NORMAL VALUES, DOUBLE REMEDIES AND RENEWABLES

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Abstract

Subsidies within the green sector are rife. Once stymied by the subsidisation of fossil fuel production, active government support is now advocated as a part of 'green industrial policy' aimed at stimulating growth within the sector. This predominantly economically motivated shift provides the positive externality of climate change mitigation, yet leaves certain government support measures vulnerable to countermeasures under WTO law in the form of unilateral countervailing duties. Further, as four investigations in the past three years demonstrate, the same products are often subject to simultaneous anti-dumping duties. This article aims to investigate the interaction between these trade remedies in the RE sector. It examines what lessons can be taken from the reports of the Panel and Appellate Body (AB) in *US – AD/CVD* and recent report of the Panel in *US – CV/AD Measures,* and moves on to an in-depth examination of the 2012 US and 2013 EU investigations into the dumping of photovoltaic products from China. It concludes by reviewing outstanding issues for trade remedies in the RE sector; namely, the appropriate choice of surrogate third country and sampling technique, the 'pass-through' of a subsidy to the export price, the burden of proof for double remedies, and if the RE sector is 'a particular market situation'.

Keywords

Renewable Energy, Subsidies, Dumping, Double Remedies, Sampling, Surrogate Country

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I. INTRODUCTION

In the past three years, four large-scale anti-dumping investigations have been initiated by the European Union (EU),[1] India[2] and the United States (US),[3] to examine claims that Chinese producers of photovoltaic modules, panels, and cells (in this article, referred to cumulatively as photovoltaics, or PVs) have 'dumped' their products on export markets below the normal value.[4] These investigations have resulted in the imposition of definitive anti-dumping duties against Chinese producers in two cases,[5] whilst two investigations are still on going,[6] and two other

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[1] European Commission, *Notice of initiation of an anti-dumping proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in the People's Republic of China*, 6 September 2012, Official Journal 2012/C 269/04.

[2] India's investigation extends to imports from Malaysia, Taipei, and the US, as well as China; Government of India, Department of Commerce (India DOC), *Initiation of Anti-Dumping Investigation concerning imports of Solar Cells whether or not assembled partially or fully in Modules or Panels or on glass or some other suitable substrates, originating in or exported from Malaysia, China PR, Chinese Taipei and USA,* 23 November 2012, <commerce.nic.in/writereaddata/traderemedies/adint_Solar_Cells_Malaysia_ChinaPR_Chinese_Taipei_USA%20Taipei%20and%20USA.pdf> (3 April 2014).

[3] US Department of Commerce (USDOC), *Initiation of the Antidumping (AD) and Countervailing Duty (CVD) Investigations of Imports of Crystalline Silicon Photovoltaic Cells (Solar Cells) from the People's Republic of China (China)*, 11 September 2011, <ia.ita.doc.gov/download/factsheets/factsheet_prc-solar-cells-ad-cvd-init.pdf> (4 April 2014); USDOC, *Commerce Initiates Antidumping Duty Investigations of Imports of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China and Taiwan and a Countervailing Duty Investigation of Imports of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China*, 23 January 2014, <enforcement.trade.gov/download/factsheets/factsheet-multiple-solar-cells-initiation-012313.pdf> (4 April 2014).

[4] Dumping is defined in article 2.1 of the Agreement on the Implementation of Article VI of GATT 1994 (the 'Anti-Dumping Agreement') as the introduction of a product into the 'commerce of another country at less than its normal value, [i.e.] if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.' *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, 15 April 1994, <www.wto.org/english/docs_e/legal_e/legal_e.htm> (4 April 2014).

[5] USDOC, *Final Determinations in the Antidumping Duty and Countervailing Duty Investigations of Imports of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules (Solar Cells) from the People's Republic of China (China)*, 22 October 2012, <ia.ita.doc.gov/download/factsheets/factsheet_prc-solar-cells-ad-cvd-finals-20121010.pdf> (4 April 2014); *EU Council Implementing Regulation No. 1238/2013, imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China,* 2 December 2013, <trade.ec.europa.eu/doclib/html/151944.htm> (4 April 2014).

investigations are being mooted.[7] The increasing frequency with which trade remedies are imposed on PVs, and renewable energy goods more generally,[8] shows the economic importance that the green sector now holds for developed and developing countries alike.[9]

The prevalence of subsidies within the green sector, as well an increasing (economically-motivated) interest in combatting 'unfair' trade practices, begs several questions. How do trade remedies designed to offset subsidies react with those aimed at countering dumping? Can states effectively identify the pass-through of a subsidy to the price of a green product, thereby ensuring that double remedies are not imposed? Other particularities of the green sector raise further issues in the context of trade remedies. How can the 'normal value' of a product be determined in a sector rife with governmental interventions, or could the green sector be considered as a 'particular market situation', liberating it from the standard rules? This article aims to address these questions.

This article will proceed in the following manner. Section II will lay out the procedures recognised within the Anti-Dumping Agreement (ADA) for determining the existence of

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[6] The investigations of the India DOC and USDOC, initiated in 2012 and 2014 respectively, have not been concluded. The investigations must be concluded by May and June 2014, respectively; India DOC, *Extension of Time-Period of Anti-Dumping Investigation*, 9 December 2013, <commerce.nic.in/writereaddata/traderemedies/adint_Extension_Time_Solar_Cells_Malaysia_ChinaPR_Chinese_Taipei_USA_Taipei_USA.pdf> (4 April 2014); USDOC, *supra* note 5, p. 2.

[7] N. Huang & A. Hwang, *Australia, Japan reportedly mulling anti-dumping probes against China PV makers*, 19 March 2014, <www.digitimes.com/news/a20140318PD211.html> (4 April 2014).

[8] See for example, *India — Certain Measures Relating to Solar Cells and Solar Modules (US),* WT/DS456 (currently in consultations); *Canada – Certain Measures Affecting the Renewable Energy Generation Sector/Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/426/AB/R, Report of the Appellate Body, 6 May 2013.

[9] M. Wu & J. Salzman, 'The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy', p. 22. This is supported by data on the growth of the global market for the renewable energy sector; see The Pew Environment Group, *Global Clean Power: a $2.3 Trillion Opportunity,* <www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Global_warming/G20-Report-LowRes.pdf> (4 April 2014).

dumping, focussing in particular on the methodologies used to calculate the NV. Section III examines the relevance of the Panel and Appellate Body (AB) Reports in *US – Anti-Dumping and Countervailing Duties (US – AD/CVD)*[10] and recent Panel Report in *US – Countervailing and Anti-Dumping Measures (US – CV/AD Measures)*[11] for the determination of the normal value in the case of renewable energy goods, particular in respect of 'double remedies'. Sections IV and V will examine how, in practice, domestic investigating authorities have conducted dumping investigations by examining closely the methodologies of the US Department of Commerce and EU Commission in the 2012 and 2013 investigations leading to the imposition of definitive anti-dumping duties on products from Chinese PV producers. The final section will address four outstanding issues that the case studies raise: the appropriate choice of surrogate country and sampling; the calculation of the pass-through of subsidy to price; who bears the burden of proof in the case of a claim of double remedies; and whether the green sector could (and should) be considered as a 'particular market situation' under the ADA.

II. CALCULATING THE NORMAL VALUE OF A GOOD

Within the definition of the ADA,[12] dumping occurs when the export price of a product (in other words, the price for which it is placed for sale on a foreign market) is lower than the comparable price of the like product[13] when sold in the ordinary course of trade on the domestic

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[10] *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (US – Anti-Dumping and Countervailing Duties (China)),* WT/DS379/AB/R, Report of the Appellate Body, 11 March 2011.

[11] *United States—Countervailing and Anti-Dumping Measures on Certain Products from China, WT/DS449/R,* Report of the Panel, 27 March 2014.

