Market Economies and Concurrent Antidumping and Countervailing Duty Remedies

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ABSTRACT

Trade authorities often use surrogates for normal value in antidumping proceedings, most famously in the case of non-market economies. When an authority pursues simultaneous antidumping and countervailing duty investigations against a non-market economy, the use of surrogate normal value creates the potential for a doubled remedy; this has been the subject of much litigation and analysis. But surrogates for normal value are also widely used in cases against market economies. There has been little recognition that this can also create an excessive remedy and has done so in important instances. Consequently, the current double-count issues will not end as non-market economies graduate to the ranks of market economies under their Accession Protocols. Further, the recent Appellate Body attempt to redress the problem in non-market economy cases and consequent U.S. legislation have created a new divergence between the treatments of non-market economies and market economies in combined antidumping and countervailing duty cases, which can lead to relatively worse outcomes for market economy respondents. The relevant WTO agreements permit solutions to this problem, but those solutions will have to abandon the method suggested by the Appellate Body for non-market economies.

I. INTRODUCTION

A 2011 Appellate Body (AB) decision, US – Antidumping and Countervailing Duties (China),1 confronted the issue of a possible double-count in the antidumping duty (AD) and countervailing duty (CVD) trade remedies applied to imports from non-market economies. The AB found that such a double-count was “likely” when AD and CVD cases are pursued simultaneously against the same product from the same country and recommended that the United States amend its practice in the instant cases accordingly.2 There has been a considerable amount of analysis concerning the underlying issues and the decision itself.3

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2 Ibid, paras 582, 612.
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However, this analysis has stayed within the context of the decision, which was the concurrent application of AD and CVD in non-market economy cases. Here we will show that the underlying issue has much broader reach and presents a serious, ongoing problem in the administration of AD and CVD measures.

The WTO’s Antidumping Agreement (ADA)\(^4\) allows signatories to set tariffs in an appropriate amount up to the amount by which "normal value" exceeds "export price".\(^5\) The WTO’s Agreement on Subsidies and Countervailing Measures (SCM Agreement) allows signatories to set tariffs in an appropriate amount up to the amount that a product is subsidized.\(^6\) Thus the ADA and the SCM Agreement individually provide that the permitted remedies shall not exceed the transgressions that trigger those remedies. Arithmetically, it follows that the sum of antidumping and countervailing duties cannot exceed the sum of dumping and subsidization and that the level of antidumping duties can affect the appropriate level of countervailing duties. This is the overarching legal context for the doubled remedies dispute.\(^7\)

The double-count controversy arose in concurrent AD and CVD cases against non-market economies, discussed in Section II below. The keys to the double-count are the presence of domestic subsidies subject to CVD’s and the use of a surrogate for normal value in the dumping calculation.\(^8\) Since surrogates are used routinely in non-market economy AD cases, the issue became prominent once nations began pursuing CVD cases against non-market economies. But normal value surrogates are also used with some frequency in market economy cases. The use of surrogates, not their particular application to NME’s, creates the double-count situation.

This paper demonstrates the latter fact in Section III. Section III also identifies the situations in which the double-count will occur, defining more tightly the concept of “surrogate” and the close relationship of some subsidies with normal value. We show that the double-count arises naturally and analyze two decisions, one by the European Commission and one by the Canadian Border Services Agency, to demonstrate that the double-count problem leads to remedies in excess of those needed to offset the dumping and subsidization found. In Section IV, we argue that the AB decision in US – Antidumping and Countervailing Duties (China)

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\(^5\) Ibid, Articles 2, 9.2 and 9.3.


\(^7\) AB report, above n 1, paras 571-72.

\(^8\) Ibid, para 519.
applies in these situations but provides a less effective solution to the double-count than alternative approaches found within the existing WTO agreements.

II. THE IMPLICATIONS OF CONCURRENT CASES AGAINST NON-MARKET ECONOMIES

A. Countervailing duties, antidumping duties, and the source of the double-count

CVD and AD proceedings involve a product from a country, such as the U.S. case against softwood lumber from Canada. Usually they are initiated by a complaint from an industry in the importing country. If the complaining industry is successful, a countervailing or antidumping duty rate is calculated and applied as a tariff on imports from the target country. The CVD and AD calculation methodologies, when considered together, underlie the creation of the double-count.

A countervailable subsidy requires a combination of government provision of funds or services, specificity to certain enterprises, and a benefit conferred on the recipient. The calculation of the benefit yields the subsidy amount and the corresponding CVD. The benefit is defined relative to market benchmarks: the price of a production input provided by the government is compared to the market price of the same input; government loans are evaluated based on the difference between commercial and government interest rates; cash grants are valued at their face amount; etc. Subsidies are typically converted to *ad valorem* terms for ease of customs administration.

Antidumping duties reflect a comparison between export prices and normal value. Export price is a measure of the net selling price to the complaining country. Typically a period

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10 SCM Agreement, above n 6, Article 1.1.


12 See Articles 1.1, 1.2, and 2.1 of the SCM Agreement. The listing in the text is illustrative and there are many elaborations in actual practice. For example, most signatories would consider a low electricity rate from a government-owned utility to be a subsidy, even if the benchmark rates are from the same utility rather than a private provider.
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of investigation or review is set, often one year in length, and transaction information – prices, quantities, sale-specific adjustments such as discounts or freight – is gathered from the foreign producers and exporters involved in exports of the subject merchandise. The reported prices are netted for discounts, movement charges and selling expenses, with the net roughly corresponding to a factory-gate price.\(^\text{13}\)

The ADA expresses a preference for using domestic prices as the basis for normal value. Conceptually the normal value calculation is similar to that for export price: for the period under consideration, average domestic sales prices are computed by product, with adjustments to bring the selling price back to the equivalent of a factory-gate price. This allows direct comparison between normal value and export price, with the excess of the former over the latter forming the dumping margin. Dumping margins are developed for individual responding companies and for the exporting country as a whole; the antidumping duties are set equal to these margins.\(^\text{14}\)

