LEGALIZED BACKSLIDING: THE PRODUCT UNDER CONSIDERATION IN THE WTO ANTI-DUMPING AGREEMENT

Yan Cai, Eunmi Kim, Zhuoqi Teng & Yuantao Fang[*]

ABSTRACT

The scope of "product under consideration" (hereinafter "PUC") is the basis for conducting an anti-dumping investigation. However, the World Trade Organization (hereinafter "WTO") Anti-Dumping Agreement does not provide any explicit details about this definition; the result is that many issues remain in legal limbo. This study aims to reveal the legal and politico-economic problems arising from the ambiguity of the PUC definition, suggesting alternatives for its amendment. To this end, we conduct analyses of the cases of EC — Fasteners and EU — Footwear. *Our legal analyses reveal that both the "internal likeness" claim and the "cross-likeness" claim would be rejected by the Panel. Our politico-economic analyses highlight that the WTO Anti-Dumping Agreement acts as a form of "legalized backsliding" which allows investigating authorities to abuse their broad discretion to satisfy protection-seeking interest parties in determining the scope of PUCs. This study recommends either inserting substantive and procedural provisions to determine PUCs in the Anti-Dumping*

[*] Yan Cai, Associate Professor, College of Commerce, Hebei University of Economics and Business. Eunmi Kim (corresponding author), Visiting Researcher, Institute of Oriental Medicine Industry, Daegu Haany University. Zhuoqi Teng, Assistant professor, College of Business Administration, Henan Finance University. Yuantao Fang, Assistant professor, School of Finance, Shanghai Lixin University of Accounting and Finance. The authors can be reached at: yancai2020@126.com; eunmi@jbnu.ac.kr; tengzhuoqi@hafu.edu.cn, 20190060@lixin.edu.cn. This research is supported by the "Funding Projects for the Introduction of Overseas Talents in Hebei Province (C20210108)".

臺灣大學學術期刊資料庫

Agreement as the best option or inserting them in Free Trade Agreements as the second-best option.

KEYWORDS: *product under consideration, anti-dumping,* EC — Fasteners*,* EU — Footwear*, internal likeness, cross-likeness*

臺灣大學學術期刊資料庫

I. INTRODUCTION

The definition of a "product under consideration" (hereinafter "PUC"), upon which the scope of like products depends, is the basis for the determination of occurrences of dumping, injury, and the causal link between them. Although this definition has significant effects on all subsequent investigation procedures as well as the eventual scope of anti-dumping (hereinafter "AD") measures, there is no explicit provision regarding it in the World Trade Organization's (hereinafter "WTO") Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement, hereinafter "ADA"). As a consequence, numerous disputes have taken place on issues related to the definition of the PUC in the WTO, disputes such as those in the cases of *EC — Fasteners*[1] and *EU — Footwear*.[2]

Countless previous studies have been written about the subsequent stages of an AD investigation, but very little has been written about the detailed definition of the PUC. At the level of international trade law, Tejeda (2011) revealed that the ambiguity of the PUC definition in the WTO ADA might be used to disguise trade protectionism.[3] That study suggested that the scope of the PUC should be determined through reasonable analysis of likeness among the sub-product categories constituting the PUC. Additionally, Cho (2006) reviewed the arguments of third parties in the case of *Korea — Certain Paper*[4] on the determination of PUCs and compared the different standpoints of major WTO members such as Canada, the United States (hereinafter "US"), and Japan.[5] At the level of domestic trade law, Han et al. (2011) studied the regulation of the PUC in the US under its Antidumping Law and criticized the US Department of Commerce's exercising its discretion to define the scope of the PUC in an overly broad manner which inclined too heavily toward the intent of the petitioner.[6]

The significant role of the PUC and the lack of previous studies on this issue highlight the necessity to fill this research gap. This study aims to

---

[1] Panel Report, *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WTO Doc. WT/DS397/R (adopted July 28, 2011) [hereinafter *EC — Fasteners*].

[2] Panel Report, *European Union — Anti-Dumping Measures on Certain Footwear from China*, WTO Doc. WT/DS405/R (adopted Feb. 22, 2012) [hereinafter *EU — Footwear*].

[3] Marco Tulio Molina Tejeda, *Assessing the Importance of the Definitions of 'Product under Consideration' and 'Like Product' in Antidumping Investigations*, 6(3) GLOB.TRADE & CUSTOMS J. 173, 173-87 (2011).

[4] Panel Report, *Korea — Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WTO Doc. WT/DS312/R (adopted Nov. 28, 2005) [hereinafter *Korea — Certain Paper*].

[5] Young Jae Cho, *A Study on the Product Scope in Anti-Dumping Investigation: Interpretation of WTO Anti-Dumping Code and Case Study*, 24 TRADE REMEDY REV. 210, 210-34 (2006).

[6] *See generally* Na-hee Han & Choong-lyong Ha, *Study Concerning the Survey Scope of the Product for the Application of the U.S. Antidumping Law*, 13(4) INT'L COM. & INFO. REV. 375 (2011).

臺灣大學學術期刊資料庫

reveal the legal and politico-economic problems due to the ambiguity of the definition of the PUC in the WTO ADA by conducting case analyses; we also suggest alternatives for its amendment. To this end, this study proceeds as follows: part II clarifies the definition of the PUC in the ADA and outlines the WTO's jurisprudence. In part III, we present case analyses on two disputes in which the PUC issue was discussed: *EC — Fasteners* and *EU — Footwear*. From a legal perspective, neither Panel in these two cases could find any explicit guidance in the WTO ADA as to how the investigating authority should define the PUC. Specifically, the Panel for *EC — Fasteners* found that there was no mandatory "internal likeness" requirement (i.e., each of the sub-product categories making up the PUC must be like the others). In addition, the Panel for *EU — Footwear* found that there was no mandatory "cross-likeness" requirement (i.e., all sub-products within the scope of the PUC must be like all sub-products within the scope of the like product). From a politico-economic perspective, the ambiguity of the PUC resulted in "legalized backsliding"[7] on trade liberalization by allowing WTO members to take protectionist measures in response to domestic lobbying pressure. Consequently, the investigating authorities abused their broad discretion to satisfy the requirements of protection-seeking interest parties in determining the scope of the PUC. In part IV, we recap our main conclusions and propose a substantive and procedural approach to the amendment of the PUC provisions.

II. RATIONALE OF LEGALIZATION OF THE PUC

Identification of the "product under consideration," as the first step in any AD investigation, has significant effects on all subsequent procedures. Specifically, the definition of the scope of the PUC determines the eligibility of foreign like products to enter the market, detects the possibility of dumping and the presence of domestic like products in cases where an injury is claimed and is the causal link between dumping and injury.[8]

This important role of the PUC permeates the legal provisions of the ADA. In particular, Article 2.6 of the ADA states that a like product is: "[A] product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which,

[7] The phrase "legalized backsliding" was famously termed by Finger (1995), who pointed out that the existence of legal loopholes in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [Anti-Dumping Agreement, hereinafter ADA] made backsliding on trade liberalization possible; however, if those loopholes had not been included, protectionist interests would have prevented the realization of tariff concessions. *See* J. Michael Finger, *Legalized Backsliding: Safeguard Provisions in the GATT*, *in* THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES 285, 286 (Will Martin & L. Alan Winters eds., 1995).

[8] JUDITH CZAKO ET AL., A HANDBOOK ON ANTI-DUMPING INVESTIGATIONS 98-99 (2003); Tejeda, *supra* note 3, at 181-82.

臺灣大學學術期刊資料庫

although not alike in all respects, has characteristics closely resembling those of the product under consideration."[9]

From the reading of this provision, we see that there is a clear relationship between the definition of "like product" and the PUC and that a comparison between them is required in any AD investigation. It is important to point out that while the term "PUC" refers to the exported product, the term "like product" has double meanings: In determining the existence of dumping, it refers to the good produced in the export country which is like the PUC (also known as the "foreign like product"); and in determining the existence of injury, it refers to the good produced in the importing country which is like the PUC (also known as the "domestic like product").[10]

Aside from the relationship with the like product, the manner in which the PUC is defined also affects the determination of dumping and the extent of injury to the domestic industry. As noted in Article 2.1 of the ADA, a product is to be considered dumped if its export price is less than the normal value of the like product. In a sense, this provision requires two kinds of comparison for the determination of dumping: a comparison between the PUC and the foreign like product, and a comparison between the export price of the PUC and the normal value of the foreign like product. In addition, Article 3 of the ADA stipulates the determination of injury to the domestic industry, which is defined as "the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products in Article 4.1. A literal reading of this provision suggests that the constitution of the domestic industry is based on the definition of the domestic like product which, in turn, must be identical or closely resemble the PUC.[11] Finally, Article 3.5 of the ADA requires the investigating authorities to demonstrate a causal link between dumping and injury to the domestic industry based on an examination of all relevant evidence. Reading from the text, we see that the definition of the PUC is relevant to this causal link because the definition of the PUC serves to define both the foreign like product for the determination of dumping and the domestic like product for the determination of injury.[12]

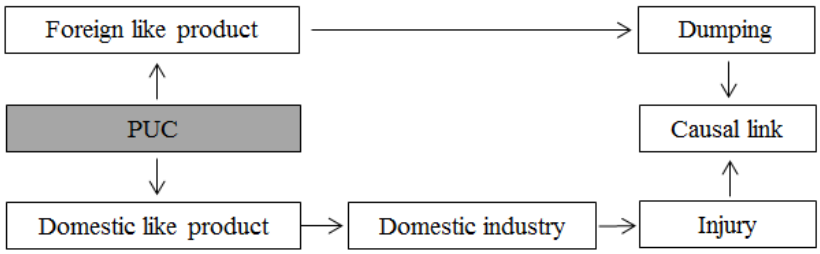
Figure 1 summarizes the inter-relationships among these provisions and reveals that the scope of the PUC is the basis for the determination of like products, dumping, domestic industry, injury, and any causal links between dumping and injury.

