THE US ANTI-DUMPING MEASURES IN LAW, IN PRACTICE AND THEIR PROBLEMS

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Received 19 December 2020
Revised 5 March 2021; Accepted 15 May 2021

Abstract: The US anti-dumping law is important in the US trade protection legislation in particular as well as the US trade law in general. The primary objective of US anti-dumping measures is to deal with dumping actions by foreign exporters in the US market to protect domestic producers. The objective of the paper is to analyze the current issues of the US anti-dumping measures in order to assess their feasibility. The research has shown that among the three US anti-dumping measures, price undertaking (suspension agreement) is a viable option for the parties to terminate anti-dumping investigation at its preliminary stage, but in fact, it is less applicable in practice; instead, anti-dumping duty is mostly used. This makes anti-dumping measures turn into a more likely tariff measure than a non-tariff measure.

Keyword: anti-dumping measures, the United States, price undertaking, suspension, anti-dumping tax

1. Introduction

The US anti-dumping measures are trade protection tools against the risk of dumping imported goods, which include differential calculations for non-market economies. Being considered a non-market economy, Vietnam's export to the US market still faces many challenges posed by the US anti-dumping measures. Therefore, analysis and clarification of legal framework as well as problems in practices of the US anti-dumping measures are really necessary for Vietnamese export companies to proactively avoid and respond to the US anti-dumping lawsuits.

Like many other countries, to prevent dumping, the governments of importing countries such as the United States take measures to handle and even retaliate to maintain a healthy competitive environment in international trade, as well as compensate for losses caused by dumping and protect domestic industries. In international trade, anti-dumping, countervailing and safeguard measures are considered the three pillars of the system of trade remedies and are applied to protection of the domestic market against unfair competition of imported goods.

This research, besides clarifying the legal framework of anti-dumping measures of the US, also focuses on clarifying the status of application of such measures.

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https://doi.org/10.25073/2525-2445/vnufs.4646

2. Methodology

The starting point for this research is analyzing anti-dumping measures in the US law to find out the key points that often become controversial topics in anti-dumping investigations initiated by the US. To clarify the practices of the US anti-dumping measures, Vietnam Catfish and Shrimp Cases are used. By analyzing these, problems of applying anti-dumping measures from law to practices are found out, such as the use of "Non-market economy" status and "Surrogate country" method by the United States Authorities for determining the fair value of products, and for calculating the input costs of the defendant's exported product. They will be important factors directly affecting the final anti-dumping duties decision of the U.S. Department of Commerce (DOC).

3. Results and Discussion

3.1. The US Anti-Dumping Measures in Law

The US anti-dumping measures have to adhere to the principle of mandatory content requirements and procedures stipulated in the relevant General Agreement on Tariffs and Trade (GATT, 1994), and the Anti-Dumping Agreement (ADA), based on the following four principles.

Firstly, the US anti-dumping law is only applied when the Authorities prove the presence of the conditions and elements of the dumping: dumping actually happens; injury is determined; and there is a causal relationship between the dumped imports and the injury to the domestic industry.

Secondly, an anti-dumping investigation must be conducted according to a set of procedures defined in terms of competence, time duration, rights and obligations of the related parties, etc.

Thirdly, anti-dumping measures are only aimed at remedies, not punishment; they are applied on the principle of non-discrimination; and they are temporary.

Under Article 1673 (1) (2) Title 19 of the United States Code (19 U.S. Code), if the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the United States International Trade Commission (ITC) determines that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

3.2. The US Anti-Dumping Measures in Practice

In accordance with the ADA's regulations and the laws of member countries, anti-dumping measures include:

3.2.1. Provisional Measures

In principle, provisional measures are always applied after the Authorities have made preliminary decisions that dumping and damage have occurred.

