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**DUMPING AND A STATE ECONOMY: IS CHINA'S ANTI-DUMPING RETALIATION JUSTIFIED  
UNDER THE WTO FRAMEWORK?**

by

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## **ABSTRACT**

Article 56 of China's Anti-dumping Regulation provides that China may adopt corresponding measures whenever another country discriminatorily imposes anti-dumping measures against imports originating in the People's Republic of China. This retaliatory language, which dates back to Article 40 of China's Old Regulations, makes China special since there is no other country's anti-dumping regulation making such an explicit retaliatory message. Although China has not invoked Article 56 in any of its anti-dumping investigations, retaliation has been put in practice. An example is the Fasteners Case. By doing an analysis at the light of the WTO Agreements, this thesis concludes that Article 56 is inconsistent with article 23.1 of the Dispute Settlement Understanding, article 18.1 of the Anti-dumping Agreement and Articles I:1 and X:3 lit. (a) of the GATT 1994.

## LIST OF ABBREVIATIONS

AD	Anti-dumping
AD Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Art.	Article
CN	Combined Nomenclature
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade
MET	Market Economy Treatment
MFN	Most-Favoured Nation
MOFCOM	Ministry of Commerce (of China)
NME	Non-market Economy
PRC / China	People's Republic of China
TRIPS	Trade-Related Aspects of Intellectual Property Rights
US	United States
WTO	World Trade Organization

## TABLE OF CASES CITED IN THIS THESIS

### WTO Dispute Settlement Reports

Short Title	Full Case Title and Citation
Argentina – Hides and Leather	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i> , WT/DS155/R, Adopted, 19 December 2000.
Canada – Autos	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R Adopted, 19 June 2000.
Canada – Periodicals	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, Adopted, 30 June 1997.
Colombia – Ports of Entry	Panel Report, <i>Colombia – Indicative Prices and Restriction on Ports of Entry</i> , WT/DS366/R, Adopted, 27 April 2009
EC – Asbestos	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS135/AB/R, Adopted, 12 March 2001.
EC – Bananas III	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/R, Adopted, 22 May 1997, upheld by the Appellate Body Report, WT/DS27/AB/R.
EC – Commercial Vessels	Panel Report, <i>European Communities – Measures Affecting Trade in Commercial Vessels</i> , WT/DS301/R, Adopted, 22 April 2005.
EC – Fasteners (China)	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/R, Adopted, 3 December 2010, upheld by the Appellate Body Report, WT/DS397/AB/R.
EC – Selected Custom Matters	Appellate Body Report, <i>European Communities – Selected Custom Matters</i> , WT/DS315/AB/R, Adopted, 13 November 2006.
EU – Footwear (China)	Panel Report, <i>European Union – Anti-dumping measures on Certain Footwear from China</i> , WT/DS405/R Adopted, 28 October 2011
Mexico – Taxes on Soft Drinks	Panel Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/R, Adopted, 7 October 2005.
US – 1916 Act (Japan)	Panel Report, <i>United States – Anti-dumping Act of 1916</i> , WT/DS162/R, Adopted, 29 May 2000, upheld by the Appellate Body Report, WT/DS162/AB/R.

US – Certain EC Products	Panel Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/R, Adopted 17 July 2000, as modified by the Appellate Body Report, WT/DS165/AB/R.
US – Continued Suspension	Panel Report, <i>United States – Continued Suspension of Obligations in the EC - Hormones Dispute</i> , WT/DS320/R, Adopted 31 March 2008, as modified by the Appellate Body Report, WT/DS320/AB/R.
US – COOL	Panel Report, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS/384/R, Adopted, 1 December 2008.
US – Section 301 Trade Act	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, Adopted, 22 December 1999.

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## INTRODUCTION

The topic of trade liberalization versus protectionism is always alive, especially currently against the background of the financial crisis. Anti-dumping<sup>1</sup> (hereinafter “AD”) is often an element of these discussions since it could be seen as a double-edge sword. On one edge, AD is a measure to deal with unfair imports if it satisfies the requirements of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter “AD Agreement”), *i.e.*, (i) dumping, (ii) material injury to a domestic industry in the importing country and (iii) causation between (i) and (ii). On the other edge, AD can be abused and used as a protectionist weapon to constraint import competition.

While AD actions are supposedly intended to combat ‘unfair trade’, by now most economists agree that AD is not so much about stopping unfair trade but has predominantly become a tool of industrial policy used by countries to foster the interests of their national industries.<sup>2</sup>

Each country establishes its own AD enforcement mechanism, and case filings are brought by domestic companies to their respective government enforcement agencies. However,

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<sup>1</sup> Dumping and AD measures are two different phenomena. The first sentence of Art. VI:1 GATT 1994, defines dumping as the conduct by which ‘products of one country are introduced into the commerce of another country at less than the normal value of the products’. Since dumping is to be condemned –if it causes or threatens material injury to an established industry in the territory of a contracting party or material retards the establishment of a domestic industry- Art. VI:2 GATT 1994 provides that ‘a country may levy on any dumped product an AD duty no greater in amount than the margin of dumping in respect of such product’.

<sup>2</sup>Hylke Vandenbussche and Maurizio Zanardi, "What explains the proliferation of antidumping laws?," in *45th Panel Meeting of Economic Policy* (Frankfurt2007)., p. 2



in recent years there has been, both, a proliferation of AD laws as AD investigations. According to the 2007 World Trade Organization (hereinafter “WTO”) Trade Report, from 1995 to 2005, there were 42 countries that launched a total number of 3044 AD investigations against 98 countries.<sup>3</sup> Also the pattern of AD users has changed notably: developing countries accounted for only about 20% of the total AD filing cases in the early 1990s, but since 1995 they have initiated over half of the total number of those AD investigations. Nowadays, the People’s Republic of China (hereinafter “PRC” or “China”), together with Argentina, Brazil, and India, are the heaviest AD users from developing countries.

As the number of AD users and cases filed annually grow, it is difficult to identify the motives of its uses and argue if AD is being used as pure protectionism rather than as a valid trade remedy. However, several economic studies suggest that countries have different AD motivations that produce the observed dynamics and asymmetries. For example, in its 2006 paper Feinberg and Reynolds show that in some cases AD measures are used by importing countries to substitute tariffs that have been reduced continuously during various rounds of GATT/WTO negotiations (Feinberg and Reynolds, 2006). In other cases, AD measures are used by countries as a ‘safety-valve’ because the WTO does not provide sufficient mechanisms to safeguard domestic import competing industries (Vandenbussche and Zanardi, 2007). However, most researchers regard retaliation as a possible explanation for the proliferation of AD laws and AD cases (Blonigen and Bown 2003; Feinberg and Reynolds 2006; Prusa and Skeath 2002; Vandenbussche and Zanardi 2007).

The subject dealing in the present thesis is not only important but also up-to-date. For instance, when a country tends to file AD complaints against precisely those countries that have previous field cases against it, the doctrine argues that its AD use is at least motivated by retaliation. China, in this regard, offers a primary *de jure* example in Article 56 of its Regulations on AD (hereinafter “Article 56”):

“Where a country (region) discriminatorily imposes anti-dumping measures on the exports from the People's Republic of China, China may, on the basis of actual situations, take corresponding measures against that country (region)”<sup>4</sup>

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<sup>3</sup>World Trade Organization, "World Trade Report 2007," (Switzerland 2007), p. 153

<sup>4</sup> WTO Document G/ADP/N/1/CHN/2, p. 11

But how this provision relates to the clear WTO rules on dispute settlement, which provide that in cases of disputes or measures not compatible with the WTO rules (as discriminatory measures would be), WTO members should seek to resolve the dispute amicably and, if necessary, resort to the WTO Dispute Settlement Body (hereinafter “DSB”)? Furthermore, what type of action would be considered as “discriminatory” within the meaning of this article? In addition, only under strict conditions, defined in the rules on dispute settlement can “retaliatory” measures be allowed under the WTO rules.

The legal base of this statement makes China special since there is no other country’s AD law making such an explicit retaliation message. China is widely known as the main target of AD measures enforced in the world. It is also, however, one of the most frequent users of AD legislation in the WTO system. In fact, all of China’s complaints under the Dispute Settlement Understanding (hereinafter “DSU”) are against the United States (hereinafter “US”) and the European Union (hereinafter “EU”). Moreover, in terms of litigation retaliation, filing a case against a country increases the likelihood that the respondent will file a complaint against the original complainant. In fact, the EU initiated four cases against China while China initiated two against the EU. This suggests that China’s complaints, *vis-a-vis* the EU, are commensurate with the number of cases brought against it.

Nevertheless, retaliation as a mechanism toward free trade is not a new idea. Illustrative of this recent effect in EU AD dynamics has been the Commission’s publication of reports on third country trade defense instruments against the EU. One report is especially highly critical of the ‘increasing’ and often ‘disproportionate’ use of AD measures by, mainly developing and transition, countries against European exports and explicitly stresses the negative consequences for EU exporters.<sup>5</sup>

The aim of this thesis is to analyze the legality of the above mentioned Article 56 in the light of the WTO Agreements. Accordingly, chapter one will portray the background of Article 56 by describing the evolution of China’s Trade Law and AD Regulations and its retaliatory

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<sup>5</sup>Report for the 133 Committee European Commission, "Overview of Third Country Trade Defense Actions Against the Community," (Brussels 9 April 2003), p. 4

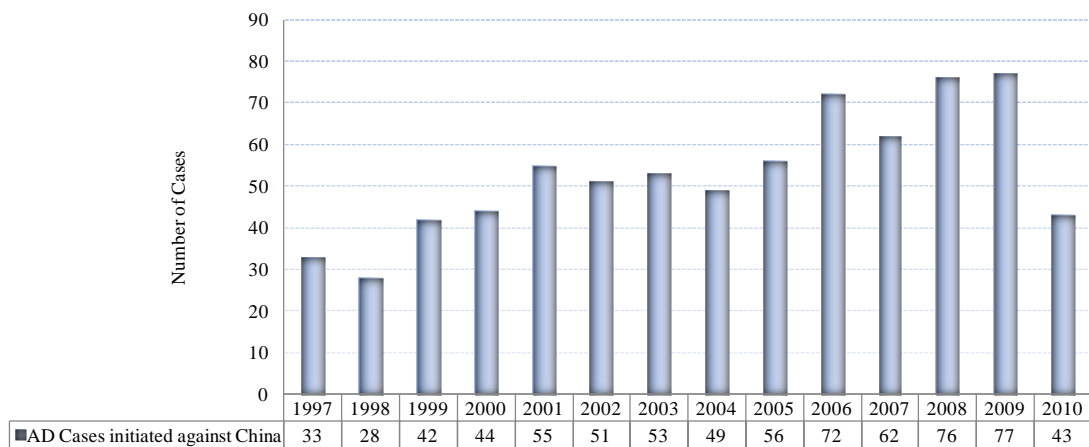
provisions; chapter two will show how in practice retaliatory AD is possible; particularly it will show how China, without invoking Article 56, retaliated the EU with a provisional AD duty in one of the main goods exported by the EU: steel fasteners. Finally, chapter three will analyze the legality of Article 56 at the light of some provisions of the DSU, the AD Agreement and the General Agreement on Tariffs and Trade (hereinafter “GATT 1994”).

## CHAPTER 1

### LEGAL AND INSTITUTIONAL TRADE FRAMEWORK OF THE PRC: AN INTRODUCTION TO ARTICLE 56 OF ITS ANTI-DUMPING REGULATION

As stated in the introduction, since the establishment of the WTO China has been the world's primary target for AD investigations, mainly because of its rapidly increasing exports. As Figure 1 show, China was the target of 825 AD investigations between 1997 and 2010 –far outnumbering the 278 investigation involving Korea, which made it the second largest target of such cases in the same period.

