Different Remedies for Different Wrongs: Adjustments for "Double Remedies" Under the Amended Antidumping Statute

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I. INTRODUCTION

On March 6, 2012, the United States House of Representatives passed the first amendment to U.S. antidumping (AD) and countervailing duty (CVD) laws since the Uruguay Round Agreements Act (URAA), by a vote of 370 to 39.[1] The United States Senate passed the bill by unanimous consent the next day[2] and signed it into law less than a week later.[3] This Article reviews how one part of the new law, which provides for adjustments to AD duties imposed on imports from nonmarket economy (NME) countries for so-called "double remedies," has been implemented to date.

The Article also responds to one criticism of the law and its implementation with a review of the legislative history of the U.S. CVD law. The question of whether, and to what extent, domestic subsidies impact the export prices used in NME dumping calculations determines whether an adjustment to AD duties is merited under the new double

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1. 158 CONG. REC. H1178 (daily ed. Mar. 6, 2012).
2. 158 CONG. REC. S1441 (daily ed. Mar. 7, 2012).
3. Act of Mar. 13, 2012, Pub. L. No. 112-99, 126 Stat. 265 (2012) (to be codified as amended at 19 U.S.C. §§ 1671, 1671f-l(f)).

remedies provision. Yet the impact of domestic subsidies on export prices continues to be irrelevant to the administration of the CVD statute. This Article attempts to explain why this is so by examining the origins and evolution of the CVD law to better understand the basic purpose of the statute and how it differs from the AD statute.

The new statute has two sections. The first confirms that the United States Department of Commerce (Commerce) has the authority to apply the CVD statute to imports from countries that are treated as NMEs under the AD statute if subsidies can be identified and measured in such an economy.[4] Because the first section was enacted in response to ongoing litigation in which this author is involved, it is not addressed in this Article.

The second section creates a new procedure by which Commerce may, under certain circumstances, make adjustments to AD duties imposed on imports from NME countries to account for the so-called "double remedy" that may arise due to the concurrent application of CVDs to the same imports.[5] This second section was enacted in response to a decision from the Appellate Body of the World Trade Organization (WTO) that criticized Commerce for not investigating claims for such adjustments, and it applies to all AD and CVD proceedings involving NME countries initiated on or after March 13, 2012, as well as to determinations under section 129 of the URAA issued after that date.[6] The effective date of this new provision is also being raised in ongoing litigation and thus is not discussed in this Article; this Article focuses instead on the substance of the new double remedies provision, not its effective date.

Part II reviews the WTO decision that led to the enactment of the new double remedies provision and the content of that provision. Part III examines the four instances in which Commerce has, as of this writing, issued a final determination granting adjustments for alleged double remedies to review how Commerce is interpreting and applying the new provision. Finally, Part IV responds to one criticism of the statute and its implementation with a review of the legislative history of the U.S. CVD law. This review clarifies why the issue of the relationship between domestic subsidies and export prices, which is central to the new double

4. *Id.* § 1(a).
5. *Id.* § 2(a).
6. *Id.* § 2(b); Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube from the People's Republic of China, 77 Fed. Reg. 52,683 (Dep't of Commerce Aug. 30, 2012).

remedies adjustment for NME countries under the AD statute, continues to be irrelevant to the administration of the CVD statute.

II. THE ORIGINS OF THE DOUBLE REMEDIES AMENDMENT

On March 11, 2011, the WTO Appellate Body issued its report in *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*.[7] In that case, China challenged Commerce's final AD and CVD determinations on four products, claiming, inter alia, that the imposition of AD duties using the NME methodology, concurrent with the imposition of CVDs on the same merchandise, resulted in a "double remedy" that was inconsistent with the WTO obligations of the United States.[8] As explained below, the Appellate Body found that a double remedy could exist in such cases where domestic subsidies that have been subject to CVDs also increase the dumping margin.[9] Such an effect could arise where such subsidies are reflected in lower export prices but are not reflected in normal value due to the use of surrogate values under an NME methodology.