The ADA allows domestic production costs to be used instead of home market sales as the basis for normal value under certain circumstances.\(^\text{15}\) Production cost is the sum of the costs of manufacturing, usually computed on a product-specific basis, and administrative, selling and general expenses. An addition is made for putative profits and the resulting “constructed value” can then be compared to the export price, both on a rough factory-gate basis, to determine the dumping margin.\(^\text{16}\)

Importantly, unless surrogates are used, the dumping calculation uses the prices and costs that the company recognizes.\(^\text{17}\) If an output or input price is lowered by subsidization, that price is nevertheless used in the dumping calculation. In cases involving export subsidies – typically transactional subsidies contingent upon export – this means that the export price, likely lower than the domestic price due to the subsidy, is used in the dumping calculation, thereby increasing the dumping margin relative to an unsubsidized case.\(^\text{18}\) If the same imports are also subject to a countervailing duty, the export subsidy is addressed twice, through the AD and the CVD. This was recognized long ago\(^\text{19}\) and national laws have mandated an addition to


\(^{14}\) Ibid. The ADA, at Article 6.10, expresses a preference for firm-specific AD margins, but allows sampling in some cases.

\(^{15}\) ADA, Article 2.2. Another, rarely used, basis for normal value is third country sales.

\(^{16}\) Ibid.

\(^{17}\) Ibid, Article 2.2.1.1.

\(^{18}\) See Kelly (2011), above n 3, at 8-11.

\(^{19}\) Jacob Viner described the double-count with respect to export bounties. Jacob Viner, Dumping: A Problem in International Trade (Chicago: University of Chicago Press, 1923) at 270. Note that while the gap between the
the export price equal to the amount of the countervailing duty in such cases, effectively removing the double-count.\textsuperscript{20} In the case of “domestic subsidies”\textsuperscript{21} the same adjustment has not been made in the past because of the belief that domestic subsidies do not raise the double-count issue. Indeed, if surrogates are not used, a domestic subsidy affects normal value and export price equally, does not increase the dumping margin, and raises no double-count concerns.\textsuperscript{22} For example, an input subsidy that lowers the cost of manufacturing is assumed to have equal impacts on domestic prices, export prices, and constructed value. The same is true of an untied subsidy that lowers financing costs or a transactional subsidy that applies equally to all sales. Prior to the issues created by pursuing CVD cases against non-market economies, this was a simple point that had rarely risen to the level of controversy.

Surrogates can be used for both domestic sales and for production costs in a broad range of circumstances. We will address this more generally in Section III below, but we turn here to the example relevant to the current double-count controversy: surrogates in non-market economy (NME) cases. NME cases refer to antidumping proceedings against countries with a high degree of state involvement in the economy.\textsuperscript{23} This means that neither the prices received for the comparison products sold domestically, nor the prices paid for production inputs purchased domestically, can be used in determining normal value. This leads
domestic price and the export price will equal the amount of the export subsidy, this may be due in part to the export subsidy raising domestic prices due to the more attractive returns on export sales; in this case, the additional dumping margin created by the export subsidy remains the amount of that subsidy, but the pass-through to export price of the subsidy is less than 100%.

\textsuperscript{20} For example, U.S. law provides that the export price will be increased by ‘the amount of any countervailing duty imposed on the subject merchandise under subtitle A to offset an export subsidy … ’ 19 United States Code §1677a(c)(1)(C) (2006).

\textsuperscript{21} “Domestic subsidy” is a general term meaning anything other than an export subsidy; despite its name, it does not refer to a subsidy just on domestic sales. Examples of domestic subsidies are input subsidies and untied financial subsidies.

\textsuperscript{22} Appellate Body Report, \textit{US – Certain Products}, above n 1, para 543 and accompanying footnote 519. This is not a claim that any given subsidy will in fact have equal effects on costs and prices in various markets, but rather points out that this is the way that normal value and export price are calculated in practice. See also below n 46.

\textsuperscript{23} The authority to depart from usual normal value calculations dates from the 1955 addition of the Ad Note to Article VI:1 of the 1947 GATT, which was included in the 1994 GATT and thus incorporated into the WTO agreements. See Appellate Body Report, \textit{US – Certain Products}, above n 1, footnotes 545-46. The Ad Note refers to ‘a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the state.’ The Accession Protocols or related documents of various non-market countries allow for this treatment; China, for example, agreed that ‘The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.’ Accession of the People’s Republic of China, 10 November 2001, WT/L/432, Section 15(a)(ii). For an extensive discussion of the use of accession protocols by the WTO, see Mitali Tyagi, ‘Flesh on a Legal Fiction: Early Practice in the WTO on Accession Protocols’, 15 Journal of International Economic Law 391 (2012).
investigating authorities to seek a surrogate to replace the domestic price or production cost bases for normal value.

The United States Department of Commerce (Commerce) uses a production cost methodology for the normal value surrogate.\textsuperscript{24} The physical input usages experienced by the respondent companies are gathered; for example, a Chinese firm might report that it uses 1.1 metric tons of scrap steel per ton of finished steel. But those inputs are valued using prices in a third country, often India. Direct manufacturing costs are built as the sum of Chinese input usage multiplied by surrogate input prices. Surrogates also are used for indirect overhead, selling, and general expenses, usually ratios applied against the direct manufacturing costs, with a surrogate profit then calculated to reach a constructed value. This is then compared to the export price, which is computed largely in the normal way. This methodology, combined with simultaneous prosecution of CVD cases, led to the double-count controversy.

