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Allocation of anti-dumping duty under WTO laws-experience from us-offset act

Duong Anh Son[1*], Tran Vang-Phu[2]
[1] University of Economics and Law, Vietnam National University of Ho Chi Minh City, Vietnam
[2] Can Tho University, Vietnam
[*]Corresponding author: sonduong@uel.edu.vn

Abstract
Subsidies and dumping are considered to be unethical trade practices in international commerce. As a result, the WTO permits importing countries to take reasonable measures such as collecting taxes on dumped and subsidized goods or requiring exporters to bear costs incurred when imports caused damage or threatened to cause injury to domestic goods. The United States Continued Dumping and Subsidy Offset Act of 2000 authorized the distribution of collected dumping or subsidy duties to domestic producers who have been harmed by imported goods dumping. Numerous countries have expressed opposition to this regulation, and the World Trade Organization has reached a final decision on the subject. This article analyzes the arguments advanced by the plaintiffs, the defendant, and the World Trade Organization's adjudicating body, and makes recommendations for the most effective use of tax revenue collected by this unfair trade practice.

Keywords: dumping duties, tax revenue, unfair trade, US-Offset Act

Introduction

A product is considered to be dumped under the provisions of Article 2.1 of the Anti-Dumping Agreement (ADA) (i.e., introduced into the commerce of another country for less than its value). if the export price of a product exported from one country to another is less than the comparable price for a similar product consumed in the exporting country on normal commercial terms. In other words, goods are considered dumped when their selling price in the market of the country of importation, in the ordinary course of business, is less than their normal price (which includes the export price, shipping costs, and a certain profit). This is an unfair trade practice that has the potential to harm international commerce. Thus, the purpose of anti-dumping duties is to compensate for the adverse trade effects of dumping and to reestablish fair trade. The WTO permits the use of anti-dumping measures as a tool for promoting fair competition. Anti-dumping is, in practice, a tool for ensuring fair trade, not a protectionist measure for domestic industry. It assists domestic industry in mitigating the harm caused by dumping (Ministry of Commerce and Industry of India, 2021) [17].

The 1994 General Agreement on Tariffs and Trade (GATT 1994) establishes a number of fundamental principles governing trade between WTO members, including the principle of "most favored nation." Article VI of the GATT of 1994 provides for the imposition of non-binding anti-dumping duties on imports from a particular source in cases where dumping has caused or threatens to cause injury to the domestic industry or has materially harmed the establishment of a domestic industry. Article VI of the GATT of 1994 establishes the anti-dumping fundamental principles. This legislation enables countries to circumvent tariff restrictions and, in violation of their non-discrimination obligations, impose a targeted tariff that offsets the effects of dumped products. While Customs levies anti-dumping duties, they are fundamentally different from import duties in terms of concept and content, as well as purpose and operation. The following points illustrate the distinction between these two "obligations": To begin, antidumping and similar measures have a conceptual connection to the concept of fair trade. While import duties are viewed as a means of increasing revenue and also serve as a shield to protect domestic goods, reasonable import taxes will create a balance between domestic and imported goods. In other words, antidumping and countervailing duties are intended to compensate for the harm caused by international price discrimination, whereas import duties affect national revenues and the overall development of the economy (Legistify, 2018) [16]. Second, import duties are a component of the government's trade and financial policies, whereas anti-dumping and anti-subsidy measures are used as trade remedies. Anti-dumping duties are not always in the nature of a tax, as the competent authority has the authority to suspend them if the exporter makes a price undertaking. As a result, such measures are not always enacted through taxes (Advocate Khoj, 2021) [6]. Thirdly, while WTO members are required to follow the principle of most favored nation treatment, anti-dumping and anti-subsidy duties are viewed as exceptions to this rule. Specifically, if WTO members export the same goods to the United States, the same import tax will apply (unless otherwise mutually agreed upon by the parties). As discussed previously, anti-dumping or anti-subsidy taxes are considered an additional import tax, not an import tax in and of themselves, and their application is intended to combat unfair trade practices. Thus, even if they

export the same goods to the United States, only those countries and manufacturers deemed to be dumping will be subject to this tax, whereas the import tax will apply uniformly to all imports regardless of origin or exporter (Dinnersoz and Dogan, 2008) [12].