---

[9] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade art. 2.6, Apr. 15, 1994, 1868 U.N.T.S. 201.
[10] CZAKO ET AL., *supra* note 8, at 98.
[11] Tejeda, *supra* note 3, at 186.
[12] CZAKO ET AL., *supra* note 8, at 98-99.

臺灣大學學術期刊資料庫

FIGURE 1: The role of the PUC in the WTO ADA



SOURCE: Compiled by the authors based on Articles 2.6, 2.1, 4.1, 3.1, and 3.5 of the ADA.

Despite the significant role of the PUC, the WTO's ADA does not provide any explicit details with respect to the definition, description, or criteria for the determination of it; consequently, numerous disputes on this issue have taken place among WTO members. WTO adjudicating bodies have examined the PUC issue on a case-by-case basis and the resulting jurisprudence on it is as follows (Table 1).

TABLE 1: WTO disputes related to Article 2.6 of the ADA

Dispute Number	Panel Report Adopted	Short Title	Complaint	Current Status	Is the determination of the PUC consistent?
DS264	2004	*US — Softwood Lumber V*[13]	Canada	Implementation notified (9 March 2007)	Y
DS312	2005	*Korea — Certain Paper*	Indonesia	Compliance proceedings completed (24 October 2007)	Y
DS331	2007	*Mexico — Steel Pipes and*	Guatemala	Implementation notified by respondent (1 October	The Panel exercised judicial economy in respect of

[13] Panel Report, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WTO Doc. WT/DS264/R (adopted Aug. 31, 2004) [hereinafter *US — Softwood Lumber V*].

臺灣大學學術期刊資料庫

		Tubes[14]		2007)	the PUC issue.[15]
DS337	2008	*EC — Salmon*[16]	Norway	Report(s) adopted (17 September 2008)	Y
DS397	2011	*EC — Fasteners*	China	Report(s) adopted (15 February 2016)	Y
DS405	2012	*EU — Footwear*	China	Implementation notified (7 December 2012)	Y
DS410	Pending consultations	*Argentina — Fasteners and Chains*[17]	Peru	In consultations (19 May 2010)	/
DS425	2013	*China — X-Ray Equipment*[18]	European Union	Implementation notified by respondent (14 February 2014)	No separate claim or in-depth analysis of the PUC issue.
DS498	Pending consultations	*India — USB Flash Drives*[19]	Chinese Taipei	In consultations (24 September 2015)	/
DS500	Pending consultations	*South Africa — Portland*	Pakistan	In consultations (9 November 2015)	/

[14] Panel Report, *Mexico — Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala (Mexico — Steel Pipes and Tubes)*, WTO Doc. WT/DS331/R (adopted July 24, 2007) [hereinafter *Mexico — Steel Pipes and Tubes*].

[15] *Id*. ¶ 8.3.

[16] Panel Report, *European Communities — Anti-Dumping Measure on Farmed Salmon from Norway*, WTO Doc. WT/DS337/R (adopted Jan. 15, 2008) [hereinafter *EC — Salmon*].

[17] Request for Consultations by Peru, *Argentina — Anti-Dumping Duties on Fasteners and Chains from Peru (Argentina-Fasteners and Chains)*, WTO Doc. WT/DS410/1, G/L/924, G/ADP/D84/1 (May 31, 2010).

[18] Panel Report, *China — Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WTO Doc. WT/DS425/R (adopted Apr. 24, 2013) [hereinafter *China — X-Ray Equipment*].

[19] Request for Consultations by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *India — Anti-Dumping Duties on USB Flash Drives from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WTO Doc. WT/DS498/1, G/L/1121, G/ADP/D111/1 (Sept. 29, 2015).

臺灣大學學術期刊資料庫

		Cement[20]			
DS591	The Panel Report has not been completed	*Colombia — Frozen Fries*[21]	European Union	Panel composed (24 August 2020)	/
DS598	The Panel Report has not been completed	*China — Barley*[22]	Australia	Panel established (28 May 2021)	/

SOURCE: Compiled by the authors based on WTO Disputes by Agreement Database.[23]

NOTE: "Y" indicates that the respondent's determination of the PUC was found to be consistent with Article 2.6 of the ADA. "/" indicates that there is no jurisprudence on the PUC issue since the current status of these cases is recorded as pending consultations or a Panel Report has not been completed.

As shown in Table 1, all Panels ruled against those countries who argued that the determination of the PUC was inconsistent with Article 2.6 of the ADA.[24] The first dispute relevant to the PUC issue is *US — Softwood Lumber V*, in which Canada claimed that the US erroneously determined there to be a single PUC notwithstanding the disparate nature of the softwood lumber products in the subsets of it. However, this contention was rejected by the Panel since there was no explicit guidance in the WTO's ADA as to how the investigating authority should define the PUC.[25] In the case of *Korea — Certain Paper*, Korea determined the scope of the PUC by including a plain paper copier and wood-free printing paper. To this, Indonesia argued that Article 2.6 of the ADA required Korea to prove that plain paper copier and wood-free printing paper were like products to include them in a single PUC. The Panel ruled against Indonesia on the grounds that no provision in Article 2.6 contained a definition of the PUC.[26]

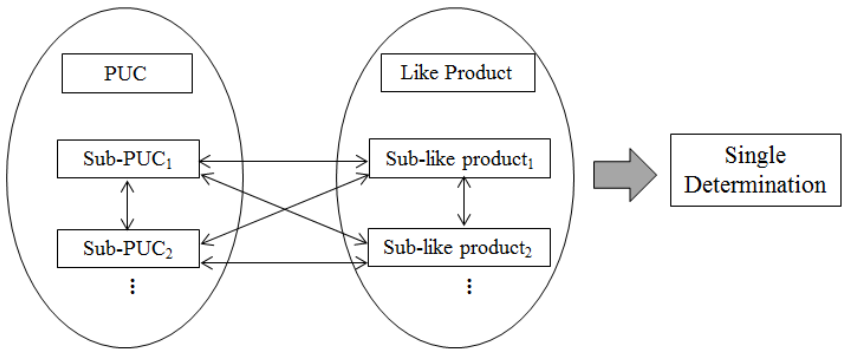
[20] Request for Consultations by Pakistan, *South Africa — Provisional Anti-Dumping Duties on Portland Cement from Pakistan*, WTO Doc. WT/DS500/1, G/L/1139, G/ADP/D112/1 (Nov. 12, 2015).
[21] Request for Consultations by the European Union, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WTO Doc. WT/DS591/4, G/ADP/D133/1, G/VAL/D/14, G/L/1339 (Aug. 26, 2020).
[22] Request for Consultations by Australia, *China — Anti-dumping and countervailing duty measures on barley from Australia*, WTO Doc. WT/DS598/1, G/L/1382, G/ADP/D135/1, G/SCM/D130/1 (Dec. 21, 2020).
[23] *Disputes by Agreement*, WORLD TRADE ORG. [hereinafter WTO], https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (last visited Jan. 23, 2021).
[24] One exception is the Panel Report of *Mexico — Steel Pipes and Tubes*, in which the Panel exercised judicial economy and did not address Guatemala's claim under Article 2.6 of the ADA.
[25] *US — Softwood Lumber V*, *supra* note 13, ¶¶ 7.140-.157.
[26] *Korea — Certain Paper*, *supra* note 4, ¶¶ 7.216-.221.

臺灣大學學術期刊資料庫

In *EC — Salmon*, Norway claimed that the EC violated Article 2.6 by combining into a single PUC whole salmon, whole head-on gutted salmon, and filleted salmon, which have important differences in physical characteristics and end-uses as well as in the production process. However, the Panel rejected Norway's claim because Article 2.6 contains no requirement of internal or cross-homogeneity of the PUC.[27]

Among these precedents, all complainants argued that a single AD investigation should subject to a single product. It is the complainant, i.e., Norway, in *EC — Salmon* that explicitly raised both the "internal likeness" claim and the "cross-likeness" claim for the first time. To give an understandable description of its claims, Norway diagrammed what it described as the "vectors" of likeness that should be respected under Article 2.6 of the ADA. As shown in Figure 2, Norway argued that a final determination of a single product required vertical, horizontal, and diagonal vectors of likeness; that is, each of the subsets making up the PUC must also be like each other (internal likeness) and all subsets forming the like product must be like all subsets making up the PUC (cross-likeness).[28] However, both the "internal likeness" claim and the "cross-likeness" claim were rejected by the Panel.