In the US anti-dumping law, provisional measures are only applied if both the Department of Commerce (DOC) and the International Trade Commission (ITC) have positive decisions about the dumping and the damage that have occurred. In fact, if the ITC has a preliminary decision that there is damage, it also means almost certainly that provisional measures will be applied then, because DOC in most cases gives the determination of dumping. The United States is also the country that allows provisional measures to be applied

retroactively if the plaintiff can prove that there exists so-called "critical circumstances" in anti-dumping cases. A critical circumstances finding is an important tool for DOC and ITC to offset possible import surges during the early period of an AD/CVD investigation[1]. If DOC determines that critical circumstances exist, it has the statutory authority to order the retroactive suspension of liquidation and posting of a cash deposit for entries made before a Preliminary and/or Final AD/CVD determination is issued (U.S. Customs and Border Protection, 2019).

If a petitioner alleges critical circumstances in its original petition, or by amendment at any time more than 20 days before the date of a final determination by the administering authority, then the administering authority shall promptly (at any time after the initiation of the investigation under this part) determine, on the basis of the information available to it at that time, whether there is a reasonable basis to believe or suspect that (i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account the merchandise was imported, knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales, and there have been massive imports of the subject merchandise over a relatively short period (Article 1673b. (E), 19 U.S. Code). The US Authorities have imposed provisional duties on a number of anti-dumping lawsuits against Vietnam's imported goods. For example, in the 2003 "Shrimp" case, the provisional duty that the United States imposed on Vietnamese enterprises are from 12.11% - 93.13%, 116.31%, in the "Uncovered Innerspring" case in 2008, and from 52.3% - 76, 11% in the case of "Plastic bags" in 2009.

3.2.2. Price Undertaking

Price undertaking means a commitment made by any foreign exporter under anti-dumping investigation to an import country represented by the competent authority to adjust the price of the export product and to eliminate injury to the domestic industry. Unlike the other two anti-dumping measures, price undertaking is an anti-dumping measure that is formed on a voluntary basis and self-regulated by the defendant exporters.

In Article 351.208 of the 19 CFR Act, price undertaking is defined in the form of a suspension agreement (SA). Suspension agreement is an agreement between each foreign producer or exporter (or representative of a foreign government in the case where the exporting country is considered a "non-market" economy) and the competent authority of the country import in which the importer voluntarily undertakes to increase the selling price or/and stop restricting the volume of exports to the importing country. Procedural legislation prescribing the procedure for the termination of an investigation under the suspension agreement is provided for in Article 351.208 of the 19 CFR Act on Suspension of Investigation: DOC will enter an agreement with the producer-exporter. Foreign importers voluntarily commit to increase prices or stop/limit the volume of exports to the importing country (sign price commitment). Suspension agreement can be made after a preliminary determination confirms that the dumping has caused injury (15 days after the date of the preliminary determination). The regulator may suspend the investigation if the foreign company whose product is under investigation agrees

[1] AD stands for Anti-dumping; CVD stands for Countervailing duty

to stop exporting goods to the United States within 6 months after the date of the suspension of the investigation, or to modify the price to offset completely any amount of money for which the ordinary value of the good exceeds the export price (or construction export price) of the good. The competent authority of the importing country has the right to accept or reject the foreign manufacturer-exporter's request for price commitment. If the price undertaking is approved, the investigation will be terminated (unless they request further investigation).

There are three types of suspension agreements as defined in Article 1673c: agreements to cease exports of investigated product to the US market; agreement to eliminate dumping; and arrangements to eliminate substantial injury caused by dumping by modifying prices. In fact, the first deal usually does not happen because no manufacturer wants to stop exporting goods to the United States. Therefore, in practice there are usually only the following two agreements.

For anti-dumping suspension arrangements: to be able to reach such an agreement, US anti-dumping legislation requires signatures of at least 85% of the volume of exporters under investigation in the United States. This is actually a problem to industries that only include a few exporters. Therefore, this kind of agreement cannot be used by all industries to quickly end an anti-dumping investigation in the United States, because it is difficult to meet that 85%.

Furthermore, it is not easy for an exporter to commit to completely eliminating dumping because dumping depends on the factors of product characteristics, shipping process, costs of storage, sales, input costs of raw materials, and exchange rates. Therefore, in many cases, even though manufacturers have tried not to dump, they still fall into the case of dumping. In fact, most of these factors are easy to apply to countries considered non-market economies by DOC, such as Vietnam and China. Reaching agreements with non-market economies is usually easier, because the basis for calculating normal prices for these countries is the value of certain factors of production that DOC chooses based on a market economy in similar conditions.

