

**Different Remedies for Different Wrongs:  
Adjustments for “Double Remedies” under the Amended Antidumping Statute \***

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On March 6, 2012, the House of Representatives passed the first substantive change to U.S. antidumping and countervailing duty laws since the Uruguay Round, by a vote of 370 to 39.<sup>2</sup> The bill was passed by unanimous consent in the Senate the next day,<sup>3</sup> and signed into law less than a week later.<sup>4</sup> This paper reviews how one part of the new law – which provides for adjustments to antidumping duties imposed on imports from non-market economy (“NME”) countries for so-called “double remedies” – has been implemented to date.

The paper also responds to one criticism of the law and its implementation with a review of the legislative history of the U.S. countervailing duty 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 antidumping duties is merited under the new double remedies provision. Yet the impact of domestic subsidies on export prices continues to be irrelevant to the administration of the countervailing duty statute. This paper attempts to explain why this is so by examining the origins and evolution of the countervailing duty law to better understand the basic purpose of the statute and how it differs from the antidumping statute.

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<sup>2</sup> 158 Cong. Rec. H1178 (Mar. 6, 2012).

<sup>3</sup> 158 Cong. Rec. S1441 (Mar. 7, 2012).

<sup>4</sup> Pub. L. 112-99, 126 Stat. 265 (Mar. 13, 2012).

The new law has two sections. The first confirms that the Department of Commerce has the authority to apply the countervailing duty law to imports from countries that are treated as non-market economies (“NMEs”) under the antidumping statute if subsidies can be identified and measured in such an economy.<sup>5</sup> As the first section was enacted in response to on-going litigation in which this author is involved, it is not addressed in this paper.

The second section of the act creates a new procedure by which the Department of Commerce may, under certain circumstances, make adjustments to antidumping duties imposed on imports from NME countries to account for the so-called “double remedy” that may arise due to the concurrent application of countervailing duties to the same imports.<sup>6</sup> This second section was enacted in response to a decision from the Appellate Body of the World Trade Organization (“WTO”) that criticized the Department of Commerce for not investigating claims for such adjustments, and it applies to all antidumping and countervailing duty proceedings involving NME countries initiated on or after March 13, 2012, as well as to determinations under section 129 of the Uruguay Round Agreements Act issued after that date.<sup>7</sup> The effective date of this new provision is also being raised in on-going 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.

First, this paper reviews the WTO decision that led to the enactment of the new double remedies provision and the content of that provision. Second, the paper examines

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<sup>5</sup> *Id.* at Sec. 1.

<sup>6</sup> *Id.* at Sec. 2(a).

<sup>7</sup> *Id.* at Sec. 2(b).

the four cases in which the Department of Commerce has, as of this writing, issued a final determination granting adjustments for alleged double remedies to review how the Department is interpreting and applying the new provision. Third, and finally, the paper responds to one criticism of the law and its implementation with a review of the legislative history of the U.S. countervailing duty law. This review clarifies why the issue of the relationship between domestic subsidies and export prices, which is central to the new double remedies adjustment for NME countries under the antidumping statute, continues to be irrelevant to the administration of the countervailing duty statute.

### **I. 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*.<sup>8</sup> In that case, China challenged the Department of Commerce’s final antidumping and countervailing duty determinations on four products, claiming, *inter alia*, that the imposition of antidumping duties using the NME methodology, concurrent with the imposition of countervailing duties on the same merchandise, resulted in a “double remedy” that was inconsistent with the WTO obligations of the United States. As explained below, the Appellate Body found that a “double remedy” could exist in such cases where domestic subsidies that have been subject to countervailing duties also increase the dumping margin. 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.

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<sup>8</sup> Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (adopted 25 March 2011).

