Exploring the Rise of Legalization in the World Trade Organization and its Consequences

- A Case Study of the Anti-dumping Regime

Yan Luo

A Thesis Submitted for the Degree of Doctor of Philosophy
Queen Mary, University of London
August 2008
Table of Content

ABSTRACT 5
ACKNOWLEDGEMENT 6
ABBREVIATION 7
TABLE OF CASES 8
CHAPTER I INTRODUCTION 15
CHAPTER II CONCEPTUALIZING LEGALIZATION IN THE WTO SYSTEM 20
  1. Introduction 20
  2. Defining Legalization in International Relations 24
     2.1 Elements of Legalization 24
     2.2 The Uneven Expansion of Legalization 27
     2.3 Consequences of Legalization 28
     2.4 A Richer View of Legalization? 32
  3. Applying Legalization in the WTO System 35
     3.1 Elements of Legalization in the WTO 35
     3.2 The Uneven Expansion of Legalization in the WTO 38
     3.3 Consequences of Legalization in the WTO 43
  4. Conclusion 50
CHAPTER III THE RISE OF LEGALIZATION IN THE MULTILATERAL FRAMEWORK 51
  1. Introduction 51
  2. The Rise of Legalization in the Multilateral Framework 52
     2.1 From Politics to “Diplomat’s Jurisprudence” – the Evaluation of the GATT 52
     2.2 A New Hope of Legalization – the Establishment of the WTO 59
  3. Theoretical Debates related to Judicialization 64
     3.1 The Role of the Dispute Settlement Mechanism (DSM) 65
     3.2 Standard of Review 69
3.3 Institutional Setting of the Dispute Settlement Body (DSB) 72
3.4 Remedies and Compliance in the DSM 74

4. Conclusion 77

CHAPTER IV LEGALIZING ANTI-DUMPING (AD) RULES AT INTERNATIONAL LEVEL 78

1. Introduction 78

2. The Phenomenon of Dumping and the Development of AD Laws 80

3. "Legalizing" the Rules at international level 86
   3.1 Trade Negotiations and International AD Rules 86
   3.2 Surveillance Mechanism and the AD Rules 120
   3.3 AD in the DSM 124

4. The Uneven Expansion of Legalization at international level 130
   4.1 The Uneven Expansion of Obligation 130
   4.2 The Uneven Expansion of Precision 136
   4.3 The Uneven Expansion of Delegation 138

5. Conclusion 141

CHAPTER V CONSEQUENCES OF LEGALIZATION: WTO-TRANSPOSED AND WTO-PLUS FEATURES OF THE EUROPEAN AD REGIME 142

1. Introduction 142

2. WTO – transposed Features of the EC AD Regime 144
   2.1 Evolution of Community AD Instruments in the Context of the Multilateral Framework 144
   2.2 The Administration of Community AD Rules 153
   2.3 The Judicial Review of Community AD Rules 161

3. WTO-plus Features of the EC AD Regime 166
   3.1 Injury Margin 167
   3.2 Community Interest 176
   3.3 Anti-circumvention 186

4. Conclusion 196
CHAPTER VI CONSEQUENCES OF LEGALIZATION: CHINA'S AD-RELATED WTO ACTIVITIES 198

1. Introduction 198

2. Engaging Private Sectors to Build Up Institutional and Legal Capacity 201
   2.1 Background of China’s AD Problems 201
   2.2 Regulation on Responding to Anti-dumping Investigations 203
   2.3 Ad hoc Public-private Networks in Responding to AD Investigations 204

3. China’s Efforts to Litigate the “Unlitigatable”: Non-market Economy (NME) 206
   3.1 China’s WTO Accession Protocol and the Working Party Report 206
   3.2 AD Methodology towards NME in National Laws 215
   3.3 The First WTO Challenge of China: US – Coated Paper 229

4. Conclusion 237

CHAPTER VII CONCLUSION 238

BIBLIOGRAPHY 241
Abstract

This study examines the rise of legalization and its consequences in the trade regime centred on the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO).

It observes a continued move to a higher level of legalization in the GATT/WTO over the past sixty years, although the ongoing expansion of legalization is uneven and imbalanced in many aspects.

It also observes that the consequences of legalization are complicated. In particular, this study analyzes two aspects of the consequences of legalization, namely 1) the move to a higher degree of legalization in a particular subject area of the GATT/WTO corresponds to major changes on domestic legislations and practices in that subject area; and 2) a higher degree of legalization provides stronger incentives for WTO Members to build up institutional and legal capacity to more effectively utilize the GATT/WTO dispute settlement mechanism (DSM). Nevertheless, this study notes that the impact of legalization has limitations and legalization is only one of the many factors that shape the domestic systems and the strategic behaviour of trading parties.

To exemplify the rise of legalization and its complicated consequences, this study empirically examines the pragmatic process of legalization and its consequences in a particular field of the GATT/WTO law - Anti-dumping (AD). It sketches the development of legalization in the multilateral AD framework by identifying increased obligation, greater precision and stronger delegation in the regime. It also explores the impact of international legalization on the European AD regime and China's AD-related dispute settlement activities.

This study concludes that the evolution of the GATT/WTO system is an illustrative example of the phenomenal rise of legalization in international organizations. The consequences of the proliferation of legalization in the GATT/WTO are however complicated.

Effort has been made to update the law and cases to 1 January 2008. For the integrity of the discussion, a few materials dated later than 1 January 2008 are included.
Acknowledgement

I dedicate this thesis to my grandmother, Ms YANG Sixuan, who passed away on 21 March 2006, at the age of 88. In my heart, she was my beloved grandma – she gave me my name when I was born. But she was far more than just a beloved grandma - she was a great woman and inspired me to have an independent spirit to pursue whatever I want to achieve.

More than 70 years ago, she became the first woman from Guizhou Province to be offered a government scholarship to go to the college. When Japan invaded China in 1936, she was a junior in China Central University (now Nanjing University). During the World War II, she suffered as ordinary Chinese - losing family, living a difficult life. Yet, nothing changed her passion for knowledge. She finally graduated with honour and became a well-respected university lecturer and chemist. She has been the first role model for me, telling me how strong a woman can be and how much she can achieve with her education and intelligence.

I likewise own this thesis to my two “doctoral mothers” – Professor Janet Dine and Professor Marise Cremona. As real experts in the field, they opened a door for me. Without their unconditional support, both personally and academically, it is impossible for me to complete this thesis.

Needless to say, I also own huge thank you to my parents, my other supervisors, my colleagues in Hammonds Brussels office and all of my friends around the world. For the past five years, it was their love gave me the courage to go through this sometimes painful yet always challenging and exciting process. I would like to thank all of them for their generosity.
Abbreviation

AD --- Anti-dumping
ADA --- WTO Agreement on Implementation of Article VI of the GATT 1994 (WTO Anti-dumping Agreement)
ASCM --- WTO Agreement on Subsidies and Countervailing Measures (WTO SCM Agreement)
CCP --- Common Commercial Policy
CVD --- Contervailing Duty
DSB --- Dispute Settlement Body
DSM --- Dispute Settlement Mechanism
DSU --- Understanding on the Settlement of Disputes
EU --- European Union
GATT --- General Agreement on Tariffs and Trade
UNDP --- United Nations Development Programme
TPRB --- Trade Policy Review Body
TPRM --- Trade Policy Review Mechanism
VCLT --- Vienna Convention on the Law of Treaties
WTO --- World Trade Organization
Table of Cases

GATT Reports


WTO Dispute Settlement Reports and Arbitration Awards

*Canada – Aircraft(AB)*


*Canada – Aircraft(Panel)*


*EC – Bed Linen(AB)*


*EC – Bed Linen(Panel)*

**EC – Bed Linen (Article 21.5 – India) (AB)**

**EC – Bed Linen (Article 21.5 – India) (Panel)**

**EC – Hormones (AB)**

**Guatemala – Cement I (AB)**

**Guatemala – Cement I (Panel)**

**Guatemala – Cement II (Panel)**
<table>
<thead>
<tr>
<th>Country</th>
<th>Issue</th>
<th>Description</th>
<th>Document(s)</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>WT/DS11/R, adopted 1 November 1996, modified by Appellate Body Report,</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>WT/DS312/R, adopted 28 November 2005</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Thailand</td>
<td>H-Beams(Panel)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

US – 1916 Act(AB)

US – 1916 Act (EC)(Panel)

US – 1916 Act (Japan)(Panel)

US – Cotton Yarn(AB)

US – Cotton Yarn(Panel)

US – Hot-Rolled Steel(AB)

US – Hot-Rolled Steel (Panel)

US – Hot-Rolled Steel (21.3)
Award of the Arbitrator, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Arbitration under Article 21.3(c) of the DSU, WT/DS184/13, 19 February 2002, DSR 2002:IV, 1389

US – Offset Act (Byrd Amendment) (AB)

US – Offset Act (Byrd Amendment) (Panel)

US – Section 301 Trade Act (Panel)

US – Steel Plate (Panel)
US – Zeroing (EC)(AB)

US – Zeroing (EC)(Panel)

European Courts Cases
Jointed Cases 239/82 and 275/82, Allied Corp. and Others v. Commission [1984] ECR 1005


Case C-94/02 P Etablissements Biret et Cie SA v Council of the European Union [2003] ECR I-10565,

Case C-352/98 P Laboratoires Pharmaceutiques Bergaderm v Goupil [2000] ECR I-5291

Case C-150/94 United Kingdom v. Council [1998] ECR I-7235,


Case C-93/03 P Biret International SA v Council of the European Union [2003] ECR I-876,
Case C-69/89 Nakajima All Precision Co. Ltd v Council [1991] ECR I-02069

Case C-76/00 P Petrotub and Republica v Council of the European Union [2003] ECR I-89

Case C-61/94 Commission v Germany [1996] ECR 3989
Chapter I Introduction

When addressing before the European Society of International Law on 19 May 2006, Director General Pascal Lamy did not hesitate to express his view that “the WTO is a unique system within the international legal order”.¹ His speech raises two interesting points: first, after more than 60 years’ evolution, the WTO comprises a “true legal order”, which is “integrated and distinctive”; and second, the WTO system is a legal system “within the international legal order” and it is “both a product and a vehicle” of the evolution of the international legal order.²

Both points raised by DG Lamy are critical in understanding the WTO as a gradually “legalized” international institution based on a treaty network and a dispute settlement mechanism (DSM). With respect to the first point, it is widely observed that the proliferation of the GATT/WTO is associated with a phenomenal rise of legalization in the system, even though a consensus on the exact meaning of legalization is lacking. Numerous literatures in the field documented that although lacking of an explicitly mentioned judicial organ to oversee the implementation and enforcement of Agreements and agreed understandings, technocrats and experts of the General Agreement on Tariffs and Trade (GATT) developed, gradually, a “legal” system to operate the Agreements. This “legal” system distinguished “normal” legitimate domestic policies from “cheating” on the trade liberalization bargain and used the collective power of the system to punish the “bad boys”, regardless of the powerfulness of trading partners.³ After the establishment of the WTO, the WTO system has been intensively examined as an existing “true legal order” and a large number of trade law literature focuses on “two essential attributes” of the WTO legal system, i.e. the valid WTO rules and the enforcement mechanisms.⁴

¹ Pascal Lamy ‘The Place and Role of the WTO (WTO Law) in the International Legal Order’ (Address before the European Society of International Law, 19 May 2006, Sorbonne, Paris) <http://www.wto.org/english/news_e/spr126_e.htm> accessed 14 June 2006 (‘The place and role of the WTO’).
² Ibid.
³ R Howse ‘From Politics to Technocracy – And Back Again: The Fate of the Multilateral Trading Regime’, (2002) 96 The American Journal of International Law 94, 98. (‘Politics to Technocracy’)

Chapter I

On the second point, many scholars examined the link between the WTO legal system and general international law, particularly with a view to exploring how WTO law relates to rules and principles deriving from other sources of international law.\(^5\)

However, one aspect of the second point addressed in DG Lamy's speech has not been adequately discussed - the intensive institutionalization in the GATT/WTO system in a broader context of legalization of international organizations.\(^6\) Defined as a distinctive form of institutionalization, the process of legalization arguably has been observed in many international organizations, including the GATT/WTO.\(^7\) The "legalized" GATT/WTO rules and the quasi-judicial DSM have been widely discussed, but the phenomenon of legalization itself has been rarely systematically analyzed under a theoretical framework which is also used to analyze similar experiences of other international organizations.

One approach to analyze the phenomenal institutionalization in the trade regime is to examine the gradually "legalized" GATT/WTO system under the theoretical framework of legalization and promote the understanding of the GATT/WTO as one of the ever-evolving international organizations that are experiencing a move to law, while at the same time focusing on the uniqueness of the path of evolution of the GATT/WTO. This study adopts this approach to examine the phenomenon of legalization and its consequences in the trade regime.

The theme of this study is three-fold: first, it depicts the proliferation of legalization, a special form of institutionalization, in the trade regime in the past sixty years. Second, it analyzes the uneven expansion of legalization with a view to providing a full picture of the legalization process in the GATT/WTO. Third, it investigates two aspects of the complicated consequences of legalization. It first examines the impact of legalization on formal legal institutions at domestic level, by identifying the correlation between a higher

---


\(^6\) K Abbott, R Keohane, A Moravcsik, A Slaughter and D Snidal 'The Concept of Legalization' (2000) 54 International Organization 401 ('Concept of Legalization').

\(^7\) J Goldstein, M Kahler, R Keohane and A Slaughter 'Introduction: Legalization and World Politics' (2000) 54 International Organization 385, 385. ('Introduction')
degree of legalization in a particular subject area of GATT/WTO law and corresponding changes in the domestic policy-making, policy administration, and judicial review in that particular subject area. It then examines the impact of legalization on the less formal process of legal capacity building and the utilization of the DSM to settle disputes in particular subject areas.

It has to be noted that this study cannot be understood in isolation from the broader debate of “constitutionalization” in international economic law literature. It also relates to other works which examine the phenomenon of “judicialization” in the GATT/WTO dispute settlement process. Nevertheless, this study narrows its scope to explore the institutionalization of the GATT/WTO from a specific perspective, namely focusing on formal institutions at international level and the consequences of institutionalization at domestic level.

The theoretical framework adopted by this study can provide a useful research tool to examine the GATT/WTO since it offers, first, a coherent set of identifiable attributes which could be used to characterize the institutional evolution of the GATT/WTO and second, the theoretical foundation to discuss the consequences of legalization on domestic systems and the strategic behaviour of WTO Members. By adopting a theoretical framework established in the field of International Relations which was also used to analyze other international institutions, this study intends to provide a fresh perspective to examine the evolution of the GATT/WTO with particular focuses on the process of legalization in the formal GATT/WTO institutions at international level and the impacts of such process on domestic systems and the strategic behaviour of trading partners. This study is therefore aiming to complement the existing literature rather than to claim a comprehensive new theory to explain all aspects of the evolution of the GATT/WTO and the relationship between GATT/WTO law and domestic laws.

For the purpose of this introduction, the term “constitutionalization” is used to refer to a collection of ongoing debates which discuss not only institutional arrangements of the GATT/WTO, but also the foundations of the trade regime. The ongoing debates that

---

8 In general legal theory, “constitutionalism” refers to the principle that a legal system is based on and legitimated by a system of legal or law-like principles that stand outside the law-making system itself. It includes both the practical arrangements of political institutions within the system, and the idea of a system of supreme law that defines fundamental rights. See, H Kritzer (eds) Legal Systems of the World – A Political, Social, and Culture Encyclopaedia
Chapter I

may fall under the umbrella of "constitutionalization" include, but not limit on, good governance of the WTO⁹, global regulatory legitimacy¹⁰, the WTO and human rights, democracy and rules of law¹¹. In each sub-category, various literature approaches the debate from different angles. For example, in the discussion of good governance of the WTO, recent scholarship focuses on institutional reforms of the WTO¹², the elements of good governance in the WTO¹³, and the culture of the WTO¹⁴.

Although situating itself in the larger debate of constitutionalization, this study exclusively analyzes the phenomenon of legalization, a special form of institutionalization, and distinguishes itself from other works discussing normative aspects of "constitutionalization" of the GATT/WTO. This study does not engage in discussions such as whether legalization, or more controversially constitutionalization, is normatively positive for the trade regime and it does not take a normative stance to judge different views presented in the "constitutionalization" debate. Instead, it observes the particular phenomenon of legalization and adopts a theoretical framework from International Relations to analyze the phenomenon and its consequences.

It is possible that some discussions in this study cross-refer to certain topics in ongoing academic debates such as the institutional reform of the WTO. Nevertheless, this study approaches these topics from a particular angle, i.e. to describe current characteristics of WTO institutions along with the three-factor theoretical framework of legalization and to examine whether those institutional settings indicate the uneven expansion of legalization. In the parts where substantive WTO rules, namely AD rules,
are discussed, discussions do not engage in normative debates such as the rationale of AD laws or the welfare effect of AD rules.

This study also relates to, but at the same time differentiates from, works which analyze the phenomenon of "judicialization" in the GATT/WTO dispute settlement process. The phenomenon of legalization examined by this study includes judicialization, but it does not limit on the judicial branch of the GATT/WTO. Instead, the analysis in this study covers the process of legalization of the GATT/WTO treaty system, its DSM and the consequences of legalization of the GATT/WTO at domestic level. In this sense, this study analyzes more comprehensively the phenomenon of legalization, its discourse, its dynamics and its effects on the trade regime with empirical examples.

The rest of this study proceeds as follow. Serving as the theoretical framework of this study, chapter II introduces the theoretical framework of legalization developed by International Relations scholars and adopts it to analyze the GATT/WTO system, with special focuses on elements of legalization, the uneven expansion of legalization and consequences of legalization in the trade regime.

Chapter III describes the development of legalization in the GATT/WTO from a historical perspective. It demonstrates the evolution of the whole system from a "diplomatic" treaty network to a "legalized" framework, on the one hand, and the uneven and imbalanced expansion of legalization on the other.

Chapter IV, V and VI advances the research by examining the legalization process of GATT/WTO AD rules and its impacts on the EC AD regime and China's AD-related WTO activities. Chapter IV sketches the development of legalization in the multilateral AD framework by identifying increased obligation, greater precision and stronger delegation in the regime. Chapter V explores the impact of multilateral legalization on the EC AD regime. Chapter VI demonstrates the impact of legalization on the utilization of the DSM by WTO Members, in particular in terms of the efforts WTO Members made to build up their institutional and legal capacity to effectively utilize the DSM, as exemplified by the AD-related dispute settlement activities of China.

Chapter VII concludes the study by summarizing the key findings of this study.

Chapter II Conceptualizing Legalization in the WTO System

1. Introduction

The process of "legalization" in many issue areas of international politics has particularly interested international lawyers and International Relations scholars in recent years. Many claimed that a growing number of international institutions are gradually legalized and the phenomenon of "legalization" has been commonly observed. Others, however, posed serious doubts not only on the empirical evidence of "legalization", but also on what it really means, whether it should be happening and whether it goes down the path that international lawyers predicted. Consequently, instead of debating only on the dichotomy between law or no law or whether hard law is better than soft law in international organizations, in-depth theoretical inquiries of legalization involve interlinked questions such as how to conceptualise "legalization", what is the discourse of legalization in a particular subject area or region and what are the effects of legalization.

Among legal and International Relations literature which analyzes the phenomenon of legalization, a special issue of International Organization in 2000 ("the special issue") presented a theoretical framework and several case studies of legalization which are of special interest to this study. The special issue developed an analytical framework to explain the common ground of the move to law in various international/regional institutions and explore the consequences of legalization in various subject areas and regions. In order to analyze the highly diversified phenomenon of legalization in different subject areas and regions, authors of the special issue set forth and elaborated a definition
of legalization, which was used as "a classificatory structure for comparative analysis" in case studies in the special issue.\(^5\) Deploying this conceptual framework of legalization, contributors examined the status of legalization in different regional/international organizations and institutional arrangements in specific issue areas. Three articles examined the pattern of legalization and its effect on participants and policies in three regions: Europe\(^6\), North America\(^7\) and Asia-Pacific\(^8\), whereas the rest three contributors focused on legalization in international monetary affair\(^9\), trade\(^10\) and human rights.\(^11\)

Despite great efforts of the contributors of the special issue to cover divergent phenomena of legalization in various regional/international institutions and issue-areas, it is clearly stated that the purpose of the special issue is not to provide a coherent new theory to explain legalization in all institutions and issue-areas. To the contrary, the principle interest of the special issue is to "open some conceptual and analytical doors to a more sustained and explicitly theoretical analysis of the connections between law and politics in contemporary world politics".\(^12\) This study is one of those researches which intends to follow the theoretical framework of the special issue and empirically analyzes the evolution of the GATT/WTO in general and the AD regime in particular.

On three grounds this study considers that the theoretical framework established in the special issue can be useful to analyze the GATT/WTO system: first, the definition of legalization in the special issue provides a coherent set of identifiable attributes which can sufficiently characterize the evolution of the GATT/WTO, not only in terms of the development of dispute resolution, but also in terms of the evolution of the treaty network and the administration of the GATT/WTO as an international organization. The existing literature largely focuses on one or another function of the GATT/WTO, as an institution

\(^5\) Goldstein (n 2) 385. ('Introduction')
\(^6\) K Alter 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?' (2000) 54 International Organization 489. ('European Union's Legal System and Domestic Policy')
\(^7\) F Abbott 'NAFTA and the Legalization of World Politics: A Case Study' (2000) 54 International Organization 519. ('NAFTA and the Legalization')
\(^8\) M Kahley 'Legalization as Strategy: The Asia-Pacific Case' (2000) 54 International Organization 549. ('Legalization as Strategy')
\(^9\) B Simmons 'The Legalization of International Monetary Affairs' (2000) 54 International Organization 573. ('Legalization of International Monetary Affairs')
\(^10\) J Goldstein and L Martin 'Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note' (2000) 54 International Organization 603. ('Trade Liberalization and Domestic Politics')
\(^12\) Goldstein (n 2) 399. ('Introduction')
of negotiation or surveillance or adjudication. The theoretical framework, however, allows examinations of institutional arrangements of different parts of the GATT/WTO under a uniform theoretical framework. It also allows this study to depict the status of legalization of the GATT/WTO at a given point of time by describing three elements of legalization and to demonstrate the trend of legalization by linking these points together. The theoretical framework hence facilitates the demonstration of the process of legalization by allowing meaningful comparisons of three elements of legalization at different points of time.

Second, the special issue laid the theoretical foundation for this study to discuss the consequence of intensive institutional changes in the GATT/WTO at domestic level. In the special issue, contributors addressed not only what is “legalization” and what are the variations of legalization, but also the consequences of legalization, namely, how legalization, “in creating a new institutional form, mobilizes different political actors and shapes their behaviour in particular ways”.¹³ Although the particular angles chosen by this study are different with those in the special issue, this study benefits from the articles in the special issue. In particular, three articles help this study to build up its arguments by exploring the interaction between the increase of legalization in the trade regime and the trade-related interests of domestic actors¹⁴, the correlation between the degree of legalization in dispute resolution mechanisms and state behaviour in dispute resolution processes¹⁵ and the interaction between the process of legalization in international/regional organizations and domestic policies¹⁶.

Finally, the theoretical framework of legalization puts the “legalized” evolution of the GATT/WTO in a broader context. By using a uniform framework to analyze strongly variable institutions across issue-areas and regions, the dynamic process of legalization of a particular institution such as the GATT/WTO could be better explained. Indeed, even though the GATT/WTO has developed in a rather unique manner, it shares common grounds with the development of many other international organizations. When national

¹³ M Kahler ‘Conclusion: The Causes and Consequences of Legalization’ (2000) 54 International Organization 661, 661. (‘Conclusion’).
¹⁴ Goldstein and Martin (n 10). (‘Trade Liberalization and Domestic Politics’)
¹⁶ Alter (n 6). (‘European Union’s Legal System and Domestic Policy’)
governments negotiate trade agreements and make institutional choices for the GATT/WTO, they face similar constraints imposed by their political environments as they do in many other issue-areas. It is therefore helpful to analyze the GATT/WTO system under a framework which can explain the commonality among the processes of legalization in different international organizations as long as this framework also reflects the divergence between systems.

The limited scope and the distinctive approach followed by this study however have to be noted at the outset. First, it is not the intention of this study to either compare or link the process of legalization in the GATT/WTO system with similar processes in other international/regional institutions discussed in the special issue. Although adopting the same theoretical framework, this study treats the GATT/WTO system as a distinctive legal order and avoids engaging in discussions in connection to discrepancies among the processes of legalization in different international institutions.

Second, among the working hypotheses of the special issue, this study identifies two aspects which are most relevant in analyzing the GATT/WTO system, namely the uneven expansion of legalization and the complicated consequences of legalization. It restrains its discussion on these two aspects. Other working hypotheses are not discussed in this study. In particular, this study has no intention to seek the explanation of why a particular institutional form appears in the GATT/WTO under a particular circumstance - a key research question intensively discussed in the special issue. Instead, this study describes the status of legalization in the trade regime as it was at a given point of time and tries to demonstrate the trend by linking these points together. In other words, this study is working under the assumption that over a particular period of time, the "legalized institutional settings of the trade regime are "frozen" until the next institutional change occurs. The discussions in the following chapters therefore have been put in specific time frames and coincidences of time between changes of status of legalization at international level and changes of institutions and legislations at domestic level are identified to the extent possible in the analysis.

The rest of the chapter proceeds as follows. Section 2 outlines the definition of legalization in the special issue and indicators for each element of legalization. It summarizes the discussion of two features of legalization, namely the uneven expansion
of legalization and the complicated consequences of legalization in the special issue. It also discusses criticisms of the theoretical framework and whether these criticisms undermine the analysis of the GATT/WTO system in this study. Section 3 adopts the theoretical framework to examine the current status of legalization in the WTO system, the uneven expansion of legalization in the WTO system and the consequences of legalization at domestic level. Section 4 concludes the chapter.

2. Defining Legalization in International Relations

2.1 Elements of Legalization

In the first article of the special issue, "The Concept of Legalization", legalization is posited as a particular form of institutionalisation characterized by three components: obligation, precision and delegation. Obligation refers to a rule or commitment or a set of rules or commitments by which states or other actors are legally bound, i.e. their behaviour becomes "subject to scrutiny under the general rules, procedures, and discourse of international law". Precision means that "rules or commitments unambiguously define the conduct they require, authorize or proscribe", i.e. definiteness of legal rules and their elaborations. Delegation is defined as whether third parties have been granted authority "to implement, interpret, and apply the rules; to resolve disputes and (possibly) to make future rules". Put differently, delegation refers to the acceptance of third-party authorities for rule making, rule interpretation and dispute resolution.

In order to better explain variations of legalization in different international institutions or in different portions of an international institution/instrument, the special issue, in addition to above definitions, identifies several indictors of each element of legalization. It first formulates obligations as commitments ranging from "coercion, comity to morality". Commitments made by states can vary widely from "unconditional obligations with language and other indicia of intent to be legally bound" to "instruments

17 Abbott etc (n 1) 401. ("Concept of Legalization")
18 Ibid.
19 Ibid.
20 Abbott (n 1) 60. ("Many Faces of Legalization")
21 Abbott etc (n 1) 408. ("Concept of Legalization").
that explicitly negate any intent to create legal obligations". In between, there are obligations with implicit conditions, contingent obligations and escape clauses. The article argues that the contrasting legal forms of obligations have distinctive implications on their discourse in the international legal system. The breach of unconditional obligations may result in other states to "assert legal claims, engage in legal discourse, invoke legal procedures and resort to legal remedies". The breach of obligations in non-binding instruments, however, can only result in normative claims, normative discourse and political resorts.

The indicator of precision is whether the scope of "reasonable interpretations" can be narrowed. The more precise a set of rules, the clearer and more unambiguous what is expected of states or other actors under particular circumstances. Precision implies not only that each rule in the package is clear and unambiguous, but also that the set of rules, as a whole, creates a framework within which "coherent and non-contradictory interpretations can be carried out in each case". Normally, high precision is represented by elaborated "rules" with detailed conditions of application, required or proscribed behaviour and a narrow scope of interpretation. Rules which have lower precision range from rules with a substantial but limited scope of interpretation, rules contained broader areas of discretion, "standards" which are "meaningful only with reference to specific situations to rules which are impossible to determine what conduct complies". It is possible that in a highly developed legal system, "precise" rules can be formulated as relatively general "standards" without detailed conditions and open to interpretation. However, the more "standard-like" a rule, the more ex post interpretations by courts or tribunals are needed. To enable "standard-like" rules to be operated as a precise rule, the institutional context has to be sufficiently thick to allow courts or tribunals to determine the acceptableness of a particular behaviour in a specific situation.

The indicators of delegation describe the extent to which states and other actors delegate authority to designated third parties, including courts, arbitrators or

---

22 Ibid.
23 Ibid.
24 Ibid.
25 Ibid.
26 Ibid.
27 Ibid.
28 Ibid.
administrative organizations, to implement agreements.\textsuperscript{29} The most characteristic forms of high delegation are third-party dispute resolutions, where "third parties are authorized to interpret rules and apply them to a particular set of facts".\textsuperscript{30} In this regard, indicators of delegation of dispute resolution constitute a spectrum from most highly legalized dispute settlement mechanisms where parties agree to binding third-party decisions, to least legalized dispute settlement mechanisms which involve political bargaining between parties. Yet, the delegation of legal authority is not confined to dispute settlement. It also includes the delegation to administrative institutions in elaborating imprecise legal norms, implementing agreed rules and facilitating enforcements. The indicators of delegation in this respect range from institutions which are authorized to elaborate agreed norms and implement them to institutional arrangements purely for the purpose of negotiation and consultation.

In addition to the definition and indicators of each element of legalization, "The Concept of Legalization" discussed three central assumptions of this definition of legalization. First, each of the three elements is a reflective criterion of different types of legalization and can vary independently. For different international institutions, legalization can be a continuum that ranges from the absence of law, where none of the three elements exists, through various forms of "quasi-" or "soft" legal institutions, to "hard" law, in which all three indicators are maximized.\textsuperscript{31} The special issue takes laws and regulations in a highly developed national legal system as the prototypical of hard legalization.\textsuperscript{32} It argues that while generally speaking international institutions are less legalized than institutions in domestic rule-of-law states, most international institutions, such as the WTO, can be located in the middle of this continuum. Where to precisely locate a particular international institution in the continuum requires a more detailed specification of obligation, precision and delegation. Second, three elements of legalization characterize the special form of institutionalization in terms of rules and procedures, but not in terms of effects. One example discussed in the special issue is that although the definition of legalization includes the delegation of legal authority to

\textsuperscript{29} Ibid, 413.  
\textsuperscript{30} Ibid.  
\textsuperscript{31} Ibid, 402.
international courts or the equivalent agencies, the factor "delegation" as described in the
definition does not include "the degree to which rules are actually implemented or to
which states comply with them".33

This study agrees with these three assumptions of the special issue and takes them as
the assumptions of the analytical work of this study.

Thirdly, the special issue understands that the substantive content of rules and the
degree that rules have been legalized are distinct matters. It argues that as the process of
legalization does not necessarily bear a normative stance, higher degree of legalization
may not justify the substantive content of a particular law from a normative standpoint.
Similarly, although a non-binding declaration could have "exactly the same substantive
content as a binding treaty", they are very different instruments in terms of legalization.34

Based on this definition of legalization, the special issue continues to discuss two
most prominent features of the legalization process in contemporary world politics, i.e.
the uneven expansion of legalization and the complicated consequences of legalization.
The following two sub-sections summarize the discussion of these two features in the
special issue and present the link between the discussion in the special issue and the
analytical work of this study.

2.2 The Uneven Expansion of Legalization

The expansion of legalization into new domains and the unevenness of that
expansion is one of the key themes of the special issue.35 The discussion in the special
issue has been focusing on two aspects: first, the existence of variations of legalization
across subject areas and regions and second, the reasons that among available
institutional forms, legalized institutions are preferred in some circumstances and not in
others. The two aspects are interrelated in the sense that the existence of variations of
legalization is in fact a result of the choices governments make under difference
circumstances. Under the broadly defined functionalist approach promoted by the special
issue, legalized institutional arrangements will be selected only if they provide "superior

32 Ibid.
33 Ibid.
34 Ibid.
net benefits" to governments in comparison to non-legalized or less legalized institutional alternatives.36

These two aspects of the discussion are however different in the sense that the first aspect examines what is the status of legalization, namely the combination of three factors of legalization, at a particular point of time in a particular institution, while the second aspect explores the rationale behind the choice of the institutional solution at that time.

This study, although agreeing on the general comment that legalization is a complex rather than a uniformed process, has no attempt to engage in the discussion of the second aspect of the uneven expansion of legalization and approaches the first aspect in a different manner. Instead of focusing on the horizontal comparison of the degree of legalization among different international/regional institutions, this study exclusively depicts the uneven expansion of legalization in different parts of the GATT/WTO at different points of time.

2.3 Consequences of Legalization

The special issue examines three frequently discussed consequences of legalization in International Relations. As summarized in the "Conclusion: The Course and Consequence of Legalization", these three consequences are effects of legalization on state behaviour, effects of legalization on the evolution of international norms and the spread and retrenchment of legalization.37 Although all three consequences are very important in understanding legalization processes across issue-areas and regions, the limited scope of this study narrows the focus to the effects of legalization on the institution changes of domestic regimes and dispute settlement activities of states. This study therefore particularly benefits from three articles in the special issue which conduct in-depth investigations of the impact of legalization on the international dispute resolution38, the mobilization of domestic actors39 and the change of national policies by a legalized region institution40.

35 Goldstein (n 2) 388. (‘Introduction’)
36 Kahler (n 13) 663. (‘Conclusion’)
37 Ibid.
38 Keohane etc (n 15) 457-488. (‘Legalized Dispute Resolution’)

28
In the article "Legalized Dispute Resolution: Interstate and Transnational", Keohane, Moravcsik and Slaughter analyze the dynamics of international dispute resolution process by constructing two ideal types of legalized dispute resolution, interstate and transnational. They examine these two types of legalized dispute resolution along the dimensions of independence, access, and embeddedness, and use the International Court of Justice (ICJ), the European Court of Justice (ECJ) and the GATT/WTO DSM as examples. They argue that although the contrasting experiences of the ICJ and the ECJ suggest "the distinction between the two ideal types appears to be associated with variation in the size of dockets and levels of compliance with decisions", the experience of the GATT/WTO DSM does not reflect the two ideal types of legalized dispute resolution faithfully. Since the caseload of the GATT/WTO DSM and the effectiveness of their decisions "increased without higher formal levels of access or embeddedness", the GATT/WTO DSM exemplifies, as argued, "legal form does not necessarily determine political process".

The article "Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note" examines another aspect of the consequence of legalization, i.e. "how increases in the legalization of the international trade regime interact with the trade-related interests of domestic actors". It argues that although it is generally true that increased legalization has a positive impact on trade liberalization by "reducing incentives for an individual nation to behave opportunistically and renege on trade agreements", certain unintended effects of legalization on the activities of domestic economic actors could interfere with the pursuit of trade liberalization at international level. The authors particularly examine three issues which implicated by legalization at international level: firstly, whether "greater precision at the time of negotiating treaties changes the incentives of antitrade groups to mobilize"; secondly, whether greater legalization provides the incentives to exporters to mobilize in order to maintain agreements already in force; and finally to

39 Goldstein and Martin (n 10) 603-632. ("Trade Liberalization and Domestic Politics")
40 Alter (n 6). ("European Union's Legal System and Domestic Policy")
41 Keohane etc (n 15) 487. ("Legalized Dispute Resolution")
42 Ibid.
43 Ibid.
44 Goldstein and Martin (n 10) 603. ("Trade Liberalization and Domestic Politics")
45 Ibid.
46 Ibid, 630.
what extent a system of highly deterministic penalties on domestic actors. The authors argue that "the prediction about the effects of changes in the information environment varies, depending upon whether we are considering the expansion of trade liberalization or compliance with enacted treaties". Therefore, they conclude that it is a need to "carefully examine the trend toward increasing legalization, weighting both its benefits and its costs". They admit that they cannot demonstrate that legalization in the trade regime has gone so far to be a threat of trade liberalization, they however wish to make a caution note on the potential impact of legalization on the mobilization of domestic protectionist groups.

Finally, Alter's work "The European Union's Legal System and Domestic Policy: Spillover or Backlash?" examines how domestic actors utilize the legal system of the European Union (EU) to influence national policies of Member States (MSs). She argues that by offering a powerful tool, the preliminary reference, to private litigants, EU law can be used to force changes in national policies once certain thresholds are met. The availability of this European law tool shapes the behaviour and expectations of domestic groups. Indeed, it has been observed that private litigants tend to use EU litigation strategies "whenever a potential benefit exists". Consequently, "the pursuit of self-interest leads litigants and national courts to challenge national policies and advance European integration". In this context, Alter investigates "the factors shaping each step of litigation process" and reveals many factors that "keep private litigants and national courts from facilitating the expansion of European law". She however also observed that "the very factors that have led to the success of the EU legal process in expanding and penetrating the national order have provoked national courts and European governments to create limits on the legal process and to repatriate powers back to the national level". As a result, "the dynamic expansion created by the ECJ may well have provoked a backlash that contributed to disintegration".

---

48 Ibid.
49 Alter (n 6) 489-518. ('European Union's Legal System and Domestic Policy')
50 Ibid, 490.
51 Ibid.
52 Ibid.
53 Ibid.
54 Ibid.
These three articles in the special issue closely relate to the analytical work of this study in different ways. The first article provides useful insights on how the institutional differences between international courts and tribunals significantly impact on the dispute settlement process and, more generally, legalization process. This study, however, examines the effects of legalization on state behavior in trade disputes from a different perspective. In the WTO system, the DSM is institutionalized by the Dispute Settlement Understanding (DSU), an agreement which is part of the single undertaking of the Uruguay Round.55 Once a WTO member chooses to use the WTO DSM to settle a trade dispute, the variable of institution is fixed. Hence, other variables, such as obligation and precision of the covered agreement to be applied in the dispute settlement process, instead of institutional arrangement of the tribunal itself, determine state behavior in a trade dispute under the framework of the WTO. This study focuses on these other variables, inter alia, the incentives provided by the "legalized" DSM to WTO Members to build up legal and institutional capacity to effectively utilize the DSM.

The discussion of the consequences of legalization at domestic level in this study benefits from the analysis in the second and the third article. The second article argues "when exporters know that they are likely targets of retaliation, they are more motivated to organize in support of the trade regime than those subject to an imprecise threat of retaliation".56 This study agrees with this comment and exemplifies it by examining the mobilization of Chinese export-dependent industries in AD cases targeting China. The moves of Chinese industries in those AD cases, including pushing their government to more effectively utilize the WTO DSM, epitomize Goldstein and Martin's argument that the rise of legalization which results in "greater precision, better transparency, stronger delegation of monitoring and dispute-resolution to centralized organizational agency and more certain penalties for rule violation", provides better information to domestic pro-trade industries and gives them stronger incentives to mobilize.57 This study however does not particularly address two other issues discussed in the second article, namely the

56 Goldstein and Martin (n 10) 631. ("Trade Liberalization and Domestic Politics")
57 Ibid.
impact of increasing legalization on trade negotiations and whether the WTO laws should allow more flexibility.

In the context of the GATT/WTO system, this study also observes, as Alter does in the third article, that the expansion of legalization heavily influenced the evolution of domestic systems. Yet, legalization at international level provoked national governments and other stakeholders to create various domestic law vehicles to limit the legalization process and to retain power at their hands. Nevertheless, the discussion in this study cover the impact of legalization on trade legislations, the administration of trade policies and the adjudication of trade politics at domestic courts, as exemplified by the EC AD regime. The focus of this study is therefore not on a particular legal tool. Instead, it is the intention of this study intends to conduct a comprehensive investigation on how legalization at international level influences domestic trade policy-making, administration and adjudication and the mobilization of domestic groups.

2.4 A Richer View of Legalization?

One year after the publication of the special issue, International Organization published Finnemore and Toope’s article “Alternatives to ‘Legalization’: Richer Views of Law and Politics”, in which the authors criticized the theoretical framework promoted in the special issue. Finnemore and Toope particularly consider that the theoretical framework of legalization is not adequate and useful for two reasons: firstly, “the framers of the legalization concept are not explicit, however, about their limited view of law or about alternative views of law that might yield different understandings of their cases”, and secondly, “they have not adequately theorized their definition of legalization so as to provide clear help to the empirical researchers seeking to apply the concept”.

This section analyzes the criticisms of the theoretical framework and examines whether these criticisms undermine the theoretical foundation of the analytical work of this study.

On the first account, Finnemore and Toope argue that the view of law, as presented by the definition of legalization in the special issue, “though important, is limited”. In their view, in the special issue, “law is constructed primarily through cases and courts, or

---


32
through formal treaty negotiation” and “the processes of law are viewed overwhelmingly as processes of dispute resolution, mostly within formal institutionalized contexts”.\textsuperscript{59} To further elaborate their arguments, the authors discuss “three interrelated features of international law neglected in the volume”, namely custom, defining characteristics of law and law as process.\textsuperscript{60} They first claim that the narrow framing of legalization fails to engage in customary international law completely.\textsuperscript{61} They also argue that since imprecise norms and the absence of delegation are found in a number of well-established areas of international law, to select precision and delegation as the defining characteristics of legalization is problematic.\textsuperscript{62} Moreover, the special issue did not explore the relationship among the three characteristics of legalization. Finally, the authors criticize the way the special issue treated law, which “equates legalization with three features of the form of an artefact” and claim that “law, and by implication legalization, may be more about process than about form or product”.\textsuperscript{63}

To demonstrate their second criticism, Finnemore and Toope analyze three articles in the special issue which apply the concept of legalization to different issue-areas and conclude that “the concept provides little help to these researchers, not only because it contains a narrow notion of law but also because it is inadequately theorized”.\textsuperscript{64}

Although this study agrees with Finnemore and Toope’s general comment that the specific legalization phenomenon analyzed in the special issue is among law’s many influences in politics and this formalized legalization “interacts with other work law does in the world”, it disagrees with them that by focusing on formal institutions, the theoretical framework in the special issue cannot be helpful to empirical researches. Moreover, this study considers that the points raised by them are either not relevant to the analytical work of this study or have been addressed in this study.

This study sets the limited scope of its discussion from the outset, namely it analyzes only the special form of institutionalization presented by the GATT/WTO and focus exclusively on the development of formal institutions in the trade regime. It never denies

\textsuperscript{59} Ibid 745.  
\textsuperscript{60} Ibid 746 – 751.  
\textsuperscript{61} Ibid 746.  
\textsuperscript{62} Ibid 747.  
\textsuperscript{63} Ibid.  
\textsuperscript{64} Ibid, 751.
that the evolution of the trade regime does not limit on the formalized and institutionalized developments, yet it considers this special form of institutionalization is one of the most important features of the trade regime and worth an in-depth research. This is the reason that this study situates itself in the broader debate of “constitutionalization” of the WTO, but at the same time distinguishes itself from other works in the debate.

With respect to three interrelated feature of international law analyzed by Finnemore and Toope, they are either not relevant to this study or have been properly addressed in this study. First, given the special institutional settings of the GATT/WTO, customary international law does not play a role in the institutionalization of the trade regime. Second, precision and delegation are important characters of the GATT/WTO rule and it is justified to include them as indicative variables in analysing the WTO system. Moreover, this study considers the definition and indicators of obligation in the special issue properly captures the features of obligation in the GATT/WTO system. It may be true that there are other dimensions of obligation in general international law theory as Finnemore and Toope argued. This study, however, limits its scope of discussion from the very beginning and states that it is not engaging in normative debates, including legitimacy.

Finally, this study addresses the relationship among three factors of legalization as part of the discussion concerning the uneven expansion of legalization in the GATT/WTO. It also examines the dynamic process of legalization in the GATT/WTO system from a historical perspective. It disagrees with Finnemore and Toope that the theoretical framework of legalization, by focusing on forms, is less useful to explain changes. To the contrary, in the context of the GATT/WTO, the theoretical framework of legalization is helpful since it facilitates empirical researches by providing an effective way to describe process, namely to identify the value of three factors of legalization at a particular point of time and enabling meaningful comparisons between the status of legalization over a period of time. This study considers that an abstract description of the process is not sufficient if there is no theoretical framework to allocate values to variables and provide a reference system to cross-examine variables over a period of time.
In sum, the criticisms raised by Finnemore and Toope indeed provide another perspective to explore the broader interaction between law and politics. Nevertheless, their particular arguments and criticisms are either not relevant to this study or have been properly addressed in this study. These criticisms therefore do not have an impact on the analytical work of this study.

3. Applying Legalization in the WTO System

3.1 Elements of Legalization in the WTO

This section adopts the definition of legalization setting out in the previous section to analyze the WTO system by examining the status of three factors of legalization in the WTO system.

Obligation

Obligation refers to norms set in all WTO agreements, agreed Understandings and other binding documents, such as the Ministerial Decisions and Declarations. The WTO treaty system is generally described as highly legalized and closely resembles a modern municipal legal system since it has a comprehensive collection of legally binding primary rules. However, if considering the indicators of obligation in the previous section, wide variations between WTO obligations can be identified. Despite the fact that all WTO obligations are legally binding, the collection of WTO obligations constitutes a full continuum of obligations, ranging from specific and unconditional obligations which require or prohibit certain behaviour of national authorities, to general principles which may tolerate divergent practices of WTO Members. Thus, it is impossible not only to characterize the features of obligations in different WTO agreements, but also to characterize the obligations with different natures in the same covered agreement. An analysis of obligations in the WTO therefore has to be not only sector-specific, but also provision specific, as to be presented in the analysis of obligations in the Anti-dumping Agreement (ADA) in Chapter IV below.

65 Ibid 750.
66 Ibid 466. The author noted that by any means, the WTO is one of the most comprehensive collections of primary obligations existing in the field of public international law.
Chapter II

Precision

Precision in the context of the WTO measures not only the clarity of the wording of related WTO agreements, but also to which extent that the WTO rules narrow down the scope of reasonable interpretations by requiring (or prohibiting) specific actions by WTO Members. Many claim that lack of precision of many WTO rules leaves a wide range of latitude enjoyed by national trade authorities in acquiescing to or, on the contrary, rejecting a specific WTO rule in both formal and informal means.67

One explanation provided by existing works is that the decision-making approach of the WTO is the root reason for this. The "legislative branch" of the WTO is its membership, taking decision on all matters and acting by consensus. The nature of such a broad decision-making power of the plenary organ decides that "rules made through it can only be the compromise between parties and lack of extensive certainty".68

This study agrees with this observation since it is largely confirmed by the evolution of AD rules in the GATT/WTO. As to be elaborated in below Chapter IV, one of the key reasons that many provisions in the ADA are lack of precision and unable to cover sharp differences among national practices is that the text of ADA is a result of comprise. Trading partners with different agendas put together the text of ADA at the last minute as part of the Uruguay Round bargaining.69 It is therefore not surprising that the text of the ADA, although fairly detailed, does not achieve high precision in the sense that a large number of provisions does not narrow the scope of reasonable interpretations.

Delegation

Delegation in this study reflects the willingness of WTO Members to delegate authority to designated WTO institutions to implement agreements and solve trade dispute. It first refers to the acceptance of the quasi-judicial dispute settlement mechanism (DSM). It also refers to the acceptance of the activities of other regulatory


agencies and administrative bodies of the WTO, such as activities of the WTO Secretariats and the Trade Policy Review Body (TPRB).

With respect to delegation to the DSM, WTO Members treat it with extreme caution and clearly distinguish rule interpretation from dispute resolution. In terms of dispute resolution, the DSM enjoys high level of delegation as expressed in Article 1 of the DSU. Nevertheless, when it comes to interpret WTO law, delegation conferred to the DSM is restricted. Although the DSM made a lot of efforts in interpreting WTO law, it has to restrict itself and limit the effect of its interpretations to a specific dispute.

The capacity of other WTO bodies to interpret WTO rules is also restricted. An example can be found in the TPRM, where the TPRB are strictly forbidden to amend or interpret WTO obligations. Nevertheless, although without explicit delegation, WTO bodies and trade diplomats are making their own contributions to the WTO rule interpretation through their day-to-day activities. Also, the WTO Secretariat produced a large number of soft law-like publications to guide the interpretation and application of WTO rules, such as the WTO Analytical Index. Although not legally binding, activities of WTO bodies promote uniform understanding of WTO norms and are influential to national trade policies and later WTO dispute settlement cases.

In addition to the limited scope of delegation conferred to the DSM and administrative bodies of the WTO in terms of rule interpretation, it is also observed that there is no parallel delegation of rule interpretation to political organs of the WTO. This study agrees with this observation and considers that examples can be found in the AD regime where significant controversies are caused by the tension between activities of the

---

70 For the details of the role and activities of the WTO Secretariat, see H Nordstrom 'The World Trade Organization Secretariat in a Change World' (2005) 39 JWT 819. ('The WTO Secretariat')
71 DSU (n 55) Art 1.
73 The WTO Analytical Index is regarded as the authoritative guide to the interpretation and application of findings and decisions of WTO panels, the WTO Appellate Body and other WTO bodies. See, WTO Website, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm (visited 15 Oct 2004)
74 Ibid.
DSM and the negotiation forum. Take “zeroing” as an example. Despite having a series of Panel and the AB reports ruled that “zeroing” was WTO-inconsistent in a number of specific investigations (both original investigations and reviews), Article 2.4.3.3 of the draft Consolidated Texts on Anti-dumping and Subsidies and Countervailing Measures circulated by the Chair of the Negotiating Group on Rules (“the Chair’s text) allows the utilization of zeroing under certain circumstances. 76 The reactions of WTO Members are mixed. On the one hand, the US, by criticizing the panels and the AB’s interpretative approach on “zeroing” cases, publicly expressed it view that zeroing is “allowable under current global trade rules, penned in the 1994 Uruguay Round accord,” and “has signalled that any agreement emerging from the six-year-old Doha Round of talks must recognise its validity”. 77 On the other hand, officials from countries which are frequent targets of AD measures warned that the Chair's text which “reinstate zeroing and reverse the earlier WTO rulings” posed a major challenge to the organization's dispute settlement system and could undermine its credibility”. 78 This example illustrates that delegation in terms of rule interpretation in the WTO is limited, although by contrast, delegation in terms of dispute resolution is high.

