

On the Practice and Dispute of the Rules for Determining the Specificity of Exchange Rate Subsidies in the United States

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Abstract. The U.S. Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings proposed in 2020 incorporated currency exchange rate undervaluation to the subsidy program and clarify the concept of a "group" of enterprises in the subsidy specificity. The exchange rate undervaluation, if needed to be regulated or prohibited, must be subsidy-specific. The Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings generalizes the concept of a "group" of enterprises to facilitate a de facto specificity determination for exchange rate subsidies. The application of this rule has been found in the exchange rate subsidy investigations initiated by the U.S. in the past two years, making it more difficult for the investigated country to defend itself. However, the rules of specifying the U.S. exchange rate subsidies are not compatible with the SCM Agreement under the WTO framework. In this regard, China can actively defend against the inconsistency between the rules of the U.S. exchange rate subsidies and the SCM Agreement, enhance the transparency of the relevant exchange rate policies and exchange rate operations, pay attention to procedural participation, and improve the skills of responding to the lawsuit.

Keywords: exchange rate subsidy, specificity of subsidy, Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings, currency undervaluation.

1. Introduction

The past few years have witnessed all the measures the U.S. took for picking trouble with China in terms of the RMB exchange rate issues and import/export trade issues. Since the WTO Appellate Body was at a standstill, the U.S. has made use of the countervailing proceedings within the states to launch an aggressive onslaught against China's subsidy program. In April 2020, the U.S. Department of Commerce issued the *Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings* (hereinafter "*the Regulations*"), which formally defines exchange rate undervaluation as a subsidy item under the countervailing duty law. Meanwhile, *the Regulations* also made a clear concept of "group" of enterprises in subsidy specificity. Within just one year after *the Regulations* formally implemented, the U.S. has filed four countervailing duty investigations against China for RMB undervaluation, which shows that the U.S. is raging and prepared for the trade war against China^[1]. However, whether exchange rate undervaluation can be eligible for subsidies remains to be verified. In this regard, specificity, as a marker to identify whether a subsidy causes distortions in resource allocation, is a legal prerequisite to make a subsidy justiciable. In general, The exchange rate policy is universally applicable to the whole economy, which is naturally incompatible with specificity, and it is undoubtedly a great challenge to the legislation and explanatory power if the exchange rate subsidy has specificity. Based on all the above factors, this paper conducts a study on the determination of the specificity of exchange rate subsidies in the U.S., analyzes the specific interpretation and application in practice in the context of the exchange rate subsidy proceedings initiated by the U.S. since the introduction of *the Regulations*, and reviews on the controversial points therein. Countermeasures to deal with the exchange rate subsidy investigations are proposed in the end for reference to meet the challenge exerted by the U.S.

2. Exchange Rate Subsidy and the Regulation: An Overview

Exchange rate undervaluation refers to the case that the currency of a nation is said to be undervalued when its value in foreign exchange is low. In such cases, enterprises in the nation can enjoy a lower competitive market price in foreign markets, thus obtaining a large amount of foreign currency, which can be exchanged for more domestic currency than the normal value of it through the settlement of foreign exchange designated banks. In this process, the difference between them (extra domestic currency earned) is recognized as a government subsidy^[2].

In fact, the U.S. has been concerned about the problem of exchange rate undervaluation for a long time, and in 2010, it attempted to charge against countries with undervalued exchange rates through *the Currency Reform for Fair Trade Act* (known as Ryan—Murphy Bill in China), but failed. With the rise of trade protectionism, the U.S. Department of Commerce issued *the Regulations* in April 2020, officially laying emphasis on the exchange rate undervaluation programs. The most evident modification of this regulation includes two aspects. The first is that the Commerce adds the new 19 CFR 351.528, which clarifies and governs the determination of undervaluation, including three paragraphs (a to c). The other is the modification of 19 CFR 351.502, which addresses specificity of domestic subsidies. The 19 CFR 351.502 adds new paragraph (c) explaining that enterprises that buy or sell goods internationally can comprise a "group" of enterprises for specificity purposes. The paragraph tells, "In determining whether a subsidy is being provided to a 'group' of enterprises or industries within the meaning of section 771(5A)(D) of the Act, the Secretary normally will consider enterprises that buy or sell goods internationally to comprise such a group."

