ISSN 2524-101X
eISSN 2617-541X
LEX PORTUS VOL 9 ISS 2 2023

DOI 10.26886/2524-101X.9.2.2023.3

Natural Resource Underpricing in WTO Subsidies Rules and Beyond: A Reflection of North-South Divide in Globalization

Van Hoc Duong*

**PhD, Can Tho University (School of Law) (Campus II, 3/2 street, Ninh Kieu district, Can Tho city, Viet Nam) https://orcid.org/0009-0008-0048-1584*

ABSTRACT

The article discusses natural resource underpricing in multilateral subsidy rules' negotiations. It starts from the U.S. experiences to consider foreign natural resource underpricing practices under its underdeveloped subsidy rules. The United States then brought its domestic concern to the Uruguay Round establishing the World Trade Organization; however, conflicts had been shown between the industrialist countries and the resource-endowed ones regarding the ways of using natural resources as a comparative advantage. At this corner of trade rulemaking, the North's pro-market demand was likely to collide with the South's natural resource sovereignty. Natural resource underpricing has again taken the stage in the ongoing Doha Development Round for renegotiation of the WTO Subsidies Agreement; nevertheless, it seems to partly place this multilateral trade rulemaking under a stalemate. The crux of the subsidy debates on natural resources is how to deal with the government's market predominance concern as to reflect the government's roles in the natural resource sector. The European Union's pressure on the WTO accession of several resource-endowed countries has been quite effective since the latter chose to surrender part of their natural resource sovereignty as a price of economic integration. However, the EU present anti-dumping practice against the natural resource underpricing problem seems to add fuel to the dilemma since its trade law consistency is under challenge.

CITATION

Duong, V. H. (2023). Natural Resource Underpricing in WTO Subsidies Rules and Beyond: A Reflection of North-South Divide in Globalization. *Lex Portus*, *9*(2), 28–42. https://doi.org/10.26886/2524-101X.9.2.2023.3

KEYWORDS

natural resource underpricing, natural resource subsidies, dual-pricing practice, the North-South divide, input subsidies, multilateral trade negotiations.

Introduction

Natural resources are essential to all economies, but their demand might vary across countries, natural resource types, and times. As a component of the natural environment brought into human economic activities, natural resources account for approximately one-fifth of world commerce (Ruta & Venables, 2012). While international trade is supposed to promote a fair and efficient distribution of economic resources in the expanding trade-liberalizing world, this tenet of the global economic system might not work perfectly in the natural resource sector. Unequal natural resource distribution is a source of comparative advantages as well as a source of conflicts with regard to the access problem. Because natural resources are essential goods for industrial productivity, the government may provide these natural inputs at below-market prices to support its downstream industries. For example, the government can provide cheap coal input to its steel industry or low-priced oil for its manufacturing activities. This practice might not cause trade friction if the government also supplies such cheap coal or oil for export at the same prices. In fact, the government tends to sell at higher prices for foreign consumption due to the rent-seeking motivation (Beaton & Clark, 2016), and this unfair trade practice might be objectionable to resource-importing countries.

Trade policy scholarship increasingly discusses the problem of governmental provision of below-market exploited natural resources to domestic downstream industries, namely natural resource underpricing or dual pricing practice, in the subsidy rules (Ripinsky, 2004; Asmelash, 2015; Marhold, 2016). This scheme operates by lowering the price of domestic inputs to downstream production as compared to the market-determined price or the world price that may constitute a hidden subsidy. It is pervasive in the fossil fuel sector – the sector that is vital input for most manufacturing industries. According to the International Energy Agency (IEA), the estimated amount of fossil fuel consumption subsidies was 400 billion USD globally in 2018 (IEA, 2019). Despite this challenging subsidy situation and its terrible environmental impacts, there is no subsidy dispute concerning the fossil fuel dual-pricing practice at the World Trade Organization (WTO).

Although the United Nations Development Program in 2021 proposed a pricing reform agenda for the fossil fuel sector as to reflect social and economic fairness (UNDP, 2021), pricing natural resources is so tricky mainly due to their environmental, social, and economic values (Zhang & Li, 2005). Canada, for example, has consistently embraced its public policies on timber pricing despite the fact that its neighbor has vociferously demanded the pricing scheme to stick on the markets. Even in the United States – considered as the leader of market idealism – searching for a 'fair market value' on most natural resources is hardly successful (Huber, 2015). Another factor contributing to such a pricing problem is governmental dominance in the natural resource sector which is supported in numerous cases by the country's legal and political foundations (Qin, 2019). This thus results in a situation in which the government manipulates the pricing strategy on natural resource inputs for the development of downstream processing industries. Trade policies, however, do not care much about how natural resources are domestically priced, but the discriminative impacts of such a pricing scheme may be subject to scrutiny (Cottier & Oesch, 2011).

From international law perspective, touching on the natural resource allocation of a trading country is not an easy task, indeed. Natural resources are a unique domain: they have plenty of sovereign characteristics and are directly connected to the government's roles in the economy and society at large. In a dispute between Democratic Republic of Congo and Uganda in 2005, the International Court of Justice confirmed the principle of sovereignty over natural resources as customary international law (ICJ, 2005). Even though natural resources legally belong to the government, communities, or private entities, they are also all submitted to state sovereignty. It means that any international constraint on the government's roles in natural resource allocation seems to be at odds with the principle of sovereignty in international law. On the other hand, natural resources are a source of comparative advantages of a trading nation. In fact, the genuine trade concern in the natural resource sector is the use of sovereign powers to improve trade advantages. As a consequence, if a trade negotiation regarding natural resources has passed the comparative advantage debate, it is likely to proceed with the natural resource sovereignty debate and *vice versa*.