3.2 Uneven Expansion of Legalization in the WTO

Although the GATT/WTO system is originated from a single undertaking and commonly regarded as a uniform global regulatory infrastructure, as the system expanded, a close look shows that three elements of legalization differentiate among different parts of the WTO. This section, by describing the current status of each factor of legalization in different parts of the WTO, intends to demonstrate that although the rise of legalization is generally observed, the expansion of legalization in different parts of the WTO is uneven and imbalanced. The uneven expansion of legalization may explain the widely observed long-lasting tension between the diplomatic negotiation and the

78 BNA International Trade Reporter "WTO Members Discuss Services Conference; Doha Rules Chair Promises New Revised Text", 20 March 2008, available at
operation of legalized multilateral institutions, which has not disappeared even with a complicated legal system in place.\textsuperscript{79}

As shown on Chart 1, three parts are covered under the roof of the WTO, which function relatively independently. The WTO is at first a decision-making mechanism, where trade negotiators "bargain in the procedural context to achieve certain kind of
compromises”. The WTO is also a locus of surveillance activities, aiming to oversee the implementation and operation of the WTO agreements already on the book. Finally, the WTO provides a quasi-judicial DSM to its Members, which results in “centrally authorized sanctions against recalcitrant violators of the multilateral trade agreements”.

Based on the definition with three elements, namely obligation, precision and delegation, a simple (if not overly simple) chart is constructed to demonstrate the status of legalization in different parts of the WTO. One of the two values, High or Low, is assigned to each component, as shown in Chart 2. The value of “high” or “low” refers to two extremes of the legalization spectrum. High value is typically represented in most advanced domestic legal systems; while low value can normally be found in a system with loose rules and institutions, such as the traditional international law system.

<table>
<thead>
<tr>
<th>Decision-making</th>
<th>Surveillance</th>
<th>Adjudication</th>
</tr>
</thead>
<tbody>
<tr>
<td>Obligation</td>
<td>Low</td>
<td>Low</td>
</tr>
<tr>
<td>Precision</td>
<td>Low</td>
<td>High</td>
</tr>
<tr>
<td>Delegation</td>
<td>Low</td>
<td>Low</td>
</tr>
</tbody>
</table>

Chart 2 Different Factors of Legalization in Different Parts of the WTO

The first and foremost part of the WTO is its decision-making body, with a negotiation forum as its centerpiece. The negotiation forum is formally the resource of all WTO rules. As an institution of barter, it is analogized as a private market, a place where states “trade” their regulator power towards international trade. In this multilateral “market”, low legalization is observed – with no tight obligation, no precise rules and no third-party delegation, it represents the lowest level of legalization of the spectrum.

The above observation, however, does not necessarily mean that there is no formal procedure in the WTO negotiations. Three provisions in the Marrakesh Agreement

---

81 Nordstrom (n 70) 819. (‘The WTO Secretariat’) The term “surveillance” is used to in a different context of dispute settlement in some literatures. Here it refers to the professional activities conducted mainly by the WTO Secretariat.
establishing the World Trade Organization (the WTO Agreement) formulate rules for this negotiation forum, namely Art IX Decision-making, Art X Amendments and Art XII Accession. Those provisions stipulate that the principle of WTO decision-making is by consensus; if consensus cannot be reached, the issue can be decided by voting. Each member of the WTO has an equal vote in decision-making.

Voting is, however, not used in practice, as widely observed. As argued, powerful parties have simultaneously dominated bargaining outcomes and supported the consensus decision-making rule. Hence, the WTO largely inherited the paradoxical practice of GATT decision-making --- the coexistence of “Green Room” practice and the consensus principle. It is observed that only when a deal has emerged in the Green Room meetings between major countries and a representative set of developing countries, it would then be submitted to the whole WTO membership for discussion. Therefore, the assessment of obligation and precision of the decision-making mechanism cannot rely on the provisions of the WTO Agreement. Rather, the practice of the WTO to date supports the “low” mark of obligation and precision in this part.

The rule of delegation in the WTO decision-making is laid out by Art IX paragraph 2 of the WTO Agreement, which explicit imposes the “exclusive authority to adopt interpretations” to intergovernmental institutions – Ministerial Conference and the General Council. In Japan – Alcoholic Beverages II, the Appellate Body (AB) re-emphasized the exclusive authority of the Ministerial Conference and the General Council on decision-making, by refusing the Panel’s finding that panel reports adopted by the DSB constituted “subsequent practice” within the meaning of Art 31 of VCLT. In doing so, the AB confirmed that in terms of decision-making, no delegation to the third party exists.

84 WTO Marrakesh Agreement establishing the World Trade Organization, LT/UR/A/2, 15 April 1994 (‘The WTO Agreement’).
86 Steinberg (n 80) 365. (‘In the Shadow of Law or Power’)
87 Hoekman and Kostechi (n 85) 61. (‘The Political Economy of Trading System’) The “Green Room” is originally a conference room adjacent to the Director-General’s office. Later, Green Room meetings referred to a consultative process of a small group of diplomats from major countries and a representative set of developing countries, which tried to hammer out the outlines of acceptable proposals or negotiating agendas.
88 WTO Agreement (n 84) Article IX.
The second part of the WTO system is its surveillance mechanisms, represented by Trade Policy Review Mechanism (TPRM). Labeled as “low” in obligation and delegation but “high” in precision, this part of the WTO abstains from creating new obligations or delegating legal authority. Trade technocrats, however, intend to employ those “soft” mechanisms to improve the transparency of national trade policy and induce compliance of the GATT/WTO rules.

Annex 3 of the WTO Agreement sets the rules for the TPRM, stipulating the mission of TPRM, the reporting obligation of the governments and the procedure of reviews. There is little doubt that precision of the TPRM can be marked as “high” given the sufficient elaboration of the rules, yet its delegation and obligation can only be marked as “low”. The TPRM, as stated by Trade Policy Review Body (TPRB), “had been conceived as a policy exercise and it was therefore not intended to serve as a basis for the enforcement of specific WTO obligations or for dispute settlement procedures, or to impose new policy commitments of Members”. It is not the mandate of the TPRB to either make or enforce WTO rules. The obligation of Members under the TPRM is to report their trade policies, while the change of those inconsistent trade policies is only voluntary. The TPRM is therefore in the intermediate zone along the spectrum: low obligation, low delegation but high precision.

The third part of the WTO system is its adjudicatory system. The WTO DSM significantly differentiates with other international tribunals and dispute settlement regimes in that it “to a large extent similar with the court in domestic law with compulsory jurisdiction and clear procedural rules”. It reaches the “high” end of the spectrum in all three factors.

Obligation in the DSM was covered by the DSU, a comprehensive instrument dealing with all aspects of the process. Not only is the DSU binding to WTO Members, the panel or the AB reports adopted by the DSB are also binding on parties of a dispute. In this sense, the value of obligation of DSM is “high”, even the panel or AB reports have

---

90 WTO Annex 3 Trade Policy Review Mechanism, LTIUR/A-3nTR/l. 15 April 1994. ("TPRM")
no precedent status. With 27 articles, precision of the DSU is also undoubtedly “high”, particularly in terms of procedural rules.

The issue of delegation in the DSM is more complex as mentioned in the previous section. On the one hand, all WTO Members accepted the delegation of the DSB in term of settling a particular dispute. To what extent that the DSB is delegated to produce legally binding interpretation of WTO law is a contested issue, on the other hand. WTO Members showed a certain degree of reluctance to empower the DSB to produce binding interpretations in the process of dispute settlement. One of the evidence is that there is no *stare decisis* in the WTO dispute settlement. Nevertheless, it is still fair to conclude that the DSM represents the highest level of legalization in the whole WTO system.

In conclusion, the above discussion illustrates that the level of legalization in different parts of the WTO is not uniformed and the expansion of legalization is uneven. This important feature of legalization process may provide the answer to the question why the emergence of a complicated legal system cannot wipe away the tension between different parts of the GATT/WTO.94

### 3.3 Consequences of Legalization in the WTO

#### 3.3.1 “Legalizing” National Trade Policy in the GATT/WTO System

The first consequence of legalization explored by this study is the impact of legalization in the trade regime on national trade policies. When the GATT/WTO has evolved away from its origins as a decentralized and relatively powerless institution and become a legal entity, the formalized interaction between the rise of legalization at international level and domestic systems became apparent.95 Considering the impact of legalization in multilateral framework on national trade policy outcomes, a two-way process can be identified: on the one hand, examples where the gradually “legalized” multilateral system constraints on national policy choices are more and more easily to be pointed, and on the other hand, domestic actors are increasingly mobilized to utilize

---

93 DSU (n 55).
95 Goldstein and Martin (n 10) 603. (‘Trade Liberalization and Domestic Politics’)

43
domestic laws or create domestic legal vehicles to limit the impact of legalization on
domestic systems and protect their interests. The rise of legalization therefore has both
intended and unintended effect on domestic trade policies due to the uncertain economic
and political environment at domestic level. Again, given the difficulty to generalize the
intended and unintended effects of the rise of legalization in all subject areas, this section
limits itself to provide certain general remarks which has to be read together with the
empirical study of EC AD regime in Chapter V below. It also has to be noted that the
discussions in this section draw certain ideas from the special issue as discussed in the
previous section, it however does not follow the line of argument in any particular article
in the special issue.

As well-argued in the special issue, one most noticeable consequence of legalization
in the trade regime is increased obligation. The intended effect of this change is to
“expand the breadth of the trade regime” and to “enhance compliance so as to increase
the benefit of membership by using a discourse focusing on rules, their applicability and
exceptions, rather than on interests”\(^{96}\) An illustrative example in this regard is that major
trading partners, through different domestic legal vehicles, transposed The WTO
agreements to their domestic systems.

Yet, increased obligation, frequently joined by greater precision and stronger
delegation, has unintended effects on domestic policies. While higher level of obligation
imposes pressure on domestic systems to be consistent with precise WTO obligations and
deters opportunism of a WTO Member, there are strong incentives for domestic actors to
create certain vehicles which can be generally refer to as “WTO-plus” rules to balance
interests of different domestic groups and retain the power to deal with economic
uncertainty at the hands of national authorities.

Similarly, increased precision has both intended and unintended effects on domestic
systems. Greater predictability and transparency are typically associated with the
intended effects of the improvement of precision. Nevertheless, the higher degree of
precision also affects the behaviour of domestic protectionist groups, by increasing
information available to them.\(^{97}\) Hence, increasing rule precision has two different, and

\(^{96}\) Ibid, 605 and 619.
\(^{97}\) Ibid, 606.
competing, effects. Increased transparency can undermine trade liberalization movements by activating import-competing groups in importing WTO Members. Conversely, precise rules may also result in more trade liberalization by activating exports groups in exporting countries.

The unintended effects of stronger delegation, namely “a system of highly deterministic penalties”, have the same logic with tight obligation: “too little enforcement may encourage opportunism; but too much may backfire, undermining the ability of domestic actors to find support for an open policy”, as argued by Goldstein and Martin.\textsuperscript{98}

The above arguments are well illustrated in the evolution of the EC AD regime. On the one hand, it is the most striking trend of the evolution of EC Trade Defence Instruments (TDIs) that they are essentially repeating basic principles of The WTO agreements and using similar vocabulary with WTO rules in the majority of provisions. Nevertheless, a number of WTO-plus provisions, such as injury margin, the Community interest, anti-circumvention and Non-market Economy Treatment, institutionalize the discretion of the Community institutions and allow them the flexibility to deal with economy uncertainties in the EU. An analysis of the WTO-plus provisions of the EC AD instruments suggests that there are two common features of these legal tools: first, they are developed in the areas where no precise WTO rule exists (or no rule at all); and second, these rules can change the outcomes of specific cases. One example is that in case where both injury and dumping have been found, the Commission can still propose to terminate the investigation and not to impose the AD duty on the ground of the Community interest. Chapter V below analyzes both the WTO-transposed and WTO-plus provisions of the EC AD laws and provides more details of the practice of the EC institutions, with a view to demonstrating both the intended and unintended effects of legalization.

3.3.2 Building up Legal Capacity to Utilise the DSM

In addition to formal institutionalized interaction between the legalization process of the GATT/WTO and domestic systems, this study examines another consequence of “legalizing” the trade regime, namely the impact of legalisation on the utilization of the
DSM to strategically advance a WTO Member’s trade claims, a consequence of legalization which has not been extensively addressed in the special issue. 99

The rise of legalization in the GATT/WTO makes the DSM an adjudication site which is “generally able to enforce, in an economically and politically meaningful way, rulings sufficient to compel a violating party to reform its act or omission”.100 Strong incentives are provide for WTO Members to utilise this mechanism to strategically protect its trade rights or advance their trade interests. As well documented in the literature, more and more WTO Members realized that “the legal rules in the treaties and agreements overseen by the WTO can be turned into instruments of power and means of persuasion against others in a legitimate way”.101 Given the growing interests at stake, scholars argue that WTO Members, such as Japan and Korea, are embracing “aggressive legalism” - “a conscious strategy where a substantive set of international legal rules can be made to serve as both ‘shield’ and ‘sword’ in trade disputes among sovereign states”.102

It is, however, not an easy task to effectively utilise the WTO DSM. WTO Members must have sufficient legal and institutional capacity to be able to make the full use of the DSM. It is observed that “[W]ith more rigorous disciplines and a growing body of jurisprudence, the dispute settlement system has however become significantly more legalistic and consequently more arduous to navigate”.103 In order for a WTO Member to use the DSM effectively, it must “develop cost-effective mechanisms to perceive injuries to its trading prospects, identify who is responsible, and mobilize resources to bring a legal claim or negotiate a favourable settlement”.104 In other words, even when a WTO Member is aware that it has sufficient legal grounds to act in the DSM, this awareness

98 Ibid 631.
99 Legal capacity has been defined as a state’s ability to identify violations of its right under the WTO. For recent literature, for example G Shaffer ‘The Challenges of WTO Law: Strategies for Developing Country Adaptation’ (2006) World Trade Review 177, 178 (‘Challenges of WTO Law’); and T Walsh ‘Dispute Settlement at the World Trade Organization: Do Municipal Laws Promoting Private Party Identification of Trade Disputes Affect State Participation?’ (2006) 40 JWT 889. (‘DS at the WTO’)
103 Nordstrom and Shaffer (n 100) Forward. (‘Access to Justice’)
104 Shaffer (n 99) 178. (‘Challenges of WTO Law’)
will not be "automatically transformed into the invocation of formal panel procedure".\textsuperscript{105}

The decision to start the formal DSM procedure can only be made under the condition that a WTO Member is confident that its claim is worth pursuing in light of its capacity to elaborate the law, litigation cost, possible remedies and associated political risks. In other words, a decision to pursue a particular case in the DSM involves both institutional resources and legal capacity of a WTO Member.

The progress of legalization in GATT/WTO system has impacts on both institutional and legal capacity building of WTO Members. This study, from two aspects, analyzes how the legalization process provides incentives for a WTO member to build up institutional and legal capacity to utilize the DSM, namely the capability to mobilize domestic resources for WTO complaints and the capacity to elaborate the law and to advance trade claims in the circumstances where the degree of obligation and precision of the provisions in the corresponding covered agreements which are expected to be applied in the dispute is low. The two factors can be referred to as "engaging the private sector" and "litigating the unlitigatable".

The mobilization of domestic interest groups enters into the discussion of the institutional capacity building since the process of legalization "entails a process of increased precision of rules and transparency of agreements" and therefore it "affects the behaviour of domestic groups by increasing the information available to actors about the distributional implications of trade agreements".\textsuperscript{106} Scholars therefore argue that well-placed private actors have more incentives, under a more legalized DSM, to actively engage in the WTO litigation process which is traditionally dominated by public actors.\textsuperscript{107} The emerging public-private network in trade disputes, as observed by many, brought together private enterprises, their lawyers and public officials by structure changes at international level, namely the move to higher level of legalization in the GATT/WTO, and pressure at domestic level, i.e. "firms more aggressively demanding the removal of foreign trade barriers in a globalising economy".\textsuperscript{108} As a result, it is

\textsuperscript{105} Ibid. 179.
\textsuperscript{106} Goldstein and Martin (n 10) 606. ("Trade Liberalization and Domestic Politics")
\textsuperscript{108} G Shaffer 'Behind the Curtains of International Trade Dispute', for a book on Changing Patterns of Authority in the Global Political Economy, 6, available at http://www.law.harvard.edu/students/orgs/hela/papers/pub-priv-teubingen-
considered that one of the key reasons for major trading partners, such as the EC and the US, to be successful in the DSM is that they "fostered the development of a reflex within their export sectors to assist them in investigating claims and building factual and legal cases in order to enforce their trading rights through the DSM".\(^{109}\)

With respect to legal capacity building, to litigate unlitigatable, or in other words, to sufficiently elaborate WTO law and bring claims in areas where the level of obligation or precision are low, is one of the most important dimensions of legal capacity of a WTO Member. This study consider that the frequent utilisation of the DSM is not only due to a higher degree of delegation, as commonly understood, but also closely related to the higher level of obligation and precision in covered agreements. The reason that the level of obligation or precision in particular provisions of covered agreement has an impact on state behaviour in trade disputes is simply: since WTO litigations involve huge amount of resources and are associated with high political risks, a WTO Member has to accurately access the legal merits of a particular claim before taking any initiative to challenge foreign trade barriers. To a large extent, to be able to access what might be a winning claim in the WTO DSM and to focus on the winning claims instead of wasting time and resources on losing claims signals the maturity of a WTO Member in terms of the utilization of the DSM.

With the development of legalization in the GATT/WTO as a whole, WTO Members made efforts to bring claims which used to be without "good" textual bases in the covered agreements and ask the panel or the AB to evaluate the WTO-consistency of particular domestic methodologies or policies, when the level of obligation or precision of relevant provisions in the covered agreement has changed.

A typical example in this regard is the series of "zeroing" cases. Before India challenged "zeroing" methodology in \textit{EC - Bed Linen}\(^{110}\), zeroing has already been

\(^{109}\) Shaffer (n 99) 185. ("Challenges of WTO Law")

challenged by Japan in *EC – Audio Cassette*\textsuperscript{111} unsuccessfully. Although in *EC – Audio Cassette*, the Panel did not preclude that the EC methodology might in certain cases be inconsistent with the 1979 Code, it nevertheless concluded that the EC’s practice, namely not to take negative dumping into account, was not inconsistent with the 1979 Code in that case.\textsuperscript{112}

India, under the WTO ADA, successfully challenged the EC’s zeroing methodology in *EC - Bed Linen* case. Part of India’s success can be attributed to its effective advocacy strategy, namely in constructing its zeroing arguments, India did not simply assert that every aspects of “zeroing” practice are against “fair comparison” and therefore WTO inconsistent. For example, India did not challenge the EC’s determination of different models of the like product and acknowledged that comparisons for individual product types within a single like product are appropriate in the context of an AD investigation and the weighted average normal value and weighted average export price for each model at issue in this case were properly calculated by the EC.\textsuperscript{113} Instead, India pinpointed the exact practice of the Commission which is alleged to be WTO-inconsistent.

India’s successful challenge of zeroing, however, also in part benefits from the improvement of precision of Article 2.4.2 of the ADA. The wording of Article 2.4.2 ADA is more precise than the equivalent provision in the 1979 Code, which was the legal basis of Japan’s challenge in *EC-Audio Cassette*. It is still controversial whether Article 2.4.2 of the ADA disallows all forms of zeroing in AD investigations, it is nevertheless clear that the panels and the AB considered that the Article 2.4.2 is precise enough to serve as the legal basis to challenge the zeroing practice in *EC-Bed Linen* and the following cases.

This study chooses China as the subject of its empirical study to exemplify the effects of legalization on the utilization of the DSM on two grounds: first, as the most frequent target of AD investigations worldwide by far, China’s utilization (or absence of utilization) of the WTO DSM to advance its AD agenda is an important dimension of the consequence of legalization in this subject area. Second, AD investigations against


\textsuperscript{112} Ibid, para 366.

\textsuperscript{113} EC-Bed Linen (n 110) footnote 45.
Chinese products are governed by special rules of Non-market Economy (NME) in China's Accession Protocol, which were vaguely drafted and have low level of legalization. China's efforts to litigate NME therefore illustrate the strong incentives provided by the legalization process, whilst indicating the limitations of legalization.

4. Conclusion

This chapter provides a theoretical description of the rise of legalization in the trade regime and the complicated consequences of legalization. It first sketches the concept of legalization in the International Relations and summarizes the discussions in the special issue concerning the uneven expansion of legalization and its complicated consequences. It then applies the theory of legalization to analyze the GATT/WTO by providing a general account of the status of three factors of legalization in the WTO system and discusses the uneven expansion of legalization in the GATT/WTO. It also discusses two consequences of legalization, namely "legalizing" national trade policies in the GATT/WTO system and legal capacity building to utilise the DSM, to provide theoretical foundations for the discussion in the chapters below.
Chapter III The Rise of Legalization in the Multilateral AD Framework

1. Introduction

The WTO system effectively inherited the architecture and "legalized" management approach of the GATT system. To better understand the dynamic legalization process in the trade regime, it is necessary to trace back how the GATT/WTO system has evolved from a loose, shortsighted "diplomatic" treaty network to a "legalized" multilateral framework in terms of both formal rules and daily operations.

This chapter intends to demonstrate, from a historical perspective, the dynamic processes of legalization in the trade regime by picking up significant events or institutional changes of the GATT/WTO system and analyzing their impacts on the process of legalization. As a general pattern, different parts of the GATT/WTO have been significantly legalized and there was certain degree of correlation between the processes. However, the "legalizing" processes of each of them were sometimes disparate. The original GATT institutional framework was chosen as a consequence of the particular political constellation in which trade negotiators were operating. After four decades’ development, by the time of the Uruguay Round, the evolution of both the institutional framework and the substantive treaty network required a new WTO package with fundamental changes to re-strike the balance. Yet, the new WTO system is not perfectly balanced and the expansion of legalization is uneven.

The discussion of the rise of legalization at international level starts with an assessment of the development of legalization in the GATT, a process from politic to "diplomatic jurisprudence". It summarizes the most noticeable features and changes that have occurred in the development of the GATT system in line with the three-factor framework of legalization established in the previous chapter. The next section elaborates the institutional changes of the WTO system which improved the value of three elements of legalization. The third section surveys theoretical debates relating to "juridicialization" of the WTO, which are closely related to the analytical work of this study. The fourth section concludes the chapter.
Chapter III

2. The Rise of Legalization in the Multilateral Framework

2.1 From Politics to "Diplomat's Jurisprudence" – the Evaluation of the GATT

As the prototype of the WTO, the GATT system share a great number of similarities with the WTO system. Among them, the most distinct one is the unique "legal" system developed by GATT diplomats to manage the trade regime. This unique type of legalization appeared in the GATT system was referred to as "diplomat's jurisprudence" by Professor Hudec, meaning that the diplomats conducted power-based bargaining in a "legal", mostly procedural, context. The following section analyzes the general institutional development of the GATT and the development of legalization in each part of the GATT system, demonstrating how "diplomat's jurisprudence" gradually developed to a unique kind of legal system and how increased legalization exerted its effects in the overall development of the trade regime.

The most widely acknowledged institutional feature of the GATT system is that it has a "constitutional-flawed" origin, yet it managed to develop an institutional structure to run the multilateral trading system. Being only a chapter of ITO Charter, the basic GATT text provided no sufficient "decision-making apparatus and dispute machinery". However, when it reached the point of the completion of Uruguay Round, the GATT has already become a de facto institution "with fairly elaborate procedures for conducting its business through trial and error". The three functions, i.e. decision-making, surveillance and dispute settlement, which are currently carried out by the WTO, all have their origins in the GATT system.

The institutionalization of the GATT started from the establishment of a GATT Council. Originally, the Contracting Parties comprised the only administrative organ mentioned in the treaty. To prepare the GATT to play better the role as the central

---

3 Hudec (n 1) 37-38. (Nature of International Trade Law')
international institution for trade, the Contracting Parties took a decision in 1960 to establish a Council without any explicit treaty language as the legal basis. The Council is “a self-selected body composed of a group of countries interested in GATT”, numbering about half of the total membership. It was set up to conduct “intersessional” business, i.e. the day-to-day running of the GATT when the Contracting Parties were not sitting in their full-scale annual session. Over time, the Council became the “principal permanent institution for the GATT” and “increasingly shouldered the burden of directing it”. In the meanwhile, numerous specialized committees and working parties having a limited membership were set up to assist the Council, especially after the Tokyo Round.

This “organic” process of institutionalization was highly successful as many believed. However, when it moved forward, it was confronted with the rigidity of the underlying treaty. The flexibility of the institutions was based mainly on the voluntary tolerance and respect of Contracting Parties, but without the support of an equally flexible treaty system. This contrast of the rigid treaty language and flexible institutional arrangement generated uncertainty on the development of legalization in each part of the GATT and made the legalization process uneven and imbalanced in many aspects.

As a negotiation forum, the GATT successfully hosted eight rounds of multilateral trade negotiation, expanding its disciplines from the reduction of tariff to non-tariff restrictions and areas such as trade in services and trade-related intellectual property. Yet, the uncertainty created by the tension between the treaty language and the operation of institutions kept the development of legalization in this forum at a bare minimum. The GATT decision making remained a combination of “legal” sovereign equality rules and the “political” invisible weighting process, where “powerful parties have exercised their invisible weights to dominate agenda setting and outcomes of the multilateral talks”.

As analyzed by Steinberg, trade rounds can be divided into three overlapping stages:

---

6 Jackson (n 4) 97. ('Changing Fundamentals of International Law')
8 Price (n 5) 87-88. ('Institutional Developments in GATT')
9 Jackson (n 4) 97. ('Changing Fundamentals of International Law')
10 Price (n 5) 88. ('Institutional Developments in GATT') As a result of the Tokyo Round “side agreements”, nice permanent committees were established in the following areas: anti-dumping practice, customs valuation, government procurement, import licensing, subsidies and countervailing measures, technical barriers to trade, trade in civil aircraft, diary products and meat.
11 Ibid.
12 Ibid, 365.
launching, informal agenda setting, and closing. Typically, a trade round is launched while a vague mandate for negotiation has attained consensus. A consensus on the drafting negotiating mandate will be blocked until "virtually all topics of interest to members have been included and until the language has been sufficiently vague so as not to prejudice the outcome of negotiations". After being launched, most of the important work took place on an informal agenda-setting process, which "largely rested with the coordinated action of the major trading powers and a secretariat that is strongly influenced by them". Most initiatives that broadly conceptualize a new area or a new form of regulation have been developed "first in Brussels and Washington DC, discussed informally by the transatlantic powers, then in increasingly larger caucuses such as OECD, and ultimately in the ‘Green Room’". The draft emerged from the Green Room was then "presented to a formal plenary meeting of GATT Contracting Parties and is usually accepted by consensus".

During the negotiation process, there is no tight obligation, no precise rules, and no third-party delegation, representing the lowest level of legalization. The fact that the decision-making were set in a procedural context has little impact on the level of legalization. Yet, it is important to make a distinction between the status of legalization of the rules which were produced by the decision-making body of the GATT and the development of legalization in the body itself. While the level of legalization of GATT rules has been in general greatly improved over time, the decision-making practice of GATT evolved in a modest manner in terms of legalization.

As an institution of surveillance, the idea of increased surveillance of trade policies in GATT can be traced back to the Tokyo Round. In 1979, the "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" provided, among others, for special GATT Council meetings to review general developments in the

---

14 Ibid.
15 Ibid 354.
16 Ibid 355. Green Room caucuses normally consist of twenty to thirty-five countries that are interested in the particular text being discussed and include the most senior members of the secretariat, diplomats from the most powerful members of the organization, and diplomats from a roughly representative subset of the GATT membership.
17 Ibid.
18 Price (n 5) 97. ('Institutional Developments in GATT')
The GATT Secretariat prepared a document for these meetings, based on a combination of "official trade policy notifications" and on what it was able to glean from "the press and unofficial sources". In April 1989, based on the previous experience, GATT technocrats established, on a provisional basis, a Trade Policy Review Mechanism (TPRM), as the first fruits of the Uruguay Round. The TPRM differs from the previous Special Council meetings as "it provided a mechanism to periodically review trade policies of all member countries at fixed intervals on a country-by-country basis". As a "soft" legal device, the TPRM provides a continually updated and comprehensive inventory of trade policy measures, which was hoped to be able to reduce the information cost of monitoring compliance. Although generally appreciated by academics, the question remains whether the peer pressure and increased transparency generated by the TPRM will have more than a marginal effect on the development of legalization, since it represents low obligation and low delegation, even with high precision.

The most controversial part of the GATT system --- its DSM --- is the part that has been "legalized" most. It is commonly observed that it largely overcame most deficiencies it shared with other public international law organizations, such as lack of autonomous judicial rules and a strong enforcement mechanism, to become a more "legal" "organ". At the beginning of GATT, disputes were generally taken up by "the diplomatic procedures", at first at semi-annual meetings of the Contracting Parties and then a working party set up to examine the disputes. Around 1955, a major shift in the procedure occurred, when the Contracting Parties decided that rather than use a "working party" composed of nations, a dispute would be referred to a "panel" of experts. This development, as commonly acknowledged, "represented a major shift from primarily a 'negotiating' atmosphere of multilateral diplomacy, to a more judicial procedure of

---

19 GATT Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, BISD 26th Supp. 210 (1980), ('Understanding')
20 Ibid.
22 D Palmeter 'The WTO as a Legal System' (2000) 24 Fordham Journal of International Law, 444. ('WTO as a Legal System')
23 Jackson (n 4) 139. ('Changing Fundamentals of International Law')
dispute settlement". During the Tokyo Round, the Contracting Parties took the initiative to improve the process and the "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" became a landmark in the history of the GATT DSM. This document, along with its annex, consisted of a detailed description of dispute settlement processes of the GATT and "formed a sort of 'constitutional framework' for these processes in GATT after 1947 and prior to the WTO".

Although the sole dispute settlement procedure incorporated in the GATT text was Art XXIII, "nullification and impairment", the GATT DSM evolved over four decades and became a rather "legalistic" institution. At the commencement of it, with vague treaty languages, obligation and precision were considerably low and since the DSM was based on the consensus principle, i.e. parties to a dispute can block either the initiation or the completion of the process, delegation was also very restricted. Yet the shifts in its working procedure and substantive focus after 1960s made the GATT DSM a more rule orientated institution and by the time of the Uruguay Round, the DSM has significantly improved along the legalization spectrum.

This genuine increase of legalization in GATT institutions was, however, largely restricted by two distinct characters of GATT obligations, which imposed fundamental restraints on the development of legalization and largely offset the efforts in the trade rounds to enhance the level of precision and obligation of GATT rules.

First, the GATT inherited the character of drafted ITO Charter with the mix of rigorous obligations on substance and relatively broad exceptions on others. On the one hand, it is observed that drafters of the GATT, through bargaining in the negotiation forum, tried to set out detailed rules that would "leave no doubt about the expected good trade practices". On the other hand, the real operation of the system rested more on "less well-defined elements out of the rule-making process – the wide-ranging exceptions to the formal rules". The common feature of these exceptions is that they may, to a large extent, justify the preference of trade authorities under a particular circumstance, even if

---

24 ibid.
25 Understanding (n 19).
26 Jackson (n 4) 140-141. ('Changing Fundamentals of International Law')
28 Ibid.
it deprives other trading partners of their legitimate benefits. In other words, the diplomats acted in a more “pragmatic” way to apply their “law”, which “included the considerations of not only the legally binding obligation, but also the domestic preference of solutions, the fact of prior deliberation and commitment and the community consensus underlying substantive norms”. 29

It is argued that the wide exceptions of GATT rules have developed in a particular historical context to facilitate the process of ratification so that the GATT could be put into force immediately. The drafters intended to show the public a clear picture of the rights and obligations in this restricted trade agreement and hoped it could be ratified easily. However, as observed by Professor Hudec, “as governments started to implement the GATT, the effectiveness of detailed substantive rules began to be seriously undermined by the wide exceptions after the first successful decade of GATT”, namely late 1960s. 30 When the practice of formally deviating from the GATT became less fashionable, the members sought to justify their increasing non-compliance or negative compliance by referring to the exceptions of GATT rules. A typical example is that the Article XIX “escape clause” served as the legal basis of the widely used form of quantitative restriction - “voluntary export restraints” in late 1970s to early 1980s. 31 The GATT rules hence obtained “an equivocal status”: it is generally considered as “a source of binding obligations on trading partners”; yet “under particular circumstances, it can be deviated by invoking the relatively broad exceptions”. 32

Leading scholars consider that to its credit, the wide exceptions in the treaty language enable the GATT to achieve institutional innovations and play a vacuum-filling role even without explicit treaty text authority. 33 The major expansion of the activity and competence of the GATT was achieved without amendments to the GATT treaty text, since “the treaty amendment requirements were too difficult to be practical”. 34 However, the relatively imprecise terms and the low level of obligation and delegation incorporated

29 Hudec (n 1) 35. (‘Nature of International Trade Law’)  
30 Ibid, 82  
33 Jackson (n 4) 98. (‘Changing Fundamentals of International Law’)
in the GATT system significantly lowered the level of legalization of the whole system and has significant impact on the development of the system.

Another distinct feature of GATT obligations is its “grandfather” clause, namely GATT norms were accepted only “provisionally” and to the extent that obligations were “not inconsistent with” existing national legislations. This clause allowed the Contracting Parties’ inconsistent legislations to be in effect until they expired. It expressed both the Contracting Parties’ reservation to the system, namely “no removal of existing trade barriers or restrictions”, and their exceptions - instead of harmonizing national trade policies, the main function of the detailed GATT rules was to help “prevent bad things from happening”. Closely linked to it, the GATT developed a distinction between mandatory and discretionary legislations. Only legislations, which mandated action inconsistent with the GATT, could be challenged as such, whereas legislation, which merely gave the discretion to the executive authority to act inconsistently with the GATT, could not be challenged. Under the historical background, it is understandable that the drafters hoped to make it easy for the GATT to be ratified, by leaving the existing trade barriers untouched. Nevertheless, this clause significantly weakened the capability of GATT rules to touch the cornerstone of domestic protectionism and justified a considerable number of GATT “illegal” measures for a long time.

By the time of the Uruguay Round, it became apparent that it is difficult for the GATT to adequately address the complex new generation of trade barriers, such as anti-dumping (AD) measures, voluntary restraints, service regulatory measures, and intellectual property norms. Hence, although the GATT has been significantly legalized, with the development of the system, a new kind of legalization was called for and breakthroughs culminated with the conclusion of the Uruguay Round in 1994 to

34 Ibid.
35 Hudec (n 1) 35-36. (‘Nature of International Trade Law’)
36 Ibid 91
39 F Abbott NAFTA and the Legalization of World Politics: A Case Study’ (2000) 54 International Organization 519, 520. (‘NAFTA and the Legalization’) The author notes that there are second- and third- generation of trade barriers. Second-generation trade barriers refer to non-tariff governmental measures directed towards trade, such as quotas, export subsidies and voluntary restraints. Third-generation trade barriers refer to internal government regulatory
Chapter III

establish a new WTO system.

2.2 A New Hope of Legalization – the Establishment of the WTO

The establishment of WTO on 1st January 1995 was a significant event in international trade governance. The new WTO treaty system integrated the fruits of all previous multilateral negotiation rounds - about 60 agreements, understandings and decisions - into a comprehensive treaty network, supported by a constitution-like agreement, the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement). The WTO also established an international organization which is manifestly less “diplomatic” and more “legalistic” than the GATT, although they are similar in the organizational structure and day-to-day operation. Unlike the ambiguous and informal institutional buildup of the GATT, each function operated by the WTO has its explicit legal basis in the WTO agreements and the level of legalization is generally higher than the GATT.

2.2.1 Decision-making of the WTO

After the establishment of the WTO, the multilateral trade talking has been formally moved to the permanent negotiation forum of the WTO. Largely inheriting the GATT practice, the WTO negotiation forum remains a combination of “legal” sovereign equality rules and the “political” bargaining process.

Consensus remains as the principle of decision-making of WTO, with the exception to decide the issues by voting when the decision cannot be reached by consensus. In theory, this “one country one vote” provision makes the WTO a more legitimate institution, and as argued, “the most democratic one among international organizations”. However, as discussed above, the consensus rule did not improve the status of legalization in the WTO decision-making. Even in cases where “the rules called measures not specifically directed toward trade, but which may distort international competition, such as competition policies (over- or under-regulatory).

40 WTO Marrakesh Agreement Establishing the World Trade Organization, LT/UR/A/2, 15 April 1994. (‘the WTO Agreement’)

41 Hoekman and Kostecki (n 27) 74. (‘Political Economy of the World Trading System’).

42 WTO Agreement (n 40) Article IX.

59
for a formal vote", negotiations and consultations, "in particular between the larger trading partners, would usually be held to arrive at a consensus text before the formal vote was held". The tension between the informal oligarchy and the formal democracy led to, in part, the failure of Doha Round, which is experiencing an irreconcilable clash of negotiating objectives pursued by the developing partners and by the developed ones. Hence, in the new WTO decision-making body, obligation and delegation remain low.

In addition to the general decision-making procedure, several provisions of the WTO Agreement also provide some special decision-making procedures, such as Article X for amendment, Article XII for accession, etc. Ideally, those rules, especially the rule of amendment, may improve the degree of precision and delegation in the WTO decision-making. For instance, Article X authorizes not only the Member of the WTO, but also the Councils listed in Paragraph 5 of Article IV, to initiate an amendment proposal. Consequently, those Councils, by sharing the right of initiative with Members, may become autonomous actors to some extent and push the progress even beyond the expectation of some Members. Nevertheless, it never happened in practice, mainly due to the strict requirements of Article X. This provision provides that the Ministerial Conference must approve an amendment proposal with a two-thirds majority of WTO Members, if it cannot reach consensus within 90 days. Then, two thirds of the Members must accept (i.e. ratify) the amendment for it to become effective: for all Members, where the amendment does not alter substantive rights and obligations; for those who accept the amendment, where it does alter substantive rights and obligations.

In short, although the WTO added more “constitutional” rules, such as various voting procedure, into its negotiation forum, the decision-making of the WTO largely followed the GATT practice and stays as low legalization with low obligation, precision and no third-party delegation.

44 Jackson (n 1) 97. (‘The World Trading System’)
45 The WTO Agreement (n 40) Art X, para 1 and Art IV, para 5.
46 Ibid.
2.2.2 Trade Policy Review Mechanism and its Impact

The previous chapter locates the TPRM in the intermediate zone of the spectrum, with low obligation, low delegation but high precision. This feature of TPRM partly relates to its creation time. Basically, the TPRM is a GATT product, with the common character of other GATT bodies, with low obligation and low delegation, matching the general features of the GATT system at that time. But it was the first fruit of the Uruguay Round, created at a time when the Contracting Parties had strong wishes to reform the old GATT system. It therefore represents a “soft” legalization formula, with mixed value of different factors of legalization.

Based on Annex 3 of the WTO Agreement, the TPRB, a newly created organ responsible for conducting the reviews within the WTO Secretariat, begins the review “by selecting a set of countries each year, according to the intervals laid down in the WTO Agreement”. The countries under review are required to complete and return a questionnaire prepared by the TPRB promptly and to submit its own report, referred to as a “policy statement”, on its trade policies and practices. TPRB staffs also draft a “secretariat’s report” based on sources such as the country’s official publications, the country’s notification of trade policy changes to the WTO, and information from a visit to the capital of the country under review. After the completion and distribution of the secretariat report, a review meeting is held by the TPRB. Representatives of Members are chosen to participate in the meeting and invited to submit questions and comments for the reports. The representatives of the country under review then present their responses. TPRB staffs complete the review “by releasing the final report, which consolidates the secretariat’s report, the chairperson’s conclusion remarks, self-report of the country and the minutes of TPRB meeting”.

The purpose of the TPRM is twofold: “to improve adherence by all WTO Members to rules, disciplines and commitments”, and “to the smooth functioning of the multilateral trading system by achieving greater transparency”. It is clear that, first, the TPRM is not a formal assessment of compliance and can not impose new obligations on the WTO Members under review. Second, the TPRM has formally distanced itself from the WTO

---

48 Keesing (n 21) 12. ("Improving the Trade Policy Review")
DSM and emphasized that it only intends to "provide a forum to discuss trade policies and practices of a Member by the whole membership" and to be the "external audit" of a Member's trade and economic situation, without confrontational and legalistic expressions.\textsuperscript{50} WTO Members and the WTO Secretariat have become convinced that initiatives to increase transparency such as the TPRM is beneficial to the system.\textsuperscript{51} The TPRM therefore becomes one of the few mechanisms which formally provides the WTO Secretariat with the investigation power to generate systematic information about the country's trade policies and practices.

In practice, however, criticisms have showed up from the past experience of TPRM and there are serious doubts concerning the effectiveness of this mechanism. Apart from the comments about the substance of the review, an important criticism is that TPRs were biased in general towards optimism — "toward saying what the country under review would like them to say".\textsuperscript{52} Although occasionally WTO Members do offer sharp criticisms to trade policies and practices of the Member under review, it is often blunted by a "glass house" effect: representatives of WTO Members understand that their turn on the firing line will come soon, so that they tend to be more gentle when criticizing others. For example, from mid-1990, the US and EU have entered into a sort of "unholy alliance" not to criticize each other's AD actions in their public statements. Therefore, even if AD has been considered as "the most serious US and EU protective device after voluntary export restrictions, there has been no thorough treatment of this topic in TPRs".\textsuperscript{53} Moreover, due to low level of delegation in the process, TPRB staffs often found themselves either under considerable pressure from the country under review to give favourable marks, or in a situation without sufficient resources or authorities to conduct a deeper and more comprehensive analysis.

To sum up, the TPRM, as a "soft" legalization device chosen by GATT Contracting Parties at the time of the Uruguay Round, is an improvement of legalization in the GATT system, especially in term of precision. Yet the deep-seated reluctance of nations to

\textsuperscript{49} Ibid.

\textsuperscript{50} Ibid, Appendix B – A WTO Description of the Trade Policy Review Mechanism.


\textsuperscript{52} Keesing (n 21) 30. ("Improving the Trade Policy Review")

\textsuperscript{53} Ibid 45.

62
delegate power to international bureaucrats, even only the power to make official pronouncements on their policies, resulted in the limited mandate of TPRM, which in turn limited the impact of TPRM on the legalization process of the WTO. The TPRM, to a large extent, remains a game of diplomats.

2.2.3 Dispute Settlement Mechanism (DSM) of the WTO

It is commonly recognized that the WTO DSM is the greatest achievement of the Uruguay Round and is the core “lynchpin” of the trading system. It is the first time that a unified and comprehensive dispute settlement system was established in the trade regime. The new DSM has the highest level of legalization in the WTO, with high obligation, high precision and high delegation, as characterized in the previous Chapter. This section describes the institutional innovations introduced in and after the Uruguay Round, in particular the rise of the Appellate Body (AB) as the centrepiece of the DSM, as they profoundly improved the level of legalization of the DSM.

The most significant institutional innovation introduced by the new DSM of the WTO is the introduction of the “reverse consensus” requirement for the adoption of panel reports. This institutional development largely promoted the level of obligation and delegation in the DSM. The panel has been granted greater authority to apply the rules in resolving disputes since a panel report is automatically binding on the parties. The introduction of the “reverse consensus” for the adoption of panel reports therefore “resolved the problem of blockage and paralysis which existed in the GATT DSM and makes the adoption of panel reports by the DSB quasi-automatic”.

However, it raised WTO Members’ concern of losing effective control over the adoption of “bad” or undesirable panel reports. An unexpected effect of “reverse consensus” was to justify the establishment of a standing AB to review panel reports. Yet, the ambition of the negotiators was modest when they established a standing AB to allow parties to appeal from panel reports. It is argued that they did not intend to “create a

54 Jackson (n 1) 124. (‘The World Trading System’)
56 Ibid.
strong international trade court at the apex of the new DSM". Instead, their intention was to ensure that their biggest innovation, namely the quasi-automatic adoption of panel reports by the DSB, would not have "the undesirable side-effect of being without protection against occasional 'bad' panel reports".

Despite the limited ambition of Uruguay Round negotiators, the AB "has risen as the centrepiece of the WTO DSM". Several developments in the procedural and substantive rules of appellate review have contributed to this rise to prominence. These developments include the compositions of the AB, the Working Procedures for Appellate Review, the early embracement and consistent application of the rules of interpretation of the VCLT, the manner in which the AB used its authority of appellate review and the case law to date, especially those "balancing free trade and other societal values and interests and those ensuring the fairness and effectiveness of the WTO DSM".

The first two developments, especially the Working Procedures for Appellate Review adopted in February 1996, reassure, from a procedural perspective, "the judicial nature of the appellate review proceedings and the quality and authority of the decisions of the AB". They advanced the level of precision and delegation of the DSM by providing precise rules for judicial-type proceedings and court-like appeals. The three developments concerning the rules of interpretation, the authority of appellate review and the development of jurisprudence improved the level of obligation, filling the gaps of the treaty system.

To sum up, the institutional innovation of "reverse consensus" has been the most important change in the WTO DSM in terms of legalization. It did not only result in direct improvements of obligation and delegation in the DSM, but also push the establishment of a standing AB. The rise to prominence of the AB is another important development of legalization in the DSM, which extended its influence to the whole system and profoundly advanced the level of legalization on all aspects and dimensions of the WTO.

3. Theoretical Debates related to Judicialization

---

57 Ibid, 7.
58 Ibid.
60 Ibid, 13-14.
While previous sections sketch the rise of legalization in the multilateral framework, theoretical debates surveyed in this section provide a more detailed account of the most important manifestations of legalization in the trade scholarship, namely "judicialization" of the GATT/WTO. Although, as discussed above, this study considers legalization as a special form of institutionalization which happens not only in the DSM, but also in other parts of the GATT/WTO, the literature concerning judicialization of the GATT/WTO is the most relevant ones in the field and this section intends to provide a brief account of the hotly debated issues.

Based on the simple mark of legalization of the DSM in the previous chapter, this section reviews various schools of scholarly comments on four interrelated contentious issues: the role of the DSM, standard of review, institutional settings of the DSM and remedy and compliance of dispute settlement reports. These four issues cross-refer to the discussion of three elements of legalization in this study.

The first issue, the role of the DSM, relates to the value of obligation of the DSM. The second one, standard of review, relates to obligation and precision of the DSM, since it decides to what extent the DSM can interpret The WTO agreements by deferring or rejecting the decision of national trade authorities. The third one, the institutional setting of the DSM and the fourth one, the issue of remedy and compliance of dispute settlement reports also closely relate to the value of delegation of the DSM from different perspectives. The purpose of this section is therefore two-fold: it is a brief survey of the contemporary literature in the field; it also provides further insights into the relationship between three elements of legalization and the ongoing controversies related to them.

3.1 The Role of the DSM

To answer the question what is the role of the DSM, a distinction must be made at first between the formal alleged role of the DSM in the WTO legal text and the normative role claimed by scholars. Literally speaking, the preliminary role of the DSM is to effectively peacefully "solve the trade dispute between WTO Members". In this sense, the revolutionary change engendered by the DSU over the GATT dispute resolution has

---

61 Ibid, 15-17.
been viewed as an enormous success. However, over time, criticisms and controversies emerged. On the one hand, some observers found that the practice of the panels and the AB in fact developed a body of jurisprudence which may exceed their authority, i.e. the alleged goals in the WTO legal text. Due to the controversy of some of the panel or AB reports, the DSM, as argued, may even “undermine the governmental support for the multilateral trading system”. Another group of scholars, on the other hand, by referring to the DSB as a “world court for trade”, expressed their expectation that the DSM should become “a legal institution more than just a diplomatic club”. They insisted that the DSM should play a more important normative role in the WTO system --- as the engine of constitutional norm-generation or judicial law-making. The WTO DSB should be a “court” system, which “provide ‘justice’ not some of the time, or most of the time, but all the time, and judicially fill in the gaps of treaty language”.

The key points of this debate are, first, whether the DSM has done a good job and second, whether the DSM is or should be a “court”. Based on different normative preferences, there are three main lines of discussion in the WTO commentary.

The first group, including the majority of legal practitioners, academics, and even members of the AB, takes the view that the WTO DSM was and is functioning well. The role of the DSM has been clearly defined in the DSU, namely to settle disputes and to clarify the Member's rights and obligations by interpreting the related WTO agreements. Despite the fact that some institutional changes are still in the process, the

---

62 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/A-2/DSU/1, Art 3.2. ('DSU')
65 Ibid, 80.
68 Ragosta (n 63) 768. ('Unmasking the WTO')
69 For example, C Ehlermann 'Six Years on the Bench of the “World Trade Court” – Some personal Experiences as Member of the Appellate Body of the World Trade Organization' (2002) 36 JWOT 605; and J Greenwald 'WTO Dispute Settlement: An Exercise in Trade Law Legalization?' (2003) 6 JIEL 113. ('WTO Dispute Settlement')
70 DSU (n 62) Art 1.
DSM presented "a very satisfactory result to both the diplomats and academics".  

The DSB in general and the AB in particular, were "responsible" and "well-functioning" institutions that "has secured, in practice, the authority it was given on paper in the Uruguay Round." What the DSM need is not to consider the possibility to reintroduce elements of the original diplomatic model of the dispute settlement, but to go ahead along the road "which has been taken, and which has proved so far to be a notable success".

On the other side, the voice of critics is also very strong. Among them, there are two sub-groups holding almost opposite arguments on two extremes. The first subgroup took the view that WTO panels and the AB have been too activist and "overly instructive" with respect to policy-making of sovereignty WTO Members. Especially in trade remedy cases, the panels and the AB were accused of "selling their policy preferences rather than reading the language of the WTO agreements neutrally". For instance, they argued that the AB's ruling has "essentially disregarded" the Article 17.6 (ii) standard of review in the WTO ADA. This practice clearly showed the AB's aversion to national import-restricting states, a sharp attitude inspired by "constitutional aspirations", i.e. "to restrict national practices inconsistent with liberal trade value and to establish a more significant role for the Appellate Body in shaping the WTO". Although the gaps or ambiguity of WTO treaties have been commonly recognized, the cons still claimed that the panels and the AB are "not the authorized institutions to fill the gaps by promoting their favored policy", and it may create "differential obligations" to the Members.