In the underlying investigations, the Department of Commerce declined to provide any 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 presuming such subsidies automatically lower export prices in the absence of such evidence would be “speculative.”<sup>9</sup> In addition, the Department noted that the fact that Congress had provided for an adjustment to the antidumping calculation where export subsidies are countervailed, but not domestic subsidies, implied that such an adjustment would not be appropriate under U.S. law.<sup>10</sup>

The Appellate Body found that, as a legal matter, double remedies are prohibited by the WTO Agreement on Subsidies and Countervailing Measures (“SCMA”).<sup>11</sup> Specifically, the Appellate Body found that countervailing duties equal to the full amount of the subsidy are not “appropriate” under Article 19.3 of the SCMA if dumping margins calculated under the NME methodology are also imposed and those dumping margins also reflect the level of subsidization to some extent.<sup>12</sup> 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.<sup>13</sup> According to the Appellate Body,

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<sup>9</sup> *Certain New Pneumatic Off-the-Road Tires From the People’s Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624 (Dep’t Commerce Sept. 4, 2008) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>10</sup> *Id.*

<sup>11</sup> Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (adopted 25 March 2011) at para. 599.

<sup>12</sup> *Id.* at para. 582.

<sup>13</sup> *Id.* at para. 542.

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.<sup>14</sup> 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.”<sup>15</sup>

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

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.<sup>16</sup>

Thus, under the Appellate Body’s theory, such double remedies can only arise where the subsidies in question have lowered export prices. And 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. The Appellate Body explained that, in determining whether a double remedy in fact exists in any particular case, the United States had an

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<sup>14</sup> *Id.* at para. 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 paper.

<sup>15</sup> *Id.* at para. 543.

<sup>16</sup> *Id.* at para. 599 (emphasis in original, citations omitted).

obligation to “conduct a sufficiently diligent ‘investigation’ into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record.”<sup>17</sup>

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.<sup>18</sup>

The United States committed to bring itself into compliance with the Appellate Body report, and initiated compliance proceedings with respect to the four underlying countervailing duty cases in August and September of 2011.<sup>19</sup> 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 noted above, Commerce had expressed doubt about its ability to provide such adjustments under the statute in the original investigations underlying the WTO dispute.<sup>20</sup> Thus, Congress intervened. The result is the new double remedies provision signed into law on March 13, 2012.

The provision amends Section 777A of the Tariff Act of 1930 (19 U.S.C. § 1677f–1) by adding a new paragraph “f.” The new provision requires the Department of Commerce to provide an adjustment to an antidumping duty determined under the NME methodology if each of three conditions are met. First, there must be a

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<sup>17</sup> *Id.* at para. 602.

<sup>18</sup> *Id.* at para. 606.

<sup>19</sup> *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 Commerce Aug. 30, 2012). Compliance proceedings on the four underlying antidumping orders were initiated in May of 2012. *Id.*

<sup>20</sup> *Certain New Pneumatic Off-the-Road Tires From the People’s Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624 (Dep’t Commerce Sept. 4, 2008) and accompanying Issues and Decision Memorandum at Comment 2.

countervailable subsidy, other than an export subsidy, which has been provided with respect to the same class or kind of merchandise subject to the antidumping duty.<sup>21</sup> Second, such 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.”<sup>22</sup> Third, the Department must be able to “reasonably estimate” the extent to which the subsidy, in combination with the use of a normal value calculated according to the NME methodology, has increased the weighted average dumping margin.<sup>23</sup> If each of the three criteria are met, the Department shall reduce the antidumping duty “by the amount of the increase in the weighted average dumping margin” that is reasonably estimated by the Department to result from the subsidy’s impact on export prices and the use of a normal value calculated under an NME methodology.<sup>24</sup> Finally, any reduction to the antidumping duty is capped at that portion of the countervailing duty rate attributable to the subsidies that meet the three criteria outlined above.<sup>25</sup>

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. The results of those proceedings are reviewed below.

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<sup>21</sup> Pub. L. 112-99 at Sec. 2, 126 Stat. 265 - 266 § 2(b) (Mar. 13, 2012) at new section 1677f-1(f)(1)(A).

<sup>22</sup> *Id.* at new section 1677f-1(f)(1)(B).

<sup>23</sup> *Id.* at new section 1677f-1(f)(1)(C).