The article explores the controversy on natural resource underpricing in multilateral subsidy rules' negotiations. Being considered in the subsidy context, the natural resource underpricing problem had been exposed to the Uruguay Round establishing the WTO. Yet legal friction over the issue had been experienced in the United States for half a decade before this trade-rules-setting agenda began in 1986. Natural resource underpricing has resurged in the ongoing Doha Development Round, but it seems to aggravate the North-South divide here. The heart of such an inconclusive debate is conflicting views regarding the government's roles in natural resource allocation between the industrialist countries and the resource-endowed ones. The natural resource underpricing problem, which is derived from the government's predominance in natural resource allocation, thus comes into the intersection between sovereignty and markets. The North's pro-market demand through the anti-subsidy instrument seems to be at odds with the South's natural resource management for their own economic development. In other words, the North's market idealism as embarked in existing international trade policies comes to battle with the South's natural resource sovereignty at the corner of multilateral subsidies rulemaking.

Methodology

The article takes a historical approach to investigate the evolution of international subsidy rules toward the natural resource underpricing practice. It starts with the analysis of U.S. trade politics on the matter before its global adventure is being studied. The U.S. critical position toward natural resource underpricing in the Uruguay Round kicked off an inconclusive debate in international trade policies regarding how the subsidy regulation should be for the underlying problem. This country has still reaffirmed its anti-subsidy approach in the Doha Development Round; however, the subsidy rules' technicalities in dealing with natural resource subsidies, e.g., how to calculate the subsidy bestowed by a natural resource underpricing scheme, have been a frontline between the North and the South. The natural resource sovereignty approach as consistently upheld by the South negotiators comes into conflict with the North's demand for the market-based allocation of natural resources. The stalemate of the ongoing subsidy rules' renegotiation might give rise to the EU recent practice against underpriced natural resource inputs but with another price-offsetting instrument – the anti-dumping duties. However, discussing the EU anti-dumping practice through the lens of existing WTO law might tell the fact that the EU approach reflects its own resource extractivism at the cost of legality.

1. Beginning of a Saga: Natural Resource Underpricing in U.S. Trade Politics

The U.S. economy's general decline in the 1980s prompted some ailing domestic industries to increase their demands for governmental protection. A growing number of trade claims in this period were about foreign natural resource pricing policies as a kind of production intervention. Early cases of natural resource underpricing in the United States were concerning steel products imported from several EEC countries (USDOC, 1982a). U.S. domestic industries claimed that these pricing practices should constitute a governmental subsidy if the government provides natural resources to its downstream manufacturers at below-market value. At that time, there was no legal instrument to expressly discipline this 'new' unfair trade practice; therefore, the United States Department of Commerce (USDOC) likely possessed all of the power to consider the countervailability of such underpricing allegations. The USDOC based its justifications on the subsidy clause in the U.S. Trade Agreements Act of 1979:

SUBSIDY – The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 303 of this Act, and includes, but is not limited to, the following:

(A) Any export subsidy described in Annex A to the Agreement (relating to illustrative list of export subsidies).

(B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:

(ii) The provision of goods or services at preferential rates.

In the preliminary determinations concerning coal input underpricing to downstream steel producers from Belgium, France, and Germany (1982), the USDOC premised the rejection of all domestic subsidy allegations on the specificity test due to the reason that the steel industry did not exclusively use the subsidized coal input (Giesen, 1985). In its final subsidy determinations, the USDOC used a new assessment to (again) dismiss all coal input subsidy claims. The USDOC interpreted that if transactions between input coal producers and downstream steel purchasers are conducted under arm's length conditions, the countervailable benefit supposedly accrued to the former could not flow onto the latter (USDOC, 1982b). This interpretation later became known as the pass-through test in the input subsidy situation.

In the next natural resource underpricing dispute before the USDOC, *Certain Softwood Lumber Products from Canada (1983)*, the U.S. softwood producers worried that 'cheap' stumpage programs (timber harvesting rights) in Canada could create a cost advantage for the Canadian timber harvesters. These benefited harvesters could then sell the underpriced timber to produce cheap softwood lumber bound for the U.S. markets (the upstream-downstream relationship). The USDOC understood the Canadian stumpage programs to involve subsidy transactions of a type falling under the governmental provision of goods under Section 771 (5) (B) of the Trade Agreements Act 1979. Nevertheless, it reasoned that the stumpage rates were uniform to all timber harvesters; therefore, the stumpage did not confer a preferential benefit on the timber harvesters (USDOC, 1983). In other words, limitations on the use of the Canadian stumpage programs did not stem from governmental discretion; thus, specificity did not exist. The USDOC consistently applied such a specificity test to reject the subsidy allegations in subsequent natural resource underpricing disputes. A notable example was *Carbon Black from Mexico (1983)*, which was in regard to natural gas pricing policies of the *Petróleos Mexicanos* (PEMEX). However, the United States Court of International Trade (USCIT) in *Cabot Corp. v. United States* then rejected the 'general availability test' as applied in *Carbon Black* that marked a fundamental change in U.S. law for subsidy calculation (USCIT, 1985).

As observed from these early natural resource underpricing cases, there are two forms of the natural resource underpricing practice. First, the government or its agencies directly provide natural resources (extracted natural resources or tradable natural resources) to its downstream producers at below-market prices, such as in Mexico's natural gas underpricing programs. This governmental underpricing mechanism should be called the 'direct' natural resource subsidy. The other form of natural resource underpricing is governmental provision of below-market natural resource exploitation rights to respective resource exploiters/producers (upstream producers). The natural resource inputs produced by such upstream producers are then purchased by producers of the subsidy-alleged merchandise (downstream producers). The underlying question becomes whether a subsidy by the underpriced natural resource exploitation rights conferred upon the upstream producers is transferred to the downstream producers. Thus the situation should be called the 'indirect' natural resource subsidy as in *Softwood Lumber (1983)*.

The problems of the natural resource underpricing were brought to the 98th and 99th U.S. congressional debates and included both the direct and indirect forms of the natural resource subsidy. The Administration (the executive branch of the U.S. Government), however, expressed strong opposition to these natural resource subsidy proposals. It presented numerous counterarguments against such a 'protectionist' agenda, such as confronting foreign retaliation from mirror legislations or undermining the natural comparative advantage of a trading nation (Bello & Holmer, 1984). After strident congressional debates, the upstream subsidies clause was finally adopted to implicitly discipline the *indirect* natural resource subsidy. The American Bar Association (ABA) criticized these subsidy bills as an unwise trade policy because they misperceived the legitimate governmental roles in natural resource management (The Natural Resource Subsidy Debate: A Critique of Proposed Legislative Action, 1987). Unable to withstand such massive opposing pressure, especially from the Administration, all direct natural resource subsidy bills were once again defeated in the U.S. 100th Congress by a presidential veto. Despite huge controversies at home, the United States brought the natural resource underpricing concern to the Uruguay Round for an international solution. The natural resource underpricing phenomenon then began its global adventure.