FIGURE 2: Internal likeness and cross-likeness requirements described by Norway in EC-Salmon



SOURCE: Compiled by the authors based on the Panel Report, *EC — Salmon* (2008), ¶ 7.16.

Regarding the controversy that can accompany determination of the PUC, we conduct analyses of the cases of *EC — Fasteners* and *EU —*

[27] *EC — Salmon*, *supra* note 16, ¶¶ 7.50-.55.
[28] *Id*. ¶¶ 7.16-.17.

臺灣大學學術期刊資料庫

Footwear for the following reasons: First, they are the latest cases related to the PUC issue where the Panel has had elaborate and prolonged discussions. Second, *EC — Fasteners* covered almost all arguments of the disputing parties which had been made in previous disputes. Third, *EU — Footwear* was the only case in which the criterion of the PUC was explicitly discussed.[29]

III. CASE ANALYSIS

A. EC — Fasteners

1. Factual Aspects of EC — Fasteners — The European Commission initiated an AD investigation concerning imports of certain iron or steel fasteners originating from China on 9 November 2007 based on an application submitted by the European Industrial Fasteners Institute (hereinafter "EIFI"). In general, a preliminary determination follows the initial investigation. However, in this exceptional case, the Commission decided to continue the investigation without the imposition of preliminary measures due to the need to examine certain aspects of the case further.[30] On 31 January 2009, the European Council of Ministers (hereinafter "Council") decided to impose definitive AD duties ranging from 0% to 85% for five years on the products at issue. In response, China complained about the European Communities (hereinafter "EC")[31] to the WTO by requesting the establishment of a panel on 12 October 2009. A Panel was established eleven days later and the Panel report, ruling against China on the PUC issue, was circulated on 3 December 2010. Then, although the disputing parties made no separate claim concerning Article 2.6 of the ADA during the appeal process, they notified the Dispute Settlement Body (hereinafter "DSB") of their decisions to appeal based on other issues in March 2011. In July 2011, the AB report, which favored China with respect to the "individual

[29] Actually, we considered selecting *China — X-Ray Equipment* but because the EU did not make a separate claim regarding Article 2.6, an in-depth analysis was not feasible. Therefore, we decided to exclude this case from our case analysis section.

[30] Council Regulation (EC) 91/2009 of Jan. 26, 2009, Imposing a Definitive Anti-Dumping Duty on Imports of Certain Iron or Steel Fasteners Originating in the People's Republic of China, 2009 O.J. (L 29) 1, 1 [hereinafter EC (2009)].

[31] It is noteworthy that in this case the acronym European Communities [hereinafter EC] was used to refer to the respondent. The EC designation had been used in the WTO glossary until the entry into force of the Treaty of Lisbon on 1 December 2009. The Panel of this dispute was established on 23 October 2009, which was before the Treaty entered into force, so the respondent was still called the EC instead of the EU. However, we use the term EU in this study to be consistent with the Panel report.

臺灣大學學術期刊資料庫

treatment" issue,[32] was circulated and later adopted by the DSB. On 4 October 2012, the EU amended its basic AD Regulation and adjusted its AD duties ranging from 0% to 74.1% in compliance with the AB report. Nevertheless, China deemed the EU's compliance insufficient; they then initiated compliance proceedings. On 12 February 2016, the DSB adopted the Article 21.5 AB report, which supported most of the critical rulings against the EU.[33] Subsequently, the EU repealed its AD duties on 27 February 2016.

In *EC — Fasteners*, China claimed that Article 2.1 of the ADA, in combination with Article 2.6, established an obligation concerning the definition of the PUC and the PUC could only include products that were alike. However, since the EU included both standard and special fasteners, which were considered different from the viewpoint of China, it acted inconsistently with Articles 2.1 and 2.6. In response, the EU argued that since Articles 2.1 and 2.6 imposed no obligation regarding the selection of the PUC, they could encompass multiple models.[34]

The Panel noted that China's premise was that Articles 2.1 and 2.6 of the ADA established an obligation for investigating authorities to ensure all individual products within the PUC be like each other. Thus, the Panel's evaluation first order was to examine whether this premise was correct; if not, then China's claim was also not correct and the Panel need not discuss whether standard and special fasteners were like each other.[35]

In addition, the Panel found that Article 2.1 of the ADA provided no guidance as to the definition or parameters of the PUC, and that internal likeness regarding the scope of the PUC was not a mandatory requirement. With respect to Article 2.6 of the ADA, the Panel identified the purpose of this provision as defining the term "like product" instead of the term "PUC;" thus, it would be absurd to impose the definition of "like product" from Article 2.6 onto the undefined term "PUC".[36] To conclude, the Panel rejected China's claim and did not continue to the next step to examine whether standard and special fasteners were like each other.

2. Legal Observations — In *EC — Fasteners*, the Panel decided virtually all of the claims with respect to the PUC in favor of the EU. With respect to Article 2.1 of the ADA, China noted that this provision required that a

[32] For a detailed analysis of the "individual treatment" issue, see generally Yan Cai & Eun-Mi Kim, *A Study on the Non-Market Economic Treatment of WTO Trade Remedies: A Focus on Case Analysis*, 13(3) J. INT'L TRADE & COM. 157 (2017).

[33] Since the compliance proceeding mainly dealt with the EU's methodology of calculating anti-dumping [hereinafter AD] duties under Article 9(5) of the EU basic AD Regulation and did not mention the product under consideration [hereinafter PUC] issue, the following case brief and analysis is based only on the original Panel report.

[34] *EC — Fasteners*, *supra* note 1, ¶¶ 7.246-.248.

[35] *Id.* ¶ 7.261.

[36] *Id.* ¶ 7.271.

臺灣大學學術期刊資料庫

determination of dumping could only be made through a comparison between the export price of "a product" and the price of the like product in the exporting country. The Panel agreed with China that Article 2.1 referred to "a product" as being dumped, but it provided neither any specific obligation concerning the scope of the PUC nor any indication as to what the parameters of the PUC should be. Moreover, the Panel considered Articles 6.10, 2.4, and 2.4.2 of the ADA as the context in which to evaluate Article 2.1.

First, the Panel noted that Article 6.10 allowed sampling in situations where the number of "types of products involved" in an AD investigation was so large that it was impracticable to determine an individual dumping margin. In the Panel's view, this provision would be unnecessary if the concept of "a product" was limited, as China argued. Second, Article 2.4 requires that due allowance be made for differences which affect price comparability, such as differences in physical characteristics. China argued that although the PUC could include different types of items, its definition did not allow investigating authorities to include items which were so substantially different that the differences could not be offset by adjustments. The Panel dismissed China's claim because it found that this provision clearly demonstrated differences might exist within both the PUC and the like product. Third, Article 2.4.2 stipulates that the dumping margin shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of export prices. The Panel interpreted this provision as allowing the investigating authorities to subdivide a product into different models for the purpose of comparison of normal value and export price. Therefore it rejected China's claim that the PUC must include only like products so that all of them are comparable to each other.[37]

With respect to Article 2.6 of the ADA, the Panel found that since this provision called for an assessment of "likeness" between the like product and the PUC, logically, the scope of the PUC must already be known before comparing it with another product which was "identical" to or "has characteristics closely resembling those of" it. In the Panel's view, China's position of requiring different goods categories to be treated separately would be problematic because such a fragmented PUC and correspondingly fragmented like products would result in too narrow a definition of any given domestic industry.[38] Moreover, based on the fact that there was no definition of the PUC in the ADA and proposals to define it had been made in the context of the ADA negotiations under the Doha Round, the Panel considered that the absence of the definition of this term indicated the intention of WTO members to allow investigating authorities wide discretion

[37] *Id.* ¶¶ 7.264-.265.
[38] *Id.* ¶ 7.267.

臺灣大學學術期刊資料庫

to determine the scope of the PUC.[39]

In support of its position, China also referred to the text of Article 12.1.1(i) as providing relevant context. However, in the Panel's view, this provision only required a public notice of the initiation of an AD investigation to contain the scope of the "product involved" rather than indicating that Articles 2.1 or 2.6 established a legal requirement to define the scope of a PUC.[40]

Essentially, the Panel considered that China's arguments raised a policy issue: the absence of limitations on the scope of the PUC might cause erroneous dumping determinations. To persuade the Panel, China outlined a hypothetical situation in which apples and tomatoes were treated as one single PUC and argued that imposing AD duties on both apples and tomatoes would cause an unfair result if apples were being dumped while tomatoes were not dumped. The Panel was not persuaded by China's example for two reasons: first, the possibility that an overly broad scope of the PUC would cause erroneous determinations of dumping was remote; second, the broader the scope of the PUC, the more complicated the investigating authority's task of collecting and assessing relevant information would be.[41]

The Panel's finding that the EU's determination of the scope of the PUC violated no obligations found in either Article 2.1 or Article 2.6 was based on reasonable interpretations of the relevant texts, which neither defined the term "PUC" nor mentioned the criteria to define it. Moreover, the Panel's findings showed sufficient consideration of previous relevant judgments[42]—as a de jure matter—future disputes are not bound by precedents; as a de facto matter, however, previous panel (or Appellate Body) decisions have been given significant persuasive authority.[43] The Panel's rather comprehensive evaluations give broad discretion to investigating authorities in determining the scope of the PUC and suggest that the same judgment will be reached in the future.