<sup>24</sup> *Id.* at new section 1677f-1(f)(1).

<sup>25</sup> *Id.* at new section 1677f-1(f)(2).

## II. Implementing the Double Remedy Adjustment

After the double remedies provision was enacted in March of 2012, the Department of 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. The Department issued its final determinations in the proceedings on July 31, 2012, and implemented those proceedings effective August 21, 2012.<sup>26</sup> As a preliminary matter, the Department was careful to note that the unique nature of the proceedings and the need to wait for congressional action before implementation gave the Department “little time or flexibility to develop and hone its practice in applying the new law for the first time.”<sup>27</sup> The Department also noted that its administration of the new provision “may evolve with the benefit of time and experience,” and the Department may reassess its approach if merited in future proceedings.<sup>28</sup> As of this writing, the Department has

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<sup>26</sup> *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 Commerce Aug. 30, 2012).

<sup>27</sup> Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration, *Final Determinations: Section 129 Proceedings Pursuant to the WTO Appellate Body’s Findings in WTO DS 379 Regarding the Antidumping and Countervailing Duty Investigations of Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China* (July 31, 2012) (hereinafter “*Final OTR 129 Determination*”) at Comment 2.A. The final determinations for the three other pairs of section 129 proceedings contain the same language regarding double remedies.

<sup>28</sup> Memorandum from Christopher Mutz, Office of Policy, Import Administration, and Daniel Calhoun, Office of the Chief Counsel for Import Administration, to Paul Piquado, Assistant Secretary for Import Administration, *Section 129 Determination of the Countervailing Duty Investigation of Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China: “Double Remedies” Analysis Pursuant to the WTO Appellate Body’s Findings in WTO DS379* (May 31, 2012) (hereinafter “*Prelim OTR 129 Determination*”) at 10. The preliminary determinations for the three other pairs of section 129 proceedings contain the same language regarding double remedies.



yet to issue final determinations in other proceedings to which the new provision applies.<sup>29</sup>

In its preliminary section 129 determinations, the Department provided a downward adjustment to each respondent's antidumping cash deposit rate equal to the product of: 1) that portion of the respondent's countervailing duty 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").<sup>30</sup> 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%.<sup>31</sup> Thus, 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, received a downward adjustment of 6.3% to its dumping rate.

The parties contested various aspects of the Department's determinations. The Government of China argued that the Department 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. In contrast, petitioners urged that no adjustment was merited under the new statutory provision,

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<sup>29</sup> The Department has issued a preliminary determination in its antidumping investigation on Drawn Stainless Steel Sinks from China that relies on the same type of economy-wide pass-through ratio used in the section 129 determinations. *Drawn Stainless Steel Sinks From the People's Republic of China: Antidumping Duty Investigation*, 77 Fed. Reg. 60,673 (Dep't Commerce Oct. 4, 2012) and accompanying Issues and Decision Memorandum at 21-23. The final determination in that case is due in February of 2013.

<sup>30</sup> *Prelim OTR 129 Determination* at 9 – 10.

<sup>31</sup> *Prelim OTR 129 Determination* at 9 – 10.

because respondents had failed to meet their burden in demonstrating that subsidies had in fact reduced the price of imports of the merchandise in question. Petitioners also argued that the RCT was an inappropriate basis upon which to estimate the extent to which subsidies passed through to export prices, for a variety of reasons. The Department rejected the contentions and adopted the preliminary determinations unchanged in the final determinations.<sup>32</sup>

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

### **III. Price Effects of Subsidies under the Antidumping Statute and the Countervailing Duty Statute**

As noted above, though 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, and thus determining whether such subsidies have indeed impacted export prices would require an examination of the facts of each case.<sup>33</sup> In the new statutory 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.<sup>34</sup> Congress also limited the extent of any adjustment to the antidumping duty rate to the Department’s reasonable estimate of the amount by which the subsidy increased the dumping margin due to its impact on

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<sup>32</sup> *Final OTR 129 Determination* at 2.

<sup>33</sup> Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (adopted 25 March 2011) at para. 599.

