Globalizing Administrative Law

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Abstract

What if the same international trade dispute is adjudicated both in a domestic court and in an international tribunal? The conventional view – dualism – may tolerate two conflicting legal conclusions in this situation. However, in the Habermasian postnational constellation, such legal dissonance appears not only normatively troublesome but also practically taxing to global business. Against the backdrop of the recent “double remedies” dispute between the United States and China, this Article seeks to offer a modest solution to this dilemma via a discursive engagement between a domestic court and an international tribunal. The Article argues that the WTO Appellate Body qua trade law adjudicator could have employed the same hermeneutical tool, such as “reasonableness,” adopted by the United States Court of International Trade (USCIT) when the latter reduced the Commerce Department’s discretion over the double remedies issue to null. The Article further views that as such an engagement between a domestic court and an international tribunal, as well as the resultant discursive connection between them, matures and deepens, both courts may form a broader interpretive community, in which they can establish an identifiable pattern of common administrative law principles. This visible, and thus accessible, trans-judicial practice in overlapping issue-areas, such as trade remedy, this Article submits, is a propitious step toward the reconciliation of domestic and international administrative law, and eventually the globalizing of administrative law. The Article concludes that this diffusive and osmotic global administrative law-making process offers a novel dimension of understanding transnational-international law.

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I. Introduction: One Dispute in Two Legal Universes

Suppose that the same international trade dispute is adjudicated both in a domestic court and in an international tribunal. Should the two legal conclusions be consistent? This is not a mere polemic query: in fact, it is a powerful representation of the ever-increasing contemporary phenomena in the area of a transnational business.²

The recent “double remedies” dispute provides a case in point. On September 9, 2008 a domestic importer (GPX) that owns a Chinese producer (Starbright) manufacturing certain pneumatic off-the-road tires sued the United States Department of Commerce (DOC) in the U.S Court of International Trade (USCIT) for the latter’s determination to impose both antidumping and countervailing duties – double

remedies – on the former’s products.3 Ten days later, the Chinese government initiated a separate proceeding in the World Trade Organization (WTO) over the same factual-legal issue, i.e., the DOC’s imposition of double remedies on certain pneumatic off-the-road tires exported by Starbright.4

The USCIT (GPX I and GPX II) rejected the DOC’s argument and sided with GPX.5 In the meantime, the WTO Appellate Body struck down the panel’s position upholding double remedies. Yet had the Appellate Body upheld the panel’s original decision, such decision would have directly clashed with the USCIT’s position on the very same issue (double remedies). Furthermore, the DOC appealed the USCIT’s decision (GPX I and GPX II) before the Court of Appeals for the Federal Circuit. If the Court of Appeals reverses the USCIT decision, there will be two conflicting decisions – one in the WTO tribunal and the other in the domestic court – over the same dispute. These potentially diverging legal conclusions over the same issue (dispute) in two different courts tend to raise an intricate normative question: should this discrepancy be simply tolerated or somehow addressed?

According to the conventional – dualist – standpoint,6 the legal conclusions need not be consistent. Under this “unquestioned dichotomy,”7 two different legal universes – national law and international trade law (such as the WTO norms) – are wrapped by two separate jurisdictions, which are destined to produce two different legal outcomes, just as two ships passing each other in the night.8 Even if those outcomes do cohere, such legal convergence would be no more than a mere serendipity. Nonetheless, this lack of legal coherence tends to become increasingly counterintuitive in the contemporary transnational sphere both normatively and practically. First of all, under the recent trend of “postnational constellation,”9 the state-oriented paradigm is losing its conventional luster. Post-Cold War global market integration and international economic interdependency, powered by global sourcing and cross-border merger and acquisitions, have begun to demolish the once-stalwart frame between what is domestic

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3 See infra
4 Id.
5 See infra
8 “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 Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 HARV. L. REV. 853, 864 (1987); see also Tom Ginsburg et al., Commitment and Diffusion: How and Why National Constitutions Incorporate International Law, 2008 U. ILL. L. REV. 201, 204.
9 JÜRGEN HABERMAS, THE DIVIDED WEST 176 (2006) (“In spatial, social, and material respects, nation-states encumber each other with the external effects of decisions that impinge on third parties who had no say in the decision-making process. Hence states cannot escape the need for regulation and coordination in the expanding horizon of a world society that us increasingly self-programming, even at the cultural level.”).
and what is international. At the same time, as such collective stakes have grown, the new “mentalistés collectives” tends to reconfigure the traditional Hobbesian international system into “a more complex system (...) concerned with common systemic values.” Given this transformation, the aforementioned jurisdictional dichotomy based largely on territoriality unduly curtails the normative domain of both domestic and international law.

In particular, these conflicting conclusions over the very same issue (dispute) are practically taxing from the global business perspective. Such legal divergence breeds legal uncertainty. Legal uncertainty in turn raises risk premiums and consequent transaction costs for global businesses traversing back and forth across these two boundaries. For example, the plaintiff in the aforementioned case (GPX), which owns a factory (Starbright) in China, might not rest assured even with the WTO Appellate Body decision that had struck down double remedies as long as its domestic case remains pending in the U.S. court. China’s inter-national victory in the WTO dimension could not guarantee the GPX’s eventual prevalence in the U.S. court on the same issue. This quandary would constitute an unfathomable cost to GPX, in particular as repeated players. The same dilemma, if left unchecked, would continue to harass future global businesses, which might be forced to muddle through different forums without any firm sense of direction.

Then, how could this judicial dissonance be addressed? At first glance, one might be tempted to have recourse to the conventional treaty compliance mode. In other words, to the extent that WTO members should comply with the WTO norms the WTO court, as a supranational organ, might be said to eventually prevail over a domestic court, thereby closing the gap of divergence between the two courts. True, a WTO member, precisely its executive branch, must bring its measure struck down by a WTO tribunal into conformity with the latter’s decision. However, it is still controversial whether the WTO court decision should directly bind the national court of a losing party. In other words, ample possibility exists that the original divergence would still persist between the WTO decision and the domestic court decision despite the quasi-supremacy of the WTO norms in general. Any other means to forcefully align a domestic court decision with a corresponding international court decision would be politically inconceivable. Perhaps, more importantly, even if the international court decision binds the domestic court decision, such formal hierarchy might not still guarantee a perfect judicial conformity. Even with the existence of the Supremacy

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10 Cite!
12 Weiler
13 Cite!
15 Cf. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2683 (2006) (denying the binding nature of a decision of the International Court of Justice in which the U.S. was a party to the dispute).
Clause, the legal coherence between a federal and a state court decision has been subject to perennial debates.  

The proposal this Article presents is more modest, and therefore feasible, than any radical judicial conformity. While any legally mandated harmonization of domestic and international legal opinions over an overlapping dispute is out of the question, both legally and politically, under the current dualist structure, one might still conceive a second-best solution through a mutual trust and respect between domestic and international courts. In fact, such judicial mutual trust is not unprecedented. At the dawn of the Republic, Chief Justice John Marshall frequently cited the law of nations in his own decisions. More recently, Justice Stephen Breyer has emphasized that such engagement can “cast an empirical light on the consequences of different solutions to a common legal problem.” Some lower courts in the U.S. have also located persuasive authority in the WTO tribunal decisions. What is happening should be happening. The Article contends that both national courts and international trade (WTO) tribunals should strengthen a discursive engagement between them in overlapping issue areas, such as trade remedy law (double remedies).  

These courts and tribunals can engage with each other discursively by cross-referencing each other’s reasoning and interpretation. The nature of such engagement need not be hierarchical but more voluntarily. In other words, a domestic court may reference a WTO panel decision “not as precedent but as persuasive authority,”  

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16 Cite!

19 See e.g., NSK Ltd. v. United States, 358 F.Supp.2d 1276, 1288 (Ct. Int’l Trade 2005); Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1348 (Fed. Cir. 2004).
22 Robert Ahdieh maintains that this “dialogue” analogy is ill-suited as it applies to a judicial communication between an international court and a national court due to a possible hierarchical relationship between these two courts. Instead, he suggests a “dialektical” review, which he views is “a hybrid of appellate review and dialogue.” Robert R. Ahdieh, Between Dialogue and Decree: International Review of National Courts, 79 N.Y.U. L. REV. 2029, 2029-30 (2004). In this Article, I use the term “dialogue” broadly enough to accommodates Ahdieh’s definition.
23 Slaughter, A Global Community of Courts, supra note __, at 193. Persuasive authority can also be contrasted with “binding authority.” West’s Encyclopedia of American Law, edition 2 (2008). Admittedly, a domestic court might still find an international court’s decision as unpersuasive. See e.g., Timken Co. v. United States, 354 F.3d 1334, 1344 (Fed. Cir. 2004), cert. denied (deeming a relevant WTO Appellate
analogous to “law review articles, treatises or commentaries.”\textsuperscript{24} Notably, the meaning of “engagement” in this Article goes beyond the mere footnoting; it refers to the situation where both domestic and international courts engage with each other in a substantive manner by seriously drawing on each other’s reasoning and actively tapping its various properties, such as its explanatory force, analytical clarity, and rhetorical prowess.

True, the discursive engagement this Article envisions shares a common ground with other types of judicial dialogue, which have been well-documented,\textsuperscript{25} in that it seeks a useful hermeneutical guidance from transnational-international legal sources. Nonetheless, this Article offers a unique contribution since it targets a particular type of engagement or dialogue differentiated from other transnational-international litigation patterns. First, the \textit{form} of engagement discussed in this Article is distinguishable from the conventional “transnational public law litigation.” A transnational public law litigation model envisions a single domestic lawsuit “brought by individual and governmental litigants challenging violations of international law.”\textsuperscript{26} In contrast, the discursive engagement discussed in the Article concerns two distinct litigations – one in the domestic court and the other in the international tribunal, though both endeavor to “meld[] two conventional modes of litigation that have traditionally been considered distinct.”\textsuperscript{27} Second, the \textit{theme} of engagement addressed in this Article regards administrative law, such as trade remedy law, rather than constitutional law. While constitutional law certainly informs administrative law, many administrative law issues tend to exhibit more technical, and thus deferential, narratives than constitutional law.\textsuperscript{28} The resultant professional engagement between two international trade law courts, both domestic and international, is likely to shield them from political, and often emotional, acrimonies accompanied by other types of judicial dialogue involving constitutional law issues, such as “cruel and unusual punishments.”\textsuperscript{29}


\textsuperscript{25} See \textit{e.g.}, Slaughter, \textit{A Global Community of Courts}, supra note \_, at 192–93 (describing a “trans-judicial dialogue” as a certain kind of communication between judges from different jurisdiction generated when they read and cite each other’s opinions). \textit{See also} Anne-Marie Slaughter, \textit{Judicial Globalization}, 40 VA. J. Int’l L. 1103 (2000) (characterizing “judicial globalization” as a \textit{vertical} judicial cooperation between supranational and national courts and a \textit{horizontal} “judicial comity” among different national courts); \textit{id.}, at 194 (defining “judicial comity” as “a set of principles designed to guide courts in giving deference to foreign courts as a matter of respect owed judges by judges”); Vikki M. Rogers & Albert H. Kritzer, \textit{A Uniform International Sales Law Terminology, in Festschrift für Peter Schlechtriem Zum 70. Geburtstag}, Mohr Siebeck Ingeborg Schwenzer (Günter Hager ed.) 223, 227 (2003), available at \texttt{http://www.cisg.law.pace.edu/cisg/biblio/rogers2.html#24} (proposing to examine foreign case law in the area of international sales). They also observe that “courts . . . have to develop their jurisprudence in company with the courts of other countries from case to case.” \textit{Id.}

\textsuperscript{26} Harold Hongju Koh, \textit{Transnational Public Law Litigation}, 100 YALE L. J. 2347, 2347 (1991) [hereinafter Koh, \textit{Transnational Public Law Litigation}].

\textsuperscript{27} \textit{Id.}, at 2348.

\textsuperscript{28} \textit{Cite!}

\textsuperscript{29} U.S. CONST. amend. VIII.
Admittedly, any discursive engagement should not be considered a default pattern. In fact, in a dualist world the lack of it would be deemed a normal phenomenon. Those schools of thought that underscore the sacrosanct value of national culture and sovereignty are predisposed to equate such engagement with impurification. As discussed above, however, the postnational transformation, in particular in the area of transnational business, tends to activate those accommodating conditions for such engagement that have largely been dormant before. Ever-increasing volumes and frequencies of transnational business both justify and sponsor such engagement. Here, three critical factors, i.e., identity, telos and hermeneutics, shared by both domestic (such as the USCIT) and international trade courts (such as a WTO panel or the Appellate Body) promote a dialogue between domestic and international trade courts by powering a vital discursive connection between them.

First, their common profession as a trade law adjudicator over an overlapping issue area, such as trade remedy, tends to form a robust “cognitive” bond between them. A considerable degree of overlapping in legal substance, such as parties’ claims and arguments, offers a powerful rationale for a trans-judicial tiding between the two tribunals. Even when a local court adjudicates a domestic dispute in a technical sense, the essential character of the case can still be international in that the case at the same time involves, explicitly or potentially, those issues, claims, and arguments related to international trade law. As long as both national and international courts engage in the essentially same dispute, they are likely to share the same interest, and mission, qua court in resolving it.