2. Natural Resource Underpricing in the Uruguay Round Establishing the WTO

There was perhaps no better place than the Uruguay Round for the United States to express its concerns over the natural resource underpricing practice while it had domestically experienced the issue for half a decade. The United States proceeded with its agenda as part of two negotiating groups established by the Punta del Este Declaration 1986: Natural Resource-based Products (NG3) and Subsidies and Countervailing Measures (NG10). The U.S. position on the issue invited support from a few industrial partners; nevertheless, developing countries were very critical of this 'protectionist' scheme. The simple reason was that the U.S. proposals likely directly threatened their national sovereignty over natural resources. Hence, negotiators from the South could find their rationale in the general international law of natural resource sovereignty, which declares: 'The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities' (Permanent Sovereignty over Natural Resources, 1962). This broad background, to some extent, heralded a tough road ahead for multilaterally disciplining the natural resource underpricing practice under the subsidy context.

2.1. Debates at the negotiation group on natural resource-based products (NG3)

As the largest trading nation and the traditional pioneer in international trade rulemaking, the United States went ahead and submitted its proposals to the NG3 group. In its first submission, the United States mentioned five specific but related practices which were assumed to impede free trade in natural resource-based products. Three out of the five concerns explicitly or implicitly related to the natural resource underpricing practice: dual pricing, export restrictions, and government ownership (GATT, 1987). These matters were subsequently crystallized in another U.S. submission titled 'Natural Resource-based Products: Two-Tier Pricing Issue'. The terms 'two-tier pricing' and 'dual pricing' seemed to be interchangeably used here, similar to the European Communities' term 'double pricing' (GATT, 1990a).

From the U.S. perspective, the dual-pricing practice was understood to be 'any government programs or actions to establish domestic prices for natural resources at some level below the value they would otherwise have if determined by market forces in a situation where there are no impediments to export' (GATT, 1988b). This price-setting practice certainly confers a cost advantage on downstream domestic industries based on the natural resource advantage; therefore, the dual-pricing practice directly connects to government ownership of natural resources. This type of ownership is likely to create the government's 'natural' predominant position in natural resource production and distribution. The United States emphasized that it did not intend to challenge the sovereign rights over natural resources of a trading nation. Yet it expressed tremendous concerns about the use of such a natural advantage to artificially cause trade distortions. It explained (GATT, 1988b):

> However, cases can exist in which governments use their ownership or control of industries to control the availability of raw materials for commercial advantage, cross-subsidize otherwise non-competitive

> production, and provide other trade advantages to firms under their jurisdiction. Moreover, the lack of transparency inherent in such situations points to the need to examine potential trade-distorting effects.

In response, the group of least-developed countries expressed their firm approach to the natural resource advantage (GATT, 1989a):

> Natural resource-based products are of major importance to the trade and development of least-developed countries and the sovereign right of these countries to adopt all appropriate measures for the safeguard and development of such resources must be recognized. Any agreement in this sector shall allow for the right of least-developed countries to protect and optimize their natural resource products and provide for support and assistance, including assistance to export development.

The United States also contended that the dual-pricing practice in the natural resource sector is relevant to the imposition of export restrictions against the natural resources concerned. It was critical of using quantitative restrictions (generally prohibited by GATT Article XI) to artificially keep natural resource inputs at a below-market price for domestic use (GATT, 1988b). Australia and the European Communities lent support to the U.S. natural resource underpricing proposals. The Australian submission in June 1988 mentioned the dual-pricing practice and the government ownership problem as 'two clear examples' of the trade-distortive measures in the natural resource sector. This country exclusively concentrated on extractive industries (mineral, fossil fuels) – the most critical resources in this period (GATT, 1988a). The European Communities, in turn, observed that the double-pricing practice usually generated trade effects similar to a subsidy. It asked the current negotiators should therefore 'bring about a higher degree of multilateral disciplines in the recourse to such measures' (GATT, 1990a). However, in the end, the natural resource underpricing debate within this negotiating group closed without an imprint.

2.2. Draft Article 14(e) to the WTO Subsidy Agreement (NG10): a failed attempt toward natural resource underpricing practice

The United States explicitly raised distinct features of the natural resource sector before the subsidy negotiating group in its submission in June 1988. Like those presented before NG3, the United States criticized the trade-distortive effects caused by three distinct but relevant natural resource practices: dual-pricing, export restraints, and government ownership. It maintained that such market-intervention schemes should be considered a 'traditional' subsidy. At a meeting in the middle of the Uruguay Round, one participant (possibly the U.S. delegate) relentlessly demanded a multilateral subsidy response to be taken against these practices. By contrast, several participants argued that natural resource pricing policies reflect a trading nation's legitimate comparative advantages; therefore, such trade advantages could not be considered as the cause of trade distortions (GATT, 1990b).

The United States distinguished the subsidy treatment between the government's provision of extraction/exploitation rights with respect to natural resources versus the government's provision of processed natural resources. In this case, processed natural resources were understood as 'natural resources which have been extracted and undergone primary processing by the government or the government-owned entities'. The United States proposed that if the government's provision of processed natural resources is open to all parties on the same terms and conditions, such governmental provision is permitted. Similarly, suppose the government provides natural resource exploitation rights through an auction bidding process that is open to all parties, the practice should be considered a non-actionable subsidy and be permitted (GATT, 1989b). It may be understood from the U.S. perspective that indiscriminate access and market mechanisms are requisite to constitute an 'undistorted' practice in the natural resource sector. The notion of indiscriminate access to natural resource products appeared in Article 14(e) of the Chairman Draft Text (Cartland IV) likely due to U.S. persistent demand. This provision reads as follows (GATT, 1990c):

> When the government is the sole provider or purchaser of the good or service in question, the provision or purchase of such good or service shall not be considered as conferring a benefit, *unless the government discriminates among users or providers of the good or service*. Discrimination shall not include differences in treatment between users or providers of such goods or services due to normal commercial considerations.