However, even *the Regulations* treats the exchange rate undervaluation as a certain program of subsidy, the *Agreement on Subsidy and Countervailing Measures* (hereinafter the SCM Agreement) stipulates that there are three elements to consider in subsidies, namely, the financial support, granting of benefits, and the specificity. From the perspective of economics, subsidies naturally have both positive and negative attributes and cannot be prohibited or restricted across the board. Specificity can be adopted to identify the adverse effect on international trade and distortion on the economy, and is a criterion for distinguishing subsidies in general from those that are worth regulating^[3]. In a legal sense, specificity is the criterion for distinguishing whether a subsidy is justiciable. Only those subsidies with specificity are subject to countervailing laws. In other words, the specificity is a screening mechanism, and only subsidies that meet the requirement of it can be classified as "pernicious subsidies" and come under the scope of regulation. Therefore, in order to identify exchange rate undervaluation as a subsidy subject to countervailing laws, it is necessary to analyze whether it coincide with the subsidy specificity criterion.

In the view of the U.S. Department of Commerce, the undervaluation of the exchange rate of another country undoubtedly constitutes a transfer of funds in financial assistance, while the rules for the granting of benefits and specificity caused by the undervaluation of the exchange rate regulated by the single exchange rate system are vacant. Therefore, *the Regulations* come, which reflects the attempt to fill the gap in the rules of benefit grants and specificity under the condition of exchange rate undervaluation of other countries^[4]. However, whether the regulations can be referred for determination of exchange rate subsidies remains to be further analyzed.

3. Coupling of Exchange Rate Subsidy and its Specificity

3.1 Determination of Subsidy Specificity

The concept of specificity first appeared in the U.S. Trade Agreements Act of 1979, which stipulates justiciable subsidies must be "provided to a particular enterprise, sector, group of enterprises, or group of sectors". Besides, it made the first restrictive interpretation of who is granted the subsidy. The pre-determined goal of the specificity standard is to control the number of countervailing investigations within the United States, and it can serve as a practical tool for administrative investigative authorities to prevent the excessive and even abusive application of the

Countervailing Duty Law (CVDL)^[5]. After a long period of development in the past, a quite complete U.S. rules for determining the specificity of subsidies had been formed, together with a more universally-acknowledged specificity determination inspired from long-term practice and clear investigation process. This can be reflected in § 771 (5A) of the U.S. Tariff Act of 1930. The corresponding subsidies with specificity refer to the allowance a country's authorities provide for a specific enterprise, industry, a group of enterprises or industry within its borders. The specificity determination is mainly for domestic subsidies, while import substitution subsidies and export subsidies are prohibited and automatically presumed to be specific, which do not need to be further elaborated. Specificity can be further divided into de jure and de facto specificity.

According to § 771(5A) (D), legal specificity means that the subsidy-granting authority or the legislation under which it operates expressly limits the recipients of the subsidy to a group of enterprises or industries. However, a type of subsidy is not specific if the eligibility and amount of the subsidy are subject to objective criteria or conditions, and the subsidy is automatically granted once those criteria or mediation are met. In U.S. practice, however, legal specificity is determined by whether the subsidy program is legally or textually authorized^[6]. If the subsidy recipient in question can defend the authorization of laws and regulations or restrictive wording in the text, it is normal for the U.S. Department of Commerce to determine that it has the legal specificity.

As for the de facto specificity, it means that a subsidy, while not directly restrictive in legislation, is limited in its actual operation to a specific group of recipients of the benefit. In accordance with § 771(5A)(D), a de facto specificity determination requires an examination of the following factors: (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number. (II) An enterprise or industry is a predominant user of the subsidy. (III) An enterprise or industry receives a disproportionately large amount of the subsidy. (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others. In addition, factors such as the degree of diversity of economic activities within the jurisdiction of the subsidy granting authority and the duration of the subsidy program that has been in place should also be considered. According to 19 CFR 351.502, the Department of Commerce of the US should examine the factors mentioned above, and if a single factor warrants a finding of specificity, the Secretary will not undertake further analysis. In the U.S. countervailing investigation process, the Department of Commerce will often first examine whether there is de jure specificity of the subsidy. If so, the existence of specificity of the subsidy can be directly determined; if not, it is also necessary to examine whether there is de facto specificity, and only if it is determined that there is no de facto specificity will the subsidy finally be determined not to have specificity^{错误!未定义书签.}. In this way, de facto specificity determination actually becomes the "final line of defense" for subsidy specificity determination, which is also one of the most complicated steps in practice.

