

BOOK REVIEWS

GATT Article VI and the Protectionist Bias in Anti-dumping Laws

By Rainer M. Bierwagen. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1990, pp. xxiv, 402, \$106.00.

Bierwagen has written the right book, with the right title, at the right time. Exporters around the world, and many of their governments, are realizing that as tariff barriers have dropped through seven rounds of General Agreement on Tariffs and Trade (GATT) negotiations, and if market access improves in the current Uruguay Round, antidumping measures (and threats thereof) will become “the weapon of choice” for importing country governments (and special interests in those countries) to close off the market access promised in the GATT. The most dangerous aspect of Bierwagen’s book is its comprehensiveness—the book is virtually a how-to manual for countries and industries seeking to exclude imports under the guise of antidumping law. The book’s extensive documentation also will provide an excellent first line of defense that “everyone else does it” for any country desiring to take advantage of the protectionist bias described in the title.

Through the mid-1980s, the existence of such a manual would not have mattered too much. Only four countries used antidumping measures with any regularity—Australia (449 cases), the European Community (EC) (316 cases), the United States (295 cases), and Canada (251 cases)—and all four had been at it long enough (Canada’s 1904 antidumping law was the first) that no guidebook was needed. The 1980s saw a veritable explosion of new antidumping laws, newly revised antidumping laws in countries that already had them, and antidumping cases in countries that had never had such cases before.

GATT statistics for 1980–88 show thirty cases by Mexico, forty-three cases by Argentina, seventeen cases by New Zealand, and thirteen cases by Finland.

And the GATT statistics are admittedly incomplete: among other things, they do not include cases brought by non-Code signatories such as India (six cases); nor do some signatories (for example, Brazil and, apparently, the EC) report to the GATT cases brought against non-Code signatories. As this review is written, Korea has just imposed antidumping duties of up to 100 percent on plastics from the United States and Japan, and Venezuela almost imposed a "third-country" dumping duty (at the behest of producers from Ecuador) on a chemical product from France. This reviewer has worked with U.S. companies that have either faced antidumping cases or modified their behavior in the face of threats thereof in Argentina, the EC, Canada, Korea, Taiwan, Japan, and Israel.

What is to be done? Proposals for antidumping reforms have been made in the Uruguay Round by countries favoring freer markets such as Sweden, Finland, Canada, Hong Kong, and Singapore. These proposals, however, have been strenuously opposed by the EC and the United States, which favor state intervention in the economy. Most of these proposals seek to eliminate some of the obvious abuses highlighted in Bierwagen's book, such as the application of antidumping duties to nondumped, below-cost sales that would not be found objectionable if from domestic sources; the creeping definition of "like product" (especially in the anticircumvention area); and the abuse of "cumulation" (especially cross-cumulation). To some extent, it probably does not matter whether agreement is reached on these issues in the Uruguay Round since GATT panels would find most of the abuses in violation of either article VI or the 1979 GATT Antidumping Code, or both. In addition, attacks against the use of antidumping procedures have already begun in countries that use those procedures, as exemplified by the European Court of Justice's opinion in the *Saudi Urea* case¹ before the EC Court of Justice in 1991 and the consumer revolt by some industrial users in the United States.

Neither of those trends, alone or together, is likely to change the fundamental problem, which is precisely the "protectionist bias" in article VI itself—the different pricing standards for goods based on their origin. That change will occur, if at all, during the next round of the GATT negotiations, the "Berlin Round," perhaps when the competition-policy people in the major nation-states discover that the GATT may be the only way to preserve significant economic sovereignty, through multilateral agreement. The starting point, oddly enough, will be the questions proposed by the United States, and rejected by the EC, at the beginning of the negotiations that led to the first 1967 Antidumping Code:

- Should antidumping measures be limited to prevention of market monopolization by foreign exporters?
- Should antidumping measures permit alignment of exporters' prices to meet competitive prices in the export market? Should such provision be limited

1. Case 49/88, *Al-Jubail Fertilizer Co. v. Commission of the European Community*, Judgment of 27 June 1991 (not yet published).

to meeting the prices of foreign but not domestic competitors in the export market?