Although the Panel did not continue to examine whether standard and special fasteners were like each other or not, China and the EU held opposite views on this. The Notice of Initiation of the EU defined the PUC as: "certain iron or steel fasteners, other than of stainless steel . . . ."[44] In the Definitive

[39] *Id.* ¶ 7.271.
[40] *Id.* ¶ 7.268.
[41] *Id.* ¶¶ 7.269-.270.
[42] For example, the Panel referred to the decisions of other panels in *Korea — Certain Paper* and *EC — Salmon*. We found that the Panel assessments with respect to the PUC issue in the *EC — Fasteners* case were almost the same as those in *EC — Salmon*.
[43] Mostafa Beshkar & Adam S. Chilton, *Revisiting Procedure and Precedent in the WTO: An Analysis of US—Countervailing and Anti-Dumping Measures (China)*, 15(2) WORLD TRADE REV. 375, 385 (2016).
[44] Commission Notice (EC) No. 2007/C 267/11, Notice of Initiation of an Anti-Dumping Proceeding Concerning Imports of Certain Iron or Steel Fasteners Originating in the People's Republic of China, 2007 O.J. (C 267) 31, 31.

臺灣大學學術期刊資料庫

Regulation, the scope of the PUC remained unchanged but generated discussions among different interest parties, as shown in Table 2. However, those argued physical differences were deemed as insufficient by the Commission because neither the EU's domestic AD law nor the WTO ADA required internal likeness in the PUC.

TABLE 2: Arguments of interest parties and determination of the Commission on the scope of the PUC

Interest Parties	Arguments of Interest Parties	Determination of the Commission
The EU importers and China's exporting producers	To exclude some types of screws, washers, or bolts with low resistance grades since there was no production by the Community industry and they were different from the typical products of the Community industry	Not accepted
The EU distributor	To exclude wood screws from the scope of the PUC because they were not produced in large quantities by the Community industry and wood screws producers did not support the AD proceeding	Not accepted
The EU distributor	To exclude do-it-yourself (DIY) fasteners from the scope of the PUC since they were not substitutable with fasteners produced by the Community industry and the DIY fasteners were different from other fasteners in terms of physical characteristics	Not accepted
The EU producer of anchors	To exclude nail screws from the PUC	Not accepted
The EU producers of fasteners	To include fasteners without heads, and "female" fasteners	Not accepted

SOURCE: EC (2009), at 7-8.[45]

Moreover, in the Definitive Regulation, the Commission defined standard fasteners as products that were described in detail by industry standards to ensure the products manufactured by different suppliers in different countries were essentially interchangeable from a user point of view. Special fasteners, on the other hand, tended to be used in high-end markets and were, on average, significantly more expensive than standard

[45] EC (2009), *supra* note 30, at 7-8.

臺灣大學學術期刊資料庫

fasteners.[46] As far as the alleged differences in price levels, the Commission stated: "Price differences between products *per se* do not justify the conclusion that a certain product type should be considered as a different product."[47] It seems apparent that, despite the price differences, the EU still considered standard fasteners were like the special fasteners to the extent of including both in the PUC. Contradictorily, the EU argued to the Panel that "the Commission never made a determination to the effect that standard and special fasteners were alike."[48] However, the Panel overlooked the self-contradictory argument of the EU since the non-existence of a mandatory requirement for internal likeness of the PUC left this issue in legal limbo.

3. Politico-economic Observations — Numerous previous politico-economic studies have shown that the geographical concentration of firms can affect an industry's ability to secure assistance and lobby successfully. In particular, spatially proximate industries are more likely to decrease communication costs and benefit from industry-wide lobbying activities.[49] China's fastener export regions are highly geographically concentrated off the southeast coast. According to fastener export value data which are publicly available at China's General Administration of Customs, the top 3 fastener export regions in China in 2017 were Zhejiang, Jiangsu, and Guangdong Provinces, accounting for 73.04% of the total. The imposition of AD duties on fasteners has caused considerable loss to the local economy. For instance, the EU's fastener AD case affected a total of 760 million dollars in exports from China, among which 320 million dollars were exported from Zhejiang Province. In Jiaxing of Zhejiang Province, as a production base of fasteners and export hub, 2100 fastener production companies were located and its fastener output accounted for 7% of the local GDP. During the imposition of AD duties, the value to Jiaxing of export of the relevant products to the EU decreased by 93% from 2008 to 2015, forcing many companies to withdraw from the EU market.[50]

The EU's inclination to impose AD duties triggered intense international and domestic lobbying activities by Chinese export firms, as shown in Table 3. Engaging in a foreign market requires high sunk costs of entry, and the variable costs associated with producing goods sold abroad are higher than for those sold domestically. Thus, exporting firms have incentives to lobby

---

[46] *Id*. at 9.
[47] *Id.* at 10.
[48] *EC — Fasteners*, *supra* note 1, ¶¶ 7.248-.249.
[49] *See generally* Marc. L. Busch & Erie Reinhardt, *Industrial Location and Protection: The Political and Economic Geography of US Nontariff Barriers*, 43(4) AM. J. POL. SCI. 1028 (1999); Catherine Y. Co, *Trade, Foreign Direct Investment and Industry Performance*, 19 INT'L J. INDUS. ORG. 163 (2001); Fiona McGillivray, *Party Discipline as a Determinant of the Endogenous Formation of Tariffs*, 41(2) AM. J. POL. SCI. 584 (1997).
[50] *Jiaxing Fastener Companies Return to the European Market Together*, JIAXING XINFENG MINFENG SCREW FACTORY (June 7, 2016), http://mf-screw.com/en/news/company-news-41.html.

臺灣大學學術期刊資料庫

for entry into foreign markets.[51]

TABLE 3: Lobbying activities by Chinese firms

Timeline	Lobbying Activities
October 2007	Right after the EIFI applied for AD investigations, Jiaxing Fasteners Export and Import Industry Association received the news from the Brussels office of the law firm Mayer Brown and notified its member firms via its online news system.
February 2008	Jiaxing Fasteners Export and Import Industry Association formed a delegation and initiated some lobbying activities against the EU AD investigation.
May 2008	The Jiaxing delegation participated in non-damaged defense hearing held in Brussels, Belgium, the European Commission headquarters, presenting six arguments in defense of the Chinese companies. In particular, the defense team claimed the scope of the PUC was unreasonably and ambiguously defined.
January 2009	When the EU published its Definitive Regulation, Jiaxing Fasteners Export and Import Industry Association expressed its dissatisfaction with the EU's measure and strongly lobbied the Chinese government to sue the EU through the WTO.
January 2016	When the compliance AB report was adopted, the Chinese government urged the EU to repeal its unfair AD duties immediately and threatened that otherwise, it reserved the right to take further retaliation measures through the WTO.

SOURCES: Gao (2014) and EPRS (2016).[52]

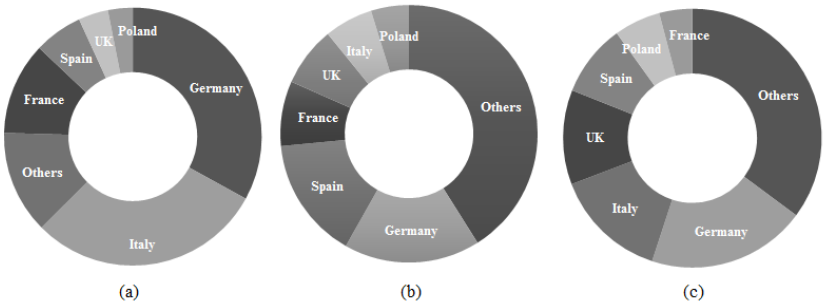
The EU's fastener production and import pattern also showed a degree of concentration. As Figure 3(a) illustrates, the EU's fastener production is concentrated in a relatively small number of countries, especially in Germany (32.99%), Italy (29.56%), and France (11.60%). Figure 3(b) shows that imports of fasteners to Germany, Spain, and France accounted for 40.57% of all imports in 2008, a year before the imposition of AD duties. Figure 3(c) illustrates that Germany, Italy, and the UK were the main countries to import China's fasteners, sharing 45.86% of the total imports from China.

[51] *See generally* Michael Plouffe, *Firm Heterogeneity and Trade-Policy Stances:* Evidence from a Survey of Japanese Producers, 19(1) BUS. & POL. 1 (2017).

[52] Henry Gao, *Public-Private Partnership: The Chinese Dilemma*, 48(5) J. WORLD TRADE 983, 994-95 (2014); Gisela Grieger, *Major EU-China Antidumping Cases*, EUR. PARLIAMENTARY RSCH. SERV. 1, 4 (May, 2016), https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583795/EPRS_BRI(2016)583795_EN.pdf.