[12] The ADA elaborates and builds upon the provisions of Article VI of the GATT 1994. Inclusion of the regulation of anti-dumping duties was largely at the behest of the US, and elaboration of Article VI resulted from the perception that the provision was inadequate as effectively dealing with anti-dumping practices; P. Van den Bossche & W. Zdouc, *The Law and Policy of the World Trade Organization* (3rd ed., Cambridge University Press, 2010), pp. 675-76.

[13] Likeness is understood here to be "a product that is identical...or...has characteristics closely resembling those of the product under consideration" (Article 2.6, Anti-Dumping Agreement), mirroring the definition of likeness found

market, referred to as the normal value — or 'NV'.[14] The difference between the normal value and export price is used as the basis for the calculation of producer-specific anti-dumping duties (ADD) that may be imposed to offset dumping that causes, or threatens to cause, material injury to the domestic industry.[15] Dumping itself is unregulated by the rules of the WTO,[16] however members may place ADDs on a product pursuant to an investigation undertaken in accordance with pre-existing domestic anti-dumping legislation, and within the limits prescribed by the ADA.[17]

Whilst the Agreement does not oblige a member's investigating authority to use a specific methodology to determine the existence of dumping, it states a preference that the normal value be ascertained from domestic market price data.[18] The ADA does, however, acknowledge that this method of determining the existence of dumping may not be appropriate, or even possible, in all cases. It specifies four instances in which a deviation from calculating the normal value on the basis of domestic sales may be justified: first, domestic sales may not have been made in 'the ordinary course of trade';[19] second, there may be such a low volume of sales of the like product

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in footnote 46 of the Agreement on Subsidies and Countervailing Measures; *Agreement on Subsidies and Countervailing Measures*, 15 April 1994, <wto.org/english/docs_e/legal_e/24-scm.pdf> (4 April 2014).

[14] Anti-Dumping Agreement, *supra* note 4, article 2.1.

[15] The dumping margin is normally calculated by a comparison of the weighted average of the 'normal value' to the weighted average of export price, or by an individual transaction-by-transaction comparison; Anti-Dumping Agreement, *supra* note 4, article 2.4.2.

[16] Dumping is an activity carried out by private firms, which are beyond the direct regulation of WTO rules.

[17] Anti-Dumping Agreement, *supra* note 4, article 1.

[18] Collected from exporting producers for the product over the period under investigation, often one year. The authority then calculates and deducts post-factory costs (e.g. distribution), bringing the domestic price back to an ex-factory price (sometimes referred to as the 'factory gate' price) and enabling a direct comparison of the domestic price with the export price of the good. The export price is ascertained using a similar methodology; B. Kelly, 'Market Economies and Concurrent Antidumping and Countervailing Duty Remedies', (2014) 17 JIEL 105, 107.

[19] Article 2.2.1 expands upon this exception, providing that if sales of the like product in the domestic market are below the marginal cost of production for an 'extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time', such sales can be disregarded

on the domestic market that a comparison between the domestic and export prices would be inappropriate or impossible;[20] third, the ADA acknowledges that a 'particular market situation' within the domestic market may cause the domestic price to be an inappropriate comparator;[21] finally - and by far the most common situation that justifies deviation - if the exporting country is a 'non-market economy' (NME).[22] The rationale behind this provision is that, because the government sets the price of products in a NME, "the economy of that country is essentially comprised of a single entity."[23] Domestic prices will hence not reflect the normal value of that product.[24] Paragraph 15 of the Accession Protocol of China to the WTO creates a rebuttable presumption that Chinese producers are operating in a NME until 2016,[25] opening an oft-used avenue that allows investigating authorities to disregard Chinese domestic prices when calculating the normal value of a product.[26]

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for the purposes of calculating the normal value of the product. In *US-Hot Rolled Steel*, the AB expanded upon those instances in which transactions may be considered not 'in the ordinary course of trade', stating that WTO members might be justified in excluding 'high or low-priced' sales between affiliated companies, or transactions between independent buyers that do not reflect 'normal commercial principles' (such as a liquidation sale)[19] from the normal value calculations; *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, Report of the Appellate Body, 23 August 2001, fn. 106, para. 148.

[20] A 'low volume' shall normally be considered to be less than 5% of the sales of the product under consideration into the export market; fn. 2, Anti-Dumping Agreement. Such a situation may occur, for example, if a product was made solely for the export market; P.C. Mavroidis, G.A. Bermann & M. Wu, *The Law of the World Trade Organization (WTO): Documents, Cases & Analysis* (West 2010), p. 448.

[21] Quite what constitutes such a situation is unclear, but in *EEC-Cotton Yarn,* a panel found that Brazil's hyperinflation and a fixed exchange rate did not necessarily constitute a 'particular market situation' within the meaning of Article 2.2 of the Agreement; *European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, Report of the Panel, 30 October 1995, BISD 42S/17, para. 479.

[22] Anti-Dumping Agreement, *supra* note 4, article 2.7.

[23] *An Act to Apply the Countervailing duty Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, and for other purposes*, 13 March 2012, U.S. P.L. 112-99 (*"US GPX Legislation"*), §1(f)(2).

[24] Mavroidis *et al.*, *supra* note 20, p. 454.

[25] *Accession of the Peoples Republic of China*, WT/L/432, 11 December 2001, para. 15.d.

[26] *Ibid.,* para. 15.

Should one of the above-mentioned situations be present, investigating authorities normally adopt one of three alternative methods for the calculation of the normal value:[27] the authority can construct the NV of the product based on cost data of the exporter,[28] it can use market price data from an appropriate "surrogate" third country, or it can construct the NV from a 'surrogate' third country. The latter method is frequently adopted to construct the NV in cases of exports from NMEs.[29]

All calculations of the normal value are more or less accurate approximations that are used as a benchmark against which the 'unfair' practice of international price discrimination is assessed.[30] The level of the normal value itself is irrelevant for the determination of dumping – it is the difference between the normal value and export price that is pertinent. This assumes that the difference between these two values is attributable to dumping, and not to other factors. As we will see in the next section, such a premise is thrown into question if other activities cause the normal value to deviate from a rough approximation of the market price of the good.

III. THE INTERACTION BETWEEN ANTI-DUMPING AND COUNTERVAILING DUTIES

Subsidies are regulated under the Agreement on Subsidies and Countervailing Measures (the SCM Agreement), which provides that countervailing duties (CVDs) may be imposed to counteract illegal subsidies proportionate to the benefit received by the subsidy recipient.[31] The aim of production subsidies is to affect the cost structure and price of a product, thereby

[27] The ADA permits 'any other reasonable method' should the exporter's cost data prove insufficient to calculate the NV; Anti-Dumping Agreement, *supra* note 4, articles 2.2.2(i)-(iii).

[28] Anti-Dumping Agreement, *supra* note 4, articles 2.2.1-2.

[29] *See United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (US – Anti-Dumping and Countervailing Duties (China))*, WT/DS379/R, Report of Panel, 22 October 2010, paras. 14.2, 14.68.

[30] Van den Bossche & Zdouc, *supra* note 12, p. 676.