Between import duties and anti-dumping duties, there are fundamental functional distinctions. Anti-dumping duties on imported goods are increasingly higher than normal customs duties. While import taxes are included in the budget revenue, there are differing views on how to use anti-dumping taxes to truly compensate domestic producers for the harm caused by dumping behavior and how they can restore competitiveness while also eliminating unfair trade practices.

WTO and US anti-dumping duty regulations

WTO rules governing the imposition of anti-dumping duties

The World Trade Organization (WTO, 2021), the European Union (EC, 2020), Australia (DISER, 2021), Vietnam (Law on Export and Import Duties of 2016, Article 4(5)), and a number of other countries stipulate that anti-dumping and countervailing duties are additional import duties, and that the revenues from these taxes shall be administered and used in the same manner as ordinary import duties. While anti-dumping and anti-subsidy taxes are intended to offset or eliminate dumping and subsidies, countries worldwide have not agreed to separate revenues from these taxes. This tax is intended to be distributed to domestic producers who have suffered or are threatened with damage, and it must be collected and used in the same manner as a standard import tax for the following reasons:

First of all, the AD Agreement authorizes the use of only three measures: provisional measures, price undertakings, and anti-dumping duty; thus, if revenue is separated from AD duty, anti-subsidy duty allocated to domestic producers would be viewed as another specific measure against dumping, a type of subsidy not sanctioned by the WTO (Uría Menendez's Latin America Network, 2012).

Second, imported goods shall be subject to anti-dumping and anti-subsidy taxes or foreign exporters must make a price commitment if it is determined that there has been an act of dumping and/or subsidy that has caused or threatened to cause damage to the domestic industry. As such, foreign exporters were "punished" for their unfair trade practices, and if the importing country distributed the tax proceeds to other producers, foreign exporters would face double punishment. Domestic production violates the SCM Agreement's provisions, further creating an unlevel playing field; domestic producers are denied fair trade activities while also receiving subsidies (Liebman and Tomlin, 2015) [8]. Third, the separation of anti-dumping and anti-subsidy taxes may result in domestic manufacturers and countries abusing this regulation to conduct a series of investigations and impose anti-dumping and anti-subsidy taxes, which violates the principle of fair trade, distorts the principle of free trade, and violates the general principle of the WTO that measures applied by count (Schmitz and Seale, 2004).

Due to the foregoing, countries have agreed that anti-dumping and anti-subsidy taxes, while distinct from standard import taxes, will be collected and used in the same manner as standard import duties, without a separate, direct allocation to domestic producers.

US anti-dumping duty regulations

On October 28, 2000, Congress passed the Continuing Dumping and Subsidy Offset Act of 2000 (CDSOA), also known as the Byard Amendment (repealed on October 1, 2007). The CDSOA amended title VII of the Tariff Act of 1930 by adding section 754 (19 USC 1675c) to provide those taxes collected in connection with an anti-subsidy, anti-dumping duty, or anti-dumping discovery under the Anti-dumping Act of 1921 will be distributed to domestic producers (who applied or supported the investigation) harmed by imported goods dumping (USFR, 2020). The 19 U.S.C. 1675c was repealed by Section 7601(a) of the 2005 Deficit Reduction Act (Byrd Amendment). Deregulation of 19 U.S.C. 1675c took effect on October 1, 2005, pursuant to Section 7701 of the Deficit Reduction Act of 2005. Article 7601(b) provides, however, that all taxes collected prior to October 1, 2007 will be distributed in accordance with 19 USC 1675c (CRS, 2006). CDSOA regulations authorize the United States Customs and Border Protection (CBP) to distribute anti-dumping and countervailing duties collected to domestic producers who have suffered damage as a result of foreign goods' dumping and subsidies (CBP, 2021a).