臺灣大學學術期刊資料庫

FIGURE 3: The EU's fastener production and import volume in 2008 (tons): (a) National production; (b) National imports; (c) National imports from China



SOURCE: Authors' calculations based on data from EIFI (2016).[53]

The heterogeneous production and trade patterns in the EU's fastener industry have affected the political mobilization of their workers and led to a significant division in lobbying activities. Although the complaint filed by the EIFI represents twenty European member states, an EIFI document indicates that Italian membership of the EIFI was initiated by Unione Produttori Italiani Viteria e Bulloneria (UPIVEB), an Italian fastener manufacturers association.[54] In the EU, Italian companies account for the largest proportion of standard fastener production, while in other countries of the EU, many manufacturers specialize in producing special fasteners. The rationale of the EIFI to include standard fasteners within the scope of the PUC was that even if a higher tariff was imposed, the EU distributors or importers could still find a way to import from other countries to circumvent the AD duty. On the other hand, the Commission's determination on the scope of the PUC disappointed the European Fastener Distributor Association (hereinafter "EFDA"), an industry association representing the interests of fastener distributors at the European and global level. The EFDA divided the PUC into two categories: fasteners of a quality level required by general users and fasteners with very high-quality standards required by high-end users. This organization also argued that the Commission only focused on high-end quality fasteners. In the view of the EFDA, the imposition of AD duties on both categories would completely block fastener

[53] Dean Tseng, *Analysis in Figures: Leverage Shift in the Tug of Anti-dumping War Among Taiwan/Europe/China*, EUR. INDUS. FASTENERS INST. 171 (2016), http://www.eifi.org/medias/files/122_FICHIER_0.pdf.

[54] Jean-Paul Micheau, *Carbon Steel Antidumping: What the Industry Thinks*, FASTENER + FIXING 46, 48 (2008), https://issuu.com/fastenerfixingmagazines/docs/issue_50_digital.

臺灣大學學術期刊資料庫

imports from China. Because the market demand for these fasteners could not be met by EU manufacturers, the imposition of AD duties was not a long-term solution.[55]

The occurrence of intense lobbying activities indicates a basic flaw in the WTO ADA, that is, the flexibility in defining the scope of the PUC. This ambiguity provides governments with an excuse to respond to domestic political pressure and allows them to deviate from considerations of economic efficiency. Given that the vast majority of the exports of the PUC by Chinese companies were standard fasteners,[56] China has a comparative advantage in this labor-intensive industry due to the low cost of labor in that country. As Figure 4 illustrates, the quantity of fasteners imported into the EU from China had increased from 2002 and peaked in 2007. However, after the EU initiated the AD investigation on China's fasteners, signs of a decrease emerged, and a drop of 13% was recorded in 2008. In January 2009, the EU started to impose AD duties of up to 85% on fasteners imported from China. In the same year, the import volume reduced by 42% compared with the peak time.[57] In 2010, the WTO Panel dismissed China's PUC claim, but ruled that the EU had violated Articles 6.10 and 9.2 of the WTO ADA, at which point the import volume rose by 19% and continued to rise until 2011. In October 2012, the EU responded to the WTO AB's ruling by lowering the highest AD duty from 85% to 74.1%, which boosted the import volume in 2015 by 20%. In 2016, although the EU repealed its prolonged AD duties, the import volume did not increase to peak levels.

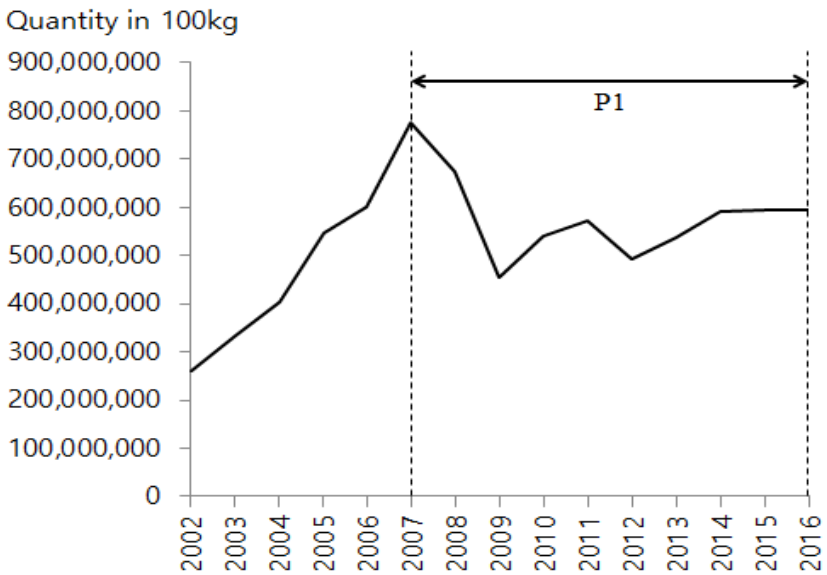
[55] *Expiry Review of the Anti-Dumping Measures Applicable to Imports of Certain Iron or Steel Fasteners Originating in the People's Republic of China*, EUR. FASTENER DISTRIBUTOR ASS'N 4 (Jan. 9, 2015), http://www.efda-fastenerdistributors.org/content/files/R591_Disclosure_-_EFDA_respons e_150109.pdf.

[56] EU (2009), *supra* note 30, at 6.

[57] Although the weak overall status of EU imports associated with the Great Recession could have affected the drastic decrease in total volume of EU imports of fasteners, the decrease in China's share of the EU's fastener import market was in line with the increase in Taiwan's share of the EU's fastener import market. Bown & Mavroidis (2013) illustrated that most of the EU import market share (by volume) vacated by China (from 70% in 2008 to 8% in 2010) due to the imposed AD duties was reallocated towards imports from Taiwan (from 22% in 2008 to 75% in 2010). *See* Chad P. Bown & Petros C. Mavroidis, *One (Firm) Is Not Enough: A Legal-Economic Analysis of* EC — Fasteners, 12(2) WORLD TRADE REV. 243, 248 (2013).

臺灣大學學術期刊資料庫

FIGURE 4: The EU's imports of fasteners from China 2002-2016



NOTE: We collected the data based on the CN codes provided in the EU's Definitive Regulation, namely 73181290, 73181491, 73181499, 73181559, 73181569, 73181581, 73181589, 73181590, 73182100, and 73182200.

SOURCE: Authors' calculations based on Eurostat figures, https://ec.europa.eu/eurostat/data/database.

Judging from this general trend, we calculate that China's export of fasteners to the EU decreased over the nine years (marked as P1) from the initiation of the investigation until the repeal of the AD duties, indicating that the AD measure put substantial economic pressure on Chinese exporters. However, imposing great pain on China brings little gain for the EU in the long run. According to opinions of experts in the EU fastener industry, the imposition of AD duties has caused disruption to the supply chain and done considerable damage to European distributors and importers. Realistically, it would be difficult for EU producers to take up the volume imported from China. Though other low-cost countries can provide alternative import sources, uncertainty exists concerning capacity and reliability of supply.[58] Therefore, a broader scope of the PUC would be very costly from the perspective of economic efficiency.

[58] Micheau, *supra* note 54, at 50.

臺灣大學學術期刊資料庫

B. EU — Footwear

1. Factual Aspects of EU — Footwear — The *EU — Footwear* dispute started when the EU quotas against Chinese footwear imports expired on 1 January 2005.[59] Six months later, the EU initiated an AD investigation against China's footwear products[60] with a petition from the European Confederation of the Footwear Industry (hereinafter "CEC").[61] On 23 March 2006, a provisional duty was imposed and on 5 October 2006, definitive AD duties ranging from 9.7% to 16.5% for a period of two years were imposed on China. With the expiration of these definitive duties, an expiry review request was lodged by the CEC on 22 December 2009, and the Council decided to extend the AD duties until April 2011. On 8 April 2010, China complained about the EU to the WTO, requesting the establishment of a Panel. The resulting Panel report was circulated to WTO members and was adopted by the DSB in October 2011.

In *EU — Footwear*, China claimed that the EU violated Article 2.6 of the ADA, read together with Articles 3.1 and 4.1, by excluding Special Technology Athletic Footwear (hereinafter "STAF") not less than (≥) €7.50 per pair from the scope of the PUC while including STAF less than (<) €7.50 per pair in its original investigation.[62] On the other hand, the EU argued that China's claim proceeded from a false premise since Article 2.6 did not apply to the definition of the PUC.

The Panel began by evaluating whether Articles 4.1 and 3.1 of the ADA should be "read together" with Article 2.6 and found that although the same term "like products" appeared in both Articles 4.1 and 3.1, China made no substantive arguments based on either, nor did they specify in what manner these two articles should be "read together" with Article 2.6. Essentially, the Panel was at something of a loss to understand China's claim in this case; therefore, the analysis proceeded based only on Article 2.6. With respect to Article 2.6, the Panel ruled in favor of the EU and found this provision did not apply to the determination of the PUC. Thus, China's claim lacked a legal basis.[63]

In addition, the Panel assumed, although it was not quite clear, that China made a so-called "cross-likeness" claim. China argued that the EU

---

[59] Prior to this date, imports of shoes from China were restricted by a quota system according to the WTO Agreement on Textile and Clothing.

[60] It is worth noting that the AD investigation targeted certain footwear of both Chinese and Vietnamese manufacture with uppers of leather; however, since we focus on dispute *EU — Footwear*, in which only China acted as the complaining country, we exclude Vietnam from this discussion.

[61] Commission Notice (EC) No. 2005/C 166/06, Notice of Initiation of an Anti-Dumping Proceeding Concerning Imports of Footwear with Uppers of Leather Originationg in the People's Republic of China, 2005 O.J. (C 166) 14, 14 [hereinafter EU (2005)].