FIGURE 1: NUMBER OF AD CASES INITIATED AGAINST CHINA BETWEEN 1997 AND 2010

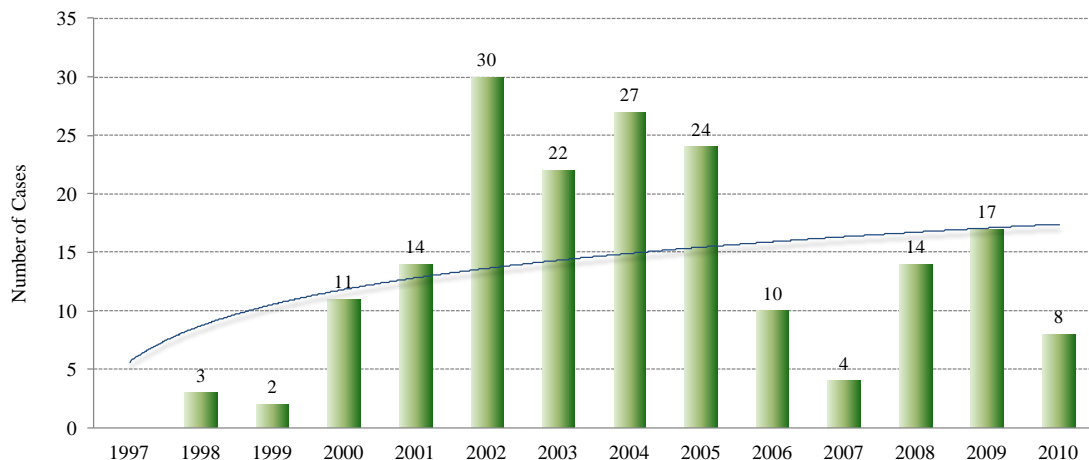


*Elaboration:* Author. *Source:* WTO.<sup>6</sup>

<sup>6</sup> See Statistics on AD, AD Initiations: By exporting country, from: 01/01/1995 to 30/06/2011. Data available online at: [http://www.wto.org/english/tratop\\_e/adp\\_e/ad\\_init\\_exp\\_country\\_e.xls](http://www.wto.org/english/tratop_e/adp_e/ad_init_exp_country_e.xls)

Since enacting its first AD regulation, China has been developing it, increasing the staff of its investigation authorities, and steadily accumulating its AD practices. Until 2010 China has been among the world's heaviest users of AD measures. As a matter of fact, of the totaled 186 AD investigations initiated by China, 156 were initiated after its accession to the WTO on December 11<sup>th</sup> 2001.

**FIGURE 2: NUMBER OF AD CASES INITIATED BY CHINA AND ITS TENDENCY**



*Elaboration:* Author. *Source:* WTO.<sup>7</sup>

As a consequence of its accession to the WTO, and to comply with its basic rules as well as its commitments made in the accession protocol, China has modified and abolished many of its laws and regulations.<sup>8</sup> The adoption of a series of AD regulations and rules has been leading these changes,

[T]o abide by the WTO rules, particularly the AD Agreement, China enacted more than ten regulations and rules before or shortly after its accession to the WTO.<sup>9</sup>

The PRC enacted its first AD law in 1997 and this gave rise to concerns about its WTO consistency. This chapter, which is divided in two parts, describes the evolution of China's AD

<sup>7</sup> See Statistics on AD, AD Initiations: By reporting member, from: 01/01/1995 to 30/06/2011. Data available online at: [http://www.wto.org/english/tratop\\_e/adp\\_e/ad\\_init\\_rep\\_member\\_e.xls](http://www.wto.org/english/tratop_e/adp_e/ad_init_rep_member_e.xls)

<sup>8</sup> Some of them are still being modified or repealed. According to MOFTEC, by 2002, there were more than 2000 laws and regulations that were being modified. [Lei Wang and Yu Shengxing, "China's New Anti-dumping Regulations," *Journal of World Trade* 36, no. 5 (2002), footnote 1]

<sup>9</sup> *Ibid.*, p. 903

law. The first part describes the historical overview of China's foreign trade regime while the second part focuses on the regimes' retaliatory provisions.

## **A. Historical Overview of China's Trade Law and Regulations**

### *I. The Old Regulations*

The 'Foreign Trade Law' is the principal law governing China's foreign trade relations; it became effective on 1994. This law which comprises 11 chapters, covers general provisions to foreign trade dealers, import and export of goods and technologies, international trade in services, protection of trade-related aspects of intellectual property rights, foreign trade order, foreign trade investigations, foreign trade remedies, foreign trade promotion, legal liabilities and supplementary provisions. The AD Regulations is included in the chapter on foreign trade remedy measures.

Article 30 of the 'Foreign Trade Law' was the first regulation dedicated to AD, which permitted the application of «counter measures» against products imported at less than their normal value:

“Where a product is imported at less than the normal value of the product and causes or threatens to cause material injury to an established domestic industry concerned, or materially retards the establishment of a particular industry, the State may take necessary measures in order to remove or ease such injury or threat of injury or retardation.”<sup>10</sup>

Article 32 of the same legal text provided that the authority designated by the State Council shall conduct investigations and make determinations in accordance with 'relevant laws and administrative regulations'. However, it was not until 1997 that the 'relevant laws and administrative regulations' were enacted. As a consequence, the State Council, on March 25<sup>th</sup> 1997 promulgated the 'Anti-Dumping and Anti-Subsidy Regulations of the PRC' (often called

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<sup>10</sup> [China] Foreign Trade Law of the People's Republic of China, adopted at the 7<sup>th</sup> Session of the Standing Committee of the 8<sup>th</sup> National People's Congress in May 12<sup>th</sup> 1994, entered into force on July 1<sup>st</sup> 1994. English translation available online at <http://en.chinacourt.org/public/detail.php?id=2685>.

the “*old regulations*”).<sup>11</sup>When these regulations were drafted, the only experience China had in regard to AD regulations was defending its firms in AD investigations conducted by other WTO Members. The Old Regulations aimed to ensure fair competition and thus to protect business interests of China’s domestic industries.

There were two major reasons for the enactment of the Old Regulations. First, China has drastically liberalized its trade in goods in the early to mid 1990s in anticipation of its accession to the WTO and the resulting competitive domestic market condition required enhanced protection of domestic industries. AD duties were among the few measures available for that purpose. Second, and as professor Nakagawa points out,

...as China became a frequent target of foreign anti-dumping action in the early to mid 1990s, China thought it was necessary and justifiable to introduce anti-dumping measures as a countermeasure or retaliation against foreign (and discriminatory) anti-dumping actions against China.<sup>12</sup>

This stance was clearly shown in Article 40 of the Old Regulations:

“In the event that any country or region applies discriminatory antidumping or countervailing measures against the exports from the People’s Republic of China, the People’s Republic of China may, as the case may be, take counter-measures against the country or region in question.”

However, the language of the Old Regulations was general and it lacked detailed rules corresponding to the AD Agreement. To mention the most relevant, these regulations did not contain any provision concerning judicial review of AD measures.

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<sup>11</sup>The *Old Regulations* consist of 6 chapters and 42 articles, focusing primarily on AD issues with a number of articles on countervailing duties. It defines dumping as an action when the price of an imported product is less than its normal value. These regulations also provided the methods to determine the normal value and the price of an import. Moreover, it included provisions on the determination of injuries, as well as AD investigation procedures and measures. The authority to conduct AD investigations was the Ministry of Foreign Trade and Economic Cooperation while the State Economic and Trade Commission was granted responsibility for the injury determination. It was under this regulation that China’s first AD investigation was initiated.

<sup>12</sup>Junji Nakagawa, “China,” in *Anti-Dumping Laws and Practices of the New Users*, ed. Junji Nakagawa (Great Britain: Cambridge University Press, 2007), p. 29

## II. *The New Regulations*

As part of its accession package, China committed to make its trade laws and regulations compatible with the WTO agreements. Thereafter, China repealed the old regulations and enacted two new regulations: the ‘Anti-Dumping Regulations’ and the ‘Anti-Subsidy Regulations’ by separating AD issues from subsidy-countervailing issues (often called the *2002 Regulation*). These Regulations became effective on January 1<sup>st</sup>2002, shortly after the National People’s Congress of China ratified its accession to the WTO.

However, like its predecessor, the language of the 2002 Regulation was general, and it lacked the detailed rules for administering an AD procedure. Furthermore, it was also based on Article 30 of the ‘Foreign Trade law’ of 1994.

In 2004, both, the ‘Foreign Trade Law’ and the 2002 Regulation were revised. The revised regulation, which took effect on June 1<sup>st</sup>2004 (often called the *2004 Regulation* or the “*new regulations*”), reflect the institutional change in AD investigating authorities.<sup>13</sup> In general, the 2004 Regulation incorporate the features of and have a similar structure as the AD Agreement. They cover most of the subject matters regulated by it, including dumping and injury, AD investigation, AD measures, and review. Moreover, through provisional rules or rules, China’s regulations provide guidelines for carrying out investigation and for applying AD measures.

However, some of China’s provisions on anti-dumping are not as specific as required in WTO’s AD Agreement. Examples include (i) provision on dumping margin or comparison between export price and normal value; (ii) provisions on provisional anti-dumping measures; and (iii) provisions on information and evidence for an anti-dumping investigation. In addition, some of China’s provisions on anti-dumping do not reflect necessary requirements as in WTO’s AD Agreement, including: (i) provision on decision to initiate an anti-dumping

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<sup>13</sup> The State Council amended the AD regulation granting separate divisions of the newly established Ministry of Commerce (hereinafter “MOFCOM”) responsibility for both the determination of dumping and injury. The Bureau of Fair Trade for Imports and Exports was given the responsibility of conducting the investigation and determining the margin of dumping, while the Investigation Bureau of Industry Injury was made responsible for the determination of injury. Together the two divisions determine whether there is a causal link between dumping and injury. [Marcia Don Harpaz, “China’s WTO Compliance-Plus Anti-Dumping Policy,” *Journal of World Trade* 45, no. 4 (2011), p. 22]



investigation; and (ii) provision on preliminary determination and applying provisional anti-dumping measures.<sup>14</sup>

Therefore, even though the new regulations had been drafted by referring to the AD Agreement, many of its provisions are rather general, offering little guidance on how to apply the rules in practice. Moreover, other provisions are different from those of the WTO Agreements. In fact, “during China’s accession negotiation to the WTO, some WTO Members raised concerns that as a result of applying these provisions, trade remedy investigations by Chinese authorities would be found to be inconsistent with WTO rules if China were a Member of the WTO.”<sup>15</sup>

## **B. China’s Foreign Trade Law and its Retaliatory Provisions**

### *I. Provisions under the Foreign Trade Law*

Before focusing on the New Regulations’ retaliatory provisions, it is important to understand its context. According to Art. 4 of the ‘Foreign Trade Law’, China must apply a uniform foreign trade regime. This article also includes other guiding principles, such as the «encouragement» of the development of foreign trade, and the maintenance of «fair» and «free» foreign trade. Articles 5 to 7 of the same legal text stipulate how China is to manage its trade relationship with other countries. In fact, Art. 5 consecrate the principles of «equality» and «mutual benefit». All together constitutes the five principles of China’s peaceful trade co-existence.

These are among the Five Principles of Peaceful Co-existence, which have been the cornerstone of China’s foreign policy since the Premier, Zhou En Lai, first announced them in 1954. The 2004 amendment adds a sentence that explicitly recognizes that China may ‘enter into or participate in such regional economic

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<sup>14</sup>Thi Thuy Van Le and Sarah Y. Tong, "China and Anti-dumping: Regulations, Practices and Responses," *East Asian Institute* no. 149 (2009)., p. 12

<sup>15</sup>Won-Mong Choi and Henry S. Gao, "Procedural Issues in the Anti-Dumping Regulations of China: A Critical Review under the WTO Rules," *Chinese Journal of International Law* 5, no. 3 (2006)., p. 664-665

trade agreements such as customs union agreements, free trade agreements and it may participate in regional economic organizations.’<sup>16</sup>

However the language of Art. 7 calls into question the peaceful co-existence principles by stating that, in the event that any country or region applies prohibitive, restrictive or other similar trade measures on a discriminatory basis, China may take measures appropriate in the actual circumstances.<sup>17</sup> However, how to understand the discriminatory basis? Again quoting professor Nakagawa, “[T]he government of China criticize the following two measures as discriminatory: (1) most countries regarded China as a country with a ‘non-market economy’ and determined the normal value of Chinese products based on domestic process of a third country with market economy; (2) the US and EC applied a single rate of the anti-dumping duty to different Chinese exporters to whom different margins of dumping were applicable on the ground that they were not independent on the government of China”<sup>18</sup>

Nevertheless, this clause provides discretionary power for retaliation to the Chinese authorities. Any restrictive or discriminatory measure ‘in respect of trade’ may be subject to this countermeasure system. Consequently, if any country takes discriminatory trade remedy measures, *i.e.* AD or countervailing measures, against Chinese exports, China may take similar trade remedy measures against its exports.

Compatibility of this countermeasure system with the WTO agreements is controversial. Even though Article 7 is a discretionary (not mandatory) provision, its consistency with the AD Agreement is highly questionable. First, when the other party is a WTO member, China must take counter-measures only after receiving authorization from the WTO (after going through the dispute settlement process); secondly, when the other party is not a WTO member, China may take any measure considered appropriate.

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<sup>16</sup>Yuejiao Zhang, Henry Gao, and Daniel Arthur Lapres, "Chapter on Foreign Trade," in *Business Law in China*, ed. Yuejiao Zhang and Daniel Arthur Lapres (Paris: International Chamber of Commerce (ICC) Publications, 2008), p. 166

<sup>17</sup>The complete text of Art. 7 is the following: “In the event that any country or region applies prohibitive, restrictive or other like measures on a discriminatory basis against the People’s Republic of China in respect of trade, the People’s Republic of China may, as the case may be, take countermeasures against the country or region in question”.