B. Domestic Subsidies, Surrogates and the Appellate Body decision

In 2007 the United States began applying the CVD law to NME’s.\textsuperscript{25} All of the early CVD cases filed by the U.S. against NME’s, and nearly all since then, included a companion AD case.\textsuperscript{26} In 2008 China responded by filing an appeal with the WTO’s Dispute Settlement process.\textsuperscript{27} Among several other arguments, China maintained that the simultaneous application of CVD’s and AD’s to the same products from an NME created a double-count of the CVD and AD remedies.\textsuperscript{28} China pointed out that the application of the CVD law to China meant that a domestic subsidy would lead to an equal countervailing duty.\textsuperscript{29} In a market economy case, the same domestic subsidy would affect normal value and export price equally, neutralizing its effect on the dumping calculation. But the NME methodology leads the U.S. to use a surrogate for normal value. Since normal value is based on input prices in another country, those surrogate values


\textsuperscript{25} Ahn and Lee, above n 3, at 339.

\textsuperscript{26} Through 2011, the U.S. had initiated 31 CVD cases against China or Vietnam; all 31 were accompanied by an AD case. See United States Department of Commerce, ‘Import Administration’, http://www.trade.gov/ia/ (visited 22 September 2013).

\textsuperscript{27} See Requests for Consultations by China, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/1, 12 December 2008; Request for the Establishment of a Panel by China, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/2, 12 December 2008.


\textsuperscript{29} The description that follows in the text is based on the Panel Report, ibid, paras 14.67-14.75.
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will not be lowered by the Chinese subsidies. This means that the dumping calculation compares a normal value that does not reflect the impact of the subsidies to an export price that does. This leads to an increase in the dumping margin due to the subsidy. The CVD already reflects the full value of the subsidy, so any additional impact on the dumping margin constitutes a double-count.

The WTO Panel that heard China’s appeal agreed with the substance of the double-count argument, but hedged on whether the double-count was inevitable.\(^\text{30}\)

To the extent that part of the dumping margin found to exist resulted from subsidies provided in respect of the exported good, the anti-dumping duties calculated under an NME methodology will remedy both dumping and subsidization. In this sense, it can be said that if countervailing duties are simultaneously applied to imports of the same good, the subsidy is likely to be "offset" more than once, i.e., once through the anti-dumping duty, and again at least partially through the countervailing duty. For this reason, we consider that the concurrent imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties creates the potential for imposition of a "double remedy", as China defines this term.

The Panel used the word “likely” because it accepted the U.S argument that in some situations it was plausible that the subsidy would not have a one-for-one impact on costs or prices.\(^\text{31}\) It then concluded that, regardless of the likelihood of a double-count, the WTO agreements did not prohibit the doubled remedy.\(^\text{32}\)

The AB reversed the Panel on the latter point, ruling that an administering authority had an affirmative duty not to collect more than the appropriate amount of countervailing duties and that the implications of the antidumping duties could not be ignored in that determination.\(^\text{33}\) The AB agreed that double remedies would “likely” result but that this would be a matter for agency investigation.\(^\text{34}\)

Contemporaneous U.S. court appeals led to a series of decisions and remands by the U.S. Court of International Trade (CIT).\(^\text{35}\) The CIT concluded that the double-count did exist and instructed the Department of Commerce to eliminate it.\(^\text{36}\) After two rounds of remand, the CIT concluded that Commerce was unable to devise an acceptable means to eliminate the double-count.

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\(^{30}\) Ibid, para 14.70.
\(^{31}\) Ibid, para 14.73.
\(^{32}\) Ibid, para 14.130.
\(^{33}\) Appellate Body Report, US – Certain Products, above n 1, para 605.
\(^{34}\) Ibid, para 544
\(^{36}\) GPX Int’l Tire Corp. v. United States, 645 Fed Supp 2d 1231 (US Ct Int’l Trade 2009), rev’d 666 F.3d 732 (Fed Cir 2011)
count and instructed the Department not to apply CVD’s.\textsuperscript{37} However, in late 2011 the Court of Appeals for the Federal Circuit (CAFC) ruled that the U.S. CVD law could not be applied to NME’s at all, overruling the CIT on that issue and mooting the CIT results concerning the double-count.\textsuperscript{38}

In 2012 the U.S. Congress reacted to both the AB and CAFC decisions by passing H.R. 4105.\textsuperscript{39} Section 1 stated that NME’s could be subject to CVD’s, thus addressing the CAFC decision. Section 2 amended U.S. law to address the NME double-count in a manner intended to address the AB decision. At present, Commerce is implementing Section 2 by leaving the CVD equal to the full amount of the subsidy while trying to measure the pass-through of the subsidy to export price in the dumping calculation.\textsuperscript{40} To the extent that such pass-through occurs, there is a corresponding reduction in the dumping margin, but the reduction cannot exceed the level of the CVD.\textsuperscript{41}

The Commerce methodology addresses the double-count only in part.\textsuperscript{42} The underlying NME surrogate methodology replaces a normal value that reflects the amount of the subsidy by one that does not. This correspondingly increases the dumping duty by the amount of the

\textsuperscript{37} GPX Int’l Tire Corp. v. United States, 715 Fed Supp 2d 1337 (US Ct Int’l Trade 2010).
\textsuperscript{38} GPX Int’l Tire Corp. v. United States, 666 Fed 3d 732 (US Fed Cir. 2011).
\textsuperscript{39} 19 United States Code §§ 1671, 1677(f)(1).
\textsuperscript{42} The methodology would correct the double-count fully only if the United States found 100% pass-through to price. In the four cases at issue in the AB decision, Commerce found pass-through rates varying from less than 1% to about 70%. (Author’s calculations, based on original and revised AD margins published in ‘Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube from the People’s Republic of China’, 77 Federal Register 52,683, at 52,686-88 (Department of Commerce, 30 August 2012). Commerce portrays its methodology as the implementation of the AB’s intent, but the AB decision arguably required a concomitant decrease in the CVD for anything less than full pass-through; the AD and CVD corrections taken together would then resolve the double-count. See Matthew R. Kelly, ‘Resolving the Double Remedy Dispute: A Critique of the WTO Appellate Body’s Decision in United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China’, Social Science Research Network #2273938, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2273938 (visited 22 September 2013).
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subsidy. Since the CVD equals the amount of the subsidy, this means that the excess dumping duty equals the amount of the CVD. If the artificially inflated dumping margin exceeds the CVD, the CVD provides the relevant amount of the double-count. If the CVD exceeds the amount of dumping, this remains technically true, but it implies a “negative” dumping margin, and in practice dumping margins are never less than zero; consequently, the double-count is limited to the amount of the putative antidumping duty. In summary, the double-count equals the smaller of the CVD or the AD.43