<sup>34</sup> Pub. L. 112-99 at Sec. 2(b), 126 Stat. 265 - 266 § 2(b) (Mar. 13, 2012) at new section 1677f-1(f)(1)(B).

export prices together with the use of normal value determined under the NME methodology.<sup>35</sup>

In the section 129 proceedings, however, the Government of 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.<sup>36</sup> In support of this contention, the Government of China argued, *inter alia*, that the fact that countervailing duties 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.<sup>37</sup> In essence, the Government of China argued that it was contradictory to, on the one hand, 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, on the other hand, deducting only that portion of the subsidy benefit that is demonstrated to lower export prices – 6.3% under the methodology employed by the Department in the section 129 determinations – from the antidumping rate.

The Department rejected the contention, citing the language from the Appellate Body report referred to above, as well as the fact that the countervailing duty law does not require an assessment of the effects that subsidies may have in order for a countervailing duty to be assessed.<sup>38</sup> The Department is correct as a matter of law, and

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<sup>35</sup> *Id.* at new section 1677f-1(f)(1)(C).

<sup>36</sup> *Final OTR 129 Determination* at Comments 3.B and 6.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*, citing section 771(5)(C) of the Act (19 U.S.C. § 1677(5)(C)).

indeed the statute mandates the result that the Government of China found so problematic. The law requires the Department to ignore the price effects of subsidies (to the extent any exist) in countervailing duty proceedings, and the full amount of the benefit must be countervailed regardless of whether such price effects exist.<sup>39</sup> Yet, in antidumping proceedings, the law now requires that such price effects be demonstrated and susceptible to reasonable estimation before an adjustment to the antidumping rate can be made, and the amount of any adjustment is limited to the extent of such pass-through.<sup>40</sup> Moreover, as with all adjustments, it is the respondent's burden to demonstrate entitlement to the adjustment, and thus to demonstrate that such subsidies in fact lowered export prices.<sup>41</sup>

While the Government of 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 the Government of China claims. The Government of China's claim rests on a very important assumption: that the purpose of a countervailing duty is to offset the lower prices that subsidies may allow exporters to charge, just as the purpose of the antidumping 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 countervailing duty at an amount equal to the subsidy margin reveals a presumption that the full amount of the subsidy passes through to prices.

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<sup>39</sup> 19 U.S.C. §§ 1671(a), 1677(5)(C).

<sup>40</sup> Pub. L. 112-99 at Sec. 2(a), 126 Stat. 265 - 266 § 2(a) (Mar. 13, 2012).

<sup>41</sup> *Final OTR 129 Determination* at Comment 2.A.

But it is the first assumption – the assumption that countervailing duties exist to offset low prices – that is fundamentally flawed. The purpose of the countervailing duty remedy and the purpose of the antidumping remedy are very different. Countervailing duties are not imposed merely to offset unfairly low prices. Thus, the fact that the countervailing duty is equal to the full amount of the subsidy margin reveals no presumptions about any relationship between domestic subsidies and export prices.

U.S. countervailing duty law pre-dates the antidumping statute. The first countervailing duty laws, enacted in the 1890s, were limited to remedying export subsidies, first on sugar and then on imports more generally.<sup>42</sup> The general countervailing duty provision for export subsidies in the Tariff Act of 1897 was carried through in the Tariff Acts of 1909 and 1913.<sup>43</sup> Under those laws, the amount of the countervailing duty imposed was equal to the net amount of the bounty or grant conferred upon export.<sup>44</sup> Two Supreme Court decisions reviewing the implementation of the statutes focused to a certain extent on the price effects of the subsidy programs at issue, as export subsidies distort trade precisely by introducing a difference between the export price and the home market price.<sup>45</sup> Because export subsidies drive home market 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 antidumping duties. It is for this reason that the GATT parties agreed to prohibit the simultaneous imposition of countervailing duties and antidumping duties “to compensate for the same situation of