<sup>18</sup>Nakagawa, "China.", footnote 7

## *II. Provision under the AD Regulation*

This countermeasure system is embodied as well in the AD Regulations of China under the mentioned Article 56,

### “CHAPTER VI - SUPPLEMENTARY PROVISIONS

**Article 56.**Where a country (region) discriminatorily imposes anti-dumping measures on the exports from the People's Republic of China, China may, on the basis of the actual situations, take corresponding measures against that country (region).”<sup>19</sup>

This provision dates back to Article 40 of the old regulations. Even though this provision has never been invoked, its very existence shows that China is well prepared to retaliate against foreign trade restrictions with corresponding measures. Certainly, this system provides an effective trade remedy tool for China and exercises a sizable potential threat upon its trading partners given the considerable economic clout that China carries.

This provision raises many interpretive issues in regard to the meanings of «discriminatory imposition» of AD measures, «corresponding measures» and «on the basis of the actual situations».

An example of discriminatory imposition of anti-dumping duties is the case in which a foreign state investigates and imposes anti-dumping measures against allegedly dumped Chinese products, while third country products in dumping are exempted from the investigation. In this kind of targeted anti-dumping situation, China may attempt to take corresponding measures against imported products of the foreign state.<sup>20</sup>

However, as further will see, under the WTO Agreements Members cannot take any retaliatory measures against other WTO Members unless the DSB has made an affirmative determination of violation of WTO obligations by the other party, and any countermeasures in

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<sup>19</sup> WTO Document G/ADP/N/1/CHN/2, p. 11

<sup>20</sup>Choi and Gao, "Procedural Issues in the Anti-Dumping Regulations of China: A Critical Review under the WTO Rules.", p. 679

the form of AD duty may be taken only after the conclusion of AD investigations duly conducted pursuant to the AD Agreement.

In addition, certain situations in which retaliation is necessary cannot be seen as 'special circumstances' within the meaning of the Anti-Dumping Agreement. Therefore, MOFCOM cannot initiate anti-dumping investigations without petitions from the domestic industry even if a foreign state has imposed a discriminatory anti-dumping duty. Instead, the MOFCOM may only self-initiate an investigation if 'special circumstances other than the mere imposition of discriminatory anti-dumping duty by a foreign country exist.'<sup>21</sup>

Given the broadly defined discretionary powers, it is always possible for this system to be abused and applied inconsistently with WTO Agreements and jurisprudence. Not surprisingly, the 'Provisional Rules Governing Investigations of Foreign Trade Barriers', provides that the MOFCOM may conduct bilateral consultations, resort to multilateral dispute settlement mechanism, or adopt other appropriate measures if trade barriers are found to exist.

As pointed out before, during China's accession negotiation to the WTO, some Members raised concerns about the application of these provisions. As a matter fact, in response to questions at the WTO from US, EU and Argentine trade officials in May 2002 on China's new AD and countervailing duty rules, China failed to clarify several significant issues about which WTO members harbor concerns. Specifically, in its written response to the questions, China failed to clarify the scope of Article 56; moreover, China refused to state the conditions under which it would invoke such retaliatory measures.

More precisely, when the Argentinean delegation asked the Chinese delegation how the provisions of Article 56 are consistent with the WTO Agreement, the reply was the following: "As to the Article 56 of the Regulation, we had made a clarification last October in the TRM meeting under Committee on Anti-Dumping Practices that there was yet to be any case as such so far."<sup>22</sup>

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<sup>21</sup>Ibid., p. 679

<sup>22</sup>World Trade Organization, *G/ADP/Q1/CHN/17, Replies to the Questions Posed by ARGENTINA regarding the Notification of CHINA*, 2003.

In the same line, when the US delegation asked what type of action would be considered as ‘discriminatory’ within the meaning of Article 56 and if there any law prohibiting its use prior to exhausting other remedies such as the WTO dispute settlement process, China interpreted the term ‘corresponding measures’ as a measure China is entitled to take after resort to the dispute settlement procedures and rules contained in Annex 2 of the AD Agreement if the party is also a WTO member.<sup>23</sup>

Last but not least, when the EU asked in what circumstances China would envisage to use article 56, China’s reply was the following:

The term country (region) used in Article 56 of Regulations on Anti-dumping includes both WTO Members and non-WTO Members. When China takes corresponding measures against a WTO Member, China will comply with WTO obligations. So far Article 56 has not been applied.<sup>24</sup>

### **C. Conclusion**

This chapter has examined China’s evolution of trade laws with particular emphasis on its retaliatory provisions. On one side, China in anticipation of its accession to the WTO, have drafted the old regulations; however, and as a result of its accession, like many Chinese laws, the Old Regulation –in force only five years- was replaced by a new set of regulations. Although the newly enacted AD Regulation still needs to alleviate many earlier substantive and procedural problems, it has made a significant improvement in bringing China’s AD regime into line with the AD Agreement.

On the other side, the retaliatory language of Article 56 dates back to Art. 40 of the old regulations. As we saw, this original provision was enacted so that China might take retaliatory AD measures against the following two types of foreign “discriminatory” measures: (1) the non-market economy (hereinafter “NME”) status of China, and; (2) the single rate of an

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<sup>23</sup>World Trade Organization, *G/ADP/Q1/CHN/33, Replies to Questions posed by the UNITED STATES Regarding the Notification of CHINA*, 2003.

<sup>24</sup>World Trade Organization, *G/ADP/Q1/CHN/55/Suppl.1, Replies to Questions Posed by the EUROPEAN COMMUNITIES Regarding the Notification of the PEOPLE'S REPUBLIC OF CHINA*, 2005.

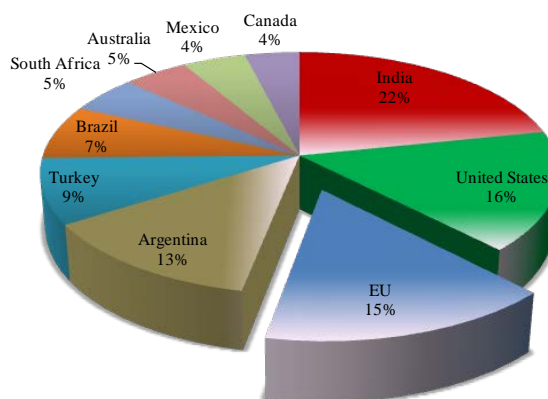
AD duty to, applied by the US and the EU, to different Chinese exporters to whom different margins of dumping were applicable on the ground that they were not independent of the government of China. If this were the case, it would not conform with some WTO Agreements as we will see on chapter 3.

## CHAPTER 2

### CHINA'S AD RETALIATION AGAINST THE EU: THE FASTENERS CASE.

The bilateral trade between the EU and China has increased rapidly since the establishment of diplomatic relations in 1975. By now, the EU is China's largest trading partner, largest export market, and largest source of technology import, while China is the EU's second-largest trading partner. However, as figure 3 shows, 15% of the total AD cases initiated by China, between 1997 and 2010, were against the EU.

**FIGURE 3: CHINA'S AD INITIATIONS BY COUNTRY  
(IN % OF TOTAL CASES. 1997-2010)**



*Elaboration:* Author. *Source:* WTO.<sup>25</sup>

<sup>25</sup> See Statistics on AD, AD Initiations: Reporting Member vs. Exporting Country, from: 01/01/1995 to 30/06/2011. Data available online at: [http://www.wto.org/english/tratop\\_e/adp\\_e/ad\\_init\\_rep\\_exp\\_e.xls](http://www.wto.org/english/tratop_e/adp_e/ad_init_rep_exp_e.xls)

Unfortunately most of these proceedings have led to the imposition of duties for the European products involved; particularly those related in the steel industry.

Kennedy (2005, 423) conjectures that chemicals and steel are the primary industrial users of antidumping within China for a number of reasons: they are large, concentrated and state-owned, and they are less involved than other industries in international production sharing or joint ventures, and they primarily produce for the domestic market.<sup>26</sup>

Although, in none of China's AD initiations has been invoked Article 56, this chapter will show how in practice retaliatory AD is possible. Particularly, it will confirm how China, without invoking Article 56, retaliated the EU with a provisional AD duty in steel fasteners<sup>27</sup>.

#### **A. First Strike: The EU's investigation and AD duties on Chinese fasteners**

On September 26<sup>th</sup>2007, the European Industrial Fasteners Institute, lodged a complaint before the EU Commission, alleging that imports of steel fasteners, falling with the Combined Nomenclature (hereinafter "CN") Codes: 73181500, 73182100, 73182200, among others, originating in the PRC were being dumped and were thereby causing material injury to the EU industry. This complaint, which contained evidence of dumping and material injury, was considered sufficient to justify the opening of a proceeding. On November 9<sup>th</sup>2007, the proceeding was initiated by the publication of a 'Notice of Initiation'<sup>28</sup> in the Official Journal of the European Union.

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<sup>26</sup>Chad P. Bown, "China's WTO entry: Antidumping, Safeguards, and Dispute Settlement," *NBER Working Paper* 13349(2007), p. 28

<sup>27</sup> A fastener is a hardware device used to mechanically join two or more elements in construction, engineering, etc. They are used in a wide variety of industrial sectors, as well as by consumers. According to international standards, fasteners should comply with the same basic physical and technical characteristics including notably strength, tolerance, finishing and coating.

<sup>28</sup>European Commission, "Notice of Initiation of an Anti-dumping Proceeding Concerning Imports of Certain Iron or Steel Fasteners Originating in the People's Republic of China," in *C 267/II* (Brussels: Official Journal of the European Union, 9 September 2007).



Since China is categorized as a NME, an analogue country has to be used when determining the normal value of Chinese goods.<sup>29</sup> In the notice of initiation, the use of India as an appropriate analogue country for the purpose of establishing normal value for the PRC was indicated; however, several importers in the EU and exporting producers in the PRC opposed the choice of India, arguing that its product range is not comparable with that of the Chinese exporting producers. Most of those parties suggested using Taiwan instead; although, the Commission considered reasonable the choice of India as analogue country.<sup>30</sup>

Finally, the investigation concluded that the pressure exerted by the dumped imports, which significantly increased their volume and market share from 2003 onwards, and which were made at dumped prices, played a determining role in the injury suffered by the EU industry.<sup>31</sup> As a consequence, on January 26<sup>th</sup> 2009 the EU imposed definitive AD duties on the Chinese fasteners.

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<sup>29</sup> In the second paragraph to AD Agreement, WTO Members explicitly recognize that MNE may need to be treated differently to market economies in AD cases. Furthermore, in its protocol of WTO accession, China agreed to allow the EU and other WTO Members to use the NME methodology in dumping cases for 15 years from the time of its accession. Thus, the EU and other WTO Members have broad discretion in determining the conditions under which they apply NME provisions in AD cases against Chinese firms. However, a careful reading of the applicable provisions of the protocol shows that they are not intended to serve as a *carte blanche* to apply NME methodologies in all cases. [Jason Z. Yin, "China: How to Fight the Antidumping War?," *China & Global Economy* (2003)., p. 5]

<sup>30</sup> According to Article 2 (7) (a) of the EU basic AD Regulation, normal value for the exporting producers not granted Market Economy Treatment (hereinafter "MET") has to be established on the basis of the prices or constructed value in an analogue country. In the mentioned case, the Commission actively sought cooperation from known producers of fasteners worldwide, including Taiwan. However, none of the Taiwanese producers agreed to cooperate. Neither did any other third country producers offer to cooperate in the proceeding. By contrast, two Indian producers agreed to cooperate by replying to the questionnaire intended for producers in the analogue country. [European Union Council, "Council Regulation (EC) No 91/2009 Imposing a Definitive Anti-dumping Duty on Imports of Certain Iron or Steel Fasteners Originating in the People's Republic of China," in *L 29* (Brussels: Official Journal of the European Union, 26 January 2009)., pa. 88-89]

<sup>31</sup> The injury in this case mainly takes the form of loss of potential sales volume in a growing market and market share. According to the investigation, between 2004 and the investigation period, the EU consumption increased, in volume, by 29%, while the production sales only increased by 17%; furthermore, the EU producers lost over 6.8 % of the market share in the same period. The resulting price depression and loss of economies of scale due to low capacity utilization led to an insufficient level of profitability despite the favorable general economic conditions which have prevailed during the period considered. The investigation has also shown that the lack of improvement regarding the situation of most injury indicators of the EU industry coincided with a sharp increase in import volumes and market share from the PRC and a substantial price undercutting by these imports. [ibid., pa. 163-165, 171, 180-181]

## B. Second Strike: China's Retaliation

### I. *The mirror investigation.*

Surprisingly, on 29<sup>th</sup> December 2008, China initiated AD investigations against EU's fasteners with the same CN Codes. According to the Announcement No. 115/2008 of MOFCOM, the Chinese Fasteners Industry Association applied for the AD investigation.<sup>32</sup> In the Announcement, the MOFCOM decided to initiate the investigation after the evidences listed in the petition were approved as dumping, injury, and causal link between the two. In December 2009, China decided to impose provisional AD measures on the EU's fasteners.<sup>33</sup>

### II. *The WT/DS397 case.*

Not satisfied with the mirror investigation, in July 2009 the Chinese authorities brought a complaint in the WTO against the EU's AD final measures on Chinese fasteners.<sup>34</sup> This was China's first offensive case against the EU since its accession to the WTO.<sup>35</sup>

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<sup>32</sup>Ministry of Commerce of the People's Republic of China, "Announcement on Initiation of Anti-dumping Investigation: Certain Iron or Steel Fasteners from the European Union," in *Announcement No. 115, 2008* (<http://english.mofcom.gov.cn/column/print.shtml?/policyrelease/domesticpolicy/200812/20081205979042>, 29 December 2008).

