RESOLVING THE DOUBLE REMEDY DISPUTE: A CRITIQUE OF THE WTO APPELLATE BODY’S DECISION IN UNITED STATES – DEFINITIVE ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN PRODUCTS FROM CHINA

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I. INTRODUCTION

On March 29, 2007, the United States Department of Commerce (Commerce) reversed its long-standing policy prohibiting the application of countervailing duties against nonmarket economy countries. Consequently, Commerce began to apply countervailing duties to products from China and Vietnam that were also subject to antidumping duties. China challenged the new U.S. practice before a World Trade Organization (WTO) panel. China argued that Commerce’s actions were inconsistent with the United States’ WTO obligations under the General Agreement on Tariffs and Trade 1994 (GATT 1994), the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the Antidumping Agreement (AD Agreement), and the Protocol on the Accession of the People’s Republic of China (Accession Protocol). According to China, Commerce’s application of both countervailing and antidumping duties resulted in a “double remedy” for the U.S. industry, specifically that the effect of Commerce’s methodology for determining antidumping duties against nonmarket economy countries was to

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8 Panel Report, supra note 3, at ¶ 14.44.
9 Id. at ¶ 14.50.
offset the same instance of subsidization twice—once through the imposition of the countervailing duty and again through the application of the antidumping duty.\(^{10}\) Although the Panel found that a double remedy was “likely,”\(^{11}\) it held that “China did not establish that the United States acted inconsistently with its obligations under … the SCM Agreement.”\(^{12}\) China appealed the latter conclusion, along with other aspects of the Panel decision,\(^{13}\) to the WTO Appellate Body (AB).\(^{14}\) In 2011, the AB reversed the Panel Report’s conclusion—but haphazardly provided an attempted solution to the double remedy dispute in a section titled “The Completion of the Analysis.”\(^{15}\)

This Note is about the AB’s decision, particularly the “Completion of the Analysis” section. The AB held that the application of concurrent duties that offset the same subsidization twice is not consistent with Article 19.3\(^{16}\) of the SCM Agreement because that article requires that an investigating authority collect countervailing duties “in the appropriate amounts.”\(^{17}\) But in doing so, the AB concluded that an investigating authority has an affirmative obligation under the SCM Agreement to ascertain the amount by which a countervailed subsidy lowers the export

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\(^{10}\) Id. at ¶ 14.70.

\(^{11}\) Id. at ¶ 17.1(e)(ii).

\(^{12}\) Id. at ¶ 17.1(e)(ii).

\(^{13}\) Although the Panel and the AB addressed other issues, this Article will only address the double remedy issue.

\(^{14}\) Notification of an Appeal by China, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, ¶ 1, WT/DS379/6 (Dec. 6, 2010).

\(^{15}\) See Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, ¶ 592, AB-2010-3 (Mar. 11, 2011) [hereinafter AB Report].

\(^{16}\) Article 19.3 of the SCM Agreement provides in full,

> When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, \textit{in the appropriate amounts in each case}, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

SCM Agreement, supra note 5, at art. 19.3 (emphasis added).

\(^{17}\) See AB Report, supra note 15, at ¶ 606.
price of a product, which depends on whether and to what extent domestic subsidies have “passed through”\(^\text{18}\) to the export price.\(^\text{19}\) As such, the investigating authority must take the necessary steps to adjust its methodology to take account of this factual situation, including the degree of pass-through of the subsidy.\(^\text{20}\) The AB’s decision has had a powerful and ongoing effect, leading to the United States Congress’s March 2012 passage of “An Act to Apply the Countervailing Duty Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, and for Other Purposes” and to extensive changes in Commerce’s administrative practice for extant and newly filed trade cases.\(^\text{21}\) Commerce practice is now again before the WTO’s AB to determine its consistency with the decision that this Note addresses.\(^\text{22}\)

The AB’s Completion of the Analysis poses several questions. Must an investigating authority adjust for the full doubled remedy in the countervailing and antidumping calculations by setting the countervailing duty equal to only the portion of the subsidy passed through to export price and adjusting the antidumping duty for any excess remedy still represented in a diminished countervailing duty? Is it possible to reconcile U.S. law, which requires the amount of the countervailing duty to be equal to the amount of subsidy that is found to exist, and the AB’s decision?\(^\text{23}\) In order to meet its WTO obligations, should the United States return to its

\(^{18}\) “Pass-through” is an economic term that describes the amount of the subsidy that affects the export price. See JACOB VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 170 (Augustus M. Kelley, Publishers 1991) (1923) (remaining the definitive history of anti-dumping and countervailing duty measure up to 1923).

\(^{19}\) AB Report, supra note 15, at ¶ 595.

\(^{20}\) Id.


long standing policy of prohibiting the imposition of countervailing duties to non-market economies?

This Note argues that the Completion of the Analysis neither factually nor legally solves the double remedy dispute. Part II provides background on U.S. countervailing and antidumping duty law. Part III introduces the double remedy dispute in greater detail, examines the AB’s analysis of the double remedy issue, and illustrates its failure to factually and legally solve the double remedy dispute. Part IV suggests three adjustments to the United States’ countervailing and antidumping methodologies that might resolve the dispute. Part V concludes.

II. BACKGROUND AND HISTORY TO THE DOUBLE REMEDY DISPUTE

A. A Review of U.S. Countervailing and Antidumping Duty Administration

Countervailing and antidumping duties are types of trade remedies. Nations employ trade remedies as mechanisms to protect domestic industries from the competitive pressures of imports. They are “remedies” under the controversial theory that they correct market failures introduced by subsidization by foreign governments or exporter market power, thus creating a “level playing field.”