In the underlying investigations, Commerce declined to provide an adjustment for any such alleged double remedies, explaining that respondents had failed to present any data demonstrating that the countervailed domestic subsidies had in fact lowered export prices and stating that to presume that such subsidies automatically lower export prices in the absence of such evidence would be "speculative."[10] In addition, Commerce noted the fact that the United States Congress had provided for an adjustment to the AD calculation where export subsidies are countervailed, but not domestic subsidies, implied that such an adjustment would not be appropriate under U.S. law.[11]

The Appellate Body found that, as a legal matter, double remedies are prohibited by the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).[12] Specifically, the Appellate Body found that CVDs equal to the full amount of the subsidy are not "appropriate" under article 19.3 of the SCM Agreement if dumping margins calculated

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7. Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (Mar. 11, 2011).

8. *Id.* ¶ 599.

9. *Id.*

10. Memorandum from Stephen J. Claeys, Deputy Assistant Sec'y for Imp. Admin., to David M. Spooner, Assistant Sec'y for Imp. Admin. 10-11 (July 7, 2008) (on file with the U.S. Department of Commerce) (footnote omitted) (regarding the AD investigation of certain new pneumatic off-the-road tires from the People's Republic of China).

11. *Id.* at 14 & n.38.

12. Appellate Body Report, *supra* note 7, ¶ 599.

under the NME methodology are also imposed and those dumping margins also reflect the level of subsidization to some extent.[13] The Appellate Body theorized that the dumping margin calculated under the NME methodology was likely to reflect some amount of subsidization because of the asymmetry between the export prices and the normal values used in the dumping calculation.[14] According to the Appellate Body, this asymmetry results from the fact that export prices are "actual, subsidized" prices, while normal values are generally constructed using surrogate values, not actual input costs, for the factors of production.[15] Thus, the Appellate Body concluded, "An anti-dumping duty calculated based on an NME methodology may . . . 'remedy' or 'offset' a domestic subsidy, to the extent that such subsidy has contributed to a lowering of the export price."[16]

But the Appellate Body was careful to note that double remedies do not necessarily arise in every instance where AD duties using the NME methodology are applied concurrently with CVDs.[17]

> In principle, we agree with the statement by the Panel that double remedies would *likely* result from the concurrent application of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties, but we are not convinced that double remedies *necessarily* result in every instance of such concurrent application of duties. This depends, rather, on whether and to what extent domestic subsidies have lowered the export price of a product, and on whether the investigating authority has taken the necessary corrective steps to adjust its methodology to take account of this factual situation.[18]

Thus, under the Appellate Body's theory, such double remedies can only arise where the subsidies in question have lowered export prices. The Appellate Body acknowledged that the extent to which subsidies in fact lowered export prices, if at all, was to be determined on the facts of each case.[19] The Appellate Body explained that, in determining whether a double remedy exists in any particular case, the United States had an obligation "to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive

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13. *Id.* ¶ 582.
14. *Id.* ¶ 542.
15. *Id.* ¶ 542 n.516. The Appellate Body appears to have accepted the contention that surrogate values are "unsubsidized" and do not, as a rule, reflect the amount of any subsidies. This is a highly problematic contention, but addressing it is beyond the scope of this Article.
16. *Id.* ¶ 543.
17. *Id.* ¶ 599.
18. *Id.* (footnote omitted).
19. *Id.*

evidence in the record."[20] According to the Appellate Body, it was Commerce's failure to assess whether such facts were present in the underlying original investigations that constituted a violation of the obligations of the United States.[21]

The United States committed to bring itself into compliance with the Appellate Body report and initiated compliance proceedings with respect to the four underlying CVD cases in August and September 2011.[22] Before Commerce could act, however, it was necessary to alleviate the concern that Commerce did not have statutory authority to provide adjustments for double remedies in the event that any were determined to exist. As a result, Congress intervened, and on March 13, 2012, the new double remedies provision was signed into law.[23]

The provision amends section 777A of the Tariff Act of 1930 (19 U.S.C. § 1677f–1) by adding a new subsection "f."[24] The new provision requires Commerce to provide an adjustment to an AD duty determined under the NME methodology if each of three conditions are met.[25] First, there must be "a countervailable subsidy . . . other than an export subsidy, [which] has been provided with respect to the [same] class or kind of merchandise" subject to the AD duty.[26] Second, such a countervailable subsidy must have "been demonstrated to have reduced the average price of imports of the class or kind of merchandise during the relevant period."[27] Third, Commerce must be able to "reasonably estimate the extent to which the countervailable subsidy . . . , in combination with the use of [a] normal value" calculated according to the NME methodology, "has increased the weighted average dumping margin."[28] If all of the criteria are met, Commerce shall "reduce the [AD] duty by the amount of the increase in the weighted average dumping margin" that is reasonably estimated by Commerce to result from the subsidy's impact on export prices and the use of a normal value