3.2 Dilemma in the Positioning of Exchange Rate Subsidy

The U.S. Department of Commerce had a long history of difficulties in determining the specificity of exchange rate undervaluation. Based on the general understanding that exchange rate policies are universally implemented for a country or region and for the entire population, it is difficult to correlate this broad feature with specificity. Moreover, it is difficult to define exchange rate undervaluation as subsidies under the U.S. countervailing law, whether taking it as export one or domestic one. It can be found in the newly-added §528 in *the regulations* that there are no direct rules for determining the specificity of currency undervaluation, and the U.S. Department of Commerce claims that *the Regulations* will not resolve disputes over the specificity of currency undervaluation subsidies per se, but rather will leave it to the Department to analyze the various elements of monetary subsidies on a case-by-case basis^[7]. In fact, there is no choice but to not directly categorize the exchange rate subsidies, which is a sensible choice. In the case of undervaluation of exchange rates, it is difficult to directly constitute a type of subsidy under the current law, and to explicitly characterize the undervaluation of currency may increase the difficulty of justification in practice, so it is better to

adopt a broad interpretation approach to reserve sufficient discretionary space for the investigating authority. By avoiding the positive rebuttal of the claim that subsidies related to the exchange rate cannot be "specific", it establishes the legitimacy of the investigation of exchange rate subsidies and achieves the effect of gaining advantages by striking first^[8].

Ostensibly, the recognition of exchange rate subsidies as export subsidies seems to obviate the problem of specificity determination and becomes the optimal solution to legalize exchange rate subsidies. However, according to the definition, the acquisition of export subsidies needs to be linked to the actual export performance, while the subsidies of exchange rate undervaluation originate from the enterprises' conversion of their foreign exchange holdings into national currency through banks, which does not take the actual export performance as a prerequisite for its acquisition. Therefore, from the perspective of textual interpretation, it is difficult to classify exchange rate subsidies into export subsidies. Actually, the United States has made such attempts in past practice. In the Copperplate Paper case against China, the U.S. Department of Commerce argued that as the excess RMB received by the enterprise was independent of the exchange of U.S. dollars involved in the transaction or business activity, or independent of the exchange of U.S. dollars by the company or individual, the exchange rate undervaluation was found not to constitute an export subsidy. By contrast, the rules for determining the specificity of domestic subsidies, while complex, are heavily dependent on the interpretation and application of individual facts due to the determination of legal specificity and factual specificity^[9]. In practice, the investigating authority was conferred with more discretionary power, thus it is possible to determine the specificity of exchange rate subsidies. The addition in §528 of *the Regulations* is not placed in the chapter related to export subsidies, but in the chapter about domestic subsidies, which is a hint showing that domestic subsidies are the main target of the revised version.

3.3 Behind the Concept of "Group": Possible Paths for Exchange Rate Subsidy Specificity

From the perspective of domestic subsidies, exchange rate undervaluation and foreign currency exchange are not explicitly authorized by the law, and it is difficult to verify them directly by the definition of de jure specificity, so de facto specificity becomes the main choice. In terms of the difficulty of argument, the U.S. does not need to examine all the elements in the de facto specificity, but only requires one of the elements to be met in order to be found to have de facto specificity. Moreover, due to the fact that several elements of specificity are vaguely expressed in the legal text, the Department of Commerce enjoys flexible interpretation in individual cases, and this fact-based discretionary approach can reduce the legal barriers to the determination of the specificity of exchange rate subsidies to a certain extent. In previous cases, DOC pointed out that the concepts of "major use" and "disproportionate use" could not be quantified, so it could only rely on specific legal facts to make the determination of subsidy specificity in individual cases^[9]. In practice, if the subsidized enterprise involved in the case receives a large proportion of the benefits, it is easy to be identified as "major use" or "disproportionate", and the standard of "large" proportion is all dependent. The criteria for a "greater" proportion is entirely at the discretion of the Department of Commerce. This means that if a specific enterprise receives a certain percentage of foreign currency from the currency exchange process during a period of lower exchange rates, it is easy to be considered de facto specific.

