Volume 26 Number 1 2025 pp. 1-7 www.usask.ca/esteyjournal

The Estey Journal of International Law and Trade Policy

Weaponizing Anti-dumping

William A. Kerr
Associate Member, College of Law, University of Saskatchewan, Canada

Abstract

International trade policy appears to be entering a new phase. The existing rules of trade did not allow the imposition of trade policy instruments for non-trade reasons. Countries are now increasingly weaponizing trade policy to achieve non-trade objectives (i.e. incentivizing countries to control outward migration, to reduce the cross-border drug outflows, increase defense spending, reduce trade surpluses). Anti-dumping is one trade policy which can be used to achieve such non-trade ends. One example is the threat to open an anti-dumping investigation against Canadian canola in retaliation for the imposition of one hundred percent tariffs on Chinese-made electronic vehicles. The suitability of anti-dumping actions for use in achieving non-trade ends is explored in this article.

Keywords: anti-dumping, duties, non-trade ends, rules of trade

Introduction

> Where instances of dumping are reported by others than those directly involved in the transactions, it is often difficult to determine in specific cases whether the reported sales at different prices in different countries are genuine instances of dumping or are to be adequately accounted for by differences in the conditions and terms governing the sales to purchasers in the domestic and the foreign markets, respectively.
>
> Jacob Viner, 1922a, p. 665

> In Canada export dumping is not widely prevalent, for the chief exports are the products of the extractive industries, which are typically produced on a small scale by thousands of scattered and unorganized individuals and are therefore not readily subject to systematic price-discrimination.
>
> Jacob Viner, 1922b, pp, 800-801

The concept of dumping is based on *bad economics* (Kerr, 2001). It allows foreign firms to be punished for pricing activities that are considered normal business practices in the countries imposing ant-dumping duties (Kerr, 2006). The methods devised by governments to implement anti-dumping measures are biased toward: (1) finding that dumping is taking place, (2) increasing the size of the penalty imposed; (3) making it costly for firms accused of dumping to defend themselves; (4) making it easy for firms in importing countries to initiate a case; and (5) allowing temporary duties to be imposed prior to an investigation to establish whether the accused firms are guilty of dumping (Kerr and Loppacher, 2004). In short, anti-dumping is generally perceived as a thinly veiled mechanism for providing economic protection for domestic firms facing stiff foreign competition (Kerr and Perdikis, 2014).

However flawed, in the rules-based international trading system that has been in place since 1947, the use of anti-dumping has been limited to dealing with perceive *unfair* pricing practices. On September 3, 2024, however, China announced that it was opening a dumping investigation against imports of Canadian canola. Prior to the announcement, there had been no indications from China that Canadian exporters were trading unfairly, something that might normally be expected prior to the launch of a dumping investigation. The motivation for bringing of the case by China has been widely attributed to Canada's imposition of a one hundred percent tariff on electronic vehicles (EVs) from China on August 26, 2024 – to take effect on October 1, 2024 (Slade and Kerr, 2024).[1] The anti-dumping action brought by China was simply retaliation for Canada's imposition of its tariff. It did not have a motivation in perceived *unfair* pricing activities of Canadian canola seed exporters. This is a new use of anti-dumping – to punish Canada for its policy on EVs – and presumably to put pressure on Canada to remove its tariff. China could have drawn on a range of trade policy measures to retaliate from simply imposing tariffs on canola (or some other product) to the use of controversial SPS measures as it had imposed on Canadian canola in the past (Wells and Slade, 2021; Cardwell and Brewin, 2019), to a range of other measures. This paper explores the potential efficacy of *weaponizing* anti-dumping for uses such as retaliation or intimidation.

Using Anti-dumping for Retaliation or Intimidation

Being threatened with an anti-dumping investigation and eventually anti-dumping duties greatly increases the risks associated with engaging in international business for those targeted by anti-dumping activities. Just the threat of being investigated is enough to have a price effect. According to Slade and Kerr (2024):

> In the two weeks following the announcement of China's anti-dumping investigation, Canadian canola prices fell by approximately 10% relative to US soybean and European rapeseed prices. Market analysts largely attributed this drop to the investigation announcement.

After the announcement of an investigation, the country initiating the anti-dumping action has a large number of avenues to increase the risks for firms in the exporting country. These can be used entirely at the discretion of the initiating country.

The timing for when the country initiates the investigation is solely determined by the importing country's investigative body.[2] Normally domestic firms in the importing country would accuse individual exporting firms of engaging in dumping. Based on the evidence presented by the accusing firm(s), the investigative institution in the importing country would determine whether dumping was plausible and whether there was the potential for economic *injury* to be suffered by domestic firms as a result of the dumping activity. It is possible, however, for the investigating agency in the importing country to initiate the investigation on its own – in the absence of domestic firms asking for an anti-dumping case to be launched.[3]

Announcing an investigation, however, is not the same as actually initiating an investigation. This leaves exporting firms in limbo – unable to make investment decisions with the potential for an investigation hanging over their heads. After the announcement and if the importing country wishes to proceed, a preliminary investigation is rapidly conducted largely using information supplied or suggested by those firms which launched the complaint. If, often flimsy, evidence indicates the possibility of dumping taking place and a potential for injury found, *preliminary* duties are imposed on the products of exporters. These duties, based on the information supplied by complaining importers, is likely biased against exporters and the preliminary duties substantial. Once the preliminary duties are in place, a full investigation can be launched. The preliminary duties stay in place until the full investigation is completed. Thus, exporting firms have their market access limited over the time of the full investigation.