[31] SCM Agreement, *supra* note 13, articles 1, 2, 3 and 5.

increasing output of the product for a given price.[32] In the context of parallel ADD/CVD investigations, issues arise when the effect of the subsidy manifests itself in a reduction in the export and domestic prices, but is not accounted for in the normal value calculation. This gives rise to the possibility of so-called 'double-remedies' whereby a product is subject to both countervailing and anti-dumping duties that offset the same instance of subsidization.[33]

Take, for example, a domestic production subsidy on the input of a product which reduces the domestic and export price of the product from $100 to $80.[34] The investigating authorities of the importing market may find that the input subsidization constitutes an actionable subsidy within the meaning of the SCM, and impose a CVD of $20 in order to offset its effect. In a parallel anti-dumping investigation, the normal value is based on the price of a like product in a third country, whilst the export price is based on data collected from producers. The third country does not have an input subsidy similar to the exporting country, and as a result the like product is sold for a higher, unsubsidized price on the third country market ($100) than on the exporters' domestic market ($80). If the investigating authority does not account for the difference that the subsidy causes to the normal value between these two markets, a comparison between the constructed normal value (which does not include the effect of the subsidy) and the export price of the product (which does include the effect of the subsidy) results in an artificial anti-dumping margin of $20. It is, in other words, an "asymmetric comparison".[35] The input subsidy of $20 has been 'double-remedied'; it has been offset by both the CVD ($20) and the ADD ($20).

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[32] Sometimes subsidies only aim to alter the price of the product under certain conditions; for example, export subsidies lower the export price of the product without (directly) impacting upon the domestic price.

[33] T.J. Prusa & E. Vermulst, 'United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through', (2013) 12 [2] World Trade Review 197, 198.

[34] 'Domestic subsidy' is understood here as defined under art 1 of the SCM Agreement, and is to be contrasted with 'export subsidies', defined under art 3.1(a).

[35] *US – Anti-Dumping and Countervailing Duties (China)*, Report of the Appellate Body, *supra* note 10, para. 542.

As a second example, consider an export subsidy that lowers the export price of a product from $50 to $30. Export subsidies are *per se* illegal under Article 3 of the SCM, and the investigating authority order that CVDs of $20 are put in place to offset the subsidy. At the same time, the investigating authority launches a parallel dumping investigation, in which it determines the normal value on the basis of the exporter's own data. As the subsidy increases the difference between the normal value ($50) and subsidized export price ($30), its effect is included dumping margin ($20). Consequentially, the ADD and the CVD total $40, offsetting the same export subsidy twice.

The latter situation is envisaged in Article VI:5 GATT, which provides that ADDs and CVDs "shall not be applied to compensate for the same situation of export subsidization".[36] The former situation, in which domestic subsidies are granted, was the addressed in *US-AD/CVD.*[37] In that case, China brought a complaint against the US alleging, *inter alia,* that the US had breached the provisions of the SCM and the GATT by simultaneously applying ADDs and CVDs to the same four products, resulting in double remedies.[38] The U.S. Department of Commerce (USDOC) investigations in question determined that the Chinese producers were operating in a NME, and proceeded to construct the normal value of the products based on cost data from a 'surrogate' third country.

[36] The assumption that Article VI:5 rests on is that the full benefit of the export subsidy 'passes through' to the export price, hence the reduction in the export price is equal to the level of subsidy given; Prusa & Vermulst, *supra* note 33, 215-16. In the rest of this article, we will limit ourselves to considering the effects of domestic subsidies.

[37] *US – Anti-Dumping and Countervailing Duties (China)*, Report of the Appellate Body, *supra* note 10.

[38] Until March 2007, the practice of the USDOC had been to apply only ADDs to NMEs, not CVDs, because it was "impossible to identify a "bounty" or "grant" within the meaning of U.S. countervailing duty law in NMEs, because of the pervasive role played by the governments of such centrally-planned economies." *See US – Anti-Dumping and Countervailing Duties (China)*, Report of the Panel, *supra* note 29, para. 14.4.

At first instance, the Panel acknowledged that a normal value constructed on unsubsidized third country cost data would generally be higher than the normal value in the Chinese market, which accounted for the domestic subsidy.[39] A comparison between the constructed NV and the export price would therefore be likely to result in the concurrent application of CVDs and ADDs to offset the same subsidy.[40] However, in the view of the Panel, double remedies imposed to offset domestic subsidies were not prohibited under the provisions of the SCM.[41] In appellate proceedings, the AB subscribed to the Panel's view that double remedies were likely in NME anti-dumping investigations, adding that such double counting was foreseeable even when constructed or third country values were used in the context of a market economy (although it was unlikely to occur if domestic prices were used to determine the normal value).[42] As a matter of law, however, the AB diverged from the Panel, stating that the obligation to impose an 'appropriate' level of CVD under Article 19.3 SCM prohibited the imposition of double remedies, and included a positive obligation incumbent on the investigating authority to take into account any ADD that may offset the effect of the subsidy.[43] In the absence of evidence that the USDOC had tried to ascertain whether or not the same domestic subsidy was being offset twice, the AB concluded that the US had failed to discharge its duty under Article 19.3 of the SCM.[44]

As a result of the AB Report, and a parallel judgment of the US Court of Appeals for Federal Circuit,[45] the US passed legislation in March 2012 affirming the ability of USDOC to account for existing CVDs when determining the existence of dumping, in order to avoid the imposition of

[39] *Ibid.,* para. 14.70.

[40] *Ibid.,* para. 14.75.

[41] *Ibid.,* para. 14.129.

[42] *US – Anti-Dumping and Countervailing Duties (China),* Report of the Appellate Body, *supra* note 10, para. 543, fn. 519.

[43] *Ibid.*, para. 602.

[44] *Ibid.*, para. 604.

[45] *GPX Int'l Tire Corp. v United States*, 666 Fed. 3d 732 (US Fed Cir. 2011).

double remedies.[46] Prior to the entry into force of this legislation, however, USDOC had imposed simultaneous ADDs and CVDs on 25 products from China. As a result, China brought a further claim before the WTO, arguing that the US had infringed its affirmative obligation under Article 19.3 SCM to investigate whether the imposition of concurrent trade remedies would lead to double remedies. The Panel upheld the AB's interpretation of Article 19.3 SCM, ruling that the US had not adduced evidence to prove that USDOC had discharged the positive obligation incumbent upon it to investigate the possible imposition of double remedies when using the NME methodology.[47]

The decisions of the Panels and AB highlight the problems that double remedies pose and bring some clarity to the legal position regarding their imposition.[48] As noted in the AB Report, double remedies can occur in the case of any market – market economy or NME – for which the normal value is constructed, or third country cost or price values used.[49] Indeed, the conclusion that a normal value calculated on the basis of the domestic price will not normally give rise to double remedies rests upon the assumption that data gathered for the purposes of the calculating the normal value are comparable to export price data. In market economies, for example, double remedies may occur if the domestic products compared "are physically similar but not identical to those exported, on sales from a different period than export sales, or on sales at a different level of trade or distribution than export sales."[50]

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[46] *GPX* Legislation, *supra* note 23.

[47] *US – CV/AD Measures,* Report of the Panel, *supra* note 11, para. 7.390.

[48] Prusa & Vermulst consider that the AB could have gone a step further, condemning the US NME methodology as illegal *in se*; Prusa & Vermulst, *supra* note 33, 225.

[49] For an excellent overview of double remedies on products from market economies, see Kelly, *supra* note 18, 113-15.

[50] *Ibid.*

Subsidies are viewed as an important tool in the promotion of renewable energy generation, stepping in to fill market failures that result in the under-production of renewable energy generation products.[51] Without taking a view on what constitutes the appropriate green industrial policy to pursue, suffice to say that the level of subsidies in the renewable energy sector alone makes it particularly susceptible to the imposition of double remedies. The following section examines two case studies – the imposition of ADDs on Chinese PV cells by the US, and the imposition of ADDs on Chinese PV cells and modules by the EU – in order to assess how the investigating authorities pursue allegations of dumping in the RE sector.