Another subgroup consists of ambitious reformers. In their view, the WTO DSM, in particular the AB, is "a dynamic force behind constitutional-building by virtue of its

73 C Ehlermann 'Reflections on the Appellate Body of the WTO', (2003) 6 JIEL 695, 706 and 708
74 Davey (n 64) 80 ('A Consideration of Deference')
76 WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (15 April 1994) LT/UR/A-1/A/3. ('the ADA')
77 Tarullo (n 75) 159. ('Hidden Costs')
78 Greenwald (n 69) 114. ('WTO Dispute Settlement')
capability to generate constitutional norms and structures during dispute resolution".\textsuperscript{79}

The DSM is assumed, or at least encouraged, to take a constitutional policing role, which may “invalidate activities of national governments that are inconsistent with the world trade constitutions”, modeling the activism of the ECJ.\textsuperscript{80} The practice of the panels and the AB is by nature “judicial supervision” but not “dispute settlement”, because of “the compulsory jurisdiction of the panels and the AB over any cases brought by WTO Members, and their ability to adopt reports which are not only binding to the parties of this dispute but also to be considered as valuable as precedent in the future practice”.\textsuperscript{81}

More importantly, as argued, there is a tendency of WTO Members to bring complaints even if they have “suffered no injury in a concrete and material sense”.\textsuperscript{82} Therefore, the panels and the AB are not only doing the job of settling dispute, but also of securing WTO rules. Although, to date, there is no enough evidence to conclude that the DSM are playing the role of judicial supervision in the WTO system, it is undeniable that, in fact, “what the growing jurisprudence of DSM provides is far more than the neutral interpretation of treaties”.\textsuperscript{83}

Despite all the normative arguments above, the research of law and economic scholars shows another interesting aspect of the DSM.\textsuperscript{84} They characterized the dispute process before the DSM as “bargaining in the shadow of the law”, by pointing out that “the decision of Members to move from the negotiation phrase to the panel stage is linked directly to the consideration of transaction cost”.\textsuperscript{85} When the subject matter of the dispute has an all-or-nothing character and leaves little room for compromise, such as health and safety regulations, the parties’ ability to reach an agreement is restricted and they are willing to bring the case before the DSB. In contrast, “if the subject matter permits greater flexibility to be determined by the trade authority in domestic level, such as tariff

\textsuperscript{79} Cass (n 67) 42. (‘Judicial Norm-generation’)
\textsuperscript{80} Ibid.
\textsuperscript{81} Y Iwasava ‘WTO Dispute Settlement as Judicial Supervision’ (2002) 5 JIEL 287, 287. The definition of “judicial supervision” is that a mechanism to control and secure compliance of international obligation undertaken by state by judicial means. There is opposite opinion about the WTO dispute settlement. Also, J Pauwelyn ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’ (2003) 14 EJIL 907
\textsuperscript{82} Iwasava, ibid.
\textsuperscript{83} Ibid.

68
rates and trade remedy cases, the parties can more easily structure appropriate transfer payments and settle their dispute out of the 'court'. They argue that the DSM served as a legal framework in the WTO system, which, to a large extent, is neutral. It may influence the future actions of WTO Members, but not because it promotes the ideology of trade liberalization. Instead, the Members decide to empanel for the reason of saving the transaction costs. The DSM is "not a symbol of the free trade, but a legal framework, which can reduce the transaction cost of parties". Once the parties of the dispute are well aware of the fact that the cost of litigation may exceed the potential benefits of "winning", they may choose to settle the dispute even the final outcome may not in the line with the ideology of a "rule-based" system.

In sum, depending on normative preferences and perspectives, scholars offer different opinions on the role of the DSM. It is not the intention of this study to support a particular argument. Instead, this section focuses on demonstrating that the asymmetry of delegation to the DSM in terms of dispute resolution and rule interpretation is widely recognized, echoing the discussion in the previous chapter.

3.2 Standard of Review

With the development of the DSM, more precise rules are called on for the "legalized" dispute settlement process, even if the DSU has been considered as a comprehensive and precise legal instrument. To respond to this need, the panels and the AB addressed a substantial number of procedural issues in their rulings. An unexhausted list of those issues includes terms of reference, representation by private attorney, the relevance of general international law, burden of proof, standard of review and so on. Most of those issues were addressed in a precise and less controversial way, which was recognized as "within the authority of the panels and the AB". However, some lead to great controversies, such as the standard of review.

85 Busch and Reinhardt, ibid.
86 Ibid, S222.
87 Ibid.
88 For example, D McRac 'What is the Future of WTO Dispute Settlement?' (2004) 7 JIEL 3, 5. ('Future of WTO Dispute Settlement')
89 Davey (n 64) 110. ('A Consideration of Deference')
By definition, the standard of review refers to “the nature and intensity of a court scrutiny of the legal validity of a legislative or administrative decision”, i.e. “the degree of deference judges should accord legislators and regulators”. In the WTO, the standard of review refers to the “margin of appreciation” which “panels and the AB grant national authorities in enacting and enforcing their obligations under The WTO agreements”. In other words, the standard of review defines to what extent panels or the AB, when providing international scrutiny of contested national measures, should respect “the prerogatives that the WTO agreements leave to individual Members”. The answer to this question not only shapes the jurisdictional competence of the WTO adjudicating body, but also influences the division of power between the judiciary and other bodies of the WTO. It related to, first, the value of obligation of the DSM since it establishes “no go” areas for the panels and the AB, requiring them to respect the choice made by national trade authorities. It also related to precision in that it restricts the scope of the AB or panels to interpret the WTO agreements. The standard-of-review question has thus become “a touchstone regarding the relationship of sovereignty concepts to the GATT/WTO rule system.

In legal terms, the standards of review applied by the panels and the AB determine “the appropriate level of deference in reviewing a Member’s measure in both finding of fact and legal interpretation”. With respect to factual issues, in EC-Hormones the panel and the AB rejected both the idea of “total deference” and the suggestion to conduct a de novo review. On one hand, the AB made it clear that total deference to the findings of national authorities could not ensure an “objective assessment” expected by Art II of the DSU. On the other hand, the panel’s practice not to engage in a de novo review has also been confirmed by the AB in several occasions. Rather, the AB gradually developed a

93 Ehlermann and Lockhart (n 90) 494. (‘Standard of Review in WTO Law’)
94 Jackson (n 1) 6-8. (‘The World Trading System’)
95 Oesch (n 91) 16. (‘Standards of Review’)
doctrine that key elements are to be examined by a panel in assessing the factual evidence. These key elements include, for example, “the objective assessments of whether the national authorities examined all relevant facts”, “whether they provided adequate explanations of those facts supported the factual determination”, and so on. However, the panels and the AB have shown great reluctance to define the contours of the appropriate standards of review of factual issues in general. The precise character of the review is “not the same in each case”, as argued.

With regard to legal interpretation, the panels and the AB leave less doubt about their view on this issue. WTO law is a constant subject of the panels and the AB’s *de novo* review. It is observed that they interpreted WTO provisions pursuant to the VCLT and “have made no deference to legal interpretations set forth by the parties of a dispute”. As to domestic laws, since they are considered as a matter of fact rather than a matter of law, there is no *de novo* review of them and the diverging national implementations of the WTO law are assumed legitimate. As the panel stated in *US-Anti-dumping Act of 1916*, it was not the role of panels to “develop our own independent interpretation of US law”. So, what the panel did was to rule the conformity of the US law to the ADA according to the interpretation of the US authority.

Except the general standard of review in the WTO system, the ADA is the only covered agreement with a specific and carefully drafted standard of review clause. It directs panels not to interfere with a Member’s interpretation and application of the ADA if the measure in question rests upon a “permissible interpretation”.

Many argued that the AB regarded Art 17.6 as relatively “insignificant in practice”. They contented that exporting countries challenging the imposition of AD duties by other countries have prevailed in every case and national authorities’ decisions
have been frequently overturned, and the AB was criticized for "'selling' its own normative preference and creating different obligations to the Members".  

This bitter criticism to the AB's standard of review is rejected as "exaggerated" by other scholars. The different answers of this question relate more to different understandings on the delegation to the DSM. If the WTO DSM has high degree of delegation in terms of rule interpretation, it will be "necessary for it to be able to conduct the de novo review of both fact and law since it can promote the uniform application of WTO laws".  If this development is not welcomed, the panels and the AB will then have to keep a strict line in terms of standards of review. Arguably, the debate itself and the gradual development of standards of review have evidenced that "the WTO has started the journey from a functionalist and contractual framework towards more constitutional structure".

3.3 Institutional Settings of the Dispute Settlement Body (DSB)

With respect to institutional arrangements of the DSM, according to the DSU, three institutions are working closely in a dispute settlement case. The DSB, an independent body established by the DSU, will administer the dispute settlement process. A panel, established under the authority of the DSB, makes an "objective assessment" of the facts of the case and the conformity with the relevant agreements. Finally, a standing AB provides a review mechanism to the findings of a panel.

In the context of the DSU review, a few most far-reaching issues have been put on the table. One of them was a proposal of permanent panel body. It suggests the creation of a "small permanent panel body composed of full-time panellists, functioning similar to the AB". This proposal has been subject to strong criticism, while a number of key figures in the academic circle and legal officers of the WTO support it firmly.

104 Ibid, 123.
105 Ibid, 519.
106 Oesch (n 91) 243. ('Standards of Review')
107 DSU (n 62) Art 11.
108 Ibid.
Chapter III

The view shared by the proponents is that the establishment of a permanent panel body would be desirable.\footnote{For example, T Cottier "The WTO Permanent Panel Body: a Bridge Too Far?" (2003) 6 JIEL 187, 189. ('A Bridge Too Far')} It would, in Davey's words, "solve the case-by-case panel selection problems, allow the most efficient solution to a number of pressing problems that arise under the present system", and encourage "great (necessary) legal expertise".\footnote{W Davey 'A Permanent Panel Body for WTO Dispute Settlement: Desirable or Practical?' in D Kennedy and J Southwick (eds) The Political Economy of International Trade Law --- Essays in Honour of Robert E. Hudec (Cambridge University Press, Cambridge 2002) 513 ('A Permanent Panel Body')} The present \textit{ad hoc} panellist system has been perceived to be inefficient and incapable of responding to the increasingly complexity of the WTO system for two reasons. First, the fact that \textit{ad hoc} panellists have their own full-time job indicates the problem of scheduling and the problem of working under tight time pressures. To meet the strict time limits set out by the DSU and cope with the pressures imposed by the parties, \textit{ad hoc} panellists are accused to be "more inclined to find a solution and be less concerned about the WTO orthodoxy".\footnote{J Bourgeois 'Comment on a WTO Permanent Panel Body' (2003) 6 JIEL 211, 212.} Second, parties of the dispute still have large room to exercise their power over the selection of the panellist. A standing panel body could be a timesaving choice, while "allowing the improvement of the process and the coherence and standardization of the panel reports".\footnote{Davey (n 111) 179-181. ('the Desirability of a WTO Permanent Panel Body')}

On the other side, widespread scepticisms of this proposal argued from two perspectives. Politically, it is argued that WTO Members have gone fairly far in judicializing dispute settlement by setting up the AB. It is quite questionable whether they are ready to take further step to establish a permanent panel body.\footnote{A Porges 'Comment: Step by Step to an International Trade Court', in Southwick and Kennedy (n 111) 535. ('Step by Step to an International Trade Court')} In doing so, the Members will lose the party control over the panel process, "the last thing that they are still in control in the dispute settlement process".\footnote{Ibid, 183.} Most importantly, it is argued that a permanent panel would likely to be more ideological than an \textit{ad hoc} body.\footnote{Cottier (n 110) 189. ('A Bridge Too Far')} With reference to the recent debate over the over-activism of the AB, the creation of a permanent panel body will definitely make it more intolerable to WTO Members, who has always been very cautious to avoid over-judicialization and law-making of the DSM.
Practically, major concerns go to the selection of permanent panellists and the relationship of the Permanent Panel Body and the AB. Any valid proposal in suggesting the establishment of a Permanent Panel Body would have to firstly answer the questions such as, how to select the permanent panellist; who is qualified to be appointed as the Permanent Panellist; whether there will be any restrictions on the nationality of the Permanent Panellist, etc. By far, no one can answer them satisfactorily. In addition, the establishment of a Permanent Panel Body will definitely affect the balance of power within the WTO. Given the fact that in the present system, panel reports are revised by the AB with relatively frequency, there are reasonable doubts whether “a new standing Permanent Panel Body could get the respect and support it needs when it is developing its own coherent procedures and judicial politics”.

The proposal of establishing a permanent panel body indicates the strong desire of trade scholars to further strengthen the judicial side of the dispute resolution. However, there are expected difficulties to take this step. One reason might be the reluctance of WTO Members, and their worries of losing control over the dispute settlement process. Yet, the root reason is the divergence of the view of the role of the DSM: does the DSM have the delegation to interpret rules? If yes, then it is quite reasonable to build up a Permanent Panel Body as a court of first instance, working together with the AB to secure the WTO law. If the answer is no, the rejection of the idea of permanent panel body are understandable since the ad hoc system will definitely provide a larger degree of flexibility to the parties of the dispute than in a standing Permanent Panel system.

3.4 Remedies and Compliance in the DSM

Once a panel or an AB report has been issued by the DSB, for most legal professionals, it is the end of the story. The panel or the AB has confirmed what is right and what is wrong, who is the winner and who is the loser, according to WTO rules. However, in reality, this is still far from a happy ending. In case of non-compliance, a few questions have to be asked: what are the remedies available for the breach of a WTO

118 Cottier (n 110) 189, ('A Bridge Too Far')
obligation? Are those remedies effective? What is the next step for this system to ensure greater compliance?

It is widely observed that the WTO system provides a bundle of legal options to be followed by the “loser” of a dispute. First, the most preferred solution indicated in the DSU is the wrongdoer to “bring its measures into conformity”, according to the recommendations of the panel or the AB. 119 Second, if the settlement or withdrawal of the WTO-inconsistent measure cannot be accomplished, the “loser” can also choose to compensate its trading partners. Finally, if again the parties cannot decide on mutually acceptable compensation, the “last resort” of the WTO system – retaliation - will be authorized. In principle, the “winner” is authorized to suspend its concession in the same economic sector and at the same level of its injury. If this is not practical and effective, cross-sector suspension may be allowed. 120 Generally, the priority concern of the whole system of remedy is to “induce compliance, rather than to repair the damage of injured party”. 121

While there are general cheers for the successful experience of the DSM, some scholarly discussions highlight the structural tension within this enforcement mechanism. 122 Deep controversies persist over two main issues: the meaning of conformity and the effectiveness of sanction as the “last resort”.

It is argued that a warning from a WTO panel or the AB that a Member must bring itself “into conformity” is “sufficient directive, yet ambiguous enough”. 123 Ironically, even when a Member lost the case in the DSM, the content of the obligation to “bring into conformity” is left to be defined by the losing party, since the panel or the AB report will not raise any issue of calculation, supervision or other practical recommendations. For disputes relating to those WTO rules with a high level of precision, it might be clear for the parties what conformity means. However, for those dispute regarding to WTO provisions with various interpretations and understandings, the term “conformity” indicates not a definite outcome, but a series of possible outcomes across a spectrum.

119 DSU (n 62) Art 19.
120 ibid, Art 22.
122 For example, G Horlick ‘Problems with the Compliance Structure of the WTO Dispute Settlement Resolution Process’, in Bronkers and Quick (n 98) 636. (‘Problems with the Compliance Structure’)
Many WTO Members argue that conformity did not necessarily mean the withdrawal of infringing measures. For example, the EC in EC-Hormone argued that the losing Member is free to do anything “not inconsistent” with the recommendation of the panel. In addition, the DSM does not provide incentives for swift compliance of a panel or an AB report. Even after appeals exhaust, the DSU still allows the delay of compliance for several months. Adding the 15 months before the release of the report, the measure in question could last almost 2 years even if it has finally been declared as WTO-inconsistent.

It is unfair to say that there is no legal resort for a winning Member. Art 21.5 of the DSU provides an arbitration mechanism for surveillance of implementation. It has been proved as a useful system, “which was frequently referred to by the parties of the disputes in case of non-compliance”. However, due to the absence of retroactive remedies in the WTO, “it is difficult for a government to refuse to pursue the entire range of delay tactics when pressured by domestic interest groups with a stake in maintaining protection”. When domestic pressures are strong enough, the government may find that non-compliance is a better choice than to fully and timely comply the report. For instance, in EC-Hormone, after utilizing all available legal tactics to delay the conformity, the EC “finally chose non-compliance even facing the sanction from the US”.

The result of EC-Hormone raised another question: to what extent the availability of sanctions promotes voluntary compliance? Numerous literature discuss the desirability of sanctions in the WTO DSM. A popular view is that the retaliation itself has “some undesirable economic features”. It is particularly unattractive to the smaller and poorer countries. Even if these countries have the authorization to retaliate against a Member on whom they relied for imports, they can hardly benefit from the retaliation. Therefore,

---

123 Carmody (n 121) 321. (‘Remedies and Conformity’)
124 EC-Hormone (n 95)
126 Ibid, 332.
127 Ibid.
punitive remedies, such as collective retaliations and retrospective remedies, might be desirable to the WTO in the sense that they may improve the effectiveness of sanctions. Nevertheless, although some WTO Members want the DSM to move away from a rebalancing approach, namely focusing on the rebalance of negotiated tariff, to a punitive approach, many others insisted that “the basic assumption of the WTO DSM is to preserve further trading opportunities rather than redress past injury”. When a WTO panel ruled that retrospective repayment of past subsidies was required, it was criticized as “challenging the long-standing understanding of DSM and a one-time aberration of no precedential value”.

In conclusion, the above theoretical debate largely reflects the uneven expansion of legalization in the WTO DSM, in particular in terms of the delegation on rule interpretation, as discussed in the previous chapter.

4. Conclusion

The past sixty years witnessed the phenomenal rise of legalization in the GATT/WTO as described in this chapter. Starting from the construction of a “legalized” operational system of the GATT, the institutional development discussed in the first two sections illustrate the general pattern of the rise of legalization in the GATT/WTO. Key changes in decision-making, surveillance forum and the DSM of the GATT/WTO highlighted the process of legalization.

The literature review in the last part of this chapter reinforced the argument that the expansion of legalization in the DSM is uneven. It identifies four highly debated issues relating to the DSM: the role of the DSM, institutional settings of the DSB, the issue of standard of review and remedy and compliance of the DSM reports. It concludes that despite the fact that the DSM has been significantly “legalized” and has the highest level of legalization in the WTO, the expansion of legalization in the DSM remains uneven and imbalanced in many aspects.

129 Anderson, ibid, 123; and Horlick (n 122) 641. (‘Remedies and Conformity’)
131 Ibid.
Chapter IV Legalizing Anti-dumping Rules at international level

1. Introduction

By formulating legalization as a process of structurally manifesting law in the trade regime, the first three chapters conceptualize legalization as a special form of institutionalisation and examined its discourse in the trade regime over the past sixty years. Although this study considers the rise of legalization is generally playing a positive role in the trade regime, it observes that the undergoing process is uneven and unbalanced in many aspects.

Given the pragmatic nature of legalization, the analysis of legalization cannot be approached in an abstract or a general way. This chapter, together with the next two chapters, advances the research by examining the process of legalization in the international AD regime and the consequences of legalization at domestic level. This chapter portrays how AD, an originally unilateral trade policy, has been multilateralized and legalized in the broader context of the development of legalization in the GATT/WTO. The next two chapters focus on the effects of the rise of legalization of the international AD regime on domestic AD policy-making, administration and judicial review and the dispute settlement activities.

There are two reasons to choose AD as the trade instrument to demonstrate the process of legalization: AD is one of the most well-developed legal instruments in the GATT/WTO; it is also one of the most controversial trade instruments. Indeed, after a century’s development, AD is not a regime that lacks of complex and intricate rules at both international and domestic levels. However, all these “awfully technical” rules did not provide a sound solution to make the AD regime less controversial. Instead, AD has moved from “being a little used unilateral trade policy to a major WTO-approved weapon in the protectionist arsenal”, which can provide the benefits of “strategically harassing trading partners in the rough and tumble of trade policy”. In this sense, the evolution of AD provides an illustrative example of both the significant contribution that legalization
made to multilateral trade liberalization, and the uneven expansion of legalization in the trade regime.

The development of legalization manifested in the international AD regime echoes the general trend of legalization in the GATT/WTO. On the one hand, the rise of legalization can be observed in all parts and dimensions of the AD regime. Multiple rounds of trade negotiations generate tighter and more specific obligations in the AD regime over the past half-century. The evolution of legal instruments marked major turning points of the process of legalization. The GATT/WTO also provides surveillance mechanisms, as the “soft law” devices, to improve precision of international AD rules and the DSM, by adjudicating AD disputes, made significant contributions to enhance precision of AD rules.

A closer analysis of the AD regime, on the other hand, indicated the uneven and imbalanced expansion of legalization. A large number of obligations in the ADA are unspecific or contingent in nature, so that the sharp differences of national practices cannot be covered. This feature of the ADA also influences the level of precision of international AD rules and makes the deference to national authorities a highly contentious issue. The development of obligation beyond the ADA, mainly the judicial activities of the DSM and “authoritative interpretation” of the Ministerial Conference and the General Council, has been bitterly criticized. In particular, irrespective of the significant contribution made by the DSM to the development of obligation and precision in the AD regime, considerable controversies are surrounding the activities of the DSM.

This chapter proceeds as follows. The next section introduces the basic notion of dumping and the AD law and provides a brief historical account of the evolution of AD rules. Section 3 articulates the development of AD laws in the GATT/WTO negotiation, surveillance and dispute settlement forums – the process of legalizing AD at international level. It also provides an assessment of the current status of three elements of legalization in the AD regime with focuses not only on formulated rules, but also on the congruence of formal rules, jurisprudence and institutions. Section 4 further examines the unevenness

---

1 W Kerr and L Loppacher 'Anti-dumping in the Doha Negotiations – Fairy Tales at the WTO' (2004) 38 JWT 211, 211. ("Anti-dumping in the Doha Negotiations")
of legalization in the AD regime in the context of the uneven expansion of legalization in the trade regime. Section 5 concludes the chapter.

2. Phenomenon of Dumping and the Development of AD Laws

Originally, dumping is a trade practice defined as price differentiation or price discrimination during the sale of goods, namely “selling the same product in different prices at different markets”. In classic economic literature, dumping has been classified in several groups according to different characters of dumping practices. One of the chief classifications distinguishes between predatory and non-predatory dumping. The former denotes the practice that the exporter sets low export prices, with the intention of eliminating more efficient competitors in the importing country and gaining, in the long term, a monopolistic position. After that, “the exporter will be able to establish international monopolies which permit them to charge inflated prices without fear of competition and recoup its short-term loss”.

Dumping may also appeal to an enterprise for a number of non-predatory reasons, such as the different competitive process and capitalisation ratio in different countries. Dumping that occurs for these non-predatory reasons is normally considered as harmless and “fair” in competition policy terms, although it may also adversely affect the competitive structures of the importing country.

According to economic literature, given the fact that dumping practices, in particular these with predatory intention, may adversely affect the situation of a domestic industry “to the detriment in its sales volume, its pricing strategy and its workforce employment”, the importing country normally reacts to dumping in two scenarios: “if it causes or threatens to cause material injury to an established industry in the importing country; or if
it materially retards the establishment of an industry in that country". This is the genesis of anti-dumping law. It provides the most often offered justification of AD legislations: “the prevention of predatory pricing – an unfair trade practice and the perseverance of the level playing field in a liberal trading system”.

Apart from economic efficiency, scholars and practitioners also put forward non-economic arguments in favour of AD laws, such as “nationhood”, “communitarianism” or “fairness”. For instance, Hutton and Trebilcock argued that “the private non-pecuniary costs of the community and individual disruption would ensue when domestic production is displaced by low-priced foreign goods”. In their view, since “individuals are often left with comparatively few traditional attachments to institutions such as family and religion in a rapidly-changed society”, job displacement caused by dumping practices may be “particularly traumatic to the individuals and communities concerned”.

The classical economic theories and non-efficiency rationales for AD laws, however, failed to convince many commentators. Although not all criticisms are equally thorough, most critics seem to acknowledge two principles: first, dumping in most cases has positive welfare effects on the overall economy of the importing country and global economy; second, AD duties negate these effects and may be used “as a surrogate tariff in protecting import-competing industry from cheaper imports”. The combination of these two perceptions then leads to the conclusion that AD duties normally have no justification on welfare analysis and are therefore merely protectionist of the local industry.

Irrespective of hotly debated normative or economic rationales of AD, AD rules are “a well-established political construct” at both domestic and international arenas. First enacted in 1904 by Canada, AD laws gradually acquired a worldwide status, “with
incredibly complex international rules and jurisprudence and a growing number of national laws”.16

Unlike some newly developed WTO norms, national AD laws have a much longer history than the GATT/WTO AD rules.17 By mid-1920s, national AD legislations modelling the Canadian AD law, have been enacted by eight countries, namely Canada, Australia, South Africa, United States, Japan, New Zealand, France and United Kingdom.18 Although largely divergent in terms of administrative procedures, it is observed that “certain basic tests for determining normal value in anti-dumping actions had already been established”, including “(a) price on the home market of the country of exportation; (b) price of the product when exported to other countries; and (c) cost of production in the country of exportation”.19

At around the same period of time, the first international deliberation on dumping and AD laws had already commenced.20 When the preliminary ITO-GATT work began in 1945, AD rules found their way into the GATT “as a counterbalance of the high tariffs on imports in several exporting countries”.21 After that, AD joined other parts of the GATT/WTO on their journey of legalization. The US’s proposal of inserting a standard into the GATT 1947, which was modelled roughly but not precisely on its own Anti-dumping Act of 1921, was accepted by the Contracting Parties. It is argued that at the same time, worrying about the potential protectionism embodied in AD rules, the founding father of the GATT tried to “design an instrument to balance the protectionist effects of the application of AD laws”22. From the very beginning, the GATT AD rule, GATT Article VI (Article VI), is a balance between “the necessity of providing members

---

15 Ibid, Slieberston, 1078.
16 M Zanardi ‘Anti-dumping: What are the Numbers to Discuss at Doha’ (2004) 27 The World Economy 403,407. (‘Numbers to Discuss at Doha’)
18 Canard (n 16) 408. (“Numbers to Discuss at Doha”)
19 Snyder (n 17) 377. (“The Origins of the Non-market Economy”)
21 Slieberston (n 14) 1078. (“Time for Change”)
22 Lowenfeld (n 9) 243. (“International Economic Law”)
with an international seal of approval for their use of AD laws” and “the intention to 
regulate national AD practice to avoid its potential trade distorting effect”. 23

Article VI established a framework for the law of AD that has remained unchanged
to date. This article first defined the term “dumping” and committed the determination of
dumping to authorities of the importing states. 24 It further stated that the remedy against
dumping is an AD duty, which is to be imposed “only upon a finding of injury caused by
the dumping imports”. 25 It contained “all the bare bones of international anti-dumping
rules”, but was relatively brief and has left too much to interpretation by individual
states. 26

Given the simplicity of Article VI, there were later efforts in the GATT to reach
agreements on more detailed and specific rules of AD. In the Kennedy Round, AD was
placed on the agenda and the result of the negotiation turned out to be the first Code
under the auspices of GATT – Agreement on Interpretation of Article VI (the 1968
Code). At the next round, the Tokyo Round, extensive negotiations were undertaken to
establish a code on subsidies. When those negotiations on subsidies were completed, it
was agreed that the 1968 Code should be revised to make it parallel (but not identical) to
the Subsidies Code. 27 The new 1979 Code therefore conformed to their analogues in the
Subsidies Code. When the Uruguay Round was first launched in 1986, it was not initially
expected that the 1979 Code would be a major subject of negotiations, as it had not been
mentioned in the agenda set out in the Ministerial Declaration. As the negotiations
unfolded, AD became a seriously contested subject. The outcome of negotiation, as set
down in the 1994 Agreement on Implementation of Article VI (ADA) 28, was a package
of compromises: procedural rules were tightened, while there were only few, rather
minimal, tightening of substantive rules. The discussions below indicate that this new
ADA, as a package of compromises, does not reflect “so much a coherent philosophy” ---

23 Harpaz (n 7) 453. (‘Dumping the Anti-dumping Instruments’)
24 Art VI Para 1 of the GATT 1947
25 Art VI Para 2 and 3 of the GATT 1947
26 J Jackson, W Davey and A Sykes Legal Problems of International Economic Relations – Cases, Materials and Texts
27 Ibid 695.
28 WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (15 April
1994) LT/UR/A-1A/3. (‘ADA’)
some of provisions favouring imports, but others addressed to the needs of domestic producers.\textsuperscript{29}

Parallel with the international efforts to establish more legalized multilateral AD rules, there was also significant progress at domestic level in introducing national AD rules during the last five decades. The spread of AD laws worldwide shows the power of multilateralism. As indicated before, by mid-1920s, the US, the United Kingdom (UK), some members of the British Commonwealth, Japan and France already had AD laws at their disposal.\textsuperscript{30} As a consequence of the GATT Article VI, about 20 countries introduced their own AD laws.\textsuperscript{31} In the post-1979 Tokyo Code era, more than 25 countries adopted their national AD laws, while after the WTO ADA, there is a surge of introducing national AD laws, which resulted the birth of more than 35 new AD laws during the past decade.\textsuperscript{32} As of 23 October 2007, 71 Members had notified the WTO AD Committee that they had national AD legislations.\textsuperscript{33} Given the fact that 28 WTO Members had not made any notification of AD legislation in 2007 and non-WTO trading partners has no obligation to notify its AD legislation, it is expected a total of around 100 countries has AD laws.\textsuperscript{34} The countries having national AD legislations cover almost all major trading partners in the world, including non-WTO members such as Russia.\textsuperscript{35} It is therefore argued that “more than 90 percent of worldwide imports are potentially subject to AD actions today”\textsuperscript{36}

Given the popularity of AD rules, not surprisingly, there are also a huge number of AD activities. Between 1 January 1995 and 30 June 2007, WTO members notified 3,097 AD investigations and a total of 1,997 AD measures were in force worldwide as of 30

\textsuperscript{29} Lowenfeld (n 9) 250. (‘International Economic Law’)
\textsuperscript{30} The 8 countries are Canada, Australia, South Africa, United States, Japan, New Zealand, France and United Kingdom. Zanardi (n 16) 408. (‘Numbers to Discuss at Doha’)
\textsuperscript{31} Ibid. Those 20 countries include the industrial countries like Germany, Norway, Finland, Austria, and newly industrial and developing countries such as Zambia, Malaysia, Uganda and South Korea.
\textsuperscript{32} Ibid. In the last decade, most of the activities in introducing AD legislation have been in developing countries, as most of the industrialized world already had AD laws prior to 1990.
\textsuperscript{33} WTO ‘Report (2007) of the Committee on Anti-Dumping Practices’ G/L/830, 26 October 2007. The report stated: “As of 23 October 2007, 98 Members had notified the Committee regarding their domestic anti-dumping legislation. Of these 98 Members, 27 notified the Committee that they had no anti-dumping legislation.... Twenty-eight Members had not, as of the end of the review period, made any notification of anti-dumping legislation and/or regulations”.
\textsuperscript{35} Russia adopted its AD law in 1998, ibid.
\textsuperscript{36} Ibid, 407.
June 2007. Traditionally, there were four major users of AD rules - US, EU, Canada and Australia and less developed or newly industrialized countries are the targets of their AD laws. However, now it is India on the top of the list – as of 30 June 2007, it reported 474 AD initiations, the largest number in the world. This indicates that the role of new users, most of which are developing countries, is more important than expected from the past experience. Many therefore argue that the recent intensive implementation and use of AD seems to have a retaliatory motive, as “countries started to use AD to offset the negative effect of unfair trade policies from another WTO Member”. The increasing pace of adopting national AD laws has another possible explanation – countries have to equip themselves with AD laws in order to not only defend, but also fight.

The brief account of the development of international and national AD rules suggests that there is an identifiable vicious circle in the AD regime, where all sorts of elements such as multilateral and national AD legislations, trade liberalization, retaliatory motives, protectionism etc, are part of the same circle. The original debate that whether dumping is unfair is of only theoretical or historical interest. Nor does the north-south question matters – “the entire First World is not on one side or the other in term of AD, nor is there a single Third World position”. In the end, AD appears to be such a popular legal game that no one can fortunately have a way out, although actually most of the time the players are facing no-win situations.

---

40 Zanardi (n 16) 403 and 405. (‘Numbers to Discuss at Doha’)
41 Ibid, 411. The author argued that this is another crucial point that must be discussed in the Doha Round since the WTO ADA excludes the use of AD in a retaliation fashion, because it is a violation of non-discriminatory principle of the WTO.
44 As analysed by economist, the AD in general has negative global welfare effects, which is welfare reducing from both an international and a domestic point of view. For example, Broude (n 12) 307 (‘New Agenda for Research and Reform’) and Zanardi (n 16) 404. (‘Numbers to Discuss at Doha’)

85
Chapter IV

3. “Legalizing” the AD Rules at international level

3.1 Trade Negotiations and International AD Rules

3.1.1 Pre-Uruguay Trade Rounds and the AD Negotiations

After the GATT’s inception in 1947, six rounds of trade negotiations occurred before the commencement of the Uruguay Round in 1986. Although the first four rounds were largely limited and focused on tariff reductions rather than other non-tariff barriers, the three decades, from the 1950s to the 1980s, witnessed significant developments of international AD rules on three elements of legalization - obligation, precision, delegation. During this period, four legal instruments highlight the evolutionary process of international AD rules: the GATT Article VI, the GATT Reports of Group of Experts, the 1968 Code (Kennedy Round) and the 1979 Code (Tokyo Round). The analysis of these four instruments, together with the negotiation background, offers insights into the “legalizing” journey that international AD rules went through.

GATT Article VI

At the time of the ITO-GATT negotiation, the US insisted on “addressing unfair trade in the form of dumping and subsidized exports” at the original ITO agreement and the GATT. The US’s proposal was generally supported due to the conventional concerns on unfair trade practice. The Contracting Parties then agreed that “the imposition of AD and countervailing duties would be allowed under the multilateral agreement, as long as such duties were imposed where conditions had been properly investigated”. There were, however, two major areas of disagreement in the negotiations: the scope of the dumping definition and the possible use of forms of retaliation other than AD duties against dumped imports.

48 Stewart (n 46) 1046. (‘The GATT Uruguay Round’)
With respect to the scope of the definition, the parties established four types of dumping early in the negotiations: price, service, exchange and social.\textsuperscript{49} It is documented that opinions on the definition of dumping was divided into two camps.\textsuperscript{50} Developing countries argued that all forms of unfair trade practices should come under the dumping heading, while developed countries preferred a more limited definition with special reference to price dumping. Since the parties worried that “the broad definition favoured by the developing countries would have left open a wide range of retaliatory actions”, a narrow definition of dumping was adopted in the GATT Article VI.\textsuperscript{51}

The question of the use of retaliatory forms other than AD duties was centred on the use of quantitative restrictions against dumped imports. Due to “the inconsistency of quantitative restrictions with the fundamental theme of the GATT negotiations”, the possibility of utilizing direct limitation of dumping through quantitative restrictions was ruled out of the text of Article VI.\textsuperscript{52} Ultimately, the desire to avoid the use of quantitative restrictions limited retaliatory dumping measures to AD duties.\textsuperscript{53}

The negotiation history on AD manifested the first multilateral efforts under GATT to “legalize” national AD rules and led to the first multilateral rule in this area. Although fairly brief (with only seven paragraphs and just over two pages), Article VI laid out “the multilaterally recognized definition of dumping and the conditions under which individual countries were justified in taking defensive measures”.\textsuperscript{54} In an implicit way, Article VI established three basic obligations: the determination of dumping (Paragraph 1 and 2), the determination of injury (Paragraph 1) and causality (Paragraph 6 (a)), which constituted a platform for future development of the AD regime. Yet, Article VI did not provide full details on the administration of an AD law.

Regarding the obligation of determining dumping, the first paragraph of Art VI articulated the situation that a product is to be considered as being dumped. The second

\textsuperscript{49} Ibid. Except price dumping, other types of dumping were either given less than cursory treatment or failed to produce a clear definition during negotiations.

\textsuperscript{50} Ibid.

\textsuperscript{51} Ibid.

\textsuperscript{52} Ibid.

\textsuperscript{53} Record of Work Performed, UN Econ. Social Council, GATT Doc. No. E/PC/T/103 (19 June 1947), 12. The Working Party on technical articles added an interpretative note as “no measures other than anti-dumping and countervailing duties or charges shall be applied by any Member for the purpose of offsetting dumping or subsidization”.

\textsuperscript{54} Ibid.
paragraph further restricted the imposition of an AD duty within the margin of dumping. Together they limited trade authorities’ ability to respond to alleged dumping practice – only under certain circumstances is the imposition of an AD duty permissible. Regarding the obligation of determining injury to domestic industry, Article VI specified “material injury” as the condition for the imposition of an AD duty, although the term itself left undefined. The abstraction of this language “made this obligation at the time an area of contention, as different parties had different standards of injury in their domestic legislations”. Nevertheless, it prohibited a trade authority from imposing an AD duty without a statement of injury, despite the ambiguous meaning of “injury”. Finally, under paragraph 6 (a) of Article VI, neither AD nor countervailing duties could be levied unless the effects of dumping or subsidization were “to cause or threaten material injury to an established domestic industry, or such as to retard materially the establishment of a domestic industry”. Again, it was clear that a trade authority is under the obligation to prove causality. The text, however, did not provide a working definition of domestic industry and a functional framework to practically assess the casual link.

As Article VI only outlined a definition of dumping and the basic parameter of an acceptable response, the precision of Article VI became “a big concern” of many parties. The lack of specificity and ultimately precision, which permitted countries to implement the GATT according to their own understandings of Article VI, led to enormous conflicts among the Contracting Parties. This became the reason for intensive negotiations on expanded rules in regulating national AD practices in later rounds of negotiations.

As an article of the GATT 1947, delegation of settling AD disputes were not separately stressed in Article VI. All GATT disputes, including the AD disputes, would refer to Article XXIII of GATT – the “nullification and impairment” clause. As a DSM based on the consensus principle, the parties have enough opportunities to block either the initiation or the completion of the process. Also, the existences of pre-existing AD laws in contrast with Article VI were justified by the well-known “grandfather clause”, under which the parties were only required to comply with GATT provisions to the extent

55 Stewart (n 46) 1409. (‘The GATr Uruguay Round’)
56 Para 6 (a) of GATT Art VI.
not inconsistent with existing legislations. Consequently, in addition to individual conflicts with Article VI, the laws of the parties conflicted with each other.\textsuperscript{58} In short, at the time of Article VI, precision and delegation of the AD regime were considerably low, despite that certain fundamental obligations have been designated.


From the birth of the GATT to the end of the 1950s, there was no major change in Article VI except the 1955 Interpretative Note which specified the rules of circumvention (Article 5) and state-monopoly (Article 6)\textsuperscript{59} and one formal challenge to an AD action by a GATT Contracting Party.\textsuperscript{60} It however did not indicate that the multilateral efforts to modify and clarify international AD rules stopped. The Contracting Parties first asked the GATT Secretariat to undertake a systematic, comparative study of the AD laws of the Contracting Parties in 1956.\textsuperscript{61} Then a Group of Experts was appointed to further study a number of technical AD issues.\textsuperscript{62} The Report of Group of Experts (the Report) was published in March 1961, as the first comprehensive consideration of practical aspects of the AD administration since the GATT's establishment. Although the opinions of the Report were not legally binding, it had a critical influence on the future development of the international AD rules. It is observed that the Report later emerged as “the basis of a large part of the 1968 Code developed during the Kennedy Round negotiations”.\textsuperscript{63}

The first effort made by the Group of Experts in the Report was to clarify a key substantive issue – the price comparison in the determination of dumping. The Report stressed that the essential aim of Paragraph 1 of Article VI was to “make an effective comparison between the normal domestic price in the exporting country and the price at

\textsuperscript{57} Stewart (n 46) 1409. (‘The GATT Uruguay Round’)
\textsuperscript{58} Ibid.
\textsuperscript{59} GATT Report of Review Working Party III on Barriers to Trade Other than Restriction on Tariffs, L1334, 1 March 1955.
\textsuperscript{61} GATT Anti-dumping and Countervailing Duties, GATT Sales No. GATT/1958-2.
\textsuperscript{63} Stewart (n 46) 1417. (‘The GATT Uruguay Round’)
which the like product left that country". For the purposes of proper price comparison, three issues were addressed in depth – normal value, like product and export price.

The Report first noted that an importing trade authority should aim at a comparison of normal value and export price “at the same level in the trade and at the same date or dates as near as possible”. It then considered the problem of the determination of domestic market price when more than one selling price on the domestic market occurred: “direct price comparison of individual sales transactions” would be preferable and the use of weighted averages should be confined to cases where “it was impossible to use a more direct method of establishing the normal domestic price”. In addition, the Report set forth the opinion that two alternative methods of establishing normal value in Paragraph 1 (b) could only be used after “the establishment of a normal market value under Paragraph 1 (a) of Article VI had failed”. These two methods were equally valid and there was no order of priority. It further noted the term “production costs” under Paragraph 1 (b) (ii) should “include all direct and indirect cost incurred in producing the product, such as the cost of materials and components, labour, general overheads and so on”. The ultimate goal of utilizing whatever method was to “achieve at a normal value which was genuinely comparable with the export price”.

Next to the normal value, the Report entered into the discussion of “like product”. The term was interpreted as a product “which is identical in physical characteristics subject, however, to such variations in the presentation which are due to the need to adapt the product to special conditions in the market of the importing country (i.e., to accommodate different tastes or to meet special legal or statutory requirements)”. This term was not allowed to be interpreted too broadly so as to cover products of a different kind with higher prices on the internal market. It also should not be interpreted “too stringently so as to elude the application of Paragraph 1 (a) of Article VI”.

---

64 The Report (n 62) 7.
65 Ibid 8.
66 Ibid 16.
68 Ibid.
69 Ibid 10.
70 Ibid 11.
71 Ibid.
72 Ibid.
Finally, the ideal “export price” was stipulated as “the ex-factory price on sales for export or the F.O.B. price, port of shipment”.73 The ultimate aim was, again, “in any event to arrive at a price which was genuinely comparable with the domestic price in the exporting country”.74 If the importers sold imported products at a loss and were not recompensed by the exporters, they should not be considered guilty of dumping.75

The next major achievement of the Report was to lay down certain rules on material injury and industry.76 The Group of Experts agreed that no precise definition of “injury” could be given, but “a common standard ought to be adopted in applying this criterion and that decisions about injury should be taken by the authorities at a high level”.77 National legislations which provided for “injury” was suggested to be applied “only as if the word material were stated therein”.78 On the question of “industry”, the Report noted that “as a general guiding principle, judgements of material injury should be related to total national output of the like commodity concerned or a significant part thereof”.79 The use of AD duties to “offset injury to a single firm without proper justification” would be protectionist in nature.80

Apart from clarifying provisions of Article VI to increase the level of legalization in the normative system, the Report also revealed the opinion of the Group of Expert on a number of procedural issues regarding the AD investigations and “legalized” the administrative system of domestic AD rules at the first time.81 Under the heading of “Application of Anti-dumping Duties”, the Report particularly considered the areas unaddressed in Article VI but of obvious divergence among the national AD laws, such as hearings, provisional AD measures, the publication of AD measures and the duration of AD measures. In terms of hearing, no preference of any national practice was indicated.82 The Report only emphasized that it would be desirable not to impose an AD duty unless the interested parties had been afforded an opportunity to be heard by the

73 Ibid, at 7.
74 Ibid.
75 Ibid, at 11.
76 Ibid, at 10.
77 Ibid.
78 Ibid.
79 Ibid.
80 Ibid.
81 Ibid 15-19.
82 Ibid 17.

91
competent authority. 83 Also, to increase the transparency of AD investigations, the Report decided that “decisions concerning the application of AD measures should be taken at a high administrative level and should be published”. 84 It noted furthermore that AD duties should remain in force only as long as necessary to counteract dumping. It might be desirable for an importing country “to review the AD measure from time to time and the exporters might request the competent authority to do so”. 85 On the issue of provisional AD measures, the Report put forward that while provisional AD measures might occasionally be justified for the purpose of limiting material injury, it “should be used sparingly and for the shortest possible time in order to interfere as little as possible with normal trade and in order that they should not assume a protectionist character”. 86

By refining the meaning of substantive terms in Article VI and clarifying certain procedural obligations of trade authorities, the Report is a big step forward in the development of legalization. It established the framework of the determination of dumping that is still in use today, and specified the “material injury” criterion and certain procedural requirements in AD investigations. Many issues discussed in the Report, such as price comparison, provisional AD measures and the duration of AD measures, became the focuses of future trade negotiations. Although the Report was unable to add obligations to the GATT Contracting Parties, since the Contracting Parties were under no mandate to take actions, it made significant contributions to the increase of precision at the AD regime. As a subject-specific report, it did not address the issue of dispute resolution and therefore was incapable of improving the level of delegation in the AD regime.

The Anti-dumping Code of Kennedy Round (the 1968 Code)

At the time that the Kennedy Round commenced in 1963, “non-tariff measures (NTMs) began to replace tariffs as the primary obstacle inhibiting the free flow of international trade”. 87 There were increased pressures for the GATT to set common parameters in the issues of NTMs through multilateral agreements. In this context, the

---

83 Ibid.
84 Ibid 18.
85 Ibid 19.
86 Ibid 18.
AD was placed on the agenda and the result of the negotiation turned out to be the first AD code under the auspices of the GATT, which entered into force on 1 July 1968.88

The Code covered five main areas, including the determination of dumping, the determination of material injury, investigation and administration procedures, AD duties and provisional measures, and AD actions on behalf of third countries.89 Developed largely from the Report, the main purpose of the 1968 Code was to improve the level of precision, both in terms of procedural rules and substantive criteria for the determination of dumping and injury. While there was no obvious change for the determination of dumping on the 1968 Code in comparison with the Report, Article 3 (a) of the 1968 Code provided:

A determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are demonstrably the principal cause of material injury or of threat of material injury or the principal cause of material retardation of the establishment of such an industry. In reaching their decision the authorities shall weigh, on one hand the effect of the dumping, and on the other hand, all other factors which may be adversely affecting the industry. (emphasis added)

In addition, it specified minimal procedural standards for AD investigations, such as the authorities were required to conduct dumping and injury investigations simultaneously, and provisional measures could only be applied upon an affirmative finding of both dumping and injury.90 The Code also established a permanent Committee on Anti-dumping Practices (the AD Committee) to resolve disputes between contracting parties on the administration of national laws, to consider and make recommendations on new AD laws or changes in existing legislations, and to oversee the efforts of the signatories to bring their legislations in line with the new Code.91

As the first separate multilateral agreement dealing with AD, the 1968 Code significantly promoted legalization in the AD regime after GATT Article VI. Remarkable advancement of obligation and precision on the basis of the Report can be identified from

87 Stewart (n 46) 1417. ("The GATT Uruguay Round")
89 Art 2-12 of the 1968 Code.
90 Art 5 and 10 of the 1968 Code.
91 Art 11 of the 1968 Code.
the 1968 Code. It tightened up the rules in the AD investigation in both substantial and procedural terms. In particular, it imposed much more stringent obligations on importing trade authorities in the determination of injury. Although the 1968 Code was applied to those who signed it, it turned most issues clarified and discussed in the Report into legally binding rules.

The achievements of the 1968 Code are not limited in promoting the level of obligation and precision of international AD rules, however. The establishment of the AD Committee to resolve disputes and superintend national AD laws was an important development of delegation in the AD regime. Most significantly, a general article was inserted in obligating each signatory to ensure the conformity of its laws, regulations and administrative procedures with the provision of the 1968 Code. The laws of, inter alia, the US, the EC, Canada and Australia were modified to reflect the GATT 1968 Code, even though the US did not formally adopt the 1968 Code. After the Kennedy Round, major trading partners’ AD legislations were all largely based upon the wording of the 1968 Code. For the first time, the demonstrative convergence emerged as a result of the development of multilateral rules in the AD regime.

The Anti-dumping Code of Tokyo Round (the 1979 Code) 

Launched in 1973, the Tokyo Round negotiation had “an ambitious agenda”, including “significant tariff reduction” and “a major focus on non-tariff measures”. AD, however, was not considered a priority early in the Round because of the resistance of further legalization by major trading partners, in particular the US. It is argued that the history of the US Congressional opposition to the 1968 Code “made the US negotiators hesitate to undertake further AD negotiations”. Given the political sensitivity of this area, trading partners were worrying that “a breakdown of negotiation in the AD regime could endanger the success of the entire Round”. Until later in the Round, under the

92 Art 14 of the 1968 Code. Due to the congress opposition, the US did not adopt the 1968 Code.
93 Lowenfeld (n 9) 249. (International Economic Law’
94 Stewart (n 46) 1431. (“The GATT Uruguay Round”)
95 Ibid 1435.
96 Ibid.
97 Ibid.
auspices of the AD Committee, trading partners were starting to grapple with difficult issues which were in need of further clarification and refine them in the negotiation.

The end result was the 1979 Code, officially titled “Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade”. The new Code continued the efforts of promoting a higher level of legalization in the AD regime. Despite its similarity with the 1968 Code, the new Code was intended to supersede the old one and signatories specially denounced the 1968 Code.

With respect to obligation, while some basic obligations remained unchanged from the 1968 Code, several new obligations were added, and others were significantly modified or expanded. One area of significant reform was the determination of material injury. On the one hand, the new Code revised the 1968 Code so that it was no longer necessary to show that dumping was “the principal cause of injury” when contributing factors exist. Instead, a non-exhaustive list of all relevant economic factors and indices having a bearing on the state of injury was provided and the competent authority was expected to examine all of them. On the other hand, the 1979 Code specified that a determination of injury should be based on positive evidence of two areas: “(a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products”.