- Should antidumping measures permit price differences between national markets to vary because of cyclical differences between markets?
- Where a seller lowers his price to gain entry, i.e., consumer familiarity and acceptance, into an export market should antidumping measures permit such price discrimination?
- Should the price comparison between home market and export market prices allow for differences in consumer preference between the two markets?
- Where consumers' or competitors' information regarding changes in supply or demand varies in different markets, and price moves up or down in response to those variances, should antidumping measures permit such geographic price discrimination?
- Where end-of-season or end-of-run "one-shot" disposal of goods at prices below home market price takes place, should antidumping measures permit such geographic price discrimination in any circumstances?
- Should antidumping laws permit absorption of freight costs, or so-called "basing-point" price systems, whose effect is to discourage geographic monopolization?²

Bierwagen recognizes that unilateral changes to improve antidumping laws "would be the object of derision in the prevailing political climate" (p. 157) (an interesting commentary on that climate at the end of a century which opened with Winston Churchill extolling the advantage of unilateral free trade). Further, Bierwagen has substantial questions as to whether minor improvements in antidumping procedures through bilateral agreements are consistent with the GATT.³

Bierwagen looks with greater favor on the replacement of antidumping laws with competition laws. The GATT clearly permits continued enforcement on nondiscriminatory antitrust laws. Bierwagen also seems open to a multilateral antidumping negotiation, urging: constraints on the use of a cost standard (to be limited to a dumping margin not greater than that generated by the traditional price-to-price comparison, and without the abusive profit margins imputed by some countries); that the "like product" definition be revised to require a showing of dumping and injury caused by any parts or components subject to an order; that "cumulation" be found counter to the letter and spirit of the GATT; that a modified form of "margin analysis" be required; a clarification of the "meeting competition" issue; de minimis margins and market shares; the requirement of a

2. *Anti-dumping Policies, Note by the United States Delegation*, U.N. Doc. TN.62/NTB/W/3 (1966).

3. GATT art. XXIV(8) requires barriers to trade to be completely removed, which some agreements do not, by leaving antidumping laws intact (a flaw that would not be remedied by minor improvements on a bilateral basis) (p. 161), while the most-favored-nation clause of art. I would not permit discriminatory treatment except through a full free trade agreement (p. 162).

showing of injury to the competitive process, with a possibility of the national interest overriding private interests seeking antidumping protection.

Perhaps Bierwagen's most insightful suggestion is that article VI and a new Code be made directly applicable in national law. He recognizes that national states are unlikely to agree willingly to follow their international obligations so faithfully. Nevertheless, the suggestion itself makes the point about current non-compliance.

As Bierwagen points out, the anticompetitive possibilities of antidumping law action would have been taken care of, at least in part, by the restrictive business practice provisions of the Havana Charter.⁴ In Bierwagen's view, the "internationalization and globalization in production in trade" lead to "a need to return to the original competition law concept. The future of antidumping is, in our opinion, the complete departure of the concept underlying the General Agreement" (p. 168).

A particular strength of the book is the excellent bibliography (forty-four single-spaced pages), and the exceptionally useful documentary appendix with complete texts or relevant excerpts: of the GATT; the 1979 Antidumping Code; the EC, United States, Canada, Australia, and New Zealand antidumping laws; the United States-Canada and Australia-New Zealand free trade agreements; and the GATT panel report on Japan's challenge to the EC's "Parts Regulation."

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The Return of Cultural Treasures

By Jeanette Greenfield. Cambridge: Cambridge University Press, 1989, pp. xviii, 361, \$ 44.50.

