EU-China Trade Relations
The Analysis of the European Union’s Code and Practice Relating to Trade Defence Instruments in Disputes with China within the WTO framework

Diana Kanecka
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Supervisor: Professor David Luff

Thesis presented by Diana KANECKA for the Degree of Master of Arts in European Interdisciplinary Studies

Academic year 2011/2012
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FUNDACJ A KOLEG IUM EUROPEJSKIE
ul. Nowoursynowska 84 · PL-02-792 Warszawa · Poland/Pologne
e-mail: publications.natolincampus@coleurope.eu

First edition: 2013
Printed in Poland

Graphic design and layout: Wojciech Sobolewski

ISBN 978-83-63128-00-5
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Key words

EU-China Trade Relations · Trade Defence Instruments · Anti-Dumping
Non-Market Economy · World Trade Organization · Article VI GATT
Table of Contents

Abstract vii

List of Abbreviations ix

Preface of the Master Thesis Supervisor xiii

Introduction 1

Defining the Research Question 3

Methodology and Structure of the Thesis 5

1. EU-China Trade relations within the WTO Framework
   – Identifying the Source of Major Tensions 7
     1.1 China and the WTO 7
     1.2 Overview of EU-China Trade Relations:
        Changing Discourse of the EU towards China 10
     1.3 China’s European Strategy 12

2. Trade Defence Instruments: Code and Practice 15
   2.1 Anti-Dumping 17
      2.1.1 Debate on Non-Market Economy in AD Investigations 18
      2.1.2 EC-Fasteners Dispute 21
      2.1.3 The Footwear Dispute 23
      2.1.4 China and Anti-Dumping Disputes 28
Abstract

Trade has always served as the engine for economic growth and competition. It was the main factor of the economic strength that China enjoys today and a key factor that drove the European integration. China's accession to the WTO contributed to its economic growth and development of international trade. The EU and China benefit from robust trade granted by new opportunities that their markets offer. At the same time however, trade relations between the two partners are not free of tensions that need to be addressed if EU-China trade relations are to not to be overshadowed by trade disputes rising on the horizon.

This thesis provides an analysis of certain aspects of EU-China trade relations by concentrating mainly on the discussion regarding the EU code and practice in regards to implementation of trade defence instruments against products originating from China. Moreover, this thesis aims to determine the potential effect of the use of trade remedies on trade relations between the EU and China. In doing so, this study is going to evaluate the EU use of trade defence instruments such as anti-dumping, anti-subsidies and countervailing duties and safeguards illustrated in trade disputes between the EU and China. Apart from the reference to the existing EU law related to the use of trade defence instruments, the analysis is also conducted within the framework of the WTO law. Given the increasing litigations regarding the use of trade remedies, this thesis emphasises the pressing need to modernise the EU’s trade defence instruments in order to ensure their fair and non-political application. In a broader context, this study aims to contribute to the debate concerning the impact of the application of trade defence instruments on trade relations between the EU and China.
List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>AB</td>
<td>Appellate Body</td>
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<td>AD</td>
<td>Anti-Dumping</td>
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<td>AS</td>
<td>Anti-Subsidy</td>
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<td>ATC</td>
<td>Agreement on Textiles and Clothing</td>
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<td>CCP</td>
<td>Common Commercial Policy</td>
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<tr>
<td>CEC</td>
<td>The European Confederation of Footwear Industry (Confédération européenne de l’industrie de la chaussure)</td>
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<td>CVD</td>
<td>Countervailing Duty</td>
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<td>DSB</td>
<td>Dispute Settlement Body</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EFTA</td>
<td>European Free Trade Association</td>
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<td>EU</td>
<td>European Union</td>
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<td>FDI</td>
<td>Foreign Direct Investment</td>
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<td>FYP</td>
<td>Five-Year Plan</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>HED</td>
<td>High-level Economic Trade Dialogue</td>
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<td>IPRs</td>
<td>Intellectual Property Rights</td>
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<td>IT</td>
<td>Individual Treatment</td>
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<td>MET</td>
<td>Market Economy Treatment</td>
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<td>MFA</td>
<td>Multifiber Agreement</td>
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<td>MFN</td>
<td>Most Favoured Nation</td>
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<tr>
<td>NME</td>
<td>Non-Market Economy</td>
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<td>PCA</td>
<td>Partnership and Cooperation Agreement</td>
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<td>SCM</td>
<td>Subsidies and Countervailing Measures</td>
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<td>SG</td>
<td>Safeguard</td>
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<td>T/C</td>
<td>Textile and Clothing</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the EU</td>
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<td>TPRM/TPR</td>
<td>Trade Policy Review Mechanism</td>
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<td>TPSSM</td>
<td>Transitional Product-Specific Safeguard Mechanism</td>
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<td>TRM</td>
<td>Transitional Review Mechanism</td>
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<td>TSSC</td>
<td>Textile-Specific Safeguard Clause</td>
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<td>US</td>
<td>United States</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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Introduction: The Natolin Best Master Thesis

Prof. Georges Mink
Director of studies
College of Europe (EIS programme, Natolin Campus)
Directeur de Recherche au CNRS (France)

The College of Europe (CoE) was the world’s first university institute of postgraduate studies and training specialised in European affairs. Its origins date back to the 1948 Hague Congress. Founded in Bruges (Belgium) in 1949 by leading European figures such as Salvador de Madariaga, Winston Churchill, Paul-Henri Spaak and Alcide de Gasperi, the idea was to establish an institute where university graduates from many different European countries could study and live together. The Natolin campus of the College of Europe in Natolin, Warsaw (Poland) was established in 1992 in response to the revolutions of 1989 and in anticipation of the European Union’s 2004 and 2007 enlargements. The College of Europe now operates as ‘one College - two campuses’.

The European Interdisciplinary Studies (EIS) programme at the Natolin campus invites students to view the process of European integration beyond disciplinary boundaries and offers them a well-rounded understanding of the European Union. Students are awarded a ‘Master of Arts in European Interdisciplinary Studies.’ This programme takes into account the idea that European integration goes beyond the limits of one academic discipline and is designed to respond to the increasing need for experts who have a more comprehensive understanding of the European integration process and European affairs.

The EIS programme is open not only to graduates in Economics, Law or Political Science, but also to graduates of History, Communication Studies, Languages, Philosophy, or Philology who are interested in pursuing a career in European institutions or European affairs in general. This academic programme and its professional dimension prepare graduates to enter the international, European and national public sectors as well as non-governmental and private sectors. For many, it also serves as a stepping stone towards doctoral studies. Recognised for its academic excellence in European studies, the Natolin campus of the College of Europe has endeavoured to enhance its research activities. A programme aimed at producing high-quality research on EU internal and external policies in line with the specificities of the EIS academic programme was designed in 2010. This has been joined by the recent creation of two Chairs; the European Parliament Bronislaw Geremek European Civilisation Chair and the European Neighbourhood Policy Chair.
Beyond research and policy-oriented workshops and conferences, a new series of Publications has been created. The first issues were published in 2011, including a series on the EU and the neighbourhood as well as the inaugural “Natolin Best Master Thesis” publications. In order to get their Masters degree all students are required to write a Thesis within the framework of one of the course they follow during the academic year. The research theme chosen by the student or proposed by the Professor supervising the Thesis must be original and linked to European policies and affairs. An interdisciplinary approach is also encouraged. Masters theses are written either in French or in English, the two official languages of the College of Europe, often not the native language of the students. A scientific committee selects the Best Masters Theses among more than 100 produced on the campus every year. By publishing them, we are proud to disseminate some of the most interesting research produced by our students throughout the wider European studies academic community.
This thesis addresses the use by the European Union of trade instruments towards China in the wider context of the EU-China’s trade relations. It exposes the most recent case-law of the General Court of the EU and of the WTO and it shows how this case-law inevitably questions the EU’s practices towards China so far. Two landmark cases were issued in 2012. The author adequately explains why they will have profound implications for the EU’s trade policy in general and how the overall EU-China relationship should be revisited in this context. This issue is currently debated within the EU Commission and the thesis is extremely timely in this regard. The thesis was written just before the adoption, by the European Parliament and the Council of Regulation (EU) No 765/2012 of 13 June 2012 and Regulation (EU) No 1168/2012 of 12 December 2012 amending the Basic antidumping Regulation of 2009. The new Regulations adapt the EU legislation to the new case law but it does not involve a substantial change of the EU’s practice towards China.

The author structured her thesis according to a very logical and rigorous succession of chapters. She first adequately defined the scope of her research, by putting it in context. She then exposed the EU’s Trade Defence Instruments and EU’s practice and she adequately highlighted the most controversial issues, namely China’s non-market economy treatment and Chinese companies’ individual treatment. She then describes the very recent case-law of the EU and the WTO addressing these issues and the way such case law will impact on the EU-China relations. Finally, she addresses the need to reform the EU’s Trade Defence instruments and she discusses the future perspective of the EU-China trade relations.

The author’s conclusions are that the use by the EU of its trade defence instruments against Chinese exports is unfair and clearly protectionist. She thus calls for an urgent reform of the instruments themselves. She proposes that they integrate more the objectives of competition policy in the legal order of the EU. She also acknowledges however that this is farfetched and may not be accepted by the EU Member States. She also notes that one of the current problems also derive from the lack of WTO’s harmonization of the treatment of non-market economies and she calls for such harmonization. Finally,
in order to maintain her overall balanced approach, she also argues that China should better control its producers / exporters’ anti-competitive practices in its territory.

The authors’ conclusions are well supported by the existing case law and authors’ and practioners’ opinions. This thesis provides an excellent policy and legal analysis of a very current and relevant topic. It is balanced, correct and well documented. In this sense, Ms Kanecka’s research is a positive contribution for the modernisation of the EU’s trade policy and for a more sophisticated use of trade remedies towards newly competitive trade partners such as China.
For three centuries the West has been given the leading power – without any patience to understand others. Whenever there was progress elsewhere, the West saw it as a self-confirmation. It will find it hard to abandon this narrow-minded perspective.

Wang Hui, Chinese Philosopher
On 11 December 2001, after fifteen years of negotiations, China joined the World Trade Organisation. This accession signified China's readiness to deepen the liberalisation of its market and an ongoing commitment to respect international trade law. Trade has always been the foundation of the European Union's relations with China. “For some time, Europe was the 'Cinderella' trade partner to China, always lagging behind the United States and Japan”. However, this is no longer the case. Since 1975, when diplomatic relations between the EU and China were officially established, trade relations between the partners developed rapidly. By 2004 the European Union (EU) had become the most important trade partner to China according to statistics from China’s Ministry of Commerce. For the EU, China is its second largest trading partner after the United States (US). At the same time however, China is considered to be the single most important challenge to the Union’s trade policy. Despite the robust trade, relations between these two strategic partners are not free of tensions that often derive form anti-competitive behaviour leading to trade distortions.

In the past, the EU used to perceive China only as a lucrative market, and it is only since recently that the EU came to realise that China has transformed from a market to a competitor. This change is reflected by the EU’s policy towards China, which seems to be evolving as the partnership between the two matures. However, frictions that have been accompanying China’s unprecedented economic growth can easily overshadow the development and deepening of the Sino-European partnership.

2 Ibid.
3 European Commission, Trade: China, 15 March 2012.
4 Ibid.
Serious concerns can be attributed to surging trade deficit, unfair trade practices and hostile rhetoric. The Chinese government is well aware of the fact that trade surplus that it enjoys with its major trade partners is unsustainable in a long run. Hence the need to address this problem that is the source of tensions often leading to trade restrictions being imposed on Chinese products. However, China has also introduced several protective measures as its foreign and economic policies have become increasingly tied up in domestic politics⁶. Litigation concerning the application of trade defence instruments against products originating from China, which is undergoing a transition from a planned economy to a market economy, conveys serious implications for the future of bilateral trade relations. For China’s discontent, its market economy status has still not been granted by the EU. While currently the importance of market economy status is debatable, it certainly matters for anti-dumping investigations. The EU treatment of China as ‘non-market economy’ is another factor giving rise to tensions.