According to US Customs and Border Protection, the purpose of granting permission to allocate anti-dumping and anti-subsidy tax revenues to domestic manufacturers is to offset the value of dumping or subsidizing, thereby creating a level playing field for domestic producers who suffer as a result of imported goods being sold for less than the price of comparable goods under normal commercial conditions (CBP, 2021b). The Customs is required by the CDSOA to establish a separate account with the Federal Reserve for each tax collected (Tariff Act of 1930, Section 754(e) (2)). The Customs will distribute to affected manufacturers all anti-dumping or countervailing duties collected during the preceding fiscal year (including interest on this deposit) upon confirmation from the affected domestic producer that they are eligible for compensation and expect to receive it (Tariff Act of 1930, Section 754(d) (2) and (3)). Deposits made to each special account during a fiscal year will be distributed no later than 60 days after the fiscal year begins. The CDSOA provides that: (1) if the total number of claims filed by affected domestic manufacturers does not exceed the available payouts, CBP will pay eligible domestic manufacturers in full; and (2) if payments exceed those collected, payments will be prorated based on the total number of affected domestic producers eligible for receipt (Tariff Act of 1930, Section 754(c))). The definition of "domestic producer" is as follows (Tariff Act of 1930, Section 754(b)(1)): "A producer, a producer,

a farmer, a ranch owner, or a representative of workers (including an association thereof) who meets the following two criteria: (i) Is a petitioner or interested party defending an anti-dumping duty order; and (ii) Is still in effect. Where companies, businesses, or individuals have ceased production of the products referenced in the order or discovered, or have been acquired by a company or business related to a company under investigation, they will not be considered domestic manufacturers.

The parties' arguments regarding the Byrd Amendment

Plaintiffs' and WTO's Perspectives

The Byrd Amendment regulation has been criticized for being in violation of WTO rules and for encouraging domestic firms to file anti-dumping or anti-subsidy lawsuits against imported goods. Numerous countries protested, and after numerous failed negotiations with the US, eleven countries finally petitioned the WTO to resolve this issue for the following reasons:

First, all of the complaining countries contended that the Byrd Amendment regulation was a targeted action against dumping and subsidies, violating both the AD and SCM agreements. Although Article VI:2 of the GATT 1994 states that anti-dumping measures are intended to "offset or prevent dumping," the ADA allows member states to combat dumping of imported goods through the use of only three measures: (1) provisional measures; (2) imposition of anti-dumping duties; and (3) price undertaking. Thus, the United States' application of a measure other than those mentioned above violates WTO provisions (WTO Docs. WT/DS217 and 234/R, paras. 4.4-4.17 and 4.26), (Platt, 2007).

Second, the Byrd Amendment's reasonableness when viewed through the lens of fairness and fair competition in international trade. Many believe that if the Byrd Amendment regulations are deemed compliant with WTO rules, it will result in other countries acting similarly to the US in order to protect domestic manufacturers from the dangers of foreign trade and competition from imported goods. This will transform anti-dumping and anti-subsidy taxes into a tool for protecting domestic goods, limiting imported goods, and assisting domestic producers in obtaining (unjustified) benefits from import taxes (WTO Documents WT/DS217 and 234/R, para. 4.18-4.21). (Platt, 2007). Additionally, the European Union, India, Indonesia, and Thailand all argued in the WTO document that the United States' direct allocation of anti-dumping and anti-subsidy taxes resulted in the creation of more protection than necessary for domestic industry (WTO Doc. WT/DS217 and 234/R, para. 4.142-4.132).

It is worth noting that any country, not just the United States, has the right to protect its citizens, domestic manufacturers, and domestic industry. Without the Byrd Amendment, countries are obligated to do so and have done so. However, a distinction must be made between protection through fair and unfair means.

We conclude that if anti-dumping duties are used solely to compensate domestic producers for actual damage suffered as a result of imported goods being dumped, this cannot be considered improper behavior. If the compensation does not exceed the losses suffered by domestic manufacturers, the Byrd Amendment is fully justified. Numerous countries are also concerned that the US government's payment of anti-dumping duties to manufacturers who have aided the country's anti-dumping and anti-subsidy investigation may exceed the amount of damage suffered by domestic producers, or that the tax collected may be greater than the actual damage caused by imported goods dumping (Gayle and Puttitanun, 2009). We believe that this concern is unfounded, as an investigation of dumping imports is only warranted when domestic manufacturers present evidence of injury or threat of injury. Brazil is also concerned about the US authorities' reliance on accurate evidence and objective investigation in order to provide an accurate anti-dumping margin, which has been criticized by a number of countries in recent years (WTO Docs. WT/DS217 and 234/R, paras. 4.27-4.28 and 4.31). We believe that the concerns raised above are justified if the dumping does not result in injury or if the compensation from the anti-dumping tax exceeds the level of damage to domestic producers. In this instance, the importing country has imposed more protectionist measures than necessary, which is clearly an unfair and deplorable trade practice. Additionally, one should not be alarmed if the importing country establishes the dumping margin without conducting an objective investigation, as this practice can be challenged before the DSB.