Both countervailing and antidumping duty law of the United States fall under Section 19 of the United States Code, Chapter 4, titled “The Tariff Act of 1930.” Under U.S. law, Commerce is the “investigating authority,” responsible for the imposition of countervailing and

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26 Id.
27 See 19 U.S.C. §§ 1671–1677 (2006). The procedural aspects of countervailing duties fall largely under 19 U.S.C. § 1671–1671(h); the procedural aspects of antidumping duties fall largely under 19 U.S.C. §§ 1673–1673(i). Id. Although Parts 3 and 4 contain a mix of procedural and substantive provisions, the law maintains the separate identities of countervailing and antidumping duties. Id.
antidumping duties.\textsuperscript{28} As a signatory to the WTO Agreement, the United States agrees to consistency with the WTO agreements in law and practice.\textsuperscript{29}

1. Countervailing Duties

A countervailing duty is a tariff levied on an imported good to offset subsidies provided to producers or exporters of that good in the exporting country.\textsuperscript{30} A subsidy is a financial contribution offered by a government that confers a benefit.\textsuperscript{31} In theory, a countervailing duty does not create a distortion in trade because the import duty is equal to or less than the amount of the conferred subsidy, offsetting—that is, countervailing—the subsidy’s effect and restoring neutrality.\textsuperscript{32} The economic reasoning is that a competitive industry will reflect, in its pricing, the full amount by which costs are lowered due to a subsidy.\textsuperscript{33} The rationale for setting an offsetting duty arises from a concern that a lowered price in the importing country could harm an industry in that country.\textsuperscript{34} While the original economic rationale for the countervailing duty applied to export subsidies alone, The Tariff Act of 1922 extended countervailing duties to subsidies on the manufacture or production of commodities.\textsuperscript{35}

\textsuperscript{28} JOHN H. JACKSON, supra note __, at 259.
\textsuperscript{32} JOHN H. JACKSON, supra note __, at 247–48.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} See U.S.C. § 1677(5) (2006). Export subsidies encourage export sales over domestic sales; a typical example would be a favored tax treatment for revenues earned from exports. Subsidies on the manufacture or production of an article typically lower production costs; an example would be subsidized loans from a government to particular industries. The latter subsidies also include those on distribution, financing, and so forth, and are typically called “domestic” subsidies to distinguish them from subsidies aimed to encourage exports over domestic sales. Unlike export subsidies, domestic subsidies are not specific to any particular market.
When Commerce initiates a countervailing duty proceeding, the proceeding is against a country and a product.\textsuperscript{36} For example, a countervailing duty proceeding on the product, light-walled rectangular pipe and tube, from China might have the caption, “\textit{Light-Walled Rectangular Pipe and Tube – China}.”\textsuperscript{37} The same product will have different proceeding if a different country is involved, such as “\textit{Light-Walled Rectangular Pipe and Tube – Turkey}.”\textsuperscript{38} The results of a countervailing duty proceeding—the amount of duty imposed—in general will vary from country to country depending on the separate facts of the proceedings.\textsuperscript{39} If Commerce initiates a concurrent antidumping proceeding against the same country and product as the countervailing duty proceeding, the antidumping proceeding is independent from the countervailing proceeding, with its own record, distinct from that of the countervailing duty proceeding.\textsuperscript{40}

In the United States, the imposition of a countervailing duty requires the establishment of three elements: (1) the existence of a subsidy on the target imports (subsidization), an inquiry conducted by Commerce; (2) the existence of material injury or threat thereof, to an industry in the United States (injury), an inquiry pursued by the International Trade Commission\textsuperscript{41} (ITC); and (3) a causal link between the subsidy and the injury (causation), also investigated by the ITC.\textsuperscript{42} If subsidization, injury, and causation are present, Commerce sets the amount of the countervailing duty “equal to the amount of the net countervailable subsidy.”\textsuperscript{43}

\textsuperscript{36} See, e.g., \textit{Welcome to the USITC Five-Year (Sunset) Reviews}, U.S. INT’L TRADE COMM’N,\texttt{http://pubapps2.usitc.gov/sunset/} (last visited Apr. 5, 2013) (providing general and schedule information concerning the ITC’s Five Year Reviews, as well as links to relevant Federal Register notices and useful Commission publications and resources).
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} See supra text accompanying note 28.
\textsuperscript{43} 19 U.S.C. § 1671(a) (2006).
One of the most significant changes to U.S. countervailing duty law came in 2007 when Commerce reversed a longstanding policy that prohibited the application of countervailing duties to non-market economies.\textsuperscript{44} Commerce had adopted this policy in 1984,\textsuperscript{45} and the United States Court of Appeals for the Federal Circuit (CAFC) affirmed the policy in 1986, concluding that application of countervailing duty legislation to non-market economy countries is inappropriate because a “non-market economy would in effect be subsidizing [itself].”\textsuperscript{46} Non-market economies were entirely exempt from countervailing relief because Commerce had no adequate way to measure the market distortions caused by the foreign government subsidies in an economy that is not based on market principles.\textsuperscript{47}

In reversing its policy, Commerce argued that China had enacted significant and sustained economic reforms, which allowed China’s economy to advance sufficiently beyond the “Soviet-style command economy,” so that Commerce could meaningfully quantify subsidies.\textsuperscript{48} As a result, Commerce could quantify the transfer of specific financial contributions and benefits from the government to producers in China.\textsuperscript{49} More specifically, “Commerce determined that wages between employers and employees largely appeared to be subject to renegotiation; 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 had been liberalized. Commerce noted that China’s present-day economy ‘features both a certain degree of

\begin{footnotes}
\textsuperscript{45} JEANNE J. GRIMMETT, \textit{supra} note __, at 7.
\textsuperscript{46} Georgetown Steel v. United States, 801 F.2d 1308, 1316 (Fed. Cir. 1986).
\textsuperscript{47} Market principles, in this context, means that buyers and sellers are free to transaction, broadly through the economy, so that forces of competition determine prices. \textit{See} JOHN H. JACKSON, \textit{supra} note __, at 335.
\textsuperscript{49} Id.
\end{footnotes}
private initiative as well as significant government intervention, combining market processes with continued state guidance.’’