In recent years the support of the EU towards the use of trade defence instruments against China has intensified significantly. The key question that the policymakers ask themselves is how best to manage economic relations between the EU and China in order to eliminate trade distortions and further integrate and liberalise the markets. In order to foster commerce and arrive to a win – win strategy, the partners have to conform themselves to the laws regulating trade relations. Both the EU and China being the members of the World Trade Organisation (WTO) are bound to comply with their obligations. More explicitly, in the case of the EU and China, market openness should be based on reciprocity, and comparative advantages should not be used as tools to unjust practices distorting trade. While the question of whether China is complying with its own commitments to WTO is one matter, the question of how the EU treats the alleged injuries to its internal markets is another. The EU’s code and practice related to the application of trade defence instruments has become a controversial topic in EU-China trade relations.

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⁶ K. Qingjiang, *Trade Disputes between China and EU*, East Asian Institute, December 2008, p. 84.
Defining the Research Question

The list of trade issues is extensive however, a number of questions that arise concern the EU’s code and practice related to the application of trade defence instruments (TDIs). The increased number of trade disputes indicates the flaws and inadequacies within the regulations governing the application of TDIs.

The Community law on TDIs as well as its trade policy are codified and reviewed under the WTO law, which has had a considerable impact on the EU legal order. The WTO agreements set out a number of legally binding rules, the interpretation of which lies within the powers conferred to the WTO Appellate Body. The recommendations of the WTO Panel or the Appellate Body must be adopted by WTO Dispute Settlement Body in order to be legally binding. In addition, the reports of the Appellate Body:

“Create legitimate expectations among WTO Members and so should be taken into account in other disputes where they are relevant.”

The EU’s practice and procedure leading to anti-dumping duties imposed on selected products from China met fierce criticism from the Chinese government and led to a series of appeals before the European Court of Justice (ECJ) and the WTO Appellate Body. In 2011, the WTO Appellate Body (AB) handed a report delivering the findings on China’s first complaint brought before the WTO appealing against the anti-dumping duties imposed by the EU on certain iron and steel fasteners from China. The question is what implications the WTO AB’s decision brings for the EU’s code and practice? Since trade disputes brought before the ECJ should be interpreted in accordance with the rules of WTO and AB reports adopted by the Dispute Settlement Body (DSB), the impact of this decision can already be seen in similar cases litigating EU anti-dumping duties on Chinese products appealed against before the ECJ. The ECJ ruling delivered on 2 February 2012 in the longstanding dispute against the anti-dumping measures imposed by the EU on imports of certain footwear from China and Vietnam serves as an example and will be analysed in this thesis.

The extent to which the EU Trade Defence Instruments (TDIs) are repeatedly being challenged serves as a strong indicator that their reform is needed. The problem is how to modernise TDIs to ensure that they address trade distortions and do not distort

competition themselves. One of the most often debated approaches is one that argues that perhaps TDIs should resemble competition rules. However, the question is how desirable and feasible this approach is. The EU TDIs are of direct concern for the Chinese exporters but at the same time, can have considerable consequences for the overall EU-China trade relations.

This thesis attempts to provide an analysis of certain aspects of EU-China trade relations and the use of TDIs. The focus of this thesis is being put on trade in goods and the EU’s code and practice related to the application of TDIs against Chinese products. By doing so, the study aims to determine the effect of the use of TDIs on trade relations between the EU and China. This project evaluates the use of anti-dumping, countervailing duties and safeguards. Having considered the litigations regarding the use of TDIs, the thesis emphasises the pressing need to reform TDIs to ensure their fair and non-political application. In a broader context, this study aims to contribute to the debate that has been gathering force for recent years namely, the debate on the impact of TDIs on EU-China trade relations.

The central argument presented in this thesis states that TDIs can have significant implications for the overall EU-China trade relations. Therefore, their application should be done in the least protectionist manner. The EU law on TDIs as it stands allows for these instruments to be used in an unfair way causing a lot of tensions between the EU and China. The method for the calculation of anti-dumping duties imposed on products from China on the basis of non-market economy provisions is outdated and often leads to litigation between the EU and China. Hence, there is an urgent need to modernise the EU TDIs, and in particular the instrument of anti-dumping in a way that will protect competition rather than competitors. The study also stresses that in order to take the full advantage of trade, the EU and China should avoid politicisation of trade remedies and focus on promotion of competition and trade.

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Methodology and Structure of the Thesis

This research encompasses a legal approach and has been carried out on the basis of the analysis of primary sources such as, WTO law concerning TDIs as well as the relevant EU legislation, trade disputes before the ECJ and the WTO AB, and trade policy reviews. This research also examines the Commission's documents and auxiliary secondary literature. In addition, this study analyses certain legal, economic and political implications of the decisions delivered by the ECJ and the WTO Panel in the process of settlement of trade disputes between the EU and China.

The thesis is structured in the following way: ‘Chapter I’ provides a general overview of EU-China trade relations in order to understand the origins of frictions between the partners that have led to the proliferation to trade disputes. ‘Chapter II’ analyses current EU regulations concerning the application of TDIs. This analysis in undertaken within the framework of the relevant provisions of the WTO law and the disputes brought before the ECJ and the DSB. Given the importance of the recent developments in EU-China trade disputes before the WTO AB in EC-Fasteners case and the ruling of the ECJ in Brosmann Footwear (HK) Ltd and Others vs. Council of the European Union, this chapter will analyse the consequences of these decisions for the EU trade policy towards China and for the future use of TDIs and treatment of China as non-market economy. The anti-dumping has been the most litigated instrument since its inception therefore a substantial analysis will be attributed to this particular instrument. The use of other TDIs including anti-subsidies and safeguards will also be given some attention. Furthermore, the subjects discussed in this chapter will provide the background to understand the context of the pressing need to modernise TDIs and the procedure under which TDIs are applied. This issue will be further discussed in ‘Chapter III’, which takes on the debate concerning the reform of TDIs and what approach should be taken in order to diminish the number of AD applications and eliminate frictions in EU-China trade relations. ‘Chapter IV’ engages into discussion concerning the factors influencing the development of future perspectives of trade relations between the EU and China. Consequently, the thesis arrives to a general conclusion of the findings of the analysed material.
The re-emergence of China as a global economic power is a fact that cannot be altered. The rapid and exponential growth of China’s economy can be attributed to a range of factors such as, abundant supply of inexpensive labour, low prices and wealth of natural resources, as well as a series of domestic economic reforms. The embracement of Deng Xiaoping’s ‘Open door policy’ enabled the process of modernisation and decentralisation of China’s state economy with market forces encouraging foreign direct investment (FDI) and export-led growth. China’s unprecedented economic success to the large extent can be attributed to its membership to the WTO. The EU was a longstanding supporter of China’s accession to the WTO as well as an active participant in monitoring that China complies with its commitments. In the analysis of trade relations between the EU and China it is essential to recognise the role of the WTO.

This section provides a brief analysis of trade relations between the EU and China within the framework of the WTO and bilateral agreements that have been concluded. An understanding of how EU-China relations have developed and what are the factors influencing trade policies is important in order to be able to identify the frictions accompanying trade relations and to better appreciate the relations of today.

1.1 China and the WTO

On 11 December 2011 China became a member of the WTO after a lengthy period of negotiations. The accession to the WTO has had a catalyst effect on domestic reforms and foreign economic policy of China. It also signified a breakthrough in the development of China’s policy to join the WTO.
of international trade relations. WTO has a considerable influence on shaping the trade policies of its Members. The EU and China obliged themselves to the ongoing compliance with commitments towards the WTO. Trade policies of both parities are subject to evaluation under the Trade Policy Review Mechanism (TPRM/TPR), which ensures that trade policies of the WTO Members support the sustainable functioning of the multilateral trading system. Generally, the compliance with international agreements is difficult to measure. TPR is the most important tool in assessing the compliance with WTO rules. In the case of China, an additional mechanism verifying China’s compliance was established. In accordance with certain provisions of the Accession Protocol, China was subjected to the Transitional Review Mechanism (TRM) for the purposes of scrutinising China’s progress in meeting its obligations to the WTO.

It has been over ten years since China joined the WTO. Ten years during which China has become world’s largest exporter and second biggest economy. In terms of meeting its obligations towards the WTO, China has shown significant efforts to achieve conformity with the WTO requirements and transposing them into domestic legislation. For instance, China adopted its first anti-dumping (AD) regulation on March 25, 1997, which was revised and replaced by new regulations in January 2002 following China’s accession to the WTO. The 2002 TPR of China revealed concerns regarding certain provisions of China’s AD regulation. Serious concerns were raised about Article 56 enabling China to take:

“(…) corresponding measures when another country discriminatorily imposes anti-dumping measures on exports from China”.

In response to this concern, China made it clear that such measure has not been taken and that prior proceeding with such action, China would resort to the WTO dispute settlement provisions. Therefore, is China complying with its WTO obligations? China may not have taken any action to AD measures imposed on its products under Article 56.

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15 The final Transitional Review took place in 2011. Article 18 of China’s Protocol of Accession to the WTO provides the procedure within which TRM was to be conducted. WTO, Accession of the People’s Republic of China, WTO, WT/L/432, 23 November 2001, art. 18, pp. 11.
17 WTO, Committee on Anti-Dumping Practices, Chairman’s Report to the Council for Trade in Goods on Transitional Review of China, WTO, G/ADP/8, 18 November 2002, p. 3.
18 Ibid., p. 7.
of its AD regulation however, there are examples indicating that China engaged in direct retaliation by imposing AD duties on imports of fasteners from the EU\textsuperscript{19}. In addition, it appears that China has resorted to strong politicisation of trade remedies and this is the reason why TDIs are capable of having great implications for trade relations.

The Final Transitional Review of the Protocol of China’s Accession to the WTO and the recent TPR reveal that China made a great progress in conforming to its WTO commitments. China succeeded in implementing its tariff reductions in accordance to the schedule as well as in pursuing ambitious domestic economic reforms\textsuperscript{20}. On the other hand, a number of challenges has been identified. Serious concerns derive from China’s lack of legal transparency and the continuing use of non-tariff barriers to trade such as, import and export licensing\textsuperscript{21}. Moreover, other areas of concern derive from restrictions to FDI in some sectors, violation of the intellectual property rights (IPRs), and restraints on export of certain raw materials\textsuperscript{22}. In addition, China’s use of TDIs has gained an increased activity. At the same time, China remains the most frequent target of the AD investigations\textsuperscript{23}.

\begin{itemize}
\item \textsuperscript{20} A. Pangratis, EU Ambassador and Head of the Permanent Mission of the EU to the WTO, \textit{Statement by EU Ambassador on the Final Transnational Review of China’s Protocol of Accession to the WTO Agreement}, speech, WTO General Council session, Geneva, 30 November 2011, p. 1.
\item \textsuperscript{22} \textit{Ibid.}, pp. viii-ix.
\item \textsuperscript{23} \textit{Ibid.}, p. viii.
\end{itemize}
1.2 Overview of EU-China Trade Relations: Changing Discourse of the EU towards China

Trade was always one of the most important issues on the agenda of the EU-China relations. Before the official establishment of diplomatic relations between China and the European Economic Community (EEC) in 1975, trade took place on the basis of economic relations only with the individual member states\(^{24}\). However, given the political landscape at the time, there was a pressing need to establish mutual relations. In 1985, the EU and China entered into bilateral agreement on economic and commercial cooperation that governs the relations between the two until today\(^{25}\). The agreement is progressively being completed by informal political dialogue, sectoral and multilateral agreements. However, the absence of an ‘upgrade clause’ in the agreement itself, limits the ability to deepen EU-China relations\(^{26}\). Hence the need to replace it with a legal framework that is more adapted to current economic reality.