Other major obligations added or modified in the 1979 Code were the length of AD investigations (except in special circumstance, an investigation shall be concluded within one year); the rule of evidence, especially those of confidential information (requiring the cause be shown as to why such data should be considered as confidential and the submission of public summaries of such data) and the rule of price undertaking. With the addition or modification of these obligations, a comprehensive framework at

99 Art 16 (5) of the 1979 Code.
100 Stewart (n 46) 1456. (The GATT Uruguay Round’)
101 Art 3.3 of the 1979 Code.
102 Ibid.
103 Art 3.1 of the 1979 Code.
104 Art 5.5 of the 1979 Code.
105 Art 6.3 and 4 of the 1979 Code.
106 Art 7 of the 1979 Code.
international level has been established to regulate the conduct of investigating authorities. The level of obligation and precision in the AD regime again has been improved.

The last major area of change was the addition of a special dispute settlement provision - Article 15 “Consultation, Conciliation and Dispute Settlement”. Article 15 stated that any Contracting Party that believed “any benefit accruing to it under this Code is being nullified or impaired” could request consultations with the offending party and each party was to provide “sympathetic consideration” to any request for consultation. In case that parties fail to find a mutually agreed solution through consultation, the matter could be referred to the Committee for conciliation. The Committee should then “meet within 30 days to review the matter” and “encourage the Parties involved to develop a mutually acceptable solution”. Finally, if these efforts were fruitless, the Committee, at the request of any Party involved, should “establish a panel to examine the matter, based upon the written statement of the exporting country and the facts made available to the authorities of the importing country”. Procedures under Article 15 were governed by the provisions of “Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance”. As the first dispute settlement provision inserted into an AD Code, this provision demonstrated the Contracting Parties’ desire to strengthen the delegation to third-party adjudicators in the AD regime. Notwithstanding the imperfect general DSM in the GATT, this provision, by requesting the panel examination of both the statement of exporting country and facts available to the competent authorities, significantly pushed the process of legalization in the AD regime forward.

In sum, a continuity of the improvement of legalization between the 1979 Code and the previous GATT AD texts can be observed. In particular in terms of obligation and precision, the 1979 Code carried forward the unfinished job of the 1968 Code, further clarifying both substantive terms in Article VI and investigating procedures. The presence of a special dispute settlement provision illustrated the parties’ concern

107 Art 15 of the 1979 Code.
108 Art 15.2 of the 1979 Code.
109 Art 15.3 of the 1979 Code.
110 Ibid.
111 Art 15.5 of the 1979 Code.
112 Art 15.7 of the 1979 Code.
regarding delegation in this particular regime. Although Article 15 of the 1979 Code did not necessarily make the AD regime special in the GATT with respect to dispute settlement, it makes dispute settlement in this regime more “rule-oriented”. The impact of this movement of legalization was two-fold: on the one hand, it made AD rules one of the most comprehensive and sophisticated multilateral legal framework under the GATT; on the other hand, it resulted in the distrust and hesitation of some trading partners, inter alia, the US to further legalization.

3.1.2 The Uruguay Round and the WTO Anti-dumping Agreement (ADA)

The Uruguay Round Negotiation

AD has not been expected as a area where intense negotiations would be conducted when the Uruguay Round was first launched in 1986. However, as the negotiations unfolded, serious contentions emerged in the AD area. As observed, on the one hand, “the US and the EU determined to plug ‘loopholes’ of the 1979 Code, in particular regarding the use of certain devices to prevent the circumvention of AD duties”. 113 On the other hand, “many of other countries commonly targeted by AD actions pressed for changes in both the basic concepts embodied in the 1967 and 1979 Code and the practices that seemed to tilt the required price comparison against imports, so as to make the AD rules less susceptible to use for the protectionist purpose”. 114 Due to lack of consensus on most of the major issues, drafting a text satisfactory to all parties appeared to be impossible at early negotiations. Finally, the parties managed to reach a set of compromises, as set out in the ADA: the procedural rules were tightened, with only few, rather minimal, tightening of substantive rules. As correctly argued, this new ADA “does not reflect so much a coherent philosophy as a package of compromises --- some favouring imports, but others addressing to the needs of domestic producers”. 115

During the long and difficult negotiation of the Uruguay Round, there were a number of “open issues” raised in the AD regime, which required “urgent political decisions”. 116 These issues were first identified in the Ramsauer Draft Text, a draft text

113 Jackson, Davey and Sykes (n 23) 695. ('Legal Problems of International Economic Relations')
114 Ibid.
115 Lowenfeld (n 9) 250. ('International Economic Law')
116 Stewart (n 46) 1532. ('The GATT Uruguay Round')
issued in 1991 to be a compromise document for continuing negotiations. It included:

1. use of weighted averages in the calculation of export prices and normal value;
2. sales below cost of production;
3. constructed value: calculation of administrative, selling and other costs and profits;
4. standing;
5. de minimis margins of dumping and negative import volumes;
6. cumulation of imports from multiple countries for determination of injury;
7. sampling;
8. sunset;
9. anti-circumvention;
10. dispute settlement;
11. public interest.

Given the divergent interests of negotiating parties, while some issues enjoyed a fairly broad consensus, such as inserting a sunset review, strengthening transparency and procedural due process, most others were “characterized by a polarization of positions”. The contention about key issues reflected two different perspectives of the parties: some were of the view that international AD rules should be “strengthened and improved so that relief from unfair trade practices would be more timely and effective”; others held that the 1979 Code should be revised “to deal with implementation on the part of some countries that had led to arbitrary, burdensome and unfair results”. Consequently, the level of legalization in the final text of ADA has been significantly influenced by the competing positions of parties in the negotiation.

Despite substantial disagreements among parties regarding whether the changes contained in the final text were “appropriate, necessary or sufficient”, the “clarifications, modifications and expansions” of these key AD issues in the Uruguay Round demonstrated the latest major improvement of legalization in the AD regime, in particular in terms of obligation and precision.

---

118 Ibid 1531.
119 Ibid.
120 Ibid 1537.
Legal Status of the ADA

a. An Overview

In general, the new WTO ADA is “a much more specific and detailed document than its predecessors”.\(^\text{121}\) It took a large step further than the old Codes, in terms of both procedural and substantive rules, although it still need to be understood as part of the political balancing between trade liberalization objectives of the GATT/WTO and WTO Members’ domestic concerns. It is in particular directed at “addressing some of the perceived shortcomings and abuses made possible by the vagaries of the old Codes and imposed more tight procedural obligations on trade authorities”.\(^\text{122}\) However, before the general examination of ADA starts, it has to be pointed out that these improvements of international AD rules never successfully prevented AD from being the most important modern non-tariff barrier. So, “the concept of AD on paper might be disarmingly simple, whereas in practice, it is anything but that”.\(^\text{123}\)

In total, there are eighteen articles in the ADA, with two annexes on procedural requirements for on-the-spot investigation and best information available. Article 2 to Article 4 dealt with the basic substantial issues, namely the determination of dumping, the determination of injury and the definition of domestic industry. By providing definitions to key words like dumping, normal value, constructed normal value, sale below cost and fair comparison, Article 2 sets forth the detailed rules for determining the existence and the margin of dumping. To establish the existence of dumping, Article 2.1 requires “a comparison of the export price with the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”\(^\text{124}\) For the meaning of “like product”, Article 2.6 clarified it as either identical, or “close resembling” in case of absence of identical one.\(^\text{125}\) If there are some situations, where no comparable price of domestic sale of the product in question exists, or the

---


\(^{122}\) Ibid.

\(^{123}\) Ibid 6.


\(^{125}\) Art 2.6 of the ADA.
domestic price cannot be relied on as the reference of comparison, Article 2.3 authorizes importing Members to compare the export price with the constructed normal value of the product, a price that does not actually exists, but is calculated by adding costs, selling, general, and administrative (SG&A) costs, and profit.\footnote{126} Furthermore, Article 2.4 provides available methodologies to be used by trade authorities in doing the comparison and calculating dumping margin.\footnote{127}

Article 3 turns the focus on "substantive obligations that a Member must fulfil in making an injury determination".\footnote{128} Among them, Article 3.1 is an overarching provision that sets forth a Member’s fundamental obligation in this respect – a determination shall be based on both “the quantity of dumped products and its effect on the price of like products and producers of such products".\footnote{129} Although without a definition of either “material injury” or “threat of material injury”, the succeeding paragraphs on Article 3 imposed more obligations to trade authorities on the following issues: the determination of the volume of dumping imports and their effect on prices (Article 3.2), investigations of imports from more than one country (Article 3.3), the impact of dumped imports on the domestic industry (Article 3.4), causality between dumped imports and injury (Article 3.5), the assessment of the domestic production of the like product (Article 3.6) and the determination of the threat of material injury (Article 3.7 and 3.8).\footnote{130} Essentially, this article is the same as the 1979 Code, emphasising that injuries caused by factors other than dumping should not be attribute to the dumping, but “rejecting the idea that dumping should be demonstrably the major cause of the injury in 1967 Code”.\footnote{131}

Except the first three substantive Articles, the majority of other Articles are dealing with procedural issues, including the investigation (Article 5), evidence (Article 6), provisional measures (Article 7), price undertaking (Article 8), imposition and collection of AD duty (Article 9), retroactivity (Article 10), duration and review of AD duties and

\footnote{126} Art 2.3 of the ADA; also M Matsushita, T Schoenbaum and P Mavroidis The World Trade Organization: law, Practice and Policy (Oxford University Press, Oxford 2003) 316. ("The WTO")
\footnote{127} Art 2.4 of the ADA.
\footnote{129} Art 3.1 of the ADA.
\footnote{130} Thailand - H-Beam (n 130) para. 106.
\footnote{131} Matsushita, Schoenbaum and Mavroidis (n 126) 326. ("The WTO")
price undertakings (Article 11), public notice (Article 12) and independent judicial review at domestic level (Article 13).

These procedural obligations are in general much more precise and less controversial than substantive issues. The improvement of the level of precision of procedural standards offered great helps to exporting countries when arguing their cases in front of the WTO panels or the AB. For instance, in United States- Hot-Rolled Steel, the US authority asked a Japanese exporter to submit evidence that was in the possession of its US joint venture. As its request failed, it decided to resort to a “facts available” methodology because of the failure of the Japanese exporter to submit the required evidence, which was caused by the refusal of its joint venture to supply them.132 The AB ruled against the US, stating that the US was wrong in utilizing a fact available approach because the Japan exporter could not be said to be uncooperative in light of its joint venture’s refusal.133 By refusing the US’s interpretation of “cooperative”, the AB actually required trade authorities to act “in a reasonable, objective and practical manner”, which in general means closer adherence to the ADA’s procedural standards.134

Part II of the ADA contains two important institutional provisions. Article 16 establishes a Committee on Anti-dumping Practice (APC), to which Members are obliged to submit several types of notification, including Notifications of Anti-Dumping Legislations and/or Regulations, Notifications of Anti-Dumping Actions, Notifications of Preliminary and Final Actions and Notifications of Competent Authorities.135 As part of the surveillance mechanism of the WTO, the practice of APC enhanced the transparency of national AD rules. Article 17, dealing with the consultation and dispute settlement of AD disputes, is one of the most important, as well as controversial, provisions in ADA. Among the sub-paragraphs of Article 17, the most controversial part is its special standard of review of both factual and legal determinations by national authorities.136 This provision, “insisted upon by the US and accepted reluctantly by other parties as the

133 Matsushita, Schoenbaum and Mavroidis (n 126) 311. ("The WTO")
136 Matsushita, Schoenbaum and Mavroidis (n 126) 331. ("The WTO")
Uruguay Round was coming to a make-or-break close”, brought “serious criticism” of not only the AD rules, but also the whole DSM, as to be elaborated below.\textsuperscript{137}

In short, the ADA continued the efforts of previous GATT codes and established a fairly “legalized” system in the AD regime.

b. Obligation

A central feature of the status of legalization of the ADA is the variability of its obligations. Although the ADA imposed a wide range of legally binding obligations on Members, the nature of these obligations differs, “from resulting coercion, comity or even morality alone”.\textsuperscript{138} Some of the obligations are specific and unconditional, which unambiguously require or prohibit certain behaviours of competent authorities. Others, however, are worded to circumscribe their obligatory force, and tolerate various practices of Members. To a large extent, the obligations in the ADA construct a continuum, from those which require specific implementations in national AD legislations, to those leaving greater flexibility to national authorities in developing their own practice, as shown on Chart 3. Various degrees of conditionality and specificity of the ADA obligations influence not only the level of obligations of ADA, but also closely link to the level of precision of the ADA, as to be discussed below.

\begin{center}
\textbf{Chart 3 Various Degree of Conditionality and Specificity of ADA Obligations}
\end{center}

\begin{tabular}{llll}
\hline
Very Specific and Unconditional & Detailed Rules but No Specific Implementation & Contingent Obligations Subject to National Implementation & Very General Obligations Principles Subject to National Implementation \\
(for example, Article 6.1.1 - exporters or foreign producers receiving questionnaires shall be given at least 30 days for reply) & (for example, Article 2.4 - fair comparison between export price and the normal value) & (for example, Article 2.3 - “on such reasonable basis as the authorities may determine”) & (for example, due process) \\
\hline
\end{tabular}

\textsuperscript{137} Lowenfeld (n 9) 291, ('International Economic Law')
Chart 3 indicates that the provisions in the ADA can be categorized as four types: unconditional and specific, specific with implicit conditions, contingent and principle. The first group of provisions provides detailed rules that give national authorities direct instructions on AD proceedings. The second and the third groups are fairly detailed, but in many situations, it remains unclear from the wording of them whether a particular decision or action taken (or not taken) by an authority during the course of an AD proceeding is WTO-consistent or not. The difference between them is therefore instructive, rather than dichotomous - the third group of provisions may explicitly allow a competent authority to make decisions under special circumstances, but the second group only implicitly tolerates divergent national practices. The last group contains general principle obligations. The wording of this group of provisions makes normative claims instead of imposing specific obligations, such as the “sufficient”, “unbiased and objective manner” and “due process”.

In general, the ADA articulates substantive and procedural obligations in different manners. Although it has defined key substantive terms in the first three provisions in a fairly detailed manner, substantive obligations of the ADA do not require WTO Members to change their sharply different practices. Hence, most substantive provisions in the ADA can be classified as the second or third group. They play a rather baseline role in national AD proceedings – they have been incorporated into domestic legislations, but can be interpreted in the way WTO Members prefer, instead of instructing national authorities to act in a particular way. With respect to procedural obligations, the ADA makes a different, indeed tighter, stand. A number of procedural provisions imposed obligations to national AD authorities, intending to directly discipline their behaviour. If those procedural requirements cannot be met, there is a real risk that the measure taken by the authorities might be easily challenged in the WTO. Most of procedural

141 The large degree of discretion of each WTO Member in AD regime has been widely discussed, in particular within the context of dispute settlement. For example, Cetlan (n 141) 804. ('Issues in AD and CVD Law')
142 For example, if the investigation authority cannot conclude the investigation within the required time limit, it is very possible that, as a result, the measure might be challenged in the WTO. J Czako, J Human and J Miranda A Handbook
provisions therefore are qualified as the first group. Both substantive and procedural provisions contain some principle obligations, which “inform” the rest of the provision. Table 1 further illustrates the variety of nature of obligations in the ADA. For the purpose of concise presentation, each provision is dissected to paragraphs and characterized as one of the four groups. In exceptional circumstance, when an important principle obligation exists to inform the rest of the paragraph, a paragraph may have two characters.

<table>
<thead>
<tr>
<th></th>
<th>Specific and Unconditional</th>
<th>Specific with implicit condition</th>
<th>Contingent</th>
<th>Principle</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art 1</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 2.1</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 2.2</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 2.3</td>
<td>---</td>
<td></td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Art 2.4</td>
<td>---</td>
<td></td>
<td></td>
<td>(fair)</td>
</tr>
<tr>
<td>Art 2.5</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 2.6</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 2.7</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 3.1</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 3.2</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 3.3</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 3.4</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 3.5</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 3.6</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 3.7</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 3.8</td>
<td>---</td>
<td></td>
<td>---</td>
<td>(special)</td>
</tr>
</tbody>
</table>

*on Anti-dumping Investigation* (Cambridge University Press, Cambridge 2003) 42. ("Handbook on Anti-dumping Investigation")

104
<table>
<thead>
<tr>
<th>Art 4.1</th>
<th>Art 4.2</th>
<th>Art 5.1</th>
<th>Art 5.2</th>
<th>Art 5.3</th>
<th>Art 5.4</th>
<th>Art 5.5</th>
<th>Art 5.6</th>
<th>Art 5.7</th>
<th>Art 5.8</th>
<th>Art 5.9</th>
<th>Art 5.10</th>
<th>Art 6.1</th>
<th>Art 6.2</th>
<th>Art 6.3</th>
<th>Art 6.4</th>
<th>Art 6.5</th>
<th>Art 6.6</th>
<th>Art 6.7</th>
<th>Art 6.8</th>
<th>Art 6.9</th>
<th>Art 6.10</th>
<th>Art 6.11</th>
<th>Art 6.12</th>
<th>Art 6.13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art 6.14</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 7.1</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 7.2</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 7.3</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 7.4</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 7.5</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 8.1</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 8.2</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 8.3</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 8.4</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 8.5</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 8.6</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 9.1</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 9.2</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 9.3</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 9.4</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 9.5</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 10.1</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 10.2</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 10.3</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 10.4</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 10.5</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 10.6</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 10.7</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 10.8</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 11.1</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

--- (as short as possible)

--- (as long as and to the...
| Art 11.2 | --- | --- |
| Art 11.3 | --- | --- |
| Art 11.4 | --- | --- |
| Art 11.5 | --- | --- |
| Art 12.1 | --- | --- |
| Art 12.2 | --- | --- |
| Art 12.3 | --- | --- |
| Art 13 | --- | --- |

(independent)

| Art 14.1 | --- | --- |
| Art 14.2 | --- | --- |
| Art 14.3 | --- | --- |
| Art 14.4 | --- | --- |
| Art 15.1 | --- | --- |

(constructive remedies)

| Art 16.1 | --- | --- |
| Art 16.2 | --- | --- |
| Art 16.3 | --- | --- |
| Art 16.4 | --- | --- |
| Art 16.5 | --- | --- |
| Art 17.1 | --- | --- |
| Art 17.2 | --- | --- |
| Art 17.3 | --- | --- |
| Art 17.4 | --- | --- |
| Art 17.5 | --- | --- |
| Art 17.6 | --- | --- |
Chapter IV

| Art 17.7 | --- |
| Art 18.1 | --- |
| Art 18.2 | --- |
| Art 18.3 | --- |
| Art 18.4 | --- |
| Art 18.5 | --- |
| Art 18.6 | --- |
| Art 18.7 | --- |

c. Precision

It is a popular argument that "the current ADA is too vague or ambiguous on many key issues, leaving leeway to the authorities to interpret it in an unduly protectionist manner".¹⁴³ This, in turn, causes "inconsistency between different Members and consequent uncertainty for interested parties".¹⁴⁴ In particular, the second and third group of provisions, which covers almost all most important substantive issues in the ADA, are the most controversial ones. They are accused as "the main cause of the divergence of methods and modalities of national anti-dumping practices", which lead to greater difficulty in establishing a consistent and predictable AD regime under the WTO.¹⁴⁵ A question has to be asked: how the ADA provisions create vagueness and uncertainty in practice, even they have been articulated in such a detailed fashion?

In answering this question, an example – calculation of dumping margin in Article 2.4.2 – will be offered to illustrate how the "precise" obligations on paper are interpreted by different authorities in different ways, which are normally "unfair" to exporters. In this context, the reason of lack of precision of this provision will also be explored.

According to the ADA, the existence and the degree of dumping are measured by the difference between the export price and the normal value, so-called "margins of dumping" in Article 2.4.2. The degree of final dumping duty is preliminarily based on the

¹⁴³ For example, K Adamantopoulos and D Notaris 'The Future of the WTO and the Reform of the Anti-dumping Agreement: A Legal Perspective' (2000) 24 Fordham International L. J. 30, 35. ("Reform of the ADA")
¹⁴⁵ Celtan (n 136) 804. ("Issues in AD and CVD Law")
finding of this dumping margin. The importance of dumping margin calculation in the administration of AD laws lies in a simply fact: the AD duty is estimated on the basis of dumping margin. If the dumping margin is measured in a way that may result in "spurious" dumping margins, exporters which are subject to the duty “have to pay extra price for these fictitious differences between export price and normal value”. Hypothetically, an investigating authority would definitely choose, among all available methods, one that may result in the greatest dumping margin. In this sense, it is very important to have international rules unambiguously ensure fairness in dumping margin calculation.

It is unfair to say that we do not have detailed rules in the ADA to address to this important issue. Article 2.4.2 reads as:

Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

The wording of Article 2.4.2 is more precise than its predecessors in the 1979 Code, Article 2.6, which only required fair comparison “at the same level of trade” and “in respect of sales made at as nearly as possible the same time”. The ADA disallowed the average-to-transaction comparison, a method was accused as “inherently unfair”. However, this provision is far from adequate to converge the difference between national rules and ensure a “fair” comparison. For instance, the AD law of Czech Republic contains no provision that “allows the AD authority to use individual export prices in

---

146 Kim (n 142) 39. (‘Fair Price Comparison in the ADA’)
147 Art 2.6 of the 1979 Code.
148 Kim (n 142) 41. (‘Fair Price Comparison in the ADA’)

comparison with weighted average normal value". When the authority find the weighted average-to-weighted average method is not applicable, they will have full discretion to make a choice among other available methods, which may result in greater dumping margins.

Even where a weighted average to weighted average approach is adopted, however, there can be a practical issue for dumping margin calculation where there is more than one type of the product concerned, as indicated in EC-Bed Linen. EC's practice before EC-Bed Linen is to identify a certain number of different "models" or "types". The weighted average-to-weighted average comparison was done type-by-type or model-by-model. If a particular type is not dumped, the negative dumping was zeroed and not able to offset the positive dumping. So, "when the EC added up the dumping margin of each type or model in order to determine the overall dumping margin for the product as a whole, the consequence of this zeroing was an increase in the resulting dumping margin". The EC argued that this was a practice perfectly utilizing weighted average-to-weighted average method, since Article 2.4.2 did not provide any guidance as to how the second stage of this method, i.e. the combining of margins, should be put into practice. Nevertheless, this practice was found WTO-inconsistent by various WTO panels and the AB.

This example clearly illustrated the problem of precision in the ADA: the complicated wording of the ADA did not narrow down the scope for "reasonable" interpretations, as discussed in Chapter II above. Most substantive rules in the second or the third group were formulated as relatively general "standard" rather than as relatively precise "rules". Thus, although the ADA is highly elaborated, detailing a large number of conditions of application, spelling out required or proscribed behaviour in numerous situations, a competent authority can still make its determination ex post in relation to specific sets of facts.

Apart from the complexity and technical deficiencies of the ADA, the most important reason for this problem was that the ADA text is the result of a compromise between interests and perspectives of the participating governments.

---

149 Kempton and Stevenson (n 146) 12. ('Practical Problems and Possible Solutions')
150 Ibid.
151 Ibid.
152 Abbott, etc (n 135) 413. ('Concept of Legalization')
between very different negotiating positions emerging during the Uruguay Round, which was put together at the last minute, as noted in the previous section.\textsuperscript{153} It is not surprising that the text of ADA lacks clear attitudes towards different practices between Members. This is perfectly illustrated by the negotiation history of Article 2.4.2 of the ADA.

Before the Uruguay Round, the methods of comparing the average normal value to individual export prices were repeatedly challenged.\textsuperscript{154} The GATT Panels in \textit{US- Salmon} and \textit{EC-Audio Cassettes}, however, did not take the position that Article 2.6 of the 1968 Code outlawed any particular method of comparing the normal value and the export price.\textsuperscript{155} The exporting countries, including the Nordic countries, Japan, Korea and Hong Kong, therefore, made several proposals, intending to strengthen the requirement of fair comparison in the Uruguay Round.\textsuperscript{156} In particular, they emphasized that the calculation should be conducted in a "uniform and consistent", or "symmetrical" manner.\textsuperscript{157} They particularly argue that any differentiation in "the method of calculation of the normal value and the export price without justifiable causes" should be disallowed.\textsuperscript{158} On the other hand, the US and the EU strongly resisted any changes in this provision in the direction of making it less trade restrictive.\textsuperscript{159}

In July 1990, a special Informal Group on AD headed by Charles Carlisle, then Deputy Direct-General of the GATT, released the so-called "Carlisle draft" which "temporarily hammered out the disagreement" between these two groups.\textsuperscript{160} Regarding to calculating dumping margin, this draft advocated "neutral methods". The draft Article 2.4.3 provided that "authorities shall in particular ensure that no margins of dumping are found when there are similar patterns of levels of movements of prices in the two

\textsuperscript{153} Adamantopoulos and Notaris (n 145)35. ("Reform of the ADA")
\textsuperscript{154} Kim (n 142) 45. ("Fair Price Comparison in the ADA")
\textsuperscript{156} Kim (n 142) 42. ("Fair Price Comparison in the ADA")
\textsuperscript{157} The Nordic countries especially proposed that the normal value and export price should be calculated in a "uniform and consistent" manner, while Japan argued that the Tokyo Code should be amended so that it could ensure symmetrical comparison of the normal value and the export price. GATT Submission by the Nordic Countries, MTN. GNG/N8/W/64 (December 1989) 5, and Submission of Japan on the Amendments to the Anti-dumping Code, MTN. GNG/N8/W/48 (August 1989) 5.
\textsuperscript{158} Ibid, Japan's submission, 5.
\textsuperscript{159} G Horlick and E Shea 'The World Trade Organization Anti-dumping Agreement' (1995) 29 (1) JWT 1, 12. ("The WTO ADA")
\textsuperscript{160} Kim (n 142) 44. ("Fair Price Comparison in the ADA")

111
Chapter IV

markets." Unfortunately, when the final result of negotiation released in December 1991 as so-called "Dunkel text", the principle of "fair comparison" as presented in the Carlisle draft was weakened. Significantly, the Dunkel text dropped the express support for "neutral methods", by which "the price comparison would reflect the movement of prices in the domestic and export market". Moreover, the Dunkel text also support both weighted average-to-weighted average and transaction-to-transaction methods and explicitly departed from the Carlisle draft in which it was provided that "the normal value and export price shall, as a rule, be established on a weighted average basis".

To a large extent, the negotiation history of dumping margin calculation manifests the common situation of negotiations involving most second and third groups of provisions in the Uruguay Round. Those negotiations always involved two sides. On the one hand, the exporting, or "target", countries, advocated various changes that would reduce the authority's discretion in administering AD laws, mainly by codifying details of the provisions and requiring higher standard of fairness. On the other hand, the final outcomes of negotiation were always subject to the repeated attempts by the EC and the US to legitimate their interpretations of AD rules and their practices, which have been established for years. Hence, the ADA achieved the improvement of precision in a certain number of provisions, but overall precision is hard to reach the higher standard as expected by exporting countries. There were always trade-offs in the negotiations and it is impossible to totally exclude the discretion of national authorities. If those second and third groups of provisions are accused of imprecision, it is important to point out that their imprecision is not simply the result of a failure of legal draftsmanship, but rather a deliberate choice given the circumstances of the Uruguay Round negotiation. The imprecision of the ADA has, however, mixed effects on the process of legalization and the development of the DSM: on the one hand, it affords the DSM an opportunity to push the level of legalization and gain authority by clarifying the provisions; it, on the other

163 Kempton and Stevenson (n 146) 45. ('Practical Problems and Possible Solutions')
hand, brought considerable controversies on, not only the interpretation of a particular ADA provision, but also the nature of the DSM and the process of legalization.

d. Delegation

The ADA in general has the most characteristic form of delegation in the WTO system - Article 17.1 sets the tone as “the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement”. Given the heavily debated negotiation history of Article 17 and the different language between it and the general rules of the DSU, especially in terms of standards of review, many, including the Panel in Guatemala, were of the opinion that Article 17 provided for a coherent set of special rules for AD disputes. The AB disagreed with it. It held that the special or additional rules within the meaning of Article 1.2 of the DSM shall prevail over the provisions of the DSU only “to the extent that there is a difference between the two sets of provisions”. Here, “difference” was further interpreted as “conflict”, i.e. the provisions of the DSU and the special or additional rules and procedures of a covered agreement are “mutually inconsistent and cannot be read as complementing each other”. The AB did not consider there is a conflict in this case. Therefore, in the view of protecting the integrity of the WTO DSM, the AB ruled that Article 17 of the ADA does not replace “the more general approach of the DSU”.

Even though Article 17 cannot replace the general approach of the DSU, the specific features in some of the Article 17 paragraphs are undeniable. Delegation in the ADA therefore can be divided into two parts: non-special provisions, namely Article 17.1-17.3 and special rules, Article 17.4 – 17.7, contained in the list of Appendix 2 of the ADA. For the non-special provisions, the equivalent provisions can be found in the DSU or other WTO agreements: Article 17.2 has similar wording of Article 4.2 of the DSU; Article 17.3 is considered as the equivalent provision in the ADA to Article XXII and

164 Art 17.1 of the ADA.
167 Ibid para 65.
168 Ibid.
169 Ibid para 67.
XXIII of the GATT 1994, and closely linked to Article 26 of the DSU. These provisions delegate the same authority to the panel and the AB in settling the AD disputes as well as other WTO cases.

Referred to as “special rules”, Article 17.4-17.7 do not have exact equivalents in the DSU or other WTO agreements. Nevertheless, they still can be traced back to the DSU. For instance, Article 17.4 has similar function as Article 6 of the DSU and was frequently read together with Article 7 of the DSU in the panel or AB reports. The special reference of Article 17.4 to “final action” of three types of AD measures - definitive AD duties, price undertakings and provisional AD measures – did not limit “the nature of the claims that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the ADA”, as stated by the AB. Accordingly, the US’s argument in US-1916 Act that Members could not bring a claim of inconsistency with the ADA against legislation as such was rejected on the ground that Article 17.4 does not address or affect a Member’s right to bring a claim of inconsistency against an AD legislation independently from a claim with respect to one of the three measures identified in Article 17.4.

Article 17.6, the standard of review applicable in AD disputes, has been proven as the most controversial special rule of Article 17. It is more specific than Article 11 of the DSU, the commonly understood legal basis of the standard of review in the DSU, and as argued, “calls for more deference to domestic agency determinations”. Under the factual standard of review in Article 17.6 (i), panels must “determine whether domestic authorities have properly established the facts and evaluated them in an unbiased and

---

170 Appendix 2 of the DSU.
171 Guatemala-I AB (n 168) para 64.
172 Ibid para 70 and 77.
173 Ibid para 79.
objective manner". At this point, an AD panel's obligation closely reflects the obligation imposed on other panels under Article 11 of the DSU. The second part of Article 17.6 addresses the standard of review on legal issues. Under it, panels must apply established international rules, namely the VCLT, in interpreting the provisions of the ADA. When a panel applies these rules and finds that there is more than one permissible way to interpret a provision of the ADA, it must "uphold the domestic agency's determination if it is consistent with one of the permissible interpretation".

There is a division of opinions among scholars. Some argue that if one follows the first sentence in 17.6, there always is only one permissible interpretation. Therefore, the analysis is over and the second sentence has no meaning whatsoever. The opposite view insists that in fact, evidences suggest that there are situations in which one could argue that "there exists more than one permissible interpretations". The panel and the AB are obligated to defer to the national authorities' determination, instead of overturning them, even if they consider better interpretations which are more consistent with the ADA are available.

This single sentence of Article 17.6 (ii) brought a wide range of far-reaching normative questions beyond the review of administrative actions under the ADA, from the resistance to hegemony in the multilateral trading system, to the pragmatics of asymmetrical power in WTO decision-making and judicial branches. It also reinforces that the expansion of legalization in the AD regime is uneven and imbalanced. The issue will be further discussed below.

3.1.3 AD in the Doha Round

In 2001, the first new round of trade negotiation after the birth of the WTO was formally launched, as the so-called Doha Development Round. The November 2001 Declaration of the Fourth Ministerial Conference in Doha, Qatar, provides the mandate

---

178 GAO Report (n 178) at 25.
179 Ibid.
181 Ibid.
for negotiations on a range of subjects, including issues concerning the implementation of
the present agreements, such as the ADA.\textsuperscript{183} A good opportunity seemed to emerge to
significantly enhance the level of legalization in the AD regime. Six years later,
unfortunately, there is still no definitive answer whether the Doha Round negotiations
have improved the level of legalization in the AD regime.

In general, three features can be identified in Doha Round rule negotiations:
restricted boundary, emphasis on precision and clarification, and divergent positions of
parties. The first two features are especially intertwined in the sense that the restricted
boundary of negotiation determined that Members could only emphasize on precision
rather than proposing on fundamental reforms of the existing obligations.

The restricted subject matters in Doha rule negotiation are the first indicator of how
little negotiations can do to move the legalization process forward. From the beginning of
the Doha Round, strict limits were put on what was open to negotiation.\textsuperscript{184} Given the
resistance of the US and the EU to open negotiations on fundamental issues of the AD
regime, Article 28 of Doha Ministerial Declaration provided that negotiations were
"aimed at clarifying and improving disciplines" under the ADA, "while preserving the
basic concepts, principles and effectiveness of these Agreements and their instruments
and objectives".\textsuperscript{185} The wording precisely points out that that fundamental concepts, no
matter how controversial they might be, must be maintained and improvements should
aim to the functioning of the AD mechanisms to enhance their effectiveness.\textsuperscript{186} This strict
boundary of negotiation disappointed many commentators as they considered that "the
effectiveness of the current system was a function of biased or cumbersome procedures in
national institutions" so that little meaningful reforms can be expected from the Doha
Round negotiations.\textsuperscript{187}

Three factors further indicate that Doha negotiations are less likely to create new
obligations for WTO Members. The negotiations are rather working on the precision of

\textsuperscript{182} For example, D Tarullo ‘The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-
\textsuperscript{183} WTO ‘Negotiations, implementation and development: the Doha agenda’, available at <
\textsuperscript{184} Kerr and Loppacher (n 1) 211. (‘Anti-dumping in the Doha Negotiations’)
\textsuperscript{185} WTO ‘Doha WTO Ministerial Declaration 2001’ WT/MIN (01)/DEC/1, 20 November 2001. Also available <
\textsuperscript{186} Kerr and Loppacher (n 1) 215. (‘Anti-dumping in the Doha Negotiations’)

116
the existing obligations of the ADA. In the past five years, several countries, including the US, the EU, Canada, India, Australia, China and an ad hoc grouping of countries called “Friends of Anti-dumping”\(^{188}\), have presented position papers in the negotiation. The areas that countries want addressed in the negotiations were wide ranging. However, first, the issues discussed so far generally did not go beyond the twelve issues identified in Ramsauer Draft Text of the Uruguay Round.\(^{189}\) Moreover, WTO Members made their intentions very clear at the beginning of every submission that the Rules Negotiating Group is expected only to explore clarification and improvement of the rules under the ADA.\(^{190}\) Finally, the issues contained in Members’ submissions all have explicit linkages to the existing ADA provisions. In some of Friends of Anti-dumping group’s submissions, issues are even indicated in the order of the articles of the ADA, rather than the order of priority.\(^ {191}\)

With respect to divergent positions of WTO Members, the US and the EU generally concentrated on increasing the strength and effectiveness of the ADA. The developing WTO Members, represented by Friends of Anti-dumping, who were not satisfied by the Uruguay Round ADA, were rather “keen to take this chance to propose changes and negotiate over details of the ADA rules which allegedly disadvantaged them for decades”.\(^{192}\) They wanted to rule out the possible abusive interpretations of the ADA.\(^{193}\) Therefore, most of the contentious substantive issues, such as “public interest”\(^ {194}\),

\(^{187}\) Ibid.

\(^{188}\) The members of Friends of Anti-dumping are Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand and Turkey.

\(^{189}\) These twelve issues are (1) use of weighted averages in the calculation of export prices and normal value; (2) sales below cost of production; (3) constructed value: calculation of administrative, selling and other costs and profits; (4) standing; (5) de minimis margins of dumping and negative import volumes; (6) cumulation of imports from multiple countries for determination of injury; (7) sampling; (8) sunset; (9) anti-circumvention; (10) dispute settlement and (11) public interest, above n 112.

\(^{190}\) For example, WTO ‘Identification of Additional Issues Under the Anti-dumping and Subsidies Agreements’, Paper submitted by the United States, 6 May 2003, TN/RL/W/98; and ‘Anti-dumping: Illustrative Major Issues’, Paper from Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand and Turkey, 28 June 2002, TN/RL/W/10 (Friends of Anti-dumping Submission 2).

\(^{191}\) For example, WTO ‘Second Contribution to Discussion of the Negotiating Group of Rules on Anti-dumping Measures’, Paper by Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand and Turkey, 28 June 2002, TN/RL/W/10 (Friends of Anti-dumping Submission 2).

\(^{192}\) Kerr and Loppacher (n 1) 216. (‘Anti-dumping in the Doha Negotiations’)

\(^{193}\) Friends of Anti-dumping Submission 2 (n 190).

“prohibition of zeroing”\textsuperscript{195}, “constructed normal value”\textsuperscript{196} and “lesser duty rule”\textsuperscript{197}, are on the top of their negotiation agenda. These issues normally fell into the scope of the second and third groups of provisions identified in previous sections, which imposed unspecific obligations with implicit conditions or contingent obligations to the competent authorities. For example, in one of Friend of Anti-dumping group’s submissions, Article 2.2.2 was accused of lack of clear guidance for the use of information used to calculate constructed normal value.\textsuperscript{198} They argued that this failure to elaborate on a general principle leads on “anomalous results” and therefore proposed more comprehensive and representative criteria for the calculation of constructed normal value.\textsuperscript{199}

On the other side, the US and the EU paid much more attention to “transparency, predictability, and adherence to the rule of law” in order to maintain the confidence in the system.\textsuperscript{200} The discretion enjoyed by the national authorities when deciding major substantive issues, such as what information to include in determinations, should not be taken away, in their view.\textsuperscript{201} Procedural issues, such as Article 6.4 maintenance of a public record, Article 6.5 protection and disclosure of confidential information, Article 6.7 and Annex I conduct of verifications, took a large proportion of the US’s submissions.

It is worth noting that although there is a contradictory general position between the developed countries and the developing countries, each Member was concerned about some special issues in the negotiations. For instance, apart from the general procedural issues, the US has submitted proposals on major substantive issues such as the interpretation of domestic production on Article 4.1, causation on Article 3.5 and cumulative assessment of injury on Article 3.3.\textsuperscript{202} The Friend of Anti-dumping group also addressed the problem of the expansive use of the exception of sunset review to continue

\textsuperscript{195} For example, Friends of Anti-dumping Submission 1 (n 192) and TN/RL/W/45.
\textsuperscript{196} For example, Friends of Anti-dumping Submission 1 (n 192).
\textsuperscript{197} For example, the issue of lesser duty rule has been discussed by Members in documents TN/RL/W/4, 13, 22, 25, 26, 28, 29, 34, 45, 47, 54, 55, 56, 62, 65, 66, 73, 74, 79, 86, 94, 99, 101,106, 110, 118,119,121,134, 170 and TN/RL/GEN/1,32,43,58,99.
\textsuperscript{198} Friends of Anti-dumping Submission 1 (n 192) 2.
\textsuperscript{199} Ibid.
\textsuperscript{201} Kerr and Loppacher (n 1) 216. ('Anti-dumping in the Doha Negotiations')
\textsuperscript{202} For example, 'Identification of Additional Issues under the Anti-dumping and Subsidies Agreements', Paper submitted by the United States, 6 May 2003, TN/RL/W/98, at 1-2.
the AD duty (Article 11.3)\textsuperscript{203} and the arbitrary introduction of rules, procedures, and methodologies in the reviews (Article 9.3, 9.5 and 11.2)\textsuperscript{204} on their submissions. In another word, in the Doha Round negotiation, AD is not exactly a south-north question. Every Member has some little issues in the ADA that they felt very strong about, which may or may not always link to their general position to the whole rule negotiations.

As a reflection on the collective effort of Rules negotiations so far, on 30 November 2007, the chair of the Negotiating Group on Rules circulated to WTO Members his draft consolidated texts on AD and subsidies and countervailing measures ("the Chair's text").\textsuperscript{205} As provided in the introduction, the purpose of the Chair's text is "to provide a solid foundation for the future negotiation".\textsuperscript{206} Therefore, the consolidated draft text has allegedly "taken into account the interests of all Participants" and is hoped to be a text that "could facilitate the negotiation of a balanced outcome".\textsuperscript{207} However, great controversies surrounding the Chair's text faithfully reflected the divergent position of WTO Members on numerous contentious issues. The most hotly debated one is the provision relating to the "zeroing" methodology. In the Chair's text, "zeroing" in original investigations is banned if national authorities take weighted average to weighted average comparisons.\textsuperscript{208} Draft Article 2.4.3 (i) provides that:

2.4.3 When the authorities aggregate the results of multiple comparisons in order to establish the existence or extent of a margin of dumping, the provisions of this paragraph shall apply:

(i) when, in an investigation initiated pursuant to Article 5, the authorities aggregate the results of multiple comparisons of a weighted average normal value with a weighted average of prices of all comparable export transactions, they shall take into account the amount by which the export price exceeds the normal value for any of the comparisons.

203 'Proposal on Sunset', Paper from Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand and Turkey, 19 March 2003, TN/RL/W/76.
204 WTO 'Proposal on Review', Paper from Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand and Turkey, 25 April 2003, TN/RL/W/83.
206 Draft Consolidated Chair Texts of the AD and SCM Agreements, 30 November 2007, TN/RL/W/213.
207 Ibid, p.2.
208 Ibid, Art 2.4.3 (i).
Nevertheless, Article 2.4.3 (ii) and (iii) allow national authority to “disregard the amount by which the export price exceeds the normal value for any of the comparison” under the circumstances that the authorities take transaction-to-transaction comparisons or in review proceedings. Condemning the Chair’s text as a “step back”, 17 WTO Members, including Brazil, China, Colombia, Costa Rica, Hong Kong, India, Indonesia, Japan, Mexico, Norway, Pakistan, Singapore, South Africa, South Korea, Switzerland, Taiwan and Thailand, circulated their joint statement which criticizing the inclusion of certain zeroing provisions in the Chair’s text, warning they would "nullify the results of trade liberalization efforts" soon after the issuance of the Chair’s text. The debate is still ongoing and a revised Chair’s text is expected to be issued soon.

In sum, the Doha Round negotiation by far has not produced any significant moves in term of legalization. The negotiations involve almost every provision of the ADA, regardless of the nature of obligations. On the positive side, current negotiations which focus on clarification of relevant provisions may result in the improvement of the level of obligation and precision of the ADA. However, it has to be borne in mind that lack of precision and consequently less specific obligation in the ADA on most issues are due to the divergent and frequently contradictory perception of AD rules of different Members, rather than a simple failure of draftsmanship.

3.2 Surveillance Mechanism and the AD Rules

The surveillance mechanism, which is largely based on the activities of the WTO Secretariat, is the most low-profile one among the three pillars of the WTO, as noted in Chapter II. The main reason for this is the self-declared status of the WTO – a member-driven organization that generally grants no formal powers to the Secretariat. All of the powers are vested in the WTO Members and they are reluctant to see the emergence of a

---

supranational organization with constitutional rights. The WTO Secretariat has therefore been deliberately kept as "a slim organization with limited resources and formal powers". 212

The "faceless" bureaucracy of the WTO that knows the process inside out, however, exercised considerable influence without formal powers. 213 The influence of the Secretariat, although rather indirect, over the AD regime is a clear example of this. Major daily activities that the Secretariat conducted to upholding international AD rules include the support to implement and administrate the ADA, trade policy review, and research and analysis on AD rules.

First, the Secretariat influences the WTO Members' AD practice in its efforts to support the implementation and administration of the ADA. This mainly involves the reviews of actions taken pursuant to the ADA and reviews of the notifications submitted by Members. Under Article 18.5 and 18.6 of the ADA, Members are obligated to inform the AD Practice Committee of "any changes in its laws and regulations and in the administration of such laws and regulations". The work of Secretariat to facilitate the practical operation of the ADA is therefore not a "one-shot" exercise, but a continuous struggle. 214

The TPRM is another tool to regularly monitor Member's trade policies and practices. It includes a factual report prepared by the Secretariat's Trade Policy Review Division and a policy statement by the Member under review. The factual reports from the TPRM are probably "the most comprehensive documents available on the trade policies of individual countries". 215 Nevertheless, in most circumstance, these reports were full of optimism and trying to avoid sensitive areas and sharp criticisms. As the example mentioned in the pervious chapter, from mid-1990, the US and the EU have entered into a sort of "unholy alliance" not to criticize each other's AD actions in their public statement. Therefore, even though AD has been considered as the most serious

212 Ibid 849. The WTO so far has only less than 600 staff, including consultants, and the budget is roughly 160 million Swiss francs.
213 Ibid.
214 Ibid 826.
215 Nordstrom (n 198) 832. ("WTO Secretariat")
protective device after "voluntary" export restrictions, there was no thorough treatment of this topic in TPRM reports for a long time.\footnote{D Keesing Improving Trade Policy Reviews in the World Trade Organization (Institute for International Economics, Washington DC 1998) 5. ("Improving Trade Policy Review")}

In-house research and analysis of international AD rules is another way that the Secretariat influences the AD practice of Members. In general, in-house research has a relatively low priority in the WTO and "little policy advice based on independent (self-initiated) research was offered by the Secretariat".\footnote{Nordstrom (n 198) 833. ("WTO Secretariat")} In the field of AD, however, the Secretariat made numerous efforts on clarifying the practical aspects of international AD rules and providing a kind of common or standard practice for investigating authorities. An outgrowth of this effort is \textit{A Handbook on Anti-dumping Investigations}, written by three counsellors in the Rule Division of the WTO Secretariat.\footnote{Czako, Human and Miranda (n 139). ("Handbook on Anti-dumping Investigation")} This handbook can naturally be considered as policy recommendations from the WTO. The authors, however, make their intentions modest, as only to "foster a great understanding of the process related to an anti-dumping investigation" and to "assist investigators to conduct the required investigation in a manner consistent with the complex multilateral agreed rules". They particularly reject the idea of including a critique of the current legal framework, or proposals for future improvement.

This handbook is divided into three parts, plus four Annexes. Part I surveys the procedural aspects of the AD investigation. Starting with outlining the multilateral and domestic legal frameworks of an AD investigation and defining the key terms in the investigation, the main part of Part I gives a full description of the whole process in chronological order, from pre-initiation/initiation, preliminary determination, final determination, to judicial and administrative reviews. In Part II, the subject moves to the calculation of dumping margin. Based on two case studies, this part goes to details of the techniques and methodologies applied in a dumping margin calculation, including those for definition of the product concerned, identification of models, determination of export price, determination of normal value and finally, calculation of dumping margin. The last substantive part of the handbook concerns the determination of injury and causation. By providing a "checklist" of popular injury factors and causations, this handbook makes an
effort to clarify further what elements should be taken into account in the determination of injury and causation.

The first three annexes are also worth mentioning as they appear to be of practical importance. They are sample applications for the initiation of an AD investigation, sample dumping investigation questionnaires for exporters/foreign producers and sample injury questionnaires for domestic producers, importers, foreign producers and purchasers. It is worth mentioning that a proposal jointly made by Japan and the EU in the Doha Round also suggested the use of Model/Standard questionnaires in investigations.\textsuperscript{219} The concern about this issue is therefore more than a coincidence. In practice, the excessive collection of information and data in the questionnaires translated directly into huge costs for parties concerned. Worse, these excessive costs do not only arise in relation to the preparation for the questionnaire reply, but also at subsequent stages of the investigation, e.g. the preparation for verification and the actual verification visit itself. These sample questionnaires, as well as this whole handbook, are intending to explore, in a “soft” way, the possibility of applying more standard rules in investigations, which might be more transparent and cost saving to parties involved.

As has always been emphasised in this handbook, it is not, and does not intend to be, an academic book, discussing the “madness” of anti-dumping rules.\textsuperscript{220} Instead, it cautiously keeps a distance from those passionate arguments from both supporter and critics.\textsuperscript{221} To some extent, it indicates the attempt of the Secretariat to keep the legalization process moving even without major change of “hard law”, i.e. the tighten-up of obligations. The underlying logic is simple: if it is the fact that the AD proceedings is still an attractive option for industries threatened by inexpensive imports, the more important question is how to deal with this in a more reasonable way to minimize its cost to the parties concerned, and to global welfare in general.

In a nutshell, although low-profile, surveillance activities of the WTO, including overseeing the implementation and administration of the ADA, conducting trade policy reviews and producing policy recommendations based on in-house research, have

\textsuperscript{220} Czako, Human and Miranda (n 144) 3. (‘Handbook on Anti-dumping Investigation’)
\textsuperscript{221} Ibid.
positive impacts on the development of legalization of the AD regime. In particular, the handbook published by the Secretariat demonstrated not only what the rules are, but also, in the view of the WTO, how they should work in practice. It implies the idea of harmonization of national AD laws and therefore may be of importance to further legalization of the AD regime.

3.3 AD in the Dispute Settlement Mechanism

AD is no doubt one of the most contentious and litigious areas in the multilateral trading system. Some US commentators depicted the picture as "WTO panels are 'making law' as if they were Platonic Guardians of trade sitting in secret in Geneva and nowhere is this clearer than in the area of trade remedies." The number of AD cases filed during the past decade, the ratio of AD cases versus other types of cases and the bitter criticisms condemning the panel and AB decisions, all manifest the significance of AD in the DSM – in terms of not only the quantity but also the quality. The section focuses only on the factual and quantity side of the picture, which should be read together with the discussion of delegation of the ADA in previous sections.

The first two statistical indicators of the importance of AD are the number of AD cases filed by Members during the past ten years and the ratio of AD cases versus other types of cases. Of the 333 cases filed in the WTO from 1995 through 2005, about one fifth (62) of them challenged Members' AD measures. The ratio of AD cases filed versus other types of cases has generally increased from 1995 to 2000, reaching the peak of one third (11 out of 34) on 2000. After that, the figure slightly dropped down to about one fourth. However, 2004 witnessed a new historical height of the numbers of AD complaints – 8 out of 19, as shown in Figure 1. The statistics of original panel reports have been circulated to Members from 1995 to 2007 shows almost the same ratio: 30 out of 110 cases are AD cases.