IV. RECENT ANTIDUMPING DUTIES IMPOSED BY THE U.S. AGAINST CHINA

As mentioned above, the specific methodology of antidumping and countervailing duty calculations is a matter of domestic law. The Tariff Act of 1930, as subsequently amended by Title VII, governs U.S. anti-dumping and countervailing duty law, which is administered jointly by the International Trade Commission (the 'Commission') and the USDOC.[52] Specifically, Section 773 of the Act outlines the methodology used by USDOC to calculate normal value, including under NME circumstances.[53] For reasons described in Section II, USDOC continues

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[51] D. Rodrik, 'Green Industrial Policy', 1-2, <www.sss.ias.edu/files/pdfs/Rodrik/Research/Green-Industrial-Policy.pdf> (4 April 2014). *See also* M. Wu & J. Salzman, *supra* note 9, 13-15.

[52] Sections relevant for the purposes of this work include: §701-709 (Subtitle A: Imposition of Countervailing Duties); §731-739 (Subtitle B: Imposition of Antidumping Duties); §771 (Definitions; special rules); §772-773 (Export price and constructed export price; Normal value); and §777A (Sampling and averaging; determination of weighted average dumping margin and countervailable subsidy rate).

[53] The Antidumping and Countervailing Duty Handbook (13th Edition, 2008), <www.usitc.gov/trade_remedy/documents/handbook.pdf> (4 April 2014), as well as the Enforcement and Compliance Antidumping Manual (2009), <enforcement.trade.gov/admanual/> (4 April 2014), outline the calculation methods most frequently used by USDOC in its antidumping investigations. The latter document highlights, *inter alia,* the determination of 'normal value' (Chapter 8) and special treatment of NME export countries (Chapter 10). USDOC makes clear that these documents cannot be cited as official practice. While for

to consider China as a NME for the purposes of its antidumping determinations, and thus employs the 'surrogate country' method for calculating NV. USDOC generally begins with the rebuttable presumption mentioned above that a single NME-wide antidumping rate should apply to all exporters, subject to specific applications made by any exporters claiming neither *de jure* nor *de facto* government control.

When the group of exporters are determined (which includes those subject to the NME-wide rate, as well as those subject to an individual rate), USDOC sets about constructing NV using publicly available financial data from firms in a surrogate country. The Tariff Act provides that the USDOC may, for the purpose of determining NV, use a surrogate country if that country is 'comparable in economic development' *and* the set of products examined from that country are also comparable.[54] Additional factors that are typically taken into consideration by USDOC when choosing an appropriate surrogate country include: the extent of production of comparable merchandise in the potentially surrogate country (i.e.*,* its market size and capabilities), and, importantly, data availability.

(i) 2012 AD and CVD measures against the PRC

On 17 October 2012, USDOC announced the final determination of antidumping and countervailing duties on PV parts[55] from China, alleging that these products had been illegally dumped and subsidised, and that the 'critical conditions' of injury to domestic industry as a result of unfair practices were satisfied. The notice of final determination was made in the Federal

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internal/educational purposes only, these materials can nonetheless provide guidance on basic calculations and standard – though approximate – practice. The legal obligations on USDOC remain rooted in the Tariff Act.

[54] *Tariff Act of 1930,* 19 U.S.C. chp. 4, §773(c)(2)(A)-(B).

[55] The exact 'Scope of Investigation' covers: crystalline silicon photovoltaic cells and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials; 77 [201] Federal Register p. 63788.

Register,[56] and the specific issues considered in this determination – including all changes made from the preliminary determination and justifications for their calculations – are set out in the *Issues and Decisions Memorandum* ('the Memorandum').[57] USDOC, in the Memorandum, responds to comments and objections made by the 'Respondents' (Chinese producers subject to their investigation and subsequent antidumping duties), as well as the Government of China (GOC). While the Memorandum addresses a wide range of substantive issues raised between preliminary and final determinations, those of relevance for this article are: the choice of surrogate country (and hence the calculation of normal value), the existence of double remedies, and the burden of proof.

(a) USDOC's calculation of Normal Value[58]

USDOC chose Thailand as the surrogate country from which it then constructed the normal values of PV cells and modules. Three main justifications were given for this choice: first, Thailand was one of seven countries 'comparable to the PRC in terms of economic development'.[59] Second, Thailand was deemed to be a 'significant producer of comparable merchandise',[60] in line with the requirement contained in Section 773 of the Tariff Act. Third, Thailand has a wealth of publicly available, reliable financial data upon which to draw when constructing a normal value.[61]

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[56] *Ibid.*, p 63788 (CVD); p 63791 (ADD).

[57] USDOC, *Issues and Decisions Memorandum For the Final Determination in the Antidumping Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China*, 9 October 2012. <enforcement.trade.gov/frn/summary/prc/2012-25580-1.pdf> (24 March 2014).

[58] Comments 2, 4, 9, and 15-18 of the *Issues and Decisions Memorandum* address USDOC's choice of surrogate country (Thailand) and thus calculation of NV using these data.

[59] *Issues and Decisions Memorandum*, *supra* note 57, Comment 4, p 19. Other countries mentioned were: Colombia, Indonesia, Peru, the Philippines, South Africa, Thailand, and Ukraine.

[60] USDOC states that Thailand has four domestic producers with total exports valued over $5 Million, thus constituting a 'significant producer'.

[61] *Issues and Decisions Memorandum*, *supra* note 57, Comment 4, p 20.

In response to allegations by Respondents and the GOC that India would have been a more appropriate surrogate country, USDOC concluded that (i) India was not 'economically comparable' to the PRC; that (ii) because Thailand met the threshold requirements of economic comparability and market suitability, it did not matter that its market was smaller than that of India; and finally that (iii) *even if* India were to be considered 'economically comparable' to the PRC, Thai data was still more robust over the period of investigation and thus a better source for constructing normal value.[62] To conclude, it seems that economic comparability and data considerations appear to be the most important factors taken into consideration by USDOC in finding a surrogate country.

(b) USDOC's response to allegations of double remedies.[63]

The Respondents and the GOC further alleged that the use of a NME methodology, combined with the imposition of CV duties, resulted in the imposition of double remedies by USDOC.[64] The Respondents specifically cited paragraph 582 of the *U.S. – AD/CVD* Report, in which the AB concluded that both antidumping and CV duties cannot be imposed to counteract the same injury to domestic industry.[65] The Respondents also made reference to the House of Representatives (H.R.) Bill 4105 ('*GPX* Legislation') regarding the application of concurrent AD and CV duties to NMEs.[66] According to the Respondents, the *GPX* Legislation requires relevant investigating authorities to take into consideration the pass-through of the actionable subsidy to

62 *Ibid.*

63 *Issues and Decisions Memorandum Issues and Decisions Memorandum*, *supra* note 57, Comment 13 addresses the possibility for double remedies.

64 These allegations were made by *Wuxi Suntech, Trina,* and the Government of China *(GOC)*, *Issues and Decisions Memorandum*, *supra* note 57, pp. 51-52.

65 *US–AD/CVD (China)*, *supra* note 10, para. 582.

66 *GPX* Legislation, *supra* note 23.

the domestic price of the good under AD investigation, and to subtract this effect from the antidumping duty.[67] The Respondents argued that *both* the U.S.'s obligations to the international community (*per* the outcome of the 2011 WTO dispute), *and* its domestic law required USDOC to re-evaluate its calculations.

USDOC made several responses to these arguments: first*,* they affirmed that, in fact, the *GPX Legislation* did not change current law; its purpose was simply to reaffirm USDOC's obligation to impose CVDs on imports from NMEs, and that there was no additional obligation contained in the law amounting to a bar on USDOC's imposition of simultaneous AD and CV duties.[68] Even if the obligation in the law were to be read as over and above any previous obligation, USDOC affirmed that the provision allowing for the reduction, where possible, of AD duties applies only to investigations initiated on or after 13 March 2012—which was not the case with the current investigation on PV cells and modules.[69] Thus, the law prevailing at the point of initiation of the AD/CVD investigation on PV parts cautioned simultaneous duties *only* in the case where export subsidies were being countervailed—not domestic subsidies.[70]

Second*,* USDOC stated that the result of the 2011 WTO AB Report (prohibiting the use of double remedies, and acknowledging that they may exist even when domestic subsidies are present) did not conclude that all instances of concurrent imposition of AD and CV duties would amount to double remedies.[71] What was concluded, USDOC argued, was that there was

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[67] The relevant portion of §2 of the *GPX Legislation* states: 'the administering authority shall… reduce the antidumping duty by the amount of the increase in the weighted average dumping margin estimated by the administering authority'.