With the determination of the conduct element of exclusivity sufficiently resolved by existing law, the only remaining obstacle to the determination of the specificity of exchange rate subsidies is the prerequisite of how to prove the "limit of the recipients of the subsidy". According to the overview part of section 771(5A)(D), both the legal and factual specificity determinations presuppose that the subsidy is granted to a "specific enterprise or industry". Therefore, the modification of the rules should be the prior task of *the Regulations*. The newly-added § 502(c) states that enterprises that buy or sell goods internationally are to comprise such a group. Seemingly, it supplements the term "group", but it aims to clarify the concept of a "group" of enterprises. On the contrary, this concept is conducive to the U.S. Department of Commerce to quickly "match" the enterprises involved in the case, shifting and reducing the burden of proof on the Department of Commerce. Since this criterion of "enterprises

engaged in international trade of goods" is quite broad, with this provision, the DOC may bypass the applicant's questioning of its own eligibility in the investigation and the definition of the number and type of enterprises, but directly determines its compliance with the prerequisites of subsidy specificity based on the industry it belongs to, which in effect lowers the threshold of specificity determination. Thus, it seems that the concept of "a group" of enterprises in *the Regulations* seems to be independent from the new rules on exchange rate subsidies, but in fact it is a supporting rule for exchange rate subsidies, which greatly facilitates the determination of the de facto specificity of exchange rate subsidies.

4. Practice and Disputes on the Determination of the Specificity of Exchange Rate Subsidies

4.1 U.S. Subsidy Specificity Determination in Exchange Rate Subsidy Investigation

In less than one year after the publication of *the Regulations*, the U.S. has launched four countervailing investigations against China on exchange rate undervaluation. An in-depth analysis of the relevant cases can help understand the application of the above-mentioned rules on exchange rate subsidies in practice and provide reference for future response to exchange rate subsidy investigations.

On February 17, 2021, the U.S. Department of Commerce issued a final affirmative countervailing determination on the zip ties from China, holding that the products caused substantial injury to the U.S. domestic industry^[10]. In the case, the determination of the specificity of the exchange rate undervaluation centered on the de facto specificity determination. In the preliminary adjudication, with the rules of "Adverse Facts Available", the U.S. Department of Commerce, on the grounds that the Chinese government did not provide sufficient information and failed to fully cooperate with the investigation, directly determined that the subsidies involved were used by a group of enterprises with goods trading sector, thus satisfying the subject requirement of "a group" of enterprises. Subsequently, the U.S. Department of Commerce, based on a comparative analysis of the IMF's data on the inflow of U.S. dollars into China and the trade data published by the General Administration of Customs of the People's Republic of China (GACC), concluded that the vast majority (69.9%) of the U.S. dollars flowing into China during the investigation period came from commodity exports. Thus, it held that the goods trade industry was the primary user of foreign exchange, and therefore the exchange rate undervaluation subsidy program granted by the Chinese government to the companies involved in the case constituted a factual specificity^[11]. The Chinese government questioned whether the foreign currency exchange constitutes a "subsidy program". It argued that according to Section 2.1(c) of the SCM Agreement and Section 771(5A) of the Tariff Act of 1930, which stipulates that the specificity determination is premised on the existence of a "subsidy program", the use of the generalized term "action plan" or "policy order" is not sufficient to constitute a "subsidy program". In short, the U.S. Department of Commerce cannot simply "label" it as constituting an existing subsidy program in the absence of a substantial and detailed analysis and strong evidence. Moreover, even assuming that currency exchange constitutes a subsidy program, since exchange rate policies are implemented for all types of economic entities, they are not exclusive as provided in the above law^[12]. However, in the final arbitration, the U.S. Department of Commerce did not answer the above questions, nor did it recognize the preliminary judgment, but instead adopted an ambiguous response. After considering all of the evidence in the record and the parties' arguments, the Department of Commerce concluded that the case was complex, which involved a complicated and multifaceted analysis of multiple economic variables, requiring more time and data to finally determine the granting of benefits and specificity of the program. Therefore, the decision was deferred to the administrative review^[13]. From the result of the zip tie case, it is more difficult to identify the factual specificity of the exchange rate undervaluation subsidy because the exchange rate policy is not exclusive in nature. Our single exchange rate system applies universally and automatically to all enterprises within China, without industrial and regional distinctions, not satisfying the requirement of specificity^[14]. Even if the U.S.

