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Research Article

CRITICAL ASSESSMENTS OF ANTI-DUMPING DISPUTES SETTLEMENT MECHANISM AT THE WTO AND VIETNAM'S PARTICIPATIONS

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ABSTRACT

Anti-dumping disputes are types of trade disputes in international trade. There are more and more countries actively conducting anti-dumping investigations on imported goods, including Vietnam's export goods. Many decisions taken by the Authorities have not received the approval of the involved parties. As a result, disputes over anti-dumping investigations happen. The settlement of anti-dumping disputes has become a necessity for parties to protect their legitimate rights and interests. This prompted the establishment of a dispute settlement body between member countries of the WTO including disputes related to anti-dumping matters. The objectives of this article are to analyze the mechanism of anti-dumping dispute settlement under WTO regulations; use case studies of anti-dumping dispute settlement of WTO to evaluate the role of WTO in anti-dumping dispute settlement mechanism in general; and most importantly, review the effectiveness of Vietnam's participation as a complainant, respondent, or a third party.

KEYWORDS

Dispute settlement mechanism; Anti-dumping; Vietnam; Appellate Body.

INTRODUCTION

Participating in the process of trade liberalization and international economic integration, many countries have to commit to removing or reducing non-tariff barriers. This has created a more open and favorable legal corridor for imported goods to have the opportunity to easily compete with domestic goods.

The fact that imported goods have flooded the import market and are still dumped has created pressure on output for the same or similar goods produced in the importing country's market, profits, and jobs, even causing damage to the domestic industry producing similar products and goods. Faced with that situation,

many countries have had to issue anti-dumping laws to protect their domestic production against imported goods. The introduction of anti-dumping legislation is an inevitable need to protect domestic production from the unfair competition of foreign goods imported at dumped prices in the importing country's market. The WTO Anti-Dumping Agreement was created to create a legal framework for member countries to comply with and settle anti-dumping-related disputes between member countries. The WTO Anti-Dumping Agreement is compulsory for all member countries. In other words, each WTO member country has the right to enact and apply its own anti-dumping legislation but must fully comply with the mandatory provisions on the content and procedures in the Agreement. the WTO's ADA regulation.

LITERATURE REVIEW

The settlement of commercial disputes in general and anti-dumping in particular has now received the attention of many researchers. Accordingly, in addition to dispute settlement mechanisms according to the laws of the importing country, trade disputes, including those about anti-dumping lawsuits, are brought to settlement under the WTO's mechanism. World Trade Organization WTO. Ernst-Ulrich Petersmann Kluwer (1997) discusses the need to establish a common mechanism for the settlement of international commercial disputes through the comparative legal study of international and regional law and the practice of dispute settlement including anti-dumping dispute settlement issues. According to Louise Johannesson and Petros C. Mavroidis (2017), the WTO's dispute settlement system was still a judicial regime that requires a single comprehensive third party, a means of promoting peaceful settlement, and members have shown no sign of needing to abandon the mechanism. The WTO continued to be the

privileged forum for the resolution of international trade disputes. Peter van den Bossche (2017) analyzed the WTO dispute settlement system and its basic principles applied to specific dispute settlement. The author also pointed out the challenges that the WTO dispute settlement mechanism was facing. Chad P. Bown (2004), provided a first-of-its-kind empirical investigation into trade practices and cases of WTO dispute settlement on complaints about the US trade remedies imposed between 1992 and 2003. The author argued that, if foreign industry was negatively affected, there was a potential for retaliation directly through an investigation and its reciprocal anti-dumping measure, without any further submission to the WTO.

