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Double Remedies in Double Courts

Sungjoon Cho* and Thomas H. Lee**

Abstract

This article uses an ongoing trade controversy litigated in US courts and the World Trade Organization dispute resolution system as a vehicle for exploring different models to deal with parallel adjudications in different legal systems between the same or related parties on the same issue. In lieu of more traditional models of subordination or first-to-decide sequencing, the article proposes an engagement model as a solution to the double-courts, single-issue problem.

1 Introduction

A recent trade dispute between the USA and China was adjudicated almost simultaneously in the US national court system and in the dispute resolution apparatus of the World Trade Organization (WTO). The issue in question was technical, involving a challenge to a US Department of Commerce policy of charging both anti-dumping duties and countervailing duties (that is, penalties to offset market-distorting government subsidies) on Chinese tyre imports to the USA. However, the final decisions of the two adjudicative systems – the US Court of Appeals for the Federal Circuit and the WTO Appellate Body – gave no indications of awareness of the legal reasoning or even of the existence of the parallel proceeding on the same technical issue. This article laments this mutual disregard and proposes a way forward to ensure substantive engagement between national and international adjudicative institutions in similar circumstances. The article's proposal of engagement adopts neither a model of subordinating one court to the other, nor the first-to-decide sequential model manifested in preclusion and comity doctrines. It is grounded, rather, in the themes of harmonizing international and municipal law and of deference to expert institutions articulated by the US *Charming Betsey* and the *Chevron* doctrines respectively.¹

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¹ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984); *Murray v. The Charming Betsey*, 6 US (2 Cranch) 64 (1804).

This article has three parts. The first part explains the underlying dispute and the procedural history of its resolution in the USA. The second part describes the WTO dispute on the same issue. The third part sets forth the two dominant models for dealing with the problem of parallel proceedings in two different legal systems facing the same legal issue. It then proposes a third model for substantive engagement between the different courts.

2 Double Remedies in the US Courts

The domestic trade agency of a WTO member state typically exercises oversight over both anti-dumping duties and countervailing duties. The relevant agency in the USA is the Department of Commerce.² An anti-dumping duty is a penalty that a member state may assess upon an import originating from another member state pursuant to a showing that the price of the import is less than its fair value.³ A countervailing duty is a penalty that a WTO member may assess upon an import pursuant to a finding that its price is artificially low because of government subsidies that the producer received in its home country.⁴ In theory, it is possible to impose both anti-dumping and countervailing duties – double remedies.

An example may help to explain the concepts of the two duties as well as the logic of double remedies. If there is evidence that a foreign company sells its good for \$150 in its home market but for \$100 in the USA, the Department of Commerce may levy an anti-dumping duty of \$50 on the good to counter ‘dumping’. In addition, if the company were to receive a \$25 government subsidy in its home country, the company could reduce the price of the good by \$25 in both its home country (now \$125) and in the USA (now \$75). The agency would still levy an anti-dumping duty of \$50 (\$125 minus \$75) to counter the dumping, but it could also assess a countervailing duty of \$25 to counteract the subsidy. The combined anti-dumping and countervailing duties would be \$75.

If the foreign company operates in a government-controlled economy, however, the anti-dumping duty will be calculated using prices from a surrogate market economy country. This policy is a result of the fact that the sales price of the good in its home country would reflect government intervention and not the good’s fair market value. To illustrate by building on the prior example, rather than using the non-market economy subsidized price of \$125, the Department of Commerce would use the \$150 price of the good in a comparable surrogate country with a market economy as the

² Another agency, the US International Trade Commission, determines the existence or threat of ‘material injury’ caused by any dumping or subsidization discovered by the Department of Commerce. Preliminary Determinations, 19 USC § 1673b(a).

³ See, e.g., Imposition of Antidumping Duties, 19 USC § 1673 (authorizing anti-dumping duties on ‘a class or kind of foreign merchandise ... sold in the United States at less than its fair value’).

⁴ See, e.g., Imposition of Countervailing Duties, 19 USC § 1671: ‘If the administering authority determines that the government of a country ... is providing, directly or indirectly, a countervailable subsidy ... then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy.’

fair market value. Hence, it would assess an anti-dumping duty of \$75 – the differential between this surrogate price and the \$75 import price in the USA. If the agency were to levy an additional \$25 countervailing duty, the combined anti-dumping and countervailing duties would be \$100. However, by assessing the anti-dumping duty based on a surrogate market economy country, the implicit subsidy has already been accounted for. Assessing double remedies in this context thus appears to be double counting.

Indeed, the US Department of Commerce had itself opined in 1984 that ‘without a market, it is obviously meaningless to look for misallocation of resources caused by subsidies’ because ‘there is no market process to distort or subvert’.⁵ The US courts agreed. In *Georgetown Steel*, the US Court of Appeals for the Federal Circuit concluded that ‘the governments of those [non-market economies] would in effect be subsidizing themselves’, and, thus, the sale of imports from non-market economies, ‘at unreasonably low prices should be dealt with under the antidumping law’.⁶ In the context of the Cold War, the US courts and trade agency shared the view that, with respect to imports from Communist countries, ‘the notion of a subsidy is, by definition, a market phenomenon’.⁷

Circumstances changed over the next two decades. First, China has become more of a market economy than the Communist bloc nations were in the 1980s, although there is still substantial government intervention in Chinese markets, and state-operated enterprises are prevalent in its economy.⁸ Second, the dramatic rise in bilateral trade between the USA and China to China’s advantage has increased political pressure in the USA to use trade law penalties to offset the lower prices of Chinese manufacturers.⁹ In 2008, departing from prior practice, the US Department of Commerce levied double remedies against GPX, a US company that imports off-road pneumatic tyres made in China by its wholly owned Chinese subsidiary company Starbright. The agency had initiated the investigation in 2007 at the insistence of GPX’s competitors and concluded it by assessing anti-dumping and countervailing duties on GPX’s tires for the overlapping periods of 1 October 2006 through 31 March 2007 (anti-dumping duties) and 1 January through 31 December 2006 (countervailing duties).¹⁰

⁵ *Carbon Steel Wire Rod from Czechoslovakia (Wire Rod)*, 49 Fed. Reg. 19370, at 19374 (7 May 1984).