The time it takes to conduct the full investigation is at the discretion of the importing country.[4] The exporting firms, hence, have no control over the duration of the restriction on market access imposed. Of course, the importing country can choose to terminate

the full investigation at any time and remove the temporary duties. The revenues collected from the temporary duties are kept in a separate fund until the end of the full investigation. If the full investigation finds that dumping was not taking place or, if it was taking place but was not found to have injured firms in the importing country, then the funds are returned. Of course, exporting countries will have had their market access restricted over the duration of the temporary duties even if they are found not to have been dumping.[5]

In the case of a full investigation, it is common for the investigating agency to choose two or three firms in the exporting country to investigate in depth. Which firms are chosen is at the sole discretion of the investigating agency. The firms chosen must cooperate with the investigating agency and must prepare to defend themselves. The remaining firms in the exporting country must simply await the findings of the full investigation. If dumping and injury are found, typically the anti-dumping duties imposed lie between the highest and lowest duties imposed on the goods of the firms which have been fully investigated. Firms that were not investigated have no opportunity to defend themselves.

Cooperation with the investigating authority can be quite onerous. Accounting information over a number of years must be prepared – often using an accounting convention specified by the investigating agency. The conversion of accounting (and other) records into the specified format may require the hiring of those trained in the accounting methods specified by the investigating agency, which can be costly.

The investigating agency may also wish that its investigators make a site visit. The visit may take a number of weeks all paid for by the firm under investigation. In addition, there may be translation costs associated with the site visit and for a broader range of documents.

If an exporting firm thinks cooperation is too onerous or too expensive, and does not wish to cooperate, then it risks having extremely high anti-dumping duties imposed. Firms almost always chose to cooperate despite the cost of doing so.

The investigated firms may also have a chance to defend themselves. This will require representations, in writing, or in person to the offices of the investigating agency in the importing country. Lawyers and other professionals from the exporting country may not be allowed to make representations in the importing country, thus requiring the hiring of legal firms in the importing country. These are often specialized international law firms that are expensive to engage, and who may take considerable time to *get up to speed* on a particular dumping accusation. All the while the temporary duties remain in place. Barichello (2007) suggests a firm mounting a credible defense in the US can

cost millions of dollars. Anti-dumping investigations are to be avoided if at all possible – including withdrawing from the particular export market.

At the end of the full investigation, with a positive finding of dumping and injury, permanent anti-dumping duties would be applied. These could vary considerably from firm to firm among those having been investigated. These differences, one suspects, depend on how successfully the defense was mounted. As suggested above, non-investigated firms will have a duty applied to their products.

The anti-dumping duties remain in place for a period specified by the importing country. In some cases, a review of the duties can be requested by the exporting firm if there is a change of circumstances. It is at the importing country's discretion as to whether the need for review is accepted. The importing country can also initiate a review – a process that could either increase the anti-dumping duties or lower them. Of course, the importing country may decide to cancel the anti-dumping duties at any time.

Anti-dumping duties often have a sunset clause whereby duties are either cancelled or reviewed after a certain number of years. The review can determine if the anti-dumping duties can be extended. They may also be altered either to increase the duties going forward or to lower them.

It seems clear that the existing anti-dumping procedures can be used to harass foreign firms, and thus indirectly foreign governments, if they wish to weaponize anti-dumping to achieve non-trade objectives. In the case of the action against Canadian canola exports, the intent was to retaliate for the Canadian government's imposition of one hundred percent duties on EVs produced in China. The use of anti-dumping to achieve ends not related to *unfair pricing* keeps retaliation within the rules-based system. Of course, if one no longer wished to abide by the obligations contained in international trade agreements, duties aimed at achieving non-trade ends can be imposed directly.[6] If international commerce is moving to a situation where trade measures can be used to achieve non-trade ends, then it would appear that weaponizing anti-dumping may be an easy way to achieve those ends without stepping outside the existing rules of trade. Much has been written about the flawed nature of the calculation of anti-dumping duties and injury such that calculation imposes virtually no constraint on determining the size of anti-dumping duties (Kerr and Loppacher, 2004; Greenwald and Horlick, 2007; Rude and Gervais, 2009; Wu, 2007).

Conclusion

Anti-dumping has been a controversial feature of international trade policy since its inception (Kerr, 2001). The version of anti-dumping enshrined in the WTO is based on Jacob Viner's incomplete analysis from the 1920s (Kerr, 2006). Given its weak

theoretical foundation, anti-dumping implementation is fraught with difficulties and open to manipulation. Its intent is to deal with unfair pricing practices of foreign competitors. Given its flaws, it can also be used to put pressure on foreign firms, and indirectly governments, to alter their behavour or to impose costs if a change of behavour is not forthcoming. From the threat of an anti-dumping investigation being launched to the final removal of permanent anti-dumping duties, the importing country has many ways of imposing risks on the exporting firms. It can also cancel imposed duties whenever it wishes.

