

# Double Remedy and Illegality of the EU Determinations to Impose Concurrent Duties on the Imported Coated Fine Paper from China

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## Résumé

Dans cet article, l'auteur analyse deux décisions de la Commission européenne d'imposer, d'une part, des droits anti-dumping et, d'autre part, des droits anti-subsidies sur l'importation de papiers fins provenant de la Chine. Il estime que ces décisions constituent une double sanction et contreviennent, par conséquent, aux normes internationales applicables en l'espèce.

## Abstract

In this article, the author analyses two decisions of the European Commission to impose anti-dumping and anti-subsidies duties on some imported coated fine paper from China. He concludes that these decisions constitute a double remedy and consequently that they were adopted in contravention with the rules applicable to this subject.

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Double remedy or double remedies is a term applied by China against a number of US determinations concerning Chinese products in the *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (hereinafter referred to as the ‘*US – Concurrent Duties Case*’)<sup>1</sup>, where anti-dumping duties (AD) and countervailing duties (CVD) are imposed against the same Chinese products concurrently. Double remedy is not a term defined in any WTO agreement. In particular, there is no such reference in Article VI of the General Agreement on Tariffs and Trade (GATT), which is the original basis for imposing AD and CVD either separately or concurrently. Nor does it exist in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the AD Agreement) or the Agreement on Subsidies and Countervailing Measures (the SCM Agreement), which are the major legal bases for imposing concurrent AD and CVD on the same import. The WTO Appellate Panel in the *US – Concurrent Duties Case* defines the term in the following words<sup>2</sup>:

“In essence, “double remedies” may arise when both countervailing duties and anti-dumping duties are imposed on the same imported products. The term “double remedies” does not, however, refer simply to the fact that both an anti-dumping and a countervailing duty are imposed on the same product. Rather, as explained below, “double remedies”, also referred to as “double counting”, refers to circumstances in which the simultaneous application of anti-dumping and countervailing duties on the same imported products results, at least to some extent, in the offsetting of the same subsidization twice.”

This is the legal meaning of double remedy as applied in the *US – Concurrent Duties Case*. It is also the meaning of the words as used in this paper.

The EU determinations in the present paper refers to the *Council Implementing Regulation (EU) No 451/2011 of 6 May 2011, imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on import of coated fine paper originating in the People’s Republic of China* (hereinafter referred to as the “EU AD Determination on Coated

<sup>1</sup> The case was finally decided by the WTO Appellate Panel on March 11, 2011. See *United States – Definitive anti-dumping and countervailing duties on certain products from China*, Report of the Appellate Body, WT/DS379/AB/R (March 11, 2011).

<sup>2</sup> *Id.*, para. 541.

Fine Paper”<sup>3</sup>, and the *Council Implementing Regulation (EU) No 452/2011 of 6 May 2011 imposing a definitive anti-subsidy duty on import of coated fine paper originating in the People’s Republic of China* (hereinafter referred to as the “EU CVD Determination on Coated Fine Paper”)<sup>4</sup>. The two determinations are also referred to as the EU Determinations to Impose Concurrent Duties on the Imported Coated Fine Paper from China (simply the EU Determinations) in the present paper.

In the two EU determinations, the EU Commission applies the Non-Market Economy (NME) methodology in its AD Determination on Coated Fine Paper, and imposes the countervailing duty against the same products in its CVD Determination on Coated Fine Paper. This appears to be the same practice as the US, which has been complained against by China successfully on the point of double remedy in the *US – Concurrent Duties Case*. Have the EU determinations offered double remedy illegally, or alternatively, has the EU Commission failed to avoid double remedy in its determination? This is the major concern of this paper.

The WTO Appellate Panel Report on the *US – Concurrent Duties Case* was published in March 2011, and the EU Commission was fully aware of the issue of double remedy when delivering its two determinations in May 2011. It appears that the EU Commission is confident that its determinations do not have any problem with double remedy, thus it states in the EU CVD Determination on Coated Fine Paper that since the relevant anti-dumping margin of the cooperating exporting producers will be adjusted and the lesser duty rule will be applied, “it was not considered necessary to further examine whether and to what degree the same subsidy are being offset twice when anti-dumping and countervailing duties are simultaneously imposed on the same imported product”<sup>5</sup>. Has the EU Commission really successfully avoided double remedy in the present concurrent investigations? As the title of this paper suggests, the author is rather doubtful on this point. In order to establish the illegality of the EU determinations on the ground of double remedy, the paper will examine the issue from three perspectives: double remedy as understood by the WTO Appellate Panel, double remedy as seen by the EU Commission, and

<sup>3</sup> *Official Journal of the European Union*, L 128/1 (May 14, 2011).

<sup>4</sup> *Official Journal of the European Union*, L 128/18 (May 14, 2011).

<sup>5</sup> *Id.*, para. 500.

the existence of double remedy in the EU determinations. A conclusion summarizing the major points will follow at the end of the paper.

## **I. Double Remedy as Prohibited by the WTO Appellate Panel in the *US – Concurrent Duties Case***

### **A. Background of Double Remedy**

Double remedy is not defined expressly in the GATT. Nor is it defined in either the AD Agreement or the SCM Agreement. But it has been used in the *US – Concurrent Duties Case* by all parties as an equivalent to the term of double counting, which is a term applicable in the US law, in particular in the case of *GPX International Tire Corporation and Hebei Starbright Tire Co., Ltd., Plaintiffs, and Tianjin United Tire & Rubber International, Consolidated Plaintiff v. United States*<sup>6</sup>, where the US Court of International Trade (CIT) holds finally in August 2010 that if the US Department of Commerce (USDOC) cannot provide a method to avoid double counting when applying concurrent AD and CVD against the imports of certain new pneumatic off-the-road tires from China, it must stop the CVD measures because double counting violates fair trade law<sup>7</sup>.

Interesting enough, although the CIT decides against the US Government on the ground of double counting and certain commentators observe that Section 1677a c (1)(C) of the US Code prohibits double counting<sup>8</sup>, it is a fact that the specific term of ‘double counting’ does not appear in the relevant US law. For example, there is no such direct reference in Articles 701-709, and 731-739 of the Tariff Act 1930, or Section 1677a of US Code. It is likely that the term is used in its common sense as an accounting concept, which may mean “an error in accounting whereby

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<sup>6</sup> Slip Op. 10-84, p. 28.

<sup>7</sup> *Id.*, p. 3.

<sup>8</sup> Kimberly A. TRACEY, “Non-Market Economy Methodology Under U.S. Anti-Dumping Laws: A Protectionist Shield From Chinese Competition”, (2006) 15 *Currents: Int’l Trade L.J.* 81, 86; Christopher BLAKE McDANIEL, “Sailing The Seas Of Protectionism: The Simultaneous Application Of Antidumping And Countervailing Duties To Non-market Economies, An Affront To Domestic And International Laws”, (2010) 38 *Ga. J. Int’l & Comp. L.* 741, 749.

a transaction is counted more than once”<sup>9</sup>. In the light of the CIT practices, double counting is an inevitable phenomenon when AD and CVD are imposed concurrently on the same product whose AD margin is calculated by using the NME methodology. Thus the CIT observes that double counting will not occur when normal value and US price of the product in question are calculated on the basis of the data from the same country through market economy approach<sup>10</sup>. As we have seen from this case, the US Government is prohibited from imposing CVD concurrently against certain new pneumatic off-the-road tires from China because the US Government cannot establish a method of calculation to prove that double counting can be avoided successfully, even though the US law per se does not prohibit the US Government to carry on concurrent AD and CVD investigations against an imported product by resorting to the NME methodology. The status of double counting or double remedy in the US practices must be kept in mind when examining the issue of double remedy in the EU practices.

Double remedy as a ground to allege illegality in the US practices of concurrent AD and CVD investigations is first time raised by China in the history of WTO in the *US – Concurrent Duties Case*. But the Chinese victory on the point of double remedy comes from a long way. The claim of double remedy is first rejected by the Panel in the case, but confirmed by the Appellate Panel in the appellate proceeding. As we can see from the Appellate Panel Report, the Panel and Appellate Panel have read different meanings into similar provisions of the SCM Agreement. Some of the major views of the Appellate Panel will be reviewed in the following paragraphs.

Even though double remedy is not expressly mentioned in any WTO agreements, both the Panel and Appellate Panel in the *US – Concurrent Duties Case* appear to agree that double remedy is a problem when the NME methodology is used to determine normal value for determining dumping margin in any concurrent AD and CVD investigations<sup>11</sup>. This is

<sup>9</sup> This is one of the definitions given to the term on Wikipedia, see: <[http://en.wikipedia.org/wiki/Double\\_counting](http://en.wikipedia.org/wiki/Double_counting)>.

<sup>10</sup> *GPX International Tire Corporation and Hebei Starbright Tire Co., Ltd., Plaintiffs, and Tianjin United Tire & Rubber International, Consolidated Plaintiff v. United States*, CIT, 4 August 2010, Jane A. Restani, Chief Judge, Slip Op. 10-84, p. 9.

<sup>11</sup> The Appellate Panel summarizes the Panel findings on this and agrees in principle with the Panel on the existence of double remedy in concurrent AD and CVD investi-



because the NME methodology points to a market economy, which may or may not be comparable with the exporting NME whose products are under investigation, and the normal value so determined, which is always higher or much higher than the ‘normal value’ otherwise determined by referring to the actual costs of the exporting country, neglects the existence of subsidy in the import price of the product under investigation. In other words, the subsidy, if exists, is neglected by the investigating authority when applying the NME methodology, and the dumping margin determined by referring to the normal value calculated on the basis of the NME methodology already covers the neglected subsidy. On such basis, if the investigating authority imposes again the CVD on the same product, the subsidy in fact is offset more than once by the AD and CVD separately and concurrently. Although by the end, the Panel and Appellate Panel moves to opposite directions on the point whether the US investigations in questions have violated WTO provisions on the ground of double remedy, the Appellate Panel appears to be happy with the Panel’s general proposition that at least some double remedy will likely arise from the concurrent imposition of countervailing duties and anti-dumping duties calculated under an NME methodology<sup>12</sup>.

## **B. Double Remedy as Interpreted by the Appellate Panel under Article 19.3 of the SCM Agreement**

The Appellate Panel reverses the Panel’s finding that China has failed to establish that the US practices in question are inconsistent with Article 19.3 of the SCM Agreement<sup>13</sup>. The interpretation of Article 19.3 is the key issue. In particular, the Appellate Panel takes the position that the requirement that CVD are to be levied “in the appropriate amounts in each case” in Article 19.3 “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 anti-dumping duties, calculated at least to some extent on the

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gations involving NME method. See Appellate Body Report, *supra*, note 1, paras 542 and 543.