⁶ *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, at 1316 (Fed. Cir. 1986).

⁷ *Wire Rod*, *supra* note 5, at 19,374.

⁸ Lin and Milhaupt, ‘We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China’, 65 *Stanford Law Review* (2013) 697.

⁹ See e.g., Becker, ‘Ways and Means Dems Want More Trade Enforcement’, *The Hill* (31 March 2011). Trade statistics illustrate the recent surge of US countervailing duty measures against China. See Ahn and Lee, ‘Countervailing Duty against China: Opening a Pandora’s Box in the WTO System?’, 14 *Journal of International Economic Law* (2011) 329, at 345; see also Zheng, ‘Counting Once, Counting Twice: The Precarious State of Subsidy Regulation’, 49 *Stanford Journal of International Law* (2013) 427 (criticizing weak theoretical foundations behind double remedies).

¹⁰ *Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China: Initiation of Countervailing Duty Investigation*, 72 Fed. Reg. 44122 (Department of Commerce 7 August 2007); *Initiation of Antidumping Duty Investigation: Certain New Pneumatic Off-the-Road Tires From the People’s Republic of China*, 72 Fed. Reg. 43591 (6 August 2007).

Retaining China's designation as a non-market economy,¹¹ the agency calculated an anti-dumping margin of 29.93 per cent¹² and a countervailing duty margin of 14 per cent against Starbright.¹³

On 9 September 2008, GPX filed suit against the USA to contest the Department of Commerce's countervailing duties determination in the US Court of International Trade,¹⁴ a national court for trade cases in New York staffed by federal judges with lifetime tenure and salary protection.¹⁵ GPX argued that to impose both anti-dumping and countervailing duties by applying non-market economy methodologies was unfair because it 'punishes Chinese companies twice for the same allegedly "unfair" trading practice'.¹⁶ In other words, in a non-market economy such as China's, a company's costs of production are presumptively subsidized by the government regardless of export implications. The Department of Commerce replied that the anti-dumping and countervailing duty laws 'provide separate remedies for separate unfair trade practices' and that 'the classification of China as an NME [non-market economy] under the [anti-dumping] law does not have any necessary consequence' with respect to the application of the countervailing duty law.¹⁷

The US trade court rejected the Department of Commerce's argument and sided with GPX (*GPX I*).¹⁸ Citing a US Government Accountability Office (GAO) report from 2005, the *GPX I* court accepted GPX's assertion of duplicative effect if the agency were to impose both countervailing and anti-dumping duties on non-market economy imports under its current methods.¹⁹ In its September 2009 remand order, the court instructed the Department of Commerce to 'forego the imposition of [countervailing duties] on the merchandise at issue' or else 'adopt additional policies and procedures to adapt its ... methodologies' for calculating both types of duties for non-market economies to obviate double counting.²⁰ When the agency failed to comply with the court's instruction in the remand order, GPX returned to the court to compel compliance.

In the second round of the dispute (*GPX II*), the US trade court ruled in August 2010 that the agency 'must forego' the countervailing duties at issue, foreclosing

¹¹ Based on the assumption that data collected in non-market economies are unreliable, the US government uses data collected in a 'surrogate' market economy. It derives various costs, wages and profits it deems to represent fair market values as related to the particular non-market economy under investigation. Cho, 'A Dual Catastrophe of Protectionism', 25 *Northwestern Journal of International Law and Business* (2005) 315, at 330.

¹² *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51624, at 51625 (4 September 2008).

¹³ *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 Fed. Reg. 40480, at 40483 (15 July 2008).

¹⁴ *GPX Int'l Tire Corp. v. United States (GPX I)*, 33 Ct Intl Trade 1368, at 1370 (2009).

¹⁵ Court of International Trade, 28 USC §§ 251–258.

¹⁶ *GPX I*, *supra* note 14, at 1376.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, at 1383.

¹⁹ *Ibid.* at 1378–1379.

²⁰ *Ibid.* at 1388.

the alternative of adapting a different methodology.²¹ The Department of Commerce refrained from imposing countervailing duties under protest and promptly appealed the trade court's decision to the Court of Appeals for the Federal Circuit. In its December 2011 decision (*GPX III*), the Federal Circuit upheld the lower court's conclusion, but for a different reason than double counting.²² The appellate court concluded that it was unclear whether state payments in a non-market economy 'constitute "counter-vailable subsidies" within the meaning of the statute' authorizing the Department of Commerce to impose countervailing duties.²³ The court turned to a theory of 'legislative ratification' to resolve the ambiguity: 'In the case of a widely known judicial decision or agency practice, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."' ²⁴ Specifically, the Department of Commerce and the Federal Circuit in the *Georgetown Steel* case had loudly articulated the rationale that subsidies were not possible in non-market economies. The appellate court reasoned that by failing to affirmatively countermand those prior agency and judicial interpretations in amending and re-enacting US trade laws in 1988 and 1994, Congress had essentially ratified them.²⁵

GPX's victory in the US courts proved pyrrhic. The same political forces that had moved the agency to shift its position on double remedies with respect to Chinese imports mobilized swift action in the US political branches. On 13 March 2012, the US legislature passed, and President Barack Obama signed into law, a statute providing that 'the merchandise on which countervailing duties shall be imposed ... includes ... merchandise imported ... into the USA from a nonmarket economy country.'²⁶ Despite its decisive language, the American statute has not ended the controversy. The December 2011 decision of the Federal Circuit did not so much as acknowledge a March 2011 decision of the WTO Appellate Body in a proceeding brought by China against the USA. The Appellate Body struck down the double remedies that an earlier WTO panel had affirmed. Reacting to the statute overruling the Federal Circuit's decision, China filed and won another action against the USA in the WTO for the latter's failure to comply with the Appellate Body's report.²⁷ This article now turns to the WTO proceedings.