There is no doubt that this proposed provision was aimed at addressing the governmental provision of natural resources to downstream industries on preferential terms and conditions. However, the United States might further emphasize the treatment of access between domestic and foreign purchasers. Mexico strongly criticized this draft provision as going far beyond the natural resource underpricing concern. It asked for a clarification that would read 'unless the government discriminates *within its territory* among users or providers of the good or service' (GATT, 1990d). Mexico argued that without such a clarification, a country would likely denounce its own natural comparative advantage which could be inconsistent with the national treatment principle. Draft Article 14(e) was subsequently dropped from the final draft text; therefore, it has no place in the WTO Subsidy Agreement. Nevertheless, its legacy might endure when the problem has resurged in future trade negotiations.

3. After Uruguay: Natural Resource Underpricing in WTO's Litigation and Accession

Natural resources under the subsidy context had been discussed in the Uruguay Round, but no results had been achieved. Nevertheless, the issue has been causing trade friction as observed in WTO dispute settlement practice. A series of *Softwood Lumber* disputes between Canada and the United States (the latest case – *Softwood Lumber VII* – is currently on stage at the WTO) that formally placed natural resources into the multilateral subsidy regime likely means regulating the natural resource underpricing practice (Gagné & Roch, 2008). This forty-years-long conflict concentrated on the Canadian timber harvesting rights, which the United States considered to be underpriced by the government in order to provide cost-reduction on upstream timber producers. Such 'artificially' cheap timbers were then processed to make softwood lumber bound for the U.S. markets. Hence, the natural resource at issue is standing timber (natural resources in their natural state) instead of in exploited/extracted forms such as iron ore or natural gas. Relying on the WTO rules on identifying a subsidy and relevant treaty interpretations, the WTO judiciary confirmed the existence of subsidization by providing below-market timber harvesting rights in the form of governmental provision of goods (WTO, 2004); and this case law remains effective in challenging the natural resource rights allocation of a trading country.

The WTO judiciary later experienced the natural resource underpricing concern in three subsidy disputes on land-use rights in China (2010), captive mining rights in India (2014), and harvesting rights for coated paper production in Indonesia (2017). The United States was the sole respondent of these disputes due to its subsidy investigations against exporters from such targeted countries. The case of land-use rights (China) may be quite unique because the subject-matter is often viewed as a fixed cost of production instead natural resource inputs like coal or iron ore for production of the subsidy-alleged merchandises. By contrast, iron ore derived from the captive mining rights (India) and wood resulting from the harvesting rights (Indonesia) are correctly natural resource inputs subject to downstream production. In the end, the subsidy conclusions were released against these natural resource underpricing practices in accordance with the WTO case law. Nevertheless, finding the existence of a subsidy is not necessarily a violation of WTO law because such a state-aid practice has to be specific and to cause adverse effects in the importing country (WTO, 1994a: art.2, art.5). Otherwise, the subsidizing country could sustain such production intervention so long as these requirements are not met.

The problem of natural resource underpricing has also been a tensed debate in the WTO accession of several natural resources-endowed countries. The focus of the underpricing concern in this arena is not natural resource exploitation rights as observed in the WTO litigation but natural resource inputs (extracted). Taking Saudi Arabia as the first example, this country was demanded by the European Union to eliminate its underpricing or dual-pricing practices in the energy sector. Under its Working Party Report for the accession, the country ultimately committed that 'producers/distributors of NGLs in Saudi Arabia would operate, within the relevant regulatory framework, on the basis of normal commercial considerations, based on the full recovery of costs and a reasonable profit' and 'these economic operators, in respect of their supplies of NGLs to industrial users, would fully recover their production and investment costs… and make a profit in the ordinary course of business' (WTO, 2005). Hence, such WTO-plus commitments are only limited to natural gas liquids rather than a large pool of energy resources in the country. In addition, Saudi Arabia pledged to publish its price and profit controls of most energy inputs (as specified in Annex A) in an official publication channel (WTO, 2005).

The European Union likewise had pressed Russia to drop out its energy underpricing policies upon the WTO accession. The country finally agreed that its producers/distributors of natural gas would operate on the basis of normal commercial considerations, based on recovery of costs and profits (WTO, 2011b). However, this country came first to emphasize the virtue of its sovereign rights over natural resources, including the pricing policies. It explained such underpricing practices as 'not different from similar practices of many WTO Members, who continued to regulate energy prices. Similar to the practice of other countries, energy and natural gas price regulation in the Russian Federation was aimed at prevention of abuse of monopoly position and protection of consumers' interests from monopoly price increases' (WTO, 2011b). According to Espa (2015), these narrowly tailored country-specific commitments on the energy sector are considered as an attempt to compensate for the shortcomings of WTO relevant disciplines, which may be owing to the unwillingness of energy-rich countries at the time establishing the WTO as previously discussed. This anti-underpricing practice, nevertheless, seems cheapen the multilateral trading system under the eyes of current accessing countries like Kazakhstan or Iran.

4. Natural Resource Underpricing in the Doha Development Round (2001 – ongoing)

As usually seen in municipal legal systems, the fruits of the litigation process are likely to provoke legislative changes. But rulemaking with respect to the multilateral trading system has certainly not gone smoothly because it embraces various economic systems and divergent levels of economic development. The Doha Ministerial Declaration 2001 set mandates for the negotiators to *inter alia* discipline trade-distorting practices (WTO, 2001). It perhaps provides a legal basis to widen the grasp of the multilateral subsidy regime. The Doha Round does not have a separate negotiating forum for natural resource-based products as did its predecessor; therefore, concerns over the natural resource underpricing practice have solely been discussed at the Rules Negotiation Group (in the WTO Subsidy Agreement part). Since 2011, discussions of general subsidy matters have been suspended. Therefore, the draft text of the WTO Subsidy

Agreement's renegotiation has remained untouched since the 2008 Chair Text (except for the fisheries subsidies part) (WTO, 2011a).