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20. *Id.* ¶ 602.
21. *Id.* ¶ 606.
22. Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube from the People's Republic of China, 77 Fed. Reg. 52,683 (Dep't of Commerce Aug. 30, 2012). Compliance proceedings on the four underlying AD orders were initiated in May of 2012. *Id.*
23. Tariff Act of 1930, Pub. L. No. 112-99, 126 Stat. 265 (2012) (to be codified as amended at 19 U.S.C. §§ 1671, 1677f-l(f)).
24. *Id.* § 2(a).
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

calculated under an NME methodology.[29] Finally, any reduction to the AD duty is capped at that portion of the CVD rate attributable to the subsidies that meet the three criteria outlined above.[30]

The section 129 proceedings undertaken to implement the Appellate Body's findings in *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* presented Commerce with its first opportunity to implement the new statutory provision on double remedies.[31] The results of those proceedings are reviewed below.

III. IMPLEMENTING THE DOUBLE REMEDIES ADJUSTMENT

After the double remedies provision was enacted in March of 2012, Commerce proceeded to investigate whether the adjustment authorized under the new statutory provision was merited in the cases that gave rise to the WTO dispute. Commerce issued its final determinations in the proceedings on July 31, 2012, and implemented those proceedings effective August 21, 2012.[32] As a preliminary matter, Commerce was careful to note that the unique nature of the proceedings and the need to wait for congressional action before implementation gave Commerce "little time or flexibility to develop and hone its practice in applying the new law for the first time."[33] Commerce also noted that its administration of the new provision "may evolve with the benefit of time and experience," and Commerce may reassess its approach if merited in future proceedings.[34]

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29. *Id.*

30. *Id.*

31. Appellate Body Report, *supra* note 7.

32. Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube from the People's Republic of China, 77 Fed. Reg. 52,683 (Dep't of Commerce Aug. 30, 2012).

33. Memorandum from Christian Marsh, Deputy Assistant Sec'y for Antidumping & Countervailing Duty Operations, to Paul Piquado, Assistant Sec'y for Imp. Admin., cmt. 2A, at 18 (July 31, 2012) (on file with the U.S. Department of Commerce) (regarding the AD and CVD investigations of certain new pneumatic off-the-road tires from the People's Republic of China). The final determinations for the three other pairs of section 129 proceedings contain the same language regarding double remedies.

34. Memorandum from Christopher Mutz, Office of Policy, Imp. Admin., and Daniel Calhoun, Office of the Chief Counsel for Imp. Admin., to Paul Piquado, Assistant Sec'y for Imp. Admin. (May 31, 2012) (on file with the U.S. Department of Commerce) (regarding the CVD investigation of certain new pneumatic off-the-road tires from the People's Republic of China). The preliminary determinations for the three other pairs of section 129 proceedings contain the same language regarding double remedies.

In its preliminary section 129 determinations, Commerce provided a downward adjustment to each respondent's AD cash deposit rate equal to the product of (1) that portion of the respondent's CVD rate attributable to input subsidies (e.g., the provision of rubber for less than adequate remuneration to tire producers) and (2) a ratio of cost to price changes for the Chinese economy as a whole for the relevant period, termed the Ratio Change Test (RCT).[35] The RCT was derived from a comparison between the rates of change in the Bloomberg Purchasing Price Index for China (as a proxy for input costs) and the Bloomberg Producer Price Index for China (as a proxy for ex-factory prices), which equaled 63%.[36] For example, a respondent who benefitted from input subsidies equal to 10% of its sales revenue, and thus had a subsidy margin of 10% for the input subsidy program, would receive a downward adjustment of 6.3% to its dumping rate.

The parties contested various aspects of Commerce's determinations. China argued that Commerce should provide adjustments for all countervailed subsidies—not just input subsidies—and that the adjustment should be equal to 100% of the subsidy margin, not a reduced amount based on the RCT.[37] However, Commerce ultimately rejected all contentions and adopted the preliminary determinations unchanged in the final determinations.[38]

While it is beyond the scope of this Article to examine in detail each of the arguments made and rejected by Commerce, one of the core criticisms of the law and its implementation is examined in more depth below.