3 Double Remedies at the WTO

While GPX sued the USA on the double-remedies issue in the US courts, China also brought the same dispute to the WTO.²⁸ Only member states can access the WTO

²¹ *Ibid.* *GPX Int'l Tire Corp. v. United States (GPX II)*, 715 F. Supp. 2d 1337, at 1341 (Ct Intl Trade 2010).

²² *GPX Int'l Tire Corp. v. United States (GPX III)*, 666 F.3d 732 (Fed. Cir. 2011).

²³ *Ibid.*, at 738–739.

²⁴ *Ibid.*, at 739 (quoting *Lorillard v. Pons*, 434 U.S. 575, at 580 (1978)).

²⁵ *Ibid.*, at 745.

²⁶ Act of March 13, 2012, Pub. L. No. 112–199, 126 Stat. 265.

²⁷ WTO, *United States – Countervailing and Anti-dumping Measures on Certain Products from China – Report of the Appellate Body (Certain Products from China)*, 7 July 2014, WT/DS449/AB/R.

²⁸ WTO, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Panel Report (WTO Panel Report)*, 22 October 2010, WT/DS379/R, para. 2.1. China challenged the USA's imposition of double remedies on three other products in addition to GPX's off-road tyres and also raised a number of other claims in addition to the concurrent assessment of anti-dumping and countervailing duties.

dispute resolution process, and so the litigants before the international tribunal were China and the USA, not GPX and the USA. Of course, the same issue was being litigated in the parallel proceedings. Although, as a formal matter, the legal claims at issue in the WTO adjudication were based on WTO treaties and agreements – not US statutes – the arguments that China and the USA raised on the issue of double remedies were identical to those that GPX and the USA raised in the US courts. The USA repeated the mantra that anti-dumping duties and countervailing duties addressed two different and unrelated problems.²⁹ Accordingly, imposing both duties concurrently upon a product from a non-market economy was not automatically double counting. The USA additionally argued that the burden of proving that any double counting did in fact occur rested on China and the importer, not on the USA as the investigating authority,³⁰ and that China had failed to carry the burden.³¹

The USA prevailed before a WTO panel, the adjudicator of first instance. The panel accepted the USA's contention that there was no contradiction in imposing both anti-dumping and countervailing duties under WTO law, even with respect to products made in a non-market economy:³² 'The imposition of anti-dumping duties calculated under a non-market economy methodology has no impact on whether the amount of the concurrent countervailing duty collected is "appropriate" or not.'³³ Perceiving no logical nexus between the two, the panel concluded that 'it was not the intention of the drafters' of the WTO's SCM Agreement – the treaty regulating countervailing duties³⁴ – 'to address the question of double remedies in Article 19.3.'³⁵ This provision constrains the imposition of a countervailing duty in the following way:

When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from such sources which have renounced any subsidies in question.³⁶

China appealed the panel report to the Appellate Body, which reversed on the question, relying in large part on a contrasting interpretation of Article 19.3 of the SCM Agreement.³⁷ The Appellate Body construed 'appropriate amounts' broadly to mean not just an amount no greater than the government subsidy to be countervailed, as the Panel had believed,³⁸ but, rather, a broader connotation of "proper", "fitting",

²⁹ The United States also asserted that a non-market economy methodology 'does not somehow transform the anti-dumping duty itself into a countervailing duty.' *WTO Panel Report, supra* note 28, para. 14.91.

³⁰ *Ibid.*, paras 14.45, 14.55, 14.77.

³¹ *Ibid.*, para. 14.6.

³² *Ibid.*, paras 14.112, 14.122.

³³ *Ibid.*, para. 114.128.

³⁴ Agreement on Subsidies and Countervailing Measures (SCM Agreement), 15 April 1994, 1869 UNTS 14, Art. 19.4.

³⁵ *WTO Panel Report, supra* note 28, para. 14.129.

³⁶ SCM Agreement, *supra* note 34, Art. 19.3 (emphasis added).

³⁷ WTO, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Report of the Appellate Body (WTO Appellate Body Report)*, 11 March 2011, WT/DS379/AB/R.

³⁸ *Ibid.*, paras 555–556. The panel based this interpretation on Article 19.2 of the SCM Agreement, which pertinently restricted the amount of any countervailing duty to 'not in excess of the amount of the subsidy'.

“suitable” – and, at the same time, adaptation to particular circumstances’.³⁹ The Appellate Body opined that the dictionary definitions of the word ‘suggest that what is “appropriate” is not an autonomous or absolute standard but, rather, something that must be assessed by reference or in relation to something else’.⁴⁰

In order to firm up its more protean sense of the crucial word ‘appropriate’ in Article 19.3 of the SCM Agreement, the Appellate Body referred to several other relevant WTO treaty provisions on subsidies and countervailing duties.⁴¹ For instance, it pointed out that Article 10 of the SCM Agreement mandates ‘all necessary steps to ensure that the imposition of a countervailing duty’ conform to Article VI of the 1994 GATT.⁴² Article VI:5, in turn, provides that ‘no product ... shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization’.⁴³

As it had done with the words ‘appropriate amounts’ in Article 19.3 of the SCM Agreement, the Appellate Body used the potential breadth of the words ‘same situation’ as the fulcrum of its analysis of GATT Article VI:5. The WTO panel had read Article VI:5 narrowly to forbid the imposition of both anti-dumping and countervailing duties as a double remedy for the sin of dumping or export subsidization and those two related wrongs only.⁴⁴ The Appellate Body rejected the panel’s narrow interpretation. Instead, it construed the words ‘same situation’ to permit circumstances other than the two explicitly referenced, including domestic government subsidies.⁴⁵ Accordingly, the Appellate Body concluded that Article VI:5’s bar on assessing both anti-dumping and countervailing duties applied to such assessments *vis-à-vis* products originating in a non-market economy.⁴⁶ In the Appellate Body’s view, both circumstances – export subsidization and a non-market economy – involve the same mathematical challenges under which an investigating authority was precluded from double counting.