222 J Ragosta, N Joneja and M Zeldovich 'WTO Dispute Settlement: The System is Flawed and Must be Fixed' (2003) 37 International Lawyer 697, 751. ('WTO Dispute Settlement')
223 R Yerxa and B Wilson Key Issues in WTO Dispute Settlement - the First Ten Years (Cambridge University Press, Cambridge 2005) 289 (Annex V). The panel and AB reports do not include Art 21.5 compliance panel reports or appeals. ('Key Issues in WTO Dispute Settlement')
Figure 1 Total Number of WTO Cases versus AD Cases Filed Per Year, 1995-2007

Source: Worldtradelaw.net Dispute Settlement Data

Given the considerable proportion of AD cases in the total WTO cases, some argue that the panels and the AB have invalidated a large number of AD measures, stripping away much needed protection for domestic industries.\textsuperscript{224} The actual data, however, presents a different picture. As of 31 December 2007, of 3,097 AD measures in force worldwide, only 72 of them have triggered the modest initial step of a request for consultation.\textsuperscript{225} Of all these consultations on AD measures, only 30 of these disputes have gone to final panel decisions. Fewer panel decisions ever faced an appeal. Overall, Members have challenged a relatively small share of the AD measures that their fellow Members imposed, while the vast majority of AD measures have never been challenged at all.\textsuperscript{226}

\textsuperscript{224} J Durling ‘Deference, But Only When Due: WTO Review of Anti-dumping Measures’ (2003) 6 JIEL 125, 127. (‘WTO Review of Anti-dumping Measures’)
\textsuperscript{225} Statistics from Worldtradelaw.net dispute settlement pages.
\textsuperscript{226} GAO Report (n 178) 8.
Chapter IV

The next indicator demonstrated the importance of AD in the DSM is the wide-ranging participants of the AD cases. In comparing WTO Members’ participation in the AD cases, the US by far has been the most frequent defendant, followed by Argentina and the EU, while on the other hand, the EU filed the largest number of complaints, as shown in Figure 2 and 3.

![Figure 2: Most Frequent Complainants in WTO AD Cases, 1995-2005](image1)

![Figure 3: Most Frequent Defendants in WTO AD Cases, 1995-2005](image2)

Although the traditional users, such as the US, the EU, Canada, are fairly active players in this field, the variety of both complainants and defendants illustrated the popularity of AD rules. When Indonesia complained about Korea’s AD measure on paper\(^{227}\) and Bangladesh complained about India’s measure on batteries\(^{228}\), it is quite

---

\(^{227}\) WTO Korea- Anti-dumping Duties on Imports of Certain Paper from Indonesia -Report of the Panel (28 October 2005) WT/DS312/R.


126
clear that AD is moving from a politically sensitive south-north question to a rather technical device, or indeed, a legal game.

Economic empirical research indicated that there are a number of factors which would determine the Members’ decision whether to formally challenge AD measures imposed by fellow Members. 229 Given the huge amount of AD measures imposed, Members “have to undertake a calculus and only pursue actions in which the expected benefit to a WTO dispute will outweigh the expected cost”. 230 The expected benefit would be jointly determined by the size of import market access and the probability of restoration of market access. On the other hand, the expected cost to pursuing a case could include the resource costs associated with litigation, as well as the political-economic costs associated with challenging the importing country through the formal DSM. Moreover, the complaints also need to consider the cost “associated with the establishment of a precedent”: if “the litigation were to establish a precedent that would also require the complainant to change the way in which it pursues AD in its own market”, they might decide not to pursue the case further. 231

The final indicator of the significance of AD is the overall high success rate of complaints, i.e. panels or the AB found in favor of the complainants in almost all cases (with the expectation of US – Corrosion – resistance Steel Sunset Review) on at least one claim. 232 The statistic alone may give an impression that “exporting countries challenging the imposition of AD duties by other countries have prevailed in every case, so that the panel and AB decisions significantly changed the way that Members operate their AD laws”. 233 The reality seems more complex. The following three factors mentioned in literature may explain the high chances of success of AD cases and portray a more comprehensive picture of the AD jurisprudence, rather than drawing on the specious conclusion that the WTO jurisprudence has dramatically changed national AD practices.

228 WTO India – Anti-Dumping Measure on Batteries from Bangladesh - Request for Consultations by Bangladesh, WT/DS396/1, 2 February 2004. India and Bangladesh reached a mutually satisfactory solution on this case.
230 Ibid.
231 Ibid 3.
232 Data from worldtradelaw.net. E Vermulst and F Graafsma ‘WTO Dispute Settlement with Respect to Trade Contingency Measures’ (2001) 35 JWT 209, 210 (‘Trade Contingency Measures’); also, Durling (n 226) 131 (‘WTO Review of Anti-dumping Measures’).
Chapter IV

The first issue in assessing the WTO AD jurisprudence is “self-selection bias at work”.\textsuperscript{234} The time, efforts, cost of bringing a case and the potential embarrassment associated with losing a case means that Members only bring those cases which “they believe that they have the highest possibility to win”.\textsuperscript{235} This explained why only a tiny fraction of AD measures faces the panel or AB scrutiny – only “major and meritorious disputes” will proceed in the DSM.\textsuperscript{236} It also provides a reasonable explanation to the fact that half of the time the losing parties essentially concede the claim of WTO inconsistency. Since the decision to appeal largely reflects the losing party’s self-assessment of the strength of the legal claim and the significance of the loss, it is sensible to assume “either that the losing party recognizes a WTO problem with its action, or that the WTO inconsistency can be easily changed in most of these case”.\textsuperscript{237}

Second, even in these narrowly self-selected strong cases, the individual claims of exporting countries are not always prevailed. The second factor indicating the complexity of the picture is the success rate of individual claims of WTO inconsistencies. If the panel decision of each case has been broken down by claim within the case, i.e. each separate provision raised and addressed is treated as a separate claim, “a different picture emerges contrary to the rhetoric that importing trade authorities always lose”.\textsuperscript{238} As argued, “it is true that in many cases, the panel found at least one WTO inconsistency; but the overall ratio of successful claim is only about 50 percent”.\textsuperscript{239}

The third factor discussed in the literature, namely the different nature of claims that the panels or the AB normally uphold or reject, is closely related to the success rate of individual claims in assessing the AD jurisprudence. It is well documented that while the AD rulings completed from 1995 to 2005 generally rejected domestic authorities’ determinations supporting AD measures, the rulings upheld a vast majority of the AD laws and regulations that were challenged.\textsuperscript{240} The major exceptions are three US laws: the

\begin{footnotesize}
\begin{enumerate}
\item Tarullo (n 184) 114. (‘The Hidden Cost’)
\item Bown (n 231) 2 and Durling (n 226) 129. (‘WTO Review of Anti-dumping Measures’)
\item Ibid. Also, Vermulst and Graafsma (n 234) 210. (‘Trade Contingency Measures’)
\item Ibid. 13 1. (‘WTO Review of Anti-dumping Measures’)
\item Ibid.
\item Ibid.
\item Data from worldtradelaw.net.
\end{enumerate}
\end{footnotesize}
Anti-dumping Act of 1916\textsuperscript{241} and two sections of US Tariff Act of 1930 – Section 754 (US Continued Dumping and Subsidy Offset Act of 2000, or commonly referred to as ‘Byrd Amendment’)\textsuperscript{242} and Section 735 (c) (5) involving calculation of the “all other” rate.\textsuperscript{243} As the US GAO Report stated, “very few other rulings so far resulted in many changes to WTO Members’ laws, regulation or even uncodified methodologies and procedures of competent authorities”.\textsuperscript{244} Instead, “most of the rulings resulted in the onetime/case-specific revision to, or removal of, AD measures, i.e. majority of domestic agency determinations involved in these cases were rejected by panels or AB”.\textsuperscript{245} The overall WTO rulings therefore normally affects the way a national AD legislation was applied in a specific investigation rather than national AD laws themselves. Even the US authorities, the most frequent defendants in the WTO AD cases, admitted that panel and AB decisions did not “significantly impair their ability to impose AD duties”, since “most rulings did not question US methodologies for determining whether to impose AD duties but have required them to provide fuller explanations and justifications for their decisions”.\textsuperscript{246} The US approach, indeed the approach for most of WTO Members, therefore has been to “appeal those cases that require a change to a statute or have serious impact on domestic industries”, and to work with the panel decisions in those case when “the WTO loss having only modest impact”.\textsuperscript{247} In this sense, in spite of the normative depth of enormous commentaries on AD jurisprudence, most issues at AD cases are straightforward, concerning only case-specific arguments. The appeals often “reflected the political need to continue fighting, as opposed to any controversial arguments about the legal merits of the claims”.\textsuperscript{248}

In sum, the magnitude of AD in the WTO DSM was manifested by both the frequency of challenges to national AD measures and the variety of participants of AD cases. The AB and panels in general have established an impressive record of stringent

\begin{itemize}
\item \textsuperscript{241} US – 1916 Act (n 176 and n 177).
\item \textsuperscript{243} US –Hot-rolled Steel (n 179). The “all other” rate is the rate used to calculate AD duties for exporters and producers who are not individually investigated.
\item \textsuperscript{244} GAO Report (n 178) 16.
\item \textsuperscript{245} Ibid.
\item \textsuperscript{246} Ibid.
\item \textsuperscript{247} Dufling (n 226) 133. (WTO Review of Anti-dumping Measures)
\item \textsuperscript{248} Ibid, 146-147.
\end{itemize}
and thoughtful reviews of AD measures taken by Members. The AD jurisprudence so far arguably indicates "an irrevocable trend to progressively standardizing the use of AD rules", through establishment of both substantive and procedural rules. Given the fact-intensive nature of most AD cases, the actual impact of WTO rulings on overall national AD practices is, however, limited, rather than far-reaching as suggested by the number of AD cases. In this regard, the DSM dramatically contributes to the increase of precision of international AD rules by identifying WTO-inconsistency in individual cases and promoting "standard" interpretations of the ADA. Nevertheless, how the AD jurisprudence affects the level of obligation and delegation in the AD regime remains controversial. In other words, although the DSM significantly contributes to the development of legalization, its efforts to push the value of legalization to a higher level have been severely criticized.

4. The Uneven Expansion of Legalization" in the AD Regime

4.1 The Uneven Expansion of Obligation

In addition to the discussions above concerning the current status of legalization in the AD regime, this section focuses on the uneven expansion of legalization in this area. Although certain topics discussed in the section has been touched upon in the previous sections, the purpose of this section is to identify the "broken links" where uneven expansion of legalization prevents the AD regime to move to a higher level of legalization and creates long lasting tensions in the system.

Obligation is central to the framework of legalization in this study on the ground that the WTO is a treaty-based regime. The obligations in the treaties are the foundations of the system and these obligations substantially determine the level of precision and delegation. A close analysis of obligation, which takes into account both the evolution of the formal legal instrument, the ADA, and the "broader" obligations brought by other activities of the WTO, however indicates that the development towards a higher level of obligation in the AD regime is imbalanced.

\[249\] Vermulst and Graafsma (n 234) 225. ("Trade Contingency Measures")
In the AD regime, the evolution of legal instruments, from GATT Article VI, the 1967 Code, the 1979 Code to the ADA, marked the major turning points which obligation in international AD rules was moving towards the "hard" law side of commitments. The level of obligation after the ADA has been "frozen" until the completion of the Doha Round.

As noted in previous sections, the ADA in fact included four types of different obligations: unconditional and specific, specific with implicit conditions, contingent and principle. Given the interpretation and implementation problems caused by the second and third types of obligation in practice, there is a general trend to move as much as possible of them into the first group, unconditional and specific obligations, as shown on the evolution of AD instruments. In the on-going negotiation of the Doha Round, most submissions from Members, in particular the Friends of Anti-dumping group, are following the footstep of the Uruguay Round negotiation, attempting to clarify the meaning of a particular ADA provision or tighten disciplines so that national authorities around the world can be clearly instructed. For instance, in the discussion of constructed normal value, they suggested to "elaborate clearer, more comprehensive and representative criteria when calculations of constructed normal value are made". As the existing Article 2.2.2 allows investigating authorities to resort to three alternative methodologies for calculating constructed normal value and no clear guideline is provided, they went on to propose solutions such as "clarify that the methodology as set out under the chapeau of Article 2.2.2 (i.e. actual data) should be used for determining the amounts for selling costs and profits; when such amounts cannot be determined on this basis, the amounts may be determined only on the basis of the alternative methodology provided for under Article 2.2.2 (i)."

One can imagine if proposals like this are all included in the new ADA after the Doha Round, very little room will be left to national authorities to manipulate the AD proceedings in that the "right" behaviour under certain circumstance, is explicitly set out in formal legal instruments so that fellow WTO Members and private parties can legitimately expect them. If national authorities cannot

---

250 Friends of Anti-dumping Submission 1 (n 192) 2.
251 WTO ‘Proposal on Determination of Normal Value’, Paper from Chile, Colombia, Costa Rica, Hong Kong, China, Japan, Korea, Norway, Singapore, Switzerland, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Thailand, 16 April 2004, TN/RL/W/150, at 8-9.
follow these instructions exactly, their decisions are easily challenged in the DSM and they have to change their practice afterwards with embarrassment.

A new ADA with all these specific obligations appears to be desirable to exporting countries which are targeted by AD measures and the WTO institutions, including the Secretariat and the quasi-judicial bodies, inter alia, the AB. Two questions have to be asked in the context: first, whether the current multilateral negotiations can make ADA specific enough to cover all national practices; and second, even if it is plausible, whether it is the best solution to the challenges facing the AD regime.

As to the first question, the reality of Doha Round negotiation, however, does not permit an optimal answer. The positions of Members are so different that it is almost impossible to reach consensus on important technical issues. If we bear in mind the broader picture of Doha Round negotiation, AD is definitely a contentious area, but not the most politically important one. Therefore, the most possible outcome of negotiation will be a compromise or a trade-off rather than a careful drafted legal instrument to cover all practical questions, as experienced before in the Uruguay Round negotiations.

If to create an extremely specific ADA is the only way to improve obligation in the AD regime, it would be worth the effort irrespective of how difficult it might be. The general legal theory, however, indicated quite the opposite. As discussed in Chapter II, in a highly developed legal system, normative directives are frequently formulated as precise “rule”, but many important directives are also formulated as general “standards”. As argued, in many circumstances, “determinations have to be made ex post, in relation to specific sets of facts, rather than to be decided ex ante which categories of behavior are unacceptable”. 252 “Standard-like” prescription allows “judicial bodies to take into account equitable factors relating to particular actors or situations, albeit at the sacrifice of some ex ante clarity”. 253 In the regard, it is neither realistic nor feasible to propose a legal instrument to be specific enough to deprive national authorities of the discretion to make decisions in particular circumstances and cover every single practice of these authorities.

252 Abbott et al. (n 140) 413. (‘Concept of Legalization’)
253 Ibid.
The question turns out to be: is the institutional context of the WTO legal system sufficiently thick to support the making of obligation beyond the ADA? Two possible routes emerge in the existing institutional structure of the WTO: first, the quasi-judicial bodies adopt an approach similar to domestic courts to effectively use general standards; second, the Ministerial conference and the General Council produce “authoritative interpretation” under Article IX:2 of the WTO Agreement.254

The first choice has been widely discussed given the proliferation of judicial activities of the panels and the AB in the AD regime. Proponents of the DSM might assume the “broader” obligations from panel or AB reports to influence the same practices or regulations of other WTO Members in the same issue are in the making. The arguments for it are normatively strong as a WTO Member has the general obligation of conformity with WTO law and good faith.255 It is also argued that in a broader understanding of the link between the WTO and general public international law, good faith, including the general obligation of states to “refrain from acts which would defeat the object and purpose of a treaty to which they are members”, has found its way into the WTO jurisprudence as a general principle of international law.256 One can therefore argue that if a particular national practice has been outlawed by the panel or the AB, it is a clear indication that this practice is WTO-inconsistent so that a WTO Member has a duty to act in good faith by bringing its law and practice into conformity, i.e. “removing it from their laws and/or ceasing to apply it as a methodology”.257

The counterarguments are, however, equally strong, if not stronger. The formal mandate to the DSM is only to settle the dispute between parties and as such, a report only binds the parties, and only with regard to the case that was settled. Article 19.2 of the DSU explicitly prohibits the panels and the AB to add or diminish rights and

256 Ibid 730.  
obligations of the Members. In another words, a DS report does not constitute an "authoritative interpretation" to impose upon Members obligations to which they did not agree.

A description closest to the current practice is perhaps that the DS reports themselves do not create broader obligations based on the argument of good faith, in a formal legal sense. A challenge of the same or similar legislation of a WTO Member or a boldfaced application of the same practice in a future case, nevertheless, would probably be "won" if it came to the WTO. The picture is therefore quite complex, as on the one hand, the case at hand does not have the precedent value; on the other hand, nonetheless, "a series of complaints about the same issue would prevail if the cases were brought". A perfect example is "zeroing" cases. After many rounds of challenge by different trading partners, including the EU, the original defendant, "zeroing" is commonly considered as WTO inconsistent in AD investigations. By far, it is fair to observe that the possibility of utilizing "zeroing" methodology in major trading partners has been largely obviated even without the amendment of the text of the ADA.

The second possibility of changing the law as it stands without a new agreement is the adoption of "authoritative interpretation" by the Ministerial Conference and the General Council. Article IX:2 of the WTO Agreement reads as:

The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

From a legal point of view, the attribute "authoritative" allows distinguishing this interpretation from the kind of interpretation performed by panels and the AB, as the later

258 Art 19.2 of the DSU.
259 McNelis (n 259) 666. ("What Obligations")
260 ibid 647.
261 Art IX:2 of the WTO Agreement.
was prohibited to modify the WTO law in a formal way. Article 3.9 of the DSU makes the distinction clear by stating “the provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement”. In other words, an authoritative interpretation would be binding to all Members and possible to add or diminish rights and obligations provided in the covered agreements - the legal effect that the judicial interpretations of panels and the AB never have. Even the language of not “undermining” the amendment provision in the last sentence does not seem to stand in the way of permitting authoritative interpretation to modify the law, but only limit the extent to which it may occur – i.e. an authoritative interpretation could not, without circumventing the amendment procedure, “replace” a set of provisions in a covered agreement with a new or revised legal text, or develop completely new obligations, especially if the area in question was not previously covered by the existing agreements. It must be linked to the pre-existing rules and cannot create self-standing rules without such a connection.

The preceding analysis may give one an impression that an authoritative interpretation could be a desirable candidate to “develop” WTO law especially in the area such as AD where the existing rules are ambiguous or contain gaps. This tool, however, has never been used to date. In practice, the terms “authoritative interpretation” are most frequently referred to in a negative sense to specify that some explanations, analysis or reports are not “authoritative interpretations”. For example, the AB has, on a number of reports, referred to the exclusive authority of the Ministerial Conference and the General Council to adopt “authoritative interpretation” in order to distinguish it from what panels and the AB are entitled to do. The only attempt of Members to obtain an authoritative interpretation was the EC’s request for an authoritative interpretation related

262 Ehlermann and Ehring (n 256) 804 and 810. (‘The Authoritative Interpretation’)
263 Art 3.9 of the DSU.
264 Ehlermann and Ehring (n 256) 811. (‘The Authoritative Interpretation’)
265 Ibid 812.
266 Ibid.
267 Ibid 810.
to Article 3.7, 21.5, 22.2, 22.6, 22.7 and 23 of the DSU in 1999.\footnote{WTO General Council, ‘Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakech Agreement Establishing the World Trade Organization – Communication from the European Communities’, WT/CC/W/133, 25 January 1999.} The General Council however did not adopt the requested authoritative interpretation due to, inter alia, the opposition of the US.\footnote{Ehlermann and Ehring (n 259) 814. (‘The Authoritative Interpretation’)} This indicates that it would take a lot more effort if the Members wish to make the authoritative interpretation more operational under the currently consensus-dominated rule-making system. In this regard, it is also of great relevance to the discussion of delegation below.

The above discussion on the ADA and beyond the ADA suggests that it is neither effective nor feasible to change all general obligations of the ADA to specific obligations and make the ADA an instrument cover every single detail in the practice. There are two potential tools available under the existing WTO system to, either formal or informal, link those obligations together, fill in the gaps between them and create a network of legal obligations with allows coherence application of the rules – through the rulings of panels and the AB and the authoritative interpretation. The real effects of both of the tools remain controversial, however.

4.2 The Uneven Expansion of Precision

To a large extent, the discussion of precision is indispensable to the discussion of both obligation and delegation. As stated above, the basic function of a precise rule is to specify clearly and unambiguously what is expected of a state or other actor in a particular set of circumstance.\footnote{Abbott, etc (n 140) 412. (‘Concept of Legalization’)} From Article VI of GATT 1947, enormous efforts have been put in multilateral negotiations to increase the level of precision of international AD rules, aiming to detail conditions of application and spell out required behaviors in particular situations. In other words, to regulate national AD practices by specifying the expected conducts and narrowing the scope for reasonable interpretations of rules is always the underlying theme of multilateral endeavors. Hence, the development of precision in the AD regime is determined by the combination of two intertwined factors
of obligation and delegation: how specific or precise obligations should be *ex ante* and how the quasi-judicial body would interpret them *ex post*.

Precision and obligation are tied together in the sense that the degree of precision of an obligation mainly depends on its function. As discussed above, not every single obligation in a legal instrument is necessary to be highly elaborated or specific; some obligations are intended be general or principal.272 Take the example of Article 2.4 of the ADA again. If “fair comparison” in the first sentence can properly “inform” the rest of the article, panels and the AB may still be able to establish a framework regarding to dumping margin calculation – investigating authorities may have the discretion to choose a method, but the method cannot affect “fair comparison” for the overall dumping margin of the product concerned. It appears to be no need to elaborate every possible method that investigating authorities might apply in a particular circumstance, as the network of obligations, instead of every individual obligation, will narrow the scope of reasonable interpretations.

The other indicator that precision closely related is delegation. The reason that highly developed legal system is tolerable or even welcome to general principles, such as good faith and due process, in a legal instrument is because it includes “well-established courts and agencies to interpret and apply them with more much detailed rules, developing both technicality-intensive secondary legislations and increasingly precise bodies of precedent”.273 In particular, if the *ex post* judicial exercises are capable of coherently carrying out case-by-case interpretations, certain degree of imprecision in some general obligations is not only acceptable, but also necessary. On the contrary, if the judicial exercises are unable to rule out disfavoured conducts, drafters would be forced to specify as many as possible potential misconducts for reasons of clarity and notice. Yet, the improvement of precision because of this reason might not be the most effective way of governance for several reasons, including “higher contracting and sovereignty costs in negotiations”.274 With the consensus-based decision-making system in the WTO, the promotion of precision and clarification only in technical issues may not

---

272 Ibid 413.
273 Ibid 413
be an effective solution to resolve the challenges facing the AD regime, as already demonstrated in the Doha Round negotiation so far.

In sum, precision of international AD rules is by nature an impartial part of the discussion of obligation and delegation. As discussed above, precision of obligations in the ADA cannot be improved by Doha Round negotiations on ADA or other institutional tools in the WTO along, neither can it be improved by the rulings of the panel and AB along as to be demonstrated in the next section. Lack of precision is therefore a sign of uneven expansion of legalization in the AD regime.

4.3 The Uneven Expansion of Delegation

The last dimension of legalization is delegation - the extent to which WTO Members delegate authority to its political organs (the Ministerial Conference and the General Council) and the judicial branch – the DSB - to interpret and implement the ADA. Given serious allegations are made against the DSM in that this independent quasi-judicial system, in which norms are clarified and thereby developed, “has been left out without a political counterweight”, it is therefore worth discussing the imbalanced delegation in the AD regime.

At the center of the contention is a special standard of review provision - Article 17.6 of the ADA. As noted above, it is the only provision in the WTO agreements in which panels are called upon to apply different (in fact more deferential) standard of review to the interpretation of WTO law. Under this provision, although a panel’s primary interpretive responsibility is the same as it is under other WTO agreements, the broad discretion has been conferred to national authorities and the panel and the AB are supposed to defer to their factual determinations, as provided in Article 17.6 (i). The word “proper” in Article 17.6.(i) “explicitly carries a considerable margin of discretion in terms of national authority’s ‘establishment’ of the facts and its ‘evaluation’ of the

273 Abbott etc (n 140) 415, (‘Concept of Legalization’)
It is clear that in AD cases, there is no de novo review and panels cannot substitute their own analysis for that of the national authority.

The locus of debate is the tension between two sentences of Article 17.6 (ii), i.e. whether multiple “permissible” interpretations exist in applying the rules in the VCLT to interpret the ADA. Although the AB has accepted that there are provisions of the ADA which admit of multiple permissible interpretations, the US still criticized the approach of panels or the AB as “rendering Article 17.6 (ii) a nullity”. The US believed that panels and the AB have not accepted reasonable, permissible interpretations of the ADA and used general terms in the ADA to “extrapolate what the ADA has said about a particular issue”. Hence, this approach of panels and the AB itself is inconsistent with the customary rules of interpretation.

Behind this criticism the underlying debate is what the balance of commitments inherent in the ADA is and what the delegation that Members have really agreed are. The real point of disagreement between the US and panels and the AB is the role of the ADA and the nature of a panel’s review. In the words of Ehlermann, the ADA gives “national authorities the responsibility for investigating the facts and making an initial determination”. The role of panel is, therefore, “confined to reviewing the investigation and determinations that have been carried out at the national level”. This is obviously a top-down view of the ADA and the panel’s review, as it emphasized the uniform application of the ADA and confirmed that the purpose of more intensive review is to make sure that in similar fact situations, the determination of every Member to (or not to) apply an AD measure could be the same.

The US’s view is quite different. Its underlying argument is that the ADA is only a bottom line for national practices. Beyond that point, i.e. something has never been mentioned in the ADA, it is the discretion of a Member to act as it considered as appropriate. If one bears in mind the negotiation history of the ADA – a compromise between Members with inherent ambiguity which is often the hallmark of consensus-

---

279 Ibid 504.
281 Ibid.
282 Ibid.
283 Ehlermann and Lockhart (n 279) 507. ('Standard of Review')
based drafting, it is difficult to argue that the US is entirely wrong at this point. The deprivation of panel’s discretion, however, decreases the level of delegation.

Powerful Members, in particular the US, also firmly opposed against another kind of delegation: authoritative interpretation by the Ministerial Conference and the General Council — delegation to political organs. As previously mentioned, this potentially important tool has remained completely unused, partly because of the US’s opposition of the EC’s request in 1999. This signaled that the US is against any kind of further delegation in the decision-making of the WTO, even as modest as an interpretation of existing provisions requiring three-fourths majority of the Members. The major concern of the US was that its sovereignty would be undermined by amendments or authoritative interpretations forced through by quickly formed majorities. Therefore, it prefers a decision-making structure contains an in-built preference for the status quo so that its bargaining power would not be reduced in the negotiations.

The skepticism of delegation of powerful Members could seriously jeopardize the development of the WTO in two different aspects. First, without delegation to political organs, there is no distinction between rule-making and decision-making, i.e. the making of primary rules and secondary rules, in the WTO. This will result in, as argued, “every single rule has to be made on the basis of consensus, regardless its specificity or technicality, and even an overwhelming majority of Members are not able to achieve what they want to decide if at least one Member maintains a veto”. Under this kind of decision-making procedure, the extent to which that deadlock is protracted and whether a breakthrough is possible depends on factors such as the political context of the question at issue and whether trade-offs are made. Second, the under-use of delegation to political organs make the changes of rules have to come from judicial branch in an informal and accused “inappropriate” way. This, in turn, raises stronger criticisms to the DSM and creates an inherently legitimacy problem for the whole WTO.

To sum up, although it is commonly recognized that a higher level of delegation has been conferred to the WTO DSM, the delegation in the AD regime is imbalanced. Article

284 Ibid.
285 Ehlermann and Ehring (n 256) 62. (Decision-making in the WTO’)
286 Ibid 65.
287 Ibid 71.
17.6 of the ADA specially generates considerable controversies in the extent to which the panel and AB should defer to national authorities - in other words, to what extent panels and the AB are authorized to review the factual determination of national authorities. The under-use of delegation to political organs results in stronger criticism to the DSM and further imbalances the AD regime.

5. Conclusion

Similar to other regimes in the GATT/WTO, international AD regime has been significantly "legalized" over the past sixty years. The development of legalization manifested in the AD regime echoes the general trend of legalization of the GATT/WTO. The AD rules have been a hotly debated subject of several rounds of multilateral negotiations. The evolution of legal instruments highlighted the movements towards higher level of legalization in the AD regime. Also, several "soft law" devices were developed in the WTO framework to improve the precision of international AD rules and the new DSM of the WTO has been actively engaged in filling the gaps in the legal instruments.

The ongoing process of legalization in the international AD regime is nevertheless imbalanced in many aspects. A fairly large amount of obligations contain in the ADA are unspecific or contingent in nature and this feature of the ADA restrains the development of precision and delegation in the regime. Yet, the current negotiation, surveillance and dispute settlement mechanisms, cannot support the improvement of obligation of international AD rules and therefore also limit the space of the improvement of precision and delegation in the regime. Similarly, imbalanced delegation in the AD regime results in great controversies and restraints further improvement of legalization.
Chapter V Consequences of Legalization: WTO-transposed and WTO-plus features of the European AD Regime

1. Introduction

The previous chapter discerned a general increase of legalization in the multilateral AD framework, as well as the uneven expansion of legalization in the regime. Legalization via different activities of the GATT/WTO greatly shaped the evolutionary trajectory of AD, an originally unilateral trade policy. This chapter examines, from an institutional perspective, the intended and unintended effects of multilateral legalization on domestic systems.

From Article VI of GATT 1947 to the ADA, the negotiation history of international AD instruments displayed the trading partners’ general preference of higher level of legalization - tightened obligations, greater precision, and stronger delegation to the DSM. Surveillance mechanisms, mainly operated by the GATT/WTO Secretariat, contributed to greater precision in the AD regime and the harmonization of national AD rules, although those activities have limited impacts on obligation and delegation of the regime in a formal way. The WTO DSM adjudicated a considerable number of national AD measures as WTO-inconsistent in the past decade, and successfully, as well as controversially, filled in the gaps between ADA provisions. To a large extent, a high level of delegation in the AD regime becomes another engine of legalization in that it advanced the level of precision in the regime irrespective of slow multilateral negotiations.

The expansion of legalization in the AD regime is however uneven, as illustrated by fruitless Doha negotiations, rather passive activities of the WTO Secretariat and bitter criticisms of judicial activism of the WTO DSM. In particular, many worried that the predominance of adjudication would result in imbalance and potential instability of the system.

This chapter examines how legalization of the multilateral AD framework formally affects national AD regimes, including the evolution of national AD legislation, the administration of AD policies and the judicial review of AD policies. As advocated in the special issue, the understanding of legalization at international level has to be joined to its
consequences at domestic level by reflexive processes: domestic politics propels legalization at international level, and multilateral legalization, in turn, shapes the domestic political process.\textsuperscript{1} It is widely discussed that the WTO has never had at its disposal an overall and coherently regulated process framework capable of sufficiently securing the uniform and effective implementation of its policies and the protection of individuals. The execution of WTO law is by and large ensured by national authorities and primarily framed by the law of WTO Members which enjoy institutional and judicial autonomy.\textsuperscript{2} As discussed in the special issue, legalization at international level aiming at providing predictability and stability in international trade may or may not have sufficient intervening effects on domestic policies and pro-trade stakeholders are not always able to benefit from the legalization process.

Following the analysis of the previous chapter on the development of legalization at international AD regime, this chapter adopts a bottom-up analysis by enquiring how the whole process affects trade policies of individual WTO Members in a formal way. It advances the general observation in Chapter II by exploring how uncertain economic and political environment at the EC level complicates the implication of multilateral legalization.

On the one hand, increased obligation, frequently joined by greater precision and stronger delegation, largely changed the landscape of domestic trade policy-making. Many norms and principles established by the multilateral framework have been transposed into domestic systems and enjoy high authority in the policy making process.

On the other hand, increased legalization has to interact with other trade-related interests of domestic actors in the dynamic trade policy making process. Interest groups with different agenda intend to maximize the possible benefit of domestic institutional settings by creating “WTO-plus” domestic legal tools. In this study, the “WTO-plus” instruments particularly refer to the practices of national investigating authorities which are normally in “grey areas” of the ADA where the WTO discipline is either not existing or ambiguous and therefore unchallengeable or difficult to challenge under the DSM. It

\textsuperscript{1} M Kahler ‘Conclusion: The Causes and Consequences of Legalization’ (2000) 54 International Organization 661, 662. (‘Conclusion’)


143
does not, however, refer to that national authorities take a further step in implementing the WTO ADA. Hence, this study considers that the introduction of WTO-plus instruments in national AD legislations enables a WTO Member to fully comply its WTO obligations, while it still remains control over its trade policy.

This chapter examines whether the evolution of the EC AD regime confirms the general observation discussed in Chapter II. It discusses the developments of two sets of provisions, namely WTO-transposed provisions (including WTO-modified provisions which slightly modified the wording of the corresponding WTO rules) and WTO-plus provisions, which reflect the unintended effect of legalization. It explores, first, how the development of legalization at international level changed substantive rules of European AD laws and how EU institutions seek to integrate obligations imposed by the GATT/WTO into their own practices; and second, how the EU builds up WTO-plus features to offer certain degree of flexibility to the Community institutions and balance European-wide interests. To address WTO-plus aspects of the EU system, it compares the EU’s laws and practices with the WTO rules and jurisprudence in the field, if any, and analyzes how WTO-plus features may change the result of an AD investigation.

This chapter proceeds as follows: section 2 is devoted to the evolution of the EU’s AD regime, by identifying the response of EC institutions and courts towards the development of legalization at international level. Section 3 examines three main WTO-plus features of the EU system, namely injury margin, Community interest and anti-circumvention. Section 4 concludes this chapter.

2. WTO-transposed Features of the EC AD Regime

2.1 Evolution of Community AD Instruments

2.1.1 Pre-ADA Community AD Instruments

The most striking trend in the evolution of EU AD instruments is that the Community always made its intention to abide by the GATT/WTO AD rule very clear. In most circumstances, the EU AD instrument essentially repeated basic principles of international AD rules and were “constructed by identity of structure and large similarity
of vocabulary with international rules". This trend is also evident by the coincident appearance of new Regulations or major amendments of existing Regulations with the development of new GATT/WTO AD Code or Agreement. As argued, "[T]he GATT negotiating rounds were the principal institutional motor of the periodic changes in EC anti-dumping law" and the GATT "served as not only as a negotiating forum, but also as a study group, mediator and interpreter of norms". Despite the GATT's "decisive contribution to the development of EC anti-dumping law", other factors, such as judgments of the ECJ, new accessions to the Community and procedural and substantive refinements of the rules, i.e. the previous practice of the Commission, also have played "important roles in the amendments or replacements of EC AD instruments".

The initial EEC AD Regulation - Regulation 459/68 on Protection against Dumping or the Granting of Bounties or Subsidies by the Countries which are not Members of the European Economic Community was adopted on April 1968. It basically translated the 1967 Code into the Community law and "allocated the tasks of enforcing the new legislation between the Commission, the Council and the Member States".

This Regulation can be considered as a positive response from the EC to the first multilateral agreement dealing with AD. In comparison with the long history of national AD laws of other major trading partners, the EEC established its framework of AD on the basis of multilateral rules at the beginning, instead of amending or modifying the existing AD law in light of the 1967 Code. Moreover, the Regulation confirmed that after the transitional period, namely since 1968, the Community institutions have the power to take actions in this field with exclusive competence.

From 1968 to 1979, i.e. before the birth of the 1979 Code, only minor changes have been made on certain procedural points to the initial Regulation and with the accession of the Ireland and UK, the Commission has been empowered to amend or revoke national

---

3 D Pierre WTO Trade Instruments in EU Law (Cameron May, London 1999) 192. ("WTO Trade Instruments in EU Law")
5 E Vermulst and P Wac "Anti-dumping Law and Practice" (Sweet&Maxwell, London 1996) 5. ("EC Anti-dumping Law and Practice")
8 Ibid 21.
AD measures of the new MSs. In 1979, the initial Regulation 459/68 was replaced by Regulation 3017/79 (the 1979 Regulation), as a result of “incorporating the provisions of the 1979 Code of Tokyo Round and codifying the practice of Community authorities and the judgment of ECJ”. Moreover, Regulation 109/70 which set the rule for state-trading countries was repealed by Council Decision 905/79.

Corresponding to the significant modification of the determination of injury in the 1979 Code, the 1979 Regulation introduced new rules which required an indication that dumped or subsidized imports were causing material injury, instead of proving that they are the principal cause of injury. More detailed provisions on confidentiality and publication requirements also have been added into the 1979 Regulation, in the same manner as amendments of the 1979 Code. Moreover, by codifying the practice of the Commission, the rule was also changed with respect to the determination of normal value of imports from non-market economy countries, the construction of export price, sales made at a loss on the domestic market and allowances to be taken into account in comparing the normal value and the export price. The amendments also reflected the Court’s ruling in the Ball Bearings case, the first judgment in the AD field, especially in terms of transparency of AD proceedings. In this case, the opinion of Advocate General Warner that private parties should be given the right to have access to the information used against them was accepted by the Court. Accordingly, this principle was included into the 1979 amendments.

Before the conclusion of the Uruguay Round, the EC AD rules experienced two more major amendments in 1984 and 1988. In July 1984, Regulation 3017/79 was replaced by Regulation 2176/84. A “sunset clause” was inserted into the text, providing for the automatic termination of measures five years after the imposition of measures, or five years after last modification or confirmation of measures. Other revisions included a
clarification of the meaning of production costs for the purpose of calculating constructed normal value, and the treatment of sales not in the ordinary course of trade. In 1988, Regulation 2423/88 replaced Regulation 2176/84. Although no fundamental changes were made to substantive rules, additional rules were introduced to clarify or modify the prior practice of the Commission. For example, the anti-absorption duty, i.e. "the possibility of increasing the duty where it was proven that the exporter bore the cost of it", was introduced. The provision concerning the treatment of discounts and rebates when normal values and export prices were determined on the basis of prices actually paid was clarified.

At the time that the ADA was born, the EC first amended Regulation 2423/88 at the points of decision-making procedures and time-limits and then replaced it by Regulation 3283/94, which consolidated all previous amendments to Regulation 2423/88 and incorporated provisions of the ADA. The 1994 Regulation was further amended by Regulation 1251/95 to incorporate changes related to time-limits of the investigation. A consolidated version, incorporating amendments to Regulation 3283/94 as well as certain linguistic changes, was published in March 1996 as Regulation 384/96, the Basic Regulation which is currently applicable. The adoption of the Basic Regulation marked the establishment of the first completely separate AD framework in the Community law from the anti-subsidy legislation.

Most commentators agreed that the Basic Regulation closely followed the text of the ADA. It basically follows the scheme and provisions of the ADA as far as to adopt most of its terminologies. The EC approach was "to transpose the language of the 1994 Agreement into the Community legislation to the extent possible and for this purpose the Agreement, rather than the existing Community legislation ... has been taken as the basis for the proposed Regulation", as the Commission stated in its Explanatory Memorandum.

---

18 Ibid.
19 Van Bael and Bellis (n 6) 24. (‘Anti-dumping and Other Trade Protection Laws’)
20 Ibid.
22 Van Bael and Bellis (n 6) 25. (‘Anti-dumping and Other Trade Protection Laws’)
23 For example, Pierre (n 3) 18-19 (‘WTO Trade Instruments in EU Law’), and Van Bael and Bellis (n 6) 25. (‘Anti-dumping and Other Trade Protection Laws’)

147
to the proposal.\textsuperscript{24} It is obviously different from the US approach to incorporate the ADA into its Tariff Act of 1930 – the US legislators only modified the existing law where necessary for the transposition of the ADA.\textsuperscript{25}

There are, however, a number of areas that the Commission considered as necessary to make additions to the ADA text to meet EC policy demands, which are referred to as "WTO-plus" provisions in this study.\textsuperscript{26} They have been described in the Commission's Explanatory Memorandum as:\textsuperscript{27}

\textit{Additions to the Agreement are few and they have, for the most part, been described to: clarifications where the Agreement is unclear; incorporation of existing provisions on EU' rather unique procedures and decision making, amended to take account of Court judgments; and the amendment or incorporation of EU specific rules on issues such as negligible import volumes, absorption, circumvention and Community interest, on which the Agreement is silent, imprecise or where it merely gives and indication of minima.}

Many therefore observed that the Basic Regulation has "not faithfully transpose the WTO rules", such as issues concerning the computation of SG&A and profit constructed in normal values and the issue of duties as a cost.\textsuperscript{28} The Basic Regulation also did not entirely follow the ADA at the point of de minimis as its threshold is lower (one per cent instead of three percent), but has to be computed as a percentage of consumption in the Community rather than as a percentage of imports.

The main character of the Basic Regulation - transposition of the ADA in most issues, but not necessarily faithful at all points - can be better understood in the context of the process which led to the adoption of these rules. Within the Community, the legislative process of the Basic Regulation can be divided into two stages.\textsuperscript{29} In December 1994, the Council unanimously approved the results of the Uruguay Round negotiations


\textsuperscript{25} Uruguay Round Agreements Act, H.R. 5110, 103rd Congress, 2d session, 807.

\textsuperscript{26} M Clough and F Randolph 'Recent Developments in EC Anti-dumping Practice and the GATT' in N Emiliou and D O'Keefe (eds) The European Union and World Trade Law - After the GATT Uruguay Round (John Wiley & Sons, Chichester 1996) 226. ("Recent Development in EC And-dumping Practice")

\textsuperscript{27} COM (94) (n 23).

\textsuperscript{28} Van Bael and Bellis (n 6) 25. ("Anti-dumping and Other Trade Protection Laws")

\textsuperscript{29} W Müller, N Khan and H Neumann EC Anti-dumping Law --- A Commentary on Regulation 384/96 (John Wiley & Sons, Chichester 1998)20. ("EC Anti-dumping Law")
including the new ADA. The adoption of the WTO ADA, nevertheless, was followed by two additional measures: the introduction of statutory time limits for investigations and a reform of the decision making procedure in the Council – from qualified majority to simply majority, although the reform on the decision-making process did not follow the adoption of the ADA immediately. Both conditions reflected the wish of a number of more protectionist MSs to strengthen the efficiency of the Community’s trade deference instruments. Southern MSs, in particular France, considered that the requirement of a qualified majority “excessively heavy” – after the accession of Scandinavian countries in 1995 they were concerned that “the free-trade camp comprising the UK, the Netherlands, Germany and Denmark would be reinforced and that an increasing number of AD measures would be defeated through lobbying MSs”. France therefore “made its approval of the Uruguay Round package conditional upon this amendment of the decision-making system” and its desire finally made its way in the 1994 Regulation.

In the second half of 1994, the discussion of the Commission’s proposal for a new Basic Regulation again drew the attention of both sides. This time “the new formula for the Community interest test and the reformulated anti-circumvention provisions” proved to be the most controversial. On the issue of the Community interest, MSs were divided into two camps again: southern MSs was concerned that the adoption of the Community interest rules could “lead to a general paralysis of AD actions”; whilst northern MSs opposed amended provisions given the silence of the ADA in this area. Therefore, the final Commission proposal was a trade-off and a solution full of compromises.

In sum, from 1968, the evolution of the EC AD law could be characterized by the mixture of the transposition of multilateral rules and compromises between interests of different MSs and the Community institutions. Corresponding to the development of multilateral rules, a high degree of obligation and precision in substantive rules and a strong emphasis on procedural requirements can be identified in the evolution of EC AD law.

31 Ibid.
32 Van Bael and Bellis (n 6) 24. (‘Anti-dumping and Other Trade Protection Laws’)
33 Ibid.
34 Müller etc (n 28) 20. (‘EC Anti-dumping Law’)
35 Ibid.
Regulations. The Community decision-making process has been strengthened and the Community institutions, in particular the Commission, has been vested with greater powers and finally taken the “driving seat” in AD proceedings.

2.1.2 An Overview of Regulation 384/96 (the Basic Regulation)\(^{36}\)

As indicated in the previous section, the Basic Regulation has an identical structure with the ADA. The Basic Regulation’s alignment over the ADA was, on the one hand, generally considered as “an improvement against the practice prior to the Uruguay Round”\(^{37}\). On the other hand, it is worth noting that in the Uruguay Round (indeed all past GATT/WTO rounds), the EC, as one of the most powerful trading partners, has essentially succeeded in molding multilateral rules to legitimize its own system, i.e. successfully multilateralized various EC practices\(^{38}\). Therefore, many practical problems of the EC AD system are directly linked to the insufficiency of the ADA itself.

The first 11 articles of the Basic Regulation were essentially reproduced from the ADA, with slight differences in titles and wordings. These articles, referring to as “WTO-transposed”, include rules concerning the determination of dumping, the determination of injury, the definition of Community industry, the initiation of the proceeding, the procedure of investigation, provisional measures, undertakings, retroactivity, the duration of the measure, reviews and refunds. From Article 12 to Article 24, the Basic Regulation established additional rules, such as non-market economy (Article 2 (7)), anti-absorption (Article 12), circumvention (Article 13) and the Community interest test (Article 21), which are rather unique for the EC, the “WTO-plus” provisions.

In this section, an example on how the Community rule determines selling, general and administrative costs (SGA) in constructed normal value (CNV) is offered to illustrate how WTO-transposed or WTO-modified provisions work in practice. As illustrated by


\(^{37}\) Pierre (n 3) 33. (‘WTO Trade Instruments in EU Law’)

this example, even a tiny dissimilitude between the Basic Regulation and the ADA can make a huge difference in practice. The literal transposition of the ADA in the EC AD rule does not necessarily represent a faithful implementation of multilateral rules.

As a subsidiary means of establishing the normal value, the CNV can be calculated if neither the exporter’s own domestic prices nor the domestic price of other producers in the exporting country concerned can be used. 39 A CNV of the like product consists of unit costs of manufacture (fixed and variable) in the country of origin plus a reasonable amount of SGA and profits. Alternatively, instead of CNV, the Commission is allowed to use export prices to a third country as the basis of normal value. 40 In practice, the Commission rarely uses third country exports to determine the normal value. 41 Instead, it routinely establishes very detailed product control numbers (PCNs) in order to compare identical models or types for the purpose of dumping and injury margin calculation. As a result, in virtually every EC AD investigation, the CNV will be calculated for one or more PCNs. The methodology utilized by the Commission in the calculation of CNV is thus of significant importance to exporters as it can make great difference in dumping margins and final AD duties.

Article 2(6) of the Basic Regulation sets out the rule governing the calculation of one element of normal value – the amount of SGA and profits. It outlined four different methods for calculating SGA expenses and the margin of profit. First, as a general rule, the amount of SGA and profits “shall be based on the actual data pertaining to production and sales, in the ordinary course of trade, of like product, by the exporter or producer under investigation”. 42 If such amounts “cannot be determined on this basis”, the second method may be applied – referring to “the weighted average of the actual amounts determined for other exporters or producers subject to the investigation in respect of production and sales of the like product in the domestic market of the country of origin”. 43 If both of the above approaches are not feasible, a third method can be applied by resorting to “the actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in

39 Pierre (n 3) 84. (‘WTO Trade Instruments in EU Law’)
40 Art 2 (3) of the Basic Regulation.
41 Pierre (n 3) 84. (‘WTO Trade Instruments in EU Law’)
42 Chapeau of Art 2 (6) of the Basic Regulation.
question in the domestic market of the country of origin”. Finally, “any other reasonable method” can be used, provided that “the amount of profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin”.  

Article 2 (6) is essentially based on Article 2.2.2 of the ADA, while several changes have been made in the text of this Article compared to that of Article 2.2.2. The first one is the different order of alternative methods. Article 2.2.2 of the ADA listed four methods as well, but putting the third method before the second. This change in the Basic Regulation is considered as “a signal of the preference for the method, since although no strict legal hierarchy is imposed, in practice”. The order set out in the Basic Regulation is followed, unless there exists good reasons to the contrary. This codification of previous practices of the Commission is justified on the ground that there is no hierarchy of the four methods set out in Article 2.2.2, so that “a degree of flexibility was deliberately reserved for implementing authorities to choose the method which most accurately reflects the expenditure incurred”. 

Other changes of the text, however, raised more controversial issues. For example, whilst Article 2.2.2 of the ADA refers to “actual costs incurred and realized by other exporters or producers” in question, Article 2(6)(a) uses the words “actual amount determined for other exporters or producers”, clearly indicating that the amount to be used is the same as those which have been determined by the Commission for such exporters. This change in the wording is less innocent than it looks: “the amount of SGA and profits determined by the Commission for other exporters will normally be computed on the basis of sales made by the exporters in question ‘in the ordinary course of trade’, i.e. on the basis of profitable sales only”, whilst Article 2.2.2 (ii) does not contain such a discrimination. This issue has been addressed by the AB in EC- Bed Linen. The AB ruled that an investigating authority could not exclude sales which were not made in the

43 Art 2 (6) (a) of the Basic Regulation.
44 Art 2 (6) (b) of the Basic Regulation.
45 Art 2 (6) (c) of the Basic Regulation.
46 Van Bael and Bellis (n 6) 73-74. (‘Anti-dumping and Other Trade Protection Laws’)
47 Pierre (n 3) 97. (‘WTO Trade Instruments in EU Law’)
48 Ibid.
49 Van Bael and Bellis (n 6) 74. (‘Anti-dumping and Other Trade Protection Laws’)

152
ordinary course of trade when calculating the amount of SGA and profit pursuant to the weighted average method.\(^51\)

Also, Article 2(6)(b) adds the word "in the ordinary course of trade" to the text of Article 2.2.2. Apart from being inconsistent with the text of Article 2.2.2 (i), this addition makes "little sense" since the provision refers to SGA and profits related to the production and sale of the "same general category of products" in the domestic market of the country of origin. In the absence of detailed model by model cost of production data for the general category of products comprising the like product (detailed cost of production information will only be available for the like product), "it will be impossible to identify which sales of products within that general category are or are not in the ordinary course of trade".\(^52\) Consequently, the calculation of CNV is arguably "unpredictable and arbitrary".\(^53\)

This example indicates that one of the EC's approaches is to codify the previous practice followed the Community institutions into the Basic Regulation by slightly altering the wording of the ADA.