IV. PRICE EFFECTS OF SUBSIDIES UNDER THE ANTIDUMPING STATUTE AND THE COUNTERVAILING DUTY STATUTE

A. China's Claim Regarding a Presumption of Complete Pass-Through

As noted above, although the Appellate Body expressed its belief that domestic subsidies are "likely" to impact export prices, it made clear that such an impact would not necessarily arise in all instances, thus requiring an examination of the facts of each case to determine whether such subsidies have indeed impacted export prices.[39] In the new statutory

35. *Id.* at 9-10.
36. *See id.* at 8-9.
37. Memorandum from Christian Marsh to Paul Piquado, *supra* note 33, cmt. 3B, at 22-24.
38. *Id.* at 2.
39. Appellate Body Report, *supra* note 7, ¶ 599.

provision, Congress requires a demonstration that such subsidies have reduced the average price of imports of subject merchandise, indicating an agreement that such an impact cannot be presumed.[40] Congress also limited the extent of any adjustment to the AD duty rate to Commerce's reasonable estimate of the amount by which the subsidy increased the dumping margin due to its impact on export prices together with the use of normal value determined under the NME methodology.[41]

In the section 129 proceedings, however, China reiterated its position that a complete adjustment for the full amount of any subsidy margin found was merited, even in the absence of evidence that such subsidies in fact lowered export prices to the full extent of the subsidy margin.[42] In support of this contention, China argued, inter alia, that the fact that CVDs are applied in an amount equal to the full amount of the subsidy benefit reveals that the law does in fact embody a presumption that domestic subsidies pass through completely to export prices, reducing those prices by the full amount of the subsidy.[43] In essence, China argued that it was contradictory to countervail a 10% subsidy benefit with a 10% countervailing duty, without performing any analysis to determine whether that subsidy benefit in fact lowered export prices by 10%, while deducting only that portion of the subsidy benefit that is demonstrated to lower export prices—6.3% under the methodology employed by Commerce in the section 129 determinations—from the AD rate.

Commerce rejected the contention, citing the language from the Appellate Body report, as well as the fact that the CVD statute does not require consideration of the effects that subsidies may have in order for a CVD to be assessed.[44] Commerce is correct as a matter of law, and indeed the statute mandates the result that China found so problematic. The law requires Commerce to ignore the price effects of subsidies (to the extent any exist) in CVD proceedings, and the full amount of the benefit must be countervailed regardless of whether such price effects exist.[45] Yet, in AD proceedings, the law now requires that such price effects be demonstrated and susceptible to reasonable estimation before an adjustment to the AD rate can be made, and the amount of any

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40. Tariff Act of 1930, Pub. L. No. 112-99, § 2(a), 126 Stat. 265 (2012) (to be codified as amended at 19 U.S.C. §§ 1671, 1677f-l(f)).

41. *Id.*

42. Memorandum from Christian Marsh to Paul Piquado, *supra* note 33, cmt. 3B, at 22-24.

43. *Id.* cmt. 6, at 32-33.

44. *Id.* cmt. 3B, at 24.

45. 19 U.S.C. §§ 1671(a), 1677(5)(C)(1) (2006).

adjustment is limited to the extent of such pass-through.[46] Moreover, as with all adjustments, it is the respondent's burden to demonstrate entitlement to the adjustment and thus demonstrate that such subsidies in fact lowered export prices.[47]

While China's concerns about what it believes is a contradictory result cannot overcome the clear language of the statute, it is worth examining whether the result is in fact as contradictory as China claims. China's claim rests on a very important assumption: that the purpose of a CVD is to offset the lower prices that subsidies may allow exporters to charge, just as the purpose of the AD duty is to offset the lower prices that result from international price discrimination. If one accepts this assumption, there would appear to be some reason to believe that setting the CVD at an amount equal to the subsidy margin reveals a presumption that the full amount of the subsidy passes through to prices.

But it is the first assumption, that CVDs exist to offset low prices, that is fundamentally flawed. The purposes of the CVD and AD remedies are very different. CVDs are not imposed merely to offset unfairly low prices. Thus, the fact that the CVD is equal to the full amount of the subsidy margin reveals no presumptions about any relationship between domestic subsidies and export prices.

