above, the United States remains reluctant to repeal the *Byrd Amendment* notwithstanding such retaliation. Retaliation therefore will do nothing to remedy the problem faced by Indonesian industries. Their products will continue to suffer from the effects of the *Byrd Amendment*, namely trade barriers in the market of the United States. This reinforces the statement that "compensation or retaliation do nothing to remedy the problem that caused the DSB proceedings in the first place: as far as the complainant industry is concerned, the problem is still there (*sic*)."[69]

Actually, Articles 21.7 and 21.8 of the DSU say nothing about the possibility of the DSB taking further action, for the interests of developing countries, after retaliation fails to force the losing developed Members, to comply with the Panel and Appellate Body recommendations. It can be inferred that further action should be anticipated by the DSB, in facing such a situation. This is possible due

66 See Raj Bhala and David A. Gantz, 'WTO Case Review 2003' (2004) 21 *Arizona Journal of International and Comparative Law* 317, 333.
67 Ibid.
68 Ibid.
69 Philippe Ruttley, 'WTO Dispute Settlement and Private Sector Interests: A Slow, But Gradual Improvement' in Philippe Ruttley, Ian MacVay and Marc Weisberger eds., *Due Process in WTO Dispute Settlement* (2004) 180.

to the fact that other than a last resort, the retaliation also constitutes a provisional action before full compliance. However, this case shows that the DSB did not even attempt to ensure that the retaliation was effective. This might have largely been because of the lack of clarity of the provisions, especially the lack of specific terms[70], regarding what clear actions that can practically be taken by the DSB in the surveillance of the Implementation of Recommendations and Rulings. As Footer states, "there is no way to ensure that such treatment is accorded to developing countries in practice..." This vagueness is more evident when the Panel and Appellate Body recommendations are not implemented after the imposition of sanctioned retaliation. Thus, despite containing a strong order to the DSB to consider the interests of developing countries, including Indonesia, Article 21.7 and 21.8 have not been implemented effectively in the enforcement process.

Concluding Remarks

The review of US *Byrd Amendment* reveals that Indonesia, in general, cannot draw benefit from the S&D provisions, because of the ineffectiveness of the provisions, both at the levels of implementation and enforcement. At the level of implementation of the S&D in practice, in relation to US *Byrd Amendment*, Indonesia could not take advantage of the S&D provisions, under Article 15 of the AD Agreement. The issuance of the *Byrd Amendment* means that the United States has been inconsistent with its obligations under Article 15, in safeguarding the interests of developing countries such as Indonesia. This measure has threatened the export interests of Indonesia in the United States market. Largely, the domestic interest group pressures, and the vagueness of the S&D provisions under Article 15 of the AD Agreement, have contributed to this inconsistency. At the level of enforcement in the WTO dispute settlement, US *Byrd Amendment* showed disappointing results, in the sense of its effectiveness. The enforcement of the substantive S&D, under Article 15 of the AD Agreement, was considered ineffective, mainly because of the absence of prima facie evidence submitted by Indonesia. Regarding the procedural S&D provisions, this case proved ironical, because, on one hand, the invocation of Article 12.11 of the AD Agreement, giving an obligation to panels to consider Article 15, had been effective. On the other hand, the invocation of Article 15 itself had been ineffective. As such, despite Articles 21.2, 21.7 and 21.8 having been taken into account, the United States did not comply with the recommendations of the Panel and Appellate Body until 30 September 2007..

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70 See for example Mary E. Footer, 'Developing Country Practice in the Matter of WTO Dispute Settlement' (2001) 35(1) *Journal of World Trade* 55, 73.