Commerce, however, continued to treat China as a non-market economy country for antidumping purposes due to remaining government constraints, such as the slow process of liberalizing the renminbi,\(^\text{51}\) the continuing restrictions on foreign investment, the slow pace of reforms in the banking sector, and the limitations on private ownership.\(^\text{52}\)

2. Antidumping Duties

Unlike countervailing duties, antidumping duties do not offset foreign government subsidies, but remedy situations where “dumping” exists.\(^\text{53}\) Dumping refers to a company selling in an export market below a benchmark level, called “fair value” or “normal value.”\(^\text{54}\) In other words, the foreign manufacturer charges a price for its product that is “less than its fair value.”\(^\text{55}\) An investigating authority imposes antidumping duties against a product or a country to offset “unfairly” low prices offered by a foreign producer or exporter.\(^\text{56}\)

Like the application of countervailing duties, to impose an antidumping duty, U.S. law requires three elements: (1) the presence of dumped goods (dumping); (2) a material injury or


\(^{51}\) Renminbi refers generally to the legal tender of the People’s Republic of China with the yuan as the basic unit. MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/ (last visited Apr. 7, 2013).


\(^{53}\) EDWIN VERMULST, supra note __, at 1.

\(^{54}\) Id.


\(^{56}\) See EDWIN VERMULST, supra note __, at 1.
threat of a material injury (injury);\textsuperscript{57} and (3) a causal link between the dumping and the injury (causation).\textsuperscript{58} The double remedy issue is a result of the methodology that Commerce uses to establish the first element. Commerce determines whether the manufacturer’s goods are sold in the United States for less than its normal value, calculating the dumping margin equal to any excess of normal value over the net U.S. price.\textsuperscript{59} The objective of the normal value and export price calculations is to put both amounts on a net, ex-factory basis to allow for comparability.\textsuperscript{60}

Commerce calculates the “net U.S. price” starting from the price charged to a U.S. customer and netting back for movement and other expenses to the factory gate in the exporting country.\textsuperscript{61} Commerce determines normal value from one of three sources: (1) the net home market price in the exporting country; (2) third country prices charged by industries in the exporting country; or (3) constructed value.\textsuperscript{62}

**Home Market Prices:** The home market price is netted back to the “ex-factory level” for the product under investigation.\textsuperscript{63} This is the preferred method for determining a dumping margin for each foreign firm.\textsuperscript{64} The ex-factory level is the implicit price of the product at the moment it leaves the factory and is calculated separately for different firms involved in a proceeding.\textsuperscript{65}

**Third Country Prices:** If the product is not sold or offered for sale in the foreign firm’s domestic market, Commerce sometimes uses third country prices, calculating the ex-factory

\textsuperscript{60} Id.
\textsuperscript{62} Id.
\textsuperscript{64} See id.
equivalent of the price at which the product is sold or offered for sale in countries other than the United States.\textsuperscript{66}

\textbf{Constructed Value}: Commerce has broad discretion to use a “constructed value” instead of sales as a basis for normal value.\textsuperscript{67} The production costs of the exported product are grossed up for selling and general expenses, as well as an imputed profit, to reach a proxy for factory-gate prices.\textsuperscript{68} In cases involving market economies, the production costs are those of the firm under investigation.\textsuperscript{69}

In the case of non-market economy countries, the above hierarchy is abandoned in favor of always using constructed value based on “surrogate” costs of production.\textsuperscript{70} In order to apply the non-market economy country methodology, Commerce must determine that “the subject merchandise is exported from [a non-market economy] country,”\textsuperscript{71} which is defined as “any foreign country that Commerce determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.”\textsuperscript{72} The standard constructed value methodology causes problems when applied to non-market economies because non-market economies do not allocate resources according to traditional market concepts of supply and demand, thereby making determinations of input prices almost impossible.\textsuperscript{73} Because Commerce considers China to be a non-market economy, it uses

\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} See 19 U.S.C. § 1677b(c) (2006) (stating when “(A) the subject merchandise is exported from a nonmarket economy country, and (B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined … the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, covering, and other expenses.”).
\textsuperscript{73} See Georgetown Steel v. United States, 801 F.2d at 1316.
surrogates for input prices: the value of those inputs in another, market economy, often India. \footnote{See supra text accompanying note 13.} This includes finding surrogate values for overhead, general, and financial expenses. It then calculates normal value for the determination of antidumping duties using the surrogate input prices applied to the actual physical consumption of inputs by the Chinese firms.\footnote{Id.}

If Commerce finds that dumping has occurred, it establishes the “dumping margin” by calculating the amount by which the product’s surrogate-based normal value exceeds the price of the product in the United States.\footnote{19 U.S.C. §1677(35) (2006).}

\textbf{B. The Simultaneous Application of Countervailing and Antidumping Duties}