<sup>12</sup> *Id.*, para. 544.

<sup>13</sup> *Id.*, para. 582.

basis of the same subsidization, are imposed concurrently to remove the same injury to the domestic industry”<sup>14</sup>.

The Appellate Panel reaches this conclusion mainly on the following grounds:

(1) The literal meaning of appropriate amount shall be read in the context with reference to Article 19.4 of the SCM Agreement, that “places a quantitative ceiling on the amount of the countervailing duty, which may not exceed the amount of the subsidization”<sup>15</sup>, even though the amount of subsidization as a ceiling is not the only test for determining the appropriate amount<sup>16</sup>.

(2) Article 19.2 of the SCM Agreement is relevant for determining the appropriate amount because this provision recommends the imposition of lesser duty if such lesser duty is adequate to remove the injury<sup>17</sup>. In fact, injury as one of the tests for determining the appropriate amount is stated clearly in Article 19.3 itself as well as a number of other provisions, such as Articles 19.1 and 21.1<sup>18</sup>.

(3) In the light of Article 10 of the SCM Agreement, the imposition of CVD must comply with Articles V and VI of the GATT, as well as the relevant provisions of the SCM Agreement<sup>19</sup>. Accordingly, the Appellate Panel disagrees with the Panel’s finding that Articles 19.3 and 19.4 do not address the issue of double remedies and that Article VI: 5 of the GATT relates only to export subsidies (as opposed to domestic subsidies)<sup>20</sup>. Instead the Panel holds that when the domestic sale is used as the basis for determining normal value, the domestic subsidies reflected in the domestic price will not lead to double remedy because dumping margin so decided would not compensate for the same situation<sup>21</sup>, but when the NME methodology is used as the basis for determining normal value there is a possibility that the concurrent application of AD and CVD on the

<sup>14</sup> *Id.*, para. 582.

<sup>15</sup> *Id.*, para. 554.

<sup>16</sup> *Id.*, para. 555.

<sup>17</sup> *Id.*, para. 557.

<sup>18</sup> *Id.*, para. 558.

<sup>19</sup> *Id.*, para. 560.

<sup>20</sup> *Id.*, para. 567.

<sup>21</sup> *Id.*, para. 568.

same product would lead to double remedies, even though only domestic subsidization is involved<sup>22</sup>. Further the Appellate Panel emphasizes that the appropriate amount in Article 19.3 must be decided by taking into account the relevant provisions of the SCM Agreement, as well as Article VI of the GATT and provisions of the AD Agreement<sup>23</sup>.

(4) The Appellate Panel points out that in the concurrent application of AD and CVD, both the AD Agreement and the CVD Agreement must be read together to avoid double remedies. In particular, “considering that each agreement sets forth a standard of appropriateness of the amount and establishes a ceiling for respective duties, it should not be possible to circumvent the rules in each agreement by taking measures under both agreements to counteract the same subsidization”<sup>24</sup>. Therefore, “in fixing the amount of countervailing duties that will be imposed, it is appropriate to take account of anti-dumping duties that are being levied on the same products and that offset the same subsidization”<sup>25</sup>.

(5) In conclusion, the Appellate Panel finds “that the imposition of double remedies, that is, the offsetting of the same subsidization twice by the concurrent imposition of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties, is inconsistent with Article 19.3 of the *SCM Agreement*”<sup>26</sup>.

In light of the Appellate Panel’s reasoning above, the author of this paper wishes to point out two crucial issues related to the study of the EU determinations in question: first, the meaning of appropriate amount under Article 19.3 of the SCM Agreement must be read in a broad context including other provisions of the SCM Agreement, Article VI of the GATT and relevant provisions of the AD Agreement; and secondly, there is a presumption that double remedies likely exist in concurrent AD and CVD investigations when the NME methodology is used, and thus the investigating authority is obliged to prove how this has been avoided when satisfying the requirements of Article 19.3 of the SCM Agreement.

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<sup>22</sup> *Id.*, para. 569.

<sup>23</sup> *Id.*, paras 570 and 571.

<sup>24</sup> *Id.*, para. 572.

<sup>25</sup> *Id.*, para. 574.

<sup>26</sup> *Id.*, para. 583.

### C. Double Remedy as Interpreted by the Appellate Panel under Article 19.4 of the SCM Agreement

In the *US – Concurrent Duties Case*, the Panel takes the position that both Articles 19.3 and 19.4 of the SCM Agreement have nothing to do with double remedy. The different conclusion of the Appellate Panel on Article 19.3 has been examined in the previous section of the paper. Now we move to Article 19.4 of the SCM Agreement which, in the view of the Panel, is oblivious to any potential concurrent imposition of AD and CVD, and thus does not address situation of double remedies<sup>27</sup>.

Article 19.4 states broadly that no CVD shall be levied in excess of the amount of subsidy found to exist. China argues that double remedy is inconsistent with Article 19.4 because it results in the levying of a CVD in excess of the subsidy found to exist<sup>28</sup>.

The Appellate Panel has expressed its view on the rules of interpretation guiding the interpretation of the SCM Agreement when discussing Article 19.3. Since the Panel's finding on Article 19.4 of the SCM Agreement is based on its isolated approach to the interpretation, which has been rejected by the Appellate Panel when examining Article 19.3, the Appellate Panel finds no need to examine the issue of double remedy under Article 19.4 further because the Panels' interpretation of Article 19.4 and other relevant provisions, in the Appellate Panel's estimation, is 'moot and of no legal effect.'<sup>29</sup>

It appears that the Appellate Panel applies judicial economic principle in the analysis of Article 19.4, because it disagrees with the Panel's finding on double remedy under the provision on the same grounds, which have been set out when analyzing Article 19.3. Thus, the author of this paper wishes to point out three key factors which are relevant to the study of EU determinations. First, Article 19.3 is more important than Article 19.4 as far as double remedy is concerned, because Article 19.4 sets out a maximum ceiling on CVD but Article 19.3 requires CVD to be an appropriate amount. Second, individually, Article 19.4 is easy to comply with due to the express reference to the ceiling of amount of subsidy, but when we

<sup>27</sup> *Id.*, para. 584.

<sup>28</sup> *Id.*, para. 587.

<sup>29</sup> *Id.*, para. 590.

read Articles 19.3 and 19.4 together, which is the correct way of legal interpretation, the requirement on appropriate amount in Article 19.3 qualifies the maximum ceiling in Article 19.4 and thus reading of Article 19.4 is relatively secondary to the reading of Article 19.3 as far as double remedy is concerned. Third, since double remedy may be illegal under Article 19.3 if the amount of CVD is not appropriate, double remedy is also illegal under Article 19.4 if the CVD exceeds the amount of subsidy, whose determination is affected by the use of NME methodology.

#### **D. Double Remedy as Found by the Appellate Panel in the *US – Concurrent Duties Case***

In the *US – Concurrent Duties Case*, the Appellate Panel correctly observes that Article 19.3 of the SCM Agreement prohibits double remedy, as a legal matter does not necessarily mean that double remedy exists as a factual matter in the four concurrent investigations complained by China in the *US – Concurrent Duties Case*<sup>30</sup>. Therefore, it is the same to say that the presumption that the NME methodology likely results in double remedy in concurrent AD and CVD investigations does not necessarily mean that double remedy really exists in every instance of concurrent investigations. Then whether double remedy exists and how to prove its existence is a crucial issue to be answered by the Appellate Panel.

Burden of proof is the most import issue in the factual analysis on the existence of double remedy. In the appellate proceedings, the US Government emphasizes that “China bore the burden of proof in front of the Panel, yet made no attempt to present hard evidence that double remedies had occurred, just as it made no such attempt before the USDOC”<sup>31</sup>. The key argument in the US presentation is that China must prove that double remedy has occurred. This argument places burden of proof, which is not an easy task to complete due to both theoretical and practical difficulties, on the complainant. It appears that the US understanding of the burden of proof has been accepted by the Panel which finds that the handling of double remedy as complained by the Chinese Government by the US Government is not in debate<sup>32</sup>. This means that if China fails to prove the

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<sup>30</sup> *Id.*, para. 599.

<sup>31</sup> *Id.*, para. 594.

<sup>32</sup> *Id.*, para. 597.

existence of double remedy in the US, it is deemed also to fail in the Panel proceeding because it fails to discharge its burden of proof on both occasions to establish the existence of double remedy. This is probably partially why China fails in the Panel proceedings in the *US – Concurrent Duties Case*.

The Appellate Panel adopts a different position on the burden of proof concerning the issue of double remedy under Article 19.3 of the SCM Agreement. Both China and the US know the importance of burden of proof, and accordingly present conflicting views on the burden to prove double remedy. China argues that the US Government must determine whether it is offsetting the same subsidies twice, but the US counter-argues that the burden to prove the existence of double remedy is on China<sup>33</sup>. By referring to Article VI: 3 of the GATT which requires an investigating authority to ascertain the precise amount of subsidy attributed to the imported products under investigation before imposing CVD, the Appellate Panel concludes that the appropriate amount requirement under Article 19.3 of the SCM Agreement imposes an analogous obligation upon the investigating authority<sup>34</sup>. Since the investigating authority has a burden to prove that the amount of CVD imposed is appropriate under Article 19.3, which constitutes one of the theoretical bases for prohibiting double remedy, the Appellate Panel places the burden to prove appropriate amount or non-existence of double remedy on the shoulder of the investigating authority. Consequently, the Appellate Panel finds that the US Government fails to fulfill its obligation to determine the appropriate amount of CVD within the meaning of Article 19.3 when declining to address China's claims of double remedy, and thus "in the circumstances of the four sets of anti-dumping and countervailing duty investigations at issue, by virtue of the USDOC's imposition of anti-dumping duties calculated on the basis of an NME methodology, concurrently with the imposition of countervailing duties on the same products, without having assessed whether double remedies arose from such concurrent duties, the United States acted inconsistently with its obligations under Article 19.3 of the SCM Agreement"<sup>35</sup>.

This is how the factual existence of double remedy is established in the *US – Concurrent Duties Case*.

<sup>33</sup> *Id.*, para. 600.

<sup>34</sup> *Id.*, para. 601.

<sup>35</sup> *Id.*, paras 605 and 606.