Had the WTO panel’s original position, which echoed that of the USA, been upheld, the overlap between anti-dumping duties and countervailing duties in a non-market economy would have been disregarded. This would have left a large loophole in the WTO subsidy rules. Even the US Court of International Trade recognized the remedial nexus and held that as applied to a non-market economy, anti-dumping and countervailing duty statutes work together ‘to counteract any unfair advantage gained by government intervention’.⁴⁷

³⁹ WTO Appellate Body Report, *supra* note 37, para. 552.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, para. 563: ‘In our view, therefore, Articles 10, 19.1, 19.2, 19.4, 21.1, and 32.1 all provide context relevant to the interpretation of Article 19.3 ... These provisions also confirm the close link between the GATT 1994, in particular its Article VI, and Part V of the SCM Agreement.’

⁴² *Ibid.*, para. 559. General Agreement on Tariffs and Trade (GATT), 30 October 1947, 55 UNTS 194, Art. 6, para. 5.

⁴³ GATT, *supra* note 42, Art. VI:5.

⁴⁴ WTO Panel Report, *supra* note 28, para. 14.118.

⁴⁵ WTO Appellate Body Report, *supra* note 37, para. 567.

⁴⁶ *Ibid.*, paras 568–569.

⁴⁷ GPX I, *supra* note 14, at 1375 (quoting *Royal Thai Government v. United States*, 441 F. Supp. 2d 1350, at 1365 (Ct Intl Trade 2006)).

The Appellate Body reversed the panel's conclusion on the remedial nexus. Although the Appellate Body acknowledged that these two modes of trade remedies were 'legally distinct,' it aimed for an overarching coherence among all of the relevant provisions of the WTO covered agreements, GATT Article VI:5 and Article 19.3 of the SCM Agreement.⁴⁸ The Appellate Body also pointed to the practical duplicativeness of trade remedies – from the standpoint of foreign producers or exporters, the consequences – that is, the extra duties at the border – are 'indistinguishable'.⁴⁹

In sum, by invalidating double remedies in the case of the non-market economy, the Appellate Body sought to prevent what it perceived as a WTO member state's attempt to abuse its right to countervail alleged foreign subsidies: '[M]embers' right to impose countervailing duties to offset subsidies is not unfettered, but subject to compliance with the obligations set forth in the SCM Agreement.'⁵⁰ In addition to its ruling that the double remedies at issue violated Article 19.3 of the SCM Agreement,⁵¹ the Appellate Body briefly completed the analysis that the panel had omitted by virtue of its upholding of double remedies.⁵² First, the appellate tribunal clarified that an investigating authority, such as the USA, not respondents like GPX, bears the burden of proving the precise amount of subsidization.⁵³ Second, the Appellate Body ruled that the USA failed to carry the burden and, therefore, failed to determine the 'appropriate' amount of countervailing duties under Article 19.3 of the SCM Agreement.⁵⁴

4 The Engagement Model

A Institutional Design and the Double-Courts, Single-Issue Problem

There are two common models for dealing with conflicts that arise when two different legal systems must decide the same issue involving the same or related parties. One approach is to subordinate one system to the other. This is typically done in one of two ways. The more moderate approach is to ordain a hierarchy where one system's laws are declared supreme over the other's, but enforcement is left to the inferior system's

⁴⁸ *WTO Appellate Body Report*, *supra* note 37, para. 570. Regarding a similar view, see WTO, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Brief for Author as Amicus Curiae Supporting Complainant (China) (Amicus Brief)*, 14 December 2010, WT/DS 379/R, para. 18.

⁴⁹ *WTO Appellate Body Report*, *supra* note 37, para. 570.

⁵⁰ *Ibid.* (emphasis original).

⁵¹ *WTO Appellate Body Report*, *supra* note 37, para. 583. Interestingly, the Appellate Body left open a largely nominal possibility that even a concurrent imposition of anti-dumping and countervailing duties with the adoption of a non-market economy methodology, which might constitute a violation of Art. 19.3 of the SCM Agreement 'as a legal matter', might not actually lead to double remedies 'as a factual matter'. *Ibid.*, para. 599 (emphasis added).

⁵² *Ibid.*, para. 596.

⁵³ *Ibid.*, paras 601–602.

⁵⁴ *Ibid.*, paras 604–605.

courts.⁵⁵ This approach is known as the norm subordination model. A more intrusive way is to subordinate the inferior system's courts by subjecting them to some form of appellate review by the other system's courts. This approach is known as the institutional subordination model. Either subordination model is especially problematic when the superior system is relatively new or lacks independent enforcement power by comparison to the theoretically inferior system.

The second model accords final weight to the first adjudication, with a narrow exception for a miscarriage of justice. In contrast to the subordination models, the first-to-decide sequential model implies no permanent hierarchy of legal systems, courts or laws. The doctrinal manifestations of the sequential model are preclusion and comity.⁵⁶ Presume that A and B are from different countries, and A sues B in its national court and B then sues A in its national court on the same issue. If the first suit has played out to a final judgment in A's favour before the second suit is begun, then A might be able to invoke comity to have it recognized in the second suit.⁵⁷ By the same token, if the first suit has not been litigated to a final judgment, A might still be able to request a stay of B's suit invoking comity or abstention in deference to the prior parallel proceeding. It may be that B's national court refuses to take notice of, or to give any legal effect to, the first-filed proceeding in A's national court while still coming to the same result based on an independent resolution of the same issue. In effect, this is what happened in the GPX litigation between the decisions of the US Court of Appeals for the Federal Circuit and the WTO Appellate Body, which were both in favour of GPX and against double remedies.