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<sup>42</sup> Terence P. Stewart, ed., *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* (1986-1992), vol. 1 (Boston: Kluwer Law and Taxation Publishers, 1993), pp. 812-813.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See *Downs v. United States*, 187 U.S. 496, 507 – 508 (1903); *G.S. Nicholas & Co. v. United States*, 249 U.S. 34, 39 – 40 (1919).

dumping or export subsidization.”<sup>46</sup> This understanding is also reflected in the provision in U.S. law which requires that the export price used in dumping calculations be increased by the amount of any countervailing duties assessed to offset export subsidies.<sup>47</sup>

It was not until 1922 that the countervailing duty laws were expanded to cover domestic as well as export subsidies.<sup>48</sup> The law continued, however, to mandate that the amount of the countervailing duty assessed be equal to the net amount of the bounty or grant, just as it mandated when the law was limited to export subsidies.<sup>49</sup> 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.<sup>50</sup> 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 Treasury’s countervailing duty decisions in the Trade Act of 1974, the number of countervailing duty petitions and orders rose dramatically.<sup>51</sup> As concerns about the impact of domestic subsidies grew, Congress, the Courts, and GATT parties began to articulate a rationale for countervailing duties that was not limited to the offsetting of low prices that may result from subsidies.

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<sup>46</sup> General Agreement on Tariffs and Trade 1994, Art. VI(5), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) (hereinafter “GATT 1994”).

<sup>47</sup> 19 U.S.C. § 1677a(c)(1)(C).

<sup>48</sup> Terence P. Stewart, ed., *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* (1986-1992), vol. 1 (Boston: Kluwer Law and Taxation Publishers, 1993), pp. 812-813.

<sup>49</sup> Tariff Act of 1922, ch. 356, 42 Stat. 858 (1922) (known as the Fordney-McCumber Tariff Act).

<sup>50</sup> D.B. King, *Countervailing Duties – An Old Remedy with a New Appeal*, 24 *BUS. LAW.* 1179, 1181 (1969) (by 1969 Treasury had never used the law to countervail domestic subsidies).

<sup>51</sup> Terence P. Stewart, ed., *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* (1986-1992), vol. 1 (Boston: Kluwer Law and Taxation Publishers, 1993), pp. 816-817.

The original provisions of the GATT recognize that domestic subsidies can distort trade and are properly redressable through countervailing duties.<sup>52</sup> Some early GATT disputes on subsidies addressed concerns regarding domestic production subsidies that were not tied to export performance.<sup>53</sup> The notification and consultation requirements regarding domestic subsidies in Article XVI of the GATT were elaborated upon in the Tokyo Round Subsidies Code concluded in 1979. The Code states that “subsidies 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.”<sup>54</sup> 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. 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 Tokyo Round, it similarly emphasized that the purpose of the countervailing duty law is to offset competitive advantages writ broadly, not just to counteract price effects. 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*

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<sup>52</sup> GATT 1994, Arts. VI.3 and XVI.1.

<sup>53</sup> See, e.g., *Report of Working Party G on the Australian Subsidy on Ammonium Sulphate*, GATT/CP.4/39 (March 31, 1950); Memorandum by the Government of Denmark, *Exports of Subsidized Cattle and Eggs from the United Kingdom*, L/627 (April 24, 1957).

<sup>54</sup> 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, T.I.A.S. No. 9619.

*another country.*”<sup>55</sup> 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.”<sup>56</sup> The same Senate report explains that the purpose of the antidumping 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 ....”<sup>57</sup>

The Department of Commerce also emphasized the broad remedial nature of the countervailing duty law, even when it exercised its discretion not to apply the law to certain imports. In its decision not to apply the countervailing duty law to imports of wire rod from Czechoslovakia in 1984, for example, the Department 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.”<sup>58</sup> That decision did not turn on any price impacts subsidies may or may not have, but instead referred to broader concerns regarding the “economic result” of subsidies.<sup>59</sup> A specific example cited by the Department in that case was an increase in the volume of output as the result of plant expansion subsidies.<sup>60</sup>

During this time, the GATT parties were involved in negotiations to strengthen the subsidy disciplines in the Tokyo Round’s Subsidies Code, particularly as they related

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<sup>55</sup> S. REP. NO. 96-249, at 37 (1979) (emphasis added).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Carbon Steel Wire Rod From Czechoslovakia; Final Negative Countervailing Duty Determination*, 49 Fed. Reg. 19,370, 19,371 (Dep’t Commerce May 7, 1984).