In summary, a few essential points can be drawn from the Appellate Panel's finding of double remedy in this case. First, double remedy as defined by the Appellate Panel in the *US – Concurrent Duties Case* in essence refers to a situation where the same subsidy is offset twice or more than once in the concurrent AD and CVD investigations. Second, double remedy is prohibited by Article VI: 5 of the GATT because AD and CVD cannot be applied concurrently to compensate for the same situation of dumping or export subsidization. The author of this paper takes the view that this provision is capable of prohibiting double remedy on the ground of either AD or CVD, and the Appellate Panel's finding that double remedy means the same subsidy cannot be offset twice in the *US- Concurrent Duties Case* reflects one of the possible meanings of double remedy as applicable in the context of subsidy. Third, Article 19.3 of the SCM Agreement requires the CVD levied to be appropriate, which in the context of double remedy means that offsetting the same subsidy twice is clearly inappropriate under Article 19.3, and accordingly, double remedy is prohibited in Article 19.3 (as well as other similar provisions under the SCM Agreement). Fourth, the obligation to ensure the CVD imposed to be appropriate implies that the investigation authority is obliged to prove that the same subsidy is not offset twice or more than once for the purpose of establishing the appropriateness of the CVD imposed. These four reasons may explain why China has won the point of double remedy in the *US – Concurrent Duties Case*. They are also crucial for assessing whether the EU determinations are legal on the ground of double remedy. Fifth, Article 19.3 (possibly a number of other provisions too) of the SCM Agreement gives rise to a presumption that double remedy likely exists when the NME methodology is used in concurrent AD and CVD investigations, and the appropriate amount requirement of Article 19.3 places the burden of proof on the part of the investigating authority to rebut the presumption. All these essential points must be bore in mind when examining the EU determinations in question.

## II. Double Remedy as Seen by the EU

### A. An Overview of the EU Determinations

The EU determinations actually involve three determinations in the present case. These are the EU AD Determination on Coated Fine Paper<sup>36</sup>,

<sup>36</sup> EU AD Determination on Coated Fine Paper, *supra*, note 3.

the EU CVD Determination on Coated Fine Paper<sup>37</sup>, and the Commission Regulation (EU) No 1042/2010 of 16 November 2010 Imposing A Provisional Anti-Dumping Duty on Imports of Coated Fine Paper Originating in the People's Republic Of China (hereinafter referred to as the "EU Provisional AD Determination on Coated Fine Paper")<sup>38</sup>. The Provisional AD Determination on Coated Fine Paper is relevant for our purpose, because the AD Determination on Coated Fine Paper confirms a number of findings of the Provisional Determination, which may directly or indirectly demonstrate the understanding of double remedy by the EU.

In the light of the reasoning as seen in the *US – Concurrent Duties Case* on the issue of double remedy, we need to first look at what the EU says about double remedy in its CVD Determination on Coated Fine Paper. The Chinese Government raises the issue of double remedy in the said EU determination and also makes reference to the *US – Concurrent Duties Case*<sup>39</sup>. This suggests that the EU Commission ought to have been fully aware of the position of the Appellate Panel on double remedy and Article 19.3 of the SCM Agreement, even though the EU Commission does not directly address the compliance issue under Article 19.3 of the SCM Agreement. In fact, the EU Commission takes a simple position when dealing with the issue of double remedy, namely double remedy does not occur in its concurrent AD and CVD investigations because it applies the so-called lesser duty rule when imposing AD and CVD on the same product<sup>40</sup>. The meaning of the lesser duty rule and its effect under Article 19.3 of the SCM Agreement will be analyzed further later in this paper. For the moment, it is sufficient to note that the issue of double remedy does rise in the EU AD and CVD proceedings in question and the EU Commission disposes of the issue on its own logic which does not directly address the legal requirements of Article 19.3 of the SCM Agreement, including the obligation to avoid double remedy as stated by the Appellate Panel in the *US – Concurrent Duties Case*.

The EU AD Determination on Coated Fine Paper does not expressly discuss double remedy, but does address the issue of double remedy briefly without actually employing the term of double remedy. The issue of

<sup>37</sup> EU CVD Determination on Coated Fine Paper, *supra*, note 4.

<sup>38</sup> *Official Journal of the European Union*, L 299/7 (17 November 2010).

<sup>39</sup> The EU CVD Determination on Coated Fine Paper, *supra*, note 4, para. 271.

<sup>40</sup> *Id.*, paras 272, 273 and 500.



double remedy becomes relevant because Article 14(1) of the Council Regulation (EC) No 1225/2009 of 30 November 2009 on Protection Against Dumped Imports From Countries Not Members of the European Community (hereinafter referred to as “the Basic Regulation”)<sup>41</sup> and Article 24(1), second subparagraph of Council Regulation (EC) No 597/2009 of 11 June 2009 on Protection Against Subsidized Imports From Countries Not Members of the European Community (hereinafter referred to as the Basic Anti-Subsidy Regulation)<sup>42</sup> require the EU Commission to avoid double remedy in concurrent proceedings. These provisions state in general that no product shall be subject to both AD and CVD for the purpose of dealing with one and the same situation arising from dumping or from export subsidization<sup>43</sup>. However, the EU Commission does not discuss the relevant provisions and double remedy in detail. Instead, it follows the same practice as it does in the CVD determination to state broadly that in view of the application of the lesser duty rule in the AD proceeding, it is considered not necessary to examine further whether and to what degree the same subsidies are being offset twice when AD and CVD are simultaneously imposed on the same imported product<sup>44</sup>. The handling of double remedy by the EU Commission in the EU AD Determination on Coated Fine Paper and the CVD Determination on Coated Fine Paper is largely the same. However, for the purpose of our analysis, the author of this paper wishes to point out that the reasoning of the EU in the CVD Determination can be directly examined in the light of the Appellate Panel’s reasoning in the *US – Concurrent Duties Case*, but the same reasoning of the EU in the AD Determination can only be studied by analogy and in line with the underlying principles concerning double remedy as stated directly or indirectly by the Appellate Panel.

The EU Provisional AD Determination on Coated Fine Paper is part of the AD Determination. It is interesting to note that the Provisional AD Determination addresses the issue of double counting<sup>45</sup>, instead of double remedy. In response to the Chinese company’s request of market economy treatment and the argument that use of the NME methodology likely

<sup>41</sup> *Official Journal of the European Union*, L 343/51 (December 22, 2009).

<sup>42</sup> *Official Journal of the European Union*, L 188/93 (July 18, 2009).

<sup>43</sup> The AD Determination on Coated Fine Paper, *supra*, note 3, para. 161.

<sup>44</sup> *Id.*, para. 162.

<sup>45</sup> EU Provisional AD Determination on Coated Fine Paper, *supra*, note 38, paras 48 and 49.

leads to double counting, the EU Commission observes that since the provisional AD is based on the injury elimination level and not on the dumping margin, any claim on double counting is invalid<sup>46</sup>. The Provisional AD Determination relies on the concept of injury elimination level as the justification to deny the possibility of double counting, which is interchangeable with the double remedy. It appears that this is the same approach to the issue of double remedy as adopted by the EU Commission in its final AD and CVD Determinations, where the Commission relies almost solely on the lesser duty rule. Due to the nature of the Provisional Determination, this paper will make some necessary reference to this Determination, where appropriate, when studying the issue of double remedy under the final AD and CVD Determinations.

In summarizing the overview of the EU determinations, it can be said that the EU Commission does realize the possibility of double remedy or double counting in the concurrent AD and CVD investigations and the relevant EU laws in fact prohibit the imposition of both AD and CVD for the purpose of dealing with one and the same situation arising from dumping or from export subsidization. However, it must be pointed out that this prohibition largely relates to Article VI: 5 of the GATT, where export subsidy is emphasized, and in addressing the issue of double remedy in such context, the EU Commission does not respond to the obligation to avoid double remedy as imposed by Article 19.3 of the SCM Agreement. Another point concerning double remedy as reflected in the EU determinations is the refusal of the possibility of double remedy on the ground of lesser duty rule or injury margin argument. This means that the EU Commission basically follows the same approach in the two determinations where it denies the possible existence of double remedy in its concurrent proceedings under the belief that it has applied lesser duty rule or alternatively it imposes AD on the ground of injury margin as opposed to the dumping margin as a consequence of applying the lesser duty rule. Whether or not the lesser duty rule can successfully ensure the appropriateness of the CVD under Article 19.3 of the SCM Agreement is yet to be studied carefully in this paper. But at least for the time being, the author is rather doubtful on the usefulness of such rule or argument in discharging the EU's obligation to determine an appropriate amount of CVD under Article 19.3 of the SCM Agreement, because neither the lesser duty rule

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<sup>46</sup> *Id.*, para. 49.

nor the injury margin, as we can see later in this paper, gives rise to a quantified explanation on why such method corresponds to the amount of subsidy or avoids the same subsidy be offset more than once.

## **B. The Lesser Duty Rule and Article 19.3 of the SCM Agreement**

### **1. The Status of the Lesser Duty Rule**

The legal basis for the lesser duty rule mainly lies in Article 9.1 of the AD Agreement, which states that it “is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry”<sup>47</sup>. Therefore, the essence of the lesser duty rule may be “that the amount of anti-dumping duty shall not exceed the lesser of the margin of dumping or the injury margin”<sup>48</sup>. The EU is one of several WTO members that enforce the lesser duty rule in AD investigations.

Under the proposition that the lesser duty rule means that the lesser of the dumping margin and injury margin will be imposed as the actual AD, which in all cases for practical reasons would often mean the injury margin being the lesser duty, the key feature of the lesser duty rule is the reduction of AD from a possible higher dumping margin to a lower injury margin. For the purpose of considering the relationship between the lesser duty rule and double remedy, it is necessary to note that no reference to the amount of subsidy whatsoever is made when the lesser duty is determined. This fact is important to understand whether and how the lesser duty rule can address the issue of double remedy under Article 19.3 of the SCM, which becomes relevant to the lesser duty rule because the EU Commission believes that the lesser duty rule is a perfect answer for double remedy in its concurrent AD and CVD proceedings<sup>49</sup>.

<sup>47</sup> The AD Agreement, art. 9.1.

<sup>48</sup> WTO, Negotiating Group on Rules, *Proposals on the Mandatory Application of The Lesser Duty Rule – Paper from Brazil; Hong Kong, China; India; and Japan*, TN/RL/GEN/99 (3 March 2006), p. 1.

<sup>49</sup> The EU AD Determination on Coated Fine Paper, *supra*, note 3, para. 500; The EU CVD Determination on Coated Fine Paper, *supra*, note 4, para. 162.