The United States again took the lead in tackling certain trade-distorting practices before the Rules Negotiation Group. In its background paper, the United States did not precisely mention the natural resource underpricing practice. It just noted 'inappropriate government involvement […] in such industries as steel and fisheries' (WTO, 2002a). However, the United States explicitly mentioned the natural resource underpricing problem in a subsequent document. Although the United States recognized the intricacy of the fair-market pricing demand in the natural resources sector, it still emphasized a need for further discussions on the issue, especially the dual-pricing practice (WTO, 2003). The United States even suggested a framework for the steel subsidy agreement (a sectoral agreement), arguing that the OECD countries lent support for this idea. Such an unfair trade concern or a benign worry about natural resource disposals is no longer the exclusive domain of the United States or the developed world. Saudi Arabia presented quite a substantiated paper to accuse the OECD countries with respect to their energy subsidy policies. It claimed that such energy subsidizing practices have inflicted substantial financial losses on the Southern fossil fuel exporters and exacerbated their economic development (WTO, 2002b).

Details of the subsidy discussion, the question of the government's market predominance as commonly observed in the natural resource sector and the benchmark selection for calculating a subsidy (for this situation) are respectively found in *Article 2.1(c)* and *Article 14.1(d)* of the Draft Text 2008. As crystallized in the 'regulated pricing' concept, the proposed text to Article 2.1(c) presents guidance for the specificity determination in the case of governmental provision of goods or services at regulated prices. The proposed Article 14.1(d) accordingly introduces a few clarifications for the subsidy calculation in this situation. The proposed texts read as follows:

> Article 2
> Specificity
>
> 2.1
>
> (c) […] In the case of subsidies conferred through the provision of goods or services at regulated prices, factors that may be considered include the exclusion of firms within the country in question from access to the goods or services at the regulated prices.
>
> Article 14
> Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient
>
> 14.1
>
> (d) […] Where the price level of goods or services provided by a government is regulated, the adequacy of remuneration shall be determined in relation to prevailing market conditions for the goods or services in the country of provision when sold at unregulated prices, adjusting for quality, availability, marketability, transportation and other conditions of sale; provided that, when there is no unregulated price, or such unregulated price is distorted because of the predominant role of the government in the market as a provider of the same or similar goods or services, the adequacy of remuneration may be determined by reference to the export price for these goods or services, or to a market-determined price outside the country of provision, adjusting for quality, availability, marketability, transportation, and other conditions of sale.

Without a doubt, the proposed amendments primarily come from the jurisprudence set forth in *Softwood Lumber IV* regarding the natural resource underpricing practice. Specifically, these draft provisions generally concur with the benchmarking jurisprudence concerning the government's market predominance as normally observed in the natural resource sector (Beaulieu & Prévost, 2020). Given the fact that such jurisprudence of the WTO judiciary has invited constant debate (Bhatnagar et al., 2018), borrowing its substance in the rulemaking process is debatable. Some negotiators have considered these amendments to be necessary; others (mainly developing members) have been concerned that these draft provisions could deny their comparative advantage and tie their hands on 'policy space' considerations (WTO, 2008). In fact, the North-South divide has been observed in this thorny corner. It appears to repeat the industrialist *versus* sovereigntist conflict in the Uruguay Round. This means that the road ahead for the subsidy rules' renegotiation could be murky if these proposed amendments are kept unchanged. Some technical points of the proposed texts will now be explained.

First, with respect to Article 2.1(c) of the Draft Text 2008 (the specificity requirement), the exclusion of firms within the country of provision from accessing goods or services at a regulated price could be a factor to take into account for the specificity examination. However, the degree of such exclusion might need to be clarified. This exclusion factor is a reminder of a past omission: Draft Article 14(e) of the WTO Subsidy Agreement (Uruguay Round). This abandoned draft provision presented a rebuttable presumption that the government monopoly in providing goods or services should *not* be considered as conferring a subsidy unless it conducts such provision in a discriminate manner.

Second, concerning the benchmark to measure a subsidy, the proposed text permits the use of alternative benchmarks for the benefit calculation if an unregulated price does not exist or the government's predominance distorts such an unregulated price. This proposal seems to change the rationale behind choosing comparable prices for the benchmark determination (compared to the existing case law). Although WTO adjudicators have consistently emphasized that the marketplace is the appropriate standard for conducting a price comparison, the underlying proposal (as in the Draft Text 2008) appears to shift the focus from the market-determined standard to whether the prices at issue are regulated or not. In fact, it may not necessarily be clear whether the unregulated price is equivalent to the market-determined price.

In addition, the proposed draft text offers a menu from which an alternative benchmark is selected to deal with the government's market predominance situation. It introduces three possible proxies: the export price, the world market price, and the foreign country market price. The catalogue, however, excludes the constructed price as a possible benchmark to calculate the benefit bestowed while such a domestically comparable value is permitted by the WTO case law for the case of government predominance (Qin, 2019). This might be the reason why a number of negotiators criticized the proposed amendment to Article 14(d) as deviating from and weakening the existing jurisprudence (WTO, 2008).

In short, the natural resource underpricing problem has again been brought to the Doha Development Round under the subsidy rules' renegotiation. The proposed amendments in the Chair Draft Text 2008 implicitly cover the issue. The highly controversial matter in this rule-making agenda has been the subsidy calculation for the case of government's market predominance as a reflection of the government's roles in the natural resource sector. Solutions for this tricky topic were implanted into the Draft Text under two provisions: Article 2.1(c) and Article 14.1(d). Because the legal substance of these proposed texts is substantially derived from the natural resource subsidy case law, the more controversial the case law is, the more controversial the legislative process might be.