However, all of the above studies have not provided specific analyzes on the WTO's anti-dumping dispute settlement mechanism, especially, the fact that this dispute settlement mechanism of the WTO is currently under crisis. The suspension of operation due to any reasons has not been analyzed by the above authors. Furthermore, the assessment of regulation on imposing anti-dumping measures under Vietnam Laws has not been discussed. Therefore, this article focuses on studying the role of the WTO in settling anti-dumping disputes in international trade is very important in the current integration process. This article is to analyze the mechanism of anti-dumping dispute settlement under WTO regulations; using case studies of anti-dumping dispute settlement of WTO to evaluate the role of WTO in anti-dumping dispute settlement mechanism in general; how this mechanism works under the Appellate Body Crisis; and most importantly, review the effectiveness of Vietnam's participation as a complainant, respondent, or a third party. It will not only help Vietnam to get knowledge of the multilateral trading system better but also help

Vietnam gain more experience in the process of dispute settlement at the WTO.

Objectives of anti-dumping dispute settlement under the WTO regulations

The fundamental objective of the dispute settlement mechanism of the WTO is to achieve a positive and effective solution to the disputes among WTO members (Members). This mechanism provides multilateral dispute settlement procedures instead of the unilateral actions of Members in international trade.

The legal framework of the WTO anti-dumping dispute settlement applies in consultation and dispute settlement procedures are regulated in Article 17 of the Anti-dumping Agreement (ADA). According to Article 17.3, “if any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, to reach a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation”.

The dispute settlement procedure of the WTO consists of three main stages: (i) consultation; (ii) panel and appellate; and (iii) implementation. The WTO anti-dumping dispute settlement is implemented by different agencies with separate functions to ensure the independence of investigation and decision-making. The Panel, the Appellate Body (AB), and the Dispute Settlement Body (DSB) are responsible for administering the entire dispute settlement system among WTO members, in which DSB plays the principal role.

The aim of the WTO dispute settlement system is regulated in Article 3.2 of the DSU states: The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. It preserves the rights and obligations of Members under the involved Agreements and clarifies the current provisions of those agreements by customary rules of interpretation of international public law. Recommendations and rulings of DSB cannot add to or diminish the rights and obligations provided in the involved Agreements. Article 3.7 of DSU states: The dispute settlement mechanism aims to secure a positive solution to a dispute. A mutually acceptable solution for the parties to solve a dispute consistent with the involved Agreements is preferred. The WTO Members have explicitly recognized that the prompt settlement of disputes arising under the covered agreements “is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members”.

Furthermore, the purpose of the dispute settlement system is for Members to reach a mutually satisfactory solution rather than through unilateral actions. Article 23.1 of DSU states: When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreement, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

Mechanism of anti-dumping dispute settlement at WTO

Disputes are initiated through a formal request for consultations, whereby the complaining Member invites the Member whose measures are being challenged to discuss the disputed matter, to resolve it

without recourse to further litigation. These requests are circulated to all WTO members. DSU expresses a clear preference for mutually agreed solutions to the Members reached through negotiations, rather than solutions resulting from adjudication. According to Article 3.7, a dispute settlement case must start with consultations between the Members of DSU to reach mutually agreed solutions. Resolving disputes through consultations is more affordable and satisfactory for long-term trade relations with the other Members of the dispute than adjudication by a Panel. However, if no solution is reached, the complainant may request the establishment of a panel to adjudicate the dispute. After hearing the parties, the panel makes an objective assessment of the complainant's claim and issues its decision in a report. If the report is appealed, the dispute will go to appellate proceedings .

At the request of the complainant, DSB shall establish a Council to consider the dispute based on: (i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

In addition, in the assessment of the facts of the matter, the Panel shall determine the authorities' establishment of the facts was proper and whether the evaluation of their evidence of those facts was unbiased and objective . If their establishment of the facts is unbiased and objective, though the panel might have reached a different conclusion, the assessment process shall not be overturned. The panel shall interpret the relevant provisions of the ADA by customary rules in the interpretation of public

international law . When the panel considers that the provisions of the ADA can be interpreted in at least two acceptable ways, it shall confirm that the measure of the competent authority conforms with the ADA if it rests upon one of those permissible interpretations.