Importantly, the longstanding correction for a double-count of an export subsidy reflects this logic. Adding the CVD to the export price eliminates the dumping margin if it is less than the CVD, and removes the equivalent of the CVD from the AD if the dumping margin is greater than the CVD. That is, the correction equals the smaller of the CVD or the AD.

While the focus of the action has been on the United States, the issue affects other signatories pursuing CVD cases against NME’s. Canada began assessing CVD’s on imports from China in 2006 and, like the United States, a great portion of its contingent trade administration activity since that time has involved simultaneous AD/CVD cases against China.44 The Canadian methodology also creates the double-count, although it has not attracted the same degree of controversy. The European Union initiated its first CVD case against China in 2010 and it was paired with an antidumping case.45 The European Commission’s methodology, like those of the U.S. and Canada, potentially leads to the double-count of AD and CVD remedies. Thus, while not yet tested before the WTO, the Canadian and EU policies appear subject to the reasoning used by the AB in US – Antidumping and Countervailing Duties (China).

43 Kelly (2011), above n 3, at 19-23.
45 European Commission, ‘Notice of initiation of an anti-subsidy proceeding concerning imports of coated fine paper originating in the People’s Republic of China’, Official Journal of the European Union, C 99/30, 17 April 2010. However, the final determinations in this first case applied the European Union’s “lesser duty rule”, which led the Commission to cap the sum of the AD and CVD at the amount of the “injury margin”, essentially the amount of underpricing of European production by Chinese imports. The injury margin was less than the standalone dumping margin, effectively removing the prospective double-count of the two remedies. ‘Council Implementing Regulation (EU) No 452/2011 of 6 May 2011 imposing a definitive anti-subsidy duty on imports of coated fine paper originating in the People’s Republic of China’, O.J. L 128/18, 14 May 2011, para 272-73.
III. MARKET ECONOMY CASES AND THE DOUBLE-COUNT

A. The source of the problem: the use of surrogates for subsidized normal value

The double-count arises in non-market economy cases due to the use of surrogate values in place of domestic sales or domestic costs. In a typical market economy case, this does not occur, for domestic subsidies will affect both domestic prices and export prices.\(^{46}\) Should normal value be based upon costs, the costs used are those reflecting the subsidy. Consequently, the subsidy has no effect on the dumping calculation and is addressed by countervailing duty alone.

But surrogates for domestic prices or costs are widely used in market economy cases. Under some circumstances, they can lead to the same double-count problem that the use of surrogates creates for NME’s.\(^{47}\) The key ingredients of the double-count are (1) a countervailed domestic subsidy\(^{48}\) that affects both normal value and export price, combined with (2) a dumping methodology that removes or alters the effects of the subsidy upon normal value. We can separate two main sets of circumstances in which the latter occurs, those in which a company’s own data underlie normal value but are not fully comparable to the export price

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\(^{46}\) The assumption of antidumping authorities, that these effects are equal and thus the subsidy does not affect the margin of dumping, may seem strong, but it occurs in different forms throughout the dumping calculation. Expenses are typically deducted from price without a concern for whether or how they affect price in the first place. If a company experiences a change in input costs, no national trade authority asks whether this is passed through differently to different markets: for example, if electricity costs fall by 10%, there is no attempt to parse out differential effects for a given product across markets. In this context, the assumption of equivalent pass-through across markets for a domestic subsidy is consistent with the dumping calculation more broadly, especially with respect to production costs.

\(^{47}\) While this has not been analyzed in any depth prior to this paper, the potential problem has been noted previously. It was discussed in a 2009 working paper that included a brief analysis of the Biodiesel decision, which is expanded below. (Brian Kelly, ‘The Off-Setting Duty Norm and the Simultaneous Application of Countervailing and Antidumping Duties’, Social Science Research Network #1530071.) The Panel report in \textit{US – Certain Products} made the following reference (above n 12, para 14.72 and accompanying footnote 972):

While the question is not before us, it would seem that a double remedy could arise in investigations involving market economy imports, depending on the costs that are used to calculate the normal value: A double remedy may arise when the normal value of a market economy producer is constructed using costs that do not reflect the subsidies that this producer received.

The AB report (above n 2, para 543), citing this section of the Panel report, notes:

Double remedies may also arise in the context of domestic subsidies granted within market economies when anti-dumping and countervailing duties are concurrently imposed on the same products and an unsubsidized, constructed, or third country normal value is used in the anti-dumping investigation.

\(^{48}\) As already noted, a subsidy may target export sales alone; this would constitute an export subsidy and WTO rules and long practice at the national level provide for a correction to prevent the double-count. The text is considering only domestic subsidies. An unusual case, not further analyzed in the text, would be one in which domestic sales are subsidized and export sales are not.
data, and those in which data from other sources replace a company’s normal value information. In the first case, while domestic subsidies affect domestic sales or costs and export price equally, subsidized domestic sales or costs might not be used in the dumping comparison for reasons unrelated to the subsidy. These reasons include the use of products that are physically similar but not identical to those exported; the use of sales from a different period than the export sales; the use of sales at a different level of trade or distribution than the export sales; the use of profits in constructed value based on a different universe of products than those exported; and various other possible differences in the circumstances of domestic sales or costs versus export sales. For many such instances, Article 2.4 of the ADA provides that such differences should be minimized and, if they occur, correcting adjustments should be made, and so we will refer to these as “fair comparison” situations.49 Such differences need not lead to difference in subsidy rates, but they can. Second, the trade authority may discard parts of a company’s normal value data in favor of information from another source. This is, of course, what occurs with respect to NMEs. In market economy cases, the application of partial “facts available”50 often leads the trade authority to use surrogate data, which may incidentally remove the subsidy from normal value.