5. Way out of Multilateral Negotiations: the Case of EU Anti-Dumping Strategy against Natural Resource Underpricing Practice

With limited deposits of energy inputs and raw materials, it is understandable toward the EU proactive strategies aimed at securing access to foreign natural resources. Its position against the natural resource underpricing practice has consistently been maintained with various instruments and pressure. It has exploited the WTO dispute settlement to halt foreign export restrictions on critical raw materials (China as the primary target), which are normally considered a *de facto* underpricing scheme (Espa, 2018). It employed its own bargaining powers supported by the WTO's consensus mechanism to force the late-coming members to lift their energy underpricing schemes up as an exchange for a WTO ticket. Recently, this economic giant has explicitly wielded its market powers to eliminate foreign input underpricing policies. In the policy paper called 'The raw materials initiative', the European Union expected to use anti-dumping duties as a prospective instrument against 'any distortion in the cost of raw materials resulting from dual-pricing practices or other mechanisms in operation in the exporting country' (European Commission, 2008). This raw materials policy is now turning into disputes at the WTO.

Under WTO law, an importing country is permitted to impose a kind of 'offsetting' tariff on an exporting producer who sells at a low price in the importing market than in its domestic market-the dumping (WTO, 1994b: art.6). Thus, the crux of the application of anti-dumping duties is to find whether the price discrimination exists between domestic prices and export prices, provided that we must have these comparable prices at hand. However, when domestic prices do not exist (the exporting producer does not sell at home) or are distorted by *the particular market situation*, one option is to calculate the domestic prices based on 'the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits' (WTO, 1994b: art. 2.2). Taking advantage of the vagueness of the term 'particular market situation' (Du, 2022), the European Union has applied its 'input cost adjustments' method to recalculate the domestic prices of the dumping – alleged products as to inflating the dumping margins (thus increasing the anti-dumping duties). In EU anti-dumping regulation, the particular market situation roughly means 'when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements'. In fact, this situation is fitting closely to the underpricing practice where the government manages prices of natural resource inputs for downstream processing production.

When the EU's anti-dumping investigations against natural gas underpricing in Russia have come into WTO litigation (*EU – Cost Adjustment Methodologies II (Russia)*), their legality seems questionable. The European Union in this case rejected domestic prices of natural gas paid by the investigated exporters for dumping assessment because such prices are equivalent only to 30 % of Russian export gas and are being regulated. As a consequence, it employed the export prices of Russian natural gas (with necessary adjustments) for calculating domestic prices of the dumping-alleged products for the dumping assessment. This EU anti-dumping practice likely paves a 'defensive' way for Ukraine to challenge Russian natural gas pricing policies in a similar context. The WTO judiciary, however, repeatedly found such anti-dumping applications to constitute a violation of its rules (WTO, 2019; WTO, 2020). The core of these anti-dumping disputes is how to find an 'undistorted-market' value of natural resource inputs in the situation where the government is predominantly affecting their prices on the market. But given the distinctive character of natural resource pricing that may involve public policy considerations, any attempt to search for a 'perfect' market value seems impractical (Zheng, 2010). In fact, the WTO Judiciary in *US – Carbon Steel (India)* observed that the fact that the government is setting prices in order to pursue public policy objectives is not necessarily the basis to disqualify the government prices as a market benchmark (WTO, 2014).

The 'protectionist' developments of the EU anti-dumping practice in the natural resource sector have been concerned by recent scholars as they are running afoul of the anti-dumping's trade policy rationale since the instrument should not be used to confront a governmental policy (here is the pricing policy over production inputs) (Hillman & Crowley, 2018). Crochet (2022) even considers such abusive anti-dumping applications an infringement of other countries' sovereignty over natural resources, which is aimed at strengthening the European Union' extractivism. The practice should therefore be labelled an anti-governmental pricing strategy in the natural resource sector instead of an anti-dumping policy as normally perceived. Though the WTO has confirmed the practice's infringement of its lawbook, this might be a prospective but 'dangerous' route besides employing the subsidy rules against natural resource underpricing practices. This anti-dumping strategy may have far-reaching implications on finding a solution for governmental market-distortive interventions as in the case of China where a clash of capitalisms (market capitalism vs. state capitalism) is clearly shown in the current time of economic rivalries (Shaffer, 2021).

Conclusions

Natural resource underpricing or natural resources in the subsidy context was the critical subject of U.S. trade politics in the 1980s. Generally, natural resource underpricing is understood as a governmental provision of below-market natural resources (exploited resources as a form of goods) or below-market natural resource exploitation rights to domestic industries. The U.S. took the initiative to bring the natural resource underpricing problem to debates at the Uruguay Round establishing the WTO. At this forum, conflicts gradually emerged between industrial interests and natural resource sovereignty interests. Like the United States or the European Communities, the industrialists demanded the natural resource underpricing practice to be defined as a governmental subsidy. By contrast, numerous developing-country negotiators perceived this demand as a threat to their natural resource sovereignty. As a result, no multilateral compromise to explicitly put natural resources under the multilateral subsidy regime could be achieved. The WTO Subsidy Agreement therefore does not specifically target the natural resource underpricing practice due to the North-South divide in the negotiation process.

The issue has reemerged in the Doha Development Round for renegotiation of the subsidy regulations. A central point of the proposed amendments in this rulemaking agenda is how to deal with the government's market predominance as to reflect the government's roles in the natural resource sector – the benchmarking problem. At this juncture, the North's pro-market demand aimed at securing foreign natural resource supplies appears to be at odds with the South's practices on natural resource allocation. As a consequence, it appears that the revision of the multilateral subsidy rules has reached a deadlock partly due to (again) the natural resource underpricing controversy. In other words, the problem of natural resource underpricing seems to exacerbate the North-South gap in the present trade-rulemaking. The European Union's pressure on the WTO accession of several resource-endowed countries has been quite effective since the latter chose to surrender part of their natural resource sovereignty as a price of economic integration. However, the EU current anti-dumping practice against the natural resource underpricing problem seems to add fuel to the dilemma since its trade law consistency is under challenge.