As for the agreement to eliminate significant injury caused by dumping, this is considered to be an agreement with much more flexibility than the agreement to eliminate dumping. However, reaching this agreement in practice is not easy either. Under Article 1673c, in order for an agreement to eliminate substantial injury caused by dumping, such agreement must satisfy the following three conditions: first, the manufacturer must completely eliminate significant injuries caused by the dumped import goods; second, ensure that each product is sold at a price that does not produce a dumping margin more than 15% of the usual dumping margin throughout the investigation; and third, make sure the goods is sold at a price not lower than domestic prices.

Although an agreement to eliminate substantial injury caused by dumping is flexible, because it may help parties to terminate the lawsuit at an early stage, it is not considered a generally applied competitive guarantee measure. Because, for this measure to be applied, DOC must firstly prove that the following special circumstances occur: (1) suspension of the investigation is beneficial to the domestic industry; (2) the lawsuit is too complicated. Furthermore, DOC will only make a decision if they see the US interests gain bigger if the agreement is signed. However, this is very rare, and can also carry elements of political compromise.

3.2.3. Anti-Dumping Tax

An anti-dumping tax is an additional tax, in addition to the usual import tax, imposed by the competent authority of the importing country, on the dumped imported products on its market. An anti-dumping tax is intended to compensate or limit the physical damage caused by dumping, so this tax has a protective meaning. Therefore, the applicable tax rate cannot be higher than the dumping margin of the imported goods that are dumped.

An anti-dumping tax, also known as a formal anti-dumping tax, is a tax imposed on dumped goods after the competent authorities have clearly identified the dumped goods to a significant extent (over 2%) which causes damage to many domestic industries. In a normal dumping case, after a provisional measure has been taken in the second stage of investigation and during this period the competent authorities will conduct an investigation and collect evidence to verify and confirm the dumping and the damage caused by the dumping. On the basis of the conclusion of this period, the competent authority will determine the anti-dumping tax rate. An anti-dumping tax will normally take effect immediately when it applies, which means that anti-dumping duties begin to be charged for goods being sued. This is the difference between an anti-dumping tax and a temporary measure. The temporary measure only determines the provisional tax rate. The amount that the business pays at this stage is not the tax payment, but just a guarantee for the goods to be cleared and circulated in the market as usual. If the product is subject to anti-dumping tax in the future, the tax due may be deducted from the security deposit.

In order to calculate the dumping margin to make the decision to apply the appropriate anti-dumping tax rate, the US anti-dumping law has used quite commonly the normal value calculation method for the case. For a non-market economy, anti-dumping tax is based on the determination of the economic status of the defendant country.

3.2.4. Problems

- ***The "Non-market economy" Status***

The US anti-dumping (AD) law considers dumping to occur when a foreign manufacturer charges a price for its product "less than its fair market value"[2]. For dumping from non-market economies, DOC uses a standard method to determine the fair value of products. First, DOC determines whether a foreign manufacturer's goods have been sold in the United States by comparing the price of US products with normal values similar merchandise in the firm's domestic market (Tatelman, 2007). If the product is not sold or offered for sale in the domestic market of the foreign company, DOC will determine the price at which the product is sold or offered for sale in other countries outside the United States. If DOC finds that dumping has occurred, it will set the dumping margin by calculating the average amount that the market value of the product exceeds the product price sold in the United States under section 1673b(b)(1)(A) at 19 U.S Code.

[2] Selling at less than fair value, or dumping, is defined in section 771(34) of the Act (19 U.S.C. §1677(34)) as "the sale or likely sale of goods at less than fair value." Dumping is defined as selling a product in the United States at a price which is lower than the price for which it is sold in the home market (the "normal value"), after adjustments for differences in the merchandise, quantities purchased, and circumstances of sale. In the absence of sufficient home market sales, the price for which the product is sold in a surrogate "third country" may be used. Finally, in the absence of sufficient home market and third country sales, "constructed value," which uses a cost-plus-profit approach to arrive at normal value, may be used.