<sup>59</sup> *Id.* at 19,372.

<sup>60</sup> *Id.*



to domestic subsidies.<sup>61</sup> Their understanding that countervailing duties 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 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.<sup>62</sup> Another note from the Secretariat from 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.<sup>63</sup>

A GATT dispute settlement panel made the same point in a decision issued later that year, noting, “The Panel fully recognized that subsidies need not in all cases ... have a price effect to be countervailable ....”<sup>64</sup>

This shared understanding is reflected in the SCMA that emerged from the Uruguay Round. The SCMA 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

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<sup>61</sup> Terence P. Stewart, ed., *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992)*, vol. 1 (Boston: Kluwer Law and Taxation Publishers, 1993), pp. 840-884.

<sup>62</sup> *Checklist of Issues for Negotiations, Note by the Secretariat*, MTN.GNG/NG10/W/9 (Sept. 7, 1987) at 18.

<sup>63</sup> *Negotiating Group on Subsidies and Countervailing Measures, Meeting of 30 April – 1 May 1990, Note by the Secretariat*, MTN.GNG/NG10/18 (May 28, 1990) at 2.

<sup>64</sup> *United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, Report by the Panel, DS7/R (Sept. 18, 1990) at para. 4.9.

subsidizing country, the displacement or impedance of another country's exports into third markets, lost sales, and loss of world market share.<sup>65</sup> While criteria for establishing injury or serious prejudice are analytically distinct from the criteria relied upon to establish the rate of countervailing duty, the negotiating history reviewed above reveals that the parties recognized that subsidies may not be reflected in prices. Thus, not only should indicators of injury other than price be taken into account, but the countervailing duty itself need not be limited to the price effects, if any, that a subsidy may have.

Near the same time the Uruguay Round negotiations were nearing 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 U.S. and Canada. In 1992, the Department issued its final determination in a self-initiated countervailing duty investigation on softwood lumber from Canada.<sup>66</sup> 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. In support of their contention, respondents cited the Department's own statement from the wire rod cases that subsidies cause market distortions, and argued that subsidies which do not create such manifest distortions are not countervailable. The Department rejected the contention, stating that, while one of the purposes of the countervailing duty law was to combat the distortions subsidies may bring about, Congress did not intend for the

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<sup>65</sup> Agreement on Subsidies and Countervailing Measures, Art. 6.3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14. Similar indicators of injury or serious prejudice that do not rely on price effects are found in Article XVI:1 of the GATT 1994 and the Tokyo Round Subsidies Code.

<sup>66</sup> *Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22,570 (Dep't Commerce May 28, 1992).

Department to have to apply a “market distortion test” in order to countervail a subsidy that could be otherwise identified and measured.<sup>67</sup>

The determination was challenged before a bi-national panel under the U.S. – Canada Free Trade Agreement, and that panel disagreed with the Department.<sup>68</sup> The panel, again citing the wire rod decisions, concluded that the Department was required to consider whether a subsidy had a market distorting effect before countervailing that subsidy.<sup>69</sup> Congress rejected the panel decision by reaffirming and clarifying that price effects – or indeed any economic effects – of subsidies are irrelevant to the assessment of countervailing duties when it implemented the Uruguay Round Agreements, including the SCMA.

In response to the softwood lumber panel ruling, Congress enacted Section 771(5)(C) of the Act, which states that the Department is not required to consider the effect of a subsidy in administering the countervailing duty statute.<sup>70</sup> The legislation clarified that countervailing duties are imposed to offset the benefit of the subsidies themselves, regardless of how those benefits may be used by recipients:

... [T]he new definition of subsidy does not require the Commerce Department to consider or analyze the price or

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<sup>67</sup> *Id.* at 22,588.