<sup>33</sup>"Announcement on Provisional Anti-dumping Measures," in *Announcement No. 115, 2009* (China Foreign Trade and Economic Cooperation Gazette No. 01-2010, 23 December 2009).

<sup>34</sup>*European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R Panel Report(Adopted, 3 December 2010). According to the request for consultations, China claimed that Article 9(5) of the EC Basic AD Regulation is inconsistent, as such, with Article XVI:4 of the Marrakesh Agreement, Articles VI:1 and X:3(a) of GATT 1994, Articles 6.10, 9.2, 9.3, 9.4, 12.2.2 and 18.4 of the AD Agreement since, in China's view, these provisions require an individual margin and duty to be determined and specified for each known exporter or producer. China also considers the criteria listed in Article 9(5) unreasonable and not objective. In China's view, the EU breaches Article I:1 of GATT 1994 by imposing these conditions only to imports from, "allegedly" NME countries. Furthermore, China considers that the EU's imposition of AD duties on imports of certain iron or steel fasteners is inconsistent with Articles VI and X:3(a) of GATT 1994, Articles 1, 2.1, 2.2, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.4, 6.1, 6.2, 6.4, 6.5, 6.10, 9.2, 9.4 and 17.6(i) of the AD Agreement as well as Part I, paragraph 15 of China's Protocol of Accession.

<sup>35</sup> In fact, China has never initiated any complaint against other major developing country, despite the fact that some such countries have become remarkably active in their AD policies against China. [Wei Zhuang, "An Empirical Study of China's Participation in the WTO Dispute Settlement Mechanism: 2001-2010," *The Law and Development Review* 4, no. 1 (2011), p. 232]

On December 2010 the panel circulated its report to WTO members. The report has two parts: the first part relates to Art. 9(5), the provision in the EU Basic AD Regulation on so-called ‘individual treatment’<sup>36</sup> of exporters from NME countries. In the view of the panel, there was no basis in the AD Agreement to condition the granting of an individual margin and duty rate on compliance with ‘individual treatment’ criteria. The panel thus found that such provision violated WTO law. It is important to note that this finding does not concern the NME status of China; MET relate to the calculation of normal value. This important matter was not an issue here. The second part of the panel report concerned the Council Regulation which imposed customs duties on Chinese fasteners. On this specific measure itself, the panel found that in the great majority of the issues examined, the EU has acted in full compliance with WTO rules. The panel found some violations of WTO law which had no effect on the general soundness of the measure.

On March 25<sup>th</sup>2011, the European Union notified its decision to appeal certain issues of the Panel report<sup>37</sup>; however the WTO Appellate Body upheld the Panel's findings.<sup>38</sup>

### **C. Third Strike: The EU’s complaint. The WT/DS407 case.**

On May 7<sup>th</sup>2010 and pursuant to Art. 4 of the DSU, the EU requested consultations with China regarding China’s mirror investigation. The EU considers that the provisional imposition of AD duties on its fasteners has to be seen in the light of Article 56.<sup>39</sup>

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<sup>36</sup> ‘Individual treatment’ *i.e.* to give a company specific duty rate to a NME exporter is only granted to those NME companies that can demonstrate their independence from the State. This is an important provision to prevent a State from challenging all dumped exports via the State Company that meets the lowest duty rate.

<sup>37</sup> As regards the first part, the EU appeals the finding of the Panel on ‘individual treatment’. With regard to the second part, the EU appeals the Panel's finding on disclosure of normal value determination and the confidentiality issues in view of the systemic issues involved.

<sup>38</sup> *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R Appellate Body Report (Adopted, 15 July 2011).

<sup>39</sup> *China - Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union*, WT/DS407/1 World Trade Organization, Request for Consultations by the European Union (12 May 2010).

According to EU's claim, Article 56 is inconsistent with Art. 23 of the DSU (fails to abide by the rules and procedures of the DSU); Art. 18.1 of the AD Agreement (no specific action against dumping allowed except in accordance with GATT 1994); and, Articles I:1 and X:3 (a) of the GATT 1994 (violates national treatment obligation and the obligation to administer rulings in a uniform, impartial and reasonable manner, correspondingly). Furthermore, the EU considers that the provisional imposition of AD duties is a further incidence of these inconsistencies.<sup>40</sup>

This is the first WTO challenge against China's trade remedy measures. Although, EU's action could be seen as a *tit-for-tat* litigation at the WTO – in order to get China to make changes in the final decision for terminate the fasteners AD investigation-, on June 28<sup>th</sup>2010, in a display of retaliation and over-aggressiveness, China issued a final AD determination in its domestic proceeding ordering the imposition of formal AD duty on EU fastener imports.<sup>41</sup>

#### **D. Conclusion**

Until now China has been the world's heaviest user of AD measures, seeming to protect its industry against all imports, regardless of their origin and regardless of whether or not such imports are competitive. Furthermore, the EU has become one of the top-three targets of these measures (after India and the US).

The facts behind the Fasteners Case reveal that retaliatory AD is possible. Although, not explicitly mentioning Article 56, China retaliated the EU: first with a mirror investigation – which ended up in the imposition of a formal AD duty on the EU's fasteners with the same CN codes- and second by bringing a complaint in the WTO against the EU's original AD measures (WT/DS397).<sup>42</sup>

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<sup>40</sup>Ibid., p. 3

<sup>41</sup>Ministry of Commerce of the People's Republic of China, "Announcement on Final Ruling on the Anti-dumping Investigation on Imports of Steel Fasteners from EU," in *Announcement No. 40, 2010* (<http://english.mofcom.gov.cn/aarticle/newsrelease/significantnews/201006/20100606995559.html>, 28 June 2010).

<sup>42</sup>The achieved Chinese victory in the WT/DS397 case –by narrowing the scope of the EU to impose one duty on imports from all exporters rather than imposing them with the 'individual treatment' criteria-,

At the time of writing this thesis, the EU's complaint on Article 56 (WT/DS407) is currently before the establishment of a WTO Dispute Panel.

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demonstrates that China has transformed itself from being a reluctant player into an aggressive litigant in the WTO dispute settlement activities. We recall that NME status is the main source of frequent trade remedy investigations against China, which places China at a considerable disadvantage in AD actions. Around one third of the WTO Members, including the US and the EU, have not recognized China's market economy status so far. [Zhuang, "An Empirical Study of China's Participation in the WTO Dispute Settlement Mechanism: 2001-2010.", p. 233]

## CHAPTER 3

### THE LEGALITY OF ARTICLE 56 WITHIN WTO AGREEMENTS

WTO laws prohibit members from unilaterally taking retaliatory measures against other members before the DSB has addressed a complaint. Furthermore, if specific action against dumping is taken in a form other than a form authorized under the AD Agreement, such action will violate the Agreement. As a consequence, China's behavior in the fasteners case appears to be inconsistent not only with the spirit of the principle of 'rule of law' but with the most-favoured nation (hereinafter "MFN") principle, among other rules.

Even though, no AD investigation have been initiated based on Article 56 is our aim to analyze in this chapter whether this article as such violates some provisions of the DSU, the AD Agreement and the GATT 1994. Accordingly, the chapter structure is as follows: sections A, B and C of the chapter will analyze Article 56 at the light of Article 23.1<sup>43</sup> of the DSU, Article 18<sup>44</sup> of the AD Agreement and Articles I:1<sup>45</sup> and X:3 lit. (a) of the GATT 1994<sup>46</sup>; finally Section D gives a brief and summarized explanation on how does retaliation work in the WTO.

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<sup>43</sup> Article 23.1 of the DSU provides as follows:

*"Strengthening of the Multilateral System*

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, *they shall have recourse to, and abide by, the rules and procedures of this Understanding*" (emphasis added).

<sup>44</sup> Article 18.1 of the AD Agreement in turn provides that:

*"Final Provisions*

18.1 No *specific action against dumping* of exports from another Member can be taken except in *accordance with the provisions of GATT 1994*, as interpreted by this Agreement.<sup>24</sup>" (emphasis added).

<sup>24</sup> This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

<sup>45</sup> Article I:1 of the GATT 1994 provides that:

*"General Most-Favoured-Nation Treatment*

## A. Article 56 and Article 23.1 of the DSU

### I. *The broad prohibition on unilateralism*

Article 23 DSU deals as its title indicates, with the ‘Strengthening of the Multilateral System’. It contains obligations of a general nature regarding dispute settlement in the WTO. While the DSU as a whole can be seen as the most crucial element of the WTO order, the obligations explicitly contained in this article must be seen as the centerpiece of all substantive DSU obligations.

With its explicit reference to the multilateralism of dispute settlement, it mirrors the overall objective of the DSU of curbing unilateral action in order to guarantee the ‘security and predictability’ of trade relations, as contained in numerous general provisions of the DSU and WTO Agreements.<sup>47</sup>

Article 23.1 overall’s design is to prevent WTO Members from unilaterally resolving their disputes in respect of WTO rights and obligations. It does so by compelling Members to follow the multilateral rules and procedures of the DSU.

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1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,\* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

<sup>46</sup> Article X:3 lit. (a) of the GATT 1994 provides that:

*“Publication and Administration of Trade Regulations*

3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.”

<sup>47</sup> Arthur Steinmann, "Article 23 DSU," in *WTO-Institutions and Dispute Settlement*, ed. Rüdiger Wolfrum, Peter-Tobias Stoll, and Karen Kaiser, *Max Planck Commentaries on World Trade Law* (The Netherlands: Nijhoff, 2006), p. 557

This Article covers all situations in which a Member seeks redress for the actions of another Member, meaning ‘a reaction by a Member against another Member, because of a perceived (or WTO determined) WTO violation, with a view to remedying the situation’. These situations include violation and non-violation complaints, as well as the ‘impediment to the attainment of any objective of the ‘covered agreements’, which must be understood as referring to the ‘other situations’ of Art. XXIII:1 lit. c GATT 1994.<sup>48</sup>

In other words, Art. 23.1 stipulates that in these situations –seek redress- Members shall have recourse to, and abide by, the rules and procedures of the DSU. The use of the rules and procedures as provided for in the DSU is meant to be exclusive. In this sense redress under the DSU is to be the only remedy, to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations.<sup>49</sup>

Moving forward, the second paragraph of Art. 23<sup>50</sup> which is explicitly linked to and has to be read together with and subject to the first paragraph of Art. 23 –as on its face, addresses

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<sup>48</sup>Ibid., p. 559

<sup>49</sup> In the case *EC – Commercial Vessels*, while interpreting the phrase ‘seek the redress of a violation...’, the Panel found that “this phrase appears in a clause contained in an article designed explicitly with a view to ‘strengthening the multilateral system’. These words must therefore be given a meaning consistent with that stated objective. Another relevant element of the context of the phrase ‘seek the redress of a violation...’ in Article 23.1 is that the DSU clearly provides for different types of ‘remedy’. In the Panel's view, an interpretation of Article 23.1 in light of the objective of Article 23 and its context in the DSU suggests that it must apply to any act whereby a Member seeks to obtain unilaterally results that can be achieved via the remedies of the DSU through means other than recourse to the DSU. [*European Communities - Measures Affecting Trade in Commercial Vessels*, WT/DS301/R Panel Report (Adopted, 22 April 2005), pa. 7.190]

<sup>50</sup> Article 23.2 DSU provides as follows:

"In such cases [referred to in Article 23.1, *i.e.* when Members seek the redress of WTO inconsistencies], Members shall:

- (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;
- (b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and
- (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the



conduct in specific disputes since it starts with the words ‘[i]n such cases’-specify three elements that need to be valued as part of the multilateral DSU process:

- a) It is for the WTO through the DSU process –not for an individual WTO Member- to determine that a WTO inconsistency has occurred (Article 23.2(a)).
- b) It is for the WTO or both of the disputing parties, through the procedures set forth in Article 21 –not for an individual WTO Member- to determine the reasonable period of time for the Member concerned to implement DSB recommendations and rulings (Article 23.2(b)).
- c) It is for the WTO through the procedures set forth in Article 22 –not for an individual WTO Member- to determine, in the event of disagreement, the level of suspension of concessions or other obligations that can be imposed (retaliation) as a result of a WTO inconsistency, as well as to grant authorization for the actual implementation of these suspensions.<sup>51</sup>

Article 23.2, thus, prohibits specific instances of unilateral conduct by WTO Members when they seek redress for WTO inconsistencies in any given dispute. This is, the first type of obligations covered under Article 23.

