
МІЖНАРОДНЕ ТОРГОВЕЛЬНЕ ТА МИТНЕ ПРАВО



Zvenyslava Opeida*

Doctor of Juridical Science (S.J.D.)

University of Pittsburgh

(Pittsburgh, USA)

ORCID: <https://orcid.org/0000-0002-3342-637X>

***Zvenyslava Opeida**, Doctor of Juridical Science (S.J.D.), Visiting Scholar of the University of Pittsburgh Law School (3900 Forbes Ave, Pittsburgh, PA 15260, USA).

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U.S. COUNTERVAILING DUTY LAW AND THE WTO RULES FOR SUBSIDIES: THE ISSUE OF CONSISTENCY

ЗАКОНОДАВСТВО США ПРО КОМПЕНСАЦІЙНІ ЗАХОДИ ТА ПРАВИЛА СОТ ЩОДО СУБСИДІЙ: ПИТАННЯ ВІДПОВІДНОСТІ

ABSTRACT

The paper focuses on U.S. law regulating countervailing measures. It examines two substantive elements which must be established in order to impose countervailing measures: (1) the imports are benefiting from countervailable subsidy, and (2) the subsidized imports cause material injury to a U.S. industry. The procedure of countervailing duty investigation is also reviewed, including such stages as filing petition and initiation of investigation, preliminary subsidy and injury determination, final subsidy and injury determination, and appeals. The possible remedies that include the imposition of CVDs (provisional and definitive duties) or a suspension agreement

are also characterized. Special attention is given to the issues of U.S. law and practice consistency with the World Trade Organization (WTO) rules on subsidies. A number of WTO Dispute Settlement Body's decisions regarding the consistency of the CVDs adopted by the United States with WTO law are also examined.

The key words: WTO, SCM Agreement, subsidy, injury, countervailing duty, countervailing investigation, Byrd Amendment, US Tariff Act of 1930.

Introduction

U.S. law does not contain any rules governing granting or controlling subsidies by any level of government; states are not allowed to countervail the subsidies of other states. On the other hand, U.S. countervailing duty (CVD) law, which allows the imposition of countervailing duties on foreign goods receiving subsidies, is a fully developed body of law. Over more than a century, U.S. CVD law has changed considerably; the most significant modifications are the result of implementation of GATT/WTO rules: first, after the Tokyo Round, and then, after the Uruguay Round.

Since the United States is a WTO Member, the WTO agreements constitute a binding international obligation of the United States (Art. II:2 of Marrakesh Agreement, 1994). They are not directly effective, however, in the domestic legal order. The U.S. Congress stated that “no provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.” (19 U.S.C. § 3512 (a) (1)). Consequently, the provisions of these agreements may only be invoked in U.S. law if the U.S. act expressly refers to or incorporates such provisions. Likewise, WTO dispute settlement decisions have no direct effect on U.S. law (*Footwear Distributors and Retailers of America v. United States*). CVD proceedings are now governed by Subtitle A of Title VII of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979 and subsequently amended (19 U.S.C. § 1671), and the relevant Customs Regulations (19 C.F.R. pt. 351).

1. Substantive Elements

In order to impose countervailing measures against subsidized imports, two basic elements need to be established during the course of the investigation: (1) the Commerce Department must determine whether there is a countervailable subsidy under the statutory definition; (2) in the case of a country that is a WTO member, or that has assumed similar

obligations with respect to the U.S., the International Trade Commission (ITC) must determine whether there has been material injury to a U.S. industry (19 U.S.C. § 1671).

Subsidy. With regard to the definition of a subsidy, U.S. law closely follows the language of Article 1 of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). In order to find the existence of a subsidy, the two cumulative conditions must be met: (1) there must be a financial contribution by a government in the country of origin or export or there must be a form of income or price support within the meaning of Article XVI of the GATT 1994; and (2) there must be a benefit conferred thereby (19 U.S.C. § 1677(5)(B)). The statute provides further guidance on the meaning of the term “benefit conferred” by stating that “a benefit shall normally be treated as conferred where there is a benefit to the recipient.” (19 U.S.C. § 1677(5)(E)). In determining whether a subsidy exists, the Commerce Department is not required to consider the effect of the subsidy on the price or output of the merchandise under investigation (19 U.S.C. § 1677(5)(C)).