Second, the common telos, i.e., object and purpose, embedded in the putative legal regime, such as subsidies, is also likely to encourage both courts to study and reference each other’s ruling in this area. Although the domestic and the international (WTO) norms on subsidies may feature different texts in their rule books, they nonetheless share this common telos. For example, both the U.S. and international (WTO) subsidies norms, one on the one hand, purport to prevent illegal subsidies from distorting the market mechanism and thus impeding free trade. To achieve this goal, both systems authorize importing countries to impose remedies (countervailing duties) on those subsidized imports. On the other hand, both systems also aim to prevent these remedies from being abused for any protectionist purpose. As long as they share the common telos, courts in both systems may find certain discursive room for cross-citations, cross-references and cross-fertilization, not necessarily for the purpose of particular retrospective reliefs (damages) but more in tune with general prospective “enunciation of norms.”

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30 The “Resistance Model” / Scalia etc.

31 I mean by cognitive “knowledge-shaping” and/or reason-enhancing. See David J. Gerber, Authority Heuristics, 79 CHI-KENT L. REV. 959, 959 (2004). See also infra _


34 Koh, Transnational Public Law Litigation, supra note _, at 2348-49, 2368.
Finally, given a specific issue area, such as subsidies law, both courts share the common legal mindset of an administrative law court and thus the common hermeneutical devices geared toward administrative rationality, such as reasonableness, due process and fairness. To the extent of this judicial discretion-checking, both courts may sympathize with each other’s decision and be more willing to cite it to strengthen the rhetorical power of one’s own ruling. Notably, the recent hermeneutical focus of the WTO tribunal in the area of trade remedy has shifted from a conventional inter-state reciprocal bargaining to the protection of expectations of private actors (traders). This interpretive shift tends to encourage the WTO court to share with domestic courts certain fundamental administrative law precepts, such as “good governance.”

Therefore, sharing the common identity, purpose and legal principles in an overlapping issue area will mitigate unnecessary apprehension of domestic judges in tapping the WTO jurisprudence. The WTO tribunal’s frequent referencing of the domestic court decisions in relevant occasions to stay on the same judicial wavelength with the U.S. court may be reciprocated by the U.S. judges themselves over time. If sustained and regularized, the discursive engagement is capable of generating au courant “global jurisprudence” in those administrative law areas, such as antidumping and subsidies, where domestic and international disputes overlap both in law and facts. As their dialogue matures and deepens, domestic and WTO courts may together form a broader “interpretive community” in which they can establish common threads of interpretations over common legal issues.

Granted, such engagement may not be always harmonious: it may entail conflicts rather than cooperation. Moreover, although this discursive engagement may generate better judgments by both domestic and international courts, even better decisions do not necessarily converge. Nonetheless, more dialogue and judicial collaboration tend to at least create a presumption of discursively connected, or quasi-monist, system. This visible, and thus usable, discursive nexus is a propitious step toward the globalizing of administrative law. Although the end product of discursive engagement would not be a particular body of law, this common hermeneutics could still guide the judicial reasoning of both the domestic and the WTO court in a given

36 See Padideh Ala’i, From the Periphery to the Center?: The Evolving WTO Jurisprudence on Transparency and Good Governance, 11 J. INT’L ECON. L. 779, 794-95 (2008) (observing that the “good governance” mandate located in the recent WTO jurisprudence in the antidumping law area highlights the significance of protecting expectations of “private traders” and thus promotes the rule of law within the WTO system).
37 Id.
38 Slaughter, A Global Community of Courts, supra note __, at 202-03.
40 Slaughter, A Global Community of Courts, supra note __, at 204.
41 Id; Koh, Transnational Public Law Litigation, supra note __, at 2397.
42 See Waters, supra note __, at 503 (depicting “norm convergence” as the “tendency of domestic and international law to converge on a single, worldwide normative standard. (...) in response to a perceived need for a single international legal norm on a particular issue”).
administrative law area, and therefore exhibit an ever-converging pattern in their interpretation.43 Together, both tribunals can “provoke judicial articulation of a norm of transnational law.”44 In sum, a “global administrative law,” for the purpose of this Article, does not denote any uniform code of positive rules. Instead, analogous to the common law tradition, it signifies an identifiable pattern of guiding principles on a certain overlapping area of administrative law that can situate both domestic and international judicial organs in the shared hermeneutical sphere to the extent that users of both systems, i.e., transnational businesses, regard them as largely interchangeable norms.45

This diffusive yet mutual nature of global administrative law-making will eventually promote compliance with, or norm internalization of, the WTO norms in the domestic legal system.46 Here, the enhanced possibilities of norm acceptance may be secured by the fact that it is actually domestic courts themselves which co-create such global administrative law via a discursive engagement with the WTO court.47 This critical involvement from domestic courts gives rise to the legitimacy in the use of these principles (global administrative law) in their own decisions.48 This judicial diffusion heralds a new mode of internalization through its unique “dynamic normativity.”49 which is differentiated from the conventional, formal concept of treaty compliance. In fact, global administrative law in the area of trade remedy may complement the relative paucity of the rule of law protection in the domestic administrative proceeding, which is

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43 To fully appreciate this new possibility of understanding international and transnational law, one must depart from a positivist obsession with traditional sources of international law and embrace a new dimension, such as the “new international legal process” that connote various soft and informal manifestations of international law, such as “declarative law.” Koh, Transnational Public Law Litigation, supra note _, at 2400.

44 Id., at 2349.

45 This terminology (“global administrative law”) connotes multiple meanings that are interrelated yet still distinguishable among one another, at least conceptually. Some scholars focus on certain procedural disciplines which international organizations should respect in their internal decision-making process in an attempt to promote their legitimacy. See generally Benedict Kingsbury et al., Forward: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law, 68-AUT LAW & CONTEMP. PROBS. 1, 5 (2005); Daniel C. Esty, Good Governance at the Supranational Scale: Globalizing Administrative Law, 115 YALE L.J. 1490, 1543-47 (2006). In contrast, the term in this Article concerns both domestic courts and the WTO tribunal that review certain domestic administrative regulations which may affect international trade.


47 See Waters, supra note _, at 490 (highlighting “a co-constitutive, or synergistic, relationship in which domestic courts worldwide are becoming active participants in the dynamic process of developing international law”).

48 See Harold Hongju Koh, Bringing International Law Home, 35 HOUS. L. REV. 623, 680 (1998) (submitting that domestic courts appear more inclined to follow international law “when they accepted its legitimacy through some internal process.”) (emphasis added) [hereinafter Koh, Bringing International Law Home].

49 Harold Koh observes that the gestalt of transnational legal process lies in its “dynamic normativity.” In other words, it captures a dynamic, and often transformative, process in which transnational law emerges, is interpreted, enforced and eventually internalized. Harold Koh, Transnational Legal Process, 75 NEB. L. REV. 181, 184 (1996).
not subject to due process principles under the Administrative Procedure Act.\textsuperscript{50} Eventually, this nascent phenomenon of the globalizing of administrative law will contribute to the reduction of uncertainty (risk premiums) on the part of global business and thus to the predictability of both domestic and international trade remedy law.\textsuperscript{51} In sum, this diffusive and osmotic global administrative law-making process offers a novel dimension of understanding transnational-international law.

Finally, an important caveat is in order. This Article does not claim that a discursive engagement can be located, or should be promoted, in all areas of international (transnational) law; nor does it observe that every incidence of discursive engagement can develop into some kind of global administrative law. Admittedly, in certain areas of law influenced by socio-cultural characteristics, such as abortion, such dialogue might not appear promising, at least for the time being. Moreover, some anecdotal instances of judicial exchange would not supply a legal platform adequate and mature enough to generate any globalization of administrative law. Yet what the Article does argue is that at least in the area of trade remedy law where both domestic and international commerce converge, judicial cross-fertilization between the U.S. federal court and the WTO Appellate Body may translate into a salient model of “jurisgenerative” dialogue.\textsuperscript{52}

Against this background, the Article presents a case for a discursive engagement between a domestic court, such as the U.S. federal court, and an international tribunal, such as the WTO Appellate Body, in a certain international/transnational issue area, such as trade remedy, employing the recent dispute on double remedies as a focal point. The Article unfolds in the following sequence. First, Part II and III document how the U.S. Court of International Trade (USCIT) and the WTO tribunal have ruled on the double remedies issue, respectively. Part II demonstrates how both \textit{GPX I} and \textit{GPX II} decisions have invalidated the double remedies policy, while Part III criticizes the recent WTO decisions on the same dispute (issue). Here, the Article argues that the WTO Appellate Body should have taken into account the U.S. court’s rulings both in \textit{GPX I} and \textit{GPX II} in its own decision for a better and more coherent reasoning. Part IV discusses the possibility of a discursive engagement between the U.S. federal court and the WTO tribunal as a constructive way to overcome potential legal incoherence. This Part contends that the common professional identity, \textit{telos} and hermeneutical device adopted by the U.S. court and the WTO tribunal can facilitate a discursive engagement between them. The Part also views that this dialogue, if repeated and regularized, can

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\item \textsuperscript{50} See Sungjoon Cho, \textit{Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition}, 87 N. C. L. REV. 357, 386 (2009) (observing that due process safeguards does not work in antidumping proceedings since the Administrative Procedural Act (APA) does not apply) [hereinafter Cho, \textit{Anticompetitive Trade Remedies}].
\item \textsuperscript{51} Cf. Ahdieh, supra note \textendash , at 2125 (arguing that “common international norms of due process as developed through dialectical exchange also would offer significant benefits in the realm of international economics”).
\item \textsuperscript{52} Koh, \textit{Transnational Public Law Litigation}, supra note \textendash , at 2397 (observing that the U.S. court may “initiate a dialogue with foreign and international courts that engenders further norm-declaration.”); Robert C. Cover, \textit{Nomos and Narratives}, 97 Harv. L. Rev. 4, 57-58 (1983) (“When [judges] oppose the violence and coercion of other organs of the state, judges begin to look more like the other jurisgenerative communities of the world.”).
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identify certain core principles of administrative law in the area of trade remedy (double remedies), which might be dubbed a global administrative law. Part V concludes.

II. THE FIRST BATTLEGROUND: A DOMESTIC DISPUTE ON DOUBLE REMEDIES

A. Double Remedies Prohibited

The WTO system permits its member country to impose trade remedies, such as antidumping and countervailing duties, on foreign imports that are allegedly benefited from unfair trade practices, such as dumping and subsidization. Foreign producers would allegedly unduly undersell domestic producers to gain market access.\(^{53}\) Also, foreign governments would offer domestic producers various grants or other financial contributions so as to boost their price competitiveness abroad. An importing country responds to these unfair practices, one by private parties (dumping) and the other by governments (subsidization), as they impose extra duties to neutralize any undue effects from such dumping or subsidization.

In a normal (“market economy”) situation, an importing country may impose both antidumping and countervailing duty over the same imported good since price effects of a subsidy are calculable. As the U.S. Department of Commerce (DOC) noted, “[d]omestic subsidies presumably lower the price of the subject merchandise both in the home and the U.S. markets, and therefore have no effect on the measurement of any dumping that might also occur.”\(^{54}\) However, this concurrent imposition of both antidumping and countervailing duties on the same product becomes problematic if an importing country adopts the so-called “non-market economy” methodology. An antidumping authority from an importing country may elect to disuse various market data, such as wages and other production costs, provided by home market (exporting) country if the authority believes that the home market economy is a centrally-planned economy and thus their data are unreliable. In such case, the authority borrows corresponding data from certain third-party countries (“surrogate” countries).\(^{55}\)

As the DOC had concluded earlier, “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.”\(^{56}\) In other words, “in an [non-market economy] system the government does not interfere in the market process but supplants it—that has led us to conclude that subsidies have no meaning outside the context of a market

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\(^{53}\) Regarding the criticism that that the antidumping regime is based on no legitimate policy grounds but protectionism, see generally Cho, Anticompetitive Trade Remedies, supra note .


economy.” Therefore, subsidization itself becomes an immeasurable event when the DOC adopts a non-market economy methodology in its antidumping investigation.

The U.S. court had also upheld the DOC’s position. In Georgetown Steel, the Court of Appeals found that “the governments of those [non-market economies] would in effect be subsidizing themselves” and thus “any selling by [non-market economies] at unreasonably low prices should be dealt with under the antidumping law.” Here, the court highlighted the silence of Congress in this matter. According to the court, Congress would have expressed its intention to apply a double remedy, i.e., a separate countervailing duties in addition to antidumping duties over non-market economy imports, if it had believed that the imposition of an antidumping in such a situation would have been insufficient.

The legislative history of the Uruguay Round Agreements Act (URAA) also corroborates the court’s position. While the URAA made some important changes in the U.S. countervailing duties law, it was silent in the matter of imposing countervailing duties on imports from non-market economy countries simultaneously with antidumping duties. In the same vein, in the Statement of Administrative Action attached to the URAA, the Clinton administration supported Georgetown Steel. The U.S. government characterized the court’s ruling as “the reasonable proposition that the countervailing duties law cannot be applied to imports from nonmarket economy countries.”