The prohibition against unilateral redress in the WTO sectors is more directly provided for in the second paragraph of Article 23. From the ordinary meaning of the terms used in the chapeau of Article 23.2 ("in such cases, Members shall"), it

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Member concerned to implement the recommendations and rulings within that reasonable period of time".

<sup>51</sup> As the Appellate Body has explained [...] Article 23 restricts WTO Members' conduct in two respects. First, Article 23.1 establishes the WTO dispute settlement system as the exclusive forum for the resolution of such disputes and requires adherence to the rules of the DSU. Secondly, Article 23.2 prohibits certain unilateral action by a WTO Member. Thus, a Member cannot unilaterally: (i) determine that a violation has occurred, benefits have been nullified or impaired, or that the attainment of any objective of the covered agreements has been impeded; (ii) determine the duration of the reasonable period of time for implementation; or (iii) decide to suspend concessions and determine the level thereof. [*European Communities - Selected Custom Matters*, WT/DS315/AB/R Appellate Body Report(13 November 2006); *United States - Continued Suspension of Obligations in the EC - Hormones Dispute*, WT/DS320/AB/R Appellate Body Report(Adopted, 16 October 2008).pa. 371]

is also clear that the second paragraph of Article 23 is "explicitly linked to, and has to be read together with and subject to, Article 23.1". That is to say, the specific prohibitions of paragraph 2 of Article 23 have to be understood in the context of the first paragraph, *i.e.* when such action is performed by a WTO Member with a view to redressing a WTO violation.<sup>52</sup>

## *II. Analysis of Article 56 in the light of Article 23 of the DSU*

As stated in the introduction of the chapter, our aim is to determine, whether Article 56 as such violates Article 23 of the DSU. Art. 23.1 is not concerned only with specific instances of violation; it prescribes a general duty of a dual nature. First, it imposes on all Members to 'have recourse to' the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to recourse to the DSU system to the exclusion of any other dispute settlement system, in particular a system of unilateral enforcement of WTO rights and obligations. "This, what one could call 'exclusive dispute resolution clause', is an important new element of Members' rights and obligations under the DSU".<sup>53</sup> Second, Article 23.1 also prescribes that Members, when they have recourse to the DSU, have to 'abide by' the rules and procedures set out in the DSU. This second obligation under Article 23.1 is of a confirmatory nature: when having recourse to the DSU Members must abide by all DSU rules and procedures.

Indeed, two of the three prohibitions mentioned in Art. 23.2 – Article 23.2(b) and (c) – are but outrageous examples of conduct that contradicts the rules and procedures of the DSU which, under the obligation in Art. 23.1 to 'abide by the rules and procedures' of the DSU, Members are obligated to follow. These rules and procedures clearly cover much more than the ones specifically mentioned in Art. 23.2.<sup>54</sup> There is also more State conduct which can violate the

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<sup>52</sup>*United States - Import Measures on Certain Products from the European Communities*, WT/DS165/R Panel Report (Adopted, 17 July 2000), pa. 6.18

<sup>53</sup>*United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R Panel Report (Adopted, 22 December 1999), pa. 7.43

<sup>54</sup>For example, the requirement to request consultations pursuant to Art. 4 of the DSU before requesting a panel under Art. 6.

general obligation in Art. 23.1 to have recourse to, and abide by, the rules and procedures of the DSU than the instances especially singled out in Art. 23.2<sup>55</sup>

As a whole, Art. 23 proscribes, thus, more than action in specific disputes, it also provides discipline for the general process WTO Members must follow when seeking redress of WTO inconsistencies. A violation of the explicit provisions of Article 23 can, therefore, be of two different kinds. It can be caused,

(a) by an *ad hoc*, specific action in a given dispute, or (b) by measures of general applicability, e.g. legislation or regulations, providing for a certain process to be followed which does not, say, include recourse to the DSU dispute settlement system or abide by the rules and procedures of the DSU.<sup>56</sup>

As a consequence, a legislation dictating possible 'corresponding measures' against other Members before the DSB has addressed a complaint would violate Article 23.2(a). The question then, is how to evaluate Article 56 language which indicates that China may adopt corresponding measures whenever another country discriminatorily imposes AD measures imports originating in the PRC?

If China were to exercise the language of Article 56 and unilaterally retaliate against other members before the DSB has addressed a complaint, China would meet the different elements required for an individual breach under Article 23.2(a).<sup>57</sup> However, Article 56 does not

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<sup>55</sup> Not notifying mutually agreed solutions to the DSB as required in Art. 3.6 DSU or not abiding by the requirements for a request for consultations or a panel as elaborated in Articles 4 and 6 are some other examples of conduct that would be contrary to DSU rules and procedures but is not mentioned specifically in Art. 23.2.

<sup>56</sup> *United States - Sections 301-310 of the Trade Act of 1974.*, pa. 7.46

<sup>57</sup> If China were to unilaterally adopt a 'corresponding measure' against other Members before the DSB has addressed a complaint according to the language of Article 56, China's conduct would meet the different elements required for a breach of Article 23. This conclusion is of crucial importance since it shows that the language of Article 56 breach at least the first type of obligations in Article 23.2(a) in a specific instance. Four elements must be satisfied for a specific act in a particular dispute to breach Article 23.2(a):

- (a) the act is taken "in such cases" (*chapeau* of Article 23.2), *i.e.* in a situation where a Member "seek[s] the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements", as referred to in Article 23.1;
- (b) the act constitutes a "determination";

*mandate* China to unilaterally adopt 'corresponding measures' in violation of Article 23; it

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- (c) the "determination" is one "to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded";
  - (d) the "determination" is either *not* made "through recourse to dispute settlement in accordance with the rules and procedures of [the DSU]" or *not* made "consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under [the DSU]". The two elements of this requirement are cumulative in nature. Determinations are only allowed when made through recourse to the DSU *and* consistent with findings adopted by the DSB or an arbitration award under the DSU.

Applying these four elements to the specific determination allowed under the language of Article 56, namely China's unilateral retaliation against other Members before the DSB has addressed a complaint, a panel will note, first, that Article 56 determinations are made in cases where China is seeking the redress of WTO inconsistencies, in the sense of the first element outlined above.

Also, the determinations under Article 56 meet the second of the four elements. Some of the relevant dictionary meanings of the word "determination" in the context of Article 23.2(a) are: "the settlement of a suit or controversy by the authoritative decision of a judge or arbiter; a settlement or decision so made, an authoritative opinion ... the action of coming to a decision; the result of this; a fixed intention" [Leslie Brown, in *The New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 2008), Vol. 1, p. 651]. Without there being a need precisely to define what a "determination" in the sense of Article 23.2(a) is, a panel will consider that –given its ordinary meaning– a "determination" implies a high degree of firmness or immutability, *i.e.* a more or less final decision by a Member in respect of the WTO consistency of a measure –in these case an AD measure– taken by another Member.

Given that Article 23.2(a) only deals with "determinations" in case a Member is seeking redress of WTO inconsistencies, the view that a "determination" can only occur *subsequent* to a Member having decided that, in its preliminary view, there may be a WTO inconsistency, *i.e.* only once that Member has decided to seek redress of such inconsistency. On that basis, a unilateral determination made by China under Article 56 meet the threshold of firmness and immutability required for a "determination" under Article 23.2(a).

The third and fourth elements under Article 23.2(a) are likewise satisfied. A panel will recall that this determination would be one finding that China's rights under the WTO have been denied, *i.e.* a determination "to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded", thus meeting the third element under Article 23.2(a). A panel will also recall that the specific determination under examination would be one made *before* DSB findings on the matter have been adopted. It would thus *not* be made "through recourse to dispute settlement in accordance with the rules and procedures of [the DSU]" *nor* made "consistent with the findings contained in the panel or Appellate Body report adopted by the DSB". Indeed, such determination made *before* exhaustion of DSU procedures, would not be required, referred to or relevant for any of the steps or procedures in the DSU. On the contrary, it would be a determination that, at face value, prejudices and could even contradict the outcome of DSU procedures. Moreover, any such determination could not be consistent with DSB findings, since no such findings would, as yet, be adopted.

In conclusion, if China were to exercise, in a specific case, the right reserved for it in Article 56 to unilaterally adopt a retaliatory measure against other Members before exhaustion of DSU procedures, China's conduct would meet all four elements required for a breach of Article 23.2(a).

merely sets out in the language itself that China has the power and right to do so. The question here is whether this constitutes a breach of the second type of obligations under Article 23, namely a breach by measures of general applicability such as a general law.

The example used by the Panel in the case *US – Section 301 Trade Act* will help us answer the question,

Imagine two farmers with adjacent land and a history of many disputes concerning real and alleged mutual trespassing. In the past, self help through force and threats of force has been used in their altercations. Naturally, exploitation of the lands close to the boundaries suffers since it is viewed as dangerous terrain. They now sign an agreement under which they undertake that henceforth in any case of alleged trespassing they will abjure self help and always and exclusively make recourse to the police and the courts of law. They specifically undertake never to use force when dealing with alleged trespass. After the entry into force of their agreement one of the farmers erects a large sign on the contested boundary: «No Trespassing. Trespassers may be shot on sight».<sup>58</sup>

One could, argue that since the sign does not say that trespassers *will be* shot, the obligations undertaken have not been violated. But would that be the ‘better faith’ interpretation of what was promised? Did they not after all promise *always* and *exclusively* to make recourse to the police and the courts of law?

Likewise, is it a good faith interpretation to read the obligations in Art. 23 to allow a Member that promised its WTO partners –under Articles 23.1 and 23.2(a)- that it will generally, including in its legislation, have recourse to and abide by the rules and procedures of the DSU which specifically contain an undertaking not to take possible retaliatory AD measures against other Members prior to exhaustion of DSU proceedings.

The good faith requirement in the Vienna Convention suggests, thus, that a promise to have recourse to and abide by the rules and procedures of the DSU, also in one's legislation, includes the undertaking to refrain from adopting national laws which threaten prohibited conduct.<sup>59</sup>

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<sup>58</sup>*United States - Sections 301-310 of the Trade Act of 1974.*, pa. 7.65

<sup>59</sup>*Ibid.*, pa. 7.68

The creation of market conditions conducive to individual economic activity in national and global markets and to the provision of a secure and predictable multilateral trading system are the more relevant purposes of the DSU.<sup>60</sup> It must be recalled that the very first Preamble to the WTO Agreement states that Members recognize

...that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services.<sup>61</sup>

Thus, providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market and its different operators. DSU provisions must, therefore, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it. In this respect it is important to refer not only to the preamble but also to positive law provisions in the DSU itself. In fact, Art. 3.2 of the DSU provides:

“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements...”<sup>62</sup>

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<sup>60</sup> An important reason why Article 23 of the DSU must be interpreted with a view to prohibiting any form of unilateral action is because such unilateral actions threaten the stability and predictability of the multilateral trade system, a necessary component for "market conditions conducive to individual economic activity in national and global markets" which, in themselves, constitute a fundamental goal of the WTO. Unilateral actions are, therefore, contrary to the essence of the multilateral trade system of the WTO. [*United States - Import Measures on Certain Products from the European Communities.*, para. 6.14]

<sup>61</sup> *Marrakesh Agreement Establishing the World Trade Organization*, Text of the Preamble. See also similar language in the second preambles to GATT 1947 and GATS. The TRIPS Agreement addresses even more explicitly the interests of individual operators, obligating WTO Members to protect the intellectual property rights of nationals of all other WTO Members. Creating market conditions so that the activity of economic operators can flourish is also reflected in the object of many WTO agreements, for example, in the non-discrimination principles in GATT, GATS and TRIPS and the market access provisions in both GATT and GATS.

<sup>62</sup> The importance of security and predictability as an object and purpose of the WTO has been recognized as well in many panel and Appellate Body reports. See the Appellate Body reports on *Japan – Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R and *India – Patents (US)*, WT/DS50/AB/R.