Subsidies are subject to CVD measures only if they are specific (19 U.S.C. § 1677(5)(A)). While export subsidies and domestic content subsidies are automatically considered to be specific and therefore countervailable (19 U.S.C. § 1677 5(A), (B) and (C)), domestic subsidies must be specific in order to be countervailable (19 U.S.C. § 1677 5(A), (D)). A domestic subsidy is *de jure* specific when it is explicitly limited, by its own terms, to a company, industry, or group of companies or industries, or to a geographical region (19 U.S.C. § 1677 5(A), (D)(i)). If the criteria and conditions governing eligibility for a subsidy are objective, however, the subsidy is not specific. The statute follows the language of footnote 2 of the SCM Agreement, defining “objective” as criteria or conditions that are “neutral and that do not favor one enterprise or industry over another.” (19 U.S.C. § 1677 5(A), (D)(ii)).

Even if on its face a subsidy is not specific, it still can be specific *de facto*. The statute sets out the following factors that the Commerce Department is to use in determining *de facto* specificity: (1) whether only a small number of companies actually use a subsidy; (2) whether a subsidy is predominantly used by a company or industry; (3) whether a particular company or industry receives disproportionately large benefits under the program, and (4) whether the foreign governmental authority has used its discretion to grant the subsidy in a manner intended to benefit a particular

company or industry (19 U.S.C. § 1677 5(A), (D)(iii)). In practice, the Commerce Department has placed the greatest emphasis on the number of firms or industries receiving a government benefit in determining whether a particular subsidy is specific *de facto* (Certain Pasta from Italy, 1996), (Certain Textile Mill Products from Thailand, 1987), (Certain Carbon Steel Products from Brazil, 1984).

Injury. After the Commerce Department has found a subsidy to exist, the ITC is required to determine whether an industry in the United States is materially injured, or threatened with material injury, or the establishment of a U.S. industry is materially retarded, “by reason of imports” of the merchandise under investigation (19 U.S.C. § 1673(2)).

Material injury is defined as harm which is not inconsequential, immaterial, or unimportant. In accordance with Article 15.4 of the SCM Agreement, the statute provides a list of factors, which the ITC *must* examine in order to reach a determination of material injury (the volume of imports, the effect of imports on prices in the U.S., the impact of imports on U.S. producers of the like product) (19 U.S.C. § 1677(7)). Therefore, following the statutory language, the ITC is required to discuss each of the factors listed in the statute in their opinion. Although the ITC may choose to give minimal weight to, or even to disregard, a particular factor, there must be a showing that the factor was considered in some form (Cohen, Dunn & Kaye 2015, *supra* note 7, at 54).

The concept of threat of material injury is not defined. Nevertheless, the statute states that the determination must be made “on the basis of evidence that the threat of material injury is real and that actual injury is imminent.” Such determination may not be made on the basis of mere conjecture or supposition.

The statute provides a list of factors that must be considered by the ITC in making the material injury determination: unused productive capacity or increases in capacity in the exporting country; rapid increases in U.S. market share; the probability that low-priced imports could suppress or depress U.S. prices; increases in inventories of the product; and the possibility of product shifting by foreign producers (19 U.S.C. § 1677(7) (F)). Generally, the ITC has been more reluctant to issue a determination of threat of injury when it finds no current injury (Cohen 2015, *supra* note 7, at 60).

In 2015, Congress amended the definition of “material injury” and the factors the ITC must examine when evaluating material injury or threat

of material injury. In particular, the new amendment prohibits the ITC from finding that there has been no injury “merely because that industry is profitable or because the performance of that industry has recently improved.” (Trade Preferences Extension Act § 503, 219 Stat. 385) Although even in previous years the ITC did not make its conclusions based on profitability alone, and always examined it together with other factors before finding injury, this change might be viewed by some industries as an “easing” of the injury standard (COHEN, DUNN & KAYE, *supra* note 7, at 56). As a result, it might encourage some U.S. industries that are only *beginning to experience* adverse financial impact from subsidized imports, but show other signs of injury, to file petitions *before* bad financial results appear (Ferrin, Heffner & Johnson 2015).