Although the lesser duty rule is basically a rule under the AD Agreement, it is also acknowledged indeed in Article 19.2 of the SCM Agreement. Given the popular meaning of the lesser duty rule as a discretionary choice in AD investigation, it appears to be illogical if we compare this rule with Article 19.3 of the SCM Agreement. But the author wishes to point out that it is the EU Commission itself who has put the lesser duty rule and double remedy under Article 19.3 of the SCM Agreement together in its determinations which are the subjects of study in the present paper. When the EU Commission relies on the lesser duty rule to deny the existence of double remedy, which is per se prohibited at least by Article 19.3 of the SCM Agreement, all we have to do is to investigate carefully and logically whether the illegality of double remedy in the two EU Determinations has been successfully avoided by the EU Commission applying the lesser duty rule. The dilemma of studying an AD rule in the context of CVD is caused solely by the EU Commission, and thus both end of the dilemma disfavours EU. This means that if the lesser duty rule is not an appropriate rule for solving CVD-related issue, the EU should not have applied this rule in its CVD Determination to rule out the possibility of double remedy; or alternatively, if the lesser duty rule is an appropriate rule for discussion under Article 19.3 of the SCM Agreement, the EU is deemed to fail on the point of double remedy because the lesser duty rule in any case has no relevance to the actual sum of subsidy in question. Since the EU Commission has taken a position that the lesser duty rule may also apply in case of CVD<sup>50</sup>, it may perhaps be argued that the lesser duty mentioned in its CVD Determination actually refers to the lesser of the subsidy margin and injury margin but, this argument, if ever attempted, will certainly fail, because there is neither reference on how the lesser duty rule applies in the CVD Determination, nor is the CVD-based lesser duty rule expressly mentioned as the ground to deny the existence of double remedy in the CVD Determination in question. Further, this paper argues that the key reason to prohibit double remedy under Article 19.3 of the SCM Agreement is to avoid the same subsidy to be offset twice. How can the EU Commission, without any clear explanation on quantitatively how the

<sup>50</sup> For example, the EU Commission states that the rate of duty for each case is based on the amount of subsidy, unless a lower rate would remove the injury ("lesser-duty rule"). See EU Commission website at: <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy/measures/>.

lesser duty corresponds to the amount of subsidy in question, ever be confident that the subsidy is not offset twice?

## 2. A Critical Analysis of the Use of the Lesser Duty Rule

### a. The Basic Grounds for EU to Deny the Issue of Double Remedy

Now we turn to the issue on whether the lesser duty rule can ensure that the amount of CVD is appropriate under Article 19.3 of the SCM Agreement, which is a provision the EU Commission must face when carrying on concurrent AD and CVD proceedings. When the EU Commission rejects the claim of double remedy raised by the Chinese Government and a Chinese company, it expresses a view that double remedy “by definition, could only occur where there is a *cumulation* of the dumping margin and the amount of subsidy i.e. where the combined level of two types of duty exceeds the higher of the dumping margin or the amount of subsidy”<sup>51</sup>. As to why double remedy is not an issue in its concurrent proceedings, the EU Commission offers the following major justifications or defences, which should be recited as detailed as possible for the fairness of the analysis<sup>52</sup>.

First of all it is recalled that the EU is applying the *lesser duty rule* when imposing anti-dumping and countervailing duties on the same product. In other words, in EU investigations, the Commission establishes the level of dumping, subsidization and injury caused to the Union industry. The level of duties can never be higher than the injury margin and the injury margin here is the same for both proceedings. In the parallel anti-dumping proceedings, the Commission established a margin of dumping that is much higher than the injury margin... Thus the subsidy margin found in the current anti-subsidy investigation will not provide any additional protection to the Union industry as compared to the dumping margin because the anti-dumping duty will already be capped by the injury margin. Therefore there is no overlap of duties in the two parallel proceedings and consequently, even assuming that there is a potential for a double remedy as described in recital above, there can be no requirement by law to ‘offset’ dumping against the subsidy. Indeed, the difference

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<sup>51</sup> The EU CVD Determination on Coated Fine Paper, *supra*, note 4, para. 272.

<sup>52</sup> *Id.*, para. 273.

between the dumping and injury margins found in the anti-dumping proceedings was much higher than the amount of subsidization found in the present investigation. It should be also highlighted that when it comes to the actual composition of the duties to be paid the Commission has a practice to first impose the duty amount resulting from the CVD investigation. If there is still a gap between the aforementioned duty level and the injury margin, this gap can be filled with the duty resulting from the anti-dumping investigation. However, this does not mean that there is double counting because the combined level of duties could already have been justified as a result of the anti-dumping investigation alone.

The EU Commission appears to be confident that its reasoning is sound in disposing of the issue of double remedy. However, the author of the present paper respectfully disagrees with this reasoning in all major aspects.

In summary, the Commission's reasoning can be reduced to four major arguments or points: (a) injury margin is the sole test for determining appropriateness of AD and CVD in all proceedings whether single or concurrent; (b) even though the use of NME methodology likely results in double remedy, there is no EU law requiring the Commission to offset dumping against the subsidy; (c) there is no double remedy because the EU practice in concurrent proceedings is to determine CVD first against the injury margin and later to use AD to fill in gap left in the injury margin after the CVD having been imposed; and (d) the lesser duty rule satisfies requirements of the relevant WTO provisions, including Article 19.3 of the SCM Agreement. The author intends to analyze these arguments one by one.

#### **b. Insufficiency of the Injury Margin to Avoid Double Remedy**

As we have seen in the EU Commission's statement as mentioned above, the EU appears to suggest that as long as the total of AD and CVD does not exceed the injury margin, there is not any problem of double remedy whatsoever to be worried about. This is falsely presented.

Like it or not, we have to admit that injury margin, the same as dumping margin and subsidy margin, is always artificially created and prejudicially conceived/manipulated for the convenience of all decision-makers who must manipulate either actively or passively the concept from time to

time to further push their political, social, economic and other goals. Thus, any divinity given to the injury margin is inevitably pretentious, amounting to simply an act of play in a game of honourable lie. In fact, despite the common and repeated use of the concept in state practices, no one knows what injury margin really means<sup>53</sup>. Nor is there any transparent and universal formula on how injury margin is determined<sup>54</sup>. Therefore, the proposition that both AD investigation and CVD investigation must lead to the same injury margin as claimed by the EU Commission in the two determinations in question is not creditable.

The EU Commission appears to have taken it for granted that the injury margin turns out to be the same in the parallel and concurrent AD and CVD proceedings in question. This is a fallacious claim for three reasons.

First, injury margin for each separate AD and CVD investigation and injury margin for combined AD and CVD investigation are two different concepts, even though EU does not appear to have accepted the second proposition that there is a combined injury margin if both AD and CVD investigations are carried out. A quick comparison between Article 3 of the AD Agreement and Article 15 of the SCM Agreement, which provide bases for determining injury margin in AD or CVD proceedings respect-

<sup>53</sup> For example, certain commentator observes that although EU rules do not mandate any particular methodology for the injury margin calculation, the EU authorities most often apply a formula which compares a Community producer selling price with sales prices of dumped imports into the Community. The resulting injury amount is expressed as a percentage of the CIF Community frontier price in order to obtain an injury margin. See Herbert SMITH, *A Legal Guide to EU Anti-Dumping Law*, September 2009, available at: <<http://www.herbertsmith.com/NR/rdonlyres/CF01F49E-9276-4B4D-9C31-A6563C3E31D4/0/AntidumpingguideIII1009.PDF>>. *But this is certainly how the injury margin is determined in the EU AD Determination on Coated Fine Paper*, *supra*, note 3.

<sup>54</sup> A research report states that, in the project of research, the calculation of injury margin on the basis of lesser duty rule has received much criticism, and gives the following major reasons to explain why the injury margin determination is problematic: the calculation of only one injury margin for all exporters from all countries; unjustified and non-transparent calculation of target prices; unpredictable calculation of reasonable profit in target prices; zeroing of non-injurious export transactions; weighing on the basis of exporters' sales and disregard of domestic models for which no comparable export models exist in the calculations. See Edwin VERMULST and Gary HORLICK, *Problems with Dumping and Injury Margin Calculations in Ten User Countries*, available at: <[www.vvgb-law.com](http://www.vvgb-law.com)>.

ively, suggests that the two provisions are largely similar except for the places where special references are made to dumping and subsidy respectively. But the similar factors for injury determination should not lead to the same injury margin in different investigations, because dumping margin and subsidy amount are two different variables affecting consequentially and differentially the injury margin in two different contexts. The author argues that if the dumping margin and amount of subsidy is not the same (which is the case for the two determinations in question), the injury margin cannot be the same in two different but concurrent proceedings because each act of dumping or subsidization is supposed to have its own individual, respective and causative injury impact upon domestic industry<sup>55</sup>. Alternatively, if the dumping margin and subsidy amount are hypothetically the same, the injury margin in the two parallel proceedings may be the same, but they represent two separate injuries for different purposes, with each injury being compensable adequately and appropriately under the AD Agreement and CVD Agreement respectively. This must be so because the investigation authority is obliged to prove causation between the alleged dumping or subsidization and the injury in question. This must be so because this is what in fact happens if only one single AD or CVD investigation is initiated. Based on these reasons, the EU determination that the injury margin is the same for both AD and CVD investigation in the parallel proceeding must be a false proposition because the separately reached injury margin cannot be the same given the huge discrepancy in the alleged dumping margin and alleged amount of subsidization in the two separate proceedings. The proposition that the injury margin is the same for both proceedings simply suggests that the EU Commission does not follow the causation requirement in its investigations. Alternatively, if the EU Commission treats the injury margin as a combined margin resulting from two separate and parallel investigations, it has not explained how injury margin is determined in each case and how they add up to become the combined injury margin which must be compensated jointly and proportionately by both the AD and CVD in the concurrent proceedings due to the causation requirement. The author

<sup>55</sup> It must be pointed out emphatically that Article 3.1 of the AD Agreement points to the causation of dumping for the injury claimed, Article 9.1 of the AD Agreement recommends the lesser duty rule if the lesser duty is adequate to remove the injury and Article 9.2 of the AD Agreement requires the AD to be an appropriate amount. Similarly, Articles 15.1 and 19.1 of the SCM Agreement point to the causation of subsidy for the injury claimed, and Article 19.3 requires the CVD to be an appropriate amount.



argues that accepting the concept of combined injury margin is necessary because this is the only rationale for bringing in concurrent AD and CVD. Otherwise, no matter what the injury margin is, it should be compensated by the AD or CVD respectively. Only when in compliance with the legal requirements for imposing an appropriate amount of AD or CVD under the AD Agreement or the CVD Agreement individually, the AD or CVD so imposed cannot compensate the injury adequately, there is a need to impose concurrently or jointly the AD and CVD. Causation between the alleged dumping and subsidy on one hand, and injury on the other is the real reason to explain why the injury in question cannot be simply compensated blandly or arbitrarily by the AD and/or CVD with an estimated amount or estimated justice.