[62] *EU — Footwear*, *supra* note 2, ¶ 7.304.

[63] *Id.* ¶¶ 7.308-.312.

臺灣大學學術期刊資料庫

focused on Article 2.6 of the ADA by claiming that "all corresponding types of footwear with uppers of leather produced and sold in the analogue country Brazil, as well as those produced and sold by the Community industry on the Community market" were like the PUC, which also included STAF＜€7.50. To the Panel, it seemed like China was claiming all products within the scope of the like product must be "like" all products within the scope of the PUC, but the Panel rejected China's claim in this regard since previous panels had already established that an absence of "cross-likeness" did not violate Article 2.6.[64]

2. Legal Observations — In *EU — Footwear*, the Panel provided a brief review of the EU's determination of the PUC in chronological order. Based on the relevant facts shown in Table 4, it was evident to the Panel that the Commission excluded only STAF≥€7.50 from the PUC in its definitive determination. China challenged this determination and argued that all STAF should be excluded from the PUC since the EU acknowledged the STAF to be different from non-STAF (i.e., other footwear relevant to the investigation).[65] On the other hand, the EU asserted that "the Commission never made any finding that STAF and non-STAF footwear were not like products,"[66] indicating that the EU considered that STAF and non-STAF *were* like products. Although China and the EU's arguments were exactly opposite, the Panel did not provide a straightforward evaluation from the beginning; this significant controversy was simply ignored for no specified reasons. Therefore, we examine the truth of the statement, "the Commission never made any finding that STAF and non-STAF footwear were not like products."[67]

TABLE 4: The EU's determinations of including/excluding STAF within/from the PUC

AD Investigation Stages	The PUC's Scope
Notice of Initiation	Include all STAF
Provisional Regulation	Exclude all STAF
Definitive Regulation	Exclude only STAF≥€7.50

SOURCE: Compiled by the authors from the Panel Report, *EU — Footwear*, ¶¶ 7.310-.311.

The EU Notice of Initiation in the original investigation did not exclude STAF from the scope of the PUC and defined the PUC as: "footwear with

[64] *Id.* ¶ 7.314.
[65] *Id.* ¶ 7.302.
[66] *Id.* ¶ 7.305.
[67] *Id.*

臺灣大學學術期刊資料庫

uppers of leather or composition leather . . . ."[68] However, in the Provisional Regulation and Definitive Regulation, the scope of the PUC generated discussions among different interest parties, as shown in Table 5.

TABLE 5: Arguments of interest parties and determinations of the Commission on the scope of the PUC

Stage	Interest party	Arguments of the interest party	Determination of the Commission
Provisional Investigation	China's exporting producers and EU importers	STAF should be excluded from the PUC, and thus from the scope of this AD investigation.	Accepted
	EU domestic footwear producers	STAF should be included in the PUC because the fashion trends had brought STAF into the market segment of casual footwear.	Not accepted
Definitive Investigation	EU domestic footwear producers	STAF＜€7.50 should be included in the PUC.	Accepted
	EU importers	STAF should be excluded from the PUC.	Not accepted

SOURCES: Compiled by the authors based on EU (2006a, 2006b).[69]

It is notable that the EU revised its Provisional Regulation excluding all STAF by including STAF ＜ €7.50 within the PUC in its Definitive Regulation. Logically, by making STAF＜€7.50 and non-STAF a single product, the EU's measure contradicts its provisional determination that STAF and non-STAF were not alike. The review of the EU's determination on the scope of the PUC in different AD investigation stages reveals that the EU's argument that they "never made any finding that STAF and non-STAF footwear were not like products" is untenable. However, the Panel ignored the EU's self-contradiction, stating that:

Even assuming that China were correct in asserting that STAF

[68] EU (2005), *supra* note 61, at 1.

[69] Commission Regulation 553/2006 of Mar. 23, 2006, Imposing a Provisional Anti-Dumping Duty on Imports of Certain Footwear with Uppers of Leather Originating in the People's Republic of China and Vietnam, 2006 O.J. (L 98) 3; Commission Regulation 1472/2006 of Oct. 5, 2006, Imposing a Definitive Anti-Dumping Duty on Imports of Certain Footwear with Uppers of Leather Originating in the People's Republic of China and Vietnam, 2006 O.J. (L 275) 1.

臺灣大學學術期刊資料庫

> and non-STAF footwear are not "like" within the meaning of Article 2.6, both STAF below €7.50 and non-STAF footwear are within the scope of the product under consideration as defined by the Commission, . . . this does not constitute a violation of Article 2.6.[70]

This ignoring of the self-contradictory argument of the EU is related to another issue, that is, whether price can be used as a criterion to define the scope of the PUC. According to the context of Article 2.6 and the ordinary meaning of the word "product," China claimed that the PUC remained a product regardless of its price so the Commission could not define the PUC based on its export price; otherwise, China's exporters would be less able to assess whether they should be concerned about the AD investigation.[71] In response, the EU argued that this and any other difficulties which might be caused for Chinese exporters did not create any legal basis for a violation of Article 2.6.

The Panel ruled in favor of the EU, explicitly pointing out in one footnote that: "[W]e see no basis in either law or logic for China's assertion that a price level may not be a relevant criterion in that regard. Certainly, even if such a definition were somehow more difficult for exporters to understand, we do not see how this would preclude it."[72]

By acquiescing in the matter of the price criterion, the Panel acknowledged that the price could be used as a standard to distinguish a product, rendering a considerable margin of discretion in the determination of the PUC scope. The question of the appropriate intensity of a Panel's review to the scope of the PUC is related to the issue of "standard of review" in the WTO dispute settlement.

Generally, Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU") stipulates a panel's standard of review as that "a panel should make an objective assessment of the matter before it . . . ."[73] However, the term "objective" provides little meaningful guidance on the level of discretion or deference that panels should grant to the domestic decision-makers of WTO Members. A panel's intensity of scrutiny to national measures should be analyzed from the perspective of different WTO agreements.[74]

---

[70] *EU — Footwear*, *supra* note 2, ¶ 7.314.
[71] *Id.* ¶ 7.303.
[72] *Id.* at 150 n.655.
[73] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 11, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 2, 1869 U.N.T.S. 401.
[74] For a detailed examination of the different standards of review that apply in WTO dispute settlement system, see generally Jan Bohanes & Nicholas Lockhart, *Standard of Review in WTO Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 378 (Daniel Bethlehem et al. eds., 2009).

臺灣大學學術期刊資料庫

In particular, the Anti-dumping Agreement contains a special standard of review clause in Article 17.6,[75] which grants greater deference to national AD authorities than would Article 11 of the DSU.[76] Therefore, although the Panel's silent consent to the price criterion may threaten the economic stability and ability for exporters to know whether or not their products are subject to an AD investigation, the standard of review set out in Article 17.6 of the ADA constrains the Panel from conducting a *de novo* review to the appropriate scope of the PUC. Only in cases where there is an egregious error will the Panel determine that the Commission's "establishment of the facts" was not "proper".

The findings of the Panel in *EU — Footwear* imply that even the seemingly contradictory determinations of the scope of the PUC in different AD investigation stages (as shown in Table 4) do not constitute an improper "establishment of the facts." The legal limbo of the definition of the PUC in the ADA renders a considerable degree of deference in fact-finding and may create ample scope for abuse in the future.

3. Politico-economic Observations — In the EU's footwear industry, intra-industry heterogeneity has become salient and different interests of many heterogeneous firms are represented by different industry associations.[77] The CEC, a well-established footwear industry association working on behalf of import-competing firms, argued for broadening the scope of the PUC. On the other hand, the Federation of the European Sporting Goods Industry (FESI), which represents the interests of big European athletic footwear firms like Adidas, Asics, and Puma, opposed the inclusion of STAF within the PUC.[78]

In addition to these industry associations, sovereign states were also sharply divided in their standpoints. The disagreement as to the scope of the

---

[75] Article 17.6 of the ADA states that:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

[76] Daniel K. Tarullo, *Paved with Good Intentions: The Dynamic Effects of WTO Review of Anti-Dumping Action*, 2(3) WORLD TRADE REV. 373, 376-77 (2003).

[77] For more detailed research on corporate lobbying during different AD investigation procedures, see generally Jappe Eckhardt, *Firm Lobbying and EU Trade Policymaking: Reflections on the Anti-Dumping Case Against Chinese and Vietnamese Shoes (2005-2011)*, 45(5) J. WORLD TRADE 965 (2011).

[78] *Id.* at 973.