CVDs may also be imposed when “the establishment of an industry in the United States is materially retarded” by reason of imports (19 U.S.C. § 1671b(a)(1)(B)). Nevertheless, such determinations are extremely rare because it is difficult to prove that the complainant would have been able to establish an industry “but for” the imports. Thus, U.S. producers are more likely to claim that they have an established industry that is being injured by a history of imports (Cohen 2015, *supra* note 7, at 61).

There is also a requirement to establish the causal link between the subsidized import and the material injury. The injury to the U.S. industry must be “by reason of imports of the merchandise,” which is the subject of the investigation (19 U.S.C. § 1673(2)). Initially, the conventional approach to injury analysis, favored by the majority of the ITC, was first to determine whether the industry is injured and then to inquire whether the subsidized imports are a cause of that injury. In the mid-1980s, however, individual Commissioners began to assert that the proper basis for assessing causality is not whether there is material injury overall, but rather whether the impact of imports is such as to constitute material injury. Courts have concluded that both tests constitute a permissible reading of the statute, and that neither test is prohibited (*See e.g.* R-M Industries, Inc. v. United States 1994, American Spring Wire Corp. v. United States 1984).

2. Procedure and Remedies

Procedure. CVD investigations are conducted on the basis of a petition filed simultaneously with the Commerce Department and ITC on behalf of a domestic industry, or by the Commerce Department on its own initiative (19 U.S.C. § 1671a(a)). The International Trade Administration (ITA), an

agency within the Commerce Department, determines whether there is a subsidy and the ITC determines whether there is material injury.

If an investigation is initiated by a petition, the Commerce Department must, within 20 days, determine the sufficiency of the petition (19 C.F.R. § 351.203(b)). If the Commerce Department's determination at this stage is negative, the petition is dismissed and the proceedings end.

Upon receiving notice from the Commerce Department that the petition is sufficient, the ITC begins to investigate whether there is "a reasonable indication" of injury (19 U.S.C. § 1671a(c)(3)). The ITC must make a preliminary determination of material injury within 45 days of receiving notice from the Commerce Department. If the ITC's determination is negative, the proceedings end. This is, however, a relatively rare occurrence since the preliminary injury standard is much lower than required for the final determination (Glick L. 2008).

If the ITC's determination is affirmative, the Commerce Department begins its preliminary investigation to determine "whether there is a reasonable basis to believe or suspect that a subsidy is being provided." The preliminary determination must be made within 65 days unless the Commerce Department determines that the case is "extraordinarily complicated" and should be postponed (19 U.S.C. § 1671b). Even if the Commerce Department's determination is negative, both the Commerce Department and the ITC continue the investigation to the final stage (19 C.F.R. § 207.20).

The Commerce Department must issue a final determination on the issue of subsidies within 75 days of an affirmative preliminary determination (19 U.S.C. § 1671d(a)(1)). Before issuing a final determination, the Commerce Department must hold a hearing upon the request of any party to the proceeding (19 C.F.R. § 351.310). It also must conduct a verification of the information upon which the final determination is based. Since the Commerce Department sends separate questionnaires to the government and to exporters, it must verify both the government's response and the responses of exporters. If for some reason the information cannot be verified, the Commerce Department will base the determination on "facts available," which could be the information in the petition. Upon making the final determination the Commerce Department issues a final order, which, if negative, ends the proceedings. If a final determination is affirmative, the investigation continues to the final injury phase at the ITC (19 U.S.C. § 1671d(c)(1)).

The ITC must make its final determination: (1) within 120 days of the Commerce Department's preliminary subsidy determination; or (2) within 45 days of an affirmative final subsidy determination by the Commerce Department. If the Commerce Department has made a negative preliminary subsidy determination and a positive final determination, the ITC must make a final injury determination within 75 days of the final subsidy determination. If both the final injury determination and the final subsidy determination are positive, then the Commerce Department issues a CVD order (19 U.S.C. § 1671d).

A decision of the Commerce Department or the ITC may be appealed to the U.S. Court of International Trade, which has exclusive jurisdiction over such appeals (19 U.S.C. § 1516a(2)(B); § 1516a(a)(1)(C)). Appeals from decisions of the Court of International Trade are taken to the Court of Appeals for the Federal Circuit, which reviews the underlying agency determination to see whether it is supported by substantial evidence or otherwise is in accordance with the law, rather than reviewing the decision of the Court of International Trade (*See, e.g., Matsushita Elec. Indus. Co., Ltd. v. United States, 1984*).