The next two subsections analyze cases that created double-counts in a fair comparison situation and in a partial facts available situation. The facts of the cases show that the problem arises naturally in dumping comparisons.

B. Fair comparison situations: the European Union investigations of Biodiesel from the United States

When sales of a physically identical product are not available for normal value, the dumping comparison often uses sales of a similar product, with adjustments made for differences in physical characteristics.51 Article 2.4 of the ADA, in addition to the overarching requirement of

49 Article 2.4 opens with ‘A fair comparison shall be made between the export price and the normal value.’ The AB raised the possibility that the use of third country sales could lead to the double-count if they are not subsidized, above n 47. This is possible, although perhaps no more likely than the same happening with domestic sales. (The AB may have been temporarily misled by the term “domestic subsidy”, which on its face would seem not to apply to third country sales.) For example, a production subsidy will affect third country sales in the same way as subject export sales. In any case, third country sales fall within the fair comparison and facts available discussions of the text.

50 ADA, Article 6.8.

51 ADA, Articles 2.1 and 2.6. The United States routinely seeks sales of similar products when sales of identical products are not available and its use of the “difference in merchandise adjustment” long pre-dates the WTO agreements. Uruguay Round Agreements Act Statement of Administrative Action, Agreement on Interpretation of Article VI, Section A.1, http://ia.ita.doc.gov/regs/uraa/saa-ad.html (visited 22 September 2013). Some other national authorities do not use similar products, preferring instead to apply constructed value if sales of identical products are not available for normal value.
a fair comparison, provides a non-exclusive list of fair comparison reasons that adjustment may be necessary between normal value and export price, including physical differences. The fair comparison requirement raises the possibility that different rates of subsidy apply to the export and comparison products, or indeed that the exported product is subsidized and the comparison product is not. Unless account were taken of this, it would create a double-count in that the exported product would be subject to a CVD due to the subsidy, but its normal value would not reflect the effects of that subsidy.

In the 2009 European Union CVD and AD investigations of Biodiesel from the United States, this issue was joined.\textsuperscript{52} In the CVD investigation, the most important subsidy was a “blender’s credit”. Under this program, the U.S. government paid a $1/gallon subsidy on biodiesel to the party that blended the biodiesel with mineral diesel.\textsuperscript{53} This led to the practice of biodiesel producers blending 0.1% mineral diesel into their biodiesel stocks to receive the subsidy. \textsuperscript{54} At the same time, purchasers of biodiesel in the United States were well aware of the program and in many cases were willing to purchase pure biodiesel and do the blending themselves, thus receiving the subsidy. This created roughly a $1 per gallon gap between the market prices of 100% pure biodiesel (“B100”) and of the 99.9% pure biodiesel (“B99”), reflecting the fact that the former was still eligible for the subsidy.\textsuperscript{55}

Respondents sold B99 to Europe; the European Commission (EC) found the $1/gallon paid before exportation to be a subsidy.\textsuperscript{56} One respondent had domestic sales largely of B100; as the unsubsidized product, it sold for a considerably higher price than the B99 exported to Europe. The products sold domestically also used a soy-based feedstock, the exported product a canola-based feedstock; while feedstock differences did not lead to a separate “like” product and did not affect product substitutability, the EC concluded that the exported and domestic products were not identical. This created the setting for a comparison of similar products, the domestic being subsidized, the export not subsidized. But the EC decided to compare export sales not to domestic sales of the similar B99 product, but to constructed value. For the


\textsuperscript{54} Ibid.

\textsuperscript{55} Ibid.

\textsuperscript{56} Ibid.
constructed value profit, the EC used all domestic sales of biodiesel, comprised mostly of high-priced B100, less the production costs of biodiesel; this had the effect of including the subsidy revenue in constructed value profit. This had the same effect as comparing export sales of subsidized product to domestic sales of largely unsubsidized product. At the same time, the Commission set the CVD equal to the full amount of the blender’s credit.

The double-count was clear and was not disputed by the EC. It arose because a surrogate was used for comparison sales and this led to a largely unsubsidized normal value being compared to a subsidized export price. The Commission declined to make an adjustment because it claimed respondents had raised the argument under the wrong provision of its regulations and also that its regulations did not permit an adjustment to constructed value to correct the problem, thus not grappling fully with the double-count. Alternative approaches that would lead to a fair comparison are explored in Section IV.B, below.

C. The application of facts available to normal value: the Canadian investigations of Grain Corn from the United States

The ADA permits agencies to use “facts available” when a responding firm does not provide necessary information. By definition, the use of facts available means that the investigating authority is departing from company data; in the language of this paper, it is using surrogates for the company’s information. In concurrent AD and CVD proceedings, a trade authority may