2.2 The Administration of Community AD Rules

2.2.1 The Commission and the Administration of AD Proceedings

The above discussion of the evolution of the Community AD rules confirmed the rise of the Commission as the central player in AD proceedings. As most commentators recognized, the role of the Commission is "much greater and more political than a normal executive body".\(^54\) Indeed, the Commission's attitude more and more determined the result of an AD proceeding.

The profound changes in the way EC AD rules have been administrated during the past half century can be analyzed from two different perspectives. Outwardly, the Commission's practice has always been regulated and constrained by multilateral rules.


\(^51\) Ibid, para. 6.20.

\(^52\) Van Bael and Bellis (n 6) 74. ('Anti-dumping and Other Trade Protection Laws')

\(^53\) Vermeulst (n 37) 108. ('The 10 Major Problems')

The Commission, while following requirements set out in the GATT/WTO rule, constantly compared its practices to its trading partners and justified them on the ground that other trading partners were practicing the same.\textsuperscript{55} This approach has been described as “playing the GATT/WTO game”, which “safeguarded the European Market by taking instruments allowed in the GATT/WTO agreement instead of publicly granting protection in the form of AD duties, but developing its methodologies to the maximum”.\textsuperscript{56} Inwardly, the Commission has to balance divergent interests of different Community institutions, MSs and economic operators involved.\textsuperscript{57} There are three different layers of balance that the Commission has to achieve: first, under the Community interest test, the Commission has to balance different interests with the Community industry, importers, and users; second, EC AD measures have to pass the control of MSs, in the Anti-dumping Committee (the ADC) and in the Council voting; and finally, the Commission administration process is also subject to the security of European Courts. The focus of this section is the outward looking review of the Commission’s practices, while the next section deals with the inward control by Community institutions, MSs and private actors within the EU.

After the adoption of the 1968 Regulation, during most of the 1970s, the primary goal of the Commission in initiating AD proceedings appeared to be “to secure price-revision undertakings from foreign exporters”, a practice closely linked to then popular “voluntary restricted exporting”.\textsuperscript{58} It is therefore observed that “the majority of cases were concluded by the execution of undertakings without having any official determination of the existence of dumping and injury”.\textsuperscript{59} The absence of decisions made it very difficult for interested parties to determine how the AD rule was construed by the Commission. Consequently, foreign producers were under heavy pressure to consent to a

\textsuperscript{55} For example, H Wenig ‘The European Community’s Anti-dumping System: Salient Features’ (2005) 39 JWT 787, 794. (‘The EC’s Anti-dumping System’) The author, as the leader of the Trade Defence Service of the European Commission’s Directorate General for Trade, frequently referred to the practice of other investigating authorities and concluded that “the EC system scores very well in this respect, as evidenced by the extremely low rate of Panel cases brought against the EC in Geneva”.

\textsuperscript{56} C Molyneux Domestic Structures and International Trade --- The Unfair Trade Instruments of the US and the EU (Hart Publishing, Oxford 2001) 4. (‘Domestic Structure and International Trade’)

\textsuperscript{57} Wenig (n 55) 787. (‘The EC’s Anti-dumping System’)

\textsuperscript{58} Van Bael and Bellis (n 6) 41. (‘Anti-dumping and Other Trade Protection Laws’)

\textsuperscript{59} Ibid.
price undertaking even “where the substantive conditions for applying AD measures were not met”. 60

The Commission significantly improved its procedure and brought more transparency after the 1979 Regulation due to both the criticism from the ECJ, such as the judgement of Ball Bearing 61, and the tightening up of procedural rules in the 1979 Code. Exporters and importers subject to investigation were provided the right to request to be informed of “the essential facts and considerations” on the basis of which the Commission intended to “recommend the imposition of the definitive duties or the definitive collection of amount secured by way of a provisional duty”. 62 Publication requirements imposed upon Community authorities also significantly stepped up as “the Commission was required to include a summary of the information received in the notice of initiation published in the Official Journal (OJ) and a summary of the reasons for the termination in the notice of termination of proceedings, or where appropriate, information on any undertaking accepted by the Commission”. 63 Moreover, no undertaking is given unless the Commission has established, at least provisionally, the existence of dumping and injury, corresponding to Article 7 of the 1979 Code.

The last ten years, i.e. after the establishment of current EC AD framework according to the ADA, have seen a more rigorous enforcement of the Basic Regulation and a massive increase in the Commission staff, “from no more than five officials in the early 1970s to around 120 officials in 2003”. 64 Facing both strong domestic interests for a more diligent application of AD rules and the criticisms that EC AD proceedings were seized by protectionism interest, the Commission always defended its position as “in strict conformity with the GATT/WTO requirements” and made restrictive interpretations of the Basic Regulation in practice. 65 The practice of the Commission, however, has still been condemned for lack of transparency by leading practitioners such as Vermulst. 66

60 Ibid.
61 Ball Bearings (n 13).
62 Van Bael and Bellis (n 6) 41. (‘Anti-dumping and Other Trade Protection Laws’)
63 Ibid.
64 Ibid 42.
65 Vermulst and Waer (n 4) 3. (‘EC Anti-dumping Law and Practice’)
66 Vermulst (n 37) 106. (‘The 10 Major Problems’)

155
identified the following 11 characteristics of the EC system as symptoms of lack of transparency: 67

- Complaints are treated as confidential until initiation of the proceeding;
- Powers of attorney and details of legal representation are treated as confidential;
- Questionnaires are made available only to interested parties;
- The public has no access to the non-confidential file;
- Non-confidential questionnaire responses and other submissions often are so vague that they are virtually meaningless
- Verification reports prepared by Commission officials are not provided to interested parties;
- Hearings are ex parte and no official transcripts or reports are provided to interested parties;
- At the stage of provisional measures, the MSs are informed before the interested parties;
- Commission guidelines for applying the AD legislation are considered “internal” and therefore confidential;
- When disclosure is provided, calculation formulas are normally removed because they are considered as “confidential”, and
- The decision-making process of the Council and its committees is confidential.

The excessive power of the Commission has been criticized as “the monopoly of all factual information” and it invites “leaks and abuse”. 68 For example, it happens often that “prior to initiation of a proceeding or prior to publication of provisional measures (but after consultation of the MSs by the Commission), information about complaints, respectively provisional findings, leaks out”. 69 This might considerably disadvantage foreign exporters and Community importers in that they are normally less well-organized and well-represented in Brussels than Community industries. Vermulst, however, also admitted that “most of the intransparencies in the EC system result from insufficient ADA regulation, rather than the deliberate breach of the ADA rules by the Commission”. 70 For example, the EU practice of keeping complaints confidential until the initiation of a proceeding is the preferred option in the ADA, even though it invariably leads to leaks and abuse, as experienced by the EU and other jurisdictions.

67 Ibid.
68 Ibid.
69 Ibid.
70 Ibid.
To sum up, over years, along with the increasing degree of obligation and precision in the multilateral rules, the Community’s AD practice has become more and more legalistic and judicialised. However, insufficiencies of the ADA give the Commission considerable room to manoeuvre the rules in order to produce favourable results and maximize the benefit from alternative methodologies.

2.2.2 Control of Administration within the EC

Although enjoying considerable discretion in administrating AD proceedings, it is fair to observe that the Commission still has to pass three different layers (ex ante and ex post) of control, or put differently, achieve three layers of balance, within the EU framework. These three layers of control in the AD regime largely illustrate a broader picture of the relationship between the Commission, MSs and private actors in the EU trade policy-making.

The first layer of balance is the interest of different Community industries under the Community interest test. Article 21 of the Basic Regulation is entirely dedicated to the notion of “Community interest”. It provides for a detailed procedural and substantive framework in which the Commission may consider whether it is the Community’s interest to call for intervention before imposing a definitive duty, even where dumping and resulting injury have been determined to exist. The discussion here focuses on the dynamic of interested parties in the Community interest test, whilst the next section provides more details of procedural rules and substantive criteria of the Community interest test.

Paragraph 1 of Art 21 established the general principle that a determination shall be based on an appreciation of all the various interests taken as a whole, and all the parties shall be given opportunities to make their views known. 71 Subsequent paragraphs set out a formal procedure and certain rights of interested parties, including the right to an oral hearing and the right to certain information. 72 Finally, the result of the Commission’s analysis for properly submitted information, together with an opinion on its merits, must

---

71 Art 21(1) of the Basic Regulation.
72 Art 21 (2) – (4) of the Basic Regulation.
be submitted to the ADC. The Commission shall take the views expressed by the ADC into account in any proposal. 73

In practice, this test has been considered as a “non-disproportionate test”, i.e. “whether the imposition of measures would place a disproportionate burden on economic operators other than the Community industry”, as argued by the Commission. 74 The ultimate intention of this procedure is “to reassure that the result of AD proceeding is a balancing of economic interests of different operators on the European market, namely exporters, importers, users and consumers”. 75 It dynamically affects the process of investigation in two aspects: first, this test “influences the structure of the investigation in a way that user and consumer interests or competition aspects are systematically and thoroughly looked into in the course of the investigation”; and second, it has “repercussions on injury or causation analysis”, as information obtained in the context of the Community interest analysis is also relevant there. 76 In this regard, this test is particularly related to those aspects of an investigation that confer a certain margin of discretion to the investigating authority where the “Community interest” plays a role.

Although the Commission has tried to “professionalize” and “neutralize” its Community interest determination over times, its established tradition of giving overwhelming weight to the complainants’ interest in applying the criterion has rarely changed – “findings counted on the fingers of one hand”, as described by Vermulst. 77 Three reasons have been identified as relevant: first, complaining industries in AD cases are normally well organized and easy to be heard compared to countless end-users or relatively many processors – in AD cases, “organization means power”. 78 Second, even in cases where processors are not limited or not well organized, the Commission will “typically find that the interests of the EC-producing industry outweigh those of the EC-processing industry”. 79 Third, where dumping and resulting injury have been found, “the momentum of those findings will tend to propel the Commission towards proposing AD

73 Art 21 (5) of the Basic Regulation.
74 Wenig (n 54) 791. (‘The EC’s Anti-dumping System’)
75 Ibid.
76 Ibid.
77 Vermulst (n 37) 112. (‘The 10 Major Problems’)
78 Ibid.
79 Ibid.
measures". The first reason is especially significant if one bears in mind the general position of the Commission in the EC policy-making. Compared with other EU institutions, the Commission is widely recognized as being "receptive and open to interest group representations", in that it is more enthusiastic to seek alliance with influential interest groups to strengthen its position vis-à-vis the Council in the EU system. The significant declines towards the interest of concentrated or even monopolized community industries in the Community interest test are therefore not surprising in that it reflects the emergence of European networks after Europeanization of lots of policy sectors and the influence of lobbying. For instance, statistics have shown that the number of EC anti-dumping initiations against Chinese products for different industry sectors "does not seem to be related to its relative significance in total import flows", but indicates "the degree of concentration". The percentage of EU anti-dumping cases is highest in the chemical sector, representing 37.8 percent of the total EU anti-dumping cases against China during 1979–2000, while the chemicals sector only represents 3.8 percent of total EU imports from China. Intensive anti-dumping investigations in those concentrated EU industries are the best evidence of "the Commission's formalized contacts with organized interests groups".

The second layer of control of AD administration is the balance of interests between the Commission and MSs as well as between different MSs. At first, the Commission has to confront with MSs in internal Commission procedure. A Commission proposal for the imposition of an AD measure is made only after a careful examination of the result of the investigation by a number of Directorate-Generals, namely those in charge of industry, customs matter and legal affairs. It is then presented to the entire college of Commissioners for adoption. After that, the proposal has to pass "a strict test" in the ADC. There is a monthly meeting of the ADC in which Commission officials and

80 Ibid.
81 S George and I Bache Politics in the European Union (Oxford University Press, Oxford 2001) 296. (‘Politics in the EU’)
82 X Liu and H Vandenbussche ‘European Union Anti-dumping Cases Against China --- An Overview and Future Prospects With Respect to China’s World Trade Organization Membership’ (2002) 36 JWT 1125, 1132. (‘EU Anti-dumping Case against China’)
83 S Hix The Political System of the European Union (Macmillan, Basingstoke and London 1999) 206. (‘The Political System of the EU’)
84 Wenig (n 54) 788. (‘The EC’s Anti-dumping System’)
85 Ibid 789.
representatives from all 27 MSs participate. The Commission proposals are discussed and scrutinized from a MS's perspective in the ADC. It is only after all aspects (ranging from the technical to the procedural) have been discussed "in considerable detail and appropriately addressed" that "a measure is finally adopted by the Council which has the final say on definitive measures". 86

In terms of the Council voting, when qualified majority voting was replaced by simple majority in the Basic Regulation, it is argued that the Commission has been given a better opportunity to "utilize the conflicting interest of MSs and introduce proposals representing the Community's interest as a whole". 87 It is more difficult for MSs to obtain sufficient votes to constitute a "blocking minority", since in the Community of 27, at least 14 votes were needed to successfully block an AD measure. In particular, since 20 March 2004, abstentions count as support, i.e. unless 14 MSs oppose definitive measures, "a Commission proposal to impose AD measure will stand". 88 Consequently, the scope for interest groups to lobby different MSs to vote in accordance with their wills was very limited. From an inter-institutional perspective, the Council normally only rubberstamped the Commission's proposal. This reflected a broader trend in the EU decision-making: the Commission's leadership capacity in the European Integration process gained on popular recognition. 89 Along with the tendency that more and more policy sectors are converted to the European level, the Commission could adopt a so-call "package-deal" approach, where "every member state has to agree some undesirable policies in return of other favourable measures". 90 As to AD proceedings, although there were always some MSs voting against the Commission's proposal, they are no longer able to block the Commission's proposal in most cases.

If one considers there is a general conflict of interest between the Commission and MSs in adoption of many AD measures, there are even bigger conflicts between different MSs on this issue. The emergence of a north liberal bloc and a south protectionism block is clear from the statistics concerning the voting pattern among MSs in the ADC and the

86 Ibid.
87 Vermulst (n 37) 105. ('The 10 Major Problems')
88 Ibid.
89 George and Bache (n 78) 245. ('Politics in the EU')
90 Ibid 236.
Chapter V

Council. The Northern European states, including Scandinavia, the United Kingdom, Germany, and the Netherlands, had tended to vote against the imposition of duties, particularly for products which are used as components and/or inputs for secondary manufacturing. Conversely, countries of Southern Europe (France, Spain, Portugal, Italy and Greece) almost invariably vote for the Commission’s proposals. Thus the ADC becomes the place where different interests of MSs “clash and are, possibly, reconciled with each other". Wherever the forum is, conflicts of MSs have never disappeared.

The last layer of control is the judicial review from European Courts. As characterized as “absence of meaningful judicial review on substantive issues” by leading practitioners, the detail of AD cases in the European Courts is to be discussed in the following section.

2.3 The Judicial Review of Community AD Rules

While the discussion of previous two sections demonstrated two basic trends which heavily influenced the evolution of the Community AD regime - the development of legalization in the multilateral system and the checks and balance within the EC system, the same themes can also be found in European Courts’ case law on AD. On the one hand, the Courts have to address to EC-specific questions, such as locus standi of relevant parties and the principle of good administration. On the other hand, the Courts have been inevitably engaged in reviewing substantive issues of AD regulations. Therefore, most AD cases involved two aspects: an EC law aspect and a GATT/WTO law aspect.

With regard to the EC law aspect, the general impression is that the Courts have been “less enthusiastically intervening in favour of parties suffering detriment through EC AD initiatives, if compared to the aid given to those who sought to enforce MSs commitments to Community objectives”. Two possible explanations are frequently discussed in the literature: relatively strict requirements concerning the locus standi for

---

91 European Commission, Information Note on the Community’s Anti- Dumping Instrument and Practice (January 1998), Appendices 7A-7C
92 Wenig (n 54) 789. (‘The EC’s Anti-dumping System’)
93 Vermulst (n 37) 107. (‘The 10 Major Problems’)

161
an action for annulment of a Regulation and the evident reluctance to intervene in the administrative actions involving complex economic judgements of the Community institutions. As argued, the Courts adopted “a more liberal and generous approach to the standing of private parties and are more prepared to double-check the work of the Commission and the Council as far as the observance of procedural rules is concerned”. 95

The first contestable issue under the EC law in the early AD cases is the standing of natural or legal persons to challenge AD measures. Since the judicial review of EC AD or anti-subsidy measures is most frequently sought through an action for annulment under Article 230 EC, the applicants have to prove their direct and individual concerns under a particular Regulation in the first place. For many years it was doubtful which party would have standings to challenge Community AD measures. Over years, the ECJ’s jurisprudence has developed to the point where, as a general rule, complaints, exporters and importers have standings. 96 In each case, it is still necessary to consider whether or not the measure in question is of direct and individual concern to the applicant.

In terms of the standing of complainants, the ECJ confirmed in cases, such as Timex and FEDIOL, that complainants would have the right to challenge a regulation imposing definitive duties and a decision not to initiate an investigation or terminating a proceeding without the imposition of measures. 97 In other words, the ECJ considered that a complainant would have standing where it is alleged that the Community institutions have disregarded any of the rights conferred to them by the Basic Regulation. Moreover, in Timex, the ECJ also admitted the standing of a main domestic manufacture, although it was not a formal complainant but one of the Community producers on whose behalf the complaint was lodged. 98

The ECJ also confirmed the standing of foreign exporters and related importers. In Allied Corporation, the ECJ ruled that foreign exporters are entitled to challenge the imposition of provisional or definitive AD duties regardless of whether or not they are specifically named in the challenged regulation, provided that they were concerned by the

95 Vermulst and Waer (n 4) 161. (‘EC Anti-dumping Law and Practice’)
96 Van Bael and Bellis (n 6) 467. (‘Anti-dumping and Other Trade Protection Laws’)
97 Case 191/82 EEC Seed Crusher's and Oil Processors' Fed'n (FEDIOL) v Commission [1983] ECR 2913. (FEDIOL)
98 Ibid, Timex.
preparatory investigation. Moreover, when the export price is determined on the basis of a constructed export price, related importers involved in the construct export price determination will have standing.

The situation is less straightforward with respect to unrelated importers and traders. Until Extramet, independent importers had no standing to bring a direct action for the annulment of AD measures. In Extramet, the ECJ, in a departure of its previous case law, ruled that an independent importer had standing to bring a direct action against AD measure under a very special circumstance of that case – Extramet was individually concerned by the contested measure insofar as it established “the existence of a set of factors constituting a situation peculiar to it and distinguishing it from all other traders”. The later development of CFI jurisprudence, however, suggested a discontinuation and a returning of strict interpretation of the notion of “individual concern”.

The second issue in the judicial review of Community AD measures under the EC law is the standard of review European Courts applied. The Courts have been widely recognized as very reluctant to seriously consider substantive challenges to administrative determinations – a signal of “excessive deference to the Community institutions”. In other words, the Courts have generally shown themselves rather unwilling to intervene in substantive details of investigation conducted by the Commission, unless there has been an infringement of an essential procedural requirement, most of which are related to the principle of good administration. Beyond essential procedural arguments, the level of review is less clear, i.e. the extent to which the institutional discretion is subject to review by the Courts is unclear. The two cases discussed below demonstrate the unclear position of the Courts.

100 Ibid. Also, Ball Bearing (n 13).
102 Ibid, para 17.
103 For example, Case C – 50/00 Union de Pequenos Agricultores v Council [2002] ECR I-6677. (Union de Pequenos Agricultores)
104 Vermulst (n 37) 107. ('The 10 Major Problems')
In 1995, one year after AD cases were transferred to the CFI, the CFI delivered its first judgement in the area, *NTN Corporation and Koyo Seiko*. In its judgement, the CFI first repeated the ECJ’s funding in Nakajima that “provisions in the basic regulation must be interpreted in the light of Article VI of the GATT and the 1979 Anti-dumping Code.” It went on to look closely at the wording of Article 3 (6) of the 1979 AD Code and Article 4 (1) of the Basic Regulation in terms of the determination of injury and the facts presented in the contested regulation about injury. After thoroughly examining the factors on which the Council based its finding of injury, the CFI found several paragraphs of the Council’s statement were “incomplete, inaccurate or insufficiently supported”, so that they are “not sufficient to justify a finding of threat of injury within the meaning of Article 4 (1) of the basic regulation, a term which must in any event be interpreted in the light of the 1979 Anti-dumping Code and in particular Article 3 (6) thereof”. The CFI referred to *FEDIOL* and *Timex* to confirm that it “may not intervene in the appraisal reserved to the Community authorities by the basic regulation but must exercise its normal power of review over a discretion granted to a public authority”. The CFI concluded that because of misleading or inaccurate statements of the Council, the contested Regulation should be annulled.

Two months later, the CFI delivered another judgement brought by one of the applicants in *NTN Corporation and Koyo Seiko* against the Council, *Koyo Seiko*. The applicant again challenged the determination of injury in a provisional regulation. The result and the reasoning of the CFI was, however, quite different with the *NTN Corporation and Koyo Seiko*. In particular, when the applicant condemned the Council’s assessment in terms of other factors which might contribute to the injury and the Council admitted that its statement on this issue was inaccurate, the CFI held that although certain parts of the provisional regulation is “indeed inaccurate”, “the underlying reasoning

---

106 Ibid para 65.
107 Ibid para 66, 67 and 75.
108 Ibid para 76, 79, 82 and 106.
109 Ibid para 113.
110 Ibid para 115.
adopted by the Community institutions in the regulation at issue proved to be correct".\footnote{Ibid para 99.} It then concluded that although the wording of the provisional regulation was misleading, “that inaccuracy in no way affected either the lawfulness of the regulation at issue or the reasoning underlying it”.\footnote{Ibid 105.} The application of annulment was therefore dismissed.

Different results of these two cases indicate certain degree of uncertainty in the Courts’ review. The CFI seems to adopt an approach to examine whether the procedural wrongdoing of the Commission results in the unlawfulness of the regulation contested. If procedural defects are not manifested, the CFI seem unwillingly to annul the regulation in question simply because the Commission did not rigidly follow the procedure.

With respect to WTO law, although the Courts consistently deny the direct effect of GATT/WTO rules in the Community legal order, due to the multilateral nature of AD rules, it appear that the Courts are more willing to consider the WTO AD rule and jurisprudence in reviewing Community AD measures. In other words, the WTO law has been largely used as “an aid in interpreting a range of EC legal instruments”, including “both EC domestic law, such as secondary legislation and general principles of law, and international agreements to which the EC is a party”.\footnote{F Snyder ‘The Gatekeepers: The European Courts and WTO Law’ (2003) Common Market Law Review 40, 313, 320. (‘The Gatekeepers’) } The ECJ had admitted in \textit{Petrotub} that the Basic Regulations are intended to transpose into the Community law as far as possible the rules contained in GATT/WTO AD Codes or Agreement, so when they were called to examine those controversial issues, such as the determination of dumping and injury, they were obliged to do so in light of the GATT/WTO rules, following the \textit{Nakajima} principle.\footnote{Case C-76/00 \textit{Petrotub and Republica v Council of the European Union} [2003] ECR I-89, para 54-58.} In this case, the applicant complained Community institutions did not provide an adequate statement of reason to its practice of zeroing. Therefore, although as Advocate General Jacobs stated, the practice of zeroing was not itself an issue in the proceeding, the WTO jurisprudence in this issue, inter alia \textit{EC-Bed Linen}, did provided a broader “multilateral background” for this case.\footnote{Petrotub Opinion of Advocate General, para 18.} The ECJ held that once Article 2.4.2 of the ADA is transposed by the Community, “the specific requirement to state reasons laid down by that provision can be considered to be
subsumed under the general requirement imposed by the Treaty for acts adopted by the institutions to state the reasons on which they are based". The CFI erred in law in considering that there was no need to take into account Article 2.4.2 of the ADA for the purposes of determining whether the Council has fulfilled the obligation to state reasons. As the contested regulation "does not contain even the merest reference to the second symmetrical method of Article 2.4.2 or the slightest explanation as to why that method would not enable significant differences in the result", the ECJ held that the Council did not satisfy the requirements of the obligation to state reasons and the contested regulation was declared invalid.

In sum, generally speaking, few challenges to Community AD measures were successful due to restricted requirements of standing and the significant deference to Community institutions. As the time being, procedural issues, inter alia locus standi, were settled and less contestable. The deference to the Community institutions and the respect of discretion are still an important baseline of reviewing AD measures, but more and more influences from multilateral AD rules and jurisprudence was found in the Court's recent rulings, such as Petrotub. In this case, the ECJ, at the first time, linked, or "subsumed", a provision of the ADA to an EC administrative principle (statement of reason) – a step forward to integrate multilateral rule or norms into the "interpretation" of the Basic Regulation.

3. WTO-plus Features of the EC AD Regime

Although Community institutions always claim that it is their intention to abide by GATT/WTO rule, it is commonly recognized that certain WTO-plus features characterize the EU AD regime. These WTO-plus provisions enable Community institutions to retain certain control over its AD policy. Consequently, they are of practical significance since they can change the result of AD investigations. A typical example is that in an investigation where dumping and injury are both found, the investigation can be terminated without imposing duty on the ground of the Community interest.

117 Ibid 58.
118 Ibid 52.
119 Ibid 51 and 86.
These WTO-plus features are not developed in vacuum. For example, Snyder described the development of “nonmarket economy”, one of the major WTO-plus features of EU AD rules, as follows: 120

[T]he principle factors giving rise to this new legal idea were changes in the international anti-dumping repertoire, specific European ideas about comparative economic systems, and perceived new economic threats during the 1970s. They were combined by the European institutions, notably the Commission, in an international context marked by a substantial decline in previous US hegemony. Taken together, they legitimated a more protectionist anti-dumping policy, of which the legal concept of “nonmarket economy” was an important part.

Therefore, in this section, for each WTO-plus feature, an outline of relevant WTO rules and jurisprudence is provided to set the background and a detailed description of the EC rules and practices is followed in order to demonstrate how these WTO-plus provisions allow the Community institutions to achieve the balance among different interests within the EU. Three WTO-plus features of EU AD rules, injury margin, community interest and anti-circumvention, are examined in detail. Another main WTO-plus feature, namely the EC’s methodology towards non-market economy countries, will be examined in the next chapter, in the context of the EU-China AD disputes. Case laws are cited to the extent possible to demonstrate how WTO-plus provisions work in practice.

3.1 Injury Margin

3.1.1 Lesser Duty Rule in the WTO

As a general rule, the ADA welcomes investigating authorities to impose AD duty less than the margin. Article 9.1 ADA reads as follows:

... The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

120 Snyder (n 4) 420. ("Nonmarket Economy")
In addition, Article 9.3 ADA provides that: "[T]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2".

Through a combined reading of Article 9.1 and Article 9.3 ADA, it results that the absolute maximum of antidumping duties in an investigation is the dumping margin, irrespective of the injury suffered by the domestic industry. The minimum is whatever is needed to eliminate such injury. It is, however, at the discretion of an investigating authority to decide whether to apply the lesser duty rule, given that the application of this rule is "desirable". This is even the case when the product concerned is originating in a developing country.

In US – India Plate, India argued that the US Department of Commerce ("DOC") should have considering applying the "lesser duty rule" as one form of constructive remedies under Article 15 ADA. However, the Panel disagreed with India by stating the following: 121

India suggests that the USDOC should have considered applying a lesser duty in this case, despite the fact that US law does not provide for application of a lesser duty in any case. We note that consideration and application of a lesser duty is deemed desirable by Article 9.1 of the AD Agreement, but is not mandatory. Therefore, a Member is not obligated to have the possibility of a lesser duty in its domestic legislation. We do not consider that the second sentence of Article 15 can be understood to require a Member to consider an action that is not required by the WTO Agreement and is not provided for under its own municipal law.

Also, as a best endeavours clause, the application of lesser duty rule in an investigation does not justify the breach of obligations deriving from other provisions of the AD Code, as the GATT Panel concluded in EC- Audio Cassette. 122 The EC in this case claimed that certain claims made by Japan were not properly before the Panel because of lack of a legal interest on the part of Japan. The EC argued that even there is a ruling in Japan’s favour on certain points, it would not affect the level of the anti-dumping duties imposed on Japanese imports due to the application of the lesser duty


rule. Consequently, no nullification and impairment had been suffered by Japan.\footnote{Ibid, para 15.} It also argued that revocation of the entire Regulation in question on the ground that part of the dumping calculation was conducted in an Agreement-inconsistent manner was inappropriate due to the effect of the "lesser duty rule".\footnote{Ibid, para 282.}

The Panel did not directly address the EC's argument that since it had imposed a duty pursuant to the lesser duty rule which was far lower than the margin of dumping it had determined to exist, the alleged errors of the EC in calculating a margin of dumping could have had no impact on the level of duties imposed in this case.\footnote{Ibid, para 342.} Instead, the Panel stated that Japan had submitted calculations to the Panel relating to one exporter in support of its view that the margin of dumping, calculated in a manner consistent with the Agreement, would have been lower than the duty imposed and the EC did not submit any counter calculation. The Panel stated that its task was to "review the legal and factual bases for the imposition of an anti-dumping duty in light of the obligations of the Agreement, and not to reach its own determination regarding the existence and extent of dumping".\footnote{Ibid, para 345.} Therefore, the Panel concluded that it was not precluded from considering Japan's claims regarding "zeroing" and "asymmetry" on the grounds that Japan lacked a "legal interest" in those claims.

Nevertheless, the application of lesser duty rule has been considered as an example of a constructive remedy by the Committee of Anti-dumping Practice. In its "Recommendation regarding Annual Reviews of the Anti-Dumping Agreement", adopted on 27 November 2002, the Committee made the following recommendation:\footnote{WTO Committee of Anti-dumping Practice, Recommendation regarding Annual Reviews of the Anti-Dumping Agreement, 27 November 2002, available at: http://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_05_e.htm.}

\emph{Developed country Members should include, when reporting anti-dumping actions in the semi-annual report that Members are required to submit under Article 16.4, the manner in which the obligations of Article 15 have been fulfilled. Without prejudice to the scope and application of Article 15, price undertakings and lesser duty rules are examples of constructive remedies that could be included in such Members' semi-annual reports.}
The Panel in *EC-bed Linen* further confirmed the status of lesser duty rule as one form of constructive remedy by stating that:\[128\]

*The Agreement provides for the imposition of anti-dumping duties, either in the full amount of the dumping margin, or desirably, in a lesser amount, or the acceptance of price undertakings, as a means of resolving an antidumping investigation resulting in a final affirmative determination of dumping, injury, and causal link. Thus, in our view, imposition of a lesser duty, or a price undertaking would constitute "constructive remedies" within the meaning of Article 15. We come to no conclusions as to what other actions might in addition be considered to constitute "constructive remedies" under Article 15, as none have been proposed to us. (Footnote omitted)*

In this case, the EC did consider the imposition of a lesser duty, although it concluded that such a duty would not be appropriate since the injury margin exceeded the dumping margin for each company.\[129\] Therefore, the Panel did not base its finding that the EC failed to act consistently with its obligations under Article 15 ADA on the ground that the EC did not apply the lesser duty rule. Instead, the Panel stated "the failure of the European Communities to respond in some fashion other than bare rejection, particularly once the desire to offer undertakings had been communicated to it, constituted a failure to 'explore possibilities of constructive remedies'"\[130\].

Hence, WTO rules and jurisprudences establish that, firstly, the application of the lesser duty rule is entirely at the discretion of an investigating authority, even in the context of Article 15 ADA concerning investigations against imports from developing countries; secondly, the application of lesser duty rule does not justify the application of methodologies such as “zeroing” which may result in miscalculations of dumping margin and finally, the application of lesser duty rule qualifies as one form of constructive remedies under Article 15 ADA that a developed country Member could offer to a developing country Member. Yet, Article 15 ADA imposes no obligation to any Member to actually apply such rule. Instead, the obligation is to actively “consider” the possibility


\[129\] Ibid, footnote 90.

\[130\] Ibid, para 6.230.
of offering a remedy, which can be the application of lesser duty rule, prior to the imposition of a definitive duty.

3.1.2 Injury Margin Calculation in the EU

The EU incorporated the lesser duty rule in various provisions of the Basic Regulation and made it mandatory for the Community institutions to apply this rule in provisional measures, definitive measures and price undertakings. Article 9(4) of the Basic Regulation provides the legal basis for the application of lesser duty rule in definitive AD measures. It states that:\textsuperscript{131}

\textit{Where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council, acting by simple majority on a proposal submitted by the Commission after consultation of the Advisory Committee [...]. The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry.}

Article 7(2) of the Basic Regulation addresses the issue of applying the lesser duty rule in provisional measures. The provision reads as follows:\textsuperscript{132}

\textit{The amount of the provisional anti-dumping duty shall not exceed the margin of dumping as provisionally established, but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry. (Emphasis added)}

In addition to the application of the lesser duty rule in provisional and definitive measures, Article 8(1) of the Basic Regulation requests the application of the lesser duty rule in determining the level of a price undertaking. Article 8(1) reads as follows:

\textit{Investigations may be terminated without the imposition of provisional or definitive duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices, so that the Commission, after consultation, is satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping and they should be less than the margin of dumping if such increases would be adequate to remove the injury to the Community industry.}

\textsuperscript{131} Article 9 (4) of the Basic Regulation.\textsuperscript{132} Article 7 (2) of the Basic Regulation.
According to the above provisions, the level of an AD duty should be equal to either to the margin of dumping or to the amount necessary to remove injury sustained by the Community industry, whichever is lower. The Community institutions are obliged "to calculate an injury margin in order to determine the level of duty that is adequate to remove the injury". The same lesser duty rule applies in connection with price undertakings.

Although no guideline has been provided by either the ADA or the Basic Regulation to foresee how to determine the level of an AD duty at which injury is removed, the Community institutions established in practice the methodologies to calculate this level of duty by examining the level of price underselling or price undercutting, as the case may be, of dumped imports.

It is now common practice to calculate the injury margin by comparing the price of exporter with the price of the Community industry for the product concerned. More specifically, the calculation of injury margin is normally based on this formula:

\[
\frac{\text{Price of the Community industry} - \text{Exporter's CIF price}}{\text{exporter's price 'CIF Community frontier'}} \times 100
\]

The price of the Community industry corresponds to either "the actual selling price" (in the case of "price undercutting") or the "target price", namely "the price level at which Community producers could sell their product in the absence of dumped imports" (in the case of "price underselling"). The exporter's CIF price can be the actual export price or the export price after adjustment in order to take into account customs duties paid for the imported product, SGA costs and profits of imports, difference in physical characteristics, etc. The difference between the (target) price of the Community industry and the exporter's price, i.e. the price underselling amount, represents the injury amount. Such injury amount is converted into an injury margin by expressing such amount as a percentage of the exporter's price at a "CIF Community frontier, duty unpaid" level.

During the last several years, after some investigations in the past where "some injury margins were based on the undercutting and some others were based on the

133 Müller etc (n 28) 404 (EC Anti-dumping Law')
134 Ibid, 405.
135 Ibid.
136 Van Bael and Bellis (n 6) 306. ('Anti-dumping and Other Trade Protection Laws')
underselling margin", the practice of Community institutions as a matter of course is "to opt for the underselling calculation of the injury margin".\textsuperscript{137} This is due to the fact that the exporter’s price is often not comparable to the actual price of the Community industry because the latter have been depressed as a result of dumped imports and are no longer made at a profitable or, more accurately, the injury-eliminating level

The target price is a fictitious price, calculated in order to set the price levels that could ensure the complainant industry's long-term viability.\textsuperscript{138} In other word, target price is an injury-eliminating fictitious price of the Community industry. It is usually computed by increasing the manufacturing costs of the Community producer by the selling, general and administrative expenses of the same Community producer and a reasonable profit.\textsuperscript{139} The determination of such reasonable profit is linked to the level of profit the Community industry could have achieved if imports were not made at dumped prices. However, this is a highly theoretical exercise, as no one can really tell at which price levels the domestic industry could have been selling in the absence of dumped imports. In addition, non-dumped imports may equally bring about price depression on the market, as they could be much lower than the desirable price of the Community industry. The existence or not of dumping is irrelevant to the level of injury and vice-versa. Furthermore, the target price of the Community industry is defined by reference to this industry's own cost data and viability prospects (in order to define a proper profit margin ensuring viability) and has nothing to do with whether imports are dumped or not. The existence of dumped imports causing injury forms the grounds on which an injury margin must be calculated within the EC and not a methodological ground for calculating such injury margin.

In \textit{EFMA vs Council}, the CFI clarified the level of "reasonable profit" as follows:

"[...] the profit margin [...] must be limited to the profit margin which the Community industry could reasonably count on under normal conditions of competition, in the absence of dumped imports", but "it would not be consistent with Article 4.1 and 13.3 of the basic regulation to allow the Community industry a profit margin that it could not have expected if there were no dumping".\textsuperscript{140}

\textsuperscript{138} Müller etc (n 28) 409. (EC Anti-dumping Law')
\textsuperscript{139} Ibid.
\textsuperscript{140} Case T-210/95, European Fertilizer Manufacturer's Association (EFMA) v Council of the European Union [1999] ECRII-3291.
Apart from the establishment of a "target price", two further questions arise where the number of export transactions is more than one (which is invariably the case). The first question is how transactions should be treated where their export price is higher than the Community industry's target sale price (a fictitious injury-eliminating price) adjusted in cases where the injury margin is based on price undercutting, or the Community industry's "target price" adjusted, in case of price underselling. The question is similar to the problem of "zeroing" in the dumping margin calculation, in cases where export transactions are not dumped, i.e. they generate negative dumping. After EC-Bed Linen, the practice of zeroing has been slapped by the WTO and as a result, that the EU no longer practices zeroing under any dumping comparison methodology.

Despite the complete abolition of zeroing in the dumping margin calculation, the Commission's practice in injury margin calculations remains to zero all transactions where the export price is higher than the Community industry's price. Although "zeroing" practice in dumping margin calculation has been ruled as WTO-inconsistent by the panels and the AB on various occasions, no WTO report has ever addressed the WTO consistency of applying zeroing in injury margin calculations. This is probably due to the fact that the lesser duty rule is not a mandatory practice in the ADA and, thus, WTO Members' voluntary lesser duty rule practice involving zeroing cannot be judged as WTO-incompatible.

The second question is how the result of all individual transactions concerned should be weighted when averaging them in order to calculate a single injury margin. In cases where a producer exports only one model to the Community, the weighted average export price is normally calculated by dividing the overall value by the overall quantity exported. If the exporter exports more than one model of the product concerned, export transactions concerning a model for which negative injury was found (i.e. sold at a higher price than the EC target price) will automatically be put at zero in the overall weighing. This practice is identical to the "zeroing" practice previously practiced by the EC as a

---

141 Vermulst and Graafsma (n 137) 31. ('EC Dumping and Injury Margin Calculation')
142 Ibid.
comparison methodology in dumping margin calculations that the Commission used to conduct before *EC-Bed Linen*.

A particular problem arises if the models imported into the Community and those produced by the Community industry have different characteristics. Since the Commission’s practice is to “limit the undercutting and underselling comparison to those models produced by the Community producers, which are directly comparable to the imported models”. 143 In case of complex products involving a variety of different characteristics, where it is troublesome to select the Community industry’s models that are identical to the imported models in order to ensure fair comparison, the Commission usually groups the products by closely resembling types and compares on a type-by-type basis. Adjustments for differences in physical characteristics are also not to be excluded.

In order to ensure fair comparison, the Commission will also typically proceed to adjustments needed for rendering the prices comparable. 144 For example, selling cost allowances should be either deducted or left in the price on both sides: imported products and sales by the Community industry. As to the Incoterms applicable, the comparison will typically take place as follows: CIF price of imports with EXW price of domestic sales of the Community industry. The rationale for this comparison is that the customer should be located somewhere in between the Community border (cf. CIF price of imports) and the factory gates of the Community producers (cf. EXW price of the Community industry).

To sum up, the Community Institutions’ methodology on assessing the injury amount and calculating injury margins is evolving through its previous practices. Now it is a common practice to calculate injury margin by comparing the exporter’s prices and the target price of the Community industry. Moreover, although “zeroing” practice in dumping margin calculation has been abolished by the Community institutions, it is still applicable in injury margin calculation where more than one transaction is made or more than one model is compared.

143 Müller et al (n 28) 407 (EC Anti-dumping Law)
144 Ibid.
3.2 Community Interest

3.2.1 Public Interest in WTO law

The term "public interest" has never been used in the ADA. The absence of relevant provisions dealing with "public interest" in the WTO agreements results in a lack of consensus among WTO Members on the following three questions: 1) which domestic parties' interest should be considered as part of "public interest"; 2) what economic factors should be taken into account and how investigating authorities should weight them; and 3) what kind of procedure should be inserted into national legislations to allow the interest of various parties to be considered.

Although there is no direct answer for the above three questions in the ADA, two ADA provisions, Article 6.12 and Article 9.1, are generally considered to be of relevance to the application of so-called "public interest" test in an AD investigation. Article 6.12 ADA warrants the opportunity for representations regarding the evidence of dumping, injury and causality from industrial users and consumer organizations of a WTO Member to be considered by investigating authorities.

It has to be noted that Article 6.12 ADA contains only procedural requirements to an investigation authority. It provides no guideline on how the information submitted by industrial users and consumer organizations should be considered and imposes no substantive obligation to investigating authorities.

Another provision, Article 9.1 ADA, has also been frequently cited as the basis of the inclusion of a "public interest" test in an AD investigation.\(^{145}\) Many WTO Members who are in favour of including a new "public interest" provision in the ADA consider Article 9.1 as the legal basis for such new provision, essentially on the ground that Article 9.1 recognises the full discretion of an investigating authority to not to impose a definitive measure or not to impose a measure to its fullest extent in the circumstances that it deems appropriate.\(^{146}\)

However, Article 9.1 ADA does not impose any obligation to a WTO Member to establish a domestic procedure to consider representations made by those economic

---

\(^{145}\) It is common understanding in the WTO/EC literature that Article 9.1 ADA is the basis of the EC's Community interest test. See Van Bael and Bellis (n 6) 293 ('Anti-dumping and Other Trade Protection Laws').

176
actors who are affected by a definitive AD measure. This is to say, similar to the lesser duty rule, the “public interest” test is non-mandatory in the ADA and whether and how to consider public interest in an AD investigation is entirely at the discretion of an investigating authority.

3.2.2 Community Interest Test in the EU law

Among the WTO-plus characterizations of the EU AD law, the implementation of a public interest test, namely the Community interest test, in AD and CVD investigations is one of the most important features of the EU system. This addition test, as is believed, makes the EU “the only WTO Member that consistently applies the public interest test in an elaborated and systematic way” and has “considerably restricted the use of anti-dumping and anti-subsidy instruments in order to balance the interests of various economic actors”.

With seven sub-paragraphs, Article 21 of the Basic Regulation provides the legal basis for the application of a public interest test under the EU law, both in terms of procedural requirements and substantive criteria.

Article 21 (1) sets out the main purpose of the Community interest test, namely to decide “whether there are compelling reasons not to impose anti-dumping measures in a given proceeding, despite a finding that dumped imports caused material injury to the Community industry”. It directs the Community institutions to give “special consideration” to the need to “eliminate the trade distorting effects of injurious dumping”, as well as the need to “restore effective competition” in the Community market. After the examination, measures are not taken only when the Community institutions can “clearly conclude that it is not in the Community interest to apply such measures”.

---

146 For example, Paper from Hong Kong, China and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Economic Effects of Anti-dumping Measures, TN/RL/GEN/142, 6 June 2006; and Paper from Canada, Procedures from Adversely Affected Domestic Interested Parties, TN/RL/GEN/111, 21 April 2006.
149 Sinnaeve (n 147)157. (‘The Community Interest’)

177
Commentators consider that in essence, the test carried out by the Community institutions is a negative one, namely measures may not be applied only where it can be clearly concluded that it is not in the Community interest to apply such measure. The Community institutions are therefore working under the presumption that measures will be applied "whenever dumped imports caused material injury to the Community industry". Only if compelling evidence leads to the conclusion that the imposition of a measure would not be in the overall interest of the Community, the Community interest test can provide the legal basis for not imposing duties. The non-imposition of measures on the basis of the Community interest is therefore an exception departing from normal rules and occurs only in special circumstances.

Procedural Aspects of the Community Interest Test

Article 21 (2) clearly defines the parties whose interests should be examined and who enjoy various rights in the Community interest test. It provides that complainants, importers and their representative associations, representative users and representative consumer organizations have the right to make themselves known and provide information to the Commission.

It is of the view of some commentators that this list is non-exhaustive and "parties with an economic interest in the product under investigation are meant to be part of the analysis". Within this logic, it is a standing practice of the Commission to also consider the interests of other economic actors, such as the suppliers of the Community industry or traders of the product concerned, on a case-by-case basis, although they are not explicitly mentioned in Article 21 (2). By contrast, parties with non-economic interests, such as environment organizations, would not be considered as interested parties under Article 21.

Article 21 (2), (3), (4) and (6) specifies the procedural rights of the parties concerned. Those rights include: right to make submissions, right to consult non-

150 Ibid and also Müller (n 28) 501. ("EC Anti-dumping Law")
151 Van Bael and Bellis (n 6) 294 ("Anti-dumping and Other Trade Protection Laws") and Vermulst and Waer (n 4) 370 ("EC Anti-dumping Law and Practice")
152 Article 21 (2) of the Basic Regulation.
153 Sinnaeve (n 147) 158 ("The Community Interest") and Müller (n 28) 505. ("EC Anti-dumping Law")
154 Ibid.
confidential files; right to respond to submissions; right to request a hearing; right to make submissions on the application of a provisional duty; right to inspect other parties’ submissions on the application of a provisional duty and responses thereto; and right to have a disclosure of final findings.

Article 21 (2) also lays down that the parties concerned may only submit information on the Community interest within the time limit specified in the initiation notice. It is common practice that the time limit specified in the notice of initiation of AD, an interim review, or an expiry review is 40 days from the date of publication of the notice.

Substantive Assessment of the Community Interest

With respect to substantive assessments, the Community interest analysis consists, first, of an evaluation of the likely consequences both of applying or not applying the envisaged measure on the Community industry and other interested parties as defined by Article 21 of the Basic Regulation, and second, the weighting and balancing of different interests at stake.

To conduct the first step analysis, the Commission normally goes one step up or down in the chain of economic operators involved in dealing with the product concerned to access the likely effect of taking or not taking the measure to those operators. Hence, in addition to relevant interests of the Community industry, relevant interests of the upstream industry, users (downstream industries) and sometimes consumers are taken into account.

In comparison with other operators likely to be directly and economically affected by the measure, such as upstream and downstream industries, the standing of consumer organizations in a Community interest test is less straightforward. For products not commonly sold at the retail level, the CFI clarified in BEUC v Commission that consumer organizations are to be involved only if they can demonstrate an “objective link” with the product concerned. Consequently, in an investigation not concerning consumer product, a customer organization does not automatically qualify as an interested party, yet

156 Sinnaeve (n 147) 159 and 160. (‘The Community Interest’)

179
not automatically excluded either. An "objective link", for example, by demonstrating "the likely effect of a cost increase of the product concerned on the price of further processed products which are sold at the retail level", has to be established on a case-by-case basis to justify the standing of a consumer organization in a Community interest test.

In the second step of the analysis, the Commission weights all the interests of different parties and balances them against each other. The Commission usually checks whether the negative impact on other interested parties would not be clearly disproportionate to the advantages that the imposition is likely to bring to the Community industry. In practice, as observed by leading practitioners, in the vast majority of cases, the Commission considers "the positive effects of measures for the Community industry outweigh the possible negative effects on users and consumers". Therefore, unless overwhelming evidences suggest that the imposition of a measure would "not bring any benefit to the Community industry, for instance, in case where the Community industry is not viable anymore and the imposition of measures could not be expected to allow its return to viability", the imposition of measures will not be considered as disproportionate.

Due to methodological difficulties, the Commission does not quantify each economic factor in the process of weighting different interests. Therefore, even though various interests are put in balance, they are not weighed against each other in a mathematical equation. In other words, "the assessment of Community interest is not a cost-benefit analysis in the strict sense and the Commission enjoy a large degree of discretion to conduct a qualitative appreciation instead of a quantitative analysis".

Under the current practice, interests that can be taken into account in the Community interest test vary from one interested party to another. For the Community industry, a number of factors are normally recognized as relevant by the Commission in a Community interest test, such as "to prevent the future aggravation of an already precarious situation for the Community industry or even of its disappearances"; "to

---

158 Sinnaeve (n 147) 159. ("The Community Interest")
159 Vermulst and Waer (n 4) 371. ("EC Anti-dumping Law and Practice")
160 Sinnaeve (n 147) 159. ("The Community Interest")
prevent investment and rationalization in the sector concerned being put in jeopardy”; “to safeguard sufficient earnings of the Community industry in order to fund necessary levels of investment”; “to prevent the loss of the Community industry’s competitiveness in terms of technology”; “to prevent the distortion of competition arising from dumping on the Community industry” and so on. 162

Similarly, certain arguments put forward by upstream industries and users are frequently taken into account by the Commission. Protection of upstream industries in the Community, especially if a loss of technology is imminent, can be an argument that supports the imposition of a measure, whereas the points made by users with regard to a potential price increase to be borne by the user industry and difficulties to make sure sufficient supply of the product concerned in the Community can put significant weights on the argumentation in favour of termination of an investigation without the measure imposed.

For example, in Synthetic staple fibres of polyesters (PSF) case, the Commission terminated the investigation due to the strong opposition of the user industry. 163 In particular, the Commission considered the following arguments made by users: shortage of supply, price increases PSF, cost impact of the proposed measure, price increases for downstream products and consequence for employment in the Community market. The Commission, after taking into account the submissions made by various interested parties, concluded that: 164

The overall advantages to be gained by the Community industry must be weighted against the probable disadvantages, in particular for users and, to some extent for consumers. The volume and the variety of supply offered by Community producers are deteriorating. This is due, among other reasons, to the industrial conversion of Community producers from PSF to other products (for example la Seda de Barcelona) and the financial difficulties of Tergal. There is a supply problem in the Community market for certain types of fibres and the Community producers cannot or are not willing to make the necessary efforts to meet the demand. Furthermore, it is likely that the imposition of duties will lead to substantial price increases of certain types of

---

161 Müller (n 28) 501. (‘EC Anti-dumping Law’)
162 Ibid.
164 Ibid, retrial 40.
PSF which are not available in sufficient quantities in the Community. Moreover, account should be taken of the fact that certain users of PSF (in particular the bedding industry) have very low profit margins and will have to pass on to consumers any price increase in PSF or abandon their activities in case competition from third countries would not allow them to increase their prices.