Over time the EU and China have made significant efforts to foster the cooperation between them. Trade relations continue to take place on both levels, the EU and separate Member States. However, the EU determines the objectives of its Common Commercial Policy (CCP). The main objectives of EU policy towards China aim to address the economic issues deriving from trade imbalances and remaining barriers to trade. The EU strategy towards China has evolved over time from a ‘global partnership’ in 1998, ‘mature partnership’ in 2003 to plans to enter into ‘strategic partnership’ since 2005\(^{27}\). The EU seems to have recognised the fact that China has become more assertive and more responsible trade partner. EU trade policy reflects the awareness of common interest of the EU and China\(^{28}\). Since 2008 both partners are engaged in High-level Economic Trade Dialogue (HED) aiming to address trade related issues such as the market access, protection of IPRs and others\(^{29}\). Finally, the developments in trade dialogue seem to suggest that Europe came to terms with China becoming an economic power and recognised the benefits of having economically strong partner.

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26 Ibid.
27 Ibid.
In recent years, the volume of goods traded between the EU and China has drastically increased\(^30\). In 2011, the EU’s exports to China reached EUR 136.2 billion, constituting a 20.3% increase from a previous year\(^31\). Also, robust increase can be seen in the area of trade in services and FDI. China’s accession to the WTO boosted the development of EU-China trade relations. The accession symbolised the recognition of China as an emerging economic power that granted different dimension to the relations between the EU and China. Since the accession a number of obstacles to trade have been lifted. However, the full potential of China’s market remains to be explored by its trade partners\(^32\):

“Despite the fact that a large consumer market is developing in China, the EU still exports more to the 7.5 million people who live in Switzerland than to the 1.3 billion people who live in China”.

Despite the efforts, a number of trade issues remain unsolved. Significant level of trade deficit and imbalances related to market access undermine EU-China trade relations today. Moreover, the EU is concerned with China’s unfair practices leading to trade distortions and causing injury to the internal market. In order to defend the EU producers from anti-competitive practices, the EU regularly resorts to the use of trade remedies, which have been often criticised for being implemented in an unfair manner.

The EU has altered its strategy towards China. Certain divisions, in particular those concerning the issue of human rights remain. However, it appears that the prospective developments of the comprehensive strategic partnership with China is to combine the elements of ‘soft’ as well as ‘hard’ law, and to be mainly based on economic and commercial aspects\(^33\). Even though both partners expressed their commitments to deepen and enhance their strategic relations during the most recent 14th EU-China Summit\(^34\), in reality the success of this initiative is very limited.

Having briefly analysed the EU’s approach towards China, the following section provides an overview of China’s strengthening position in dialogue with its major trade partner.

\(^{30}\) Ibid.

\(^{31}\) European Commission, China: EU Bilateral Trade and Trade with the World, 21 March 2012, p. 3.


\(^{34}\) Council of the European Union, Joint Press Communiqué of the 14th EU-China Summit, 6474/12, PRESSE 50, Beijing, 14 February 2012.
1.3 China’s European Strategy

These words of one of China’s top policy strategists are probably best suited to describe China’s attitude towards making business with Europe. China’s understanding of the EU has changed. Chinese government realised that the enlargement of the EU did not strengthen EU’s unity and that the decision-making remains with the capitals\textsuperscript{36}. The policy brief of the European Council on Foreign Relations indicates that: “China no longer wants a ‘strategic partnership’ with Europe”\textsuperscript{37}. The unchanged position of the EU in regard to maintaining the arms embargo, the way the EU tries to pressure China to comply with human rights, non-recognition of China’s market-economy status, and a number of anti-dumping duties imposed on Chinese products, irritate China\textsuperscript{38}. The statements and commitments made during bilateral dialogues such as the HED\textsuperscript{39} are non-legally binding therefore it is difficult to ensure their implementation. The EU is China’s fastest developing export market amounting to 20.1\% of its total exports\textsuperscript{40}. Therefore, it is clear that it is in China’s own interest to strengthen economic relations with the EU. At the same time, China wants to be recognised and treated as an equal partner and focus on economic growth.

China is well aware of its strong economic position as its policies show increasing level of assertiveness and pragmatism, clearly illustrated in the 12th Five-Year Plan (FYP) for 2011-2015\textsuperscript{41}. The recent FYP unveiled plans on how to further liberalise and rebalance China’s economy. China recognises the implications of its export-led growth strategy and the need to restructure its economy in order to ensure its sustainability\textsuperscript{42}. The plans to increase domestic consumption, development of technology and innovation, diminish

\textsuperscript{35} The citation is taken from a policy brief: ‘The Scramble for Europe’. The authors quote China’s strategist however, maintain his unanimity. F. Godement, J. Parello-Plesner, A. Richard, \textit{The Scramble for Europe}, European Council on Foreign Relations, Policy Brief, July 2011, p. 2.
\textsuperscript{36} \textit{Ibid.}
\textsuperscript{37} \textit{Ibid.}
\textsuperscript{38} \textit{Ibid.}
\textsuperscript{40} \textit{Ibid.}, p. 6
\textsuperscript{41} APCO, \textit{China’s 12th Five-Year Plan: How it actually works and what’s in store for the next five years}, Beijing, 10 December 2010, pp. 1-11.
\textsuperscript{42} \textit{Ibid.}, p.3.
state's influence on the economy and encourage competition\textsuperscript{43} will open a number of opportunities in trade for the European companies.

China's strategy towards the EU is also influenced by the global financial crisis\textsuperscript{44}. The current account deficits and high levels of public debt of the EU Member States have led to the situation where the EU is forced to seek financial support from China. While the Chinese government expressed its support and emphasised the urgency of the need to solve the Eurozone crisis, recent developments suggest that China's readiness to support the EU in solving its debt crisis might be based upon certain conditions. In February 2012, the Chinese Ministry of commerce released a statement expressing its strong dissatisfaction with the anti-dumping and anti-subsidy investigations that were launched by the European Commission into imports of coated sheet steel products, which are widely used in the building industry\textsuperscript{45}. According to the ministry, investigation into steel products from China\textsuperscript{46}:

“(…) sends a wrong signal of protectionism to the outside world, which not only casts a shadow on the regular trade in steel between Europe and China, but will also hinder the joint Sino-European efforts to respond to the crisis.”

In the past, the EU and China have held differing positions in regard to the use of trade remedies. However, it appears that in the current situation China is trying to take advantage of the EU’s vulnerable position by linking its debt assistance to trade issues and politicising TDI\textsuperscript{s} which in principle follow non-political procedures. According to data from the European Commission, currently the EU has fifty-five AD measures and one anti-subsidy (AS) measure in place against imports from China covering around 1\% of its total imports\textsuperscript{47}. Despite this figure, the impact of TDI\textsuperscript{s} on Chinese exporters is not to be underestimated. The element of AD and AS\textsuperscript{s} which upset China the most, is the non-market economy treatment of Chinese producers in substantial number of cases. China has been eager to acquire market economy status for a long time, and the EU’s refusal to grant such status causes frictions between the partners.

The arguments and analysis presented in this section lead to the conclusion that trade policies of both partners become increasingly entangled into politics. Consequently,

\begin{itemize}
\item \textsuperscript{43} Ibid., p. 1-11.
\item \textsuperscript{44} Godement, Parello-Plesner, Richard, Op. Cit., pp. 2-3.
\item \textsuperscript{45} Le Monde, \textit{Le Chine aidera l’Europe si celle-ci assouplit ses règles antidumping}, lemonde.fr, 23 February 2012.
\item \textsuperscript{46} Le Monde, \textit{Ibid.}, (Personal translation).
\item \textsuperscript{47} European Commission, “Facts and Figures on EU-China Trade”, 15 March 2012, p. 1.
\end{itemize}
instead of removing barriers to trade, such strategy is an obstacle in itself. Despite
the rapid increase in volume of trade, in recent years trade relations between the EU
and China have deteriorated. The relations between the two are not free of tensions.
Trade between the EU and China is substantially out of balance. In addition, there
are numerous concerns which can be attributed to the anti-competitive behaviour of
Chinese companies and protectionist policy in respect to some sensitive areas, such as
the exportation of certain raw materials. Other concerns relate to China’s undervalued
currency as well as practices violating the IPRs, limiting market access for the European
enterprises, and trade distortions caused by unlawful subsidisation and dumping.
Therefore, the EU has been progressively engaging in pressuring China to fulfil its
WTO obligations, trade fairly, and respect IPRs. However, on many occasions, the
EU itself has been accused of implementing TDI$s, such as AD measures in an unfair
and protectionist manner. Although, EU trade remedies that are currently in force
correspond to a marginal percentage of total imports from China, they have great impact
on China’s producers. The EU’s increased activity in imposing trade remedies against
products from China is the major source of concern of Chinese exporters. While the
EU accuses China of engaging in anti-competitive practices, China criticises the EU
for denying its producers the individual treatment when calculating the AD duties.
The use of TDI$s resulted in a number of trade disputes before the ECJ and the WTO
AB. The application of trade remedies is a source of major tensions in EU-China trade
relations that needs to be addressed otherwise it may have undesirable consequences
for economic cooperation between the partners. Having identified the EU application
of TDI$s and non-recognition of market economy status of the majority of Chinese
exporters subjected to AD investigations, as being the main sources of tensions in EU-
China trade relations, the next chapter is going to focus on the analysis of the EU code
and practice relating to the use of TDI$s against products from China.

48 Rapid increase in the volume of trade between the EU and China is accompanied by surging trade
deficit. A. Sautenet, “The Current Status and Prospects of the ‘Strategic Partnership’ between the EU
49 Qingjiang, Op. Cit. p. 84.
50 Ibid.
2. Trade Defence Instruments: Code and Practice

The anti-competitive behaviour of Chinese undertakings on the European market has led to a number of trade distortions and at the same time, contributed to the growing support of the EU for the use of trade remedies. Trade defence instruments such as the anti-dumping have been included into national legislation and international agreements since the beginning of twentieth century\(^5\). The implementation of these instruments has been probably the most litigated and politicised area of international trade. TDIs are often the only instruments that companies have at their disposal to react against distortive trade practices\(^2\). TDIs that are going to be discussed in this chapter include anti-dumping measures, anti-subsidies and safeguards. The EU is one of the most frequent users of trade remedies after the US and India, and China is the most frequent target of the EU AD measures\(^3\). In a number of cases, Chinese exporters have appealed against the EU regulations imposing AD duties. Recent decisions and judgments delivered by the WTO Panel and the ECJ, in several cases concerning the EU application of AD measures against Chinese products, have ruled in favour of the appellants. While such developments mark a clear victory for Chinese producers concerned with AD duties, the recent rulings will have great consequences for the way the EU conducts its AD investigations.

The main questions to be asked in this chapter concern the implications of trade remedies for EU-China trade relations. The application of AD duties against Chinese products has been the most contested trade remedy therefore a substantial part of this chapter will be devoted to the analysis of this instrument. In addition, given the importance of the recent case-law, in particular the AB report in the *EC-fasteners* dispute and the judgment of the ECJ in *Brosmann Footwear* case, some consequences for the Chinese producers

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\(^{52}\) European Commission, DG Trade, *The European Commission launches consultation on modernisation of Trade Defence Instruments*, European Commission, Brussels, 3 April 2012.

as well as for the EU code and practice related to AD, will be examined. Moreover, this chapter will also discuss the effect that anti-subsidies and countervailing measures as well as safeguards have on trade between the EU and China. The implementation of these instruments has been very controversial.