[68] *Issues and Decisions Memorandum Issues and Decisions Memorandum*, *supra* note 57*,* Comment 13*,* p 54.

[69] The investigation on PV cells and modules from the PRC was initiated by the Commission on 19 October 2011, <www.usitc.gov/press_room/news_release/2012/er1107kk1.htm> (25 March 2014).

[70] *Issues and Decisions Memorandum Issues and Decisions Memorandum*, *supra* note 57,Comment 13, p. 56.

[71] *US–AD/CVD*, Report of the Appellate Body, *supra* note 10, para. 599.

only a likelihood of double counting in these instances. Further, USDOC alleged that the 2011 decision by the Appellate Body was not conclusive of the legality of U.S. AD practice, and was certainly not conclusive of whether U.S. practice is consistent with U.S. law as WTO reports are without effect under U.S. law unless the report in question has been adopted by domestic courts.[72]

Third, USDOC disagreed with the Respondents' argument that simultaneous remedies *necessarily* resulted in the imposition of double remedies, and that the burden of proof lies with the Respondents to prove that a double remedy in fact exists. According to USDOC, neither the Respondent firms nor the GOC had dismissed this burden, as the proof they provided was merely theoretical rather than based on hard facts (i.e., data). Burden of proof is discussed in more detail in Section VI, below.

Finally, and in response to the GOC's (theoretical) argument that NME methodology for calculating NV does not take into account lower production costs resulting from domestic subsidies, USDOC raised four final arguments in defence of their methodology:[73] (i) If domestic subsidies to NME entities might affect the consumption behaviour of these entities (for example, in terms of the choice of factors of production), then using a surrogate factor value for these factors might, if anything, result in *lower* dumping margins; (ii) NV calculated under the NME AD methodology does not in all cases reflect subsidy-free surrogate values, and thus will not in all cases produce an inflated dumping margin; (iii) The fact that USDOC, in some cases, used factor values of inputs imported into the NME from market economies would lead to the conclusion that these prices in the PRC are in fact lower than those from surrogate countries; (iv) In cases when exports from the PRC are significant enough to flood world markets, and

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[72] *Issues and Decisions Memorandum Issues and Decisions Memorandum*, *supra* note 57, Comment 13, p. 56, fn. 201.

[73] *Ibid.,* Comment 13, pp. 57—58.

hence depress world market prices, it could be argued that the lower world market price would feed into (and depress) the normal value calculation.

V. RECENT ANTIDUMPING DUTIES IMPOSED BY THE EU AGAINST THE PRC

(i) EU procedure & parallels with U.S. procedure

The EU law concerning imposition of antidumping and countervailing duties lies in Council Regulations (EC) 1225/2009 (on protection against dumped imports from countries not members of the European Community)[74] and 597/2009 (on protection against subsidised imports from countries not members of the European Community)[75]. The relevant provisions of these Regulations are contained in Article 2 of the Antidumping Regulation (concerning 'Determination of dumping'), specifically paragraph 7(a) and (b) (concerning treatment of Non-Market Economies), and Articles 5-7 of the Countervailing Regulation (concerning 'Calculation of the amount of the countervailable subsidy'; 'Calculation of benefit to the recipient'; and 'General provisions on calculation'). While largely similar to the U.S. procedure, the EU provisions do not specify the exact criteria to be used in finding an 'appropriate market economy third country', or surrogate country. Rather, the law calls for a reasonable examination, based on 'any reliable information made available at the time of selection'.[76] In contrast, U.S. law (and practice) makes reference to economic comparability, market size, as well as data availability and quality in deciding on surrogate countries for NMEs.

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[74] *Council Regulation (EC) 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community*. Official Journal L 434/51. ('Antidumping Regulation'), 30 November 2009, < trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146035.pdf> (26 March 2014).

[75] *Council Regulation (EC) 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community*. Official Journal L 188/93. ('Countervailing Regulation'), <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:188:0093:0126:EN:PDF> (26 March 2014).

[76] Antidumping Regulation, *supra* note 74, article 2, para. 7(a).

Nevertheless, the EU procedure does have at least two key factors in common with that of the U.S. First*,* Article 2(7)(a) of the Antidumping Regulation allows relevant authorities to either use exact prices from a surrogate country as NV prices, or to construct a normal value based on the price of factors of production (FOP) in a surrogate country and other (e.g. international) prices. Second*,* the EU also makes an allowance for producers in NME countries to apply for 'market economy treatment' (MET), in accordance with Article 2(7)(c) of the Antidumping Regulation, thus receiving a separate dumping margin to the NME-wide rate. While the wording in U.S. legislation is more succinct (requiring only proof of both *de jure* and *de facto* independence from governmental control), it would appear as though the requirements set out in paragraph 7(c) of the EU Antidumping Regulation largely amount to the same burden on those producers seeking MET.[77]

(ii) Final antidumping and countervailing determinations against the PRC

On 2 December 2013, the EU issued final antidumping and countervailing duty determinations against Chinese producers on PV parts.[78] The details of the final determination, including the

[77] The requirements imposed by the EU include: *de facto* requirements (that business decisions are made without significant State interference; accounting records are audited in line with international standards; no other distortions are carried over from the NME system; and currency exchanges are carried out at the market rate), and *de jure* requirements (that these producers are governed by relevant bankruptcy and property laws).

[78] The exact product scope of this determination was: crystalline silicon photovoltaic modules and cells originating in or consigned from China. The EU reduced the scope of products affected by the investigation between the preliminary and final determinations after a successful argument by the GOC that wafers (included in the preliminary determination) were not similar enough to cells and modules so as to be included in the same determination; *Commission Regulation (EU) No 513/2013 of 4 June 2013 imposing a provisional anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China and amending Regulation (EU) No 182/2013 making these imports originating in or consigned from the People's Republic of China subject to registration* ('Preliminary Determination'), Official Journal of the European Union L 152/5, <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:152:0005:0047:en:PDF> (1 April 2014); *Council Implementing Regulation No 1238/2013 of 2 December 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China,* ('Final Determination'), Official Journal L 325/1, <eur-

methods of calculation as well as the responses to comments and objections by interested parties ('respondents'), are set out in the EU's Final Determination. The following discussion highlights one of the key issues addressed by EU authorities in this Determination, namely the choice of surrogate country. Double remedies were not discussed by the EU in either the preliminary or final determinations.

After defining the scope of its investigation, the EU set about deciding the group of exporters that would be subject to an individual duty (those receiving MET). In calculating the antidumping rates that would be applied to each producer, the EU, in its preliminary determination, rejected every application for MET status, citing, *inter alia*, that all of the seven applicants still had some degree of distortionary effect that 'carried over' from the previous NME system, and six of the seven applicants could not prove that their accounts were being independently audited in line with international accounting standards.[79] The decision to reject all applicants was upheld in the final determination, and thus all producers were subject to the NME-wide duty.