Finally, some members of Congress had introduced legislation to render countervailing duties explicitly applicable to non-market economy countries for the past years. Yet no single effort has mustered enough support to pass the bill.

B. Double Remedies Resurrected and Challenged

As bilateral trade deficits between the U.S. and China have recently widened, political pressures are mounting to reinforce the enforcement of the U.S. trade remedy rules. Against this background, on April 9, 2007, departing its long-standing policy

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57 Id.
59 Georgetown Steel, 801 F.2d at 1316 (Fed. Cir. 1986).
60 Id., at 1308, 1318 (Fed. Cir. 1986).
64 See e.g., Bernie Becker, Ways and Means Dems Want More Trade Enforcement, THE HILL, Mar. 31,
against imposing countervailing duties on non-market economies, the DOC announced its affirmative preliminary determination on coated free sheet paper from China. Six months later, the DOC rendered its final determination of countervailing duties ranging from 7.40 to 44.25%. The DOC found a justification for its policy change in China’s economic development for the last decades. The DOC argued that due to its “significant and sustained economic reforms,” China has now advanced from a centrally-planned economy to an economy in which the DOC could “determine the transfer of a specific financial contribution and benefit from the government to a producer.” In particular, the DOC determined that “wages between employers and employees largely appeared to be renegotiated; foreign investment, though directed, was largely permitted; many state-owned enterprises had been privatized; and China’s command economy had receded and the majority of prices liberalized.” In sum, the DOC seems to have believed that it could surgically remove, via countervailing duties, whatever newly emerged market distortions exerted by subsidies. Nonetheless, this case was eventually terminated as the International Trade Commission rendered negative injury determination on December 7, 2007.


GPX I, supra note 65, at 4.


2008. On September 9, 2008, GPX challenged, among others, the DOC’s countervailing duties determination.

GPX basically argued that imposing both antidumping and countervailing duties under the NME methodology resulted in a double remedy since it “punishes Chinese companies twice for the same allegedly ‘unfair’ trading practice.” In particular, GPX argued that the DOC counted twice the alleged effect of subsidy by imposing additional countervailing duties on its tires despite the previous antidumping duties calculated on the basis of a “subsidy-free constructed normal value (essentially using information from surrogate countries).”

However, the DOC denied such remedial nexus between the antidumping and countervailing duty measure in case of non-market economy methodologies. The DOC maintained that “[t]he [antidumping] and [countervailing duty] laws provide separate remedies for separate unfair trade practices” and that “the classification of China as an NME under the [antidumping] law does not have any necessary consequence under the [countervailing duty] law.” The DOC basically ascribed the “double counting” as an “assumed or undetermined” effect, which should not be adjusted without any explicit statutory directive. Then, the DOC argued that it was the respondents who should prove the existence and the precise amount of double remedy, if any.

The USCIT (GPX I) rejected the DOC’s argument and sided with GPX. Citing the Government Accountability Office Report in 2005, the GPX I court acknowledged the likely effect of double remedies when the DOC imposes on non-market economy imports countervailing duties concurrently with the imposition of antidumping duties. The court also held that if it is too difficult for the DOC to determine the existence and the extent of double counting, it “should refrain from imposing countervailing duties on NME goods until it is prepared to address this problem through improved methodologies or new statutory tools.” In its remand, the court instructed the DOC to “forego the imposition of [countervailing duties] on the merchandise at issue or for Commerce to adopt additional policies and procedures to adapt its [non-market economy antidumping and countervailing duty] CVD methodologies.”

Yet the DOC failed to comply with the court’s instruction in the remand order. Originally, the DOC had contemplated two acceptable options: it could have withdrawn the countervailing duties on the subject merchandise at issue (Chinese tires produced by Starbright and imported by GPX); or it could have applied a market economy standard to

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73 Certain Off-the-Road Tires From China; Determination, 73 Fed. Reg. 51,842 (ITC Sept. 5, 2008).
74 GPX I, supra note _, at 5.
75 Id., at 13.
76 Id., at 15.
77 Id., at 13-14.
78 Id., at 14.
79 Id., at 15.
80 Id., at 17.
81 Id., at 18.
82 Id., at 33.
China as a country or to Starbright as an individual producer. In the end, however, the 
DOC decided to simply window-dress the problem by “merely offsetting [countervailing 
duties] against [non-market economy antidumping duties] after it uses its regular 
methodologies to calculate the [countervailing duties] and [non-market economy 
antidumping duties] margins.” In the second round of the dispute, the court (GPX II) 
viewed that the DOC’s aforementioned failure “clearly demonstrate[d] its inability, at 
this time, to use improved methodologies to determine whether, and to what degree 
double counting occurs.” Therefore, the court ruled that the DOC “must forego” the 
countervailing duties at issue. The DOC appealed the USCIT’s decision in the federal 
circuit and the appeal is currently pending.

III. The Second Battleground: A WTO Dispute on Double Remedies

A. The Panel Report

While the GPX litigated on the double remedies issue in the U.S. court, China 
also brought the same dispute to the WTO. Over the same measure (double remedies) 
on the same products (certain new pneumatic off-the-road tires) adjudicated in GPX I 
and GPX II, China requested consultations with the U.S. on September 19, 2008 and 
the establishment of a panel on December 9, 2008. In this dispute, both China and 
the U.S. made predictably similar claims and arguments raised in GPX I and GPX II. 
China argued that the DOC’s concurrent imposition of countervailing duties on certain 
new pneumatic off-the-road tires in addition to AD imposed on the same products using 
NME methodologies constituted a “double remedy” since “the subsidies at issue are 
"offset" twice” once via [antidumping duties] and once via [countervailing duties] with 
the use of NME methodologies. Thus, China claimed that the double remedy violated 
WTO subsidy disciplines, such as GATT Article VI:5 and SCM Article 19:4. In 
response, the U.S. argued that “anti-dumping and countervailing duties are two distinct 
instruments, meant to address different kinds of harm.” Likewise, it contended that a 
non-market economy methodology “does not somehow transform the anti-dumping 
duty itself into a countervailing duty.”

84 Id.
85 Id., at 3 (emphasis added)
86 Id.
87 U.S. Court of Appeals for the Federal Circuit, Case Number 11-1109, filed on Dec.8, 2010.
88 United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, 
89 Id., ¶ 1.1.
90 Id., ¶ 1.2
91 Id., ¶ 14.5.
92 Id., ¶ 14.8.
93 United States First Written Submission, ¶¶ 389-394.
94 Panel Report, supra note 2, ¶ 14.91.
The U.S. also characterized the occurrence of double remedies as depending on “special factual circumstances.”95 In so doing, the U.S. argued that it was the respondents, not the investigating authority, that must prove the “precise amount of a subsidy attributed to the imported products under investigation.”96 According to the U.S., interested parties and China had failed to “establish[] the existence of a double remedy, and in particular had not provided sufficient evidence.”97 Here, the U.S. argued that its simultaneous imposition of countervailing duties at issue may not necessarily entail double remedies. According to the U.S., one cannot assume that “replacement of actual (subsidized) values of factor inputs with surrogate values under the non-market economy methodology results in an increase in the normal value by an amount that is equal to or greater than the amount of the subsidy” and that “the normal value arrived at using the non-market economy calculation is, in every instance, completely insulated from any of the effects of the countervailed subsidy.”98

Strikingly reminiscent of the DOC’s argument in GPX I, the panel, for the most part, supported the U.S. position. First, the panel denied any essential connection between antidumping duties and countervailing duties in the WTO system. This denial of a remedial nexus, in particular when an antidumping authority uses a non-market economy methodology as in this dispute, paves the way for the imposition of double remedies. Shockingly, the panel even refused to apply the WTO subsidy disciplines to the double remedy situation. The panel held that the SCM, Article 19.4 in particular, is “unrelated” to an NME methodology and thus, the double remedy problem. The panel ruled that:

14.112. [B]y its own terms, Article 19.4 of the SCM Agreement is oblivious to any potential concurrent imposition of anti-dumping duties. Hence, that an anti-dumping duty calculated under a methodology may have the effect of "offsetting" a subsidy in totality or in part has no effect on the existence of the subsidy which, under Article 1 of the SCM Agreement, depends on the existence of a financial contribution and of a benefit; nor would it have an effect on the amount of the subsidy which, under Article 14 of the SCM Agreement, must be determined by reference to the marketplace. In sum, the narrowly-crafted discipline contained in Article 19.4 of the SCM Agreement does not address situations of "double remedies". (emphasis added)

95 Id., ¶ 14.45 (“[T]he United States submits counter-examples to demonstrate that in some instances, the surrogate values used by the USDOC in its dumping margin calculation were in fact lower than both the producer’s actual costs and the benchmarks used by the USDOC in its calculation of the amount of the subsidy.”) (emphasis added); id., ¶ 14.75 (“In sum, the United States’ arguments raise the question of the extent of a double remedy in specific factual circumstances – whether a complete double remedy necessarily results from all instances of concurrent imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties. They do not, however, invalidate the 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.”) (emphasis added).
96 Id., ¶ 14.77.
97 Id., ¶ 14.6.
98 Id., ¶ 14.55 (emphasis added).
14.122. (…) We view China’s argument as implying that it is the object and purpose of the SCM Agreement to impose disciplines not only with respect to the use of countervailing duties, but also of anti-dumping duties. As explained above, we are of the view that the object and purpose of Part V of the SCM Agreement is limited to imposition of disciplines with respect to the former. (emphasis added)

The panel’s ruling here echoes the DOC’s claim in GPX I that “[t]he [antidumping] and [countervailing duty] laws provide separate remedies for separate unfair trade practices” and that “the classification of China as an [non-market economy] under the [antidumping] law does not have any necessary consequence under the [countervailing duty] law.”

Second, the panel also sided with the U.S. position on the critical burden of proof as to who should demonstrate the existence and the extent of a double remedy. The panel held that:

14.147. We have sympathy for the United States’ argument that it is for interested parties who seek to convince an investigating authority to modify its application of its trade remedy laws (especially where that application has not been shown to be WTO-inconsistent) to bring relevant evidence to the investigating authority. (emphasis added)

14.180. By contrast, while we have found above that the use of a surrogate value in principle reflects the use of unsubsidized costs, we also have indicated that the precise extent to which the NME calculation captures any subsidization is a factual issue which it could be difficult to ascertain. (emphasis added)

Therefore, the panel ruled that China had failed to establish that the U.S. violated the WTO subsidy disciplines, including GATT Article VI:5 and SCM Article 19:4.

It is highly disconcerting that the panel basically revered the ordinary burden of proof and required the respondents to demonstrate the existence (and the extent) of double remedies at issue. Here again, the panel followed the U.S. position in GPX I, which the USCIT found “unreasonable,” that “require[d] GPX to submit specific evidence that a double remedy of a particular amount actually was imposed on its products when parallel [non-market economy antidumping and countervailing duty] procedures were utilized.”

B. The Appellate Body Report

99 GPX I, supra note _, at 14.
100 Id., ¶ 17.1.
101 GPX I, supra note _, at 19.
First of all, the Appellate Body expounded in detail how a concurrent imposition of antidumping duties under a non-market economy methodology and countervailing duties would lead to double remedies. According to the Appellate Body, when an importing country (the U.S.) determines whether any specific export is dumped, it compares a domestic price (export price) of such product with its normal value (the product’s home market price). However, if an exporting country is a non-market economy, such as China, the U.S. antidumping authority (DOC) elects not to use China’s home market prices of Chinese exports under investigation on the ground that those numbers are unreliable due to the lack of a full market mechanism in China. Instead, the DOC uses alternative (surrogate) values from third countries (such as India) that the DOC believes is similar to China in terms of economic development.

Naturally, the use of surrogate values purges any market distortions that state interventions, such as subsidies, might have caused in non-market economies. In other words, a non-market economy methodology adopted in an antidumping investigation structurally “countervails” any subsidization in that non-market economy country at issue. For this reason, the Appellate Body noted that non-market economy dumping margins tend to be higher than margins calculated without the methodology. Under these circumstances, if a separate countervailing duty is imposed on the same products subject to a non-market economy dumping margin to remedy the alleged subsidization, such subsidy would be countervailed twice, leading to “double remedies.”

The gist of the Appellate Body’s reasoning, which eventually led to its reversal of the panel’s ruling, is that double remedies as such precipitate the imposition of “inappropriate” amounts of countervailing duties under Article 19.3 of the SCM Agreement, which reads that “when a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case.” To the Appellate Body, this Article necessitates a certain adjustment (“tailoring”) of countervailing duties in accordance with circumstances that “have renounced relevant subsidies.”