REFERENCES

Asmelash, H. (2015). Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies are Challenged. *Journal of International Economic Law*, *18*, 261–285. https://doi.org/10.1093/jiel/jgv024

Beaton, C., & Clark, K. (2016, August). One Fuel, Two Prices: International experiences with dual pricing of fuel. Briefing Note. *International Center for Trade and Sustainable Development*. https://www.iisd.org/system/files/publications/one-fuel-two-prices-international-experiences-dual-pricing-of-fuel.pdf

Beaulieu, E., & Prévost, D. (2020). Subsidy Determination, Benchmarks, and Adverse Inferences: Assessing 'Benefit' in US-Coated Paper (Indonesia). *World Trade Review*, *19*(2), 216–231. https://doi.org/10.1017/S147474562000004X

Bello, J. H., & Holmer A. F. (1984). Subsidies and Natural Resources: Congress Rejects a Lateral Attack on the Specificity Test. *George Washington Journal of International Law and Economics*, *18*(2), 297–330.

Bhatnagar, M., Arora, P., & Das, I. (2018). External Benchmark Choices in Anti-Dumping and Countervailing Duty Proceedings: A Battle of "Proxies"? In J. J. Nedumpara, & and W. Zhou (Eds.), *Non-market Economies in the Global Trading System. The Special Case of China* (pp. 155–184). Springer. https://doi.org/10.1007/978-981-13-1331-8_6

Cottier, T., & Oesch, M. (2011). *Direct and Indirect Discrimination in WTO Law and EU Law*. Working Paper No 2011/16. NCCR Trade Regulation.

Crochet, V. (2022). Trade Defense Instruments: A New Tool for The European Union's Extractivism. *European Journal of International Law*, *33*(2), 381–410. https://doi.org/10.1093/ejil/chac024

Du, M. (2022). From 'Non-Market Economy' to 'Significant Market Distortions': Rethinking the EU anti-Dumping Regulation and China's State Interventionism. *Yearbook of European Law*, *00*(0), 1–45. https://doi.org/10.1093/yel/yeac004

Espa, I. (2018). Chinese Natural Resources Disputes: A Never-Ending Story? In M. Bungenberg, M. Krajewski, C. J. Tams, J. P. Terhechte, A. R. Ziegler (Eds.), *European Yearbook of International Economic Law*, *9*, 39–60. Springer, Cham. https://doi.org/10.1007/8165_2018_2

Espa, I. (2015). Fair Access to Energy Resources, Market Transfers and Climate Change in the WTO. *Diritto del Commercio Internazionale*, *29*(1), 203–223.

European Commission. (2008). *The Raw Materials Initiative – Meeting our critical Needs for Growth and Jobs in Europe*. COM (2008) 669 Final.

Gagné, G., & Roch, F. (2008). The US–Canada Softwood Lumber Dispute and the WTO Definition of Subsidy. *World Trade Review*, *7*(3), 547–572. https://doi.org/10.1017/S1474745608003972

General Agreement on Tariffs and Trade (GATT). (1987). *Submission from the United States,* MTN.GNG/NG3/W/2.

General Agreement on Tariffs and Trade (GATT). (1988a). *Subsidies and Other Non-Tariff Support Programs Affecting Market Access in World Minerals, Metals and Energy Trade – Submission from Australia,* MTN.GNG/NG3/W/12.

General Agreement on Tariffs and Trade (GATT). (1988b). *Natural Resource-Based Products: Two-Tier Pricing Issue – Submission from the United States*, MTN.GNG/NG3/W/13.

General Agreement on Tariffs and Trade (GATT). (1989a). *Proposals on Behalf of the Least-Developed Countries*, MTN.GNG/NG3/W/29.

General Agreement on Tariffs and Trade (GATT). (1989b). *Elements of the Framework for Negotiations – Submission by the United States*, MTN.GNG/NG10/W/29.

General Agreement on Tariffs and Trade (GATT). (1990a). *Submission by the European Communities: Natural Resource-based Products*, MTN.GNG/NG3/W/37.

General Agreement on Tariffs and Trade (GATT). (1990b). *Meeting of 21 June 1990 – Note by the Secretariat*, MTN.GNG/NG10/20.

General Agreement on Tariffs and Trade (GATT). (1990c). *Draft Text by the Chairman*, MTN.GNG/NG10/W/38/rev. 3 (Cartland Draft Text IV).

General Agreement on Tariffs and Trade (GATT). (1990d). *Subsidies and Countervailing Measures – Communication from the Permanent Delegation of Mexico*, MTN.TNC/W/38.

Giesen, H.-M. (1985). Upstream Subsidies: Policy and Enforcement Questions after the Trade and Tariff Act of 1984. *Law & Policy in International Business*, *17*, 241–325.

Hillman, J. A., & Crowley, M. A. (2018). Slamming the Door on Trade Policy Discretion? The WTO Appellate Body's Ruling on Market Distortions and Production Costs in EU – Biodiesel (Argentina). *World Trade Review*, *17*, 195–213. https://scholarship.law.georgetown.edu/facpub/2063

Huber, B. R. (2015). The Fair Market Value of Public Resources. *California Law Review*, *103*(6), 1515–1560. http://dx.doi.org/10.15779/Z388Z79

International Court of Justice (ICJ). (2005). Case Concerning Arm Activities on the Territory of Congo (*Congo v. Uganda*). Judgement.

International Energy Agency (IEA). (2019, June 13). *Fossil Fuel Consumption Subsidies Bounced Back Strongly in 2018*. https://www.iea.org/commentaries/fossil–fuel–consumption–subsidies–bounced–back–strongly–in–2018

Marhold, A. (2016, October 5). *Subsidy regulation in WTO Law: Some implications for fossil fuels and renewable energy*. In L. Hancher, & A. De Hauteclocque (Eds.), *State Aid in the Energy Sector* (Hart Publishing, 2017), Tilburg Law School Research Paper No. 20/2016, TILEC Discussion Paper No. 2016–022, http://dx.doi.org/10.2139/ssrn.2848191

Permanent Sovereignty over Natural Resources, 1962. UN General Assembly resolution 1803 (XVII). https://legal.un.org/avl/ha/ga_1803/ga_1803.html

Qin, J. Y. (2019). Market Benchmarks and Government Monopoly: The Case of Land and Natural Resources under Global Subsidies Regulation. *University of Pennsylvania Journal of International Law*, *40*(3), 575–642.

Ripisnky, S. (2004). The System of Gas Dual Pricing in Russia: Compatibility with WTO Rules. *World Trade Review*, *3*(3), 463–481.