A considerable number of appeals against EU AD measures imposed on imports from China often challenge either the refusal or the procedure of granting market economy status or individual treatment for Chinese exporters. Given the importance of the non-market economy status for the level of AD duties in relation to imports from China, and for the EU-China trade relations in a broader context, the debate on the use of AD measures is going to focus on the examination of this particular issue.
2.1 Anti-Dumping

TDIs constitute an inseparable element of EU trade policy. The instrument of anti-dumping has been by far the most frequently implemented measure by the EU against imports from China\textsuperscript{54}. AD is used as a remedy to the strategy of penetrating the market at low prices to eliminate competition. At the initial phase it harms the enterprises and consumers will benefit from low prices, however once the exporting company acquires significant market share it will not hesitate to increase the prices in the next phase therefore, harm to the consumers is inevitable. The purpose of AD is to remove the injury to the industry caused by dumped products\textsuperscript{55}. Ultimately, AD duties have an effect of additional tariff applicable to specified products and are less severe than anti-subsidies or safeguards\textsuperscript{56}. On the other hand it has been argued that\textsuperscript{57}:

“No other trade instrument offers as much protection with so little risk as AD: large duties are easily imposed, affected countries have little ability to meaningfully appeal and have no ability to directly retaliate.”

The lack of possibility of direct retaliation can be challenged. As already discussed in chapter 1, China is known to have resorted to direct retaliation by imposing AD duties against EU exports of fasteners\textsuperscript{58}. Moreover, China could also potentially backfire under Article 56 of its AD Regulation. At the same time, the way the EU applies AD duties against Chinese products is often criticised for being done in a highly protectionist manner.

Despite the fact that the adoption of Article VI of the General Agreement on Tariffs and Trade\textsuperscript{59} (GATT) codified and standardised the procedure to impose the AD measures, Article VI of the GATT provides a broad framework giving the parties to the agreement relatively high level of discretion regarding its interpretation and ultimately the method used to determine the AD duty. The key to determine dumping is based on the comparison of the normal value of the product sold in the exporting country

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\textsuperscript{54} Ibid., p. 5.
\textsuperscript{58} In addition, fear of an indirect retaliation is a recognised factor that prevents some European producers from submitting a complaint. BKP Development Research Consulting, vol. 2. \textit{Op. Cit.} appendix F, p. 7.
and its export price. However, the determination of the normal value in regard to products originating from China is not as straightforward as one may think. China is still considered as a country undergoing a transition to market economy. Therefore, special provisions apply in order to determine dumping and to calculate AD duties for products that are allegedly dumped. In order to better understand the reasons why China objects the way EU imposes AD measures on exports from China, it is useful to engage in a debate on the EU treatment of China as a non-market economy (NME). The question of how to apply AD duties against products from NME was raised long before China acceded to the WTO. Nevertheless, this debate remains valid until today.

2.1.1 Debate on Non-Market Economy in AD Investigations

The Contracting Parties to GATT 1955 concluded in an interpretative note of Article VI GATT (AD Agreement) that for the purposes of determining the normal value of a product from NME country, comparison between domestic prices influenced by the government and not by market forces would not reflect the actual price of a product:

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

The debate on differential treatment of NMEs in reference to AD proceedings implies that NMEs differ fundamentally from market economies. The interpretative note implies that NME treatment should apply to countries where the government has a ‘complete or substantially compete monopoly’ over price fixing. This provision gives vague interpretation of NME and apart from this note WTO agreements offer no guidance as to what NME actually is. Definition of NME that is often being referred to is the one provided by the US Department of State:

60  Ibid, Art. 2.1.
62  Ibid.
“A national economy in which the government seeks to determine economic activity largely through a mechanism of central planning, as in the Soviet Union, in contrast to a market economy, which depends heavily upon market forces to allocate productive investment allocation, raw materials, labour, international trade, and most other economic aggregates are manipulated within a national economic plan drawn up by a central planning authority. Hence, the public sector makes the major decisions affecting demand and supply within the national economy.”

However, in reality there are very few countries where the government maintains such power. The market and NME distinction emerged during time when there was a clear divide between market-based economies and centrally planned economies, long before China joined the WTO. With the fall of the Soviet block, the adaptation of the ‘open doors’ policy by China, and other economic developments, this approach to NMEs perhaps with one or two exceptions, is obsolete.

The Protocol of China's accession to WTO includes special provisions on AD, subsidies and countervailing measures (SCM) as well as a close on ‘transitional product – specific safeguard’ that under certain circumstances, other members of the WTO are entitled to use against the imports from China. These provisions provide some indication as how to calculate the level of duties during AD and AS investigations against producers who cannot prove that market conditions prevail. This system of differential treatment will be applicable during AD proceedings against Chinese exports until 2016.

Since the WTO agreements provide no guidance as to what methods to use when calculating dumping margin for products imported from NMEs, China’s Protocol of Accession and EU AD law are the only legal documents indicating how normal value of such product should be determined. Paragraph 6 of the preamble of the Council Regulation 1225/2009 on protection against dumped imports from countries not members of the European Community (Basic AD Regulation) states that:

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68 Ibid., provision 15 (d), p. 9.
“When determining normal value for non-market economy countries, it appears prudent to set out rules for choosing the appropriate market-economy third country to be used for such purpose and, where it is not possible to find a suitable third country, to provide that normal value may be established on any other reasonable basis.”

The EU treatment of NMEs in AD investigations is enshrined in Article 2(7) of the EU Basic Regulation. The Article sets out the method to calculate the normal price of a product from NME, which is to be based on the: “price or constructed value in a market economy third country”\(^{70}\). This provision gives Commission high degree of discretion to when it comes to choosing an appropriate third country. In accordance with provisions of China’s Accession Protocol and EU Basic AD Regulation, if it is proved that market economy conditions prevail, market economy treatment (MET), shall be granted\(^{71}\). Moreover, under Article 9(5) EU Basic AD Regulation, if MET claims are not satisfied, Chinese exporter can apply for an individual treatment (IT). However, IT can be granted only if Chinese producer can prove that it operates under market economy conditions and is sufficiently free from the influence of the government\(^{72}\). The provisions of the EU Basic AD Regulation provide a possibility for the Chinese producers to have their MET or IT claims recognised. However, demonstration of such claims states a significant administrative burden for the exporters as well as for the Commission when it analyses MET/IT applications. In addition, even if Chinese exporter is able to demonstrate that it meets the conditions to be granted the IT, the individual duty\(^{73}\) will be calculated on the basis of company’s export, but the normal value of a product is still going to be constructed on the basis of price from a third or analogue country\(^{74}\). The main problem with calculation of the normal value for NMEs is that this method artificially inflates the price of a product and therefore, leads to higher dumping duties being imposed. The EU’s refusal to recognise China’s market economy status has been a source of tensions between the EU and China. The provisions of EU Basic AD Regulation regarding treatment of products from NMEs in AD investigations have been challenged in a number of appeals before the ECJ and the WTO.

\(^{70}\) Ibid, art. 2(7).


\(^{73}\) In effect, individual dumping margin.

\(^{74}\) Ibid., art. 9(6).
2.1.2 EC-Fasteners Dispute

One of the most significant developments in recent years was the adoption of the AB report by the WTO DSB in the dispute between China and the EU: WT/DS397/AB/R European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China75. This case is of a particular importance since it is the first complaint that has been submitted by China before the WTO76. The decision of the WTO Panel that was appealed against was largely upheld by the AB report and signifies a maiden victory for China. The adoption of the AB report means great consequences for the EU AD law and practice. China appealed against definitive AD duties imposed by the EU on imports of fasteners77 and at the same time, it challenged certain provisions of the EU Basic AD Regulation. China argued that the Article 9(5) of the EU Basic AD Regulation providing that a country-wide AD duty should be imposed unless producer meets the criteria for IT listed in this Article is inconsistent with certain provisions of the WTO AD Agreement78.

The AB report upheld the WTO Panel's decision declaring that the EU IT test violates Articles 6.10 and 9.2 of the AD Agreement79, conferring the right to the producers that are subject to AD investigation, of having their individual dumping margin determined80. The AB confirmed that Article 6.10 of the AD Agreement should be interpreted as an obligation to determine individual dumping margin81. Moreover, the AB states that82:

“(...) even if the authorities have limited their examination based on sampling, they are nevertheless required to determine an individual margin of dumping for any exporter or producer not initially selected for individual examination if that exporter submits the necessary information in time during the investigation.”

77 The rates of the duties were particularly high as they ranged from 64 up to 85 %. Ibid, p. 73.
80 Ibid., para. 316.
81 Ibid.
82 Ibid., para. 319.
The AB concluded that affording IT for the Chinese exporters under Article 6.10 of the AD Agreement is obligatory rather than optional, even in a situation when sampling is used\textsuperscript{83}. This decision implies first, an obligation to determine individual dumping duties and a condemnation of a country-wide duty as allowed for in the Article 9(5) of the EU Basic AD Regulation, second, significant administrative burden for the Commission, and third, clear indication that this particular provision of the EU Basic Regulation should be changed.

China has also posed a powerful critique of the EU procedure for granting the IT claims, as it argued that the Commission’s practice in determining IT concerning producers from NMEs, infringes the fundamental principle of the WTO – ‘the Most Favoured Nation’ (MFN) treatment under Article 1 of the GATT 1994 (WTO Agreement) which states the following\textsuperscript{84}:

“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.”

In essence, the EU failed to prove that WTO AD Agreement allows for: “(...) specific different treatment of imports from NMEs that is provided for in Article 9(5) of the Basic AD Regulation”\textsuperscript{85}. In addition, the EU treatment of NMEs under Article 9(5) of the Basic Regulation was not based on factual evidence but on assumption that imports from NMEs differ in nature from imports from other WTO Members\textsuperscript{86}.

The conclusion of the AB in EC-fasteners case clearly contradicts the interpretative note that was cited earlier in this chapter, which itself was based on the presumption that estimation of prices based on records from NMEs may not reflect the actual value of a product.

The decision of the WTO Panel was based on the argument that the application of the Article 9(5) of the EU Basic AD Regulation can lead to different treatment of the same product imported from different countries, therefore can lead to discrimination and violation of MFN\textsuperscript{87}. The AB however, declined this decision of the Panel declaring it moot

\textsuperscript{83} Ibid., para. 329.
\textsuperscript{84} GATT, General Agreement on Tariffs and Trade 1994, 1994, art. 1.
\textsuperscript{86} Ibid.
\textsuperscript{87} Ibid., para. 387.
and of non-legally binding and unnecessary for the purposes of settling this dispute. On the basis of this decision of the AB report, it can be argued that the AB decided to temper to a certain extent, the remarkably fearless critique of the EU AD code and practice that was delivered by the Panel in declaring that the contested provision of the EU Basic AD Regulation violates one of the fundamental principles of the WTO – the MFN treatment. Having affirmed this decision of the Panel as legally binding would potentially have drastic effects not only for the EU practice in relation to AD investigations but for the EU AD law as a whole. The allegation that one of the key Members of the WTO does not respect the fundamental principles of the Agreement carries serious consequences and should be interpreted as a clear indication of a necessity to reform the relevant provisions of the EU Basic AD Regulation.

The EC-Fasteners dispute is not the only example where the EU practices in relation to the AD proceedings against imports from China have been condemned. Certain provisions of the Basic AD Regulation are no longer adequate to ensure fair determination of AD duties and therefore are capable of significantly straining trade relations between the EU and China. In order to demonstrate the magnitude of a problem related to the current code and practice of the EU in relation to AD investigations it is necessary to analyse the recent judgement of the ECJ in a longstanding dispute regarding the definitive AD duties imposed on imports of certain footwear from China and Vietnam.