Remedies. Consistent with WTO law (SCM Agreement, *supra* note 100, art. 19.), U.S. law provides for two types of relief in CVD proceedings: (1) the imposition of CVDs (provisional and definitive duties); or (2) a suspension agreement (referred to as a price undertaking in the SCM Agreement) (19 U.S.C. § 1671).

Provisional duties are imposed when the Commerce Department makes an affirmative preliminary determination regarding the existence of countervailable subsidies. The Commerce Department instructs the U.S. Customs and Border Protection to order the suspension of liquidation of all entries of merchandise subject to the determination which are entered, or withdrawn from warehouse, for consumption on or after the later of the date on which notice of the determination is published in the Federal Register, or the date which is 60 days after the date on which notice of the determination to initiate the investigation is published in the Federal Register. All entries of subject merchandise are subject to a security requirement. The importer must, at the time the merchandise is entered, post security in an amount sufficient to cover the CVD liability as set forth in the preliminary determination. Although the statute provides for acceptance of security in the form of "a cash deposit, bond or other security," (19 U.S.C. § 1671b(d)(1)(b)).

In 2011 the Commerce Department announced that it would “normally” accept only cash deposit as security (Modifications of Regulations Regarding the Practice of Accepting Bonds During the Provisional Measures Period in Antidumping and Countervailing Duty Investigations).

If the Commerce Department makes a preliminary affirmative determination of “critical circumstances,” the suspension of liquidation applies retroactively. Such critical circumstances exist if (1) the alleged countervailable subsidy is inconsistent with the SCM Agreement; and (2) there have been “massive imports” of subject merchandise over a relatively short period. (19 U.S.C. § 1671b(e)). Retroactive liquidation applies to entries made beginning on the later of the date of publication of the notice of initiation of the investigation (normally, 20 days after the filing of petition), or 90 days after the preliminary determination.

If the preliminary investigation is negative, the Commerce Department conducts a final determination, although there is no suspension of liquidation.

Definitive duties are imposed when the ITC makes an affirmative final determination of injury. Within 7 days after being notified by the ITC of an affirmative final determination the Commerce Department publishes in the Federal Register a CVD order (19 U.S.C. § 1671e). Once a CVD order is in effect, all entries are subject to a cash deposit requirement equal to the subsidies percentage found in the final determination (19 U.S.C. § 1671d). Duties are imposed on all subject merchandise entered on or after the date of suspension of liquidation (i.e. Commerce’s preliminary affirmative determination), unless the ITC’s final determination is based on threat of material injury or material retardation. In these cases, duties are imposed only on merchandise entered on or after the date of publication of the ITC’s final affirmative determination.

CVD orders are subject to annual administrative reviews, conducted upon request as frequently as once a year by the Commerce Department, and “changed circumstances” review, conducted by either the Commerce Department or the ITC, depending upon the nature of the change involved. “Sunset” review must be conducted on each CVD order no later than once every 5 years. (19 U.S.C. § 1675). The Commerce Department determines whether subsidies would be likely to continue or resume if an order were to be revoked, and the ITC conducts a similar review to determine whether injury to the domestic industry would be likely to continue or resume. If both determinations are affirmative, the CVD

remains in place; if either determination is negative, the order is revoked (19 C.F.R. § 351.218.).

A compensation agreement is an alternative to imposing CVDs. A compensation agreement is an agreement between the Commerce Department and (1) the exporters and producers, or (2) the foreign government, whereby the latter agrees to modify their behavior so as to eliminate subsidization or the injury caused thereby (19 C.F.R. § 351.208). The statute provides for only three types of suspension agreements: (1) agreements to cease exporting the investigated product to the United States; (2) agreements to eliminate the subsidies (i.e. to eliminate the subsidies completely or to offset the subsidy with an export tax); and (3) agreements to eliminate injurious effects of subsidies (the agreement must eliminate or offset at least 85 percent of the subsidy and must result in the elimination of the suppression or undercutting of U.S. prices) (19 U.S.C. § 1675c(b)(1)). In practice, however, the first type of agreement doesn't happen, because there is no incentive for the exporter to enter into it. An exporter that intends to stop exporting to the United States could simply withdraw from the case rather than go through the procedural difficulties of a suspension agreement (Cohen 2015 *supra* note 7, at 65). Therefore, there are basically two types of suspension agreements: to eliminate the subsidy and to eliminate injurious effects.