Third, about the objectivity with which anti-dumping and anti-subsidy tax rates are determined. Anti-dumping and countervailing duties are intended to against unfair trade practices, but because the US government allows this money to be transferred to domestic manufacturers, this may result in domestic producers filing a request to investigate the dumping of imported goods, possibly because the provision's sole purpose is to against dumping. Additionally, it will be difficult for the US authorities to determine whether a domestic producer is filing an application to against dumping or to obtain a portion of the tax allocation under the Byrd Amendment (WTO Docs. WT/DS217 and 234/R, paras. 4.33, 4.66, and 4.125). This provision will be even more irrational in cases where domestic producers have not been harmed but are threatened with harm as a result of imported goods dumping (Movsesian, 2004). Additionally, the plaintiff countries contended that the Byrd Amendment would sway US authorities' decision to approve or reject the exporter's "price undertaking" measure, as tariffs would provide greater financial benefits to domestic US manufacturers. Moreover, Canada argued in its document submitted to the Panel that it was the importing country's responsibility to conduct an investigation and determine the margin of dumping in an objective, unbiased, and proper manner, based on the principles of good faith and argumentation of fairness, in order to criticize the anti-dumping investigation process as well as determining the margin of dumping of the United States.

Fourth, the WTO Panel's and Appellate Body's opinions on this case. Both the Panel and the Appellate Body concluded in their reports that Byrd Amendment introduced measures that were determined to be covered by the AD and SCM Agreements (i.e., within the jurisdiction of WTO Doc. WT/DS217 and 234/R, para. 8.1), and that Byrd Amendment violated the AD and SCM Agreements in the following articles: Article 5.4, Article 18.1 and Article 18.4. Finally, the WTO Panel and Appellate Body approved the claimant's request that the United States repeal this provision in order to bring the Byrd Amendment into compliance with WTO rules (WTO Docs. WT/DS217 and 234/R, para. 8.6).

Positions of the US government and proponents of the Byrd Amendment

The United States identified the following unreasonable points in the plaintiff's arguments in its counter-claim to the WTO:

First, the US has stated that there is no provision in the WTO that prohibits member states from allocating revenue from anti-dumping or countervailing duties to domestic producers other than the national budget. Additionally, the United States cited the Appellate Body's recommendation in India - Patents that the Panel or Appellate Panel's role is limited by the words and contexts used in the Agreement at hand. As a result, the United States emphasizes that, under the WTO Agreement's provisions, member countries retain autonomy over tax rate determination, tax collection, control of their national budgets, and resource allocation for various purposes (WTO Doc. WT/DS217 and 234/R, para. 4.232). We concur with this view, but want to emphasize that states' rights in this case are not absolute and are constrained by the rights of other countries, particularly the right to be treated fairly. Beside that, the EU demonstrated in the document submitted to the WTO that, while the WTO did not specify how member states should use tax revenues, the Byrd Amendment exceeded the scope of Article 18.1 of the ADA and Article 32.1 of the SCMA (WTO Docs. WT/DS217 and 234/R, paras. 4.368-4.369).

Second, contrary to the claimants' assertion that the Byrd Amendment took a "specific action" against dumping or subsidies, the United States demonstrated that the Byrd Amendment was not a specific action because it establishes a limitation on the amount of taxes that can be allocated to domestic producers as mentioned. The Byrd Amendment establishes a general rule that any domestic producer, in any industry, can receive tax revenue simply by filing or supporting an anti-dumping or anti-subsidy investigation (WTO Doc. WT/DS217 and 234/R, para. 4.234), i.e., the Byrd Amendment regulation is not targeted at a specific group of US producers. Additionally, the US believes that the Byrd Amendment is merely a routine payment program and thus does not constitute a "specific action" against dumping or anti-subsidy practices. As a result, Byrd Amendment is not covered by the AD or SCM Agreements, the plaintiff's claims are without merit, and the WTO lacks jurisdiction to adjudicate the Byrd Amendment's legality in comparison to pertinent WTO regulations (WTO Documents WT/DS217 and 234/R, paras. 4.243-4,246), (Rus, 2007).