The security and predictability in question are of ‘the multilateral trading system’. The multilateral trading system is composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.

Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market and the activities of individuals within it.<sup>63</sup>

Let’s consider, first, the overall obligation of Members concerning their internal legislation. Under traditional public international law, a State cannot rely on its domestic law as a justification for non-performance.<sup>64</sup> Equally, however, under traditional public international law, legislation under which an eventual violation could, or even would, subsequently take place, does not normally in and of itself engage State responsibility. If, say, a State undertakes not to expropriate property of foreign nationals without appropriate compensation, its State responsibility would normally be engaged only at the moment foreign property had actually been expropriated in a given instance.

When a Member imposes unilateral measures in violation of Art. 23 in a specific dispute, serious damage is created both to other Members and the market. A law reserving the right for unilateral measures to be taken contrary to DSU rules and procedures, may –as is the case of Article 56- constitute an ongoing threat and produce a ‘chilling effect’ causing serious damage in a variety of ways.

First, there is the damage caused directly to another Member, in this case the EU. Members faced with a threat of unilateral action (in this case China’s retaliatory AD measures against other Members before the DSB has addressed a complaint), especially when it emanates from an economically powerful Member –as China-, may in effect be forced to give in to the demands imposed by the Member exerting the threat, even before DSU procedures have been

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<sup>63</sup>*United States - Sections 301-310 of the Trade Act of 1974.*, pa. 7.77

<sup>64</sup> See Article 27 of the Vienna Convention.

activated. To put it differently, merely carrying a big stick is, in many cases, as effective a means to having one's way as actually using the stick. The threat alone of conduct prohibited by the WTO would enable the Member concerned to exert undue leverage on other Members. It would disrupt the very stability and equilibrium which multilateral dispute resolution was meant to foster and consequently establish, namely equal protection of both, large and small, powerful and less powerful Members through the consistent application of a set of rules and procedures.

Second, there is the damage caused to the market itself. The mere fact of having legislation which permits conduct which is WTO prohibited –namely, the imposition of unilateral measures against other Members- may in and of itself prompt economic operators to change their commercial behavior in a way that distorts trade. Economic operators may be afraid, say, to continue ongoing trade with, or investment in, the industries or products threatened by unilateral measures. Existing trade may also be distorted because economic operators may feel a need to take out extra insurance to allow for the illegal possibility that the legislation contemplates, thus reducing the relative competitive opportunity of their products on the market. Other operators may be deterred from trading with such a Member altogether, distorting potential trade. The damage thus caused to the market may actually increase when national legislation empowers individual economic operators to trigger unilateral State action, as is the case of Article 56.

The risk of a unilateral retaliation as found in the language of Article 56 itself has an equally apparent ‘chilling effect’ on both Members and the market even if it is not quite certain that such a determination would be made. The point is that neither other Members nor, in particular, individuals can be reasonably certain that it will not be made. Whereas States which are part of the international legal system may expect their treaty partners to assume good faith fulfillment of treaty obligations on their behalf, the same assumption cannot be made as regards individuals.

## **B. Article 56 and Article 18.1of the AD Agreement**



## I. Introduction to Article 18.1 of the AD Agreement

Article VI of the GATT 1994 allows Members to do what they would not normally be allowed to do: to impede trade by imposing duties on imports in contravention of Article II of the GATT 1994. Because Article VI of the GATT 1994 gives Members the right to impede trade in specified circumstances, then, the same Article VI of the GATT 1994 establishes the right to restrict dumped imports only by a single authorized remedy: an «AD duty». Being more specific, a Member may have recourse to (i) definitive AD duties, (ii) provisional measures, or (iii) price undertakings as permissible response to dumping. This is what constitutes ‘specific action against dumping’ within the meaning of Article 18.1 of the AD Agreement<sup>65</sup>. In other words, what Art.18.1 does is helping clarify the scope of Article VI of the GATT 1994.

...the text of Article 18.1 of the Anti-dumping Agreement reaffirms the understanding that Article VI of the GATT 1994 is the sole GATT-authorized remedy for dumping. The plain meaning of this provision could not be more explicit. "No specific action" can be taken to address dumping except action that follows the requirements of Article VI of the GATT 1994.<sup>66</sup>

Furthermore,

Article 18.1 of the Anti-Dumping Agreement contains a prohibition on the taking of any ‘specific action against dumping’ of exports when such specific action is not ‘in accordance with the provisions of GATT 1994, as interpreted by this Agreement’. Since the only provisions of the GATT 1994 ‘interpreted’ by the Anti-Dumping Agreement are those provisions of Article VI concerning dumping, *Article 18.1 should be read as requiring that any ‘specific action against dumping’ of exports from another Member be in accordance with the relevant provisions of*

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<sup>65</sup> We recall the text of Article 18.1 of the AD Agreement:

“Final Provisions

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.<sup>24</sup>”

<sup>24</sup> This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

<sup>66</sup> *United States - Anti-Dumping Act of 1916*, WT/DS162/R/Add.1 Panel Report (Addendum)(Adopted, 25 September 2000), pa. 3.272

*Article VI of the GATT 1994, as interpreted by the Anti-Dumping Agreement.*<sup>67</sup>  
(emphasis added)

The meaning of the phrase ‘specific action against dumping’ of exports within the meaning of Art. 18.1 is an action taken in response to situations presenting the constituent elements of ‘dumping’. As a consequence, ‘Specific action against dumping’ of exports must encompass action that may be taken only when the constituent elements of ‘dumping’ *i.e.* dumping; material injury and causality, are present.

Looking to the ordinary meaning of the words used in this provision, they establish two precedent conditions that must be met in order for a measure to be governed by them. The first is that a measure must be ‘*specific*’ to dumping; the second is that a measure must be ‘*against*’ dumping. These two conditions operate together and complement each other. If they are not met, the measure will not be governed by Art. 18.1. If, however, it is established that a measure meets these two conditions, it would then be necessary to move to a further step in the analysis and determine whether the measure has been ‘taken in accordance with the provisions of GATT 1994’ as interpreted by the AD Agreement. If it is determined that this is not the case, the measure would be inconsistent with Article 18.1.

## *II. Analysis of Article 56 in the light of Article 18.1 of the AD Agreement*

We now turn to the question whether Article 56 provides for “specific action against dumping” of exports from another Member –the EU in this case- and, thus, fall within the scope of application of Article VI of the GATT 1994.

As noted above, there are three ‘permissible responses to dumping’ available to WTO Members: definitive AD duties, provisional measures, and price undertakings. Such ‘permissible responses to dumping’ constitute ‘specific action against dumping’ within the meaning of Article 18.1 of the AD Agreement. By virtue of this article, other types of ‘specific action against dumping’ are not permitted. Thus, if Article 56 is a ‘specific action against dumping’, but not one

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<sup>67</sup>*United States - Anti-Dumping Act of 1916*, WT/DS162/AB/R Appellate Body Report (Adopted, 28 August 2000), pa. 124

of the three ‘permissible responses to dumping’, it will violate Article 18.1. The issue is thus whether or not Article 56 is a ‘specific action against dumping’.

Article 56 may only be applied in situations where the constituent elements of dumping are present. Thus by stating that “[W]here a country...imposes anti-dumping measures on the exports from the PRC” there is a direct and unavoidable connection with the determination of dumping.

Now, in considering whether Article 56 constitutes specific action ‘against’ dumping, it is important to recall that Art. 18.1 refer only to measures that act against ‘dumping’ as a practice. There is no express requirement that the measure must act against the imported dumped product, or entities connected to, or responsible for, the dumped good such as the importer, exporter, or foreign producer. Neither is the requirement that action may only be considered to be ‘against’ dumping if its acts *directly* against dumping. As noted above, a measure will only act ‘against’ dumping if it has an adverse bearing on the practice of dumping. The ordinary meaning of the term ‘against’, which is not qualified in any way in Art. 18.1, encompasses any form of adverse bearing, be it direct or indirect. Thus, Art. 18.1 apply to measures that specifically act either directly or indirectly against the practice of dumping.

As a consequence, Article 56 has an adverse bearing on dumping. This conclusion is based on the following consideration which demonstrates that the Article 56 operates ‘against’ dumping.

- i. Incentive to file/support AD applications/investigations

The adverse bearing on dumping created by Article 56 is compounded by the additional consequence that it will have the effect of providing an incentive for Chinese producers to file AD applications, or at least to support such applications. This will in all probability result in a greater number of AD applications and investigations –as heretofore has happened (See Figure 2)- than would have been the case without Article 56, both because additional applications will

be filed, and because Art. 5.4 AD Agreement<sup>68</sup> standing requirements will likely be met in cases where there would not have been sufficient ‘support’ in absent of Article 56. A greater number of AD investigations will likely result in a greater number of AD orders (since some of those additional investigations will on the balance of probability result in orders). The prospect of an increased number of investigations will disrupt the trading environment for foreign producers/exporters that may be engaged in dumping.<sup>69</sup>

In light of the above considerations, Article 56 has an adverse bearing on dumping, and therefore acts ‘against’ dumping. Since Article 56 is in response to dumping, in the sense that the ‘corresponding measures’ may be made only in situations presenting the constituent elements of dumping, and since Article 56 acts ‘against’ dumping, it constitutes ‘specific action against dumping’ within the meaning of Art. 18.1. However, Article 56 is a non-permissible ‘specific action against dumping’, contrary to Article 18.1.

### **C. Article 56 and Articles I:1 and X:3 lit. (a) of the GATT 1994**

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<sup>68</sup> Article 5.4 of the AD Agreement states that:

*Article 5*

*Initiation and Subsequent Investigation*

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed<sup>13</sup> by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry<sup>14</sup>. The application shall be considered to have been made “by or on behalf of the domestic industry” if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

<sup>13</sup>In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

<sup>14</sup>Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

<sup>69</sup> Increased applications and/or orders will likely create a repressive trading environment even if the substantive requirements of the AD Agreement for the imposition of AD measures are fully respected.

## I. *The MFN obligation and Retaliation*

This part of the section will examine whether Article 56 is inconsistent with Article I:1 of the GATT 1994. We shall start by looking at the text of Article I:1 of the GATT 1994 and how it has been interpreted by panels and the Appellate Body. In that light, we will proceed and examine whether Article 56 violates this provision.

### i. Overview and purpose of Article I:1 of the GATT 1994

Article I:1 provides as follows:

“With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,\* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

Thus, Article I:1 requires that any privilege granted to imports of any country be accorded immediately and unconditionally to the like products originating in or destined for the territories of all other WTO Members. This MFN principle, which is considered to be “a cornerstone of the GATT and one of the pillars of the WTO trading system”<sup>70</sup>, requires WTO Members to treat like products equally irrespective of their origin; that is, discrimination between like products originating in or destined for different countries is prohibited by the MFN principle.

On one side, the Appellate Body in *Canada – Autos* explained that the object and purpose of Article I:1 “is to prohibit discrimination among like products originating in or destined for different countries. [Further explained that] the prohibition of discrimination in

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<sup>70</sup>*Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R Appellate Body Report (Adopted, 19 June 2000), pa. 69

Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis.”<sup>71</sup>

On the other side, the Appellate Body in *EC – Bananas III* confirmed that, to establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all “like products” of all WTO Members.<sup>72</sup> Following this line, we will conduct our analysis by considering: (i) whether Article 56 is a measure of the kind subject to the disciplines of Article I:1 of the GATT 1994, (ii) whether it confers an advantage of the type covered by Article I:1, and, if so, (iii) whether the advantages are extended to all like products immediately and unconditionally.

ii. Analysis of Article 56 in the light of Article I:1 of the GATT 1994

Accordingly, our first step in the analysis is to determine whether Article 56 is a measure subject to the disciplines of Article I:1 of the GATT 1994. The text of Article I:1 shows that this applies to: (i) customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports; (ii) the method of levying such duties and charges; (iii) all rules and formalities in connection with importation and exportation; and (iv) all matters referred to in paragraphs 2 and 4 of Article III.

Particularly, panels and the Appellate Body have interpreted the terms “rules and formalities in connection with importation” to encompass a wide range of measures, including, AD regulations, countervailing duties, additional bonding requirements and activity function rules. For example, the Panel Report in *EU – Footwear (China)*, when analysing the ‘individual treatment’ criteria established in Article 9(5) of the EU’s Basic AD Regulation, recognized that:

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<sup>71</sup>Ibid., pa. 84

<sup>72</sup>*European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R Appellate Body Report(Adopted, 9 September 1997)., pa. 7.555

“...rules and formalities applied in anti-dumping investigations, including Article 9(5) of the Basic AD Regulation, fall within the scope of the ‘rules and formalities in connection with importation’ referred to in Article I:1.”<sup>73</sup>

We recall that Article 56 is part of China’s AD Regulation which subjects the adoption of ‘corresponding’ measures whenever another Member ‘discriminatorily’ imposes AD measures against imports from China; as a consequence, based on the following considerations, this provision not only constitutes a rule or formality maintained by China in connection with importation, but also an advantage within the meaning of Article I:1.