adopted legislative techniques and flexible interpretations, it would be difficult to make exchange rate subsidy logically exclusive.

In the following automobile chassis case, the U.S. Department of Commerce took the same path in its preliminary adjudication to conclude that the product involved showed exchange rate subsidy specificity. The Chinese government borrowed the fact that the U.S. Department of Commerce in the twist tie case deferred the determination of specificity to argue that the exchange rate program had insufficient grounds for subsidy specificity. At the same time, it continued to defend the broad nature of currency exchange, arguing that currency exchange was not limited to export trade enterprises, but applied widely to the entire economy. It pointed out that the U.S. government's concept of "a group" of enterprises is too general and lacks the commonality requirement for enterprises^[15]. However, China's request was still not supported by the U.S. Department of Commerce in the final judgment. That is because the applicant cited the view of the U.S. Department of Commerce when *the Regulations* were amended, that export subsidies and import substitute subsidies are inherently exclusive, with no need to argue whether the industry or enterprise of the subsidy recipients is narrow or diverse. Low exchange rates can reduce export prices and raise import prices, directly distorting international trade and creating the same adverse impact as providing both import substitution and export subsidies. Thus, treating enterprises engaged in international goods trade as "a group" is consistent with the focus and purpose of the trade remedy law^[16]. That claim was supported by the U.S. Department of Commerce in the final decision. In short, when interpreting the application of the exchange rate subsidy rules, the Department of Commerce compared exchange rate undervaluation subsidies to export subsidies and import substitution subsidies only on the basis of the similarly harmful consequences, deducing that as long as the exchange rate subsidies were granted to industries engaged in international goods trade, even if they were clearly widely applied to an entire economy, nothing could deny their specificity. Such interpretation completely overlooks the legal text, ignores the definition of export and import subsidies, and creates a new rule for the determination of subsidy specificity, which deviates from the basic requirement of subsidy specificity review.

Through the above exchange rate countervailing investigations initiated by the U.S. against China, it can be seen that although the introduction of *the Regulations* provides legal support for the determination of exchange rate subsidy specificity, there are still difficulties in the application of the relevant rules in individual cases. The U.S. Department of Commerce was unable to argue for the existence of the specificity of exchange rate subsidies with sufficient reasons, and it never gave a clear answer to the question that "the beneficiary of exchange rate undervaluation is the whole economy rather than only the international goods trading enterprises".

4.2 Challenges to the Interpretation and Application of the Exchange Rate Subsidy Specificity Rules

4.2.1 From the Perspective of U.S. Domestic Law

According to the current exchange rate subsidy investigations practice, even if we leave aside the reasonableness of *the Regulations*, mistakes exist in the specific application of the rules on the determination of exchange rate subsidy specificity by the U.S. Department of Commerce. Literally, the concept of "a group" of enterprises is introduced to explain the industrial characteristics of the relevant enterprises. "Engaged in international goods trade" is a descriptive concept. Since there are a wide range of enterprises engaged in international goods trade, that description is not sufficient to determine the criteria of "a group" of enterprises. The U.S. Department of Commerce also made an explanation when *the Regulations* were introduced: "The amendments to 19-CFR 351.502 constrain to the definition of "a group", unable to address the specificity of particular types of subsidies. On the contrary, an affirmative or negative finding can only be made in a countervailing investigation procedure. ^[17]" In terms of the analysis on logicity, "enterprises engaged in international goods trade" (A) belongs to a large scope, whereas "a group of enterprises meeting the requirements of specificity determination" (B) is a small scope. B is a subset of A. However, the current practice that

the U.S. Department of Commerce can directly identify the enterprises "engaged in goods trade" (A) as B, is actually a logical fallacy of replacing small concepts with large ones.