In calculating the NME-wide duty, the EU also used a surrogate country methodology. However, the approach taken by the EU to determine NV differed from the U.S. approach in a number of ways. First, the choice of surrogate country differed, as the EU chose India instead of Thailand. Second, the EU's reasoning for choosing India also differed from the U.S.'s reasoning for choosing Thailand, in that it did not follow the same systematic examination of specific

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lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:325:0001:0065:EN:PDF> (1 April 2014). Following the issuance of the final determination, Chinese producers made a price undertaking with the EU Commission; *EU Commission Implementing Decision of 4 December 2013 confirming the acceptance of an undertaking offered in connection with the anti-dumping and antisubsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures*, Official Journal L 325/214, (4 April 2014).

[79] *Ibid.,* Preliminary Determination recitals 50–71; Final Determination recitals 76–85.

economic criteria. Finally, rather than using robust, publicly available financial data, the EU used a sampling and polling system, eventually employing detailed financial data provided by only one producer (Tata Power Solar, 'Tata') from one country (India).

In the Preliminary Determinations, the EU stated that India was chosen because Tata was the only producer (of 168 polled) that correctly replied to their polling questions. In the final determinations, the EU made the following additional justifications for its choice of surrogate. First, the Indian market, having recently experienced a steady flow of imports from *inter alia* China, is a legitimately competitive market. Second, any local content requirement measures put into place by the Indian government had not taken effect (or at best, had only a negligible effect) at the time of investigation and thus the market has not been distorted by those policies. Third, despite allegations that antidumping investigations by the Indian government against other Members (including China and the U.S.) had in fact protected the Indian market during the period of investigation, imports into India from China (and indeed the rest of the world) continued to grow substantially over this time.[80] Fourth, other countries (such as Taiwan) were dismissed as not being more appropriate candidates than India because the only Taiwanese companies that responded to the EU's polls produced *exclusively* PV cells, while Chinese exporters mainly produced PV modules. This over-specialisation meant that EU authorities would have to adjust for price differentials between cells and modules, and the EU concluded that this extra step would have been unreasonable.

Several respondents disagreed with the EU's decision to use Tata as the sole producer in its sample.[81] Their arguments centred on the fact that Tata was alleged to be too small and too young, and thus not an adequate comparator to Chinese producers. It was also argued that the

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[80] Final Determination, *supra* note 78, recitals 89–95.

[81] *Ibid.*, recitals 102–112.

Chinese exporters varied greatly in size and presumably faced vastly different economies of scale to one another and thus could not possibly all be compared to the single, small Indian producer. The EU rejected these arguments, concluding that there is no reasonable correlation between economies of scale and prices in the market for PV parts and hence no correlation between economies of scale and dumping margins. Thus, according to the EU, this was sufficient evidence to support the use of a single producer in its calculations. Interestingly, no respondents flagged the statistical problems arising from a sample size of one firm. Sampling will be discussed in more detail in Section VI.

VI. AN APPRAISAL OF OUTSTANDING ISSUES

The USDOC and EU Commission investigations demonstrate that several issues persist in relation to the simultaneous application of ADDs and CVDs. First, in both cases, the appropriateness of the choice of surrogate third country was raised. The ADA provides no guidance on the issue, leaving domestic investigating authorities significant latitude in their choice. On which criteria should this analogy be based, and what recourse may WTO members have to challenge the choice of surrogate country? Should, for example, the existence of analogous governmental support measures in the third country economy factor into the investigating authority's choice? Second, the theoretical basis for double remedies assumes that a domestic subsidy is likely to affect the domestic and export prices symmetrically. Does this always occur and, if not, is this asymmetry quantifiable? Similarly, how do subsidies in other parts of the production chain affect the domestic and export prices, and when should these be taken account of in dumping investigations? Third, upon whom does the burden of proof for double remedies rest? Finally, could (and should) one argue that the RE sector is 'a particular market situation' under the meaning of Article 2.2 of the ADA?

A. The Choice of Surrogate Country & Sampling

To begin, the facts presented in Sections IV and V bring to light two procedural issues in the determination phase of dumping: the choice of surrogate country and the sampling (in the case of the EU) of foreign, third country producers from which normal value is to be extrapolated. Prusa and Vermulst have made the argument that, in the context of out-of-country benchmarks in CVD investigations, the amount of evidence required to prove the appropriateness of an out-of country benchmark is one of the major procedural issues that is likely to arise in future remedies disputes.[82] The same conclusion can be drawn with regards to antidumping investigations: the choice of surrogate country, as well as the choice of data employed in constructing normal values, should be held to a higher standard.

1. EU 'Reasonability' versus USDOC's 'Objective' Criteria

As mentioned in Sections IV and V, USDOC lays down relatively clear requirements for assessing the viability of a surrogate country, while EU law only prescribes that relevant authorities choose surrogate countries based on a 'reasonable' assessment of facts. It appears as though U.S. procedure ultimately selects viable surrogates based on the robustness of data available, whereas EU procedure, while also selecting surrogates based on data available, seems to throw robustness out of the picture altogether. The wide discretion granted by the ADA to Members in conducting antidumping investigations could be seen as a double-edged sword: on the one hand, it would be unreasonable to prescribe a single manner in which Members are expected to carry out their investigations. On the other hand, this discretion has made investigations fraught with uncertainty and has likely created bias in antidumping duty determinations. While it is beyond the scope of this work to propose an alternative to the status quo*,* at least one procedural element might be improved upon: that of sampling.

[82] Prusa & Vermulst, *supra* note 33, 232.

2. Sampling: 'Objective Examination' under Article 3.1 ADA?

In the context of antidumping investigations, sampling involves the use of financial data (often in the form of survey feedback, but also from publicly available sources) from a fraction of producers in a given industry. Members are not prohibited from sampling, and indeed in practice national authorities have often relied on these techniques to compile their datasets (particularly in where comprehensive data are unavailable). Sampling can occur before surveys are distributed or data are compiled (meaning authorities decide only to survey a sub-sample of all producers in a given market), during the survey period (through self-selection by producers who decide not to participate), after the survey period (when authorities determine some responses are invalid or redundant, and use only a subset of the replies they receive), or in a combination of these three phases. Equally, sampling can occur in relation to domestic producers (when investigating authorities calculate the extent of injury resulting from alleged dumping), as well as foreign producers (to calculate dumping margins—under both the traditional and NME calculation methods). Sampling bias, or the difference between the 'true' normal value and the estimated normal value, will occur when the set of producers examined is not representative of the entire market.

Recent anti-dumping cases bring to light the difficulties national authorities face when collecting data from foreign producers and exporters—and the potential for bias in the estimation of normal value. While the ADA takes no position on sampling, the AB has confirmed that in order to meet the 'objective examination' requirement under Article 3.1 of the ADA investigating authorities cannot examine parts of an entire industry on a selective basis.[83] In the *US – Shrimp* panel proceedings, the complainant (Vietnam) argued that the failure to examine each exporter

[83] *European Communities–Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China,* WT/DS397/AB/R Report of the Appellate Body, 15 July 2011, para. 436. This conclusion was drawn in relation to injury calculation, however the same conclusion can also be drawn in relation to calculations of normal value.

individually meant that U.S. authorities could not ensure that duties imposed on Vietnamese exporters were not excessive.[84] Likewise, in *EC – Fasteners* (AB), the complainant (China) appealed to the AB on the grounds that (i) the EC erred in its initial investigations by not taking a statistically viable sample of Chinese exporters, and that (ii) the EC equally erred in excluding certain domestic firms from its injury investigation.[85] While the AB rejected China's claims because they failed to see any explicit requirement contained in Article 3.1 as to the way in which Members should sample, they nevertheless acknowledged that a sample, if taken, must be representative of the industry under investigation.[86]

The issues surrounding sampling are ever the more pertinent in the context of NME antidumping investigations, as authorities are permitted to impose an industry-wide duty based on samples selected from surrogate, third party countries. Not only are authorities making conclusions on alleged dumping based on information extracted from foreign, third party markets, but they are also taking only a subset of these foreign producers when doing so. In other words, there is an additional 'degree of separation' or margin for error between the 'true normal value' and the estimated normal value. The first margin for error occurs when choosing the surrogate country, while the second margin for error occurs when authorities take a sample of total producers in the surrogate country. Recall the EU's procedure described above: in its calculations of surrogate normal value on PV parts, the EU sampled foreign producers in two steps: first, in the selection of survey recipients (meaning EU authorities sent surveys to only a subset of producers in a selected group of candidate surrogate countries), and second, after receiving replies from four of these producers, the EU selected only one respondent producer to use as a case study because the others did not complete the survey correctly. It could be argued

[84] *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/R, Report of the Panel, 15 May 1998*,* paras. 7.154–7.155.