We consider the Byrd Amendment to be a "specific action" against dumping and subsidies because, in contrast to the United States, it argues that this is a general compensation for domestic producers. The United States has established very specific criteria for allocating this tax amount, which must include domestic manufacturers who have requested or supported the filing of an anti-dumping and anti-subsidy investigation. Thus, not all domestic manufacturers will be allocated anti-dumping and anti-subsidy tax sources, but only a few specific manufacturers will be eligible for this tax amount; this is a 'specific action" against dumping and subsidies.

Third, the plaintiff countries contended that the US was not objective in its anti-dumping and anti-subsidy investigations, as well as in its method of determining the dumping margin. However, the US pointed out that the plaintiffs lacked concrete evidence to support their arguments (WTO Docs. WT/DS217 and 234/R, paras. 4.27-4.28). Simultaneously, the US and a number of researchers have highlighted an irrational point in both the Panel and Appellate Body reports, namely that both the Reports believe the Byrd Amendment has had a detrimental effect on the competitive relationship between domestic and imported goods (dumping), and that the margin of dumping may exceed the actual injury caused by the dumping. In other words, because the US will distribute anti-dumping duty proceeds to domestic manufacturers who have requested an anti-dumping investigation, it is possible that domestic manufacturers will abuse anti-dumping procedures, and the DOC and ITC investigation agencies will determine the anti-dumping margin is greater than the actual damage caused by the imported (to collect more tax). Despite these arguments, neither the two levels of WTO arbitration in this case nor the plaintiffs have any evidence that the US determines the anti-dumping and anti-subsidy margins in these cases. The former is in conflict with the ADA's provisions (WTO Documents WT/DS217 and 234/R, para. 3.9), (Hervey, 2003). As a result, the argument that the Byrd Amendment will result in the US collecting taxes above the dumping margin is unfounded (Bhagwati and Mavroidis, 2004), (Horn and Mavroidis, 2005). Although the plaintiff countries did not provide direct evidence for this argument, numerous other documents demonstrate that the United States' process of gathering evidence and determining the margin of dumping is not truly objective and results in numerous disadvantages for foreign exporters when determining the extent of damage and the margin of anti-dumping (Appellate Body Report, *US — Hot-Rolled Steel*, paras. 165, 192, 223 and 224), (Startup, 2005), (Vang-Phu, 2018).

Fourth, the plaintiffs contended that the Byrd Amendment would increase the US refusal rate for exporters' "price undertaking" offers, because if they refused, the US would opt for taxation, thereby benefiting domestic producers financially. However, the US has stated that an importing country is not required to always accept an exporter's offer of a price undertaking. Furthermore, the Byrd Amendment has no connection to or influence over the criteria and conditions under which the US Department of Commerce (DOC) or the US International

Trade Commission (ITC) decide whether to accept or reject an offer of a price undertaking; Plaintiffs provided no concrete evidence to support their arguments. Additionally, the United States noted that from 1996 to the time of this case, the United States accepted numerous price commitments from exporters; there is no reason to believe that domestic producers will object to offers of price commitments; and the Byrd Amendment are unlikely to affect the DOC's and ITC's investigative and decision-making independence. However, Japan pointed out in its submission to the Panel that, according to US Department of Commerce statistics, the US investigated and concluded 187 cases of imported goods being dumped or subsidized between 1996 and 2001, but only 11.2 percent of investigations resulted in the approval of foreign exporters' price undertakings, and 64.9 percent concluded with the imposition of tariffs (WTO Doc. WT/DS217 and 234/R, paras. 4.1555-4.1556). Thus, while the US has accepted the proposal for foreign exporters to commit to a price, this rate is extremely low in comparison to the imposition of anti-dumping and anti-subsidy duties.

Conclusion and recommendations

The ADA's regulations on imposition of anti-dumping duties (Article 9) and price undertaking (Article 8) are entirely reasonable in our opinion. Following the conclusion of the investigation, it is determined that there is a dumping margin and that the respondent has one of two options. However, the question is how and when to apply these two measures. Appropriate explanation is required when applying them. It is well established that dumping has two types of consequences: (i) threaten to cause damage, and ii) caused damage to domestic producers.