The World Trade Organization agreements, together with the WTO Accession Protocols of China and Vietnam, do not prohibit the concurrent application of countervailing and antidumping duties.\footnote{See Brian D. Kelly, \textit{The Offsetting Duty Norm and the Simultaneous Application of Countervailing and Antidumping Duties}, 11 GLOBAL ECON. J. 1524, 1524 (2011) (citing the United States International Trade Commission (2010)).} On the other hand, the GATT signatories recognized the harmful potential for double remedies.\footnote{See GATT, \textit{supra} note __, art. VI: 5.} Article VI:5 GATT provides that “no product … shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.”\footnote{Id.} In the circumstances of concurrent countervailing and antidumping duty actions that include the application of duties to countervail export subsidies, those duties are added to the normal value in the dumping calculation, reducing the dumping margin by the amount of the relevant countervailing duties.\footnote{The fact that Article VI: 5 of the GATT 1994 notes the impermissibility of double remedies in the context of export subsidies but not domestic subsidies was a key element of the United States’ legal argument. Thomas J. Prusa & Edwin Vermulst, United States – Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through 25 (unpublished manuscript), available at http://econweb.rutgers.edu/prusa/cv/53%20-%20US%20AD%20CVD%20China.pdf. Domestic subsidies are “specific subsidies [other than an export subsidy or import substitution subsidy] in law or in fact, to an enterprise or
individually provide that the amount of the remedies individually cannot exceed the amount of the subsidization or dumping being addressed, which a double remedy would violate.\textsuperscript{81}

Concurrent proceedings involving non-market economies have become common only in recent years in, at least, American and Canadian practice.\textsuperscript{82} Through 2006, for example, there were no U.S. countervailing duty proceedings against non-market economy countries.\textsuperscript{83} In 2009, however, 70\% of the cases and over 75\% of the value of imports subject to investigation, based on imports in the prior year, were subject to the simultaneous imposition of countervailing and antidumping duties, amounting to several billion dollars.\textsuperscript{84} This increase in the occurrence of simultaneous countervailing and antidumping cases has resulted largely from the increase in countervailing duty cases against non-market economies.\textsuperscript{85}

III. THE CURRENT DISPUTE: THE CREATION OF THE DOUBLE REMEDY DISPUTE

On September 19, 2008, China requested consultations concerning the definitive antidumping and countervailing duties imposed by the United States in four pairs of countervailing and antidumping duty investigations: (1) Circular Welded Carbon Quality Steel Pipe; (2) Certain New Pneumatic Off-the-Road Tires; (3) Light-Walled Rectangular Pipe and

\begin{itemize}
  \item SCM Agreement, art. 19.4 (“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.”); AD Agreement, art. 9.3 (“The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.”).
  \item Brian D. Kelly, supra note __.
  \item Id.
  \item Id.
  \item Id.
\end{itemize}
Tube; and (4) Laminated Woven Sacks. The Director-General composed a WTO Panel on March 4, 2009 to address the Chinese challenges to various aspects of Commerce’s determinations.

A. The WTO Panel

Before the WTO Panel, China argued that the concurrent application of countervailing and antidumping duties was inconsistent with the United States’ WTO obligations because, in some instances, the simultaneous application of antidumping and countervailing duties on the same products from China created a situation where the same instance of subsidization was offset twice.

As previously discussed, when calculating a dumping margin in an antidumping investigation involving a product from a non-market economy, Commerce compares the export price to a constructed normal value, which is calculated based on surrogate costs or prices from a third country. The normal value is based on the surrogate values because Commerce considers prices and costs in non-market economies to be unreliable. This same antidumping procedure is followed whether or not the Chinese producer receives domestic subsidies, and whether or not there is an accompanying countervailing duty case.

However, when a producer receives a subsidy, its costs fall and, consequently, its domestic and export prices may fall as well. In cases involving market economy countries, the United States and other WTO signatories effectively assume that these effects are equal, so that there is no net effect of the subsidy on the antidumping calculation, and thus no double remedy issue created by applying a countervailing

86 Panel Report, supra note __, at ¶ 1.1.
88 Panel Report, supra note __, at ¶ 14.47.
89 Id. at ¶ 14.68.
90 Id.
92 Panel Report, ¶ 14.71
duty to a domestic subsidy. But the use of surrogate costs from a different country means that those costs will not reflect—will not be lowered by—the amount of subsidy received by the Chinese firm. However, the export price, which reflects the sales by the Chinese company to the United States with no use of surrogates, is presumably lower than it would have otherwise been due to the subsidy; this, after all, is the rationale for a countervailing duty being imposed. Therefore, the resulting dumping margin is based on an asymmetric comparison and is generally higher than it would be in a market economy antidumping duty calculation. An antidumping duty that is calculated on a non-market methodology may therefore “remedy” a domestic subsidy to the extent that such subsidy has contributed to a lower export price. In other words, China asserted that this non-market economy country antidumping calculation takes into account the presence of domestic subsidies, and thus when Commerce also imposes a countervailing duty, Commerce is repeating the same exercise.

Accordingly, the simultaneous or concurrent imposition of an antidumping duty based on the non-market economy methodology and a countervailing duty based on a domestic subsidy results in a subsidy being offset more than once; the United States overcorrects for the foreign government subsidization and/or foreign firms’ market power.

A comparison of Table 1 and Table 2, below, illustrates how a double remedy occurs. Table 1 considers circumstances in which concurrent antidumping and countervailing duties are assessed in a market economy. A situation in which the same instances of subsidization are offset

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93 Id.
96 Id. at ¶¶ 14.69, 14.72 (citing Brian D. Kelly, The Law and Economics of Simultaneous Countervailing Duty and Anti-Dumping Proceedings, 3 GLOBAL TRADE CUSTOMS JOURNAL 41, 48 (2008)).
97 Id. at ¶ 14.70
98 Id.
99 Id.
twice in the countervailing and antidumping duty calculations does not occur because both sides of the antidumping calculation reflects the subsidies’ effects, leaving no net effect.