3. Consistency with WTO Rules

In general, U.S. CVD law and administrative practice are consistent with WTO law. This has been achieved through the implementation of WTO rules by the Uruguay Round Agreements Act of 1994, as well as, through implementing the Dispute Settlement Body's (DSB) decisions. At the same time, CVDs imposed by the United States have been the most challenged in the WTO. Of the 41 cases in which a CVD was challenged on the ground of its inconsistency with the SCM Agreement, 26 were brought against the United States (WTO Index of Disputes by Agreement Sited). The disputes are various and distinct; at the same time, they address only certain, very specific aspects of U.S. law and administrative practice.

For example, in *US – Softwood Lumber IV* Canada granted a financial contribution in the form of the provision of goods by granting the right to harvest standing timber (“stumpage”) at terms beneficial to harvesters. When the stumpage was harvested, the logs were further processed into primary lumber by sawmills. Part of such lumber was further processed by

independent remanufactures into remanufactured lumber. The Commerce Department imposed CVDs on both primary and remanufactured lumber on the basis of a determination that stumpage had been subsidized, without assessing whether the benefit was effectively passed through to independent lumber producers. The Appellate Body decided that where the CVDs are to be imposed on processed products, and where a downstream producer is unrelated to the alleged subsidized upstream producer of the input, the investigating authority is not allowed to simply assume that a benefit has passed through. Similarly, in *US – Lead and Bismuth II*, the Appellate Body concluded that the Commerce Department should not have presumed that the non-recurring subsidies given to a state-owned enterprise would have passed through.

The United States has generally complied with DSB rulings. In one case, however, it failed to do so, resulting in retaliatory measures imposed against the United States. In *US – Offset Act (Byrd Amendment)*, the Appellate Body condemned the so-called Byrd Amendment by finding that it was inconsistent with the SCM Agreement. Enacted on October 28, 2000, the Byrd Amendment mandated the distribution of the proceeds from CVDs to all U.S. producers supporting a domestic petition seeking such duties. The U.S. Customs Services distributed a total amount of \$231 million in 2001 and \$329 million in 2002 (U.S. Customs Annual Report 2001). As Congress explained, the purpose of U.S. unfair trade law is to restore the conditions of fair trade in order that economic investment and jobs that should be in the United States are not lost as a result of disingenuous market signals; and if foreign subsidization persists, U.S. producers will be hesitant to rehire employees that were laid off in order to survive and may be incapable of maintaining pension or health care benefits (Historical & Statutory Notes 1999).

From the time of its enactment, the Byrd Amendment was controversial both domestically (See, e.g. Bhagwati J. & Mavroidis P. 2004, Xuesong A. 2005) and internationally. In the largest joint dispute resolution action in the history of the WTO, thirty countries challenged the Byrd Amendment. Eleven complaining parties (Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand) were accompanied with five third-party participants (Argentina, Costa Rica, Hong Kong, Israel and Norway). Together, the 15 parties represent 30 countries, given that the “European Communities” represented the 15 countries of the EC (Austria, Belgium, Denmark, Finland, France, Germany, Greece,

Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom). The Appellate Body found that the Byrd Amendment is inconsistent with Article 32.1 of the SCM Agreement because it is a specific action against a subsidy other than those permitted by the SCM Agreement (US – Offset Act, *supra* note 216, para. 265). Since the SCM Agreement allows only three measures in response to subsidies (provisional CVDs, definitive CVDs, or a price undertaking), the United States violated its obligations under the WTO by introducing a measure to counteract a subsidy other than the three permissible forms.

In June 2003, the United States was granted eleven months to bring the measure into conformity with its WTO obligations (United States – Continued Dumping and Subsidy Offset Act. Arbitrator Award.) When the United States failed to do so, the WTO authorized retaliation by eight complaining WTO Members, giving them the right to impose additional import duties having a total trade value of up to 72% of total Byrd Amendment disbursements (United States – Continued Dumping and Subsidy Offset Act of 2000. Arbitrator Decisions.).