B. Subsidy Price Effects Under the CVD Law

U.S. CVD law predates the AD statute. The first CVD laws, enacted in the 1890s, were limited to remedying export subsidies, first on sugar and then on imports more generally.[48] The general CVD provision for export subsidies in the Tariff Act of 1897 was carried through in the Tariff Act of 1922.[49] Under those laws, the amount of the CVD imposed was equal to the net amount of the bounty or grant conferred upon export.[50] Two United States Supreme Court decisions reviewing the implementation of the statutes focused to a certain extent on the price effects of the subsidy programs at issue, because export subsidies distort trade precisely by introducing a difference between the export price and the home market price.[51] Because export subsidies drive home market

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46. Tariff Act of 1930, Pub. L. No. 112-99, § 2(a), 126 Stat. 265 (2012) (to be codified as amended at 19 U.S.C. §§ 1671, 1677f-l(f)).

47. Memorandum from Christian Marsh to Paul Piquado, *supra* note 33, cmt. 2A, at 18.

48. 1 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 812-13 (Terence P. Stewart ed., 1993).

49. *Id.*

50. *Id.*

51. *See* G.S. Nicholas & Co. v. United States, 249 U.S. 34, 39-40 (1919); Downs v. United States, 187 U.S. 496, 507–08 (1903).

prices higher than export prices, they also create a situation in which those export prices would be below normal value and would merit the application of AD duties. It is for this reason that the states parties to the General Agreement on Tariffs and Trade of 1947 (GATT 1947) agreed to prohibit the simultaneous imposition of AD and CVDs "to compensate for the same situation of dumping or export subsidization."[52] This understanding is also reflected in the provision in U.S. law that requires the export price used in dumping calculations to be increased by the amount of any CVDs assessed to offset export subsidies.[53]

It was not until 1922 that the CVD laws were expanded to cover domestic as well as export subsidies.[54] The law continued, however, to mandate that the amount of the CVD assessed be equal to the net amount of the bounty or grant, just as it mandated when the law was limited to export subsidies.[55] This issue does not appear to have been discussed by lawmakers at the time. Indeed, the issue was theoretical at best, given the fact that the law continued to be applied, in practice, only to countervail export subsidies.[56] With an increase in the use of domestic subsidies by governments in the 1970s and 1980s, and particularly with the creation of the right to seek judicial review of the United States Department of the Treasury's CVD decisions in the Trade Act of 1974, the number of CVD petitions and orders rose dramatically.[57] As concerns about the impact of domestic subsidies grew, Congress, the courts, and the GATT 1947 states parties began to articulate a rationale for CVDs that was not limited to the offsetting of low prices that may result from subsidies.[58]

The original provisions of the GATT 1947 recognize that domestic subsidies can distort trade and are properly redressable through CVDs.[59] Some early GATT 1947 disputes on subsidies addressed concerns regarding domestic production subsidies that were not tied to export

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52. General Agreement on Tariffs and Trade art. IV(4), Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT 1947].

53. 19 U.S.C. § 1677a(c)(1)(C) (2006).

54. 1 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992), *supra* note 48, at 812-13.

55. *See generally* Tariff Act of 1922, ch. 356, 42 Stat. 858 (1922).

56. D.B. King, *Countervailing Duties—An Old Remedy with New Appeal*, 24 BUS. LAW. 1179, 1181 (1969) (suggesting that by 1969 the United States Department of the Treasury had never used the law to countervail domestic subsidies).

57. 1 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992), *supra* note 48, at 816-17.

58. *Id.*

59. GATT 1947, *supra* note 52, arts. VI.3, XVI.

performance.[60] The notification and consultation requirements regarding domestic subsidies in article XVI of the GATT 1947 were elaborated upon in the Tokyo Round Subsidies Code (Code) concluded in 1979. The Code states:

> [S]ubsidies other than export subsidies . . . may cause or threaten to cause injury to a domestic industry of another signatory or serious prejudice to the interests of another signatory or may nullify or impair benefits accruing to another signatory under the General Agreement, in particular where such subsidies would adversely affect the conditions of normal competition.[61]

It is notable that domestic subsidies were considered most likely to cause serious prejudice or injury where they affected conditions of competition—a concept much broader than mere price effects.[62] Conditions of competition could encompass effects on the volume of trade, the range or sophistication of products offered, the profitability of producers, and many other competitive factors other than price.