2.1.3 The Footwear Dispute

The judgement of the ECJ in a case C–249/10 Brosmann Footwear (HK) Ltd. and Others vs. Council, was eagerly awaited. The conclusion of the ECJ in the appeal against the decision of the General Court was a landmark ruling, which will have profound implications for the EU use of AD in the future and is likely to reflect in EU-China trade relations. The Brosmann Footwear case concerns the provisions of the EU Basic AD Regulation regarding granting of MET and IT status during AD proceedings therefore, it is important for the discussion of this chapter. In order to understand the potential consequences of this ruling it is worth to refer to certain aspects of the circumstances that led to the dispute.

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88 Ibid., para. 397-398.
89 Case C-249/10 P, Brossman (HK) and Others v. Council, 2012.
90 Ibid.
Provision 17 of China’s Protocol of Accession to WTO\textsuperscript{91} granted special reservations for China’s trade partners that are Members of the WTO. This provision refers to the process of phasing out of ‘all prohibitions, quantitative restrictions and other measures’ that are maintained by WTO Members against Chinese imports, at the time of China’s accession\textsuperscript{92}. The provision states that all of these measures which are inconsistent with the WTO Agreement should be dealt with in accordance with terms mutually agreed by the trading parties\textsuperscript{93}. In the case of the EU, it committed itself to a timetable according to which, quotas on non-textile materials such as footwear would gradually be eliminated. This timetable is annexed to China’s Accession Protocol and indicates that the aforementioned restrictions should have been removed by 2005\textsuperscript{94}.

Following the expiry to the restrictions indicated in Annex 7 to China’s Protocol of Accession to WTO\textsuperscript{95}, the EU could no longer rely on quotas granted by special reservations in the protocol\textsuperscript{96}. Therefore, the only instrument the EU could resort to in order to limit the impact of cheap imports of footwear products from China on the Community producers, was the application of AD duties. In fact, the notice of an AD investigation was published in the Official Journal already on 5 July 2005\textsuperscript{97}. The European Confederation of Footwear Industry (CEC), acting on behalf of the producers representing over 40% of the total Community production of certain footwear with uppers of leather, lodged a complaint against allegedly dumped products exported from China and Vietnam\textsuperscript{98}. The CN codes of the products included in the Commission’s Notice largely mirror the CN codes from the Annex 7 of China’s Protocol of Accession\textsuperscript{99}.

On 5 October 2006, the EU introduced the \textit{Council Regulation no. 1472/2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People’s Republic of China and Vietnam}\textsuperscript{100}, which were preceded by provisional AD duty brought in March of

\begin{thebibliography}{99}
\bibitem{92} Ibid.
\bibitem{93} Ibid.
\bibitem{95} Ibid., pp. 96-102
\bibitem{96} Ibid.
\bibitem{98} Ibid., p. 14.
\bibitem{99} Ibid.
\bibitem{100} Council of the European Union, Council Regulation No 1472/2006 of 5 October 2006 imposing a
\end{thebibliography}
that year. Imposition of the AD duties on products for which the quantitative restrictions on imports have just expired raised a lot of controversies not only in China but also in the EU. Member States were largely divided because imposition of definitive AD duties on footwear from China did not necessarily serve the interests of a substantial number of Member States. It was also found that certain Community producers benefited directly from the imports of footwear from China and Vietnam – there was therefore a ‘risk of retaliation’ or other harmful consequences\textsuperscript{101}.

Since the AD investigation involved a large number of exporters and Community producers, definitive AD duties on imports of certain footwear from China were calculated on the basis of sampling under Article 17 of the EU Basic AD Regulation\textsuperscript{102}. The level of the AD duties amounted to 9.7\% for the Golden Step and 16.5\% for all other undertakings from China\textsuperscript{103}. The Council Regulation 1472/2006 denied the disclosure of the justification why the Commission did not grant MET status to the parties that were entitled to it, but were not included in the sample\textsuperscript{104}. Having had their MET or IT status recognised, the companies would be charged with significantly lower AD duties at 9.7\% as opposed to 16.5\%. Recital 61 of this Regulation stated that\textsuperscript{105}:

“(...) whether it be in the non-market economy countries or in economies in transition, exporters are by nature of the sampling exercise denied individual assessment and the conclusions reached for the sample are extended to them.”

A number of undertakings subject to AD duties contested the Regulation before the General Court on the basis that the Regulation 1472/2006 breached certain provisions of the EU Basic AD Regulation\textsuperscript{106}. The pleas of the Chinese producers have not been ruled in favour of by the General Court what led to the appeal before the ECJ. The judgment of the ECJ was delivered on 2 February 2012 and rejected the ruling of the General Court. The main grounds, on which the Regulation imposing definitive AD duties was challenged, referred to the breach of the provisions granting MET and IT

\begin{flushleft}
\textit{definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People’s Republic of China and Vietnam, Official Journal of the European Union, L 275, 6 October 2006, pp. 1 -41.}
\end{flushleft}

\textsuperscript{101} Case C-249/10 P, Op. Cit., para. 25.
\textsuperscript{103} Ibid., Art. 1(3).
\textsuperscript{104} Ibid., recital 60.
\textsuperscript{105} Ibid., recital 61.
enshrined in Articles 2(7) and 9(5) of the Basic AD Regulation\textsuperscript{107}. These Articles have already been referred to in this chapter and it has been established that share a high degree of similarity. The appellants submitted applications to be granted MET but were not included in the sample, therefore they presented strong argument that they should have had their claims examined and that they were entitled to the treatment other than the one applicable to producers from NME\textsuperscript{108}, in other words, their MET/IT status should have been recognised. Moreover, by definition Articles 2(7)(c) and 9(5) of the Basic AD Regulation, which set out the list of criteria that a producer from NME country must meet in order to have the claim for MET/IT examined\textsuperscript{109}, should be applied on an individual basis\textsuperscript{110}. Therefore, the Commission should have analysed the applications on case-by-case basis and denying individual assessment of individual dumping margin should not have been justified by the use of sampling method within the meaning of Article 17 of the Basic AD Regulation as the Commission argued in defence\textsuperscript{111}.

The ECJ endorsed the arguments of the appellants and clarified the meaning of Articles 2(7) and 17 of the Basic AD Regulation. The Court stated that while Article 2(7) concerns “solely the determination of normal value”, Article 17 refers to “the methods available for the dumping margin”, hence the purpose and content of these Articles are different\textsuperscript{112}. Therefore, they should be treated differently. The ECJ recognised the arguments of the appellants and concluded that Article 2(7)(b) imposes an obligation on the Commission to assess and to adjudicate upon an application from any producer who wishes to claim MET\textsuperscript{113}. Moreover, this obligation is not to be conditioned by the method used to calculate the margin of dumping\textsuperscript{114}. Therefore, the Commission is obliged to examine MET\textsuperscript{115} claims also for the non-sampled exporters that are able to present substantial evidence demonstrating their entitlement to MET\textsuperscript{116}. The ECJ concluded that rather than

\begin{itemize}
  \item[107] Ibid., para. 21.
  \item[111] Ibid.
  \item[112] Ibid., para. 37.
  \item[113] Ibid., para. 38.
  \item[114] Ibid.
  \item[115] Ibid., para. 30-42.
  \item[116] Ibid., para. 30-42.
\end{itemize}
proving that the producer does not satisfy the MET/IT criteria, the EU institutions are obliged to prove that the producer applying for MET meets the criteria:\textsuperscript{117}

“(…) it is for the EU institutions to assess whether the evidence supplied by the producer concerned is sufficient to show that the criteria laid down in the first subparagraph of Article 2(7)(c) of the basic regulation are fulfilled in order to grant it MET and it is for the EU judicature to examine whether that assessment is vitiated by a manifest error.”

This decision will result in significant administrative burden for the Commission because it will not only have to consider MET/IT applications from non-sampled producers, but it will also have to examine the validity of such claims. This may carry significant legal implications for the EU Basic AD Regulation since it will have to accommodate the procedure for dealing with large numbers of MET/IT claims that are to be expected.

The ECJ recognised the claim of the appellants that if they have been granted MET/IT they would have been charged with lower AD duties at 9.7\% that were applicable to Golden Step who was included in the sample and had its MET granted. The judgment of the ECJ represents a shift in interpretation of the provisions of the EU Basic AD Regulation. Therefore, it is undeniably a landmark ruling for the European law concerning trade disputes. The findings of the ECJ in the \textit{Brosmann Footwear} case signify an unprecedented victory for Chinese manufacturers. Interestingly, the Court did not consider whether the appellants were actually entitled to claim MET, but it was sufficient that their claims were discriminated against because these producers were not included in the sample.

By setting aside the ruling of the General Court and annulling the contested Regulation imposing definitive AD duties as far as it concerned the appellants\textsuperscript{118}, the ECJ condemned the Commission’s practice that was typical for AD investigations regarding imports from NMEs when sampling method was applied. In addition, this judgment of the ECJ grants a financial benefit for Chinese manufactures and potentially carries significant legal and economic implications for the EU since this decision will most likely have an impact on a number of current AD duties imposed on the products from China as well as future AD investigations.

\textsuperscript{117} \textit{Ibid.}, para. 32.

\textsuperscript{118} \textit{Ibid.}, para. 41-23.
2.1.4 China and Anti-Dumping Disputes

The ECJ in the Brosmann Footwear case did not address the issues with the EU Basic AD Regulations which became apparent in the light of the judgment. However, this issue has been treated by the WTO Panel in dispute concerning the AD measures imposed by the EU on the same products as in the discussed Brosmann Footwear case. On the 28 October 2011 the WTO Panel circulated its report on the European Union – Anti-Dumping Measures on Certain Footwear from China[^119]. The WTO Panel was established following China’s request to challenge certain provisions of the EU Basic AD Regulation. The adoption of the Panel report by the DSB on 22 February 2012 signified yet another victory for China[^120]. The Panel concluded in the report that Article 9(5) of the EU Basic AD Regulation was violating provisions of the AD Agreement and recommended for the EU to bring the measures into conformity[^121]. Following the adoption of the report by DSB, The EU declared that it will take action to implement the recommendations of the Panel[^122]. The EU’s use of the instrument of AD against Chinese producers was contestable on several basis indicated in the earlier parts of this chapter. Moreover, China stood its ground in the Footwear dispute that it brought before the WTO. During the meeting of the WTO DSB concerning the adoption of the Panel report China clearly indicated that[^123]:

“(...) any amendment to the EU’s Basic Anti-Dumping Regulation should not only avoid explicitly targeting mainland China, but it should also be written in a way that avoids treating mainland China less favourably than other WTO Members.”

It appears as the conclusions of the WTO AB report in the EC- Fasteners case paved the way for other rulings criticising the way the EU conducts its AD investigations against Chinese products. The recent developments in case-law regarding trade disputes between the EU and China challenging the AD measures imposed on products originating from China by the EU show China’s growing influence. It became apparent that China has learned how to defend its interests in AD cases. Reflecting this reality indicates that China has made significant progress in the process of integration into the WTO and in using legal its legal instruments.

[^120]: Ibid.
[^121]: Ibid.
[^122]: Ibid.
[^123]: HKtDC, WTO adopts Panel report in EU-Footwear signalling victory for Chinese mainland exporters; other trade developments, HKTDC, 9 March 2012.
Other TDIs that have been used against Chinese producers are anti-subsidy and countervailing measures. Although, their implementation does not reflect the frequency of the AD duties that have been implemented, it is nevertheless important to discuss the EU use of this instrument against producers from China.
2.2 Anti-Subsidies/Countervailing Duties and Problem of Double Remedy

The EU anti-subsidy law is based on the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). The most recent regulation transposing the provisions of the SCM Agreement is the *Council Regulation 597/2009 on protection against subsidised imports from countries not members of the European Community* (Basic AS Regulation). The definition of subsidies provided in the Basic AS Regulation can be summarised as:

“Financial contribution made by (or on behalf of) a government or public body which confers a benefit to the recipient.”