In circumstances, in which a foreign producer in a market economy receives a domestic subsidy of US$2; the producer has a normal value of US$8; the producer sells in the investigating authorities’ domestic market at US$7; the producer’s export price is US$1 lower than its domestic value (US$8), based on its domestic sales or production costs, an investigating authority would impose a countervailing duty of US$2 because the countervailing duty, in practice, is equal to subsidy and an antidumping duty of US$1, totaling US$3. These trade remedies properly maintain a “level playing field” with regards to the disparity in the market prices. The imposition of the duties effectively treats the subsidy as reflected in both normal value and export price and thus having no effect on the dumping margin. This reflects standard U.S. practice in combined countervailing and antidumping duty cases that involve market economies.  

Table 1. Calculations with No Surrogate

<table>
<thead>
<tr>
<th>Subsidy:</th>
<th>$ 2.00</th>
<th>yields</th>
<th>CVD:</th>
<th>$ 2.00</th>
</tr>
</thead>
<tbody>
<tr>
<td>NV:</td>
<td>$ 8.00</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Export price:</td>
<td>$ 7.00</td>
<td>yields</td>
<td>AD:</td>
<td>$ 1.00</td>
</tr>
<tr>
<td>Total:</td>
<td></td>
<td></td>
<td></td>
<td>$ 3.00</td>
</tr>
</tbody>
</table>

On the other hand, Table 2 considers circumstances in which simultaneous antidumping and countervailing duties are assessed in a non-market economy country, illustrating the double remedy result. Table 2 assumes the following: a foreign producer in a non-market economy receives a subsidy of US$2; the producer has a normal value of US$8; the producer sells in the

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100 See JOHN H. JACKSON, supra note __.
101 See discussion supra Part II.A.1 and Part II.A.2.
investigating authorities’ domestic market at US$7; the producer’s export price is $1 lower than its domestic prices (US$8). In this case, the investigating authorities would continue to set the countervailing duty at US$2 because the countervailing duty is set equal to the subsidy.\textsuperscript{102} The investigating authorities, however, would not use the foreign producer’s normal value because the investigating authorities consider prices and costs in non-market economies to be unreliable.\textsuperscript{103} The normal value in a non-market economy is therefore based on surrogate costs from a third country.\textsuperscript{104} If the normal value in the surrogate market is US$10, the higher amount reflecting the fact that the surrogate market companies do not enjoy the US$2 subsidy, and the foreign producer’s export price is US$7, the investigating authorities would set the antidumping duty at US$3 after comparing the export price to the surrogate market normal value (calculated by subtracting the export price (US$7) from the surrogate market value ($10)). This antidumping duty, unlike the antidumping duty applied to a market economy, does not create a level playing field because the export price reflects the subsidy while that effect is removed from normal value due to the use of a surrogate value.\textsuperscript{105}

\begin{center}
\textbf{Table 2. Surrogate Normal Value Used with No Adjustment Upward Bias}
\end{center}

\begin{center}
\begin{tabular}{l|c|c|c|c}
\hline
 & Subsidy: & $2.00 & \rightarrow & CVD: & $2.00 \\
Actual prices: & $8.00 & & & \\
Surrogate NV: & $10.00 & \rightarrow & AD: & $3.00 \\
Export price: & $7.00 & & Total: & $5.00 \\
\hline
\end{tabular}
\end{center}

\begin{footnotesize}
\textsuperscript{103}19 U.S.C. § 1677b(c) (2006).
\textsuperscript{104}Id.
\textsuperscript{105}See JOHN H. JACKSON, supra note __.
\end{footnotesize}
Although the WTO Panel found, as Table 1 and Table 2 illustrate, that a double remedy was “likely” to occur,\textsuperscript{106} the Panel concluded that “China did not establish that the United States acted inconsistently with its obligations under Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement of under Article VI:3 of GATT 1994 ….\textsuperscript{107} The AB overturned the Panel’s holding.\textsuperscript{108}

\textbf{B. United States Federal Court Proceedings}

At the same time as the dispute before the WTO Panel, several Chinese companies\textsuperscript{109} whose products were the subject of the countervailing and antidumping duty investigations filed suit in the United States Court of International Trade (CIT).\textsuperscript{110} In September 2009, the CIT acknowledged the existence of a double remedy issue and remanded the matter to Commerce to assess concurrent countervailing and antidumping duties in a manner that avoided a double remedy.\textsuperscript{111} Subsequently, the CIT in 2010 found that Commerce failed to comply with its instructions and ordered Commerce to forego the imposition of countervailing duties on pneumatic off-the-road tires from China.\textsuperscript{112} The United States appealed to the U.S. Court of Appeals for the Federal Circuit (CAFC),\textsuperscript{113} and on December 19, 2011, the CAFC broadly held that U.S. law forbade the application of countervailing duties to non-market economy countries.\textsuperscript{114}

\textbf{III. THE APPELLATE BODY REPORT}

\textsuperscript{107} \textit{Id.} at ¶ 17.1(e)(ii).
\textsuperscript{108} AB Report, \textit{supra} note __, at ¶ 604.
\textsuperscript{110} See GPX Int’l Tire Corp. v. United States, 645 Fed. Supp. 2d. at 1231.
\textsuperscript{111} \textit{Id.} at 1251.
\textsuperscript{113} GPX Int’l Tire Corp. v. United States, 666 F.3d 732, 737 (Fed. Cir. 2011).
\textsuperscript{114} \textit{Id.} at 745.
On appeal from the WTO Panel, the AB overturned the Panel’s holding that China did not establish that the United States acted inconsistently with its obligations under the SCM Agreement. The AB considered the main interpretive question before it to be the meaning of the Article 19.3 phrase, “in the appropriate amounts.” From the outset, the AB emphasized that the Panel’s interpretation of Article 19.3 of the SCM Agreement was erroneous. The Panel had found that “the imposition of anti-dumping duties calculated under a nonmarket economy country methodology has no impact on whether the amount of the concurrent countervailing duty collected is ‘appropriate’ or not,” and that Article 19.3 of the SCM Agreement does not address the double remedy issue. The AB, however, concluded that the Panel failed to give meaning and effect to all of the terms of Article 19.3 of the SCM Agreement.