The standard method applied to non-market economies (NMEs) described above has problems because non-market economies do not allocate resources according to the traditional market concept of supply and demand, thereby making decisions about fair value almost impossible (Tatelman, 2007). In the 1960s, the US Department of Finance, which was the then body responsible for domestic trade defense laws, developed and began to use the so-called "surrogate country" approach to apply AD law to NME countries (Smith, 2013). According to this approach, it was possible to compare prices and costs from third countries with similar conditions instead of using prices and costs from NME countries to determine fair market value. This approach was adopted by the Congress in the Trade Act 1974. In principle, the selected third country must be an economy with similar economic conditions to the exporting country, i.e. having the same level of economic development as the non-market economy of the exporting country. However, this "surrogate country" method sometimes was difficult to apply because it is not always possible to find a suitable country to replace. Therefore, it was necessary to come up with another solution that could be more effective.

The Department of Commerce had found out a way to solve concerns about the surrogate nation's approach by adopting a new methodology in 1975. This methodology was known as the "factors of production" approach. Accordingly, in case of the absence of an available surrogate country, DOC would base on the "surrogate country" taken from a non-market economy that was considered to be at the period of having equivalent economic development to the country whose products were under investigation for dumping (Lantz, 1995).

The U.S. AD provisions continued to amend in 1988 to deal with non-market economies issues. In the Omnibus Competition and Trade Act of 1988 (OTCA), the Congress enacted many reforms to anti-dumping laws by giving a definition of a non-market economy as well as a set of standards that DOC was based on to determine whether a country has a non-market economy or not. Under the OTCA, a non-market economy is a country that "does not operate on market principles of cost or pricing structures, so sales of merchandise in such a country do not reflect the fair value of the merchandise."

Under section 1677 (18)(B) at 19 U.S. Code, DOC must consider when making decisions regarding the state of a non-market economy basing on the following factors:

(i) the extent to which the currency of the foreign country is convertible into the currency of other countries;

(ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management;

(iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;

(iv) the extent of government ownership or control of the means of production;

(v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises;

(vi) such other factors as the administering authority considers appropriate.

For the first criterion, in terms of the convertibility of the local currency, the factors to be assessed include the ability to convert current and capital accounts, exchange rates, and foreign exchange policy trends.

For the second criterion, wages must be determined based on a market price, where workers and employers are free to agree on terms and conditions of

employment contract. When investigating this criterion, the US Department of Commerce will take into account factors of the right of workers to join a union, the independence of union, the ability to develop a self-payment regime of the union, etc.

Regarding the third criterion and the degree of freedom of foreign investment activities, several factors can be considered such as the openness of the investment environment, non-discrimination between domestic and foreign investors, and regulations on profit remittance.

The fourth criterion, the degree of ownership or control by the Government of the means of production, is a very important criterion for the United States to determine a market economy. Factors related to this criterion include the level of equitization of enterprises, the proportion of economic sectors in the economy, and the role and extent of the State's intervention in economic activities. The fourth criterion is also related to the government's participation in the economy, which is the level of government's control over the allocation of resources and the determination of prices and output of enterprises. This criterion is associated with the following factors: price liberalization, reform of the banking sector, and freedom of individuals and businesses to participate in business activities.

Besides, the US Department of Commerce may also investigate a number of other issues such as compliance with the provisions of the Antitrust Law, Anti-Dumping Law, etc.

Moreover, according to 19 U.S.C. § 1677(18)(C) (2000), DOC has the authority to determine when a foreign country is a non-market economy. According to the Act, the determination of a non-market economy status may be made with respect to any foreign country at any time, and remains effective until expressly revoked by DOC.

In addition, the Trade Agreements Act of 1979 also transferred administrative authority from Treasury to DOC to determine which approach would be used when determining fair market value. Under 19 C.F.R. § 353.8 (a)-(c) (1979), DOC stated at that time that market value should be determined according to the value of the elements in the following order of priority: (1) the home market prices of such or similar merchandise in a surrogate country; (2) the export price of such or similar merchandise shipped from a surrogate; (3) when actual or accurate prices are not available, the constructed value of such or similar merchandise in a surrogate country; and (4) the value in a surrogate country of the factors of production used in the non-market economy for such or similar merchandise.