The parties may appeal the legal issues of the Panel Report (appellate request) to the WTO Appellate Body (AB) in writing. The Appellate Body's final decision may uphold, amend or remove the Panel's legal issues and findings, and will be submitted to the DSB for adoption. During the implementation phase, the recommendations and rulings of the DSB are binding and enforceable. In all of the above stages, the decisions of the DSB are adopted by veto consensus, whereby a decision is not adopted only when all DSB members vote against it.

Jurisdiction of the WTO dispute settlement system

Dispute settlement over the approval of a price undertakings measure

A dispute over the approval of a price undertakings measure is regulated in Article 17.4 of the ADA, but the legal basis cited in disputes over the approval of a price undertakings measure is regulated in Article 8 of the ADA and other relevant provisions. According to Article 8 (ADA), "Proceedings may be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated". The disputes of this measure are rare because this is a voluntary action by the exporter, they have to carefully consider the price they can offer to commit to eliminating the possibility of dumping.

Moreover, this measure needs to get the approval of the Authorities to come into effect.

Disputes over-application of provisional measures

Provisional measures are regulated in Article 7 of the ADA. Accordingly, WTO shall settle the disputes of the following provisional measures: Provisional duty; a security deposit (bond) - equal to the amount of the anti-dumping duty provisionally estimated and not greater than the provisionally estimated dumping margin. While this is not the most common type of anti-dumping dispute, in some cases WTO members still choose this to initiate for several reasons: First, the plaintiff wants to pressure the defendant in the anti-dumping investigation to see their willingness for further lawsuits; Second, the final decision of the anti-dumping investigation may not have any anti-dumping duty imposition. Therefore, the plaintiff can take this advantage as soon as possible to initiate a lawsuit for the application of provisional measures without waiting until the official decision to impose an anti-dumping duty.

Dispute over a member's lawfulness with the content of the ADA

Article 18.4 of the ADA stipulates that WTO members are obliged to "...not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question...". However, the provisions of the Member countries' legal systems are not always consistent with the content of the ADA. Due to this problem, sometimes there have several legal arguments taking place among Members involving the consistent contents of the ADA provisions. To settle this type of dispute, there may have an initiation of a lawsuit against DSB. Although

this is also not the most common type of anti-dumping dispute, in some cases, WTO members still choose this measure because of the winning possibility of the complainant. The evidence they have will help them to prove that having a Member's non-compliance with the content of the ADA. Therefore, the plaintiff has opportunities to persuade the Dispute Settlement Body to issue decisions in their favor.

According to the statistic of the WTO from 01 January 1995 to 31 December 2020, WTO members referred 598 disputes to the Dispute Settlement Body, in which 134 anti-dumping disputes. The first case was the dispute between the United States and Mexico (DS49) with the request for consultations requested on 01 July 1996 regarding the US anti-dumping investigation of fresh/chilled tomatoes from Mexico. The latest case, was the dispute DS598 on 16 December 2020, regarding Australia's requested consultations with China regarding certain measures imposing anti-dumping duties and countervailing duties on barley imported from Australia.

The role of Vietnam in the WTO anti-dumping dispute settlement

On January 11, 2007, Vietnam officially became the 150th member of the WTO and also accepted the status of being a developing country and being treated as a non-market economy. Since Vietnam has had full rights and obligations and enjoyed special and differential treatment for developing members in dispute settlement at the WTO to protect legitimate interests. By the end of November 2021, there were 41 disputes at WTO involving Vietnam, in which Vietnam plays the role as a complainant 5 cases (in which 4 cases involved in anti-dumping files), as a respondent 0 case(s), and as a third party 36 case(s) (WTO, 2021).

DS404 was the first anti-dumping dispute filed by Vietnam and also was the dispute with the US relating to Vietnam's frozen shrimp at the WTO in 2003. On 1 February 2010, Vietnam requested consultations with the United States concerning several anti-dumping measures on certain frozen warm-water shrimp from Vietnam. In addition to several administrative and new shipper reviews, the request for consultations concerns several United States laws, regulations, administrative proceedings, and practices, including the “zeroing” method.