*I opposed, and will oppose the robbery of ruins from Athens, to instruct the English in sculpture (who are as capable of sculpture as the Egyptians are of skating).*¹

Lord Byron was among the first to criticize the removal of the Parthenon friezes by Lord Elgin, who offered them for sale to the British Government in 1816. The Elgin Marbles have remained the cause célèbre of the cultural return

4. Many clauses of the draft charter for the International Trade Organization (the Havana Charter), Final Act and Related Documents, United Nations Conference on Trade and Employment, Havana, Cuba, Nov. 21, 1947-Mar. 24, 1948, U.N. Doc. ICITO/1/4 (1948), were reworked and carried into the GATT. The Havana Charter can thus be viewed as the preparatory work (or negotiating history) of the GATT.

1. K.E. MEYER, *THE PLUNDERED PAST* 178 (1973).

cases ever since. However, it is only in recent years, as many former colonies have gained their independence, that the return of cultural treasures to their homelands has become a powerful political issue. Centuries of colonialism, war, missionary and archaeological expeditions, looting, theft, fraudulent "purchases," and even the peaceful trade with antiquities, have led to a situation in which many states and ethnic groups find that their national and cultural heritage has been lost to museums and private collections abroad. The Ethnological Section of the British Museum in London alone contains more than ten times the number of cultural property items than in all of the presently existing black African museums.²

Jeanette Greenfield's book provides a thoroughly researched assessment of the world's most important cultural treasures that are being reclaimed as cultural property and discusses the legal framework involved. To master the arcane complexity of the issue it was necessary to choose an interdisciplinary approach and to analyze the legal as well as the historical aspects of the cases reviewed.

The case of the Icelandic Manuscripts is the outstanding example of a successful state-to-state restitution of cultural property. Dr. Greenfield records how, in the seventeenth century, along with many other historic manuscripts, two priceless books³ were sent from colonial Iceland to the king of Denmark. Both works were of inestimable value for Iceland, for they symbolized Iceland's great heritage of medieval prose and poetry. The quest for their return and the heated public debate that lasted for more than twenty-five years between historians, politicians, and lawyers, is documented in the first chapter of the book.

The second chapter deals with the most famous unresolved cultural return case, the Elgin Marbles. Since the time of Pericles (c. 495–429 B.C.) until 1901, when Lord Elgin started to remove the sculptures from the Acropolis temples, the Elgin Marbles were part of the world's finest classical architecture. Dr. Greenfield gives a detailed description of the pieces, illustrated with diagrams and excellent photographs (pp. 47–61). The circumstances of their removal are documented in the 1816 House of Commons Select Committee Report on the purchase of the Marbles (pp. 62–70). The act of removing the Marbles has resulted in debate continuing until today. The author points out that many of the British arguments against a return distract from the central issues, namely the legal and historical aspects. There is serious doubt about the legality of the acquisition. The existence of a document entitling Elgin to remove the Marbles has not been confirmed. Dr. Greenfield examines the Greek claim for restitution and proves that it is not totally unbased.

2. B. WALTER, RÜCKFÜHRUNG VON KULTURGUT IM INTERNATIONALEN RECHT 4 (1988).

3. *Flateyjarbók* is a magnificent two-volume collection of Icelandic sagas and other historical material written on 450 pages of vellum at the end of the fourteenth century. *Codex Regius*, written around the year 1270, is Scandinavia's most valuable literary treasure for it contains the *Elder Edda*, the major existing source of Norse mythological and heroic poetry including the Norse discovery of the New World five hundred years before Columbus.

Chapter three sheds light into the tangled legal situation that surrounds the two great European museums, the British Museum and the Louvre, when confronted with claims for return. The author analyzes the 1963 British Museum Act, which requires amending before the trustees of the museum can return any objects. The author points out, however, that any bill submitted for that purpose is likely to be defeated in the House of Lords, as a large number of the Lords themselves are either trustees or former trustees of the British Museum (p. 115). In addition, Britain has failed to become party to any major international convention dealing with the protection or the return of cultural property. The French museum position also makes it illegal for the Louvre to return cultural treasures.