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57 EC Biodiesel AD Final, above n 42, paras 52-53.
58 EC Biodiesel CVD Final, above n 42, para. 195.
59 Interestingly, the Commission has shown some possible qualms about this decision. In the more recent case concerning bioethanol from the United States, the Commission stated, ‘The product concerned and the like product present the particularity that traders/blenders have received a subsidy mainly in the form of excise tax credits during the IP on their sales of bioethanol blends. The method used to establish normal value and export price is a method where the actual sales prices, domestic and export of the said traders/blenders are fully taken into account. Hence, a comparison of sales made by traders/blenders in the US market and export prices of traders/blenders to the EU, in order to calculate the level of dumping on the product concerned, eliminates any possible impact the subsidy may have had on prices, since the subsidy equally affected both domestic and export sales during the IP.’ Council Implementing Regulation No 157/2013 on imposing a definitive anti-dumping duty on imports of bioethanol originating in the United States of America, Official Journal of the European Union L49/17, 22 February 2013. While this does not go so far to state that a difference would lead to an adjustment, the advertisement that no such adjustment is necessary given the particular facts of the case is suggestive.
60 The Commission also faced an argument that the comparison of B99 sales revenues to a cost of production that was not netted for the blenders’ credit led to an inappropriate ordinary course of trade comparison, with the revenue from the subsidy not being recognized in determining whether sales were at less than production costs. This represents another part of the dumping calculation that can lead to overlapping remedies. The EC rejected the possibility of adding the subsidy or CVD amount to price because it claimed a lack of specific authority to do so. EC Biodiesel AD Final, above n 42, paras 45–47.
61 ADA, Article 6.8 and Annex II.
find countervailable domestic subsidies and yet conclude that the domestic price or cost information from the respondent companies cannot be used in the dumping calculation. The double-count occurs if a domestic subsidy is countervailed, yet its effect on normal value is overlooked due to the use of facts available. This may be difficult to identify: if facts available are used as a punishment for a generally inadequate response, an overall dumping duty rate may be assigned without using any of the company’s information. The “computation” of the duty rate becomes meaningless. But often facts available are applied to elements of a response, in which case the double-count might be readily identified.

In *Grain Corn from the United States* 62, the Canadian Border Services Agency (CBSA) conducted concurrent CVD and AD investigations. The subsidies found, $0.45/bushel or 18% against export price, were countervailed in full. 63 On the dumping side, the CBSA concluded that certain respondents had not provided complete, timely responses and applied facts available, using U.S. Department of Agriculture (USDA) estimates of the annual production costs of corn. 64 These estimated costs were not net of the countervailed subsidy amounts with respect to the main subsidy, direct and counter-cyclical payments, and likely not with respect to the other two subsidy programs. 65 The CBSA compared these costs to corn prices in the United States, again using the USDA data for corn prices. The CBSA determined normal value by using constructed value in months in which annual costs were above monthly prices – the considerable majority of the investigation period - and by using domestic prices otherwise, then averaging the constructed values and average domestic prices together for an annual normal value. 66 Thus an invalid comparison first appears in the cost test: unsubsidized costs are compared to market prices. 67 The resulting normal value relied heavily on costs that did not

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63 Ibid, para 82.

64 Ibid, paras 27, 33.

65 The direct and countercyclical payments amounted to $0.23 per bushel of the total $0.45 per bushel in subsidies. Ibid Appendix IV. The text describes the double-count with respect to this program, which arises from the use of USDA cost information as a surrogate. For the USDA methodology for develop crop cost estimates, see USDA, ‘Commodity Costs and Returns: Documentation’ and the associated links, found at [http://www.ers.usda.gov/data-products/commodity-costs-and-returns/documentation.aspx](http://www.ers.usda.gov/data-products/commodity-costs-and-returns/documentation.aspx) (visited 22 September 2013). The other two programs likely also represented a double-count – the quantification of both relies on commercial benchmarks and it is likely that the surrogate costs are based on commercial rather than subsidized amounts - but the information on the public record is insufficient to be completely certain. See Ibid, Appendix IV, for a description of the subsidy programs and their quantification.

66 CBSA, above n 77, para 29.

67 The overlapping remedies at this stage of the dumping calculation is essentially the same as that mentioned above n 60. A farm that had gross costs of $100 per unit, market revenues of $90 per unit, and a subsidy of $20 per unit, could not count the subsidy in the cost test, leaving it showing a loss and thus falling back to a constructed value based on the gross costs of $100.
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reflect the subsidies and was compared to the actual export prices, resulting in the dumping margin reflecting the same subsidies as were addressed by the CVD. The difficulty arose from not using the producers’ overall costs and revenues; instead, the CBSA employed surrogate approach that largely eliminated the subsidies from normal value. The overall dumping margin was 26% and the subsidy margin 18%, with the latter figure likely representing the amount of the double-count.

The double-count was not recognized as an issue in the case, despite its numeric importance. The case preceded the rise of the double-count issue with respect to NMEs and so participants may not have been sensitized to the possibility. But likely more important was the fact that the double-count can be difficult to recognize; it is key that trade authorities and parties to proceedings realize that it can occur whenever an unsubsidized normal value is used as a surrogate for the firms actual costs or prices.

IV. WHAT IS TO BE DONE?

Canada, the United States, and other WTO signatories created the double-count problem with respect to non-market economies by countervailing domestic subsidies bestowed in those countries without making appropriate adjustments to the NME AD methodologies. The Appellate Body decision in US – Antidumping and Countervailing Duties (China) addressed the double-count, but arguably in a way that allows a correction for less than its full impact. The U.S. statutory change in 2012 compounded this; while leaving the final discretion with Commerce, it allowed an interpretation of the AB decision that would prevent the full correction of the double-count. Commerce implementation of the AB decision has used a methodology that leaves the double-count in place for large categories of subsidies. However, while the contradictions of the AB decision, the eagerly rushed U.S. legislation, and Commerce implementation are problems, one can observe that they are likely to go away as countries “graduate” from NME status under the terms of the Accession Protocols; for China and Vietnam, this will occur in late 2016.68

But as shown in Section III, the double-count arises because of the use of surrogates for normal value generally, not just because of the use of surrogates in NME cases. To date the market economy cases have not entered the public debate, beyond the Biodiesel case, because the double-count matter has taken years to resolve in the NME context and because of a simple

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lack of awareness. However, the double-count represents a serious ongoing problem. The use of simultaneous AD and CVD cases is increasing for market economies, and their coordinated use against China and Vietnam is likely to continue after those countries are no longer treated as NME’s. Thus the double-count is not going away in 2016 when China and Vietnam graduate from NME status.