[85] *EC–Fasteners,* Report of the Appellate Body, *supra* note 83, paras. 164–166.

[86] *Ibid.,* para. 436.

that the EU faces a substantial margin for error in their normal value calculations. While 'interested parties' raised doubts in relation to the appropriateness of India as a surrogate country and Tata as the case study, it is remarkable that none mentioned the potential for error arising out of the EU's procedural thrift.

Take as a more abstract example a national authority that selects only a subset of surrogate country producers to include in the calculation of an NME-wide rate against another Member. Suppose that the surrogate has been chosen based on overall macroeconomic comparability, as well as product market comparability, and that this country is economically 'close enough' to the Member under investigation so as to yield, under perfect estimating conditions, a normal value 5 per cent higher than the true normal value in the Member country under investigation. If the authorities choose a disproportionate sample of producers from the total set of producers in the surrogate country, then the estimated normal value will be skewed again (either above or below the average normal value in the surrogate country). If authorities choose only *one* producer from the set of producers in the surrogate country, then unless this producer represents the average of all producers in the surrogate country market, there will also be a skew (either above or below the average normal value in the surrogate country), and the estimated normal value in the surrogate country risks being significantly skewed from the true normal value in the Member under investigation.

Regardless of the method national authorities choose to implement when sampling producers and exporters, and without prescribing the exact methods Members should use to overcome potential biases, two important points are worth bearing in mind. First, it is rarely (if ever) beneficial to exclude information that is voluntarily provided by a firm on its costs or output. Simply put, when it comes to sampling (and particularly when limited data are available), the more the merrier. Second, some of the difficulty associated with data collection may stem from

an overly complicated process set out for calculating antidumping margins to begin with. Because the exact process is left to national authorities to determine, some Members may benefit from streamlining their calculations by, for example, requiring less data per producer surveyed or, in the case of recent U.S. investigations, using robust publicly-available data. This type of reform may open up the possibility for authorities to include more producers in their sample.

The issue of sampling bias is not just one of statistical precision. Certainly, it is vital that national authorities seek to assemble samples accurately, but the issue also goes deeper. When producers submit data on costs or production and these data are discarded because national authorities deem them not practicable or reasonable to use in investigations, then it could be suspected that these authorities may not be acting in good faith. The same is true when national authorities decide *a priori* that they will not seek information from selected producers, and so sample strategically. They are thus prone to impose unfair antidumping duties on producers excluded from the sample, but that nonetheless 'followed the rules'. At best, even if authorities act in good faith, the use of improper sampling methods might still fall below the legal requirement to conduct an objective examination based on facts available.

Finally, it is important to point out that sampling may not be a problematic issue for all cases, as some markets are highly homogeneous and producers in these markets—regardless of the country—may face similar cost structures. If this is the case, then sampling only a small portion of firms in this market is less problematic because the in-sample average is likely to be similar to the out-of-sample average. Thus, assigning all exporters the same NME-wide rate could be both efficient and practical in these types of industries.

B. The Accurate Calculation of Subsidy Effects

In *US-AD/CVD*, the AB stated that Article 19.3 SCM would be breached in two instances: first, when the investigating authority had made no attempt to identify, quantify and offset any existing anti-dumping duty on the product upon which countervailing duties were being set;[87] and second, when double remedies actually occur.[88] The former places upon investigating authorities a positive obligation not only to identify if double remedies may occur, but also to calculate the *actual* amount of subsidy that is accounted for in the domestic and export prices. The degree to which subsidies have an impact upon domestic and export prices is referred to in the economic literature as the 'pass through' of a subsidy to domestic or export prices. Investigating authorities are obliged to calculate the actual pass-through of the subsidy in each case to accurately quantify the 'appropriate' CVD.

Recall that the dumping is price discrimination calculated by the difference between normal value and export price. The assumption is that this difference is attributable to dumping, and can be used as the basis from which to calculate ADDs. If, however, the difference were due to other factors, an ADD of the difference between the normal value and export price would not solely counteract the dumping, but also other factors exogenous to the 'unfair' price discrimination. Economic literature disagrees with the assumption of the AB that domestic subsidies will affect domestic and export prices to the same extent.[89] If they do not affect these

[87] *US-AD/CVD*, Report of the Appellate Body, *supra* note 10, para. 571.

[88] *Ibid.*, para. 582. *See also* Panel Report, *US – CV/AD Measures*, Report of the Panel, *supra* note 11, para. 7.308.

[89] A related issue is whether domestic subsidies actually pass through to the domestic price completely; in essence, this is the question of the effectiveness of subsidies to achieve their goals. US CVD practice, for example, obliges the level of the CVD to be set at the amount of the countervailable subsidy, without requiring that the full value of the subsidy actually passes through to the price of the product. As Kelly notes, an "untied grant, for example, is assumed to benefit the company's operations by the amount of the grant, even if a corrupt board member absconds with the funds shortly after their receipt by the company." *See* US Tariff Act of 1930, §701(a)(2)(B), <enforcement.trade.gov/regs/title7.html> (4 April 2014); Kelly, 'The Pass-Through of Subsidies to Price', (2014) 48 [2] Journal of World Trade 295, 299.

prices symmetrically, the difference between the normal value and the domestic price could be partly attributable to the differential effects of the subsidy and not dumping.[90]

Consider, for example, a small producer that receives a domestic production subsidy. This lowers the marginal cost of the product, reducing the price of the product on the domestic market. On the export market, however, the producer is a 'price taker'; in other words, the producer cannot affect the price in the market.[91] As such, the producer is left to sell on the export market at the equilibrium price, which has no reactivity to the domestic subsidy; the 'pass through' of the subsidy to the export price is zero. The domestic subsidy may have played a significant impact in reducing domestic price, but has zero impact on export price.[92] Depending primarily upon the supply elasticity of the firms and the demand elasticity of the export market, the effects of the domestic subsidy on the export price can range from zero to more than 100% of the value of the subsidy in the (unlikely) case of a downward sloping supply curve.[93]

A further complication within the renewable sector is the presence of subsidies at multiple stages in the production chain. Take, for example, a production subsidy on input X of $100 per unit in Country A, which is offset by CVDs of $100 from Country B. This subsidy reduces the price for Product Y in Country A, of which Input X is a component, from $100 to $80. Country B's producers further suspect that Product Y is being dumped, and the investigating authority launches an anti-dumping investigation using a constructed or third country normal value of

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[90] For a comprehensive discussion of pass-through, see B. Kelly, *supra* note 89.

[91] More formally, the producer faces an infinitely elastic demand curve on the world market; S.T. Kaplan & J.F. François, 'The Pass Through of Countervailable Subsidies to the Export Price', p. 8, <www.cit.uscourts.gov/Judicial_Conferences/17th_Judicial_Conference/17th_Judicial_Conference_Papers/KaplanPaper.pdf> (4 April 2014).

[92] In this case, the assumption is that the firm would then shift sales to the export market to benefit from the higher price; B. Kelly, *supra* note 89, 312.