Other important considerations for the Commission in a Community interest test include the elimination of trade distorting effects resulting from dumped imports and to restore effective competition in the Community market. In this regard, the Commission normally rejects the argument from exporters, users or consumers that the adoption of AD measures would exclude producers outside the Community to supply the Community market.

However, in two situations, the Commission examines the competition argument with special care. The first one is when “the possible danger of reducing competition or even creating a monopolistic market structure as a result of the imposition of an anti-dumping measure”. 165 The second one is where the Community industry has been the subject of measures sanctioning anti-competitive behaviours. 166 Yet, the mere existence of these situations does not automatically result in the termination of the investigation on the ground of Community interest.

Reflections on Green Paper

On 6 December 2006, the Commission adopted a Green Paper for Public Consultation on Europe’s Trade Defence Instruments in a Changing Global Economy (“Green Paper”) to launch reflections on the application of the EU Trade Defence

---

165 For example, in Potassium chloride case, the form of the measure has been changed on the ground of Community interest. Council Regulation (EC) No 969/2000 of 8 May 2000 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia and Ukraine, OJ L 112, 4, recitals 123 and 125.

Instruments ("TDI") in the light of "emerging new realities from the application of TDI as well as in a context of globalisation". 167

Two issues related to the concept of "Community interest", namely the weighting of different EU interests and the form, timing and duration of AD measures, were raised in the Green Paper consultation. These issues were emanated from recent high profile investigations involving consumer products, such as footwear 168, in which the concept of "Community interest" took the centre stage.169 During these investigations, stakeholders started to question whether the balancing of interests should be rethought or whether the scope of analysis of Community interest should be broadened, in order to reflect the reality of the changing global economy.

For instance, in the footwear case, strong divisions among different stakeholders in the EU and among MSs are provoked. The EU leather footwear sector is featured by its significant degree of outscoring. Although many EU companies still maintain their production in Europe, a large number of them have outsourced their production to China and Vietnam, while keeping other functions, such as design, in the EU. These outsourcing companies are subject to the AD measures and suffer negative consequences from them. Similarly, consumers suffer the price increase as a result of the imposition of the measure. Therefore, questions were raised on "whether and how to better reflect the interests of those outsourcing EU companies and consumers in an anti-dumping investigation". 170

During the process of the Green Paper consultation, possible changes to the existing law and practice of Community interest have been discussed in more than 500 submissions made by interested parties around the world.171 Three proposed changes, which have already been practiced by the Commission in certain cases but have not yet been codified, draw most of attentions.

170 Sinnaeve (n 147)162. ('The Community Interest')
The first proposed change is to codify the Commission's practice in modulating the level of AD measures. The current Community interest test leads to a either positive or negative conclusion, namely a measure should be imposed or not. The Commission therefore considers that more flexibility might be appropriate in particular for cases where the balance of interest is not a clear-cut and a lower level of duties might alleviate the negative impact on certain economic operators.\textsuperscript{172}

The Commission's practice in footwear case was an experiment on modulation of the level of AD measures. In this case, the Commission adopted a new approach to incorporate the concept of a non-injurious import volume in the calculation of injury margin.\textsuperscript{173} The Commission calculated new underselling margins based on the size of non-materially injurious import value amounts. For this purpose, the cumulated import values of 2003 were regarded as non-materially injurious. These import values were then allocated to China and Vietnam on the basis of their share of import volumes during 1 April 2004 – 31 March 2005. These adjusted non-injurious import values were subsequently expressed as a percentage deducted from the underselling margin to arrive a revised lower underselling margin. Consequently, and also as a result of the lesser duty rule, the definitive AD duty was lower than the dumping margin and injury margin calculated under "normal" rules.

Despite potential positive effects of the flexibility to modulate the level of AD measures, it is argued that its implementation may reveal a number of difficulties.\textsuperscript{174} Lack of criteria or methods to define the modulation is one of the most serious risks. The idea of modulation is criticized as dangerous since it will make the outcome established by precise and sophisticated methodology of dumping and injury margin to be modulated according to non-precise parameters.

The second hotly debated proposal is the shorter duration of AD measures. The application of AD measures for a shorter period of time than the normal five-year period is rare, but not exceptional. For example, in footwear case, the Commission experimented with a definitive AD measure for two years instead of the normal five years

\begin{flushright}
\textsuperscript{172} Sinnaeve (n 147) 175. ("The Community Interest")
\textsuperscript{173} Footwear Regulation (n 168) recitals 301.
\textsuperscript{174} Sinnaeve (n 147) 176. ("The Community Interest")
\end{flushright}
as stipulated in the Basic Regulation in order to gain sufficient political support from MSs.\textsuperscript{175}

This practice of the Commission has been confirmed by the CFI in \textit{Cecom v. Council}.\textsuperscript{176} In this case, the CFI held that a shorter duration of measures provided by Article 11 (2) of the Basic Regulation is allowed, since Article 11 (2):

\begin{quote}
...\textit{must be structured as allowing the Council a discretionary power to fix at less than five years the period of application of definitive anti-dumping duties adopted following a procedure for the review of the measures initially adopted if, ..., such a limitation best serves to protect the differing interests of the parties to the procedure and maintain the equilibrium between those interests which the basic regulation seeks to establish.}
\end{quote}

However, the legitimate and long-standing practice of the Commission has not yet been codified in the Community law and no guideline has been provided to clarify how shorter duration of AD measures can be applied in each investigation.

The third proposal concerns the possibility of excluding certain product types from the application of AD measures in its efforts to balance the interest of producers, importers, retailers, distributors and consumers. Again, the case best demonstrated the Commission's experiment is the footwear case. In the course of the investigation, the Commission excluded, both at the provisional stage and the definitive stage, \textit{Special Technical Athletic Footwear} from the product scope on the ground that STAF has distinctive technical features.\textsuperscript{177}

The proposal to allow certain flexibility to exclude certain product types from the application of AD measures received less criticism than other proposals, as it is easier to operate. However, it has been pointed out that the main difficulty of this idea is "to have higher risk of circumvention".\textsuperscript{178}

In conclusion, the EU's Community interest test is unique among WTO Members in the sense that it establishes a systematic and balanced instrument to look into the wider economic impact of TDI and consider whether the application of a measure is in the "public interest" or not. In applying the Community interest test, the Commission

\textsuperscript{175} Ibid.
\textsuperscript{176} Case T-232/95, Committee of European Copier Manufactures (Cecom) v. Council of the European Union [1998] ECR II-2679.
\textsuperscript{177} Footwear Regulation (n 164) recital 15.
exercises its wide discretion and makes an overall appreciation under the principle of proportionality. In general, the practice shows that the current threshold is very high for concluding that the negative effects of measures would be disproportionate and an investigation should be terminated on the ground of Community interest. However, as discussed in Chapter II, the Community interest test provides the Community institutions certain flexibility to balance the interest of different economic operators in the EU. The proposals discussed in the Green Paper consultation may achieve more transparency, effectiveness and workability, but may equally risk opening the door to a politicization of TDI. Therefore, it remains to be seen how the Commission will address these challenges in its future practice. 179

3.3 Anti-circumvention

3.3.1 Anti-circumvention in the WTO

Circumvention issues arise when an exporter, which is subject to an AD duty, avoids the duty by misclassifying or altering the goods, transshipping them through a third country as a product of that country or sending components of the subject product to the importing country for assembly into a finished product that otherwise would be subject to the dumping duty. 180

Forms of circumvention can include:

- Carrying out the final assembly in the importing country or a third country;
- Altering the product without economic justification so that it falls under a different tariff code, which is not subject to dumping measures;
- Transshipment via other third countries;
- Repackaging;
- Re-channelling the sales via exporters with lower duties;
- Incorrect origin declarations;
- Importation of parts or knock-down kits.

---

176 Sinnaeve (n 147) 176. (‘The Community Interest’)  
180 Van Bael and Bellis (n 6) 482. (‘Anti-dumping and Other Trade Protection Laws’)
Neither the Kennedy Round nor the Tokyo Round AD Codes contained any express provisions on circumvention. The introduction of rules on this subject in the Uruguay Round was discussed as one of the negotiation objectives of the EU and the USA but finally failed to be adopted. The ‘Dunkel draft’ contained separate provisions for importing country circumvention and third country circumvention.\(^{181}\) Article 12 provided that, “under specific circumstances, anti-dumping duties could be extended, in the case of circumvention operations consisting of assembling or completing a like-product in the importing country from components originating in the country subject to the duties”.\(^{182}\)

The USA found these draft provisions insufficient, so they filed a proposal to extend AD duty orders in the case of third-country and minor alternation circumventions.\(^{183}\) The majority of GATT Contracting Parties rejected this proposal and it was impossible to find a compromise in this respect. As there was no strong political interest in the adoption of multilateral anti-circumvention provisions, no final agreement was reached and Article 12 of the Dunkel Draft was deleted.\(^{184}\)

Nevertheless, the Final Act embodying the result of the Uruguay Round of multilateral trade negotiations issued the following decision which stated: \(^{185}\)

> Noting that while the problem of circumvention of anti-dumping duty measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, negotiators were unable to agree on a specific text,

\(^{181}\) GATT Secretariat, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNCW/F/W-21 (Dec. 20, 1991) (‘Dunkel Draft’).

\(^{182}\) Ibid Article. 12.1. These specific circumstances include cases in which it has been established that: 1. the product assembled/completed had to be a like-product with regard to a product which was subject to a definitive dumping measure; 2. the assembly/completion operation had to be carried out by an entity which was related to the original dumping exporter; 3. the components used in the assembly/completion operation had to be, directly or indirectly, sourced by the dumping exporter; 4. the assembly/completion operation had to have started or expanded substantially after the initiation of the anti-dumping investigation; 5. the totally costs of the components used in the assembly/completion operation had to be no less than the 70% of the total cost of all the parties used in the operation, with the exception that no anti-dumping measure should be extended if the value of the assembly/completion operation was greater than 25% of the ex-factory cost of the like-product; 6. there had to be evidence of dumping concerning the difference between the priced of the product in the importing country and the normal value of the product when subject to the original definitive anti-dumping duty; and 7. there had to be evidence that the extension of the anti-dumping measures to the components was within the scope of the definite anti-dumping duty in order to prevent the injury to a domestic industry with regard to the like-product.


\(^{185}\) WTO Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations LT/UR/A/1, 15 April 1994.
Mindful of the desirability of the applicability of uniform rules in this area as soon as possible,

Decide to refer this matter to the Committee on Anti-Dumping Practices established under that Agreement for resolution.

3.3.2 Anti-circumvention in the EU AD Law

Despite the lack of international rules, several WTO Members have adopted anti-circumvention legislation, including the EU. These Members interpreted the declaration as permitting individual Members to adopt provisions unilaterally, pending a multi-lateral solution within the framework of the WTO. The Council stated in *Polyethylene terephthalate film* that, as “the Final Act of the Uruguay Round contained a Decision on anti-circumvention referring the matter to the Committee on Anti-Dumping Practices and as this decision was made knowing that several WTO members already had their own anti-circumvention legislation, the European Community interpreted it as permitting individual members to adopt or maintain provisions in this respect, pending the adoption of multilaterally agreed rules”.

Provisions on anti-circumvention were first introduced by the EC in 1987 and were aimed at covering assembly operations within the Community where a very high proportion of components used were from countries whose exports AD measures had been imposed. The provision was added as paragraph 10 to Article 13 of Regulation 2176/84 and it was designed to counteract EC circumvention. Third country circumvention was dealt with under the rule of origin.

Seven anti-circumvention proceedings were initiated between 1987 and 1989. All of them concerned Japanese manufacturing operations in the Community. Article 13(10) fell into disuse, however, after a GATT Panel found that this provision was not consistent with the Community’s obligations under the GATT, in Panel Report *EEC- Parts and Components*.

186 Australia, Canada, Japan, Mexico, New Zealand, as well as the EU and US have adopted anti-circumvention measures.


When implementing the result of the Uruguay Round, the EC introduced new circumvention procedures into the Basic Regulation that were subsequently amended in 2004.

Article 13 (1) of the Basic Regulation provides that:

Circumvention shall be defined as a change in the pattern of trade between third countries and the Community or between individual companies in the country subject to measures and the Community, which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence of injury or that the remedial effects of the duty are being undermined in terms of prices and/or quantities of the like product, and where there is evidence of dumping in relation to the normal values previously established for the like product, if necessary in accordance with the provisions of Article 2.

Article 13(2) expressly deals with cases of circumvention with regard to assembly. In accordance with paragraph 2 of the provisions, operations involving assembly operations may be caught where:

a) The operation started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation and the parts concerned are from the country whose exports are subject to measures; and

b) The parts constitute 60% or more of the total value of the parts of the assembled product; however circumvention will not be considered to be taking place where the value added to the parts brought in, during the assembly or completion operation, is greater than 25% of the manufacturing cost; and

c) The remedial effects of the duty are being undermined in terms of the prices and/or quantities of the assembled like product and there is evidence of dumping in relation to the normal values previously established for the like or similar products.

Given the variety of circumvention practice, the EC's practice in the anti-circumvention is in fact established by a number of case law, as discussed below, which provides meaningful interpretations on the wording of the Basic Regulation.
'Change in the pattern of trade'

A change in the pattern of trade is not defined in the Basic Regulation but it is the consistent practice of the Commission to interpret it as a decrease in imports of the product concerned from the country whose exports are subject to measures and an increase in imports from a third country not so subject, or an increase in imports of parts of the product subject to measures although it can also cover the alteration of a product without being economically justified. The following cases illustrate this interpretation of the Commission.

In Certain tube and pipe fittings of iron and steel (China)\textsuperscript{192}, a change in the pattern of trade was established on the basis that exports to the Community from cooperating exporters in the third country increased by 300% and in relation to the non-cooperating exporters, the increase of imports from the third country was substantially higher.

In Tungsten electrodes\textsuperscript{193}, some companies were assigned individual AD duty rates, which were significantly lower than the residual duty rate. The Commission stated that where the exports by the companies benefiting from lower individual duty rates increase significantly in volume after the imposition of the measure, such an increase in volume could be considered as constituting in itself a change in the pattern of trade due to the imposition of the measure within the meaning of Article 13(1) of the Basic Regulation.

In Ring binder mechanisms\textsuperscript{194}, AD duties were extended where duties imposed on imports of Ring Binder Mechanisms (RBM) from China were being circumvented by means of transshipment through Vietnam. The replacement of exports of RBM from China with imports of the same product from Vietnam was considered to be a clear change in the pattern of trade, irrespective of whether the exports from China were replaced immediately or only after a certain time period. The Commission stated that the mere fact that exports from China ceased prior to the start of operations in Vietnam did

\textsuperscript{191} Article 13 (2) of the Basic Regulation.
not have any impact on the conclusion as to whether or not there had been a change in the pattern of trade.

'Practice, process or work'

A variety of activities may potentially be considered as a 'practice, process or work', such activities can range from simple 'operations' such as transshipment, repackaging, wrong origin declarations, imports of knockdown kits, reversible product alterations, slightly altered goods, to more complex activities. For example, in Ring-binder mechanisms, a contravening 'practice, process or work' was considered to have occurred where both machinery and equipment used in Vietnam had been transferred from related companies dealing with RBMs which were located in China or previously in Indonesia. The transfer of equipment took place immediately prior to the imposition of definitive measures. In the original case, the investigation revealed, that during the investigation period (IP), the entirety of the Vietnamese exporter's needs for RBM components were manufactured in related companies located in the China and in some cases the components were imported in semi-assembled form, such as half rings assembled with the blade.

Also, in Integrated electronic compact fluorescent lamps (CFL-i), the assessment of circumvention was undertaken by analysing successively whether there was a change in the pattern of trade between the third countries and the Community by the consignment of the product concerned via third countries. It was found that imports from China more than halved after the imposition of measures in 2001, i.e. decreased from 85 million units in 2000 to 37 million units in 2002. Although imports recovered partially after 2002, their level in 2004 was still more than 20% below the level before the imposition of measures, yet imports from Vietnam, Pakistan and the Philippines, which were practically non-existent prior to 2001, increased significantly after the imposition of measures. It was also found that the resurge in the Chinese imports in 2003 and 2004 was mainly due to an increase in exports from companies subject to no or low duties. Exports from China to Philippines had increased consistently since 2000 and

195 Ibid.
dramatically in 2003, at the same time import statistics from the Philippines showed consistently higher volumes than export statistics from China to Philippines. The Commission therefore concluded that the difference between the statistics corresponded to the volumes exported from Philippines to the Community, indicating that goods may have been transshipped from China via Philippines to the Community.

'Insufficient due cause or economic justification'

The Commission normally investigates the criterion of "insufficient due cause or economic justification other than the imposition of the anti-dumping duty" for the change in the pattern of trade by examining import patterns, the functions of the product concerned, their marketing, packaging, and expected uses.\(^{197}\)

In Coumarin,\(^{198}\) the company stated that the main reason for exporting coumarin originating in China was because of the insecurity due to the risk of strikes in India. However when the Council considered the facts of the case and concluded that the product re-exported to the Community retained its Chinese origin and that the further cost of purification was not significant, it did not consider the threat of strikes as a significant justification.\(^{199}\)

The economic justification criterion was accepted in Imports of certain zinc oxides originating in the People's Republic of China by imports of certain zinc oxides consigned from Kazakhstan.\(^{200}\) In this case, AD duties had been imposed on zinc oxides originating in China from 2002. It was alleged that there was a change in the pattern of trade shown by a significant increase in imports of the same product from Kazakhstan. It was accepted that Kazakhstan showed reasonable economic grounds, other than the imposition of definitive duties, for the change in the pattern of trade.

\(^{197}\) Ibid, recital 15.
\(^{199}\) During the IP, the volume of coumarin which was subject to further purification by Atlas (the cooperating Indian company) was 75% of Atlas' total production volume, the remaining volume of 25% represented genuine production in India. In addition, the CN code used for the coumarin imported from the PRC was the same as the one used for the further purified coumarin re-exported by Atlas to the Community. The product re-exported to the Community thus retained its Chinese origin. The cost of further purification of coumarin was not high, it consisted of a slight modification and the value of coumarin lost in the purification process was incurred at the moment the product was purchased, it could not thus be considered as a cost generated by the purification process itself.
"Remedial effects of the duty are being undermined in terms of prices and/or quantities"

Notwithstanding the existence of circumvention, in order to extend duties to the third country exporters, the Commission must also establish that remedial effects of the duty are being undermined in terms of the prices and/or quantities of like product being exported. The un-dumped export price of the original product (export price, plus customs and duties) is compared with the average EC sales price of the new product. An estimate is then made of the extent to which imports of the new product have replaced those of the original.

In Integrated electronic compact fluorescent lamps (CFL-i)\(^{201}\), in order to assess whether the imported products had, in terms of quantities and prices, undermined the remedial effects of the measures in force on imports of CFL-i from China, quantities and prices to unrelated customers in the Community of imports consigned from the three countries under investigation were used where available. The prices so determined were compared to the injury elimination level established for Community producers in the original investigation.

"like product"

The product which is allegedly circumventing the duties must be like to the product concerned the measures. The term ‘like product’ is defined in Art. 1(4) of the Basic Regulation as a product that is identical, i.e. alike in all respects, to the product under consideration, or in the absence of such a product, another product which has characteristics closely resembling those of the product concerned.

In Polyester staple fibre/polyester filament tows\(^{202}\) the Commission noted that polyester staple fibre (PSF) and polyester filament tows (PFT) shared the same basic physical and chemical characteristics. The only difference between PFT and PSF resulted from a simple cutting process. The imported PFT was therefore viewed as a product which has been slightly altered in order to avoid the AD measure currently applicable to PSF. Differences of this nature, which could be created or eliminated by

minor alterations, could put into question the fact that PSF and PFT were essentially the same product. In any event the import of PFT ultimately ended up as a product which was not only alike but identical to the imports subject to the original investigation, i.e. PSF. Thus, although the alteration process from PFT into PSF was not as such an assembly operation, it was of such a nature that it had to be considered as a practice which was carried out to avoid the measures in force.

In *Gas-fueled, non-refillable pocket flint lighters and disposable refillable pocket flint lighters*\(^{203}\), the Commission found that an ineffectual addition to a product does not affect its likeness. In that case, disposable, refillable flint lighters from China were identical in all respects to the disposable, non-refillable flint lighters covered by the AD duty, except for the addition of a refill valve which was determined to be an ineffectual addition for a lighter which in practice was perceived and treated by consumers as disposable. It was therefore determined that these were alike to the lighters subject to the existing measure.

**The 60% value of parts test and the 25% value-added test**

In determining the existence of circumvention, the Commission also carries out a 60% value of parts test and a 25% value-added test. In *Electronic weighing scales (Japan, Singapore) assembled in the Community*\(^{204}\) the circumvention consisted of imports of parts, which were used for the assembly in the Community of electronic weighing scales, for use in the retail trade which incorporate a digital display of the weight, unit price and price to be paid, whether or not including a means of printing this data (REWS). The investigation established that an assembly operation was conducted by three Dutch companies (CTW, Keylard and Digi Nederland) acting in close cooperation and belonging to the same corporate group. The value of the REWS parts was established on the basis of the purchase price of the parts when delivered to the assembler's premises, that is, on an into-factory basis.

In view of the fact that CTW, Keylard and Digi Nederland were found to be related and functionally interdependent in the assembly of REWS, they were considered to be part of a single economic entity, together constituting the assembler. Consequently, parts were in principle identified and their value determined when first entering this single economic entity. Intra-group transfers of parts and semi-finished or finished products were therefore disregarded for purposes of this value added test.

In this case the Commission established that the prices charged by the exporters of REWS parts to the assembler were at arms length, i.e. above cost of production plus a reasonable profit for parts produced by the exporter or above the exporters' own purchase price and allowing for a reasonable profit. It also established that the value of parts originating in Japan and Singapore was found to be higher than 60% of the total parts value of the assembled REWS during the IP.

In the same case, the average value-added established during the IP was found to be above the 25% threshold and consequently, the assembly operation could not be considered to constitute circumvention in the sense of Article 13. The value-added to the parts was generally determined as the sum of labour costs and factory overheads incurred within the single economic entity. Selling, general and administrative expenses, profit and parts which allegedly acquired Community origin were in principle not considered to be value-added within the meaning of Article 13(2) (b) of the Basic Regulation. The value-added thus established was then expressed as a percentage of the manufacturing cost which consists in essence of the value of all parts, based on the into-factory, at arm's length purchase prices of these parts, plus the value-added to the parts during the assembly or completion operation.

In conclusion, the Basic Regulation allows the Community institutions to extend AD duties to third country producers if circumvention is found. Despite the absence of multilateral framework, the EU established a comprehensive legal framework to cover assembly, third country circumvention and minor modification. The EU is reportedly a main user of anti-circumvention rules. For example, the EC initiated 13 anti-circumvention investigations against Chinese producers from 2003 to 2005, which

---

205 Y Yu 'Circumvention and Anti-circumvention in Anti-dumping Practice: A New Problem in China's Outbound Trade (2007) 41 JWT 1015, 1023. ('Circumvention in AD Practice')
Chapter V

represented 76 percent of all anti-circumvention investigations initiated by WTO Members against China in that period of time.\textsuperscript{206} Hence, the anti-circumvention provision in the Basic Regulation provide an additional layer of protection to the Community industry after the imposition of AD measures.

4. Conclusion

The rise of legalization in the international AD regime provides a rich arena for examining the intervening effect that multilateral legalization has on domestic systems. The evolution of EU AD regime in the past sixty years illustrates how the phenomenal rise of legalization in the trade regime interacts with other factors and shapes the AD regime of Europe.

The development of EU AD regime is an illustrative example of both the effect of legalization process and the limit of this process. Although most of the EU AD instruments essentially repeat the basic principles of GATT/WTO AD rules, a close look of them suggests that those instruments are in fact a mixture of the transposition of multilateral rules and the compromise between interests of different MSs, Community institutions and economic operators. Similarly, although the administration of AD policy in the EC has always been regulated and constrained by multilateral rules, the Commission, as the key player, is preliminarily bound by its commitments under the EC law and has to balance divergent interests of different institutions, MSs and economic operators in the EU. The European Courts, key players in the EU trade policy-making, have a more ambivalent attitude towards multilateral legalization – they to a large extent admitted the impact of multilateral legalization on the EC’s trade policy-making, yet they refused the idea to completely substitute European legalization by multilateral legalization. Hence, the impact of multilateral legalization on the EC system is complex and sometimes unintended.

Meanwhile, the EU introduces a number of WTO-plus provisions to provide the Community institutions more flexibility to handle uncertain economic and political situations and balance domestic interests. Injury margin calculation, Community interest,

\textsuperscript{206} WTO Anti-dumping semi-annual reports from WTO Members, available at http://www.wto.org
anti-circumvention and non-market economy provisions are representatives of WTO-plus features of the EC system. These provisions, although indeed offering additional protection to the Community industry from time to time, do not necessarily favour domestic protectionists all the time. Instead, the key function of these provisions is to give addition flexibility to the system so that the imposition of AD measure can be "a balanced act".
Chapter VI Consequences of Legalization: China's AD-related WTO Activities

1. Introduction

This chapter examines another consequence of legalization, namely the growing impact of legalization on the utilization of the DSM, in particular in terms of the institutional and legal capacity building of WTO Members. The rise of legalization in the GATT/WTO, demonstrated by tightened obligations, greater precision and stronger delegation, creates strong incentives for WTO Members to utilize the DSM for the purpose of protecting trade interests and strategically advancing trade claims. One commentator describes the trend as "[W]hen officials from different countries disagree about trade policy, some say 'see you in Geneva!' meaning 'see you in court'".¹ Although it is arguable that this formal legal representation is just one aspect of the trade regime and there are many other ways that the GATT/WTO law affects global governance, it is commonly agreed that "[T]he crowning achievement of the WTO, ..., is its codified legal obligations and a dispute settlement system more active than any other international tribunal".²

It is, however, not an easy task to use the more "legalized", and consequently more complicated, DSM to the full extent. Various reasons are propounded for lack of effective uses of the DSM by some WTO Members, in particular the developing countries.³ These reasons include "a lack of sufficient awareness of WTO rights and obligations; inadequate coordination between the government and private sector; difficulty in determining the existence of undue trade barriers and the feasibility of legal challenge; financial and human resource constrains in lodging dispute; and an oft-cited lack of political will to pursue trade disputes due to fear that trade preferences or other forms of assistance will be withdrawn, or some form of retaliatory action will be taken, ...".⁴

---


² Ibid.


With respect to resources and institutional arrangements, it is observed that under the current DSM, "it can take up to three years to settle a dispute and cost more than half a million dollars in legal fees, as well as requiring significant time commitment for a bureaucracy that may already be severely under-resourced". With the inequality of power and size of WTO Members in mind, it is not difficult to understand the rationale behind the claim that "[N]otionally equal litigation rules provide unequal opportunity for WTO Members".

Apart from the institutional arrangements, the uneven expansion of legalization in covered agreements also presents limitations to the DSM in the sense that it is not always feasible to challenge a foreign trade barrier in the DSM, due to the low level of obligation or precision in the corresponding covered agreement.

Among all potential factors listed above, this chapter discusses two aspects of the capacity building which allows a WTO Member to effectively utilize the DSM: the institutional capacity building which involves the coordination between governments and private sectors and the legal capacity building which involves the legal capacity of a WTO Member to challenge undue trade barriers when there is no "good" textual basis in covered agreements. As discussed in Chapter II, the formal is referred to as "engaging the private sector" in this study and the latter is as "litigating the unlitigatable". These two factors are selected because they are closely related to the discussion of legalization in previous chapters. Engaging the private sector describes the institutional response of WTO members to a higher level of legalization of the GATT/WTO system, in particular in terms of delegation, whilst litigating the unlitigatable is a more direct response of tighter obligation and greater precision in the GATT/WTO agreements. Moreover, the difficulty that WTO Members experience when litigating matters where the degree of legalization in the covered agreement is low illustrates, in another way, that the uneven expansion of legalization in the GATT/WTO imposes restraints on the effective utilization of the DSM.

China has been chosen as the example of the empirical study for its unique position on AD issues. China has been the main target of AD measures worldwide for almost two decades. The WTO Secretariat reported that during the period 1 July-31

5 Ibid, 1.
6 Ibid, 3.
December 2007, China remained the most frequent target of new investigations initiated worldwide, with 40 initiations directed at its exports out of 101 new investigations.\(^8\) Economists argue that China as a target of foreign AD measures is “much more because of the intrinsic economic features of her exported products (differentiation level and oligopolistic markets) than because it was not a WTO Member”.\(^9\)

Legally speaking, the specific, but vaguely drafted, non-market economy (NME) provisions in the WTO accession protocol of China (the Protocol) makes it even more difficult for China to minimize its exposure to foreign AD measures and reduce the damages.\(^10\) As well documented, “starting in the 1960s, the GATT multilateral negotiating rounds began to define more specific international rules of the game, but a variety of more localised process played essential roles as forces of change”.\(^11\) This describes exactly the evolution of NME methodologies towards China.

At the time that China accessed the WTO, although lack of specific rules in the multilateral agreements such as the ADA concerning the NME, major trading partners ensured that the methodologies towards NME countries in their national laws were legitimated by specifically articulated provisions in the Protocol. These NME provisions therefore have a noticeable low level of obligation and precision, which grants wide discretions to investigating authorities in AD investigations involving Chinese products. In this sense, Chinese exporters have to continue their fights in both legal and commercial battles after China’s accession to the WTO when import-competing industries in a WTO Member use AD instruments to segment the world markets and deny the access of Chinese products.

Against this background, it is no doubt that by the time China was accepted as a full member of the WTO, chief negotiator Long Yongtu ranked stricter AD rules second among China’s priorities in the WTO. China’s five years experience in the WTO, nevertheless, presents a mixed picture. On the one hand, the much-hoped WTO


\(^9\) Messerlin (n 7) 35. (‘China in the WTO’)


Membership of China does not significantly reduce the number of foreign AD measures targeting it for the past five years. The ambiguous language in the Protocol concerning NME creates obstacles for China to challenge many of the practices of investigating authorities in the DSM. On the other hand, China has taken steps forward to build up both institutional and legal capacity in order to strategically utilize the DSM to protect its interests in foreign AD investigations. China’s story therefore tells how a relatively new WTO Member struggles to deprive benefit from the rise of legalization in the trade regime, and at the same time fights the restraints imposed by the uneven expansion of legalization.

This chapter proceeds as follows. Section 2 depicts how the Chinese government engages private sectors in AD cases, by examining the Regulation on Responding to AD Investigations and ad hoc public-private networks formed in previous AD cases. Section 3 outlines the GATT/WTO rules on NME and national laws of the EU and the US towards NME. Section 4 examines the legal arguments in the US – Coated Paper, the only WTO case initiated by China thus far. Section 5 concludes the chapter.

2. Engaging Private Sectors to Build Up Institutional and Legal Capacity

2.1 Background of China’s AD Problems

From the late 1990s, Chinese exporters were becoming formidable competitors in the world market, exporting a wide range of products, from inexpensive textiles, televisions and micro ovens, to higher priced electronic equipment. In 2006, China’s trade volume reached $1 760.69 billion, up by 23.8% and trade surplus reached $177.47 billion, up by 74%. The huge trade surplus resulted in intense trade frictions between China and its trading partners and increased political pressure for trade protection in major trading partners. The Ministry of Commerce (MOFCOM), which is responsible for China’s trade policy, pointed out in its annual Foreign Market Access Report, “[W]ith the rapid growth of China’s economy and foreign trade, some of our trading partners and industry groups in those

——

countries are increasingly using various trade and investment barriers against Chinese products in order to protect their domestic industry and home market."

Among all foreign trade barriers, the (mis)use of the AD instrument by trading partners is one of the first major trade barriers that Chinese exports encountered. Since 1979, when the first AD case against China was initiated by the EC, for almost two decades, China has been the main target of worldwide AD investigations. After China’s accession, the MOFOM felt the pressure to take initiatives to actively utilize the WTO DSM to address AD issues in order to maintain market access abroad and advance China’s trade interests. It had two options: first, it can follow other large developing countries, such as India and Brazil, to aggressively initiate AD investigations against imports; and second, it can minimize its own AD use and invest its resources in effectively responding to foreign AD investigations in front of foreign investigating authorities and possibly in front of the DSM. With a huge trade surplus and strong export dependant industries at home, the Chinese government opted for the second one, by reducing the number of new initiations in the past few years and putting significant efforts on fighting foreign AD charges.

MOFCOM’s efforts focus on two areas: formally, it institutionalizes legal mechanisms to support exporters curtailing AD abuse of trading partners. In this regard, a Regulation has been promulgated and upgraded to effectively organize resources and to improve the response rate and the quality of cooperation of exporters in AD investigations targeting China. Informally, it worked closely with trade associations, enterprises and their lawyers to increase the awareness of AD rules. For example, as early as 2001, Shanghai People’s Municipal Government set up a professional, non-government consulting institution, the Shanghai WTO Affairs Consultation Centre, to provide legal and policy advice on WTO affairs, as well as

13 Ibid, 2.
14 For example, X Liu and H Vandenbussche ‘European Union Anti-dumping Cases Against China — An Overview and Future Prospects With Respect to China’s World Trade Organization Membership’ (2002) 36JWT 1125. (‘EU AD Case against China’) The author confirmed that from 1979 to 2002, China has been the most accused country in EU AD charges.
15 For example, as reported by WTO Secretariat, Chile, China, Colombia, Malaysia, Pakistan, and Chinese Taipei, each of which had reported new initiations during the second half of 2006, reported no new initiations during the corresponding period of 2007.
16 Non-cooperation or not sufficient cooperation in AD investigations was one of the major problems that China has in the EC AD cases. Ibid, 1135.
Chapter VI

2.2 Regulation on Responding to Anti-dumping Investigations

As discussed above, the MOFCOM exercises a formally legal tool to solicit industry support in advancing its AD agenda, namely “Regulation on Responding to Anti-dumping Investigations of Products Exported from China” (the Regulation). To help Chinese firms more effectively defend themselves in foreign AD investigations, the MOFCOM upgraded the Regulation in August 2006 and replaced the one issued in December 2001.

With 20 articles, the Regulation is relatively brief. It nevertheless clarifies rights and obligations of key players in responding foreign AD charges, including the MOFCOM, trade associations, and private firms. Article 2 of the Regulation provides that it is an obligation of exporting producers under investigation to actively respond to foreign AD investigating authorities. It also emphasizes the role of trade associations and gives more respect on market-based decisions of individual firms, while limiting the role of MOFCOM to providing key information and guidelines pertaining to AD procedures.

Unlike the previous version, the Regulation clearly states that each respondent has the right to decide how it wishes to respond to an investigating authority and to select its legal counsel. If a respondent believes it has been discriminated against during the investigation, the firm may file a complaint with the MOFCOM.

The MOFCOM, as the authority, is responsible for formulating policies to promote effective responses in foreign AD investigations. MOFCOM is also responsible for providing information to exporting producers under investigation.

---


20 Ibid, Art 4 and 6.

21 Ibid, Art 9.

22 Ibid.

23 Ibid, Art 5.

Chapter VI

Yet, it does not directly shoulder the responsibility of day-to-day coordination and organization of exporting producers in an AD investigation.

Article 4 and 12 provides that trade associations are playing key roles in responding to foreign AD investigations. They are responsible for, among others, building up databases to collect export data and trade remedy information; assisting firms on issues such as non-market economy, individual treatment and verification; organizing firms to participate in hearings and negotiations; providing assistance on negotiating price undertaking and making proposals to the MOFCOM if certain kind of government involvement is necessary; and finally assisting firms to seek judicial remedies in importing country.25 Trade associations are required to consult with the MOFCOM under certain circumstances, such as those involving large amount of exports and critical exporting markets or where the investigating authority acted discriminately.26

The emphasis of trade associations' role serves two purposes. First, by doing so, the leverage of individual Chinese firms in AD cases is expected to be improved and small- and medium-sized enterprises are allowed to enjoy downstream benefits from collaborations spearheaded by larger organizations. Although it is well-established in developed countries that firms can enhance their chances of successfully challenging foreign trade restrictions when they coordinate their activities through a trade association, Chinese firms rarely organized themselves and presented a united industry front through trade associations in previous AD proceedings.27 The Regulation aims to change this and brings collective benefits to Chinese firms. Second, through trade associations as middlemen playing diplomats' role', the MOFCOM can differentiate new public-private networks from state interference by not directly involving in a Chinese firm's market-orientation decision.

2.3 Ad hoc Public-private Networks in Responding to Foreign AD Investigations

In practice, the Chinese government, Chambers of Commerce (trade associations) and private exporters develop ad hoc networks to organize themselves in responding to foreign AD investigations.

25 Ibid, Art 4 and 12.
26 Ibid, Art 16.
27 Liu and Vandenbussche (n 14) 1125, ('EU AD Case against China')
The process of responding to a foreign AD investigation normally starts with the publication of the initiation of a foreign AD investigation by the MOFCOM in its website, *China Trade Remedy Information*. The relevant Chambers of Commerce then notifies its members who have been targeted in the investigation and organizes meetings to coordinate those exporting producers. Normally, the meetings are divided into two parts: the exporters firstly hold close door discussions to form a joint defence position and then invite outside counsels to make presentation on the legal aspects of the case. Exporters who are involved in the investigation are free to hire their own legal representatives and make submissions to the investigating authority. However, throughout the investigation, Chambers of Commerce and MOFCOM are working closely with targeted exporters to provide them with information and guidance.

In the meanwhile, the MOFCOM frequently involves WTO Affairs Consultation Centres to analyze underlying legal issues and “educate” potentially targeted exporters. Recognizing that “many Chinese exporters lack the knowledge of the trade rules or the financial resources required to defend their interests”, WTO Affairs Consultation Centres throughout the country develop mechanisms aiming to provide “practical assistance to Chinese manufacturers and exporters”. One project which Shanghai WTO Affairs Consultation Centre developed to help potentially targeted exporters is an early warning system. The system is described as follows:

1. In its first stage, the V 1.0 system covers 189 varieties of export goods in eighteen categories (mainly textiles, home appliances, steel and furniture) which are contained in the items accounting for some 60 per cent of China’s annual total exports to the United States. Registered companies receive information on the quantity, future prices and dumping margins of Chinese products exported to the United States. Companies can also obtain monitoring reports on US trade remedy measures, and receive training services to help them respond to anti-dumping investigations or charges.

After several years of effort, Chinese exporters are now more willing to play a better legal game in foreign AD investigations. This becomes a new trend of Chinese exporters participating in foreign AD investigations. For example, on 6 February 2006, eight Chinese firms involved in the EC’s footwear investigation voluntarily

28 http://www.cacs.gov.cn/
29 Gong (n 17) (Shanghai’s WTO Affairs Consultation Centre)
30 Ibid.
formed an *ad hoc* association to coordinate their activities and consolidate the industry position after the EU refused to give any of the thirteen sampled firms the market economy status. The association issued a Position Paper, which especially stated that it would support further government actions on this matter. Later, more than 200 Chinese firms joined this association and it was still functioning even after the final Regulation has been released by the EU. This move of the private sector indicates that Chinese firms are increasingly aware of the importance of organizing themselves and cooperating with the government in addressing their trade claims, echoing the thread of the Regulation.

In short, China’s institutional capacity building, which is represented by the emergence of a strong public-private network in responding foreign AD investigations, illustrates that the rise of legalization has an impact on the utilization of the DSM by, *inter alia*, mobilizing domestic export groups. As discussed in Chapter II, by increasing transparency and information available to domestic export groups, the legalization process provides strong incentives for pro-trade industries to utilize legal tools available to push the enforcement of trade agreements and maintain market access abroad. Chinese exporting industries therefore are keen to support the efforts of the Chinese government to tighten up AD disciplines at the WTO level.

The next section explores another aspect of the impact of legalization, namely the overall development of legalization, in particular tighter obligation and greater precision, provides strong incentives for WTO Members to litigate a wider range of matters in front of the DSM, including matters which are used to be “unlitigateable” since there were no “good” textual basis in the GATT/WTO agreements. Non-market economy (NME) is one of these “unlitigateable” issues and the next section focuses on China’s efforts to litigate it in the DSM.

3. China’s Efforts to Litigate the Unlitigatable: Non-market Economy (NME)

3.1 China’s WTO Accession Protocol and the Working Party Report

---

32 ibid.
This section provides a brief account of the origins of NME in the GATT/WTO and analyzes the relevant provisions in China’s WTO Accession Protocol (the Protocol) and the Working Party Report. It particularly discusses the scope of the exceptions provided in the Protocol and the Working Party Report when handling AD investigations involving Chinese products.

The special treatment of state-trading and non-market economy in the GATT/WTO has a long history - long before China emerged as a major player in international trade. Stemming from the idea that “free trade” only exists if trading partners operate “free markets”, essentially capitalist non-regulated markets, GATT Contracting Parties have made the distinction between market and NME since the very beginning of the GATT. The US Department of State defines NME in a glossary of trade terminology in The Language of Trade as follows:

**NONMARKET ECONOMY (NME) — A national economy in which the government seeks to determine economic activity largely through a mechanism of central planning, as in the former Soviet Union, in contrast to a market economy, which depends heavily upon market forces to allocate productive resources. In a nonmarket economy, production targets, prices, costs, investment allocations, raw materials, labor, international trade, and most other economic aggregates are manipulated within a national economic plan drawn up by a central planning authority. Hence, the public sector makes the major decisions affecting demand and supply within the national economy.**

GATT Contracting Parties, led by the US, considered that AD rules expressed in Article VI of the GATT should not apply to NME countries. This is based on the idea that comparing market prices on different markets would be meaningless when markets do not actually set the prices. For this purpose, an interpretative note was

---

For background on the legal concept of “non-market economy”, Snyder (n 11) and H Detlof and H Fridh ‘The EU Treatment of Non-Market Economy Countries in Anti-dumping Proceedings’ (2007) 2 Global Trade and Customs Journal 265 (‘EU Treatment of Non-market Economy’).

Ibid, Snyder, 381.


Snyder (n 11) 381 (‘The Origins of the Nonmarket Economy’) and Detlof and Fridh (n 33) 268 (‘EU Treatment of Non-market Economy’). Also, A Polouektov ‘Non-market Economy Issues in the WTO Anti-dumping Law and Accession Negotiations Revival of a Two-tier Membership’ (2002) 36 JWT 1. (‘NME Issues in the WTO AD Law’)
added to the first paragraph of GATT Article VI in 1955. The supplementary provision to Article VI reads as follows:

*It is recognized that, in case of imports from a country which has a complete or substantially complete monopoly of trade and all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purpose of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.*

It is argued that despite the fact that this interpretative note, in theory, could be applied only to countries where all prices are fixed by the State and it did not affirm the use of prices or costs in an surrogate country as the basis of normal value calculation, the provision remains the only reference to NME in the GATT/WTO agreements (with the exception of protocols of accession). Practitioners therefore argue that "[T]here are very few, if any, countries left where the government controls 'all' prices, thus any WTO Member is entitled to normal MES treatment under the WTO Anti-dumping Agreement, unless it has agreed otherwise".

China's accession of protocol is the most recent example that NME treatment is "agreed otherwise". Section 15 of China's Accession Protocol, entitled "Price Comparability in Determining Subsidies and Dumping", reads as follows:

*Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:*

*In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:*

---

38 Detlof and Fridh (n 33) 268. ("EU Treatment of Non-market Economy")
40 Paragraph 15 of the Protocol on the Accession of People’s Republic of China (1 January 2002) WT/ L/432. ("the Protocol")
(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

(b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.

(c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

This study considers that this Section is vaguely drafted. It touched upon two different but interrelated issues: (i) the establishment of market economy status of China as a whole, a particular Chinese industry or a particular Chinese producer and (ii) a special methodology to calculate dumping margin, if China as a whole or a
particular Chinese industry/producers cannot prove that they are operating under market economy conditions. It nevertheless provides clear answers to neither of them. It does not offer importing WTO Members any criteria on the establishment of "market economy conditions" in an investigation. Moreover, as observed, it does not "give any guidance as to which methodology can be used when a strict comparison with domestic prices or costs is inappropriate". Instead, it only gives the permission to an importing country to disregard Chinese domestic prices and costs in case it considers China cannot be treated as a market economy, i.e. if Chinese producers cannot demonstrate that market economy conditions prevail in the industry "producing the like product".

Concerned about "past measures taken by certain WTO Members which had treated China as a non-market economy and imposed anti-dumping duties on Chinese companies without identifying or publishing the criteria used, without giving Chinese companies sufficient opportunity to present evidence and defend their interests in a fair manner, and without explaining the rationale underlying their determinations, including with respect to the method of price comparison in the determinations", China tried to tighten up the discipline in the Working Party Report and obtained the following commitments from its trade partners:

In response to these concerns, members of the Working Party confirmed that in implementing subparagraph (a)(ii) of Section 15 of the Draft Protocol, WTO Members would comply with the following:

(a) When determining price comparability in a particular case in a manner not based on a strict comparison with domestic prices or costs in China, the importing WTO Member should ensure that it had established and published in advance (1) the criteria that it used for determining whether market economy conditions prevailed in the industry or company producing the like product and (2) the methodology that it used in determining price comparability. With regard to importing WTO Members other than those that had an established practice of applying a methodology that included, inter alia, guidelines that the investigating authorities should normally utilize, to the extent possible, and where necessary cooperation was received, the prices or costs in one or more market economy

---

countries that were significant producers of comparable merchandise and that either were at a level of economic development comparable to that of China or were otherwise an appropriate source for the prices or costs to be utilized in light of the nature of the industry under investigation, they should make best efforts to ensure that their methodology for determining price comparability included provisions similar to those described above.

(b) The importing WTO Member should ensure that it had notified its market-economy criteria and its methodology for determining price comparability to the Committee on Anti-Dumping Practices before they were applied.

(c) The process of investigation should be transparent and sufficient opportunities should be given to Chinese producers or exporters to make comments, especially comments on the application of the methodology for determining price comparability in a particular case.

(d) The importing WTO Member should give notice of information which it required and provide Chinese producers and exporters ample opportunity to present evidence in writing in a particular case.

(e) The importing WTO Member should provide Chinese producers and exporters a full opportunity for the defence of their interests in a particular case.

(f) The importing WTO Member should provide a sufficiently detailed reasoning of its preliminary and final determinations in a particular case.

To a certain extent, Paragraph 151 provides useful guidelines on the methodology of price comparability in case China is treated as a NME and reassures a few procedural rights of Chinese producers under investigation. Commentators consider this paragraph validates the approaches of the EC and the US in terms of using analogue country data to calculate dumping margin.43

To read Section 15 and Paragraph 151 together, one may reasonably consider that in handling cases involving China, an investigating authority is free: first, to establish criteria to determine whether market economy conditions prevailed in the industry or company producing the like product (NME criteria); and second, to establish a methodology to calculate normal value in case the industry or the producer cannot prove that market economy conditions prevail (NME methodology). In
applying the NME methodology, to calculate normal value, investigating authorities are allowed to disregard domestic prices and costs in China, but are required to use “the prices or costs in one or more market economy countries that were significant producers of comparable merchandise and that either were at a level of economic development comparable to that of China or were otherwise an appropriate source for the prices or costs to be utilized in light of the nature of the industry under investigation”. 44

In other words, Section 15 and Paragraph 151 provide two exceptions which give an importing WTO Member the freedom to depart from the normal practice under the ADA in cases involving Chinese products. The exception of NME methodology is more explicit as Section 15 is entitled “Price comparability in determining subsidies and dumping”, whilst the NME criteria exception is more implicit – Section 15 (d) states that China has to establish itself as a market economy “under the national law of the importing WTO Member”, which indicates that an importing WTO Member can set its own rules to make the NME determination and Chinese producers have to follow these rules.

In order to determine the scope of the two exceptions provided by Section 15 and Paragraph 151, two questions are raised. Firstly, should the interpretation of NME criteria be bound by the general interpretative approach of the WTO even if they are by nature domestic laws? Second, apart from the two exceptions, namely NME criteria and NME methodology, should an investigating authority be bound by general rules in the ADA in other parts of the investigation, such as sampling, the treatment of export price and the combined imposition of AD and countervailing duty (CVD)?

There are different views on these two questions. The traditional view, and the view taken by investigating authorities such as the US DOC and the Commission, is that the establishment of NME criteria and NME methodology are purely matters of national law and investigating authorities enjoy the entire discretion offered by national legislations. Some commentators conclude that “the WTO does not give much guidance on these issues, and member states are not forbidden to set their own parameters”. 45 So, the answers to both questions are no.

42 Cornelis (n 41) 109. ('China’s Quest for Market Economy Status')
44 Detlof and Fridh (n 33) 280. ('EU Treatment of Non-market Economy')
This study, however, considers that Section 15 and Paragraph 151 can be interpreted differently and offer a “yes” answer to the second question, whilst the WTO jurisprudence may confirm the wide discretion investigating authorities enjoy in interpreting the NME criteria.

With respect to the second question, the argument in favour of China can be that in a NME investigation, although the applicable law to establish the NME criteria and the NME methodology is national laws, other parts of the investigation, which are not covered by the exceptions provided by Section 15 and Paragraph 151, should be conducted in a WTO-consistent way. In other words, the whole purpose of Section 15 and Paragraph 151 is, in investigations targeting Chinese products, to provide an exception to normal value calculation methodologies set forth in the ADA and to give a WTO Member the discretion to establish certain criteria in order to determine when it can apply the NME methodology. The general rules of the ADA govern other parts of investigations.

The Panel’s ruling in US – 1916 Act can support this argument. The Panel stated that “Article VI:1 of the GATT 1994, interpreted in accordance with the Vienna Convention, must be understood as applying to any situation where a Member addresses the type of transnational price discrimination defined in that Article”. Therefore, unless an exception is provided by other WTO agreements, the general rules of Article VI of the GATT and the ADA apply to any AD investigations, i.e. “any situation where a Member addresses the type of transnational price discrimination defined in that Article”. Whether an investigation involves products of Chinese origin should not be a factor which can justify the non-application of the ADA.