In February 2006, the United States eventually repealed the Byrd Amendment effective October 1, 2007. Nevertheless, while duties are no longer collected under the Byrd Amendment, distribution of “duties on entries of goods made and filed before October 1, 2007” continue (Deficit Reduction Act of 2005). The WTO complaining Members asserted that the United States had not brought its measures fully into conformity with the DSB ruling (Communication from the European Union. United States – Continued Dumping and Subsidy Offset Act of 2000). As a result, the EU continues to apply retaliatory tariffs. Japan also continued to apply the retaliatory measures until 2014, when they notified the DSB about non-application of the suspension of concessions because the authorized level was marginal (Current Status of US – Offset Act (Byrd Amendment)).

Furthermore, in three disputes, the compliance proceedings are still ongoing (*US – Countervailing Measures (China)*, *US – Countervailing and Anti-Dumping Measures (China)*, *US – Washing Machines (Korea)*). In particular, in *US – Countervailing Measures (China)*, the Appellate Body found that the Commerce Department had applied unlawful standards and methodologies for determining the benefit to the recipient. The Appellate Body concluded that “government-related prices” other than the financial contribution at issue should not be automatically rejected and may serve as a benchmark in calculating the benefit for the purpose of determining the

existence of a subsidy under Article 14 of the SCM Agreement, provided they are market determined. On this basis, it was found that the United States acted inconsistently with its obligation under Article 14(d) as it failed to conduct the necessary market analysis to verify whether in-country prices in China were market determined or not.

In *US – Countervailing and Anti-Dumping Measures (China)*, the Panel addressed the issue of “double remedies,” where the simultaneous application of anti-dumping and CVDs on the same imported products results in the offsetting of the same subsidization twice. The Panel explained that (1) the imposition of double remedies arising from concurrent imposition of CVDs and anti-dumping duties calculated under non-market economy methodology is inconsistent with the obligation in Article 19.3 of the SCM Agreement to levy CVDs “in the appropriate amounts”; and (2) the burden is on an investigating authority imposing such concurrent duties to investigate whether it is offsetting the same subsidies twice. Therefore, it was found that the United States acted inconsistently with Article 19.3 by failing to investigate whether double remedies arose in 25 CVD investigations.

In the most recent case, *US – Washing Machines*, the Appellate Body concluded that the Commerce Department’s calculation of ad valorem subsidization rate fails to ensure that CVDs are not imposed in excess of the amount of subsidy found to exist. The Commerce Department originally found that tax credits Samsung received from the Government of Korea were not tied to any particular products and, therefore, attributed the subsidies received by Samsung under those programs across all products. According to the Commerce Department, a subsidy is tied to a product “only when the intended use is known to the subsidy giver” (Issues and Decision Memorandum 2012, p. 41) and in the present case the Government of Korea “had no way to know the intended use” of the subsidy at the time Samsung was authorized to claim the tax credits (Issues and Decision Memorandum 2012, pp. 41–42).

Although the Appellate Body confirmed that the SCM Agreement does not dictate any particular methodology for calculating subsidy ratios and an investigating authority has the discretion to choose the most appropriate methodology for carrying out its calculation, the methodology, nevertheless, has to allow for a sufficiently precise determination of the amount of subsidization bestowed on the investigated products, as required under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT. The

Appellate Body explained that, rather than focusing on “the intended use,” the appropriate inquiry into the existence of a product-specific tie requires: “. . . a scrutiny of the design, structure, and operation of the subsidy at issue, aimed at ascertaining whether the bestowal of that subsidy is connected to, or conditioned on, the production or sale of a specific product. Based on this assessment, a subsidy that does not restrict the recipient’s use of the proceeds of the financial contribution may, nevertheless, be found to be tied to a particular product if it induces the recipient to engage in activities connected to that product.” (US – Washing Machines, para 5.273).

Thus, it was found that the Commerce Department acted inconsistently with the United States’ obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT by applying a flawed test for ascertaining whether the tax credits were tied to particular products.

Conclusion

U.S. CVD law has undergone substantial change over the last century. The current law is the result of a certain synthesis between internal developing and evolving of CVD law and bringing it into conformity with GATT/WTO rules. Indeed, on the one hand, the United States has demonstrated historical leadership in developing CVD law. It is not surprising, therefore, that WTO law has accepted certain fundamental features of U.S. CVD law (such as “benefit” and “specificity” requirements). On the other hand, the United States was ready for the changes on a multilateral level and a number of changes in U.S. law over time have been specifically in response to developments in GATT and WTO rules (for example, “financial contribution” requirement, injury to the domestic industry, sunset provision). The recent WTO case-law demonstrates that despite the inconsistency of certain aspects of U.S. CVD practice and methodologies with WTO law, general concepts underlying U.S. CVD law closely follow the language of the WTO agreements.