Ruta, M., & Venables, A. J. (2012). International Trade in Natural Resources: Practice and Policy. *Annual Review of Resource Economics*, *4*, 331–352.

Shaffer, G. (2021). Governing the Interface of U.S.-China Trade Relations. *American Journal of International Law*, *115*(4), 622–670. http://dx.doi.org/10.1017/ajil.2021.36

The Natural Resource Subsidy Debate: A Critique of Proposed Legislative Action. (1987). *The International Lawyer*, *21*(1), 285–302. http://www.jstor.org/stable/40706817

United Nations Development Program (UNDP). (2021). *Fossil Fuel Subsidy Reforms: Lessons and Opportunities*.

United States Court of International Trade (USCIT). (1985). *Carbot Corp. v. United Sates*, 620F. Supp. 722 (Ct. Intl. Trade 1985).

United States Department of Commerce (USDOC). (1982a). *Notices of Initiation of Investigations: Certain Steel Products from France* (47 Fed. Reg. 5739); *Germany (Republic)* (47 Fed. Reg. 5741); *Belgium* (47. Fed. Reg. 5744).

United States Department of Commerce (USDOC). (1982b). *Final Determinations: Certain Steel Products from France* (47 Fed. Reg. 39339); *Germany (Republic)* (47 Fed. Reg. 39351); *Belgium* (47. Fed. Reg. 39308).

United States Department of Commerce (USDOC). (1983). *Countervailing Duties: Softwood Products from Canada*. 48 Feb. Reg. 24167.

U.S. Trade Agreements Act of 1979. https://www.govinfo.gov/content/pkg/STATUTE-93/pdf/STATUTE-93-Pg144.pdf

World Trade Organization (WTO). (1994a). *Agreement on Subsidies and Countervailing Duties, in the Results of the Uruguay Round of Multilateral Trade Negotiations*. The GATT Secretariat.

World Trade Organization (WTO). (1994b). *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement)*. The GATT Secretariat.

World Trade Organization (WTO). (2001). *Ministerial Declaration*, WT/MIN(01)/DEC/W/1.

World Trade Organization (WTO). (2002a). *Communication for the United States – Basis Concepts and Principles of the Trade Remedy Rules*, TN/RL/W/27.

World Trade Organization (WTO). (2002b). *Energy Taxation, Subsidies and Incentives in OECD Countries and Their Economic and Trade Implications on Developing Countries, in Particular Developing Oil Producing and Exporting Countries – Submission by Saudi Arabia*, WT/CTE/W/215 – TN/TE/W/9.

World Trade Organization (WTO). (2003). *Communication for the United States – Subsidies Disciplines Requiring Clarification and Improvement*, TN/RL/W/78.

World Trade Organization (WTO). (2004). *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (Softwood Lumber IV)*. Appellate Body Report WT/DS257/AB/R.

World Trade Organization (WTO). (2005). *Report of the Working Party on the Accession of Saudi Arabia,* WT/ACC/SAU/61.

World Trade Organization (WTO). (2008). *Working Document from the Chairman (Annex B)*, TN/RL/W/232.

World Trade Organization (WTO). (2011a). *Communication from the Chairman*, TN/RL/W/254.

World Trade Organization (WTO). (2011b). *Report of the Working Party on the Accession of the Russian Federation*, WT/ACC/RUS/70. 17.

World Trade Organization (WTO). (2014). *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (US – Carbon Steel (India))*. Appellate Body Report WT/DS436/AB/R.

World Trade Organization (WTO). (2019). *Ukraine – Anti-dumping Measures on Ammonium Nitrate*. Appellate Body Report WT/DS493/AB/R.

World Trade Organization (WTO). (2020). *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia – (Second complaint)*. Panel Report WT/DS494/R.

Zhang, Y., & Li, Y. (2005). Valuing or pricing natural and environmental resources? *Environmental Science & Policy*, *8*(2), 179–186. https://doi.org/10.1016/j.envsci.2004.09.005

Zheng, W. (2010). The Pitfalls of the (Perfect) Market Benchmark: The Case of Countervailing Duty Law. *Minnesota Journal of International Law*, *19*(1). http://scholarship.law.ufl.edu/facultypub/222

Дуонг В. Х. Заниження цін на природні ресурси у правилах субсидіювання СОТ та поза ними: різниця між Північчю та Півднем в умовах глобалізації. – Стаття.

У статті досліджено заниження цін на природні ресурси у багатосторонніх переговорах про правила субсидіювання. Її розпочато з огляду досвіду США з метою визначення зарубіжної практики заниження цін на природні ресурси через недостатньо розроблені правила субсидіювання. США висловили стурбованість щодо цього під час Уругвайського раунду переговорів зі створення СОТ; тоді були означені конфлікти між країнами, забезпеченими природними ресурсами, та промислово розвиненими країнами щодо способів використання природних ресурсів як порівняльної переваги. У цьому аспекті формування правил торгівлі ринковий попит Півночі, швидше за все, зіткнеться з суверенітетом Півдня над природними ресурсами. Заниження цін на природні ресурси знову вийшло на порядок денний під час Дохійського раунду переговорів щодо перегляду Угоди СОТ про субсидії; тим не менш, здається, що ця багатостороння нормотворча діяльність частково зайшла у глухий кут. Суть дебатів про субсидії на природні ресурси полягає у визначенні механізму подолання схвильованості уряду домінуванням на ринку для відображення його ролі у сфері природних ресурсів. Тиск ЄС стосовно вступу до СОТ низки багатих на природні ресурси країн був досить ефективним, оскільки останні вирішили поступитися частиною свого суверенітету над природними ресурсами в якості платні за економічну інтеграцію. Проте сучасна антидемпінгова практика ЄС щодо проблеми заниження цін на природні ресурси, схоже, підсилює дилему, оскільки її погодженість з торговельним законодавством є сумнівною.

Ключові слова: занижена ціна на природні ресурси, субсидії на природні ресурси, практика подвійного ціноутворення, різниця між Північчю та Півднем, субсидії на ресурси, багатосторонні торговельні переговори.