4.2.2 From the Perspective of WTO Agreement

Under the conditions of the global multilateral monetary and trade regimes, U.S. domestic legislation is subject to the constraints of the international treaty obligations. If the new U.S. exchange rate countervailing regulations violate the relevant international rules, it will suffer a crisis of international legality^[18]. There are some inconsistencies between the U.S. exchange rate subsidy rules and the application of their interpretations in practice and the SCM Agreement.

First, the absence of examining the commonality of "a group" of enterprises is contrary to WTO practices and the legislative purpose of specificity standard. In the WTO's countervailing investigations, if a subsidy is granted to a wide enough target, it is not exclusive. For example, in *Brazil v. U.S. Cotton* case, the panel interpreted "specific enterprises" as a specific limited group of producers of certain products and noted that "subsidies that are widely available throughout the economy are not subsidies provided to specific enterprises^[19]." It delivers two messages, one is that "a group" is not judged by whether enterprises belong to a certain industry, but probably by the common product; another is that the subsidy must be exclusive, not available to the whole economy. The U.S. approach of not examining the exclusive or common nature of a "group" of enterprises is contrary to both WTO practice and the original legislative purpose of subsidy specificity. The introduction of the subsidy specificity criteria is intended to provide a relatively stable standard for determining subsidies, and prevent the abuse of discretion of investigating agencies, resulting in a broad subsidy definition. However, the U.S. classifies enterprises as a "group" based on the criterion of "enterprises engaged in international goods trade", without considering the commonality of enterprises, creating a standard that is not specified in the SCM Agreement. In order to depoliticize, the specificity review was originally established by the WTO to measure the legality of subsidies adopted by each member^[20]. However, nowadays, the specificity standard under the Regulations has become a product of trade protectionism as a tool for a government to manipulate exchange rate issues.

Second, it is inconsistent with WTO practice to hold that subsidies are factually specific merely based on the fact that the enterprise involved is the "major user", because according to Section 771(5A) of the U.S. Tariff Act of 1930, "a subsidy is specific if it satisfies one or more of the following elements", which means that any one of the four elements is sufficient to determine the factual exclusivity of the subsidy, making it much easier to determine the factual exclusivity in U.S. countervailing investigations. In the steel tube case of *U.S. v. Turkey*, the panel held that the investigating authority must consider the two factors of the "subsidy duration" and the "diversity of economic activities within the jurisdiction of the subsidy granting authority" to determine the factual specificity of the subsidy^[21], because although in practice the investigating authority can judge the "primary use" more easily based on the benefit ratio, without measuring and assessing the economic internal diversity and other enterprises receiving subsidies, it would be difficult to determine whether the subsidy has led to a mismatch of resources, which is the exclusive nature of the subsidy. In the case of merely identifying the "primary use", if a country's economy is oriented to goods exports, then the currency undervaluation subsidy may be considered largely exclusive; however, in the case of an Pacific island country, where the main economic source lies in foreign tourists, there is little chance that the currency undervaluation subsidy will be considered specific^[22], and it would be unfair for the country if it is identified as so.

4.3 Countermeasures to the U.S. Exchange Rate Subsidy Investigation

4.3.1 Actively Resorting to the Rules of International Law

On the one hand, China should defend against the unreasonable aspects in the U.S. exchange rate subsidy rules and their application based on the SCM Agreement. The SCM Agreement's rules on specificity are more flexible in interpretation, not yet fully harmonized in practice, which means that the country under investigation has more opportunities to defend itself. For the determination of "a