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АНОТАЦІЯ

Опейда З. Й. Законодавство США про компенсаційні заходи та правила СОТ щодо субсидій: питання відповідності. – Стаття.

У даній статті розглядаються норми законодавства США щодо компенсаційних мит, які регулюють питання субсидій та компенсаційних заходів у сфері зовнішньої торгівлі. Проаналізовано підходи до тлумачення базових визначень,

що встановлюються у рамках антисубсидійного розслідування – понять субсидії та завданої шкоди, які сформувався у практиці Міністерства торгівлі США та Комісії з міжнародної торгівлі США. Визначаються повноваження та компетенція відповідних органів щодо ведення розслідування та застосування компенсаційних заходів. Характеризується судова практика щодо визначень субсидованого імпорту та шкоди національному товаровиробнику. Також розглядається процедура антисубсидійного розслідування, включаючи такі етапи, як подання клопотання, порушення розслідування, попереднє розслідування, попереднє та остаточне визначення субсидій та шкоди, апеляції тощо. Визначено можливі засоби правового захисту, які застосовуються за результатами відповідного розслідування, та включають: (1) введення ССЗ (тимчасові та остаточні збори); або (2) укладання угоди про призупинення (має назву “цінове зобов’язання” в Угоді СКМ). Особлива увага приділяється питанням узгодження законодавства США з правилами СОТ щодо субсидій. Зокрема детально аналізується ряд справ, вирішених Органом з врегулювання спорів СОТ (ДСБ) щодо застосування Сполученими Штатами Акту щодо триваючого демпінгу та субсидій 2000 р., зокрема США – Компенсаційні заходи (Китай), США – Антидемпінгові та Компенсаційні заходи (Китай), США – Пральні машини (Корея) тощо. Висвітлюються основні висновки ДСБ, дії США щодо забезпечення відповідності правилам СОТ та заходи інших членів СОТ у відповідь.

Ключові слова: СОТ, Угода про субсидії та компенсаційні заходи, субсидія, компенсаційне мито, антисубсидійне розслідування, Поправка Берда, Тарифний Акт 1930 року США.

АННОТАЦІЯ

Опейда З. И. Законодательство США о компенсационных мерах и правила ВТО о субсидиях: вопросы соответствия. – Статья.

В данной статье рассматриваются нормы законодательства США о компенсационных пошлинах, регулирующие вопросы субсидий и компенсационных мер в сфере внешней торговли. Проанализированы подходы к толкованию базовых определений, устанавливаемых в рамках антисубсидиционного расследования – понятий субсидии и ущерба, которые сформировались в практике Министерства торговли США и Комиссии по международной торговле США. Определяются полномочия и компетенция соответствующих органов по расследованию и применению компенсационных мер. Характеризуется судебная практика относительно определений субсидированного импорта и вреда национальному товаропроизводителю. Также рассматривается процедура антисубсидиционного расследования, включая такие этапы, как подача ходатайства, расследование, предварительное расследование, предварительное и окончательное определение субсидий и вреда, апелляции и тому подобное. Определены возможные средства правовой защиты, которые применяются по результатам соответствующего расследования, и включают: (1) введение ССЗ (временные и окончательные сборы) или (2) заключение соглашения о приостановлении (называется “ценовое обяза-

тельство” в Соглашении СКМ). Особое внимание уделяется вопросам согласования законодательства США с правилами ВТО о субсидиях. В частности подробно анализируется ряд дел, разрешенных Органом по разрешению споров ВТО (ОРС) по применению Соединенными Штатами Акта о делящемся демпинге и субсидиях 2000, в частности США – Компенсационные меры (Китай), США – Антидемпинговые и компенсационные меры (Китай), США – Стиральные машины (Корея) и др. Освещаются основные выводы ОРС, действия США по обеспечению соответствия правилам ВТО и ответные меры других членов ВТО.

Ключевые слова: ВТО, Соглашение о субсидиях и компенсационных мерах, субсидия, компенсационная пошлина, антисубсидиционное расследование, Поправка Берда, Тарифный Акт 1930 года США.