In order to show that the issue of return of cultural property is still of great importance and interest today, the author provides a survey in the fourth chapter of the most important cultural treasures that are still held in British museums. The stories of the Sphinx beard (p. 133) and the Rosetta Stone are related, along with those of the Australian aboriginal skulls (p. 156) and of the Ashanti Gold ransacked during a punitive expedition in 1874 (p. 137). Dr. Greenfield proves that the pattern of exploration, colonization, tribute, and the punitive removal of treasures was repeated many times. The result is that many African and Asian nations were often deprived of the central core of their own art. This is the case with the Benin bronzes (p. 141) and the invaluable documentary records of Sri Lanka (p. 154). The British Government and the British Museum, afraid of setting an unacceptable precedent, refuse to return any of these treasures (p. 123).

In the fifth chapter of her book, the author discusses the responsive attitude of the United States and Canada towards the issue of the return of cultural property. Both countries have implemented the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on Illicit Traffic of Cultural Property.⁴ A U.S.–Mexico treaty provides for the return of stolen pre-Columbian artifacts. American jurisdiction goes even further. Dr. Greenfield analyzes two landmark cases dealing with illicit trafficking with pre-Columbian artifacts. She concludes that American criminal law can be used to enforce foreign export legislation if artworks are exported without authorization from another country.⁵

Chapter six covers the international legal framework concerning cultural property. The 1970 UNESCO Convention on Cultural property receives close scrutiny as it is the convention that deals most directly with the return of cultural property (pp. 126, 217–19, 243, 252, 254, 258, 260). Dr. Greenfield does not fail to mention that the Convention has been criticized as being too broad and too

4. The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

5. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974); *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979).

unprecise in defining the terms “cultural property” and “country of origin.” Also, the Convention is not retroactive and, by its terms, would never cover historically removed objects. Other efforts of UNESCO, the International Council of Museums (ICOM), and the Organization of American States (OAS) to facilitate cultural return and the protection of cultural property are documented. Unfortunately, the evaluation of the 1970 UNESCO Convention is unnecessarily confusing since its discussion spreads over four chapters. Equally unfortunately, the author fails to mention the 1983 Vienna Convention on Succession of States in Respect of State Property.⁶ This Convention may be considered an additional effort to regulate the return of cultural property to its place of origin.

Generally, the resulting contemporary emphasis has been on making lists and preventing illicit trafficking (p. 293). It is clear, however, that any return depends on national legislation and on bilateral negotiations. The role of intergovernmental bodies can only be one of mediation and moral pressure.

In the seventh chapter of her book the author categorizes the broader problem of art theft and the active worldwide traffic in stolen art objects. Most countries impose some sort of export regulation on cultural treasures. However, illegal export of cultural property, as opposed to actual theft, does not prevent legal import into major art-importing countries, a serious legal problem that needs to be resolved.

The final chapter contains the author’s principal conclusions. As opposed to artifacts illegally removed in more recent times, historically removed objects are subject neither to state legislation nor to international conventions. Dr. Greenfield provides her own working formula. She determines the issue of return on the basis of two main criteria: the means of acquisition and the nature of the object. It ought to be possible to claim historic records or manuscripts of a nation, objects torn from immovable property forming part of the sovereign territory from which they were taken, and paleontological materials if they were taken by force, by unequal treaty, by theft, or by deceit (p. 255). The author proves by means of a number of examples that returns of certain major cultural treasures to their homelands have taken place without setting a precedent that might cause the ultimate absurdity—the return of everything (p. 307).

Within each chapter the author alternates between legal and historical issues, with the legal problems receiving less consideration than the historical aspects. The book presents the existing legal framework, but pleads the case for the return of cultural property primarily based on historic grounds. It provides numerous references for further reading, including a key set of eighteen international documents on microfiche.

The reader willing to spend the time to study this book is likely to find it highly rewarding. It presents part of the world’s cultural heritage, and documents it with

6. Convention on Succession of States in Respect of State Property, Archives and Debts, UN Doc. A/Conf. 117/ 14 (1983).

eighty-eight striking illustrations that unveil the timeless beauty of many of the objects. The reader receives an insight into the art and symbols of the world's cultures, as well as the appropriate legislation.

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