When Congress implemented the Code, it similarly emphasized that the purpose of the CVD law is to offset competitive advantages writ broadly, not just to counteract price effects.[63] The Senate Finance Committee explained, "Subsidies are bounties or grants bestowed . . . on the production, manufacture, or export of products, often with the effect of providing *some competitive advantage in relation to products of another country*."[64] The use of the word "some" underscores the broad range of competitive advantages contemplated. The impact of subsidies on price, if any, is not mentioned. Thus, the report explains, "Countervailing duties are special duties imposed to offset the amount of the foreign subsidy."[65] The same Senate report explains that the purpose of the AD statute, by contrast, is to remedy price effects: "Antidumping duties are special duties imposed to offset the amount of the difference between the fair value of the merchandise and the price for which it is sold in the United States . . . ."[66]

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60. *See, e.g.*, *Report Adopted by the Contracting Parties on 3 April 1950: The Australian Subsidy on Ammonium Sulphate*, GATT/CP.4/39 (Mar. 31, 1950); Memorandum by the Gov't of Den., Export of Subsidized Eggs and Cattle from the United Kingdom, L/627 (Apr. 24, 1957).

61. General Agreement on Tariffs and Trade: Interpretation and Application of Articles VI, XVI, XXIII, art. 11(2), Apr. 12, 1979, 31 U.S.T. 513.

62. *See id.*

63. S. REP. NO. 96-249, at 37 (1979).

64. *Id.* (emphasis added).

65. *Id.*

66. *Id.*

Commerce also emphasized the broad remedial nature of the CVD law, even when it exercised its discretion not to apply the law to certain imports.[67] In its decision not to apply the CVD law to imports of wire rod from Czechoslovakia in 1984, for example, Commerce stated, "We believe a subsidy . . . is definitionally any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth."[68] That decision did not turn on any price impacts that subsidies may or may not have, but instead referred to broader concerns regarding the "economic result" of subsidies.[69] A specific example cited by Commerce in that case was an increase in the volume of output as the result of plant expansion subsidies.[70]

During this time, the GATT 1947 states parties were involved in negotiations to strengthen the subsidy disciplines in the Code, particularly as they related to domestic subsidies.[71] Their understanding that CVDs are intended to offset the benefit that subsidies provide, and not just the price effects, if any, of those subsidies, is evident in discussions regarding the causal link between the margin of subsidization and material injury. In a September 1987 note from the WTO Secretariat setting out a checklist of issues for the negotiations, the Secretariat noted that in some cases the margin of price undercutting due to subsidized imports could be "substantially larger than the margin of subsidization."[72] A note from the Secretariat in May of 1990 elaborated further:

> [The parties] considered that there should be no automatic relationship between the margin of subsidization and injury. Indeed, in some cases a relatively small amount of a subsidy could result in material injury. Furthermore, the effects of a subsidy were not necessarily reflected in prices but could materialize in preserving profits, maintaining levels of exports or enhancing marketing.[73]

A GATT 1947 dispute settlement panel made the same point in a decision issued later that year, noting, "The Panel fully recognized that

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67. *See, e.g.*, Carbon Steel Wire Rod from Czechoslovakia, 49 Fed. Reg. 19,370 (Dep't of Commerce May 7, 1984) (final determination).

68. *Id.* at 19,371.

69. *Id.* at 19,372.

70. *Id.*

71. *See* 1 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992), *supra* note 48, at 840-84.

72. GATT Secretariat, *Checklist of Issues for Negotiations*, MTN.GNG/NG10/W/9, at 12 (Sept. 7, 1987).

73. GATT Secretariat, *Meeting of 30 April-1 May 1990, Note by the Secretariat*, MTN.GNG/NG10/18, ¶ 3 (May 28, 1990).

subsidies need not in all cases . . . have a price effect to be countervailable . . . ."[74]

This shared understanding is reflected in the SCM Agreement that emerged from the Uruguay Round. The SCM Agreement lists among the criteria that may be used to establish that domestic subsidies have caused serious prejudice not only price undercutting, suppression, and depression, but also the displacement or impedance of imports into the subsidizing country, the displacement or impedance of another country's exports into third markets, lost sales, and loss of world market share.[75] While the criteria for establishing injury or serious prejudice are analytically distinct from the criteria relied upon to establish the rate of a CVD, the negotiating history reviewed above reveals that the parties recognized that subsidies may not be reflected in prices.[76] Thus, not only should indicators of injury other than price be taken into account, but the CVD itself need not be limited to the price effects, if any, that a subsidy may have.