Secondly, when the NME methodology is applied in concurrent AD and CVD proceedings, the dumping margin must be much higher than the situation where the market economy methodology is used. It is illogical to claim that an anti-subsidy margin rate range between 4.06% -12.4% as determined by the EU in the present CVD investigation<sup>56</sup> has actually resulted in the same injury margin range between 20% -39.1% to the EU domestic industry<sup>57</sup> as the one that has been caused by the same product in the parallel AD investigation yielding an outrageous dumping margin range between 43.5% -63% on the basis of the NME methodology<sup>58</sup>. Given the causation requirement in both the AD Agreement and CVD Agreement, how can vastly different anti-subsidy margin rate range and dumping margin range, which are all based on some reference to the actual import price of the Chinese product, lead to the same injury margin, whatever it means, to the same domestic industry in two parallel and yet independent investigations. Thus, the reliance on the same injury margin in the two concurrent proceedings is a defective exercise, because it is only an estimate without any reasonable explanation on how it is calculated quantitatively.

Thirdly, given the prima facie presumption that using the NME methodology in the concurrent AD and CVD proceedings likely results in double remedy<sup>59</sup>, the use of dumping margin under the lesser duty rule

<sup>56</sup> The EU CVD Determination on Coated Fine Paper, *supra*, note 4, para. 370.

<sup>57</sup> *Id.*, para. 499.

<sup>58</sup> The EU AD Determination on Coated Fine Paper, *supra*, note 3, paras 80 and 165.

<sup>59</sup> The *US-Concurrent Duties Case*, Appellate Body Report, *supra*, note 1, para. 582.

without any quantitative reference to the NME-based dumping margin, which includes the actual subsidy, and the injury margin, some of which must be contributable proportionately to price dumping and subsidization causatively under the causation requirement of the AD Agreement or the CVD Agreement, cannot be free of risk of double remedy per se. It must be emphasized again that the causation requirement, in particular determining the amount of subsidy that causes the injury in question is interpreted by the Appellate Panel in the *US – Concurrent Duties Case* as being a necessary factor for determining the appropriate amount under Article 19.3 of the SCM<sup>60</sup>, which must be satisfied by EU Commission in its determinations.

In conclusion, the author argues that the EU Commission misunderstands and misrepresents the legal effect of injury margin on double remedy. For the reason given above, a lower injury margin as an estimated amount, which is applicable under the lesser duty rule, itself cannot be an answer to the potential existence of double remedy. More specifically, the appropriate amount requirement of Article 19.3 of the SCM Agreement, and to the same extent, the appropriate amount requirement of Article 9.2 of the AD Agreement<sup>61</sup>, which gives rise to an obligation to avoid double remedy in concurrent AD and CVD investigations as explained by the Appellate Panel in the *US – Concurrent Duties Case* cannot be satisfied or discharged by a mere reference to the injury margin being the lesser of two, or more possible duties, under the lesser duty rule as having been applied by the EU Commission.

**c. Obligation to Avoid Double Remedy versus Obligation to Offset Dumping Against Subsidy**

An obligation to avoid double remedy arises from at least Article 19.3 of the SCM Agreement<sup>62</sup>. In the light of the reasoning on double remedy by the Appellate Panel in the *US – Concurrent Duties Case*, there is an obligation on the part of the investigating authority to avoid double remedy, inter alia, under Article 19.3 of the SCM Agreement and Article 9.2 of the AD Agreement for the purpose of determining an appropriate amount of CVD or AD, or under Article VI: 5 of the GATT for prohibiting the con-

<sup>60</sup> *Id.*, para. 558.

<sup>61</sup> *Id.*, para. 571.

<sup>62</sup> *Id.*, para. 583.

current application of AD and CVD to compensate for the same situation of dumping or export subsidization.

When rejecting the claim of double remedy by the Chinese Government in the concurrent proceedings in question, the EU Commission states, *inter alia*, that even assuming that there is a potential for a double remedy, there can be no requirement by law to offset dumping against the subsidy<sup>63</sup>. The EU Commission appears to have refused the claim of double remedy made by the Chinese Government on the ground of the EU law, thus giving to its determinations a dignified claim of rule of law and a divined glory of legitimacy. However, in the author's view, with respect, this is no more than a misrepresented distortion to confuse one obligation with a different concept for the purpose of justifying its abuse of concurrent proceedings.

It must be noted clearly that when holding that Article 19.3 of the SCM Agreement imposes an obligation to avoid double remedy, the Appellate Panel in the *US – Concurrent Duties Case* states that “the requirement that any amounts be ‘appropriate’ means, at a minimum, that investigating authorities may not, in fixing the appropriate amount of countervailing duties, simply ignore that anti-dumping duties have been imposed to offset the same subsidization”<sup>64</sup>.

This statement is made for the purpose of interpreting Article 19.3 of the SCM Agreement, which cannot be narrowly interpreted as an obligation to avoid double remedy only when determining the CVD, which must take place after the AD is determined. In fact, the Appellate Panel is fully aware of the possibility of certain distorted interpretation of its interpretation of Article 19.3 of the SCM Agreement. Thus, in the same paragraph, the Appellate Panel emphasizes that both “the *Anti-Dumping Agreement* and the *SCM Agreement* contain provisions requiring that the amounts of anti-dumping and countervailing duties be ‘appropriate in each case’, as reflected in Articles 9.2 and 19.3 respectively”<sup>65</sup>. Since the basis of the obligation lies in the determination of an appropriate amount in both the AD and CVD proceedings, the obligation to avoid double remedy exists in all

<sup>63</sup> The EU CVD Determination on Coated Fine Paper, *supra*, note 4, para. 273.

<sup>64</sup> The *US – Concurrent Duties Case*, Appellate Body Report, *supra*, note 1, para. 571.

<sup>65</sup> *Id.*

concurrent AD and CVD investigations no matter which duty is determined first.

Given what the real meaning of the obligation to avoid double remedy is, the simple statement that there can be no requirement by law to offset dumping against the subsidy provides no answer to the EU obligation to avoid double remedy in concurrent proceedings. The EU Commission cannot avoid its obligation to ensure the amount of AD or CVD to be appropriate under Article 9.2 of the AD Agreement or Article 19.3 of the SCM Agreement respectively by choosing a practice of making a CVD determination ahead of AD determination. Such choice of determination order may appear to have made the Appellate Panel observation on Article 19.3 of the SCM Agreement inapplicable because the AD determination has yet to be made when the EU Commission decides the appropriateness of the CVD to be imposed, but EU Commission still has an obligation to avoid double remedy in its subsequently determination of AD under Article 9.2 of the AD Agreement, which gives rise to the existence of a similar obligation to avoid double remedy as Article 19.3 of the SCM Agreement. Or alternatively, it can be argued that Article 19.3 of the SCM Agreement imposes an obligation to avoid double remedy in concurrent proceedings even if the AD determination is to be made after the CVD, and thus the EU Commission who is the same investigating authority in the concurrent proceedings must take the likely result of the AD determination into consideration when discharging its obligation to avoid double remedy in the CVD proceeding under Article 19.3 of the SCM Agreement.

In conclusion, the author argues that the EU Commission cannot justify its refusal to consider the issue of double remedy in the concurrent proceedings in question by relying on the EU practice of determining CVD ahead of AD or on the lack of EU law which specifically requires offsetting dumping against subsidy. The obligation to avoid double remedy cannot be twisted into an obligation to “offset dumping against subsidy”. The EU Commission is wrong on this point because there is an obligation to avoid double remedy in either the AD or CVD proceedings, or the EU has violated its obligation under Article 9.2 of the AD Agreement for its failure to make adequate EU law to implement Article 9.2 of the AD Agreement.

**d. Double Remedy and the Total Amount of AD and CVD as Capped by the Injury Margin**

The EU Commission appears to suggest that there is no possibility of double remedy in its concurrent proceedings because both the AD and CVD are capped by the injury margin which is lower than the dumping margin determined by the NME methodology<sup>66</sup>. Is there any relevance between double remedy and total AD and CVD as capped by the injury margin?

As we have seen, double remedy means “the offsetting of the same subsidization twice by the concurrent imposition of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties”<sup>67</sup>. The essence of this concept is the offsetting of the same subsidization twice. Two points are crucial for understanding this concept: first, subsidization must be a quantitative concept, which must be expressed in a monetary term as reflected in the actual import price in question<sup>68</sup>; and secondly, offsetting may refer to not only a situation where the same subsidy is fully offset twice, but also a situation where the same subsidy is offset more than once even though the offset is not yet as much as two times of the subsidy which should be compensated under the SCM Agreement<sup>69</sup>. On the basis of these analyses on the concept of double remedy, it can be said that whether or not the capped injury margin is adequate to avoid double remedy must be decided on the basis of certain transparent and quantitative formula indicating the amount of subsidy or its equivalent or its conversional value as being reflected in the injury margin in question. Otherwise, the difference in the NME-based dumping margin and esti-

<sup>66</sup> The EU CVD Determination on Coated Fine Paper, *supra*, note 4, para. 273.

<sup>67</sup> The *US – Concurrent Duties Case*, *supra*, note 1, para 583.

<sup>68</sup> For example, Article 6.1(a) of the SCM Agreement provides that serious prejudice to the interest of another WTO member exists if the total ad valorem subsidization of a product exceeds 5%; and Article 19.4 of the SCM Agreement states that no CVD is to be levied in excess of the amount of subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported goods. These provisions reflect the quantitative nature of subsidization.

<sup>69</sup> This proposition is based on a logical interpretation of the appropriate amount requirement under Article 19.3 of the SCM Agreement, where offsetting of the same subsidy more than once, for example at a rate between 1.1-2 times of the subsidized sum, cannot satisfy the requirement for an appropriate amount of CVD. Similarly, Article 19.4 of the SCM Agreement also prohibits offsetting subsidy more than once because of the maximum ceiling requirement.

mated injury margin, no matter how big the difference is, cannot accurately and appropriately indicate that the subsidy in question is not offset more than once.