<sup>68</sup> Decision of the Panel, *In the Matter of Certain Softwood Lumber from Canada*, U.S.A.-92-1904-01 (May 6, 1993) at 44-59.

<sup>69</sup> *Id.* at 51. Canada also challenged certain aspects of a subsequent countervailing duty determination on softwood lumber at the World Trade Organization. In that case, the Appellate Body found the manner in which the Department of Commerce analyzed whether subsidies to upstream input producers passed through to unrelated downstream producers was inconsistent with the obligations of the United States. Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (adopted 17 February 2004) at paras. 155 - 159. 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 the output or prices of the downstream good in order to be countervailable.

<sup>70</sup> S. REP. NO. 103-412, 103d Cong., 2d Sess., at 92 (1994).

output effects (including whether there is any effect at all) of a government action on the merchandise under investigation or review.<sup>71</sup>

Importantly, the statement notes that subsidies may not have any effect on prices at all. The statement further confirms that the countervailing duty 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 U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit have reiterated that the purpose of countervailing duties is, as Congress explained in 1979, to offset the unfair competitive advantage recipients of government subsidies enjoy. In *Royal Thai Government*, for example, the Court of International Trade noted that countervailing duties are “intended to counteract any unfair advantage gained by government intervention.”<sup>72</sup> Similarly, the Federal Circuit in *Wolff Shoe* noted that countervailing duties are levied, “to offset the unfair competitive advantage created by foreign subsidies.”<sup>73</sup>

Finally, the Department of Commerce has explained how subsidies may create unfair competitive advantages that merit the application of countervailing duties even where such subsidies may have no price effects: “[w]hile 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

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<sup>71</sup> *Id.*

<sup>72</sup> *Royal Thai Government v. United States*, 441 F. Supp. 2d 1350, 1365 (CIT 2006) (internal citation omitted).

<sup>73</sup> *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1117 (Fed. Cir. 1998).

improvements, retiring debt, or any number of uses.”<sup>74</sup> As noted by the GATT Secretariat, firms may also use subsidies to maintain output or increase marketing. In addition, the stated goal of many of the subsidy programs implemented by the Government of China, for example, is to develop new products and technologies and to move the domestic industry up the value chain.<sup>75</sup> 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, whether to make investments, retain workers or meet worker benefit obligations, improve their financial risk profile, or even to fund 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.

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

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<sup>74</sup> *Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China*, 72 Fed. Reg. 60,632 (Dep't Commerce Oct. 25, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>75</sup> Ping Gong and Jessica Wang, “China’s 12<sup>th</sup> Five-Year Plan: An Overview,” Trade Flow from Stewart and Stewart (May 18, 2011), available on-line at: [http://www.stewartlaw.com/stewartandstewart/TradeFlows/tabid/127/language/en-US/Default.aspx?udt\\_583\\_param\\_detail=524](http://www.stewartlaw.com/stewartandstewart/TradeFlows/tabid/127/language/en-US/Default.aspx?udt_583_param_detail=524).

recipient chooses to use that benefit or the form that competitive advantage takes. Thus, it is appropriate to set the countervailing duty 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 marketplace. Indeed, it was the inability to successfully terminate such tit-for-tat subsidies under international agreements governing the sugar market that preceded the creation of the first countervailing duty laws in the United States.<sup>76</sup>

The countervailing duty 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 public expense), countervailing duties offset the amount of subsidies foreign producers receive, thus 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 countervailing duty equal to the full amount of the subsidy margin efficiently and effectively meets each of these goals.

In the end, Congress, the Courts, the Department of Commerce, and even the GATT and WTO parties have articulated numerous reasons why countervailing duties are

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<sup>76</sup> Congressional Budget Office, HOW THE GATT AFFECTS U.S. ANTIDUMPING AND COUNTERVAILING-DUTY POLICY (Sept. 1994) at 22.

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 countervailing duty law and the purpose of the antidumping law. The two statutes, as amended by Congress earlier this year, 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 ensure 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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