The appropriateness of the countervailing duties cannot be determined without having regard to anti-dumping duties imposed on the same product to offset the same subsidization. The amount of a countervailing duty cannot be “appropriate” in situations where that duty represents the full amount of the subsidy and where anti-dumping duties, calculated at least to some extent on the basis of the same subsidization, are imposed to remove the same injury to the domestic industry. Dumping margins calculated based on [a non-market economy] methodology are, for the reasons explained above, likely to include some component that is attributable to subsidization.

115 AB Report, supra note __, at ¶ 604.
116 Id. at ¶ 552.
117 Id. at ¶ 591 (“We have reversed the Panel’s interpretation of Article 19.3 of the SCM Agreement. Because it was based on an erroneous of Article 19.3, we must also reverse the Panel’s ultimate finding in paragraph 17.19(e)(ii) of Panel Report that China did not establish that the United States acted inconsistently with its obligations under Article 19.3, 10, or 32.1 of the SCM Agreement.”).
118 Panel Report, supra note __, at ¶ 14.128.
119 Id. at ¶ 14.129.
120 AB Report, supra note __, at ¶ 555.
121 Id. at ¶ 582.
Importantly, the AB also went a step further, concluding that an investigating authority has an affirmative obligation to establish whether or to what degree the concurrent application of countervailing and anti-dumping duties would offset the same subsidization twice.\textsuperscript{122}

\textbf{A. The AB’s “Completion of the Analysis”}

Having reversed the Panel’s interpretation of Article 19.3 of the SCM Agreement, the AB responded to China’s request that it complete the analysis and find that Commerce’s concurrent imposition of anti-dumping duties calculated on the basis of its non-market economy country methodology, and countervailing duties on the same products in the four countervailing duties at issue to be inconsistent with Article 19.3 of the SCM Agreement.\textsuperscript{123} The Panel had concluded that it was unnecessary to examine “the extent to which the concurrent imposition of anti-dumping duties determined under Commerce’s [non-market economy country] methodology and of countervailing duties resulted in the imposition of ‘double remedies’ in the four investigations at issue,” reasoning that China had failed to establish that the imposition of double remedies is inconsistent with any the provisions upon which it based its claims.\textsuperscript{124}

The AB distinguished between the legal and factual matter of double remedies, concluding that double remedies do not \textit{necessarily} result in every instance of such concurrent application of duties when an investigating duty is using the non-market economy methodology.\textsuperscript{125} The offsetting of the same subsidization twice depends, rather, on whether and to what extent domestic subsidies have lowered the export price of a product, and on whether the investigating authority has taken the necessary steps to adjust its methodology to take account of

\begin{footnotesize}
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\begin{itemize}
\item \textsuperscript{122} Id. at ¶ 604.\textsuperscript{122}
\item \textsuperscript{123} Id. at ¶ 592.\textsuperscript{123}
\item \textsuperscript{124} Id. at ¶ 596 (citing Panel Report, ¶ 14.76).\textsuperscript{124}
\item \textsuperscript{125} Id. at ¶ 599.\textsuperscript{125}
\end{itemize}
\end{footnotesize}
this factual situation.\(^{126}\) Noting that the United States had argued that it had no statutory authority to make adjustments to countervailing duties, the AB nevertheless concluded that the failure to address the double remedies represented a failure of Commerce’s duty to determine the “appropriate” amount of countervailing duties.\(^{127}\)

Citing *US – Countervailing Measures on Certain EC Products*,\(^ {128}\) the AB concluded that, “under Article VI:3 of the GATT 1994, investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation.”\(^ {129}\) The AB drew a parallel obligation of an investigating authority under Article VI: 3 of the GATT 1994 to determine the precise amount of the subsidy and the analogous obligations that an investigating authority has under Article 19.3 and 19.4 of the SCM Agreement to determine and levy countervailing duty in amounts that are appropriate in each case and that do not exceed the amount of the subsidy found to exist.\(^ {130}\) Therefore, an investigating authority has an affirmative obligation to conduct a sufficiently diligent “investigation” into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record.\(^ {131}\)

The AB held that, in this case, Commerce 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.\(^ {132}\)

B. The Factual and Legal Implications of the WTO Appellate Body’s Analysis

\(^{126}\) Id.
\(^{127}\) Id. at ¶ 604, 605.
\(^{129}\) AB Report, *supra* note __, at ¶ 601.
\(^{130}\) Id.
\(^{131}\) Id. at ¶ 602.
\(^{132}\) Id. at ¶ 604.
Although the AB’s decision in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* provided a favorable result for China,\(^{133}\) the AB’s approach fails to solve the double remedy dispute. The AB concluded that the potential for a “double remedy” depends on “whether and to what extent domestic subsidies have lowered the export price of a product, and on whether the investigating authority has taken the necessary corrective steps to adjust its methodology to take account of this factual situation.”\(^{134}\) This presumably means that an investigating authority should reduce the countervailing duty to reflect only the amount of the subsidy passed through to the export price, while concurrently reducing the antidumping duty to reflect only the underpricing that is not attributed to the subsidy.\(^{135}\) Adding these two adjustments together would remove the double remedy.\(^{136}\) A failure to make these adjustments violates Article 19.3 of the SCM Agreement because the investigating authority would have failed its obligation to determine the “appropriate” amount of the countervailing duty.\(^{137}\)