[93] *Ibid.*

$100. As a result, ADDs of $20 are imposed. This does not take into account the fact that the input subsidy that caused Country A's domestic prices to drop has already been countervailed, as this subsidy affects a different product not under consideration in the present investigation. The subsidy further down the production chain is hence *partially* double remedied ($100 CVD + $20 ADD versus $100 subsidy). This conclusion holds true for subsidies within the production chain for which the components are identified as separate products from the finished good.

In reality, the effects of subsidies on domestic prices are more complicated, encompassing subsidies not just in different links of the production chain but also other (often non-pecuniary) subsidies that affect the domestic price of the product in different ways (for example, those that subsidize variable costs versus those that subsidise fixed costs). Let us take an example. Land leased to a PV producer by Country C at a less-than market rate may constitute an actionable subsidy within the meaning of the SCM Agreement, and hence products produced by the firm are subjected to CVDs from Country D. However, this subsidy also has an impact on the price of the PV product by reducing the fixed costs of the producer, thereby lowering the price of the product. It may be possible to calculate the benefit that the PV producer enjoys as a result of this subsidy by comparing the conditions of lease to those available to the producer on the market of Country C. However, the pass through effect of this subsidy on the domestic price of the PV product may be difficult to identify, separate and quantify, especially if further government intervention to promote RE is prevalent in Country C (such as feed-in tariffs that guarantee a fixed price for the generation of RE). The precise, individual effect of the subsidy on the domestic price will be hard to separate out from other effects on domestic price, yet – if not factored into the constructed or third country normal value calculation – Country D is at risk of double remedying the initial subsidised grant of land.

It must be pointed out that the requirement for authorities to ensure that they have not imposed double remedies is in fact no more onerous on these authorities than the requirement that investigating authorities must prove that a causal relationship exists between dumping and injury, and that no other factor has concurrently caused this injury (referred to as the '*causation – non-attribution requirement*').[94] Proving causal relationship involves, *inter alia,* filtering out possible factors (such as demand contractions or other changes to consumer preferences, shifts in conditions of competition, changes to domestic productivity or technology, and export performance) contributing to domestic injury. The AB reaffirmed the importance of the causation – non-attribution requirement in *US – Wheat Gluten,* where they stated that the injurious 'effects caused by other factors… must be excluded from the determination of injury so as to ensure that these effects are not attributed' to imports.[95]

While *US – Wheat Gluten* dealt with safeguards, this conclusion can equally be extended to antidumping attribution: Article 3.5 ADA contains the obligation for authorities to accurately identify the detrimental effects flowing from dumping, minus any effects flowing from all other economic factors. The obligation contained in paragraph 571 of the AB's decision in *US – AD/CVD* amounts to the same evidentiary burden as the non-attribution requirement: it is for national authorities, when conducting antidumping investigations, to ensure that the AD duties they impose only offset the injury caused by dumping—not the injury caused by, among other factors, a countervailable subsidy.

C. Burden of Proof

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[94] Anti-dumping Agreement, *supra* note 4, article 3.5.

[95] *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,* WT/DS166/AB/R, Report of the Appellate Body, 22 December 2000, para. 66.

As noted in Section IV, it was the view of USDOC that double remedies do not necessarily result from the simultaneous imposition of remedies against a NME, and as such it is incumbent upon the claimant to prove that double remedies were imposed. The position of USDOC is theoretically correct. Although the Dispute Settlement Understanding (DSU) contains no rules regarding the allocation of the burden of proof, WTO case law has affirmed the "canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[96]

Nevertheless, USDOC's assertion does not tell the whole story. In order to advance a claim of the breach of Article 19.3 SCM that double remedies have been attributed, or that the danger of allocation of double remedies has not been explored, the burden of proof lays with the complainant. However, once this party has advanced sufficient evidence to create a *prima facie* breach of the provision,[97] it is incumbent on the respondent to adduce evidence to prove that double remedies were not attributed, and that the investigating authority took positive steps to ensure that the effects of subsidies were not offset twice.[98] Considering that the AB in *US-AD/CVD* viewed such steps as a positive obligation to act, as opposed to a negative obligation to refrain from certain actions, the *prima facie* threshold of evidence could be reached by a complainant merely demonstrating that there was no manifest consideration of double remedies in the ADD or CVD investigation. The respondent party would then be obliged to adduce evidence proving that the investigating authority has taken into account the possibility of double

[96] *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, 23 May 1997, p. 335.

[97] On burden of proof and the *prima facie* threshold, *see* J. Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?', (1998) 1 JIEL 227, 253.

[98] *US – Wool Shirts and Blouses,* Report of the Appellate Body, *supra* note 94, 335*;* see also *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, Report of the Panel, 27 January 2000, para. 7.14.

remedies, and has effectively modified the respective amounts of trade remedies to reflect this.[99] This was the view taken by the Panel in the *US-CV/AD Measures* report.[100] Whilst USDOC is therefore correct in asserting that the burden of proof rests with the complaining party, in reality, it may fall to the defendant to prove that their investigating authority had taken measures to ensure that double remedies did not exist.

D. The Renewable Energy Sector – a 'Particular Market Situation'?

One issue not dealt with in the US and EU investigations into Chinese PV products was whether the renewable energy sector could be considered to be a 'particular market situation' within the meaning of Article 2.2 of the ADA. Two arguments could be advanced in support of this view. First, the renewable energy sector operates against the backdrop of large-scale and long-standing fossil fuel subsidies in the energy sector, which have necessitated the subsidisation of nascent renewable energy generation to make entry into the energy market economically feasible for firms.[101] Second, the market unquestionably produces positive externalities, insomuch as green energy plays an important role in climate change mitigation by reducing carbon emissions. Several commentators have invoked this rationale to contend that certain extant WTO rules (in particular, those in the SCM Agreement) should be revisited and amended in light of the overarching policy goal of climate change mitigation.[102]

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[99] "[T]he party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof"; *US – Wool Shirts and Blouses,* Report of the Appellate Body, *supra* note 94, 14; see J. Pauwelyn, *supra* note 95, 253.

[100] *US – CV/AD Measures*, Report of the Panel, *supra* note 11, para. 7.374.

[101] "Renewable energy - both wind and solar - was for a long time a new technology that needed state intervention to develop'; European Commission Press Release, 'Guidance for State Intervention in Electricity", 5 November 2013, <europa.eu/rapid/press-release_IP-13-1021_en.htm> (4 April 2014).

[102] *For example* A. Cosbey & P. Mavroidis, 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO', (2014) 17 JIEL 11, 46.

Recall that this enables countries' investigating authorities to disregard domestic prices for the purposes of calculating the normal value. While the RE sector forms a peculiar, albeit not unique, market in terms of large-scale intervention, there is limited use in contending that it has a particular market situation. Indeed, it is the calculation of the effect of domestic subsidies on the normal value that has been shown to be most problematic. This situation occurs primarily if the domestic price is *not* used as the basis from which to calculate the normal value, as the domestic price is presumed to take into account the effect of subsidies on the final price of the product.

CONCLUSION

The imposition of trade remedies within the green sector is a phenomenon that will only increase as time passes. The increasing financial rewards that the sector offers, as well as the non-pecuniary advantages that RE provides, motivates – and, to some extent – justifies continued state intervention in the sector. The continued imposition of unilateral trade remedies is, therefore, to be expected. This article has attempted to address some of the issues that arise in the RE sector when simultaneous trade remedies are imposed. An analysis of the US and EU investigations into dumping of PV products from Chinese producers demonstrates that various issues – sampling, double remedies, and burden of proof – are inadequately dealt with by the investigating authorities. These issues must be addressed squarely and transparently in future investigations. Only then will the simultaneous imposition of trade remedies on RE products assuredly be fully capable of combating 'unfair' trade practice in a fair way.