Subsidies grant an unfair competitive advantage therefore can lead to significant trade distortions. China has been known for subsidising its domestic producers, which ultimately has an effect on deflating the export price of a product. The Basic AS Regulation provides Community producers with remedies offsetting the injury caused by subsidies. The measure that is taken to counteract the effects of a subsidy granted to the exporter in the country of origin and to remove the injury caused by subsidised imports is a countervailing measure that is usually in form of a duty collected by customs authorities. However, the Basic AS Regulation conditions the imposition of provisional and definitive countervailing measures upon the ‘Community interest’. Countervailing duty (CVD) can be imposed on subsidised product in order to neutralise the negative effect of such imports. The EU AS rules clarify that:

“Where are to be imposed, it is necessary to provide for the termination of investigations and to lay down that measures should be less than the amount of countervailable subsidies if such lesser amount would remove the injury (...).”

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125 Ibid., Art. 3.
126 Ibid., Art. 12; 15.
128 Ibid., Art. 1.
130 Ibid., Art. 5.
131 Ibid., recital 17.
The Basic AS Regulation differentiates between contervailable and non-contervailable subsidies as opposed to the traffic light system of the SCM Agreement. WTO SCM Agreement distinguishes between prohibited, actionable and non-actionable subsidies. Therefore, in accordance with the EU Basic AS Regulation, only subsidies that have been granted to a specific “enterprise or industry or a group of enterprises or industries” can be subject to CVD. If this condition is not met, in principle even if a subsidy falls under the category of prohibited subsidies under the SCM Agreement, countervailing measure would not be taken. This limits the scope of application of the EU Basic AS Regulation for the advantage of China’s domestic production that benefits from non-specific subsidies. This approach to AS can be quite problematic in particular in investigations concerning Chinese producers. It is often the case that the evidence of specific subsidisation is very difficult to obtain. Chinese government has mastered its skills in subsidising its domestic production in various forms of cheap loans, tax rebates or other incentives which deliver considerable advantage to products that are destined for exports and at the same time circumvent the EU AS law.

In the Protocol of Accession to WTO, China agreed to NME treatment for the purposes of not only AD but also AS investigations. Although the EU has recognised AD and AS measures to serve as second-best solutions to address unfair trading in the absence of international rules on competition, its experience in relation to AS investigations against China, is very limited. This mainly results from the fact that insofar, the EU has adhered to a policy of not imposing CVDs on NMEs. It seems apparent that since the EU has not recognised China’s market economy status, it is can be presumed that China’s domestic production is still benefiting in a higher or lesser extent, from various forms of subsidisation. The advantage granted for the Chinese producers by subsidisation can hinder the level playing field in trade as it artificially reduces the costs of production and can even lead to dumping.

Recently the EU has changed its approach towards the treatment of Chinese beneficiaries of specific subsidisation and simultaneously launched AD and AS investigations on

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134 WTO, Agreement on Subsidies and Countervailing Measures, Op Cit., part II, III, IV.
imports of coated fine paper\textsuperscript{139}. These investigations resulted in concurrent definitive AD\textsuperscript{140} and AS\textsuperscript{141} duties being imposed on Chinese producers. Insofar it has been the first and only AS measure imposed by the EU against China. The legality of the concurrent imposition of CVD and AD measures on the same product has been doubted by China.

China argued that concurrent measures such as the ones imposed by the EU would result in double remedies\textsuperscript{142}. The Regulation imposing AS duty on the products concerned claimed that the concurrent measures in the case at hand are justifiable and would not result in double remedy because the EU capped the combined duty rate for the products subjected to AD/AS measures at their respective margin of injury\textsuperscript{143}. Therefore\textsuperscript{144}:

\begin{quote}
“Whether or not simultaneous imposition of anti-dumping and countervailing duties in the case of non-market economy can lead to a potential ‘double remedy’, this situation, by definition, could not occur where there is a cumulation of the dumping margin and the amount of subsidy (…).”
\end{quote}

Despite this claim, the justification of the EU’s action may not be sufficient. The preceding part of this chapter has already identified certain problems arising from the EU code and practice in regard to AD investigations treating China as a NME and denying the examination of MET/IT claims to Chinese producers that are not included in the sample\textsuperscript{145}. In effect, inaccurate overestimation of the dumping margin combined with CVD calculated as to neutralise the effect of a granted subsidy, inevitably leads to total excessive duty therefore has an effect of a double remedy.

Similar practices have already been condemned by the WTO AB in its report reviewing dispute between the US and China\textsuperscript{146}. Despite the fact that significant differences between

\begin{thebibliography}{99}
\bibitem{141} Council of the European Union, \textit{Council Implementing Regulation No 452/2011, Op Cit.}
\bibitem{143} \textit{Ibid.}
\bibitem{145} Explanatory note: If sampling is used.
\end{thebibliography}
the EU and the US practices related to AD/AS investigations exist, this AB Report is likely to have an impact also on the EU remedies used in the coated fine paper case¹⁴⁷.

The commentators in China have repeatedly expressed their concerns regarding the legality of such measures and feared that coated fine paper products from China affected by the concurrent AD and AS duties may not be the only targets¹⁴⁸:

"Targeting at the paper industry, the EU is testing water. The precedent-setting case may indicate a sharp change in the EU’s trade defence policy.”

In fact, in December 2011 the EU has launched another concurrent AD and AS investigations into imports of coated sheet steel products from China. This time however, China has resorted to the use of political pressure to persuade the EU to stop its proceedings. This issue has already been raised in chapter 1 and demonstrates just how significant influence the practices related to TDIs can have on EU-China trade relations. It is very doubtful that the concurrent use of AS measures and AD duties on the same product will not result in a double remedy. Such practice is highly protectionist and harmful for overall trade relations. TDIs should not be used as to constitute a barrier to protect national producers but to ensure that a competitive advantage of a product does not derive from benefits granted by the government.

The last TDI that is going to be discussed in this thesis is safeguard mechanism. The use of this instrument is severely affecting the exporters and can only be taken as a measure of a last resort. Next part will discuss safeguards and will elaborate on some of the aspects and issues that derived from the textiles and clothing dispute between the EU and China.

¹⁴⁷ Ibid.
2.3 Safeguards

Safeguard is the most restrictive and the most protectionist instrument of all TDIs. It can only be used under the circumstances when a Community industry is challenged by "an unforeseen, sharp and sudden increase of imports" of like products or directly competing products threatening to cause or causing serious injury\(^{149}\). Article XIX of the GATT 1994 and the WTO Safeguard Agreement (SG Agreement) specify the conditions under which safeguards can be applied against imports from other Member of the WTO\(^{150}\). As opposed to AD or AS measures, the application of safeguard (SG) is not determined by unfair trading practices therefore the conditions that have to be met are more rigorous\(^{151}\). The EU law on SGs consists of five distinct regulations\(^{152}\). The appropriate EU Regulation governing SG instruments for imports from China is the Council Regulation 427/2003\(^{153}\). This Regulation is applicable to all products imported from China and reflects provisions of China's Protocol of Accession to the WTO\(^{154}\). In order to mitigate the effects of China's exports on global economy, upon accession to the WTO, China agreed to introduce Transitional Product-Specific Safeguard Mechanism (tPSSM) that will be in force until 2013, and which provided that\(^{155}\):

> “In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution, including whether the affected WTO Member should pursue application of a measure under the Agreement on Safeguards.”


\(^{155}\) *Ibid.*
In the Protocol of Accession and the Report of the Working Party on the Accession of China to the WTO the provisions included Textile-Specific Safeguard Close (TSSC).\textsuperscript{156} TSSC accommodated a possibility for the WTO members for consultations with China in order to implement a SG measure for textiles up to the negotiated percentage of maximum 7.5\% for up to 12 months upon the condition that market disruption is caused by imports of textiles from China and that such high volumes of imports jeopardise “an orderly development of trade in these products.”\textsuperscript{157}

Textile and clothing (T/C) is one of the industries where China holds a significant comparative advantage. Moreover, T/C has been one of the most protected sectors not only in the EU but worldwide\textsuperscript{158}. In the past textile industry was covered by a number of multilateral and bilateral agreements limiting market access to textile sector in industrialised economies\textsuperscript{159}. The Multifibre Agreement (MFA) governed bilateral negotiations concerning setting quotas on textiles throughout the duration of the Uruguay Round\textsuperscript{160}. Since the creation of the WTO, the MFA was replaced by the Agreement on Textiles and Clothing (ATC)\textsuperscript{161}. The purpose of the ATC was to allow some time for the domestic industry of the importing industrialised countries to prepare for the gradual elimination of the restrictions on textiles. The ATC expired in 2005 integrating T/C sectors into GATT rules\textsuperscript{162}. Termination of the ATC on 1 January 2005 brought an end to quota regime for T/C. This resulted in a rapid and significant increase in imports of T/C products from China to the EU. The European market was flooded with imports of T/C from the producers from China who were determined to fully benefit from access to the European market\textsuperscript{163}:

“Between January and May 2005 alone, Chinese T/C exports to the EU surged by between 71\% and 534\%, depending on the product category.”

Given the expiry of the ATC it is difficult to claim that such developments were unforeseen. Nevertheless, in order to protect its domestic industry the EU engaged

\textsuperscript{156} Comino, Op. Cit., p. 824
\textsuperscript{159} Agreements included Short-Term Agreement on Trade in Textiles of 1961, Multi-Fibre Agreement and bilateral agreements such as EC Textile Agreement with China of 1979 etc. Ibid.
\textsuperscript{160} WTO, Textiles Monitoring Body: The Agreement on Textiles and Clothing, WTO, 2012.
\textsuperscript{161} Ibid.
\textsuperscript{162} Ibid.
in consultations with China on how to mitigate the impact of import of T/C from China and despite concrete evidence of market disruption, TSSC was invoked\textsuperscript{164}. The EU and China negotiated a level of quotas on exports of T/C from China to the European market\textsuperscript{165}. The quotas that were imposed exceeded the level of measures permitted under the TSSC nevertheless, China accepted them\textsuperscript{166}.

However, the \textit{Regulation No. 1084/2005} imposing quotas negotiated under TSSC was implemented over a monthly delay since the negotiations with China took place\textsuperscript{167}. This mismanagement of the EU led to a situation where the EU retailers submitted orders to Chinese producers for T/C for the volumes that significantly exceeded the level of quotas permitted under the adopted Regulation\textsuperscript{168}. As a result of that, 75 millions of T/C products from China were blocked from entry to the European market\textsuperscript{169}. The EU had to renegotiate the agreement with China to introduce voluntary export restrains in order to manage this situation\textsuperscript{170}. However, there was a clear division between the EU Member States on whether to use the safeguard mechanism against Chinese imports of T/C\textsuperscript{171}.

The textile dispute revealed a number of problems regarding the manner in which SG mechanism was triggered and the way the EU mishandled the entire situation. The lack of agreement between the EU Member States due to their varying interests in quota free trade in T/C with China undermined the EU’s position in trade relations with China.

In fact, the lack of unity in supporting the imposition of trade remedies has been also a common feature in the case of AD and AS investigations. The EU behaviour in the textile case reaffirmed China that the Union can be largely divided when it comes to addressing certain sensitive issues such as, providing a unified approach on how to respond to challenges posed by China’s growing competitiveness. The EU not only failed to prepare for the consequences posed by the expiry of the ATC but it also misused SG remedy in a clearly protectionist manner. The facts and the procedure for resolving the problems encountered in the textile case that are presented in this part of the chapter on TDIs, do not engage into a detailed debate, however they reflect the essence of the problem.