What about situations in which a subsequent litigation involves a non-party to the first one? The sequential model operates along similar lines but with the incorporation of preclusion doctrines when parallel proceedings implicate litigation on the same issue but between an old party and a new one. Recall that in the GPX proceedings, the litigation in the US courts was between GPX and the USA and in the WTO proceedings it was between China and the USA. Under US law, issue preclusion is sometimes allowed when an issue has been decided between two parties as to the subsequent litigation involving one of the parties.⁵⁸ This is called non-mutual issue preclusion. In the USA, it is accepted that a non-party to the initial litigation may, under certain circumstances, assert *res judicata* on an issue that was decided against a party to the prior litigation. Defensive uses – that is, when the non-party invokes issue preclusion to defend itself in a suit against it by a party to the prior litigation, are more accepted than offensive uses, but offensive uses are also permitted when the non-party could

⁵⁵ The European Court of Justice ruled that European Union (EU) law prevails in case of a clash between the EU and domestic law. Case 6/64, *Falminio Costa v. ENEL* [1964] ECR 585, at 593. The US Constitution's Supremacy Clause declares that federal law is 'supreme' over state law and that state judges are expressly bound to apply it, state laws 'notwithstanding.' US Constitution, Art. VI, cl. 2. If the founding Americans had not created federal courts, then the USA would have been such a system too.

⁵⁶ Related are abstention and stay doctrines designed to allow the first-filed suit to play out to a final adjudication.

⁵⁷ Most common and civil law jurisdictions have provisions for the recognition of foreign judgments; in civil law jurisdictions by application for *exequatur*.

⁵⁸ Restatement (Second) of Judgments (1982).

not have participated in the prior litigation. If the Federal Circuit had applied non-mutual offensive issue preclusion in the GPX proceedings, it would have reasoned that GPX was entitled to prevail against the USA on the issue of double remedies because the WTO Appellate Body had already decided that issue against the USA in its adjudication of the dispute with China.

Both the subordination and sequential models are problematic when the two legal systems involved are the national courts of a powerful state and an international tribunal. With respect to the subordination model, both the US trade court and the Federal Circuit have explicitly rejected it *vis-à-vis* WTO adjudications.⁵⁹ And the US Supreme Court has strongly intimated as a general matter that institutional subordination of US national Article III courts such as the trade court and the Federal Circuit to an international court would raise serious domestic constitutional concerns.⁶⁰ The subordination model works best, as it has done historically in the USA⁶¹ and is now doing in the European Union,⁶² as the legal system between confederated states and a newly established central general court. Subordination of a national legal system to an international counterpart does not appear feasible in the current political environment.

The sequential model works best in the context of parallel proceedings in relatively homogeneous co-equal states involving the same or closely related parties. A good example of the model in action is the Full Faith and Credit Clause of the US Constitution, which guarantees formal recognition of the judgments of one state in any of the other 49 states.⁶³ Of course, the GPX proceedings do not involve homogeneous or co-equal legal systems. Nor do they involve the same parties, although the USA was the defendant in both actions. As a general matter, the double-courts, single-issue problem most often comes up with respect to completely different parties in parallel proceedings when the non-mutual preclusion doctrines are unavailable. Accordingly, the sequential model is more limited in scope than the subordination model.

If neither model works well, the answer possibly is that the two parallel proceedings should not acknowledge each other at all, each operating in its own world. This approach is known as the so-called ‘dualist’ view of the relationship between municipal and international law.⁶⁴ If the two bodies of law move in different universes such as two ships passing in the night, then it follows that there is nothing at all troubling

⁵⁹ See, e.g., Jeanne J. Grimmett, Congressional Research Service, *World Trade Organization (WTO) Decisions and Their Effect in U.S. Law* (2011), at 9 (observing that WTO decisions are ‘not binding’ on the US judiciary, citing *Corus Staal BV v. United States*, 502 F.3d 1370, at 1375 (Fed. Cir. 2007) and *Koyo Seiko Co. v. United States*, 442 F.Supp.2d 1360, at 1363 (Ct Intl Trade 2006)).

⁶⁰ *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 352–57 (2006) (refusing to defer to International Court of Justice decision interpreting Vienna Consular Convention to require departure from US procedural rules for defaulted constitutional and treaty claims).

⁶¹ See, e.g., *Martin v. Hunter’s Lessee*, 14 US 304 (1816).

⁶² Helfer and Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’, 107 *Yale Law Journal* (YLJ) (1997) 273.

⁶³ US Constitution, Art. IV, para. 1.

⁶⁴ Brilmayer, ‘International Law in American Courts: A Modest Proposal’, 100 YLJ (1991) 2277, at 2292 (viewing dualism as a ‘dominant paradigm’ of international law).

when the courts of each pay no attention to the other. Any congruence between the decisions of the two courts is the result of chance, not design.⁶⁵

The problem with this *laissez-faire* approach is the confusion it sows among global economic actors who have to navigate dual and potentially dueling legal regimes, each with their own courts and rules regulating the same primary conduct. A Chinese importer who wants to do business in the USA needs to know if his pricing will draw double duties or not. The lawyer seeking to give guidance on this question has to walk the client through the saga of the GPX proceedings and explain why there is no clear answer to the question. The net social costs of this regulatory diffusion and confusion may be hard to estimate precisely, but they are easy to imagine.

If doing nothing is not an option, and neither the subordination nor the sequential models are satisfactory in the context of national–international parallel proceedings, what is to be done? This article argues for an ‘engagement’ model between the judicial systems. Each court should consider the arguments and reasoning of the other tribunal, without presuming a hierarchy between the two courts or the priority of the first adjudication.⁶⁶ The model has been articulated in the abstract by public international law scholars who frame the practice in terms of ‘dialogue’.⁶⁷ What is special about the articulation and application of the model to the double-remedies issue is that the

⁶⁵ ‘Dualism’ is a school of thought in public international law regarding international law as a ‘discrete legal system’ *vis-à-vis* a domestic legal system. According to dualism, international law is literally international, that is only about state-to-state relationships. Thus, dualism argues that international law ‘operates wholly on an inter-nation plane’. In contrast, ‘monism’ takes an integrative view on international and domestic law. See generally Henkin, ‘The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny’, 100 *Harvard Law Review* (1987) 853, at 864; see also Ginsburg *et al.*, ‘Commitment and Diffusion: How and Why National Constitutions Incorporate International Law’, *University of Illinois Law Review* (2008) 201, at 204.