But a factual near-impossibility exists under the AB’s solution. Unless the domestic subsidy lowers the product’s export price by the full amount of the domestic subsidy, Commerce cannot meet its obligations under U.S. law and the AB’s analysis.\(^{138}\) Commerce cannot reduce the countervailing duty to reflect only the amount of the subsidy passed through to the export price because it must impose a countervailing duty “equal to the amount of net countervailable

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\(^{133}\) AB Report, *supra* note 15, at ¶ 591 (“We have reversed the Panel’s interpretation of Article 19.3 of the SCM Agreement. Because it was based on an erroneous interpretation of Article 19.3, we must also reverse the Panel’s ultimate finding in paragraph 17.1(e)(ii) of the Panel Report that China did not establish that the United States acted inconsistently with its obligations under Article 19.3, 10, or 32.1 of the SCM Agreement”) (emphasis in original).

\(^{134}\) Id.

\(^{135}\) Id. at ¶¶ 595, 602–06.

\(^{136}\) See AB Report *supra* note 15, at ¶ 602.

\(^{137}\) SCM Agreement *supra* note 5, at art. 19.3.

\(^{138}\) See AB Report, *supra* note 15, at ¶¶ 602-06. A numerical illustrated is also provided in Table 3 through 5. See discussion *infra* Part III.
subsidy.” The Panel’s decision leaves a partial adjustment to the antidumping side that depends on the remaining adjustment being made on the countervailing duty side, but that remaining adjustment cannot be made.

The United States Congress’s enacted legislation on March 13, 2012, designated H.R. 4105 and titled, “An Act to Apply Countervailing Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, and for Other Purposes.” This made the factual impossibility a matter of U.S. law. The new legislation explicitly authorized Commerce to apply countervailing duties to imports from nonmarket economy countries, overriding the CAFC’s holding in GPX Int’l Tire Corp. v. United States, in which the court broadly held on December 19, 2011 that U.S. law forbade the application of countervailing duties to nonmarket economy countries. Further, the new legislation also attempted to comply with the AB’s holding that the concurrent application of countervailing and antidumping duties to a nonmarket economy country has the potential to create a “double remedy,” which is prohibited by the SCM Agreement. The new law requires that Commerce grant an offset to the antidumping calculation if (1) a respondent received a countervailable subsidy other than an export subsidy; (2) the countervailable subsidy reduced the prices of the subject imports; and (3) Commerce can reasonably estimate the extent to which the countervailable subsidy has increased the dumping margin for the subject imports. Commerce may not reduce combined duties to less than the stand-alone antidumping margins.

142 GPX Int’l Tire Corp. v. United States, 666 F.3d 732, 745 (Fed. Cir. 2011).
144 Id.
145 Id.
Most notably, however, the new legislation does not require Commerce to grant a reduction to the countervailing duty value, implicitly complying with the current U.S. law that requires Commerce to impose a countervailing duty “equal to the amount of the net countervailable subsidy.” 146 Congress’s acknowledgment that a domestic subsidy lowered the export price in the antidumping calculation but not for purposes of the countervailing duty calculation is mathematically illogical. This error might be the result of the fact that Congress designed the nonmarket antidumping statute to remedy Commerce’s previous inability to apply countervailing duty law to nonmarket economy countries, 147 and as such, Congress believed that it could independently offset the double remedy under the antidumping calculation. As this Note will address below, Congress could offset a double remedy in the antidumping calculation by requiring an adjustment in normal value downwards by the amount of the subsidy to correct for the double remedy problem otherwise created by the countervailing duty and the discarding of the (subsidized) normal value of the exporter. 148 In this case, no measurement of the degree of the subsidy pass-through to the export price would be necessary. Therefore, Congress has left the double remedy dispute unresolved by applying only part of the AB’s solution to the U.S. countervailing and antidumping methodologies.

Table 3 illustrates Commerce’s implementation of Congress’s new legislation. Consider a hypothetical circumstance in which Commerce determines that export price decreases by only 60% of the subsidy amount in response to the subsidy. Commerce will continue to set the countervailing duty at US$2, in accordance with U.S. law. 149 Consequently, only part of the necessary adjustment is being made; the partial effect of the subsidy on export price is being

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148 See infra Part IV.
reflected in the antidumping calculation, but not the countervailing calculation. The remainder of the AB’s solution would reduce the countervailing duty rate by US$0.80 to US$1.20, resulting in a combined remedy of $3.00, eliminating the full amount of the double-count, but this is not permitted under U.S. trade law.150

**Table 3. Surrogate Normal Value, Export Price Adjusted to Correct for Pass-Through**

| Actual prices: | $ 8.00 |
| Surrogate NV: | $ 10.00 |
| Export price: | $ 7.00 |
| Export price,* increased for subsidy pass-through | $ 8.20 |
| yields | AD: | $ 1.80 |
| | Total: | $ 3.80 |

* U.S. CVD = subsidy amount, regardless of pass-through
* Equivalently, the surrogate NV could be decreased by the $1.20 in pass-through.