The panel equated the concept of the “appropriate amounts” under Article 19.3 with amounts “not in excess of the amount of the subsidy” under Article 19.4. However, the Appellate Body disagreed with the panel and broadened the notion of appropriateness to the extent that should take into account other contexts from relevant GATT and SCM provisions on subsidies and countervailing duties. For example, the Appellate Body tapped GATT Article VI in interpreting the appropriateness by

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103 Id.
104 Id.
105 SCM Agreement, supra note __, art. 19.4 (emphasis added)
106 AB Report, supra note __, ¶ 553.
108 AB Report, supra note __, ¶ 555.
emphasizing certain textual connections between the SCM and GATT Article VI stipulated under Articles 10 and 32:1 of the SCM Agreement.\footnote{Id., ¶¶ 560, 561, 563.}

Notably, the Appellate Body captured GATT Article VI:5 as a crucial context for determining whether the double remedies are appropriate under Article 19.3 of the SCM. GATT Article VI:5 provides that:

No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.\footnote{GATT, supra note _, art. VI:5.}

The panel objected to the application of Article VI:5 to other circumstance, such as a non-market economy situation in question, than export subsidies that were explicitly listed in the Article.\footnote{Panel Report, supra note _, ¶ 14.118.} However, the Appellate Body rejected the panel’s narrow textual ground by invoking its finding in Canada – Autos that “omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive.”\footnote{Appellate Body Report, Canada – Autos, ¶ 138.} Instead, the Appellate Body focused on the “same situation” language juxtaposed with “export subsidization” and interpreted that such language could cover, even without an explicit textual ground, some domestic subsidies situations where double remedies might occur.\footnote{AB Report, supra note _, ¶ 567.} Then, the Appellate Body illuminated a functional (computational) equivalence in double remedies between situations involving export subsidization and a non-market economy methodology.\footnote{Id., ¶¶ 568-69.}

The Appellate Body’s interpretation on GATT Article VI:5 seems to be in sync with the drafters’ intention to avoid double remedies in general (“both anti-dumping and countervailing duties to compensate for the same situation”), be it “export subsidization,” which the panel did single out, or “dumping,” which certainly connotes a non-market economy methodology, as in this dispute. As the Appellate Body illustrated, the simultaneous imposition of both antidumping and countervailing duties with the use of a non-market economy methodology tends to generate the same adjustment problem that occurs with the imposition of both antidumping and countervailing duties over export subsidies. The Government Accounting Office also found that “[t]here is substantial potential for double counting of domestic subsidies if Commerce applies [countervailing duties] to China while continuing to use its current NME methodology to determine antidumping duties.”\footnote{GAO 2005 Report, supra note _, at 33.} As Japan rightly observed, export subsidization is just an “expression of an underlying principle that an importing Member may not impose a double remedy against the same subsidy,” rather than of an exclusive example.
for a double remedy situation. In sum, both occasions – export subsidies and the non-market economy methodology – involve the same mathematical challenges under which an investigating authority should avoid any double counting.

On the other hand, the panel’s basic position, which echoed that of the U.S., is that antidumping duties are a separate trade remedy from countervailing duties. Premised on this denial of the remedial nexus, the panel viewed that Articles 19.3 and 19.4 are “oblivious to any potential concurrent imposition of anti-dumping duties.” Yet, the panel’s approach is a strikingly narrow interpretation of fundamental subsidy disciplines under the SCM Agreement, which contains no express language that permits an investigating authority to disregard a double remedy situation. As a result of its narrow interpretation, the panel deprived the SCM of a necessary discipline over a non-market economy situation as it failed to recognize a critical remedial link between antidumping and countervailing measures under the WTO system. In fact, the defending party (the U.S.)’s court has also held that the non-market economy antidumping and countervailing duty statutes work together “to counteract any unfair advantage gained by government intervention” and “to correct governmental distortion of market prices.” With this remedial nexus in mind, the USCIT rejected the DOC’s argument that “[t]he [antidumping] and [countervailing duty] laws provide separate remedies for separate unfair trade practices” and that “the classification of China as a non-market economy under the [antidumping] law does not have any necessary consequence under the [countervailing duty] law.”

Fortunately, the Appellate Body rectified the panel’s erroneous conclusion on the remedial nexus. Although the Appellate Body acknowledged that these two modes of trade remedies are “legally distinct,” it nonetheless rejected the panel’s view, emphasizing a coherent and harmonious interpretation among provisions of the WTO covered agreements, such as the GATT and the SCM Agreement. The Appellate Body justified such remedial nexus by pointing to the practical effect of trade remedies: from the standpoint of foreign producers or exporters, the consequences, i.e., the extra duties at the border, are “indistinguishable.”

Then, in a critical step, the Appellate Body ascribed the panel’s rejection of remedial nexus, i.e., the panel’s dismissal of the fact that a non-market economy antidumping measure has already been employed to neutralize the effect of

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116 Japan Third-Party Submission, ¶¶ 3-14 (emphasis added).
118 GPX I, supra note __, at 12-13.
119 Id., at 13-14.
120 AB Report, supra note __, ¶ 570. Regarding a similar view, see Brief for Sungjoon Cho as Amicus Curiae Supporting Complainant (China), United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS 379/R (Appellate Body, Dec. 14, 2010), ¶ 18 [hereinafter Amicus Brief] (“The panel’s approach is a strikingly narrow interpretation of so fundamental a subsidy discipline as Article 19.4. This Article contains no express language that permits an investigating authority to disregard a double remedy situation. As a result of its narrow interpretation, the panel deprived the SCM of a necessary discipline over an NME situation as it fails to recognize a critical remedial nexus between antidumping and countervailing measures under the WTO system.”).
121 AB Report, supra note __, ¶ 570.
subsidization, to its flawed finding of appropriateness in the DOC’s determination on countervailing duties in question.\textsuperscript{122} The Appellate Body also projected its reasoning against the backdrop of the telos of the SCM Agreement. Recalling its past rulings on \textit{US – Carbon Steel} and \textit{US – Softwood Lumber IV}, the Appellate Body accentuated “disciplines” over WTO members’ imposition of countervailing duties that must balance their rights to do so.\textsuperscript{123} The Appellate Body underscored that “members’ right to impose countervailing duties to offset subsidies is not unfettered, but subject to compliance with the obligations set forth in the SCM Agreement.”\textsuperscript{124}

In a captivating move, the panel attempted to justify its position to deny the SCM Agreement’s regulation on double remedies by relying on the disappearance of Article 15 of the Tokyo Round Subsidies Code, which did explicitly prohibit double remedies, in the current text of the SCM Agreement (“the prior existence and demise”).\textsuperscript{125} This appeared to be an ostensibly plausible interpretation at first glance.\textsuperscript{126} Citing the Appellate Body Report in \textit{U.S. – Underwear}, the panel had concluded that the prior existence and demise of Article 15 of the Tokyo Round Subsidies Code would constitute a “context” within the meaning of Article 31 of the Vienna Convention on the Law of Treaties.\textsuperscript{127} According to the panel, this context reveals the intention of the SCM’s drafters not to address the double remedy issue with a non-market economy methodology. The panel made a similar inference from the silence in addressing the double remedy issue under China’s Accession Protocol.\textsuperscript{128}

Nonetheless, the Appellate Body, as it did in interpreting GATT Article VI:5, rejected this “mechanistic \textit{a contrario} reasoning” and held that the mere non-existence of a provision in a predecessor agreement (the Tokyo Round Subsidies Code) illegalizing double remedies does not necessarily permit the same practice under the new agreement (the SCM Agreement).\textsuperscript{129} The panel’s interpretation appeared to have read too much into the Appellate Body Report that it had originally invoked (\textit{U.S. – Underwear}) to support its position. In fact, in other parts that the panel did not cite, the Appellate Body in \textit{U.S. – Underwear} unequivocally confirmed that:

\begin{quote}
We are not entitled to assume that that disappearance was merely accidental or an inadvertent oversight on the part of either harassed negotiators or inattentive draftsmen. That no official record may exist of discussions or statements of delegations on this particular point is, of course, no basis for making such an assumption.\textsuperscript{130}
\end{quote}

\textsuperscript{122} \textit{Id.}, ¶¶ 571-72.
\textsuperscript{123} \textit{Id.}, ¶ 573.
\textsuperscript{124} \textit{Id.} (emphasis original)
\textsuperscript{125} Panel Report, \textit{supra} note _, ¶ 14.119.
\textsuperscript{126} \textit{Id.} (citing Daniel Porter).
\textsuperscript{127} \textit{Id.}, ¶ 14.120, n. 1027.
\textsuperscript{128} \textit{Id.}, ¶ 14.121 (“Rather, we merely note the absence of any provision addressing the question of "double remedy" in China’s Protocol of Accession. In our view, such an absence again suggests that the drafters of Article 19.4 of the SCM Agreement did not intend this provision to address the issue of double remedies.”).
\textsuperscript{129} \textit{AB Report, supra} note _, ¶ 581..Regarding a similar argument, \textit{see} Amicus Brief, \textit{supra} note _, ¶ 22-27.
\textsuperscript{130} Appellate Body Report, \textit{United States – Restrictions on Imports of Cotton and Man-made Fibre}
Therefore, in *U.S. – Underwear*, the Appellate Body in fact strongly warned against drawing too many inferences, without any affirmative evidence, from the non-existence of a particular provision which had existed in a previous, related legal document. No doubt, this warning applies unreservedly to the factual pattern of this dispute.  

In addition to its ruling that double remedies in general violate Article 19.3 of the SCM Agreement, the Appellate Body completed the analysis that the panel had originally skipped, i.e., whether China had established that the U.S.’ simultaneous imposition of antidumping duties calculated from a non-market economy methodology and of countervailing duties in four investigations at issue actually resulted in double remedies.

First of all, the Appellate Body identified an investigating authority’s obligation to establish the precise amount of subsidization, which is explicit under GATT Article VI:3, and the appropriate amount of countervailing duties, which is analogous under Articles 19.3 and 19.4 of the SCM Agreement. The AB ruled that:

[A]s an investigating authority is subject to an affirmative obligation to ascertain the precise amount of the subsidy, so too is it subject to an affirmative obligation to establish the appropriate amount of the duty under Article 19.3. This obligation encompasses a requirement to conduct a sufficiently diligent "investigation" into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record. We recall our finding above


131 As a matter of fact, in stark contrast with the panel’s inference, the Appellate Body has not hesitated to rule on those issues whose disciplines are not explicitly manifest in the WTO provisions. For example, the Anti-Dumping Code on its face neither endorses nor prohibits the practice of “zeroing.” Nonetheless, in a series of well-crafted decisions, the Appellate Body has unwaveringly invalidated this practice. See generally Sungjoon Cho, *Global Constitutional Lawmaking*, 31 U. Pa. J. Int’l L. 621 (2010). In addition, the Appellate Body has imposed effective disciplines on many other subsidy issues, such as the “privatization” (effect of a privatization of state-owned assets on previously-conferred subsidies) and “pass-through” (treatment of subsidies conferred upon upstream inputs),” despite the absence of any express textual provision. Panel Report, *supra* note __, ¶ 14.84. For these reasons, the panel’s inference from the textual silence seems too far-fetched. Moreover, *U.S. – Underwear* involved an entirely different legal relationship between the previous and subsequent agreements, which militates against applying its reasoning. In *U.S. – Underwear*, the subsequent agreement (the Agreement on Textiles and Clothing (ATC)) was created to override the previous Multi-Fiber Agreement (MFA), which had been condemned as highly protectionist. Therefore, one should not be surprised to see that many of the MFA provisions had disappeared in the new ATC. In fact, that is exactly why the ATC replaced the MFA. In contrast, the SCM was not created to override the Tokyo Round Subsidies Code. On the contrary, the SCM evolved from the Tokyo Round Subsidies Code.

132 AB Report, *supra* note __, ¶ 583. Interestingly, the AB left open a largely nominal possibility that even a concurrent imposition of antidumping and countervailing duties with the adoption of an NME methodology, which might constitute a violation of Article 19.3 of the SCM Agreement “as a legal matter,” might not actually lead to double remedies “as a factual matter.” *Id.*, ¶ 599 (emphasis added).

133 *Id.*, ¶ 596.


that, among the factors to be taken into account by an investigating authority, in establishing the “appropriate” amount of countervailing duty to be imposed, is evidence of whether and to what degree the same subsidies are being offset twice when anti-dumping and countervailing duties are simultaneously imposed on the same imported products.\textsuperscript{136}

Then, the Appellate Body observed that “the USDOC made no attempt to establish whether or to what degree it would offset the same subsidies twice by imposing anti-dumping duties calculated under its non-market economy methodology, concurrently with countervailing duties.”\textsuperscript{137} According to the Appellate Body, such failure amounted to a failure “to fulfil its obligation to determine the “appropriate” amount of countervailing duties within the meaning of Article 19.3 of the SCM Agreement.”\textsuperscript{138}

\textbf{C. Critique: A Lost Opportunity}

Although the Appellate Body’s reversal of the panel’s ruling upholding double remedies is salutary, the Appellate Body’s reasoning still leaves much to be desired, in particular as to its interpretive choice. The panel’s interpretations on both Articles 19.3 and 19.4 of the SCM Agreement, were under appeal. Yet, the Appellate Body made a puzzling interpretive choice: it focused on Article 19.3, instead of Article 19.4.\textsuperscript{139} In rendering the fundamental disciplines on the imposition of countervailing duties, Article 19.3 is more abstract than Article 19.4: the former simply requires that countervailing duties shall be “\textit{appropriate} amounts,”\textsuperscript{140} while the latter provides that these duties shall not be “in excess of the amount of the subsidy found to exist,” echoing a similar language under GATT Article VI:3. Now that the Appellate Body chose Article 19.3 over Article 19.4, it had to de-ambiguate the main terminology (“appropriate”) by relying on “contexts,” such as other provisions under the SCM Agreement, as well as the “object and purpose” of the Agreement within the meaning Article 31 of the VCLT.