\textsuperscript{164} \textit{Ibid.}.
\textsuperscript{165} \textit{Ibid.}.
\textsuperscript{166} \textit{Ibid.}, p. 832.
\textsuperscript{167} \textit{Ibid.}.
\textsuperscript{168} \textit{Ibid.}.
\textsuperscript{169} \textit{Ibid.}.
\textsuperscript{170} \textit{Ibid.}, pp. 831-833.
\textsuperscript{171} \textit{Ibid.}.
2.4 TDI and EU-China Trade Relations

The discussion undertaken in this chapter demonstrates tensions that accompany EU trade defence policy and its negative effect on trade relations with China. Of course it would be misleading to claim that trade relations between the EU and China are based on trade restrictions. Nonetheless, the issues deriving from the EU use of TDI are highly capable of straining trade relations between the two. The EU appears to be resorting to an increased use of TDI instead of addressing the issue at its source.

The lack of preparedness of the EU to liberalise some of its most sensitive industries was clearly demonstrated in the textile dispute. Commentators argued that the implementation of SG mechanism derived from the flawed implementation of the ATC and not from real market disruption. Such misuse of trade remedies indicates protectionist approach to trade policy and sends negative signals to China as a trade partner. That is not to deny the fact that China is often engaging in anti-competitive practices that cause trade distortions. However, the EU rules on TDI are inadequate to properly address the challenges deriving from China's growing competitiveness therefore a major reform of TDI is needed.

Particular concerns derive from the EU implementation of AD measures against Chinese products. The purpose of AD is to remove the injury to the industry caused by dumped products. In reality, if compared with the average level of tariffs under the fundamental principle of the WTO – the MFN treatment, the level of AD and AS imposed by the EU on imports from China is very high. Therefore, China has at its disposal concrete legal basis to challenge such duties before the DSB. This fact should serve as yet another indication that EU's TDI are in serious need of reform. On the other hand, determination of AD and AS measures in the way the EU and other industrialised Members of the WTO have been practicing, often leads to unfair treatment. However, at the same time it has been a long established tradition that only recently has been challenged. Hence, one may argue that perhaps the sacrosanct of the WTO, the MFN treatment no longer applies in practice. This topic however goes beyond the scope of this thesis therefore it shall not be discussed.

A number of problems can be attributed to the EU treatment of China as a NME in AD proceedings. China is eager to acquire market economy status mainly for political reasons. However, the importance of market economy treatment particularly during AD

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172 Ibid., p. 837.
investigations should not be underestimated. Chinese producers who fail to obtain MET or IT are obliged to carry the costs of artificially inflated AD duties, which constitute considerable and unfair financial burden. The EU practices in this area were challenged in several disputes some of which were discussed in this chapter. The decision of the ECJ in *Brosmann Footwear* case recognised the obligation of the EU institutions to examine the claims to be granted MET status and will have significant consequences for the EU AD code and practice. The importance of the EU approach to NME treatment of Chinese producers in AD investigations is gaining an increasing presence in other cases at the ECJ. The dispute concerning NME treatment in AD proceedings, between the *Council and Zhejiang Xinan Chemical Industrial Group* has not been decided at the time of writing however, in the opinion issued by the Advocate General Kokott the importance of this case for EU trade relations with China was stressed:

> “The present anti-dumping case is of fundamental importance for future trade relations between the European Union and a number of dynamic emerging countries, such as the People’s Republic of China, which are currently in transition from a planned economy to market economy, but are still classified as ‘non-market’ economies.”

Trade disputes between the EU and China clearly illustrate that both partners take strong stands when it comes to defending their interests. However, unless the EU and China agree to pursue more flexible approach to resolve trade disputes, there is a serious risk that any further developments in EU-China trade relations may be overshadowed. Having identified a number of issues with current EU rules on the implementation of TDIs and the need to reform trade remedies, the next chapter is going to consider the approach of how to modernise TDIs.

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3. Reforming TDIs

The last revision of the EU trade remedies was conducted in 1995 long before China’s accession to the WTO. Since then market and economic conditions have changed significantly, hence it is necessary to adapt trade defence mechanisms to address current challenges. Moreover, as it was demonstrated in the previous chapter, the Commission’s procedure in AD investigations involving producers from NMEs under Basic AD Regulation leads to determination of AD duty that goes far beyond offsetting the injury caused by dumped products. Insofar, the need to reform the regulations governing the use of TDIs, and in particular AD law, has been also given limited attention during multilateral negotiations. Nevertheless, recent decisions of the WTO DSB and the ECJ indirectly respond to this issue. The litigation concerning the application of AD duties on imported goods from China reveals the problems with unfair and artificial inflation of the rate of AD duties. Therefore, the review of TDIs and is inevitable.

The Commission has recognised the necessity to reform TDIs and has taken serious steps to carry out this process. In April 2012, the EU has reassured its commitment to review its TDIs by launching public consultations on how to modernise TDIs. Although, the reform of EU’s TDIs will have an impact on trade relations between the EU and all of its trade partners, it will carry particular consequences for trade relations between the EU and China. The purpose of this chapter is to consider whether TDIs would be more effective if they were to encompass the principle of competition policy, namely protection of competition rather than competitors.

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3.1 TDIs and Competition Law

The possible link between TDIs and competition law has been widely commented on in the literature related to trade topics. In fact, trade remedies emerged as instruments to address trade related disputes in the absence of international rules on competition. The problem with discussing possible approximation of TDIs to competition law is that there is a fundamental difference between them. In reality, trade law is not designed to help the consumers and TDIs in particular the instrument of AD, are designed to protect the competitors, the domestic production rather than competition. Nevertheless, a conceptual linkage between TDIs and competition law exists. Competition law ensures more accurate assessment of the injury caused by anti-competitive practices and supports development of economic growth. In fact, the best example of where TDIs have been replaced by common rules on competition is the European internal market. In order to better understand how application of competition law would enhance economic cooperation and growth, it is useful to look at the Article 26 of the EEA Agreement, which states that:

“Anti-dumping measures, countervailing duties and measures against illicit commercial practices attributable to third countries shall not be applied in relations between the Contracting Parties, unless otherwise specified in this Agreement.”

In the context of the discussions regarding the negotiation of Article 26 EEA Agreement, initially the Union was not prepared to abandon the use of TDIs in case of dumped products originating from countries, parties to the European Free Trade Association (EFTA). The principle of non-application of AD measures against products originating from EFTA members was eventually accepted on the basis of the argument that dumping, which is resulting from price discrimination between national markets, occurs because of the existence of the protected domestic market. However, the nature of provisions on the free movement of goods liberalises the domestic markets for products originating from the countries, which are parties to this agreement. Therefore, opening of the national markets would lead to the elimination of dumping and any abuse or injury to the market within the EEA caused by a domestic producer should be treated in the same

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way as intra-Union dumping, in accordance with the competition law of the EU. Since, the provisions of the EEA Agreement concerning competition rules were to mirror the relevant Articles 101 and 102 of the TFUE, the EU conditionally agreed to include the principle of non-application of AD and AS measures.

In fact, the were instances where the Commission had initiated several proceedings against dumped imports from Norway, Iceland and Sweden that led to the application of AD measures, which were suspended only as of 1 January 1994 with the date of entry into force of the EEA Agreement. Since the later termination of the AD proceedings against EFTA members, the Commission had again initiated two AD and one AS investigations concerning imports of fish products from Norway.

This example shows that application of competition rules to trade disputes between different countries does not necessarily exclude the use of TDIs when it is necessary. While it is impossible to compare EU-China trade relations to trade among the Members of the EEA, it may be worth considering, whether the new rules on TDIs should reflect more upon the principle of protecting competition rather than competitors, which clearly features in the competition law. Of course, there are some fundamental differences between TDIs and competition policy. Taking the example of AD, this instrument is inherently anti-competitive as it is used as a protectionist measure. Therefore, some commentators argue that:

“Anti-Dumping is much more than a trade defence instrument, there will have to be a major reform of Anti-Dumping law prior any approximation to competition rules.”

There are significant procedural differences between determination of injury due to dumping of a product according to AD law and determination of price discrimination or predatory pricing in accordance to competition law. However, the argument of

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182 Ibid.
184 Ibid., Art 26, protocol 13.
185 Van Bael & Bellis, Op. Cit., p. 27
186 Dumping of farmed Atlantic salmon from Norway led to the imposition of definitive AD duties in 1997 and countervailing measures in 1997 whereas in the case of large rainbow trout, AD duties were imposed in 2004. Ibid.
188 P. Holmes, Visiting Professor at the College of Europe, Competition Policy and Market Regulation, Lecture, College of Europe, Natolin, Warsaw, 2 April 2012.
3. Reforming TDIs

bringing TDIs closer to competition rules does not posit that TDIs should be replaced by competition law. The lack of established international rules on competition eliminates such possibility. However, if TDIs were to pursue more liberal approach rather than protectionist and focus on promotion of fair trade by aligning more to competition policy, they would generate more economic growth and development in a long run. Of course the starting point of such reform would have to be the political willingness. Since there are ranging interests at stake in maintaining the rules on TDIs as they are, the unity of the EU Member States in regard to such liberal approach to the EU trade defence policy is unlikely.

It is important to recognise the fact that the reform of EU’s TDIs must comply with the rules that are set by the WTO, but at the same time, this modernisation must also serve the EU’s interests. Insofar, the overall welfare benefit of the implementation of TDIs has often been negative\textsuperscript{190}. In particular, this has been the case in AD duties imposed on Chinese footwear products as well as SG measures taken against T/C from China\textsuperscript{191}. The studies evaluating EU’s code and practice related to TDIs conclude that in order to address the challenges deriving from global economic developments, EU’s TDIs will need to be modernised\textsuperscript{192}. The effectiveness of TDIs in restoring the competitiveness of the European industries or generating welfare benefits has been limited\textsuperscript{193}. Therefore, there is certainly a room for improvement. Given the importance of the recent rulings of the ECJ and the WTO DSB in trade disputes that were discussed in the previous chapter, the EU reform of its TDIs will have to address the issues that have been identified in regard to treatment of producers from NMEs in AD and AS investigations. In respect to this aspect it has been argued that Commission should specify its practices in regard to AD and AS investigations concerning NME cases\textsuperscript{194}. At the same time, it is clear there is a need for the concept of NME to be harmonised at the multilateral level\textsuperscript{195}. The EU reform of TDIs is going to have a considerable influence on its trade relations with China. Depending on the direction that the new EU rules on TDIs will pursue, it may further liberalise or restrict trade between the two. Liberalised trade and market access are going to be sustainable only when competition is fair. While the EU needs to ensure that Chinese producers are granted fair treatment during AD and AS proceedings,

\textsuperscript{193} Ibid.
\textsuperscript{194} Ibid., p. 453.
\textsuperscript{195} Ibid. p. 445.
China needs to show more initiative in ensuring that its domestic producers comply with international trade rules and do not abuse their access to the European market by resorting to predatory pricing strategies or other anti-competitive practices causing market disturbances. Having raised the importance of the upcoming reform of EU trade remedies for EU-China trade relations, the next chapter is going to consider the future perspective of trade relations between the two.
4. Future Perspectives of Trade Relations between the EU and China

The key question that the policymakers ask themselves is how to manage economic relations between the EU and China in order to avoid trade distortions and fully benefit from the potential the markets offer. Insofar, EU-China trade relations have been developing very fast. This rapid progress in bilateral trade relations derives mainly from the fact that that both partners share common interests in strengthening their economic cooperation. However, as it has been already identified in the chapters of this thesis, EU-China trade relations are not free of tensions. While the list of trade issues is extensive, a number of tensions concern the EU’s code and practice related to the application of TDIIs against products from China. Given the fact that the EU’s TDIIs are about to be submitted to a major reform, the modernisation of trade remedies is going to have an impact on the future of trade relations between the EU and China. Therefore, the focus of this final chapter is going to be put on the discussion regarding the factors that may positively or negatively contribute to future EU-China trade relations.