The theoretical bases for determining injury margin are found in Article 3 of the AD Agreement and Article 15 of the SCM Agreement respectively. The two provisions list similar factors for assessing injury in domestic industry and emphasize that an injury determination must take into account the volume of the dumped or subsidized imports and the effect of such imports to domestic prices and domestic producers. Therefore, causation or causality is a necessary factor for assessing injury. Following these provisions, the EU Commission refers to the largely similar data in the two parallel investigations for the purpose of determining injury<sup>70</sup>, and reaches injury conclusions on both occasions although certain factors are reviewed in the CVD investigation but not in AD investigation<sup>71</sup>. For those parts of the injury, where the same data are used, the injury indicators are the same. The EU Commission has also examined the causality aspect of the alleged dumping and subsidization, and appears to have established causation between the alleged dumping and subsidization on both occasions<sup>72</sup>. However, it must be pointed out duly that the EU Commission does not consider the causality or the effect of either dumping or subsidization in the total injury claimed in each separate but parallel proceeding. This is a fundamental error in EU practices. Theoretically, the EU Commission cannot, no matter whether this has been its practice or not, establish the causality between the alleged dumping or subsidization and the injury by neglecting the injury impact of dumping or subsidization selectively in the parallel proceedings even though it believes that both dumping and subsidization involving the same product have taken place during the same investigation period. When both the AD Agreement and SCM Agreement require the investigating authority to prove causality between the dumping or subsidization and the injury concerned respectively, the

<sup>70</sup> See The EU CVD Determination on Coated Fine Paper, *supra*, note 4, paras 376-433; The EU AD Determination on Coated Fine Paper, *supra*, note 3, paras 84-129.

<sup>71</sup> For example, in the CVD investigation, the EU Commission examines “production, production capacity and capacity utilization” as well as “sales volume and market share”; The EU CVD Determination on Coated Fine Paper, *supra*, note 4, paras 400-404, but these are not reviewed in details in the AD investigation.

<sup>72</sup> *Id.*, paras 434-461; The EU AD Determination on Coated Fine Paper, *supra*, note 3, paras 130-146.

investigating authority has to prove the causality under each law. Then if we put the two separate proceedings together, the two individual causes cannot lead to the same injury. In addition, pragmatically speaking, if the EU Commission believes that both dumping and subsidization exist for the same product, how can it ignore the injury impact of dumping when investigating the injury for subsidization and vice versa, because both causes presumably exist on the same product during the same period of investigation.

Based on analyses above, the author argues that the EU Commission's claim that totality of the AD and CVD as capped by the lower injury margin under the lesser duty rule can avoid double remedy is a false proposition. This is because not only is there no quantitative indication on how much subsidy is actually compensated for by the final CVD imposed, but also the determination of injury margin is a defective exercise because of the EU's failure to allocate accurately or reasonably the proportionate contribution of dumping in the injury margin when investigating subsidization, or of subsidization in the injury margin when investigating dumping. Such proportionate allocation of causality is necessary because both the AD Agreement and SCM Agreement requires the establishment of causality on each individual occasion, and each causality must therefore stand on its own concurrently in the context of injury if the EU believes that both dumping and subsidization exist for the same product during the same period of investigation in any concurrent proceedings.

#### e. Effect of the Lesser Duty Rule on Double Remedy

The lesser duty rule is discretionary or optional under Article 9.1 of the AD Agreement or Article 19.2 of the SCM Agreement. A number of WTO members, such as Argentina, Australia, Brazil, the EU, India, New Zealand, and Turkey, have voluntarily adopted the lesser duty rule in their practices<sup>73</sup>. In the presently on-going Doha Negotiations, the mandatory use of the lesser duty rule has become of the hot issues to be debated between the group known as Friends of Antidumping Negotiations (hereinafter referred to as Friends), which mainly consist of Brazil, Chile, Colombia, Costa Rica, Hong Kong (China), Israel, Japan, Korea, Mexico,

<sup>73</sup> Vivian C. JONES, "Trade Remedies and the WTO Rules Negotiations", Congressional Research Service 7-5700, June 7, 2010, p. 23, available at: <<http://www.nationalaglawcenter.org/assets/crs/R40606.pdf>>.



Norway, Singapore, Switzerland, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (China), Thailand and Turkey<sup>74</sup>; and India (originally on its own initiative<sup>75</sup>, but with others later<sup>76</sup>) on one hand, and the US on the other. The Friends and India are in favour of a mandatory application of the lesser duty rule as one of essential measures to reform AD rules, but the US is strongly against such mandatory rule on the ground that many uncertainties arise from the application of the lesser duty rule.

In summary, the group in favour of mandatory application of the lesser duty rule proposes to apply the rule on the grounds of the price undercutting method (which is calculated as the difference between the price, normally at the ex-factory level, of the domestic like product and the CIF landed price of the dumped imports; with appropriate adjustment based on differences affecting the price comparability between the domestic like product and the imported product including market characteristics affecting customers' purchase decision between them in the market of the importing Member), the representative cost plus profit method (which is calculated as the difference between the representative per unit cost of production, selling, general and administrative costs, and profit of the domestic like product; and the CIF landed price of the dumped imports; with appropriate adjustment based on differences affecting the price comparability between the domestic like product and the imported product

<sup>74</sup> They advocate strongly the mandatory use of the lesser duty rule, see WTO, Negotiating Group on Rules, *Proposal On Lesser Duty – Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand and Turkey*, TN/RL/W/119 (16 June 2003); WTO, Negotiating Group on Rules, *Further Submission Of Proposals On the Mandatory Application of the Lesser Duty Rule – Paper from Brazil; Chile; Costa Rica; Hong Kong; China; Israel; Japan; Korea; Norway; Singapore, Switzerland, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, and Thailand*, TN/RL/GEN/43 (13 May 2005); WTO, Negotiating Group on Rules, *Comments on the Lesser Duty Rule – Communication from Brazil*, TN/RL/W/189 (13 October 2005); WTO, Negotiating Group on Rules, *Proposals on the Mandatory Application of the Lesser Duty Rule – Paper from Brazil; Hong Kong; China; India; and Japan*, TN/RL/GEN/99 (3 March 2006); as well as WTO, Negotiating Group on Rules, *Further Comments On Lesser Duty Proposals – Paper from the United States*, TN/RL/GEN/58 (13 July 2005).

<sup>75</sup> WTO, Negotiating Group on Rules, *Proposal on Mandatory Application of Lesser Duty Rule – Communication from India*, TN/RL/GEN/32 (22 March 2005).

<sup>76</sup> WTO, TN/RL/GEN/99 (3 March 2006), *supra*, note 74.



including market characteristics affecting customers' purchase decision between them in the market of the importing Member) or the non-dumped import price method (which is calculated as the difference between the CIF landed price of the non-dumped imports of the like products and the CIF landed price of the dumped imports)<sup>77</sup>. The group later realizes the importance of the injury margin in the application of the lesser duty rule, and then proposes to define the concept as "the difference between the price of the dumped imports ('the import rice') and the non-injurious price ('the NIP') of the domestic products like the products under investigation ('domestic like products')"<sup>78</sup>. They also propose four specific methods for the calculation of the NIP<sup>79</sup>. The NIP is further explained by certain WTO members in favour of the lesser duty rule as "the price at which the domestic industry of the like product in the importing Member should be able to compete with exporters or foreign producers of the product under investigation"<sup>80</sup>. The lesser duty rule as endorsed by the group in favour of its mandatory application appears now to be clearer than what is used voluntarily by certain WTO members<sup>81</sup>. In

<sup>77</sup> WTO, TN/RL/W/119 (16 June 2003), *supra*, note 74, p. 2.

<sup>78</sup> WTO, TN/RL/GEN/43 (13 May 2005), *supra*, note 74, p. 3.

<sup>79</sup> These methods are:

(a) The NIP is calculated as the current price of the domestic like product.

(b) The NIP is calculated as the price of the domestic like product during a period prior to being affected by dumping, provided that such period is, except for the absence of the effect of dumping, comparable to the dumping investigation period taking into account relevant market factors.

(c) The NIP is calculated as the price of non-dumped imports of the product under investigation or the like products, provided that such price is representative and the volume of the non-dumped imports is not negligible for the importing market. The non-dumped imports shall be selected from all sources including like products imported from foreign producers in a country or countries not subject to antidumping investigations or measures or products under investigation which have been found not to be dumped.

(d) If the NIP is calculated as per unit cost of production plus a reasonable amount of selling, general and administrative costs and for profits of the domestic producers of the domestic like product.

See *id.*

<sup>80</sup> WTO, TN/RL/GEN/99 (3 March 2006), *supra*, note 74, p. 2.

<sup>81</sup> This has been one of the major criticisms for the US to object to the mandatory use of the lesser duty rule. In its proposal, the US states that among those WTO members currently apply the lesser duty rule, there is no consensus as to the appropriate methodology to use the rule. See WTO, TN/RL/GEN/58 (13 July 2005), *supra*, note 74, p. 2. Similarly, the group in favor of mandatory use of the lesser duty rule is also unhappy

essence, the group, which also includes China, suggests to apply the lesser duty rule by referring to the injury margin which is usually lower than the dumping margin, because the injury margin is determined by referring to the difference between the import price (dumped price) and the NIP, which is deemed to be a hypothetical price at which injury to the domestic industry can be eliminated fairly. The difference between the lesser duty rule as endorsed by China and the one relied on by the EU in the two investigations in question must be taken into account in dealing with the issue of double remedy.

A summary of the US position on the lesser duty rule can help us to understand the features of the lesser duty rule as allegedly having been applied by the EU in the two concurrent investigations. The US criticisms on the lesser duty rule can be summarized as follows<sup>82</sup>:

The present practice which is based on discretion of the WTO members offers no explanation on how the lesser duty rule is applied, how the injury margin is assessed, or how the injury margin can remove the injury.

- There is a general lack of transparency and lack of effective judicial review in national practices concerning the lesser duty rule.
- The proponents of the mandatory lesser duty rule have not explained why anti-dumping duties should be assessed on the basis of the underselling margin, apart from the possibility that it might result in a lesser duty than the dumping margin.
- The proponents of the mandatory lesser duty rule have not explained why it is appropriate to calculate an injury margin based on a constructed estimate of the sales price the industry should have obtained during the period of investigation.
- The methods suggested by the proponents of the mandatory lesser duty rule are not reasonable in the light of the relevant provisions of the AD Agreement, because many impact factors listed for assessing injury under the AD Agreement are not measurable in the same manner. For example, sales, profits, wages, and investments, are measured in units of currency; output and inventories are

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about the confusion in the present practices on the lesser duty rule. They observe that while many members have applied the lesser duty rule, it appears that there is divergence in the methodology of applying this rule. WTO, TN/RL/W/119 (16 June 2003), *supra*, note 74, p. 2.