The term ‘advantage’, has been broadly interpreted by panels and the Appellate Body. In *Canada – Autos* the Appellate Body examined the language in Article I:1 “any advantage...granted by any Member to any product” and gave a broad interpretation of the term ‘advantage’:

“We note next that Article I:1 requires that ‘*any advantage, favour, privilege or immunity granted by any Member to any product* originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of *all other Members.*’ (emphasis added) The words of Article I:1 refer not to *some* advantages granted ‘with respect to’ the subjects that fall within the defined scope of the Article, but to ‘*any advantage*’; not to *some* products, but to ‘*any product*’; and not to like products from *some* other Members, but to like products originating in or destined for ‘*all other*’ Members.”<sup>74</sup>

Furthermore, the Panel in *EC – Bananas III* considered that ‘advantages’ within the meaning of Article I:1 are those that create “more favourable competitive opportunities...or affect the *commercial relationship between products of different origins.*”<sup>75</sup> (emphasis added)

Under Article 56, China affects imports of only those Members who have as well imposed an AD measure against Chinese products, constituting not only a threat to those Members but to other Members. Furthermore, as shown in Section A of this chapter, Article 56 has an equally ‘chilling effect’ on both, Members and the market itself. Thus, Article 56 is an

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<sup>73</sup>*European Union - Anti-dumping measures on Certain Footwear from China*, WT/DS405/R Panel Report (Adopted, 28 October 2011), pa. 7.100

<sup>74</sup>*Canada - Certain Measures Affecting the Automotive Industry.*, pa. 79

<sup>75</sup>*European Communities - Regime for the Importation, Sale and Distribution of Bananas.*, pa. 7.239

advantage within the meaning of Article I:1 of the GATT 1994 because its application depends exclusively on the product's origin; moreover its application difficultly the market access opportunities for those members to whom the provision applies, affecting the commercial relationship between them.

Having found that Article 56 is an advantage within the meaning of Article I:1, will next consider whether like products<sup>76</sup> from other Members are granted such an advantage in an immediately and unconditionally way. Although, it is important to mention that Article I:1 requires a comparison between like products originating from one country *vis-à-vis* products originating from a WTO Member, the Fasteners Case analyzed in chapter 2 showed how China applied Article 56 in the same like product originating from the EU.<sup>77</sup> Furthermore, the condition imposed by Article 56 is origin-based in respect of the Member it affects, *i.e.* EU's steel fasteners, and not from any other WTO Member.

Turning to the interpretation of the phrase 'immediately and unconditionally', the panel in *Canada – Autos*, considered that the issue of whether an advantage within the meaning of Article I:1 is accorded 'unconditionally' cannot be determined independently of an examination of whether it involves discrimination between like products of different countries. The panel clarified that the word 'unconditionally' (*i.e.* 'not subject to conditions') in Article I:1 does not pertain to the granting of an advantage *per se*, but to the obligation to accord to the like products

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<sup>76</sup> The concept of like product has been abundantly interpreted in prior decisions of panels and the Appellate Body. Whatever the provision at issue, the Appellate Body has explained that a like product analysis must always be done on a *case-by-case* basis. The traditional approach for determining 'likeness' has, in the main, consisted of employing four general criteria: (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits –more comprehensively termed consumers' perceptions and behavior- in respect of the products; and (iv) the tariff classification of the products. This fourth criterion, was not mentioned by the Working Party on *Border Tax Adjustments*, but was included by subsequent panels (*e.g.*, GATT Panel Report, *EEC – Animal Feed Proteins* and GATT Panel Report, *Japan – Alcoholic Beverages I*). A different approach used by panels and the Appellate Body to determine the likeness of the products has been to assume –hypothetically- that two like products exist in the market place when one of two situations arises: first cases concerning origin-based discrimination, and second, cases where it was not possible to make the like product comparison because of –for example- a ban on imports. [*European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R Appellate Body Report (Adopted, 12 March 2001)., pa. 102 and *Canada - Certain Measures Concerning Periodicals*, WT/DS31/AB/R Appellate Body Report (Adopted, 30 June 1997)., pa. 5.22-5.23]

<sup>77</sup> We recall that China initiated an AD investigation and further imposed a provisional AD measure against EU's fasteners with the same CN Codes. See Section B of chapter 2.



of all Members an advantage which has been granted to any product originating in any country. The panel further explained that the purpose of Article I:1 is to ensure unconditional MFN treatment<sup>78</sup>; in other words, it considered that the obligation to accord unconditionally to WTO Members an advantage which has been granted to any other country means that the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin, which does not occur according to the language of Article 56; in other words, the adoption of a ‘corresponding’ measure, grants an advantage to imports of like products from Members other than those that previously imposed an AD measure of Chinese goods.

Moreover, the panel in *Colombia – Ports of Entry* followed this reasoning and considered that it could assess whether an advantage was conferred ‘immediately and unconditionally’ “based on whether an advantage granted to textiles, apparel, or footwear of any Member was not similarly accorded to those products originating in Panama for reasons related to its origin or the conduct of Panama.”<sup>79</sup> As a consequence, conditions attached to an advantage granted in connection with the importation of a product will violate Article I:1 only when such conditions discriminated with respect to the origin of the products, which again confirms our reasoning with respect to Article 56.

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<sup>78</sup>The panel went to say: “It appears to us that there is an important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded ‘unconditionally’ to the like product of all other Members. An advantage can be granted subject to conditions without necessarily implying that it is not accorded ‘unconditionally’ to the like product of other Members. More specifically, the fact that conditions attached to such an advantage are not related to the imported product itself does not necessarily imply that such conditions are discriminatory with respect to the origin of imported products. We therefore do not believe that, as argued by Japan, the word ‘unconditionally’ in Article I:1 must be interpreted to mean that making an advantage conditional on criteria not related to the imported product itself is *per se* inconsistent with Article I:1, irrespective of whether and how such criteria relate to the origin of the imported products” [*Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R Panel Report (Adopted, 11 February 2000), pa. 10.24]

<sup>79</sup>*Colombia - Indicative Process and Restrictions on Ports of Entry*, WT/DS366/R, Panel Report (Adopted, 27 April 2009), pa. 7.362.

On the basis of the foregoing analysis, Article 56 violates the MFN principle contained in Article I:1 of the GATT 1994.<sup>80</sup>

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<sup>80</sup>It is important to dismiss a justification of Article 56 under Article XX lit. (d) of the GATT 1994.

In a general perspective, Article XX provides Members “with the option to take **national protective measures** in a range of defined policy areas, thus exempting them, under certain conditions, from WTO rules and concessions concerning the protection and promotion of free trade”. [Rüdiger Wolfrum, Peter-Tobias Stoll, and Holger P. Hestermeyer, "WTO - Trade in Goods," in *Max Planck Commentaries on World Trade Law*, ed. Rüdiger Wolfrum and Peter-Tobias Stoll (Leiden: Nijhoff, 2011), p. 455] The policy objectives legitimizing those exemptions are set out in literal (a) to literal (j). Ahead of the ten literals, the *chapeau* formulates general limitation on the application of those measures, which in particular “are meant to ensure that the application of a measure does not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.” [ibid., p. 457]

The application of Art. XX requires a two-tiered approach, which has been firmly established by the Appellate Body. Accordingly, it is first necessary to examine whether the national measure in question is justified under one of the ten literals of Article XX and, secondly, whether the application of the national measure meets the requirements of the *chapeau*.

Since our aim is to dismiss a justification under Article XX lit. (d), will start by analyzing the measure under this provision.

Article XX lit. (d) provides as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

Literal (d) covers the potential impact on trade measures necessary to enforce laws or regulations, including the four sectors stipulated in the provision: customs, monopolies, intellectual property and the control of deceptive business practices. For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under Art. XX lit (d), two elements must be shown. First, the measure must be one designed to ‘secure compliance’ with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be ‘necessary’ to secure such compliance; finally, is further necessary to conform to the requirements of the *chapeau*. However, literal (d) requires that such laws and regulations must be *consistent* with the GATT. “In *US – Tuna (EEC)* and *US – Taxes in Automobiles*, the Panels...dismissed a justification under Art. XX lit. d GATT 1947 because, contrary to the requirements of that provision, the relevant aspects of the underlying measures were themselves inconsistent with the General Agreement” [ibid., p. 532]. We recall that Article 56 –according to the analysis shown in chapter 3- turned out to be inconsistent with the provisions of the GATT 1994, making it unjustifiable by Article XX lit. (d).

II. *The uniform, impartial and reasonable administration of trade rules.*

The issue covered in this section is whether Article 56 violates the obligation contained in Article X:3(a)<sup>81</sup> of the GATT 1994.

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The next issue is to determine whether the measure is 'necessary to secure compliance with laws or regulations' that are not inconsistent with the provisions of the GATT 1994.

With respect to the requirement 'to secure compliance with', the panel in the case *Mexico – Taxes on Soft Drinks* consider this requirement to be interpreted as to 'enforce compliance':

The context in which the expression is used makes clear that 'to secure compliance' is to be read as meaning to enforce compliance. Firstly, the provision is addressing compliance with 'laws or regulations', and these characteristically concern obligations rather than requests, and compliance is secured by enforcement through the use of force by the authorities, if necessary. Secondly, the examples of measures that are given in the latter part of paragraph (d) all concern that concept (the terms used in these examples are 'enforcement' (twice), 'protection', and 'prevention') [*Mexico - Tax Measures on Soft Drinks and other Beverages*, WT/DS308/R, Panel Report(Adopted, 7 October 2005)., pa. 8.175]

In other words, Article XX lit. (d) is designed to cover measures preventing actions that would be illegal under the law or regulation of the Member concerned. In this context, the question dealt with whether the adoption of a 'corresponding' measure established in Article 56, found inconsistent with GATT 1994, secured compliance with a law or regulation not inconsistent with the GATT 1994. From all the analysis carried out, Article 56 did not 'secure compliance' with China's AD Regulations; furthermore the adoption of a corresponding measure is not an enforcement mechanism.

In addition, Art. XX lit. (d) requires that the measure must be 'necessary' to 'secure compliance with laws and regulations'. The so-called 'least-trade restrictiveness' requirement decide whether a measure is 'necessary' under Art. XX lit. (d). This means that a contract party cannot justify a measure inconsistent with another GATT provision as 'necessary' if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions available to it. Before adopting a 'corresponding' measure, in terms of Article 56, China could apply GATT-consistency alternatives *i.e.* exhaust other remedies such as the WTO dispute settlement process.

Consequently, the inconsistent measure of adoption a 'corresponding' measure does not come within the scope of the literal (d) exception.

<sup>81</sup> We recall that Article X:3 lit. (a) of the GATT 1994 states that:

*"Publication and Administration of Trade Regulations*

3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

i. Overview and purpose of Article X:3lit. (a) of the GATT 1994

Article X:3(a) lays down the principle that WTO Members should administer their laws, regulations, decisions and rulings that affect trade in a *uniform, impartial and reasonable* manner. As a consequence, this obligation aims at ensuring that laws, regulations, decisions and rulings that are substantively consistent with a Member's WTO obligations are also implemented in an appropriate manner so that exporters from other Members can predict the treatment their exports will be accorded under the regime to which their trade will be subjected in the territory of that Member.

To establish a violation of Article X:3(a), a complaining party must therefore show that the responding Member *administers* the legal instrument of the kind described in Article X:1<sup>82</sup> in a manner that is *non-uniform, partial* and/or *unreasonable*; understanding the term *administer* as 'putting into practical effect' or 'applying' those legal instruments.<sup>83</sup> Consequently, the obligations of uniformity, impartiality and reasonableness are legally independent and the WTO Members are obliged to comply with all three requirements.<sup>84</sup> This means that, a violation of any of the three obligations will lead to a violation of the obligations under Article X:3(a).

Turning to the scope of Article X:3(a), it is established that the obligations under this Article apply to the *administration* of the laws, regulations, decisions and rulings of the kind falling within the scope of Article X:1, but *not* to such laws and regulations *themselves*. However, the Appellate Body states that to the extent that such laws and regulations are

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<sup>82</sup> Article X:1 in turn reads:

"1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports..."

<sup>83</sup> *European Communities - Selected Custom Matters*, WT/DS315/AB/R Appellate Body Report (Adopted, 13 November 2006), pa. 224

<sup>84</sup> *Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/AB/R Panel Report (Adopted, 19 December 2000), pa. 11.86.