臺灣大學學術期刊資料庫

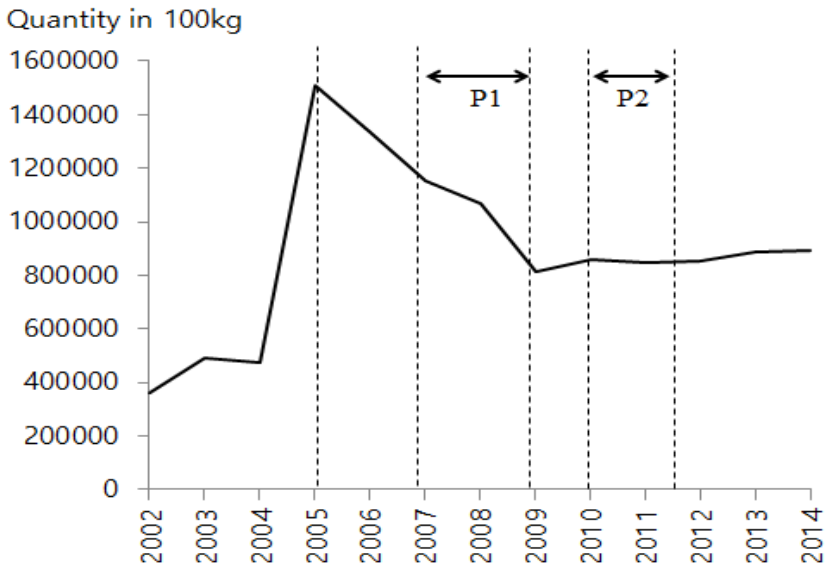
PUC was so intense that this issue escalated to the state level and caused a rift among them. Dunoff et al. (2014) revealed that a small group of states, including Italy, Portugal, and Spain, opposed exclusion of the STAF from the PUC; on the other hand, a much larger group of states, such as the UK, Denmark, Netherlands, Sweden, and Finland, supported the exclusion of STAF from the PUC.[79] These pieces of evidence indicate that the final determination of the scope of the PUC is not simply an evaluation by the investigating authority, but also a result of firms' lobbying power and member states' political rivalry.

The imposition of AD duties due to a broader PUC scope put great economic pressure on Chinese exporters. As shown in Figure 5, although the EU's imports of STAF from China showed an increasing trend from 2002 to 2005, initiation of the AD investigation in 2005 curbed STAF imports from that country (a decrease of 24% from 2005 to 2007). Exporters had to bear significant legal and administrative costs, while importers faced the uncertainty of having to pay backdated AD duties once the final AD determination was made. After the definitive AD duties were imposed on 5 October 2006, this decreasing trend continued from 2007 to 2009 (marked as P1). During this period, the imposition of AD duties acted as a protective measure for the EU's domestic industry by preventing imports from China. With the expiration of the definitive AD duties in October 2008, however, imports of STAF showed a slightly increasing trend until 2010. However, imports of STAF did not continue to increase due to extension of the AD duties for almost two years (marked as P2).

[79] Jefferey L. Dunoff & Michael O. Moore, *Footloose and Duty-Free? Reflections on European Union – Anti-Dumping Measures on Certain Footwear from China*, 13(2) WORLD TRADE REV. 149, 161-62 (2014).

臺灣大學學術期刊資料庫

FIGURE 5: The EU's STAF imports from China



SOURCE: Authors' calculations based on Eurostat figures, https://ec.europa.eu/eurostat/data/database.

NOTE: We collected the data on STAF based on the CN codes provided in the EU's Definitive Regulation, namely, 64039111, 64039113, 64039116, 64039118, 64039191, 64039193, 64039196, 64039 98, 64039991, 64039993, 64039996, and 64039998.

Causing great pain to China did not ensure great gain to the EU since the imposition of AD duties increased the import price of STAF. Consequently, the EU importers who depended on Chinese athletic footwear suffered direct economic loss not only because they could not change their signed contracts immediately, but also because they had no import alternatives other than China.[80] In fact, the footwear industry is a labor-intensive industry in which wage costs can play a significant role in determining the production location.[81] Highly-productive EU footwear companies tended to offshore much of their production to labor-intensive countries like China. However, low-productive EU companies, whose production occurred in the EU, were inclined to use the AD measure as a

[80] Eckhardt, *supra* note 77, at 976.
[81] Dunoff & Moore, *supra* note 79, at 156.

臺灣大學學術期刊資料庫

wall of protection to maintain their market share and prevent new entrants.[82] Therefore, the imposition of AD duties for the purpose of broadening the scope of the PUC ended up only favoring the narrow interests of certain lobbyists; it was not conducive to the healthy development of the whole industry.

IV. CONCLUSIONS AND SUGGESTIONS

According to the relevant provisions of the WTO ADA, the determination of the scope of an AD investigation and any subsequent measures hinge on the definition of the PUC. However, the ADA does not provide any explicit guidance as to how the investigating authority should define it. For this reason, the Panel of *EC — Fasteners* rejected the argument that all sub-product categories making up the PUC must be like each other, and the Panel of *EU — Footwear* stated that there was no mandatory requirement that all product types of the PUC must be identical to the various product types together constituting the like product.

The lack of guidance from the ADA on the homogeneity of the PUC can create systemic problems. From a legal perspective, as revealed in the cases of *EC — Fasteners* and *EU — Footwear*, it can cause investigating authorities to include products that are completely different in a single AD investigation (the internal likeness problem), and it can also allow for the possibility of error in the types of products included in the scope of the PUC and those included in the list of like products (the cross-likeness problem). From a politico-economic perspective, the lack of clarify regarding the definition of the PUC in the WTO's ADA may encourage a form of "legalized backsliding" which allows WTO members to take protectionist measures to alleviate pressure from domestic constituencies. The investigating authorities may be pushed to broaden the scope of the PUC to respond to political lobbying imperatives; consequently, the WTO ADA may act as an expression of protection-seeking interest parties at the expense of domestic importers, distributors, and consumers.

Given these legal and politico-economic problems, amendment of the PUC provision is worth considering to improve discipline in relation to the ADA. Not surprisingly, several WTO members have made proposals[83] to

[82] *Id.* at 150.

[83] WTO members that have made proposals to require amendments of the PUC provision are as follows: Canada; Brazil, Chile, Israel, Korea, Singapore, Switzerland, Thailand; Canada; Hong Kong, China. *See* Proposal on Like Product and Product Under Consideration, *Communication from Canada*, WTO Doc. TN/RL/GEN/26 (Dec. 1, 2004); Proposal on Product Under Consideration, *Communication from Brazil, Chile, Israel, Korea, Singapore, Switzerland, Thailand*, WTO Doc. TN/RL/GEN/50 (July 1, 2005); Product Under Consideration, *Paper from Canada*, WTO Doc. TN/RL/GEN/73 (Oct. 17, 2005); Product Under Consideration, *Paper from Hong Kong, China*, WTO Doc. TN/RL/GEN/78 (Oct. 24, 2005).

臺灣大學學術期刊資料庫

the Negotiating Group on Rules to introduce new or revised provisions to the ADA concerning the determination of the PUC. The Draft Consolidated Chair Texts of the ADA and Agreement on Subsidies and Countervailing Measures (SCM Agreement), circulated in 2007, inserted new provisions to define the PUC and gave procedural guidance on its determination. However, those inserted provisions were deleted in the new draft of 2008 because different views had been expressed regarding the scope, criteria, and procedure involved in determining the PUC.

The "tying-of-the-hands" rationale of trade agreements suggests that the stronger the multilateral agreement is, the more domestic political pressure the investigating authorities can withstand and the fewer the opportunities for abuse.[84] Thus, a well-defined PUC will prevent investigating authorities from succumbing to the protectionism of particular interest parties, instead acting for the benefit of social welfare. A more explicit definition of the PUC in the WTO ADA would not only enhance predictability for both exporters and importers, but also alleviate internal and cross-homogeneity problems throughout AD investigations.

We suggest specifying both substantive and procedural conditions to determine the PUC. For substantive conditions, we suggest inserting into Article 2.6 of the ADA the following provision:

> The term "product under consideration" shall be interpreted to mean the imported product subject to investigation or under review. Each of the sub-product categories constituting the product under consideration shall be like each other (i.e., meeting the internal likeness requirement) as will like sub-product categories constituting the like product (i.e., cross-likeness requirement) as regards conditions of competition. The assessment of those conditions of competition shall be based upon an objective examination of factors such as physical characteristics of the products, including quality and technical specifications, and their market characteristics, including substitutability, end uses, and distribution channels.

Procedurally, we suggest the following addition to Article 5 of the ADA:

> An investigation shall be initiated and subsequently conducted only with respect to a single product under consideration. Where, in light of the evidence obtained at initiation, investigating authorities find that there is more than one distinct product under

[84] B. Peter Rosendorff, *Domestic Politics and International Disputes*, *in* THE OXFORD HANDBOOK OF THE POLITICAL ECONOMY OF INTERNATIONAL TRADE 138, 140 (Lisa L. Martin ed., 2015).

臺灣大學學術期刊資料庫

> consideration, they shall initiate a separate investigation for each such distinct product. Subsequent to the initiation of an investigation, if further evidence obtained indicates that the investigation pertains to more than one single product under consideration, an anti-dumping duty shall not be imposed on any distinct product unless separate determinations of the existence of dumping, injury, and a causal link between dumping and injury are made with respect to that distinct product.

However, we have to admit that any ambitious amendment proposal seems to be unrealistic given the realities of the long and arduous multilateral trade negotiations during the ongoing Doha Round. Therefore, a second-best option is to insert the above-suggested amendments in the trade remedy chapter in Free Trade Agreements through bilateral negotiations. Further studies on more legally practical, politically feasible reforms of the PUC provisions are necessary to ensure the legitimacy and fairness of the AD legislation process and avoid legalized backsliding.