Actually, US anti-dumping laws treat MEs and NMEs very differently (Sandkamp et al., 2020). In specific anti-dumping cases applicable to an exporter from an ME, DOC will decide dumping by trying to consider whether the foreign exporter sells products to the United States at a lower price. DOC compares the import price with the price of similar goods in the market of the export country. If this comparison is not possible because of having no trade in the same goods in the domestic market of the exporter, DOC compares the price of imported goods with the value of construction or price of similar goods sold in third countries. If the price of goods imported into the US is lower than the comparable price, dumping will occur, and if evidence finds a risk of damaging the US domestic industry, anti-dumping measures will be applied to offset differences and protect US manufacturers. However, if a country is considered an NME, the US law considers that the prices and production costs of such goods are unreliable. Depending on the adequacy of the available information, DOC may determine the normal value of the product to be investigated based on the price of similar goods in the imported country, or DOC may

determine the value of products. DOC can replace the price of an ME with the same level of development for NME. This is often called the "alternative methodology".

The use of different methods for MEs and NMEs is widely criticized for a number of reasons. Firstly, in fact, it is not fair to distinguish between market and non-market economies for the purposes of anti-dumping regulations; the differences among the calculating dumping margins methods possibly prevent NME exporters from exporting goods to the US market because of high anti-dumping tariffs. Secondly, the regulations regarding NMEs are ambiguous and cause arbitrariness in the implementation by the anti-dumping authorities. The determination of MEs or NMEs largely depends on DOC's interpretation. Thirdly, the determination of an alternative country is complex and almost never accurate because MEs and NMEs concepts are fundamentally different. Although the concept of an alternative country seems reasonable, in fact, the alternative countries and the export countries often do not compare each other thoroughly. Therefore, it is impossible to determine an accurate replacement price for anti-dumping investigations. Fourthly, the "alternative nation" approach is completely unforeseeable. For a producer, the calculating price method is unpredictable: there is no level for NME producers to calculate export prices to avoid dumping. Moreover, producers of similar goods in the alternative country often compete with producers and exporters in the export country. Therefore, producers and exporters in the alternative country are often willing to provide relevant data for antidumping investigations, or they may provide unfavorable information for NME exporters.

- ***Surrogate country method***

The alternative use of surrogate country data applies when the defendant is found to be a non-market economy. In both Vietnam's pangasius and shrimp cases, the United States uses alternative surrogate country data analysis as the basis for calculating the input costs of the defendant's exported product. The country chosen for substitution will need to ensure that the relevant criteria are outlined in the brochure issued by DOC on March 1, 2004, according to which order of factors is considered by DOC to decide for a substitute country. The position includes:

First, the country's economic comparability to a country with a non-market economy. For selecting the best surrogate country, DOC relies on per capita Gross National Income (GNI) among 5 or 6 countries, as reported in the latest annual issue of the World Bank's World Development Report. The country selected for calculating dumping measures to be a significant producer of comparable merchandise to a NME standards.

Second, an ME country's ability to compare commodity production with a country with a non-market economy. Accordingly, DOC will determine that the above economically comparable country can produce goods similar to the goods under anti-dumping investigation.

Third, based on the comparability of the market share of commodity production to determine whether any of the countries which produce comparable merchandise are "significant" producers of that comparable merchandise.

Fourth, the comparability of the availability of data used to determine factors of production. The availability and amount of information is one of the most important considerations of DOC when choosing an alternative country because these are the bases that DOC and ITC will consider in the process of making the results argument for anti-dumping investigation.

The selection of an alternative

country has a significant effect on the results of investigation and may expose the defendant to an unreasonable anti-dumping tax rate. In both pangasius and shrimp cases, the US side chose Bangladesh as the third country to replace Vietnam in the process of calculating input costs and considering related data and information (Walton, 2004). Data taken from the 2003 Bangladesh Fisheries Comprehensive Assessment, funded by several aid organizations including the US AID, DFID, SIDA and World Bank, shows how fish are farmed. Bangladesh's pangasius products are different from those in Vietnam, and their production costs are significantly lower. Besides, the market price for this seafood item in Bangladesh at that time largely reflected production costs in an aging and inefficient system (Hambrey & Blandford, 2010). Meanwhile, Vietnam has low farming costs, high intensive farming culture, and lower market prices. Most of Vietnam's farming and export of pangasius products apply a closed production process from nursery to nurturing and export, leading to very low fillet costs (Luu, 2019).