*discriminatory*, they can be examined for their consistency with the relevant provisions of the GATT 1994.<sup>85</sup>

ii. Analysis of Article 56 in the light of Article X:3 lit. (a) of the GATT 1994

Bearing the above in mind, we will begin our analysis of Article 56 at the light of this provision. First of all, we need to determine whether Article 56 is subject to review under Article X:3(a). Article 56 does not establish substantive customs rules for enforcement of export laws; rather it provides the adoption of ‘corresponding’ measures whenever another country discriminatorily imposes AD measures against Chinese imports. As a consequence, Article 56 it is administrative in nature and therefore properly subject to review under Article X:3(a).

Next, we must test Article 56 against the requirements that it may be applied in a manner that is uniform, impartial and reasonable. As this regard, the dictionary provides the following definition for the terms ‘uniform’ and ‘impartial’, respectively: “Of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times”<sup>86</sup> and “*adjective* 1. Not favouring one party or side more than other; unprejudiced, unbiased; fair”.<sup>87</sup> On the contrary, the word ‘partial’ means “*adjective*. 1 Inclined beforehand to favour one party in a cause, or one side of a question, more than the other, prejudiced, biased. *Opp.* Impartial”<sup>88</sup>

What is meant from these uses of the terms and based on their ordinary meaning, is that trade regulations should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with

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<sup>85</sup> Further elaborating on the scope of Article X:3(a), the Appellate Body clarified that a government's act of administration subject to the provisions of Article X:3(a) includes not only acts of administering the laws and regulations of the kind in Article X:1, but also legal instruments that regulate the application or implementation of such laws and regulations. [*European Communities - Regime for the Importation, Sale and Distribution of Bananas.*, pa. 200]

<sup>86</sup> Brown. Vol. II

<sup>87</sup> Ibid. Vol. I

<sup>88</sup> Ibid. Vol. II

respect to other persons. Furthermore, an impartial administration would mean the application or implementation of the relevant laws and regulations in a fair, unbiased and unprejudiced manner.

In the present case, the language of Article 56 does not allow the application of China's AD Regulations in a consistently and predictably manner. Besides, the analysis showed in chapter 2, evidence that China has applied its AD Regulations against the EU in a non-uniform and biased manner. Therefore, Article 56 cannot be considered a uniform and impartial administration of adopting AD measures against another member.

With respect to the reasonableness<sup>89</sup> of Article 56 we have to take in consideration that in *US – COOL*, the panel established that “whether an act of administration can be considered reasonable within the meaning of Article X:3(a) entails a consideration of factual circumstances specific to each case.”<sup>90</sup>

We recall that Article 56 dates back to Article 40 of China's Old Regulations; we also recall that China found it necessary to maintain this provision in the amended regulations against two measures that China consider discriminatory: its NME status and the ‘individual treatment’ on AD duties from developed countries. However, China agreed to accept discriminatory terms for AD in its protocol of WTO accession by allowing WTO Members to use the NME methodology in dumping cases for 15 years from the time of its accession. As a result, WTO members have discretion in determining the conditions under which they apply NME provisions in AD cases against Chinese firms. Contrary to this obligation and based on Article 56, Chinese authorities may decide to impose AD measures or adopt ‘corresponding measures’ whenever a Member decides to apply NME status in AD cases.

Although, in general, a WTO Member has the discretion to administer its laws and regulations in the manner it deems fit, it equally has the responsibility to respect certain

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<sup>89</sup> The term ‘reasonable’ is defined as ‘in accordance with reason’, ‘not irrational or absurd’, ‘proportionate’, ‘sensible’, and ‘within the limits of reason, not greatly less or more than might be thought likely or appropriate’. [ibid., Vol. II]

<sup>90</sup>*United States - Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R Panel Report (Adopted, 18 November 2011), pa. 7.851

minimum standards for transparency and procedural fairness as regards its action. Article 56 does not meet this minimum standard of procedural fairness, in fact; it goes over it.

Taken together all these consideration with the circumstances under Article 56 was issued, we must consider that Article 56 is not ‘appropriate’, and does not meet the requirement of reasonableness, uniformity and impartiality administration of China’s AD Regulations within the meaning of Article X:3(a).

#### **D. Retaliation under the WTO**

Remedy is an important part of the WTO system. Its legal basis is that the commitments of the Members made in the negotiations are based in the principle of reciprocity. When a Panel or Appellate Body finds that a Member’s measure is inconsistent with its obligations under a covered agreement, it may recommend that such Member brings its measure into conformity with the agreement. For such Member to implement the final recommendations of the DSB, it is normally given a reasonable period of time to do so. However, if within the reasonable period of time, the Member concerned finds it impracticable to comply with the recommendations of the DSB, it may enter into mutually acceptable compensations with the other party within 20 days after the expiry of the reasonable period of time. If no such mutually acceptable compensation is reached within the 20-day period, the complaining party may make a request to the DSB for authorization to retaliate *i.e.* compensation and suspension of concessions.

Where nullification or impairment is ruled to have occurred, a respondent may choose either compensation or the suspension of concessions as the form of restitution. *Compensation* normally takes the form of tariff reductions and is purely voluntary since the suspension of concessions is the default means of restitution. Any compensation must satisfy the requirement that it is compatible with the provisions of the WTO. Compensation is rarely used however, because most tariff reductions are not consistent with the requirement of MFN treatment. The *suspension of concessions* is more complex: in the first instance, the general principle is to suspend concessions in the same sector as the violation occurred. If this is not practicable, then

concessions are suspended in other sectors covered by the same and only then between agreements.

...as a general principle, retaliation must be done in the sample product sector(s) as that in which the adopted report has found nullification and impairment. As an exception to this general rule, if the retaliatory Member(s) consider that it is not practicable or effective to follow the DSU Article 22.3(a) guidelines, it may seek to retaliate in other sectors under the same covered agreement as that which violation was found.<sup>91</sup>

Furthermore,

In the case of retaliation as conceived in the DSU, compliance is to be induced, not so much via the level of suspension of concessions or other obligations (although sometimes the level may be sufficiently high to induce compliance), but through the selection of the concessions or other obligations to be suspended.<sup>92</sup>

In this respect, the specific provisions of the DSU governing WTO retaliation are Articles 3.7, 22 and 23.2(c).<sup>93</sup> A careful reading of these provisions, reveals several key characteristics of WTO retaliation. In particular, it can be seen from the DSU provisions that WTO retaliation is:

- a) Subject to multilateral authorization by the DSU;<sup>94</sup>
- b) Discriminatory *vis-à-vis* the Member that has failed to implement rulings of the DSB;<sup>95</sup>
- c) Intended as non-punitive countermeasure;<sup>96</sup>
- d) Available only as a measure of last resort;<sup>97</sup>
- e) Available only on a temporary basis;<sup>98</sup> and,

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<sup>91</sup>Ngangjoh H. Yenkong, "World Trade Organization Dispute Settlement Retaliatory Regime at the Tenth Anniversary of the Organization: Reshaping the 'Last Resort' Against Non-compliance," *Journal of World Trade* 40, no. 2 (2006)., p. 368

<sup>92</sup>Reto Malacrida, "Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members' Preparation and Adoption of Retaliatory Measures," *Journal of World Trade* 42, no. 1 (2008)., p. 5

<sup>93</sup> Special or additional rules on retaliation are contained in Articles 4.10 and 7.9 of the WTO Agreement on Subsidies and Countervailing Measures. These rules apply to disputes concerning certain types of subsidies or effects on subsidies.

<sup>94</sup> Art. 3:7, 22:6-7, 23:2(c) DSU.

<sup>95</sup> Art. 3:7, 22:2 DSU.

<sup>96</sup> Art. 22:4, 22:7 DSU.

<sup>97</sup> Art. 3:7, 22:1 DSU.



- f) Available only in the form of a suspension of obligations under one or more WTO Agreements<sup>99</sup>.

While the immediate aim of the WTO retaliation is re-balancing, its ultimate aim is to induce compliance on the part of the responding member. Indeed, this is the aim of all so-called 'countermeasures' under general international law. Furthermore, a concern about retaliation as a mechanism for securing compliance relates to the implications it has for the integrity and stability of the WTO Agreement as a treaty.

...retaliation as conceived in the DSU amounts to the temporary suspension by the complaining Member if concessions or other obligations under one or more WTO agreements *vis-à-vis* the responding Member in essence, therefore, WTO retaliation follows the international principle of *inadimplenti non est adimplendum*, although application of the principle is subject to, and tempered by, multilateral control via the DSB.<sup>100</sup>

However, the fact that retaliatory measures tend to target and harm private parties of the responding Member gives rise to a concern related to the fairness issue. As stated in the first sentence of Art. 3.2 DSU<sup>101</sup>, the WTO dispute settlement mechanism aspires to be a central element in providing security and predictability to the multilateral trading system. To the extent retaliation contributes to inducing compliance on the part of a responding Member, it constitutes a critical element in providing, or re-establishing, security and predictability for producers and traders of the complaining Member.

In other words,

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<sup>98</sup> Art. 22:1, 8 DSU.

<sup>99</sup> Art. 3:7, 22:2, 3, 5, 23:2(c) DSU.

<sup>100</sup> Malacrida, "Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members' Preparation and Adoption of Retaliatory Measures.", p. 13

<sup>101</sup> Article 3.2 DSU provides as follows :

*General Provisions*

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

...retaliation may help 'make the world safe' for producers and traders of the complaining Member who are harmed by the failure of the responding Member to implement a DSB ruling. However, paradoxically, retaliation at the same time is certain to 'make the world unsafe' for producers and traders of the responding Member who are targeted by a retaliatory measure.<sup>102</sup>

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<sup>102</sup>Malacrida, "Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members' Preparation and Adoption of Retaliatory Measures.", p. 15

## FINAL REMARKS

Several conclusions can be drawn from the foregoing analysis.

- Article 56 of China's AD Regulations is inconsistent with the obligations contained in Art. 23 of the DSU. The discretion given in this article creates a real risk or threat for both, Members and individual economic operators, that determinations prohibited under Article 23 will be imposed. Under Article 23 China promised to have recourse to and abide by the DSU rules and procedures, specifically not to resort to unilateral measures referred to in Article 23. In Article 56, by contrast, China statutorily reserves the right to do so.
- The interpretation we gave of Art. 23 of the DSU is confirmed when taking account also of other elements referred in Article 31 of the Vienna Convention. Under this reading the duty of Members under Art. 23 to have recourse to and abide by the rules and procedures of the DSU and to abstain from unilateral determinations of inconsistency, is meant to guarantee Members as well as the market-place and those who operate in it that no such determinations in respect of WTO rights and obligations will be made.
- Article 56 is also inconsistent with Article 18.1 of the AD Agreement. Article 56 not only acts against dumping but also constitutes 'specific action' against it. However, Article 56 violates Article 18.1 since is a non-permissible 'specific action against

dumping'. Furthermore, Article 56 it is also in violation of paragraphs 2 and 3 of Article VI of the GATT 1994.<sup>103</sup>

- By indicating the unilateral adoption of measures against a country which discriminatorily imposes AD measures in Chinese exports, Article 56 goes over the minimum standard of procedural fairness and therefore does not allow the application of China's AD Regulations in a consistently and predictably manner. Consequently, Article 56 is not 'appropriate', and does not meet the requirement of reasonableness, uniformity and impartiality administration of China's AD Regulations within the meaning of Article X:3(a).
- By allowing the adoption of a 'corresponding' measure, Article 56 allows a *de facto* discrimination among like products originating from those members to whom the measure applies. Consequently it breached the MFN obligation spelled out in Article I:1. Furthermore, Article 56 turned out to be unjustifiable under Article XX lit. (d), since the relevant aspect of the underlying measures were themselves inconsistent with the GATT.
- Retaliation under the WTO *i.e.* compensation and the suspension of concessions, is only implemented if the recommendations and rulings of the DSB are not acted upon within a reasonable time period and are based on the principles of nullification or impairment. Accordingly a respondent may choose either compensation or the suspension of concessions as the form of restitution. Neither compensation nor the suspension of concessions however, can be applied retrospectively and are intended to be temporary measures.

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<sup>103</sup> The Appellate Body confirmed in *US – 1916 Act* that a non-permissible response to dumping violates GATT Article VI:2. The Appellate Body asserted in *US – 1916 Act* that Article VI of the GATT 1994 and the AD Agreement apply to 'specific action against dumping'. Article VI, and, in particular, Article VI:2, read in conjunction with the AD Agreement, limit the permissible responses to dumping to definitive AD duties, provisional measures and price undertakings. Therefore, the 1916 Act is inconsistent with Article VI:2 and AD Agreement to the extent that it provides for 'specific action against dumping' in the form of civil and criminal proceedings and penalties' [*United States - Anti-Dumping Act of 1916.*, pa. 137]



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