In resolving the request for consultation on the issue that the United States used the “zeroing” method in calculating the dumping margin for Vietnam’s shrimp products (DS294), DSB has decided that the “zeroing” method DOC used in anti-dumping investigations was inconsistent with Article 2.4.2 of DSB and Article 9.2 of ADA.

When the Panel's decision was adopted on September 2, 2011, however, the United States delayed implementation. Since the dispute could not be resolved during the consultation period, on January 17, 2013, the DS429 case was established when Vietnam submitted an application to the DSB requesting the establishment of a Panel. The United States implemented the DSB's decision during the period of consultation. Also, a legal fact occurred when the US officially abolished the use of zeroing method not only in the investigation stages but also in the review process of anti-dumping duty. This decision, however, was only valid for the anti-dumping decisions of DOC since April 16, 2012. Therefore, the DS404 and DS429 cases still needed to settle the WTO.

Although the WTO officially announced to terminate the case until 22 July 2016, based on the decision made by the two sides on 18 July 2016, after the two parties informed the DSB that the two sides had reached a

mutually agreed solution, and Vietnam withdrew the request, this is remarked as the first successful dispute sue of Vietnam against the decisions of the US in the anti-dumping investigations at the WTO.

How can Vietnam successfully participate in the WTO anti-dumping dispute settlement mechanisms?

These several recommendations can be given for Vietnam in anti-dumping dispute settlement in the WTO:

Firstly, continue to improve institutions on the role of associations and non-governmental organizations in giving effective directions to help Vietnamese exporting enterprises avoid anti-dumping cases.

Secondly, on capacity building for early warning system: The early warning system will help the Government in general and enterprises in particular to (i) identify early threats/risks of anti-dumping investigations to apply anti-dumping measures to exports before official petitions from foreign manufacturing industries; (ii) Vietnamese enterprises will have well-prepared conditions to readjust their manufacture and export activities to eliminate threats and actively respond to anti-dumping investigations from importing countries.

Thirdly, take advantage of support from the Advisory Centre on WTO Law. This is an effective support channel for Vietnam in anti-dumping dispute settlement at the WTO. Advisory Centre on WTO Law (ACWL) is an independent organization of the WTO established in 2001 under the provisions of the Agreement establishing the WTO Legal Advisory Center. The purpose of the ACWL is to provide developing countries with the necessary legal capacity to participate more fully in the WTO dispute settlement system and to enhance the credibility of the WTO

dispute settlement system. ACWL provides effective legal aid based on WTO law. The ACWL's legal services are considered to be very effective for developing countries to reduce the costs of litigation and especially to encourage them to refer their dispute to the WTO dispute settlement body.

Vietnam became a member of ACWL on September 25, 2009. As a WTO member, Vietnam can fully take advantage of ACWL to settle anti-dumping disputes with the other WTO members. Currently, Vietnam mainly exploits ACWL's free legal advice service but has not used the legal support service for the process of participating in dispute settlement at the WTO. It is possible that in anti-dumping disputes at the WTO, Vietnam participates as a plaintiff, and a third party, with support from hired foreign lawyers. Therefore, the services of ACWL have not been yet used by Vietnam. However, this still will be an effective legal support mechanism when Vietnam joins in the anti-dumping dispute at WTO as a defendant.

CONCLUSION

Anti-dumping disputes are among the most common types of disputes settled at the WTO. The number of cases resolved by the WTO has shown that this is one of the effective anti-dumping dispute settlement mechanisms that many countries choose, including Vietnam. DS404 and DS429 cases have indicated the attitude of proactive preparation and active participation from Vietnam is the most important factor in resolving disputes. This also emphasizes the need to create and complete an appropriate legal corridor for the association and coordination between Vietnamese enterprises and the active participation of business associations. Besides, to use effectively the WTO dispute settlement mechanism to protect manufacturers as well as exporting enterprises, it is very important for Vietnam to actively follow all the

dispute settlement procedures of the WTO and take advantage of every opportunity by international law.

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