Another practical example shows that sometimes DOC's implementation is inconsistent with the regulations that the agency itself has issued above. In the final decision of DOC's 8th administrative review (POR8) on the Vietnamese pangasius export case, instead of continuing to choose Bangladesh as previous reviews, unexpectedly in this review, DOC decided to choose Indonesia as the third alternative country to calculate the price of Vietnamese pangasius when in fact the data on the Indonesian catfish farming and exploitation compared to Vietnam is very different. The production of farmed pangasius in Indonesia is only a very small industry, while Vietnamese pangasius is a staple industry of the country, farming on a large scale (Sao Mai, 2020).

Besides, the technical process of farming between Vietnam and Indonesia pangasius is also different. Indonesian pangasius is farmed by natural methods, while Vietnamese pangasius is industrial farming, so production costs are completely different. Another difference is that Vietnam is a pangasius exporter, while Indonesia only supplies domestically. In fact, Indonesia's pangasius is also exported to the US, but the product is mainly in frozen fillet form and the export volume is very small, only reaching 69,591 kg in 2007 (VCCI, 2013). The above difference clearly shows that Indonesia cannot be used as a substitute country, i.e. a basis for comparing input costs in order to apply anti-dumping tax on Vietnamese pangasius.

3. Conclusion

Although anti-dumping measures are classified as non-tariff measures, they are in fact often enacted as part of tariff measures, i.e. a remedy is used as a tariff. Its main purpose is to impose anti-dumping duties on import goods under investigation, and customs authorities will be responsible for monitoring the enforcement of anti-dumping duties. And even if no tariffs are ultimately imposed, the administrative procedures involved are sufficient by themselves to have detrimental effects on imports.

Being considered an NME, many Vietnamese exporters have been disadvantaged in the US anti-dumping investigations, because all data on prices and production costs in Vietnam are subject to investigation by the US Authorities. The United States still refuses to recognize Vietnam as a market economy. As a result, Vietnamese exporters have to receive unfavorable anti-dumping duties decisions from the US Authorities. Dealing with these problems is not only the responsibility of Vietnamese manufacturers and exporters, but also of the US Authorities so as to find out the most plausible resolutions to avoid and minimize injuries from the US anti-dumping lawsuits.

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Tóm tắt: Luật chống bán phá giá của Hoa Kỳ có ý nghĩa quan trọng trong hệ thống pháp luật bảo hộ thương mại của Hoa Kỳ nói riêng cũng như luật thương mại Hoa Kỳ nói chung. Mục tiêu chính của các biện pháp chống bán phá giá của Hoa Kỳ là nhằm đối phó với các hành động bán phá giá hàng hóa của các nhà xuất khẩu nước ngoài trên thị trường Hoa Kỳ và bảo vệ ngành sản xuất trong nước. Mục tiêu của bài báo là phân tích các vấn đề hiện tại của các biện pháp chống bán phá giá của Hoa Kỳ để đánh giá tính khả thi của chúng. Nghiên cứu đã chỉ ra rằng trong ba biện pháp chống bán phá giá của Hoa Kỳ, cam kết về giá (thỏa thuận đình chỉ) là một phương án khả thi để các bên chấm dứt điều tra chống bán phá giá ở giai đoạn điều tra sơ bộ; tuy nhiên trên thực tế nó ít được áp dụng hơn so với các biện pháp khác; thay vào đó, thuế chống bán phá giá là biện pháp chủ yếu được sử dụng. Điều này khiến cho các biện pháp chống bán phá giá có nhiều khả năng trở thành một biện pháp thuế quan hơn là một biện pháp phi thuế quan.

Từ khóa: biện pháp chống bán phá giá, Hoa Kỳ, cam kết về giá, thỏa thuận đình chỉ, thuế chống bán phá giá