Consequently, the two exceptions provided in Section 15 and Paragraph 151 can be elaborated as follows: the first exception allows a WTO Member to disregard domestic prices and costs of Chinese producers under investigation in calculating their normal value and the second exception allows a WTO Member to establish its own rules to decide when they would like to (or not to) disregard Chinese prices and costs. Apart from these two exceptions, which in China’s view have to be interpreted narrowly, investigating authorities should conduct other parts of the investigation, 46

such as the establishment of export price and the determination of injury and causation, according to corresponding rules in the ADA and follow the procedural rules of the ADA. The conducts of investigating authorities are subject to the scrutiny of the DSM in the same way as they do in any other investigation which does not involve Chinese products.

Investigating authorities cannot hide behind the notion of NME and develop associated practices which are WTO-inconsistent in “normal” AD investigations. A non-exhaustive list of these practices includes the EC’s sampling in the MET test, the EC’s individual treatment (IT) practice and the US’s double counting in a combined AD and CVD case, and so on. This is essentially the reason that China considered that it will be able to challenge some NME associated practices in the DSM, although Section 15 and Paragraph 151 indeed provide expectations in terms of price comparability in AD and CVD investigations targeting China.

The story of the first question is somehow different and the WTO jurisprudence is less favourable to China. The NME criteria of a WTO Member are rightly considered as provisions of national laws and these provisions, irrespective of their contents, do not breach any WTO rule. Irrespective of how “unfair” China consider these NME criteria are, by having its own NME criteria and following these criteria in investigations involving Chinese products, a WTO Member does not breach its obligations under the ADA and the Protocol.

Against this background, even if an investigating authority does not adopt the interpretative approach followed by the panel and the AB, it does not necessarily violate WTO law. China may politically argue that it has been treated less favourably or “unfairly”. Yet, it is difficult to legally argue that the importing WTO Member, by interpreting the NME criteria in its national law less favourable to China, does not meet its obligations under the WTO.

The WTO jurisprudence cannot provide much help to China in this regard as well. In previous cases, the WTO panels and the AB indeed examined municipal laws, but for a particular purpose, namely “in accessing the conformity of that domestic law with the relevant GATT/WTO obligations”. Moreover, the panels and the AB repeatedly held that they do not interpret national laws “as such”, or the way they interpret provisions of a covered agreement. Hence, under the assumption that the
NME criteria are not inconsistent with the ADA or the Protocol, it is not surprising that a panel may decline to rule that an importing WTO Member breaches its WTO obligations by interpreting its NME criteria in a way less favourable to China or by not following the interpretative approach of the panel or the AB.

The next section, by taking an example in the EC's NME practice towards China, further demonstrates the complexity of the issue discussed above.

3.2 AD Methodology towards Non-market Economy in National Laws

3.2.1 The US

This sub-section describes the law and practice of the US DOC in AD investigations involving NME countries. Although China is the most important trading partner which the DOC is currently treating as a NME country, the methodology of a Normal Value (NV) calculation in a NME case is nevertheless not China-specific. The China-specific controversy occurred when the DOC decided to depart from its previous practice and apply combined CVD and AD to China, a NME country. More details of simultaneous AD and CVD proceedings conducted by the DOC and the underlying WTO issues are to be examined in the next section.

The legal basis for the DOC to use the NME methodology to calculate NV for cases involving NME countries instead of the standard NV methodology applicable to market economies is Section 771 (18) of the Tariff Act of 1930 (Section 771 (18)). Section 771 (18) (A) first defined NME as follows:

> The term "nonmarket economy country" means any foreign country that the administering authority 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.

Section 771 (18) (B) provides five criteria on which the DOC can rely to make a determination to treat a trading partner as a NME:

> In making determinations under subparagraph (A) the administering authority shall take into account...
(i) the extent to which the currency of the foreign country is convertible into the currency of other countries;
(ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management,
(iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country,
(iv) the extent of government ownership or control of the means of production,
(v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and
(vi) such other factors as the administering authority considers appropriate.

In the Code of Federal Regulations, the methodology of NV calculation in a NME case is clarified as follows:50

In identifying dumping from a nonmarket economy country, the Secretary normally will calculate normal value by valuing the nonmarket economy producers' factors of production in a market economy country. (See section 773(c) of the Act.)

The “factors of production” approach is codified in Section 773(c) of the Tariff Act of 1930, which requires the DOC “normally” to calculate NV using market economy (surrogate country) prices to value the NME country “factors of production” used to produce the product concerned.51 The list of factors include, for example, hours of labor required; quantities of raw materials employed; amounts of energy and other utilities consumed; representative capital costs, including depreciation, etc.52 For the purpose of the NV calculation, to these factor costs, the DOC also adds amounts for factory overheads, general, selling and administrative expenses, profits and packing. As a established practice, the DOC measures material inputs in the number of physical units used in the production of the product, i.e., tons, pounds, gallons; labor in terms of hours and we distinguish between direct and indirect labor; and energy in terms of quantities used, e.g., BTUs (gas), kilowatt hours (electricity), gallons (fuel oil).53

By filing the NME questionnaire, exporters in the NME provide information on the quantity of inputs actually used to produce the product concerned.

50 19 CFR 351.408.
51 19 U.S.C. 1677b (c).
Nevertheless, it is a long-standing policy of DOC that not all exporters in NME cases are assigned their individual duties. Only those exporters who can have sufficient autonomy over their export activities qualify for individual dumping margin. The DOC’s practice is to examine whether exporters pass a “separate rate” test in order to decide whether they can receive their own, individual dumping margins.\textsuperscript{54}

In a number of case law, the DOC set out the elements of this separate rate test. It essentially requires that the exporter demonstrates that its export activities, on both a \textit{de jure}, and \textit{de facto} basis, are not subject to government control.\textsuperscript{55} Evidence, such as “an absence of restrictive stipulations associated with an individual exporter’s business and export licenses” and “any legislative enactments devolving central control of export trading companies”, can support, yet not guarantee, a finding of \textit{de jure} absence of government control over export activities.\textsuperscript{56} Other evidence, such as “whether the export prices are set by or are subject to the approval of a government authority”, “whether the respondent has the authority to negotiate and sign contracts and other agreements”, “whether the respondent has autonomy from the government in making decisions regarding the selection of management” etc, can be taken into account in a \textit{de facto} determination.\textsuperscript{57}

One formal exception to the DOC’s standard approach to calculate NV in a NME is the market-oriented industry (MOI) standard. Section 773(C)(1) of the Tariff Act of 1930 allows the DOC, in certain circumstances, to use the market-economy methodology described in section 773(A) to determine NV in an NME case.\textsuperscript{58} Under the current MOI test, an affirmative finding of a market-oriented industry requires:\textsuperscript{59}

\begin{itemize}
  \item \textit{For the merchandise under investigation or review, there must be virtually no government involvement in setting prices or amounts to be produced. For example, state-required production or allocation of production of the merchandise, whether for export or domestic consumption in the non-market-}
\end{itemize}

\textsuperscript{53}Ibid, 88.
\textsuperscript{54}Ibid, 91.
\textsuperscript{55}For example, \textit{Final Determination of Sales at Less than Fair Value: Sparklers from the People’s Republic of China (“Sparklers”), 56 FR 20588 (May 6, 1991), and Final Determination of Sales at Less than Fair Value: Silicon Carbide from the People’s Republic of China (“Silicon Carbide”), 59 FR 22585 (May 2, 1994).}
\textsuperscript{56}Ibid.
\textsuperscript{57}Ibid.
\textsuperscript{58}19 U.S.C. 1677 b (c) (1).
economy country, would be an almost impossible barrier to finding a MOI.

- The industry producing the merchandise under investigation or review should be characterized by private or collective ownership. There may be state-owned enterprises in the industry, but substantial state ownership would weigh heavily against finding a MOI.

- Market determined prices must be paid for all significant inputs whether material or non-material (e.g., labor and overhead) and for all but insignificant proportions of all the inputs accounting for the total value of the merchandise under investigation or review. For example, an input price will not be considered market-determined if the producers of the merchandise under investigation or review pay a state-set price for the input or if the input is supplied to the producers at government direction. Moreover, if there is any state-required production in the industry producing the input, the share of state-required production must be insignificant.

If these conditions are not met, the industry under investigation will be treated as NME producers and the NV will be calculated under the “factors of production” approach. Although consistently used in practice, this test has not been codified in DOC’s regulations, due to DOC’s concerns that “the test did not succeed in identifying situations where it would be appropriate to use domestic prices or costs in an NME as the basis for normal value.”

Upon China’s accession, the US negotiated “the right to treat China as a NME country for 15 years from the date of China’s accession”. Ever since, China has started requesting WTO Members to grant it market economy status or at least to recognize that some of its industries or producers are market-oriented and thus can enjoy market economy treatment. Over years, the DOC has found that the vast majority of exporters in China qualify for a separate rate. Nevertheless, no industry in China has succeeded in meeting the MOI test in the past fifteen years.

The US NME criteria and methodology themselves, though having been fiercely criticized as “unfair”, are difficult to challenge under the WTO since the US has pushed China to accept most of its practices in China’s WTO Accession Protocol

---

60 Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27,295, 27,364 (DOC., May 19, 1997) (citation omitted).
and US – China bilateral agreement. Although practitioners have long been arguing that the DOC practices on the selection of surrogate values and calculation of the Country-wide rate in NME cases are discriminatory, China for many years did not challenge the US practices. It was when the US decided to depart from its tradition, i.e. not to apply anti-subsidy laws to China, that China considered that the US practice can no longer hide behind the curtain of NME and was challengeable in the WTO.

3.2.2 The EU

The EU, over years, establishes a similar system with the US to handle AD cases involving NME countries. According to Article 2 (7) (a) of Council Regulation (EC) 384/96, normal value in a NME should be determined on the basis of “the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin”. In other words, the EU methodology to calculate NV in a NME case also bases on the price or constructed NV in an analogue country. The similarity between the US and the EU systems nevertheless ends here. In the EU system, no "factors of production" approach is used to calculate NV, i.e. the quantity of inputs used to produce the product concerned by an exporter in NME is irrelevant to the calculation of NV in an EU investigation.

Moreover, in 1998, the Basic Regulation was amended to reflect the changes of economic conditions in Vietnam and in China so that they were no longer automatically considered as NMEs. This amendment significantly changed the EU system. Individual companies in China and Vietnam now have the opportunities to apply for Market Economy Treatment (MET). A company that is granted MET is

treated the same way as a company from a market economy, namely their NV will be
calculated based on their own home market prices and costs. It is therefore different
from the US system which grants MOI status to industries, instead of individual
companies.

Art 2 (7) (c) specifies conditions that must be fulfilled in order for a company
to qualify for MET as follows:

(c) A claim under subparagraph (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is if:

- decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

- firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

- the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

- the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

- exchange rate conversions are carried out at the market rate.

A determination whether the producer meets the abovementioned criteria shall be made within three months of the initiation of the investigation, after specific consultation of the Advisory Committee and after the Community industry has been given an opportunity to comment. This determination shall remain in force throughout the investigation.

It has long been argued that although the five MET criteria look straightforward, "EC case handlers have broad administrative discretion to interpret whether a company meets each of the condition, particularly with respect to the first
three". In numerous cases, the Commission has applied these criteria to examine hundreds of Chinese companies and rejected the MET for the majority of them. As to be discussed below, although Article 2 (7) (c) itself can hardly be considered as WTO-inconsistent, over years, the Commission’s interpretation and application of these five criteria have raised significant controversies.

Also, the Commission develops a few practices associated with its MET methodology, such as individual treatment (IT) and sampling, and frequently applies them in NME AD investigations.

The first established practice associated with MET is IT. As another important exception of one-country-one-duty rule, if a company does not qualify for MET, it can apply for IT, which allows their own export prices to be used to calculate the dumping margin. IT is similar with the US’s “separate rate” test, although with slightly different conditions. Article 9 (5) of the Basic Regulation stipulates the conditions as follows:

Where Article 2(7)(a) applies, an individual duty shall, however, be specified for the exporters which can demonstrate, on the basis of properly substantiated claims that:

(a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;

(b) export prices and quantities, and conditions and terms of sale are freely determined;

(c) the majority of the shares belong to private persons. State officials appearing on the board of Directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;

(d) exchange rate conversions are carried out at the market rate; and

(e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.

67 Deflof and Fridh (n 33) 276. (‘EU Treatment of Non-market Economy’)
68 Basic Regulation, Art 9 (5).
Chapter VI

The second practice which often surfaces in a NME investigation is sampling. In cases where a large number of respondents need to be investigated and the Commission does not have the resources to conduct the investigation, it resorts to sampling techniques. 69 Yet, as widely discussed, the sampling practice can have "peculiar consequences" for the companies not selected in the sample, since their status (MET, IT or NME) is unknown. 70 The Commission therefore introduced a desk-check analysis to remedy the problem of sampling. The system is described as follows by commentators: 71

If a desk-check system is utilized, companies outside the sample will be checked in detail on the merits of their application, but will not be investigated on the spot. These non-selected companies will then, in due course, be provided their status and attributed the weighted average duty of each status group of companies (MET, IT or NME).

The practice of the Commission with the desk-check system is that in the initial stage of the investigation, the Commission requests exporting producers to supply sampling information and MET and IT requests at the same time. After examining and verifying both sampling and MET/IT information, it merges two sets of information and makes decisions. The sampled producers which obtained MET or IT will normally receive individual dumping margin based on their own data. For producers not included in the sample, those that were granted MET after desk-check will be awarded the weighted average dumping margin of the sampled MET producers and those that were granted IT after desk-check will be awarded the weighted average dumping margins of the sampled IT producers. Companies that were granted neither MET nor IT receive the country-wide dumping margin.

The Commission, however, did not apply MET desk-check system in the Footwear case, where it granted one MET out of 154 cooperating Chinese exporting producers and rejects the MET application from all non-sampled companies, up to 140 companies. 72

For more than a decade, Chinese exporting producers and leading practitioners criticized the Commission's approach to interpret five criteria in Article 2 (7) (c), its

69 Vermulst and Graafsma (n 63) 128. ('Recent EC AD Practice')
70 Ibid.
71 Ibid.
IT practice and its sampling practice in various AD cases, accusing them as WTO-inconsistent, and challenged some of these practices in front of the European courts. The question in this study is however whether these issues are litigatable in the DSM. The following analysis, by taking the examples of the first criterion of Article 2 (7) (c) and IT, intends to shed some lights on the question.

**First criterion of Article 2 (7) (c): “state interference”**

The first criterion of Article 2 (7) (c) requires that the “decision of firms regarding prices, costs and inputs, ... are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values”. Although the five criteria of Article (7) (c) are cumulative, i.e. the companies applying for MET need to fulfil all five of them, statistics show that “the main reasons that MET is refused is that companies are either under state influence, or that they do not keep adequate accounts”, since “[F]ifty eight per cent of the companies who failed MET, failed upon each of these grounds”. State interference is therefore one of the key reasons that the Commission rejects MET applications by Chinese companies.

In the past, the Commission has for various reasons considered that state interference existed in Chinese companies. Among these widely varied reasons, three types of frequently-cited state interference are identified as “direct state ownership or ownership by state owned companies”, “limitations on sale and export targets”, and “restrictions on imports and exports”. Due to limited space, this study cannot discuss every type of state interference in numerous AD investigations against China. It takes the Commission’s interpretation of state ownership or ownership by state-owned companies as an example. Chinese exporting producers in more than a dozen AD cases argued that majority state ownership or ownership by state owned companies should not be a
factor which automatically disqualifies the MET status of a company, yet none of them was successful.76

Chinese exporters have long been arguing that the first criterion should be interpreted as requiring that (1) the company’s business decisions are made in response to market signals, and (2) that these business decisions are made without significant State interference in this regard, i.e., the state interference, if any, are not such as to prevent the business decisions from being made in response to market signals with respect to price, costs and inputs. Also, this state interference needs to be “significant”. Therefore, the relevant factors in assessing whether a company fulfil the first criterion are: 1) through the state ownership, if any, whether the State has interfered with the company’s business decisions so as to prevent the business decisions from being be made in response to market signals; 2) whether the State interference is “significant”, although the exact reach of “significant” is not defined in the Basic Regulation. In other words, evidence of past significant State interference is sufficient to disqualify the company’s MET application, yet the mere possibility that the State may influence the future decision-making of the company is not sufficient. The Commission has to verify whether State interference has the effect on business decisions so that they do not reflect demand and supply.

It is nevertheless not the Commission’s approach. The Commission considers that if the State exercise control over a Chinese company, this company does not fulfil the first criterion. Evidences, such as the State has a blocking majority; other shareholders are so fragmented that the State as the majority shareholder can exercise influence; and several members of a company board were appointed by the State or state-owned parent company, can be considered as the proof that the company is controlled by the State and operates with significant State interference. 77

The focus of the debate is whether the first criterion of Article 2 (7) (c) refers to past State interference or the possibility of State interference in the future. In trichloroisocyanuric acid78, the Commission clearly stated its interpretation:

---


The aim of the investigation, is inter alia, to assess to which extent the State could interfere in business decisions, and which measures were taken by the company to prevent such interference.

In this regard, it was found that the State held the majority of the Director posts on the Board of Directors, and that there were no restrictions on the State-appointed Directors' voting rights on the Board (minority protection). The company failed to demonstrate that appropriate measures have been taken to prevent such State interference in the future. (Emphasis original)

One Chinese company argued in the CFI as follows:

[T]he refusal of MES on the basis of potential State interference in the company's business decisions, without any concrete realisation of that potential, is not compatible with the provision at issue. Such an interpretation is, moreover, contrary to the principles of legal certainty and respect for this right of the defence, since it would require the exporter to provide evidence not available to it.

A hypothetical question is raised as whether a WTO panel will support this argument of the Chinese exporter in light of the WTO rules and jurisprudence, if China brought this matter to the DSM. The answer can hardly be straightforward. On the one hand, it has to be noted that the first sentence of Article 2 (7) (c) uses the present tense “are”. If one intends to strictly follow the general rule of interpretation followed by the AB and the panels contained in Article 31 of VCIL, the use of present sense in the first sentence of Article 2 (7) (c) suggests that the State interference must be existing or in progress. By using the present tense, it is arguable that the ordinary meaning of the first sentence of Article 2 (7) (c) is that as long as a Chinese firm’s decision is currently making in response to market signals and without significant State interference in this regard, it fulfils the requirement of the first sentence of Article 2 (7) (c), unless evidence suggests otherwise. The determination of whether the first sentence of Article 2 (7) (c) is fulfilled by a Chinese company should not be connected to future action or behaviour of this company.

On the other hand, a WTO panel may consider that although the Commission interprets Article 2 (7) (c) in a different way that a panel or the AB might have, to apply different interpretative approach itself does not necessarily constitute a violation of the EU’s WTO obligation. The fact that Article 2 (7) (c) is not a provision in a
covered WTO agreement, and Article 2 (7) (c) itself does not breach any WTO rules, creates a different situation from the Panel and the AB’s examination and interpretation of Indian law in *India – Patents (US)*, where the AB stated as follows:80

*It is clear that an examination of the relevant aspects of Indian municipal law and, in particular, the relevant provisions of the Patents Act as they relate to the 'administrative instructions', is essential to determining whether India has complied with its obligations under Article 70.8(a). There was simply no way for the Panel to make this determination without engaging in an examination of Indian law. But, as in the case cited above before the Permanent Court of International Justice, in this case, the Panel was not interpreting Indian law 'as such'; rather, the Panel was examining Indian law solely for the purpose of determining whether India had met its obligations under the TRIPS Agreement....*

Previous GATT/WTO panels also have conducted a detailed examination of the domestic law of a Member in assessing the conformity of that domestic law with the relevant GATT/WTO obligations. For example, in *United States – Section 337 of the Tariff Act of 1930*, the panel conducted a detailed examination of the relevant United States' legislation and practice, including the remedies available under Section 337 as well as the differences between patent-based Section 337 proceedings and federal district court proceedings, in order to determine whether Section 337 was inconsistent with Article III:4 of the GATT 1947. This seems to us to be a comparable case.

The Panel in *US – Section 301 Trade Act* repeated the AB’s finding and stated that it would not "interpret US law 'as such', the way we would, say, interpret provisions of the covered agreements."81 Rather, the Panel held that it was instead "called upon to establish the meaning of Sections 301-310 as factual elements."82 This Panel also makes statements with respect to the different interpretations between WTO law and municipal law as follows:83

82 Ibid.
83 Ibid, para 7.20.
We note, finally, that terms used both in Sections 301-310 and in WTO provisions, do not necessarily have the same meaning. For example, the word 'determination' need not always have the same meaning in Sections 304 and 306 as it has in Article 23.2(a) of the DSU. Thus, conduct not meeting, say, the threshold of a 'determination' under Sections 304 and 306, is not by this fact alone precluded from meeting the threshold of a 'determination' under Article 23.2(a) of the DSU. By contrast, the fact that a certain act is characterized as a 'determination' under domestic legislation, does not necessarily mean that it must be construed as a determination under the covered agreements.

Although abovementioned quotes does not preclude China to argue that by interpreting Article 2 (7) (c) in a way that is not consistent with the “ordinary meaning” of the provision, the EC breaches its WTO obligations, it obviously increases the difficulty of challenging the Commission’s practices in the DSM.

IT practice

As observed by commentators, “[T]he granting of individual treatment is rather exceptional in anti-dumping investigations regarding NMEs, which might be because the criteria are essentially similar to those for granting MET”. The frequent rejections of IT application of Chinese companies bring serious question into the IT practice.

The arguments of Chinese exporting producers with respect to IT practice are relatively straightforward. The current IT regime, as far as it applies to China, is an exception to the general ADA rule governing the calculation of dumping margin. This exception, however, is not covered by Section 15 or Paragraph 151. Indeed, as discussed in the previous section, Section 15 and Paragraph 151 provides two exceptions of the NV calculation in case a company cannot qualify MET. The export price of Chinese producers was not mentioned in Section 15 and hence remains unaffected by the NME exceptions. Consequently, the determination of export price, even in an investigation involving Chinese products, should be governed by Article 2.3 of the ADA.

Article 2.3 of the ADA provides that an investigating authority may disregard the export price only when there is no verifiable export price or when it believes that the export price is unreliable because of an association or a compensatory

84 Detlof and Fridh (n 33) 272. ('EU Treatment of Non-market Economy')
arrangement. These are the only two permissible exceptions to the rules of Article 2.3. In all other circumstance, namely when an exporting producer’s export price is reliable, it should be used.

Under the EU’s current IT system, the Commission however will use a Chinese co-operating exporting producer’s own export price for the purpose of calculating an individual dumping margin only if that company demonstrates that it meets all IT criteria of Article 9(5) of the Basic Regulation. All other exporting producers’ individual export prices are disregarded, despite the fact that these export prices may be “reliable” in the sense of Article 2.3 of the ADA.

Consequently, Chinese exporting producers argue that the Commission would be required under Article 2.3, Article 6.10 and a contrario Article 9.4 ADA to determine individual margin and duty rate for each producer, which provided a reliable export price. Only if the Commission were to demonstrate for each company that its specific circumstances make the export price unreliable, the export price of Chinese companies may be rejected. In such cases, a constructed export price will be used as opposed to disregarding completely individual export prices of Chinese producers.

Arguments of this nature challenge the long standing notion that in a NME case, if a company/an industry cannot demonstrate it is market-oriented, a single country-wide duty should apply to this company/industry unless it fulfils IT criteria, in order to “avoid circumvention by channelling exports through the exporters with the lowest margin”. Chinese exporting producers argue that to use IT system to prevent potential dumping is unwarranted under the ADA and individual margins ought to be established in respect of Chinese producers with reliable export price.

In sum, the EC and the US methodologies towards NME can be divided into three parts for the purpose of this study: the NME criteria, the NME methodology and associated practices. The NME criteria, namely the US’s MOI standard and the “separate rate” test and the EU’s MET and IT tests, are to a large extent not challengable as demonstrated by the discussion above. The NME methodologies, i.e. the US’s “factors of production” method and the EU’s analogue country method, are also difficult to challenge in the WTO DSM. The associated practices, such as the EU’s IT test, however fall outside the two exceptions provided by Section 15 and

85 Ibid.
Chapter VI

Paragraph 151. These practices are therefore arguably challengeable in the DSM. The next section further discusses one of the associated practices which has been brought to the DSM by China, namely double counting in the simultaneous AD and CVD investigations.

3.3 The First WTO Challenge of China: US – Coated Paper

On 14 September 2007, China formally requested consultations with the US concerning the preliminary AD and CVD determinations made by the DOC on 29 May 2007 and 2 April 2007, respectively, in respect of coated free sheet paper from China.\(^{86}\) As the first complaint filed by China alone after its accession to the WTO, China made this move in a hope to stop "a trend" that could develop after the DOC's decision to levy preliminary duties of 23.19% to 99.65% on coated paper imported from China.\(^{87}\) Although the case remains inactive since the US International Trade Commission (ITC) found on 21 December 2007 that the imports were not materially injuring or threatening material injury to the US industry and there is no definitive duty imposed, it is a significant step forward by China.\(^{88}\) Moreover, the debate surrounding double counting do not fade away since the ITC's negative injury finding in coated paper case did not upset the DOC's policy to impose the combined CVD and AD duties to Chinese exports and there are a few similar investigations pending against China.\(^{89}\)

This section examines the GATT/WTO rules on simultaneous AD and CVD investigations, the US's law and practice and China's WTO consultation.

3.3.1 GATT/WTO rules on simultaneous AD and CVD investigations

The purpose of AD duties is to offset dumping, which is defined in GATT Article VI:1 as the introduction of products originating in one country into the territory of another country at less than the normal value of these products. Dumping

---

\(^{86}\) WTO 'United States – Preliminary Anti-dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China, Request for Consultation by China' WT/DS368/1, G/L826, G/SCM/D77/1, G/ADP/D72/1, 18 September 2007. ('Request for Consultation')


is therefore the amount by which the price of domestic sales of the like product
exceeds the price of export sales of the product under investigation to a certain
country. AD measures are imposed in order to offset this difference and the purpose
of AD duties or undertakings is to increase the price of dumped imports to non-
dumped levels or to obtain from exporting producers a commitment to sell above a
minimum price, which is set at a non-injurious level.

Subsidisation can have an impact on dumping when the subsidies are granted
upon exportation of products since an export subsidy will enable the exporting
producer to lower its export price. As dumping is calculated by comparing the
domestic and export prices, the export subsidy will in effect increase the difference
between both prices, and hence the amount of dumping.

In such cases, combining CVD duties (in order to offset countervailable
subsidies) and AD duties (in order to offset dumping) could result in compensating
domestic industry twice for the same situation: once through the CVD duty (targeting
the subsidisation directly) and once through the AD duty (which is higher due to the
export subsidy).

GATT Article VI: 5 forbids WTO Members from imposing both AD and CVD
duties in order to compensate for the same situation caused through dumping and
export subsidisation. It reads as follows:

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

In other words, GATT Article VI:5 was adopted in order to avoid the double
compensation that could result from the combined imposition of CVD and AD duties.
This provision, however, has never been applied by the GATT or WTO panels,
although major trading partners, such as the EU, the US and Canada, frequently
conduct combined CVD and AD investigations against imports.

As a consequence, no WTO or GATT panel has ever discussed directly the
obligations created by GATT Article VI:5. This provision was only examined,
indirectly, in Indonesia – Autos, in order to illustrate the panel’s argument that the
WTO ASCM was not intended to be the exclusive mechanism for challenging subsidy measures.\textsuperscript{90} No guidance can therefore be found in panel decisions concerning the interpretation of GATT Article VI:5.

The reason why no panel ever had to discuss GATT Article VI:5 is probably that the text of this provision is quite clear, and therefore is not prone to being misinterpreted by WTO members. Yet, when the NME concept enters into the picture, it becomes much more complicated as suggested in the analysis of the US practice below.

3.3.2 US Law and Practices of Simultaneous CVD and AD Proceedings

The provision implementing GATT Article VI:5 in the US law is Section 772(c)(1)(C) of the Tariff Act of 1930, which provides that:\textsuperscript{91}

\begin{quote}
\textit{(c) Adjustments for Export Price and Constructed Export Price. The price used to establish export price and constructed export price shall be}

\textit{(1) increased by}

\textit{...}

\textit{(C) the amount of any countervailing duty imposed on the subject merchandise under subtitle A to offset an export subsidy (...).}"
\end{quote}

In accordance with Section 772(c)(1)(C), the US DOC prevents, when dealing with imports from market economy countries, the imposition of both AD and CVD duties for the purpose of dealing with one and the same situation arising from dumping or from export subsidization, by increasing the export price in the dumping calculation by the amount of the CVD duty imposed. As the export price is increased by the amount of the CVD duty, the dumping margin (i.e., the amount by which the normal value exceeds the export price) is reduced proportionately.


\textsuperscript{91} 19 U.S.C. 1677a(c)(1)(C).
The purpose of Section 772(c)(1)(C) is to avoid the double counting of CVD and AD duties, as was explained by the US DOC in *Cold-Rolled Corrosion Resistant Carbon Steel Flat Products from Korea*:\textsuperscript{92} Domestic 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. Export subsidies, by contrast, benefit only exported merchandise. Accordingly, an export subsidy brings about a lower U.S. price, which could be ascribed to either dumping or export subsidization, as well as the potential for double remedies. Imposing both an export-subsidy CVD and an AD duty, calculated with no adjustment for that CVD, would impose a double remedy specifically prohibited by Article VI.5 of the GATT. Thus, the only reasonable explanation for Congress' decision to provide for the addition to U.S. price of export-subsidy CVDs is protection against double remedies.

It is a well-established US practice not to deduct AD and CVD duties from the export price in calculating dumping margins. This was discussed at length recently in *Low Enriched Uranium From France*.\textsuperscript{93} Under Section 772(c)(2)(A), the export price or constructed import price must be reduced by "United States import duties". The DOC confirmed in *Low Enriched Uranium* its long-standing practice of considering that AD duties and CVD duties are not United States import duties and that, accordingly, should not be deducted from the export price or the constructed import price under Section 772(c)(2)(A).

This means that in the dumping margin calculation, when the export price is compared to the normal value that contains any AD and CVD duty paid upon importation of the product into the US, these duties are not deducted.\textsuperscript{94} In such circumstances, any CVD duty paid, whether destined to offset domestic or export subsidies, increases the export price, and therefore reduces the dumping margin.\textsuperscript{95}

\textsuperscript{92} Cold-Rolled Corrosion Resistant Carbon Steel Flat Products from Korea, 62 FR at 18,422.
\textsuperscript{93} See for a detailed analysis of this matter, Appendix I (Proposed Treatment of Countervailing Duties as a Cost) to the Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium From France, 69 FR 46501-46508. ('Low Enriched Uranium From France')
\textsuperscript{94} This is the case for instance if the goods are sold "duty paid", and the price agreed therefore includes duties paid by the exporter. It would also be the case if the export price is constructed, in which case the price to a purchaser in the US not affiliated with the producer or exporter (that will include any duties paid) is used as the starting point for calculating the export price.
\textsuperscript{95} This is a significant difference with the EU practice, where countervailing and anti-dumping duties are always deducted from the export price when calculating the dumping margin, and therefore have no impact on the margin. There is one exception in the EU practice, under Article 11(10) of the EU Basic Regulation. This provision specifies in the relevant part that: "In any investigation carried out pursuant to this Article [reviews], the Commission shall examine the reliability of export prices in accordance with Article 2. However, where it is
Chapter VI

The DOC commented in this regard in *Low Enriched Uranium from France* that: \(^96\)

With respect to CVDs to offset export subsidies, the 1979 amendments to the statute provide a straightforward response to the argument that they should be deducted from initial U.S. prices in calculating dumping margins—they require that CVDs to offset export subsidies be added to initial U.S. prices. We do not interpret the statute to require CVDs to offset export subsidies first to be added to initial U.S. prices and then to permit this addition to be negated by their subsequent subtraction.

Domestic subsidies present a closer question, as the statute does not speak directly to them. The fact that the statute addresses CVDs to offset export subsidies directly, however, and then remains silent about the plainly related issue of CVDs to offset domestic subsidies, is not complete silence—it implies that no adjustment is appropriate. There is no reason why Congress would have provided for the addition of export subsidy CVDs, but not considered the plainly related issue of domestic subsidy CVDs." (emphasis added)

The DOC’s view is therefore clear: CVD duties cannot be deducted from the export price, whether they offset domestic or export subsidies. Recognising the fact that this implies that CVD duties have the effect of reducing the dumping margin, the DOC concludes that “to the extent that CVDs may reduce dumping margins, this is not a distortion of any margin to be eliminated, but a legitimate reduction in the level of dumping." \(^97\)

Despite the above well-established methodology, the US has never used it against China before 2007. The US has historically not applied its CVD law against NMEs. This practice was established in the 1980s in subsidies investigations against Carbon Steel Wire Rod from Czechoslovakia and Poland. \(^98\)

In these cases the DOC analysed the applicability of the US CVD law in force at the time, which did not include a definition of a subsidy, and looked at the actual effect a subsidy has. It concluded that a subsidy is by definition an action that distorts

---

\(^95\) Low Enriched Uranium From France (n 88) 46505.
\(^96\) Ibid, 46508.
\(^97\) Carbon Steel Wire Rod from Czechoslovakia, 49 FR 19370 (May 7, 1984) (final negative CVD determination); Carbon Steel Wire Rod from Poland, 49 FR 19374 (May 7, 1984). (final negative CVD determination).
or subverts the market process and results in a misallocation of resources. In NMEs, however, resources would not be allocated by the market but by central planning. There would be no market process to distort or subvert, as misallocations of resources would result from central planning, not from subsidies. The DOC therefore concluded that subsidies have no meaning outside the context of a market economy. The DOC’s findings were challenged before the US Court of International Trade (CIT), which reversed the decisions. Upon appeal by the US government, the US Court of Appeals for the Federal Circuit (CAFC) reversed the CIT’s decision on the ground that the DOC’s findings were not unreasonable, a violation of the law or an abuse of discretion. Georgetown Steel became the landmark case which formed the legal basis of the DOC’s policy not to apply CVD laws to NME.

Upon accession to the WTO on 1 January 1995, the US adopted the ASCM. The definition of Article 1 ASCM was implemented by Section 771(5)(B). Section 771(5)(C) stipulates that the administering authority is not required to consider the effect of the subsidy and Section 771(5A) includes the specificity requirement. While the old US rule did not define a subsidy and the DOC’s interpretation was based on the effect a measure had on the market, post WTO-accession law has clearly filled that gap. Both the ASCM and the US national law now contain an explicit definition of subsidy and add a requirement of specificity. The amended laws therefore allow the authorities to distinguish between a specific subsidy and general central planning.

These changes in the US law complicated the interplay of CVD and AD proceedings in NME cases. It is questionable whether Georgetown Steel is still applicable and it is widely debated whether Georgetown Steel had established binding case law or merely confirmed that the DOC exercised its discretion correctly.

After China’s accession, the situation was further complicated. Section 15(b) of the Protocol did not include a similar provision for the application of CVD laws as Section 15 (a) did with respect to AD laws. It allows Members to “use methodologies of identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the

---

100 Georgetown Steel Corp. v. United States, 801 F. 2d 1308 (Fed. Cir. 1986) (Georgetown Steel).
importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China. Therefore, the concept of NME applies by virtue of Section 15(a)(ii) of the Protocol only to AD laws. Although Section 15(b) also allows for specific calculation methods, it does not extend the concept of NME to CVD laws.

This can lead to a double standard. A Member can treat China as NME for the purpose of applying AD law, but may consider China as a market economy under CVD law. This raises several problems in combined AD and CVD investigations against China.

One practical issue is that where the DOC establishes an AD duty for a company on a countrywide basis because its data is deemed unreliable as influenced by the NME environment, it might experience difficulties justifying the consequent use of company specific data for a subsidy determination, or vice versa.

Most importantly, the issue of double counting may rise in the case where a company receives a countrywide AD duty and a company-specific CVD duty. As well-documented by economists, since the surrogate country methodology accepted the physical factors of production from the NME respondent, but not the prices paid for those factors, the DOC cannot directly observe the firm's subsidized cost. Also, the double compensation cannot be remedied by the non-deduction of CVD in the export price. In a NME case, when the NV is calculated based on the surrogate costs, the increase of export price by the amount of the CVD cannot fully reduce the dumping margin as the NV itself has also been inflated by the unsubsidized costs in a surrogate country. As a result, "with the CVD countermanding the effects of the subsidy, using the surrogate unsubsidized costs in AD calculation penalizes the company for the same subsidy".

Instead of challenging the DOC's change of policy in the US courts, China decided to bring the issue to the WTO by formally requested consultation with the US. Although due to the ITC's negative injury finding, this case is unlikely to proceed to the panel stage, this study considers it is still necessary to analyze China's claims since there are other combined CVD and AD cases pending.

---

102 For more economy discussion on how AD and CVD interplay, B Kelly 'The Law and Economics of Simultaneous Countervailing Duty and Anti-dumping Duty Proceedings' (2008) 3 Global Trade and Customs Journal, 41, 44. ('Simultaneous CVD and AD Proceedings')

103 Working Party Report (n 40).

104 Kelly (n 96) 47. ('Simultaneous CVD and AD Proceedings')
3.3.3 WTO Consultation of US – Coated Paper

On May 30, the DOC announced its affirmative preliminary determinations in the AD and CVD investigations on imports of coated free sheet paper from Indonesia, Korea, and the People's Republic of China (China) and imposed 23.19 to 99.65 percent of combined AD and CVD duty. 105

In response to these preliminary determinations, China made four claims in its consultation paper: 106

1. the failure of the US authorities to demonstrate specificity under Article 2.1 of the SCM Agreement in respect of alleged countervailable subsidies identified in the preliminary CVD determination, and to clearly substantiate these determinations of specificity on the basis of positive evidence, as required by Article 2.4 of the SCM Agreement;

2. the failure of the US authorities to make a proper determination of benefit under Articles 1 and 14 of the SCM Agreement in respect of the alleged "government policy lending program";

3. the failure of the US authorities to ensure that the preliminary affirmative determination of subsidization, and the imposition of provisional countervailing duties, were based on the amount of subsidy found to exist, as required by Articles 17 and 19 of the SCM Agreement; and

4. the failure of the US authorities to ensure that the preliminary affirmative determination of dumping, and the imposition of provisional anti-dumping duties, were based on the amount of dumping found to exist, as required by Articles 7 and 9 of the AD Agreement.

The relevant provisions in the WTO agreements are identified as Articles VI of the GATT 1994, Articles 1, 2, 10, 14, 17, and 32 of the ASCM, and Articles 1, 2, 7, 9, and 18 of the ADA.

While the first two claims are made under ASCM to question the specification of alleged subsidies and the calculation for the government loan benefit, the third and fourth claims are addressing the double-counting issue discussed in the previous subsection.

105 72 Federal Register 30,758 – 30,766.
106 Request for Consultations (n 82).
Chapter VI

Given that no definitive duty has been imposed and thus no panel is requested to examine both the factual and legal issues of this case, it is not possible to know how exactly China would argue the double counting issue and demonstrate the WTO-inconsistency of the US NME practice, how the US would respond to China’s claims and most importantly, how would a WTO panel rules on the scope of NME exceptions and the interplay between AD and CVD in NME cases. Although the factual background of this case will be irrelevant in future cases, the legal arguments of this case, in particular the matter of double counting, will nevertheless resurface in other cases and might be adjudicated by a WTO panel or the AB sooner or later.

4. Conclusion

This chapter discusses how WTO members respond to the rise of legalization in the GATT/WTO system by making efforts to more effectively utilize the DSM. The response of WTO members can be demonstrated in two aspects: to build up legal and institutional capacity to utilize the DSM and challenge “unfair” trade barriers abroad, by forming public-private networks, and to pursue matters in the DSM which traditionally are considered as unlitigatable in the WTO.

China’s efforts to engage private sectors and litigate NME issues in the WTO illustrates that WTO members are making efforts to deprive benefits from the higher level of legalization in the WTO as a whole. In the meanwhile, the fact that thus far no WTO panel has had a chance to scrutinize the WTO-consistency of the NME and its associated rules and practices, which govern more than one third of AD investigations worldwide, indicates that the ongoing process of legalization has its limitations.
Chapter VII Conclusion

From the outset, this study centres on two underlying themes: the proliferation of legalization in the trade regime and the unevenness of the ongoing process. Separately, both the rule-orientation trend in the trade regime and the uneven expansion of judicialization in the GATT/WTO have garnered considerable scholarly attention, sparking debates regarding "constitutional" evolution of the GATT/WTO and numerous proposals to reform WTO institutions, in particular the DSM. Yet, many observers ignore the underlying interrelation between these two themes as they assume that the rise of legalization is a single-faceted phenomenon and has a straightforward policy path. Few have attempted to break down the legalization process into different dimensions and evaluate its complicated consequences. The analysis in this study, nevertheless, not only confirms the rise of legalization in the trade regime as a whole, as has been widely observed, but also identifies in which dimension legalization has increased and explores the complicated consequences of the legalization process.

This study first examines the rise of legalization in the GATT/WTO, one of the most cited examples of a successfully "legalized" international institution. It is commonly acknowledged that legalization has dramatically expanded in the trade regime, especially after the establishment of the WTO. Yet, to precisely analyze the phenomenon of legalization, a definition of legalization needs to be offered in the first place. Drawing on the International Relations theory, this study builds up its theoretical foundation on the assumption that legalization is a particular form of institutionalization characterized along three dimensions: obligation, precision, delegation. In the context of the GATT/WTO system, obligation refers to norms set in all WTO agreements, agreed Understandings and other binding documents. Precision measures not only the clarity of the wording of related WTO agreements, but also the extent to which these substantive WTO obligations require (or prohibit) specific actions by the Members. Delegation reflects the willingness of WTO Members to relinquish sovereignty in terms of both the DSM and other activities of WTO institutions.

Based on this three-factor definition, this study evaluated the dynamic process of legalization in the trade regime by further breaking down the trade regime into three different parts: decision-making mechanism, surveillance mechanism and the DSM.
Chapter VII

By reviewing both the current status of legalization in each part and the historical developments, this study concludes that as a general pattern, all three parts of the GATT/WTO have been significantly legalized and there are certain degrees of correlation between the processes. However, the "legalizing" process of each of these parts was not always in the same pace and not perfectly balanced. Further increases of legalization are therefore coupled with many unsolved controversies.

The empirical study of international AD regimes provides an illustrative example of the significant contribution that legalization made to decades of success in trade liberalization as well as the apparent imbalance of the legalization process. On the one hand, multiple rounds of trade negotiations generate tighter and more specific obligations in the AD regime. On the other hand, a closer analysis of the ADA indicates that a fairly large number of obligations contained in the ADA are unspecific or contingent in nature. This feature of the ADA also influences the level of precision and makes the deference to national authorities a highly contentious point. Given the fact that the developments of legalization beyond the ADA, namely the judicial activities of the DSM, are heavily criticized, the gaps and discontinuities of the ADA can hardly be filled under the current system.

This study then explores the consequences of legalization at domestic level, both in a formal, institutional way and an informal way. The discussion on the EU AD regime attempts to exemplify the mixed effects of multilateral legalization on formal legal institutions of a domestic regime: on the one hand, increased obligations, frequently joined by greater precision and stronger delegation, largely changed the landscape of domestic trade policy-making. On the other hand, WTO-plus features have been developed to counter balance the impact of increased legalization at international level on domestic systems. This is exactly the reason that although the EC AD instruments essentially repeat the basic principles of international rules, a close look of the instruments and the administration of them suggest a compromise between different interests.

The discussion of China's AD related activities demonstrates the impact of legalization on the strategic behaviour of trading partners to utilize the DSM. On the one hand, the development of legalization provides incentives for China to effectively utilize the DSM and changes the strategic behaviour of China on selecting matters to be litigated in the DSM. On the other hand, the fact that China's efforts cannot change
the low degree of legalization of NME provisions and the difficulty to challenge the practices of trading partners in the DSM, presents the limits of the DSM.

In conclusion, the phenomenal rise of legalization is one of the most important institutional developments of the past half century in the trade regime. While it is extraordinarily important to acknowledge its significance, it is even more important to fully understand the unevenness of the ongoing process and its consequences on domestic systems. This study, by using three identifiable variables adopted from International Relation, presents one angle to analyze this complicated institutional development and its consequences.
Bibliography


R Leal-Arcas ‘Exclusive or Shared Competence in the Common Commercial Policy: From Amsterdam to Nice’ (2003) Legal Issue of Economic Integration 3


C. Bown, B. Hoekman, and C. Ozden, "The Pattern of US Antidumping: The Path from Initial Filing to WTO Dispute Settlement" (2003) 2 World Trade Rev 349


N. Broek, "Legal Persuasion, Political Realism, and Legitimacy: The European Court's Recent Treatment of the Effect of WTO Agreements in the EC Legal Order" (2001) JIEL 411


T. Broude, "An anti-dumping "To Be or Not To Be" in Five Accuses New Agenda for Research and Reform" (2003) 37 JWT 305


C. Carmody, "WTO Obligations as Collective" (2006) 17 EJIL 419


J Cornelis 'China's Quest for Market Economy Status and its Impact on the Use of Trade Remedies by the European Communities and the United States' (2007) 2 Global Trade and Customs Journal 105

T Cottier and M Oesch *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland – Case, Materials and Comments* (Cameron May, London 2005)

R Cunningham 'Commentary on the First Five Years of the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing Measures’ (2000) 31 Law and Policy in Intl Business 897


H Detlof and H Fridh 'The EU Treatment of Non-Market Economy Countries in Anti-dumping Proceedings’ (2007) 2 Global Trade and Customs Journal


J Dunoff and J Trachtman 'Economic Analysis of International Law' (1999) 24 The Yale Journal of International Law 1

J Durling 'Deference, But Only When Due: WTO Review of Anti-dumping Measures’ (2003) 6 JIEL 125


243


H Gao ‘Aggressive Legalism: The East Asian Experience and Lesson for China’ in *China’s Participation in the WTO* H Gao and D Lewis (eds) (Cameron May, London 2006)


S George and I Bache *Politics in the European Union* (Oxford University Press, Oxford 2001)


C Harlow ‘Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot’ (1995) Jean Monnet Chair Papers 27, The Robert Schuman Centre at the European University Institute

G Harpaz ‘“Dumping” the Anti-dumping Instruments in the Trade Relations Between the European Union and the State of Israel? – The European Union’s Perspective’ (2005) 39 JWT 445
Chapter VII


M Kahler ‘Conclusion: The Causes and Consequences of Legalization’ (2000) 54 Int Organization 661
Chapter VII


W Kerr and L Loppacher 'Anti-dumping in the Doha Negotiations – Fairy Tales at the WTO' (2004) 38 JWT 211


J Krikorian ‘Planes, Trains and Automobiles: the Impact of the WTO “Court” on Canada in Its First Ten Years’ (2005) JIEL 921

Q Kong *China and the WTO – A Legal Perspective* (World Scientific, New Jersey 2002)

P Kuijper and M Bronckers ‘WTO Law in the European Court of Justice’ (2005) 42
Common Market Law Review 1313

V Kumaran ‘The 10 Major Problems with the Anti-dumping Instrument in India’ (2005) 39 JWT 115


D Layton and J Miranda ‘Advocacy Before World Trade Organization Dispute Settlement Panels in Trade Remedy Cases’ (2003) 37 JWT 69


X Liu and H Vandenbussche ‘European Union Anti-dumping Cases Against China -- An Overview and Future Prospects With Respect to China’s World Trade Organization Membership’ (2002) 36 JWT 1125


M Matsushita and D Ahn (eds) WTO and East Asia: New Perspectives (Cameron May, London 2004)


P Messerlin ‘China in the WTO: Anti-dumping and Safeguards’ at D Bhattasali, S Li
Chapter VII


C Molyneux Domestic Structures and International Trade --- The Unfair Trade Instruments of the US and the EU (Hart Publishing, Oxford 2001)


W Muller, N Khan and H Neumann EC Anti-dumping Law --- A Commentary on Regulation 384/96 (John Wiley& Sons, Chichester 1998)


E Petersmann ‘Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice’ (2007) 10 JIEL 529
R Philip, M Iain and G Carol (eds) *The WTO and International Trade Regulation* (Cameron May, London 1998)

R Philip, M Iain and M Ahmad (eds) *Liberalization and Protectionism in the World Trading System* (Cameron May, London 1999)

D Pierre *WTO Trade Instruments in EU Law* (Cameron May, London 1999)


P Posenthal and R Vermylen 'The WTO Antidumping and Subsidies Agreements: Did the United States Achieve its Objectives During the Uruguay Round?' (2000) 31 Law and Policy in Intl Business 871


T Prusa ‘East Asia’s Anti-dumping Problem’ (2006) 29 The World Economy 743

J Ragosta, N Joneja and M Zeldovich ‘WTO Dispute Settlement: The System is Flawed and Must be Fixed’ (2003) 37 Int Lawyer 697

F Roessler *The Legal Structure, Function and Limits of the World Trade Order* (Cameron May, London 2000)


249


D Steger ‘Appellate Body Jurisprudence Relating to Trade Remedies’ (2001) 35 JWT 799


J Trachtman ‘Regulatory Jurisdiction and the WTO’ (2007) 10 JIEL 631

Oregon 2004)


E Vermulst and P Waer EC Anti-dumping Law and Practice (Sweet&Maxwell, London 1996)

E Vermulst and F Graafsma ‘WTO Dispute Settlement with Respect to Trade Contingency Measures’ (2001) 35 JWT 209


T Yu ‘The 10 Major Problems with the Anti-dumping Instrument in China’ (2005) 39
Y Yu 'Circumvention and Anti-circumvention in Anti-dumping Practice: A New Problem in China's Outbound Trade (2007) 41 JWT 1015

M Zanardi 'Anti-dumping: What are the Numbers to Discuss at Doha' (2004) 27 The World Economy 403

H Zeitler ' "Good Faith" in the WTO Jurisprudence -- Necessary Balancing Element or an Open Door to Judicial Activism?’ (2005) JIEL 721

G Zonnekeyn ‘The Status of Adopted Panel and Appellate Body Reports in the European Court of Justice and the European Court of First Instance’ (2000) 34 JWT 93