Around the same time the Uruguay Round negotiations were approaching their completion, the question of whether subsidies must have demonstrable price effects—or indeed any demonstrable economic effects—in order to be countervailable came to a head in the softwood lumber dispute between the United States and Canada.[77] In 1992, Commerce issued its final determination in a self-initiated CVD investigation on softwood lumber from Canada.[78] In that case, Canadian respondents argued that the government stumpage program for logs was not countervailable because it could have no impact on the prices or output of softwood lumber.[79] In support of their contention, respondents cited Commerce's own statement from the wire rod cases that subsidies cause market distortions and argued that subsidies that do not create such manifest distortions are not countervailable.[80] Commerce rejected the contention, stating that while one of the purposes of the CVD law was to combat the distortions subsidies may bring about, Congress did not intend for Commerce to have to apply a "market distortion test" in order

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74. Report by the Panel, *United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, ¶ 4.9, DS7/R (Sept. 18, 1990), GATT B.I.S.D. (38th Supp.) at 14 (1991).

75. Agreement on Subsidies and Countervailing Measures art. 6(3), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

76. GATT Secretariat, *supra* note 73, ¶ 3.

77. Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570 (Dep't of Commerce May 28, 1992) (final determination).

78. *Id.*

79. *Id.* at 22,573.

80. *Id.* at 22,588.

to countervail a subsidy that could be otherwise identified and measured.[81]

The determination was challenged before a binational panel under the United States-Canada Free Trade Agreement, and that panel disagreed with Commerce.[82] The panel, also citing the wire rod decisions, concluded that Commerce was required to consider whether a subsidy had a market-distorting effect before countervailing that subsidy.[83]

In response to the softwood lumber panel ruling, Congress enacted section 771(5)(C) of the Tariff Act of 1930, which states that Commerce is not required to consider the effect of a subsidy in administering the CVD statute.[84] The legislation clarified that CVDs are imposed to offset the benefit of the subsidies themselves, regardless of how those benefits may be used by recipients. The statute's "new definition of [a] subsidy does not require the Commerce Department to consider or analyze the price or output effects (including whether there is any effect at all) of a government action on the merchandise under investigation or review."[85] Importantly, the statement notes that subsidies may not have any effect on prices at all. The statement further confirms that the CVD statute provides relief from competition with subsidized imports regardless of the price impact, if any, of those subsidies.

Since the implementation of the Uruguay Round, the United States Court of International Trade (CIT) and the United States Court of Appeals for the Federal Circuit have reiterated that the purpose of CVDs is, as Congress explained in 1979, to offset the unfair competitive advantage recipients of government subsidies enjoy.[86] In *Royal Thai Government v. United States*, for example, the CIT noted that CVDs are "intended to counteract any unfair advantage gained by government

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81. *Id.*

82. Decision of the Panel, *In the Matter of Certain Softwood Lumber from Canada*, U.S.A.-92-1904-01, at 44-59 (May 6, 1993).

83. *Id.* at 51. Canada also challenged certain aspects of a subsequent CVD determination on softwood lumber at the WTO. *See* Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶¶ 155-159, WT/DS257/AB/R (Jan. 19, 2004). In that case, the Appellate Body found the manner in which Commerce analyzed whether subsidies to upstream input producers passed through to unrelated downstream producers was inconsistent with the WTO obligations of the United States. *Id.* That issue is distinct from the question of whether direct input subsidies that provide an undisputed benefit to the downstream producer (i.e., the government provision of an input for less than adequate remuneration) must also be shown to have some impact on the output or prices of the downstream good in order to be countervailable.

84. *See* S. REP. NO. 103-412, at 92 (1994).