**IV. POSSIBLE SOLUTIONS TO THE DOUBLE REMEDY DISPUTE**

A careful analysis of the AB’s decision reveals several solutions to the double remedy dispute. First, the United States could revert to its longstanding policy of not applying countervailing duties to non-market economy countries. After all, the non-market economy country antidumping duty methodology was arguably designed to compensate for the lack of countervailing duty.151 Second, an investigating authority could adjust the surrogate normal value downwards by the amount of the subsidy to correct the double remedy problem otherwise

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150 See *infra* Part IV.
151 GPX Int’l Tire Corp. v. United States, 645 Fed. Supp. 2d at 1239. (“Congressional silence regarding the application of the [countervailing duty] law to [nonmarket economy] countries may indicate that Congress never anticipated that the [countervailing duty] law would be applied while a country remained designated as an [nonmarket economy].”).
created by the countervailing duty and the discarding of the (subsidized) normal value of the exporter. Third, if China challenges the U.S. law that requires the countervailing duty to be set equal to the amount of the subsidy, an investigating authority could adjust both the countervailing and anti-dumping duty; in the preceding example, this requires that the countervailing duty be set equal to US$1.20.

The second approach, illustrated as Table 4, adjusts the surrogate normal values downwards by the amount of the subsidy to correct for the double remedy problem otherwise created by the countervailing duty and the discarding of the (subsidized) normal value of the exporter. Because the non-market economy country antidumping statute was designed to remedy Commerce’s inability to apply countervailing law to non-market economy countries, this approach would account for Commerce’s decision to reverse its policy against the imposition of countervailing duties against non-market economy countries, thereby eliminating the double remedy.\textsuperscript{152}

<table>
<thead>
<tr>
<th>Subsidy: $2.00</th>
<th>yields</th>
<th>CVD: $2.00</th>
</tr>
</thead>
<tbody>
<tr>
<td>Actual prices: $8.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Surrogate NV: $10.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>less subsidy: $8.00</td>
<td>yields</td>
<td>AD: $1.00</td>
</tr>
<tr>
<td>Export price: $7.00</td>
<td></td>
<td>Total: $3.00</td>
</tr>
</tbody>
</table>

The final approach, illustrated as Table 5, perhaps most closely resembling the AB’s view, taking account of the amount of pass-through. The investigating authorities determine that 60\% of the US$2 subsidy “passes through” to the export price. An "on-the-face" reading of the

\textsuperscript{152} See GPX Int’l Tire Corp. v. United States, 645 Fed. Supp. 2d at 1239.
AB opinion suggests that investigating authorities should set the countervailing duty at only $1.20 because the subsidy confers only 60% of the US$2 subsidy benefit.\textsuperscript{153} To prevent the remaining overlap of duties, the investigating authority would also have to account for the fact that the lower export price also decreased the export price in the antidumping duty calculation by the pass-through amount of $1.20, with no matching account taken on the normal value side due to the use of a surrogate. Therefore, the anti-dumping duty should be calculated based on an export price of US$8.20 ($7.00 + $1.20) due to the distortion of the antidumping duty calculation caused by the use of the surrogate in the presence of domestic subsidies.\textsuperscript{154} The investigating authorities would set the antidumping duty at US$1.80 (calculated by subtracting the export price (US$8.20) from the surrogate normal value (US$10)), with the total offsetting duty equal to $3.00.\textsuperscript{155} The acknowledgment of the pass-through of the subsidy in both the countervailing and antidumping duty calculations would restore neutrality and thus create a level playing field.

**Table 5. Surrogate Normal Value, Countervailing Duty and Export Price Adjusted to Reflect Pass-Through**

<table>
<thead>
<tr>
<th>Subsidy(60% pt):</th>
<th>$ 2.00</th>
<th>CVD:</th>
<th>$ 1.20</th>
</tr>
</thead>
<tbody>
<tr>
<td>Actual prices:</td>
<td>$ 8.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Surrogate NV:</td>
<td>$ 10.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Export price:</td>
<td>$ 7.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Export price,* increased for subsidy pass-through</td>
<td>$ 8.20</td>
<td>AD:</td>
<td>$ 1.80</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Total:</td>
<td>$ 3.00</td>
</tr>
</tbody>
</table>

\textsuperscript{153} See AB Report, *supra* note 15, at ¶ 595.

\textsuperscript{154} *Id.* This is effectively the calculation if the subsidy in question is an export subsidy: the amount of the countervailing duty is added to the export price in the antidumping calculation.

Among these three solutions, the second approach is the most practicable solution. The first approach is not practicable because the recent legislation and countervailing and antidumping duty practices illustrate Congress’s and Commerce’s reluctance to revert to the long-standing policy that prohibited the application of countervailing duties to non-market economy countries. Although the third approach offers a solution that closely follows the language of the AB’s decision, it would require a change in U.S. trade law. The second approach, however, reaches the same result of the third approach, eliminating the potential for a double remedy without the modification of existing U.S. law.

V. CONCLUSION

The AB’s holding, in its Completion of the Analysis section, ignores a factual impossibility. The AB requires an adjustment so that both the countervailing and antidumping duty amounts are “appropriate” under Article 19.3 of the SCM Agreement, but a countervailing duty adjustment is legally impossible under U.S. law. In attempt to comply with the AB’s decision, the United States Congress enacted legislation which authorized Commerce to continue apply countervailing duties to imports from non-market economy countries, overriding the CAFC’s holding that U.S. law forbade the application of countervailing duties to non-market economies, and incorporating the AB’s holding into the legislation’s language. As demonstrated above, however, the double remedy issue remains unresolved. Large numbers of cases continue to be filed with Commerce in which the double remedy issue plays a critical role. In order to eliminate double remedies, the United States could (1) revert to its longstanding policy prohibiting the application of countervailing duties against non-market economies, (2) adjust the surrogate normal value downwards by the amount of the subsidy, or (3) adjust both the

countervailing and antidumping duty by the amount of the pass-through. Until the double remedy dispute is resolved, “trade disputes among nations might continue to produce intractable situations where economies and politics conspire to impair long-term solutions.”