One of the most vital hermeneutical goals that the Appellate Body tried to achieve was to restore the remedial nexus between antidumping duties calculated under a non-market economy methodology and countervailing duties levied on the same product. Note that the panel simply dismissed such nexus, paving the way toward the eventual denial of double remedies. In striking the panel’s ruling and upholding the existence double remedies, the Appellate Body had to highlight that the original amount of countervailing duties was excessive, and therefore \textit{inappropriate}, in the absence of due adjustment (discount). To the Appellate Body, the wooly language (“appropriate

\begin{itemize}
\item \textsuperscript{136} Id., ¶ 602 (emphasis added)
\item \textsuperscript{137} Id., ¶ 604.
\item \textsuperscript{138} Id., ¶ 605 (emphasis original).
\item \textsuperscript{139} The AB, in what seems to be judicial economy, avoided interpreting Article 19.4 of the SCM Agreement. AB Report, supra note __, ¶ 590 (“However, since we have already found that the imposition of double remedies is inconsistent with Article 19.3 of the SCM Agreement, we need not continue our analysis and address China’s appeal with respect to the interpretation and application of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.”).
\item \textsuperscript{140} SCM, supra note __, art. 19.3 (emphasis added).
\end{itemize}
amounts”) would be a suitable proxy on the basis of which it could incorporate, in the name of context, persuasive corroborations offered by other relevant provisions. These provisions include GATT Article VI:5, which invalidates, albeit implicitly, double remedies, as well as Article 19.2, which acknowledges the desirability of adjusting original amounts of countervailing duties to the extent of injuries (the “lesser duty” rule). Finally, the Appellate Body also invoked the object and purpose of the SCM Agreement, i.e., disciplines over any abuse in imposing countervailing duties, to rationalize its interpretation.

However, the Appellate Body could have directly addressed GATT Article VI:3 and SCM Article 19.4 that offer much clearer reasons behind the prohibition of double remedies than Article 19.3 does. The gestalt of double remedies is that an investigating authority remedies twice the same alleged unfair practice (subsidization) that the non-market economy antidumping duties have already addressed double remedies. Thus, double remedies signify the imposition of countervailing duty when there is no subsidy to be countervailed in the first place.

This is a blatant violation of the most fundamental subsidy discipline of the WTO system. GATT Article VI:3 provides that:

No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation. (emphasis added)

Here, GATT Article VI:3 clearly prohibits a WTO member from imposing any countervailing duty when there is no subsidy “determined to have been granted,” and no subsidy was left to be determined in this case. Likewise, Article 19.4 of the SCM provides that:

No 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. (emphasis added)

In this dispute, the non-market economy antidumping methodology effectively offset any subsidization to be countervailed, and consequently no subsidy was found to exist. Therefore, no countervailing duty should have been imposed in this situation. In conclusion, the DOC’s imposition of countervailing duties in the four investigations in question is inconsistent with Article 19.4 of the SCM and GATT Article VI:3.

141 Amicus Brief, supra note __, ¶¶ 13-15.
143 China’s First Written Submission, ¶¶ 375-379; Second Written Submission, ¶¶ 255-257 (citing to the Panel Report on US – Countervailing Measures on Certain EC Products, ¶ 8.1(a), and Appellate Body Report on US – Countervailing Measures on Certain EC Products, ¶ 161(a)).
The Appellate Body could have employed such more direct, and thus clearer, hermeneutical path under Article 19.4 of the SCM and GATT Article VI:3, had it paid due attention to the related USCIT decisions in GPX I and II. Note that the same issue and dispute (double remedies) emerged in the U.S. domestic legal system. Considering the innate connection between the domestic case and the WTO case before the Appellate Body, it would not be unreasonable for either tribunal to reference the other’s ruling so as to reach a more informed decision. Furthermore, as discussed above, the panel’s reasoning curiously mimicked the DOC’s very arguments in GPX I and II. In striking the panel’s finding, the Appellate Body could have tapped the USCIT decisions in these cases that so blatantly rejected the DOC’s positions in the same legal issue. At this juncture, one might analogize this situation with that in which a domestic court cite a foreign or international court decision, and vice versa. Note that either tribunal need not apply the other’s ruling: it merely references the other’s finding to find some useful guidance for its own decision.

Likewise, the Appellate Body could have reinforced its reasoning under GATT Article VI:3 and Article 19.4 of the SCM Agreement by utilizing the defending country (the U.S.)’s own internal studies and findings. For example, public, independent research institutes, such as the Government Accountability Office and the Congressional Research Service, have already published the comprehensive studies on the double remedies issue, concluding that antidumping duties calculated under a non-market economy methodology remedy market distortions that subsidies would have occurred.

The aforementioned domestic court decisions and public studies form a rich set of legal discourse on double remedies within the U.S. As a persuasive authority, such discourse sheds critical light on the current WTO dispute. In particular, as to the two domestic court decisions (GPX I and GPX II), not only the issue (double remedies) but also the very imported product (pneumatic off-road tires) overlap. The USCIT’s unequivocal invalidation of double remedies based on the finding that a non-market economy antidumping duty effectively remedies any potential subsidization in a non-market economy echoes Article 19.4 of the SCM Agreement, and GATT Article VI:3, which prohibits the imposition of any excessive amounts of countervailing duties. Granted, these domestic references (studies and court decisions) might not comfortably fit in any referential criteria under Article 31 of the Vienna Convention on the Law of Treaties. However, as “undisputed facts” these references could have nonetheless provided the Appellate Body with useful guidance in reaching the same interpretive outcome as the current ruling yet in a more direct, and thus more persuasive, fashion.

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144 See supra _.
145 See infra _.
146 Id.
147 See supra _.
148 In the entire decision, the AB’s only reference, albeit in a passing way (in a footnote), to the U.S. tribunal addressing the same dispute was the USITC’s decision that led to a single injury determination over each parallel antidumping and countervailing duty investigation at issue. AB Report, supra note _, ¶ 570, n. 549. Apparently, the AB attempted to highlight that even the U.S. International Trade Commission (ITC) tribunal endorsed, in practice, the remedial nexus between antidumping and countervailing duties.
Importantly, the Appellate Body’s tapping of GPX I and GPX II could have reinforced its reasoning in a procedural sense. Originally, the panel report had two fundamental flaws – substantive and procedural. First, the panel disregarded the general illegality of double remedy under the WTO norms, which is manifest under GATT Article VI and SCM Article 19:4. As a result, the panel validated the U.S.’s concurrent imposition of countervailing duties after the previous imposition of antidumping duties under the non-market economy methodology. Second, the panel, dismissive of SCM provisions, such as Article 12.8, shifted the burden of proof from the investigating authority (the DOC) to the respondents. Although the investigating authority is required under the Article to fully 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 there existed actual double counting, and therefore “duties in excess of the subsidy.”

China, as the defendant, did make claims under various paragraphs of Article 12 of the SCM Agreement, challenging certain “procedural” aspects of the USDOC’s countervailing duty investigations. In particular, China claimed that the U.S. failed to “provide interested parties notice of the information that the USDOC required to evaluate the existence of double remedies” and to “inform China and interested parties of the essential facts under consideration that would “form the basis” for the USDOC’s determinations in respect of the issue of “double remedies.””

However, the Appellate Body focused mostly on the U.S.’ substantive violation and failed to address the procedural violation on its own right. In particular, the Appellate Body failed to mention fairness and other crucial administrative procedural law principles, such as due process, in invalidating the U.S.’ double remedy measure. Here, the Appellate Body forfeited a rare opportunity to tap domestic decisions (GPX I and GPX II) addressing the same issue and product, and consequently to embrace a broader nomos, such as global administrative law.

Although the Appellate Body, rightly, identified “an affirmative obligation to establish the appropriate amount of the duty under Article 19.3” and held that the DOC failed to fulfill the obligation, the Appellate Body’s interpretation here focused basically on a substantive law violation, i.e., Article 19.3 of the SCM Agreement. However, what the USDOC did breach, and what the panel erroneously failed to detect, was more of procedural obligations, such as Articles 11.2, 12.8 and 14 of the SCM Agreement.

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149 Id., ¶ 8.
150 Panel Report, supra note __, ¶ 14.10.
151 See infra.
152 Article 11.2 of the SCM Agreement reads that:

The 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;
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 (grant) despite the potential existence of double remedies.” Second, it must also “provide respondents with an adequate explanation of how it discovered the subsidy to be countervailed, i.e., the calculation methodology.”

Such procedural disciplines on an investigating authority retain vital implications on the “burden of proof.” It should be recalled that both the U.S. and the panel, which supported the U.S. position, departed from the fundamental procedural obligation that an investigating authority must demonstrate the existence and the amount of subsidy at issue. The panel ignored the U.S.’s obligations as an investigating authority under the GATT and the SCM to adhere to a fair and equitable investigation procedure and inform respondents of detailed justifications for its final determination. In fact, the panel’s position upholding the U.S.’s view unduly shifted the general burden of proof in a subsidy dispute from the investigating authority to the respondent. According to the USCIT, this shift imposes an insurmountable burden on the respondent:

Commerce cannot avoid addressing an important aspect of the problem caused by applying [countervailing duty] and [antidumping] methodologies to goods from NME countries by placing the burden to demonstrate double counting on GPX, because there is likely no way for any respondent to accurately prove what may very well be occurring.

If Commerce now seeks to impose [countervailing duty] remedies on the products of NME countries as well, Commerce must apply methodologies that make such parallel remedies reasonable, including methodologies that will make it unlikely that double counting will occur. The court finds that it was unreasonable for Commerce to require GPX to submit specific evidence that a

(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).

153 Article 12.8 of the SCM Agreement reads that:

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)

154 Article 14 of the SCM Agreement reads that:

For 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).

155 Amicus Brief, supra note __, ¶ 35.
156 Id.
157 GPX I, supra note __, at 18 (emphasis added).
double remedy of a particular amount actually was imposed on its products when parallel [non-market economy] [antidumping] and [countervailing duty] procedures were utilized.\textsuperscript{158}

As the USCIT rightly held, it is the U.S. that must prove that the four investigations at issue would not constitute a double remedy situation—that, for example, “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.”\textsuperscript{159}

Importantly, however, such proof appears to be practically infeasible, as the DOC tacitly admitted. First, it had conceded that “Congress provided no adjustment for CVDs imposed by reason of domestic subsidies in NME proceedings.”\textsuperscript{160} Then, it had failed to respond to the USCIT’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.”\textsuperscript{161} Therefore, as the USCIT aptly observed, the only option left to the DOC must be to withdraw the imposition of the countervailing measure on the non-market economy products.\textsuperscript{162}

In sum, by failing to substantiate the existence of subsidization and its amount, the DOC violated its basic procedural obligation as the investigating authority under the WTO subsidy norms. At the same time, the U.S., and the panel which upheld the U.S. position, wrongly shifted the burden of proof on these critical probative issues from the investigating authority to respondents. However, the Appellate Body’s approach, which paid little attention to these procedural aspects of the SCM Agreement, failed to articulate this burden of proof issue. The Appellate Body could have avoided this lapse if it had found useful guidance in pertinent decisions by the USCIT (\textit{GPX I} and \textit{GPX II}), which held that the USDOC should have proved the absence of double remedies, i.e., should have determined “whether, and to what degree, double counting occurs when [non-market economy] antidumping remedies are imposed on the same good.”\textsuperscript{163}

\textbf{IV. GLOBALIZING ADMINISTRATIVE LAW}

\textit{A. Making Sense of One Dispute in Two Legal Universes: The Case for a Discursive Engagement and Administrative Law Reconciliation}

As discussed above, the Appellate Body reversed the panel’s position that upheld the DOC’s double remedies measure. Had the Appellate Body sided with the panel, it

\textsuperscript{158} \textit{Id.}, at 19 (emphasis added).
\textsuperscript{159} Panel Report, \textit{supra} note __, ¶ 14.56.
\textsuperscript{160} \textit{Id.}, ¶ 14.6, n. 874.
\textsuperscript{161} \textit{GPX II}, \textit{supra} note __, at 3.
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{GPX II}, \textit{supra} note 8, at 3.
would have conflicted with the USCIT’s GPX I and GPX II. At the same time, as the U.S. case is pending in the appellate court, there still remains a possibility of two conflicting opinions between the domestic and international court in this matter. This uncertain situation raises a complicated normative question: should this discrepancy be simply tolerated or somehow tackled?