⁶⁶ Before its major amendment of the trade remedy statute, the Israeli court relied heavily on the WTO anti-dumping jurisprudence in the former’s own judicial review of domestic antidumping measures. See Arie Reich and Gill Nadel, *Judicial Review of Trade Remedies in Israel: A Comparative Study of Two Models* (2 October 2011), at 13–14, available at <http://ssrn.com/abstract=1937410> (last visited 2 May 2015).

⁶⁷ See, e.g., Slaughter, ‘A Global Community of Courts’, 44 *Harvard International Law Journal* (2003) 191, 192–193 (describing a ‘trans-judicial dialogue’ as a certain kind of communication between judges from different jurisdictions generated when they read and cite each other’s opinions); Tushnet, ‘The Possibilities of Comparative Constitutional Law’, 108 *YJL* (1999) 1225, at 1307 (emphasizing constitutional learning from other countries’ experience); Harding, ‘Comparative Reasoning and Judicial Review’, 28 *YJIL* (2003) 409, at 424–425 (calling judicial dialogue a ‘conversation’ that ‘involves many more forms of interaction and interpretation’); Martinez, ‘Towards an International Judicial System’, 56 *Stanford Law Review* (2003), 429, at 443, n. 15 (highlighting and advocating the interpenetrating of domestic and international legal systems via judicial communication); Hongju Koh, ‘International: Law as Part of Our Law’, 98 *American Journal of International Law* (2004) 43, at 45 (arguing that transnational legal process creates ‘interlinked rules of domestic and international law’); Simma, ‘Universality of International Law from the Perspective of A Practitioner’, 20 *European Journal of International Law* (2009) 265, at 278–279 (observing that international judicial dialogue tends to enhance the legitimacy of international law); Kersch, ‘The Supreme Court and International Relations Theory’, 69 *Albany Law Review* (2006) 771, at 776 (pointing out that judges can benefit from participating in the judicial globalization process); Waters, ‘Normativity in the “New” Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts’, 32 *YJIL* (2007) 455, at 460 (viewing that judicial dialogue plays a key role in ‘determining both how international legal rules are shaped and how they are internalized into domestic legal systems’).

relevant domain is a highly technical one, unlike more controversial domains such as individual human rights. The prospect of dialogue or discourse among expert courts thus seems more attainable and realistic.

In addition to the theme of inter-judicial dialogue, the engagement model also analogizes from a pair of US doctrines that acknowledge the importance of deferring to expert agencies and harmonizing domestic law with international law. First, the *Chevron* doctrine requires US courts to defer to the reasonable interpretations of regulators with subject matter expertise in the face of textual ambiguity in a governing statute.⁶⁸ The calculation of anti-dumping and countervailing duties for imports from a non-market economy, such as the point sources of pollution in the *Chevron* case itself, is a technical question on which it makes sense for both domestic and international specialized courts to consider whether the other's assessment of the same issue between related parties was reasonable. Indeed, in the USA, the rise of the administrative agencies for which the *Chevron* doctrine was designed was inextricably linked with rate making and adjudications for common carriers across state and federal systems⁶⁹ – a factual predicate remarkably analogous to duties on the trans-border movement of goods today.

Second, the so-called *Charming Betsey* canon counsels US courts to construe US statutes to comply with international law obligations.⁷⁰ Although the interpretive canon was inapplicable as a formal matter after the US Congress had enacted an explicit statute to overrule its decision, the Federal Circuit could have included WTO jurisprudence in the category of international law obligations triggering the *Charming Betsey* canon in justifying its prior decision, rather than relying on a domestic legislative ratification rationale that virtually invited the congressional override statute. If the appellate court had emphasized consistency with WTO adjudication instead, Congress may have hesitated before enacting a statute to overrule the court's decision because of the likelihood of continued attacks by China before the WTO.

There is flexibility in the engagement model in terms of how much 'engagement' it contemplates at any given time. In its weakest form, engagement may be nothing more than footnoting to the parallel proceedings – visible indicators of awareness that there is another court handling the same case. In its strongest form, one can envision substantive engagement with the decisions of the other court, each court borrowing where it is impressed with the reasoning, analytical clarity or rhetorical prowess of the other. As one of the co-authors has described, such sharing was not uncommon with respect to 19th-century judges from the USA and the United Kingdom deciding

⁶⁸ *Chevron*, *supra* note 1.

⁶⁹ See, e.g., Thomas McGraw, *Prophets of Regulation: Charles Francis Adams; Louis D. Brandeis; James M. Landis; Alfred E. Kahn* (1986); *Verizon Communications Inc. v. Federal Communications Commission*, 535 US 467 (2002).

⁷⁰ *Charming Betsey*, *supra* note 1, at 118: '[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains'; cf. *Knight v. Florida*, 528 US 990, at 997 (1999), Breyer J., dissenting (comparing the court's reference to foreign and international law to 'a decent respect to the opinions of mankind'). See generally William Dodge, Michael Ramsey and David Sloss (eds), *International Law in the United States Supreme Court* (2010).

international maritime law cases.⁷¹ It is possible to imagine that over time a weak form may have evolved into a strong form as engagement bred mutual respect and the formation of a broader interpretive community.⁷² Such a community may not offer the cold, clear comfort of the subordination model or a uniform body of law, but it would go a long way towards uprooting the chaotic cacophony of multiple adjudications between the same or related parties on the same issues but with different results.

Indeed, the most powerful reason for moving towards something like the engagement model on the double-remedies issue (and perhaps technical aspects of trade law generally) is the confusion that inconsistent decisions by duelling courts sow among economic actors that are subject to both legal regimes. Such divergent outcomes breed uncertainty about the rules that govern primary conduct. Legal uncertainty in turn raises risk premiums and consequent transaction costs for global businesses working across national boundaries. In the GPX case, for example, after all of the energy expended in China's international victory at the WTO, it still does not mean that GPX can import its tyres into the USA without fear of double duties. What should or could GPX do? Should it explore other markets? Can it count on China to go back to the WTO to challenge the new congressional statute? For international businesses that are repeat players in the world markets, the ignorance model for dealing with the double-courts, single-issue problem is highly problematic.