臺灣大學學術期刊資料庫

REFERENCES

Book

CZAKO, JUDITH ET AL. (2003), A HANDBOOK ON ANTI-DUMPING INVESTIGATIONS.

Articles

Beshkar, Mostafa & Adam S. Chilton (2016), *Revisiting Procedure and Precedent in the WTO: An Analysis of US—Countervailing and Anti-Dumping Measures (China)*, 15(2) WORLD TRADE REVIEW 375.

Bohanes, Jan & Nicholas Lockhart (2009), *Standard of Review in WTO Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 378 (Daniel Bethlehem et al. eds.).

Bown, Chad P. & Petros C. Mavroidis (2013), *One (Firm) Is Not Enough: A Legal-Economic Analysis of* EC — Fasteners, 12(2) WORLD TRADE REVIEW 243.

Busch, Marc. L. & Erie Reinhardt (1999), *Industrial Location and Protection: The Political and Economic Geography of US Nontariff Barriers*, 43(4) AMERICAN JOURNAL OF POLITICAL SCIENCE 1028.

Cai, Yan & Eun-Mi Kim (2017), *A Study on the Non-Market Economic Treatment of WTO Trade Remedies: A Focus on Case Analysis*, 13(3) JOURNAL OF INTERNATIONAL TRADE & COMMERCE 157.

Cho, Young Jae (2006), *A Study on the Product Scope in Anti-Dumping Investigation: Interpretation of WTO Anti-Dumping Code and Case Study*, 24 TRADE REMEDY REVIEW 210.

Co, Catherine Y. (2001), *Trade, Foreign Direct Investment and Industry Performance*, 19 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION 163.

Dunoff, Jefferey L. & Michael O. Moore (2014), *Footloose and Duty-Free? Reflections on European Union – Anti-Dumping Measures on Certain Footwear from China*, 13(2) WORLD TRADE REVIEW 149.

Eckhardt, Jappe (2011), *Firm Lobbying and EU Trade Policymaking: Reflections on the Anti-Dumping Case Against Chinese and Vietnamese Shoes (2005-2011)*, 45(5) JOURNAL OF WORLD TRADE 965.

Finger, J. Michael (1995), *Legalized Backsliding: Safeguard Provisions in the GATT*, *in* THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES 285 (Will Martin & L. Alan Winters eds.).

Gao, Henry (2014), *Public-Private Partnership: The Chinese Dilemma*, 48(5) JOURNAL OF WORLD TRADE 983.

Han, Na-hee & Choong-lyong Ha (2011), *Study Concerning the Survey Scope of the Product for the Application of the U.S. Antidumping Law*, 13(4) INTERNATIONAL COMMERCE AND INFORMATION REVIEW 375.

臺灣大學學術期刊資料庫

McGillivray, Fiona (1997), *Party Discipline as a Determinant of the Endogenous Formation of Tariffs*, 41(2) AMERICAN JOURNAL OF POLITICAL SCIENCE 584.

Plouffe, Michael (2017), *Firm Heterogeneity and Trade-Policy Stances:* Evidence from a Survey of Japanese Producers, 19(1) BUSINESS AND POLITICS 1.

Rosendorff, B. Peter (2015), *Domestic Politics and International Disputes*, *in* THE OXFORD HANDBOOK OF THE POLITICAL ECONOMY OF INTERNATIONAL TRADE 138 (Lisa L. Martin ed.).

Tarullo, Daniel K. (2003), *Paved with Good Intentions: The Dynamic Effects of WTO Review of Anti-Dumping Action*, 2(3) WORLD TRADE REVIEW 373.

Tejeda, Marco Tulio Molina (2011), *Assessing the Importance of the Definitions of 'Product under Consideration' and 'Like Product' in Antidumping Investigations*, 6(3) GLOBAL TRADE AND CUSTOMS JOURNAL 173.

WTO Cases

Panel Report, *China — Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WTO Doc. WT/DS425/R (adopted April 24, 2013).

Panel Report, *European Communities — Anti-Dumping Measure on Farmed Salmon from Norway*, WTO Doc. WT/DS337/R (adopted January 15, 2008).

Panel Report, *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WTO Doc. WT/DS397/R (adopted July 28, 2011).

Panel Report, *European Union — Anti-Dumping Measures on Certain Footwear from China*, WTO Doc. WT/DS405/R (adopted February 22, 2012).

Panel Report, *Korea — Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WTO Doc. WT/DS312/R (adopted November 28, 2005).

Panel Report, *Mexico — Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala (Mexico — Steel Pipes and Tubes)*, WTO Doc. WT/DS331/R (adopted July 24, 2007).

Panel Report, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WTO Doc. WT/DS264/R (adopted August 31, 2004).

Treaties

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, April 15, 1994, 1868 U.N.T.S. 201.

Understanding on Rules and Procedures Governing the Settlement of

臺灣大學學術期刊資料庫

Disputes, April 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 2, 1869 U.N.T.S. 401.

WTO-related Documents

Product Under Consideration, *Paper from Canada*, WTO Doc. TN/RL/GEN/73 (October 17, 2005).

Product Under Consideration, *Paper from Hong Kong, China*, WTO Doc. TN/RL/GEN/78 (October 24, 2005).

Proposal on Like Product and Product Under Consideration. *Communication from Canada*, WTO Doc. TN/RL/GEN/26 (December 1, 2004).

Proposal on Product Under Consideration, *Communication from Brazil, Chile, Israel, Korea, Singapore, Switzerland, Thailand*, WTO Doc. TN/RL/GEN/50 (July 1, 2005).

Request for Consultations by Australia, *China — Anti-dumping and countervailing duty measures on barley from Australia*, WTO Doc. WT/DS598/1, G/L/1382, G/ADP/D135/1, G/SCM/D130/1 (December 21, 2020).

Request for Consultations by Pakistan, *South Africa — Provisional Anti-Dumping Duties on Portland Cement from Pakistan*, WTO Doc. WT/DS500/1, G/L/1139, G/ADP/D112/1 (November 12, 2015).

Request for Consultations by Peru, *Argentina — Anti-Dumping Duties on Fasteners and Chains from Peru (Argentina-Fasteners and Chains)*, WTO Doc. WT/DS410/1, G/L/924, G/ADP/D84/1 (May 31, 2010).

Request for Consultations by the European Union, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WTO Doc. WT/DS591/4, G/ADP/D133/1, G/VAL/D/14, G/L/1339 (August 26, 2020).

Request for Consultations by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *India — Anti-Dumping Duties on USB Flash Drives from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WTO Doc. WT/DS498/1, G/L/1121, G/ADP/D111/1 (September 29, 2015).

Internet Sources

Analysis in Figures: Leverage Shift in the Tug of Anti-dumping War Among Taiwan/Europe/China, EUROPEAN INDUSTRIAL FASTENERS INSTITUTE (2016), http://www.eifi.org/medias/files/122_FICHIER_0.pdf.

Disputes by Agreement, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm.

Expiry Review of the Anti-Dumping Measures Applicable to Imports of Certain Iron or Steel Fasteners Originating in the People's Republic of China, EUROPEAN FASTENER DISTRIBUTORS ASSOCIATION (January 9,

臺灣大學學術期刊資料庫

2015), http://www.efda-fastenerdistributors.org/content/files/R591_Disclosure_-_EFDA_response_150109.pdf.

Grieger, Gisela, *Major EU-China Antidumping Cases*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (May, 2016), https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583795/EPRS_BRI(2016)583795_EN.pdf.

Jiaxing Fastener Companies Return to the European Market Together, JIAXING XINFENG MINFENG SCREW FACTORY (June 7, 2016), http://mf-screw.com/en/news/company-news-41.html.

Other Sources

Micheau, Jean-Paul (2008), *Carbon Steel Antidumping: What the Industry Thinks*, FASTENER + FIXING 46, https://issuu.com/fastenerfixingmagazines/docs/issue_50_digital.

Commission Notice (EC) No. 2005/C 166/06, Notice of Initiation of an Anti-Dumping Proceeding Concerning Imports of Footwear with Uppers of Leather Originationg in the People's Republic of China, 2005 O.J. (C 166) 14.

Commission Notice (EC) No. 2007/C 267/11, Notice of Initiation of an Anti-Dumping Proceeding Concerning Imports of Certain Iron or Steel Fasteners Originating in the People's Republic of China, 2007 O.J. (C 267) 31.

Commission Regulation 553/2006 of March 23, 2006, Imposing a Provisional Anti-Dumping Duty on Imports of Certain Footwear with Uppers of Leather Originating in the People's Republic of China and Vietnam, 2006 O.J. (L 98) 3.

Commission Regulation 1472/2006 of October 5, 2006, Imposing a Definitive Anti-Dumping Duty on Imports of Certain Footwear with Uppers of Leather Originating in the People's Republic of China and Vietnam, 2006 O.J. (L 275) 1.

Council Regulation (EC) 91/2009 of January 26, 2009, Imposing a Definitive Anti-Dumping Duty on Imports of Certain Iron or Steel Fasteners Originating in the People's Republic of China, 2009 O.J. (L 29) 1.

臺灣大學學術期刊資料庫

臺灣大學學術期刊資料庫