To some, such divergence, albeit inconvenient, might be a natural consequence of dualism. In most countries, the domestic legal system and the international legal system are two separate legal universes. In the absence of the majestic force of a World Government or without subscribing to the radically enlightening idea of “dédoublement fonctionnel,” two different legal outcomes in separate legal universes might be taken for granted, just as two ships passing each other in the night. For example, some argue that because the U.S. governs both trade remedies – antidumping and countervailing measures – in one integrated statute, its court might be in a better position to find double remedies in a non-market economy situation than the WTO tribunal that should interpret two side agreements – one for antidumping and the other for countervailing measure – in a separate manner. In other words, while a remedial nexus between antidumping and countervailing measures exists in the U.S. trade remedy law, which is a single statute, such nexus cannot be found in the WTO, which has two different Antidumping Code and Subsidy Code.

Apart from this tenuous formulaic speculation, the aforementioned legally divergent outcomes over the same issue in two legal universes – domestic and international (WTO) – appears problematic in many aspects. First of all, the lack of legal coherence in the transnational sphere simply appears unnatural in a normative sense. Against the backdrop of “postnational constellation,” this largely territoriality-based jurisdictional dichotomy tends to shrink the potential normative space of both domestic and transnational law. Furthermore, these diverging opinions on the same (commercial) dispute are also taxing in a practical sense. Could the plaintiff in the aforementioned dispute (GPX) rely on the WTO Appellate Body report that had invalidated the double remedies, while the same issue is now pending in the U.S. court? To a global business, such as GPX, such legal uncertainty inflicts an unbearable cost. Likewise, the same quandary would continue to pester similar global economic players. They might be forced to shop venues between a domestic and international court.

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164 See Antonio Cassese, Remarks on Scelle’s Theory of “Role Splitting” (Dédoublement Fonctionnel) in International Law, 1 EUR. J. INT’L L. 210 (1990).
166 The remedial nexus between AD and CVD within the WTO system appears unquestionable considering that GATT Article VI regulates both AD and CVD in the same provision. Both the WTO Anti-Dumping Agreement and SCM Agreement elaborate and expand basic obligations under GATT Article VI. GATT Article VI:5 clearly prohibits a double remedy in general (“both anti-dumping and countervailing duties to compensate for the same situation”), be it “export subsidization,” which the panel does single out, or “dumping,” which certainly connotes a NME methodology, as in this dispute.
167 See supra note _.
168 Cite!
One might be tempted to translate this judicial incoherence into a matter of treaty compliance. Just as WTO members must comply with the WTO norms, their courts might also have to respect, in a hierarchical sense, the WTO Appellate Body decision. Nonetheless, it is not a settled law whether a domestic court must be bound by an international court decision over the same legal matter. As seen in a series of U.S. domestic court cases involving the Vienna Convention on the Consular Relations, even the general prevalence of the WTO norms as international law might not bring related domestic court decisions to conformity with those of the WTO tribunal.  

The proposal this Article presents is more modest, and therefore doable, than any radical judicial harmonization. The Article advocates some kind of discursive engagement between the domestic and the international (WTO) courts. It is a trans-judicial engagement that courts and judges conduct via citing and referencing each other’s interpretation and reasoning. Notably, such dialogue does not signify any radical departure from the existing legal system of both the U.S. and the WTO. In fact, it is reconcilable with both legal systems.

As for the WTO, its tribunal can cite or reference some of the main reasoning or narratives of a domestic court over a particular issue to the extent that such reasoning or narratives inform the WTO court’s own ruling in a meaningful way. While such contribution of the domestic court to international law is under-explored, the dialogue may still translate into an example of deference by the WTO court to the domestic government, such as the judicial organ. Likewise, the WTO tribunal’s reference to a domestic court’s reasoning is within the former’s standard of review in terms of an “objective assessment of the matter” under Article 11 of the WTO Dispute Settlement Understanding. As long as a WTO panel considers the domestic court’s decisions as “undisputed facts,” similar to the notion of “judicial notice” in the domestic legal system, the panel can factor them into its own ruling.

To the U.S. court, such an engagement may constitute a Charming Betsy moment in that the engagement can adjust the U.S. court’s interpretation to

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169 See supra _.
170 See supra _.
172 See Melissa Waters, Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 Geo. L. J. 487, 489-90 (2005) (observing that the role of the United States courts in the process of “international norm creation” is an under-explored area of study). See also Nollkaemper, supra note _, at 310 (noting that “it remains quite rare for the Court to refer to domestic case law in its determination of the state of international law”).
173 For example, the WTO Appellate Body referenced certain international environmental treaties to highlight a defending party’s past behaviors in the areas at issue. See e.g., World Trade Organization, Report of the Appellate Body, United States—Import Prohibition of Certain Shrimp and Shrimp Products ¶ 130, 132, WTO Doc No WT/DS58/AB/R (Oct 12, 1998) (referencing multilateral environmental treaties, such as the United Nations Convention on the Law of the Sea (“UNCLOS”) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) in interpreting the “exhaustible natural resources” phrase under GATT Article XX (g)).
174 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (“an 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 U.S. 997 (1999) (Breyer J., dissenting) (comparing the court’s reference to foreign and
international law (WTO jurisprudence), while the U.S. court need not directly “apply” the WTO court decisions in adjudicating domestic cases. At the same time, the discursive engagement can also be seen in sync with the Chevron doctrine, precisely its second prong, to the extent that such engagement is based on a firm legal foundation that the government must exercise its discretion in an unarbitrary manner in the face of textual ambiguity. Importantly, the WTO tribunal’s hermeneutical focus in the area of trade remedy has recently been convergent around a similar “reasonableness” test. To the extent that the WTO’s reasonableness test in the trade remedy law corresponds with the U.S. court’s rules of statutory interpretation, such as the Chevron doctrine, WTO norms can “form[] part of national law” via the discursive engagement.

Now as the DOC appealed the USCIT’s decision in the federal circuit, it is the Court of Appeals’ turn to engage in a discursive engagement with the Appellate Body. This Article argues that the Court of Appeals (the Federal Circuit) should find a useful guidance in the Appellate Body’s decision in upholding the USCIT’s decision in GPX I and GPX II. Despite the Appellate Body’s failure to reference the USCIT’s decision, the basic interpretive positions of these two courts on the issue of double remedies converge: both courts firmly recognized the existence of remedial nexus between countervailing and antidumping duties in case the DOC adopts a non-market economy methodology. Note that the existence of remedial nexus in this dispute eventually led to the existence of double remedies in both courts’ reasoning. The subtle interpretive convergence in this key issue between the USCIT and the WTO Appellate Body could motivate the Court of Appeals to reference the Appellate Body’s ruling.

Two recent developments set a positive tone for the Court of Appeals’ possible dialogue with the Appellate Body. First, the Court of Appeals (the Federal Circuit) has recently approved a motion to file an amicus brief submitted by the Chinese government despite the U.S. government’s opposition. The Court of Appeal’s decision to hear the Chinese government in this case is critical in that it has installed a channel, albeit indirect, by which it can situate itself into the WTO dispute between China (complainant) and the U.S. (defendant). Once the Court of Appeals weighs in arguments from both China and the U.S. over the same factual and legal issue as is before it, it will then find itself well-positioned to consult the Appellate Body’s decision. Second, the DOC has recently announced that it will implement the Appellate Body decision within a reasonable period of time. Considering that the Appellate Body decision addressed international law to “a decent respect to the opinions of mankind”). See also


177 Certain Norwegian Loans (France v. Norway), Preliminary Objections (sep. op. Lauterpacht), ICJR (1957), 40-41

178 U.S. Court of Appeals for the Federal Circuit, Case Number 11-1109, filed on Dec.8, 2010.


the same product-fact (certain pneumatic off-the-road tires) and the same legal issue (double remedies) as the Court of Appeals now adjudicates, the DOC’s decision to undo double remedies tends to make the pending dispute moot. Under these circumstances, the Court of Appeals can comfortably align its decision with that of the Appellate Body.

B. Three Conditions for a Discursive Engagement: Identity, Telos and Hermeneutics

Admittedly, a discursive engagement should not be taken for granted. We live in a dualist world where the opposite is a default pattern. Nonetheless, those “accommodating trends,” such as the ever-intensifying international economic integration, tend to activate certain latent conditions for such engagement or dialogue between a domestic and international court, in particular in the area of transnational business. Here, three critical judicial factors, i.e., identity, telos and hermeneutics, shared by both a domestic (U.S.) court and an international tribunal (a WTO panel or the Appellate Body) tend to make the discursive engagement discussed in this Article more likely than before. First, their common profession qua adjudicator, in particular in the areas of trade, tends to accord them a basic collegial bond between them. Secondly, the common telos, i.e., object and purpose, of the subsidy regime is likely to encourage both courts to study and reference each other’s ruling in this area. Finally, a common hermeneutical device shared by both courts, such as reasonableness, due process or fairness, in adjudicating a similar dispute, such as a double remedy, in a similar area, such as countervailing measures, tends to make both courts sympathize with each other’s decision and more willing to reference it to strengthen the rhetorical power of one’s own ruling.

1. A Common Identity

In general, both domestic judges and members of the WTO Appellate Body share a basic level of common knowledge and experience between them as a trade law adjudicator. This shared knowledge and expertise in the common profession (adjudicator) in turn help them form a common “identity.” Based on this common identity, both domestic and international courts can generate a “sense of collegiality,” especially when they face the same legal issue or dispute before them. In fact, this phenomenon of a firm trans-judicial bond between courts in different jurisdictions is not new. The subtle epistemic and teleological tie and partnership between the

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181 HABERMAS, supra note , at 126.
182 See Slaughter, A Global Community of Courts, supra note , at 193 (characterizing judges “not only as servants and representatives of a particular polity, but also as fellow professionals in an endeavor that transcends national borders”). In this regard, the American Society of International Law (ASIL)’s “Judicial Outreach Program” chaired by the former Justice O’Connor encouraged the U.S. judges to pay more attention to international law in an effort to facilitate the flow of international commerce. Id., at 199.
183 Id., at 192 (noting that “professional identity of the judges who sit on them, is forged more by their common function of resolving disputes”).
European Court of Justice and national courts of the European Union (EU) have been well documented by a number of scholars.185

Here, a considerable degree of overlapping in legal substance, such as parties’ claims and arguments, between a domestic court and an international tribunal offers a powerful rationale for a trans-judicial tiding between the two tribunals.186 Both tribunals may adjudicate essentially the same legal dispute whose nature remains international. Even when a local court adjudicates a domestic dispute in a technical sense, the essential character of the case can still be international in that the case at the same time involves, explicitly or potentially, those issues, claims, and arguments related to international law.187 As long as both national and international courts engage in the same (international) dispute, they are likely to share the same interest, and mission, qua court in resolving the same dispute.

In particular, from a more functional perspective, their common identity may also assume a critical role of “regulator” in such a specific area as trade remedy. Although their regulatory involvement appears rather indirect vis-à-vis ordinary regulators, such as domestic agencies (the DOC) or international bureaucracy (the WTO Subsidies and Countervailing Duties Committee), their rulings may still help undo an old policy or make a new one.188 This common role expectation tends to smooth the progress of an epistemic dialogue between the USCIT and the WTO tribunal by making it easier for them to interact and communicate with each other in this issue-specific (trade remedy) area.189

2. A Common Telos

The next catalyst for a discursive engagement can be found in the common telos of subsidy and countervailing norms in both legal systems. On the one hand, both the domestic (U.S.) and international (WTO) subsidy norms purport to prevent illegal subsidies from distorting the market mechanism and thus impeding free trade. To achieve this goal, both systems authorize importing countries to impose remedies (countervailing duties) on those subsidized imports. On the other hand, both systems also prevent these remedies from being abused for any protectionist purpose. Although both systems may have different legal technicalities in their rule books, they nonetheless share this common telos. As long as they share the common telos, courts in both

187 See also Anne Peters, International Dispute Settlement: A Network of Cooperational Duties, 14 EUR. J. INT’L L. 1, 3 (2003).
189 This professional, epistemic identity-building (“a shared sense of common judicial purpose”) among judges from different jurisdictions yet adjudicating a common issue can also be identified in the “death penalty” issue. See Waters, supra note __, at 519.
systems may find discursive room for cross-citations, cross-references and cross-fertilization.

First, the WTO Appellate Body recognized a WTO member’s right to levy countervailing duties on subsidized imports to offset the effect of such subsidization under Article VI of the GATT and Article 19 of the SCM Agreement. At the same time, however, the Appellate Body also observed that the object and purpose of the SCM Agreement is “to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures.”\(^{190}\) To establish these legal disciplines, the SCM Agreement “defines the concept of “subsidy”, as well as the conditions under which Members may not employ subsidies.”\(^{191}\) In sum, the WTO subsidy norms aim to “strike a balance between the right to impose countervailing duties to offset subsidization that is causing injury, and the obligations that Members must respect in order to do so.”\(^{192}\)

One may locate the similar object and purpose in the U.S. subsidy statute (U.S.C. §1671). Its “general rule” reads that:

\[\text{[T]he administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a } \text{countervailable } \text{subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States.}\]

\(^{193}\)

Here, the object and purpose (telos) of the U.S. domestic subsidy statute is to remedy only “countervailable” subsidies. This mission statement can be interpreted a contrario as a discipline over the administering authority that prohibits such authority from imposing any countervailing duties when it finds no subsidy to be countervailed in the first place.