<sup>82</sup> WTO, TN/RL/GEN/58 (13 July 2005), *supra*, note 74.

measured in units of output; employment is measured in units of labor; capacity utilization, market share, productivity, and the magnitude of the margin of dumping, are expressed as ratios. Due to the disparate nature of these factors, the US believes the calculation of a single injury margin that adequately reflects all factors contributing to injury would, to say the least, present considerable difficulty.

- The proposals are not actually aimed at removing injury, and do not contemplate any analysis of whether injury would, in fact, be removed by application of the lesser duty. Rather, they are aimed at estimating a level of duties that *may* be sufficient to remove injury. However, if the methodology does not provide an accurate basis for assessing the injury, it will likely also fail to determine accurately what level of duty will remove the injury.
- These observations are made by the US against the proposals for mandatory lesser duty rule, but in the view of the author of this paper, by the same logic they are quite suitable to address the issue on whether the lesser duty rule practiced by the EU Commission in the two investigations has actually avoided double remedy.

In the light of the understanding of the lesser duty rule by its proponents such as China, Brazil and India, as well as the US criticisms on the lesser duty rule, we shall be able to see both the differences between the lesser duty rule as proposed by the Friends and the one practiced by the EU in the two investigations in question, and the defects or controversies in the EU practices on the lesser duty rule. All of these can help us to determine whether the lesser duty rule as practiced by the EU has helped to avoid double remedy in the two investigations.

The author of this paper is of the view that the EU Commission has not avoided double remedy by relying on the lesser duty rule in the two investigations. There are a number of reasons for this. First, the lesser duty rule as practiced by the EU Commission in concurrent AD and CVD proceedings is uncertain and non-transparent because the EU has not explained how the lesser duty rule operates in the parallel proceedings where the EU claims to have determined the CVD before AD. Secondly, the EU has not explained how the same injury margin or injury elimination level can avoid double remedy quantitatively, except for the broad assumption that the injury margin is much lower than the dumping margin established on the basis of the NME methodology which has neglected

the amount of actual subsidization in the calculation of dumping margin. The EU is making an estimated guess that the same subsidy is not offset more than once because the injury margin appears to be much lower than the dumping margin statistically. Third, the adoption of the vague lesser duty rule as capped by the injury margin, which fails to address the causality proportionately between the alleged dumping or subsidization on one hand and the alleged injury on the other in the concurrent proceedings, does not comply with the requirements for imposing appropriate amount of AD or CVD in Article 9.2 of the AD Agreement and 19.3 of the SCM Agreement respectively.

### **III. Illegality of the EU Determinations in the Light of Double Remedy**

#### **A. Failure of the Injury Margin to Respond to Article 19.3 of the SCM Agreement**

The injury margin or the injury elimination level plays a crucial role in the EU defence against the complaint of double remedy. As we know, the EU Commission finds the same injury margin in the two parallel proceedings. In the light of the EU Determinations, the injury margin on both occasions is established in the same way: first, the EU Commission establishes the NIP by adding 8% profit to the cost of production of the like product allegedly to have been injured<sup>83</sup>; and secondly, the EU compares the weighted average import price of each product in question and the NIP of the like product of EU, and expresses the injury margin as a percentage of the average CIF import value of the compared types of products<sup>84</sup>. The method for determining the injury thus appears to be fairly clear. However, a fairly clear method may not always yield a fair result, and in addition, a clear method in which the injury margin is calculated may not be an answer to the EU's obligation to avoid double remedy in its concurrent AD and CVD proceedings.

<sup>83</sup> The EU CVD Determination on Coated Fine Paper, *supra*, note 4, para. 495; The EU Provisional AD Determination on Coated Fine Paper, *supra*, note 38, para. 156.

<sup>84</sup> The EU CVD Determination on Coated Fine Paper, *supra*, note 4, para. 497; The EU Provisional AD Determination on Coated Fine Paper, *supra*, note 38, para. 157.

The author argues that the injury margin relied upon by the EU Commission as one of the major grounds to deny the existence of double remedy in its investigations does not discharge the EU of its obligation to avoid double remedy under Article 19.3 of the SCM Agreement for the following reasons:

The method for determining the injury margin as applied by the EU Commission is only one of possible options/solutions still subject to debate by WTO members<sup>85</sup>, and thus the EU has yet to prove the injury margin so determined can lead to the imposition of an appropriate amount of CVD under Article 19.3 of the SCM Agreement, or as the case may be under Article 9.2 of the AD Agreement.

- In the EU Determinations, the injury margin actually decides the amount of CVD and AD to be imposed. Therefore, the injury margin shall represent the appropriate amount of CVD or AD as required by 19.3 of the SCM Agreement and Article 9.2 of the AD Agreement respectively. However, as we can see from the method for calculating the injury margin as applied by the EU in its determination, there is no reference to the appropriate amount requirements. Nor has the EU explained why the full amount of subsidy to be appropriate in its CVD Determination, although the EU appears to have reduced the actual AD by deducting the CVD already imposed against the injury margin<sup>86</sup>.
- The gap filling role of the AD in EU practices may arguably appear to be “appropriate” because the AD is capped by the total injury margin, which presumably represents an amount of duty capable of helping the EU industry to recover from the injury alleged, but such qualified “appropriateness” is weak if we examine the artificial and arbitrary basis of the injury margin. The NIP, which is essential for establishing the injury margin in EU practices, is artificially and arbitrarily set as a combination of 8% profit plus the cost of production. Leave the arguable 8% profit margin aside, it is questionable whether the cost of production is the holy ground for justifying the imposition of AD. The logic is very simple, in a market economy situation where either no dumping is established or the dump-

<sup>85</sup> The Friends propose four methods for determining the NIP, and the EU’s method is similar to some extent to one of the methods so proposed. See WTO, TN/RL/GEN/43 (13 May 2005), *supra*, note 74, p. 3.

<sup>86</sup> The EU AD Determination on Coated Fine Paper, *supra*, note 3, para.165.

ing margin is lower than the NIP, the EU is not entitled to impose AD exceeding the established dumping margin<sup>87</sup>, even though such dumping margin cannot help the EU industry to get advantage over foreign imports due to its uncompetitive high cost of product. This means that the EU cannot take the cost of production for granted as the holy subject of protection and it can only protect the EU industry if the dumping or subsidization has caused the injury in question, which may or may not correspond to the NIP or the injury margin artificially and arbitrarily set by the EU. In fact, the so-called injury margin guarantees to be the lesser of the two margins (dumping or injury) only when the NME methodology is tactically and purposefully used by the EU.

- Due to the reasons set out above, the author argues that the injury margin as applied by the EU in the two investigations in question has failed to address Article 19.3 of the SCM Agreement, or alternatively Article 9.2 of the AD Agreement, and thus it does not discharge of the EU's obligation to avoid double remedy under Article 19.3 of the SCM Agreement.

## **B. Failure to Allocate Causality Proportionately in the Concurrent Proceedings**

Establishing causation between the alleged dumping or subsidization and the injury is the duty of EU under the relevant WTO law. Indeed, the EU Commission examines the issue of causation in the two investigations respectively. In its CVD Determination, the EU Commission reviews the effect of a number of factors on the injury claimed, including subsidization, the development of consumption on the EU market and the economic crisis, the price of raw material, export performance of the representative EU producers, imports from other third countries, and structural overcapacity<sup>88</sup>. In its AD Determination, the EU Commission reviews the effect of largely similar factors, including dumped imports, the development of consumption on the EU market and the economic crisis, the price of raw materials, export performance of the representative EU producers, imports from other third countries, and structural overcapa-

<sup>87</sup> The AD Agreement, Article 9.3.

<sup>88</sup> The EU CVD Determination on Coated Fine Paper, *supra*, note 4, paras 435-462.

city<sup>89</sup>. At the end of each investigation, the EU Commission is satisfied that the causality is established between the alleged dumping and subsidization respectively.

In the light of the EU's determinations on causality, the author argues that the causality finding is flawed on both occasions. The problem is that the EU Commission fails to acknowledge the effect of dumping in its CVD Determination, and vice versa, the effect of subsidization in its AD Determination, even though the EU Commission believes that both dumping and subsidization exist on the same Chinese products for the same investigation period. If both dumping and subsidization exist for the same period on the same Chinese products, the co-existent dumping and subsidization must have caused their respective or collective injury to the EU industry of the like products. If so, the EU is obliged to decide how much injury is actually caused by the alleged dumping or similarly how much injury is actually caused by the alleged subsidization in each individual but yet parallel investigation. Such causation requirement is seen in Article VI of the GATT, Articles 3.5 and 9.2 of the AD Agreement, Articles 15.5 and 19.3 of the SCM Agreement. If the injury is jointly caused by both the dumping and subsidization, the relevant provisions of the AD Agreement and the SCM Agreement still require the EU Commission to proportionate the injury caused by dumping and subsidization respectively. The causality in this sense is needed for the EU Commission to decide the appropriate amount of AD or CVD to remove the injury concerned. If EU or any WTO member chooses to conduct concurrent AD and CVD investigations, it is its duty to determine the causality and appropriate amount on each occasion respectively, although such duty does not exist if the EU or any other WTO member chooses only to apply AD, and the AD so applied may perhaps cover up to the full amount of injury margin as artificially and arbitrarily set by the EU.

The author thus argues that the EU Commission has failed to address the issue of causality in its concurrent AD and CVD investigations because of its deliberate refusal to acknowledge the existence of dumping in its CVD investigation and the existence of subsidization in its dumping determination. The causality so determined is flawed. With such flawed causality determination, the EU Commission has failed to perform its obligations under Article 19.3 of the SCM Agreement and Article 9.2 of

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<sup>89</sup> The EU AD Determination on Coated Fine Paper, *supra*, note 3, paras 130-146.

the AD Agreement to determine appropriate amounts of CVD or AD so imposed, and accordingly has failed to discharge its obligation to avoid double remedy under these provisions, in particular Article 19.3 of the SCM Agreement as interpreted by the Appellate Panel in the *US – Concurrent Duties Case*.