B Applying the Engagement Model to Double-Remedies Decisions

In the next subpart, this article briefly describes the opportunities for engagement in the parallel adjudications on double remedies and counterfactually considers how things might have been different if the two courts had adopted the engagement model.

1 The US Appellate Court's Missed Opportunities for Engagement

The US appellate court failed to refer to the WTO Appellate Body report, which is surprising given that the US court has sometimes referred to WTO jurisprudence in cases that were far less connected to the case *sub judice* than GPX.⁷³ The Federal Circuit did grant China's motion to file a brief as *amicus curiae*, despite the US government's opposition.⁷⁴ In the brief, China explicitly pointed out that the WTO Appellate Body's decision 'reinforces the analysis and the holding' of the US Court of International Trade's decision (*GPX I* and *GPX II*) that struck down double remedies.⁷⁵ And the Federal Circuit panel surely had judicial notice of the Department of Commerce's

⁷¹ Thomas Lee, *The Civil-Law Influence on the First Century of U.S. Constitutional Jurisprudence* (manuscript on file with author) (describing the correspondence between US Supreme Court Justice Joseph Story and British Admiralty Court Judge Lord Stowell, the pre-eminent English civilian of his day).

⁷² Harold Hongju Koh, 'Why Do Nations Obey International Law?', 106 *YlJ* (1997) 2599, at 2639.

⁷³ See, e.g., *Acciai Speciali Terni, S.p.A. v. U.S.*, 26 Ct Int'l Trade 892, 217 F. Supp. 2d 1345, 24 Int'l Trade Rep. (BNA) 1796 (2002) (ruling that the Department of Commerce's post-privatization subsidy determination was not inconsistent with a relevant Appellate Body decision).

⁷⁴ *GPX International Tire Corporation et al. v. United States*, 2011 US App. LEXIS 10061 (18 May 2011).

⁷⁵ *Brief of Amicus Curiae the Bureau of Fair Trade for Imports and Exports (Boft), Ministry of Commerce, of the People's Republic of China in Support of Plaintiffs-Appellees Briefs*, 666 F.3d 732 (Fed. Cir. 2011) (No. 2011-1107, 2011-1108, 2011-1109), 2011 WL 23 23800, at 28.

announcement before their decision was released that it would implement the WTO Appellate Body's decision within a reasonable period of time.⁷⁶ In fact, the announcement might have been taken to mean that the US litigation was moot. At the very least, the US appellate court could have aligned its decision with the reasoning (as well as the result) of the Appellate Body.

Had the Federal Circuit done so, it is conceivable that legislative enactment to override its decision would have run into stiffer resistance. The court's legislative ratification rationale made it seem like the question was entirely a domestic affair and that everything turned on what Congress wanted. The end result was that the USA simply replaced an agency authorization of double remedies with a legislative authorization, which rendered it more bulletproof from the perspective of US domestic law. However, the statute has only intensified the international legal controversy, as China filed yet another suit against the USA over the legislation in the WTO and won.⁷⁷

2 *The WTO Appellate Body's Missed Opportunities for Engagement*

The WTO Appellate Body's opinion reversing the panel's decision in favour of double remedies leaves much to be desired in terms of its key substantive and procedural rulings. First, it could have focused on the economic fallacy of imposing double remedies in the non-market economy context, rather than relying so heavily on dictionary textualism to interpret the relevant treaties, in the fashion of US Supreme Court Justice Antonin Scalia.⁷⁸ Second, the Appellate Body treated the procedural point that the USA bore the burden of proof on the crucial issue of proving the inadequacy of anti-dumping duties as a full remedy as an afterthought, not as a central issue in the controversy. On both counts, the international tribunal would have benefited greatly from having considered the reasoning and records of the parallel proceedings in the US courts.

As described earlier, the Appellate Body focused on the words 'appropriate amounts' as the measure of allowable countervailing duties in Article 19.3 of the SCM Agreement and essentially dismissed the relevance of the adjacent Article 19.4, which had factored prominently in the panel's initial decision. Article 19.4 provides that countervailing duties shall not be 'in excess of the amount of the subsidy found to exist', echoing similar language in GATT Article VI:3. The reason why double remedies are pernicious in theory is because an investigating authority remedies the same alleged unfair trade practice (that is, subsidization) that it had already addressed by calculating anti-dumping duties for a non-market economy based on a surrogate country. In other words, double remedies in a non-market economy context result in the imposition of a countervailing duty when there is no subsidy left to be countervailed in the first place.⁷⁹

This is a violation of the most basic countervailing duty rule in the WTO system. GATT Article VI:3 provides: 'No countervailing duty shall be levied on any product ... in excess of an amount equal to the estimated ... subsidy determined to have been granted ... in

⁷⁶ Pruzin, 'U.S. States Intention to Comply with Ruling by WTO on AD/CV Measures Aimed at China', *International Trade Reporter* (18 April 2011), at 28.

⁷⁷ *Certain Products from China*, *supra* note 27.

⁷⁸ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997).

⁷⁹ *WTO Panel Report*, *supra* note 28, para. 14.110.

the country of origin or exportation'.⁸⁰ Likewise, Article 19.4 of the SCM Agreement states that '[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product'.⁸¹ In the dispute between the USA and GPX, the agency's non-market economy anti-dumping methodology did not involve any 'determination,' 'calculation' or 'finding' of a subsidy. Instead, benchmark prices from a surrogate market economy country were used as a substitute. Therefore, under a straightforward reading of GATT Article VI:3 and Article 19.4 of the SCM Agreement, no countervailing duty should have been imposed on the Chinese imports so long as the US Department of Commerce maintained China's designation as a non-market economy.