4.1 Intensifying Tensions vs. Common Interests

The perspective of escalating trade disputes between the EU and China poses a real threat capable of jeopardising further development of EU-China trade relations. The excessive use of TDIIs in an unfair manner leads to discrimination between foreign products and has negative effect on trade. Moreover, it rarely solves the problem of an industry that is suffering from losses allegedly due to dumped or subsidised products or due to large volumes of imports related to elimination of quantitative restrictions. This is a reality that has often been the case when trade remedies were imposed by the EU on products originating from China. The most illustrative example was the textile saga that triggered the SG mechanism to protect European producers from large quantities of imports of textile and clothing from China. The implementation of this most restrictive measure, as according to the Danish Prime Minister: “in the end, will not save one job
for the European industry”196. Therefore, rather than resorting to the use of TDIs the EU should focus on internal policies supporting the process of restructuring of the Community industries that are most sensitive to imports from abroad.

Despite the upcoming reform of TDIs, the general attitude of the EU towards the use of trade remedies is unlikely to change in the near future. This observation derives from the official statements included in the EU trade policy incorporated into the EU 2020 Strategy. While overall, the EU reassures its commitment to open trade, it stresses that it wants to197:

“(...) protect EU production from international trade distortions or disruptions, by applying trade defence instruments in compliance with WTO rules.”

The use of TDIs in a protectionist or unfair manner is likely to lead to the proliferation of trade disputes between the EU and China. Therefore, to decrease this risk, the EU needs to ensure that its rules on TDIs guarantee fair and accurate treatment of products from China that are subject to AD measures and CVD. It is in the interest of the EU that it addresses the issues that have been raised in regard to its code and practice in implementation of trade remedies. This derives from the fact that in a number of disputes which have been discussed in previous chapters, China has demonstrated its growing legal capacity to defend its interests.

Despite the impressive economic growth that China has achieved during the last three decades, generated wealth is not equally distributed198. Therefore, China is still considered as a developing country and it has been the case that China’s legal competences in international trade used to be perceived through similar lenses199:

“As the world’s largest developing country, China is a land of pockets of garnish wealth and stunning skylines amidst a desert of mild to extreme poverty and life threatening pollution. Its legal capacity in international trade is a microcosm of this macrocosm.”

199 Ibid.
There is still a lot of improvement to be made in terms of China’s domestic policies concerning legal transparency and other legislative issues relevant for China’s compliance with its obligations to WTO\textsuperscript{200}. However, since its accession to the WTO, China’s legal ability has significantly improved\textsuperscript{201}. This has been clearly demonstrated in trade disputes between the EU and China that have been discussed.

By engaging into litigation over protectionist and unfair use of EU’s TDIs it can be argued that apart from pursuing this path in order to defend its interests, China shows its commitment to the promotion of WTO rules. Therefore, in this respect, the increased use of the WTO Dispute Settlement mechanism should not be interpreted as a reason for concern. It shows that China achieved significant progress in its integration into the WTO structure. This should serve as a positive signal that China has become more responsible and capable to adjust to international trade rules. It also indicates that if the EU continues to implement its TDIs in a clearly protectionist and unfair manner, it should expect a response from China.

Trade issues between the EU and China are likely to continue to appear in the future\textsuperscript{202}. However, their frequency and impact on EU-China trade relations can be diminished if both partners were to engage in a constructive dialogue of how to resolve the tensions before resorting to trade sanctions.

\begin{itemize}
\item \textsuperscript{201} Don Harpaz, \textit{Op. Cit.}, p. 757.
\item \textsuperscript{202} Qingjiang, \textit{Op. Cit.}, p. 89.
\end{itemize}
4.2 Future Trade Cooperation between the EU and China

In order to overcome the tensions accompanying EU-China trade relations, both partners need to increase their efforts in negotiating the framework for a new trade agreement. The EU and China are well aware of the need to replace the legal basis for their economic cooperation which dates back to 1985. However, the promising proposal for a new form of a strategic partnership between the EU and China appears to be fading away. Despite the official statements confirming the commitment of both parties to deepen their trade cooperation, a formal conclusion of the proposed Partnership and Cooperation Agreement (PCA), remains a wishful thinking. A new legal framework for EU-China trade cooperation would provide concrete basis for trade cooperation and could resolve a number of tensions that feature in EU-China trade relations today.

The character and direction of trade policies that both partners pursue unilaterally, is going to define the relations between the EU and China in the future. The adoption of a policy where the EU is favouring the use of TDIs as means to respond to the challenges posed by China’s growing competitiveness is most likely going to have a negative effect on the bilateral relations. At the same time, if EU-China trade relations are to progress, China needs to stop politicising trade disputes and focus on economic reforms addressing the problem of anti-competitive behaviour of its exporters. The relationship between the EU and China is bound to develop further in the future nevertheless the pace and direction that it will pursue may depend on the preparedness and willingness of both partners to cooperate and obey by the rules on fair trading practices to foster competition and sustainable economic development.

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5. Conclusion

The purpose of this thesis was to provide an analysis of certain aspects of trade relations between the EU and China and the use of trade remedies. The thesis focused on the analysis of the EU code and practice related to the application of TDIs against Chinese products. The analysis was conducted within the multilateral framework of the WTO, which enabled identification of a number of issues concerning the use of TDIs in response to anti-competitive behaviour of Chinese producers on the European market. Despite the fact that TDIs that are currently imposed on Chinese products constitute a marginal percentage of the overall volume of imports from China, the implementation of trade remedies by the EU can have a considerable impact not only on the producers who are directly affected by the duties, but also on the overall character of EU-China trade relations.

Trade has always been one of the most important aspects that guided the development of relations between the EU and China. Both partners enjoy the benefits of a robust trade that has increased rapidly in volume in recent years. China’s accession to the WTO contributed to the process of liberalisation of its market and granted different dimension to the relations between the EU and China. Nevertheless, the relations between the EU and China are not free of tensions that have been gathering force and can easily overshadow the perspective of strengthening of economic cooperation in the future. A number of concerns derive from surging trade deficit, anti-competitive practices of Chinese producers and hostile rhetoric that undermines EU-China trade relations today.

The tensions between the EU and China are multifaceted. The EU is largely divided when it comes to addressing the challenges posed by China’s growing competitiveness therefore it often resorts to TDIs, which signals protectionism and reveals the weaknesses of the EU trade policy of not being able to respond to trade issues in less restrictive manner. On the other hand, China is angered by not having been granted the market economy status and feels that its producers do not receive fair treatment during AD investigations therefore it often reaches to the politicisation of trade dialogue.
The application of trade remedies has been identified as a source of major tensions in EU-China trade relations that needs to be addressed. Otherwise the escalation of trade disputes may strain the perspective of further economic cooperation between the EU and China. The debate on the use of TDIs in response to anti-competitive practices of Chinese producers on the European market generates ranging views. The instrument of AD has been the most litigated trade remedy. It has been confirmed in the recent case-law that the EU method for the calculation of AD duties concerning products from China on the basis of non-market economy provisions is outdated and often leads to litigation between the EU and China. The developments in trade disputes between the EU and China depict that the EU’s procedure in implementing TDIs against products from China lacks consistency with the rules of the GATT AD Agreement. The recent judgements delivered by the ECJ and the WTO AB carry serious implications for the EU code and practice in relation to trade remedies.

The excessive use of TDIs has led to a number of trade disputes between the EU and China. The EU law governing the implementation of TDIs as it stands allows for these instruments to be used in an unfair and clearly protectionist manner. The most recent developments concerning trade disputes between the EU and China at the WTO level and in the ECJ, will force the EU to reflect upon its TDIs. A major reform of EU’s TDIs is urgently needed in order to ensure the ability of trade remedies to tackle unfair trade practices. At the same time, while the EU’s practice in AD proceedings will have to change significantly to ensure conformity with the recent decisions of the WTO DSB and the ECJ, more action should be taken at the WTO level to harmonise the treatment of NMEs and provide more guidance on how to calculate the AD duties in order to eliminate the possibility of inflating the duty artificially.

The EU has recognised the need to reform its TDIs. One of possible recommendations raised in this thesis posits that TDIs would be more effective and more adequate to address trade issues without impeding economic growth if they were to encompass the principle of the rules on competition namely, to protect competition rather than competitors. However, since there is a lack of internationally established rules on competition, TDIs constitute a key element of trade defence policy and the only remedy against trade distortions. Therefore, any approximation to competition policy seems unlikely to take place in the near future. Given the number of trade issues featuring in the EU trade relations with China, the upcoming modernisation of TDIs is going to be reflected in trade relations between the two partners.
The EU trade policy towards China has been gradually changing in face of China’s growing influence and presence in the international community. China has become more assertive and wants to be treated as an equal partner in its relations with the EU. It has become evident that China is prepared to defend its key interests and since it joined the WTO in 2001, its legal capacity and influence in trade dialogue has significantly grown.

China’s growing presence in the WTO also strengthens its position in bilateral trade relations with the EU. At the same time, it does not mean that Chinese export-led growth strategy does not lead to trade distortions. China needs to ensure that its producers comply with the rules of international trade and do not resort to anti-competitive practices. The EU has reassured its commitment to further liberalisation of trade in its relations with China, but in order for this objective to be realised, China needs to pursue a slightly more humble approach to its trade policy if it wants to stop being a target of TDIs. Given the number of arising trade issues in relations between the EU and China, both partners need to engage in a dialogue and identify a common approach of how to respond to these challenges, in order to be able to focus on promotion of economic growth and competition.
This project illustrated that the increasing number of trade disputes between the EU and China clearly indicates that the code and practice of the EU related to the application of TDIs are in urgent need of revision. Since the completion of this Master Thesis, the process of modernisation of the EU’s TDIs gathered pace. Trade disputes between the EU and China concerning the application of TDIs including EC-Fasteners and Brosmann Footwear proved to have implications for the revision of the EU’s trade remedies.

In order to come into conformity with recommendations of the WTO Appellate Body Report in the EC-Fasteners case, the EU adopted Regulation (EU) No 765/2012 of 13 June 2012 amending the disputed provision of the EU’s Basic AD Regulation, Article 9(5). Subsequently, another amending measure was delivered in Regulation (EU) No 1168/2012 of 12 December 2012 to address the issues that were raised in the judgement of the ECJ in the Brosmann Footwear dispute concerning the MET/IT claims while sampling method provided for in Article 17 of the Basic AD Regulation is applied. In order to avoid imposing a disproportionate burden upon the Commission, Regulation No 1168/2012 adopts an extended timeframe to investigate MET claims and posits that the method of sampling in itself is not contrary to the WTO law. To revisit Brosmann Footwear case, the undertakings subjected to AD duties contested the Regulation that imposed the AD duties on the basis that it breached certain provisions of the EU Basic AD Regulation. Therefore, in this case – the amendments represent modest revision of the rules and are likely to have limited impact on changing of the Commission’s practice in applying certain provisions of Basic AD Regulation.


3 Ibid., recital 3, Art. 1.
While the adoption of amendments deserves some recognition as it demonstrates the EU’s responsiveness to the case law, the amendments represent only a mere attempt to modernise the instrument of anti-dumping. The EU needs to show greater effort in reforming its TDIs otherwise it might facilitate an environment encouraging China to resort to retaliatory measures. In order to settle interests of many different stakeholders and boost confidence in international trade regulatory framework, more guidance is going to be needed from the WTO.
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