85. *Id.*

86. *See, e.g.*, Royal Thai Gov't v. United States, 30 Ct. Int'l Trade 1072 (2006).

intervention."[87] Similarly, the Federal Circuit in *Wolff Shoe Co. v. United States* noted that CVDs are levied "to offset the unfair competitive advantages created by foreign subsidies."[88]

Finally, Commerce has explained how subsidies may create unfair competitive advantages that merit the application of CVDs even where such subsidies may have no price effects: "While subsidies unquestionably benefit their recipients, it is by no means certain that those recipients automatically respond to subsidies by lowering their prices, pro rata, as opposed to investing in capital improvements, retiring debt, or any number of other uses."[89] As noted by the GATT Secretariat, firms may also use subsidies to maintain output or increase marketing.[90] In addition, the stated goal of many of the subsidy programs implemented by China, for example, is to develop new products and technologies and to move the domestic industry up the value chain.[91] Indeed, as the world financial crisis and resulting government bailout programs starkly demonstrated, firms may use government subsidies in myriad ways that have no impact whatsoever on prices. These ways include making investments, improving their financial risk profiles, retaining workers or meeting worker benefit obligations, or even funding executive bonuses. All of these practices confer a benefit, and a competitive advantage, on the subsidy recipient, even if they have no impact on prices.

V. CONCLUSION

In sum, the contention that there is a contradiction between assessing CVDs equal to the full subsidy benefit while adjusting AD duties downwards only to the extent such subsidies affect prices ignores the fundamental differences between the CVD law and the AD law. The AD law is concerned solely with price discrimination, and the duty remedy it offers is designed to offset the precise amount by which normal value exceeds export prices. The CVD law, particularly as it relates to domestic subsidies, is not concerned with price effects at all. CVDs are designed to offset a subsidy benefit that confers an unfair

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87. *Id.* at 1087 (citation omitted).

88. 141 F.3d 1116, 1117 (Fed. Cir. 1998).

89. Memorandum from Stephen J. Claeys, Deputy Assistant Sec'y for Imp. Admin., to David M. Spooner, Assistant Sec'y for Imp. Admin., cmt. 2, at 14 (Oct. 17, 2007) (on file with the U.S. Department of Commerce).

90. *See generally* GATT Secretariat, *supra* note 73.

91. Ping Gong & Jessica Wang, *China's 12th Five-Year Plan: An Overview*, STEWARTLAW.COM (May 18, 2011), http://www.stewartlaw.com/stewartandstewart/TradeFlows/tabid/127/language/en-US/Default.aspx?udt_583_param_detail=524.

competitive advantage, regardless of the way in which the recipient chooses to use that benefit or the form that a competitive advantage takes.[92] Thus, it is appropriate to set the CVD at an amount equal to the amount of that benefit.

The logic of the structure of the law is illuminated by one further point. Domestic producers harmed by competition with imports from subsidized foreign firms could seek various forms of relief. One option would be for those domestic producers to lobby their own government for subsidies that match those received by their competitors abroad. The result would be a spiraling succession of larger and larger subsidies as governments seek to keep their industries competitive in a global market. Indeed, it was the inability to terminate such tit-for-tat subsidies successfully under international agreements governing the sugar market that preceded the creation of the first CVD laws in the United States.[93]

The CVD law offers an elegant solution to this problem. Rather than seeking to counteract subsidies to foreign producers by providing the same amount of subsidies to domestic producers (at the public's expense), CVDs offset the amount of subsidies foreign producers receive, thereby neutralizing their competitive advantage, raising government revenue, protecting domestic producers from unfair trade, and creating a disincentive for further trade-distorting subsidization by foreign governments. Setting the amount of the CVD equal to the full amount of the subsidy margin efficiently and effectively meets each of these goals.

In the end, Congress, the courts, Commerce, and even the GATT and WTO parties have articulated numerous reasons why CVDs are not limited to instances in which subsidies affect prices, and why the amount of such duties does not depend on whether any such price effects exist. This reflects a fundamental difference between the purpose of the CVD law and the purpose of the AD law. The two statutes, as amended by Congress in 2012, continue to reflect these very different goals. Understanding the fundamental difference between the statutes and ensuring they are implemented to give full effect to their different goals will help guarantee that domestic producers and their workers can continue to secure relief from the two different wrongs the statutes were enacted to remedy.

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92. *See supra* notes 84-88 and accompanying text.

93. Congressional Budget Office, How the GATT Affects U.S. Antidumping and Countervailing-Duty Policy 22 (1994).