group" of enterprises, China can file a complaint with WTO, arguing that the U.S. domestic law is not consistent with the legislative intent of the SCM Agreement on subsidy exclusivity, and that the WTO judicial approach should be adopted, in opposition to the new criteria for the determination of "a group" of enterprises proposed by the U.S. [23]. As for the de facto specificity identification, the WTO has analyzed all the four factors in the past practice[24]. Therefore, China can start from the review process and try to advocate the review of the four items, especially the "duration" and the "degree of economic activity diversity", in order to limit the extensive proportion recognition of the U.S. subsidy grant benefit. On the other hand, China can also actively utilize bilateral agreements to solve problems. The conclusion of the China-US phase-one economic and trade agreement (hereinafter referred to as "the Agreement") may provide a new channel for resolving exchange rate disputes. Although the exchange rate undervaluation is deliberately packaged as a "subsidy" issue by the United States, it is essentially an exchange rate issue. China can claim that the unilateral actions of the U.S. side are suspected of violating the Agreement, and request further actions to be taken in accordance with the provisions of the Agreement[25].

4.3.2 Improving China's Ability to Respond to Exchange Rate Undervaluation Countervailing Investigations

Considering the source, the Chinese government should set self-restrictions when formulating foreign exchange policies, pay attention to the linguistic neutrality of the legal text when drafting legislation, and design a reasonable foreign exchange rate system. In the meantime, China should improve the flexibility and transparency of the RMB exchange rate system, and report to the IMF in a timely and comprehensive manner on China's foreign exchange policy and necessary foreign exchange intervention measures taken, so as to reduce other countries' unreasonable suspicions[26].

In terms of the ability to respond to the lawsuit, Chinese enterprises and the government should focus on countervailing investigation procedures. In the two aforementioned U.S. exchange rate countervailing investigations against China, our enterprises and the government were considered to have "failed the questionnaire survey required by the U.S. Department of Commerce" and did not "provide information as much as possible". Therefore, the U.S. Department of Commerce used the rule of "Adverse Facts Available" to make a direct presumption on the facts, which not only facilitated the determination of subsidy specificity, but also led to the abnormally high subsidy rate[27]. In fact, that is a common tactic of the U.S. in countervailing investigations against China. Prof. Yang Rongzhen has calculated that among the 74 cases in which the U.S. has made affirmative decisions on countervailing subsidies against China, some enterprises have not responded to the questionnaire; some have responded to the questionnaire but the content did not meet the requirements. In such cases, if the U.S. Department of Commerce cannot obtain accurate and specific information from the questionnaires answered by the enterprises or the government, it will, according to the "Adverse Facts Available", rule on the tax rate of such enterprise's subsidy programs[28]. Therefore, Chinese enterprises and government authorities involved in the case should be more active in the lawsuit, fill out the questionnaire effectively, and try their best to provide sufficient information in line with the U.S. requirements, so as to avoid being at a unfavorable position in the countervailing investigations.

5. Conclusion

In this globalized world of economy, no country can be independent from global industries and trade exchanges. In 2021, the total trade between China and the U.S. reaches 4.41 trillion yuan, an increase of 21.1%[29]. However, underneath the prosperity, trade frictions between the U.S. and China continue and the issue of exchange rate disputes hangs in the balance. The exchange rate undervaluation subsidy investigation is a brand-new challenge launched by the US to China. The new *Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings* is a leap by the U.S. to bridge the gap between specificity and exchange rate subsidies. In the new rule, the U.S. provides a path for exchange rate subsidy specificity determination through legislative techniques and flexible interpretation, but these practices not only have logical loopholes, but also violate the

requirement of the SCM Agreement. Even so, China is still in a disadvantageous position in the countervailing case of exchange rate undervaluation initiated by the United States. In this regard, China should have a clear understanding of the current international trade environment and trade legal system, and be alert to the rise of trade protectionism. On the one hand, we should actively resort to the rules of international law to solve the disputes on exchange rate subsidies, improve the relevant laws on subsidies and countervailing regulations in China, and strengthen the connection between domestic countervailing regulations and the SCM Agreement. This is a law-for-law measure China should take. On the other hand, we should improve our ability to respond to countervailing investigations in terms of policy formulation and litigation response skills, so as to avoid being put at a loss in confrontation with international investigations on exchange rate subsidies.

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