### **C. Failure of the Lesser Duty Rule to Address the Issue of Double Remedy**

As we have seen, the EU Commission rejects the claim of double remedy by relying on the lesser duty rule it has practiced. The lesser duty rule as practiced by the EU rests heavily on the injury margin artificially and arbitrarily set by the EU. The EU Commission appears to have adopted a logic that if it sets out a ‘cost + profit’ based NIP, which as a basis for comparison with the CIF import price of the Chinese product leads to percentage-expressed ‘injury margin’, which in turn must be much lower than the NME-methodology-based dumping margin, it is free of any worry of double remedy when it imposes CVD ahead of AD in its concurrent investigations. In such practices, the EU Commission presumes that subsidy is not offset more than once because it imposes CVD ahead of AD, whose amount has taken into account the CVD already imposed; the EU Commission presumes that subsidy is not offset more than once because the injury margin applied is much lower than the dumping margin calculated on the basis of the NME methodology, and further the EU Commission also presumes that it is entitled to apply the cost of production as the holy basis for calculating the NIP because the alleged dumping determined under the NME methodology does appear to have injured the EU industry which cannot make sufficient profit on the basis of its present cost of production. However, the author wishes to point out that all of these are presumptions because the EU Commission has failed to prove the justification of any of these presumptions under the relevant WTO provisions.

First, the author argues that the lesser duty rule as applied by the EU does not address at least the appropriate amount requirement as set out in Article 19.3 of the SCM Agreement or Article 9.2 of the AD Agreement. If we can borrow a criticism of the lesser duty rule by the US Government, it can be said analogously that the EU’s lesser duty rule has not explained



why its AD is based on the underselling margin, apart from the possibility that it might result in a lesser duty than the dumping margin<sup>90</sup>.

Secondly, when applying the lesser duty rule in the two investigations in question, the EU Commission has failed to ascertain how much injury has been caused by the alleged dumping or subsidization in each separate investigation and thus how much AD or CVD should be appropriately imposed for the purpose of removing the injury so caused. It only estimates that when both dumping and subsidization are deemed to exist, the EU industry in question is entitled to be compensated on the cost-profit basis. There is no explanation on why the EU industry is entitled to recover the cost of production and 8% of profit in the investigations. The EU Commission appears to have forgotten that it is not entitled to impose more than what the dumping margin or subsidy margin actually is under the relevant laws regardless of whether such margins are sufficient to cover the cost of production of the EU industry. This means that as one of the basic principles, the EU industry is not entitled to recover the cost of production as a matter of right. The EU Commission makes the cost of production appear to be a justified claim only when it applies the NME methodology against the Chinese products in question, in particular by selecting the US as the analogue/surrogate country for determining normal value of the Chinese products<sup>91</sup>. This is outrageous. Let's look at a very simple example, according to the World Bank statistics for 2005 and 2010, the US ranks number 8 with a GDP (PPP) per capita of US\$47,084 and China ranks at number 95 with a GDP (PPP) per capita of US\$7,536<sup>92</sup>. How can the cost of product in China be comparable or analogous with the cost of production in the US then? By comparison, it is interesting to note that in an US investigation against similar products from China, the US Government chooses India as the surrogate country for determining the normal value and also, unlike the EU, provides reasons for such selection<sup>93</sup>. By comparison, it appears that the only reason for the EU

<sup>90</sup> WTO, TN/RL/GEN/58 (13 July 2005), *supra*, note 74, p. 2.

<sup>91</sup> The EU AD Determination on Coated Fine Paper, *supra*, note 3, para. 62.

<sup>92</sup> See for example, List of countries by GDP (PPP) per capita, available at: <[http://en.wikipedia.org/wiki/List\\_of\\_countries\\_by\\_GDP\\_\(PPP\)\\_per\\_capita](http://en.wikipedia.org/wiki/List_of_countries_by_GDP_(PPP)_per_capita)>.

<sup>93</sup> The US Department of Commerce gives the following reasons for the selection: it is a significant producer of comparable merchandise; (2) it is at a level of economic development comparable to that of the PRC, pursuant to section 773(c)(4) of the Act; and (3) we have reliable data from India that we can use to value the FOPs. See DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, "Certain Coated Paper Suit-

Commission to choose the US as an analogue/surrogate for determining normal value is to establish an unrealistically high dumping margin and thus to facilitate its artificial and arbitrary determination of the injury margin. Again, if we borrow a criticism made by the US on the lesser duty rule, it can be said analogously that the EU lesser duty rule does not explain why it is appropriate to calculate an injury margin based on a constructed estimate of the sales price the industry should have obtained during the period of investigation<sup>94</sup>.

Thirdly, the lesser duty rule as applied by the EU Commission in the two investigations represents an estimated calculation of the subsidy, and thus the EU Commission can only presume there is no double remedy in its determinations. Obviously, when using the US data for determining normal value, the amounts of subsidization in the import prices of Chinese products are not ascertained. Thus, no matter how huge the differences between the dumping margin and the injury margin is, the EU Commission is not able to tell accurately or with evidence that the AD which is capped by the injury margin does not offset subsidy established more than once. Thus, the EU Commission fails to discharge its obligation to avoid double remedy by explaining how the appropriate amount is determined at least under Article 19.3 of the SCM Agreement, which has been applied by the Appellate Panel in the *US – Concurrent Duties Case*.

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The EU Determinations in question have not avoided the issue of double remedy by the application of the lesser duty rule. The injury margin artificially and arbitrarily set by the EU Commission, although being much lower than the NME-method-based dumping margin, does not indicate why it represents appropriate amounts under Article 19.3 of the SCM Agreement or Article 9.2 of the AD Agreement. Due to its failure to prove the appropriateness of the AD and CVD as capped by the injury margin under the relevant WTO provision, the EU Commission has failed to discharge its obligation to prove that double remedy has been avoided

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able for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Determination of Sales at Less Than Fair Value", (2010) 75 FR 59217, 59220, available at: <<http://federalregister.gov/a/2010-24159>>.

<sup>94</sup> WTO, TN/RL/GEN/58 (13 July 2005), p. 2.

in its determinations. Further, the author wishes to point out that the EU Commission has misunderstood its obligation under the relevant laws, in particular Article 19.3 of the SCM Agreement or Article 9.2 of the AD Agreement, to avoid double remedy. This is actually seen, for example, in its statement that in any case there is no double remedy in its concurrent investigations “because the combined level of duties could already have been justified as a result of the anti-dumping investigation alone”<sup>95</sup>. What the EU Commission actually says is that since it may impose AD up to the full amount of injury margin in a single AD investigation which is not conducted concurrently with a CVD investigation, it may as well be entitled to impose whatever amounts of AD and CVD as long as the total amounts of these duties do not exceed the injury margin. This is a wrong rationale. First, whether an injury margin set out in an independent AD investigation is legal or not can only be determined in its specific context. A WTO member can choose to use the lesser duty rule or injury margin in its AD determination; it does not mean that the use of the lesser duty rule or injury margin in any specific case is always free of error or fault. Secondly, single and concurrent proceedings are two types of actions. If the EU Commission, for whatever reasons, chooses to apply parallel and concurrent AD and CVD proceedings, it has to be prepared to be judged under the WTO rules applicable to such concurrent proceedings. The EU Commission cannot play the game of concurrent AD and CVD investigations by relying on the rules made for playing the game of single AD or CVD investigation, merely because these rules appear at least for the time being to be in its favour. This is particularly true on the issue of double remedy or proportionate causality (or whatever we name it) in the injury determination, because these issues may not arise at all in most single AD or CVD investigations, even though the investigating authority also has to comply with Article 19.3 of the SCM Agreement or Article 9.2 of the SD Agreement respectively.

In conclusion, for the reasons already given above, the author believes that the EU Determinations are illegal at least on the ground of double remedy, and that the Chinese Government shall be able to make a successful challenge against the two determinations in the WTO panel proceedings at least on the ground of double remedy.

<sup>95</sup> The EU CVD Determination on Coated Fine Paper, *supra*, note 4, para. 273.

There are also other issues in the EU Determinations which may make the EU Determinations questionable. For example, the use of US as the analogue/surrogate country for determining normal value in the AD investigation and the misinterpretation of many Chinese documents/regulations/policies<sup>96</sup>, which are said to constitute preliminarily bases for establishing subsidies are all questionable exercises. Briefly speaking, how China, as a transitional country, is deemed to be comparable or analogous with the US in terms of production cost in the making and sale of the coated fine paper, especially when the similar Chinese products were also subject to the US AD investigation a few months earlier, but the USDOC chooses India as the analogue/surrogate country?<sup>97</sup> There are many problems with the reading, interpretation and use of the translated Chinese documents/regulations/policies provided to the EU Commission by the complaining EU industry. One of the basic problems is that the EU Commission requests a burdensome amount of documents and information whose importance and legal effect are viewed by the EU Commission as being relevant from its own (often distorted or prejudiced) perspective of China, that more likely than not does not represent the true commercial operation in China. Inability on the Chinese side to satisfy the requests of EU due to many financial, resource and other practical restraints is held by the EU Commission against Chinese producers justifiably under the facts available rule which appears to be permissible under the relevant WTO laws. However, the unfairness in the use of the facts available rule against China in the present investigations is self-evident, which serves as a perfect example of the arbitrary, manipulative, discriminative, abusive

<sup>96</sup> There are many examples of misinterpretation. For instance, Decision No. 40 of the State Council on Promulgating and Implementing the ‘Temporary Provisions on Promoting Industrial Structure Adjustment’ (‘Decision No. 40’) is referred to as one of the evidence to prove that papermaking industry is given special financial support under the state policy. However, if one reads the document objectively, one would easily find that the document is a policy statement to encourage industrial structure improvement for the purpose of enhancing efficiency, energy-saving and environmental protection. Similarly, the 2007 Development Policy for the Papermaking Industry is also said to be one of the evidence establishing subsidization in papermaking industry. But this policy statement per se does not satisfy the definition of ‘subsidy’ in Article 1 of the SCM Agreement because these documents cannot establish that the specific producer has received specific subsidy under these policy statements. Similar misreading happens to many documents/regulations/policies referred to by the EU Commission. The EU CVD Determination on Coated Fine Paper, *supra*, note 4, paras 74-95.

<sup>97</sup> INTERNATIONAL TRADE ADMINISTRATION, *supra*, note 93, 59220.

and political nature of some of the AD and CVD investigations presently practiced by many WTO members.<sup>98</sup> These issues and also many others are not the main concerns of the paper and thus further analysis on these is omitted.

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<sup>98</sup> The EU Commission requests many documents and information from the Chinese Government and Chinese companies under investigations, who all feel that the request is a burden they cannot bear for many practical reasons. The EU Commission then applies the facts available rule to find the existence of subsidization against the Chinese products. See for example, the EU CVD Determination on Coated Fine Paper, *supra*, note 4, paras 64-73.