This simple and crucial WTO principle – that a countervailing duty may only be levied if a member state's enforcing agency has determined the amount of the alleged government's subsidy to be remedied – would have been clearer to the Appellate Body if it had reviewed the US trade court's opinions and records in *GPX I* and *GPX II*.⁸² The US Court of International Trade had articulated the same principle based on US domestic sources in rejecting the Department of Commerce's argument to the contrary. Moreover, the Appellate Body would also have seen the USA's own official studies and findings such as the 2005 study by the Government Accountability Office, which the US court had cited, concluding that anti-dumping duties calculated under a non-market economy methodology are a full remedy for any market distortions that subsidies have produced in the non-market economy.⁸³ In general, the WTO adjudicators would have benefited from the sophisticated and thoughtful analysis of this precise question that US policy makers and judges had contemplated in agency and court decisions since before the 1980s, which were reviewed and summarized in the GPX decisions of the US courts.

If the WTO Appellate Body had engaged with the work product of the US courts in *GPX I* and *GPX II*, it may have done a better job of addressing China's claims of serious procedural foul play in the USA's method for imposing double remedies. The initial panel had been dismissive of claims made by China challenging procedural aspects of the US Department of Commerce's countervailing duty investigations⁸⁴ under Articles 11.2,⁸⁵

⁸⁰ GATT, *supra* note 42, Art. 6, para. 3 (emphasis added).

⁸¹ SCM Agreement, *supra* note 34, Art. 19.4 (emphasis added).

⁸² The Appellate Body's only reference to a US tribunal addressing the same dispute was a footnote mention of the US International Trade Commission's decision that led to a single injury determination over each parallel anti-dumping and countervailing duty investigation at issue. *WTO Appellate Body Report, supra* note 37, para. 570, n. 549.

⁸³ See the discussion in the second part of this article.

⁸⁴ *WTO Appellate Body Report, supra* note 37, at para. 8.

⁸⁵ SCM Agreement, *supra* note 34, Art. 11.2 reads that '[t]he application shall contain such information as is reasonably available to the applicant on the following: ...

(iii) evidence with regard to the *existence, amount and nature of the subsidy in question*;

(iv) evidence that *alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies*; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15' (emphasis added).

12.8⁸⁶ and 14⁸⁷ of the SCM Agreement. Two basic procedural obligations may be drawn from these provisions. First, an investigating authority, when it adopts a non-market economy methodology, must ‘prove the existence of, and calculate the amount of, an alleged subsidy despite the potential existence of double remedies’.⁸⁸ Second, it must also ‘provide respondents with an adequate explanation of how it discovered the subsidy to be countervailed, i.e., the calculation methodology’.⁸⁹

These procedural requirements on the investigating authority have vital implications for the burden of proof. Both the USA and the WTO panel, which agreed with the USA on this point, dismissed the fundamental procedural obligation that an investigating authority must demonstrate the existence and the amount of an alleged government subsidy. In fact, the panel’s position upholding the USA’s view unduly shifted the burden of proof in a subsidy dispute from the investigating authority to the subject of the investigation.⁹⁰ To reiterate, although the investigating authority is required under the SCM Agreement to demonstrate the non-existence of double counting when it employs the non-market economy methodology, the panel nonetheless imposed on respondents the burden of establishing that double counting existed and, therefore, that the investigating agency had levied ‘duties in excess of the subsidy’.

However, as the US trade court clearly held, it is the USA that must prove that the investigations at issue would not constitute a double-remedy situation – for example, that ‘the surrogate values used by the DOC in its dumping margin calculation were in fact lower than both the producer’s actual costs and the benchmarks used by the DOC in its calculation of the amount of the subsidy’.⁹¹ The Department of Commerce’s actions in the US court proceedings suggested that such proof was very difficult to obtain. It failed to respond to the US trade court’s remand instruction to ‘use improved methodologies to determine whether, and to what degree, double counting occurs when non-market economy antidumping remedies are imposed on the same good’.⁹² As a result of its failure, the only option the court left for the Department of Commerce was to withdraw the imposition of the countervailing measures on the non-market economy products.⁹³

In sum, by failing to substantiate the existence of subsidization and its amount, the US Department of Commerce violated its basic procedural obligation as the investigating authority under the WTO’s basic norms governing subsidies. At the same time, the USA, and the panel that upheld the US position, incorrectly shifted the burden

⁸⁶ SCM Agreement, *supra* note 34, Art. 12.8: ‘The authorities shall, before a final determination is made, inform all interested Members and interested parties of the *essential facts* under consideration which form the basis for the decision whether to apply definitive measures’ (emphasis added).

⁸⁷ *Ibid.*, Art. 14 reads that ‘[f]or the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be *transparent and adequately explained*’ (emphasis added).

⁸⁸ *Amicus Brief*, *supra* note 48, para. 35.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, at 19.

⁹¹ *WTO Panel Report*, *supra* note 28, para. 14.56.

⁹² *GPX II*, *supra* note 21, at 1342.

⁹³ *Ibid.*

of proof on these critical probative issues away from the investigating authority onto the respondents. However, the Appellate Body's decision, which paid little attention to these procedural aspects of the SCM Agreement, did not focus on this burden of proof issue. If they had paid attention to what the US trade court had done, they would have been aware of the central importance of the issue and how it might be resolved consistently with WTO principles.

5 Conclusion

A growing feature of globalization is litigation over the same issue between the same or related parties in two or more courts affiliated with different political entities and legal systems. One such prominent dispute in the trade arena involved US imports of off-road tyres from China on which the US Department of Commerce assessed both anti-dumping and countervailing duties. In subsequent litigation in the US courts and before the WTO, neither set of adjudicative institutions engaged with the work product of the other. This is an unfortunate standoff, likely premised on a reluctance to imply subordination to the other court or to acquiesce in a first-to-decide logic to resolve whose decision carries more weight. However, this is a false choice. It is both possible and prudent for the two courts to engage each other and, in so doing, to reap the benefits of their mutual expertise, harmonize international and municipal law in the same technical subject matter and, ultimately, create a more uniform and coherent body of rules to facilitate international commerce and trade.