Consider the first scenario, in which dumping threatens only to damage domestic producers. In this case, one of the two ADA measures specified in Articles 8 and 9 may be used. When exporters commit to selling prices, they implicitly admit their previous dumping behavior. The price undertaking measure used in this case is intended to eliminate the foreign respondent enterprise's unjustified commercial behavior. In this extend, the application of the price undertaking measure appears to be more straightforward for the parties than the application of anti-dumping duties. However, in practice, the price commitment measure is used infrequently because it is extremely rare for the respondent enterprises to admit dumping conducts. When the "price undertaking" measure is not used, anti-dumping tax is unavoidably applied. The application of this measure eliminates both unfair trade practices and the threat of dangerous injury to domestic producers.

Moving on to the second scenario, in which dumping has caused injuries to domestic producers. In this case, if only the "price undertaking" measure is used and no anti-dumping tax is levied, how will the damage caused by previous dumping acts be addressed? We have to agree that dumping is an illegitimate commercial practice, as evidenced by international price discrimination. Then, the individual who engages in this behavior must face appropriate sanctions commensurate with the consequences of their conducts. It would be unjust if they ignored violations of the law with consequences just because they made one promise (the price undertaking is merely a promise). Thus, how will the injury caused to domestic producers by previously dumped or subsidized imports be addressed? As a result, Articles 8 and 9 of the ADA have to clarify that the "price undertaking" measure is only applicable in cases where dumping has not yet threatened to cause injury to domestic producers. If the dumping has caused damage, the price undertaking measure will merely expedite the application of anti-dumping duty. In this case, the anti-dumping duty must be applied at the same time as the imported goods are dumped. Only in this manner can support the manufacturers' losses to be compensated. Without a price undertaking, the time limit for levying anti-dumping duties will almost certainly be extended (according to ADA regulations). As a result, we believe that the application of the Byrd Amendment does not violate the ADA's provisions, and thus that the Panel's and Appellate Board's conclusions in the Byrd Amendment case are not completely appropriate.

Supporters of the WTO ruling in this case argue that consumers benefit when goods are dumped. Consumers will no longer benefit from the application of anti-dumping duties. When anti-dumping duties are viewed as additional import duties, the revenue generated will be used to improve social welfare, which is viewed as a form of indirect compensation for consumers. However, we believe that dumping is an unjustifiable trade practice and consumers benefit first from importers' unfair trade practices by dumping goods; second, consumers benefit from the loss (unfortunately) of domestic producers as a result of dumped goods. Countries' current regulations on anti-dumping taxes as additional import taxes are unreasonable in that, when imported goods are dumped, the victims are domestic manufacturers who are not compensated. One of the objectives of anti-dumping duties is to restore the competitiveness of domestic manufacturing enterprises; if they are unable to compensate for the damage, the process of restoring their competitiveness will be prolonged, possibly resulting in bankruptcy, an increase in unemployment, and social instability. As a result, anti-dumping duties must be more rationally allocated. A reasonable portion should be transferred to the domestic manufacturing enterprise that is impacted. Because the purpose of countries joining the ADA is to protect domestic industries from unfair trade practices such as dumping and to compensate for the harm caused by dumping. However, if the anti-dumping tax is treated as an additional import tax, the proceeds will be transferred to the state budget to be used for other financial expenditure items authorized by the State Budget Law, which manufacturers, it is unreasonable for manufacturing industry workers to have or be threatened with damage as a result of the dumping of imported goods that are not eligible for support from the State Budget Law. As a result, we believe it is more reasonable if countries separate this tax source and establish a credit fund to allow businesses and workers in industries

affected by dumping or subsidy conducts to borrow at a preferential interest rate to rehabilitate production activities for a period of no more than five years; after that, the above fund will be redirected to the State budget.
In order to assess the case for accepting or rejecting a price undertaking, we believe that importing countries should divide their analysis into the following two categories: (i) where dumping or subsidies have caused injury to domestic industry, the importing country may impose anti-dumping and anti-subsidy duties to compensate for the injury caused by the imported goods, as suggested above; (ii) where the imported goods only threaten to cause injury to domestic industry, the importing country may consider accepting the foreign manufacturer's price undertaking.

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