If the rules of trade are fading, but not yet totally abandoned, then weaponizing anti-dumping to achieve non-trade ends appears to offer a means of achieving those ends while remaining within the exiting rules of trade. This is what China did when faced with unilaterally imposed one hundred percent Canadian tariffs on its EVs. Anti-dumping actions appear well suited for this role given their ability to increase the risks for exporting firms – and by extension their governments. If the international rules of trade are increasingly ignored, as is likely the case in the second Trump administration, other countries may wish to follow. Weaponizing anti-dumping may be a first step.

References

Barichello, R.R. (2007) Administrative Procedures, the Distribution of Costs and Benefits, and Incentives in Anti-dumping Cases, in J.D. Gaisford and W.A. Kerr (eds.) *Handbook on International Trade Policy*, Cheltenham: Edward Elgar, (pp. 360-367).

Cardwell, R. and D.G. Brewin (2019). Blackleg or Blackmail? Economics of the Canada–China Canola Trade Dispute. *Canadian Journal of Agricultural Economics*, 67(3): 251-260.

Greenwald, J. and G. Horlick (2007) Dumping Margin Calculation Problems in the United States. *Global Trade and Customs Journal*, 2: 67-71.

Kerr, W.A. (2018) Eliminating the Constraints on Trade Policy – The Strategy that Underpins US Negotiations in the Trump Administration, *Journal of International Law and Trade Policy*, 19, (2): 75-84.

Kerr, W.A. (2006) Dumping: Trade Policy in Need of a Theoretical Make Over, *Canadian Journal of Agricultural Economics*, 54 (1): 11-31.

Kerr, W.A. (2001) Dumping – One of Those Economic Myths, *Journal of International Law and Trade Policy*, 2 (2): 1-10.

Kerr, W.A. and L.J. Loppacher (2004) Antidumping in the Doha Negotiations: Fairy Tales at the World Trade Organization, *Journal of World Trade*, 38 (2): 211-244.

Kerr, W.A. and N. Perdikis (2014) *A Guide to the Global Business Environment*, Cheltenham: Edward Elgar.

Rude, J. and J.P Gervais (2009) Biases in Calculating Dumping Margins: The Case of Cyclical Products, *Applied Economic Perspectives and Policy*, 31(1): 122-142.

Slade, P. and W.A. Kerr (2024) Collateral Damage: China's Anti-dumping Case Against Canadian Canola, *Canadian Journal of Agricultural Economics*, DOI: 10.1111/cjag.12381.

Viner, J. (1922a) The Prevalence of Dumping in International Trade: I. *Journal of Political Economy*, 30 (5): 655-680.
Viner, J. (1922b) The Prevalence of Dumping in International Trade: II. *Journal of Political Economy*, 30 (6): 796-826.
Wells, J. and P. Slade (2021). The Effect of the Canada–China Canola Trade Dispute on Canola Prices. *Canadian Journal of Agricultural Economics*, 69 (1): 141-149
Wu, X. (2007) Dumping Margin Calculation Methods: Ten Major Problems in China. *Global Trade and Customs Journal*, 2: 21-28.

Endnotes

[1] Chinese car makers have gained a competitive advantage over US automakers, similar to what happened with Japanese car makers in the 1980s. US carmakers found a receptive ear in the administration of President Biden which saw EVs as one of the transformative technologies that would meet a number of policy goals to do with manufacturing jobs and the environment. The Biden administration duly provided US automakers with protection by announcing a100 percent tariff on Chinese made EVs on May 14, 2024. As part of the United States, Mexico Canada Agreement (USMCA), goods from Canada have low tariff access to the US which would have meant Chinese automakers could have exported their EVs to Canada and then have them shipped to the US thus avoiding the 100 percent US tariff on Chinese-made EVs. The US could not allow such transshipments to happen. If Canada did not match the US tariff on Chinese EVs then the US would have imposed tariffs on imports from Canada. Canada chose the former.

[2] In the case of the announced Chinese investigation of Canadian canola, as of the end of January 2025 no further action has been announced. As a result, Canadian firms that export canola seed (and others along the canola supply chain) have no idea when, or if, an investigation will actually be initiated. This makes planning very difficult.

[3] This was the mechanism used in the Chinese case against Canadian canola. Such a provision may not exist in the anti-dumping mechanisms of all countries.

[4] In some countries a timetable is specified for the full investigation, but these are notional because those conduction the investigation can always ask for more time to complete their work.

[5] In the US, for example, a finding of dumping is almost always found, findings of injury are somewhat less likely (Kerr and Loppacher, 2004).

[6] As was done against Chinese goods during the first administration of President Trump. The second Trump administration has suggested it will use direct import duties more broadly to achieve non-trade ends and in violation of its World Trade Organization (WTO) and other trade agreements. It sees the rules imposed by trade agreements signed by previous administrations as too constraining. (Kerr, 2018).