In this section, I will first consider whether the legal reasoning of the AB’s decision concerning the existence of the double-count applies in market economy cases. I will then discuss possible approaches to resolving the double-count in such cases.

A. Does the AB reasoning apply to market economy examples?

The Panel and the AB concluded that the simultaneous application of AD and CVD could lead to a double-count in the case of an NME surrogate. Does the AB’s reasoning also apply to double-counts arising from other normal value surrogates? Both the Panel and the AB hinted that they thought so, but their comments were dicta without significant further analysis and we have to look more closely at their reasoning in the matter before them.

The AB, following the Panel, found that the double-count arose from “the concurrent imposition of antidumping duties calculated on the basis of an NME methodology and countervailing duties”. The AB reasoned:

Under Article 19.3 of the SCM Agreement, the appropriateness of the amount of countervailing duties cannot be determined without having regard to anti-dumping duties imposed on the same product to offset the same subsidization. The amount of a countervailing duty cannot be "appropriate" in situations where that duty represents the full amount of the subsidy and where the anti-dumping duties, calculated at least to some extent on the basis of the same subsidization, are imposed concurrently to remove the same injury to the domestic industry. Dumping margins calculated based on an NME methodology are, for the reasons explained above, likely to include some component that is attributable to subsidization.

The AB’s interpretation of the applicability of Article 19.3 rests on the double-count; the NME situation is presented as an instance of that interpretation, not its defining characteristic. Paraphrasing the Panel’s report, the AB reasoned that the comparison of a normal value that does not reflect the subsidy, to an actual export price that does, implies that ‘The resulting

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69 The AB decision is persuasive rather than applying in a mandatory sense to similar market situations. Any appeal to the WTO Dispute Settlement process of overlapping remedies occurring in a market case would have to consider afresh the question of whether the double-count in fact exists, since the terms of the AB’s decision are limited to the NME situation. The purpose here is to explore the underlying logic of that decision to see whether it would continue to apply in market economy cases.
70 Above n 47.
71 Appellate Body Report, US – Certain Products, above n 1, para 611(d).
72 Ibid, para 582.
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dumping margin is thus based on an asymmetric comparison and is generally higher than would otherwise be the case. ... Put differently, the subsidization is “counted” within the overall dumping margin.73

Thus the AB decision places no reliance on the particular nature of the NME comparison beyond its use of a surrogate. The key element is that the production or sales that the subsidy is deemed to benefit are not those used in the calculation of normal value.

B. Resolving the double-count in market economy cases

Given the existence of the double-count and the likely conclusion upon challenge that it is contrary to the SCM Agreement, what approaches could address the problem? The relevant WTO texts themselves provide the answers to the two leading situations described in Section III.

Article 2.4 of the ADA provides that:

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

Article 2.4 provides the authority to take account of subsidization in a fair choice of normal value and to correct for inappropriate comparisons. The first sentence states its general nature, the remainder provides examples specific to price-to-price comparisons. The examples may be associated with differences in subsidy rates. For example, in the Biodiesel case, the physical differences in merchandise were the reason for the difference in the subsidy rates; the exported product received the subsidy by its nature, the domestic product did not.74 Had the Commission chosen price-to-price comparisons, Article 2.4 provides clear authority to remedy the double-count through the physical differences adjustment.75 But the examples are not exhaustive. Again using Biodiesel as an example, the EC chose a roundabout methodology that

73 Ibid, paras 542-43.
74 The Biodiesel case was unusual in that the price impact of the subsidy was clear. In general this will not be the case. However, the due adjustment requirement of Article 2.4 is routinely based on differences in costs when the products differ, not the effects of those cost differences on price. The same is true for differences in a variety of expenses such as commission, freight, etc.
75 This is not to argue that Article 2.4 in itself requires such a correction for the subsidy difference, a question that we do not reach; rather, the AB’s reasoning in DS379 requires the correction and Article 2.4 provides the means. Similarly, the first sentence of Article 2.4 allows correction for differences in an export price to constructed value comparison, as actually occurred in Biodiesel; again, we do not need to reach the question whether the article requires such a correction.
led to a constructed value profit inflated by the subsidy, with the resulting comparison
distorted by the inclusion of the subsidy in export price but not normal value. The Commission
could have based constructed value profit on just sales of the subsidized U.S. product; the WTO
Panel in Thailand – H-Beams\textsuperscript{76} held that the products used for developing surrogate profit need
not be broader than the exported product and the EC regulations mirror the ADA’s language on
constructed value profit.\textsuperscript{77} Alternatively, it could simply have availed itself of its own authority
to make adjustments\textsuperscript{78} to assure a fair comparison, which is based on the first sentence of the
ADA and its own Article 2(10).\textsuperscript{79} The language of 2.4 does not restrict an adjustment for
differing subsidy rates only to those cases in which the difference is caused by one of the
enumerated subsidy factors: the first sentence and the reference to “any other differences” are
expansive.\textsuperscript{80, 81}

The second category of double-count situations concerns facts available. As with fair
comparison situations, the solution here lies within the existing language of the agreements. In
the case of facts available applied to normal value, the ADA advises that “special
circumspicence” should be used in applying facts available to normal value.\textsuperscript{82} The guidance
provided by the ADA, pointedly titled “Best Information Available” rather than “Facts