This common telos tends to provide an essential discursive connection between the domestic (U.S.) court and the WTO tribunal in terms of reasoning and narratives. In particular, a notable narrative in the U.S. court rulings on a double remedy, which cascades from the telos (disciplines) of the U.S. subsidy regime, focuses on undue burdens that double remedies may inflict on respondents not only substantively but also procedurally. These burdens are in fact an obverse side of trade remedies since trade remedies, unlike other trade measures concerning state-to-state relations, directly target individual economic players, such as exporters. Accordingly, preventing an abuse of trade remedies parallels avoiding any undue burdens that may befall to exporters.

Substantive burdens that a double remedy may cause to both domestic (U.S.) importers and foreign (Chinese) producers are patent: the DOC imposes an extra countervailing measure despite an antidumping measure is sufficient to remedy any market distortion when non-market economy methodologies are used. As discussed


\(^{191}\) Id.

\(^{192}\) Id. (emphasis added)

\(^{193}\) U.S.C. §1671 (emphasis added).
above, a double remedy essentially means a double counting as it occurs in a non-market economy situation. Originally, “the [non-market economy] [antidumping] statute was designed to remedy the inability to apply the [countervailing duty] law to [non-market economy] countries.” In other words, when the DOC employs non-market economy methodologies in its antidumping proceedings, it already addresses any possible effect of subsidization occurring in that non-market economy. To be more precise, the export (U.S.) price is compared not with the home market (Chinese) price but with the (subsidy-free) normal value constructed from a third country (surrogate values). Therefore, without some adjustment, foreign producers pay twice for the same alleged unfair practice.

Here, the U.S. court’s substantive burden narrative is also operable in the WTO tribunal. As discussed above, a double remedy constitutes a violation of GATT Article VI:5, which prohibits the imposition of “both anti-dumping and countervailing duties to compensate for the same situation of dumping.” This “same situation of dumping” can be interpreted to refer to a non-market economy antidumping situation since when using non-market economy methodologies any subsidies are remedied through an antidumping measure. Therefore, if an extra countervailing measure is imposed in this situation, it would be to “compensate for the same situation of dumping,” thereby generating a double remedy consequence. Likewise, both GATT Article VI:3 and SCM Article 19.4 forbid the imposition of countervailing duties “in excess of” subsidies granted. Here, a non-market economy antidumping methodology, due to its use of surrogate values, inherently eliminates any subsidies to be countervailed. Thus, any countervailing duties imposed in this situation would be excessive.

Procedurally, the U.S. court held that the current DOC position on double remedies imposes an “impractical and onerous” burden on foreign producers who are required to “accurately prove what may very well be occurring” in the market due to the alleged subsidy. Note that the DOC itself acknowledged that the price effect of a subsidy in a non-market economy, if any, is “so uncertain that it would not have been a sound basis for any formal determination.” Therefore, the DOC essentially abandoned the basic proof burden it would bear as an investigator to the respondent. This proof burden-shifting tactic adopted by the DOC is nothing more than polemics in that it simply “highlight[s] the opponent’s inability to disprove her default premise (presumption).”

As is in the substantive burden narrative, this procedural burden narrative employed in the U.S. court can also find its discursive equivalent in the WTO norms. As discussed above, GATT Article VI:3 mandates a domestic subsidy authority (an importing country government), not a respondent (exporter), to determine the existence and the extent of any subsidy granted. Likewise, SCM Article 12.8 stipulates that a domestic subsidy authority “inform all interested Members and interested parties of the

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194 See supra _
195 GPX I, supra note _, at 16.
196 Id., at 18.
197 Id., at 17.
essential facts under consideration which form the basis for the decision whether to apply definitive measures.”

3. A Common Hermeneutics

Both a domestic (U.S.) court and the WTO tribunal may have its own hermeneutics that codes its own patterns of judicial thoughts or practices. Yet qua trade law court both judicial organs may share certain fundamental legal precepts in formulating their rulings. For example, “general principles of law,” which hold a dual status of being both a source of law and an interpretive device, may offer such a common hermeneutical tool to both domestic and international tribunals in that they are “embodiment of the highest principles.” Along this line, both courts adopt a common hermeneutical device geared toward administrative rationality, such as reasonableness, due process or fairness, in adjudicating a similar dispute in a similar area (such as a double remedy). To the extent of this judicial discretion-checking, both courts may sympathize with each other’s decision and more willing to cite it to strengthen the rhetorical power of one’s own ruling.

The WTO jurisprudence in the area of trade remedy has centered largely on administrative rationality, i.e., a “reasonable” exercise of discretion by domestic authorities. Throughout the course of investigation and determination, these authorities face countless moments of decision-making, big and small, regarding how to assess and weigh the facts as well as how to interpret their own domestic antidumping and countervailing duty statutes. Technical complexities, which are a defining nature of trade remedy laws and their application, tend to increase both the depth and the width of such discretion. If left unchecked, such vast discretion is prone to protectionist abuse. Therefore, the WTO jurisprudence in this field aims to discipline this untrammeled discretion of domestic authorities and prevent its abuse.

As is in domestic judicial review of administrative actions, WTO panels and the Appellate Body have relied on a traditional standard of “reasonableness,” which connotes both unbiasedness and objectiveness. For example, the panel in DRAMS (1999) highlighted that to continue a pre-existing antidumping order requires antidumping authorities to conduct a “practical reasoning” based on evidence, beyond mere presumption, on the probability of recurrence of dumping after the duty was

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199 SCM Agreement, art. 12. 8 (emphasis added).
201 ICJ Statute, art. 38(1)
204 In the area of AD law, Article 17.6 of the WTO AD Agreement seemingly grants domestic agencies wide deference in domestic antidumping investigations and determinations.
removed.²⁰⁵ Likewise, the panel in HFCS (2000) rejected Mexico’s argument that the investigating authority enjoyed full discretion to examine the impact of dumping “without explaining why some factors are not addressed”²⁰⁶ and ruled that an “analysis” based on evidence, beyond mere speculation, was required to conclude that a threat of injury existed due to dumped imports.²⁰⁷ In a similar context, panels and the Appellate Body have often condemned specific assessments of facts by domestic authorities on the ground that an “unbiased and objective investigating authority” could have reached a different outcome.²⁰⁸ In so doing, the WTO tribunal has also criticized futile excuses by domestic authorities as “ex post rationalization.”²⁰⁹

In many cases, government officials’ abuses of discretion lead to the flunking of due process, such as reason-giving. As the Steel Rebar (2002) panel observed, certain due process provisions under the WTO Antidumping Agreement “leave to the discretion of the investigating authority exactly how they will be performed.”²¹⁰ This interrelation may best be located in the case law involving the “facts available.” It is a widespread practice for antidumping authorities to rely on adverse information, the titular “facts available,” which are often provided by petitioners, on the ground that foreign producers or exporters fail to cooperate or submit necessary data in a timely fashion.²¹¹ Of course, it is those authorities who determine whether to use facts available, which are prone to profuse discretion. Panels and the Appellate Body aim to check this discretion.

The panel in Hot-Rolled Steel (2001) faulted the DOC’s indiscretion to reject information submitted by a Japanese producer and instead turn to the adverse facts available. The DOC refused to accept and use the information for the sole reason that the submission missed the deadline, although it was within a reasonable period of time.²¹² The panel emphasized that cooperation in an antidumping investigation is a “two-way process” which requires a “good faith” effort not only from foreign producers but also from the investigating authority itself.²¹³ The panel in Steel Rebar (2002) also found it to be a violation of good faith when the Egyptian antidumping authority dismissed as unverifiable necessary information submitted by Turkish producers on the sole ground of “minor flaws.”²¹⁴

²⁰⁷ Id., ¶ 7.141.
²¹⁰ Steel Rebar (2002), ¶ 7.2.
²¹¹ Cho, Anticompetitive Trade Remedies, supra note __, at 376.
²¹² Hot-Rolled Steel (2001), Appellate Body Report, ¶¶ 87, 94.
²¹³ Id., ¶¶ 101, 104.
In the same line, the panel in *Steel Plate* (2002) criticized the DOC for relying entirely on the facts available in calculating dumping margins after it dismissed, without a valid basis, U.S. sales information provided by an Indian steel producer as unverifiable, tardily submitted or otherwise flawed. Here, the panel’s disciplining of the DOC’s investigatory discretion seems to originate from “due process” concerns in that the panel highlighted an investigating authority’s obligation to provide an opportunity to explain or defend to foreign producers before the authority relies on the facts available that are adverse to these parties. In assessing whether a domestic authority’s investigation is consistent with due process, the WTO tribunal evaluates whether the exercise of its discretion is acceptable or reasonable.

Markedly, the same general legal principles, such as reasonableness, fairness and due process, can be distilled from the U.S. jurisprudence in the same area of administrative law, i.e. trade remedies. For example, the USCIT in *GPX I* and *GPX II* has employed the well-established *Chevron* doctrine that guarantees the discretion of government agencies, such as the DOC, only to the extent of reasonableness. If the DOC makes its policy outside of this zone of reasonableness, the court will invalidate such a policy. This is one of the backbones of the domestic (U.S.) administrative law.

First of all, the court cautiously delineated the zone of discretion (deference) in which the DOC would make policies on a double remedy issue without breaching the delegated statutory boundary. The court viewed that since the relevant countervailing duty law provisions, such as 19 U.S.C. §§ 1671 and 1677(5), are ambiguous, the DOC is neither barred from imposing countervailing duties on non-market economy imports nor required to do so. As a next step, the court had to decide, in pursuit of *Chevron*, whether the DOC’s new interpretation in favor of the imposition of double remedies was “reasonable.” Then, the court held that:

If Commerce is to apply [countervailing duty] remedies where it also utilizes [non-market economy] [antidumping] methodology, Commerce must adopt additional policies and procedures for its [non-market economy] [antidumping] and [countervailing duty] methodologies to account for the imposition of the

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217 As discussed above, while several attempts had been made in the Congress to grant the DOC the explicit authority to impose CVDs to NME imports, none of them was adopted. See supra _.

218 *GPX I*, supra note _, at 2-3.

219 _Id._, at 13.

220 _Id._, at 9; *See Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994) (“Chevron requires us to defer to the agency’s interpretation of its own statute as long as that interpretation is reasonable.”).
[countervailing duty] law to products from a [non-market economy] country and avoid to the extent possible double counting of duties.221

Therefore, without such adjustment to avoid double counting problems a double remedy would be unreasonable or constitute an abuse of the DOC’s discretion.222 This position was reaffirmed when the DOC had failed to comply with the court’s initial remand order.223

Even from the standpoint of respondents (importers or foreign producers), it appears reasonable to expect that the DOC would not alter its long-standing policy of refraining from imposing double remedies on non-market economy imports. It had been a firm position of DOC, which the court had also endorsed, that the broad AD margin calculated with non-market economy methodologies would also remedy any assessable subsidy benefits that a countervailing duty margin is supposed to countervail and therefore any concurrent countervailing duty duties would counteract the same measure (subsidization) twice (double counting).224 One might argue that the DOC would be estopped from imposing a double remedy as long as a target country remains a non-market economy.225

C. From a Discursive Engagement to a Global Administrative Law

As discussed above, in the area of trade remedy law in general, and double remedies in particular, both the U.S. court and the WTO tribunal (Appellate Body) share a common identity, telos and hermeneutics that guide their judicial reasoning. The common identity qua adjudicator tends to accord both courts a basic collegiality. The common telos pursues a balance of importing countries’ rights to remedy market distortions and their obligations not to abuse these remedies. Concomitantly, the common hermeneutics, informed by general principles of law, such as reasonableness, fairness and due process, tends to offer a converging pattern of interpretation on this area. These three factors shared by the U.S. international trade court and the WTO tribunal will create an auspicious environment for both courts cross-cite, cross-reference and cross-fertilize with each other over the same dispute and subject-matter before them.

As discussed above,226 these common factors, while latent in the past, have recently been activated against the recent background of postnational constellation. If further regularized and routinized under these facilitative condition, the more matured

221 GPX I, supra note __, at (emphasis added).
222 Id., at 13; Georgetown Steel, supra note __, at 1318; CRS 2007 Report, supra note __, at 12.
223 “If there is a substantial potential for double counting, and it is too difficult for Commerce to determine whether, and to what degree double counting is occurring, Commerce should refrain from imposing CVDs on NME goods until it is prepared to address this problem through improved methodologies or new statutory tools,” GPX I, supra note __, at 18.
224 Id.
225 However, the DOC has recently contended that it may identify countervailable subsidies in China despite the latter’s NME status due to the recent market reform. CRS 2007 Report, supra note __, at 2-3.
226 See supra text accompanying note __.
and deepened level of judicial engagement between the two courts may envision a broader “interpretive community” in which these courts can establish an identifiable pattern of common interpretations.227 This discernible judicial mutual trust provides an auspicious path toward the reconciliation of domestic and international administrative law and eventually the globalizing of administrative law. The globalizing of administrative law or “global administrative law,” at least for the purpose of this Article, does not represent any specific body of harmonized rules. Instead, it denotes a common set of interpretive principles (references) that can guide both a domestic international trade law courts and a WTO tribunal in a consistent and coherent manner.