\textsuperscript{76} Panel Report, Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and
H-Beams from Poland, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R,
DSR 2001:VII, 2741
\textsuperscript{77} Compare Article 2.2.2. of the ADA to Article 2(6) of the European Commission regulations. (‘Council
Regulation No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not
Regulation of 30 November 2009).)
\textsuperscript{78} The arithmetic of implementing the double-count correction through an adjustment for the differences in
subsidization is straightforward. Essentially, the subsidy rate, perhaps zero, would be removed from the surrogate
normal value and replaced by the subsidy rate leading to the CVD. If the surrogate normal value carries a subsidy
of $2, and the exported product carries a fully countervailed subsidy of $8, there would be a net subtraction of $6
from normal value. This is consistent with the second solution proposed in Kelly (2011), above n 3, at 22.
\textsuperscript{79} Council Regulation of 30 November 2009, Article 2(10), above n 77.
\textsuperscript{80} The first sentence of the corresponding Article 2.6 in the GATT’s Agreement on the Implementation of
Article VI of the General Agreement on Tariffs and Trade
(http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm, visited 22 September 2013) referred to a fair
comparison between export prices and domestic or third country prices, not normal value generally. During the
WTO negotiations, this was replaced when the New Zealand I text replaced the Carlisle II text; the New Zealand I
text deliberately broadened the reference to normal value and that language was maintained in subsequent drafts
to appear finally in the ADA. See James P. Durling and Matthew R. Nicely, Understanding the WTO Antidumping
Agreement, (Cameron May Publishers, 2002), 75-76.
\textsuperscript{81} In addition to the reasons in the text, both of which relate directly to the double-count, the EC could have
compared the exports of canola-based B99 to domestic sales of soy-based B99; both individual products were
considered highly similar. EC Biodiesel AD Final, above n 52, para 23.
\textsuperscript{82} Annex II, para 7 of the ADA (‘if the authorities have to base their findings, including those with respect
to normal value, on information from a secondary source, including the information supplied in the application for
the initiation of the investigation, they should do so with special circumspection.’)
Available”, urges investigating authorities to use alternatives that are grounded in reality.\(^8^3\) In general the subsidy and countervailing duty rates will be considered “facts” by the trade authority and they will be available. Consequently the loss of the subsidy element in using a normal value surrogate can be addressed by using the fact of the corresponding subsidy rate. For example, in the Grain Corn case, a surrogate was used for normal value costs that did not include the direct and counter-cyclical subsidies actually received by the respondent; the amount of these subsidies was calculated in order to set the CVD. The simple solution is to adjust the surrogate value directly by deducting the subsidy; if a company uses subsidized fertilizer but the trade authority finds it necessary to use a surrogate for those costs, that surrogate should be for subsidized fertilizer, not unsubsidized fertilizer. Otherwise, some of the relevant facts available are not being used, in contradiction of the ADA.\(^8^4\) If this is not possible, an adjustment to normal value can be made under the Article 2.4 logic above.

An apparent alternative to the corrections described above would be to implement the quantification methods of the AB’s decision with respect to market as well as non-market economies. This has several difficulties. First, if the AB’s ruling implies that an AD adjustment is necessary only to the extent that the subsidy lowers export price, and if the CVD remains set at the full amount of the subsidy, this method does not correct for the full double-count, as described in Section II above. Second, if the ruling requires that CVDs be lowered to reflect less than 100% pass-through to export price, it will create a direct clash with many national laws. Third, the pass-through calculations are difficult, with few rules to guide them, and would be a source of controversy in every case. Essentially, the pass-through approach is at best a costly diversion when the alternative of fully adjusting for the double-count is available under the ADA and existing national laws.

The current situation, in which no correction for the double-count is made in market economy cases, while a partial correction is made in NME cases, seems difficult to sustain. Current U.S. practice, designed to implement the AB’s decision, creates a situation in which market economy respondents could be subject to higher duties than non-market economy respondents in similar circumstances, since there is a partial adjustment for the double-count in NME cases and none in market cases. Ironically, China and Vietnam could find themselves facing higher duties due to the double-count as they lose the partial protection of the pass-through measurement.

\(^8^3\) Ibid.

\(^8^4\) Ibid. Indeed, the logic of the AB decision in DS379, combined with the language of Annex II to the ADA, appear to require that the double-count problem be corrected, if possible, in the choice of the best information for normal value. In any case, Article 6.8 and Annex II provide a straightforward way to correct the double-count, even if one does not read them, in themselves, as requiring that correction.
V. **CONCLUSION**

The application of both anti-dumping and countervailing duties to address a given subsidy creates a doubled remedy that the AB found to be in violation of Article 19.3 of the SCM Agreement. The context was the prosecution of non-market economy antidumping cases, but the Article 19.3 violation arises generally from addressing the same subsidy through both remedies. This article has shown that the problem appears in a natural way in market economy cases; its existence is fundamental to the use of substitutes for normal value that do not reflect subsidies and is not just an artifact of the NME methodology.

The AB’s reasoning with respect to the existence of the double-count clearly applies to market economies. The AB’s own approach of measuring pass-through encounters a number of problems, including complexity and possibly the failure to correct the double-count in full.

Fortunately, the WTO’s Antidumping Agreement contains the methods to address the problem. Article 2.4 is written expansively, not narrowly, to allow for adjustment for factors that distort the export price to normal value comparison. The Agreement also cautions against distortive use of facts available, urging circumspection rather than treating the use of facts available as an uncontrolled means of increasing duties. The distortion to the AD calculation created by the use of surrogates equals the violation of Article 19.3 of the SCM Agreement. One need not look beyond the WTO texts for solutions.

The main impediments to implementing corrections may be that national authorities will look for ways to preserve rather than prevent the double-count. The EC acknowledged a double-count in *Biodiesel* and yet did nothing to prevent it, although this decision pre-dated the AB ruling in *US – Antidumping and Countervailing Duties (China)*. The U.S. adopted an interpretation of the AB’s ruling that guaranteed that the overlapping remedies would continue. As market economy cases of the double-count arise and are identified as such, appeals are likely if full corrections are not made, and the WTO Dispute Settlement process will need to recognize the nature of the double-count and provide clear guidance concerning its correction.