Notably, the extended level of judicial engagement between two administrative (trade) law courts – domestic and international – will help domestic judges overcome any unnecessary anxiety in counseling the WTO jurisprudence over the same issue areas. The WTO tribunal’s frequent referencing of domestic court decisions in relevant occasions will bestow on the U.S. courts a sense of reciprocal collegiality. Given these circumstances, the U.S. court may be in a better position to exercise judicial comity toward the WTO tribunal. This diffusive nature of global administrative law will eventually promote norm internalization of the WTO norms in the domestic legal system.228 Here, not only the WTO tribunal but also the U.S. international trade law court takes part in the globalizing of administrative law. This vital participation from domestic courts tends to legitimizes their use of these common interpretive principles (general administrative law) in their own decisions.229 This judicial diffusion tends to offer a new mode of norm internalization distinguishable from the conventional, formal concept of treaty compliance.230

Undoubtedly, this phenomenon of the globalizing of administrative law will contribute to the reduction of uncertainty (risk premiums) on the part of global business and thus to the predictability of both domestic and international trade remedy law.231 Yet this ultimate contribution of discursive engagement via the globalizing of administrative law cannot be fully grappled without exploring the role of its cardinal beneficiary of this diffusive jurisgenerative process, i.e., private economic players. It is private actors, such as exporters, importers, shippers, bankers and consumers, as well as their existential status in the global marketplace, which tend to legitimize the very notion of global administrative law in the area of trade remedies. While nations trade

227 See supra text accompanying note _.
228 See Aceves, supra note _, at 173.
229 See Koh, Bringing International Law Home, supra note _, at 680.
230 Compliance with international law is not a static incidence as its conventional obsession with a dichotomy of compliance and violation might misleadingly insinuate. From this standpoint, compliance might be something to be imposed from above. However, this static view is largely oblivious to a more dynamic, and sociological, process under which various actors, private and public, interact and interplay so as not only to transpose but more to “internalize” international law within the domestic system. Since this norm internalization is a sociological process, certain cognitive aspects, such as learning, persuasion, empathy and peer pressure, are involved. This is why some scholars highlight the endogenous, structural density of norm internalization, employing some characteristic languages such as “stickiness.” See Koh, Transnational Legal Process, supra note _, at 204.
231 Cf. Ahdieh, supra note _, at 2125 (arguing that “common international norms of due process as developed through dialectical exchange also would offer significant benefits in the realm of international economics”).
with each other, it is actually private parties that conduct the numerous transactions on a daily basis that collectively constitute trade.\textsuperscript{232} Moreover, laws of trade remedy, unlike other areas of international trade, directly involve behaviors of private actors, i.e., foreign producers. Therefore, although those private parties may not directly invoke global administrative law either as a cause of action or as an affirmative defense in a domestic litigation,\textsuperscript{233} it may still provide a certain normative guidance with domestic governments in light of “indirect effect.”\textsuperscript{234}

Moreover, as the main constituencies for this global administrative law, these private parties can also play the critical role of norm sponsors who help “internalize” this global, or transnational, body of law further into the domestic legal system.\textsuperscript{235} These private economic players are “norm entrepreneurs”\textsuperscript{236} whose interests in normative reconciliation tend to steer both the domestic and the WTO court to gravitate toward global administrative law in the area of trade remedy. Once these global norms “emerge[,]” these private actors, through various channels such as litigation or policy consultation, help these nascent norms “cascade” further into the domestic public sphere via learning and socialization. In this regard, one can identify a certain transmissive pathway in which domestic actors debate, interpret and eventually internalize international norms.\textsuperscript{237} Therefore, this type of norm internalization process is diffusive, osmotic and incremental, rather than direct, radiative and immediate, which the traditional concept of treaty compliance tends to conjure up.

In sum, as judicial actors (domestic judges and WTO panelists or Appellate Body members) engage in a discursive engagement mostly in an epistemic, or even experimental, fashion, it is private-commercial actors who actually sponsor and promote such phenomenon with a practical motivation, i.e., judicial reconciliation and accompanying reduction of risk premiums in the global marketplace.

\textbf{D. Legitimacy of a Discursive Engagement}

While the aforementioned discursive engagement is a celebrated tendency to some, it may nonetheless raise certain questions to others. Three issues stand out. First,
some domestic (U.S.) scholars fear that a discursive engagement somehow corrupts their unique legal culture. They contend that “judicial injection of (...) supposed international law (...) denigrates the relevance many have had for the uniqueness of the U.S. system.”

Perhaps this deeply entrenched apprehension of the judicial corruption might explain the “national prejudice” found in most domestic courts.

Second, from a diametrically opposite angle to the first concern, developing countries might suspect that developed countries’ courts, which are equipped with abundant judicial experts and resources, would dominate the discursive engagement with international tribunals. Some scholars even view that the U.S. courts are “global governors.” In this regard, scholars from developing countries cast their suspicion on the nascent notion of global administrative law along the line of neo-imperialism.

Finally, other scholars point out the risk of “capture” in the discursive engagement. It is mostly private actors (businesses) that initiate litigations triggering the dialogue between domestic courts and international tribunals. Both domestic and international courts rely on these private parties’ initiation – both of facts (evidence) and law (arguments). Therefore, it is likely that resourceful private parties are well-positioned to influence both the direction and contents of the dialogue. As discussed above, developed countries’ courts, captured by powerful private parties, might steer the discursive engagement and consequent global administrative law to their own advantage. If this captured version of global administrative law, whose hallmark is often deregulation-cum-privatization, is imposed on developing countries, the latter might find less room for their regulatory autonomy.

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239 Wolfgang Friedmann warns us on the “national prejudice” that domestic courts tend to harbor in the development of transnational law. WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 147 (1964). According to him, “[f]ew national courts have been able to resist the temptation of modifying doctrine when national passion area aroused.” Id.

240 Reza Dibadj, Panglossian Transnationalism, 44 STAN. J. INT’L L. 253, 279 (2008) (observing that developing countries’ courts might be disadvantaged in the creation of transnational law due to the relative lack of judicial resources).


242 See e.g., B.S. Chimni, Co-Option and Resistance: Two Faces of Global Administrative Law, 37 N.Y.U. J. INT’L L. & POL. 799, 806 (2005) (observing that an emerging notion of global administrative law is an essential character of imperial international laws and institutions); B.S. Chimni, International Institutions Today: An Imperial Global State in the Making, 15 EUR. J. INT’L L. 1 (2004) (arguing that a “transnational capitalist class” (TCC) has recently shaped international economic norms and institutions to its advantage and that these imperial developments deepened the North-South divide).


244 Dibadj, supra note _, at 284-85 (noting that while liberalism provides an intellectual justification for the enhanced role of private parties in the transnational decision-making process, it is still deeply problematic in that those private parties are “unaccountable” in a public sense).
The first fear of the judicial corruption appears to be over-exaggerated. Most of all, a discursive engagement by no means denotes any unswerving imposition or application of international law by domestic courts. Instead, it means nothing more than reference or citation of international court rulings in a way that guides domestic courts’ reasoning. In a more technical sense, this type of dialogue may be translated into pre-established judicial practices, such as “judicial notice.”

Critically, any reflexive opposition to a discursive engagement betrays the highly “disarticulated” use of “sovereignty” which is nothing but a sheer isolationist attempt to alienate a domestic legal system from the external world, including the WTO system. More often than not, a nearly “emotional appeal” for a rough notion of sovereignty conceals protectionist motivations or other oppositions to legitimate global regulatory efforts. Accordingly, such a dismissive reaction to a discursive engagement tends to block otherwise constructive discourses on the allocation of regulatory competence between a domestic system and the WTO. Likewise, this culture of “veto,” in particular when exercised by powerful countries, such as the U.S., risks poisoning the atmosphere of international cooperation. If left unchecked, those powerful countries

Footnotes:

245 Fed.R.Evid. 201 (regarding “judicial notice of adjudicative facts”).
246 See Brown v. Piper, 91 U.S. 37, 42 (1875) (“Among the things of which judicial notice is taken are the law of nations; the general customs and usages of merchants ....”). See also Daniel A. Farber, The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History, 95 CAL. L. REV. 1335, 1344-52 (2007) (aptly observing that the law of nations and foreign laws greatly influenced the Framers and the the Supreme Court in early times).

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might be tempted to replace compliance with international norms with a convenient evocation of a “mantra” of sovereignty.\textsuperscript{250}

However, it is vital to note that the very notion of sovereignty itself must be transformed in the current interdependent international environment. For example, as Abraham Chayes and Antonia Chayes urged, nations must embrace the “new sovereignty,” which is more constructive and participatory than the old inward-looking concept.\textsuperscript{251} Under this new sovereignty, a discursive engagement may well be welcome as a salutary enterprise to improve regulatory performance not only in a domestic but also in a global sphere. After all, in this interdependent world, staying connected with the external (international) legal system is in fact to preserve, not undermine, sovereignty itself.\textsuperscript{252} It is in the “enlightened national interest.”\textsuperscript{253}

In contrast, the second and third criticisms do raise legitimate concerns. The developmental disparity in resources and opportunities between the North and the South in engaging in the discursive engagement is undeniable. Concomitantly, the nature of democracy and freedom of speech inevitably nurture the lobbying culture, increasing the risk of capture. Nonetheless, the more recent micro-business transformation, such as global supply chains, tends to substantially mitigate these concerns.

Most of all, the development of sophisticated global sourcing has altered the conventional political economic dynamics. Now, economic interests of both domestic business (such as retailers and domestic consuming industries) and international business (such as foreign producers and logistic managers) have dramatically converged. For example, in the past the U.S. shoe industries would have endeavored to preserve biased trade remedy jurisprudence both in the domestic court and in the GATT panel, which would have hurt both domestic retailers and foreign shoe producers. More recently, however, shoes are almost entirely sourced from developing countries and shipped to the U.S. distributors. As more domestic players, such as distributors and retailers, as well as foreign manufacturers and various supply chain participants, co-prosper, there will be more room for a discursive engagement in the area of trade remedy law. In the same vein, more foreign players tend to get direct access to domestic courts to seek relief in the area of trade remedy law. Many Chinese and Indian companies now hire U.S. law firms and sue the DOC for the latter’s antidumping and countervailing duty determinations. This is another trend militating against both the Western bias of the dialogue and the capture risk.

\textsuperscript{252} Jenny S. Martinez, Towards an International Judicial System, 56 STAN. L. REV. 429, 474-75 (2003) (submitting that promoting the well-arranged interaction between the domestic legal system and the outside world is not about eroding sovereignty but about protecting our values).
\textsuperscript{253} FRIEDMANN, supra note _, at 48.
V. CONCLUSION: FROM CONTROL TO COMMUNICATION

This Article presents the case for a discursive engagement against the backdrop of a recent trade dispute between the U.S. and China that rendered both a domestic court ruling and a WTO decision on the same legal issue (double remedies). The Article argues that the WTO Appellate Body should have found a useful judicial guidance on an earlier ruling by the USCIT in GPX I and GPX II and that the Court of Appeals should exercise a judicial notice on the fact that the Appellate Body has struck down double remedies in adjudicating the same dispute with the same facts and legal claims. If regularized, this discursive practice, which the Article conceptualizes as a discursive engagement, may generate a certain set of core principles of administrative law, i.e., a global administrative law, informed by both domestic trade remedy law and WTO subsidy norms. This nascent notion of global administrative law can help the global business reduce the uncertainty that potential legal incoherence between a domestic court and an international tribunal on the same issue might cause.

Granted, the specific issue of double remedies involving China discussed in this Article will have become moot at the end of 2016 when the Chinese non-market economy status expires under the Chinese WTO Accession Protocol. Nonetheless, the nascent notion of a discursive engagement and global administrative law in general is likely to claim continuing ramifications beyond this particular case as long as the same legal issues, in particular in such areas as trade remedy, are adjudicated both in a domestic court and the WTO tribunal, thereby generating risks for legal incoherence between the two jurisdictions.

Finally, this diffusive process of transnational norm-making, albeit incremental, may hold a number of merits vis-à-vis a more direct international law-making process, such as negotiation. The conventional treaty-based compliance mostly aims to “control” its members’ behaviors by forcing them to abide by certain treaty obligations, which may inherently suffer both ambiguities and rigidities. In contrast, the discursive engagement and the globalizing of administrative law may promote a more effective transnational norm-building by placing both national and WTO courts in the shared interpretive community. In this regard, a discursive engagement represents a critical paradigm shift embedded in the very notion of global administrative law, i.e., from control to communication.

\[254\] Cf. Waters, supra note _, at 530-31 (observing that treaty negotiations have failed to offer guidance to domestic courts concerning a proper balance between domestic norms and international law).